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

NIEHAUS, et al. Plaintiffs, vs. HUPPENTHAL, Defendant. and GOLDWATER INSTITUTE, et al, Intervernor-Defendants.	Case No. CV2011-017911 **INTERVENOR-DEFENDANT GOLDWATER INSTITUTE'S RESPONSE TO APPLICATION FOR PRELIMINARY INJUNCTION** Oral argument requested *Hon. Maria Del Mar Verdin*

Introduction and Applicable Standard of Review

"One of the most enviable attributes of our constitutional form of government is its adaptability to change and innovation," our Supreme Court has declared. "Today's reality is that primary and secondary education systems are facing nationwide reform. Many states are exploring alternatives to traditional public education. . . . The pursuit of such a strategy falls

squarely within the legislature's prerogative." *Kotterman v. Killian*, 193 Ariz. 273, 290, 972 P.2d 606, 623 (1999).

Empowerment scholarship accounts are designed to provide additional educational options to children most in need of them: students with disabilities who, by definition, have special individualized needs. The program, codified at Arizona Revised Statutes ("A.R.S.") § 15-2401, *et seq.* (attached as Appendix 1), places an unprecedented array of options at the disposal of eligible families. As the architects of the program have explained, such accounts provide "cafeteria style" flexibility for the eligible families:

> Some families may choose to spend 50 percent of their funds on an online education program, 30 percent on private tutors, and save 20 percent for college. Others might want to spend 90 percent of the funds to offset private school costs and save 10 percent for college. Parents best understand the individual needs of their children and should be free to make allocation decisions. Further, discretion over funds makes it clear that parents, not the state, are making education decisions for their child. Participation in the program is voluntary, and even within the context of parents who have opted in, multiple uses for funds exist.

Matthew Ladner & Nick Dranias, *Education Savings Accounts: Giving Parents Control of their Children's Education*, Goldwater Institute Policy Brief No. 11-01 (Jan. 28, 2011) at 11 (App. 2). The report documents impressive academic gains produced by a Florida school choice program for disabled students, compared with less-impressive results for similarly disadvantaged Arizona students. *Id.* at 2-6.

Plaintiffs seek to have those opportunities struck down. They face a tough burden. As

the Court set forth in *Kotterman*, 193 Ariz. at 284, 972 P.2d at 617 (citations omitted), "Legislative enactments are presumptively constitutional. . . . The party challenging a statute bears the burden of demonstrating its invalidity, . . . and we resolve all uncertainties in favor of constitutionality." Moreover, in a facial challenge as here, "the party challenging the provision must demonstrate that no circumstances exist under which [it] would be valid." *Hernandez v. Lynch*, 216 Ariz. 469, 472, 167 P.3d 1264, 1267 (App. 2007). The types of conjectures that fuel plaintiffs' arguments simply will not suffice.

Argument

I. AID AND RELIGION

Plaintiffs contend that the scholarship accounts violate (1) Ariz. Const. Art. IX, § 10, which prohibits the "appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation" ("aid clause"); and (2) Art. II, § 12, which forbids public funds "appropriated for or applied to any religious worship, exercise, or instruction" ("religion clause").

Three Arizona Supreme Court decisions provide the framework for resolving those claims. In *Community Council v. Jordan*, 102 Ariz. 448, 432 P.2d 460 (1967), the Court sustained payments to a religious organization in partial reimbursement for services provided to the poor.[1] The Court ruled that the "'aid' prohibited in the constitution of this state is, in our

[1] The services at issue in *Jordan* were provided pursuant to a contract between the State and the religious provider. The U.S. Supreme Court has more rigorously scrutinized "direct" assistance, such as the contractual relationship between the State and the religious provider in *Jordan*, as

opinion, assistance in any form whatsoever which would encourage or tend to encourage the preference of one religion over another, or religion per se over no religion." *Id.*, 102 Ariz. at 454, 432 P.2d at 466. "We also hold that in order to fulfill the original intent of the constitution, the word 'aid' like the word 'separation' must be viewed in the light of the contemporary society, and not strictly held to the meaning and context of the past." *Id.* The Court went on to find, under the facts of the case, that the "true beneficiaries" of the program were not the religious institutions but "the individuals and families who are destitute and receive the emergency aid." *Id.*, 102 Ariz. at 455, 432 P.2d at 467.

In *Kotterman*, the Court sustained a scholarship tax credit for private school tuition largely on the ground that tax credits are not appropriations, and therefore do not implicate the clauses. "Even if we were to agree that an appropriation of public funds was implicated here," the Court observed, "we would fail to see how the tax credits for donations to a student tuition organization violates" the religion clause. The range of available choices and the program's neutrality, the Court concluded, "ensure that the benefits accruing from this tax credit fall generally to taxpayers making the donation, to families receiving assistance in sending children to schools of their choice, and to the students themselves." *Id.*, 193 Ariz. at 287, 972 P.2d at 620. The Court found the program permissible under the aid clause as well. *Id.*, 193 Ariz. at 288, 972 P.2d at 621.

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opposed to "indirect" assistance, where funds are placed at the disposal of parents or students, as here. See, e.g., *Mitchell v. Helms*, 530 U.S. 793 (2000).

In *Cain v. Horne*, 220 Ariz. 77, 202 P.3d 1178 (2009), the Court struck down voucher programs for foster and disabled children under the aid clause, without reaching the religion clause.[2] The basis for the Court's ruling was that beneficiaries had one choice only: private schools. The Court noted that "once a pupil has been accepted into a qualified school under either program, the parents or guardians have no choice; they must endorse the check or warrant to the qualified school." Accordingly, the "programs transfer state funds directly from the state treasury to private schools." *Id.*, 220 Ariz. at 83, 202 P.3d at 1184. "There may well be ways of providing aid to these student populations without violating the constitution," the Court declared. "But . . . because the Aid Clause does not permit appropriations of public money to private and sectarian schools," the programs were impermissible. *Id.*, 220 Ariz. at 84, 202 P.3d at 1185.

Those three cases provide the guideposts for constitutional analysis, underscoring that the outcome lies in the details and operation of the program. Clearly, there is no *per se* rule that no public funds may go to religious institutions. Rather, the rule is whether there are sufficient choices so that the program cannot be said to constitute a direct appropriation to private schools.

We believe the appropriate line of demarcation was articulated in the colloquy between counsel for plaintiffs here and Justice Hurwitz in the *Cain* oral argument. Plaintiffs' counsel agreed with Justice Hurwitz that a grant to parents of disabled students that could be used as they

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[2] For that reason, the discussion of the religion clause in *Kotterman* remains the applicable law on the religion clause.

wish for their children's education would be constitutional, even if they spent it on private or religious schools. Why? Said plaintiffs' counsel, "I think the dividing line is how much the state constrains the choice." Ladner and Dranias at 8 (citing oral argument in *Cain v. Horne*). It would be so, counsel conceded, even if "the odds are overwhelming that it's going to go to a prohibited recipient" (i.e., a private or religious school), because counsel's "assumption is that you can hire a tutor with it, you can do all kinds of things with that money other than paying a private or religious school." *Id.* at 9.

That is, of course, precisely the case with empowerment scholarship accounts. They differ from the vouchers struck down in *Cain* in numerous crucial respects:

1. The choices are abundant. Unlike in *Cain*, the funds here may be used, as provided by A.R.S. § 15-2402(B)(4), not only for private school tuition, but for textbooks, educational therapies or services, tutoring services, curriculum, online learning programs, educational testing, college savings (the "529" program), tuition and fees at a postsecondary institution, and textbooks at a postsecondary institution.[3]

2. Except for K-12 tuition and online programs, which must be nongovernmental owing to the fact that all public schools in Arizona are tuition-free, none of the choices are limited to private schools or providers. Consequently, all of the other educational services may be

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[3] It is amusing that plaintiffs say there are "only" 11 purposes for which the funds can be used (Application for Preliminary Injunction ("Br.") at 6), when of course that is 11 times the number of choices that could be made by parents in *Cain*.

obtained from public or private providers. Indeed, eligible students can use their empowerment scholarship accounts to purchase tutoring services from public school teachers, or to purchase public school curricula.

3. Thus, unlike in *Cain*, in which *every* dollar of funds in the program was pre-ordained for a private or religious school, *none* of the funds for empowerment scholarship accounts are similarly earmarked. It is entirely a matter of parental choice.

Plaintiffs speculate (Br. at 8) that it is "inevitable that most scholarship proceeds would be used to pay the tuition at [private] schools." No it is not. All that is required is that the parent "[p]rovide an education for the qualified student in at least the subjects of reading, grammar, mathematics, social studies and science." A.R.S. § 15-2402(B)(1). Although students initially receiving scholarship funds must "transfer" to a "nongovernmental" school, under Arizona law that category includes both private schools, A.R.S. § 15-802(F)(2), and home schools, which also are classified as "nonpublic schools." A.R.S. § 15-802(F)(1). That is what makes the options of online education, curriculum, and postsecondary school attendance so salient.

We have no idea, at any particular point in time, how much of the aggregate empowerment scholarship account funds will be used for private school tuition or for other purposes. From a constitutional standpoint, the uses to which the funds are directed by parents are irrelevant so long as the choices are not limited to private schools. The universe of choices

separates a legislative appropriation in aid of private and religious schools from a genuine neutral social services program in which private schools are one of the available service providers. It may be, especially for disabled children, that empowerment savings accounts may primarily be used for private school tuition. But that is up to the parents and is not dictated by the program. A facial challenge does not allow the Court to indulge plaintiffs' self-serving predictions; it requires plaintiffs to demonstrate that the program can be valid under no circumstances. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 641 (2002) ("The constitutionality of a neutral educational aid program simply does not turn on whether and why . . . at a particular time . . . most recipients choose to use the aid at a religious school"); accord, *Mueller v. Allen*, 463 U.S. 388, 400-01 (1983).

4. Plaintiffs also confuse the permissible uses of scholarship funds for postsecondary tuition and a 529 college savings plan. As plaintiffs should know, Arizona law allows students to complete K-12 academic requirements at a community college or university. A.R.S. § 15-701.01(G). Thus, A.R.S. §§15-2402(B)(4)(i) and (j) allow funds to be used for tuition and textbooks "at an eligible postsecondary institution." Eligible postsecondary institutions, in turn, are defined by A.R.S. §15-2401(2) to include community colleges, public universities, and accredited private postsecondary institutions. In other words, parents may direct scholarship account funds to those public educational institutions to satisfy their children's K-12 educational requirements.

In addition, A.R.S. §15-2402(B)(4)(h) allows contributions to 529 college accounts, which of course may be used at any public or private postsecondary institution.

5. Finally, empowerment scholarship accounts are owned by the families, as contrasted with the checks in *Cain*, which had to be restrictively endorsed to private schools. Funds remaining after K-12 education may be saved for college, and revert back to the State only if they are not used. A.R.S. § 15-2402(G).

Because the range of options is so great, the choice of options is entirely in the hands of parents, and the options include both private and public educational services, the public funds allocated for this program plainly are not an "appropriation" in "aid" of private schools. Moreover, the program is neutral and does not "encourage the preference of one religion over another, or religion per se over no religion." *Jordan*, 102 Ariz. at 454, 432 P.2d at 466. The empowerment scholarship accounts are an effort to meet an educational need by providing additional options to children with disabilities. They are precisely a means "of providing aid to these student populations without violating the constitution." *Cain*, 220 Ariz. at 84, 202 P.3d at 1185.

II. UNCONSTITUTIONAL CONDITIONS

Plaintiffs also contend that the voluntary participation of families in the empowerment scholarship accounts program forces them to sacrifice their right to an education under the Arizona Constitution. Our motion to dismiss this count of the complaint should fully dispose of

this issue. The rights at issue belong to parents and children, whose interests are represented in this lawsuit—but most emphatically not by plaintiffs.

Regardless, the claim has no merit. The essential predicate for an unconstitutional conditions claim is a dilemma. There is no dilemma here. Empowerment scholarship savings accounts are an addition to a pre-existing set of educational options under Arizona law, which include: public schools; public charter schools, see A.R.S. § 15-181; private school scholarships supported by tax credits, see *Kotterman*, *supra*; or, if a school district approves it for eligible disabled students, a publicly funded placement in a private school. See, e.g., *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993) (upholding publicly funded placements of disabled students in religious schools). When students withdraw from any of those options, they may return to the public school option guaranteed by Ariz. Const. Art. XI, § 6.

The unconstitutional conditions doctrine is not always a model of coherence, but the program here easily satisfies any of the applicable rules. Summarizing various judicial articulations of the doctrine, Professor Jon Romberg states that "the rough benchmark is whether the person offered a conditioned benefit has been unfairly made worse off by the offer." Thus, "if the offer of a conditioned benefit does not harm the person because it increases her options, has an incidental and unintended effect on a constitutional right, or merely subsidizes a governmentally favored alternative . . .[,] the harm is found not only to be indirect but nonexistent for purposes of judicial review." Romberg, "Is There a Doctrine in the House?

Welfare Reform and the Unconstitutional Conditions Doctrine," 22 *Fordham Urb. L. J.* 1051, 1078-79 (1995) (App. 3).

Here, it would be absurd to contend that families have been made worse off by the offer of empowerment scholarship accounts. Rather, unlike successful challenges under the doctrine, families have had their options expanded. Those families who have chosen empowerment scholarship accounts obviously consider that they are better off. Accordingly, there is no harm and the doctrine is not implicated.

Likewise, Professor Kathleen Sullivan writes that most cases that have found unconstitutional conditions have done so for one of two reasons: (1) the condition is too coercive, or (2) the nexus between the benefit and the condition is strained. Sullivan, "Unconstitutional Conditions," 102 *Harv. L. Rev.* 1413, 1427-28 & 1458 (1989) (App. 4). Here, no coercion is involved in deciding whether or not to choose an empowerment scholarship account. At the same time, the nexus between the benefit and condition is exact: it is an exchange of one type of educational service for another. The relative value of the options is in the eye of the beholder, and the choice is entirely voluntary and reversible.

Not surprisingly, the program at issue here is completely unlike conditions found to be unconstitutional on grounds of coercion. In *Speiser v. Randall*, 357 U.S. 513 (1958), the U.S. Supreme Court struck down a property tax exemption for veterans that was conditioned on beneficiaries attesting that they did not advocate the overthrow of the government by force or

violence. The Court found that the effect of the condition was to "penalize" beneficiaries for their constitutionally protected speech, to serve as a "deterrent" to such speech, and to "coerc[e]" them not to exercise their rights. *Id.* at 518-19. Similarly, in *Sherbert v. Verner*, 374 U.S. 398, 403-04 (1963), the Court held that conditioning unemployment benefits on willingness to work on the Sabbath amounted to a waiver of religious liberty, by pressuring the beneficiary to forego religious practices and forcing her to choose between the benefits and her religious beliefs. No such coercion is present here; this program adds to the preexisting range of educational choices available to eligible families.

Likewise, cases requiring a "nexus" between the benefit and condition do not support plaintiffs' argument. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (requiring "rough proportionality" between the benefit and the condition). In *GST Tucson Lightwave, Inc. v. City of Tucson*, 190 Ariz. 478, 949 P.2d 971 (App. 1997), the court sustained the requirement of requiring a company to obtain a new long-distance telephone license in order to secure a local service license. The court found there was no property right in the company's previous long-distance license that was sacrificed in order to obtain the local service license. *Id.*, 190 Ariz. at 485, 949 P.2d at 948. Even if there was, the court ruled there was no unconstitutional condition because of a close nexus and rough proportionality between the benefit sought and the required waiver. *Id.*, 190 Ariz. at 486, 949 P.2d at 979.

An obvious nexus exists for the State to require that when a family chooses an

educational option other than a public school education, it may not also choose a public school education. It does not present the family with a dilemma but an option. That the value of the benefit and condition are roughly proportionate is established by A.R.S. § 15-2402(C), which sets the amount of scholarship account funds at 90 percent of the base support level for the particular student. In essence, the program makes funding for eligible students fungible, allowing the parents to choose whether it is spent in a public school or deposited into an empowerment scholarship account. The value of the options is largely the same, and certainly the family is not worse off by choosing one option over the other.

It would be entirely a different matter if, as plaintiffs groundlessly assert (Br. at 11), families were "barred" from returning their children to public schools. The statute logically assumes that children either are "enrolled" in public schools or in the empowerment savings account program, and not in both at the same time. If a child is no longer enrolled in the empowerment scholarship account program, then the conditions of A.R.S. § 15-2402(B) by definition no longer apply, and the student may return to a public school.[4] Plainly, the section is intended not to force families to relinquish constitutional rights, but simply to prevent double-dipping. After all, A.R.S. § 15-2402(B)(3) also prohibits families from receiving scholarship tax credit funds in addition to empowerment savings accounts. It is a maxim of statutory interpretation that, where possible, courts should not construe a law in a manner that

[4] Presumably, the State could take action to recover any excess funds that were deposited into an empowerment scholarship account for a student who withdraws from the program.

would render it unconstitutional. *Arizona Downs v. Arizona Horsemen's Found.*, 130 Ariz. 550, 554, 637 P.2d 1053, 1057 (1981). To do so here would require an especially tortured interpretation, whereby a statute designed to "provide options for the education of students in this state" (A.R.S. § 15-2402(A)) in fact thwarts them. Certainly the parents in this lawsuit do not think so, even though it is their right to be free of unconstitutional conditions that plaintiffs perversely purport to represent.

For these reasons, all the cases cited by plaintiffs are materially different from the instant case. In all of them, the plaintiffs were asked to surrender an existing right for a benefit, and the courts concluded that the plaintiffs should be able to enjoy both the benefit and the right. See *Employers' Liab. Assur. Corp. v. Frost*, 48 Ariz. 404, 62 P.2d 320 (1936) (right to practice business exchanged for waiver of freedom of contract); *State v. Quinn*, 218 Ariz. 66, 178 P.3d 1190 (App. 2008) (driving privilege in exchange for surrendering constitutional rights); *Havasu Hts. Ranch & Devel. Corp. v. State Land Dep't of State of Ariz.*, 158 Ariz. 552, 764 P.2d 37 (App. 1988) (lease of public land in exchange for waiver of statutory and constitutional recovery rights). Here, by contrast, the bizarre result of the unconstitutional conditions doctrine would be that children would be entitled to a publicly funded public education and a publicly funded nonpublic education at the same time—in essence, that the families may not be offered an equal exchange.

No unconstitutional conditions cases stand for that proposition, and indeed plaintiffs do

not appear to be making that argument. Rather, they are urging the Court to interpret the statute to forbid students who leave the empowerment scholarship account program from ever returning to public schools. The statute does not do that, just as the other educational options provided by Arizona law do not do that. Indeed, if they did, surely someone would have challenged them long ago.

Instead of creating an artificial dilemma that presents an unconstitutional condition that does not exist, the Court should leave intact the educational options upon which the opportunities and future of many special-needs schoolchildren may depend.

Conclusion

For all of the foregoing reasons, we urge this honorable Court to hold that the empowerment scholarship savings account program is constitutionally valid and deny the requested relief.

RESPECTFULLY SUBMITTED this 28th day of October, 2011 by:

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