Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
Clint Bolick (021684)
Carrie Ann Sitren (025760)
Taylor C. Earl (028179)
500 E. Coronado Road
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org
Attorneys for Intervenor-Defendant Goldwater Institute

INSTITUTE FOR JUSTICE
Timothy D. Keller (019844)
Paul V. Avelar (023078)
398 S. Mill Avenue, Suite 301
Tempe, AZ 85281
(480) 557-8300
tkeller@ij.org
Attorneys for Applicant-Intervenors Andrea Weck, et al.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

NIEHAUS, et al. Plaintiffs, vs. HUPPENTHAL, Defendant, and GOLDWATER INSTITUTE, Intervenor-Defendant.	Case No. CV2011-017911 **INTERVENOR'S AND APPLICANT INTERVENORS' PARTIAL MOTION TO DISMISS AND MEMORANDUM IN SUPPORT THEREOF** *Hon. Maria Del Mar Verdin*

PARTIAL MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Intervenor-Defendant Goldwater Institute and Applicant-Intervenors Andrea Weck, et al. respectfully move that Plaintiffs' Complaint be dismissed in part, with prejudice, on the grounds that Plaintiffs lack standing to bring an unconstitutional conditions claim on behalf of third parties not before the Court.

In their Complaint, Plaintiffs allege that the Empowerment Scholarship Account Program (hereafter "Empowerment Account Program"), codified at Ariz. Rev. Stat. §§15-2401 to 2404 (2011), is unconstitutional on three grounds. Compl. at ¶¶10-12. They allege that the Empowerment Account Program violates the Aid and Religion Clauses (Art. 9, §10 and Art. 2, §12, respectively) of the Arizona Constitution, and that it places an unconstitutional condition on receipt of a government benefit in violation of public policy. *Id*. This Motion to Dismiss seeks dismissal of the third of these claims: the unconstitutional condition allegation.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Plaintiffs' Unconstitutional Conditions Claim Alleges Harm Only to Third Parties.

In their Complaint, Plaintiffs allege the Empowerment Account Program is unconstitutional because "it conditions the availability of a public benefit on a waiver of constitutional rights." Compl. at ¶12. Plaintiffs note that "[f]or a student to obtain a[n] [Empowerment Account], the student's parents must promise not to enroll the qualified student in a school district or charter school, and to release the school district from all

obligations to educate the qualified student." Compl. at ¶9. In sum, Plaintiffs' argument is that the Empowerment Account Program (the alleged "public benefit") conditions participation on the waiver of the child-beneficiary's right to attend public school, *i.e.*, a waiver of the child's constitutional right to public education. Nowhere in the Complaint do Plaintiffs allege harm to any individuals or entities other than children participating in the Empowerment Account Program, nor do Plaintiffs allege any harm to themselves.

II. Plaintiffs Lack Standing To Allege Third Party Harms.

Individuals generally do not have standing to allege harms to third parties. *Barrows v. Jackson*, 346 U.S. 249, 255 (U.S. 1953) ("Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party."). The Arizona Supreme Court has articulated a three-part test to determine whether third party standing is proper: "[A] third party has standing to assert the constitutional rights of others if a substantial relationship exists between the claimant and the third party, assertion of the constitutional right by the claimant is impossible, and the claimant's constitutional right will be diluted if the third party is not allowed to assert it." *Rasmussen v. Fleming*, 154 Ariz. 207, 219, 741 P.2d 674, 686 (1987). Plaintiffs' complaint makes no assertions in support of any of these factors. There is no allegation that Plaintiffs have substantial relationships with the affected third parties. Plaintiffs state no reason why the program beneficiaries could not themselves bring this challenge—indeed, three individuals affected by the Empowerment Account Program

have moved to join this action, but as *defendants* seeking to uphold the constitutionality of the program. Any similar program beneficiaries wishing to challenge the program's constitutionality could do so directly. Finally, Plaintiffs make no allegation that their personal constitutional rights would be in any way diluted by this Court's finding that Plaintiffs lack standing.

The Arizona Supreme Court has held that "[i]n order to possess standing to assert a constitutional challenge, an individual must himself have suffered 'some threatened or actual injury resulting from the putatively illegal action.'" *State v. B Bar Enters., Inc.*, 133 Ariz. 99, 101, 649 P.2d 978, 980 (1982), citing *State v. Herrera*, 121 Ariz. 12, 15, 588 P.2d 305, 308 (1978). Here, Plaintiffs allege neither threatened nor actual personal injury, as Plaintiffs have neither participated in the program nor expressed an interest in doing so. On the contrary, their goal is to have the program declared unconstitutional and terminated.

Every Arizona court to hear a challenge on the grounds of unconstitutional conditions did so when the plaintiff was the party harmed by the challenged governmental practice. *See, e.g., Employers' Liab. Assurance Corp. v. Frost*, 48 Ariz. 402, 62 P.2d 320 (1936), *Havasu Heights Ranch and Development Corp. v. State Land Dep't*, 158 Ariz. 552, 764 P.2d 37 (App. 1988), *State v. Quinn*, 218 Ariz. 66, 178 P.3d 1190 (App. 2008). In *Employer's Liability Assurance Corporation v. Frost*, the plaintiff insurance company brought an unconstitutional conditions challenge against the state

regarding insurance regulations that affected the ability of the plaintiff to conduct its business. *Frost*, 48 Ariz. at 406-07, 62 P.2d at 322. In *Havasu Heights Ranch and Development Corporation v. State Land Department*, plaintiff land development corporation challenged a provision of its lease with the state that waived its right to just compensation in certain circumstances. *Havasu Heights*, 158 Ariz. at 554-55, 764 P.2d at 39-40. In *State v. Quinn*, plaintiff objected to the state conditioning the return of her driver's license on her stipulation that evidence subject to the exclusionary rule be admitted against her in criminal proceedings. *Quinn*, 218 Ariz. at 68, 178 P.3d at 1192. Although the factual backgrounds of these three cases are extremely diverse, they share in common the fact that the plaintiffs alleged they were personally harmed by the government's unconstitutional conditions. A *participant* in the Empowerment Account Program would have standing to claim that the government's alleged unconstitutional condition had caused them harm. However, none of the Plaintiffs are participants in the Empowerment Account Program, nor have they expressed any interest in becoming participants.

III. Plaintiff Arizona School Boards Association Has Corroborated This Standing Argument in an Analogous Context.

Plaintiff Arizona School Boards Association (ASBA), acting through the same lead counsel, also serves as Intervenor in *Craven v. Horne*, No. CV 2009-029436 (Maricopa Cty. Super. Ct.). That suit challenges alleged disparate funding of charter schools under various provisions of the Arizona Constitution, including the

unconstitutional conditions doctrine. In Intervenors' Response to Plaintiffs' Motion for Partial Summary Judgment and Cross Motion for Partial Summary Judgment in that case (Exhibit A), ASBA makes exactly the argument that Intervenors make here in our Motion to Dismiss.

In *Craven*, ASBA correctly argues that political subdivisions, including public schools, "have only such constitutional rights against the State that created them as are expressly conferred on such entities by the Arizona Constitution," citing case authorities holding that "political subdivisions have no federal constitutional rights vis-a-vis the states that created them," and that "municipalities [are] not entitled to state or federal constitutional protections" (*id.* at 10). Moreover, even if schools "had relevant rights, Plaintiffs would not have standing to assert such rights. *See State v. B Bar Enters., Inc.*, 133 Ariz. 99, 101, 649 P.2d 978, 980 n.2 (1982) (parties ordinarily cannot assert the rights of others)" (*id.* at 10-11).

ASBA is entirely correct in those legal assertions in *Craven*. Neither it nor the other plaintiffs here are asserting their own constitutional rights. ASBA admits it does not possess such rights in the first place. Hence, the unconstitutional conditions claim should be dismissed with prejudice for lack of standing.

CONCLUSION

Plaintiffs' unconstitutional conditions challenge to the Empowerment Account Program solely alleges violations of the constitutional rights of third parties. Plaintiffs

make no claim that their own constitutional rights are in any way diluted or violated by the alleged unconstitutional condition at issue. Under Arizona case law, parties lack the ability to bring claims for harms to third parties. Plaintiffs have made no showing that they suffer personal harm from the Empowerment Account Program. Accordingly, the portion of Plaintiffs' complaint challenging the Empowerment Account Program on grounds of unconstitutional conditions should be dismissed with prejudice for lack of standing.

Respectfully submitted this 13th day of October 2011 by:

Scharf-Norton Center for Constitutional Litigation
at the GOLDWATER INSTITUTE
/s/ Clint Bolick
Clint Bolick (021684)
Carrie Ann Sitren (025760)
Taylor C. Earl (028179)
500 E. Coronado Road
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org
Attorneys for Intervenor-Defendant Goldwater Institute

INSTITUTE FOR JUSTICE
ARIZONA CHAPTER
/s/ Timothy D. Keller
Timothy D. Keller (019844)
Paul V. Avelar (023078)
398 South Mill Avenue, Suite 301
Tempe, AZ 85281
(480) 557-8300
tkeller@ij.org
Attorneys for Applicant-Intervenors Andrea Weck, et al.

CERTIFICATE OF SERVICE

ORIGINAL was filed on October 13th, 2011 with:

Clerk, Superior Court of Maricopa County
201 West Jefferson Street
Phoenix, Arizona 85003

COPY of the foregoing was mailed via First Class mail and via electronic mail on October 13th, 2011 to:

Donald M. Peters
Kristin M. Mackin
LaSota & Peters, PLC
722 E. Osborn, Suite 100
Phoenix, AZ 85014

Timothy M. Hogan
Arizona Center for Law in the Public Interest
202 E. McDowell Road, Suite 153
Phoenix, AZ 85004

Attorneys for Plaintiffs

OFFICE OF THE ATTORNEY GENERAL
Thomas C. Horne, Arizona Attorney General
David Cole, Solicitor General
Kevin Ray, Assistant Attorney General
1275 W. Washington Street
Phoenix, AZ 85007

Attorneys for Defendants

By: /s/ Taylor C. Earl
Taylor C. Earl