Nos. 09-987, 09-991

In The Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,

Petitioner,

v.

KATHLEEN M. WINN, et al.,

Respondents.

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

Petitioner,

v.

KATHLEEN M. WINN, et al.,

Respondents.

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

BRIEF OF RESPONDENTS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Did the court of appeals err in holding that if most taxpayers who contribute to school tuition organizations contribute to organizations that award scholarships to students attending religious schools, Arizona Revised Statute (A.R.S.) section 43-1089 (the "Scholarship Tax Credit Program") has the purpose and effect of advancing religion in violation of the Establishment Clause even though it is a neutral program of private choice on its face and the State does nothing to influence the taxpayers' or the school tuition organizations' choice?

PARTIES TO THE PROCEEDINGS

Petitioners are Defendant Gale Garriott, in his official capacity as Director of the Arizona Department of Revenue, and the Defendant-Intervenor Arizona Christian School Tuition Organization, a tax-exempt organization that provides scholarships so that children may attend the private Christian school of their parents' choice.

The other Defendant-Intervenors (hereafter "Parents") file this brief as Respondents in Support of Petitioners. They are parents Glenn Dennard and Luis Moscoso, whose children receive scholarships from the Arizona School Choice Trust to attend private schools, and the Arizona School Choice Trust, a non-religious school tuition organization that awards scholarships to low-income parents to enable them to send their children to any qualified private school, regardless of whether the school is religious or non-religious. Parents Dennard and Moscoso have chosen to send their children to religious schools. As parties to the proceedings in the District Court and the United States Court of Appeals for the Ninth Circuit, they file this brief pursuant to Supreme Court Rule 12.6.*

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* Parents filed a timely petition for writ of certiorari seeking review and urging summary reversal of the Ninth Circuit panel's decision in this case. No. 09-988. This Court vided Parents' petition with No. 09-987 and No. 09-991 and distributed all three petitions for conference on May 20, 2010. The two other petitions were granted, but Parents' petition is still pending before this Court.

PARTIES TO THE PROCEEDINGS – Continued

Respondents, who were Plaintiffs below, and who sue in their capacity as taxpayers, are Kathleen M. Winn, Maurice Wolfthal, and Lynn Hoffman.

CORPORATE DISCLOSURE STATEMENT

The Arizona School Choice Trust does not have a parent company and is not publicly held.

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DECISIONS BELOW

Arizona law allows individuals to claim a tax credit for donations to school tuition organizations, which are tax-exempt charities that provide scholarships to help families send their children to private school. A.R.S. § 43-1089(A), (G)(3); Pet. App. 117a, 120a.[1] Solely because a majority of taxpayers have so far chosen to direct their charitable contributions to organizations that award scholarships to benefit children whose parents want them to attend religious schools, a panel of the United States Court of Appeals for the Ninth Circuit reversed the District Court's dismissal of this case and concluded that Arizona's Scholarship Tax Credit Program constitutes governmental endorsement of religion in violation of the Establishment Clause. The panel opinion is reported at 562 F.3d 1002 (9th Cir. 2009) and is reproduced in Pet. App. at 1a-46a.

Over the dissent of eight circuit judges, the Ninth Circuit on October 21, 2009 denied the three timely filed petitions for rehearing en banc. The panel concurred with the denial in a written opinion. The dissent emphasized that the panel decision conflicts with this Court's Establishment Clause precedents and jeopardizes other religion-neutral school choice

[1] Petitioner Garriott's Appendix to Petition for Certiorari will be referred to throughout Parents' brief as "Pet. App." Petitioner Arizona Christian School Tuition Organization's Appendix to Petition for Certiorari will be referred as "ACSTO Pet. App." Parents' Appendix to this brief will be referred to as "Parents' App."

programs across the country. The dissenting and concurring opinions concerning rehearing are reported at 586 F.3d 649 (9th Cir. 2009) and are included at Pet. App. 64a-116a.

The District Court's decision granting the motion to dismiss is reported at 361 F. Supp. 2d 1117 (D. Ariz. 2005) and is included at Pet. App. 47a-63a.

This Court's prior decision in this case held that the federal Tax Injunction Act does not deprive federal courts of jurisdiction to hear challenges to state tax credit laws. *Hibbs v. Winn*, 542 U.S. 88 (2004). The Ninth Circuit panel's prior opinion in this case held the same. *Winn v. Killian*, 307 F.3d 1011 (9th Cir. 2002).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Establishment Clause of the First Amendment to the U.S. Constitution, which declares that "Congress shall make no law respecting an establishment of religion," as it applies to state governments through the Fourteenth Amendment to the U.S. Constitution. The challenged Scholarship

Tax Credit Program is codified at A.R.S. § 43-1089.[2] Pet. App. 117a-120a.

STATEMENT OF THE CASE

Arizona is a pioneer in education reform and has been aggressively "expand[ing] the options available [to parents] in public education" for two decades. *Kotterman v. Killian*, 972 P.2d 606, 611 (Ariz. 1999). It adopted one of the nation's first—and by far most robust—charter school laws. A.R.S. §§ 15-181 – 15-189.03 (1994). It erased arbitrary geographic boundaries for public schools by requiring open public school enrollment. A.R.S. §§ 15-816 – 15-816.07 (1995). It then sought "to bring private institutions into the mix of educational alternatives open to the people of [Arizona]," *Kotterman*, 972 P.2d at 611, by adopting the Scholarship Tax Credit Program. A.R.S. § 43-1089 (1997).

The idea for the Scholarship Tax Credit Program originated with the Arizona School Choice Trust—one of the Parent-Intervenors—which was founded in 1993 to award privately funded scholarships. Arizona School Choice Trust, *ASCT's Generous Founders*,

[2] Legislative amendments to the Scholarship Tax Credit Program will go into effect on December 31, 2010. 2010 Ariz. Sess. Laws, ch. 293, §§ 1-4. Parents' App. 1a-16a. The amendments do not affect the issues in this case, but Parents will discuss them as appropriate in their Argument.

http://www.asct.org/Founders.shtml (last visited July 27, 2010). As the program's primary sponsor explained, it "allows for a tax credit . . . for contributions to a tuition scholarship organization, such as the Arizona School Choice Trust Fund." Ariz. House of Rep. Comm. on Educ., Minutes of Meeting (Wed. Jan. 29, 1997), http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/43leg/1R/comm_min/House/0129%2EED.htm (last visited July 27, 2010). The program essentially changed what was "a tax deduction to a tax credit, enhancing the ability of these organizations to raise funds and [thereby] allowing more low-income children the opportunity to attend the school of their choice." *Id.*

The Scholarship Tax Credit Program authorizes individuals to claim a state tax credit of up to $500 per individual (or $1000 for married couples filing jointly) for donations to qualified school tuition organizations. A.R.S. § 43-1089(A); Pet. App. 117a. A qualified school tuition organization must be a tax-exempt charity under 26 U.S.C. § 501(c)(3) and must allocate 90 percent of the donations it receives to scholarships to help children attend private schools. A.R.S. § 43-1089(G)(3); Pet. App. 120a. To qualify as a tax-exempt organization, an entity must be "organized and operated exclusively" for, among other purposes, "religious, charitable, scientific . . . literary, or educational purposes. . . ." 26 U.S.C. § 501(c)(3). Consequently, "organizations unabashedly devoted to promoting religion—churches and other religious institutions—enjoy . . . direct economic tax benefits" under the federal tax code, *Kotterman*, 972 P.2d at

613 n.2, including deductibility of contributions, 26 U.S.C. § 170. The Scholarship Tax Credit Program thus allows school tuition organizations to operate precisely like any other federally recognized tax-exempt organization.

Arizona has continued to lead the nation in reforming education by expanding parental choice through religion-neutral scholarship programs. Due in large measure to the success of the Scholarship Tax Credit Program, Arizona enacted two corporately funded scholarship tax credit programs: a means-tested program for low- and middle-income children transferring from public to private schools, A.R.S. § 43-1183 (2006), and a program to fund scholarships for children with disabilities and children in the foster care system, A.R.S. § 43-1184 (2009).

Following its enactment in 1997, the Scholarship Tax Credit Program was immediately challenged in state court as allegedly violating the Establishment Clause. The Arizona Supreme Court rejected those claims because it was "persuaded that § 43-1089 falls within the parameters of the Establishment Clause." *Kotterman*, 972 P.2d at 616, *cert. denied*, 528 U.S. 921 (1999). After an exhaustive analysis, the Arizona Supreme Court concluded that the program "does not prefer one religion over another, or religion over non-religion. It 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." *Id.* (citation omitted).

After this Court denied certiorari in *Kotterman*, Respondents filed this case in February 2000 in federal court. The District Court initially dismissed the case as barred by the federal Tax Injunction Act, but the Ninth Circuit reversed, *Winn*, 307 F.3d 1011, and this Court affirmed, *Hibbs*, 542 U.S. 88. Upon remand, the District Court granted Parents' motion to dismiss and held that, in light of *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), Respondents were unable to state a claim against this facially neutral tax credit program because it operates based on true private choice. Pet. App. 55a.

The Ninth Circuit reversed and held that, based on the allegations in Respondents' complaint, the program lacks religious neutrality as-applied and "carries with it the *imprimatur* of government endorsement."[3] Pet. App. 23a (panel) (citation omitted).

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[3] The Ninth Circuit panel opined that, because Respondents abandoned their facial challenge to the Scholarship Tax Credit Program, the Parent-Intervenors are no longer "being directly challenged" in this case. Pet. App. 7a-8a n.6 (panel). The panel said this because Respondents' as-applied challenge purportedly calls into question only the existence of—and taxpayers' donations to—religiously affiliated school tuition organizations and not donations to nonreligious school tuition organizations, even if the nonreligious organizations offer scholarships to both nonreligious and religious schools. Pet. App. 7a-8a n.6 (panel). However, the panel reinstated Respondents' challenge to the legislature's purpose for enacting the program. If the legislature enacted the program for an improper religious purpose, the program must be struck down in its entirety, i.e., it must be struck down as to every application, not just as to one particular application. *Church of the Lukumi Babalu Aye, Inc. v. City of*

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The panel first determined that the central question under the "endorsement inquiry is whether 'the reasonable observer would naturally perceive the aid program [in question] as *government* support for the advancement of religion.'" Pet. App. 37a (panel) (quoting *Mitchell v. Helms*, 530 U.S. 793, 843 (2000)) (alteration in original). The panel then concluded that a reasonable observer would believe that by giving taxpayers the free choice to donate to both religious and nonreligious school tuition organizations, the state has failed to provide any "reasonable assurance" that the taxpayers will advance the program's secular purpose. Pet. App. 40a (panel). It reached this conclusion without disputing that the program "is neutral with respect to the taxpayers who direct money to [school tuition organizations], or that any of the program's aid that reaches a [school tuition organization] does so only as a result of the genuine and independent choice of an Arizona taxpayer." Pet. App. 34a (panel).

The dissent from the denial of rehearing en banc found, however, that given the "layers of private, individual choice" under the program, it was "at a loss to understand how a reasonable observer—one fully informed about all matters related to the

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Hialeah, 508 U.S. 520, 534 (1993) ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."). The Parent-Intervenors thus have a direct stake in the outcome of this litigation.

program—could conclude that the *government itself* has endorsed religion in this case." Pet. App. 94a (en banc) (O'Scannlain, J., dissenting) (citation omitted).

SUMMARY OF THE ARGUMENT

For twenty-seven years, this Court has consistently rejected the argument Respondents make in this case: that the validity of a school choice program depends on how many participants or beneficiaries choose religious options. *Zelman*, 536 U.S. at 658 ("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."); *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."). That argument is especially tenuous here because no payment of public funds is made, even indirectly, to religious entities. Instead, the program merely encourages taxpayers to donate to privately created charities in order to benefit other people's children. This Court's *Mueller* decision made it very clear that the connection between state and religious organizations is especially attenuated when a tax deduction or tax credit is involved. It is therefore not surprising that, until the panel decision, not a single court in the

last twenty-seven years had struck down a tax credit or deduction as unconstitutional under the Establishment Clause.

Arizona's Scholarship Tax Credit Program has multiple layers of true private choice, permits a wide range of religious and nonreligious entities to participate on completely neutral terms, and was adopted in a state that has more public and private educational options than any other in the nation. Respondents are asking this Court to overturn twenty-seven years of clear and settled law, an invitation this Court should heartily decline, especially given the important reliance that states and families increasingly place on the role of parental choice in improving America's public education system.

ARGUMENT

Arizona's Scholarship Tax Credit Program, A.R.S. § 43-1089, fits comfortably within a large and expanding framework of religion-neutral educational choice programs of the type approved by this Court in *Zelman*, 536 U.S. 639.[4] Yet Respondents assert that the program constitutes the establishment of religion in violation of the Establishment Clause of the First Amendment to the U.S. Constitution, which, as it applies to the states through the Fourteenth Amendment,

[4] Parents have read Petitioner Arizona Christian School Tuition Organization's merits brief and, being in full agreement, join their arguments that Respondents lack taxpayer standing.

forbids the enactment of any "law respecting an establishment of religion." U.S. Const. amend. I. "[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970). Here, the Scholarship Tax Credit Program is clearly not a "law respecting an establishment of religion" because the government does not sponsor, provide financial support to, or involve itself with any religious organization.

To determine whether a challenged educational aid program contravenes the Establishment Clause, this Court asks "whether the government acted with the purpose of advancing or inhibiting religion [and] whether the aid has the 'effect' of advancing or inhibiting religion." *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997). Here, there is no government action that manifests any religious purpose or that has the effect of advancing religion. "[T]he state's involvement stops with authorizing the creation of [school tuition organizations] and making tax credits available. After that, the government takes its hands off the wheel." Pet. App. 90a (en banc) (O'Scannlain, J., dissenting).

Any individual may create a school tuition organization and apply to the Internal Revenue Service for tax-exempt status. Any taxpayer may contribute to any school tuition organization and receive a tax credit for the amount contributed up to the statutorily defined limit of $500 per individual or $1000 for

married couples filing jointly. And any parent may apply for any scholarship offered by any school tuition organization. "That is not government endorsement: that is government nonchalance." Pet. App. 95a (en banc) (O'Scannlain, J., dissenting).

This Court reviews *de novo* the Ninth Circuit panel's decision reversing the dismissal of Respondents' complaint and construes Respondents' factual allegations in the light most favorable to them. *Christopher v. Harbury*, 536 U.S. 403, 406 (2002). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). Accepting Respondents' factual allegations as true, they have not stated any facts that support their claim that the program lacks a valid secular purpose or that the legislature has acted to advance or endorse religion—nor could they, because the challenged program is neutral with regard to religion and operates on the basis of true private choice. *Cf. Zelman*, 536 U.S. at 653 ("[W]e have never found a program of true private choice to offend the Establishment Clause.").

I. The Arizona Legislature Acted With A Valid Secular Purpose When It Enacted The Scholarship Tax Credit Program.

To determine whether the state's stated secular purpose is in fact genuine, this Court looks through the eyes of an "objective observer" who "takes account

of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act." *McCreary Cnty. v. ACLU*, 545 U.S. 844, 862 (2005) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)); *see also Edwards v. Aguillard*, 482 U.S. 578, 594-95 (1987) (noting that the purpose inquiry looks to the "plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history, . . . [and] the historical context of the statute, . . . and the specific sequence of events leading to [its] passage").

A. The Scholarship Tax Credit Program's Text And Contemporaneous Legislative History Manifest A Clear Secular Purpose To Increase Parental Choice In Education.

This Court is reluctant "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. Here, a valid secular purpose is readily discernable from the face of the challenged statute: "to allow [children] to attend any qualified school of their parents' choice." A.R.S. § 43-1089(G)(3); Pet. App. 120a.[5]

[5] The recent amendments to the Scholarship Tax Credit Program retain this fundamental purpose. Parents' App. 9a (Title 43 amended by adding chapter 15 and A.R.S. § 43-1503(A),

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This legitimate governmental purpose rests on one of the most basic liberties recognized by this Court; namely, that parents—not government actors—have the right to direct the education and upbringing of their children. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."). Moreover, there is nothing unconstitutional about encouraging private schooling as one option in the mix of educational alternatives available to parents. *Bd. of Educ. v. Allen*, 392 U.S. 236, 247-48 (1968) (recognizing that "private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience" and that "a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students").

The Scholarship Tax Credit Program is facially neutral with regard to religion. The program "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.

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which reads, "A certified school tuition organization must be established to receive contributions from taxpayers for the purposes of income tax credits under section 43-1089 and to pay educational scholarships or tuition grants to allow students to attend any qualified school of their parents' choice.").

54a (district court); *see also Kotterman*, 972 P.2d at 611-12 (finding a valid secular purpose because the program is part of the state's broader policy of maximizing parental choice).

The program also "does not provide taxpayers or students financial incentives which are skewed toward religious schools" or religious school tuition organizations. Pet. App. 57a (district court). Taxpayers receive the same tax credit amount regardless of whether they donate to a religious or nonreligious school tuition organization. And just like the tax deduction upheld in *Mueller*, this tax benefit is "only one among many." 463 U.S. at 396. Arizona offers a wide range of other tax credits to individual taxpayers. A.R.S. §§ 43-1071 – 43-1090.01. For example, individuals may claim a tax credit for contributions to organizations that provide assistance to the working poor. A.R.S. § 43-1088 (including, according to *Kotterman*, 972 P.2d at 613, churches, synagogues, missions, as well as other religious and nonreligious institutions). There is also a corresponding tax credit for contributions to public schools, adopted at the same time as the Scholarship Tax Credit Program. A.R.S. § 43-1089.01 (1997). Additionally, the class of beneficiaries under the challenged program is even broader than that approved in *Mueller* because any Arizona taxpayer, not just parents, may donate to a school tuition organization. A.R.S. § 43-1089(A); Pet. App. 117a. The "provision of benefits to so broad a spectrum of groups is an important index of secular effect." *Widmar v. Vincent*, 454 U.S. 263, 274 (1981).

Because it is available to all taxpayers and not just parents, the program "clearly achieves a greater level of neutrality" than the deduction upheld in *Mueller*. *Kotterman*, 972 P.2d at 613.

Arizona also does not skew incentives for parents receiving scholarships under the program to choose private schools—religious or otherwise—over public schools. "An Arizona student may attend any public school in the state without cost," including charter schools, "just as the students in *Zelman* could attend community and magnet schools for free." Pet. App. 57a (district court). By contrast, the average scholarship amount paid by school tuition organizations in 2009 was $1889. Arizona Dept. of Revenue, *Individual Income Tax Credit for Donations to Private School Tuition Organizations: Reporting for 2009* 3 (Apr. 21, 2010), *available at* http://www.azdor.gov/Portals/0/Reports/private-school-tax-credit-report-2009.pdf. That is "a sum unlikely to cover all of the costs of private school attendance."[6] Pet. App. 57a (district court). Nor are parents permitted to make donations that benefit their own dependents.[7] As a result, and

[6] A recent study found the average tuition at Arizona private schools was $4398 during the 2004-05 school year. Andrew Coulson, *Arizona Public and Private Schools: A Statistical Analysis*, Goldwater Institute, Policy Report No. 213 (Oct. 17, 2006), *available at* http://www.goldwaterinstitute.org/article/1851.

[7] A.R.S. § 43-1089(E) currently says, "The tax credit is not allowed if the taxpayer designates the taxpayer's contribution to the school tuition organization for the direct benefit of any

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considering all of the educational options available to parents in Arizona, it is difficult to perceive any *government*-created incentives to choose private schools.

Moreover, there is no hint in the legislative history of any improper or religious motive. The legislative history shows that the "primary sponsor's concern in introducing the bill was providing equal access to a wide range of schooling options for students of every income level by defraying the costs of educational expenses incurred by parents." Pet. App. 18a (panel) (citing Ariz. House of Rep. Comm. on Ways & Means, Minutes of Meeting, Tues. Jan. 21, 1997). When the program was enacted, only one school tuition organization was operating—the non-religious Arizona School Choice Trust. While the legislature had every reason to expect that other school tuition organizations would be formed, as indeed they have been, it had no way to predict how

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dependent of the taxpayer." Pet. App. 118a. The recent legislative amendments re-letter section (E) as letter (F) and adds at the end of the sentence:

> . . . or if the taxpayer designates a student beneficiary as a condition of the taxpayer's contribution to the school tuition organization. The tax credit is not allowed if the taxpayer, with the intent to benefit the taxpayer's dependent, agrees with one or more other taxpayers to designate each taxpayer's contribution to the school tuition organization for the direct benefit of the other taxpayer's dependent.

Parents' App. 3a.

many there would be, how many would be religiously affiliated, or how much money each would receive from taxpayer donations. The legislature "could hardly have had the 'purpose' of endorsing religion when it set up a plan that, for all it knew, could have resulted in absolutely no funding for religious entities." Pet. App. 114a (en banc) (O'Scannlain, J., dissenting).

Respondents do not claim that any contrary legislative history exists. Their complaint is bereft of any allegation suggesting that the legislature's stated purpose was disingenuous or a sham. And as explained below in Part I.C., the Ninth Circuit panel's only suggestion that such evidence could be adduced is based on an errant reading of the statute that would require the Department of Revenue to ignore the program's plain text in implementing the program.

In sum, there is nothing in the legislative history of the Scholarship Tax Credit Program that would lead an objective observer to believe that the legislature intended to endorse religion when it enacted the law.

B. The Scholarship Tax Credit Program Is Furthering The State's Valid Secular Purpose.

The objective observer, through whose eyes programs of this kind are to be perceived, is not only familiar with the legislative history but also with the

"implementation of the statute." *McCreary Cnty.*, 545 U.S. at 862. Here, the objective observer would see: (1) that school tuition organizations are privately created and must engage in extensive marketing and fundraising activities and that they operate without any governmental influence or control; (2) that private citizens decide whether and how much to contribute to school tuition organizations and make an independent choice regarding which school tuition organizations they will contribute to; and (3) that any family is free to apply to any school tuition organization to attend any school supported by that organization. "No *reasonable* observer would think this lengthy chain of choice suggests the government has endorsed religion." Pet. App. 115a (en banc) (O'Scannlain, J., dissenting).

The objective observer would also be aware of the steadily increasing number of school choice programs that have been flourishing in Arizona and around the country. In 2009-10, there were eighteen school choice programs in twelve states serving close to 180,000 students, including seven scholarship tax credit programs similar to the Arizona program challenged here. Alliance for School Choice, *Fighting for Opportunity: School Choice Yearbook 2009-10* 17 (2010), *available at* http://www.allianceforschoolchoice.org/UploadedFiles/ResearchResources/ASC_Yearbook_2010_FINAL.pdf. These numbers do not include the new voucher programs for children with disabilities adopted this past legislative session by Oklahoma and Louisiana.

2010 Okla. Sess. Laws 381; 2010 La. Sess. Law Serv. Act 515 (H.B. 216) (West).

As religion-neutral school choice programs increase in number and popularity, parents are increasingly expecting more options and more control over where their children go to school. States are responding by giving parents those choices—including choices among religious and nonreligious options on a wholly neutral basis—just as this Court has consistently held they may do. *Zelman*, 536 U.S. at 652-53 ("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.") (quoting *Mitchell*, 530 U.S. at 810); *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 839 (1995) ("We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("[W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 486 (1986) ("Nor

does the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion."); *Mueller*, 463 U.S. at 400 ("The historic purposes of the clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case.").

Under those precedents, the decision to enact a tax credit program that allows taxpayers to donate to the religious or nonreligious school tuition organization of their choice would not lead an objective observer to conclude that the government acted with an improper purpose to advance religion—even if a majority of taxpayers in any given year contribute to religious school tuition organizations. Instead, the objective observer would conclude that the legislature's decision to allow religious charities to participate in the program is entirely consistent with the legislature's stated purpose of maximizing parental choice. That conclusion is solidified further when the objective observer considers that the empirical studies of school choice programs show they have been highly effective in promoting that purely secular—and perfectly valid—objective. *See, e.g.*, Jay P. Greene, Ph.D., *Education Myths: What Special-Interest Groups Want You To Believe About Our Schools—And Why It Isn't So* 147-56, 167-78 (2005) (summarizing the eight random assignment studies finding that school choice

programs "produce test scores that are at least as good as those produced in public schools, with happier parents, for about half of the cost" and also those studies demonstrating that "school choice helps public school students by providing public schools with positive incentives").

School choice programs, including Arizona's, have a proven track record of improving public school performance through competition. *See, e.g.*, Matthew Ladner, Ph.D., *Putting Arizona Education Reform to the Test*: *School Choice and Early Education Expansion*, Goldwater Institute, Policy Report No. 216 (Feb. 6, 2007), *available at* http://www.goldwaterinstitute.org/file/4264/download/4266 (finding that Tucson public schools facing competitive pressure from charters, tax-credit-funded scholarships, and home schooling achieved significant improvements in reading, math, and language arts scores relative to other local schools); David Figlio & Cassandra M.D. Hart, *Competitive Effects of Means-Tested School Vouchers*, National Center for Analysis of Longitudinal Data in Education Research, Working Paper No. 46 (June 2010), *available at* http://www.urban.org/uploadedpdf/1001393-means-tested-school-vouchers.pdf (analyzing Florida's corporate tax-credit-funded scholarship program and finding positive competitive effects on public schools).

The Scholarship Tax Credit Program also saves the state money and results in increased per-pupil funding for Arizona public schools. Susan L. Aud, Ph.D., *School Choice by the Numbers: The Fiscal*

Effect of School Choice Programs, 1990-2006, Milton and Rose D. Friedman Foundation (Apr. 2007), *available at* http://www.edchoice.org/CMSModules/EdChoice/FileLibrary/243/voucher_savings_final.pdf (finding that the Scholarship Tax Credit Program saved state and local authorities $18 million); Susan L. Aud, Ph.D. & Vicki Murray, Ph.D., *Opening the Books: 2006 Annual Report on Arizona Public School Finance*, Goldwater Institute, Policy Brief No. 06-02 (Apr. 17, 2006), *available at* http://www.goldwaterinstitute.org/file/3269/download/3269 (finding that the Scholarship Tax Credit Program increases per-pupil funding in the public school system).

The point here is not that expanding parental options represents the best educational policy choice (though it very well might); rather, the point is that an objective observer would find it entirely plausible that the legislature might wish to include private schools within the available mix of educational options for purely secular purposes. Arizona's decision to include religious options in its completely neutral school choice program is certainly advancing the state's secular goal of increasing parental choice while also increasing parental satisfaction and improving public education.

C. The Ninth Circuit Panel's Attempt To Reframe Respondents' Purpose Challenge Must Fail Because It Relied On Irrelevant Governmental Actions As Well As An Erroneous Interpretation Of The Program.

The Ninth Circuit panel's attempt to resurrect Respondents' claim as an as-applied challenge fails for two reasons. First, post-enactment action by the executive branch is not relevant to discerning the legislature's motive for enacting the program. Second, the panel's reasoning relies on a misinterpretation of the program itself.

1. Post-Enactment Action By The Executive Branch Is Not Relevant To Determining Whether The Legislature Had A Valid Purpose For Enacting The Program.

When a legislature passes a law for an improper purpose, the constitutional violation occurs at the moment of enactment. A challenge to a statute's purpose is therefore a challenge to the statute as written, not as to any particular application.[8] That is

[8] This Court previously considered a challenge to a statute's purpose only as an aspect of a facial challenge. *Bowen v. Kendrick*, 487 U.S. 589, 600-01 (1988). Because Respondents abandoned their facial challenge, Pet. App. 7a n.5 (panel), there is a strong argument they abandoned their challenge to the program's stated secular purpose.

why the only way to remedy a law that was passed with an unconstitutional religious purpose is to strike down the statute in its entirety. *Lukumi*, 508 U.S. at 534; *see also McCreary Cnty.*, 545 U.S. at 860 (holding that there can be "no neutrality when the government's ostensible object is to take sides").

Respondents' allegation that the legislature enacted the Scholarship Tax Credit Program to advance religion is an allegation that the legislature violated the Establishment Clause at the time it passed the challenged program. Because the alleged constitutional violation would have occurred before the program was ever implemented, post-enactment action by a separate branch of government is not evidence of a legislature's purpose for enacting a program. While it is conceivable that the executive branch might violate the Establishment Clause by applying a law in a manner that advances religion (for example, if the Arizona Department of Revenue encouraged taxpayers to donate to religious over nonreligious school tuition organizations), neither the executive branch nor private actors can pass a law for an improper purpose. That is why the subject of the inquiry is the legislature, not the executive branch or citizens. The question is whether the legislature had a valid purpose when it enacted the challenged program.

Under limited circumstances, non-legislative action might be probative of the legislature's purpose. This Court's decision in *Lukumi* illustrates when an inquiry into outside actions might shed light on the

legislature's purpose for enacting an otherwise neutral law. In *Lukumi*, this Court took notice of the fact that many residents expressed concern to the legislative branch about the religious practices of the Santeria church. 508 U.S. at 526. The legislature's response to the public's animosity was to enact several resolutions and ordinances aimed at preventing that church from engaging in its practice of ritual animal sacrifice. *Id.* Thus, private religious discrimination (or private action favoring religion) that actually prompts a legislative response can be used to show that an otherwise facially neutral law might have been motivated by an improper purpose. But here neither Respondents nor the panel identified any private conduct that is relevant to the purpose inquiry.

2. The Panel Misconstrued The Program Because Its Plain Language Permits Participation Of Any School Tuition Organization That Awards Scholarships To At Least Two Schools.

The panel attempted to make the Arizona Department of Revenue's implementation of the program relevant to the purpose inquiry by holding that the Department is acting contrary to the language of the program by allowing tax credits for donations to school tuition organizations that provide scholarships only to religious schools. However, in order to reach its conclusion, the panel ignored the plain language of the Scholarship Tax Credit Program and read into it

a nonexistent limitation on the ability of religiously affiliated school tuition organizations to participate in the program. The program's plain text allows school tuition organizations to limit scholarships to as few as two schools. The panel read into the language in A.R.S. § 43-1089(G)(3), which defines school tuition organizations as organizations that allocate scholarships "to allow [children] to attend any qualified school of their parents' choice," a requirement that school tuition organizations may not limit the number of schools to which they provide scholarships. Pet. App. 68a-69a (en banc). But A.R.S. § 43-1089(G)(3) goes on to say that "to qualify as a school tuition organization the charitable organization shall provide scholarships or tuition grants to students without limiting availability to only students of one school."[9] Pet. App. 120a.

The panel ignored this additional, clarifying language. The fact that some school tuition organizations will limit their scholarships to less than the entire universe of private schools is readily "apparent from the statute itself, which is satisfied so long as [school tuition organizations] provide scholarships to two or more schools, a fact plaintiffs themselves

[9] The recent amendments to the Scholarship Tax Credit Program retain this language. Parents' App. 10a (Title 43 amended by adding chapter 15 and A.R.S. § 43-1503(B)(2) which says, "To be eligible for certification and retain certification, the school tuition organization: Shall not limit the availability of educational scholarships or tuition grants to only students of one school" and deleting the existing A.R.S. § 43-1089(G)(3)).

recognize in their complaint." Pet. App. 113a (en banc) (O'Scannlain, J., dissenting) (citation omitted).

The panel's interpretation of A.R.S. § 43-1089(G)(3) not only conflicts with the plain language of the statute, it is at odds with the allegations in Respondents' complaint. ACSTO Pet. App. 119a (alleging that "[school tuition organizations] may (and most do) restrict their grants to students attending religious schools"). It is also contrary to the Arizona Supreme Court's interpretation of the statute, this Court's prior understanding of the law, and the Ninth Circuit's own prior opinion in this case. *Hibbs*, 542 U.S. at 95 (explaining that school tuition organizations "must designate at least two schools whose students will receive funds"); *Winn*, 307 F.3d at 1013 ("the statute provides that recipients of [a school tuition organization's] funds must be drawn from at least two different schools"); *Kotterman*, 972 P.2d at 614 (recognizing that school tuition organizations "may not limit grants to students of only one" private school); *id*. at 626 ("[A] group of taxpayers who subscribe to a particular religion may form [a school tuition organization] that will support only schools of that religion.") (Feldman, J., dissenting).

By erroneously construing the program to prohibit a practice that it clearly allows, the panel was able to accuse the Department of improperly allowing taxpayers to claim a tax credit for donations to school tuition organizations that award scholarships only to religious schools. Pet. App. 19a (panel). This untenable statutory construction is the necessary condition the panel needed to make the Department's

"implementation" of the program appear relevant to the purpose inquiry.

After transforming the program into something it is not, the panel stated that *if* Respondents can prove the legislature knew the Department would implement the statute by allowing tax credits for donations to religiously affiliated school tuition organizations, *then* this knowledge "could be probative" of the legislature's "expectations as to how assistance" under the Scholarship Tax Credit Program "would be directed in practice." Pet. App. 85a (en banc). But that reasoning is faulty because the text of the statute clearly allows religiously affiliated school tuition organizations to participate in the program and to limit scholarship awards only to religious schools.

The panel's attempt to shoehorn the Department's administration of the program—which is both neutral and statutorily authorized—into the purpose inquiry fails as a matter of text, logic, and precedent.

3. The Establishment Clause Has Never Been Construed To Prohibit Religious Groups From Participating In A Religion-Neutral Government Aid Program.

The panel's construction of the program is not only inconsistent with the program's text, but with the history of the Establishment Clause itself, which has never been held to require the exclusion of religious groups from a neutral educational aid program.

See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (holding that the First Amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary").

That the legislature permitted a wide variety of privately created and operated school tuition organizations to participate in the Scholarship Tax Credit Program on a neutral basis along with nonreligious organizations is not and cannot be evidence that the legislature's stated valid secular purpose was a sham. *Walz*, 397 U.S. at 689 (Brennan, J., concurring) ("Government may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society."); *Hernandez v. Comm'r*, 490 U.S. 680, 696 (1989) (holding that 26 U.S.C. § 170 does not advance religion under the Establishment Clause by allowing taxpayers to deduct charitable "gifts to . . . religious organizations").

The legislature is vested with discretion as the state's education policymaker. "What is at stake as a matter of policy is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point." *Walz*, 397 U.S. at 694 (Harlan, J., concurring). Here, the range of religious and nonreligious options reflects the state's pluralism. Rather than being a reflection of religious establishment, the wide variety

of school tuition organizations is a reflection of a robust and healthy diversity of beliefs.

II. The Scholarship Tax Credit Program Does Not Constitute Government Endorsement Of Religion.

Once a court is satisfied the legislature acted with a valid secular purpose, the next question is whether the law has the forbidden effect of endorsing religion. *Agostini*, 521 U.S. at 223. In *Zelman*, this Court held that educational aid programs that permit religious groups to participate on neutral terms and provide program participants genuine choice whether to direct that aid to religious or nonreligious schools are "not readily subject to challenge under the Establishment Clause." 536 U.S. at 652. As the dissent from the denial of rehearing en banc aptly observed, this case is notable "for what it does not involve: state action advancing religion." Pet. App. 87a (en banc) (O'Scannlain, J., dissenting). This is because under the Scholarship Tax Credit Program it is not "fair to say that the *government itself* has advanced religion through its own activities and influence." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 337 (1987).

Under *Zelman*, the panel's holding is erroneous for at least three reasons: (1) every decision under the tax credit program is private; (2) the panel's holding is premised on irrelevant annual statistics about where taxpayers donate their money; and (3) no

parent is coerced into sending his or her child to a religious school. The Scholarship Tax Credit Program is therefore not "readily subject to challenge under the Establishment Clause." *Zelman*, 536 U.S. at 652. The panel should have affirmed the District Court's dismissal of Respondents' complaint.

A. The Scholarship Tax Credit Program Operates On The Basis Of True Private Choice.

When a law is based on "true private choice, with no evidence that the State deliberately skew[s] incentives toward religious schools, [it is] sufficient for the program to survive scrutiny under the Establishment Clause." *Zelman*, 536 U.S. at 650. As this Court stated in *Mueller*, the "historic purposes of the [Establishment] [C]lause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case." 463 U.S. at 400.

Private choice imbues every aspect of Arizona's Scholarship Tax Credit Program:

> [T]he "*government itself*" is at least four times removed from any aid to religious organizations. First, an individual or group of individuals must choose to create [a school tuition organization]. Second, that [school tuition organization] must then decide to provide scholarships to religious schools.

> Third, taxpayers have to contribute to the [school tuition organization] in question. Finally, parents need to apply for a scholarship for their student.

Pet. App. 94a (en banc) (O'Scannlain, J., dissenting). The state's "involvement stops with authorizing the creation of [school tuition organizations] and making tax credits available. After that, the government takes its hands off the wheel." Pet. App. 90a (en banc) (O'Scannlain, J., dissenting). In this way, the Scholarship Tax Credit Program parallels the particular aspects of federal charitable deductions that this Court has found central to their constitutionality under the Establishment Clause. *Hernandez*, 490 U.S. at 696 (holding that tax deductions for charitable contributions to organizations created and operated exclusively for religious purposes neither "advance nor inhibit religion").

Considering that the government itself does not disburse the Scholarship Tax Credit Program's benefits, there is no way for the government to grant any special favors that might lead to a religious establishment. *See Mitchell*, 530 U.S. at 810. For example, once a school tuition organization is created, it is up to its board and staff to solicit charitable contributions from taxpayers, and the program provides no financial incentive for taxpayers to donate to religiously affiliated scholarship organizations over nonreligious organizations. And as described above in Part I.A., parents also have no financial incentive to choose a religious education—in fact, there are

financial *disincentives* for parents to choose a private education—either religious or nonreligious, just as there were in *Zelman*. 536 U.S. at 654 ("The program here in fact creates financial *dis*incentives for religious schools. . . .").

The panel implicitly suggests that taxpayers are doing the government's bidding, but as described above, taxpayers have ample choices of school tuition organizations to donate to, as well as the choice to not donate at all. "In every respect and at every level, these are purely private choices, not government policy." Pet. App. 94a (en banc) (O'Scannlain, J., dissenting).

B. Annual Statistics Concerning Which School Tuition Organizations Taxpayers Choose To Donate To Are Irrelevant To The Constitutional Inquiry.

The Ninth Circuit panel relied heavily on annual statistics about where taxpayers choose to direct their donations to support its conclusion that the program constitutes governmental endorsement of religion. Pet. App. 30a-32a. If this Court were to sanction the use of such data, it could imperil many other tax credit programs in Arizona and nationwide. But such statistics are plainly irrelevant to the constitutional inquiry. *Zelman*, 536 U.S. at 650 (noting that in prior educational aid cases this Court "found it irrelevant to the constitutional inquiry that the vast majority of beneficiaries were parents of children in religions schools"); *Mueller*, 463 U.S. at 401 ("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."). One reason this Court refuses to attribute constitutional significance to constantly fluctuating statistics is that it would lead to the "absurd result that a neutral school-choice program might be permissible" in states where low percentages of individuals choose religious schools, but not in states where high percentages of individuals choose religious schools. *Zelman*, 536 U.S. at 657.

The present case is a good example of the wisdom of this Court's decision not to evaluate the constitutionality of challenged programs based on constantly fluctuating data. For example, since this case was filed in 2000, there has been a consistent trend toward increased donations to nonreligious school tuition organizations. The most recent data reported to the Arizona Department of Revenue, *Individual Income Tax Credit for Donations to Private School Tuition Organizations: Reporting for 2009* (Apr. 21, 2010), *available at* http://www.azdor.gov/Portals/0/Reports/private-school-tax-credit-report-2009.pdf, show that:

- The number of school tuition organizations has more than tripled from sixteen in 1998 to fifty-three in 2009. *Id.* at 3.
- In 2009, at least twenty-nine of the fifty-three school tuition organizations had no obvious religious affiliation. *Id.* at 8-9.

- The number of donations from taxpayers to school tuition organizations rose from 4248 (totaling $1.8 million) in 1998 to 73,391 (totaling $50.8 million) in 2009. *Id.* at 3.
- In 2009, two of the five largest school tuition organizations in terms of both donations received and scholarships awarded were nonreligious: the Arizona Scholarship Fund and the Institute for Better Education. Those two organizations received nearly $10 million—twenty percent of total donations. *Id.* at 8-9.
- In 2009, five of the ten largest school tuition organizations in terms of both donations received and scholarships awarded had no religious affiliation and received nearly thirty percent of total donations. *Id.* at 8-9. In 1998, according to Respondents' complaint, only six percent of program donations were made to nonreligious school tuition organizations.
- When all school tuition organizations are taken into account, nearly forty percent of funds were donated to nonreligious school tuition organizations (similar to the religiously affiliated organizations, many of the nonreligious organizations provide scholarships only to certain types of nonreligious schools, such as Montessori or Waldorf schools). *Id.* at 8-9.
- In 2009, 27,582 students used the scholarships to attend 370 different private schools—including nearly one hundred private schools

that have no obvious religious affiliation. *Id.* at 14-21.

In sum, the third-largest school tuition organization in 2009 had no religious affiliation, five of the ten largest organizations had no religious affiliation, and over 27,000 students used program scholarships to attend 370 different private schools—including nearly one hundred private schools that have no obvious religious affiliation. Over time, the program has become "less" religious rather than "more" religious—not because of any state action, but due to the private choices of the individuals participating in it. And while the pendulum may one day swing back toward religion, that swing would not be attributable to the government, but attributable to the private decisions of individual taxpayers and to the work of school tuition organizations whose employees must fundraise like other nonprofit organizations and convince taxpayers to donate to their organizations.

If Respondents were correct that the Scholarship Tax Credit Program skews incentives toward religion, one would expect that both the percentage of students attending religious schools and the percentage of scholarships reserved for use at religious schools would have jumped over the program's thirteen-year history. But the proportion of students attending religious schools has barely increased—while the percentage of scholarships reserved for use in religious schools has plummeted. In 1998, approximately seventy-five percent of private school students in Arizona were enrolled in religious schools. Andrew Coulson, *The Case of the Missing Evidence*, Cato @

Liberty blog (Jan. 26, 2010 8:31 AM), http://www.cato-at-liberty.org/2010/01/26/the-case-of-the-missing-evidence (relying on U.S. Dep't of Educ. "Private School Universe Survey"). In 2008, that number was eighty-one percent, a mere five percent increase over a ten-year period. *Id*. During the same time period, taxpayers donated an increasing amount of money to school tuition organizations that award scholarships to both religious and nonreligious schools—and some that award scholarships only to nonreligious schools. Respondents allege that in 1998, ninety-four percent of donated funds went to religiously affiliated school tuition organizations. ACSTO App. 120a. But in 2008 only sixty-five percent of funds were donated to religious school tuition organizations. Coulson, *supra*. This means that the percentage of scholarships available for use at nonreligious schools is nearly twice as large as the percentage of families who choose to attend nonreligious private schools.

Evaluating the constitutionality of a neutral tax credit program in light of how much money individuals donate to religious organizations in any given year jeopardizes numerous other tax credit programs in Arizona and in other states that allow both religious and nonreligious charitable institutions to accept tax-credit-eligible donations. *E.g.*, A.R.S. § 43-1183 (corporate tax credit for low-income scholarships); A.R.S. § 43-1184 (corporate tax credit for scholarships for children with special needs); A.R.S. § 43-1088 (individual tax credit for contributions to organizations that assist the working poor); Ga. Code Ann. § 48-7-29.16 (2009) (individual and corporate

tax credits for donations to student scholarship organizations); Iowa Code § 422.11S (2010) (individual tax credit for donations to school tuition organizations); 72 Pa. Cons. Stat. §§ 8701-F to 8708-F (2009) (corporate tax credit for contributions to scholarship organizations); R.I. Gen. Laws §§ 44-62-1 to -7 (2009) (corporate tax credit for donations to scholarship organizations).

The panel's reasoning could also easily spill over into challenges to state and federal tax deductions and exemptions. Americans donate significant sums each year to religious charities. The panel's holding, if logically and consistently applied, places the constitutionality of other tax benefits in grave jeopardy. For example, the tax exemption approved in *Walz* is far more valuable to religious groups than the indirect, third-party tax credit at issue here. A credit merely reduces by a small amount the taxes owed by individual taxpayers—but an exemption allows the religious organization itself to completely escape the government's taxing authority.

In a futile attempt to avoid those consequences, the panel contrived an artificial distinction between tax credits and tax deductions. But this "appear[s] to be a matter of form rather than substance." *Kotterman*, 972 P.2d at 618 (finding no "principled" distinction between tax credits and "other established tax policy equivalents like deductions and exemptions"). Indeed, there is no principled standard by which to evaluate different types of tax benefits. *See Mueller*, 463 U.S. at 412 n.5 ("[T]he constitutionality of a tax

benefit does not turn on whether the benefit is in the form of a deduction from gross income or a tax 'credit.' ") (Marshall, J., dissenting).

The panel placed a heavy emphasis on the fact that Arizona's tax credit is a dollar-for-dollar credit in an effort to distinguish tax credits from tax deductions. Pet. App. 14a (panel) ("By structuring the program as a dollar-for-dollar tax credit, the Arizona legislature has effectively created a grant program whereby the state legislature's funding of [school tuition organizations] is mediated through Arizona taxpayers."). But not all tax credits are dollar-for-dollar. At what point does a tax credit violate the constitution? Is it only at one hundred percent? Would a credit that allowed the taxpayer to claim eighty percent of the contribution pass muster? The panel provides no guidance on this crucial question. Fortunately, there is no need to answer the question because this inquiry is irrelevant to the constitutionality of facially neutral laws based on private choice.

C. The Scholarship Tax Credit Program Is Just One Among Many Educational Options Available To Arizona Parents.

Another critical question in determining whether the Scholarship Tax Credit Program unconstitutionally endorses religion is to ask whether it coerces parents into sending their children to religious schools. *Zelman*, 536 U.S. at 655-56. The answer to that question is clearly no because it "must be

answered by evaluating *all* options [the state] provides [its] schoolchildren, only one of which is to obtain a program scholarship and . . . choose a religious school." *See id.* at 656; *see also id.* at 663 (O'Connor, J., concurring) (emphasizing that this Court's inquiry "should consider all reasonable educational alternatives to religious schools that are available to parents").

The Ninth Circuit panel "did not even engage in this inquiry." Pet. App. 104a (en banc) (O'Scannlain, J. dissenting). Instead, it "reject[ed] the suggestion that the mere existence of the public school system guarantees that any scholarship program provides for genuine private choice." Pet. App. 33a (panel). But this inquiry does not merely ask whether a public school system exists. Rather, the court must evaluate and consider the full range of nonreligious educational options provided to parents by the state.

Arizona has, for a long time, led the nation in offering families educational choice. Jay P. Greene, Ph.D., *The Education Freedom Index*, Manhattan Institute for Policy Research, Civic Report No. 14 (Sept. 2000), *available at* http://www.manhattan-institute.org/html/cr_14.htm (ranking Arizona first in educational freedom). It continues to do so with its recent adoption of the tax credit programs tailored to serve low-income families and families with children with special needs. Alliance for School Choice, http://www.allianceforschoolchoice.org/StateSchoolChoice/StateSchoolChoice_Arizona (last visited July 27, 2010). Families who want their children to receive a nonreligious

education have ample options from which to choose, including nearly one hundred nonreligious private schools that enroll students receiving scholarships from school tuition organizations. Arizona's charter schools now constitute twenty-five percent of all public schools, with a total of 509 charter schools, and ten percent of public school students are enrolled in a charter school. Arizona Charter School Association, *About Arizona Charter Schools*, http://www.azcharters.org/pages/schools-basic-statistics (last visited July 27, 2010).[10] And given Arizona's open public school enrollment statute, it is fair to say that every child in Arizona attends a school of choice.

The panel suggested that taxpayers, because they have a genuine choice as to where they donate their money, somehow limit—rather than expand—parental choice by directing large sums of money to religiously affiliated school tuition organizations. Pet. App. 43a-45a (panel). But it is undisputed that tax-credit-funded scholarships bring more educational options within the financial means of more families, and thus it is bizarre to say they limit choice. Moreover, "[t]he question is not whether a parent's choice is somehow limited or constrained, the question is

[10] Arizona has also established a "virtual academy" that offers a public school education online. Arizona Virtual Academy, http://www.k12.com/azva (last visited July 27, 2010). And local school districts have established "traditional academies" in addition to the common district schools. *See, e.g.*, Chandler Traditional Academy, http://www.mychandlerschools.org/freedom (last visited July 27, 2010).

whether the *government* has somehow limited or constrained the choice." Pet. App. 97a (en banc) (O'Scannlain, J., dissenting). Even if private decisions inhibit choice—and here they do not—that would be irrelevant to the constitutional inquiry.

In *Zelman*, for instance, many nonreligious private schools chose not to participate in the voucher program. 536 U.S. at 656-57. Neighboring public schools also refused to participate. *Id.* This resulted in the program participants not being able to use their voucher to attend more than a handful of nonreligious private or public schools. *Id.* Yet *Zelman* refused to "attribute constitutional significance" to these private decisions because doing so would mean that a facially neutral school choice program might be constitutional in some places or at certain times, but not others. *Id.* at 657. "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 in this case, why most taxpayers choose to donate to religious school tuition organizations. *Id*. at 658.

Applying this principle to this case, even if all taxpayers suddenly chose to donate to religious school tuition organizations, the Scholarship Tax Credit Program would still be constitutional. Indeed, the program would still achieve its secular purpose of increasing parental choice by creating more educational options for Arizona parents.

Arizonans enjoy the greatest array of educational options of any parents in America. The panel chose to ignore this fact. But the existence of those options clearly affects the decisions Arizona parents make about how and where to educate their children. Arizona parents do not make decisions in a vacuum consisting only of the options available within the Scholarship Tax Credit Program (which include a significant number of nonreligious private schools and nonreligious scholarships). Instead, they choose among charter schools, regular public schools—including schools across district boundaries—as well as traditional academies, magnet schools, virtual schools, and even home school. Given all of these nonreligious options, both public and private, no family in Arizona is remotely coerced into choosing a religious education, nor can any intent to coerce families to choose religion plausibly be attributed to the legislature. The Ninth Circuit panel's conclusion that offering taxpayers a tax credit—on perfectly neutral terms—for donations to either nonreligious or religious school tuition organizations is the equivalent of the state coercing parents into sending their children to religious private schools is profoundly mistaken.

CONCLUSION

Arizona's Scholarship Tax Credit Program is the product of a neutral law that allows a wide array of religious and nonreligious organizations to participate

and leaves the amount of support these organizations receive entirely in the hands of private individuals. The Program's design and operation is reflective of a growing number of school choice programs nationally, all of which fit comfortably into this Court's past precedents upholding neutral educational assistance programs that direct aid to religious institutions only as a matter of private choice.

Parents respectfully ask this Court to reverse the Ninth Circuit's decision.

Respectfully submitted,

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July 30, 2010

Senate Engrossed House Bill

State of Arizona

House of Representatives

Forty-ninth Legislature

Second Regular Session

2010

HOUSE BILL 2664[1]

AN ACT

Amending section 43-1089, Arizona Revised Statutes; amending title 43, Arizona Revised Statutes, by adding chapter 15; relating to school tuition organizations.

Be it enacted by the Legislature of the State of Arizona:

Section 1. Section 43-1089, Arizona Revised Statutes, is amended to read:

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

A. A credit is allowed against the taxes imposed by this title for the amount of voluntary cash contributions by the taxpayer or on the taxpayer's behalf pursuant to section 43-401, subsection ~~H~~ I during the

[1] The text of the legislative amendments to the Scholarship Tax Credit Program is also available at http://www.azleg.gov/legtext/49leg/2r/bills/hb2664s.pdf (last visited July 27, 2010).

taxable year to a school tuition organization~~, but not exceeding~~ THAT IS CERTIFIED PURSUANT TO CHAPTER 15 OF THIS TITLE AT THE TIME OF DONATION. EXCEPT AS PROVIDED BY SUBSECTION C OF THIS SECTION, THE AMOUNT OF THE CREDIT SHALL NOT EXCEED:

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

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

~~3.~~ 2. One thousand dollars in ~~taxable year 2006 and~~ any ~~subsequent~~ taxable year for a married couple filing a joint return.

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

C. FOR EACH TAXABLE YEAR BEGINNING ON OR AFTER JANUARY 1, THE DEPARTMENT SHALL ADJUST THE DOLLAR AMOUNTS PRESCRIBED BY SUBSECTION A, PARAGRAPHS 1 AND 2 OF THIS SECTION ACCORDING TO THE AVERAGE ANNUAL CHANGE IN THE METROPOLITAN PHOENIX CONSUMER PRICE INDEX PUBLISHED BY THE UNITED STATES BUREAU OF LABOR STATISTICS, EXCEPT THAT THE DOLLAR AMOUNTS SHALL NOT BE REVISED DOWNWARD BELOW THE AMOUNTS ALLOWED IN THE PRIOR TAXABLE YEAR. THE REVISED

DOLLAR AMOUNTS SHALL BE RAISED TO THE NEAREST WHOLE DOLLAR.

~~C.~~ D. If the allowable tax credit exceeds the taxes otherwise due under this title on the claimant's income, or if there are no taxes due under this title, the taxpayer may carry the amount of the claim not used to offset the taxes under this title forward for not more than five consecutive taxable years' income tax liability.

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

~~E.~~ F. The tax credit is not allowed if the taxpayer designates the taxpayer's contribution to the school tuition organization for the direct benefit of any dependent of the taxpayer OR IF THE TAXPAYER DESIGNATES A STUDENT BENEFICIARY AS A CONDITION OF THE TAXPAYER'S CONTRIBUTION TO THE SCHOOL TUITION ORGANIZATION. THE TAX CREDIT IS NOT ALLOWED IF THE TAXPAYER, WITH THE INTENT TO BENEFIT THE TAXPAYER'S DEPENDENT, AGREES WITH ONE OR MORE OTHER TAXPAYERS TO DESIGNATE EACH TAXPAYER'S CONTRIBUTION TO THE SCHOOL TUITION ORGANIZATION FOR THE DIRECT BENEFIT OF THE OTHER TAXPAYER'S DEPENDENT.

~~F. A school tuition organization that receives a voluntary cash contribution pursuant to subsection A shall report electronically to the department, in a~~

~~form prescribed by the department, by February 28 of each year the following information:~~

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

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

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

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

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

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

~~(a) The name and address of the school.~~

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

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

G. For the purposes of this section:

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

(a) Hearing impairment.

(b) Visual impairment.

(c) Developmental delay.

(d) Preschool severe delay.

(e) Speech/language impairment.

2. "Qualified school":

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

(b) DOES NOT INCLUDE A CHARTER SCHOOL OR PROGRAMS OPERATED BY CHARTER SCHOOLS.

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

Sec. 2. Title 43, Arizona Revised Statutes, is amended by adding chapter 15, to read:

CHAPTER 15

SCHOOL TUITION ORGANIZATIONS FOR INDIIDUAL CONTRIBUTIONS

ARTICLE 1. GENERAL PROVISIONS

43-1501. Definitions

IN THIS CHAPTER, UNLESS THE CONTEXT OTHERWISE REQUIRES:

1. "ALLOCATE" INCLUDES RESERVING MONEY FOR AN AWARD OF A MULTIYEAR EDUCATIONAL SCHOLARSHIP OR TUITION GRANT FOR A SPECIFIC STUDENT.

2. "FISCAL YEAR" MEANS THE FISCAL YEAR OF THE STATE AS PRESCRIBED IN SECTION 35-102.

3. "QUALIFIED SCHOOL" HAS THE SAME MEANING PRESCRIBED IN SECTION 43-1089.

43-1502. Certification as a school tuition organization

A. A NONPROFIT ORGANIZATION IN THIS STATE THAT IS EXEMPT OR HAS APPLIED FOR EXEMPTION FROM FEDERAL TAXATION UNDER SECTION 501(C)(3) OF THE INTERNAL REVENUE CODE MAY APPLY TO THE DEPARTMENT OF REVENUE FOR CERTIFICATION AS A SCHOOL

TUITION ORGANIZATION, AND THE DEPARTMENT SHALL CERTIFY THE SCHOOL TUITION ORGANIZATION IF IT MEETS THE REQUIREMENTS PRESCRIBED BY THIS CHAPTER. AN ORGANIZATION MUST APPLY FOR CERTIFICATION ON A FORM PRESCRIBED AND FURNISHED ON REQUEST BY THE DEPARTMENT.

B. THE DEPARTMENT SHALL:

1. MAINTAIN A PUBLIC REGISTRY OF CURRENTLY CERTIFIED SCHOOL TUITION ORGANIZATIONS.

2. MAKE THE REGISTRY AVAILABLE TO THE PUBLIC ON REQUEST.

3. POST THE REGISTRY ON THE DEPARTMENT'S OFFICIAL WEBSITE.

C. THE DEPARTMENT SHALL SEND WRITTEN NOTICE BY CERTIFIED MAIL TO A SCHOOL TUITION ORGANIZATION IF THE DEPARTMENT DETERMINES THAT THE SCHOOL TUITION ORGANIZATION HAS ENGAGED IN ANY OF THE FOLLOWING ACTIVITIES:

1. FAILING OR REFUSING TO ALLOCATE AT LEAST NINETY PER CENT OF ANNUAL REVENUES FOR EDUCATIONAL SCHOLARSHIPS OR TUITION GRANTS.

2. FAILING OR REFUSING TO FILE THE ANNUAL REPORTS REQUIRED BY SECTION 43-1504.

3. LIMITING AVAILABILITY OF SCHOLARSHIPS TO STUDENTS OF ONLY ONE SCHOOL.

4. ENCOURAGING, FACILITATING OR KNOWINGLY PERMITTING TAXPAYERS TO ENGAGE IN ACTIONS PROHIBITED BY THIS ARTICLE.

5. AWARDING, RESTRICTING OR RESERVING EDUCATIONAL SCHOLARSHIPS OR TUITION GRANTS FOR USE BY A PARTICULAR STUDENT BASED SOLELY ON THE RECOMMENDATION OF THE DONOR.

D. A SCHOOL TUITION ORGANIZATION THAT RECEIVES NOTICE FROM THE DEPARTMENT PURSUANT TO SUBSECTION C OF THIS SECTION HAS NINETY DAYS TO CORRECT THE VIOLATION IDENTIFIED BY THE DEPARTMENT IN THE NOTICE. IF A SCHOOL TUITION ORGANIZATION FAILS OR REFUSES TO COMPLY AFTER NINETY DAYS, THE DEPARTMENT MAY REMOVE THE ORGANIZATION FROM THE LIST OF CERTIFIED SCHOOL TUITION ORGANIZATIONS AND SHALL MAKE AVAILABLE TO THE PUBLIC NOTICE OF REMOVAL AS SOON AS POSSIBLE. AN ORGANIZATION THAT IS REMOVED FROM THE LIST OF CERTIFIED SCHOOL TUITION ORGANIZATIONS MUST NOTIFY ANY TAXPAYER WHO ATTEMPTS TO MAKE A CONTRIBUTION THAT THE CONTRIBUTION IS NOT ELIGIBLE FOR THE TAX CREDIT AND OFFER TO REFUND ALL DONATIONS RECEIVED AFTER

THE DATE OF THE NOTICE OF TERMINATION OF CERTIFICATION.

E. A SCHOOL TUITION ORGANIZATION MAY REQUEST AN ADMINISTRATIVE HEARING ON THE REVOCATION OF ITS CERTIFICATION AS PROVIDED BY TITLE 41, CHAPTER 6, ARTICLE 10. EXCEPT AS PROVIDED IN SECTION 41-1092.08, SUBSECTION H, A DECISION OF THE DEPARTMENT IS SUBJECT TO JUDICIAL REVIEW PURSUANT TO TITLE 12, CHAPTER 7, ARTICLE 6.

43-1503. Operational requirements for school tuition organizations; notice; qualified schools

A. A CERTIFIED SCHOOL TUITION ORGANIZATION MUST BE ESTABLISHED TO RECEIVE CONTRIBUTIONS FROM TAXPAYERS FOR THE PURPOSES OF INCOME TAX CREDITS UNDER SECTION 43-1089 AND TO PAY EDUCATIONAL SCHOLARSHIPS OR TUITION GRANTS TO ALLOW STUDENTS TO ATTEND ANY QUALIFIED SCHOOL OF THEIR PARENTS' CHOICE.

B. TO BE ELIGIBLE FOR CERTIFICATION AND RETAIN CERTIFICATION, THE SCHOOL TUITION ORGANIZATION:

1. MUST ALLOCATE AT LEAST NINETY PER CENT OF ITS ANNUAL REVENUE FOR EDUCATIONAL SCHOLARSHIPS OR TUITION GRANTS.

2. SHALL NOT LIMIT THE AVAILABILITY OF EDUCATIONAL SCHOLARSHIPS OR TUITION GRANTS TO ONLY STUDENTS OF ONE SCHOOL.

3. MAY ALLOW DONORS TO RECOMMEND STUDENT BENEFICIARIES, BUT SHALL NOT AWARD, DESIGNATE OR RESERVE SCHOLARSHIPS SOLELY ON THE BASIS OF DONOR RECOMMENDATIONS.

4. SHALL NOT ALLOW DONORS TO DESIGNATE STUDENT BENEFICIARIES AS A CONDITION OF ANY CONTRIBUTION TO THE ORGANIZATION, OR FACILITATE, ENCOURAGE OR KNOWINGLY PERMIT THE EXCHANGE OF BENEFICIARY STUDENT DESIGNATIONS IN VIOLATION OF SECTION 43-1089, SUBSECTION F.

C. A SCHOOL TUITION ORGANIZATION SHALL INCLUDE THE FOLLOWING NOTICE IN ANY PRINTED MATERIALS SOLICITING DONATIONS, IN APPLICATIONS FOR SCHOLARSHIPS AND ON ITS WEBSITE:

NOTICE

A SCHOOL TUITION ORGANIZATION CANNOT AWARD, RESTRICT OR RESERVE SCHOLARSHIPS SOLELY ON THE BASIS OF A DONOR'S RECOMMENDATION.

A TAXPAYER MAY NOT CLAIM A TAX CREDIT IF THE TAXPAYER AGREES TO SWAP DONATIONS WITH ANOTHER TAXPAYER TO BENEFIT EITHER TAXPAYER'S OWN DEPENDENT.

D. IN EVALUATING APPLICATIONS AND AWARDING, DESIGNATING OR RESERVING SCHOLARSHIPS, A SCHOOL TUITION ORGANIZATION:

1. SHALL NOT AWARD, DESIGNATE OR RESERVE A SCHOLARSHIP SOLELY ON THE RECOMMENDATION OF ANY PERSON CONTRIBUTING MONEY TO THE ORGANIZATION, BUT MAY CONSIDER THE RECOMMENDATION AMONG OTHER FACTORS.

2. SHALL CONSIDER THE FINANCIAL NEED OF APPLICANTS.

E. A QUALIFIED SCHOOL SHALL NOT ACCEPT AN EDUCATIONAL SCHOLARSHIP OR TUITION GRANT FROM A SCHOOL TUITION ORGANIZATION IN AN AMOUNT THAT EXCEEDS THE SCHOOL'S TOTAL COST OF EDUCATING THE STUDENT IN WHOSE NAME THE SCHOLARSHIP OR GRANT IS RECEIVED.

43-1504. Annual report

ON OR BEFORE SEPTEMBER 30 OF EACH YEAR, EACH SCHOOL TUITION ORGANIZATION SHALL REPORT ELECTRONICALLY TO THE DEPARTMENT, IN A FORM PRESCRIBED BY THE DEPARTMENT, THE FOLLOWING INFORMATION, SEPARATELY COMPILED AND IDENTIFIED FOR THE PURPOSES OF SECTION 43-1089:

1. THE NAME, ADDRESS AND CONTACT PERSON OF THE SCHOOL TUITION ORGANIZATION.

2. THE TOTAL NUMBER OF CONTRIBUTIONS RECEIVED DURING THE PREVIOUS FISCAL YEAR.

3. THE TOTAL DOLLAR AMOUNT OF CONTRIBUTIONS RECEIVED DURING THE PREVIOUS FISCAL YEAR.

4. THE TOTAL NUMBER OF CHILDREN AWARDED EDUCATIONAL SCHOLARSHIPS OR TUITION GRANTS DURING THE PREVIOUS FISCAL YEAR.

5. THE TOTAL DOLLAR AMOUNT OF:

(A) EDUCATIONAL SCHOLARSHIPS AND TUITION GRANTS DISTRIBUTED DURING THE PREVIOUS FISCAL YEAR.

(B) MONEY BEING HELD FOR IDENTIFIED STUDENTS' SCHOLARSHIPS AND TUITION GRANTS IN FUTURE YEARS.

6. THE COST OF AUDITS PURSUANT TO SECTION 43-1505 PAID DURING THE FISCAL YEAR.

7. THE TOTAL DOLLAR AMOUNT OF EDUCATIONAL SCHOLARSHIPS AND TUITION GRANTS AWARDED DURING THE PREVIOUS FISCAL YEAR TO:

(A) STUDENTS WHOSE FAMILY INCOME MEETS THE ECONOMIC ELIGIBILITY REQUIREMENTS ESTABLISHED UNDER THE NATIONAL SCHOOL LUNCH AND CHILD NUTRITION ACTS

(42 UNITED STATES CODE SECTIONS 1751 THROUGH 1785) FOR FREE OR REDUCED PRICE LUNCHES.

(B) STUDENTS WHOSE FAMILY INCOME EXCEEDS THE THRESHOLD PRESCRIBED BY SUBDIVISION (A) OF THIS PARAGRAPH BUT DOES NOT EXCEED ONE HUNDRED EIGHTY-FIVE PER CENT OF THE ECONOMIC ELIGIBILITY REQUIREMENTS ESTABLISHED UNDER THE NATIONAL SCHOOL LUNCH AND CHILD NUTRITION ACTS (42 UNITED STATES CODE SECTIONS 1751 THROUGH 1785) FOR FREE OR REDUCED PRICE LUNCHES.

8. FOR EACH SCHOOL TO WHICH EDUCATIONAL SCHOLARSHIPS OR TUITION GRANTS WERE AWARDED:

(A) THE NAME AND ADDRESS OF THE SCHOOL.

(B) THE NUMBER OF EDUCATIONAL SCHOLARSHIPS AND TUITION GRANTS AWARDED DURING THE PREVIOUS FISCAL YEAR.

(C) THE TOTAL DOLLAR AMOUNT OF EDUCATIONAL SCHOLARSHIPS AND TUITION GRANTS AWARDED DURING THE PREVIOUS FISCAL YEAR.

9. THE NAMES, JOB TITLES AND ANNUAL SALARIES OF THE THREE EMPLOYEES WHO RECEIVE THE HIGHEST ANNUAL SALARIES FROM THE SCHOOL TUITION ORGANIZATION.

43-1505. Audits and financial reviews

A. ON OR BEFORE SEPTEMBER 30 OF EACH YEAR, EACH SCHOOL TUITION ORGANIZATION THAT RECEIVED ONE MILLION DOLLARS OR MORE IN TOTAL DONATIONS IN THE PREVIOUS FISCAL YEAR SHALL PROVIDE FOR A FINANCIAL AUDIT OF THE ORGANIZATION. THE AUDIT MUST BE CONDUCTED IN ACCORDANCE WITH GENERALLY ACCEPTED AUDITING STANDARDS AND MUST EVALUATE THE ORGANIZATION'S COMPLIANCE WITH THE FISCAL REQUIREMENTS OF THIS ARTICLE. THE AUDIT MUST BE CONDUCTED BY AN INDEPENDENT CERTIFIED PUBLIC ACCOUNTANT LICENSED IN THIS STATE. THE CERTIFIED PUBLIC ACCOUNTANT AND THE FIRM THE CERTIFIED PUBLIC ACCOUNTANT IS AFFILIATED WITH SHALL BE INDEPENDENT WITH RESPECT TO THE ORGANIZATION, ITS OFFICERS AND DIRECTORS, SERVICES PERFORMED AND ALL OTHER INDEPENDENT RELATIONSHIPS PRESCRIBED BY GENERALLY ACCEPTED AUDITING STANDARDS.

B. ON OR BEFORE SEPTEMBER 30 OF EACH YEAR, EACH SCHOOL TUITION ORGANIZATION THAT RECEIVED LESS THAN ONE MILLION DOLLARS IN TOTAL DONATIONS IN THE PREVIOUS FISCAL YEAR SHALL PROVIDE FOR A FINANCIAL REVIEW OF THE ORGANIZATION. THE REVIEW MUST BE CONDUCTED IN ACCORDANCE WITH STANDARDS FOR ACCOUNTING

AND REVIEW SERVICES AND MUST EVALUATE THE ORGANIZATION'S COMPLIANCE WITH THE FISCAL REQUIREMENTS OF THIS ARTICLE. THE REVIEW MUST BE CONDUCTED BY AN INDEPENDENT CERTIFIED PUBLIC ACCOUNTANT LICENSED IN THIS STATE. THE CERTIFIED PUBLIC ACCOUNTANT AND THE FIRM THE CERTIFIED PUBLIC ACCOUNTANT IS AFFILIATED WITH SHALL BE INDEPENDENT WITH RESPECT TO THE ORGANIZATION, ITS OFFICERS AND DIRECTORS, SERVICES PERFORMED AND ALL OTHER INDEPENDENT RELATIONSHIPS PRESCRIBED BY GENERALLY ACCEPTED AUDITING STANDARDS.

C. WITHIN FIVE DAYS AFTER RECEIVING THE AUDIT OR FINANCIAL REVIEW THE SCHOOL TUITION ORGANIZATION SHALL FILE A SIGNED COPY OF THE AUDIT OR FINANCIAL REVIEW WITH THE DEPARTMENT.

D. THE SCHOOL TUITION ORGANIZATION SHALL PAY THE FEES AND COSTS OF THE CERTIFIED PUBLIC ACCOUNTANT UNDER THIS SECTION FROM THE ORGANIZATION'S OPERATING MONIES. THE FEES AND COSTS SHALL BE EXCLUDED FROM THE CALCULATION OF TOTAL REVENUES SPENT ON SCHOLARSHIPS AND TUITION GRANTS.

Sec. 3. School tuition organizations; transition reports

Notwithstanding the provisions of this act providing for school tuition organization annual reports on or before September 30, on or before February 28, 2011, each school tuition organization shall submit to the department of revenue the report required by section 43-1089, subsection F, Arizona Revised Statutes, as in effect before the effective date of this act, for the 2010 calendar year. Thereafter, the school tuition organization shall submit an annual fiscal year report as prescribed by section 43-1504, Arizona Revised Statutes, as added by this act.

Sec. 4. Effective date

This act is effective from and after December 31, 2010.