

No. 09-987

---

**IN THE SUPREME COURT  
OF THE UNITED STATES**

---

**ARIZONA CHRISTIAN SCHOOL TUITION  
ORGANIZATION,**

Petitioner

v.

**KATHLEEN M. WINN,**

Respondent

---

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

---

**BRIEF FOR AMICI CURIAE LIBERTY  
COUNSEL AND AMERICAN  
ASSOCIATION OF CHRISTIAN SCHOOLS  
IN SUPPORT OF PETITIONER**

---

Mathew D. Staver (Counsel of Record)	Stephen M. Crampton
Anita L. Staver	Mary E. McAlister
Horatio G. Mihet	David M. Corry
LIBERTYCOUNSEL	LIBERTY COUNSEL
1055 Maitland Center	PO Box 11108
Commons, 2d Floor	Lynchburg, VA 24506
Maitland, FL 32751	(434) 592-7000
(800) 671-1776	Email: court@lc.org
Email: court@lc.org	Attorneys for Amici

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES..... iii**

**INTEREST OF AMICI..... 1**

**SUMMARY OF ARGUMENT ..... 3**

**LEGAL ARGUMENT ..... 6**

**I. THIS COURT SHOULD DISMANTLE  
THE ENDORSEMENT TEST  
MINEFIELD AND GIVE CLEAR  
GUIDANCE TO LEGISLATURES SO  
THAT THEY CAN ENACT LAWS  
WITHOUT FEAR OF STEPPING ON  
LANDMINES..... 6**

**A. The Poorly Articulated “Reasonable  
Observer” Standard Makes The  
Endorsement Test Inadequate As A  
Standard For Establishment Clause  
Claims..... 9**

**B. Fractured, Internally Inconsistent  
Opinions By Members of This Court  
Demonstrate That The Enforcement  
Test Is An Unworkable Standard..... 15**

**II. THE NINTH CIRCUIT’S RELIANCE  
UPON NYQUIST TO OVERTURN  
ARIZONA’S SCHOOL TAX CREDIT  
STATUTE DEMONSTRATES THAT  
NYQUIST SHOULD BE EXPLICITLY  
OVERRULED..... 25**

**III. THE NINTH CIRCUIT’S USE OF  
THE “PERVASIVELY SECTARIAN”  
DOCTRINE ILLUSTRATES THAT THE  
DOCTRINE SHOULD BE EUTHANIZED  
AND BURIED AS A  
CONSTITUTIONALLY OFFENSIVE  
RELIC OF THE PAST..... 35**

**CONCLUSION ..... 45**

**TABLE OF AUTHORITIES****Cases**

<i>ACLU of Ky. v. Grayson County</i> , 2008 WL 859179 (W.D. Ky. 2008).....	11, 13
<i>ACLU of Ky. v. Mercer County</i> , 219 F.Supp. 2d 777 (E.D. Ky. 2002).....	11, 13
<i>ACLU of Ky. v. Mercer County</i> , 240 F.Supp. 2d 623 (E.D. Ky. 2003).....	11, 13
<i>ACLU of Ky. v. Mercer County</i> , 432 F.3d 624 (6th Cir. 2005), .....	11, 13
<i>ACLU of New Jersey v. Schundler</i> , 104 F.3d 1435 (3d Cir. 1997).....	13
<i>ACLU v. Garrard County</i> , 517 F. Supp. 2d 925 (E.D. Ky. 2007).....	12
<i>ACLU v. McCreary County</i> , 2007 WL 2903210 (E.D.Ky. 2007),.....	12
<i>ACLU v. Rowan County</i> , 513 F. Supp. 2d 889 (E.D.Ky. 2007).....	12
<i>Agostini v. Felton</i> , 521 U.S. 203 (1997),.....	40

<i>Aguilar v. Felton</i> , 473 U.S. 402 (1985).....	40
<i>Alvarado v. City of San Jose</i> , 94 F.3d 1223 (9th Cir. 1996). .....	14
<i>American Jewish Congress v. Chicago</i> , 827 F.2d 120 (7th Cir. 1987) .....	16
<i>Board of Education v. Allen</i> , 392 U.S. 236 (1968).....	10, 28, 31, 32
<i>Books v. Elkhart County</i> , 401 F.3d 857 (7th Cir. 2005). .....	12, 14
<i>Brooks v. City of Oak Ridge</i> , 222 F.3d 259 (6th Cir. 2000). .....	14, 16
<i>Capitol Square Review &amp; Advisory Bd. v. Pinette</i> , 515 U.S. 753 (1995) ..	7, 21, 22, 24, 26
<i>Committee for Public Education &amp; Religious Liberty v. Regan</i> , 444 U.S. 646,(1980), .....	39
<i>Committee for Public Education and Religious Liberty v. Nyquist</i> , 413 U.S. 756 (1973).....	4, 27, 30, 31, 33, 34
<i>County of Allegheny v. ACLU</i> , 492 U.S. 573 (1989).....	16, 18, 19, 20, 21

<i>Employment Div., Dept. of Human Resources of Ore. v. Smith</i> , 494 U.S. 872 (1990). . . . .	43
<i>Everson v. Board of Education</i> , 330 U.S. 1 (1947) . . . . .	28, 31, 32
<i>Freedom From Religion Foundation v. City of Marshfield</i> , 203 F.3d 487 (7th Cir. 2000) . . . . .	15
<i>Freedom from Religion Foundation, Inc. v. Bugher</i> , 249 F.3d 606 (7th Cir. 2001) . . . . .	36
<i>Hills v. Scottsdale Unified School District No. 48</i> , 329 F.3d 1044 (9th Cir. 2003) . . . . .	43
<i>Hunt v. McNair</i> , 413 U.S. 734 (1973) . . . . .	10, 40
<i>Lamb’s Chapel v. Center Moriches Union Free School Dist.</i> , 508 U.S. 384 (1993) . . . . .	43
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971) . . . . .	38
<i>Lynch v. Donnelly</i> , 465 U.S. 668 (1984) . . . . .	17
<i>Meek v. Pittenger</i> , 421 U.S. 349 (1975) . . . . .	39

<i>Mitchell v. Helms</i> , 530 U.S. 793 (2000) .....	<i>passim</i>
<i>Mueller v. Allen</i> , 463 U.S. 388 (1983).....	6, 34, 43
<i>Norwood v. Harrison</i> , 413 U.S. 455 (1973).....	30
<i>Prince v. Jacoby</i> , 303 F.3d 1074 (9th Cir. 2002) .....	44
<i>Roemer v. Board of Pub. Works of Md.</i> , 426 U.S. 736 (1976).....	10, 42
<i>Rosenberger v. Rector and Visitors of Univ. of Va.</i> , 515 U.S. 819 (1995); .....	43
<i>School District of Grand Rapids v. Ball</i> , 473 U.S. 373 (1985).....	40
<i>Tilton v. Richardson</i> , 403 U.S. 672 (1971).....	10
<i>Widmar v. Vincent</i> , 454 U.S. 263 (1981).....	43
<i>Winn v. Arizona Christian School Tuition Organization</i> , 562 F.3d 1002 (9th Cir. 2009) .....	<i>passim</i>

<i>Winn v. Arizona Christian School Tuition Organization,</i> 586 F.3d 649 (9th Cir. 2009) .....	33, 36, 38
<i>Witters v. Washington Dep't. of Servs. for the Blind,</i> 474 U.S. 481 (1986) .....	6, 32
<i>Zelman v. Simmons-Harris,</i> 536 U.S. 639 (2002).....	3, 6, 10, 27, 34
<i>Zobrest v. Catalina Foothills School Dist.,</i> 509 U.S. 1 (1993).....	6
<b>Other Authorities</b>	
Jesse H. Choper, <i>The Endorsement Test: Its Status And Desirability,</i> 18 J. L. & POL'Y 499 (2002) .....	8-10, 26, 27
William P. Marshall, "We Know it When We See It." <i>The Supreme Court Establishment,</i> 50 S. CAL. L.REV. 495 (1986).....	23

**INTEREST OF AMICI<sup>1</sup>**

Liberty Counsel is a national nonprofit litigation, education and policy organization dedicated to advancing religious freedom, the sanctity of human life and the traditional family. Liberty Counsel has offices in Florida, Virginia and Washington, D.C. and has hundreds of affiliate attorneys in every state. Liberty Counsel represents citizens, organizations and governmental entities in matters related to religious liberties, sanctity of human life and the traditional family. In particular, Liberty Counsel has represented government entities facing Establishment Clause challenges and has seen firsthand how unarticulated and often conflicting

---

<sup>1</sup> Counsel for a party did not author this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *Amicus Curiae* or its counsel made a monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this brief and such consents are being lodged herewith.

Establishment Clause standards have created confusion among courts and legislators.

The American Association of Christian Schools (“AACS”) serves Christian schools and their students through a network of thirty-six state affiliate organizations, including the Christian Schools of Arizona. The AACS represents more than one hundred thousand students in more than eight hundred schools. Nine of those schools are in Arizona. The Arizona tax credit program has been a wonderful vehicle for allowing parents who are not wealthy to exercise a choice in their children’s education that previously only those who were more prosperous could exercise. Single mothers and factory workers can now choose a school that best meets the needs of their children, funded by a scholarship from a School Tuition Organization. AACS believes that such freedom is the most effective and equitable way to improve the quality of K-12 education in America. Individuals and corporations may freely choose the School Tuition Organization to which they contribute. Parents may freely choose the STO and through it the school that a child will attend. The State of Arizona establishes no particular religion, but establishes an environment in which diversity, individual choice and educational quality can flourish. The AACS

fully supports those core values and applauds the State of Arizona for this remarkable and critical effort to offer educational choice and to foster educational quality.

Amici are concerned about the detrimental effects that the Ninth Circuit's ruling, and particularly its reliance upon largely discredited Establishment Clause concepts, will have on educational assistance programs that provide parents with choices in how to educate their children in a constitutionally permissible manner. Amici believe that it is critical that this Court has as complete a picture as possible of the ramifications of some existing Establishment Clause principles and whether some of them should be abandoned in favor of a more uniform objective standard.

### **SUMMARY OF ARGUMENT**

The Ninth Circuit capitalized on three weak spots in this Court's Establishment Clause jurisprudence to overturn a neutral program of private choice where state aid reaches religious schools solely as a result of independent decisions of private individuals, in direct contravention of this Court's ruling in *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002). First, the Ninth Circuit took advantage of the lack of definition of the "reasonable

observer” standard to create its own version of the fictional character. The Ninth Circuit concluded that its informed reasonable observer would find that the taxpayer choice provision in the Arizona law thwarts the law’s secular purpose of providing equal access to various educational choices because there is nothing to prevent taxpayers from only contributing to religious schools. *Winn v. Arizona Christian School Tuition Organization*, 562 F.3d 1002, 1022 (9th Cir. 2009) *petition for rehearing en banc denied*, 586 F.3d 649 (9th Cir. 2009). This manipulation of the endorsement test exposes its inherent weakness as an objective standard and demonstrates why it should be abandoned.

From there, the Ninth Circuit unearthed a barely alive educational aid precedent, *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) and propped it up as viable authority for the proposition that Arizona’s tax credit law violates the Establishment Clause because it imposes an additional layer of private choice on scholarship funding decisions over those in place in the program upheld in *Zelman*. That additional layer of insulation between the state and the religious institutions meant that the Arizona statute was significantly different from the Ohio statute in *Zelman*. Therefore, the

Ninth Circuit concluded that it did not need to apply *Zelman*, but could fall back on *Nyquist* to overturn Arizona's law. The Ninth Circuit could perform this sleight of hand because *Nyquist* has been implicitly but not explicitly overruled by *Zelman*, and other subsequent school funding cases. *Nyquist* should be explicitly overruled to prevent future attempts to circumvent established precedent.

Finally, the Ninth Circuit used a procedural technicality to resurrect the "pervasively sectarian" doctrine, which a plurality of this Court has said should be buried as a tarnished relic of a bygone era. Although the decision in *Mitchell v. Helms*, 530 U.S. 793 (2000) effectively killed the ailing "pervasively sectarian" doctrine, there were only four signatories on that portion of the decision. The Ninth Circuit took advantage of the fact that two concurring justices did not explicitly sign on to the plurality's determination that the doctrine was dead to claim that it remains viable. Based upon that, the Ninth Circuit used the "pervasively sectarian" doctrine to bolster its claim that the Arizona tax credit law violates the Establishment Clause. As is true with *Nyquist*, it is time for the "pervasively sectarian" doctrine to be buried once and for all.

## LEGAL ARGUMENT

### I. THIS COURT SHOULD DISMANTLE THE ENDORSEMENT TEST MINEFIELD AND GIVE CLEAR GUIDANCE TO LEGISLATURES SO THAT THEY CAN ENACT LAWS WITHOUT FEAR OF STEPPING ON LANDMINES.

This Court has repeatedly held that “no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the imprimatur of government endorsement.” *Zelman*, 536 U.S. at 655 (citing *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Dep’t. of Servs. for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993)). Nevertheless, the Ninth Circuit constructed its own “informed reasonable observer” to find such an endorsement in the Arizona law. This manipulation of the “reasonable observer” standard illustrates how the endorsement test has become a minefield for legislators as they try to craft legislation without inadvertently violating the unarticulated sensibilities of an undefined “reasonable observer” who might perceive that the state is endorsing religion. *See Capitol*

*Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 768 n.3 (1995). As one constitutional scholar stated:

Under the endorsement approach, reasonable perceptions of state approval or endorsement which beget legitimate feelings of alienation or offense by a segment of the population—and nothing more—trigger a holding of unconstitutionality. While this may indeed be an attractive feature of the test insofar as it appeals to our compassionate instincts...absent any meaningful threat to religious liberty, distressed sensibilities should not rise to the level of a judicially cognizable harm under the Establishment Clause because, if the endorsement threshold were faithfully applied, it would unjustifiably operate to invalidate desirable governmental attempts to accommodate religious interests as

well as improperly authorize official injury to religious liberty.<sup>2</sup>

As is true with the Arizona law in this case, “[m]ost government action that alienates or offends people because it is seen as approving or endorsing religion is not the product of a deliberate government effort to be pejorative toward those who are aggrieved.”<sup>3</sup> “Rather, it results from the adoption of well meaning, legitimate, and sometimes even successful attempts to improve the conditions of society.”<sup>4</sup> “In our pluralistic culture, ‘not all beliefs can achieve recognition and ratification in the nation’s laws and public policies; and those whose positions are not so favored will sometimes feel like ‘outsiders.’”<sup>5</sup> “It is clear that the Constitution cannot generally provide relief when this occurs.”<sup>6</sup>

Nevertheless, that is precisely what the endorsement test and its “reasonable observer” standard has done. It has given veto power to

---

<sup>2</sup> Jesse H. Choper, *The Endorsement Test: Its Status And Desirability*, 18 J. L. & POL’Y 499, 521 (2002).

<sup>3</sup> *Id.* at 523.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

anyone who might feel slighted by a government action or program that, from their perspective, gives too much attention to or provides too much support, even tangentially, for a religious institution. The inconsistent rulings among and within the circuits and even within decisions by this Court illustrate how the endorsement test is not the kind of objective standard necessary to analyze Establishment Clause claims.

**A. The Poorly Articulated  
“Reasonable Observer”  
Standard Makes The  
Endorsement Test  
Inadequate As A Standard  
For Establishment Clause  
Claims.**

At the center of the endorsement test is the hypothetical “reasonable observer.” Despite his centrality to the test, this “reasonable observer” has not been clearly defined. Neither his qualities and characteristics nor his level of knowledge have been clearly articulated, “ultimately leaving us with the uncomfortable inclination that this purely fictitious character will perceive precisely as much, and only as much, as its author wants it to perceive.”<sup>7</sup> The conflict between the Ninth Circuit’s “reasonable

---

<sup>7</sup> *Id.*

observer” who would find Arizona’s educational assistance program unconstitutional, and the “reasonable observers” who would have found similar programs in Ohio, Louisiana, Washington, Minnesota, Maryland, South Carolina, Connecticut and New York constitutional<sup>8</sup> aptly illustrate the truth of that proposition.

Similarly, conflicts within and between the circuits regarding the constitutionality of identical Ten Commandments displays illustrate how the standard-less “reasonable observer” criterion has led to contradictory rulings and made the endorsement test unworkable for analyzing Establishment Clause challenges. Identical displays of nine historical documents, including the Ten

---

<sup>8</sup> See *Zelman*, 536 U.S. at 639 (vouchers); *Mitchell v. Helms*, 530 U.S. 793 (2000) (educational materials); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986)(scholarship); *Mueller v. Allen*, 463 U.S. 388 (1983) (tuition tax deduction); *Roemer v. Board of Pub. Works of Md.*, 426 U.S. 736 (1976) (grants to private colleges); *Hunt v. McNair*, 413 U.S. 734 (1973)(revenue bonds for colleges); *Tilton v. Richardson*, 403 U.S. 672 (1971) (grants for colleges); *Board of Education v. Allen*, 392 U.S. 236 (1968) (loan of textbooks).

Commandments (“Foundations Displays”), were donated by private parties to several counties in Kentucky, Indiana and other states. Using the “reasonable observer” perspective, district courts reached radically different results. The United States District Court for the Western District of Kentucky found that a reasonable observer in Grayson County would find the display unconstitutional. *ACLU of Ky. v. Grayson County*, 2008 WL 859179 (W.D. Ky. 2008), *rev’d on appeal* 591 F.3d 837 (6th Cir. 2010), *reh’g denied*, 605 F.3d 426 (6th Cir. 2010). One judge in the Eastern District of Kentucky found that a reasonable observer viewing the same display in Mercer County would not see any endorsement. *ACLU of Ky. v. Mercer County*, 219 F.Supp. 2d 777, 790 (E.D. Ky. 2002).<sup>9</sup> However, other judges in the same district found that reasonable observers in Garrard, McCreary and Pulaski counties would

---

<sup>9</sup> In the cited decision, the district court denied Plaintiffs’ motion for a preliminary injunction. The court later granted summary judgment in favor of Mercer County, *ACLU of Ky. v. Mercer County*, 240 F.Supp. 2d 623 (E.D. Ky. 2003). The Sixth Circuit affirmed. *ACLU of Ky. v. Mercer County*, 432 F.3d 624 (6th Cir. 2005), *reh’g en banc denied*, 446 F.3d 651 (6th Cir. 2006).

see endorsement because of prior stand alone displays and other events that occurred nearly a decade earlier. *ACLU v. Garrard County*, 517 F. Supp. 2d 925, 944 (E.D. Ky. 2007); *ACLU v. McCreary County*, 2007 WL 2903210 (E.D.Ky. 2007), *aff'd* 607 F. 3d 439 (6th Cir. 2010). Another Eastern District judge reviewing the display in Rowan County, which, like Garrard, McCreary and Pulaski, had a history of stand-alone Ten Commandments displays, found no endorsement. *ACLU v. Rowan County*, 513 F. Supp. 2d 889, 903 (E.D.Ky. 2007). The Sixth Circuit produced similarly inconsistent results, finding the displays constitutional in Mercer and Grayson counties, but not in McCreary and Pulaski. *Mercer County*, 432 F.3d 624; *Grayson County*, 591 F.3d 837; *McCreary County*, 607 F. 3d 439.

Upholding the same display in Elkhart County, Indiana, the Seventh Circuit attempted to inject some clarity into the reasonable observer test. *Books v. Elkhart County*, 401 F.3d 857, 867 (7th Cir. 2005). “The effect of a display of a religious object on public property is evaluated against an objective, reasonable person standard, not from the standpoint of the hypersensitive or easily offended.” *Id.* “Thus, ‘we do not ask whether there is any person who could find an endorsement of religion, whether some people

may be offended by the display, or whether some reasonable person might think [the State] endorses religion.” *Id.* (citations omitted). “Rather, we ask whether an objective, reasonable observer, ‘aware of the history and context of the community and forum in which the religious display appears,’ would fairly understand the display to be a government endorsement of religion.” *Id.* “This standard presupposes a person of ordinary understanding and sensibility, familiar with the circumstances surrounding the display.” *Id.* “Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.” *Id.* Under that definition, the Seventh Circuit found that the “reasonable observer” would “think history, not religion.” *Id.* at 869. As the other Foundations Display cases illustrate, even this attempt to add some depth to the definition of the reasonable observer has failed to yield consistent results.

Other circuit cases addressing religious displays reflect similar inconsistencies. The Third Circuit found an annual crèche and menorah display which was part of a year-round celebration of different cultures and religions in Jersey City, New Jersey unconstitutional. *ACLU of New Jersey v. Schundler*, 104 F.3d 1435, 1448 (3d Cir. 1997).

“We cannot agree that an observer of the display who is a new resident to Jersey City, has no understanding of the history of the community, but has a strong sense of his or her own faith, a faith not depicted in the display, is somehow less ‘reasonable’ and observer than the Christian or Jewish observer who has lived in Jersey City for twenty years.” *Id.* The Sixth Circuit held that a Japanese “Friendship Bell” on display in a public park was not an unconstitutional endorsement of Buddhism. *Brooks v. City of Oak Ridge*, 222 F.3d 259, 266 (6th Cir. 2000). The *Brooks* court found that the “reasonable observer” would know about the bell casting ceremony, as well as about the history of the bell’s adoption as a celebratory display for Oak Ridge’s fiftieth birthday and the city’s official statement of secular purpose to commemorate Oak Ridge’s historic connection to Japan and to express a desire for international peace and friendship.” *Id.* However, the Ninth Circuit found that a “reasonable observer” would be aware that a serpent statue represented an ancient Aztec deity but would not be aware of the statue’s connection to New Age and Mormon religions because “the reasonable observer is not an expert on esoteric religions.” *Alvarado v. City of San Jose*, 94 F.3d 1223, 1232 (9th Cir. 1996).

This patchwork of inconsistent results reflects, as the Seventh Circuit has observed, that the unarticulated “reasonable observer” standard has created an unresolved dispute within the circuits regarding “the proper level of understanding to impute onto our mythical reasonable observer.” *Freedom From Religion Foundation v. City of Marshfield*, 203 F.3d 487, 496 n. 2 (7th Cir. 2000). That unresolved dispute is also apparent within this Court’s decisions, which offers the strongest argument for jettisoning the endorsement test.

**B. Fractured, Internally  
Inconsistent Opinions By  
Members of This Court  
Demonstrate That The  
Enforcement Test Is An  
Unworkable Standard.**

The unworkability of the endorsement test is most apparent in the conflicts among members of this Court who have often reached different conclusions regarding the constitutionality of the same program or display based upon different perceptions of the “reasonable observer.” Justice Kennedy’s observations about the majority’s version of the endorsement test in *County of Allegheny v. ACLU*, accurately describes how the test overall has become an ineffective standard.

*County of Allegheny*, 492 U.S. 573, 675-676 (1989) (Kennedy, J. dissenting).

This test could provide workable guidance to the lower courts, if ever, only after this Court has decided a long series of holiday display cases, using little more than intuition and a tape measure. Deciding cases on the basis of such an unguided examination of marginalia is irreconcilable with the imperative of applying neutral principles in constitutional adjudication. “It would be appalling to conduct litigation under the Establishment Clause as if it were a trademark case, with experts testifying about whether one display is really like another, and witnesses testifying they were offended – but would have been less so were the crèche five feet closer to the jumbo candy cane.” *American Jewish Congress v. Chicago*, 827 F.2d 120, 130 (CA7 1987) (Easterbrook, J., dissenting).

*Id.* Rather than providing an objective, neutral standard for courts to use when analyzing Establishment Clause challenges and

legislatures to use when drafting legislation, the endorsement test and its “reasonable observer” standard have only further complicated what was already a labyrinthine constitutional analysis. That is most apparent in the internally inconsistent results in some of this Court’s prominent Establishment Clause cases.

A reasonable observer in Pawtucket Rhode Island would not view the city’s Christmas display that included a creche, Santa Claus house, reindeer, candy-striped poles, a Christmas tree and carolers as endorsing religion, according to Justice O’Connor. *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O’Connor, J., concurring). “Although the religious and indeed sectarian significance of the crèche, as the district court found, is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display.” Justices Brennan, Marshall, Blackmun and Stevens disagreed: “For many, the City’s decision to include the crèche as part of its extensive and costly efforts to celebrate Christmas can only mean that the prestige of the government has been conferred on the beliefs associated with the crèche, thereby providing ‘a significant symbolic benefit to religion....’” *Id.* at 701 (Brennan, J. dissenting).

The holiday displays in the Allegheny County courthouse resulted in equally fractured rulings under the endorsement test. *County of Allegheny*, 492 U.S. 573. One of the displays challenged in the case was a creche placed in the county courthouse and the other a display that included a menorah, Christmas tree, and sign saluting liberty in front of the city-county building. *Id.* at 587. Analyzing the tree and menorah display, the plurality found that a reasonable observer would not view the addition of the menorah to the tree display as an endorsement of the Christian and Jewish faiths. *Id.* at 620. Justice O'Connor said that the display "conveyed a message of pluralism and freedom of belief during the holiday season." *Id.* at 635 (O'Connor, J. concurring). "A reasonable observer would, in my view, appreciate that the combined display is an effort to acknowledge the cultural diversity of our country and to convey tolerance of different choices in matters of religious belief or nonbelief by recognizing that the winter holiday season is celebrated in diverse ways by our citizens." *Id.* at 635-636. Justice Brennan stated that the reasonable observer could not overlook the "religious significance" of the Christmas tree when it is placed next to a menorah. *Id.* at 641 (Brennan, J., concurring in part and dissenting in part). "I shudder to think that the only 'reasonable observer' is one

who shares the particular views on perspective, spacing and accent expressed in Justice Blackmun's opinion, thus making analysis under the Establishment Clause look more like an exam in Art 101 than an inquiry into constitutional law." *Id.* at 642-643. Justice Stevens also found that the reasonable observer would find that the "presence of the Chanukah menorah, unquestionably a religious symbol, gives religious significance to the Christmas tree. The overall display thus manifests governmental approval of the Jewish and Christian religions." *Id.* at 654 (Stevens, J., concurring in part and dissenting in part).

In *Pinette*, Justice O'Connor found that the reasonable observer looking at the Ku Klux Klan's display of a Latin cross in a plaza next to the state capital "would view the Klan's cross display fully aware that Capitol Square is a public space in which a multiplicity of groups, both secular and religious, engage in expressive conduct." *Pinette*, 515 U.S. at 782 (O'Connor, J., concurring in part and concurring in the judgment). "Moreover, this observer would certainly be able to read and understand an adequate disclaimer, which the Klan had informed the State it would include in the display at the time it applied for the permit, and the content of which the Board could have defined as it deemed necessary as a condition of

granting the Klan's application.” *Id.* By contrast, Justice Stevens found “a reasonable observer would likely infer endorsement from the location of the cross erected by the Klan in this case. Even if the disclaimer at the foot of the cross (which stated that the cross was placed there by a private organization) were legible, that inference would remain, because a property owner's decision to allow a third party to place a sign on her property conveys the same message of endorsement as if she had erected it herself.” *Id.* at 806 (Stevens, J., dissenting). Justice Ginsburg similarly held that a reasonable observer viewing the stand-alone cross and aware of the fact that “no human speaker was present to disassociate the religious symbol from the State...No other private display was in sight. No plainly visible sign informed the public that the cross belonged to the Klan and that Ohio's government did not endorse the display's message” would conclude that the state endorsed the display. *Id.* at 817 (Ginsburg, J., dissenting).

Applying the “reasonable observer” standard to a school funding case, Justice O'Connor determined that the observer would be able to readily discern between a program that offered direct aid to religious schools based upon student population and a program that

offered aid directly to students who then chose to use it for a religious school. *Mitchell v. Helms*, 530 U.S. 793, 842-843 (2000) (O'Connor, J., concurring).

In the former example, if the religious school uses the aid to inculcate religion in its students, it is reasonable to say that the government has communicated a message of endorsement. Because the religious indoctrination is supported by government assistance, the reasonable observer would naturally perceive the aid program as government support for the advancement of religion. That the amount of aid received by the school is based on the school's enrollment does not separate the government from the endorsement of the religious message. The aid formula does not-and could not-indicate to a reasonable observer that the inculcation of religion is endorsed only by the individuals attending the religious school, who each affirmatively choose to direct the secular government aid to the school and its religious mission. No such choices have been made. In

contrast, when government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, "[n]o reasonable observer is likely to draw from the facts ... an inference that the State itself is endorsing a religious practice or belief."... Rather, endorsement of the religious message is reasonably attributed to the individuals who select the path of the aid.

*Id.* (citation omitted).

As Justice Scalia observed in *Pinette*, the justices' disagreement about whether the "hypothetical beholder who will be the determinant of 'endorsement' should be any beholder (no matter how unknowledgeable), or the average beholder, or (what Justice STEVENS accuses the concurrence of favoring) the 'ultra-reasonable' beholder" shows how the endorsement test has led to "invited chaos." *Pinette*, 515 U.S. at 768. "And, of course, even when one achieves agreement upon that question, it will be unrealistic to expect different judges (or should it be juries?) to reach consistent answers as to what any

beholder, the average beholder, or the ultrareasonable beholder (as the case may be) would think. It is irresponsible to make the Nation's legislators walk this minefield." *Id.*

As one commentator observed, the endorsement test contains insoluble difficulties that render the test incomprehensible.<sup>10</sup> "Is the objective observer (or average person) a religious person, an agnostic, a separationist, a person sharing the predominate religious sensibility of the community, or one holding a minority view? Is there any 'correct' perception?"<sup>11</sup> One problem with the test, he said, is that it "attempts to objectify that which avoids objectification."<sup>12</sup> The test "incorrectly assumes that the symbolic inquiry is reducible to a rational construct, while the interpretation of symbols, and perhaps religion itself, is inherently irrational. Objectifying the inquiry in this manner is, as the idiom suggests, to place a square peg in a round hole."<sup>13</sup>

---

<sup>10</sup> William P. Marshall, "We Know it When We See It." *The Supreme Court Establishment*, 50 S. CAL. L.REV. 495, 536-537 (1986).

<sup>11</sup> *Id.* at 537.

<sup>12</sup> *Id.* at 536.

<sup>13</sup> *Id.*

The Ninth Circuit attempted that feat again when it used the endorsement test to invalidate an Arizona school tax credit a law virtually identical to laws other courts, including this Court, have found valid. The ruling illustrates how the unarticulated standards of the test have led to inconsistent rulings that often “disrupt the settled principle that policies providing incidental benefits to religion do not contravene the Establishment Clause.” *Pinette* 515 U.S. at 768. “It has radical implications for our public policy to suggest that neutral laws are invalid whenever hypothetical observers may—even reasonably—confuse an incidental benefit to religion with state endorsement.” *Id.* Those radical implications are manifested in the Ninth Circuit’s ruling.

The fractured results spawned by the endorsement test show why it should be abandoned as an intellectually incoherent legal standard. With few exceptions, “the outcome of any constitutional case judged under the endorsement/objective observer analysis can be changed by simply altering the characteristics of the observer.”<sup>14</sup> Such an ad-hoc, fact-specific standard does not afford government officials

---

<sup>14</sup> Choper, *The Endorsement Test*, at 513-514.

the kind of objective, predictable standard needed to craft legislation that will withstand constitutional scrutiny.<sup>15</sup> Therefore, it should be abandoned.

**II. THE NINTH CIRCUIT'S RELIANCE UPON *NYQUIST* TO OVERTURN ARIZONA'S SCHOOL TAX CREDIT STATUTE DEMONSTRATES THAT *NYQUIST* SHOULD BE EXPLICITLY OVERRULED.**

The Ninth Circuit used the *Zelman* Court's failure to overrule *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S., 756 (1973) to find a loophole which it could use to conclude that the Arizona educational assistance program was a disguised attempt to circumvent the Establishment Clause. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002) The Ninth Circuit's manipulation of *Nyquist* to find an Establishment Clause violation where there is none demonstrates that it is time to explicitly overrule *Nyquist*.

The Ninth Circuit's explanation for relying upon *Nyquist* instead of the more recent and relevant decision in *Zelman* reveals the

---

<sup>15</sup> *Id.* at 514.

danger of leaving *Nyquist* as a viable precedent. Until *Nyquist* is explicitly overruled, it will continue to be used, as it was here, when courts are looking for a way to invalidate facially neutral tax credit programs when some individuals use them to benefit religious schools.

In *Zelman*, the Court held “*Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion.” 536 U.S. at 662, 122 S.Ct. 2460. As discussed above, Section 1089 does not “offer aid directly to individual recipients,” but rather mediates the aid through taxpayers and STOs. Insofar as Section 1089 is not a “program of true private choice,” within the meaning of *Zelman*, the Court's holding in *Nyquist* is relevant to determining whether a reasonable observer would conclude the tax credit program endorses religion.

*Winn*, 562 F.3d at 1021. “*Nyquist* illustrates that if an educational assistance program provides individual choice through tax credits,

but those tax credits hinder the program's ability to achieve its valid secular goals, a reasonable observer could well conclude that the tax credits are simply masking an Establishment Clause violation." *Id.*

Arizona's program is substantially similar to the program upheld in *Zelman*. Nevertheless, the Ninth Circuit found that "Section 1089 is not a program of true private choice immune from further constitutional scrutiny" under *Zelman*, but was susceptible to invalidation under *Nyquist*. *Id.* The panel capitalized on the continuing viability of *Nyquist* to create a non-existent constitutionally significant distinction between the neutral educational assistance program aimed at parents in *Zelman* and the neutral educational assistance program aimed at taxpayers in this case. In other words, since *Nyquist* has not been overruled, the Ninth Circuit could use it to "unmask" an Establishment Clause violation the panel believed was lurking in shadows of the statute. The Ninth Circuit reasoned that because the recipients of educational assistance (taxpayers) were different in Section 1089 than were the recipients of assistance in the Ohio statute in *Zelman* (parents), it could distinguish *Zelman* and go back to *Nyquist* to find an Establishment Clause violation.

The Ninth Circuit's actions illustrate how, as former Chief Justice Burger observed in his dissent, the perspective adopted by the majority in *Nyquist* created a dangerous precedent that undercuts this Court's basic principles for analyzing Establishment Clause claims. *Nyquist*, 413 U.S. at 799 (Burger, C.J. concurring in part, dissenting in part). Referencing *Everson v. Board of Education*, 330 U.S. 1 (1947) and *Board of Education v. Allen*, 392 U.S. 236 (1968), Chief Justice Burger said:

While there is no straight line running through our decisions interpreting the Establishment and Free Exercise Clauses of the First Amendment, our cases do, it seems to me, lay down one solid, basic principle: that the Establishment Clause does not forbid governments, state or federal, to enact a program of general welfare under which benefits are distributed to private individuals, even though many of those individuals may elect to use those benefits in ways that 'aid' religious instruction or worship.

*Id.* For example, in *Everson*, the Court held that a New Jersey township could reimburse all

parents of school-age children for bus fares paid in transporting their children to school, even though it might benefit students attending religious schools. *Everson*, 330 U.S. at 18. The New Jersey legislation, as applied, “does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.” *Id.* Similarly, in *Allen*, The Court upheld a statute that required the public schools to loan textbooks, without charge, to all seventh to twelfth grade students, including those in private schools. *Allen*, 392 U.S. at 238. Citing to *Everson*, the *Allen* court held that “the Establishment Clause does not prevent a State from extending the benefits of state laws to all citizens without regard for their religious affiliation.” *Id.* at 241-242. The law merely makes available to all children the benefits of a general program to use books free of charge. *Id.* at 243-244. No funds were spent and no books were furnished to parochial schools, and the financial benefit accrued to parents and children, not to schools, so the program did not violate the Establishment Clause. *Id.*

As Chief Justice Burger pointed out in his *Nyquist* dissent:

The Court's opinions in both *Everson* and *Allen* recognized that

the statutory programs at issue there may well have facilitated the decision of many parents to send their children to religious schools. *Everson v. Board of Education*, *supra*, 330 U.S., at 17-18, 67 S.Ct., at 512-513; *Board of Education v. Allen*, *supra*, 392 U.S., at 242, 244, 88 S.Ct., at 1925, 1927. See *Norwood v. Harrison*, 413 U.S. 455, at 463 n. 6, 93 S.Ct. 2804, at 2810, 37 L.Ed.2d 723 (1973). Indeed, the Court in both cases specifically acknowledged that some children might not obtain religious instruction but for the benefits provided by the State. Notwithstanding, the Court held that such an indirect or incidental 'benefit' to the religious institutions that sponsored parochial schools was not a conclusive indicium of a 'law respecting an establishment of religion.

*Nyquist*, 413 U.S. at 800 (Burger, C.J. concurring in part and dissenting in part). The essence of these decisions is that "government aid to individuals generally stands on an entirely different footing from direct aid to religious institutions." *Id.* at 801. "Where the

state law is genuinely directed at enhancing a recognized freedom of individuals, even one involving both secular and religious consequences, such as the rights of parents to send their children to private schools, the Establishment Clause no longer has a prohibitive effect.” *Id.* (internal citations omitted). That conclusion reflects the principle that “the balance between the policies of free exercise and establishment of religion tips in favor of the former when the legislation moves away from direct aid to religious institutions and takes on the character of general aid to individual families.” *Id.* at 802. That judgment in turn “reflects the caution with which we scrutinize any effort to give official support to religion and the tolerance with which we treat general welfare legislation.” *Id.*

The *Nyquist* majority abandoned that reasoned approach in favor of the “unsupportable approach of measuring the ‘effect’ of a law by the percentage of the recipients who choose to use the money for religious, rather than secular, education.” *Id.* at 804. In other words, the *Nyquist* court improperly focused on the effects of the beneficiaries’ choices under the law instead of whether the state did anything to steer those choices in the direction of religious institutions. As Chief Justice Burger observed, that

improper shift in focus, followed to its logical conclusion would subject government assistance programs such as social security benefits or “G.I. Bill” payments, which beneficiaries direct to religious institutions, to invalidation. *Id.*

This Court has addressed the fallout from the *Nyquist* Court’s shift in focus in a series of cases which have clarified that benefits accruing to religious institutions as a result of beneficiaries’ choices **do not** violate the Establishment Clause. *In Mueller v. Allen*, 463 U.S. 388, 397 (1983), this Court addressed some of the problems that had arisen as a result of *Nyquist* when it rejected an Establishment Clause challenge to a Minnesota program that provided tax deductions for various educational expenses, including private school tuition costs, even though the great majority of the program’s beneficiaries (96 percent) were parents of children in religious schools. The *Mueller* court said that the fact that the vast majority of beneficiaries of the program were parents of children in religious schools was irrelevant to the constitutional analysis. Similarly, in *Witters v. Washington Department of Services for Blind*, 474 U.S. 481, 487 (1986), the Court rejected an Establishment Clause challenge to a vocational scholarship program that provided tuition aid

to a student studying at a religious institution to become a pastor, noting that “[a]ny aid ... that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.” Finally, in *Zelman*, this Court removed any remaining doubt about the constitutionality of government educational aid programs which provide benefits to individuals who independently choose how to apply the funds, even when the choices are predominately religious. *Zelman*, 536 U.S. at 662.

These post-*Nyquist* rulings should have settled the question of the constitutionality of educational assistance programs through which third parties independently direct some funds to religious institutions. However, since this Court did not explicitly overrule *Nyquist*, it left open a window of opportunity for appellate courts to enter when they want to strike down a program they believe provides too much assistance to religious organizations. That is what the Ninth Circuit did here. It used an inconsequential difference in wording to create a “constitutionally significant” difference between the Ohio plan in *Zelman* and Arizona’s plan in this case. *Winn v. Arizona Christian School Tuition Organization*, 586 F.3d 649, 664 n.12 (9th Cir. 2009) (denial of petition for

rehearing *en banc*) (O’Scannlain, J. dissenting). The panel took full advantage of a procedural technicality to ignore the clear holding in *Zelman* and invalidate Arizona’s educational assistance program because it directed benefits to taxpayers whose choices have created a greater availability of assistance to religious schools than to non-religious. The result is a holding that violates the principles established in *Everson*, *Allen* and other precedents: “We therefore hold that plaintiffs have alleged facts upon which a reasonable, informed observer could conclude that Section 1089, as applied, violates the Establishment Clause *even though the state does not directly decide whether any particular sectarian organizations will receive program aid.*” *Winn*, 562 F.3d at 1021 (emphasis added). Since *Everson* and *Allen* established that the Establishment Clause does not prohibit programs in which “the state does not directly decide whether sectarian organizations will receive program aid,” the Ninth Circuit’s conclusion is an inherent contradiction.

The fact that the Ninth Circuit could use *Nyquist* to reach such a conclusion illustrates that the precedent should be explicitly overruled. *Nyquist* is little more than an empty shell, and appellate courts should not be permitted to use that shell as a loophole

through which to contradict this Court's established precedent.

**III. THE NINTH CIRCUIT'S USE OF THE "PERVASIVELY SECTARIAN" DOCTRINE ILLUSTRATES THAT THE DOCTRINE SHOULD BE EUTHANIZED AND BURIED AS A CONSTITUTIONALLY OFFENSIVE RELIC OF THE PAST.**

A plurality of this Court's has rejected the "pervasively sectarian" doctrine as "born of bigotry, [which] should be buried now." *Mitchell v. Helms*, 530 U.S. 793, 829 (2000)(plurality opinion). However, because two justices concurring in the judgment did not explicitly reject the doctrine, the Ninth Circuit determined that the doctrine was still viable and alluded to it as authority for its invalidation of Arizona's educational assistance program. See *Winn v. Arizona Christian School Tuition Organization*, 562 F.3d 1002, 1013, 1019 (9th Cir. 2009) (panel opinion); *Winn*, 586 F.3d 649 655 (9th Cir. 2009) (denial of rehearing *en banc*). Other circuit courts have similarly argued that the "pervasively sectarian" doctrine remains viable in order to invalidate otherwise permissible government

aid programs.<sup>16</sup> These inconsistent rulings have added mines to the Establishment Clause minefield through which legislatures are forced to walk. This Court should clear away these mines by declaring, once and for all, that the “pervasively sectarian” doctrine is dead.

In his plurality opinion in *Mitchell*, Justice Thomas offered several reasons why the “pervasively sectarian” doctrine should be explicitly overruled. *Mitchell*, 530 U.S. at 826. Those reasons are equally apparent in the Ninth Circuit’s decision. Further illustrating why the doctrine should be abandoned. First and foremost, the “pervasively sectarian” doctrine “has a shameful pedigree” born of animus toward sectarian schools, and particularly Roman Catholic schools, which resulted in an hostility toward religion that itself was improper under the Constitution. *See generally, id.* at 828.

Opposition to aid to ‘sectarian’  
schools acquired prominence in the

---

<sup>16</sup> *See, e.g., Freedom from Religion Foundation, Inc. v. Bugher*, 249 F.3d 606, 613-614 (7th Cir. 2001) (like the Ninth Circuit, claiming that *Nyquist* was not explicitly overruled and therefore could be relied upon to invalidate a funding program)

1870s with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that "sectarian" was code for "Catholic." Notwithstanding its history, of course, "sectarian" could, on its face, describe the school of any religious sect, but the Court eliminated this possibility of confusion when, in *Hunt v. McNair*, 413 U.S. [734], at 743, 93 S.Ct. 2868 [(1973)], it coined the term "pervasively sectarian"—a term which, at that time, could be applied almost exclusively to Catholic parochial schools and which even today's dissent exemplifies chiefly by reference to such schools.

*Id.* at 828-829. While the term "pervasively sectarian" first appeared in *Hunt*, it actually arose from the Court's analysis of the educational assistance programs in *Lemon v.*

*Kurtzman*, 403 U.S. 602 (1971). In *Lemon*, the court engaged in an intrusive examination of the proximity of churches to religious schools receiving assistance, the religious symbols present in the school buildings, the time spent in religious instruction, the “atmosphere” of the schools, the makeup of the faculty and the nature of school governance. *Id.* at 615-616. Based upon that examination, the Court struck down the programs for violating the “excessive entanglement” prong of the newly minted *Lemon* test. *Id.* at 618-619. Following that lead, the *Hunt* court engaged in a similar inquiry and held that the Establishment Clause prohibits government fund of “institutions in which religion is so pervasive that a substantial portion of its funds are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.” *Hunt*, 413 U.S. at 743.

In subsequent cases various pluralities of the Court continued to engage in intrusive examinations of the doctrines and practices of religious schools in order to determine whether they were “pervasively sectarian” and therefore prohibited from receiving government aid. “The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious

values and belief.” *Meek v. Pittenger*, 421 U.S. 349, 366 (1975) (plurality opinion)(*overruled in Mitchell*). “Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole.” *Id.* Therefore, “direct aid to the predominantly church-related nonpublic schools inescapably results in the direct and substantial advancement of religious activity, and thus constitutes an impermissible establishment of religion.” *Id.* In *Roemer v. Board of Public Works*, 426 U.S. 736 (1976), the Court again engaged in an intrusive examination of four Roman Catholic colleges in order to determine whether they were “pervasively sectarian” and therefore prohibited from benefitting from governmental aid. In that case, the plurality found that the colleges were not “pervasively sectarian,” and since state law prohibited use of the funds for religious activity, the challenged statute did not violate the Establishment Clause. *Id.* at 758-759.

In *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646, 648 (1980), the Court seemed to back away from prohibiting aid to “pervasively sectarian” schools by upholding a New York program of direct cash reimbursements of the actual costs of the religious schools for preparation and

grading of state-mandated tests. The majority said that *Meek* did not prohibit all aid to sectarian schools, but only aid that could not be proven to be benefitting solely secular instruction. *Id.* at 850. The dissent called the continuing validity of the “pervasively sectarian” into question, but the majority did not explicitly overrule it. *Id.* at 667-668. In *Mueller* the Court seemed to step further away from the strict application of the doctrine when it upheld the Minnesota tuition tax deduction statute. *Mueller*, 463 U.S. at 398-399. The *Mueller* court said that the private choices in the Minnesota law meant that there was no “imprimatur of state approval” conferred on any particular religion or on religion generally. *Id.* at 399. Although it created the independent funding paradigm that significantly undercut the “pervasively sectarian” doctrine, the majority did not explicitly overrule it. *Id.* Consequently, it was resurrected two years later in *Aguilar v. Felton*, 473 U.S. 402 (1985) and *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985). Those decisions were overruled by *Agostini v. Felton*, 521 U.S. 203 (1997), but the doctrine, again, was not explicitly overruled.

As a result, as Justice Thomas noted in *Mitchell*, the “pervasively sectarian” doctrine continued to rear its head even while the Court

upheld state educational assistance laws that indirectly benefitted religious schools. *Mitchell*, 530 U.S. at 828-829. The Ninth Circuit's most recent allusion to the doctrine is the latest example of this phenomenon. The court engaged in herculean efforts to prove that the neutral tax credit law is a disguised attempt to funnel money to "religious schools" to the detriment of secular schools and made particular mention of the Catholic Tuition Organization. *Winn*, 562 F.3d at 1016. The religious hostility Justice Thomas described in *Mitchell* remains a problem, which further illustrates why the "pervasively sectarian" doctrine should be fully and finally rejected.

The Ninth Circuit's ruling also illustrates that the "special hostility" to sincere religious beliefs Justice Thomas cautioned against in *Mitchell* continue to surface as courts continue to apply the "pervasively sectarian" doctrine. The Ninth Circuit placed particular emphasis on the fact that the vast majority of scholarship money is only available for religious private schools. *Winn*, 562 U.S. at 1017. However, "[i]f a program offers permissible aid to the religious (including the pervasively sectarian), the areligious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be." *Mitchell*, 530

U.S. at 827-828. “The pervasively sectarian recipient has not received any special favor, and it is most bizarre that the Court would, as the dissent seemingly does, reserve 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.” *Id.* In other words, “the religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government’s secular purpose.” *Id.* at 827. Similarly, in this case, the religious schools, including Catholic schools, have not received any special favor from the State of Arizona, which makes tax credits available for scholarships to religious, “areligious and irreligious” schools alike. Arizona has not supported a particular, or any, religious viewpoint. The Ninth Circuit’s allusion to the “pervasively sectarian” doctrine to find a constitutional violation illustrates the danger posed by keeping the doctrine alive.

Furthermore, inquiring into the religious views of scholarship recipients, which is required under the “pervasively sectarian” doctrine, “is not only unnecessary but also offensive.” *Id.* at 828. “It is well established, in numerous other contexts, that courts should

refrain from trolling through a person's or institution's religious beliefs." *Id.* (citing *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 887 (1990)).

"In addition, and related, the application of the 'pervasively sectarian' factor collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity. *Id.* (citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993) and *Widmar v. Vincent*, 454 U.S. 263 (1981)). That collision is eminently apparent when the Ninth Circuit's ruling in this case is contrasted with its rulings regarding equal access and other government benefits. For example, in *Hills v. Scottsdale Unified School District No. 48*, 329 F.3d 1044, 1052 (9th Cir. 2003), the court cited to *Lamb's Chapel* and overturned a school district policy that granted access to organizations to distribute informational flyers but denied access to a religious organization. "Premising refusal of permission to advertise an event or class based on the religious nature of the event or class cannot be justified under our precedents, where other similar groups can advertise events or classes similar except for their lack of religious viewpoint." *Id.* *See also*,

*Prince v. Jacoby*, 303 F.3d 1074, 1092 (9th Cir. 2002) (invalidating a school policy denied access to a Christian club while granting access to similar secular clubs). By contrast, in this case, the Ninth Circuit is premising invalidation of the Arizona tax credit law upon the religious nature of the recipients. *Winn*, 562 U.S. at 1017. If Arizona must exclude or limit “pervasively sectarian” schools as recipients of tax credit dollars to comport with the Establishment Clause, then how can it avoid violating the First Amendment under *Hills* and *Jacoby* by denying religious schools access to scholarship funds?

Using the “pervasively sectarian” doctrine as the Ninth Circuit does here fosters discrimination on the basis of religion. That irreconcilable conflict with *Rosenberger*, *Lamb’s Chapel* and *Widmar* illustrates why the “pervasively sectarian” doctrine must be explicitly overruled. This Court has not relied upon the doctrine to overturn a benefit program since 1985 (*Aguilar*), but the lack of a fifth vote for Justice Thomas’ eulogy for the doctrine has permitted lower courts to continue to resuscitate it to invalidate otherwise valid programs. That procedural technicality should not be permitted to undermine *Mitchell* and other recent precedent which uphold

educational assistance programs virtually identical to Arizona's.

“In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it.” *Mitchell*, 530 U.S. at 829. The Ninth Circuit's allusion to the doctrine in its ruling demonstrates that what was true in 2000 is even more true today: “This doctrine, born of bigotry, should be buried now.” *Id.*

### CONCLUSION

The Ninth Circuit's ruling invalidating an education assistance program substantially similar to the Ohio program this Court upheld in *Zelman* emphasizes three lingering issues that cloud this Court's Establishment Clause jurisprudence. The unarticulated “reasonable observer” standard central to the endorsement test is an unworkable concept that leads to inconsistent, even contradictory, results. The continuing viability of *Nyquist* as a precedent for educational assistance programs creates a loophole that permits appellate courts to circumvent establish precedent to reach a desired result. Finally, the “pervasively sectarian” doctrine places the Establishment Clause and Free Exercise Clause at odds in a way that prevents legislatures and courts from

developing programs that meet state interests in education and general welfare without infringing constitutional rights. The Ninth Circuit used all of these factors to reach its conclusion that Arizona' tax credit program is unconstitutional.

Because the continuing use of these three concepts can lead to unprincipled results, this Court should explicitly abandon them.

Dated August 6, 2010.

Mathew D. Staver (Counsel of Record)	Stephen M. Crampton
Anita L. Staver	Mary E. McAlister
Horatio G. Mihet	David M. Corry
LIBERTYCOUNSEL	LIBERTY COUNSEL
1055 Maitland Center	PO Box 11108
Commons	Lynchburg, VA 24506
Second Floor	(434) 592-7000
Maitland, FL 32751	Email: <a href="mailto:court@lc.org">court@lc.org</a>
(800) 671-1776	Attorneys for Amici
Email: <a href="mailto:court@lc.org">court@lc.org</a>	