

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION *v.* WINN *et al.*

certiorari to the united states court of appeals for the ninth circuit

Syllabus

Decided April 4, 2011

Respondents, Arizona taxpayers, sued petitioner Director of the State Department of Revenue, challenging Ariz. Rev. Stat. Ann. §43-1089 on Establishment Clause grounds. The Arizona law gives tax credits for contributions to school tuition organizations, or STOs, which then use the contributions to provide scholarships to students attending private schools, including religious schools. Petitioner Arizona Christian School Tuition Organization and others later intervened. The District Court dismissed the suit for failure to state a claim. Reversing, the Ninth Circuit held that respondents had standing as taxpayers under *Flast v. Cohen*, 392 U. S. 83, and had stated an Establishment Clause claim.

Held: Because respondents challenge a tax credit as opposed to a governmental expenditure, they lack Article III standing.

Kennedy: Opinion of the Court

Justice Kennedy delivered the opinion of the Court.

Arizona provides tax credits for contributions to school tuition organizations, or STOs. STOs use these contributions to provide scholarships to students attending private schools, many of which are religious. Respondents are a group of Arizona taxpayers who challenge the STO tax credit as a violation of Establishment Clause principles under the First and Fourteenth Amendments. After the Arizona Supreme Court rejected a similar Establishment Clause claim on the merits, respondents sought intervention from the Federal Judiciary.

To obtain a determination on the merits in federal court, parties seeking relief must show that they have standing under Article III of the Constitution. Standing in Establishment Clause cases may be shown in various ways. Some plaintiffs may demonstrate standing based on the direct harm of what is claimed to be an establishment of religion, such as a mandatory prayer in a public school classroom. Other plaintiffs may demonstrate standing on the ground that they have

incurred a cost or been denied a benefit on account of their religion. Those costs and benefits can result from alleged discrimination in the tax code, such as when the availability of a tax exemption is conditioned on religious affiliation.

For their part, respondents contend that they have standing to challenge Arizona's STO tax credit for one and only one reason: because they are Arizona taxpayers. But the mere fact that a plaintiff is a taxpayer is not generally deemed sufficient to establish standing in federal court. To overcome that rule, respondents must rely on an exception created in *Flast v. Cohen*, 392 U. S. 83 (1968). For the reasons discussed below, respondents cannot take advantage of *Flast's* narrow exception to the general rule against taxpayer standing. As a consequence, respondents lacked standing to commence this action, and their suit must be dismissed for want of jurisdiction.

Respondents challenged §43-1089, a provision of the Arizona Tax Code. Section 43-1089 allows Arizona taxpayers to obtain dollar-for-dollar tax credits of up to \$500 per person and \$1,000 per married couple for contributions to STOs.... Under a version of §43-1089 in effect during the pendency of this lawsuit, a charitable organization could be deemed an STO only upon certain conditions. The organization was required to be exempt from federal taxation under §501(c)(3) of the Internal Revenue Code of 1986. It could not limit its scholarships to students attending only one school. And it had to allocate "at least ninety per cent of its annual revenue for educational scholarships or tuition grants" to children attending qualified schools. A "qualified school," in turn, was defined in part as a private school in Arizona that did not discriminate on the basis of race, color, handicap, familial status, or national origin....

The concept and operation of the separation of powers in our National Government have their principal foundation in the first three Articles of the Constitution. Under Article III, the Federal Judiciary is vested with the "Power" to resolve not questions and issues but "Cases" or "Controversies." This language restricts the federal judicial power "to the traditional role of the Anglo-American courts." By rules consistent with the longstanding practices of Anglo-American courts a plaintiff who seeks to invoke the federal judicial power must assert more than just the "generalized interest of all citizens in constitutional governance."

Continued adherence to the case-or-controversy requirement of Article III maintains the public's confidence in an unelected but restrained Federal Judiciary. If the judicial power were "extended to every *question* under the constitution," Chief Justice Marshall once explained, federal courts might take possession of "almost every subject proper for legislative discussion and decision."For the federal courts to decide questions of law arising outside of cases and controversies would be inimical to the Constitution's democratic character. And the resulting conflict between the judicial and the political branches would not, "in the long run, be beneficial to either."

To state a case or controversy under Article III, a plaintiff must establish standing. The minimum constitutional requirements for standing were explained in *Lujan v. Defenders of Wildlife*, 504 U. S. 555 (1992).

"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 ... trace[able] to the challenged action of the defendant,

and not ... th[e] 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.' "

In requiring a particular injury, the Court meant "that the injury must affect the plaintiff in a personal and individual way." The question now before the Court is whether respondents, the plaintiffs in the trial court, satisfy the requisite elements of standing.

Respondents suggest that their status as Arizona taxpayers provides them with standing to challenge the STO tax credit. Absent special circumstances, however, standing cannot be based on a plaintiff's mere status as a taxpayer. This Court has rejected the general proposition that an individual who has paid taxes has a "continuing, legally cognizable interest in ensuring that those funds are not *used* by the Government in a way that violates the Constitution." This precept has been referred to as the rule against taxpayer standing.

The doctrinal basis for the rule was discussed in *Frothingham v. Mellon*, 262 U. S. 447 (1923) (decided with *Massachusetts v. Mellon*). There, a taxpayer-plaintiff had alleged that certain federal expenditures were in excess of congressional authority under the Constitution. The plaintiff argued that she had standing to raise her claim because she had an interest in the Government Treasury and because the allegedly unconstitutional expenditure of Government funds would affect her personal tax liability. The Court rejected those arguments. The "effect upon future taxation, of any payment out of funds," was too "remote, fluctuating and uncertain" to give rise to a case or controversy. And the taxpayer-plaintiff's "interest in the moneys of the Treasury," the Court recognized, was necessarily "shared with millions of others." As a consequence, *Frothingham* held that the taxpayer-plaintiff had not presented a "judicial controversy" appropriate for resolution in federal court but rather a "matter of public ... concern" that could be pursued only through the political process....

In holdings consistent with *Frothingham*, more recent decisions have explained that claims of taxpayer standing rest on unjustifiable economic and political speculation. When a government expends resources or declines to impose a tax, its budget does not necessarily suffer. On the contrary, the purpose of many governmental expenditures and tax benefits is "to spur economic activity, which in turn *increases* government revenues."

Difficulties persist even if one assumes that an expenditure or tax benefit depletes the government's coffers. To find injury, a court must speculate "that elected officials will increase a taxpayer-plaintiff's tax bill to make up a deficit." And to find redressability, a court must assume that, were the remedy the taxpayers seek to be allowed, "legislators will pass along the supposed increased revenue in the form of tax reductions." It would be "pure speculation" to conclude that an injunction against a government expenditure or tax benefit "would result in any actual tax relief" for a taxpayer-plaintiff.

These well-established principles apply to the present cases. Respondents may be right that Arizona's STO tax credits have an estimated annual value of over \$50 million. The education of its young people is, of course, one of the State's principal missions and responsibilities; and the consequent costs will make up a significant portion of the state budget. That, however, is just the beginning of the analysis.

By helping students obtain scholarships to private schools, both religious and secular, the STO program might relieve the burden placed on Arizona's public schools. The result could be an immediate and permanent cost savings for the State. Underscoring the potential financial benefits of the STO program, the average value of an STO scholarship may be far less than the average cost of educating an Arizona public school student. Because it encourages scholarships for attendance at private schools, the STO tax credit may not cause the State to incur any financial loss.

Even assuming the STO tax credit has an adverse effect on Arizona's annual budget, problems would remain. To conclude there is a particular injury in fact would require speculation that Arizona lawmakers react to revenue shortfalls by increasing respondents' tax liability. A finding of causation would depend on the additional determination that any tax increase would be traceable to the STO tax credits, as distinct from other governmental expenditures or other tax benefits. Respondents have not established that an injunction against application of the STO tax credit would prompt Arizona legislators to "pass along the supposed increased revenue in the form of tax reductions." Those matters, too, are conjectural.

Each of the inferential steps to show causation and redressability depends on premises as to which there remains considerable doubt. The taxpayers have not shown that any interest they have in protecting the State Treasury would be advanced. Even were they to show some closer link, that interest is still of a general character, not particular to certain persons. Nor have the taxpayers shown that higher taxes will result from the tuition credit scheme. The rule against taxpayer standing, a rule designed both to avoid speculation and to insist on particular injury, applies to respondents' lawsuit. The taxpayers, then, must rely on an exception to the rule, an exception next to be considered.

The primary contention of respondents, of course, is that, despite the general rule that taxpayers lack standing to object to expenditures alleged to be unconstitutional, their suit falls within the exception established by *Flast v. Cohen*, 392 U. S. 83. It must be noted at the outset that, as this Court has explained, *Flast's* holding provides a "narrow exception" to "the general rule against taxpayer standing."

At issue in *Flast* was the standing of federal taxpayers to object, on First Amendment grounds, to a congressional statute that allowed expenditures of federal funds from the General Treasury to support, among other programs, "instruction in reading, arithmetic, and other subjects in religious schools, and to purchase textbooks and other instructional materials for use in such schools." *Flast* held that taxpayers have standing when two conditions are met.

The first condition is that there must be a "logical link" between the plaintiff's taxpayer status "and the type of legislative enactment attacked." In *Flast*, the allegation was that the Federal Government violated the Establishment Clause in the exercise of its legislative authority both to collect and spend tax dollars. In the decades since *Flast*, the Court has been careful to enforce this requirement.

The second condition for standing under *Flast* is that there must be "a nexus" between the plaintiff's taxpayer status and "the precise nature of the constitutional infringement alleged." This condition was deemed satisfied in *Flast* based on the allegation that Government funds had been

spent on an outlay for religion in contravention of the Establishment Clause. In *Frothingham*, by contrast, the claim was that Congress had exceeded its constitutional authority without regard to any specific prohibition. Confirming that *Flast* turned on the unique features of Establishment Clause violations, this Court has "declined to lower the taxpayer standing bar in suits alleging violations of any constitutional provision apart from the Establishment Clause."

After stating the two conditions for taxpayer standing, *Flast* considered them together, explaining that individuals suffer a particular injury for standing purposes when, in violation of the Establishment Clause and by means of "the taxing and spending power," their property is transferred through the Government's Treasury to a sectarian entity. As *Flast* put it: "The 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." *Flast* thus "understood the 'injury' alleged in Establishment Clause challenges to federal spending to be the very 'extract[ion] and spen[ding]' of 'tax money' in aid of religion alleged by a plaintiff." "Such an injury," *Flast* continued, is unlike "generalized grievances about the conduct of government" and so is "appropriate for judicial redress."

...Respondents contend that these principles demonstrate their standing to challenge the STO tax credit. In their view the tax credit is, for *Flast* purposes, best understood as a governmental expenditure. That is incorrect.

It is easy to see that tax credits and governmental expenditures can have similar economic consequences, at least for beneficiaries whose tax liability is sufficiently large to take full advantage of the credit. Yet tax credits and governmental expenditures do not both implicate individual taxpayers in sectarian activities. 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. In that instance the taxpayer's direct and particular connection with the establishment does not depend on economic speculation or political conjecture. The connection would exist even if the conscientious dissenter's tax liability were unaffected or reduced. When the government declines to impose a tax, by contrast, there is no such connection between dissenting taxpayer and alleged establishment. Any financial injury remains speculative. And awarding some citizens a tax credit allows other citizens to retain control over their own funds in accordance with their own consciences.

The distinction between governmental expenditures and tax credits refutes respondents' assertion of standing. 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. Arizona's §43-1089 does not "extrac[t] and spen[d]" a conscientious dissenter's funds in service of an establishment or " 'force a citizen to contribute three pence only of his property' " to a sectarian organization. On the contrary, respondents and other Arizona taxpayers remain free to pay their own tax bills, without contributing to an STO. Respondents are likewise able to contribute to an STO of their choice, either religious or secular.... Finding standing under these circumstances would be more than the extension of *Flast* "to the limits of its logic." It would be a departure from *Flast's* stated rationale.

Furthermore, respondents cannot satisfy the requirements of causation and redressability. 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. And an injunction against those expenditures would address the objections of conscience raised by taxpayer-plaintiffs. Here, by contrast, contributions result from the decisions of private taxpayers regarding their own funds. Private citizens create private STOs; STOs choose beneficiary schools; and taxpayers then contribute to STOs. While the State, at the outset, affords the opportunity to create and contribute to an STO, 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. And while an injunction against application of the tax credit most likely would reduce contributions to STOs, that remedy would not affect noncontributing taxpayers or their tax payments. As a result, any injury suffered by respondents would not be remedied by an injunction limiting the tax credit's operation....

...The fact that respondents are state taxpayers does not give them standing to challenge the subsidies that §43-1089 allegedly provides to religious STOs.

Kagan: Dissent

Justice Kagan, with whom *Justice Ginsburg*, *Justice Breyer*, and *Justice Sotomayor* join, dissenting.

Since its inception, the Arizona private-school-tuition tax credit has cost the State, by its own estimate, nearly \$350 million in diverted tax revenue. The Arizona taxpayers who instituted this suit (collectively, Plaintiffs) allege that the use of these funds to subsidize school tuition organizations (STOs) breaches the Establishment Clause's promise of religious neutrality. Many of these STOs, the Plaintiffs claim, discriminate on the basis of a child's religion when awarding scholarships.

For almost half a century, litigants like the Plaintiffs have obtained judicial review of claims that the government has used its taxing and spending power in violation of the Establishment Clause. Beginning in *Flast v. Cohen*, 392 U. S. 83 (1968), and continuing in case after case for over four decades, this Court and others have exercised jurisdiction to decide taxpayer-initiated challenges not materially different from this one. Not every suit has succeeded on the merits, or should have. But every taxpayer-plaintiff has had her day in court to contest the government's financing of religious activity.

Today, the Court breaks from this precedent by refusing to hear taxpayers' claims that the government has unconstitutionally subsidized religion through its tax system. These litigants lack standing, the majority holds, because the funding of religion they challenge comes from a tax credit, rather than an appropriation. A tax credit, the Court asserts, does not injure objecting taxpayers, because it "does not extract and spend [their] funds in service of an establishment."

This novel distinction in standing law between appropriations and tax expenditures has as little basis in principle as it has in our precedent. Cash grants and targeted tax breaks are means of accomplishing the same government objective--to provide financial support to select individuals or organizations. Taxpayers who oppose state aid of religion have equal reason to protest whether that aid flows from the one form of subsidy or the other. Either way, the government has financed the religious activity. And so either way, taxpayers should be able to challenge the subsidy.

Still worse, the Court's arbitrary distinction threatens to eliminate *all* occasions for a taxpayer to contest the government's monetary support of religion. Precisely because appropriations and tax breaks can achieve identical objectives, the government can easily substitute one for the other. Today's opinion thus enables the government to end-run *Flast's* guarantee of access to the Judiciary. From now on, the government need follow just one simple rule--subsidize through the tax system--to preclude taxpayer challenges to state funding of religion.

And that result--the effective demise of taxpayer standing--will diminish the Establishment Clause's force and meaning. Sometimes, no one other than taxpayers has suffered the injury necessary to challenge government sponsorship of religion. Today's holding therefore will prevent federal courts from determining whether some subsidies to sectarian organizations comport with our Constitution's guarantee of religious neutrality. Because I believe these challenges warrant consideration on the merits, I respectfully dissent from the Court's decision....

(The] simple restatement of the *Flast* standard should be enough to establish that the Plaintiffs have standing. They attack a provision of the Arizona tax code that the legislature enacted pursuant to the State Constitution's taxing and spending clause. And they allege that this provision violates the Establishment Clause. By satisfying both of *Flast's* conditions, the Plaintiffs have demonstrated their "stake as taxpayers" in enforcing constitutional restraints on the provision of aid to STOs. Indeed, the connection in this case between "the [taxpayer] status asserted and the claim sought to be adjudicated" could not be any tighter: As noted when this Court previously addressed a different issue in this lawsuit, the Plaintiffs invoke the Establishment Clause to challenge "an integral part of the State's *tax* statute" that "is reflected on state *tax* forms" and that "is part of the calculus necessary to determine *tax* liability." I would therefore affirm the Court of Appeals' determination (not questioned even by the eight judges who called for rehearing en banc on the merits) that the Plaintiffs can pursue their claim in federal court.

The majority reaches a contrary decision by distinguishing between two methods of financing religion: A taxpayer has standing to challenge state subsidies to religion, the Court announces, when the mechanism used is an appropriation, but not when the mechanism is a targeted tax break, otherwise called a "tax expenditure." In the former case, but not in the latter, the Court declares, the taxpayer suffers cognizable injury.

But this distinction finds no support in case law, and just as little in reason. In the decades since *Flast*, no court--not one--has differentiated between appropriations and tax expenditures in deciding whether litigants have standing. Over and over again, courts (including this one) have faced Establishment Clause challenges to tax credits, deductions, and exemptions; over and over again, these courts have reached the merits of these claims. And that is for a simple reason:

Taxpayers experience the same injury for standing purposes whether government subsidization of religion takes the form of a cash grant or a tax measure. The only rationale the majority offers for its newfound distinction--that grants, but not tax expenditures, somehow come from a complaining taxpayer's own wallet--cannot bear the weight the Court places on it. If *Flast* is still good law--and the majority today says nothing to the contrary--then the Plaintiffs should be able to pursue their claim on the merits....

Our taxpayer standing cases have declined to distinguish between appropriations and tax expenditures for a simple reason: Here, as in many contexts, the distinction is one in search of a difference. To begin to see why, consider an example far afield from *Flast* and, indeed, from religion. Imagine that the Federal Government decides it should pay hundreds of billions of dollars to insolvent banks in the midst of a financial crisis. Suppose, too, that many millions of taxpayers oppose this bailout on the ground (whether right or wrong is immaterial) that it uses their hard-earned money to reward irresponsible business behavior. In the face of this hostility, some Members of Congress make the following proposal: Rather than give the money to banks via appropriations, the Government will allow banks to subtract the exact same amount from the tax bill they would otherwise have to pay to the U. S. Treasury. Would this proposal calm the furor? Or would most taxpayers respond by saying that a subsidy is a subsidy (or a bailout is a bailout), whether accomplished by the one means or by the other? Surely the latter; indeed, we would think the less of our countrymen if they failed to see through this cynical proposal.

And what ordinary people would appreciate, this Court's case law also recognizes--that targeted tax breaks are often "economically and functionally indistinguishable from a direct monetary subsidy." Tax credits, deductions, and exemptions provided to an individual or organization have "much the same effect as a cash grant to the [recipient] of the amount of tax it would have to pay" absent the tax break....

....Today's decision devastates taxpayer standing in Establishment Clause cases. The government, after all, often uses tax expenditures to subsidize favored persons and activities. Still more, the government almost *always* has this option. Appropriations and tax subsidies are readily interchangeable; what is a cash grant today can be a tax break tomorrow. The Court's opinion thus offers a roadmap--more truly, just a one-step instruction--to any government that wishes to insulate its financing of religious activity from legal challenge. Structure the funding as a tax expenditure, and *Flast* will not stand in the way. No taxpayer will have standing to object. However blatantly the government may violate the Establishment Clause, taxpayers cannot gain access to the federal courts.

And by ravaging *Flast* in this way, today's decision damages one of this Nation's defining constitutional commitments. "Congress shall make no law respecting an establishment of religion"--ten simple words that have stood for over 200 years as a foundation stone of American religious liberty. Ten words that this Court has long understood, as James Madison did, to limit (though by no means eliminate) the government's power to finance religious activity. The Court's ruling today will not shield all state subsidies for religion from review; as the Court notes, some persons alleging Establishment Clause violations have suffered individualized injuries, and therefore have standing, independent of their taxpayer status. But *Flast* arose because "the taxing and spending power [may] be used to favor one religion over another or to support religion in general" without causing particularized harm to discrete persons. It arose because state

sponsorship of religion sometimes harms individuals only (but this "only" is no small matter) in their capacity as contributing members of our national community. In those cases, the *Flast* Court thought, our Constitution's guarantee of religious neutrality still should be enforced.

Because that judgment was right then, and remains right today, I respectfully dissent.