

**COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE**

CHRISTIE A. GREEN, DAWN  
WYLAND, ERIC MEYER, RAE J.  
WATERS, THE PROFESSIONAL  
GROUP PUBLIC CONSULTING INC.,  
an Arizona Corporation,  
Plaintiffs-Appellants,

vs.

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

STELLA GOMEZ; CECILIA  
HERNANDEZ; STEFANIE ORTEGA;  
KERIN ZIMMERMAN; ARIZONA  
SCHOOL CHOICE TRUST, INC., a  
private non-profit corporation,  
Intervenor-Defendant-Appellees.

No. 1 CA CV 07-0424

MARICOPA COUNTY  
SUPERIOR COURT  
NO. CV 2006-014135

**AMICUS CURIAE BRIEF OF SCHOOL CHOICE ARIZONA, INC.  
IN SUPPORT OF APPELLEES**

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## STATEMENT OF THE CASE

### **I. IDENTITY AND INTEREST OF AMICUS**

School Choice Arizona (SCA) is a Student Tuition Organization (STO) organized solely to facilitate scholarships from corporate donations. (Harowitz Decl. in Support of SCA's Motion to Intervene as Defendant-Appellees ¶ 10.) SCA's corporate purpose depends on A.R.S. § 43-1189 withstanding the latest attack on scholarship programs. SCA filed a Motion to Intervene in Superior Court but that motion was mooted by the dismissal of the case with prejudice. SCA filed a Motion to Intervene with this Court on July 5th, 2007. (SCA's Motion to Intervene as Defendant-Appellees, July 5, 2007.) That motion was denied, but the Court has allowed SCA to file this Amicus Brief. (Order, Judge Orozco, Aug. 3, 2007.) SCA's Amicus Brief will address limited points in order to give the Court a broader perspective on the legal issues presented. Those issues are: (1) standing of the Appellants (2) the use of precedent in determining whether corporate tax credits are government money, (3) the First Amendment's Establishment Clause and Arizona Constitution Religious Clauses, and (4) Appellants unconstitutional relief requested.

### **II. NATURE OF THE CASE, THE COURSE OF THE PROCEEDING, DISPOSITION OF THE CASE BELOW, AND JURISDICTION OF THE COURT**

The Corporate Tax Credit Program, Arizona Revised Statute § 43-1183 (A.R.S. § 43-1183), is one of many tax credits available for aiding school children.

A.R.S. § 43-1183 is the Corporate Tax Credit counter-part to the Individual Tax Credit passed in 2005, Arizona Revised Statute § 43-1089 (A.R.S. § 43-1089). Both statutes provide dollar for dollar tax credits for donations made to an STO. Ninety percent of the funds donated to STOs go directly to scholarships for students to use at the private school of their choice.

Appellants brought suit alleging that A.R.S. § 43-1183 violates the First Amendment's Establishment Clause and various sections of the Arizona Constitution. (Appellants' Op. Br. App. Tab 1, Compl. ¶¶ 39-45.) Appellants appeal the final judgment of the Maricopa County Superior Court dismissing the case with prejudice on April 16, 2007. (Appellants' Op. Br. App. Tab 9, Judgment.) Relying on *Kotterman v. Killian*, 193 Ariz. 273, 972 P.2d 606 (1999), the Superior Court found that like the individual tax credit, the corporate tax credit does not violate the State and federal Constitutions because the donations are used at private religious schools. This Court has jurisdiction over a timely filed notice of appeal. A.R.S. § 12-2101(B).

### **STATEMENT OF FACTS**

Before the adoption of the corporate tax credit, the Arizona legislature passed A.R.S. § 43-1089, permitting individuals to claim a tax credit for voluntary tax donations to STOs. That statute withstood similar legal challenges in state and federal court to those presented here. *See Kotterman v. Killian*, 193 Ariz. 273, 972

P.2d 606 (1999), *cert. denied*, 528 U.S. 921 (1999) and *Winn v. Hibbs*, 361 F. Supp. 2d 1117 (D. Ariz. 2005), *appeal docketed*, No. 05-15754 (9th Cir. Apr. 29, 2005). In *Kotterman*, the Arizona Supreme Court held that A.R.S. § 43-1089 did not violate the Establishment Clause because a tax credit is not an appropriation of public money, and any incidental benefit to private religious schools was the result of choices made by private citizens. 193 Ariz. at 292, 972 P.2d at 625.

In *Winn*, the plaintiffs claimed that the high percentage of sectarian schools that were permitted to receive tuition under the individual tax credit program was a violation of the Establishment Clause. 361 F. Supp. 2d at 1120. The federal court rejected plaintiffs' argument based on *Kotterman* and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). *Zelman* upheld a voucher program where a similarly high percentage of sectarian schools received vouchers. The Court ruled that because private choice determined which schools received vouchers, it did not constitutionally matter that a majority were used at religious schools. *See Winn*, 361 F. Supp. 2d 1117.

The individual tax credit and the corporate tax credit are distinguishable only in methods of accounting. They read, in part, as follows:

A.R.S. § 43-1089(A) A credit is allowed against the taxes imposed by this title for the amount of voluntary cash contributions made by the taxpayer during the taxable year to a school tuition organization;

A.R.S. § 43-1183(A) a credit is allowed against the taxes imposed by this title for the amount of voluntary cash contributions made by the taxpayer during the taxable year to a school tuition organization.

The corporate and individual tax credit contributions follow the same path of private choice.

Appellants are private individuals and a corporation that reside and pay Arizona state income tax. (Appellants' Op. Br. App. Tab 1, Compl. ¶¶ 1-4.) All of the individual Appellants have children currently attending public school. (*Id.*)

### **STATEMENT OF THE ISSUES PRESENTED**

1. When general taxpayer standing is not sufficient to confer standing, and the Appellants have not alleged a particular injury, does this Court have jurisdiction to address the merits of the case?

2. When the Arizona Supreme Court has already determined that tax credits are not considered state funds, should this Court hold that tax credits are state funds?

3. Where Arizona and United States Supreme Court precedent hold that religiously neutral – private-choice – scholarship programs do not violate the state and federal religion clauses, should this Court find that the corporate tax credit does?

4. Since the First and Fourteenth Amendments prohibit discrimination based on religion, can the Court provide the discriminatory relief sought by the Appellants?

### ARGUMENT

#### **I. APPELLANTS LACK STANDING TO CHALLENGE THE CORPORATE TAX CREDIT STATUTE BECAUSE THEY HAVE NOT ALLEGED OR SUFFERED AN INJURY THAT MAY BE REDRESSED BY THE COURT**

Appellants have not pleaded an injury that may be redressed by this Court, nor have they suffered an injury that may be redressed by this Court. As such, they are not true adversaries to a legitimate dispute that this Court can adjudicate. *Bennett v. Brownlow*, 211 Ariz. 193, 119 P.3d 460 (2005). To have standing, a plaintiff must have suffered injury in fact, economic or otherwise, from the conduct complained of, and that injury must be distinct and palpable so that the plaintiff has a personal stake in the outcome. *Aegis of Ariz., L.L.C. v. Town of Marana*, 206 Ariz. 557, 81 P.3d 1016 (Ct. App. 2003). The injury must be particularized to the petitioner. *Bennett*, 211 Ariz. at 196, 119 P.3d at 463. That injury must also be redressable by a favorable decision of the court. *McComb v. Super. Ct. of Ariz.*, 189 Ariz. 518, 522, 943 P.2d 878, 882 (Ct. App. 1997).

In *Pratt v. Board of Regents*, 110 Ariz. 466, 467, 520 P.2d 514, 515 (1974), the Arizona Supreme Court cited *Baer v. Kolmorgen*, 181 N.Y.S.2d 230 (1958), which addresses Establishment Clause standing. In *Baer*, plaintiffs alleged that the

school board had violated the First and Fourteenth Amendments by allowing a crèche to be displayed on public property. 181 N.Y.S.2d at 234. The court held that general taxpayer interest alone was “not such a special, peculiar or personal interest as to entitle him to challenge in the courts the constitutionality of an act of a public official or body.” *Id.* at 235. The court allowed only the plaintiff who had a child that attended the school where the crèche was displayed to pursue the claim. *Id.* The Appellants do not have a comparable injury, nor do they claim one. In fact, the Appellants have made no allegation that the tax credit, either individual or corporate, has actually reduced the amount of the State budget allocated to any particular public school or that the quality of public education has decreased since the tax credit program began in 2005.

The United States Supreme Court has also addressed the issue of state taxpayer standing in *Doremus v. Board of Education of Borough of Hawthorne*, 342 U.S. 429 (1952). Plaintiffs in *Doremus* claimed a state law requiring daily Bible reading violated the First Amendment’s Establishment Clause. *Id.* The Plaintiffs were taxpayers in the town where the Bible was read each morning in the public school. *Id.* at 433. Dismissing the case for lack of jurisdiction based on standing, the Court stated:

The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some [sic] indefinite way in common

with people generally.

*Id.* at 434 (internal citations omitted). A case that does not involve “a direct dollars-and-cents injury but ... a religious difference” does not meet the requirements for injury necessary to establish standing. *Id.* Deciding on a case on the merits where the plaintiff lacks standing is nothing more than advisory. But the Arizona Supreme Court does not issue advisory opinions as a matter of judicial restraint. *Bennett*, 211 Ariz. at 196, 119 P.3d at 463.

Appellants have no specialized injury. If the Court rules as Appellants request, such a ruling would not guarantee a reduction in the Appellants’ tax liability, an increase in the amount of state funding for public school, or change the State’s use of public property. Declaring A.R.S. § 43-1189 unconstitutional would directly and negatively affect the children on waiting lists for scholarships.

## **II. TAX CREDITS ARE NOT GOVERNMENT FUNDS UNDER ARIZONA LAW AND SUPREME COURT PRECEDENCE**

Appellants entire argument rests on their ability to change the definition of tax credits and tax deductions to a tax laid, imposed, or appropriation of state funds. In support, the Appellants state that “[t]he clauses of the Arizona Constitution that specifically prohibit state financial support of private and religious schools have a long history, described in detail in Justice Feldman’s dissenting opinion in *Kotterman*...” (Appellants’ Op. Br. 19), and cite the dissent in *Kotterman*. *Id.* In contrast, the majority in *Kotterman* states that “[t]here is

sparse recorded evidence respecting the clauses at issue here, and any historical analysis is necessarily filled with speculation.” 193 Ariz. at 288, 972 P.2d at 621. The majority in *Kotterman* held that the plain meaning of the text of the constitution would control its reading of the religion clauses. *Id.* at 289, 972 P.2d at 622. The *Kotterman* majority held that tax credits are not taxes laid or appropriations.

Appellants complain that the holding in *Kotterman* has sanctioned “broad state funding for religious and other private school education” through the use of tax credits. (Appellants’ Op. Br. 20.) Appellants cite *Community Council v. Jordan*, 102 Ariz. 448, 432 P.2d 460 (1967) and *Pratt v. Board of Regents*, 110 Ariz. 466, 520 P.2d 514 (1974) to support their argument that *Kotterman* is incompatible with Arizona Supreme Court precedent. But these cases are certainly compatible with *Kotterman*.

In *Community Council*, a contract between the State and the Salvation Army, where the State reimbursed the Salvation Army for a percentage of the expenses incurred in distributing aid, was found compatible with the Arizona Constitution. 102 Ariz. at 456, 432 P.2d at 468. The Arizona Supreme Court stated that payment for aid to the homeless was not the type of aid to religion prohibited by the Arizona Constitution. “The ‘aid’ prohibited in the constitution of this state is, in our opinion, assistance in any form whatsoever which would encourage or tend to

encourage the preference of one religion over another, or religion per se over no religion.” *Id.* at 454, 432 P.2d at 465. The corporate tax credit does not aid religion nor does it entice a preference for one religion over another. The corporate tax credit provides an incentive for corporations to donate money to STOs in order to fund scholarships for students seeking a quality education. *Kotterman*, 193 Ariz. at 278-79, 972 P.2d at 611-12. The fact that some of the scholarships support students attending private religious schools, through a series of private – non-governmental – choices, does not give the appearance of the government supporting religion any more than the *direct* payments to the Salvation Army for services gave that impression in *Community Council*.

In *Pratt* the Court reaffirms the historical restrictions of Article II § 12 announced in *Community Council*. *Pratt*, 110 Ariz. at 468, 520 P.2d at 516.

We believe that the framers of the Arizona Constitution intended by this section to prohibit the use of the power and the prestige of the State or any of its agencies for the support or favor of one religion over another, or of religion over nonreligion.... It does not necessarily follow, however, that the framers of Arizona’s Constitution intended to entirely prohibit the use by religious groups of public and school property for religious purposes....

*Id.* In *Pratt* the use of state property for a religious revival did not violate the constitution. Appellants do not make a convincing argument that *Kotterman* is inconsistent with *Community Council* or *Pratt*. The State does not make direct payments to religious schools, as in *Community Council*, and no government

property is used by the religious schools, as in *Pratt*. The central holding in both cases is that government neutrality towards religion does not violate the Arizona Constitution. That principal is used in *Kotterman's* analysis of the Arizona Constitution's support of A.R.S. § 43-1183 as a legitimate tax credit that does not involve the use of public money or property, taxes laid, or appropriations in support of religion.

Article IX, § 10 states that “[n]o tax shall be laid or appropriation of public money made in aid of any church, or private sectarian school . . . .” Ariz. Const. art. IX, § 10. Article II, § 12 states that “[n]o public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, . . . .” Ariz. Const. art. II, § 12. The Arizona Constitution does not define public money or property. When a term is not defined, it must be given its generally understood meaning, and not lead to an absurd result. *Kotterman*, 193 Ariz. at 284, 972 P.2d at 617. *Kotterman* held that tax credits do not constitute “public money.” *Id.* at 285, 972 P.2d at 618. If it held otherwise, it would lead to the absurd result that all income is public money. *Id.* Wage earners would hold their wages as mere custodians for the state treasury. *Id.* Equating “public money” with potential revenue would prohibit taxpayers from supporting any religious cause as that would be direct support of religion in violation of Article II, § 12. *Id.*

Additionally, if such an expansive reading were given to the term “public money,” exempting churches from property taxes would violate Article II, § 12. But that interpretation would conflict with Article IX, § 2(2): “charitable and religious associations or institutions not used or held for profit may be exempt from taxation by law.” Ariz. Const. art. IX, § 2(2). Because the framers of the Arizona Constitution did not write contradictory clauses, *Kotterman* held that public money did not include tax exemptions to religious organizations or tax credits allowing an attenuated benefit to religious organizations. 193 Ariz. at 287, 972 P.2d at 620. *Kotterman* cannot be ignored to redefine “public money” to include tax credits.

The corporate tax credit is not an appropriation of funds to aid sectarian schools or churches. Appropriations are state funds the legislature “appropriates” for a specific use. While the legislature may appropriate public money for specific uses, tax credits are not public money or property and therefore cannot be set aside for specific use. *Id.* No facts exist to support an allegation that the corporate tax credit has “earmarked” state funds for sectarian schools. Appropriations must come from state funds and tax credits are not state funds. *Id.*

The Appellants also claim that the corporate tax credit is a tax laid in support of sectarian schools in violation of Article IX, § 10. (Appellants’ Op. Br. App. Tab

1, Compl. ¶ 39.) But construing a tax credit as a tax laid was unequivocally rejected in *Kotterman*:

We cannot say that the legislature has somehow imposed a tax by declining to collect potential revenue from its citizens. Nor does this credit amount to the laying of a tax by causing an increase in the tax liability of those not taking the advantage of it. Such a construction *tortures* the plain meaning of the constitutional text.

193 Ariz. at 288, 972 P.2d at 621 (emphasis added). The corporate tax credit, just like the individual tax credit, provides an opportunity for a private, voluntary contribution to an STO that will reduce the corporation's tax liability. A.R.S. §43-1183(A). The tax credit is not morphed into a tax laid because it may eventually benefit a private religious school.

### **III. THE CORPORATE TAX CREDIT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE, *KOTTERMAN*, OR *ZELMAN***

The Supreme Court has repeatedly affirmed the principle that neutral government aid to education programs that result in incidental benefits to sectarian schools do not violate the Establishment Clause. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (discussing applicable cases). Appellants attempt to distinguish A.R.S. § 43-1189 from *Zelman* and *Kotterman* to demonstrate that A.R.S. § 43-1189 violates the Establishment Clause. First, Appellants attempt to distinguish *Zelman* by focusing on the unique characteristics of the Ohio scholarship program all the while ignoring the principal of "true private choice" expounded upon by the Supreme Court in *Zelman*. Second, Appellants argue, the

STOs distributing the scholarships are overwhelmingly religious, a fact the Arizona Supreme Court could not have been aware of at the time of its decision in *Kotterman*. Finally, Appellants claim the additional reporting requirements of A.R.S. § 43-1183, not present in the individual tax credit statute A.R.S. § 43-1089, causes impermissible entanglement with religion.

**A. A.R.S. § 43-1183 is a neutral aid program that does not violate the Establishment Clause under the *Lemon* Test.**

Establishment Clause challenges to government action are evaluated under the three-part test articulated by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). “Under the *Lemon* analysis, a statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion.” *County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 592 (1989). The Arizona Supreme Court applies the *Lemon* test to challenges such as the one brought by the Appellants. *Kotterman*, 193 Ariz. at 278, 972 P.2d at 611. A.R.S. § 43-1183’s secular purpose to broaden educational options does not have the primary effect of advancing religion, and does not foster an excessive entanglement between government and religion.

## 1. Secular purpose

To satisfy the first prong of the *Lemon* test, the state must have a valid secular purpose in enacting a statute. *County of Allegheny*, 492 U.S. at 592. When reviewing statutes that provide neutral aid to education, the Supreme Court has noted that it is rare to find an invalid purpose “when a plausible secular purpose for the state’s program may be discerned from the face of the statute.” *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983). Responding to an Establishment Clause challenge to a tax deduction for tuition, textbooks, and transportation to private sectarian and non-sectarian schools the Court stated:

A state's decision to defray the cost of educational expenses incurred by parents-regardless of the type of schools their children attend-evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a state's efforts to assist parents in meeting the rising cost of educational expenses *plainly serves this secular purpose* of ensuring that the state's citizenry is well-educated.

*Id.* at 395 (emphasis added).

Readily discernable from the face of A.R.S. § 43-1183 is the secular purpose of encouraging corporations to help improve education among all the State’s children: “The purpose clause states that the Act was enacted ‘to encourage businesses to direct a portion of their taxes by contributing to school tuition organizations in order to improve education by raising tuition scholarships for children in this state.’” (Appellants’ Op. Br. App. Tab 1, Compl. ¶ 9.)

In like manner, *Kotterman*, found that A.R.S. § 43-1089 encouraged individuals to “bring private institutions into the mix of educational alternatives open to the people of this state.” 193 Ariz. at 278, 972 P.2d. at 611. *Kotterman* also noted that private schools often stimulate public schools through increased competition, and that encouraging public and private education serves a constitutional purpose. *Id.* Reviewing the same statute in *Winn*, the federal court held that the tax credit was “part of a secular state policy to maximize parents’ choices as to where they send their children to school.” *Winn*, 361 F. Supp. 2d at 1120.

Arizona does indeed have many education options available to parents. The State authorizes charter schools, home-schooling, tax credits for extracurricular activities or character education in public schools, and the individual tax credit program for private schools. *See* A.R.S. § 15-181 (providing for charter schools); A.R.S. § 15-802 (excepting home-schooled students from mandatory public school attendance); A.R.S. § 15-803(A)(3) (authorizing education at home school); A.R.S. § 15-745 (regulating academic testing of home-schooled children); A.R.S. § 43-1089.01 (tax credit for expenditures towards extracurricular activities); A.R.S. § 43-1089 (individual tax credit for scholarship donations). The State’s highest court has determined that this multi-faceted education policy, including individual tax credits to support private education, serves a legitimate secular purpose.

*Kotterman*, 193 Ariz. at 278-79, 972 P.2d at 611-12. A.R.S. § 43-1183 furthers the same public policy of promoting education choices to all of Arizona's children, not just the financially elite.

Appellants attempt to distinguish the Arizona aid program by highlighting the minority and financial status of the aid recipients in *Zelman*. (Appellants' Op. Br. 10, 12.) Appellants claim the Cleveland program "had the valid secular purpose of helping seriously at-risk children living in a school district with substandard public schools to obtain an adequate education." (Appellants' Op. Br. 11.) But the principle in *Zelman* is that "true private choice" is the constitutional support under which aid programs are upheld. *Zelman*, 536 U.S. at 662-63. If the State of Arizona wants to expand the educational opportunities to all its citizens, the Court is not to decide the wisdom of the policy, but only whether such a policy comports with the requirements of the Constitution by providing scholarships through "true private choice." *Kotterman*, 193 Ariz. at 288, 972 P.2d at 621. By the Appellants' logic, Arizona must wait until the public schools are in crisis and utterly failing before offering education alternatives, and then that aid must discriminate against the middle class. (Appellants' Op. Br. 12.) But the Arizona and United States Supreme Courts disagree with the Appellants and have stated that improving the educational opportunities for all citizens is a valid secular purpose. *Zelman*, 536 U.S. at 649 ("There is no dispute that the program

challenged here was enacted for the valid secular purpose of providing educational assistance...”); *Kotterman*, 193 Ariz. at 278-79, 972 P.2d 611-12.

## 2. Primary effect

Supreme Court jurisprudence and Arizona precedent are in agreement on the constitutionality of neutral aid programs. A religiously neutral program of true private choice does not violate the primary effect prong of the *Lemon* test. *Zelman*, 536 U.S. at 652. In *Kotterman*, the Arizona Supreme Court ruled that tuition money generated from the individual tax credit, A.R.S. § 43-1089(A), is available “on a neutral basis with any financial benefit to private schools sufficiently attenuated.” 193 Ariz. at 279, 972 P.2d at 612. Private sectarian schools benefit from the individual tax credit only after the taxpayer chooses to donate to an STO, a student is chosen to receive a tuition scholarship, and then only if the student’s parent chooses a sectarian school. The State does not force a taxpayer to make a donation to any particular STO and does not force a parent to enroll in any particular private school. Sectarian schools are merely incidental beneficiaries of a series of individual private choices. *Kotterman*, 193 Ariz. at 282, 972 P.2d at 615.

Three years after *Kotterman* was decided, the United States Supreme Court decided *Zelman v. Simmons-Harris*, 536 U.S. 639. *Zelman* involved a voucher program that provided tuition aid for use at a private school of the parent’s choice, religious or not. *Id.* at 645. The Court affirmed that “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” do not violate the Establishment Clause. *Id.* at 649.

In *Mueller*, the Court upheld tax deductions for education expenses available to all parents of school children. 463 U.S. 388. The Court found it constitutionally irrelevant that 96% of the program’s beneficiaries attended sectarian schools. *Id.* at 401. The Court stated: “[t]hat the program was one of true private choice, with no evidence that the State deliberately skewed incentives towards religious schools, was sufficient for the program to survive scrutiny under the Establishment Clause.” *Zelman*, 536 U.S. at 650 (discussing *Mueller*). Again, in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), a vocational tuition aid program withstood an Establishment Clause challenge because private “recipients generally were empowered to direct the aid to schools or institutions of their choosing.” *Zelman*, 536 U.S. at 651 (discussing *Witters*, 474 U.S. at 487 (1986)). And in *Zobrest v. Catalina Foothills School District*, the Supreme Court rejected an Establishment Clause challenge to a federal program that provided sign language interpreters to assist deaf students enrolled in religious and non-religious schools. 509 U.S. 1 (1993). The program provided the benefit to any child who qualified as disabled. *Id.* at 10.

Appellants argue that the Supreme Court first addressed the constitutionality of aid programs in *Zelman*. (Appellants' Op. Br. 10.) Appellants misrepresent the Supreme Court's jurisprudence in an effort to displace *Kotterman* with *Zelman*, but the Supreme Court states that *Zelman* is fourth in a line of cases reviewing neutral aid programs to private schools.

[O]ver 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.* at 649 (internal citations omitted) (referencing *Mueller*, *Witters*, and *Zobrest*).

*Zelman*, *Mueller*, *Witters*, *Zobrest* and *Kotterman* all “make clear” that a program to encourage education does not violate the Establishment Clause if by a series of independent non-governmental decisions, a religious institution is incidentally benefited. *Zelman*, 536 U.S. at 652, *Kotterman*, 193 Ariz. at 284, 972 P.2d at 617. Likewise, the corporate tax credit here is available to all private corporations who pay income tax in Arizona.

Appellants argue that the corporate tax credit does not provide the scholarships on a neutral basis and that parents are not free to choose a religious or non-religious private school. (Appellants' Op. Br. 13.) To support this claim, the Appellants point to the large majority of STOs with religious affiliations and they

highlight the structure difference between the Arizona tax credit program and the Ohio program. *Id.* The Supreme Court has repeatedly refused to base the Constitutionality of a program on the percentage of recipients with religious affiliations. *Zelman*, 536 U.S. at 658 (“Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid” (citing *Mueller*, 463 U.S. at 401, 103 S.Ct. 3062, and upholding the constitutionality of the Cleveland voucher program where 96% of the aid founds its way to sectarian schools.)). Likewise in *Kotterman*, the Arizona Supreme Court was unmoved by an Establishment Clause challenge where the STOs are under the same limitations as in this case and noted that funds may find their way to more sectarian schools than non-sectarian. “Like the *Mueller* Court, however, we refuse to hinge constitutional scrutiny on such ephemeral numbers.” *Kotterman*, 193 Ariz. at 282, 972 P.2d at 615.

The corporate tax credit is a program of true private choice regardless of the Appellants attempt at coloring it as a state endorsement of religious schools. The private corporation chooses which private STO will receive its contribution. A.R.S. § 43-1183(A). The parent of a student receiving the tuition must choose the private school where the tuition scholarship will be used. A.R.S. § 43-1183(N). Only after these separate acts of private choice have been made is it possible for a

religious school to benefit from the corporate tax credit. As is the case here, when the “circuit between government and religion [is] broken” by a “program ensur[ing] that parents were the ones to select a religious school,” the Establishment Clause is not implicated. *Zelman*, 536 U.S. at 652 (discussing *Zobrest*).

### **3. Entanglement**

To determine whether the government has excessively entangled itself with religion, courts “examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.” *Lemon*, 403 U.S. at 615. An invalid entanglement arises only when the government engages in a “comprehensive, discriminating, and continuing state surveillance” to ensure government restrictions on a religious practice. *Id.* at 619.

Neutrality is a strong antidote to religious entanglement, as the *Kotterman* court properly noted. Arizona “does not involve itself in the distribution of funds or in monitoring their application. Its role is entirely passive.” *Kotterman*, 193 Ariz. at 283, 972 P.2d at 616. The State’s passive relationship to private schools is no different in A.R.S. § 43-1183. The State only ensures that the STOs are properly qualified for federal tax-exempt status, the funds donated do not exceed the statutory limitation, and that an independent verification of their books is

annually submitted. A.R.S. § 43-1183(C)(1-3), (O)(1-7), (Q)(2)(a-b). This minimal involvement was not “excessive entanglement” with religion in *Kotterman*, 193 Ariz. at 283, 972 P.2d at 616, and just as in *Kotterman*, ensuring participation “complies with state requirements” will not invalidate A.R.S. § 43-1183 in this case. *Id.*

#### **IV. THE APPELLANTS ARE NOT ENTITLED TO DISCRIMINATORY RELIEF**

By attacking the corporate tax credit as a violation of the Establishment Clause, the Appellants are requesting relief that would violate the First and Fourteenth Amendments to the Constitution. Courts are no more allowed to order religious discrimination in court ruling than legislators are allowed to pass discriminatory laws.

The Establishment Clause requires that government act neutrally towards religion. *McCreary County, Ky. v. ACLU*, 545 U.S. 844 (2005). In *Lynch v. Donnelly*, the Establishment Clause prohibited the removal of a crèche from a city holiday display merely because it was a symbol of Christianity. 465 U.S. 668, 673 (1984). To remove the crèche based solely on its religious character would be acting hostile towards religion. The Establishment Clause prohibits such hostility. Invalidating A.R.S. § 43-1183, a neutral aid program, because it incidentally benefits religion would not be neutrality, but exactly the hostility toward religion,

prohibited by the Establishment Clause. Hostility towards religion causes an internal conflict with the Free Exercise Clause. *Id.* at 673.

The Free Exercise Clause holds that laws which discriminate on the basis of religion are presumptively invalid. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993); *Employment Division v. Smith*, 494 U.S. 872 (1990). The government may not impose “special disabilities on the basis of religious views or religious status.” *Employment Division*, 494 U.S. at 877. The Court cannot invalidate the corporate tax credit program, otherwise neutral towards all private schools, because it allows incidental benefits to religious persons and schools. To make such a ruling would have the impermissible object of punishing a religious practice. *Church of Lukumi Babalu Aye*, 508 U.S. at 523-24.

Finally, the Equal Protection Clause of the Fourteenth Amendment requires that the government treat similarly situated people alike – with neutrality. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Disallowing use of the tuition scholarship at a private, religious school but allowing its use at a non-religious private school would “impinge on personal rights protected by the Constitution” and violate the Equal Protection Clause. *Id.* at 440. Laws that treat persons similarly situated, like students, differently based on a fundamental right are subject to strict scrutiny by the courts. *Id.* at 441. The Establishment Clause is no excuse for discrimination based on religion. Where the legislators are bound by


the restrictions of the Equal Protection Clause, courts cannot claim more leeway. To hold the corporate tax credit unconstitutional only as applied to religious schools, would be to draft a holding that violates the Free Exercise and Equal Protection Clauses.

### **CONCLUSION**

In conclusion, the Appellants not only lack standing to challenge § 43-1183, they have failed to distinguish it from the individual tax credit of § 43-1089, upheld in *Kotterman*. The corporate tax credit is part of the State's comprehensive educational program designed to provide choices to parents in steering their child's education. In SCA requests that this Court affirm the Superior Court and uphold § 43-1183 as compliant with both State and Federal Constitutions.

Respectfully submitted this 15th day of October, 2007.

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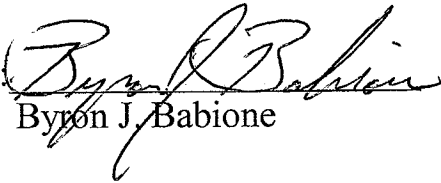
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**CERTIFICATE OF COMPLIANCE**

Pursuant to ARCAP 14, I certify that the attached brief uses proportionately spaced type of 14 points or more, is double-spaced using a roman font and contains 5,612 words.

Dated: October 15, 2007

By:   
Byron J. Babione

**CERTIFICATE OF SERVICE**

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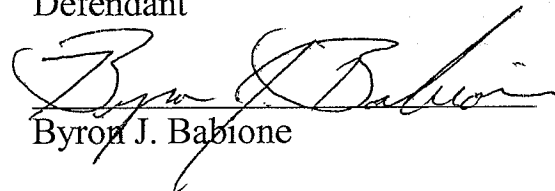
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