

# Supreme Court wrestles over religious scholarship program

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WASHINGTON (RNS) Is a state law that allows tax credits for donations to scholarship programs unconstitutional if most of the recipients attend religious schools?

That's the question the U.S. Supreme Court wrestled with Wednesday (Nov. 3), centered around an Arizona program where two of the largest scholarship groups require recipients to attend Catholic or evangelical schools.

Lawyers representing Arizona and the U.S. Department of Justice argued that the decision on where to use the scholarships is made by parents and students, not the government, and does not violate the First Amendment.

"Arizona's tuition tax credit does not violate the Establishment Clause because it's a neutral law that results in scholarship programs of private choice," said Paula Bickett, Arizona's chief counsel for civil appeals.

The tax credit, enacted in 1997, is one of some two dozen tax credits offered to Arizona taxpayers. Participants receive dollar-for-dollar tax credits for donations to student tuition organizations, or STOs, of up to \$500 for individuals and \$1,000 for married couples.

Last year, the program distributed a total of \$52 million in scholarships.

Acting Solicitor General Neal Katyal told the court that taxpayers who oppose the program should not have legal standing to sue because

"not a cent" of their money funds religion.

But Paul Bender, representing the American Civil Liberties Union of Arizona, said the program violates the First Amendment's Establishment Clause because some STOs require the scholarship money be used at religious schools.

"The STOs are a conduit of government funds to the parents," he said.

The U.S. 9th Circuit Court of Appeals ruled last year that the critics of the program had the legal standing to question whether the program was unconstitutional.

The arguments, involving two consolidated cases, prompted comparisons with a 2002 Supreme Court ruling, *Zelman v. Simmons-Harris*, which ruled that a Cleveland school voucher plan that could be used to pay tuition at either religious or secular schools was constitutional.

Justice Elena Kagan asked Pickett why Arizona opted for such a program rather than vouchers. Pickett said that unlike Ohio, where the *Zelman* case was centered, Arizona prohibits direct aid to private schools.

Kagan then asked why a state would set up an intermediary organization "that can say, sorry, if you are a Catholic you don't get scholarships out of our STO."

Bickett responded that such decisions are not made by the state. "It's private organizations," she said. "And anyone can set up a school tuition organization."

The ACLU's Bender, answering a query from Justice Antonin Scalia on why he thought the program runs afoul of the First Amendment, said "the Constitution prohibits organizations that distribute government funds as part of a government spending program to do it on the basis of religion."

But Scalia appeared skeptical that the case actually involves state money.

"That's a great leap to say that it's government funds -- that any money the government doesn't take from me because it gives me a deduction is government money," Scalia said.

A report from the Arizona Department of Revenue found that two religious organizations -- the Arizona Christian School Tuition Organization and the Catholic School Tuition Organization of the Diocese of Phoenix -- received 38 percent of the total donations in 2009.

The Alliance Defense Fund, which is representing the Arizona Christian School Tuition Organization in the case, said in a court filing that the percentage of religiously affiliated STOs in the program has dropped from 94 percent in 1998 to 67 percent in 2009.

Six states -- Florida, Georgia, Indiana, Iowa, Pennsylvania and Rhode Island -- have programs similar to Arizona's, according to an amicus brief of 13 states that argued that the Arizona program is neutral and neither advances nor inhibits religion.

Other supporters include the National Association of Evangelicals, the Christian Educators Association International and the American Center for Law and Justice, founded by religious broadcaster Pat Robertson. Opponents include the American Humanist Association, which joined in a brief with several atheist and secular groups.

The arguments marked the second time in as many days that the high court addressed a case related to religious issues. On Tuesday, it heard arguments in *Sossamon v. Texas*, which questions whether states can be sued for damages under the Religious Land Use and Institutionalized Persons Act.