Jay P. Greene's Blog
With Help From Some Friends

Lawsuit Losers' Ostrich Act

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As I reported on Tuesday, a Florida appellate court threw out a challenge to the state's tax-credit scholarship program. In response, one of the plaintiff groups, Americans United for Separation of Church and State (AU), published a disingenuous and factually challenged blog post whining about the case being dismissed and pretending that the court didn't actually address the merits of the case. I'll address their assertions in order:

A Florida court just threw out an appeal brought by Americans United and its allies challenging a school-voucher-like program that provides taxpayer support for religious organizations. As disappointing as that outcome is, it's doubly frustrating to see a second Sunshine State court fail to even consider the merits of the case.

The program provides tax credits for donations to scholarship organizations that help students attend *any* private school, religious or secular, so that's not quite an accurate description of the program.

Moreover, as I will explain below, the court *did* consider the merits of the case. Although courts often avoid addressing the merits of a case when rejecting the plaintiffs' standing to bring the case, here the court directly addressed the central issues in the process of dismissing the case on standing.

In case you're not familiar with tuition tax credits, they are a type of voucher scheme that allows individuals or corporations to donate money to a middle-man "scholarship" organization in exchange for a generous tax credit. The "scholarship" group then writes a check for tuition at a private school. It's essentially a way to launder government funds through a private entity.

What an odd use of scare quotes. Are these somehow not scholarships? Let's consult the dictionary. Merriam-Webster defines a "scholarship" as "an amount of money that is given by a school, an organization, etc., to a student to help pay for the student's education." So yes, AU scare quotes notwithstanding, these are *bona fide* scholarships.

But are they "laundered government funds"? According to the unanimous Florida appellate court, the U.S. Supreme Court, and every state supreme court to address the question, the answer is a resounding "No." The courts all held that a private individual or corporation's money is their own, and not the government's, until the government has actually collected it. When people keep their own money through tax deductions, tax credits, or tax exemptions, it remains exactly that: their own money.

Does the AU believe that all churches run on "laundered government money" because their donors receive tax deductions or because they receive 100% property tax exemptions? No? Interesting.

The overwhelming majority of private schools participating in the tax credit program are religious, which goes against the Florida Constitution's "no-aid" clause, which says: "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."

Again, as the court ruled, it's not government money, so the historically anti-Catholic Blaine Amendment ("no-aid" clause) is not implicated. Moreover, the percentage of schools that are religious versus secular is constitutionally irrelevant. The law is religiously neutral. What matters is only that families may choose either religious or secular schools. It makes no constitutional difference whether the majority select one type or the other, or whether the market (responding to demand) supplies more of one type or another.

The U.S. Supreme Court has repeatedly rejected AU's religious bean counting, including in the landmark *Zelman v. Simmons-Harris* decision more than a decade ago:

Respondents and Justice Souter claim that even if we do not focus on the number of participating schools that are religious schools, we should attach constitutional significance to the fact that 96% of scholarship recipients have enrolled in religious schools. They claim that this alone proves parents lack genuine choice, even if no parent has ever said so. We need not consider this argument in detail, since it was flatly rejected in *Mueller*, where we found it irrelevant that 96% of parents taking deductions for tuition expenses paid tuition at religious schools. Indeed, **we have recently found it irrelevant even to the constitutionality of a direct aid program that a vast majority of program benefits went to religious schools**. See *Agostini*, 521 U.S., at 229 ("**Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid**" (citing*Mueller*, 463 U.S., at 401)); see also *Mitchell*, 530 U.S., at 812, n. 6 (plurality opinion) ("[*Agostini*] held that **the proportion of aid benefiting students at religious schools pursuant to a neutral program involving private choices was irrelevant to the constitutional inquiry**"); *id.*, at 848 (O'Connor, J., concurring in judgment) (same) (quoting *Agostini*, *supra*, at 229). **The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school.** As we said in*Mueller*, "[s]uch an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated." 463 U.S., at 401. [emphasis added]

The SCOTUS majority goes on to note that the other side's obsession over how many private schools have a religious affiliation ignores that they are but a tiny slice of all the available school choices, including the secular district schools that the vast majority of students attend. Students do not lack secular options.

Returning to the AU blog post, the author claims:

The program also violates the state constitution by taking money away from public schools.

No, the appellate court specifically and repeatedly rejected this argument, noting that any reduction in aid to the district schools is entirely speculative. As the appellate court detailed at length, the AU and their allies proved unable time and time again to demonstrate any harm that the district schools incur from the scholarship program.

Despite those problems, two Florida courts have now kicked the case on standing – that is, the right to sue – saying that the plaintiffs, which include interfaith religious leaders as well as educators, don't even have the right to bring this case. As a result, neither court weighed in on the actual facts of the case.

Incorrect. As noted above, like the district court before it, the appellate court addressed the main issues that plaintiffs raised:

Does the scholarship program violate the Blaine Amendment? **A: No, it relies on private funds so the Blaine Amendment is not implicated.**

Does the scholarship program unconstitutionally create a parallel system of public schools? **A: No, this is a privately funded and privately administered program, not a separate government school system.**

Does the scholarship program harm the district school system? **A: No, there is no evidence of any harm to the district schools.**

The AU and their union allies don't like the answers that the appellate and district court gave, so they simply pretend that they didn't give them.

Since the court didn't weigh in on the facts, here are some other things to consider: Sometimes "school choice" advocates claim low-income students need government assistance to escape "failing" schools. But here, some parents openly admitted that the public school options available to them are actually good.

Here we have a straw man argument. The question isn't whether the district schools are "good" but rather whether they're the best fit for all the kids who happen to live nearby. Even a school that performs very well on average can't be all things to all students, which is why the system should empower parents to choose the schools that align with their values and work best for their children.

So why do they want help paying private school tuition? The short answer is that many of them want education infused with their faith. […] That's perfectly fine. But Florida taxpayers should not be forced to contribute to the religious education of any child.

Again, as the court ruled, these are *private* funds. No taxpayer is forced to contribute to a scholarship organization. If a taxpayer doesn't want to support religious education, they need only refrain from donating to the scholarship organizations, which is certainly their right.

By contrast, all taxpayers *are* forced to pay into the district school system, even if they have moral objections to what is taught there. If the AU really cared so much about coercion, they

should support entirely privatizing education so that no one is forced to subsidize an education with which they disagree.

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