IN THE ARIZONA SUPREME COURT

SHARON NIEHAUS; ARIZONA SCHOOL BOARDS ASSOCIATION; ARIZONA EDUCATION ASSOCIATION; and ARIZONA ASSOCIATION OF SCHOOL BUSINESS OFFICIALS, Plaintiffs-Appellants, v. JOHN HUPPENTHAL, in his capacity as Arizona Superintendent of Public Instruction, Defendant-Appellee, and ANDREA WECK ROBERTSON; VICTORIA ZICAFOOSE; CRYSTAL FOX; and GOLDWATER INSTITUTE, Intervenors-Appellees.	No. CV-13-0323-PR Court of Appeals Division One No. 1 CA-CV 12-0242 Maricopa County Superior Court No. CV 2011-017911

RESPONSE TO PLAINTIFFS-APPELLANTS' PETITION FOR REVIEW

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INTRODUCTION

In a careful and well-reasoned opinion, the Court of Appeals unanimously held that Arizona's Empowerment Scholarship Account ("Empowerment Account") program, A.R.S. § 15-2401, *et seq*., passes muster under the Arizona Constitutional provisions at issue in this case, Article 2, Section 12 (the "Religion Clause") and Article 9, Section 10 (the "Aid Clause").[1] It also held that the program is perfectly consistent with this Court's ruling in *Cain v. Horne*, 220 Ariz. 77, 202 P.3d 1178 (2009), which struck down private school voucher programs for children with disabilities and children in foster care.

In *Cain*, this Court looked at the "composition of the[] voucher programs" and concluded that they violated the Constitution's "prohibition against the use of public funds to aid private or sectarian education" because the voucher programs gave "parents or guardians . . . *no choice*" except to "endorse the check or warrant" to a private school. 220 Ariz. at 83, ¶ 26-27, 202 P.3d at 1184 (emphasis added). The lack of discretion as to how to use the funds led this Court to conclude the voucher programs "transfer[ed] state funds directly from the state treasury to

[1] Ariz. Const. Art. 2, § 12 states, in relevant part, that "[n]o public money . . . shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment."

Ariz. Const. Art. 9, § 10 states that "[n]o 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."

private schools." *Id.* at ¶ 26. However, this Court refused to adopt an absolute bar to using public funds to aid students and concluded the *Cain* opinion by emphasizing that: "There may well be ways of providing aid to these student populations without violating the constitution." *Id.* at 84, ¶ 29, 202 P.3d at 1185.

Following this Court's specific guidance in *Cain*, the Legislature drafted the Empowerment Account program to give parents significant discretion over how they spend their educational aid. A.R.S. § 15-2402(B)(4)(a)-(m) (funds may be used on eleven different educational goods and services). The program also does not require that participating children enroll in private schools, but rather allows parents to educate their children at home through any combination of authorized expenditures, including, but not limited to, private tutors, curriculum, and individual coursework at private and public schools. A.R.S. § 15-802(G)(1).

I. IMPORTANT FACTS

Facts matter. This Court, in its first reported case interpreting the Religion and Aid Clauses, flatly rejected the strict view that "no public funds [may be] given to a sectarian organization at all." *Cmty. Council v. Jordan*, 102 Ariz. 448, 456, 432 P.2d 460, 468 (1967). Instead, this Court adopted the "practical" view that examines "the facts and circumstances of each individual case and realistically analyze[s] the situation to see if there is any violation of state or federal constitutional prohibitions." *Id.* The Empowerment Account program is distinct

from the voucher programs struck down in *Cain*. But rather than deal with these distinctions forthrightly, Plaintiffs-Appellants misrepresent the Empowerment Account program's eligibility requirements. They falsely claim that "student[s] must attend a private school to qualify" for the program. Pet. Review ("PR") 4. Plaintiffs-Appellants also ignore the genuine freedom parents have in spending—and saving—Empowerment Account funds. PR 4 ("choices afforded" by the Empowerment Account program "are largely illusory"). They also do not advise this Court of the many state-funded programs that permit participants to use their benefits at institutions listed in the Aid Clause, including both private schools and public service corporations, that would be jeopardized if this Court adopted the absolutist view advocated in Plaintiffs-Appellants' petition for review. PR 9.

A. Contrary To Plaintiffs-Appellants' Assertion, Families Who Open An Empowerment Account Are Not Required To Enroll Their Children In Private Schools.

No student is required to enroll in a private school as a condition of opening an Empowerment Account. The law could not be more clear:

> "Educated pursuant to an empowerment scholarship account" means a child whose parent has signed a contract pursuant to section 15-2402 to educate the child outside of any school district or charter school and in which the parent may but is not required to enroll the child in a private school or to educate the child through any of the methods specified in section 15-2402.

A.R.S. § 15-802(G)(1) (2012) (emphasis added).

B. Far From Being "Illusory," The Choices Offered To Families By The Empowerment Account Program Are Real And Substantial.

The record demonstrates that families relying on Empowerment Accounts are customizing their children's education by spending their education dollars on a wide variety of goods and services. In the program's first quarter, families used Empowerment Account funds to purchase textbooks, hire tutors, pay for educational therapies, buy curriculum for home education, and deposit money in a college savings account. PR App. 9. Participating families also left nearly one quarter of the initial disbursement unspent. PR App. 8-9. A subsequent analysis of Department of Education data demonstrates that this diverse spending trend continued throughout the first year. Lindsey M. Burke, *The Education Debit Card: What Arizona Parents Purchase with Education Savings Accounts*, 11-14, The Friedman Foundation for Educational Choice (August 2013), *available at* http://www.edchoice.org/CMSModules/EdChoice/FileLibrary/1015/THE-EDUCATION-DEBIT-CARD-What-Arizona-Parents-Purchase-with-Education-Savings-Accounts.pdf (finding that parents used 11% ($176,108) of total disbursed funds ($1,576,167) on educational expenses such as tutoring, educational therapies, and home education; and that parents spent only 46% ($729,047) of total disbursed funds on private schools, while saving approximately 43% ($671,012) for future education-related expenses). In a separate survey of participating families, nearly

one-third of respondents said they used their Empowerment Account funds to purchase homeschool materials while spending nothing on private school tuition. Jonathan Butcher and Jason Bedrick, M.P.P., *Schooling Satisfaction: Arizona Parents' Opinions on Using Education Savings Accounts*, 10, The Friedman Foundation for Educational Choice (October 2013), *available at* http://www.edchoice.org/CMSModules/EdChoice/FileLibrary/1019/SCHOOLING-SATISFACTION-Arizona-Parents-Opinions-on-Using-Education-Savings-Accounts.pdf. There is nothing illusory about the choices being exercised by Empowerment Account participants.

C. There Are Other Publicly-Funded Programs That Allow Beneficiaries To Pay, Among Other Things, Expenses At Private Schools And Public Service Corporations.

Plaintiffs-Appellants assert that the "Legislature cannot authorize citizens to use public funds for private education without violating the Aid Clause." PR 9. Yet, the Legislature authorizes *government* officials to place elementary and high school-aged students with disabilities in private schools and to use public funds to pay the tuition at—and transportation costs to—those same private schools. A.R.S. §§ 15-765(D), -1184. Arizona also funds four postsecondary grant programs that permit student-grantees to pay tuition and expenses at public, private, and even religious, institutions:

- Education and Training Vouchers are available for children in foster care at the age of 16 or 17 "for costs related to higher education and training

programs." Child Protective Services, *Independent Living Program and Young Adult Program*, https://www.azdes.gov/landing.aspx?id=9697; A.R.S. § 8-521.

- Private Postsecondary Education Student Financial Assistance Program. A.R.S. § 15-1854.
- Postsecondary Education Grant Program. A.R.S. § 15-1855.
- Leveraging Educational Assistance Program. 20 U.S.C. § 1001; A.R.S. § 15-1856.

Moreover, the Supported Housing program, which is administered by the Department of Human Services, provides assistance for individuals with serious mental illness and allows funds to be spent on utilities—almost all of which are public service corporations. Ariz. Dep't of Health Servs. Div. Behavioral Health Servs., *Covered Behavioral Health Servs. Guide* 87, http://www.azdhs.gov/bhs/documents/covserv/CovBHsvsGuide.pdf; Ariz. Const. Art. 15, § 2 (defining public service corporations). Public service corporations are "prohibited" recipients under the Aid Clause, along with private schools. In 2014, the Legislature appropriated $5,324,800 to fund the Supported Housing program. H.B. 2001, 51st Leg., 1st Spec. Sess. (Ariz. 2013); State of Ariz., *Fiscal Year 2014 Appropriations Report* 147, 153, http://www.azleg.gov/jlbc/14AR/FY2014AppropRpt.pdf.

II. REASONS THE COURT SHOULD DENY REVIEW

The petition for review should be denied for five reasons. First, Plaintiffs-Appellants challenge a straw man, not the Empowerment Account program. Plaintiffs-Appellants' description of the Empowerment Account program as requiring participants to enroll in private schools, PR 4, contradicts both statutory text and record evidence of the program's operation. The Court of Appeals correctly determined that the Empowerment Account program gives parents a genuine choice as to how to spend their educational dollars. Second, Plaintiffs-Appellants urge this Court to overrule nearly 45 years of precedent by misrepresenting that the cases interpreting the Religion and Aid Clauses blindly followed federal Establishment Clause jurisprudence. PR 10-11. But this Court has always looked to the unique language and histories of those provisions and has never construed them in "lockstep" with the federal Establishment Clause. Third, the appellate court correctly applied the text of the Religion and Aid Clauses, and this Court's precedents interpreting their texts, to conclude that the Empowerment Account program is constitutional. Fourth, the Plaintiffs-Appellants urge this Court to erect an absolute prohibition against any public funds ever flowing to any of the institutions listed in those provisions. PR 9, 12. Accepting Plaintiffs-Appellants' interpretation would overrule long-settled precedent and jeopardize a number of existing programs that allow beneficiaries to use their public assistance

at private schools and public service corporations. Finally, the Court of Appeals' decision does not "nullify" the Aid Clause. PR 8. The Aid Clause still restricts legislative action, but does not prohibit the program enacted here.

A. The Court Of Appeals Correctly Concluded That The Empowerment Account Program Gives Families A Wide Range Of Educational Choices.

Plaintiffs-Appellants' foundational argument is that the Empowerment Account program functions like the voucher programs struck down in *Cain* and is unconstitutional for the same reasons. PR 4, 8. But, as the Court of Appeals recognized, the Empowerment Account program does not function like a voucher. PR, Attach. at 5, ¶ 12 ("Where ESA funds are spent depends solely upon how parents choose to educate their children."). Unlike the voucher programs struck down in *Cain*, which gave parents "no choice" but to use their scholarships at private schools, 220 Ariz. at 83, ¶ 26-27, 202 P.3d at 1184, parents participating in the Empowerment Account program have no less than 11 choices as to how they spend their funds. PR, Attach. at 1-2, ¶ 2 (citing A.R.S. § 15-2402(B)(4)(a)-(k)). The Empowerment Account program is constitutional for the exact reason the vouchers in *Cain* were not.

B. There Is No Need To Reconsider This Court's Prior Cases Construing The Aid And Religion Clauses Because This Court Has Always Construed Them Independently From The Federal Constitution.

Plaintiffs-Appellants argue that this Court has previously held that the constitutional provisions at issue mean "the same thing as the Establishment Clause" and that this Court should now abandon the so-called "lockstep" approach. PR 10-12. However, this Court has never taken the lockstep approach. Rather, this Court has always construed the unique language of the Arizona Constitution and applied it independently from the federal Establishment Clause. In addition to *Cain*, which Plaintiffs-Appellants do not assert took the lockstep approach, there are three decisions interpreting and applying the constitutional provisions at issue here: *Kotterman v. Killian*, 193 Ariz. 273, 972 P.2d 606 (1999) (scholarship tax credit program comports with the Religion and Aid Clauses); *Pratt v. Arizona Board of Regents*, 110 Ariz. 466, 520 P.2d 514 (1974) (leasing Sun Devil Stadium to Billy Graham does not violate the Religion Clause); and *Jordan*, 102 Ariz. 448, 432 P.2d 460 (contracting with religious organization to provide emergency relief is permissible under the Aid and Religion Clauses). Each of these cases was decided based on the specific words of the Arizona Constitution and not as merely "coextensive with the Establishment Clause." PR 12.

In *Jordan*, this Court focused on the meaning of the word "aid" in the Aid Clause, 102 Ariz. at 454-56, 432 P.2d at 466-68, and thoroughly examined

precedents from other states with similar constitutional language. *Id*. at 452-54, 432 P.2d at 464-66. The *only* citation to federal cases was in a "see" string-cite noting all of the jurisdictions that had considered the child benefit theory in the context of educational aid programs. *Id*. at 455, 432 P.2d at 467.

Pratt involved only the Religion Clause and does not rely on, or cite, a single federal case. 110 Ariz. at 468, 520 P.2d at 516. It merely notes that the Establishment Clause broke the practice of recognized state religions and that principle had become not only "accepted" by the time of the Arizona Constitutional Convention, but "reflected by the constitutions of most of the states." *Id*.

While neither *Jordan* nor *Pratt* involved Establishment Clause claims, the *Kotterman* plaintiffs did raise an Establishment Clause claim in their challenge to Arizona's scholarship tax credit program. Accordingly, this Court engaged in a thorough analysis of federal law and presciently concluded the program did not violate the Establishment Clause. *Kotterman*, 193 Ariz. at 283, ¶ 29, 972 P.2d at 616. (It would be another 3 years before the U.S. Supreme Court, in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), definitively settled the constitutionality of school choice programs under the Establishment Clause.) The balance of the *Kotterman* decision, however, is a rigorous analysis of the specific meaning of the unique words contained in the Aid and Religion Clauses—without citation to any

U.S. Supreme Court Establishment Clause cases—and no suggestion that the Court considered the Religion and Aid Clauses merely co-extensive with the First Amendment. 193 Ariz. at 284-93, 972 P.2d at 617-25.

C. The Court Of Appeals Correctly Applied This Court's Precedents Interpreting The Aid And Religion Clauses.

The Court of Appeals correctly applied the text of the Religion and Aid Clauses and the precedents interpreting them.

Regarding the Religion Clause, this Court has stated that the framers "intended by this section 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." *Pratt*, 110 Ariz. at 468, 520 P.2d at 516. The Court of Appeals correctly determined that the Empowerment Account program does not encourage one religion over another or religion over nonreligion. PR, Attach. at 5, ¶ 11. Under the program, the state simply takes no cognizance of religion.

Regarding the Aid Clause, this Court said that "aid" may in fact be given to the institutions listed in the Aid Clause, but that Courts are required to take a "practical" look at the facts and circumstances to determine whether any such aid is "the type of aid prohibited by our constitution." *Jordan*, 102 Ariz. at 454, 456, 432 P.2d at 466, 468. In *Cain*, this Court did precisely that. It took a practical look at the voucher programs and struck them down because parents had "no

choice" but to use the program funds at private and religious schools.[2] 220 Ariz. at 83, ¶ 26, 202 P.3d at 1184. The Court of Appeals correctly noted that it was the "composition of the[] voucher programs" that made them unconstitutional. PR, Attach. at 6, ¶ 16 (quotation omitted). It also correctly noted that the Empowerment Account program is different because it places the full amount of the aid at the disposal of the recipient families for educational expenditures, without any requirement that the funds be used at private or religious schools. PR, Attach. at 6, ¶ 15. And parents in fact use the funds for things other than private and religious schools. *Supra*, § I.B.

[2] While Parent-Intervenors maintain that the Empowerment Account program complies in all respects with *Cain*, they also believe *Cain* erred. The Arizona Constitution's Gift Clause, Art. 9, § 7, "substantially overlaps" with the Aid Clause. John D. Leshy, *The Arizona State Constitution* 247 (2011). The two clauses should thus receive a parallel interpretation. Of the two provisions, the Gift Clause is the more applicable provision because it contains language prohibiting aid to "individuals." Ariz. Const. Art. 9, § 7 ("the state . . . shall [not] ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual . . . ."). As such, the Aid Clause was not directly implicated in *Cain* because the aid was given to individuals, not private schools. The Gift Clause, however, was implicated. And under that clause, aid to individuals is permitted as long as it meets the public purpose test. *Kotterman*, 193 Ariz. at 288, ¶ 51, 972 P.2d at 621. To the extent the Aid Clause was implicated, this Court should have applied the public purpose test. Moreover, Leshy does not find any evidence that the Aid Clause was designed to protect public schools. *Compare* Leshy at 247, *with Cain*, 220 Ariz. at 82, ¶ 21, 202 P.3d at 1183 (citing a law review article speculating about such a purpose without any historical evidence or support).

D. Plaintiffs-Appellants Are Not Asking This Court To Merely Follow *Cain*. They Are Asking This Court To Adopt An Absolutist Approach That Would Require Overruling Past Precedent And That Would Jeopardize Numerous Public Assistance Programs.

Plaintiffs-Appellants assert that "[t]he Legislature cannot authorize citizens to use public funds for private education without violating the Aid Clause." PR 9. That is not, and never has been, an accurate statement of law. *Cain*, 220 Ariz. at 84, ¶ 29, 202 P.3d at 1185 ("There may well be ways of providing aid to these student populations without violating the constitution."); *Kotterman*, 193 Ariz. at 286, ¶ 42, 972 P.2d at 619 ("[W]hile the plain language of the provisions now under consideration indicates that the framers opposed direct public funding of religion, including sectarian schools, we see no evidence of a similar concern for indirect benefits."). If this Court were to overrule its prior cases and adopt the absolutist view, it would jeopardize a broad array of funding programs, at both the K-12 and postsecondary education levels, which allow benefits to flow to private and religious schools and even public service corporations, based on the choices of the beneficiaries.

At the K-12 level, state appropriations fund "vouchers" that permit school district officials to place students with disabilities at private schools and pay the full tuition to those schools. A.R.S. § 15-765(D). Similarly, each of Arizona's four postsecondary grant programs appropriates funds to pay higher education

expenses and permits recipients to choose between public, private, and religious colleges and universities.[3] *See supra*, § I.C. Finally, the Supported Housing program, *see supra*, § I.C., allows individuals to spend appropriated funds on utilities. Most utilities are public service corporations, Ariz. Const. Art. 15, § 2, which are "prohibited" aid recipients under the Aid Clause. The Supported Housing Program operates like the Empowerment Account program by allowing beneficiaries to pay for utilities as one option amongst many housing-related expenses.

E. The Court Of Appeals' Decision Upholding The Empowerment Account Program Does Not "Nullify" The Aid Or Religion Clauses.

In *Cain*, this Court said that upholding the voucher programs at issue would "nullify" the Aid Clause's "prohibition against the use of public funds to aid private or sectarian education." 220 Ariz. at 83, ¶ 27, 202 P.3d at 1184. The Plaintiffs-Appellants repeat that refrain here. PR 8. But there is no truth to it.

[3] There was a public option in *Cain* that this Court said was not at issue. 220 Ariz. at 79, n.1, 202 P.3d at 1180. That public option was distinct, however, from the public options available under the postsecondary education programs. In *Cain*, the public option was simply a broadening of Arizona's open enrollment statute to include students with disabilities—thus allowing disabled students to attend public schools outside of their resident school district free of charge. A.R.S. § 15-891.01(C). The postsecondary programs, on the other hand, give students a scholarship that they can direct to any institution of their choice, public, private, or religious.

The Court of Appeals' decision upholding the Empowerment Account program does not "read out" of the Constitution either the Aid or Religion Clause. There are still plenty of examples of prohibited appropriations. Such appropriations include those that actually sparked the battle that led to the inclusion of the Aid and Religion Clauses in our Constitution in the first instance: namely, the educational grants directly to the mission school of San Xavier and the Sisters of St. Joseph to pay for those Catholic schools' expenses. *Kotterman*, 193 Ariz. at 300-02, ¶¶ 110-114, 972 P.2d at 633-35 (Feldman, J., dissenting). Specific examples of forbidden "direct" expenditures would necessarily include construction funds to build new private schools and paying salaries of private school teachers. What these examples have in common is that they provide assistance directly to the schools as schools. This, pure and simple, is what the language of the Aid and Religion Clauses says is forbidden. And, under *Cain*'s interpretation of the Aid Clause, it also prohibits voucher programs that limit their beneficiaries to using their aid at institutions listed in the Aid Clause.

CONCLUSION

Because the Court of Appeals correctly applied this Court's precedents to uphold the Empowerment Scholarship Account program, which Plaintiffs-Appellants willfully misrepresent in an effort to manufacture error where there is none, this Court should deny the petition for review.

Respectfully submitted this 22nd day of November 2013 by:

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