NOS. 09-987, 09-991

IN THE
SUPREME COURT OF THE UNITED STATES

ARIZONA CHRISTIAN SCHOOL TUTION ORGANIZATION,
Petitioner,

v.

WINN *et al.,*
Respondents.

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

BRIEF OF AGUDATH ISRAEL OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization. Among its other functions and activities, Agudath Israel articulates and advances the position of the Orthodox Jewish community on a broad range of legal issues affecting religious rights and liberties in the United States. Agudath Israel regularly intervenes at all levels of government—federal, state, and local;

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[1] All parties have consented to the filing of this amicus curiae brief. No counsel for a party authored this brief in whole or in part; and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae, its members or its counsel made such a monetary contribution. We thank Rivkah Morgenstern, a student at Cardozo Law School, for her assistance with the research and writing of this brief.

legislative, administrative, and judicial (including through the submission or participation in amicus curia briefs)—to advocate and protect the interests of the Orthodox Jewish community in the United States in particular and religious liberty in general.

One of Agudath Israel's roles in this connection is to serve as an advocate for Jewish schools and Jewish education, which Orthodox Jews see as both a personal religious obligation and a critical factor—perhaps the critical factor—in ensuring Jewish religious continuity. The overwhelming majority of Agudath Israel's constituents choose to send their children to the approximately 700 Orthodox Jewish day

schools across the country that collectively educate over 200,000 students. There are students in Jewish schools in Arizona who have benefited from donations received under the Arizona tax credit program.

In this case, the court below ruled that a facially neutral tax credit was unconstitutional simply because most taxpayers chose to donate to School Tuition Organizations (STOs) that provided tuition assistance to students at religious schools. The court concluded that the result of these private choices raised a valid Establishment Clause challenge to the tax credit.

Agudath Israel respectfully submits this *amicus curiae* brief in support of the Arizona Christian STO because the decision

below turns the Establishment Clause on its head and creates a very real risk of the precise entanglement that it seeks to avoid—essentially requiring that the government take a hand in limiting the proliferation of religious organizations, or even distributing benefits only after an inquiry into the religious intentions of individual recipients.

ARGUMENT

I. THE NINTH CIRCUIT MISREADS *ZELMAN* AND CREATES AN UNPRECEDENTED AND INAPPROPRIATE DISTINCTION BETWEEN TAXPAYER AND PARENT

A. Misunderstanding *Zelman*

There is little question that the constitutional propriety of Ariz. Rev. Stat. Ann. § 43-1089(G)(2)-(3) (2005) ("Section 1089") is determined under the rubric set forth in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and the argument is compelling that Section 1089 is squarely covered by that

precedent. In order to distinguish *Zelman*, the Ninth Circuit was forced to engage in a convoluted and artificial argument that draws a line between the taxpayer[2] and the parents. *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002 (9th Cir. 2009)

In *Zelman*, the vouchers were offered directly to "parents or students, as the beneficiaries of the program's aid," *Id.* at 1018, and only then passed on to the (possibly sectarian) schools. *See Zelman*, 536 U.S. at 646. The true private choice of the parents served to insulate the government from the sectarian institutions, avoiding the appearance of an endorsement and avoiding

[2] "Taxpayer" here refers to an individual taxpayer taking advantage of the tax credit available under Section 1089, as distinct from the "Taxpayer," under which aegis Plaintiff brings suit and with respect to which the Ninth Circuit passed on standing to bring suit.

the "*imprimatur* of government endorsement." *Id.* at 655.

The Ninth Circuit misconstrues the reason that the parent's choice "breaks the circuit," perceiving it to do that work because the parent's incentive was to "best use the program aid to assist *their* children . . . based on their children's educational interests instead of on sectarian considerations." That is to say, the circuit is broken because parents have secular – or at least non-sectarian – motivations, and therefore the decisions of the parents, when imputed back to the government by the reasonable and informed observer, will not stain the government with the ink of entanglement. *Winn*, 562 F.3d at 1021.

That reading of *Zelman* is wrong at its core. The very heart of the *Zelman* rubric is not that the choices made by the individuals must be understood to be non-sectarian, but that the very fact of the individual's discretion insulates the government, even where the choices made are overwhelmingly sectarian. *Zelman*, 536 U.S. at 650, 652.

> [W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious

> institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.

Id., at 652. In fact, as explicitly stated in *Zelman*, even where virtually all of the benefits eventually inure to sectarian recipients, the Establishment Clause is not implicated so long as it is the individual, and not the government, who makes that selection. *Id.* at 649-50 (citing *Mueller v. Allen*, 463 U.S. 388 (1983)).

Under *Zelman*, the individual's (possibly sectarian) choice takes that decision away from the government; the government's involvement "ends with the disbursement of benefits." *Id.* The Ninth Circuit opinion, however, misunderstands *Zelman* to hold that the individual's choice is made in the shoes of the government; under that misunderstanding the government is still exercising discretion, but only through the mechanism of individual choice, and so the sectarian decisions of the individual are imputed back.

B. Inventing an Untenable and Irrelevant Distinction

Misunderstanding *Zelman* and its antecedents as it does, the Ninth Circuit is

then required to read those cases as looking to the intentions and motivations of the individual decision-makers. The Ninth Circuit opinion in the instant case posits a disconnect between the taxpayer – who distributes the benefits – and the parent, who is the indirect recipient thereof. Based on that distinction, the Ninth Circuit understands that the independent choices of the taxpayer (made without the benefit of the parent's secular motivations) will be insufficient to break the circuit, and the taxpayer's acts and motives will be imputed to the government. Because the majority of STOs are sectarian, the taxpayer's motivations are then assumed to be sectarian, and the Ninth Circuit would read

those motivations to reflect back on the State. *Winn*, at 1022-23.

The distinction posited by the court below, however, is both untenable and irrelevant. The distinction is untenable in two related ways. First, there is nothing that the court points to that can support the assertion that the parents' or students' interests in *Zelman* or its antecedents were particularly non-sectarian. In fact, it can be presumed that those challenges were themselves brought primarily because the parents' interests were demonstrating themselves to be very sectarian. *See*, *Mueller v. Allen*, 463 U.S. 388 (1983)(96 percent of program beneficiaries were parents of children in religious schools); *see*

also Witters v. Washington Dept. of Serv's. for Blind, 474 U. S. 481 (1986)(scholarship recipient studying at a religious institution to be a pastor); *Zobrest v. Catalina Foothills School Dist.*, 509 U. S. 1 (1993)(challenge directed at recipients of benefits in religious schools).

The Ninth Circuit opinion simply plucks from the ether a non-sectarian motivation for the decision-makers in these cases and then claims that the non-sectarian nature of that motivation insulates the government.

At the same time, the court below can point to nothing in law, fact, or reason that can support its arbitrary descriptions of taxpayer motivations. Nothing supports the

apparent assumption by the court below that the taxpayer will not have the same non-sectarian motivations as a parent, seeking to support educational excellence or a particular secular study. [3]

The parent-taxpayer distinction is irrelevant for related reasons. The only relevant inquiry under *Zelman* is whether or not the individuals who are distributing the funds or benefits are making independent decisions in a manner sufficient to keep the *imprimatur* of the government away from any sectarian interest. The only individuals who could be making such decisions are

[3] The rationale of the court below for attributing sectarian motivations to the taxpayers cannot be the (apparent) relative success of religious STOs, because that rationale is backwards. The prevalence of religious STOs (or schools) is necessarily the result of the individual choices made, not the cause. Further, without some ancillary support, that result cannot be read to prove some insidious or sectarian intent.

those that are directing that aid. *See Zelman*, 536 U.S. at 669 (O'Connor, J., concurring)(describing the "beneficiaries of indirect aid" as precisely those who "determin[e] the organization to which they will direct that aid.")

The recipients of STO scholarships (and their parents) have no possible mechanism by which to somehow implicate the government in sectarian shenanigans. The act of receiving money or benefits could not cause an objective observer to perceive a government involvement in religion. Rather, it must be the taxpayers who can, by their distribution of benefits, make such an implication possible and who can, by their independent choice, insulate the

government. Even under the false and misguided dichotomy created by the Ninth Circuit, the relevant inquiry and the Constitutional analysis pertains to only one category – the taxpayer.[4] It is the taxpayer's choice that must be evaluated for its actual and apparent independence from government influence. If the taxpayer's choice is, in fact, a "genuine and independent private choice," *Zelman*, at 652, then under both precedent and reason Section 1089 raises no difficulties under the Establishment Clause, even as applied.[5]

[4] The Ninth Circuit analysis further elides the strong likelihood that there is a significant overlap between "taxpayers" and "parents of children receiving STO scholarships."

[5] There are three other "layers" of independent decisions that further insulate the government from any hint of entanglement: "First, an individual or group of individuals must choose to create an STO. Second, that STO must then decide to provide scholarships to religious schools. . . . Finally parents need to apply for a scholarship for their student."

C. The Ninth Circuit's Mistake Forces More Government Entanglement

As discussed, the Ninth Circuit's misunderstanding of *Zelman* and invention of the parent-taxpayer distinction have the paradoxical effect of requiring that the independent decision makers have (and prove) a non-sectarian purpose to their decisions.

The question that must be asked is what sort of statute could possibly meet that requirement. To comply with such a rule, a State wishing to enact a program like the one at issue would have to require from every taxpayer taking advantage of the

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Winn, 586 F.3d at 662 (9th Cir. 2009) (en banc) (O'Scannlain, J. dissenting from the refusal to rehear the case en banc).

program some sort of representation (perhaps under oath) to the effect that their mind is devoid of any sectarian or religious intent, regardless of the final destination of the donation.

Very few actions by the government would more forcibly implicate the Establishment Clause than an annual inquiry into the religious convictions of every taxpayer, except perhaps an annual inquiry into those convictions with an effective penalty attached to the "wrong" answer.

Far from working against government entanglement in the institutions of religion, the Ninth Circuit's opinion establishes a regime under which the government must involve itself intimately with the religious

lives of its citizens – precisely the sort of outcome that the Establishment Clause is intended to prevent.

II. STRIKING DOWN A FACIALLY NEUTRAL PROGRAM SOLELY BECAUSE RELIGIOUS INSTITUTIONS BENEFIT SIGNIFICANTLY EVINCES A HOSTILITY TO RELIGION AND POTENTIALLY THREATENS MANY OTHER GOVERNMENT PROGRAMS

In the instant case, no one contests the validity of Section 1089 on its face; the statute clearly does not violate the Establishment Clause as drafted. The challenge is to the statute as applied. To

sustain that challenge, the Ninth Circuit's decision rests on the additional allegations made in the trial court. Those allegations are: first, that the STOs receiving the taxpayer donations have chosen to limit the schools to which they offer scholarships; second, that the largest STOs restrict their scholarships to sectarian schools. *Winn v. Ariz. Chirstian Sch. Tuition Org.*, 562 F.3d 1002, 1005-06 (9th Cir. 2009) (panel).

In countenancing an "as applied" challenge premised solely on the existing fact of the distribution of aid recipients as between secular and sectarian, the Ninth Circuit undermines a tremendous swathe of Establishment Clause jurisprudence. It cannot be that a statutory

scheme that passes constitutional muster at one point in time can be rendered unconstitutional by a shift in demographics. As this Court has made clear time and time again, statistics should not be relevant to the constitutional inquiry:

> 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. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated.

Mueller v. Allen, 463 U.S. 388, 401 (1983). The only relevant question should be whether the program on its face deliberately skews aid towards religion. If not, it is

irrelevant that through "genuine and independent private choice" the bulk of aid is directed to religious institutions. *Zelman*, 536 U.S. at 652.

Under the lower court's analysis, a facially neutral statute could be challenged two, five, or ten years after enactment if at any time it could be shown statistically that at the moment the challenge is brought, religious institutions happen to be the majority of recipients or even just a very significant beneficiary. In such a case, the lower court's "reasonable observer" might be held to conclude that the program impermissibly aids religion.

In reality, the lower court's "reasonable observer" test fails to impute

to the reasonable observer basic high school economic knowledge. A truly reasonable observer would understand in the instant case that the high percentage of STO donations benefiting religious school students is merely a function of supply and demand. Most private schools are religious simply because a private education is expensive and only those few who can either afford the costs or feel a religious imperative to provide their children with a religious education regardless of the cost will send their children to private schools. "[T]he preponderance of religiously affiliated private schools… is a phenomenon common to many American cities." *Zelman,* 536 U.S. at 656-57. Such a reasonable observer would

understand that it is not government that is directing the bulk of the tax-credit encouraged funding to religious schools, but the social and economic reality that most private schools are religious schools. As this Court already stated in *Zelman*, it is simply not relevant "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 schools." *Id.* at 658.

Allowing "as applied challenges" like the one before this court could thus jeopardize other government programs that benefit religious institutions based solely on statistical analysis as to who benefits from a particular program. Other

tax credit programs, property tax exemptions for religious institutions, certain government aid programs, and even some tax deduction provisions could potentially be challenged anytime a litigant could marshal evidence as to the preponderance of religious institutions that benefit from a particular program. The ability of religious organizations to raise funds central to their very existence would be threatened. And the message to the millions of Americans who send their children to religious schools and support religious institutions would be that their government now evinces "special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the

mistake of being effective in transmitting their views to children." *Mitchell,* 530 U.S. 793, 827-28 (2000) (plurality opinion). That, we submit, is not what the Establishment Clause, as interpreted by this Court, would mandate.

CONCLUSION

Agudath Israel of America respectfully urges the court to reverse the decision of United States Court of Appeal for the Ninth Circuit.

RESPECTFULLY SUBMITTED this 6th day of August, 2010

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