

Arizona Christian School Tuition Organization v. Winn: Does the Government Own the Money in Your Pocket?

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For 20 years, beginning soon after the enactment of the nation's first modern private school voucher program in Milwaukee, not a day passed that school choice advocates were not in court somewhere in the nation defending parents' right to choose the best school for their child. From Wisconsin to Florida, Illinois to Colorado, and Ohio to Arizona, the Institute for Justice and its allies have been in state and federal courts arguing that empowering parents to choose from among public and private schools, including religious schools, accords with federal and state constitutional guarantees of religious freedom.

But that 20-year "everyday" litigation streak came to a gratifying end on April 4, 2011, when the U.S. Supreme Court dismissed *Arizona Christian School Tuition Organization (ACSTO) v. Winn*.¹ In *ACSTO*, the Court held that taxpayers do not have standing to assert an Establishment Clause challenge to a state income-tax credit granted to individuals who donate their money to private nonprofit organizations that use these donations to help families pay tuition at private and religious elementary and secondary schools.

The respite from school choice litigation did not last long, however. Just over two months after *ACSTO* was decided, two lawsuits

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¹ *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011).

were filed against a voucher program recently enacted by the school district in Douglas County, Colorado, and soon thereafter a legal challenge was filed against Indiana's new statewide voucher program.² The Institute for Justice has moved to intervene in those cases on behalf of parents and children in desperate need of educational choice. And it is gearing up to intervene in yet another school choice case in Arizona, where the teachers' unions have threatened a lawsuit challenging the state's innovative education savings account program for children with special needs.

Given the holdings in *ACSTO* and its predecessor case *Zelman v. Simmons-Harris*,³ future school choice cases will most certainly be filed only in state courts and will focus on state constitutional claims. There will undoubtedly be a long, drawn-out, state-by-state battle requiring the same type of perseverance and hard work that marked the first 20 years of school choice litigation. But defenders of choice are energized, passionate, and, perhaps most importantly, on solid legal ground.

I. A Story within a Story

For me, the *ACSTO* decision came as a bit of a surprise. Throughout the more than 10 years of litigation, the standing argument gained no traction—at least not until the case reached the U.S. Supreme Court for the *second* time. Upon reflection, however, the decision should not have been a surprise. In the final months of briefing, the merits argument became substantially intertwined with the taxpayer-standing argument. Indeed, the *ACSTO* plaintiffs declared in their merits brief that the “controlling issue” in the case was whether the program involved private charity or government spending.⁴ If the program involved private, not government, spending, it should have been obvious that the “narrow exception” to the

² Institute for Justice Files to Intervene to Defend New Colorado School Choice Program, <http://ij.org/about/3874> (last visited July 15, 2011); Institute for Justice Will Defend Indiana's New School Choice Program Against Legal Attack, <http://ij.org/about/3898> (last visited July 15, 2011).

³ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding a publicly funded private school scholarship program permitting families to select both religious and nonreligious private schools under the Establishment Clause because the program was religiously neutral and controlled by private choice).

⁴ Brief for Respondents at 1, *ACSTO v. Winn*, 131 S. Ct. 1436 (2011) (Nos. 09-987, 09-991), 2010 WL 3624706.

prohibition against taxpayer standing created by *Flast v. Cohen* would not apply.⁵ Why? Because *Flast* involved the government's taxing and spending power.

But I'm getting ahead of myself. While the Court's holding in *ACSTO* is important, the case was first and foremost about private school choice and the lengths that school choice opponents will go to halt school choice programs. That is why this article will start at the beginning of the school choice fight.

School Choice in a Nutshell

The philosophy of school choice is simple: If the government is going to spend money on public education, then it should be done in a way that maximizes parental choice and minimizes government monopolization. Parents know better than bureaucrats what kind of educational environment best suits their children's needs, and choice-driven competition between schools is essential to any education reform effort that seeks to ensure that public schools perform at acceptable levels.

All parents, regardless of means, should enjoy a reasonable measure of choice in deciding what schools their children attend. Just above 10 percent of Americans exercise school choice by sending their K–12 children to private school.⁶ Many more exercise school choice by moving to neighborhoods with (what they believe to be) good public schools.⁷ But most Americans lack the financial means to do either of those things and must instead accept whatever public schools happen to serve the neighborhood they can afford to live in.⁸ Public school officials know that their "customers" have nowhere

⁵ *Flast v. Cohen*, 392 U.S. 83, 105–06 (1968) (creating an exception to the general rule that taxpayers do not have standing to challenge a government spending program because the Establishment Clause specifically limits congressional "taxing and spending power").

⁶ Nat'l Ctr. for Educ. Statistics, Percentage distribution of students ages 5 through 17 attending kindergarten through 12th grade, by school type or participation in homeschooling and selected child, parent, and household characteristics: 1999, 2003, and 2007, Table 39, available at http://nces.ed.gov/programs/digest/d09/tables/dt09_039.asp (last visited July 12, 2011).

⁷ See Lance T. Izumi, Vicki E. Murray, and Rachel S. Chaney, *Not as Good as You Think: Why the Middle Class Needs School Choice*, Pac. Res. Inst. (2007).

⁸ In 2007, 70.6 percent of children attended a public school assigned to them by the government. See Nat'l Ctr. for Educ. Statistics, *supra* note 6.

else to turn, so those officials lack any meaningful incentive to provide a high-quality education.⁹

Per-pupil public school funding has *octupled* since the end of World War II—even though the U.S. population has only doubled—and it has *tripled* since the 1970s.¹⁰ Yet performance during that time has remained stagnant. America spends more on public education per pupil than any other industrialized nation and receives far worse results. Currently, Washington, D.C., spends approximately \$16,500 per pupil per year, but still has one of the nation’s most atrocious public school systems.¹¹ And contrary to popular mythology, public school teachers are not underpaid, but actually earn roughly the same amount as architects, accountants, engineers, nurses, and other professionals of similar stature—about \$30 per hour.¹² So more money is not the answer; choice-driven competition is.

There are four basic ways of delivering true¹³ school choice:

First are scholarships or “vouchers” given directly by the government to parents, who may then select the private (and sometimes public) school of their choice, using the voucher as partial or total payment, depending on the terms of the particular program.

Second are personal tax credits and deductions for educational expenses. Under the terms of personal-use tax benefits, parents who spend their own money on private (and many times public) school expenses, including the cost of tuition, may claim a personal tax credit or deduction on their state income taxes.

Third are scholarships awarded by private scholarship-granting organizations and funded by personal or corporate contributions.

⁹ See generally John E. Chubb and Terry M. Moe, *Politics, Markets, and America’s Schools*, The Brookings Inst. (1990).

¹⁰ Jay P. Greene, *Education Myths: What Special Interest Groups Want You to Believe About Our Schools—And Why It Isn’t So* 10 (2005).

¹¹ Leah Fabel, D.C., *Maryland Rank Near Top in Per-Pupil Spending*, Wash. Examiner, May 25, 2011, at 4, available at <http://washingtonexaminer.com/local/dc/2011/05/dc-maryland-rank-near-top-pupil-spending>.

¹² Greene, *supra* note 10, at 78.

¹³ “True” is used to denote school choice programs that enable parents to escape the public school system altogether. Within the public school system, there is a slowly increasing tendency to provide greater parental choice through inter- and intra-district transfer options, charter schools, magnet schools, etc. While important, those measures are insufficient in themselves because they usually present no competitive threat to the public school system itself, which is the root of the problem.

Contributors are then eligible to claim a state income tax credit when they file their tax return. This is the type of program that was at issue in *ACSTO*.

Finally, there has been recent interest in publicly funded education savings accounts.¹⁴ Education savings accounts differ from traditional voucher programs in that parents can use the funds deposited in their child's account for a wide variety of educational services, including tutoring, purchasing curriculum, online instruction, saving for college tuition—and, of course, for tuition at private schools.

Currently, 20 voucher or scholarship tax credit programs operate in 12 states and Washington, D.C.¹⁵

2011: A Blockbuster Year for School Choice

In fall 2010, the Gleason Family Foundation hosted a school choice conference in San Francisco to announce plans for the first annual School Choice Week to be held the third week of January 2011. The conference galvanized the school choice movement around the shared values of expanding educational options for families and increasing student achievement. There was a particular emphasis on bipartisanship because there is no reason that school choice should be identified as either a Republican or Democrat issue. School Choice Week resulted in 200 organizations putting on over 150 events with tens of thousands of activists, parents, educators, policy wonks, and legislators participating.¹⁶ Those events were publicized in more than 550 news stories.

School Choice Week's momentum carried over into state legislatures. Since November 2010, for example, the Institute for Justice (my organization) has provided legislative counseling in more than 20 states—an unprecedented number for a single legislative season. Careful drafting of school choice legislation is not only the key to a successful program, it is an essential part of maximizing the likelihood a program will withstand a constitutional challenge.

¹⁴ See generally Matthew Ladner & Nick Dranias, *Education Savings Accounts: Giving Parents Control of Their Children's Education*, Goldwater Inst., No. 11-01 (Jan. 28, 2011).

¹⁵ American Federation for Children, *Facts*, <http://www.federationforchildren.org/facts> (last visited July 12, 2011).

¹⁶ See National School Choice Week, http://schoolchoiceweek.com/Video?video_id=32 (last visited July 12, 2011).

The six-month period following School Choice Week was the most productive ever for school choice legislation. Forty-two states introduced 96 bills to create or expand private school choice programs. As of this writing, 11 states and the U.S. Congress have passed school choice legislation of some type (either school voucher or scholarship tax credit programs), including five expansions of existing programs and seven new programs.¹⁷ In addition, Congress reauthorized and expanded the Washington D.C. Opportunity Scholarship Program, a voucher program that only last year appeared to have been sentenced to a slow, lingering death from the Obama administration's decision not to allow any new students to apply for scholarships.

Arizona was the first state to create a significant new school choice program this year. It adopted the nation's first publicly funded education savings account program, targeted at children with disabilities.¹⁸ The school district in Douglas County, Colorado, was the next to enact a new program. Colorado is one of the few states that give school districts real authority to innovate, and the result is a publicly funded scholarship program for private school tuition.¹⁹ Indiana not only expanded its existing scholarship tax credit program and authorized a new personal tax deduction for educational expenses, it also created a means-tested statewide voucher program.²⁰ Oklahoma created a new scholarship tax credit program.²¹ North Carolina adopted a personal-use tax credit for families with special-needs children.²² And Wisconsin, where the modern school choice movement was born, eliminated the cap on enrollment in the Milwaukee program, made more families eligible, and expanded choice to the city of Racine.²³

¹⁷ American Federation for Children, *School Choice Makes History*, <http://www.federationforchildren.org/articles/402> (last visited July 18, 2011).

¹⁸ S. Bill 1553, 50th Leg., 1st Reg. Sess. (Ariz. 2011).

¹⁹ Douglas County School District, *Choice Scholarship Pilot Program*, http://www.dcsdk12.org/portal/page/portal/DCSD/District_Information/School_Choice/Option_Certificates, (last visited July 15, 2011).

²⁰ The School Scholarship Act, H. Bill 1003, 117th Gen. Assem., 1st Reg. Sess. (Ind. 2011).

²¹ The Oklahoma Equal Opportunity Education Scholarship Act, S. Bill 969, 53rd Leg., Reg. Sess. (Okla. 2011).

²² H. Bill 344, Gen. Assem., Reg. Sess. (N.C. 2011).

²³ Governor Walker's 2011-13 biennial budget (2011 Wisconsin Act 32).

There are at least three reasons to believe that the level of interest in adopting new and expanding existing private school choice programs will continue for the foreseeable future.

First, school choice works. A recent report by Foundation for Educational Choice summarized all the empirical studies examining the effectiveness of school choice programs in improving educational outcomes both for children participating in the program and for public schools that face competitive pressure from school voucher programs.²⁴ The report demonstrated that 9 out of 10 empirical studies found positive educational gains for children participating in the program—and the one study that did not find a positive impact found no visible impact of any kind.²⁵ Indeed, no empirical study has ever found a school voucher program to negatively affect educational outcomes. Nineteen empirical studies examined the effect of school choice programs on public schools. With one immaterial exception, they all concluded that vouchers improve educational outcomes in public schools.²⁶

Second, school choice programs—if designed to do so—can save states money. Considering that many states are in severe financial straits and looking for ways to save money—particularly on educational expenses that often make up one of the largest budget items—school choice is a natural alternative. Arizona’s Individual Tax Credit Scholarship program was not even designed as a cost-saving measure, yet an analysis by the *Arizona Republic* concluded that the tax credit saves the state at least \$8.3 million each year.²⁷

²⁴ Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Vouchers*, Found. for Educ. Choice 1–3 (2nd ed. 2011).

²⁵ *Id.* at 8 (six had positive gains across all students, while three had positive gains for only some students).

²⁶ *Id.* at 15. The exception is the recent study of Washington, D.C.’s voucher program, which holds public schools “harmless” by continuing to provide funding to public schools for the students who have left and now receive a voucher. *Id.* at 25.

²⁷ Ronald J. Hansen, *Private School Tax Credits Save \$8.3 Million*, *Arizona Republic*, Oct. 20, 2009, available at <http://www.azcentral.com/news/election/topstories/articles/1020taxcredits1020.html>. A more generous examination of the Arizona tax credit program by Dr. Charles North at Baylor University argues that the program saves the state a minimum of \$99.8 million and possibly as much as \$241.5 million per year. See Charles M. North, *Estimating the Savings to Arizona Taxpayers of the Private School Tuition Tax Credit*, Center for Ariz. Policy, available at <http://www.azpolicy.org/sites/azpolicy.org/files/downloads/ArizonaSTOTaxCreditCMNorth.pdf>.

Finally, school choice is constitutional. Indeed, many new school choice programs over the past several years—particularly tax credit programs and voucher programs for special-needs students—have gone unchallenged in court. Four years ago, the Institute for Justice and the American Legislative Exchange Council published a nationwide analysis of each state’s constitution to determine the legal viability of school choice programs and concluded that nearly every state’s constitution will permit some form of private school choice.²⁸

Of course, some types of school choice programs and some states are more likely to generate legal challenges than others. While there will likely be interest in and consideration of all four types of school choice programs, the *ACSTO* decision may spur some states to seriously consider tax credit programs because they are now effectively immune from federal court challenges by state taxpayers. Tax credit programs have also survived or avoided legal challenges in states where voucher programs have been held unconstitutional.²⁹

II. Arizona’s Path to Genuine Education Reform (and its Road to the Supreme Court)

In the mid-’90s, the Arizona legislature charted a course toward genuine educational freedom. Like those early explorers who set sail on uncharted waters, Arizona’s journey has been long, sometimes choppy, and filled with hardship, sacrifice, and triumph.

Arizona’s first step, in 1994, was to enact a robust charter school law.³⁰ Charter schools are nontraditional public schools funded by the state, but typically operated by private nonprofit or for-profit

²⁸ Richard D. Komer & Clark Neily, *School Choice and State Constitutions*, Inst. for Justice and Am. Legis. Exchange Council (2007), available at http://www.ij.org/images/pdf_folder/school_choice/50statereport/50stateSCreport.pdf. The principal exceptions are Massachusetts and Michigan.

²⁹ Compare *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999) (upholding scholarship tax credit program under Arizona Constitution) with *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009) (striking down voucher programs under Arizona Constitution). In Florida, the Supreme Court declared a voucher program for children attending failing schools unconstitutional in *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), but Florida’s corporate scholarship tax credit program has never been challenged.

³⁰ Ariz. Rev. Stat. Ann. § 15-181 et seq. (1994).

organizations.³¹ According to the Arizona Charter School Association, there are now 511 charter schools in Arizona constituting 25 percent of the public schools in the state.³²

The following year, the legislature took its next step by requiring school districts to establish open enrollment policies—so that students could attend any traditional public school, either within or outside their school district, without being charged tuition.³³

Two years later, the legislature took another bold educational reform step by “seek[ing] to bring private institutions into the mix of educational alternatives open to the people” of Arizona.³⁴ It did so by establishing a modest tax credit, up to \$500, for contributions from individuals to nonprofit organizations called school tuition organizations.³⁵ School tuition organizations, in turn, award tuition scholarships to families who desire to enroll their children in private schools.

Arizona’s tax credit program was inspired by the Arizona School Choice Trust, an organization founded in 1993 to award privately funded private school scholarships to low-income families.³⁶ Within 10 days of the trust’s publishing a request for applications for scholarships in the *Arizona Republic*, 500 students applied. The trust was able to issue 54 privately funded scholarships. The other children were placed on a waiting list.

The demand for the Arizona School Choice Trust’s privately funded scholarship program spurred the legislature to adopt “a tax credit . . . for contributions to a tuition scholarship organization, such as the Arizona School Choice Trust Fund.”³⁷ The individual

³¹ Ariz. Rev. Stat. Ann. § 15-183(A) (2011).

³² About Arizona Charter Schools, <http://www.azcharters.org/pages/schools-basic-statistics> (last visited May 17, 2011).

³³ Ariz. Rev. Stat. Ann. § 15-816.01 (1995).

³⁴ Kotterman, 972 P.2d at 611 (upholding Arizona’s individual scholarship tax credit program under both the U.S. and Arizona Constitutions).

³⁵ Ariz. Rev. Stat. Ann. § 43-1089 (2009). The legislature has amended the tax credit program numerous times over the years, including adjusting the amount of the tax credit. This article cites the current version of the program.

³⁶ Arizona School Choice Trust, ASCT’s Generous Founders, <http://www.asct.org/Founders.shtml> (last visited July 12, 2011).

³⁷ Hearing Before H. Comm. on Educ., 43d Leg., 1st Reg. Sess. (Ariz. 1997) (minutes of Jan. 29 meeting), ALIS Online, http://www.azleg.gov/FormatDocument.asp?in-Doc=legtext/43leg/1R/comm_min/House/0129%2EED.htm (last visited July 12, 2011).

tax credit program essentially changed what was “a tax deduction to a tax credit, enhancing the ability of these organizations to raise funds and [thereby] allowing more low-income children the opportunity to attend the school of their choice.”³⁸

By the Numbers: Arizona’s Individual Scholarship Tax Credit Program

The Individual Scholarship Tax Credit program authorizes individuals to claim a dollar-for-dollar state income tax credit up to \$500 per individual (or \$1,000 for married couples filing jointly) for donations to qualified school tuition organizations.³⁹ A qualified school tuition organization must be a tax-exempt charity under 26 U.S.C. § 501(c)(3)⁴⁰ and must allocate 90 percent of the donations it receives to scholarships to help children attend private schools.⁴¹ They may not restrict their grants to students attending only one school.⁴² Nor may they award grants to students who attend schools that discriminate on the basis of race, color, handicap, familial status, or national origin.⁴³ Donors may not request that their contribution be used to benefit a dependent.⁴⁴

In 2010, the 53 school tuition organizations operating in Arizona collectively awarded 26,453 tuition scholarships.⁴⁵ These diverse organizations serve a wide variety of needs, pedagogies, and geographic areas. Four organizations offer grants only to families seeking a nonreligious Montessori-style education. Other organizations

³⁸ *Id.*

³⁹ Ariz. Rev. Stat. Ann. § 43-1089(A)(1)–(2) (2011).

⁴⁰ To qualify as a tax-exempt organization, an entity must be “organized and operated exclusively” for, among other purposes, “religious, charitable, scientific . . . literary, or educational purposes” 26 U.S.C. § 501(c)(3) (2011). Consequently, even organizations devoted to promoting religion—such as churches—enjoy direct economic tax benefits, including deductibility of contributions. See 26 U.S.C. § 170 (2011).

⁴¹ Ariz. Rev. Stat. Ann. §§ 43-1089(A), 43-1603(B)(1) (2011).

⁴² Ariz. Rev. Stat. Ann. § 43-1603(B)(2) (2011). The obvious result of this provision is that school tuition organizations may serve less than the entire private school market, but they may not exist to serve only one school.

⁴³ Ariz. Rev. Stat. Ann. § (H)(2)(a) (2011). The implication of this provision is that school tuition organizations may operate precisely like any other federally tax-exempt organization and prefer coreligionists or like minded individuals.

⁴⁴ Ariz. Rev. Stat. Ann. § 43-1603(B)(4) (2011).

⁴⁵ Ariz. Dep’t of Revenue, Individual Income Tax Credit for Donations to Private School Tuition Organizations: Reporting for 2010 (2011).

exist to meet the needs of particular geographic areas, such as children attending private schools in cities or regions outside the state's major metropolitan areas.

Considering that a large percentage of Arizona's private schools are religious, it should not be surprising that many organizations affiliate themselves with particular religious beliefs and/or denominations.⁴⁶ At least 30 of the 55 school tuition organizations in terms of both donations and grants have no obvious religious affiliation, however, including 5 of the top 10.⁴⁷ Of the 367 different private schools attended by scholarship recipients, well over 100 had no obvious religious affiliation.⁴⁸

Moreover, research shows that the program has given families access to private schooling options that they likely could not have afforded otherwise. Data from nearly 80 percent of scholarship recipients reveal that the median family income of participants is almost \$5,000 lower than both Arizona's statewide median and the median income of recipients' neighborhoods.⁴⁹

The Empire Strikes Back

My friend and fellow school choice litigator Clint Bolick is fond of saying that if there is one thing *Star Wars* teaches us, it is that the empire always strikes back.⁵⁰ That is particularly true in the school choice context. For two decades, proponents of educational freedom have not only had to work hard to overcome the teachers' unions powerful lobbyists in state legislatures in order to pass new school choice programs, but they have also had to fight a rear-guard action in court in order to keep their hard-won legislative victories.

⁴⁶ See, e.g., Kotterman, 972 P.2d at 626 ("At least seventy-two percent of [Arizona private] schools are sectarian.") (Feldman, J., dissenting) (citing Coffey, *A Survey of Arizona Private Schools* (1993)).

⁴⁷ Ariz. Dep't of Revenue, *supra* note 47 at 8–9.

⁴⁸ *Id.* at 14–20.

⁴⁹ Vicky E. Murray, *An Analysis of Arizona Individual Income Tax-Credit Scholarship Recipients' Family Income, 2009–10 School Year*, at 1, available at http://www.hks.harvard.edu/pepg/PDF/Papers/PEPG10-18_Murray.pdf.

⁵⁰ Clint Bolick, *Voucher Wars: Waging the Legal Battle over School Choice* 198, 207 (2003).

First Legal Challenge to Arizona Tax Credit Program: Kotterman v. Killian

Arizona's school choice opponents are a particularly litigious bunch. The first lawsuit challenging Arizona's Individual Tax Credit program, *Kotterman v. Killian*, was filed in 1997 by the Arizona Education Association before the first tax-credit-eligible donation was ever given to a school tuition organization. The Arizona Supreme Court rejected the union's claims under both the federal and state constitutions.

In a prescient decision three years before the primary federal constitutional issue was settled by *Zelman*, the Arizona Supreme Court determined that Arizona's tax credit program was religiously neutral, allowed a broad spectrum of private choice, and therefore did not have the impermissible effect of either advancing or inhibiting religion under the Establishment Clause.⁵¹

Kotterman also involved claims under the Arizona Constitution's religion clauses—commonly known as Blaine Amendments.⁵² As the *Kotterman* majority recognized, Blaine Amendments are vestiges of Maine Representative James G. Blaine's attempt to ride a wave of anti-Catholic bigotry to the White House in the 1870s and 1880s.⁵³ Blaine rose to prominence at a time when the public schools were predominantly Protestant.⁵⁴ Finding the public schools inhospitable to their doctrine, Catholics pushed for a separate system of publicly funded Catholic schools. Blaine thus attempted to amend the U.S. Constitution to prohibit any public funding for "sectarian" schools—and it was an open secret that "sectarian" was code for "Catholic."⁵⁵

⁵¹ *Kotterman*, 972 P.2d at 616.

⁵² The Arizona Constitution, Article 2, Section 12 states in relevant part: "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment." The Arizona Constitution, Article 9, Section 10 says, "No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation."

⁵³ *Kotterman*, 972 P.2d at 624.

⁵⁴ Richard D. Komer, *School Choice and State Constitutions' Religion Clauses*, 3 J. of Sch. Choice 331 (2009).

⁵⁵ *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality) ("Opposition to aid to 'sectarian' schools acquired prominence in the 1870's with Congress's 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

While finding no direct link between the original Blaine Amendment and Arizona's Blaine Amendments, the Arizona Supreme Court was nevertheless "hard pressed to divorce the amendment's language from the insidious discriminatory intent that prompted it."⁵⁶ The court therefore refused to interpret the provisions beyond the scope of their plain language and concentrated on the meaning of the phrases "public money" and "appropriation of public money." Given that no money from the tax credit program ever enters the state treasury or is ever controlled by the government, the Arizona Supreme Court declared that "under any common understanding of the words, we are not here dealing with 'public money.'"⁵⁷

The *Kotterman* plaintiffs made the same argument that the plaintiffs in *ACSTO* would later make, namely that "because taxpayer money *could* enter the treasury if it were not excluded by way of the tax credit, the state effectively controls and exerts quasi-ownership over it."⁵⁸ But the Arizona Supreme Court found such an expansive interpretation "fraught with problems."⁵⁹ It dealt specifically with two of those problems. First, "under such reasoning all taxpayer income could be viewed as belonging to the state because it is subject to taxation by the legislature."⁶⁰ And second, if tax credits "constitute public funds, then so must other established tax policy equivalents like deductions and exemptions."⁶¹

The Arizona Supreme Court also rejected the notion that the tax credit was the equivalent of laying a tax. "We cannot say that the legislature has somehow imposed a tax by declining to collect potential revenue from its citizens."⁶² Indeed, the court went on to say that if it were the equivalent of laying a tax that the justices "would be hard pressed to identify the citizens on whom it is assessed."⁶³

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.'").

⁵⁶ *Kotterman*, 972 P.2d at 624.

⁵⁷ *Id.* at 618.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 621.

⁶³ *Id.*

The *Kotterman* plaintiffs filed a petition for certiorari to the U.S. Supreme Court on the federal constitutional question. The Institute for Justice, which had intervened in *Kotterman* on behalf of parents and children who would benefit from the program, actually supported the petition because we and our clients believed so strongly that Arizona's tax credit program would pass constitutional muster. The petition, however, was denied.

Federal Court Challenge to Arizona's Tax Credit Program: Winn v. Killian (ultimately ACSTO v. Winn)

Soon after the U.S. Supreme Court denied the petition for certiorari, the ACLU of Arizona filed a federal court challenge, *Winn v. Killian*, alleging that Arizona's Individual Tax Credit program violated the Establishment Clause. The complaint asserted both a facial and an as-applied challenge to the statute.

The ACLU claimed that the program violated the Establishment Clause by (1) "affirmatively authorizing and permitting [school tuition organizations] to use State income-tax revenues to pay tuition for students at religious schools"; (2) "affirmatively authorizing and permitting [school tuition organizations] to use State income-tax revenues to make tuition grants to students attending only religious schools or schools of only one religious denomination or to students of only one religion"; and (3) "affirmatively authorizing and permitting [school tuition organizations] to use State income-tax revenues to pay tuition for students at schools that discriminate on the basis of religion in selecting students."⁶⁴

The Institute for Justice immediately moved to intervene on behalf of parents and children relying on the scholarship program. The Arizona Christian School Tuition Organization also moved to intervene, represented by separate counsel. The state of Arizona, before the motions to intervene were ruled on, filed a motion to dismiss, arguing that the Federal Tax Injunction Act deprived the district court of jurisdiction.⁶⁵ The district court granted the state's motion

⁶⁴ Complaint at 6–7, *Winn v. Killian*, No. CV-00-0287 EHC, on file with the Institute for Justice.

⁶⁵ The Federal Tax Injunction Act, 28 U.S.C. § 1341, reads: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

to dismiss pursuant to the Tax Injunction Act and denied the motions to intervene as moot.

Of course, in 2000, Arizona was not the only state actively defending school choice programs. In Ohio, after that state's supreme court upheld Cleveland's school voucher program,⁶⁶ a federal court challenge was filed—a challenge that would ultimately take the Cleveland program to the U.S. Supreme Court. The early school choice cases always began in state court and included both federal and state constitutional claims. But school choice opponents—led by the National Education Association—knew they needed a knockout blow. The union's opportunity came in *Zelman v. Simmons-Harris*, decided by the U.S. Supreme Court in June 2002. But it was the unions who were knocked out.

In *Zelman*, the Court struck a tremendous blow for freedom of educational choice and opportunity. For decades, students in the Cleveland public school system were trapped in public schools that failed miserably on every imaginable performance measure. Things were so bad that in 1995 “a Federal District Court declared a ‘crisis of magnitude’ and placed the entire Cleveland school district under state control.”⁶⁷ It is no wonder that the legislature sought to enact some meaningful education reforms. One of those measures was the Pilot Project Scholarship Program, which provided tuition aid from the state treasury to students to attend any participating public or private school of their parents' choice.⁶⁸ While the program permitted any public school district adjacent to the district's boundaries to participate in the program, no public school district elected to do so.⁶⁹ Of the 56 private schools that signed up to participate, 46 (or 82 percent) had a religious affiliation; of the more than 3,700 students who participated, 96 percent enrolled in a religious school.⁷⁰

Against this backdrop, and in light of decades of prior precedent upholding government programs that permitted public aid to flow

⁶⁶ *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999).

⁶⁷ *Zelman*, 536 U.S. at 644 (noting that “[o]nly 1 in 10 ninth graders could pass a basic proficiency examination, and students at all levels performed at a dismal rate compared with students in other Ohio public schools”).

⁶⁸ *Id.* at 644–45.

⁶⁹ *Id.* at 645–47.

⁷⁰ *Id.* at 647.

to religious institutions at the direction of private individuals, a 5-4 majority upheld the voucher program.⁷¹ In summarizing the prior precedent establishing the appropriate legal test to be applied to the Cleveland voucher program, the Court said:

Mueller, Witters, and Zobrest thus make clear that where 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 choice, the program is not readily subject to challenge under the Establishment Clause.⁷²

The majority in *Zelman* concluded that the Cleveland voucher program shared these features and that, as a program of true private choice that provided benefits to families on neutral terms with no governmental preference for or against religion, it easily passed constitutional muster. *Zelman* should have put an end to the Arizona federal case. As Notre Dame law professor Nicole Stelle Garnett recently opined, after *Zelman* the claims in *ACSTO* “bordered on frivolous.”⁷³

But before *Zelman*, the ACLU had appealed *Winn*’s dismissal under the Tax Injunction Act to the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit heard oral argument on June 11, 2002—a mere 16 days before the U.S. Supreme Court announced its decision in *Zelman*. The Ninth Circuit opinion, released on October 3, 2002, and written by Judge Stephen Reinhardt, reversed the district court’s dismissal pursuant to the Tax Injunction Act. The decision did not address the merits of the case—and therefore did not discuss *Zelman* or its predecessor cases—but it did include a lengthy footnote attempting to distinguish tax credits from tax deductions, suggesting

⁷¹ *Id.* at 649 (“Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges.”).

⁷² *Id.* at 652.

⁷³ Nicole Stelle Garnett, *A Winn for Educational Pluralsim*, 121 *Yale L.J. Online* 31, 33 (2011), available at <http://yalelawjournal.org/2011/05/26/garnett.html>.

the panel was sympathetic to the *Winn* plaintiffs' argument that tax-credit-eligible contributions were the equivalent of state tax revenues.⁷⁴

The state filed a petition for certiorari on the Tax Injunction Act issue, which the U.S. Supreme Court granted. In *Hibbs v. Winn*, the Supreme Court, in yet another 5-4 decision—with Justice Sandra Day O'Connor siding with the oft-described liberal wing of the Court—affirmed the Ninth Circuit's decision and remanded the case to the district court for further proceedings.⁷⁵

In *Hibbs*, the Court noted that there was half a century of federal court precedent adjudicating claims involving tax credits and that not once had any jurist or attorney suggested that the Tax Injunction Act—enacted in 1937—stood as a jurisdictional bar.⁷⁶ Foreshadowing some of the arguments to come later in *ACSTO*, the state argued that those cases—which did not address jurisdiction—were mere *sub silentio* holdings entitled to no deference now that the issue was squarely before the Court. The Court very quickly “reject[ed] that assessment.”⁷⁷ Of course, it would be a different story when the taxpayer-standing issue was raised. But before the *Winn* plaintiffs would learn that they never had standing to raise their claims in federal court in the first instance, there would be another six years of litigation.

Return to the District Court

Frankly, it was not at all obvious that the plaintiffs would continue to press their Establishment Clause claim after *Hibbs v. Winn*. They had set a favorable precedent on the Tax Injunction Act that would preserve future challenges to state tax credit programs. But the Arizona tax credit program appeared, at least to those of us who were defending the program, to be on all fours with *Zelman*. Between the majority opinion's emphasis on the importance of private choice—

⁷⁴ *Winn v. Killian*, 307 F.3d 1011, 1015 n.5 (9th Cir. 2002) (“We note that a tax credit differs from a tax deduction in that where a tax deduction is involved, giving money to a religious institution is not, as is the case of a tax credit, a free gift.”).

⁷⁵ *Hibbs v. Winn*, 542 U.S. 88 (2004). J. Elliott Hibbs replaced Mark Killian as the director of the Department of Revenue in the period between the Ninth Circuit and the Supreme Court decisions on the Tax Injunction Act issue.

⁷⁶ *Id.* at 92.

⁷⁷ *Id.* at 94.

and Justice O'Connor's concurrence stressing that the private choice inquiry should encompass "all reasonable alternatives to religious schools that are available to parents"⁷⁸—the Arizona program seemed constitutionally bulletproof.

Private choice imbues *every* aspect of Arizona's tax credit program. The government is at least four times removed from any money that flows to religious organizations. Private individuals or groups must create a school tuition organization. Those privately created and operated school tuition organizations must then decide to provide scholarships to students attending religious schools. Taxpayers then have to choose to contribute to the school tuition organization. And parents must apply for a scholarship for their student from that school tuition organization. As Judge Diarmuid O'Scannlain would later write, "the state's involvement stops with authorizing the creation of [school tuition organizations] and making tax credits available. After that, the government takes its hands off the wheel."⁷⁹

In light of *Zelman*, it was difficult to see how *Mueller's* statement that the "historic purposes of the [Establishment] Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case" would not be applied to Arizona's tax credit.⁸⁰

And yet, what we viewed as the program's constitutional shield, the plaintiffs viewed as the program's Achilles' heel. The plaintiffs would argue that it was the multiple layers of private choice that made the tax credit program unconstitutional. This view, of course, is informed by the plaintiffs' belief that tax-credit-eligible funds are the equivalent of state tax revenues and that, therefore, school tuition organizations are just like government grantees. The plaintiffs' basic argument would be that the same strictures that applied to government programs providing aid directly to religious institutions should be applied to the Arizona program.

The plaintiffs relied on cases like *Bowen v. Kendrick*, where the Supreme Court upheld, on its face, the Adolescent Family Life Act—

⁷⁸ *Zelman*, 536 U.S. at 663 (O'Connor, J., concurring).

⁷⁹ *Winn v. ACSTO*, 586 F.3d 649, 660 (9th Cir. 2009) (denying rehearing en banc) (O'Scannlain, J., dissenting).

⁸⁰ *Mueller v. Allen*, 463 U.S. 388, 400 (1983).

a government program that allowed both religious and nonreligious institutions to receive direct grants from Congress to pay for services related to adolescent sexuality and family planning—but said that this type of direct government grant could not be used to promote religion or inculcate the views of a particular religious doctrine.⁸¹ If the Supreme Court’s direct aid line of cases applied to the Arizona program, then school tuition organizations could not affiliate with religious schools or prefer coreligionists when awarding scholarships. In other words, the plaintiffs were not going to raise the white flag of surrender.

Thus, on remand, the Institute for Justice immediately renewed its motion to intervene on behalf of the Arizona School Choice Trust and the parents, including Glenn and Rhonda Dennard, who became the human faces of the case.⁸² The Arizona Christian School Tuition Organization, now represented by the Alliance Defense Fund, also renewed its motion to intervene. Those motions were granted and both IJ and ADF submitted motions to dismiss, arguing that the taxpayers lacked standing and that the plaintiffs failed to state a claim after *Zelman*. The state filed a motion for judgment on the pleadings arguing that *Zelman* controlled, but the state declined to challenge the taxpayer plaintiffs’ standing.

The district court assumed standing and granted IJ’s motion to dismiss, holding that the “Tuition Tax Credit program is a program of ‘true private choice’” and that *Zelman* controlled.⁸³ The district court found that the decisions of some school tuition organizations to fund religious schools did not implicate the Establishment Clause because those decisions were based on private choices—not government control.⁸⁴

The ACLU appealed and the parties received notice that the Ninth Circuit panel that heard and decided *Winn v. Killian* was going to retain jurisdiction of the case. But it would be almost three years before that panel would hear oral arguments in the case. Given

⁸¹ *Bowen v. Kendrick*, 487 U.S. 589, 621–22 (1988).

⁸² See, e.g., Institute for Justice, *Arizona School Choice Fight Goes to U.S. Supreme Court*, available at <http://www.youtube.com/watch?v=weipY6rpMss>.

⁸³ *Winn v. Hibbs*, 361 F. Supp. 2d. 1117, 1120 (D. Ariz. 2005).

⁸⁴ *Id.* at 1122.

Reinhardt's previous opinion and the panel's willingness to distinguish between credits and deductions—essentially tipping its hand that it would view credits as the equivalent of tax revenue, the ACLU was content to wait for what it expected would be a very favorable panel.

The Ninth Circuit, Again

A few months before the argument, the panel *sua sponte* ordered supplemental briefing in light of the Supreme Court's decision in *DaimlerChrysler Corp. v. Cuno*, which held that state taxpayers did not have standing to challenge a local municipality's grant of certain tax breaks to an auto manufacturer as a violation of the Commerce Clause.⁸⁵ IJ and ADF continued to argue that the taxpayer plaintiffs lacked standing. The state once again refused to contest standing.

When the day for oral argument finally came, school choice supporters did not walk away very encouraged. During the argument, the plaintiffs' attorney, Arizona State University College of Law Professor Paul Bender, while not fully abandoning some of his more audacious claims, was definitely open to relief far narrower in scope than the original complaint had requested.

At one point, when pushed by Judge Reinhardt, Professor Bender even conceded that the plaintiffs were only challenging school tuition organizations that restricted their scholarships along religious lines. He went so far as to say that, absent a very narrow reading of *Zelman*—that is, absent cabining *Zelman* to its specific facts of a school district in dire straits—his clients had no problem with school tuition organizations like the Arizona School Choice Trust because it provides scholarships to students choosing both religious and nonreligious schools.

Once the state stood to argue, the state's attorney, Paula Bickett, announced our planned division of time. She would argue the Establishment Clause and I would argue the taxpayer-standing issue. The court instructed us, however, not to address standing. Fortunately, I prepared for the merits as well. When I reached the podium, due to Professor Bender's concession on the narrowing of issues, Judge Reinhardt pressed me as to whether my clients, the Arizona School

⁸⁵ *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344–46 (2006).

Choice Trust and parents receiving scholarship funds from the trust, had any real interest in the case.

Of course the Arizona School Choice Trust had an interest in the case. The ACLU had not explicitly abandoned its facial claims and its briefing argued forcefully that the tax credit program had been passed for an improper religious purpose. (Any law passed for an improper purpose—even a law that is facially neutral—must be struck down in its entirety.) It also maintained its claim that *Zelman* was an exception to the general rule that public funds may not be used to attend religious institutions absent the extraordinary facts present in that case. I had to waste precious time arguing these points with Judge Reinhardt before getting to my merits argument. The time clock ran quickly down to zero.

It would be more than a year—April 21, 2009—before the Ninth Circuit issued its written opinion reversing the district court. The court concluded that the plaintiffs had standing as taxpayers. It cited *Hibbs v. Winn* for the proposition that the Supreme Court “has rejected the suggestion that its consistent past practice of exercising jurisdiction [in cases challenging tax credits, deductions, and exemptions] amounts to mere *sub silentio* holdings that command no respect.”⁸⁶

On the merits, the panel said that even though the tax credit was religiously neutral on its face and there was no legislative history suggesting an improper religious motivation for passing the program,⁸⁷ a program’s *operation* “may, in some circumstances, reveal its ostensible purpose to be a sham.”⁸⁸ The only such “evidence” proffered by the plaintiffs in this case was the fact that school tuition organizations “are permitted to restrict the use of their scholarships to use at certain religious schools.” But it is the plain language of the statute itself that “permits” the scholarship organizations to restrict scholarships to less than the entire population of private

⁸⁶ *Winn v. ACSTO*, 562 F.3d 1002, 1011 (9th Cir. 2009) (internal quotations omitted).

⁸⁷ To the contrary, the panel admitted that the only legislative history demonstrated that the tax credit program’s “primary sponsor’s concern in introducing the bill was providing equal access to a wide range of schooling options for students of every income level by defraying the costs of educational expenses incurred by parents.” *Id.* at 1011–12.

⁸⁸ *Id.* at 1012.

schools.⁸⁹ Indeed, no party contested the fact that school tuition organizations operated in precisely this manner. And yet, the panel said that “[s]uch allegations, *if proved*, could belie defendants claim that [the tax credit] was enacted primarily to provide Arizona students with equal access to a wide range of schooling options.”⁹⁰

The panel further stated that the plaintiffs could demonstrate that the primary effect of the tax credit program was to advance religion because parental choices were constrained by the choice of taxpayers as to which school tuition organizations taxpayers choose to donate their money. Neither the panel nor the plaintiffs disputed that the tax credit program “is neutral with respect to taxpayers who direct money to [school tuition organizations], or that any of the program’s aid that reaches a [school tuition organization] does so only as a result of the genuine and independent choice of an Arizona taxpayer.”⁹¹ And yet, both were willing to argue that because a majority of taxpayers contributed to religious institutions, those private choices amount to government endorsement of religion. They reached that conclusion by suggesting that a “reasonable observer” would view the large number of religious donations as somehow being encouraged by the state.⁹²

These conclusions ignored the Supreme Court’s repeated admonition that it would be “loathe 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”⁹³ and that “the constitutionality of a neutral choice program does not turn on annual tallies of private decisions made in any given year by thousands of individual recipients.”⁹⁴

⁸⁹ Ariz. Rev. Stat. Ann. § 43-1603(B)(2) (2011) (“To be eligible for certification and retain certification, the school tuition organization . . . [s]hall not limit the availability of educational scholarships or tuition grants to only students of one school.”).

⁹⁰ ACSTO, 562 F.3d at 1012 (emphasis added).

⁹¹ *Id.* at 1018.

⁹² *Id.* at 1022 (“Significantly, plaintiffs’ allegations suggest the taxpayers’ role in the structure of the [tax credit program] *encourages* them to use the tax credits to promote sectarian goals . . .”).

⁹³ Mueller, 463 U.S. at 401.

⁹⁴ Zelman, 536 U.S. at 658 n.4.

Once More into the Breach: Back to the Ninth Circuit

The Ninth Circuit's decision in *Winn v. Arizona Christian School Tuition Organization* was nothing short of outrageous. It warranted a petition for certiorari, and there was a strong belief that a petition would be granted. But the decision was so far afield from Supreme Court precedent that we felt there was some chance—however slight—that the Ninth Circuit might grant a motion to rehear the case *en banc*. After conferring with other appellate lawyers and Ninth Circuit practitioners, one thing became clear: Even if the Ninth Circuit declined to rehear the case, the panel opinion was so out of touch with Establishment Clause jurisprudence that we were likely to draw an opinion dissenting from a denial of rehearing. Such a dissent, it was strongly advised, would increase the likelihood of our petition for certiorari being granted.

It took another six months to receive the decision denying rehearing, but it was well worth the wait. We had hoped that, if the court voted to reject rehearing, at least one judge would write a dissent that would become useful to us in further litigation. Our hope was realized—and then some. Judge Diarmuid O'Scannlain wrote a blistering attack on the *Winn* panel's opinion, and his dissent was joined by *seven* other judges. The original panel even felt compelled to write a separate opinion concurring in the decision to deny the petition for rehearing so it could respond to O'Scannlain's dissent.

O'Scannlain's dissent meticulously demonstrates that "nothing in the panel opinion grapples with the fact that Arizona does nothing to encourage, to promote, or otherwise to incentivize private actors to direct aid to religious schools. Nothing explains how 'the *government itself*' has advanced religion through its own activities and influence."⁹⁵ He concludes by saying that the panel can hardly be faulted for this failure because "it cannot manufacture what does not exist."⁹⁶

III. Back to the U.S. Supreme Court

Judge O'Scannlain's dissent emboldened IJ to take an unusual and risky tactic. We did not simply ask for certiorari; we asked that the Ninth Circuit be summarily reversed. The state of Arizona sought certiorari on the merits. Our ADF allies focused their petition on

⁹⁵ ACSTO, 586 F.3d at 670 (denying rehearing *en banc*) (O'Scannlain, J., dissenting).

⁹⁶ *Id.* at 671.

the issue of taxpayer standing (while concurring with the petitions filed by IJ and the state on the merits).

There is no such thing as a certainty when it comes to Supreme Court litigation, and even though we felt like we had positioned ourselves as well as possible for Supreme Court review, we were all nervous waiting for the orders to be filed after the case was conferenced. So when we saw the order granting the petitions for certiorari, there was much celebration. There was only one slight disappointment. The Court granted the state's and ADF's petitions, but held ours—leaving our clients in the relatively rare position of “Respondents in Support of Petitioners” pursuant to Supreme Court Rule 12.6. Our clients thus had full party status, entitling them to file briefs on the merits, but this odd arrangement foreshadowed that I would not be participating in the oral argument.

During the merits briefing, it became increasingly clear that the question of standing and the merits arguments were closely connected because they both involved the question of whether tax-credit-eligible contributions were the equivalent of state tax revenue. The ACLU pegged its entire argument on the notion that (1) all tax-credit-eligible contributions were state tax revenues, not private charitable contributions; and (2) this transformed the program into a government spending program and meant that school tuition organizations should therefore be treated like direct government grantees.

We received a pleasant surprise during the briefing, when the United States joined our side by filing an amicus brief arguing both that the plaintiffs lacked standing and that the tax credit program passed muster under the Establishment Clause. The United States argued in no uncertain terms that “[a] tax credit, by definition, does not extract one cent from taxpayers. To the contrary, it *forges* the extraction of state income taxes.”⁹⁷ That led the United States to argue that the program “merely provides a beneficial tax consequence for private citizens who donate their own funds to [school tuition organizations] of their own choosing.”⁹⁸

⁹⁷ Brief of United States at 15, *ACSTO v. Winn*, 131 S. Ct. 1436 (2011) (Nos. 09-987, 09-991), 2010 WL 3066230.

⁹⁸ *Id.* at 14.

A total of 18 amicus briefs were filed in support of the program. Three were filed in opposition. While the supporting amicus briefs were all excellent, three stood out as particularly helpful. The Becket Fund for Religious Liberty's brief hammered home the fact that the Supreme Court has repeatedly rejected the Ninth Circuit's notion that "private choices can be mistaken for government endorsement" of religion.⁹⁹ The Cato Institute brief took on the plaintiffs' notion that the numerous private choices under the Arizona program limited parental choice and autonomy.¹⁰⁰ This brief demonstrated that giving individuals the freedom to create and operate school tuition organizations consistent with their values and beliefs has led to more funding and more options for parents.¹⁰¹ And the Jewish Tuition Organization's brief, written by Bennett Cooper and Robert Destro, dismantled not only the Ninth Circuit's many erroneous legal arguments, but corrected many of the factual misrepresentations made by both the plaintiffs and the Ninth Circuit regarding how school tuition organizations fundraise, award scholarships, and work with private schools.¹⁰²

When it came time to decide who would argue the case, IJ and ADF strongly agreed that it was important for an ADF attorney to argue the taxpayer standing issue. After all, it was ADF's petition that asked the Court to grant certiorari on the standing issue. And moreover, for 10 years the state of Arizona had conceded that the plaintiffs had standing. The state was not opposed to splitting the argument time, but the United States' participation as an amicus added a new wrinkle because the acting solicitor general, Neal Katyal, also intended to ask for argument time.

⁹⁹ Brief of Becket Fund for Religious Liberty, *ACSTO v. Winn*, 131 S. Ct. 1436 (2011) (Nos. 09-987, 09-991), 2010 WL 4150190. The Becket Fund also appended a partial list of over 600 tax laws, including federal and state tax credits, tax deductions, and tax exemptions that could be negatively affected if the Supreme Court let stand the Ninth Circuit's reasoning.

¹⁰⁰ Brief of Cato Institute at 26–29, *ACSTO v. Winn*, 131 S. Ct. 1436 (2011) (Nos. 09-987, 09-991), 2010 WL 3066228. Cato's brief was joined by the Foundation for Educational Choice, the American Federation for Children, the Council for American Private Education, the Center for Education Reform, and the director of Cato's Center for Educational Freedom, Andrew Coulson.

¹⁰¹ *Id.* at 27.

¹⁰² Brief of Jewish Tuition Org. et al., *ACSTO v. Winn*, 131 S. Ct. 1436 (2011) (Nos. 09-987, 09-991), 2010 WL 3167316.

IJ felt very strongly that the only way a three-way split would be granted was if the parties filed a joint motion for divided argument time. Several friends and colleagues warned me about how heated things could become when it came to matters in the U.S. Supreme Court, but up until this point the parties had worked solidly together toward a common goal. Unfortunately, no agreement was reached and two separate motions were filed asking the Court to divide the argument time.

Arizona and the United States moved first and asked that the time be divided only between the two governments. ADF proposed a three-way split but also argued that if the time was divided in two, the solicitor general should not supplant the party whose petition had been granted. The government's motion was granted, but the Court's decision to deny ADF an opportunity to argue set the stage for post-argument briefs—briefs that the ACLU used to dig even deeper the hole its clients found themselves in at argument.

At oral argument on November 3, 2010, Chief Justice John Roberts and Justices Antonin Scalia, Anthony Kennedy, and Samuel Alito showed particular skepticism at the notion that the challenged tax credit program was a government spending program. Justice Kennedy—who would subsequently write the majority opinion—asked Professor Bender about his theory that tax-credit-eligible contributions to school tuition organizations are the equivalent of state tax revenues:

Justice Kennedy: I'll give you credit, Mr. Bender. In your brief, you say if you're wrong on that point, that you're folding your tent and leaving. There's -- that there's no standing and that there's no -- no violation. But I must say, I have some difficulty that any money that the government doesn't take from me is still the government's money.

Prof. Bender: But it does take it.

Justice Kennedy: Let me ask you. If -- if you reach a certain age, you can get a -- a card and go to certain restaurants, and they give you 10 percent credit. I think it would be rather

offensive for the cashier to say, “and be careful how you spend my money.” But that’s the whole theory of your case.¹⁰³

Building on Justice Kennedy’s questions, Justice Alito sounded the same note as the majority in *Kotterman v. Killian* did more than 10 years earlier:

Justice Alito: There’s a very important philosophical point here. You think that all the money belongs to the government --
Prof. Bender: No.
Justice Alito: -- except to the extent that it deigns to allow private people to keep some of it.¹⁰⁴

Needless to say, school choice supporters walked away far more encouraged after the Supreme Court argument than they had been after the Ninth Circuit argument. It appeared that the ACLU had, in fact, correctly framed the issue. The Court was going to decide if the moneys contributed to school tuition organizations were private or government funds. If the Arizona program did not involve any government money, what possible interest or stake could a taxpayer who sat on the sidelines have in the program?

Post-Argument Briefing

The government advocates in *ACSTO* performed capably at argument. There were important distinctions, however, in the way in which ADF—and IJ—would have responded to some of the questioning. Indeed, there were even differences between IJ and ADF (differences that were irrelevant to the taxpayer-standing issue). Both organizations, therefore, filed motions asking to file post-argument briefs. And in that subsequently granted post-argument briefing, the ACLU continued to pound the argument—to its detriment—that the tax credit contributions were state tax revenues and that the program was therefore a government spending program.

¹⁰³ Transcript of Oral Argument at 31, *ACSTO*, 131 S. Ct. 1436 (Nos. 09-987, 09-991), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-987.pdf.

¹⁰⁴ *Id.* at 35.

ADF, in its post-argument brief, argued that there was no record evidence of religious discrimination. The word “discrimination” certainly has a strong negative connotation, but the fact is that school tuition organizations are permitted to—and do—“discriminate” in a variety of ways, as pointed out by IJ’s post-argument brief. As private, nonprofit organizations—and not government actors—school tuition organizations enjoy substantial discretion in awarding scholarships, under both state law and section 501(c)(3) of the federal tax code.

Nonreligious school tuition organizations can and do offer scholarships on a selective or “discriminatory” basis. For example, several school tuition organizations provide scholarships only to families seeking Montessori education. The state neither encourages nor discourages such pedagogical “discrimination,” but rather remains appropriately neutral, just as it does towards religion.¹⁰⁵

The neutrality principle thus allows religious nonprofit organizations to prefer coreligionists.¹⁰⁶ Jewish tuition organizations may permissibly award scholarships only to Jewish children attending Jewish schools, while Catholic tuition organizations may permissibly award scholarships only to Catholic children attending Catholic schools. Allowing religious school tuition organizations the freedom to prefer coreligionists is not government endorsement of religion. It is, at most, government accommodation of religion.¹⁰⁷

This argument—that the Establishment Clause does not prevent the government from even-handedly authorizing private, nonprofit scholarship organizations to serve a variety of discrete and diverse

¹⁰⁵ See *Walz v. Tax Comm’n of New York*, 397 U.S. 664, 669 (1970) (holding that the Establishment Clause allows “benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference”).

¹⁰⁶ Indeed, in *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), the Supreme Court held that the Establishment Clause is not offended when religious organizations make employment decisions based on religion. And in *Hernandez v. Comm’r*, 490 U.S. 680 (1989), the Supreme Court upheld the Internal Revenue Code’s section 170, which permits deductions for charitable contributions to religious organizations and churches, even though they are permitted to prefer coreligionists both when hiring staff and when delivering aid or resources to the community.

¹⁰⁷ See *Amos*, 483 U.S. at 349 (O’Connor, J., concurring) (“[T]he objective observer should perceive the Government action as an accommodation of the exercise of religion rather than as a Government endorsement of religion.”).

constituencies, including both religious and nonreligious groups—did not sit well with the ACLU. Its response agreed that “religious organizations may prefer coreligionists in distributing benefits in situations where those benefits are paid for *with their own money*,” but argued that “[t]his case involves benefits paid for *entirely with state income-tax revenues*.”¹⁰⁸ They concluded by saying, “*all of the money in the Arizona program—every penny—is tax revenue*.”¹⁰⁹

As the final words presented to the Court in the case, we believed this put the school choice program in a very favorable position. It seemed unlikely that a majority of the Court would agree with the plaintiffs that the funds involved were public dollars. And if they were not public funds, the plaintiffs had just admitted that school tuition organizations were free to distribute funds “to classes of beneficiaries chosen by them,” including those preferring “co-religionists.”¹¹⁰

The only thing left to do was sit back and wait for the decision.

IV. The Final Decision

I arrived at my Tempe, Arizona, office early on Monday, April 4. My practice was to arrive early, grab a cup of coffee, and watch the live blog at SCOTUSblog each morning the Court announced decisions. Even though the case had been argued in November, I was not expecting the decision until the end of May. Fatefully, that morning our internet service was down. So I called home and asked my wife to watch the live blog and tell me which cases were decided. She put me on the phone with our three-and-a-half-year-old son while she watched the blog.

Suddenly, in the middle of our innocent chat, I heard my wife scream and (I can only presume) rip the phone from my little boy’s hand to excitedly tell me that we had won. I waited for her to give me a few more details—the vote was 5–4, Kennedy wrote the majority opinion, there was no taxpayer standing—and then I was off and running. I immediately phoned IJ’s headquarters in Arlington, Virginia, to relay the good news while on my way to Starbucks to read the decision and pound out a quick press release.

¹⁰⁸ Post-Argument Brief of Appellee-Respondent at 5, *ACSTO v. Winn*, 131 S. Ct. 1436 (2011) (Nos. 09-987, 09-991), 2010 WL 5487485 (emphasis in original).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 6.

Digesting the Standing Ruling

The Court's holding—that state taxpayers do not have standing to challenge a tax credit program that is implemented by private action, funded by private contributions, and involves no state intervention—should not have come as a big surprise, given the way the standing and merits questions had become entwined. And yet, for me, it did. The standing arguments had gained *no traction* in the previous 10 years of litigation, and the case had already been in front of the Supreme Court on a jurisdictional issue. As Justice Elena Kagan wrote in her dissent, the Court had faced similar issues at least five times—“including in a prior incarnation of this very case”—and standing was never even mentioned.¹¹¹

My surprise also flowed from my personal view of the doctrine of standing¹¹²—particularly the doctrine of *taxpayer* standing. I do not conceptualize the doctrine as being rooted in the text of the U.S. Constitution. I view it instead as a judicial doctrine rooted in concerns about judicial economy and, in particular, the danger of issuing an advisory opinion regarding matters of constitutional law. While the latter is a legitimate concern, as a lawyer who most often represents plaintiffs in constitutional challenges to government laws and regulations, I am less sympathetic to the former. In my opinion, the doctrine of taxpayer standing is easily gerrymandered when judges are inclined—or disinclined—to reach the merits of a particular case. And, as discussed below, my slightly jaded view of standing requirements is not far off from those articulated by the Supreme Court.¹¹³ Notwithstanding my generally skeptical view of standing

¹¹¹ ACSTO, 131 S. Ct. at 1452–53 (Kagan, J., dissenting).

¹¹² *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), outlines the general standing requirements. “First, the plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not ‘conjectural or hypothetical.’ Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Id.* at 560–61 (citations and some internal quotations omitted). An “injury in fact” requires “that the injury must affect the plaintiff in a personal and individual way.” *Id.* at 560 n.1.

¹¹³ “The ‘many subtle pressures’ which cause policy considerations to blend into the constitutional limitations of Article III make the justiciability doctrine one of uncertain and shifting contours.” *Flast v. Cohen*, 392 U.S. 83, 97 (1968) (quoting *Poe v. Ullman*, 367 U.S. 497, 508 (1961)).

doctrine, however, the Court was right in *ACSTO* to conclude that the plaintiffs lacked standing as taxpayers.

The Supreme Court first declared that taxpayers lacked standing to challenge the constitutionality of a government appropriation or program in *Frothingham v. Mellon*.¹¹⁴ The Court said that it had “no power per se to review and annul acts of Congress on the ground that they are unconstitutional.”¹¹⁵ Such questions may only be considered when the party has suffered or been threatened with a “direct injury.”¹¹⁶ The Court could not find the requisite injury because a U.S. taxpayer’s “interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.”¹¹⁷

In *Flast v. Cohen*, the Supreme Court punctured the “impenetrable barrier” erected by *Frothingham* that had stood for 45 years and prevented federal taxpayers from “challeng[ing] the constitutionality of a federal statute.”¹¹⁸ It did so to allow taxpayers to attack a statute on the grounds that it violated the Establishment Clause.¹¹⁹ *Flast* involved an allegation that federal funds had been appropriated to pay for instruction, textbooks, and other instructional materials in religious schools.¹²⁰ In the time between *Frothingham* and *Flast*, a split of opinion had developed as to whether the taxpayer-standing doctrine was “a rule of self-restraint” or whether it was “constitutionally compelled.”¹²¹ The Court in *Flast* believed that *Frothingham* could be read to support either position.¹²²

¹¹⁴ *Frothingham v. Mellon*, 262 U.S. 447, 487–88 (1923).

¹¹⁵ *Id.* at 488 (“The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.”).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 487.

¹¹⁸ *Flast v. Cohen*, 392 U.S. 83, 85 (1968).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 85–86.

¹²¹ *Id.* at 92.

¹²² *Id.* at 93.

If the doctrine was constitutionally compelled, it would be grounded in Article III's "cases" and "controversies" language.¹²³ The Court said that those words "limit the business of federal courts to questions presented in an adversary context."¹²⁴ From this, the Court in *Flast* reiterated that Article III imposes a rule against advisory opinions on federal courts.¹²⁵ "In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable."¹²⁶ And a "proper party is demanded so that federal courts will not be asked to decide ill-defined controversies over constitutional issues or a case which is of a hypothetical or abstract character."¹²⁷ Thus, the question becomes "whether the party invoking federal court jurisdiction has a personal stake in the outcome of the controversy."¹²⁸

The Court in *Flast* therefore found "no absolute bar in Article III to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs."¹²⁹ The Court concluded its discussion by saying that "a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Article I, § 8, of the Constitution."¹³⁰ And moreover, that "[t]he taxpayer's allegation in such cases would be that *his tax money is being extracted and spent* in violation of specific constitutional protections against such abuses of legislative power."¹³¹

In the years since *Flast*, however, the Court has rejected every effort to expand the taxpayer-standing doctrine beyond the Establishment

¹²³ *Id.* at 94–95.

¹²⁴ *Id.* at 95.

¹²⁵ *Id.* at 95–96.

¹²⁶ *Id.* at 99–100.

¹²⁷ *Id.* at 100 (internal quotations and citations omitted).

¹²⁸ *Id.* at 101 (internal quotations and citations omitted).

¹²⁹ *Id.*

¹³⁰ *Id.* at 102.

¹³¹ *Id.* at 106 (emphasis added).

Clause.¹³² In fact, it has been slowly plugging the hole in the “impene- trable barrier” erected by *Frothingham* and punctured by *Flast*.¹³³

Flast’s focus on whether the particular *plaintiffs* are the proper party to bring a claim is essential to understanding the outcome in *ACSTO*. The outcome certainly could not have been rooted in concerns about issuing an advisory opinion. The case had been vigor- ously litigated for more than 10 years. The plaintiffs’ lawyers were tenacious, smart, and entirely opposed to Arizona’s tax credit pro- gram. The issues in the case were well defined. The concerns regard- ing issuing an advisory opinion were not present. I am sure the plaintiffs also opposed the program, but the question in *ACSTO* was whether they had a personal stake in the outcome of the case.

Justice Kennedy’s opinion in *ACSTO* begins by rooting the lack of taxpayer standing far more firmly in the text of Article III than did *Flast*. “Under Article III, the Federal Judiciary is vested with the ‘Power’ to resolve not questions and issues but ‘Cases’ or ‘Controvers- ies.’”¹³⁴ Thus, “a plaintiff who seeks to invoke the federal judicial power must assert more than just the ‘generalized interest of all citizens in constitutional governance.’”¹³⁵ The plaintiffs in *ACSTO* were unable to prove this. Nor did they try to make such a showing. Rather, they sought to rely on the *Flast* exception to the general rule against taxpayer standing. But even under *Flast*, there must be some showing of particular injury to the taxpayer bringing the suit.¹³⁶

The plaintiffs in *ACSTO* could not show a particular injury because the tax credits at issue did not extract and spend the plaintiffs’

¹³² See, e.g., *DaimlerChrysler Corp.*, 547 U.S. at 332 (declining to expand the *Flast* exception to the doctrine of taxpayer standing to Commerce Clause challenges).

¹³³ See, e.g., *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587 (2007) (plurality opinion) (no standing under *Flast* to challenge federal executive actions funded by general appropriations); *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) (no standing under *Flast* to challenge an agency’s decision to transfer a parcel of federal property to a religious institution).

¹³⁴ *ACSTO*, 131 S. Ct. at 1441.

¹³⁵ *Id.* at 1441-42 (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974)).

¹³⁶ See *Doremus v. Bd. of Educ. of Hawthorne*, 342 U.S. 429 (1952) (plaintiffs lacked taxpayer standing to bring Establishment Clause challenge to a law providing for the reading of the Bible in public schools because they lacked a direct financial interest in the case).

money.¹³⁷ “When Arizona taxpayers choose to contribute to [school tuition organizations], they spend their own money, not money the State has collected from respondents or from other taxpayers.”¹³⁸ Echoing the merits arguments that the program did not violate the Establishment Clause because of the multiple layers of private choice, Justice Kennedy wrote that the “contributions result from the decisions of private taxpayers regarding their own funds.”¹³⁹ He then stressed the multiple layers of private choice in the program. This language goes to the heart of the Establishment Clause challenge and will most certainly preclude the ACLU from attempting to find some other plaintiff to challenge the program.¹⁴⁰

Concluding Thoughts

The Court’s rejection of the plaintiffs’ view of tax credits as the equivalent of state revenues was a welcome one. It should be a commonsense notion that funds that never enter the government’s coffers remain private funds. When a taxpayer writes a check from her private bank account to a school tuition organization in December, there should be no doubt that the money contributed belongs to the taxpayer. That the state allows the taxpayer to reduce her tax bill the following April based on that contribution should not transform the contribution into tax revenue belonging to the state.

As the Arizona Supreme Court said in *Kotterman*, the tax credit merely “reduces the tax liability of those choosing to donate to

¹³⁷ ACSTO, 131 S. Ct. at 1447.

¹³⁸ *Id.*

¹³⁹ *Id.* at 1448 (“Private citizens create private [school tuition organizations]; [school tuition organizations] choose beneficiary schools; and taxpayers then contribute to [school tuition organizations]. While the State, at the outset, affords the opportunity to create and contribute to a[] [school tuition organization], the tax credit system is implemented by private action and with no state intervention. Objecting taxpayers know that their fellow citizens, not the State, decide to contribute and in fact make the contribution. These considerations prevent any injury the objectors may suffer from being fairly traceable to the government.”).

¹⁴⁰ “[I]f a law or practice, including a tax credit, disadvantages a particular religious group or a particular nonreligious group, the disadvantaged party would not have to rely on *Flast* to obtain redress for a resulting injury.” *Id.* at 1449 (citing *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8 (1989) (plurality opinion) (finding standing where a general interest magazine sought to recover tax payments on the ground that religious periodicals were exempt from the tax)).

[school tuition organizations].”¹⁴¹ It cannot be said, therefore, “that the legislature has somehow imposed a tax by declining to collect potential revenue from its citizens.”¹⁴² And yet, the U.S. Supreme Court came within one vote of holding that “all wealth belongs to the government, and then government allows citizens to keep some of it by declining to tax it.”¹⁴³

The ramifications of deciding who initially owns privately generated income extend far beyond education policy. If *ACSTO* had come out the other way on this issue, the U.S. Supreme Court would essentially have been holding that tax dollars fund every church, mosque, synagogue, and religious institution in America. Indeed, it would have been holding that *every* charitable organization that receives tax-deductible contributions—including IJ, ADF, and the ACLU—receives state funds from its donors. Such reasoning could have led to the elimination of tax deductions for donations to religious institutions. It could even have led to the elimination of tax-exempt status for religious institutions because, by declining to collect “potential revenue,” the government would have arguably been directly subsidizing religion with state funds. An opposite holding would also have jeopardized the independence of nonreligious organizations that receive tax-deductible contributions because the receipt of state funds always comes with strings, limitations, and government controls. Nothing short of intellectual freedom and liberty of conscience rode on the correct outcome in *ACSTO*.

Given the way the Supreme Court ruled, however, we were spared that parade of horrors. Fortunately, the money in your wallet still belongs to you and not the government.

¹⁴¹ Kotterman, 972 P.2d at 621.

¹⁴² *Id.*

¹⁴³ Editorial, Supreme School Choice: A Narrow Decision Averts a Legal Assault on Private Schools, *Wall St. J.*, Apr. 5, 2011, at A14, available at http://online.wsj.com/article/SB10001424052748703712504576242942552010676.html?mod=WSJ_article_MoreIn_Opinion.

