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,
Petitioner,

v.

KATHLEEN M. WINN, et al.,
Respondents.

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

BRIEF *AMICUS CURIAE* OF THE AMERICAN CENTER FOR SCHOOL CHOICE IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The American Center for School Choice ("ACSC") is a non-profit corporate entity, founded in 2008 and dedicated to the proposition that meaningful parental choice in education is a moral and civic imperative and serves well the good of children, the good of families, and the good of the political community.

The mission of ACSC is to support and defend policies that make it possible for poor and working-class parents to exercise their right – a right that well-off families already enjoy and exercise – to choose the schools that they believe will best form and educate their children. ACSC believes that the education of the child is a fundamental responsibility of the family – one that the political community should support, but not usurp – and that enabling parents to choose the school that will best help them to fulfill this responsibility will strengthen our families, our schools, and our communities.

ACSC is not a partisan pressure-group. Instead, it addresses all citizens who are concerned about freedom, justice, opportunity, and the common good,

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[1] *Amicus curiae* files this brief with the consent of the parties, and the parties' letters of consent have been filed with the Clerk of this Court. *See* S. Ct. Rule 37.3(a). This brief was authored entirely by *amicus* and its counsel, who are named on the front cover of this brief, and was not authored in any part by any of the parties or by any party's counsel. No person or entity, other than *amicus,* its supporters, and its counsel, has made any monetary contribution to the preparation or submission of this brief. *See* S. Ct. Rule 37.6.

proposing that parental choice in education is an exercise of freedom and a matter of justice that contributes to the common good. ACSC provides expertise across a broad range of crucial areas – education and persuasion, research and information, program design and implementation, litigation and legislation – bringing conceptual clarity, intellectual rigor, practical know-how, and political savvy to the task of formulating a wise, just, and effective set of educational policies that will serve the American public – in a manner entirely consistent with the First Amendment to our Constitution – by supporting American families.

STATEMENT OF THE CASE

The history and details of this case are set out fully elsewhere, including in the brief of Petitioner Arizona Christian School Tuition Organization. The United States Court of Appeals for the Ninth Circuit ruled below that an Arizona program which allows taxpayers to donate their own money to a "school tuition organization" of their choice, and to credit the amount donated against their state-income-tax obligation, "overall" and "in practice" violates the Establishment Clause of the First Amendment to the Constitution because it supposedly does not make scholarships available to parents on a religion-neutral basis and therefore "carries with it the *imprimatur* of government endorsement" of religion. *Winn v. Arizona Christian School Tuition Organization,* 562 F.3d 1002, 1005 (9th Cir. 2009) (quoting *Zelman v. Simmons-Harris,* 536 U.S. 639, 655 (2002)), *reh'g denied,* 586 F.3d 649 (9th Cir. 2009).

Judge O'Scannlain, joined by seven of his colleagues, dissented powerfully from the denial of rehearing en banc, and demonstrated that the decision of the court below "cannot be squared with [this Court's] mandate in *Zelman*" and "casts a pall over comparable tax-credit schemes in states across the nation[.]" 586 F.3d at 659 (O'Scannlain, J., dissenting). As Judge O'Scannlain correctly observed, the Arizona program at issue does not itself "direct any aid to any religious school. Nor does the government encourage, promote, or otherwise incentivize private actors to direct aid to religious schools." *Id.* at 658-59. "In short," he concluded, "the panel's conclusion invalidates an increasingly popular method for providing school choice, jeopardizing the educational opportunities of hundreds of thousands of children nationwide." *Id.* at 659. On May 24, 2010, this Court granted certiorari.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

We agree entirely with Petitioners that the panel below misapplied this Court's relevant doctrines and decisions – including *Zelman* – and that the ruling under review is neither required by, nor consistent with, the First Amendment to our Constitution. Arizona's tax-credit program does not impermissibly "establish" or "endorse" religion. Instead, it is an entirely permissible (and promising) policy experiment that empowers taxpayers and parents to provide enhanced educational opportunities to children through a religion-neutral tax-credit mechanism. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)("It is one of the happy incidents of the federal system that a single

courageous state may, if its citizens choose, serve as a laboratory[.]"). For the reasons stated and elaborated in Judge O'Scannlain's dissent from denial of rehearing, the decision below should be reversed, and the Establishment Clause challenge to the Arizona program rejected.

This case implicates – and this Court should vindicate – two foundational and animating principles of our Constitution and tradition: First, as was emphasized long ago in *Pierce v. Society of Sisters,* parents enjoy the "liberty . . . to direct the upbringing and education" of their children. 268 U.S. 510, 534 (1925). After all, "[t]he 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." *Id.* at 535. Arizona's tax-credit program helps to make this promised right a meaningful reality for thousands of parents.

Second, and relatedly, this Court reminded the country in its landmark decision in *Brown v. Board of Education* that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education[.]" 347 U.S. 483, 493 (1954). *See also Zelman,* 536 U.S. at 680 (Thomas, J., concurring) ("[W]ithout education one can hardly exercise the civic, political, and personal freedoms conferred by the Fourteenth Amendment."). Policy initiatives like Arizona's bring this opportunity closer to thousands of children for whom it would otherwise, unfortunately, be out of reach.

This case presents a discrete and straightforward question of constitutional law, namely, whether

Arizona's tax-credit program violates the Establishment Clause. It does not. It should be appreciated, though, that choice-in-education is not and should not be regarded only as a free-market fad or an efficient means of promoting economic growth. Instead, as John Coons explained nearly 20 years ago:

> [T]he case for choice in education goes much deeper than market efficiency . . . . Shifting educational authority from government to parents is a policy that rests upon basic beliefs about the dignity of the person, the rights of children, and the sanctity of the family; it is a shift that also promises a harvest of social trust as the experience of responsibility is extended to all . . . .
>
> Choice . . . needs to be loved for its own sake, or at least for a reason more noble than its capacity to make life better for the producers. In fact, there are larger reasons for believing in choice–reasons equal in dignity to those that underlie our great constitutional freedoms.

John E. Coons, *School Choice as Simple Justice,* FIRST THINGS, Apr. 1992, at 15. *See also* Nicole Stelle Garnett & Richard W. Garnett, *School Choice, The First Amendment, and Social Justice,* 4 TEX. REV. L. & POL. 301, 363 (2000) ("School choice is not . . . about profit, efficiency, or competition. It is about justice.").

The panel's misreading and re-casting of this Court's authoritative and correct decision in *Zelman* threatens not only to confuse and misshape Establishment Clause doctrine but also to undermine creative reform efforts by federal, state, and local

governments and thereby to deprive children in poor and working-class families of hope and opportunity and their parents of dignity. Policy experiments like the Arizona program under review are welcome steps toward a prudent restoration of the right and responsibility of low-income parents to exercise the fundamental social function enjoyed by more fortunate parents. The legitimate interest of the State in securing that right for all citizens is part of the message of *Zelman*. The decision below runs contrary to that message, and should be reversed.

ARGUMENT

Arizona's Tax-Credit Program Helps to Make Meaningful the Fundamental Right of Parents to Direct the Education and Formation of Their Children and to Secure Better Educational Opportunities for Thousands of Children

The family is the building block of civil society and a seed-bed of good citizenship. Our constitutional tradition has therefore respected its autonomy and integrity. *See Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with [this Court] that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder . . . . And it is in recognition of this that . . . decisions have respected the private realm of family life which the state cannot enter."). A long line of this Court's decisions confirm that parents' rights sit at the very heart of the "liberty" protected by the Fourteenth Amendment. *See generally Troxel v. Granville,* 530 U.S. 57, 65 (2000) ("The liberty interest

at issue in this case – the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court.") As this Court observed in *Parham v. J.R.*, 442 U.S. 584, 602 (1979):

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's important decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. 1 W. Blackstone, Commentaries *447; 2 J. Kent, Commentaries on American Law *190.

These rights are not recent innovations, but instead reflect protections deeply rooted in our history and tradition. As the Court stated in *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972):

> The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of children. This primary role of the parents in the upbringing of

> their children is now established beyond debate as an enduring American tradition.

Parents' rights and family autonomy do not depend on or derive from positive law, but rather are "intrinsic human rights, as they have been understood in this Nation's history and tradition." *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 845 (1977). These statements and principles are not dusty anachronisms, but are instead among the more inspiring and truly liberating statements in the *United States Reports*. That parents play the primary role in childrearing and educating children is true not just as a matter of Anglo-American tradition and constitutional law. There is universal recognition of the fact that "parents seem naturally inclined to love and care for their children." Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 953 (1996); *see also Parham*, 442 U.S. at 602 (The concept of the "family as a unit with broad parental authority over minor children" is rooted in the recognition that the "natural bonds of affection lead parents to act in the best interests of their children").

Accordingly, decisions such as *Pierce* and the principle of parental control in education do not reveal archaic and patriarchal prejudices, but instead reflect the common-sense, truly child-centered belief that, in Professor Gilles's words, "parents are more likely to pursue the child's best interest as they define it than is the State to pursue the child's best interest as the state defines it." Gilles, *On Educating Children, supra,* at 940. This Court's vindication of the fundamental right described in *Pierce* "promises children that decisions about their best interests will

be made by those who, generally speaking, are most likely to work conscientiously, motivated by love and moral obligation, to advance their best interests." Richard W. Garnett, *Taking* Pierce *Seriously: The Family, Religious Education, and Harm to Children,* 76 NOTRE DAME L. REV. 109, 133-34 (2000). And, programs like the Arizona tax-credit experiment help to make good on that promise, one that for too many "remains a hollow promise, conditioned to a large degree by the economic position of parents." JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 143 (1999). Programs like Arizona's are not ideological impositions on families; rather, they reflect and recognize the way that families usually do, desire to, and should work and function.

It is crucial to recall that, for every individual child, one or more adults will select a preferred set of skills and values and will attempt, through some accepted form of schooling, to convince that child of their truth and importance. In other words, adult authority over a child's experience shrinks and departs over time, and it may be exercised well or poorly, but it is an inescapable reality during the many years that education is required by law. Whatever one's political or philosophical orientation, the question must be answered: *Who decides?* Who – which adult – will select the school experience for this child? And, again, in our traditions, we have rejected Plato's answer to this question, and affirmed repeatedly the rights and responsibilities of parents in the formation and education of children.

We have done this not because children are "property" (they are certainly not) or without moral

and legal rights. Nor have we done this because parents are always good and caring decisionmakers. We have done so, instead, for the good of children and the good of society, recognizing that a fit, custodial parent is likely to care about his or her child as one of a kind, to know that child better than others, and to feel the weight of moral responsibility and accountability for that child's welfare and flourishing. That programs like the Arizona tax-credit initiative under review make it possible, or at least easier, for parents to carry out this responsibility – to escape the crushing and demoralizing sense of helplessness that can accompany poverty – is no small point in its favor.

Parents today are likely to hear a great deal about their responsibilities. We tell them, for example, that if they do not like what's on television, then it is their responsibility to turn it off. But, one cannot fairly be given responsibility without the authority to make decisions and the capacity to act on them. In the context of education, it is too common to treat parents as, in effect, "nobodies"; many parents, not surprisingly, receive this message clearly and act accordingly. Given the schooling regime that so many of our fellow citizens experience, a natural response is passivity and despair. If we truly embrace the values to which decisions like *Pierce* and *Brown* commit us, then we ought to take steps – as Arizona has – to make sure that American parents who are not so rich have real authority over who will have access to their children's minds for the prime hours of their formative years.

CONCLUSION

Parental choice in education, which the Arizona tax-credit program helps to promote, is constitutional, sensible, and just. What's more, it is essential to achieving equality of opportunity for American children, rich or poor. School choice treats the poor as citizens of equal dignity; it promotes the independence upon which constitutional government depends; and it empowers parents to transmit their values to their children. Because the decision below is inconsistent both with this Court's controlling Establishment Clause precedents and with fundamental values that have long animated our traditions, it should be reversed.

Respectfully submitted,

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