IN THE
SUPREME COURT OF ARIZONA

VIRGEL CAIN, et al.,

Plaintiffs/Appellants,

v.

TOM HORNE, Superintendent of Public Instruction,

Defendant/Appellee,

and

JESSICA GEROUX, et al.,

Intervenors/Appellees.

Arizona Supreme Court
No. CV-08-0189-PR

Court of Appeals
Division Two
No. 2 CA-CV 07-0143

Maricopa County Superior Court
No. CV 2007-002986

INTERVENORS/APPELLEES' SUPPLEMENTAL BRIEF

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INTRODUCTION

This case will determine whether parents like Andrea Weck, whose daughter Lexie has autism, cerebral palsy and mild mental retardation, will be able to make the same educational choices for their children as school districts routinely make in deciding how and where to educate children with disabilities. This case will also determine whether parents like Jessica Geroux, whose son Tyler has autism, will be able to take advantage of Arizona's open enrollment policy or whether school districts will retain a veto over a parent's decision to transfer a child with a disability to another district. Finally, this case will determine whether the state can do for foster children in grades K-12 what it routinely does for foster children at the post-secondary level: namely, use public funds to help foster children obtain the best available education for their unique educational needs, whether in a public or private educational setting.

ARGUMENT

The Arizona Constitution's text, as recognized by this Court's past precedent, distinguishes between programs "in aid of" or "in support of" individuals on the one hand, and programs "in aid of" or "in support of" institutions on the other. The constitutional provisions at issue—Art. 2, § 12 and Art. 9, § 10—thus prohibit direct grants of public funds to institutions such as churches, private and religious schools, and public service corporations. These

provisions do not prohibit Arizona's numerous educational aid programs, including the two at issue in this case, because the programs were passed "in support of" or "in aid of" individuals, children, and families. Nothing in the Constitution's text limits the ability of private individuals to decide where to use their public benefits.

I. NOTHING IN THE TEXT, THE HISTORY, OR THIS COURT'S INTERPRETATIONS OF ARIZONA'S RELIGION CLAUSES PROHIBITS EDUCATIONAL AID PROGRAMS DESIGNED TO BENEFIT SPECIAL NEEDS FAMILIES.

a. The Court of Appeals Erred When It Failed to Recognize That Both Art. 2, § 12 and Art. 9, § 10 Are Blaine Amendments Intended to Prohibit Direct Aid to Institutions.

This Court has repeatedly recognized that both Art. 2, § 12 and Art. 9, § 10 prohibit "the use of public assets for religious purposes" and "were included in the Arizona Constitution to provide for the historical doctrine of separation of church and state." *Kotterman v. Killian*, 193 Ariz. 273, 289, ¶ 58, 972 P.2d 606, 622 (1999) (quoting *Cmty. Council v. Jordan*, 102 Ariz. 448, 451, 432 P.2d 460, 463 (1967)); *see also* John D. Leshy, *The Arizona State Constitution: A Reference Guide* 216 (Greenwood Press 1993) (Art. 9, § 10's "prohibition on public financial aid to religious institutions substantially overlaps with . . . Article II, section 12 . . ."). The "thrust" of this historical doctrine is "to insure that there would be no state supported religious institutions thus precluding governmental preference and favoritism of one or more churches." *Jordan*, 102 Ariz. at 451, 432 P.2d at 463.

The Court of Appeals concluded that these statements do not apply to Art. 9, § 10 because that provision prohibits appropriations "in aid of" both religious and nonreligious private schools and not religious schools alone. *See Cain v. Horne*, 218 Ariz. 301, ___, ¶ 15, 183 P.3d 1269, 1275 (App. 2008). Released from the text's historical moorings, the Court of Appeals accepted the Plaintiffs/Appellants' invitation to go beyond the plain text and expand the reach of Art. 9, § 10 to preclude programs never intended to be within the clause's scope and purpose.

As Justice Feldman noted in his *Kotterman* dissent, "Article II, § 12 and article IX, § 10 were the product of contemporary social forces and a national and local battle over separation of church and state in public school instruction." *Kotterman*, 193 Ariz. at 298, ¶ 104, 972 P.2d at 631 (Feldman, J., dissenting). Specifically, Justice Feldman traced the history of Arizona's religion clauses to the proposed federal Blaine Amendment. *Kotterman*, 193 Ariz. at 299-303, ¶¶ 105-118, 972 P.2d at 632-36 (Feldman, J., dissenting). The federal Blaine Amendment and the state Blaine Amendments that it spawned—such as Arizona's Art. 2, § 12 and Art. 9, § 10—were aimed at a specific target, namely, the efforts of the Catholic Church to obtain direct funding for its parochial schools. *Id.* Such grants to Catholic schools were a controversial issue in Arizona's early educational history. *Kotterman*, 193 Ariz. at 300-02, ¶¶ 110-114, 972 P.2d at 633-35 (Feldman, J., dissenting).

As Justice Feldman documented, Arizona's territorial government's first educational grant was $250 to a Catholic school—the mission school of San Xavier in 1866. *Id.* at 300, ¶ 110, 972 P.2d at 633. In 1875, the Legislative Assembly ordered that the Sisters of St. Joseph be reimbursed for textbooks used at a Catholic school—St. Joseph's Academy. *Id.* at 301, ¶ 113, 972 P.2d at 634. This issue triggered a vigorous public debate in which Chief Justice Edmund Dunne of the Arizona Territorial Supreme Court championed direct aid to Catholic schools. *Id.* at 301, ¶ 114, 972 P.2d at 634. Previously, Arizona's territorial "Governor A.P.K. Safford, known as the father of Arizona education, [had] expressed [] concern that sectarian, primarily Catholic, schools would attract public moneys for their support." *Id.* at 300, ¶ 111, 972 P.2d at 633. The Safford faction prevailed and President Ulysses S. Grant (one of the primary backers of the federal Blaine Amendment) relieved Chief Justice Dunne of his position that same year. *Id.* at 301, ¶ 113, 972 P.2d at 634.

Read in this historical light, it is clear that Art. 2, § 12 and Art. 9, § 10 prevent direct aid to religious and private schools. However, "while the plain language of the provisions now under consideration indicates that the framers opposed direct public funding of religion, including sectarian schools, [there is] no evidence of a similar concern for indirect benefits." *Kotterman*, 193 Ariz. at 286, ¶ 42, 972 P.2d at 619. Considering that the Constitution's plain language indicates

no concern for indirect aid programs, a "textual analysis is sufficient to decide the issues presented here." *Id.* at 288, ¶ 53, 972 P.2d at 621.

b. The Scholarship Programs Benefit Children, Not Institutions.

The most critical question this Court must answer in order to resolve the constitutional issues presented is: Who truly benefits from the challenged programs? Stated another way, the issue is whether the challenged programs were passed "in aid of" private institutions, or whether the programs were created to benefit children. The challenged programs were plainly intended to benefit individuals, not institutions—specifically, children with disabilities and children who have been in the foster care system. *See, e.g.,* App. in Support of Int./Appellee's Mot. for Order Preserving Status Quo (containing affidavits from participating families demonstrating how, in only two years, Arizona's scholarship programs have transformed the lives of children living with significant physical, mental, and learning disabilities).

This Court has always distinguished between programs in aid of individuals and programs in aid of institutions. In *Community Council v. Jordan*, 102 Ariz. 448, 455, 432 P.2d 460, 467, this Court adopted the "true beneficiary" test to examine programs challenged under Art. 2, § 12 and Art. 9, § 10. The true beneficiary test is in perfect harmony with this Court's holding in *Kotterman* that there is no evidence from the plain language of Art. 2, § 12 and Art. 9, § 10 that

our Framers were concerned with indirect educational aid programs. 193 Ariz. at 288, ¶ 53, 972 P.2d at 621.

The true beneficiary test originated in educational aid cases like this one. As this Court explained, "it is not the school or sectarian institution that is receiving the benefits of the appropriation but the child itself." *Jordan*, 102 Ariz. at 455, 432 P.2d at 467. But the Court of Appeals failed to appreciate the distinction between appropriations in aid of institutions on the one hand, and public programs designed to benefit individuals on the other. *See Kotterman*, 193 Ariz. 273, 282, n. 4, 972 P.2d 606, 615, n. 4 (noting that "the dissent[] wrongly gives the impression that private schools, rather than scholarship recipients, are the primary beneficiaries of contributions" to School Tuition Organizations). Programs that benefit parents by enabling them to choose from public, private, religious, and nonreligious institutions to provide educational services for their children—on a purely religion-neutral basis—are quite distinct under the true beneficiary test.

Sadly, children with disabilities and children in foster care are at significant risk for falling through the cracks of our educational system. There is mounting evidence that our current model "for providing special education focuses more on regulatory compliance than improved student learning." *See* Index of Record 44

(Aff. of Vicki Murray, Ph.D. at ¶ 10).[1] "Since 1970, special-education litigation has increased dramatically and can take up to three years to be resolved." *Id.* Children with disabilities should not be made to wait so long to resolve disputes regarding needed services and therapies. Meanwhile, children in foster care are twice as likely to drop out of high school before graduation and more likely to attend an under-performing school than other children (78% vs. 43%). *See* Resp. Br. of Int. Appellee's at 4.

Applying the true beneficiary test announced in *Jordan* to the facts in this case, this Court should "ignore th[o]se who are not in fact the real or true beneficiaries" and "hold that the payments are made in effect from the state—not to [private and religious schools]—but to those who actually profit from the disbursements—to the individuals and families who" need to find the school that will best meet the special educational needs of their child. *See Jordan*, 102 Ariz. at 455, 432 P.2d at 467.

c. There Is No Constitutional Distinction Between School Districts Placing Children In Private Schools and Allowing Parents to Make the Same Placement Decision.

As established above, there is no constitutional prohibition against indirect aid when the true beneficiaries of publicly funded programs are individuals and not institutions. Therefore, this Court has resolved that "the state or any of its agencies

[1] Dr. Murray's affidavit is attached to Intervenor-Defendants' Response to Plaintiffs' Motion for Summary Judgment as Appendix 1.

can choose to do business with and discharge part of its duties through denominational or sectarian institutions without contravening constitutional prohibitions." *Jordan*, 102 Ariz. at 451, 432 P.2d at 463. Religious schools are obviously "denominational or sectarian institutions" through which the state may discharge part of its duties under *Jordan*.

If the state can do business with religious schools it must follow that the state is also permitted to do business with nonreligious private schools. The Court of Appeals and the Plaintiffs/Appellants thus make much ado about nothing by stressing that Art. 9, § 10 prohibits appropriations "in aid of" both private and religious schools. This Court's holding that the state may contract with churches to provide services to individuals without violating Art. 9 § 10 necessarily means that the state may contract with private or religious schools as well.

Indeed, the Plaintiffs/Appellants agree that the government may constitutionally contract with private schools to provide educational services to children with disabilities. Resp. to Pet. for Rev. at 10. The fact is that children with disabilities need a remedy when they cannot obtain adequate services in a public school. The Legislature therefore authorizes "[a] school district or county school superintendent [to] contract with, and make payments to, other public or private schools, institutions and agencies approved by the division of special education, within or without the school district or county, for the education of and

provision of services to children with disabilities." Ariz. Rev. Stat. Ann. (A.R.S.) § 15-765(D) (2008).[2] In 2005, nearly 2,600 Arizona special needs students were placed in educational environments outside their district schools pursuant to A.R.S. § 15-765(D). *See* Index of Record 44 (Aff. of Vicki Murray, Ph.D. at ¶ 7).[3] Of those, 1,232 students were placed in private educational settings. *Id.*

All the parties agree that Arizona's Constitution permits government officials to choose private educational settings and pay private school tuition with public funds. The issue in this case is whether there is anything in the Constitution's text that precludes parents from making the same choice. There is not. Indeed, the Constitution's text constrains the actions of governmental actors, not the decisions of private citizens using public benefits.

Arizona's Scholarships for Pupils with Disabilities Program merely allows parents to make the same decisions about their children's educational placement that school districts can lawfully make. Far from merely "accommodat[ing] those

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[2] The Plaintiffs/Appellants correctly note that this statute implements the requirements of federal law, specifically 20 U.S.C. 1412(a)(10)(B)(i), Resp. to Pet. for Rev. at 10, but they ignore that federal law includes the distinction between aid to individuals and aid to institutions. For example, federal law requires that federal "funds not benefit a private school," 34 C.F.R. § 300.141, but allows payments to private, including religious, schools for educational services. *See, e.g.,* 34 C.F.R. § 300.132 (mandating that special education services be provided to parentally-placed private school children with disabilities). These regulations make it clear that the "aid" provided to parentally-placed students is "aid" to the student on the services plan and is not regarded as aid to the school itself.

[3] Dr. Murray's affidavit is attached to Intervenor-Defendants' Response to Plaintiffs' Motion for Summary Judgment as Appendix 1.

parents who simply prefer a private or religious education" as Plaintiffs aver, Resp. to Pet. for Rev. at 10, the Legislature designed the program to be remedial in nature. The remedial nature of the programs further demonstrates that the programs help special needs families rather than aid private schools.

A child with a disability is only eligible for the program if after attending a public school for one year a parent is not satisfied with his or her child's progress. A.R.S. § 15-891(B)(1). By conditioning scholarship eligibility on first trying out the public school system, the Legislature encompassed children that the public schools have already failed. *See* App. in Support of Int./Appellee's Mot. for Order Preserving Status Quo.

The Legislature also provided dissatisfied parents with additional *public* school choice options. A.R.S. § 15-765(E). Unfortunately, the Court of Appeals both mischaracterized and missed the significance of including public schools in the program. *See Cain*, 218 Ariz. at ___, ¶ 21, 183 P.3d at 1277 ("[I]t strikes us as meaningless to offer a [voucher] for tuition scholarships to schools that charge no tuition") (quoting *Kotterman*, 193 Ariz. at 273, ¶ 25, 972 P.2d at 616). The scholarship program includes public schools because a student with a disability otherwise cannot attend a public school outside of his or her home district without the permission of both the home district and the new district. *See* A.R.S. § 15-816.01; A.R.S. § 15-764(C).

Moreover, Arizona has been appropriating public funds for educational aid programs in which the beneficiaries use the money to attend private schools—at both the K-12 and post-secondary levels—for decades. For example, children in foster care at the age of 16 or 17 are eligible for grants of up to $5,000 to attend the college, university, or vocational institute of their choice. A.R.S. § 8-521. The challenged scholarship programs are nothing new. The Court of Appeals refused to consider the impact of its decision on these existing programs, *Cain v. Horne*, 218 Ariz. at ___, n. 5, 183 P.3d at 1275, n. 5, but the Plaintiffs/Appellants try to distinguish some of them. Resp. to Pet. for Review at 11. The Plaintiffs/ Appellants point out, with regard to Arizona's post-secondary educational aid programs, that the Washington Constitution (Art. 9, § 4) does not include post-secondary institutions in its definition of "schools." *Id.* The Arizona Constitution, however, *does* include post-secondary institutions in its definition of schools. *See* Art. 11, § 1(A)(6) ("[A] general and uniform public school system . . . shall include . . . Universities"). Thus, the limitations of Art. 9, § 10 do apply to Arizona's post-secondary programs, which have long included aid to students choosing private education.

As the following table demonstrates, in addition to A.R.S. § 15-765(D), Arizona spends a significant amount educating students in private settings—including other programs for children with disabilities and children in foster care.

Program[1]	Public Funds Expended	Who Decides Where Funds Are Spent?
Special Education Vouchers for Private Residential Placement (A.R.S. § 15-1181)	$6,981,338	Government Bureaucrats
Education and Training Vouchers For Children In Foster Care (A.R.S. § 8-521)	$1,580,937	Program Beneficiary
AIMS Intervention and Dropout Prevention Program (A.R.S. § 15-809)	$5,550,000	Program Beneficiary
Leveraging Educational Assistance Partnership Program (LEAP) (20 U.S.C. § 1001 and A.R.S. § 15-1877(B))	$2,808,172	Program Beneficiary
Postsecondary Education Grant Program (PEG) (A.R.S. § 15-1855)	$4,800,000	Program Beneficiary
Private Postsecondary Education Student Financial Assistance Program (PFAP) (A.R.S. § 15-1854)	$116,333	Program Beneficiary

[1] The information in this table taken from Dick M. Carpenter II, Ph.D. and Sara Peterson, *Private Choice in Public Programs: How Private Institutions Secure Social Services for Arizonans*, p. 3 Table 1, Institute for Justice (Jan. 2007). *See* Index of Record at 35 (Intervenor-Defendants Resp. in Opposition to Pl.'s App. for Prel. Inj. at App. 2).

The challenged scholarship programs are a modest addition to Arizona's long-standing, well-settled, and widely accepted policy of providing a broad array of educational opportunities, particularly for those most in need, at both public and private institutions through neutral, choice-based programs.

d. Upholding Arizona's Scholarship Programs Will Not "Nullify" the Arizona Constitution's Religion Clauses.

The Court of Appeals said that applying the true beneficiary test in this case "would essentially nullify" Art. 9, § 10's prohibition of appropriations "in aid of . . . private and religious schools." *Cain*, 218 Ariz. at ___, ¶ 18, 183 P.3d at 1277. The Plaintiffs/Appellants repeat that refrain, but there is simply no truth to it, as the examples below make very clear. Resp. to Pet. for Review at 5.

The Arizona Constitution prohibits appropriations that directly aid private or religious schools. Examples of prohibited appropriations include those that sparked the battle that led to the inclusion of Art. 2, § 12 and Art. 9, § 10 in our Constitution—the educational grant directly to the mission school of San Xavier and the decision of the Legislative Assembly to directly reimburse the Sisters of St. Joseph for a Catholic school's expenses. *Kotterman*, 193 Ariz. at 300-02, ¶¶ 110-114, 972 P.2d at 633-35 (Feldman, J., dissenting). Other forbidden expenditures would include providing construction funds to private schools and paying salaries of private school teachers.

Thus, upholding the challenged scholarship programs certainly would not "read out" of the Constitution either Art. 2, § 12 or Art. 9, § 10. The Constitution will still prohibit direct institutional grants, which were the very type of appropriations that led to the inclusion in our Constitution of the Blaine Amendments at issue in this case.

II. NUMEROUS JURISDICTIONS JOIN ARIZONA IN DISTINGUISHING BETWEEN PROGRAMS IN AID OF INDIVIDUALS AND PROGRAMS IN AID OF INSTITUTIONS.

This Court is not alone in interpreting Blaine Amendments to allow programs providing scholarships to families and individuals that enable them to choose private schools. The Court of Appeals was demonstrably incorrect when it said that other jurisdictions "*uniformly* reject[] the notion that schools are not aided by tuition payments." *Cain*, 218 Ariz. at ___, ¶ 15, 183 P.3d at 1276 (emphasis added). Courts in at least five jurisdictions have construed their states' Blaine Amendments to permit tuition or tuition-type programs because those programs were passed "in aid of" individuals, not institutions:

- *Ala. Educ. Assoc'n v. James*, 373 So.2d 1076, 1081 (Ala. 1979) (holding that private school tuition grants do not violate the state's Blaine Amendment because "the grants it provides are not for the support of the individual schools but are for the benefit of individual students");

- *Am. United for Separation of Church & State Fund, Inc. v. State*, 648 P.2d 1072, 1081 (Colo. 1982) (upholding post-secondary education grant program under Colorado's Blaine Amendments because the "design of the statute is to benefit the student, not the institution");

- *Father Flanagan's Boys Home v. Dep't of Soc. Serv.*, 583 N.W.2d 774, 782 (Neb. 1998) (upholding a state contract to educate special needs students in private institutions, noting that "[t]he fact that a nonpublic institution derives a benefit from the contract 'does not transform payments for contracted services into [a proscribed] appropriation of public funds'") (citation omitted);

- *Lenstrom v. Thone*, 311 N.W.2d 884, 889 (Neb. 1981) (holding that nothing in the state Constitution prevents the state from creating a scholarship

program to assist "needy students" in attending public and private post-secondary educational institutions);

- *Schade v. Allegheny County Inst. Dist.*, 126 A.2d 911, 914 (Pa. 1956) (holding that payment of public funds to religious orphanages did not violate the state's Blaine Amendment because they were not "appropriations" but rather payments for services rendered and "are, in legal effect, payments to the child, not the institution supporting and maintaining him or her"); and

- *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998) (upholding Milwaukee's Parental Choice Program under Wisconsin's Blaine Amendment, which contains language that is functionally equivalent to Art. 9, § 10's "in aid of" language).

Moreover, at least five more jurisdictions have upheld other forms of indirect educational aid, such as transportation and textbook loan programs, because children, not schools, are the true beneficiaries of those programs:

- *Bd. of Educ. v. Allen*, 228 N.E.2d 791 (N.Y. 1967), *aff'd*, 392 U.S. 236 (1968) (upholding textbook loan program because the state's Blaine Amendment was never intended to prohibit state policies that might ultimately entail some benefit to religious schools);

- *Rhoades v. Sch. Dist.*, 226 A.2d 53, 64 (Pa. 1967) (upholding statute authorizing transportation of private school students noting that "to come within the constitutional ban, financial benefits accruing to a nonpublic school would have to be direct and not merely incidental, supplemental or peripheral");

- *Bd. of Educ. v. Bakalis*, 299 N.E.2d 737, 741 (Ill. 1973) (finding no violation of the state's Blaine Amendment when public school buses transport private school students because the measure was "a general program to help parents" and any aid to religious schools was purely incidental);

- *Embry v. O'Bannon*, 798 N.E.2d 157 (Ind. 2003) (upholding dual-enrollment program against Blaine Amendment challenge because incidental

benefits to religious organizations do not invalidate an otherwise constitutional statutory program);

- *Am. United v. Indep. Sch. Dist. No. 622*, 179 N.W.2d 146, 151 (Minn. 1970) (holding that a busing statute does not violate the state's Blaine Amendment because the "the children and their parents are the real beneficiaries of public funds"); and

- *Chance v. Miss. State Textbook Rating Purchasing Bd.*, 200 So. 706, 713 (Miss. 1941) (upholding textbook loan program under the state's Blaine Amendment by distinguishing between aid to students and aid to schools saying that "the emphasis must be put upon the need of, and service to, the pupil").

Thus, contrary to the Court of Appeals' mistaken assertion, at least ten other jurisdictions agree with this Court's adoption of the true beneficiary test.

This Court has admonished that "we must cautiously view the constitutional decisions of other state courts as we attempt to place our own founding document in historical perspective." *Kotterman*, 193 Ariz. at 292, ¶ 70, 972 P.2d at 625. Yet, both the Court of Appeals and the Plaintiffs/Appellants rely heavily on out-of-state jurisprudence—presumably because there is not a *single* Arizona precedent that supports the notion that a program primarily benefiting families violates our state's Blaine Amendments.

Further underscoring the absence of supporting authority is the Plaintiffs/Appellants continued reliance on Washington State precedent, which even the Court of Appeals rejected, noting that this Court "has specifically distanced itself from the Washington court's decisions as they apply to this

particular shared provision [i.e., Art. 2, § 12] in our constitutions." *Cain*, 218 Ariz. at ___-__, ¶ 8, 183 P.3d at 1273-74; *see also* Intervenors/Appellees' Resp. Br. at 40-42 (explaining that Washington actually interprets its constitutional provision analogous to Art. 2, § 12 to permit precisely what the Plaintiffs/Appellants claim it forbids). Instead, the Court of Appeals relied on precedents from states like Virginia, South Carolina, and Alaska that have no documented ties or relationship to Arizona's founding. *See Kotterman*, 193 Ariz. at 288, ¶ 54, 972 P.2d at 621 (noting that "[t]here is sparse recorded evidence respecting the clauses at issue here, and any historical analysis is necessarily filled with speculation").

The first decision the Court of Appeals cited, after its mistaken assertion that jurisdictions have "uniformly" rejected similar programs, is the Virginia Supreme Court's decision in *Almond v. Day*, 89 S.E.2d 851 (Va. 1955). But *Almond* is a remarkably thin reed upon which to place so much weight. First, the case was not decided in the context of an adversarial proceeding because no party to the case defended the challenged scholarship program for children of deceased veterans. Second, this Court in *Jordan* specifically considered *Almond* and rejected its reasoning, adopting the true beneficiary test instead. *Jordan*, 102 Ariz. at 455, 432 P.2d at 467. Finally, *Almond* is no longer good law because of subsequent constitutional amendments. Va. Const., Art. 8, § 10.

The South Carolina decision in *Hartness v. Patterson*, 179 S.E.2d 907 (S.C. 1971) is equally unhelpful, particularly on the question of whether Arizona's religion clauses were intended to prohibit indirect educational aid programs. The South Carolina Court was, after all, interpreting a provision that prohibited any public money that "directly or indirectly" aided various private institutions. *Hartness*, 179 S.E.2d at 908. Given the specific South Carolina prohibition on indirect aid, *Hartness* is plainly inapposite, although it does demonstrate that if Arizona's Framers had wanted to prohibit both direct and indirect aid, they could have done so explicitly. Moreover, *Hartness* is no longer good law in South Carolina, which removed the prohibition on indirect aid immediately after the decision. S.C. Const. Art. 9, § 4.

Finally, the Alaska Supreme Court's decision in *Sheldon Jackson College v. State*, 599 P.2d 127 (Alaska 1979), is premised on the Alaska Constitution's "mandate that Alaska pursue its educational objectives through public educational institutions." *Sheldon*, 599 P.2d at 131. By contrast, in Arizona "[t]he encouragement of private schools, in itself, is not unconstitutional." *Kotterman*, 193 Ariz. at 278, ¶ 8, 972 P.2d at 611. Indeed, this Court has said that policies that encourage students to attend private schools are "a matter for the legislature, as policy maker, to debate and decide." *Kotterman*, 193 Ariz. at 290-91, ¶ 63, 972 P.2d at 623-24.

There is nothing unconstitutional about the challenged scholarship programs. The programs were adopted in support of and in aid of families in the hopes that they would "encourage the development of educational settings that would invigorate learning, improve academic achievement, and provide additional choices for parents and children." *Kotterman*, 193 Ariz. at 290, ¶ 62, 972 P.2d at 623 (citing A.R.S. § 15-181(A)).

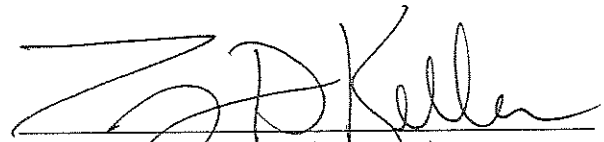
CONCLUSION

Every year Arizona school districts place hundreds of students in private schools because government officials decide that is the best way to provide those students with a free and appropriate public education. The districts procure the private school's educational services by paying tuition. No party to this litigation believes that the districts are supporting or aiding the private schools by paying that tuition. The challenged programs merely allow parents such as Andrea Weck to make the same private placement decision as school districts. If such action when undertaken by school districts does not violate the Arizona Constitution, the same action when undertaken by parents cannot violate the Constitution.

The Interenvors/Appellees ask this Court to reverse and vacate the Court of Appeals' opinion and to reinstate the judgment of the trial court upholding the scholarship programs.

Respectfully submitted this 25th day of November 2008.

INSTITUTE FOR JUSTICE
ARIZONA CHAPTER



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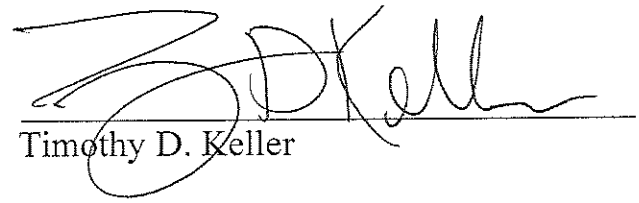
CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 14, I certify that the attached brief uses proportionately spaced type of 14 points or more, is double-spaced using a roman font, contains 4,453 words and does not exceed 20 pages.



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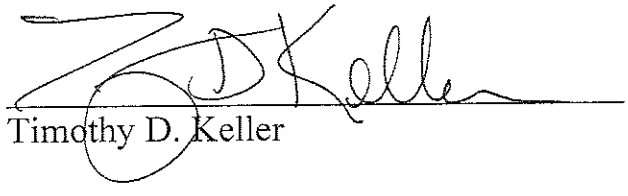

Timothy D. Keller