

TUITION TAX CREDITS AND WINN: A CONSTITUTIONAL BLUEPRINT FOR SCHOOL CHOICE

INTRODUCTION

“Congress shall make no law respecting an establishment of religion,
or prohibiting the free exercise thereof”¹

The Supreme Court recently paved the way for a new avenue of school choice, refusing to strike down an Arizona tax-credit program that allows Arizonans to direct a portion of their state income tax payments to organizations that support private schools, including religiously-affiliated schools.² In *Arizona Christian School Tuition Organization v. Winn*, a sharply divided Court held that the respondents, Arizona taxpayers, did not have legal standing to challenge the program’s constitutionality under the Establishment Clause.³ Writing for the five-four majority, Justice Anthony Kennedy distinguished Arizona’s tax-credit program from a government subsidy for religious schools, which taxpayers would have had legal standing to challenge.⁴ In her first dissenting opinion, Justice Elena Kagan argued that Arizona’s tax credit was for all practical purposes a government subsidy that supported religious schools, and thus respondents should be able to challenge the tax-credit program under the Establishment Clause.⁵

Although *Winn* was decided on standing grounds, its consequential holding established a constitutional blueprint for state school choice programs.⁶ This Comment attempts to gauge the impact of the Court’s decision. Part I details the Arizona tax-credit program, the procedural history leading to the Court’s decision in *Winn*, and the applicable Supreme Court legal standing and Establishment Clause jurisprudence.

¹ U.S. CONST. amend. I.

² Jess Bravin, *Private-School Tax Break Is Upheld*, WALL ST. J., Apr. 5, 2011, at A3.

³ 131 S. Ct. 1436, 1439–40 (2011); see also Adam Liptak, *Tax Credit Is Allowed for Religious Tuition*, N.Y. TIMES, Apr. 5, 2011, at A16.

⁴ *Winn*, 131 S. Ct. at 1447–49.

⁵ *Id.* at 1450–52 (Kagan, J., dissenting).

⁶ See *Tuition Tax Credits*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/issues-research/educ/school-choice-scholarship-tax-credits.aspx> (last visited Apr. 6, 2012) (noting that Arizona, Florida, Georgia, Indiana, Iowa, Oklahoma, Pennsylvania, and Rhode Island have tuition tax-credit programs); see also Jess Bravin, *Private-School Tax Break Is Upheld*, WALL ST. J. (Apr. 5, 2011), <http://online.wsj.com/article/SB10001424052748703712504576242992744305366.html> (“Florida, Georgia, Indiana, Iowa, Pennsylvania and Rhode Island already have such measures on the books, and similar proposals are pending in at least 11 other states.”); Richard Komer, *School Choice Is Here to Stay*, WALL ST. J., Aug. 29, 2011, at A17 (noting that Oklahoma also passed a tuition tax-credit scholarship program).

Part II discusses the Court's majority and dissenting opinions, while briefly acknowledging the concurring opinion. Part III then argues that, even if a challenger were able to establish standing, Arizona's and similar state tax-credit programs do not violate the Establishment Clause. Part IV analyzes the impact of the Court's decision on education reform. Finally, this Comment concludes that *Winn* is a step forward for school reform.⁷

I. BACKGROUND

Arizona's Constitution, like many other state constitutions, bars direct government aid to religious schools, including in the form of vouchers.⁸ To get around this, Arizona enacted a law that allows individual taxpayers to take a dollar-for-dollar tax credit up to \$500 for donations to private school scholarship funds known as school tuition organizations ("STOs").⁹ To qualify as an STO, a charitable organization must be nonprofit, make scholarships available to students of more than one school, and allocate at least ninety percent of its annual revenue to provide student scholarships for children attending qualified schools.¹⁰ In Arizona, more than fifty STOs distribute approximately \$50 million dollars annually to fund approximately 27,000 scholarships for students attending private schools, at least two-thirds of which are religious schools.¹¹

⁷ See *All Things Considered* (NPR radio broadcast Apr. 4, 2011), available at <http://www.npr.org/player/v2/mediaPlayer.html?action=1&t=1&islist=false&id=135121183&m=135121263> (reporting that, according to school choice advocate Timothy Keller of the Institute for Justice, the ruling will embolden other states to take similar action).

⁸ ARIZ. CONST. art. IX, § 10 ("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."); *Cain v. Horne*, 202 P.3d 1178, 1184–85 (Ariz. 2009) (holding that a school voucher program was unconstitutional under this provision of the Arizona Constitution). For a discussion of state constitutional provisions barring direct or indirect aid to religious schools, see Nicole Stelle Garnett, *A Winn for Educational Pluralism*, 121 YALE L.J. ONLINE 31, 31–37 (2011), <http://yalelawjournal.org/2011/05/26/garnett.html>.

⁹ ARIZ. REV. STAT. ANN. § 43-1089(A)(1) (2010–2011); see also Liptak, *supra* note 3; *All Things Considered*, *supra* note 7. The Arizona State Legislature recently amended the law to effectively double the amount of tax credits available. 2012 Ariz. Sess. Laws 4 (effective June 30, 2012).

¹⁰ *Winn*, 131 S. Ct. at 1440–41 ("A 'qualified school,' in turn, was defined in part as a [school] that did not discriminate on the basis of race, color, handicap, familial status, or national origin." (citing § 43-1089(G)(2))). The provision is now codified at § 43-1089(H)(2).

¹¹ See OFFICE ECON. RESEARCH & ANALYSIS, ARIZ. DEPT REVENUE, INDIVIDUAL INCOME TAX CREDIT FOR DONATIONS TO PRIVATE SCHOOL TUITION ORGANIZATIONS: REPORTING FOR 2010, at 3 (2011), available at <http://www.azdor.gov/Portals/0/Reports/private-school-tax-credit-report-2010.pdf>; Editorial, 'A Huge Victory for Choice,' N.Y. SUN (Apr. 4, 2011), <http://www.nysun.com/editorials/a-huge-victory-for-choice/87288/>; *All Things Considered*, *supra* note 7.

A group of Arizona taxpayers challenged the tax-credit program, arguing that it violated the Establishment Clause, incorporated to the states by the Fourteenth Amendment.¹² The Arizona Supreme Court rejected the taxpayers' claims on the merits.¹³ The respondents then filed the present action in the United States District Court for the District of Arizona.¹⁴ The Ninth Circuit reversed the district court's dismissal for failure to state a claim, ruling that the respondents had sufficiently alleged that the Arizona tax-credit program violated the Establishment Clause because it lacked religious neutrality.¹⁵ The Ninth Circuit held that the respondents had standing under *Flast v. Cohen*, a Supreme Court case that carved out a specific standing exception for taxpayers challenging state government's religious spending.¹⁶ The Ninth Circuit also noted that, as applied, Arizona's tax-credit program violated the Establishment Clause because it carried with it the "*imprimatur* of government endorsement."¹⁷ The Supreme Court granted certiorari.¹⁸

To frame the Supreme Court's decision in *Arizona Christian School Tuition Organization v. Winn*, this Part first examines the Court's standing jurisprudence relevant to taxpayer Establishment Clause challenges and, second, the Court's applicable Establishment Clause jurisprudence.

¹² *Winn*, 131 S. Ct. at 1440–41 (“Respondents alleged that [the Arizona law] allows STOs ‘to use State income-tax revenues to pay tuition for students at religious schools,’ some of which ‘discriminate on the basis of religion in selecting students.’”); Bravin, *supra* note 2 (“The Arizona law doesn’t bar discrimination on religious grounds, and the taxpayer plaintiffs alleged that many of the schools benefiting from the tax credit required adherence to a particular faith.”).

¹³ *Kotterman v. Killian*, 972 P.2d 606, 625 (Ariz. 1999) (en banc) (“We hold that the tuition tax credit is a neutral adjustment mechanism for equalizing tax burdens and encouraging educational expenditures. Petitioners have failed to demonstrate that it violates either the Federal or the Arizona Constitution.”); *see also* Shannon E. Trebbe, Cain v. Horne: *School Choice for Whom?*, 51 ARIZ. L. REV. 817, 817 (2009) (noting that although the Arizona Supreme Court later unanimously held in *Cain v. Horne* that school voucher programs providing state funding for the private education of disabled and foster children violated the Arizona Constitution, the court reaffirmed its previous decision in *Kotterman v. Killian*, upholding a tax-credit program that gave taxpayers a dollar-for-dollar tax credit for donations to their choice of private school scholarship programs). The United States Supreme Court denied certiorari. *Kotterman v. Killian*, 528 U.S. 921 (1999); *Rhodes v. Killian*, 528 U.S. 810 (1999).

¹⁴ *Winn*, 131 S. Ct. at 1440–41.

¹⁵ *Winn v. Ariz. Christian Sch. Tuition Org.*, 586 F.3d 649, 652, 658 (9th Cir. 2009) (denying motion to rehear en banc).

¹⁶ *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1008 (9th Cir. 2009), *overruled by Winn*, 131 S. Ct. at 1439.

¹⁷ *Winn*, 586 F.3d 649, 660–61 (9th Cir. 2009) (quoting *Winn*, 562 F.3d at 1013–14).

¹⁸ *Ariz. Christian Sch. Tuition Org. v. Winn*, 130 S. Ct. 3350 (2010).

A. Standing Jurisprudence

To bring a suit contesting a law's constitutionality, a plaintiff must have legal standing.¹⁹ This requires the plaintiff to suffer an "injury in fact" as a result of the challenged government action.²⁰ In *Flast v. Cohen*, the Supreme Court carved out an exception so that taxpayers have standing to challenge taxing and spending policies that violate the Establishment Clause.²¹ The Court has noted that this is a "narrow exception" to "the general rule against taxpayer standing"²² and has declined to extend it beyond Establishment Clause challenges.²³ The Court further limited this exception in *Hein v. Freedom from Religion Foundation, Inc.*, holding that taxpayers lacked standing to challenge the constitutionality of the White House's faith-based initiatives because the program stemmed from the executive branch rather than the legislative branch.²⁴

B. Establishment Clause Jurisprudence

If a plaintiff had standing to challenge a law under the Establishment Clause, the Supreme Court traditionally relied on a three-prong test set forth in *Lemon v. Kurtzman*²⁵ to determine whether that law violated the Establishment Clause.²⁶ Under the *Lemon* test, a government action "must have a secular legislative purpose"; "its principal or primary effect must be one that neither advances nor

¹⁹ *Allen v. Wright*, 468 U.S. 737, 750–51 (1984) (citing *Valley Forge Christian Coll. v. Am. United for Separation of Church & State*, 454 U.S. 464, 472 (1981)).

²⁰ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citing *Allen*, 468 U.S. at 756).

²¹ *Flast v. Cohen*, 392 U.S. 83, 102 (1968) (noting that two conditions must be met to establish taxpayer standing: (1) a "logical link" between the taxpayer status "and the type of legislative enactment attacked"; and (2) a "nexus" between taxpayer status and "the precise nature of the constitutional infringement alleged").

²² *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988).

²³ *See, e.g.*, *Hein v. Freedom From Religion Found.*, 551 U.S. 587, 609 (2007) (plurality); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 226–28 (1974); *United States v. Richardson*, 418 U.S. 166, 175 (1974).

²⁴ *Hein*, 551 U.S. at 609.

²⁵ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

²⁶ MICHAEL J. KAUFMAN & SHERELYN R. KAUFMAN, *EDUCATION LAW, POLICY, AND PRACTICE: CASES AND MATERIALS* 186 (2d ed. 2009) (recognizing that the Supreme Court has nonetheless disregarded the *Lemon* test in recent years). Among the current members of the Court, Justice Scalia is perhaps best known for criticizing the *Lemon* test and the Court's inconsistent application of Establishment Clause jurisprudence over the years. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 397–400 (1993) (Scalia, J., concurring).

inhibits religion”; and it “must not foster ‘an excessive government entanglement with religion.’”²⁷

Applying this test, the Court struck down a state tax deduction for tuition paid at religious and other private schools, holding that its primary effect was to advance religion, which was fatal under the second prong of the *Lemon* test.²⁸ But the Court has upheld the constitutionality of property tax exemptions for religious organizations,²⁹ state-issued tax-exempt bonds provided to sectarian institutions,³⁰ and a state tax deduction for expenses incurred by attending religious or other private schools under the *Lemon* test.³¹

The Court, however, has since shied away from the *Lemon* test, although never blatantly rejecting it.³² Instead, the Court has adopted the neutrality/private choice analysis from *Zelman v. Simmons-Harris*.³³ In *Zelman*, the Court upheld a Cleveland voucher program even though some of the money went to Catholic schools, holding that it was not tantamount to establishing religion because parents could decide how to use the vouchers.³⁴ The Court labeled the voucher program a “neutral program of private choice” that benefited “a broad class of individuals defined without reference to religion,” and neither favored one religion over another, nor favored religious organizations over non-religious organizations.³⁵

²⁷ *Lemon*, 403 U.S. at 612–13. The three-part test announced in *Lemon* derived from the Court’s Establishment Clause precedents in *Board Educ. v. Allen*, 392 U.S. 236, 243 (1968) and *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970).

²⁸ *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 789–94 (1973).

²⁹ *Walz*, 397 U.S. at 666–67, 680.

³⁰ *Hunt v. McNair*, 413 U.S. 734, 735–36 (1973).

³¹ *Mueller v. Allen*, 463 U.S. 388, 390–91 (1983).

³² *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (“*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 private choice, the program is not readily subject to challenge under the Establishment Clause.” (emphasis added)); *Mitchell v. Helms*, 530 U.S. 793, 809 (2000); *Agostini v. Felton*, 521 U.S. 203, 234–35 (1997); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993); *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 488–89 (1986); *see also supra* note 26 and accompanying text (recognizing that the Supreme Court has disregarded the *Lemon* test in recent years).

³³ *See Zelman*, 536 U.S. at 654–55; KAUFMAN & KAUFMAN, *supra* note 26, at 209.

³⁴ *See Zelman*, 536 U.S. at 643–48, 662–63; Editorial, *Supreme School Choice*, WALL ST. J., Apr. 5, 2011, at A14. *See generally* Ira C. Lupu & Robert W. Tuttle, *Zelman’s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917 (2003).

³⁵ *Zelman*, 536 U.S. at 653, 655.

II. DISCUSSION

In *Winn*, the Supreme Court held that a group of Arizona taxpayers did not have legal standing to challenge an Arizona law giving state income tax credits for contributions to STOs, organizations that provide scholarships to students attending private schools, the majority of which are religious schools.³⁶

In general, taxpayers do not have legal standing in federal court.³⁷ But the respondents, Arizona taxpayers, relied on the exception carved out in *Flast v. Cohen* granting taxpayers legal standing to challenge taxing and spending policies that violate the Establishment Clause.³⁸ The majority rejected this argument, however, and distinguished the case from *Flast*, holding that the respondents could not take advantage of the narrow exception carved out in *Flast* because the Arizona tax credit was not the equivalent of government expenditures intended to subsidize religion.³⁹

A. Justice Kennedy's Majority Opinion

A tax credit, according to Justice Kennedy's majority opinion, does not amount to a government subsidy of religion because private taxpayers are directing their own money, pre-government collection.⁴⁰ This is distinguishable because, in the case of tax expenditures, the resulting subsidy of religion is directly traceable to government spending.⁴¹

Justice Kennedy explained, "A dissenter whose tax dollars are 'extracted and spent' knows that he has in some small measure been made to contribute to an establishment in violation of conscience."⁴² He added, "When the government declines to impose a tax, by contrast, there is no such connection between dissenting taxpayer and alleged establishment."⁴³ Justice Kennedy also reasoned that any financial

³⁶ *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1440 (2011).

³⁷ *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 343 (2006) ("On several occasions, this Court has denied *federal* taxpayers standing under Article III to object to a particular expenditure of federal funds simply because they are taxpayers.").

³⁸ *Winn*, 131 S. Ct. at 1440, 1445; *see also* Geoffrey R. Stone, *Eviscerating the Establishment Clause*, HUFFINGTON POST (Apr. 6, 2011, 3:12 PM), http://www.huffingtonpost.com/geoffrey-r-stone/eviscerating-the-establishment_b_845646.html.

³⁹ *Winn*, 131 S. Ct. at 1447; *see also* Bravin, *supra* note 2.

⁴⁰ *Winn*, 131 S. Ct. at 1447 ("When Arizona taxpayers choose to contribute to STOs, they spend *their own money*, not money the State has collected from respondents or other taxpayers." (emphasis added)).

⁴¹ *Id.* ("When the government collects and spends taxpayer money, governmental choices are responsible for the transfer of wealth. In that case a resulting subsidy of religious activity is, for purposes of *Flast*, traceable to the government's expenditures.").

⁴² *Id.*

⁴³ *Id.*

injury alleged as a result of a tax credit “remains speculative,” while any financial injury alleged from tax expenditures is “direct and particular.”⁴⁴ Thus, according to the majority opinion, the distinction between tax credits and governmental expenditures refuted the respondents’ assertion of standing.⁴⁵

B. Justice Kagan’s Dissent

In her first dissent as a member of the Supreme Court, Justice Elena Kagan called the distinction between tax credits and tax expenditures “arbitrary.”⁴⁶ Justice Kagan reasoned, “Either way, the government has financed the religious activity. And so either way, taxpayers should be able to challenge the subsidy.”⁴⁷ In the fiery dissent, Justice Kagan argued that the “novel” distinction “has as little basis in principle as it does in our precedent.”⁴⁸ Justice Kagan noted that the Court had faced the identical situation five times, resolving each prior case without questioning the plaintiffs’ legal standing under *Flast*.⁴⁹ The consequence of the majority opinion, she suggested, would enable the government “to end-run *Flast*’s guarantee of access to the Judiciary.”⁵⁰ Now, Justice Kagan wrote, the government needs only to subsidize through the tax system to avoid taxpayer challenges to the state funding of religion.⁵¹ In making her dissent, she scolded the majority for eviscerating “our Constitution’s guarantee of religious neutrality.”⁵²

C. Justice Scalia’s Concurrence

In his concurring opinion, Justice Antonin Scalia, joined by Justice Clarence Thomas, urged the majority to overturn *Flast* and eliminate the narrow exception created by the Warren Court giving standing to taxpayers wishing to challenge taxing and spending laws that allegedly violate the Establishment Clause.⁵³ Justice Scalia labeled *Flast* “misguided” and “an anomaly in our jurisprudence, irreconcilable with

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 1450 (Kagan, J., dissenting); see also Editorial, *Justice Kagan Dissents*, N.Y. TIMES, Apr. 10, 2011, at WK9 (“The court’s ruling is another cynical sleight of hand, which will reduce access to federal courts while advancing endorsement of religion.”); Garrett Epps, *Justice Elena Kagan Speaks to America’s Main Street*, ATLANTIC (Apr. 6, 2011, 1:40 PM), <http://www.theatlantic.com/national/archive/2011/04/justice-elena-kagan-speaks-to-americas-main-street/236865/>.

⁴⁷ *Winn*, 131 S. Ct. at 1450 (Kagan, J., dissenting).

⁴⁸ *Id.*

⁴⁹ *Id.* at 1452–53.

⁵⁰ *Id.* at 1450.

⁵¹ *Id.*

⁵² *Id.* at 1451.

⁵³ *Id.* at 1449–50 (Scalia, J., concurring).

the Article III restrictions on federal judicial power that our opinions have established.”⁵⁴

III. ANALYSIS

In *Winn*, the Court pared down, to the absolute minimum, a taxpayer’s right to challenge government programs that provide financial aid to religion.⁵⁵ The majority opinion did everything but overturn *Flast v. Cohen*, leaving only a crack in the door to judicial access for taxpayers wishing to challenge the constitutionality of government taxing and spending under the Establishment Clause.⁵⁶

Although the distinction between tax credits and tax expenditures is perhaps a bit “novel,” as suggested by Justice Kagan,⁵⁷ the undecided issue in the case remains the most intriguing: whether the Arizona tax-credit program violates the Establishment Clause. This Part argues that such dollar-for-dollar state income tax-credit programs, currently existing in eight states,⁵⁸ and pending in several more, do not violate the Establishment Clause.⁵⁹

The First Amendment limits government action; it says nothing about private, individual choices.⁶⁰ The Arizona tax-credit program falls on the side of private, individual action and thus does not violate the

⁵⁴ *Id.* at 1450.

⁵⁵ See Lyle Denniston, *Opinion Recap: The Near-End of “Taxpayer Standing,”* SCOTUSBLOG (Apr. 4, 2011, 11:26 AM), <http://www.scotusblog.com/2011/04/opinion-recap-the-near-end-of-taxpayer-standing/> (“While the Court left in the books its most important ruling on ‘taxpayer standing,’ the 1968 precedent in *Flast v. Cohen*, that ruling appeared to stand alone, in stark and even threatened isolation.”); Editorial, *High Court Ruling on Arizona Program Sets a Bad Precedent*, L.A. TIMES (Apr. 7, 2011), <http://articles.latimes.com/2011/apr/07/opinion/la-ed-tuition-20110407>.

⁵⁶ See Denniston, *supra* note 55 (“The Ninth Circuit Court ruled that the program would fail constitutionally if it actually went to trial, but now there is no apparent candidate eligible to pursue such a challenge.”); Editorial, *supra* note 55 (“The decision might seem technical, but it will make it harder in the future for taxpayers to challenge programs that breach the wall between church and state.”); see also discussion *supra* Part II.A.

⁵⁷ *Winn*, 131 S. Ct. at 1450 (Kagan, J., dissenting).

⁵⁸ See ARIZ. REV. STAT. ANN. § 43-1089 (2010–2011); FLA. STAT. ANN. § 220.1875 (West Supp. 2012); GA. CODE ANN. § 48-7-29.16 (West 2009 & Supp. 2011); IND. CODE ANN. § 6-3.1-30.5 (LexisNexis Supp. 2011); IOWA CODE § 422.11S (2011); OKLA. STAT. ANN. tit. 68, § 2357.206 (West Supp. 2012); PA. CONS. STAT. ANN. § 8705-F (West Supp. 2011); R.I. GEN. LAWS § 44-62-1 (2010). As previously noted, the Arizona law was recently amended to effectively double the amount of tax credits available. 2012 Ariz. Sess. Laws 4 (effective June 30, 2012).

⁵⁹ Notably, Stanford University Professor of Law, Michael McConnell, has suggested that, given the current Court’s conservative leaning and more accommodating view of church and state, the *Winn* decision “probably does not change the ultimate outcome of any cases.” See *All Things Considered*, *supra* note 7.

⁶⁰ See Nicole Stelle Garnett & Richard W. Garnett, *School Choice, the First Amendment, and Social Justice*, 4 TEX. REV. L. & POL. 301, 333–36 (2000).

Establishment Clause.⁶¹ As urged by the American Center for School Choice, the Arizona tax-credit program does not “establish” or “endorse” religion; instead, it is a program that empowers individual taxpayers “to provide enhanced educational opportunities to children through a religion-neutral tax-credit.”⁶² As the *Winn* majority opinion noted, “When Arizona taxpayers choose to contribute to STOs, they spend their own money, not money the State has collected from respondents or from other taxpayers.”⁶³ The fact that twenty-five of the fifty-five STOs chose to limit their scholarships to religious schools is not the result of government action, but rather reflects private, market-based decisions.⁶⁴

Furthermore, the neutrality of the Arizona tax-credit program is the beginning and end of the analysis.⁶⁵ In *Zelman*, the Supreme Court upheld an Ohio voucher program because the program permitted participation of all schools within the district, religious and non-religious, and provided benefits to all families, without reference to religion.⁶⁶ The Arizona tax-credit program, which is available to students attending religious or non-religious institutions, is no different.⁶⁷ Moreover, the Arizona religion-neutral tax-credit program is far removed from the New York tuition reimbursement program that the Court struck down in *Committee for Public Education and Religious Liberty v.*

⁶¹ See *Winn v. Ariz. Christian Sch. Tuition Org.*, 586 F.3d 649, 662 (9th Cir. 2009) (denying motion for rehearing en banc) (O’Scannlain, J., dissenting) (“In every respect and at every level, these are purely private choices, not government policy.”).

⁶² Brief Amicus Curiae of the American Center for School Choice in Support of Petitioners at 3, *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (No. 09-987); see also *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002) (“We believe that the program challenged here is a program of true private choice, consistent with *Mueller*, *Witters*, and *Zobrest*, and thus constitutional.”).

⁶³ *Winn*, 131 S. Ct. at 1440, 1447.

⁶⁴ See Brief of Amici Curiae States of Michigan, Florida, Indiana, Louisiana, New Jersey, Pennsylvania, South Carolina, & Utah in Support of Petitioner at 11–12, *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (No. 09-991) [hereinafter Brief for States] (“[I]n a different community this same program could just as easily result in a total dearth of funding for religious schools.” (citing *Winn*, 586 F.3d at 662) (O’Scannlain, J., dissenting)); see also *Zelman*, 536 U.S. at 656–57 (“But Cleveland’s preponderance of religiously affiliated private schools certainly did not arise as a result of the program; it is a phenomenon common to many American cities.” (citing NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T EDUC., PRIVATE SCHOOL UNIVERSE SURVEY: 1999–2000, at 2–4 (2001))).

⁶⁵ Brief for States, *supra* note 64, at 6–7.

⁶⁶ *Zelman*, 536 U.S. at 653 (noting that the only preference in the Ohio voucher program was for low-income families who received higher funding and who were given priority admission).

⁶⁷ ARIZ. REV. STAT. ANN. § 43-1089(H)(3) (2010–2011) (“School tuition organization” means a charitable organization in this state that is exempt from federal taxation under section 501(c)(3) of the internal revenue code and that allocates at least ninety per cent of its annual revenue for educational scholarships or tuition grants to children to allow them to attend any qualified school of their parents’ choice.” (emphasis added)); see also *supra* Part II (discussing the Arizona tax-credit program).

Nyquist,⁶⁸ which served functionally and “unmistakably” to provide financial support to religious schools while prohibiting participation from parents of public school enrollees.⁶⁹ In stark contrast, the Arizona tax-credit program, as the respondents readily admitted, is religion-neutral; therefore, under *Zelman*, it does not violate the Establishment Clause.⁷⁰

IV. IMPACT

Since the Arizona tax-credit program began in 1997, it has become the third-largest and third-longest running school choice program in the country, spurring a growing number of identical tax-credit mechanisms across the country.⁷¹ Although the Supreme Court did not decide whether the Arizona tax-credit program violated the Establishment Clause, *Winn* essentially shut the door to litigants wishing to challenge the constitutionality of the tax-credit mechanisms, effectively upholding them.⁷² Even if a plaintiff were able to establish standing, in light of the Court’s recent Establishment Clause jurisprudence, particularly *Zelman v. Simmon-Harris*, the Court would be unlikely to find the program unconstitutional.⁷³ Thus, as a result of *Winn*, tax-credit programs in seven states, in addition to Arizona, and those that are on the verge of passing in several other states are likely to stand.⁷⁴ This Part argues

⁶⁸ 413 U.S. 756 (1973).

⁶⁹ *Zelman*, 536 U.S. at 661 (quoting *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 783 (1973)).

⁷⁰ *See Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1018 (9th Cir. 2009).

⁷¹ *See* Press Release, Am. Fed’n for Children, AFC Applauds U.S. Supreme Court Ruling on Arizona Tax Credits (Apr. 4, 2011), <http://www.federationforchildren.org/articles/261>; *see also supra* note 6 and accompanying text (noting that seven states, in addition to Arizona, have instituted tax-credit programs and that legislation to create tax-credit programs is pending in several more states).

⁷² *See* Denniston, *supra* note 55 (“[T]here is no apparent candidate eligible to pursue such a challenge.”); *see also* Editorial, *supra* note 55; Liptak, *supra* note 3; Stone, *supra* note 38.

⁷³ Nina Totenberg, *High Court OKs Ariz. Tax Credit for Religious Schools*, NPR (Apr. 4, 2011), <http://www.npr.org/2011/04/04/135121183/supreme-court-rules-for-arizona-tax-credit> (“But Stanford University law professor Michael McConnell says these decisions ‘probably [do] not change the ultimate outcome of any cases,’ given the current Supreme Court’s more accommodating view of church and state.”); *see also Zelman*, 536 U.S. at 653.

⁷⁴ *See* Bravin, *supra* note 2 (“The ruling appears to clear a path for other states to offer similar tax breaks in response to advocates of giving parents disenchanted with public schools assistance to send their children to religious schools.”); Andrew J. Coulson, *Victory! Supreme Court Upholds Education Tax Credits*, CATO INST. (Apr. 4, 2011, 11:56 AM), <http://www.cato-at-liberty.org/victory-supreme-court-upholds-education-tax-credits/> (“With this ruling, the way forward for the school choice movement is clearer than it has ever been. Education tax credits — both the scholarship form operating in Arizona and the direct form operating in Illinois and Iowa — allow for universal access to the education

that the impact of the Court's decision—effectively upholding tax-credit programs—is a step forward for education reform.

Critics of Arizona's tax-credit program, including Justice Kagan in her dissent in *Winn*, argue that the tax-credit program has diverted \$350 million from the Arizona State Treasury to private schools.⁷⁵ But there is no evidence that state legislatures would pass along those funds to public schools if the respondents had successfully sought an injunction against the Arizona tax-credit program.⁷⁶ Moreover, this amount does not account for the financial burden lifted from the public schools as a result of STOs, which grant approximately 27,000 scholarships⁷⁷ for students to attend private schools, an estimated 11,697 of whom would otherwise have no choice but to attend public schools.⁷⁸ Additionally, the average value of an STO scholarship is far less than the average cost of educating an Arizona public school student, constituting a *net gain* in government savings per student.⁷⁹ With budget cuts to state education coffers becoming the norm across the country, the Arizona tax-credit

marketplace without forcing any citizen to subsidize instruction that violates their convictions.”).

⁷⁵ See *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1458 (2011) (Kagan, J., dissenting); Bravin, *supra* note 2.

⁷⁶ *Winn*, 131 S. Ct. at 1444 (majority opinion); see also *All Things Considered*, *supra* note 7.

⁷⁷ See ARIZ. DEP'T REVENUE, *supra* note 11, at 3; Editorial, *supra* note 11; Press Release, *supra* note 71.

⁷⁸ See *Winn*, 131 S. Ct. at 1444; Vicki E. Murray, *An Analysis of Arizona Individual Income Tax-credit Scholarship Recipients' Family Income, 2009–10 School Year* 4–5 (Harvard Kennedy Sch. Program on Educ. Policy and Governance, Working Paper PEPG 10-18, 2010) (citing statistics by the Goldwater Institute and Charles M. North, a Baylor University economics professor); see also *Mueller v. Allen*, 463 U.S. 388, 395 (1983) (“By educating a substantial number of students [private] schools relieve public schools of a correspondingly great burden—to the benefit of all taxpayers.”).

⁷⁹ See *Winn*, 131 S. Ct. at 1444 (“Because it encourages scholarships for attendance at private schools, the STO tax credit may not cause the State to incur any financial loss.”); Brief of Cato Institute et al. as Amici Curiae in Support of Petitioners at 15, *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (No. 09-988) (noting the average STO scholarship is less than one-fourth of per-pupil funding available to charter schools and one-fifth of the funding available to traditional public schools); Brief for Petitioner Garriott at 38, *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (No. 09-987) (noting that the average value of an STO scholarship is far less than the average per pupil spending in Arizona's public schools); TOM HORNE, ARIZ. DEP'T EDUC., SUPERINTENDENT'S ANNUAL REPORT FOR FISCAL YEAR 2008–2009, at 54 (2010), available at <http://www.ade.az.gov/AnnualReport/AnnualReport2009/Vol1.pdf>; see also Dan Lips & Lindsey Burke, *School Choice Gaining Momentum*, HERITAGE FOUND. (Feb. 19, 2009), <http://www.heritage.org/research/education-notebook/school-choice-gaining-momentum> (“A fiscal analysis mandated by the state legislature found that Florida's corporate scholarship tax credit saved taxpayers \$39 million in 2007.”).

program provides a blueprint for much-needed and financially-sustainable education reform.⁸⁰

Although critics of the Arizona tax-credit program argue that the program benefits children of wealthy families, scholars from Harvard University's Program on Education Policy and Governance recently published a report that debunks this myth.⁸¹ According to the report, the median family income of families with scholarships from STOs was \$55,458, almost \$5,000 less than the statewide median family income and almost \$5,000 less than the median incomes of their home neighborhoods, as estimated using student addresses.⁸²

Further, more than two-thirds of families with scholarships from STOs had incomes that were below \$75,467, qualifying them for Arizona's corporate income tax-credit scholarship program.⁸³ Thus, in addition to limiting the financial burden on public schools, the Arizona tax-credit program grants cash-strapped parents a choice in the education of their children that otherwise would be unavailable to an estimated 11,697 students.⁸⁴

CONCLUSION

The phenomenon of school choice has swept across the country. Charter schools, virtual schooling, homeschooling, vouchers, and many other options are now available to parents seeking an alternative to the educational status quo.⁸⁵ In *Winn*, the Supreme Court effectively upheld the constitutionality of Arizona's tax-credit program, paring down

⁸⁰ See Brief for Petitioner Arizona Christian School Tuition Organization at 31, *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (No. 09-987); Carrie Lips & Jennifer Jacoby, *The Arizona Scholarship Tax Credit: Giving Parents Choices, Saving Taxpayers Money*, POLICY ANALYSIS, no. 414, Sept. 17, 2001, at 1, available at www.cato.org/pubs/pas/pa414.pdf.

⁸¹ See Murray, *supra* note 78, at 1 ("These student-level data show there is no factual basis for claims that the individual income tax-credit scholarship program fails to help poor and lower-income students.").

⁸² *Id.* at 1, 14–15.

⁸³ *Id.* at 1, 15.

⁸⁴ *Id.* at 4–5; see also Lindsey Burke, *Supreme Court Throws Out Challenge to Arizona Tuition Tax Credit Program*, THE FOUNDRY (Apr. 4, 2011, 3:09 PM), <http://blog.heritage.org/2011/04/04/supreme-court-throws-out-challenge-to-arizona-tuition-tax-credit-program/> ("The Arizona Tuition Tax Credit Program has successfully provided school choice options to low- and middle-income students who would otherwise be relegated to schools that do not meet their needs.").

⁸⁵ See Dale Basset, *On School Choice We Must Look to the US*, THE TELEGRAPH (Apr. 26, 2011, 3:43 PM), <http://www.telegraph.co.uk/news/politics/8474348/On-school-choice-we-must-look-to-the-US.html> (noting that advocates of school choice "have been winning the debate in America for several years"); Burke, *supra* note 84 ("School choice—whether tuition tax credit programs, vouchers, virtual school, homeschooling, or the many other options offered across the country—ensures that families have access to an education that best meets their children's needs.").

judicial access to the bare minimum for litigants wishing to challenge similar programs in federal court. As a result, tax-credit programs already present in eight states, and pending in several others, will remain a viable policy option for state lawmakers.

As this Comment argues, tax-credit programs are a positive step for education reform: first, because they lift some of the financial burden off public schools, and, second, because they provide low and middle-income families educational opportunities otherwise unavailable. Thus, each state should institute financially-sustainable education reform patterned after Arizona's successful tax-credit program.

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