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STATEMENT OF INTEREST OF AMICI CURIAE¹

Amici curiae are a group of associations dedicated to the improvement of public

members. ASBA serves 95 percent of Arizona's public school districts, and those districts serve over 1.12 million children.

The American Association of School Administrators ("AASA"), founded in 1865, is the professional association of over 14,000 local school system leaders across America. AASA members range from chief executive officers, superintendents and senior level school administrators to cabinet members, professors and aspiring school system leaders. AASA's mission is to support and develop effective school administrators who are dedicated to the highest quality education for all children.

The National Education Association ("NEA") is a nationwide employee organization with more than 3.2 million members, the majority of whom are employed as teachers by public school districts, colleges, and universities.

The Arizona Education Association ("AEA") represents more than 30,000 public school educators and education support professionals throughout Arizona. AEA members include teachers, counselors, speech pathologists, and student teachers.

NSBA and the other amici regularly represent their members' interests before Congress and federal and state courts and each has participated as amicus curiae Forest Grove Sch. Dist. v. T.A., 129 S. Ct. 2484 (2009); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Morse v. Frederick, 551 U.S. 393 (2007); Arlington Cent. Sch. Dist. Board of Educ. v. Murphy, 548 U.S. 291 (2006); Schaffer v. Weast, 546 U.S. 49 (2005); Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Board of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237 (1991).

The amici are concerned about the Arizona tuition tax credit program (the "Arizona program") because it undermines both important Establishment Clause principles and public education in Arizona. The harm this program does to public education and the degree to which it violates the Constitution go far beyond voucher programs of the type narrowly approved by this Court in Zelman, 536 U.S. 639. Indeed, the program is in many respects far worse than other voucher and tuition tax credit plans adopted by other states since Zelman.

Amici strongly believe that any educational voucher or tax credit program must, at a minimum, be religiously neutral. Like the program approved in Zelman, it must not have the purpose or effect of advancing religion, but rather must serve an important educational purpose. Second, it must provide public financial support to religiously-affiliated schools only through genuine and

independent parental choice. The Arizona system meets neither of these minimum criteria.

INTRODUCTION

This Court has long recognized "the importance of [public] education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child." Plyler v. Doe, 457 U.S. 202, 221 (1982). "[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all" and "has a fundamental role in maintaining the fabric of our society." Id.

The vast majority of students in America—and in Arizona—are educated in public schools. More than one million K-12 students attend public schools in Arizona. Less than 10 percent of that number, somewhere between 50,000-75,000 students, attend private schools. Less than 30,000 of those private school students participate in the State-funded, private-school scholarship program at issue in this case.

In recent decades, a number of school reform efforts across the country have sought to improve education, including public education, by fostering open competition between public and private schools. Whatever the merit or effectiveness of such school choice plans, the Arizona program at issue here simply is not one of them.

Some of the school choice plans implemented in recent decades have raised Establishment Clause concerns because they allow for the participation of religiously affiliated schools along with secular private and public schools. In Zelman, 536 U.S. 639 (2002), this Court addressed these issues and decided that not all such programs violate the Establishment Clause. As a result, the Court upheld a school choice plan that awarded vouchers to low-income parents of children in failing inner-city schools.

Zelman, however, also established the minimum criteria that such a plan must meet to be consistent with the Establishment Clause. The Arizona program does not come close to satisfying these criteria. Unlike some other school choice programs, the Arizona program does not provide free choice among public, secular private and religiously-

schools, as well, can deny admission to scholarship recipients on the basis of religion.

ARGUMENT

The Arizona program violates the longstanding principle that the government "cannot consistently with the Establishment Clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches tenets and faith of any church." Everson v. Board of Educ. of Ewing, 330 U.S. 1, 16 (1947). It also conflicts with this Court's long and sustained recognition of the importance of public education. See Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

In Zelman this Court addressed one of a growing number of school choice plans that have been designed in part to supplement public schools' efforts to educate a broad spectrum of students and to improve these schools through healthy competition. Zelman reiterated the general principle that public funding of religious instruction is prohibited, and concluded that a plan could satisfy Establishment Clause only if the program served an important secular purpose, was religiously neutral, and authorized the government aid to be distributed according to the free choice of parents about what schools their children should attend. 536 U.S. at 652.

None of the Zelman factors is present here. The Arizona program does not serve any important educational purpose. It does not give parents genuine free choice. And it is not religiously neutral.

A. The Arizona Program Is Not a True School Choice Plan.

The Arizona program does not provide true school

their parents' choice." Iowa Code Ann. § 422.11S (West 2010) (emphasis added). Sæ Zelman, 536 U.S. at 646 ("[w]here tuition aid is spent depends solely upon where parents who receive tuition aid choose to enroll their child") (emphasis added).

B. The Arizona Program Does Not Increase Educational Options for Students.

The Arizona program also does not increase educational options for students by improving access to private schools for the State's neediest families. If, as its proponents claim, the Arizona program were actually designed to "provid[e] access to a broad array of educational choices," Pet. Br. 10, the program would target—and its implementation would benefit—those students who have the fewest educational choices available to them or at least those who do not already have the option of attending a private school. The Arizona program does not. Neither low-income families nor at-risk students benefit from the program.

Only seven out of 55 STOs use financial need as a primary factor in determining which students receive scholarships. See Tax Credit Sponsor's Vision Unrealized, East Valley Tribune, June 15, 2010, http://www.eastvalleytribune.com/special_reports/rig ged_privilege/article_2caa9671-aaad-5992-9d46-2594a9ee6b3c.html. Nor does the program require STOs to consider the quality of students' public

school options or give any special consideration to students with physical, mental and emotional challenges, or limited English proficiency.² See Ariz. Rev. Stat. Ann. § 43-1089.

Moreover, because the program does not specify the size of the scholarships that must be awarded, the scholarships tend to be too small to cover a student's tuition at most private schools, effectively excluding most low-income students. Scholarship sizes have ranged from an average of \$554 in 1998 to an average of \$1,889 in 2009. See Arizona Department of Revenue, Individual Income Tax Credit for Donations to Private School Tuition Organizations: Reporting for 2009 (Apr. 21, 2010) [hereinafter "2009 Ariz. Dep't of Revenue Report of Donations to STOs". Yet tuition at Arizona's private schools can range from \$5,000 to \$20,000. Ronald J. Hansen & Pat Kossan, Tuition Aid

² As explained in Respondents' Supplemental Brief Regarding a Change in State Law, in April and May 2010, Arizona enacted two statutes (S.B. 1274 and H.B 2664) that amend the Tuition Tax Credit program. The amendments, effective July 1, 2011, require STOs to take students' financial

Compare Zelman, itself, for example. The Ohio voucher plan challenged there was designed to give students an alternative to struggling public schools. The plan targeted students in the Cleveland School District at a time when only 10 percent of students were performing at basic proficiency, and fewer than one-third of students were graduating from high school. See Zelman, 536 U.S. at 644. The Ohio plan also distributed aid to parents according to their financial need. Families with incomes below 200 percent of the poverty line were given priority access to vouchers and could receive up to 90 percent of private school tuition (up to \$2,250); private schools were prohibited from charging these parents a copayment greater than \$250. Relatively wealthier families could receive up to 75 percent of private school tuition. As a result, when Zelman was decided, 60 percent of the students participating in the Ohio plan were from families at or below the poverty line. See id. at 646.

Five other states that have enacted tuition tax credit programs (Florida, Georgia, Iowa, Pennsylvania, and Rhode Island) all similarly include provisions targeting low-income students or requiring that scholarship recipients be currently enrolled in a public school.³ Florida's Tax Credit

³ See Fla. Stat. Ann. § 1002.395 (West 2010); Ga. Code Ann. §§ 20-2A-1, 48-7-29.16 (West 2010); Iowa Code Ann. § 422.11S;

Scholarship, for example, awards scholarships up to \$4,106. See Florida Department of Education, Florida Tax Credit Scholarship Program FAQs, http://www.floridaschoolchoice.org/information/ctc/faqs.asp.

The Arizona program creates no such opportunities for low-income students to attend private schools. And, it lacks basic features to ensure genuine, independent parental choice. These characteristics distinguish it—and favorably—from other school choice programs. These failures in the Arizona program's design and implementation also suggest that the program is not actually intended to promote school reform; rather, its primary purpose is to provide public resources to private, mostly religious schools and the students already attending them.4

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II. THE ARIZONA PROGRAM VIOLATES **ZELMAN**.

When the Zelman Court held that the Ohio school choice plan passed constitutional muster, it made clear that in order for other such plans to satisfy the Establishment Clause they must provide "genuine and independent choice[]" to a broad class of parents and must be religiously neutral. Zelman, 536 U.S. at 649. The amici agree that these minimum criteria are necessary, both under the Establishment Clause and to ensure that choice plans are effective tools of educational improvement. The Arizona program does not satisfy the minimum criteria set forth in Zelman.

A state-funded scholarship like program, Arizona's, that totally excludes public schools does not give parents a genuine choice and is skewed against public education. Moreover, a program, like Arizona's, that permits scholarships to be restricted to certain sectarian schools is not religiously neutral and cannot be squared with the program's ostensible improving public education through competition. Worst of all, a program, like Arizona's, that allows schools to deny students admission on the basis of their religion countenances one of the principal harms—state-sponsored religious preference—that the Establishment Clause was designed to prevent.

A. The Arizona Program Provides No Public School Option.

Although the merit of any school choice plan that funnels state funds to religious schools is debatable,

Clause, it must give parents the option to use program benefits at public as well as private schools. This Court four times has approved state programs that direct aid to religious schools through the choices of parents or students, and each time the Court has emphasized that an essential requirement insulating the program from an Establishment Clause violation is that parents had the choice of using program aid at public and private schools. The only time that the Court has squarely addressed a choice plan preventing parents from using the benefits at public schools, the Court struck it down—largely because the exclusion of public schools skewed the incentives toward religious schools. See Nyquist, 413 U.S. 756.

⁶ See Mueller, 463 U.S. 388, 391 (inclusion of both public and private schools in a Minnesota tax deduction program was one of the "most important[]" factors "argu[ing] * * * strongly for the provision's constitutionality."); Witters, 474 U.S. at 488 (upholding aid program because "aid recipients have full opportunity to expend vocational rehabilitation aid on wholly secular education," which "creates no financial incentive for students to undertake sectarian education"); Zobrest, 509 U.S. at 10 (approving the use of funds under the Individuals with Disabilities Education Act ("IDEA") in a Catholic school because it "distributes benefits neutrally * * * without regard to the 'sectarian-non-sectarian, or public-nonpublic' nature of the school the child attends"); Zelman, 536 U.S. at 649-50. Nyquist, 413 U.S. at 782 n.38 (emphasizing importance for Establishment Clause purposes of the benefit "includ[ing] all schoolchildren, those in public as well as those in private schools").

the Zelman emphasized constitutional significance of including public schools in the parents' choice. The Ohio plan provided "two basic kinds of assistance": "[T]uition and aid for students * * * to attend a participating public or private school of their parent's choosing" and "tutorial aid for students who choose to remain enrolled in public school." 536 U.S. at 645. That in theory any parent—whether the parent wanted to send their child to public or private school-could take advantage of the program was a crucial factor in the majority's determination that the Ohio plan satisfied the Establishment Clause. As the Court explained, the "program challenged here is a program of true private choice" because "[t]he program permits the participation of all schools within the district, religious or nonreligious" and is available to "any parent of a school-age child who resides in the Cleveland City School District." Id. at 653.

In contrast to the plan in Zelman, the Arizona program prohibits parents from using program funds at public schools. Under the Arizona program, taxpayers make 100-percent tax-refundable contributions to STOs, which then provide scholarships to students at nonpublic schools. Ariz. Rev. Stat. Ann. § 43-1089(H)(2)-(3) (West 2010). As a result, the Arizona program does not include "the participation of all schools" in the State and is not available to "any parent of a school-age child who resides" in Arizona. Zelman, 536 U.S. at 653.

By limiting its benefits to private, mostly religious schools, the Arizona program is much more similar to two New York programs that this Court struck down in

B. The Arizona Program Skews Parents' Choice of Private Schools Toward Religious Schools.

In addition to excluding public schools, the Arizona program further skews its benefits toward religious schools and undermines any potential educational benefits of the program by permitting STOs to select participating schools on the basis of religion. This defect further limits "the narrowness of the benefited class," makes the Arizona program more likely to create "divisiveness" rather than fair competition, and excludes the majority of parents and students in Arizona who have no desire to choose a religious education. See Nyquist, 413 U.S. at 794.

The statutory provision authorizing the Arizona program prohibits STOs from "limiting availability [of scholarships and aid] to only students of one school," Ariz. Rev. Stat. Ann. § 43-1089(H)(3), but it does not prohibit them from limiting scholarships to a class of schools selected on religious grounds. STOs could

school that may use those scholarship funds to teach its own religious beliefs. Such an option—whether to accept publicly-funded religious indoctrination or forego a government benefit altogether—is not a genuine, religiously neutral choice by any stretch of the imagination.

In Bowen v. Kendrick, this Court made clear that a government program is unconstitutional if, in its application, public aid is directed to religious organizations that are "pervasively sectarian" or that use the public funds to "inculcate the views of a particular religious faith." 487 U.S. 589, 621 (1988). By permitting STOs to award scholarships only to religious schools and to require that scholarship recipients attend those schools, the Arizona program fails this test.

In fact, the Arizona program restricts parental choice even further, as taxpayers that fund the STOs have the real power of choice under the law. For example, under the Arizona program, taxpayers may designate scholarship funds for a particular student and apparently may require that the student attend a particular school. See Catholic Tuition Organization,

http://www.catholictuition.org/faq.aspx#funddistribu tion ("[C]ontributors can designate their money to go to the students at a particular school."). This practice often leaves parents that want to seek a scholarship no choice at all. At a minimum, a genuine school choice program must allow parents an unfettered opportunity to select the schools that their children will attend with the children's best interests in mind. Limiting parents' choice based on the religious views of certain taxpayers is not only contrary to the Establishment Clause, it is bad educational policy.

C. The Arizona Program Allows Schools To Deny Students Admission Because of Their Religious Beliefs.

The Arizona program also allows participating schools to discriminate against students on the basis of religion. See Ariz. Rev. Stat. Ann. § 43-1089(H)(2) (prohibiting only discrimination "on the basis of race, color, handicap, familial status or national origin"). This means that even a parent who wants his or her child to be educated in a religious school may not be able to use the scholarship if his or her child does not meet the religious criteria of a school's admissions policy. But a publicly funded program that permits exclusion from its benefits solely on the basis of religious criteria is plainly prohibited by the Establishment Clause.

The religious discrimination permitted by the Arizona program is in sharp contrast to the non-discrimination requirements of the plan upheld in Zelman. The Court found that the Ohio program provided parents a genuine and independent secular

choice in part because it broadly prohibited all discrimination, including religious discrimination, by participating schools. Zelman. 536 ("Participating private schools must agree not to discriminate on the basis of race, religion, or ethnic background, or to 'advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion.") (emphasis added). Whereas the Ohio program prohibited discrimination on the grounds of religious belief and provided other crucial safeguards to ensure that program funds were not used to advance religion (for example, allowing parents to choose a public school), the Arizona program, by omission, permits both.

On a more fundamental level, the Arizona program's authorization of religious discrimination undermines the purposes and goals of publicly funded education, which is designed to be inclusive and to provide an education for all citizens regardless of background, beliefs or circumstances. By allowing religious discrimination, the Arizona program places the State's "prestige, coercive authority, [and] resources behind * * * religious belief * * * compelling non-adherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community." See Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 9 (1989). This Court should not endorse a program—like Arizona's—that so plainly violates the Establishment Clause and undermines the foundations of public education.

III. THE ARIZONA PROGRAM HAS THE EFFECT OF ADVANCING RELIGION

As a direct result of the Arizona program's limitations on parental choice, the benefits of the Arizona program primarily have inured to religiously affiliated STOs, sectarian schools, and parents whose children already attend religious schools. Thus, the "effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." Nyquist, 413 U.S. at 783.

the Arizona program benefited has primarily religiously affiliated STOs. In the program's first year of operation in 1998, more than 90 percent of the \$1.8 million in tax credit funds were contributed to STOs that limited scholarship awards to students attending specific religious schools. In 2003 and 2004. respectively, approximately 82 percent and 79 percent of scholarships were awarded by STOs that restricted scholarships to religious schools.

This early trend has continued. An analysis by The Arizona Republic found that, in 2008, 93 percent of the \$54 million in tax credits were directed toward religiously affiliated STOs. See Ronald J. Hansen & Pat Kossan, Tuition-aid Program Benefits Wealthy Families, Raises Concerns, Ariz. Republic, Aug. 1, 2009,

http://www.azcentral.com/arizonarepublic/news/articles/2009/08/01/20090801sto-whobenefits0801.html. And currently, four of the largest STOs are religious organizations (Arizona Christian STO, Catholic Tuition Organization of the Diocese of Phoenix, Catholic Tuition Organization of the Diocese of Tucson, and the Jewish Tuition Organization). In 2009, these four STOs received more than half of the \$50,853,086 contributed to the program by Arizona's taxpayers.¹⁰

Second, the State's private, primarily religious schools directly benefit from the program as well. As of 2005, 75 percent of Arizona's private schools were religiously affiliated. Because the program does not prohibit STOs from discriminating on the basis of religion, see Ariz. Rev. Stat. Ann. § 43-1089, these private, religious schools receive the vast majority of the taxpayer funds donated to the State's largely religious STOs. As of 2009, only 15 percent of scholarship money was available for use at secular schools. See Winn v. Ariz. Christian Tuition Org., 586 F.3d 649, 650 (9th Cir. 2009) (concurring op.). In

 $^{^{10}}$ The Arizona Christian STO awarded \$10,807,320 in awards to religious schools, the Catholic Tuition Organization of the Diocese of Phoenix awarded \$9,377,207 in awards to religious schools, and the Catholic Tuition Support Organization for the Diocese of Tucson awarded \$4,330,366 in awards to religious schools. See 2009 Ariz. Dep't of Revenue Report of Donations to STOs.

fact, the availability of scholarships under the Arizona program actually has provided a windfall to the religious schools who participate, encouraging them to increase their tuition rather than open their doors to more students. See Schools Teach Parents How to Skirt Law, East Valley Tribune, June 15, 2010,

http://www.eastvalleytribune.com/special_reports/rig ged_privilege/article_db4088f9-5789-5a1d-abed-9af2a5a39cf2.html.

Finally, most of the scholarships go to a small group of individuals who already attend the private, mostly religious schools.¹¹ For example, as of 2005, more than three-fourths of the scholarship dollars awarded had gone to students who were enrolled in private school when the statute was enacted. See Deborah Katz Levi, Tuition Tax Credit Proposals in Utah—Their Constitutionality and Feasibility, 2005 Utah L. Rev. 1047, 1075-76 (2005).

¹¹ In 2007-2008, only 4.5 percent of Arizona students attended private schools. See National Center for Education Statistics, Enrollment in Public Elementary and Secondary Schools. State Jurisdiction. bv or http://nces.ed.gov/programs/digest/d09/tables/dt09_034.asp; and National Center for Education Statistics, Characteristics of Private Schools in the US. http://nces.ed.gov/pubs2009/2009313.pdf. Thus, program funds are available to only a very small percentage of Arizona's students.

At every level, the primary effects of the program are to direct funds to support religious education. Most tax-credit donations go to religiously affiliated STOs, which were created under the program to support religious education. Because STOs are allowed to practice religious discrimination in selecting which schools scholarship recipients can attend, most of the scholarships benefit religious schools, which themselves are not prohibited from discriminating on the basis of religion. And the scholarships are ending up largely in the hands of private individuals who already have chosen a private, and in most cases, religious education for their children.

Rather than providing competition and improving public education, therefore, the Arizona program advances the religious mission of participating schools. This result is inconsistent with both the Establishment Clause and any sound notion of educational reform or school improvement.

IV. THE ARIZONA PROGRAM HARMS PUBLIC y,pUCATION

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U.S. at 493 ("Today, education is perhaps the most important function of state and local governments * * *. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.").¹²

Undermining this commitment, the Arizona program diverts funding from the State's public schools. As a result, the program directly harms public education in at least three respects. It also threatens the number and quality of public school options in Arizona, the only viable choices for the overwhelming majority of the State's students.

First, the program's tax credits divert public funds from the State treasury (where those dollars could support public schools) to STOs, which use those dollars to support the private—in most cases, religious—schools of their choice. Since the program's inception in 1997, the state treasury has diverted a total of \$350 million to mostly religious STOs. See Private School Tax Credits Rife with Abuse, East Valley Tribune, July 31, 2009, http://www.eastvalleytribune.com/special_reports/rig

¹² See also Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) ("[Public] education must prepare pupils for citizenship in the Republic.") (internal quotation marks and citation omitted); Plyler, 457 U.S. at 221 ("In sum, education has a fundamental role in maintaining the fabric of our society.").

have been underfunded for years, and the recession has recently forced further reductions in public education funding. Each year between 2005 and 2008 (the latest year for which data are available), Arizona's total per-pupil funding ranked somewhere between 44th and 48th lowest among the 50 states and the District of Columbia. We U.S. Census Bureau, 2008 Annual Survey, supra. For the 2010-11 school year, the Arizona legislature cut funding for public schools even further—by \$400 million. See Don Harris, Sounding the Alarms: Arizona Schools Feeling Budget Pinch, Ariz. Capitol Times, July 23, 2010.

The impact of these cuts during the 2010-11 school year is dramatic. For example, Arizona's public schools: (1) cut pre-school programs for 4,328 children; (2) lost half of the prior year's State funding for kindergarten; (3) eliminated programs for disadvantaged children in preschool through third grade; (4) reduced financial aid to charter schools; and (5) slashed funding for books, computers, and other supplies.¹⁵ See Nicholas Johnson, et al., Center

 $^{^{14}}$ Each year between 2005 and 2008 (the latest year for which data is available), Arizona's per-pupil funding from state sources ranked somewhere between 40th and 44th lowest among the 50 states and the District of Columbia. Id.

¹⁵ Arizona is not alone. Thirty-two other states and the District of Columbia have been forced to adopt similar budget

on Budget and Policy Priorities,

child in a participating private school, to transfer their child to a public school in an adjacent district, or to have their child receive tutorial services while remaining in his or her public school. See Zelman, 536 U.S. at 645. The Ohio program also includes a financial disincentive to choose a private school in that parents who choose to send their children to private school receive only half the assistance given

The Arizona program's failure to provide any support to the State's public schools is further evidence that true school reform is not the program's goal. This failure and the program's continued diversion of public funds away from the State treasury also constitute a grave threat to Arizona's public schools.

CONCLUSION

For the foregoing reasons and for those in Respondents' brief, the Ninth Circuit's decision should be affirmed.

Respectfully submitted,

Francisco M. Negrón, Jr. General Counsel Naomi Gittins National School Boards Association 1680 Duke Street Alexandria, VA 22314 (703) 838-6722

Of Counsel

JOHN W. BORKOWSKI*
MAREE F. SNEED
CHRISTOPHER LOTT
CLAIRE SULLIVAN
HOGAN LOVELLS US LLP
555 Thirteenth Street,
N.W.
Washington, D.C. 20004
(202) 637-5779

* Counsel of Record Counsel for Amici Curiae

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