Docket No. 05-15754

In the

United States Court of Appeals

For the

Ninth Circuit

KATHLEEN M. WINN, et al.,

Plaintiffs-Appellants,

v.

MARK W. KILLIAN, et al.,

Defendants-Appellees.

Appeal From a Decision of the United States District Court
for the District of Arizona, No. 00-CV-00287
Honorable Earl H. Carroll, District Judge

BRIEF OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

There are no parent corporations. Appellee Arizona School Choice Trust is a nonprofit corporation that does not issues stock. Therefore, there are no publicly held corporations that hold 10% or more of the stock of Arizona School Choice Trust. Appellees Glenn Dennard and Luis Moscoso are not corporate entities and therefore are not subject to the requirement of filing a corporate disclosure statement under Rule 26.1(a), Fed. R. Civ. P.

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ISSUES PRESENTED FOR REVIEW

1) Do Plaintiff-Appellants (hereafter "Plaintiffs") lack taxpayer standing because the challenged Scholarship Tuition Tax Credit, as a matter of law, does not involve the expenditure of state tax revenues?

2) Does Arizona's virtual representation doctrine preclude Plaintiffs from bringing a subsequent taxpayer action in federal district court when a prior Arizona Supreme Court judgment rejected their Establishment Clause claim?

3) Can Plaintiffs state an Establishment Clause claim against Arizona's facially neutral, indirect educational aid program that involves true private choice and neither inhibits nor impermissibly advances religion?

STATEMENT OF FACTS

Plaintiffs' Statement of Facts fails to disclose the identity of all the Defendant-Intervenors: namely, the parent-intervenors Glenn Dennard and Luis Moscoco. In addition to the two scholarship tuition organizations, the Arizona School Choice Trust and the Arizona Christian School Tuition Organization,[1] the district court granted intervention to two parents whose children depend on the needs-based tuition scholarships awarded by the Arizona School Choice Trust. Parents' E.R. at 12-13.[2]

Glenn Dennard is the pastor of Family of Faith, an inner city Phoenix church, and father of five school-aged children. Parents' E.R. at 8. Pastor Dennard's 15 year old daughter, Micah, now attends Xavier College Preparatory, a Catholic High School devoted solely to educating young women, *see* http://www.xcp.org/www/missionphilo.html (last visited Aug. 19, 2005), thanks to a scholarship grant from the Arizona School Choice Trust. *See* Tim Keller, *The Ultimate Winn-Win Scenario*, http://www.ij.org/publications/liberty/2005/14_3_05_d.html (last visited Aug. 19, 2005). His three sons, Glenn II (13), Joshua (12), and Marchè (10), along with his nine-year-old daughter Sarah, now attend

[1] Separate legal counsel represents the Arizona Christian School Tuition Organization. Plaintiffs' E.R. at D:5. To distinguish the intervenors, hereafter the intervenors Arizona School Choice Trust, Glenn Dennard and Luis Moscoso will be referred to as "Parent-Intervenors."

[2] Parent-Intervenors' Supplemental Excerpts of Record designated "Parents' E.R."

Grace Community Christian School in Tempe, Arizona. *Id.* Pastor Dennard would not be able to send any of his four youngest children to Grace Community without the tuition scholarships from the Arizona School Choice Trust. Parents' E.R. at 8.

Luis Moscoso is the father of four school-aged children, Jazminne (16), Gerald (15), Dedrda (11), and Luis Eduardo (7) – all of whom attend Northwest Christian Academy utilizing scholarships from the Arizona School Choice Trust to help offset the cost of private school tuition. Parents' E.R. at 10. Luis and his wife were not satisfied with the education their three oldest children were receiving in the public school system and sought out an environment that suited their children's needs. Parents' E.R. at 10. Luis and his wife would struggle financially to keep their children at Northwest Christian Academy without the scholarships from the Arizona School Choice Trust, but have said they will do almost anything to ensure their children remain in private school. Parents' E.R. at 11.

For 13 years the Arizona School Choice Trust has been providing tuition scholarships to low-income families to attend any tuition-based private kindergarten, elementary school or high school of their choice. Parents' E.R. at 3. The Arizona School Choice Trust was founded in 1992, well before Arizona enacted the challenged Scholarship Tuition Tax Credit, with the sole purpose of helping low-income families realize their dreams of sending their children to the school that best meets their need. *Id.* Between 1993 and 1998, the Arizona School

Choice Trust gathered enough donations to fund between 50 and 100 scholarships for low-income children. *See* http://www.asct.org/about.htm (last visited Aug. 11, 2005). Since 1997, the year Arizona enacted the Scholarship Tuition Tax Credit, the number of Trust scholarships has grown to more than 850 individual scholarships in the 2002-2003 school year. *Id*.

Plaintiffs are correct that the Arizona School Choice Trust does not discriminate on the basis of religion in awarding tuition scholarships. Plaintiffs' Brief at p.13, n. 15. The School Choice Trust's grants are based on financial need. Parents' E.R. at 3-4. Parents who receive Arizona School Choice Trust scholarships are free to send their children to any tuition-based private school in Arizona – whether secular or sectarian. Parents' E.R. at 5. It is interesting to note, though not legally relevant to this case, that Arizona School Choice Trust parents choose religious schools to meet their children's needs by an overwhelming margin. In the most recent school year, of the 125 private schools to which Arizona School Choice Trust parents choose to send their children, 123 of the private schools are religiously affiliated while only two are secular.

SUMMARY OF ARGUMENT

1) Taxpayers do not have standing in the Ninth Circuit to challenge a state law unless the statute involves the expenditure of state tax revenues. *Cammack v. Waihee*, 932 F.2d 765, 769 (9th Cir. 1991). The Arizona Supreme Court has declared that monies donated to scholarship tuition organizations and claimed as a tax credit are not state tax revenues. *Kotterman v. Killian*, 193 Ariz. 273, 285, ¶ 36, 972 P.2d 606, 618 (Ariz. 1999). A state court judgment enjoys the same preclusive effect in federal court that the judgment enjoys in the state where the judgment was rendered. *Migra v. Warren City Sch. Dist. Bd.*, 465 U.S. 75, 81 (1984). Plaintiffs thus lack taxpayer standing.

2) Arizona applies a doctrine of "virtual representation" in cases "instituted by a taxpayer to determine a public right or matter of public interest" and "any judgment rendered therein w[ill] bind all other taxpayers." *El Paso Natural Gas Co. v. State of Arizona*, 123 Ariz. 219, 222, 599 P.2d 175, 178 (Ariz. 1979). State court judgments enjoy the same preclusive effect in federal court as in the state where rendered. *Migra*, 465 U.S. at 81. The Arizona Supreme Court has already rejected an Establishment Clause challenge to Arizona's Scholarship Tuition Tax Credit finding that the challenged law "aids a broad spectrum of citizens, allows a wide range of private choices, and does not have the primary effect of either advancing or inhibiting religion." *Kotterman*, 193 Ariz. at 283, ¶ 27, 972 P.2d at

616 (internal citations and quotation marks omitted). Arizona law would preclude the re-litigation of Plaintiffs' Establishment Clause claim in state court and therefore bars Plaintiffs from re-litigating their claim in federal court.

3) The U.S. Supreme Court declared that a facially neutral, indirect educational aid program will be upheld against an Establishment Clause claim if the statute was enacted for a valid secular purpose and is based on true private choice. *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002). The constitutionality of indirect aid programs does not hinge on the number of beneficiaries who choose of their own accord to use the aid at religious institutions. *Mueller v. Allen*, 463 U.S. 388, 401-02 (1983). When a government program involves direct aid, the government must ensure that no religious indoctrination can be attributed to governmental action. *Mitchell v. Helms*, 530 U.S. 793, 809 (2000). But where it is indirect – i.e., directed by decisions of taxpayers, parents and students – it is immaterial how much money flows to religious institutions or the use to which those institutions put the aid. *Zelman* at 650. The challenged Scholarship Tuition Tax Credit is a facially neutral law designed to advance the secular goal of providing a high quality education to school children by opening up private institutions as an educational alternative. *Kotterman*, 193 Ariz. at 278-79, ¶ 7-8, 972 P.2d at 611-12. Therefore, Plaintiffs have failed to state a claim that the Arizona Scholarship Tuition Tax Credit violates the Establishment Clause.

ARGUMENT

I. PLAINTIFFS LACK TAXPAYER STANDING BECAUSE THE ARIZONA SUPREME COURT HELD THAT A CITIZEN'S DECISION TO DONATE MONEY TO A SCHOLARSHIP TUITION ORGANIZATION IS NOT AN APPROPRIATION OF STATE INCOME TAX REVENUE.

A taxpayer does not have standing in the Ninth Circuit to challenge a state law unless the statute involves the expenditure of state tax revenues. *Cammack v. Waihee*, 932 F.2d 765, 769 (9th Cir. 1991). Before standing can be conferred, the Plaintiffs must establish they have "sustained or [are] immediately in danger of sustaining some direct injury as the result" of the challenged law. *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434 (1952) (internal citations and quotation marks omitted). This direct injury requirement is established only when the challenged statute involves the expenditure of state tax revenues. *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1178 (9th Cir. 1984); *see also Reimers v. State of Oregon*, 863 F.2d 630, 632 n.4 (9th Cir. 1988) (noting that state taxpayer does not have standing when he or she fails to challenge the disbursement of state funds). If Plaintiffs do not challenge a law that results in state tax dollars being spent then taxpayer standing will be denied. *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789 (9th Cir. 1999) (finding no taxpayer standing to bring Establishment Clause challenge to school district policy of permitting student prayers at public high schools).

Plaintiffs allege that the amount taxpayers contribute to scholarship tuition

organizations and claim as tax credits are "contributions of state funds . . . because the amounts . . . reduce state income tax revenues on a dollar-for-dollar basis." Plaintiffs' E.R. at 1:2, ¶ 9. State law and precedent foreclose Plaintiffs' argument because the Arizona Supreme Court rejected the contention that monies donated to scholarship tuition organizations and claimed as a credit constitute state income tax revenues. *Kotterman v. Killian*, 193 Ariz. 273, 285, ¶ 36, 972 P.2d 606, 618 (Ariz. 1999), *cert. denied*, 528 U.S. 921 (1999).

In rejecting Plaintiffs' precise contention, the Arizona Supreme Court recognized that "under such reasoning all taxpayer income could be viewed as belonging to the state because it is subject to taxation by the legislature." *Kotterman*, 193 Ariz. at 285, ¶ 37, 972 P.2d at 618. The Court refused to:

> accept the position, implicit in [plaintiffs'] argument, that the tax return's purpose is to return state money to taxpayers. 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. The tax on that amount would then instantly become public money. 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.

Id. at ¶ 40 (emphasis added). The state, having no legal claim to taxpayer contributions to scholarship tuition organizations cannot, as a matter of law, be said to have spent a single dollar funding scholarship organizations. As the *Kotterman* Court emphasized, the Plaintiffs' theory "directly contradicts the

decades-long acceptance of tax deductions for charitable contributions, including donations made directly to churches, religiously-affiliated schools and institutions." 193 Ariz. at 285, ¶ 38, 972 P.2d at 618. If the tax credits are public funds, then so are "other established tax policy equivalents like deductions and exemptions." *Id*. Plaintiffs offer no constitutionally significant difference between tax credits and deductions.

The Arizona Supreme Court's holding that tax credits do not involve state tax revenue binds this Court. 28 U.S.C. § 1738 ("The . . . judicial proceedings of any court of any State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law and usage in the courts of such State . . . from which they are taken"); s*ee also Allen v. McCurry*, 449 U.S. 90, 96 (1980) (federal courts "give preclusive effect to state-court judgments whenever courts of the state from which the judgments emerged would do so"). Plaintiffs' citation to cases involving similar challenges to tax credits or deductions, but in which taxpayer standing was not raised, are of no help. It is well settled that the "exercise of jurisdiction . . . is not precedent for the existence of jurisdiction." *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1130 (9th Cir. 1996).

Plaintiffs ask that the tax credit be declared unconstitutional because it authorizes scholarship tuition organizations "to use State income-tax revenues to pay tuition for students attending religious schools . . . ." Plaintiffs' E.R. at 1:7,

¶ B. However, the Arizona Supreme Court rejected this argument and held that the Scholarship Tuition Tax Credit does not involve the use of Arizona income tax revenues. The Plaintiffs lack taxpayer standing, as a matter of law, because they have failed to allege the requisite "good-faith pocketbook" injury required by *Doremus*, 342 U.S. at 434.

II. ARIZONA'S DOCTRINE OF VIRTUAL REPRESENTATION IN TAXPAYER ACTIONS BARS PLAINTIFFS FROM FILING A COLLATERAL ATTACK IN FEDERAL COURT BECAUSE THE ARIZONA SUPREME COURT HAS REJECTED THEIR CLAIM.

A state court judgment enjoys the same preclusive effect in federal court that the judgment enjoys in the state where the judgment was rendered. *Migra v. Warren City Sch. Dist. Bd.*, 465 U.S. 75, 81 (1984). Therefore, this Court is bound to apply Arizona law to Parent-Intervenors' claim that *res judicata* bars Plaintiffs from re-litigating the Establishment Clause issues already decided by the Arizona Supreme Court in *Kotterman v. Killian*, 193 Ariz. 273, 972 P.2d 606.

Arizona law precludes the re-litigation of Plaintiffs' Establishment Clause claims in both state and federal court. Arizona recognizes and applies a doctrine of "virtual representation" in cases "instituted by a taxpayer to determine a public right or matter of public interest so that any judgment rendered therein w[ill] bind all other taxpayers." *El Paso Natural Gas Co. v. State of Arizona*, 123 Ariz. 219, 222, 599 P.2d 175, 178 (Ariz. 1979). For over 70 years, the Arizona Supreme Court has held that *res judicata* bars taxpayers from challenging a law that has

previously been challenged by different taxpayers and where a court of competent jurisdiction has previously rendered a judgment. *Luhrs v. City of Phoenix*, 33 Ariz. 156, 160-61; 262 P. 1002, 1003-04 (Ariz. 1928) (holding that judgment was conclusive against subsequent taxpayer if issue could have been raised in first suit); *Martin v. Whiting*, 65 Ariz. 391, 394, 181 P.2d 819, 821 (Ariz. 1947); *see also Stuart v. Winslow Elem. Sch. Dist. No. 1*, 100 Ariz. 375, 387, 414 P.2d 976, 984 (Ariz. 1966) (holding that taxpayer's challenge was precluded by previous action brought by a school district because the matter was of general interest to all people). In this case, state taxpayers have already filed an Establishment Clause challenge to the Scholarship Tuition Tax Credit that the Arizona Supreme Court rejected. *Kotterman*, 193 Ariz. at 283, ¶ 29, 972 P.2d at 616.

"*Res judicata* is a judicial doctrine grounded in public policy considerations to insure that at some point there will be an end to litigation." *El Paso Natural Gas Co.*, 123 Ariz. at 223, 599 P.2d at 179. The doctrine is designed to prevent repeated litigation over the same program involving identical legal challenges – exactly what Plaintiffs attempt to do in this case. All prerequisites for the application of Arizona's virtual representation doctrine are present: (1) the matter is one of public and general interest; (2) the Plaintiffs are similarly situated to the plaintiffs in *Kotterman*; and (3) the matter has been resolved by a final judgment of

a court of competent jurisdiction. *El Paso Natural Gas Co*., 123 Ariz. at 222, 599 P.2d at 178.

The constitutionality of Arizona's Scholarship Tuition Tax Credit, which is of general applicability and statewide in scope, is of significant public interest to: (1) the thousands of students attending private school with the assistance of a scholarship grant; (2) the public schools that would have to absorb the scholarship students if the credit were struck down; and (3) the 50,000 Arizona taxpayers who claim the credit – if not to every Arizona taxpayer. The Plaintiffs in this case are in the same situation as the Plaintiffs who previously challenged the Scholarship Tuition Tax Credit in *Kotterman* – they are Arizona taxpayers asserting their interest in preventing an alleged violation of a First Amendment right. Finally, a state supreme court is clearly a court of competent jurisdiction.

Plaintiffs pin their hopes of avoiding Arizona's virtual representation doctrine on two arguments, neither of which is persuasive. First, Plaintiffs assert that their complaint is not barred by *res judicata* because "no challenge was made in [*Kotterman*] based on the actual effect of the statutory scheme." Plaintiffs' Brief at 28. This argument is unavailing because the U.S. Supreme Court has repeatedly held that the exclusive means of ascertaining the constitutionality of a facially neutral, indirect educational aid program is by examining the purpose for which it was enacted and determining whether it is based on true private choice.

Zelman v. Simmons-Harris, 536 U.S. 639, 650 (2002) ("it is irrelevant to the constitutional inquiry" how many "beneficiaries [a]re parents of children in religious schools"); *Mueller v. Allen*, 463 U.S. 388, 401 (1983) ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law").

The only way Plaintiffs' "as-applied" challenge could be distinguished is if the state itself is not acting in a neutral fashion. As demonstrated below, because the Arizona program involves true private choice with virtually no role for the state, how much money private citizens direct to religiously affiliated institutions is legally irrelevant. As the Arizona Supreme Court said, "The state does not involve itself in the distribution of funds or in monitoring their application. Its role is entirely passive." *Kotterman*, 193 Ariz. at 283, ¶ 28, 972 P.2d at 616. The only facts offered by Plaintiffs in an effort to manufacture an as-applied challenge relate to the actual use of the funds by third parties and the choices they make – the very facts that were offered in *Mueller* and *Zelman* and deemed irrelevant, as a matter of law, to the constitutional inquiry.

Second, Plaintiffs point to the U.S. Supreme Court's statement in *Hibbs v. Winn*, 542 U.S. 88, __, 124 S. Ct. 2276, 2282 (2004), that *Kotterman* "has no preclusive effect on the instant as-applied challenge." Plaintiffs' Brief at 28. The

Parent-Intervenors were not parties to the appeal in *Hibbs v. Winn* because their first motion for intervention was denied as moot when the district court granted the state's motion to dismiss under the Federal Tax Injunction Act. *Winn v. Killian*, 307 F.3d 1011, 1015 (9th Cir. 2002). Therefore the U.S. Supreme Court did not consider Arizona's stringent *res judicata* precedents that control this case. *Migra*, 465 U.S. at 81 (state court judgment will have same preclusive effect in federal court as it would in the state where the judgment was rendered). Absent consideration of Arizona's virtual representation doctrine, the cited language from the U.S. Supreme Court in *Hibbs v. Winn* is dicta and cannot be deemed controlling on the *res judicata* issue in this case.

III. ARIZONA'S SCHOLARSHIP TUTITION TAX CREDIT IS A FACIALLY NEUTRAL, INDIRECT EDUCATIONAL AID PROGRAM BASED ON TRUE PRIVATE CHOICE AND THUS IS NOT READILY SUBJECT TO AN ESTABLISHMENT CLAUSE CHALLENGE.

The real constitutional inquiry in this case is whether Arizona's Scholarship Tuition Tax Credit "has the [forbidden] 'effect' of advancing or inhibiting religion." *Zelman*, 536 U.S. at 649 (citing *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997)). To answer that question, the U.S. Supreme Court says its decisions "have drawn a consistent distinction between government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine

and independent choices of private individuals." *Zelman* at 649 (internal citations and quotation marks omitted).

> While our jurisprudence with respect to the constitutionality of direct aid programs has changed significantly over the past two decades, our jurisprudence with respect to true private choice programs has remained consistent and unbroken. Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges.

Id. (internal citations and quotation marks omitted). Indirect aid inquiries to determine if the state is impermissibly advancing or inhibiting religion begin by examining whether the program was enacted for a valid secular purpose. *Zelman* at 649.

The test then shifts to "focus[] on the class of beneficiaries" and finally to whether the program is based on true private choice. *Zelman* at 650. The U.S. Supreme Court has announced that one important indicator of true private choice is whether the program "is part of a general and multifaceted undertaking . . . to provide educational opportunities" to school children. *Id.* at 653. Arizona's Scholarship Tuition Tax Credit is one facet of perhaps the broadest array of public and private educational choices in the nation. As the Arizona Supreme Court held: the program "aids a broad spectrum of citizens, allows a wide range of private choices, and does not have the primary effect of either advancing or inhibiting religion." *Kotterman*, 193 Ariz. at 283, ¶ 27, 972 P.2d at 616 (internal

citations and quotation marks omitted).

A. The Arizona Tuition Scholarship Tax Credit is designed to advance a valid secular purpose.

The U.S. Supreme Court is "reluctan[t] 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. In this case, the Arizona Supreme Court has already held that the challenged Scholarship Tuition Tax Credit is a facially neutral law designed to advance the secular goal of providing a high quality education to school children by opening up private institutions as an educational alternative. *Kotterman*, 193 Ariz. at 278-79, ¶ 7-8, 972 P.2d at 611-12. Plaintiffs assert that the challenged tax credit was not enacted with a valid secular purpose because, they argue, the only valid secular purpose for a government-created private school scholarship program is to assist low-income students escape failing public schools by transferring to private schools. Plaintiffs' Brief at 35. The U.S. Supreme Court has never said that there is but one valid secular purpose for which either indirect or direct educational aid programs may be enacted. Indeed, over thirty years ago the U.S. Supreme Court recognized as valid the secular goals of "promoting pluralism and diversity among its public and nonpublic schools," *Comm. for Public Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973), as well as the "concern for an already overburdened public school system that might suffer

in the event that a significant percentage of children presently attending nonpublic schools should abandon those schools in favor of the public school," *id*.

Plaintiffs would have the State of Arizona wait until its schools were in "crisis" and "among the worst performing public schools in the Nation," Plaintiffs' Brief at 4 (citing *Zelman*, 546 U.S. at 644), before conceding that Arizona's Scholarship Tuition Tax Credit is aimed at accomplishing a valid secular purpose. The district court correctly found that "no useful purpose would be served by making the State wait until its schools were in . . . trouble . . . before implementing a program of true private choice." Plaintiffs' E.R. at 79:11.

Even if the Scholarship Tuition Tax Credit was, as Plaintiffs assert, designed "to help pay for tuition for parents whose children are already in private school," Plaintiffs' Brief at 21-22, it would still serve a valid secular purpose under *Nyquist*, 413 U.S. at 773, because it is valid for a state to be concerned that the "public school system . . . might suffer in the event that a significant percentage of children presently attending nonpublic schools should abandon those schools in favor of the public school."[3]

[3] Parent-Intervenors disagree with Plaintiffs' assertions concerning the purpose of the tax credit and believe that the Arizona Supreme Court was correct that the program is designed to ensure that a high quality education is available to all Arizona students and to open up private schools as an educational alternative. *Kotterman*, 193 Ariz. at 278-79, ¶ 7-8, 972 P.2d at 611-12. Additionally, Plaintiffs reliance on *Nyquist* is of no assistance because the U.S. Supreme Court held "that *Nyquist* does not govern neutral educational assistance programs that, like the

B. A broad class of individuals may claim the Scholarship Tuition Tax Credit.

"[T]he Arizona tuition credit is available to all taxpayers who are willing to contribute" to a scholarship tuition organization. *Kotterman*, 193 Ariz. at 280, ¶ 16, 972 P.2d at 613. In determining whether a program has the primary effect of advancing religion, the U.S. Supreme Court has stated that "[t]he provision of benefits to [a] broad spectrum of groups is an important index of secular effect." *Widmar v. Vincent*, 454 U.S. 263, 274 (1981). In *Mueller v. Allen*, 463 U.S. at 397, the U.S. Supreme Court upheld a tax deduction for educational expenses because it was available to "*all* parents, including those whose children attend nonsectarian private schools or sectarian private schools."[4] Arizona's tax credit is available to "[a]ny individual, not just a parent." *Kotterman*, 193 Ariz. at 280, ¶ 16, 972 P.2d at 613. Indeed, unlike the taxpayers in *Mueller*, Arizona taxpayers cannot claim credits for their own children. Ariz. Rev. Stat. Ann. (A.R.S.) § 43-

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program here, offer aid directly to a broad class of individual recipients defined without regard to religion." *Zelman*, 536 U.S. at 662.

[4] Given that *Mueller* involved an income tax deduction for the taxpayers' own children, by definition most if not all of the beneficiaries were not poor thus undermining Plaintiffs' assertion that indirect aid programs are only valid if aimed at assisting low income individuals. Additionally, Plaintiffs' assertion (without citation) that the *Mueller* program primarily benefited public school parents is unsupported by the language in the case, which says that "the bulk of deductions . . . will be claimed by parents of children in sectarian schools." 463 U.S. at 401. Indeed, the allegation was that 96% of the claimed deductions were for sectarian school expenses. *Id*. The exact same percentage of students enrolled in religiously affiliated schools in the Cleveland program. *Zelman*, 536 U.S. at 647.

1089(E) (2005). Arizona's tax credit benefits two broad classes of beneficiaries, both defined without reference to religion: taxpayers and those who receive scholarships. The class of beneficiaries is thus broader than that found acceptable in *Mueller*. *Kotterman*, 193 Ariz. at 280, ¶ 16, 972 P.2d at 613 ("Arizona's class of beneficiaries . . . clearly achieves a greater level of neutrality"). Every Arizona taxpayer with a tax liability can benefit from the tax credit: those with children in public school; those with children in private school; those who home school their children; and those who do not have school age children, are all eligible to claim the Tuition Scholarship Tax Credit up to the dollar amounts specified in the statute.

The tax credit does not offer any financial incentives in favor of religious scholarship tuition organizations or private schools. *See Zelman*, 536 U.S. at 653. Other than personal preference, taxpayers have no reason to contribute to the religiously affiliated Intervenor Arizona Christian School Tuition Organization instead of the secular Intervenor Arizona School Choice Trust. Nor do parents have any financial incentive to choose a religious over a nonreligious private school. This is because, as demonstrated below, the Arizona Scholarship Tuition Tax Credit is a program based on true private choice.

C. The Scholarship Tuition Tax Credit is based on true private choice.

"[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct

government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause." *Zelman*, 536 U.S. at 652. This is because where "aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of State approval' can be deemed to have been conferred on any particular religion, or on religion generally." *Mueller*, 463 U.S. at 400 (internal citation omitted). Additionally, "if numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment." *Mitchell v. Helms*, 530 U.S. 793, 810 (2000) (plurality opinion).

"Arizona's statute provides multiple layers of private choice." *Kotterman*, 193 Ariz. at 281, ¶ 19, 972 P.2d at 614. Under Arizona's tax credit plan there are two separate and distinct decision makers, the second of which Plaintiffs failed to acknowledge in their brief: (1) taxpayers who choose to which (if any) of the over fifty scholarship tuition organizations they want to donate; and (2) parents who decide to which school to send their children and to which scholarship tuition organization or organizations to apply for a scholarship. *Id*.

> The donor/taxpayer determines whether to make a contribution, its amount, and the recipient [scholarship tuition organization]. The taxpayer cannot restrict the gift for the benefit of his or her own child. Parents independently select a school and apply to [a scholarship

> tuition organization] of their choice for a scholarship. Every [scholarship tuition organization] 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. Thus, schools are no more than indirect recipients of taxpayer contributions, with the final destination of these funds being determined by individual parents.

Id. (internal citations and quotation marks omitted). Arizona's two neutrally defined classes of beneficiaries provide for a double attenuation separating the state and religion. *See Mueller*, 463 U.S. at 400 ("The Establishment Clause . . . do[es] not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents"). Further, the fact that private schools are merely indirect recipients underscores another important aspect of the program: it is the children who receive scholarships that are the primary beneficiaries of donations to scholarship tuition organizations, not private schools. *Kotterman*, 193 Ariz. at 282, ¶ 21 n.4, 972 P.2d at 615 n.4. Arizona's Scholarship Tuition Tax Credit offers no financial incentives for taxpayers to choose religious over secular scholarship tuition organizations or for parents to choose religious over secular private schools.

Plaintiffs allege that the program does not provide real private choice by asserting that religiously affiliated scholarship tuition organizations apply religious tests when granting scholarships. Plaintiffs' Brief at 45. However, Plaintiffs do not allege a single instance of an Arizona scholarship tuition organization taking

religion into account when awarding a scholarship. The only evidence offered is the names of various scholarship tuition organizations along with their website descriptions. Plaintiffs' Brief at 10, n.13. There is no allegation that parents or children must sign a statement of faith or take a religious oath to apply for scholarships from these organizations or attend private schools. There is a crucial distinction to be made between scholarship organizations that provide scholarships only to particular schools, such as Montessori or Lutheran schools, and scholarship organizations that provide scholarships based on religion.

The Catholic Tuition Organization for the Diocese of Phoenix for example, the largest of the scholarship organizations, Plaintiffs' Brief at 12, n.15, restricts grants only to diocese schools, but awards scholarships strictly on financial need and does not take into account the religious affiliation of either the parents or students. Plaintiffs' E.R. at 71:11. Indeed, Parent-Intervenor Glenn Dennard pastors a nondenominational Christian church but sends his daughter to an all-girl Catholic high school. His decision is based on Xavier's high academic standards and the school gladly accepts Micah as a student, using the Arizona School Choice Trust's needs-based scholarship, even though she is not a member of the Catholic faith. And as demonstrated, these issues are legally irrelevant.

Plaintiffs also argue that the Arizona Supreme Court expected every scholarship tuition organization to provide scholarships to every private school in

Arizona. Plaintiffs' Brief at 44. To support their argument Plaintiffs cite the Arizona Supreme Court's statement that "[e]very [scholarship tuition organization] must allow its scholarship recipients to attend any qualified school of their parents' choice." *Kotterman*, 193 Ariz. at 281, ¶ 19, 972 P.2d at 614 (internal citation and quotation marks omitted). However, they fail to include the entire quote, which says that:

> Every [scholarship tuition organization] 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. A.R.S. § 43-1089(E)(2).

Kotterman at 281, ¶ 19, 972 P.2d at 614. The cited language, which has remained unchanged (though renumbered) since *Kotterman*, says that "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." A.R.S. § 43-1089(G)(3) (2005). The Arizona Supreme Court, by citing the statute and paraphrasing its contents, clearly understood that scholarship tuition organizations were permitted to grant scholarships to less than the whole of the private school market – as long as no scholarship tuition organization was established to benefit only one school. Any other interpretation would disregard the plain language of the statute. A basic rule of statutory construction is that courts must give meaning "to each word, phrase, clause, and sentence within a statute so that no part will be superfluous, void, contradictory, or

insignificant." *Champlin v. Sargeant*, 192 Ariz. 371, 374, ¶ 16, 965 P.2d 763, 766 (Ariz. 1998).

Finally, while asserting that Arizona's tuition program distributes scholarships based on whether or not children attend religious schools, the Plaintiffs note that the Arizona School Choice Trust has a wait list of parents and imply that the list demonstrates a lack of true private choice. Plaintiffs Brief at 12-13, n.15. In fact, the wait list demonstrates the real need for a program of this type.

Arizona's Scholarship Tuition Tax Credit offers a double layer of true private choice resulting in "[t]he decision-making process [being] completely devoid of state intervention or direction and protect[ing] against the government 'sponsorship, financial support, and active involvement' that so concerned the framers of the Establishment Clause." *Kotterman* at 281, ¶ 20, 972 P.2d at 614 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)).

D. The Scholarship Tuition Tax Credit is part of a much larger and general undertaking to provide educational choice to Arizona's school children.

The U.S. Supreme Court in *Zelman* emphasized that Establishment Clause challenges must be "answered by evaluating *all* options" provided to parents of school children. 536 U.S. at 655-56. In recent years, Arizona has "expanded the options available in public education." *Kotterman*, 193 Ariz. at 278, ¶ 7, 972 P.2d at 611. Arizona's school districts are required to "implement an open enrollment

program without charging tuition." *Kotterman*, 193 Ariz. at 278, ¶ 7, 972 P.2d at 611 (citing A.R.S. § 15-816.01(A) (1995)). The Legislature has established charter schools to provide "a learning environment that will improve pupil achievement" as well as "additional academic choices for parents and pupils." A.R.S. § 15-181 (1998); *Kotterman*, 193 Ariz. at 278, ¶ 7, 972 P.2d at 611. Charter schools are public schools, A.R.S. § 15-181, and cannot be religiously affiliated. There are 466 charter schools in Arizona.[5] *See* Charter Summary Report, http://www.asbcs.state.az.us/asbsc/CharterSummary.asp (last visited July 29, 2005). Arizona also has in place a limited voucher program available to special education students when such children are not receiving the education they are entitled to receive in a traditional public school. A.R.S. § 15-1181 to -1185 (2000). And a separate tax credit is available for donations to public schools for extracurricular activities or character education programs. A.R.S. § 43-1089.01 (2003).

The challenged Scholarship Tuition Tax Credit is part of a larger plan to improve Arizona's public education system. Plaintiffs offer "no evidence that the program fails to provide genuine opportunities for . . . parents to select secular educational options for their school-age children." *Zelman*, 536 U.S. at 655.

[5] This Court may take judicial notice of facts contained in the public record. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (noting that the Rules of Evidence permit a court to take judicial notice of "matters of public record" when considering a motion to dismiss).

E. As a facially neutral law based on true private choice, the Scholarship Tuition Tax Credit does not have the primary effect of either advancing or inhibiting religion.

Plaintiffs attempt to distinguish this lawsuit from *Kotterman* by labeling it an "as applied" challenge. This distinction is artificial. Under the Establishment Clause, there is no separate "as-applied" test under which the Scholarship Tuition Tax Credit must be examined. In *Kotterman*, the Arizona Supreme Court applied the U.S. Supreme Court's *Lemon* test, 193 Ariz. at 278, ¶ 5, 972 P.2d at 611, which does bring in elements of fact to evaluate a challenged program's primary effect. After examining the facts, the Arizona Supreme Court found that "the tuition tax credit . . . does not have the primary effect of either advancing or inhibiting religion." *Id.* at 283, ¶ 27, 972 P.2d at 616. The U.S. Supreme Court in *Zelman* addresses at length what data and structural elements are relevant in determining when the primary effect of a challenged program is to advance religion. 536 U.S. at 652-60. Not every fact is relevant to the constitutional inquiry. As the Court in *Kotterman* correctly determined, and as *Zelman* made absolutely clear, the Establishment Clause analysis in indirect aid cases does not rest on yearly statistics. This leads to a conclusion that once all of the appropriate facts have been considered and a determination is made that a program is facially neutral and based on true private choice, then no separate as-applied challenge exists.

Yet in this case, the only evidence Plaintiffs offer to support their "as-applied" challenge is annual reports that demonstrate a steadily decreasing percentage of taxpayers and parents choosing to contribute to religiously affiliated scholarship organizations and to send their children to religious schools. Plaintiffs' Brief at 12 (from 90% in 1998 to 79% in 2004); see also Plaintiffs' E.R. at 1:3-6, ¶ 15-26. These statistics offer Plaintiffs no assistance. The U.S. Supreme Court says it "would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Mueller*, 463 U.S. at 401.

"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." *Zelman*, 536 U.S. at 658. "Moreover, the fact that private persons fail in a particular year to claim the tax relief to which they are entitled – under a facially neutral statute – should be of little importance in determining the constitutionality of the statute permitting such relief." *Mueller* at 401.

Plaintiffs are correct that Arizona's Scholarship Tuition Tax Credit, on its face, requires religious neutrality. Plaintiffs' Brief at 44. The fact that, in its operation, the majority of taxpayer contributions are directed toward scholarship tuition organizations with a religious affiliation and that the majority of parents

choose religious options when directing aid to private schools (even from completely secular scholarship tuition organizations such as Intervenor Arizona School Choice Trust) is not germane to the constitutional inquiry because the challenged program involves indirect, rather than direct aid.

The Plaintiffs offer a detailed description of how the Arizona Scholarship Tuition Tax Credit could operate as a constitutionally valid program. Plaintiffs' Brief at 49. Ironically, they describe a scholarship organization that functions exactly like Intervenor Arizona School Choice Trust, which has no religious affiliation or mission, does not take religion into account when awarding scholarships, and grants scholarships based on financial need. *Id.* And yet the majority of Arizona School Choice Trust parents choose to send their children to religious schools. The facts of this case demonstrate the U.S. Supreme Court's wisdom in not allowing the constitutionality of indirect aid programs to hinge on the number of taxpayers or parents who choose to direct scholarship funds to religiously affiliated scholarship tuition organizations or religious private schools.

Accepting all of Plaintiffs' material allegations as true, *Broderbund/ Learning Co. Sec. Litig. v. Mattel, Inc.*, 294 F.3d 1201, 1203 (9th Cir. 2002), Arizona's facially neutral Scholarship Tuition Tax Credit is constitutional under an unbroken line of U.S. Supreme Court precedent. *Zelman*, 536 U.S. 662-63. Because the Plaintiffs can prove no set of facts in support of their claims that

would entitle them to relief the district court's dismissal must be affirmed. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

IV. CONCLUSION

The Plaintiff taxpayers lack standing because the Arizona Tuition Tax Credit, as a matter of law, does not involve the expenditure of state tax revenues. *Cammack*, 932 F.2d at 769. Further, Arizona's doctrine of virtual representation precludes Plaintiffs from re-litigating in federal court claims already resolved by the Arizona Supreme Court. *El Paso Natural Gas Co.*, 123 Ariz. at 223, 599 P.2d at 179. Finally, the U.S. Supreme Court declared that facially neutral, indirect educational aid programs will be examined under the Establishment Clause by assessing whether the program was enacted for a valid secular purpose and then determining if it is based on true private choice, thus foreclosing the type of as-applied challenge Plaintiffs seek to bring in this action. *Zelman*, 536 U.S. at 649. When aid reaches religious institutions as the result of numerous private choices, the constitutionality of the program will not hinge on whether the majority of the individuals directing the aid choose religious options. *Mueller*, 463 U.S. at 401. Thus, assuming the facts alleged by Plaintiffs to be true, they have not stated a legal claim upon which relief may be granted. Parent-Intervenors therefore request this Court to affirm the district court's order granting their Motion to Dismiss.

RESPECTFULLY SUBMITTED this 7th day of September 2005.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and contains 6,697 words.

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STATEMENT OF RELATED CASES

There are no related cases pending in this Court.