

# High Court takes dim view of church-state barrier

by [Adelle M. Banks](#) in the [May 3, 2011](#) issue

The Supreme Court has rejected a challenge to an Arizona school tuition credit program that critics contend has principally benefited religious institutions. The 5-4 decision, combined with a 2007 ruling rejecting a similar challenge to the Bush administration's faith-based office, seems to solidify the court's skepticism toward attempts to derail government funding of religious programs.

The decision on April 4 was hailed by supporters of religiously based education and makes it tougher for taxpayers to challenge such scholarship programs by claiming that they violate church-state separation.

The Arizona tax credit, enacted in 1997, allows participants to receive dollar-for-dollar tax credits for donations to so-called "student tuition organizations," or STOs, of up to \$500 for individuals and \$1,000 for married couples.

The Arizona Department of Revenue reported that two STOs—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.

Court documents showed that the total percentage of religiously affiliated STOs was 67 percent that year, down from 94 percent in 1998.

Justice Anthony Kennedy, writing for the court's conservative majority, said the taxpayers who filed suit lacked legal standing to challenge the

program because they incorrectly viewed the tax credit as a form of government spending.

"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," he wrote.

The decision echoed the court's 2007 ruling in a case filed against the White House office by an atheist group; in that case too, the justices said challengers did not have standing. "In an era of frequent litigation, . . . courts must be more careful to insist on the formal rules of standing, not less so," Kennedy concluded in the Arizona decision.

In a strongly worded dissent, the court's freshman member, Justice Elena Kagan, argued that taxpayer standing should not be based on whether the money subsidizing religion comes through a tax break or a direct grant.

"Either way, the government has financed the religious activity," she said. "And so either way, taxpayers should be able to challenge the subsidy." She was joined in her dissent by Justices Ruth Bader Ginsburg, Stephen Breyer and Sonia Sotomayor. Kennedy was joined by Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas and Samuel Alito.

The Alliance Defense Fund, which argued for the Arizona Christian School Tuition Organization, hailed the "national precedent" that will limit similar suits in federal courts. "The court's reasoning is sound," said ADF senior counsel David Cortman. "The government does not own 100 percent of every American's paycheck. The donations are private money, not government money."

Americans United for Separation of Church and State agreed that the decision could prevent federal court action on the issue in the future but vowed to continue the fight in state courts.

"This is not a good day for the wall of separation," said Barry Lynn,

executive director of Americans United. "A few more bricks are out of it."

Lynn called the twin decisions "disturbing roadblocks to litigation" set up by the high court. "Certainly it's one more hurdle to jump, and these hurdles are getting pretty big," he said.

The decision leaves in-depth court review of the merits of voucher programs to state courts, said Ira Lupu, a church-state expert at George Washington University Law School. There, lawyers could argue whether such programs violate state or federal constitutions because state courts don't follow the same rules on legal standing as federal courts. "The questions about the validity of the Arizona program remain unresolved," he said. —RNS