

Supreme Court Affirms Arizona Tax Credit Scholarship Program - by Sarah McIntosh

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In a ruling hailed by school choice supporters across the country, the United States Supreme Court has ruled opponents of Arizona's 14-year-old tax credit scholarship program may not challenge the program on grounds it violates the Establishment Clause of the First Amendment.

The Court ruled 5-4 in *Garriott vs. Winn* and *Arizona Christian School Tuition Organization vs. Winn* against a lawsuit by the Arizona chapter of the American Civil Liberties Union, which contested a tax credit program giving Arizona parents choices other than their neighborhood public schools.

The April 4 ruling overturns a 2009 decision by the Ninth U.S. Circuit Court of Appeals, which held the Arizona program promotes religion.

Clint Bolick, director of the Phoenix-based Goldwater Institute's Center for Constitutional Litigation, says the ruling is important and has ramifications beyond school choice. "It takes tax deductions and tax credits that can be used for religious purposes out of the realm of federal legal challenges, so long as they are not discriminatory," he explained.

Not State Money

Justice Anthony Kennedy wrote the opinion for the majority, which included Chief Justice John Roberts and Justices Samuel Alito, Clarence Thomas, and Antonin Scalia.

"By helping students obtain scholarships to private schools, both religious and secular, the [student tuition organization] program might relieve the burden placed on Arizona's public schools," Kennedy wrote. "The result could be an immediate and permanent cost savings for the State."

Later in the opinion, Kennedy explained: "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."

Tim Keller, executive director of the Arizona chapter of the Institute for Justice, which helped represent the Arizona Christian School Tuition Organization, said the majority opinion "reflects the commonsense notion that private charitable donations to private nonprofit organizations involve private funds, not public funds."

"The fact that the government reduces an individual's tax liability based on that donation does not transform those funds from private to public money," he said.

"Sadly, the four dissenters appear to believe that all money is government money except that which the government deigns to let us keep," Keller added.

Taxpayer Standing Was Focus

The court soundly rejected the ACLU's argument that tax credits constitute state funds, in effect claiming all money is state money except what the state declines to collect.

"On standing, this was a genuinely close question," said Bolick.

"Prior rulings indicated that unlike in other areas of the law, taxpayers have standing to challenge actions under the Establishment Clause of the First Amendment," Bolick said. "The court ruled that tax credits are not public funds, and therefore taxpayers have no standing to challenge them. If the Court [case] had reached the merits of the program, it should not have been a tough call."

Keller agrees. "Even though the court ruled the plaintiffs did not have standing, the majority decision strongly suggests that if the court had reached the merits it would have upheld the program as perfectly consistent with the Establishment Clause," he said.

"For example, the court recognized that the program was religiously neutral, neither favoring religion over non-religion or one religion over another, and that private decisions control every aspect of the program," Keller explained. "The Supreme Court has never found a neutral program of private choice to be unconstitutional."

Kagan Dissents

Justice Elena Kagan wrote the dissenting opinion, which was joined by Justices Sonia Sotomayor, Stephen Breyer, and Ruth Bader Ginsberg.

"Cash grants and targeted tax breaks are means of accomplishing the same government objective—to provide financial support to select individuals or organizations," Kagan wrote.

"Taxpayers who oppose state aid of religion have equal reason to protest whether that aid flows from one form of subsidy or the other," Kagan argued. "Either way, the government has financed the religious activity."

Andrew Coulson, director of the Cato Institute's Center for Educational, took issue with the dissenters' claims.

"Justice Kagan seems to be claiming that taxpayers could never have standing to sue under credit programs, but she is mistaken on that point," Coulson said. "She does seem to think that a parent who was unable to obtain a scholarship to a secular school would have standing, but I would argue that that would only be the case if it could be shown that parents seeking secular schooling were at a relative disadvantage in obtaining credits to parents seeking religious schooling."

Coulson says that's simply not the case.

"The share of private school scholarships available for secular schooling is actually larger than the share of families seeking secular private schooling, so secular families are not at a disadvantage, in practice," he said.

Future Challenge Unlikely

Even if the facts were otherwise, Coulson says, a future plaintiff would lose on the merits because the allocation of scholarships is decided by independent scholarship organizations, not state officials.

"The First Amendment's Establishment Clause applies only to state actions, not the actions of individuals, which is why tax deductions for donations to religious charities have long been found constitutional," he said.

Arizona's scholarship program offers individuals a 100 percent tax credit up to

\$500 (or \$1,000 for couples filing jointly) for donations to state-authorized school tuition organizations. Those charitable groups then award scholarships for students to attend a private school of their parents' choice. More than 27,000 students used scholarships averaging \$1,889 in Arizona in 2009 under the program.

Although Arizona ACLU attorney Paul Bender told reporters the court's ruling leaves a small opening for a future challenge to the program, Keller says he does not anticipate another attack.

"I believe that school choice opponents have exhausted their legal challenges to the Arizona program," Keller said.

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Internet Info:

U.S. Supreme Court: *Arizona Christian School Tuition Organization vs. Winn*

<http://www.supremecourt.gov/opinions/10pdf/09-987.pdf>

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