Justices cite ‘standing’ in church-state disputes

by Adelle M. Banks in the July 26, 2011 issue

After the U.S. Supreme Court ended its 2010–2011 term in late June, legal scholars specializing in church-state issues are saying a Court decision issued in the spring is likely to resonate in First Amendment debates for years to come.

On April 4, the justices rejected a challenge to an Arizona school tuition credit program that largely benefits religious schools, saying taxpayers did not have legal grounds to challenge a tax credit as government spending.

At the heart of the decision was an arcane yet essential legal term—"standing," or a plaintiff's right to sue. Critics say the Court increasingly relies on standing to dismiss church-state challenges without addressing the merits of the complaints.

Whatever the Court's reasoning, the Arizona ruling already is influencing other cases that touch on the First Amendment's prohibition on a government "establishment" of religion:

- A Wiccan chaplain lost a religious discrimination case in a federal appeals court on June 1, which cited the Arizona decision in its ruling.
- Two weeks later, the Freedom From Religion Foundation voluntarily dropped its case challenging tax exemptions for clergy housing in light of the Arizona decision.
- That same atheist group is now considering whether to seek an appeal in a case it lost trying to declare the National Day of

Prayer proclamation by President Obama as unconstitutional.

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Laurie Gaylor, copresident of the Freedom From Religion Foundation, said by focusing on the standing issue the Court's conservative majority has reduced its ability to hear cases on their merits.

"They are
slamming the door shut, and they do not want any examination of the constitutionality of governmental support for religion," she said. "It's just rendering our Establishment Clause meaningless because we cannot enforce it."

Groups like Gaylor's had already taken a hit when the
Court ruled in 2007 that taxpayers associated with the atheist group did not have standing to challenge the White House initiative that channels federal funds to religious groups providing social services.

But
with the Arizona ruling, conditions have grown worse, Gaylor said. "It's such a chilling effect," she said. "Taxpayers, we're just sitting out there in the cold."

Writing for the 5–4 majority in the
Arizona case, Justice Anthony Kennedy defended the reliance on standing: "In an era of frequent litigation, . . . courts must be more careful to insist on the formal rules of standing, not less so."

Conservative Christian legal groups like the American Center for Law and Justice hope the April decision in *Arizona Christian School Tuition Organization v. Winn* will help them in future cases.

Citing
the Arizona decision, ACLJ lawyers hope to convince the high court to reject the idea of "offended observer" standing with a case about an Ohio county court judge who has posted the Ten Commandments on his courtroom wall. "The people who sued him—they don't like to look at the poster," said Jay Sekulow, the ACLJ's senior counsel, of the American Civil Liberties Union. "So what?"

Melissa Rogers, a church-state expert at Wake Forest University School of Divinity, said standing is not just a dry legal concept. "It can make the difference between whether the Establishment Clause is a vibrant source of values that protects us and protects the religious liberty that we enjoy," she said, "or whether it's a paper promise that theoretically bars certain things but not in practice."

The church-state arguments over taxpayer standing often refer to a 1968 case, *Flast v. Cohen,* in which the Supreme Court ruled that taxpayers could sue when Congress provided financial aid to public and private schools, including parochial schools. Some justices think that the *Flast* decision should be overturned or narrowly interpreted; others, like first-term Justice Elena Kagan, think it paves the way for taxpayer cases to be considered.

Kagan, in a strong dissent in the Arizona case, said the majority's decision "devastates taxpayer standing" in cases involving the Establishment Clause. "However blatantly the government may violate the Establishment Clause, taxpayers cannot gain access to the federal courts," she wrote.

With losses in federal court, church-state separationists say they're hoping for better success in state courts.

Barry Lynn, executive director of Americans United for Separation of Church and State, estimates that three dozen states have constitutions that prohibit "even more clearly the expenditure of government funds for religious purposes." So he hopes plaintiffs may have a greater ability to sue at the state level. "So far [at that level] we haven't seen the same trend . . . where people are just being kicked out right and left because of alleged lack of standing," he said.

David Cortman, senior counsel of the Alliance Defense Fund, which argued for both the National Day of Prayer and for the Arizona tuition credit program, is not surprised about strategies to move to the state courts. "If they

can't challenge them in federal courts, they'll certainly challenge them in states," he said, "but we'll also be there to defend those programs." —RNS