IN THE COURT OF APPEALS FOR THE STATE OF ARIZONA
DIVISION ONE

SHARON NIEHAUS, Arizona School Boards Association, Arizona Education Association and Arizona Association of School Business Officials, Plaintiffs/Appellants, vs. JOHN HUPPENTHAL, Defendant/Appellee, and THE GOLDWATER INSTITUTE, ANDREW WECK ROBERTSON, VICTORIA ZICAFOOSE and CRYSTAL FOX, Intervenor-Appellees.	Court of Appeals, Division One Case No. 1 CA-CV 12-0242 Maricopa County Superior Court Case No. CV2011-017911

INTERVENOR-APPELLEE GOLDWATER INSTITUTE'S ANSWERING BRIEF

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Statement of the Case

Appellee-Intervenor-Defendant Goldwater Institute agrees with Appellants' Statement of the Case.

Statement of Facts

This case arises from efforts to expand educational opportunities for disadvantaged Arizona schoolchildren. Appellants contend (Op. Br. at 2) that the Goldwater Institute originated the idea of education savings accounts "[i]n the wake of the *Cain* decision," referring to *Cain v. Horne*, 220 Ariz. 77, 202 P.3d 1178 (2009), which invalidated private-school scholarship programs for disabled and foster children. In fact, the Institute first proposed education savings accounts in 2005. See Dan Lips, "Education Savings Accounts: A Vehicle for School Choice," *Goldwater Institute Policy Report* No. 207 (Nov. 15, 2005) (App. 1). The report noted that "under a system of ESAs, instead of giving parents a voucher, the government would provide money directly to parents to purchase education services for their children." *Id.* at 4-5. The report compared ESAs to health savings accounts, which individuals may use to purchase a wide variety of health-care services. *Id.* at 5. A subsequent Institute report described the "cafeteria style" flexibility provided by ESAs:

> 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 in the context of parents who have opted in, multiple uses for funds exist.

Matthew Ladner and 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).

Following the *Cain* decision, the Arizona Legislature enacted A.R.S. § 15-2401, *et seq.*,[1] which created an empowerment scholarship program for children with disabilities. The initial program allowed disabled children who were attending a governmental primary or secondary school to instead obtain an empowerment scholarship account for an annual amount equal to 90 percent of that student's base support from state education funds. The funds can be used for any of the 11 expenses outlined in § 15-2402(B)(4): (a) tuition or fees at a qualified school; (b) textbooks required by a qualified school; (c) educational services or therapies provided by a licensed or accredited practitioner; (d) tutoring services by an accredited tutor; (e) curriculum; (f) tuition or fees for a nonpublic online learning program; (g) fees for standardized tests; (h) contributions to a 529

[1] Referenced statutes and constitutional provisions are attached in the Appendix.

college tuition program; (i) tuition or fees at an eligible postsecondary institution; (j) textbooks required by an eligible postsecondary institution; or (k) account management fees assessed by the State Treasurer.

In 2012, the program was amended by H.B. 2622 (App. 3), which expanded the pool of eligible pupils to include children attending a school or school district receiving a letter grade of D or F under A.R.S. § 15-241, children of members of the armed forces, and certain children who are wards of the juvenile system. See A.R.S. § 15-2401(6)(a)(iv)-(ix). Although the program's expansion is not before the Court, certain provisions of the original program were changed by H.B. 2622, and we will discuss those changes below as appropriate.

Statement of Issues Presented

1. Whether the empowerment scholarship account program, pursuant to which the State deposits a portion of a child's state education funds into an account owned by the child's family and which can be used for a wide variety of public and private educational services, represents an "appropriation of public money made in aid of any . . . private or sectarian school" prohibited by Ariz. Const. Art. IX, § 10 ("Aid Clause"), or public money "appropriated for or applied to any religious . . . instruction" proscribed by Art. II, § 12 ("Religion Clause").

2. Whether a parent's choice to secure an empowerment scholarship

account for his or her child instead of an education provided by a governmental school creates an unconstitutional condition; and whether plaintiffs, who have not alleged that they have sustained an unconstitutional condition, have standing to assert such a claim.

Argument

Standard of Review. The same standard of review applies to all of Appellants' claims on appeal. The appellate court "review[s] the trial court's conclusions of law de novo. . . . In deference to the legislature, however, we begin with a presumption that the statute is constitutional. . . . 'Indeed, we have a duty to construe statutes in harmony with the constitution if it is reasonably possible to do so'." *Cain*, 218 Ariz. at 304-05, 183 P.3d at 1272-73 (citations omitted). "The party challenging a statute bears the burden of demonstrating its invalidity, . . . and we resolve all uncertainties in favor of constitutionality." *Kotterman v. Killian*, 193 Ariz. 273, 284, 972 P.2d 606, 617 (1999) (citations omitted). Moreover, when plaintiffs elect to challenge a statute on its face, as they did 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).

I. AID AND RELIGION CLAUSES

Were the Legislature inclined to make an appropriation in aid of private or sectarian schools or religious instruction, the empowerment scholarship account program at issue in this case would be a very odd and tortured way to do so. Not a single dollar of public funds is earmarked for private schools or religious instruction. The accounts are owned by the beneficiaries, and any funds remaining after K-12 education may be used for postsecondary education, most of which (particularly in Arizona) is provided by public institutions. The account funds can be used for a wide variety of educational services, including home-based instruction, curriculum, tutoring, and early community college enrollment. If private or religious schools were looking for the type of subsidy forbidden by the Arizona Constitution, they need to fire their lobbyists.

In reality and on its face, the empowerment scholarship account program reflects an expansion of educational options to children who, by the public school system's own reckoning, need specialized educational services.[2] The program is innovative and controversial. No doubt it threatens powerful interests that possess a strong stake in preserving the educational status quo.

But the fact that the program presents a different, additional way of

[2] A.R.S. § 15-2401(5) (subsection 6 in the new statute) provides eligibility to children with disabilities as defined by federal or state law.

providing educational services does not render it unconstitutional. "One of the most enviable attributes of our constitutional form of government is its adaptability to change and innovation," our Supreme Court has declared. *Kotterman*, 193 Ariz. at 273, 972 P.2d at 623. "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*, 193 Ariz. at 290, 972 P.2d at 623.

Appellants rely exclusively on *Cain* for their contention that the Aid and Religion clauses prevent the Legislature from placing a variety of educational options at the disposal of parents. In reality, the applicable analytical framework is established not by one decision but by three—one of which (*Kotterman*) Appellants suggest is no longer good law and the other they ignore altogether.

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.[3] The Court ruled that the "'aid' prohibited in the

[3] 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 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).

constitution of this state is, in our opinion, assistance in any form whatsoever which would encourage the preference of one religion over another, or religion per se over no religion." *Id.* 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 was not the religious institution but "the individuals and families who are destitute and receive the emergency aid." *Id.* at 455, 432 P.2d at 467.

The empowerment scholarship account program is several additional steps removed from the program upheld in *Jordan*. There the state *directly* paid a *religious* institution to provide services to identified beneficiaries. Here, the state deposits funds into an account from which parents may draw to purchase a wide range of services from religious, nonreligious, and public providers.

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. But the Court also upheld the program on alternative grounds that are directly relevant to the issue presented here. "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 credit for donations to a student tuition organization violates" the Religion Clause. 193 Ariz. at 287, 972 P.2d at 620. 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.* The Court found the program permissible under the Aid Clause as well. In *Kotterman*, the only permissible use of scholarship tax credit funds was private school tuition; here, account funds can be used for many different services, so that the connection between the ESA program and the concerns of the Aid and Religion Clauses is even more attenuated.

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.[4] 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

[4] For that reason, the discussion of the Religion Clause in *Kotterman* and *Jordan* remains the applicable law.

the state treasury to private schools." *Id.* 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.* 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 public funds may not go to private or religious institutions, particularly at the direction of beneficiaries and particularly when private schools are only one of numerous genuine options. Rather, the inquiry is whether there are sufficient choices and parental controls so that the program cannot be said to constitute a direct appropriation to private schools.

The two critical and dispositive ways that the Empowerment Scholarship Program differs from the vouchers struck down in *Cain* might be characterized as (1) predestination and (2) ownership. Unlike vouchers, empowerment scholarship account funds are not predestined to go to private schools, and the funds are owned by the beneficiary families. Appellants implicitly acknowledge the importance of those differences when they repeatedly caricature features of the ESA program. They assert (Op. Br. at 8) that it is "inevitable" that most

empowerment scholarship account funds will be used in private schools. And they characterize the program (*id.* at 12) as "routing the expenditures through private intermediaries." They realize they must depict the program in that fashion in order to squeeze it into the narrow holding of *Cain*, in which there was but one choice and in which public funds were transferred directly to private schools.

Counsel for Appellants saw things differently during oral argument in *Cain*. He agreed with Justice Hurwitz that a grant to parents of disabled students that could be used as they wish for their children's education would be constitutional, even if they spent it on private or religious schools. Why? "I think the dividing line is how much the state constrains the choice." See Ladner and Dranias at 8. 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.[5]

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

[5] The full exchange between Justice Hurwitz and Appellant's counsel is reproduced in the brief of the parent intervenors.

1. The choices are abundant. Unlike *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.[6] Indeed, as a result of H.B. 2622, ESA funds now may be used for a 12th purpose: "Services provided by a public school, including individual classes and extracurricular programs." A.R.S. § 15-2402(B)(4)(l).

2. Most of the services for which ESA funds can be used are not "schools," and thus do not implicate the Aid Clause at all.

3. Choices are not limited to nongovernmental providers. 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 obtained from public or private providers. Indeed, eligible students can use their empowerment scholarship accounts to purchase tutoring

[6] It is amusing that plaintiffs say there are "only" 11 purposes for which the funds can be used (Op. Br. at 7), when of course that is 11 times the number of choices that could be made by parents in *Cain*.

services from public school teachers, or to purchase public school curricula.[7] As noted above, account funds now may also be used to purchase classes and extracurricular activities from public schools.

4. Thus, unlike *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.

Appellants insist (Op. Br. at 8) that it is "inevitable" that most account proceeds will be used to pay private school tuition. No it is not. All that is required is that the parent "[p]rovide an education 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) (now § 15-802(G)(3)), and home schools, which also are classified as "nonpublic schools." A.R.S. § 15-802

[7] Several public colleges and universities sell K-12 curricula and other educational services directly to students who are educated at home. See, e.g., http://www.depts.ttu.edu/uc/k-12/homeschool/ (Texas Tech University); http://www.utexas.edu/ce/k16/ (University of Texas); http://www.muhigh.missouri.edu/middle-elementary-homeschool (University of Missouri); http://www.iuhighschool.iu.edu/about/index.shtml (Indiana University).

(F)(1) (now § 15-802(G)(2)).[8] That is what makes the options of online education, curriculum, and postsecondary school attendance so salient.

We can have no idea, at any particular point in time, how much of the aggregate empowerment scholarship account funds will be used for private school funds 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 scholarship accounts may primarily be used for private school tuition. But that is up to the parents, in light of the unique needs of their children, and is not dictated by the program.

A facial challenge does not allow the Court to indulge Appellants' self-serving predictions; it requires Appellants to demonstrate that the program can be valid under no circumstances. Appellants make much of the fact (Op. Br.

[8] H.B. 2622 explicitly drew the connection between empowerment scholarship accounts and those two types of nongovernmental schools. See A.R.S. § 15-802 (G)(1), which defines a child "educated pursuant to an empowerment scholarship account" as one "in which the parent may but is not required to enroll . . . in a private school."

at 13) that a large percentage of funds in the program's first year were used for private school tuition, but that does not satisfy the showing necessary in a facial challenge, because those numbers can change from year to year. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 641 (2002) ("The constitutionality of a neutral 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). Moreover, the point of *Cain* is that *all* funds necessarily would be used in private and religious schools; there was no other option.

Indeed, Appellants unwittingly corroborate that very point when they acknowledge (Op. Br. at 15) that families who educate their children at home generally do not incur tuition or fee expenses. But, contrary to Appellants' baseless assertions, they do purchase curricula and other educational services, and now even can purchase discrete classes or extracurricular activities from public schools. The critical point from a constitutional perspective is that for families who do not pay private school tuition, *all* of the empowerment scholarship account funds, by definition, will be used for purposes that are not implicated by the Aid or Religion clauses. Because such families are fully eligible to participate in the program, it is far from "inevitable" that most of the ESA funds will be used for

private school tuition—even if that were the constitutional test under *Cain*, which it is not.

Appellants also confuse the permissible uses of scholarship funds for postsecondary tuition and a 529 college savings plan. As Appellants ought to 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)(h) and (i) 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) (now § 15-2401(3)) 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, §15-2402(B)(4)(h) allows contributions to 529 college accounts, which of course may be used at any public or private postsecondary institutions.

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

Appellants' second argument—that students who receive empowerment scholarship accounts are unconstitutionally forced to surrender their right to a public education—abounds with novelty as much as it lacks in substance. But the trial court correctly dismissed the claim because Appellants lack standing to raise it.

A. Standing. Appellants spend the entirety of their standing argument asserting that they have standing to challenge the perceived unlawful expenditure of public funds—a proposition with which we do not quarrel. That is because taxpayers are ultimately obligated to replenish any public funds that are

unlawfully spent. See, e.g., *Sears v. Hull*, 192 Ariz. 65, 961 P.2d 1013 (1998). Unfortunately, they do not provide any legal basis for their standing to challenged alleged unconstitutional conditions, apparently assuming that the Court will bootstrap their taxpayer standing to enable them to do so. Such a holding would be contrary to case-law and would set a dangerous precedent.

No one in this litigation asserts that they have been injured by an unconstitutional condition. Indeed, the organizational Appellants could not do so because the rights they assert belong to schoolchildren, not to school districts or teacher unions. There are schoolchildren represented in this lawsuit, but they are beneficiaries of the empowerment scholarship account program and their rights are emphatically not represented by Appellants. If there were plaintiffs claiming to have been injured by an unconstitutional condition, they likely would seek a remedy different than the Appellants seek—that is, invalidation of the condition rather than the program.

Individuals generally do not have standing to allege harms to third parties. *Barrows v. Jackson*, 346 U.S. 249, 255 (1953). The Arizona Supreme Court has articulated three prerequisites for third-party standing: "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). Appellants have not even alleged those essential elements, much less demonstrated them. Should someone come forward alleging such a harm, they will have an opportunity to do so regardless of the outcome of this litigation. Indeed, if Appellants are allowed to assert such claims now, in the absence of evidence or concrete injury, the judgment actually could preclude future re-litigation of the issue by someone who actually alleges such a concrete injury. See, e.g., *Howell v. Hodap*, 221 Ariz. 543, 549, 212 P.3d 881, 887 (App. 2009).

Appellants suggest that because taxpayers may assert claims against unconstitutional spending, they may raise any additional constitutional issues that suit their fancy. Not so. "[S]tanding is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). Rather, "a plaintiff must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). "In 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) (citation omitted). The Appellants have neither

participated in the empowerment scholarship accounts program nor expressed a desire to do so. They cannot raise this claim.

B. Substance. There are no plaintiffs complaining of injury from an unconstitutional condition for a good and simple reason: there is no unconstitutional condition. To stitch together their improbable claim, Appellants are forced to conjoin a parade of hypothetical horribles—which are palpably inappropriate in a facial claim—with a complete rewriting of the unconstitutional conditions doctrine.

The essential predicate for an unconstitutional conditions claim is a dilemma. There is no dilemma here. Eligible families may choose a regular public school education (or other options provided by Arizona law, such as a public charter school, a publicly funded private school placement, or a scholarship under the tax credit program); or they may choose an empowerment scholarship account. If they choose the latter and change their mind, they can 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 made unfairly 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." Jonathan 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. 4).

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, 1428, 1458 (1989) (App. 5). 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 and 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,

396 (1994) (requiring "rough proportionality" between the benefit and the condition); see also *Burgess v. Lowery*, 201 F.3d 942, 947 (7th Cir. 2000) (benefits may be conditioned on surrender of constitutional rights if the requirement is "reasonable"). Thus, U.S. Supreme Court has sustained such conditions in a wide variety of contexts. See, e.g., *Lyng v. Int'l Union*, 485 U.S. 360 (1988) (upholding statute making striking workers ineligible for food stamps); *Maher v. Roe*, 432 U.S. 464 (1977) (upholding conditions under welfare law providing benefits only for first-trimester abortions that are medically necessary). Likewise, in *GST Tucson Lightwave, Inc. v. City of Tucson*, 190 Ariz. 478, 949 P.2d 971 (App. 1997), the Court sustained a requirement that a company 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. 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.* 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. The program does not present the family with a

dilemma but an option, to substitute one form of educational opportunity for another. That 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.

Recognizing the tenuous nature of their argument, Appellants urge (Op. Br. at 28) that if a child withdraws from the ESA program, a "public school would not have to accept him or her." Moreover, the "parents would be liable to repay the State of Arizona for any scholarship funds they have already spent," meaning that they "would have no choice but to keep their child in private school" (*id.*). Appellants thus pile hypothetical upon hypothetical, which is particularly inappropriate in a facial challenge, in which they must demonstrate that there are no circumstances in which the program could be constitutional, rather than merely concocting an instance in which the program might be unconstitutional as applied. Again, we have no one in the lawsuit actually alleging that such a situation has occurred.

And in fact, Appellants' base premise simply is wrong. Ariz. Const. Art. XI, § 6 requires the State to maintain free public schools that are "open to all pupils between the ages of six and twenty-one years." We read that provision to guarantee a free public education to all children who are not availing themselves of alternatives made available by law; so that if children relinquish their ESAs, they are eligible immediately to attend public schools. With regard to Appellants' second hypothetical, we would not expect the Superintendent to seek reimbursement for legitimately expended funds—i.e., funds spent in the absence of fraud—whether for private school tuition or any other permissible expenses.

This is the point at which not only Appellants' decision to challenge the program on its face, but also the presumption of constitutionality, come in. Appellants argue that the Court should assume that public schools will be unavailable to children withdrawing from the ESA program; that the Superintendent will attempt to force reimbursement of lawfully expended funds; and that students will be forced to remain in private schools if such actions occur, which further assumes that they have enrolled in private schools in the first place. In a facial challenge, and applying the presumption of constitutionality, the Court

should assume *none* of those things, until a plaintiff comes forward to show that any of them has occurred.

Without such assumptions, Appellants' unconstitutional conditions claim fails utterly. The ESA statute logically assumes that children either are "enrolled" in public schools or in the empowerment scholarship account program, and not 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. Plainly, the section is intended not to force families to relinquish constitutional rights, but simply to prevent double-dipping. After all, § 15-2402(B)(3) also prohibits families from receiving scholarship tax credit funds in addition to empowerment scholarship accounts. It is a maxim of statutory interpretation that courts should not construe a law in a manner that would render it unconstitutional. 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, the cases cited by plaintiffs all 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 benefits and the rights. 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. St. Land Dep't of St. 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 Appellants do not even 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. 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 futures 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 account program is constitutionally valid and deny the requested relief.

RESPECTFULLY SUBMITTED this 9th day of July, 2012 by:

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