No. CV-08-0189-PR

IN THE SUPREME COURT OF THE STATE OF ARIZONA

VIRGEL CAIN, et al.,
Plaintiffs/Appellants,
v.
TOM HORNE, in his capacity as Superintendent of Public Instruction,
Defendant/Appellee,
and
JESSICA GEROUX, et al.,
Defendant-Intervenors/Appellees.

On Review from the
Arizona Court of Appeals, Div. 2, No. CA-CV 2007-0143
Maricopa County Superior Court, No. CV 2007-002986

AMICUS CURIAE BRIEF OF CENTER FOR ARIZONA POLICY

IN SUPPORT OF APPELLEE AND INTERVENOR-APPELLEES

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INTEREST OF AMICUS CURIAE

The Center for Arizona Policy is a nonprofit, public-policy and legal organization dedicated to promoting and defending the institution of the family as the primary element of civil society. The Center supports public policy that recognizes the fundamental right of parents to direct the education and upbringing of their children. The Center also supports public policy that expands the educational options available to parents. To this end, the Center supported the two programs that are the subject of this litigation when they were being considered by the Arizona Legislature.

To assist the Court in its review of this case, this brief addresses the important public purpose served by these programs, as well as their consistency with the Arizona Constitution.

SUMMARY OF ARGUMENT

Plaintiffs' complaint attacked two acts of the Arizona Legislature: the Arizona Scholarship for Pupils with Disabilities Program and the Arizona Displaced Pupils Grant Program. Plaintiffs assert these Programs unconstitutionally support or provide government financial aid to religious schools and private schools.

Briefs filed by the State, the Intervenors, and other amici curiae show why Plaintiffs' constitutional church-vs-state arguments (and others) lack merit. This amicus curiae brief shows the two Programs to be constitutional exercises of the legislative power to enact the people's demands for creative, flexible, and diverse options in education.

The Programs recognize and carry out Arizona's public policy of educating children having particular difficulties. That public policy flows directly from the education imperatives declared in Article 11 of the Arizona Constitution. This Court's precedents uphold state programs that make funds available for parents to employ for education of their children because such expenditures advance a public purpose and are constitutionally permissible.

Funding parents' decisions to choose from a variety of options for educating students with special needs is: (1) constitutional under the Arizona and U.S.

Constitutions; (2) recognized judicially as beneficial to society; and (3) strongly supported by recent empirical social science research as both educationally and cost effective (while not harming the existing public school system). Empowering Arizona parents to exercise their right of choice of education, where the education demonstrably uplifts students and prepares them for productive adult lives wherever possible, itself constitutes a legislative policy that advances a public purpose.

The superior court correctly dismissed Plaintiffs' complaint, and its judgment should be reinstated (by reversing the Court of Appeal's contrary decision). The Programs should be sustained as constitutional assets that broaden the availability of quality, parent-selected education options for all Arizonans.

ARGUMENT

I. THE PROGRAMS EMPOWERING PARENTS TO SELECT EDUCATIONAL OPTIONS FOR THEIR CHILDREN WITH SPECIAL NEEDS FULFILL ARIZONA EDUCATION POLICY

Does Arizona's Constitution prohibit the legislature from making funds available to assist parents of children with special needs in obtaining appropriate education for them in the private sector?

Plaintiffs sued the State to block any such funds and thereby to halt parents' discretion to select the educational programs best suited for their children. Plaintiffs' lawsuit thus directly opposes the full implementation of Arizona's education policy. The superior court correctly dismissed that lawsuit on its merits.

A. Plaintiffs' Proposed Critical Scrutiny of the Choices of Private Decision Makers Contravenes the Clear Meaning of the Arizona Constitution.

This case turns on these words:

> No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment.

Ariz. Const. art. 2, § 12.

> No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation.

Id., art. 9, § 10.

These provisions are written to the State of Arizona and its political subdivisions. They set standards for official conduct, not restrictions on private action. Plaintiffs, however, press this Court for an unreasonable interpretation of these provisions that focuses not on the behavior of the government, but on the choices of individual Arizonans.

B. The Scholarship Programs Express Arizona Public Policy.

Plaintiffs' challenge invites this Court to modify the public policy of the State in a manner that reduces the options of parents of children with special needs. Such a public policy modification is a quintessentially legislative matter; this Court should reject that invitation. *See Kotterman v. Killian*, 193 Ariz. 273, 290-91 ¶63, 972 P.2d 606 (1999) ("[The wisdom of promoting private schools] is a matter for the legislature, as policy maker, to debate and decide. It is not for us to pass on the wisdom of this or any other social policy.")

Reflecting the will of the citizenry, the Arizona Legislature created the Arizona Scholarship for Pupils with Disabilities Program, (A.R.S. §§ 15-891 to 15-891.06) and the Arizona Displaced Pupils Grant Program (A.R.S. §§ 15-817 to 15-817.07 and § 43-1032) (collectively the "Scholarship Programs").[1] "The

[1] This amicus brief uses the term "children with special needs" to refer to children who have special needs either because of disabilities or because of being

Legislature speaks for the people" of Arizona. *Windes v. Frohmiller*, 38 Ariz. 557, 561, 3 P.2d 275 (1931), *quoting State v. Osborne*, 14 Ariz. 185, 125 P. 884, 886-887 (1912). Indeed, "the principal function of a legislature is ... to make laws that establish the policy of the state." *National R.R. Passenger Corp. v. Atchison Topeka and Santa Fe Ry. Co.*, 470 U.S. 451, 466, 105 S. Ct. 1441 (1985), cited approvingly in *Baker v. Arizona Dept. of Revenue*, 209 Ariz. 561, 565 ¶ 14, 105 P.3d 1180 (App. 2005).

C. The Scholarship Programs Help Assure Education to Children with Special Needs, Thus Advancing A Vital Public Purpose Under The Arizona Constitution.

The Scholarship Programs carry out a public purpose because these Programs reflect the will of the people of Arizona to implement the education directive of the Arizona Constitution (Ariz. Const. art. XI, §§ 1-2). "It is axiomatic that a governmental body may disburse funds only for a public purpose." *Wistuber v. Paradise Valley Unified School Dist.*, 141 Ariz. 346, 348, 687 P.2d 354 (1984). To a decisive degree a "public purpose" is defined by the people, via the Legislature, "to meet new developments and conditions of [the] times." *Id., quoting City of Glendale v. White,* 67 Ariz. 231, 236, 194 P.2d 435 (1948).

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displaced, and who thus could qualify for assistance under one or the other of the Scholarship Programs at issue here.

Education of the public is certainly one such public purpose. *City of Tombstone v. Macia*, 30 Ariz. 218, 222, 245 P. 677 (1926) ("so that the coming generation may be adequately prepared for the performance of the functions of government"). As this Court recognized in *Roosevelt Elementary School Dist. No. 66 v. Bishop* ("*Roosevelt I*"), 179 Ariz. 233, 877 P.2d 806 (1994), the framers of the Arizona Constitution "believed that an educated citizenry was extraordinarily important to the new state." *Id.*, 179 Ariz. at 239. Early drafts of the Constitution's education article included language such as: "[a] general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people" and "[t]he stability of a Republican form of Government depending mainly on the intelligence of the people...." *Id.* (internal quotations and citations omitted).

Educational programs designed to serve and uplift students with special needs students are both constitutional and implement the public purpose directive. *See Roosevelt I*, 179 Ariz. at 243 ("a system that acknowledges special needs would not run afoul of the uniformity clause," Ariz. Const. art. XI, § 1). Educational services provided by private entities, as part of the variety of educational offerings available in Arizona, fit directly within the education public purpose. *See Kotterman v. Killian*, 193 Ariz. 273, 278 ¶8, 972 P.2d 606 (1999)

(The "encouragement of private schools ... is not unconstitutional [and] ... can properly be used to facilitate a state's overall educational goals.")

D. Non-Government School Options, Particularly for Children with Special Needs, Deliver Benefits to the Children and to Society.

Both this Court and the United States Supreme Court have recognized the benefits – public and financial – of private school educational alternatives. "[P]rivate schools frequently serve to stimulate public schools by relieving tax burdens and producing healthy competition." *Kotterman*, 193 Ariz. at 278 ¶ 8, *citing Mueller v. Allen*, 463 U.S. 388, 395, 103 S. Ct. 3062 (1983). The U.S. Supreme Court expressly observed that private schools, including those religiously-affiliated,

> have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools. The State has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them.

Mueller, 463 U.S. at 395 (quotation and citation omitted).

1. Florida's comparable scholarship program improved education for its students with special needs.

The *Mueller* Court's favorable observations about non-government education find ample empirical support in the current era, and exquisitely so in the

area of education for children with special needs. A 2003 study of Florida's statewide McKay Scholarship Program for Students with Disabilities confirmed the public purpose benefits of such programs. The McKay Program makes a school voucher available to *any* special-education student in Florida public schools. As the then-second largest school voucher program in the country, by 2003 it had supplied 9,202 vouchers to students with special needs. Jay P. Greene & Greg Forster, *Vouchers for Special Education Students: An Evaluation of Florida's McKay Scholarship Program* (Civic Report No. 38, Manhattan Institute for Policy Research, June 2003).[2] The 2003 study reported:

- Among participants, the program is overwhelmingly popular: 92.7% of current McKay participants were satisfied or very satisfied with their McKay schools; only 32.7% were similarly satisfied with their public schools.
- Class sizes dropped dramatically (25.1 students per public classroom; 12.8 students in McKay school classes).
- Participating students were victimized far less by other students because of their disabilities in McKay schools. In public schools,

[2] The full text Greene & Forster report is available online at www.manhattan-institute.org.

46.8% were bothered often and 24.7% were physically assaulted, while in McKay schools 5.3% were bothered often and 6.0% were physically assaulted.

- McKay schools outperformed public schools on accountability for services provided. Only 30.2% of current participants said they received all services required under federal law from their public school, while 86.0% report their McKay school had provided all the services they promised to provide.
- Behavior problems dropped in McKay schools. 40.3% of current participants said their special education children exhibited behavior problems in the public school, but only 18.8% reported such behavior in McKay schools.
- Former McKay participants provide similar responses. 62.3% were satisfied with their McKay school, while only 45.2% were satisfied with their prior public school. Former participants also reported that their McKay schools performed better than their public schools on almost every other measure.
- McKay schools on average cost the same or only slightly more money per pupil than was spent in public schools.

Greene & Forster, *supra*, Executive Summary (text adapted, quotations omitted).

The 2003 study results demonstrate the public purpose effectiveness of non-government educational options, supported by vouchers or state scholarships, for students with special needs. The Arizona Scholarship Programs at issue here aim to accomplish those same public purpose results for Arizona students.

2. Florida's students with special needs scholarship program benefitted public schools as well.

Do such non-governmental school options damage the students with special needs who remain in public schools, as Plaintiffs have argued? A 2008 follow-up study, addressing that very question under the McKay Program, answered "*no*." That 2008 study, Jay P. Greene & Marcus A. Winters, *The Effect of Special Education Vouchers on Public School Achievement: Evidence from Florida's McKay Scholarship Program* (Civic Report No. 52, Manhattan Institute for Policy Research, April 2008),[3] indicated that *most public school students with special needs* "made statistically significant test score improvements in both math and reading *as more nearby private schools began participation* in the McKay Program." *Id.* (Executive Summary, emphasis added). Those students "with relatively severe disabilities" who remained in the public schools (while the

[3] The full text Greene & Winters report is available online at www.manhattan-institute.org

Mckay Program was expanding in private schools) were "neither helped nor harmed" in their academic achievement. *Id.* The data thus show the availability of non-governmental options for students with special needs can – and in the Florida system do – deliver measurable outcome improvements for such students in *both* public and private schools.

3. Healthy competition in education benefits students, parents and society, thereby accomplishing a constitutional public purpose.

Promoting competition among providers of special education services is likely to increase quality while lowering prices. "[O]ur economy is built largely upon competition in quality and prices." *U. S. v. Line Material Co.*, 333 U.S. 287, 309, 68 S. Ct. 550 (1948) (citation omitted). "Whatever may be the evil social [effects of competition] ... the advantages of competition in opening rewards to management, in encouraging initiative, in giving labor in each industry an opportunity to choose employment conditions and consumers a selection of product and price, have been considered to overbalance the disadvantages." *Id.*

Fostering competition in education can accomplish worthy public purposes, e.g., improved education for citizens and cost savings. A 2007 report comparing educational outcomes in public schools vs. private schools reported: (a) students in private schools made better academic gains than students in public schools; (b)

race relations were about the same in public and private schools; and (c) the dropout rates in private schools were equal or less than those of public schools. *See* Greg Forster, *Monopoly Versus Markets: The Empirical Evidence on Private Schools and School Choice* (Friedman Foundation, October 2007).[4] A 2007 multi-state survey of costs and savings under systems of school choice reported: "Every existing school choice program is at least fiscally neutral, and most produce a substantial savings." Susan Aud, *Education by the Numbers: The Fiscal Effect of School Choice Programs, 1990-2006* (Friedman Foundation, April 2007).

Viewing both the judicial observations and the empirical data, it becomes clear that scholarship programs for students with special needs advance the vital public purpose of cost-effectively educating the citizens (*City of Tombstone*, 30 Ariz. at 322; *Roosevelt I*, 179 Ariz. at 239, 243). Arizona's Scholarship Programs thus advance that public purpose. Therefore, the Scholarship Programs accord with the Arizona Constitution's education directives (Ariz. Const. art. XI, §§ 1-2) and are compatible with the Constitution's requirement that public funds be expended to achieve a public purpose (*Kotterman,* 193 Ariz. at 278 ¶8).[5]

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[4] The full text Forster report is available online at www.friedmanfoundation.org.

[5] As Plaintiffs concede, a non-governmental entity with an overall religious affiliation is not barred from carrying out public purpose tasks and receiving state funds for doing so. *See* Resp. to Pet. for Rev. at 10; *Comty. Council v. Jordan*, 102

II. ASSISTANCE TO PARENTS OF CHILDREN WITH SPECIAL NEEDS IS FULLY CONSISTENT WITH ARTICLE IX, SECTION 10

Plaintiffs have urged the Scholarship Programs violate the Arizona Constitution's prohibition of "aid" to religious or private schools. The provision in question, Article IX, Section 10, states: "No tax shall be laid or appropriation of public money made *in aid of any* church, or *private or sectarian school*, or any public service corporation." (Emphasis added.)

Before this Court stands the issue: do state scholarship funds provided to parents of children with special needs for use in non-government school programs constitute appropriations of money "in aid of a private or sectarian school"? The first task is to define the phrase "in aid of."

This Court, in *Community Council v. Jordan*, 102 Ariz. 448, 432 P.2d 460 (1967), explained "[t]he 'aid' prohibited [under art. IX, § 10] ...is ... 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. In the next sentence, however, the unanimous *Jordan* Court held the term "aid" includes an understanding of Arizona public policy in the current era:

Ariz. 448, 451-452, 432 P.2d 460 (1967) (not unconstitutional for Salvation Army to be paid for providing state-contracted relief support).

> We also hold that in order to fulfill the original intent of the constitution, the word "aid" must be viewed in the light of the contemporary society, and not strictly held to the meaning and context of the past.

Id.

As shown in Argument § I, *supra,* there is no denying the Legislature's intent, which by proxy is the people's intent, to provide *aid* to parents of children with special needs seeking educational options via the Scholarship Programs. The *Jordan* Court observed Arizona and its governmental functions had evolved over the decades since statehood; the "new reality" is that religiously-affiliated entities can and do provide public purpose services to the citizenry in cooperation with government. *Id.*, 102 Ariz. at 451-452. Accordingly, the *Jordan* Court approved the state's paying the religiously-affiliated Salvation Army for relief services it provided in a contract with the state. *Id.*, 102 Ariz. at 456.

Rejecting a state-vs-church argument like that pressed by Plaintiffs here, the *Jordan* Court declared:

> The prohibitions against the use of public assets for religious purposes were included in the Arizona Constitution to provide for the historical doctrine of separation of church and state, the thrust of which was to insure that there would be no state supported religious institutions thus precluding governmental preference and favoritism of one or more churches. But the doctrine of separation of church and state *does not include the doctrine of total nonrecognition* of the church by the state and of the state by the church.

Id., 102 Ariz. at 451 (emphasis added). The Court continued:

> The state constitutional provisions must be viewed in light of contemporaneous assumptions concerning the appropriate sphere of action for each institution. History is clear that as a state evolves from one decade to another the role of the state "transcends traditional boundaries and assumes new dimensions" necessitating a revision of the idiomatic meaning of "separation" *to align it with "the new realities if original purposes and expectations are to be realized*".

Id., 102 Ariz. at 451-452 (emphasis added; citation omitted).

The Scholarship Programs reflect a social recognition, translated into legislative action, that non-government schools (including those religiously-affiliated) can and do provide vital services advancing both: (1) the general education objectives of the framers of the Constitution; and (2) the modern needs of society for specialized education to help students with hardships. Under the reasoning and direction of *Jordan*, the Scholarship Programs do not violate the "aid" prohibition of Article IX section 10.

III. PLAINTIFFS' ANTI-RELIGIOUS, ANTI-PRIVATE SCHOOL POSITIONS WOULD INFRINGE ON RELIGIOUS LIBERTY AND ARE UNSUPPORTED BY THE CONSTITUTIONAL PROVISIONS THEMSELVES AS WELL AS PRECEDENT

Plaintiffs seek a new gloss on the Arizona Constitution. Dissatisfied with the existing reach of Article 9, section 10, Plaintiffs ask this Court to interpret the

provision to ban aid to parents of children with special needs. Transparently, Plaintiffs are troubled by the possibility that parents may decide a private or religiously-affiliated school is in their child's best interest. The U.S. Supreme Court has held "a law targeting religious beliefs as such is never permissible," and "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 113 S. Ct. 2217 (1993) (citations omitted). A law violates the First Amendment Establishment Clause just as certainly if it *inhibits* religion as if it promotes religion. *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-649, 122 S. Ct. 2460 (2002).[6] In contrast, a program that allows parents the private choice to direct state voucher funds to private schools, whether religiously-affiliated or secular, does not offend the Establishment Clause at all. *Id.*, 536 U.S. at 650 (approving an Ohio school-choice program).

By seeking to amputate religious parents' options of choosing among

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[6] Blanket one-way restrictions placed on religiously-inclined citizens provoke Constitutional concerns. Thus, on First Amendment free speech grounds the Tenth Circuit struck down a City of Albuquerque policy prohibiting sectarian instruction and religious worship at its Senior Centers, in part because the City's policy would and did permit presentations openly hostile to religion in the same Centers. *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1279, 1281 (10th Cir. 1996).

private and religiously-affiliated schools to help their children with special needs, Plaintiffs' positions openly ask this Court to raise a unique barrier to people of faith.. This Court should reject Plaintiffs' idiosyncratic positions because they are not neutral toward religion and they would restrict parental choice because of religious motivation.

Arizona government need not be hostile toward religion. Programs that are neutral in their structure and practice pose no problem. The constitutional problem arises only when there is direct state support for a specific religion or for non-religion. Thus in *Pratt v. Arizona Bd. of Regents*, 110 Ariz. 466, 520 P.2d 514 (1974), this Court found no constitutional objection to Arizona State University's leasing its stadium to Reverend Billy Graham's Christian ministry event. The *Pratt* Court noted "the framers of the Arizona Constitution intended" the religions clause provisions "to prohibit the use of the power and the prestige of the State or any of its agencies for the support or favor of one religion over another, or of religion over nonreligion." *Id.*, 110 Ariz. at 468. Impartiality – not deep-space black- hole isolation – is all the Arizona Constitution requires. The *Pratt* Court thus explained:

> The State is mandated by this constitutional provision to be absolutely impartial when it comes to the question of religious preference, and public money or property may not be used to promote

> or favor any particular religious sect or denomination or religion generally. It does not necessarily follow, however, that the framers of Arizona's Constitution intended to entirely prohibit the use by religious groups of public and school property for religious purposes, when it is clear that such use does not infer support or favor by the State of that particular religious group.

Id.

In *Pratt*, the state did not confer favor upon Billy Graham's ministry by renting stadium facilities for his religious purposes. In *Jordan*, the state did not confer favor upon the Salvation Army by paying on its contract for relief services to Arizonans in need. Likewise with the Scholarship Programs here, the state does not confer favor upon the private schools, whether religious or secular, which the parents choose to educate their children with special needs.

As there is no church-state entanglement inherent or evident in the operation of the Scholarship Programs, this Court should uphold the will of the people and Legislature as expressed in these Programs. The decision of the court of appeals should be reversed, and the decision of superior court, dismissing the Plaintiffs' constitutional challenges to these Programs, should be affirmed.

CONCLUSION

Amicus curiae Center for Arizona Policy respectfully requests this Court to reverse the decision of the Court of Appeals and to affirm the decision of the superior court dismissing Plaintiff's lawsuit in its entirety.

DECEMBER 1, 2008

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CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 14, I certify that the foregoing brief uses a proportionately spaced typeface of 14 points, is double-spaced using a Roman font and contains approximately 3,853 words, as counted by Corel Word Perfect Software.

December 1, 2008

X _____

Peter A. Gentala

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Amicus Curiae Brief of Center for Arizona Policy In Support of Appellee and Intervenor-appellees was filed with the Clerk this 1st Day of December, 2008, via Hand-Delivery, at the following address:

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