



Here Come the Suits...

Understanding the legal landscape

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TMF Background

- Indiana Deputy AG 2001-2023
- Indiana SG 2005-2023
- Successfully Defended Indiana's Choice Scholarship Program
- Successfully defended against a public-school funding adequacy challenge

GOALS

- Understand federal legal landscape
- Learn key aspects of state litigation
- Consider strategies to discuss the law of school choice



Establishment Clause

Zelman v. Simmons-Harris (2002)

- Upheld Ohio Pilot Project Scholarship Program
- Parent's choice of school is attributable solely to the parent, not the state.



Free Exercise Clause

Kendra Espinoza v. Montana Dept of Revenue (2020)

“A State need not subsidize private education, [b]ut once a State decides to do so, it cannot disqualify some private schools solely because they are religious.”



Free Exercise Clause

David & Amy Carson v. Makin (2022)

“[T]he prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination.”



LITIGATION IN THE STATES

The Indiana Story

2003 – Dual Enrollment Program

- Can a public-school teacher go to a religious school to teach computers?

2009 – Funding Adequacy Challenge

- Should courts set minimum public school funding standards?

2013 – Choice Scholarship Program

- Can the legislature fund K-12 education outside the public school system?
- Can parents use state scholarship to send kids to K-12 religious schools?

Key Aspects of State Litigation

- **Standing to Sue**

- Separation of Powers
- State standards vary

- **Process Challenges**

- Legislative process
- Local and special laws
- Single subject clauses

- **Exclusivity/Adequacy Challenges**

- Public Schools Only!
- Can bleed scholarships

- **Religion Clause Challenges**

- No-aid clauses (Baby Blaines)
- Compelled support clauses

ARIZONA

- ✓ **INDIVIDUAL INCOME TAX CREDIT SCHOLARSHIP PROGRAM**
- ✓ **LOW-INCOME CORPORATE INCOME TAX CREDIT SCHOLARSHIP PROGRAM**
- ✓ **EMPOWERMENT SCHOLARSHIP ACCOUNTS**
- ✓ **LEXIE'S LAW FOR DISABLE AND DISPLACED STUDENTS TAX CREDIT SCHOLARSHIP PROGRAM**
- ✓ **ORIGINAL INDIVIDUAL INCOME TAX CREDIT SCHOLARSHIP PROGRAM**

ARKANSAS

- **ARKANSAS CHILDREN'S EDUCATIONAL FREEDOM ACCOUNT PROGRAM (ESA)**
 - **Procedural Challenge Pending**
- **PHILANTHROPIC INVESTMENT IN ARKANSAS KIDS' SCHOLARSHIP PROGRAM (TAX-CREDIT SCHOLARSHIP)**
- **SUCCEED SCHOLARSHIP PROGRAM (VOUCHER)**

- ✓ **TUITION AND TEXTBOOK TAX CREDIT
(INDIVIDUAL TAX CREDIT/DEDUCTION)**
- **EDUCATION SAVINGS ACCOUNT PROGRAM**
- **SCHOOL TUITION ORGANIZATION TAX CREDIT
(TAX-CREDIT SCHOLARSHIP)**

NORTH CAROLINA

➤ EDUCATION STUDENT ACCOUNTS (ESA +)

✓ OPPORTUNITY SCHOLARSHIPS (Voucher)

Upheld once, but . . .

OKLAHOMA

- OKLAHOMA EQUAL OPPORTUNITY EDUCATION SCHOLARSHIPS (TAX CREDIT SCHOLARSHIP)
- OKLAHOMA PARENTAL CHOICE TAX CREDIT ACT (INDIVIDUAL TAX CREDIT/DEDUCTION)
- ✓ LINDSEY NICOLE HENRY SCHOLARSHIPS FOR STUDENTS WITH DISABILITIES (VOUCHER)



✓ HOPE SCHOLARSHIP PROGRAM

Upheld by SCOWV just last year





WISCONSIN

- PARENTAL PRIVATE SCHOOL CHOICE PROGRAM (RACINE VOUCHER)
- PARENTAL CHOICE PROGRAM (STATEWIDE VOUCHER)
- K-12 PRIVATE SCHOOL TUITION DEDUCTION (INDIVIDUAL TAX CREDIT/DEDUCTION)
- SPECIAL NEEDS SCHOLARSHIP PROGRAM (VOUCHER)
- ✓ MILWAUKEE PARENTAL CHOICE PROGRAM (VOUCHER)
Upheld Twice by SCOWI

Talking the Talk

When you hear...

You can say...

- School choice violates the separation of church and state. 
- **Parents, not the state, direct** how and where dollars are spent.
- School choice violates the free exercise clause. 
- School choice programs are open to **all types of religious schools** that meet required state criteria.

Strategy for Discussing Constitutionality of School Choice

- Ask probing questions – Never accept hollow, meaningless generalities.
- Narrow the universe – address specific details one at a time.



Strategy for Discussing Constitutionality of School Choice

- Use constitutional text and precedents. EdChoice can provide information.
- Ask an expert to address the statement or question. We can help!
- Debate with joy and confidence, knowing you are on the side of the angels.

