

**Scharf-Norton Center for Constitutional Litigation at the
GOLDWATER INSTITUTE**

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Arizona Christian University, on behalf of
itself and its students,

Plaintiff,

vs.

Washington Elementary School District
No. 6; and Nikkie Gomez-Whaley; Jenni
Abbott-Bayardi; Kyle Clayton; Lindsey
Peterson; and Tamillia Valenzuela, all in
their official and individual capacities,

Defendants.

No. CV-23-413-PHX-SPL

**BRIEF AMICUS CURIAE OF THE
GOLDWATER INSTITUTE**

INTRODUCTION AND SUMMARY OF ARGUMENT¹

Defendants’ hostility toward Christians is apparently so intense that they cut off a long-standing teacher training program during an historic nationwide teacher shortage, simply because the teachers attended Arizona Christian University (ACU)—a school that espouses traditional Christian beliefs on its website. ACU has already described in its briefing how Defendants’ decision not to renew ACU’s contract on purely religious

¹ The identity and interest of amicus curiae is set forth in the accompanying motion for leave to file.

1 or ideological grounds violates the U.S. Constitution’s guarantees of free exercise, free
2 speech, freedom of expressive association, etc. In this amicus brief, the Goldwater
3 Institute highlights how Defendants’ discrimination violates the Arizona Constitution’s
4 ban on religious tests as well, which aims to prevent just these kinds of harms.

5 **BACKGROUND**

6 It is worth emphasizing the magnitude of Defendants’ discrimination here. They
7 have not merely required individual staff members or job applicants to subscribe to a
8 particular ideology (that would be bad enough). Nor were their actions aimed at
9 addressing any misconduct or sub-par performance by student-teachers or other staff
10 members.

11 Indeed, during their discussion of whether to renew the agreement with ACU,
12 board members identified several objective factors that *would* be relevant to their
13 decision—for example, how many student-teachers go on to work full-time for WESD
14 after graduation—and admitted they had absolutely no data on *these* factors. Staff
15 admitted, for example, their ignorance of whether the five ACU student-teachers
16 currently placed at WESD were interested in post-graduation employment at WESD.²
17 They also did not know whether ACU is “a viable source for [WESD] to hire educators,”
18 or how many ACU students have historically accepted offers for full-time employment.³
19 Instead, the only factual basis for the board’s unanimous vote was apparently a handful
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21 ² WESD, Student Recognition & Regular Meeting, YouTube (Feb. 23, 2023, 6:30 p.m.)
22 (“Feb. 23 Meeting”), <https://www.youtube.com/watch?v=oUaLqZbleFo> at 1:19:00–
1:19:15 (last visited Mar. 31, 2023).

23 ³ *Id.* at 1:22:00–1:22:15; *see also id.* at 1:24:10–1:24:21 (Nikki Gomez-Whaley) (“We
24 continue to have these contracts with schools, and we don’t track if any of them actually
25 stay.... We have no idea how many of these folks that we’ve had over the last eleven
26 years have actually stayed. That is very concerning to me ...”). Staff indicated that
27 they “don’t know that data, and it would be difficult to find that data.” *Id.* at 1:22:40–
1:22:45. It is perplexing that the district would not have data readily available on who
28 works there, who has been offered a job, or who has accepted a job offer. But in any
event, it is clear that the board made its decision without the benefit of any of this
information.

1 of statements about ACU’s Christian identity and beliefs that one member (Tamillia
2 Valenzuela) reported she read on ACU’s website.

3 But to base a public employment decision on a person’s religious beliefs plainly
4 violates Article II, Section 12, and Article XI, Section 7, of the Arizona Constitution,
5 which provide, respectively, that “[n]o religious qualification shall be required for any
6 public office or employment,” and that “no religious ... test or qualification shall ever be
7 required as a condition of admission into any public educational institution of the state,
8 as teacher” And such discrimination harms not only those who are denied
9 employment, but the general public as well.

10 ARGUMENT

11 **I. The district’s rationale for terminating its relationship with ACU violates the** 12 **Arizona Constitution’s ban on religious tests.**

13 School districts are generally free to determine the programming and content that
14 their teachers are required to provide to students. Here, however, Defendants’ actions
15 amount to policing what Defendants perceive to be teachers’ internal *beliefs*, rather than
16 an effort to regulate their paid conduct. Such an action violates the Arizona
17 Constitution.

18 Article II, Section 12 of the Constitution forbids the state from imposing any
19 religious test for any position of public employment. This provision originated at the
20 Arizona Constitutional Convention as Proposition 94, which after some deliberation was
21 replaced by Substitute Proposition 94, which was taken almost verbatim from Article I,
22 Section 11 of the Washington Constitution. *See Records of the Arizona Constitutional*
23 *Convention of 1910* at 658 (John Goff, ed., 1991). Washington courts have interpreted
24 that provision as requiring a person who asserts unconstitutional discrimination to “first
25 prove the government action has a coercive effect on the practice of religion”—which is
26 established here by the government’s refusal to employ—and once that is established,
27 “the burden of proof shifts to the government to show the restrictions serve a compelling
28 state interest and are the least restrictive means for achieving the government objective.

1 If no compelling state interest exists, the restrictions are unconstitutional.” *First United*
2 *Methodist Church of Seattle v. Hearing Exam’r for Seattle Landmarks Pres. Bd.*, 916
3 P.2d 374, 378 (Wash. 1996).

4 This prohibition on religious requirements for employment is not Arizona’s only
5 such constitutional provision. Article XI, Section 7 declares that “no religious or
6 political test or qualification shall ever be required as a condition of admission into any
7 public educational institution of the state, as teacher, student, or pupil.” This provision
8 was borrowed from Article IX, Section 8 of the Colorado Constitution, and “the
9 meaning of the clause,” obviously, “is that any person of any religion or no religion may
10 become a teacher or student.” *People ex rel. Vollmar v. Stanley*, 255 P. 610, 615 (Colo.
11 1927).

12 Notably, unlike most other religious-test clauses, Article XI, Section 7 explicitly
13 applies to “any public educational institution of the state,” and it appears specifically in
14 the section dealing with education. It goes out of its way to protect “teacher, student,
15 [and] pupil,” and “is broader than the other ‘religion clauses’ of Arizona’s Constitution.”
16 *Ariz. Att’y Gen. Op. I99-030*, 1999 WL 1289600, at *4 (1999) (citations omitted). In all
17 these ways, the framers left no room for doubt about their desire to keep religious tests
18 out of public schools—both for students and for teachers.

19 These provisions were clearly intended to ensure that no litmus test of religious
20 belief is used as a screening mechanism to discriminate against teachers employed at, or
21 students admitted by, state-operated educational institutions. Yet the Defendants’ stated
22 objections to the religious beliefs of attendees of ACU demonstrate that Defendants view
23 those purported beliefs themselves (as opposed to any actual behavior by staff members)
24 as inherently disqualifying. ACU, as a private religious institution, is free to require a
25 statement of faith among its faculty and students—and the Arizona Constitution forbids
26 WESD from conditioning employment on any personal profession of faith.⁴

27 ⁴ Or lack thereof. *See* Ariz. Const. art. XX, § 1 (“Perfect toleration of religious
28 sentiment shall be secured to every inhabitant of this state, and no inhabitant of this state

1 WESD’s decision in this case penalizes ACU-affiliated candidates for their
2 adherence to ACU’s religious principles, regardless of whether these individuals ever
3 share or promote those principles in their capacity as paid employees of the district.
4 That is precisely the type of discrimination that Arizona’s prohibitions on religious tests
5 forbid.

6 Defendants suggested during the Feb. 23 Meeting that the religious tenets of
7 ACU teachers posed some sort of threat to members of the District’s LGBTQ
8 community. But that cannot warrant discrimination in violation of the Constitution.
9 First, there was and is no evidence that ACU teachers committed *any* form of
10 discrimination, let alone violence, fraud, defamation, or other kind of injury against any
11 individual or group, or were likely to do so in the future. Insinuations to the contrary
12 were just that—precisely the sort of wholly speculative inferences and implications that
13 fit the dictionary definition of “prejudice.” *Black’s Law Dictionary* 1343 (4th ed. 1968)
14 (“forejudgment; bias; preconceived opinion.”). Of course, the entire purpose of the
15 prohibition on religious tests—one of the oldest and most cherished of America’s
16 constitutional bans on bigotry⁵—is to forbid the government from indulging in such
17 prejudice.

18 Second, if Defendants were allowed to apply a presumption that members of
19 certain religious traditions are incapable of following WESD’s standards of conduct, that

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21 shall ever be molested in person or property on account of his or her mode of religious
22 worship, or lack of the same.”).

22 ⁵ The federal Constitution’s ban on religious tests, after all, antedates the First
23 Amendment by several years. That ban was adopted partly in light of the history of
24 persecution imposed in England through various religious tests. As Oliver Ellsworth,
25 one of the delegates to the 1787 Convention, put it, the federal ban on religious tests was
26 designed “to exclude persecution In our country every man has a right to worship
27 God in that way which is most agreeable to his conscience. If he be a good and peace-
28 able person, he is liable to no penalties or incapacities on account of his religious
sentiments.” Quoted in Daniel L. Dreisbach, *In Search of a Christian Commonwealth:
An Examination of Selected Nineteenth- Century Commentaries on References to God
and the Christian Religion in the United States Constitution*, 48 *Baylor L. Rev.* 927, 950
(1996).

1 would be functionally identical to an overt religious test, and it would justify every sort
2 of religious discrimination. For example, the Catholic Church espouses doctrines about
3 marriage and sexuality that appear similar to those ACU professes. *See* Catechism of
4 the Catholic Church ¶¶ 2357–2359 (Nov. 2019).⁶ So does the Church of Jesus Christ of
5 Latter-Day Saints. *See Same-Sex Attraction*, Church of Jesus Christ of Latter-Day Saints
6 (last visited Mar. 31, 2023).⁷ If Defendants can categorically exclude ACU based on *its*
7 statements, they would be equally free to forbid hiring any member of these churches
8 (and countless others), solely due to their membership.

9 Defendants’ stereotypes about Christian teachers appear more in keeping with a
10 broader—and troubling—trend unfolding across education: the increasing willingness to
11 screen out teacher candidates who do not share a politically “Progressive” worldview.
12 *See, e.g.,* Madeline Will, *Districts Are Screening for Racial Biases During Teacher Job*
13 *Interviews. Here’s How*, Education Week (Dec. 7, 2021)⁸ (“[S]chool districts are
14 increasingly asking teacher-candidates questions about cultural competency, race, and
15 equity during the application and interview process.”). Such questions can—and in this
16 case plainly did—function as an “ideological litmus test” and “loyalty oath” to screen
17 out insufficiently “Progressive” teaching candidates. Screening of this sort has been
18 found, in the case of the University of California Berkeley, for instance, to result in a
19 public education institution “reject[ing] 76 percent of qualified applicants without even
20 considering their teaching skills” or “their potential for academic excellence.” Robby
21 Soave, *Berkeley Weeded Out Job Applicants Who Didn’t Propose Specific Plans to*
22 *Advance Diversity*, Reason.com (Feb. 3, 2020).⁹

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25 ⁶ <https://www.usccb.org/sites/default/files/flipbooks/catechism/568/>.

26 ⁷ <https://www.churchofjesuschrist.org/study/manual/gospel-topics/same-sex-attraction?lang=eng>.

27 ⁸ <https://www.edweek.org/leadership/districts-are-trying-to-screen-out-racial-biases-during-teacher-job-interviews-heres-how/2021/12>.

28 ⁹ <https://reason.com/2020/02/03/university-of-california-diversity-initiative-berkeley/>.

1 Within Arizona’s public university system—a competing source of new
2 teachers—up to 80 percent of faculty job postings now require a “diversity statement,”
3 including prompts which require applicants to discuss “intersectionality”—a concept
4 developed by and strongly associated with heavily “Progressive” schools of thought with
5 respect to race and gender. By targeting ACU for its religious tenets, the District further
6 exacerbates the political and ideological orthodoxy increasingly demanded of would-be
7 Arizona educators via such tactics. Insofar as such “statements” require a statement of
8 *political* belief, they constitute a political, as well as religious, test, in violation of Article
9 XI, Section 7.

10 **II. When the government discriminates in hiring, everybody suffers.**

11 The harmful effects of discrimination go far beyond the particular individual or
12 organization discriminated against, as courts and social scientists have long recognized.
13 “Discrimination is extremely hurtful to individuals from targeted minorities. But ... the
14 effects of excluding talented individuals from economic opportunities tend to go further:
15 when a society discriminates against a specific group, its entire economy can suffer.”
16 Kilian Huber, *How Discrimination Harms the Economy and Business*, Chicago Booth
17 Review (July 15, 2020);¹⁰ *see generally* Gary Becker, *The Economics of Discrimination*
18 (1957).

19 Here, the District specifically targeted one institution (ACU), but WESD
20 students, staff, and families, as well as Arizona taxpayers, all bear the costs of that
21 unconstitutional discrimination. Defendants’ conduct also sends a message to other
22 Christians in WESD (both students and staff) that their most deeply held beliefs are
23 unwelcome and unworthy of respect.

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28 ¹⁰ <https://www.chicagobooth.edu/review/how-discrimination-harms-economy-and-business>.

1 **A. Defendants’ discrimination deprived WESD students of qualified**
 2 **teachers during a historic teacher shortage.**

3 First, Defendants severed their relationship with a longstanding, reliable source of
 4 teachers during a massive teacher shortage. They did so not because there was any
 5 evidence that the relationship was poorly serving WESD, but rather, for purely
 6 ideological reasons.

7 Public school administrators statewide have warned that the state faces a “severe
 8 teacher shortage,” with the Arizona School Personnel Administrators Association
 9 (ASPAA) estimating in February 2023 that “over 25% of teacher vacancies across the
 10 state this year remain unfilled,” while observing that “school districts and charter
 11 schools compete nationally for the limited pool of candidates.” *Ariz. Sch. Personnel*
 12 *Admin. Ass’n, Severe Teacher Shortage in Arizona Continues* at 1 (Feb. 20, 2023)¹¹; *see*
 13 *also* Feb. 23 Meeting at 1:09:19–1:09:25 (Tamillia Valenzuela) (“I understand that we
 14 are currently in a situation across the nation that we have a teacher shortage ...”).

15 WESD’s decision not just to terminate the employment of one or more individual
 16 teachers, but to close off an entire pipeline of rising educators, arbitrarily and needlessly
 17 shrinks the pool of candidates from which the district can reliably draw. Such a decision
 18 in no way advances WESD’s educational mission, nor does it strengthen its academic
 19 programming. Instead, it merely and unnecessarily exacerbates the challenges WESD
 20 already faces in recruiting and retaining educators.

21 WESD has benefitted from more than two dozen student teachers from ACU, and
 22 it has hired at least seventeen individual educators trained at that institution. Compl. ¶¶
 23 61, 62. To put these figures in perspective, as of last fall WESD had “19 classroom and
 24 special education teacher vacancies.” Yana Kunichoff, “*My Teacher Just Left*” *How*
 25 *Arizona’s Teacher Shortage Affects Families*, AZCentral.com (Oct. 19, 2022).¹² Thus,

26 _____
 27 ¹¹

28 [https://cdn.ymaws.com/www.aspaa.org/resource/resmgr/documents/press_releases/aspaa
 _press_release_-_januar.pdf](https://cdn.ymaws.com/www.aspaa.org/resource/resmgr/documents/press_releases/aspaa_press_release_-_januar.pdf).

¹² [https://www.azcentral.com/story/news/local/arizona-education/2022/10/19/how-
 arizona-schools-grappling-teacher-shortage-crisis/8002010001/](https://www.azcentral.com/story/news/local/arizona-education/2022/10/19/how-arizona-schools-grappling-teacher-shortage-crisis/8002010001/)

1 the number of WESD teachers who have been sourced from ACU is virtually the same
2 as WESD’s entire teacher deficit.

3 Defendants’ decision to terminate the relationship with ACU comes at a
4 particularly inopportune time, given WESD’s staffing trends. As *The Arizona Republic*
5 reported in 2022:

6 COVID-19 brought class sizes down. But the teacher shortage has caused
7 Washington Elementary’s student-to-teacher ratio to rise. First grade
8 classes are as big as 29 students per teacher this school year, up from a
9 maximum of 24. Second grade has gone from at most 27 to 31 students
10 per teacher.

11 *Id.* In other words, WESD is already failing to meet its existing staffing needs, and its
12 decision to sever ties with a significant provider of teaching talent only exacerbates its
13 difficulties. Such a decision was therefore not in keeping with WESD’s educational
14 mission or objectives. Rather, it directly contributed to the teacher shortage, larger class
15 sizes, and inability to provide special-education and other essential services. It thus
16 plainly violates strict scrutiny—in fact, it likely would fail even the rational basis test.

17 **B. Defendants’ discrimination sends a hostile message to Defendants’
18 own constituents.**

19 With a “diverse population” of students across thirty-three schools, WESD is
20 “[t]he largest elementary school district in Arizona.” Washington Elementary School
21 District, *About WESD*.¹³ As a matter of both common sense and statistical certainty, this
22 “diverse population” includes many students, families, and staff members who share the
23 beliefs Defendants have publicly denigrated and discriminated against.

24 Approximately 67 percent of Arizonans identify as “Christian.” Pew Research
25 Center, *Religious Landscape Study: Adults in Arizona*.¹⁴ Fifty-one percent say religion
26 is “very important” in their lives. *Id.* One in three Arizonans, when surveyed, shared
27 that they hold similar beliefs about marriage and sexuality to those which Defendants

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¹³ <https://www.wesdschools.org/domain/44> (last visited Mar. 28, 2023).

¹⁴ <https://www.pewresearch.org/religion/religious-landscape-study/state/arizona/> (last
visited Mar. 28, 2023).

1 cited when choosing not to employ people who attend ACU. *Id.* Regardless of how
2 Defendants may personally feel about the “decent and honorable religious or
3 philosophical premises” such people hold, *Obergefell v. Hodges*, 576 U.S. 644, 672
4 (2015), these are the beliefs of thousands of their own constituents.

5 By using their offices to publicly denigrate ACU for its beliefs, Defendants not
6 only violated ACU’s constitutional rights, but sent a clear message to countless students,
7 families, and staff “that they are outsiders, not full members of the political community.”
8 *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring). Defendants
9 also deprived students of educational opportunities by taking a stand against teacher
10 diversity, and they aggravated teacher attrition by creating a climate of institutional
11 hostility toward current staff members whose beliefs are similar to those ACU espouses.

12 As the U.S. Supreme Court has made clear, the First Amendment protects the
13 rights of “religious organizations and persons ... to teach the principles that are so
14 fulfilling and so central to their lives and faiths,” and to share “their own deep
15 aspirations to continue the family structure they have long revered.” *Obergefell*, 576
16 U.S. at 679–80. If Defendants are permitted to carry on with their discriminatory
17 behavior, then the guarantee of “an open and searching debate,” without having one’s
18 “beliefs ... disparaged” or punished by the government, *id.* at 680, 672, will be an empty
19 promise.

20 **C. Arizona taxpayers ultimately bear the cost of Defendants’**
21 **discrimination.**

22 Discrimination against *any* individual or group based on protected characteristics
23 like religion and speech is unconstitutional. Here, however, the *effects* of Defendants’
24 discrimination fall not only on those directly involved, but also on society at large.
25 “Research has revealed that when minorities subjected to discrimination represent a very
26 small percentage of the population, the cost of discrimination falls mainly upon the
27 minority.” *M & T Mortg. Corp. v. Foy*, 858 N.Y.S.2d 567, 569–70 (N.Y. Sup. Ct.
28 2008). But when, as here, “they represent a larger segment of society, the cost of

1 discrimination falls upon both the minorities and the majority”: the minority because it is
2 deprived of job opportunities and constitutional rights; the majority because it deprives
3 *itself* of the economic and social benefits the excluded minority could otherwise offer.
4 *Id.*

5 This is one of the many reasons why the law requires Arizona school districts to
6 make contracting decisions based only on relevant, objective criteria, with the goal of
7 fulfilling district needs without unnecessary cost. *See, e.g.*, A.R.S. § 41-2565 (“All
8 specifications shall seek to promote overall economy for the purposes intended and
9 encourage competition in satisfying this state’s needs and shall not be unduly
10 restrictive.”); Ariz. Admin. Code § 7-2-1010(C)(4) (“To the extent practicable,
11 specifications shall emphasize functional or performance criteria. To facilitate the use of
12 such criteria, the school district shall use reasonable efforts to include the principle
13 functional or performance requirements as part of their requisitions.”).

14 By prioritizing ideology over objective, practical considerations, Defendants have
15 hamstrung WESD’s staffing efforts and have forced them to expend additional time,
16 money, and other resources to carry out their mission under irrational hiring constraints.

17 **III. This Court should grant a preliminary injunction.**

18 ACU has requested only “narrow” injunctive relief, “limited only to the parties.”
19 *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138–39 (9th Cir. 2009). Thus, “the public
20 interest [is] ‘at most a neutral factor in the analysis,’ *id.* (citation omitted), and it is
21 enough here that an injunction would not harm the public interest. And of course,
22 “[p]rotecting religious liberty and conscience is obviously in the public interest.”
23 *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018). Beyond that, however, insofar as
24 Defendants’ conduct harms the general public as described above, the public interest
25 strongly favors granting an injunction. *See, e.g., Hernandez v. Sessions*, 872 F.3d 976,
26 996 (9th Cir. 2017) (“[T]he general public’s interest in the efficient allocation of the
27 government’s fiscal resources favors granting the injunction.”).

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CONCLUSION

The Court should grant ACU’s motion for a preliminary injunction.

RESPECTFULLY SUBMITTED this 31st day of March, 2023 by:

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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2023, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record. All other defendants or their counsel of record are being served by regular mail and/or email.

/s/ Scott Day Freeman
Scott Day Freeman