Pro: Program is constitutional, helps low-income families

In its lawsuit seeking to eliminate scholarships that serve 70,000 low-income schoolchildren, the Florida Education Association argues that the state’s high court has already found this kind of program to be unconstitutional. As a former justice who participated in the 2006 Florida Supreme Court case they cite, I know that decision did not consider these scholarships.

If the current justices find the 13-year-old Tax Credit Scholarship unconstitutional, it won’t be because of Bush vs. Holmes. This scholarship is legally distinct from the voucher program the court disapproved.

The court did indeed reject a program called the Opportunity Scholarship, which was created in 1999 to give private school options to students who attended public schools the state deemed to be failing. But the court tied its decision to the fact that the opportunity vouchers came from the state’s public education fund. The checks were drawn directly from the treasury.

This distinction is made clear throughout the majority opinion, declaring that the Constitution “does not allow the use of state monies to fund a private school education” and that the voucher program “transfers tax money earmarked for public education to private schools” and that the money came improperly out of “each school district’s appropriated funds.”

Even the 1st District Court of Appeal, which decided the case on separate, religious grounds in 2004, distinguished between tax funds and tax exemptions. Of the latter, it wrote: “These forms of assistance constitute substantially different forms of aid than the transfer of public funds expressly prohibited by the no-aid provision.”

These court declarations bear directly on the new challenge, filed by the Florida Education Association in August, because the scholarships are not government-funded vouchers. They are financed by private corporate contributions that receive dollar-for-dollar state tax credits. The contributions are made to private, nonprofit scholarship organizations that then use them to pay for scholarships for students whose average household income this year is only 5 percent above the poverty level.

This is a distinction with a difference. Direct government allocations and tax-preferred contributions have long been distinguished. And it is hard to ignore that the U.S. Supreme Court, in a 2011 case involving a very similar tax-credit scholarship program in Arizona, denied the challenge because the plaintiffs did not have standing.

The court reasoned that the tax-credited contributions did not amount to government expenditures, and therefore the plaintiffs had nothing to complain about. Justice Anthony Kennedy put a fine point on it: “Like contributions that lead to charitable tax deductions, contributions yielding (scholarship organization) tax credits are not owed to the state and, in fact, pass directly from taxpayers to private organizations.”

To be clear, I was among the dissenters in a split 5-2 vote in the Holmes case. But it is the majority opinion that establishes the clear constitutional boundaries for school choice: “Only when the private school option depends on school funding is choice limited.”

This scholarship now has a 13-year track record of helping poor students, mostly minorities. According to the data, the scholarship is serving the poorest and most educationally disadvantaged students, and on a national level they are keeping pace on standardized tests with students of all incomes. The data also show that the scholarship saves the state $1.44 for every $1 in tax credits.

That’s why it is so perplexing that the teachers union and some school boards would seek to end an educational effort that is helping the least among us in a way that strengthens our collective commitment to public education. This is not about public vs. private education, but about recognizing that different children learn in different ways.

But the courts will not be evaluating how well the program works. Their role is to determine whether it is constitutional. And the economically disadvantaged students and parents who are being threatened with expulsion can rest assured that legal precedent is on their side.

Raoul Cantero, a partner in the law firm of White & Chase, served as a Florida Supreme Court justice from 2002-08. He is part of a legal team that represents intervening parents in the scholarship lawsuit. He wrote this exclusively for the Tampa Bay Times.