IN THE SUPREME COURT
OF THE STATE OF ARIZONA

No. CV-08-0189-PR

Maricopa County Superior Court
No. 2 CA CV2007-0143

VIRGEL CAIN, *et al.*, Plaintiffs-Appellants,

vs.

TOM HORNE, in his capacity as Superintendent of Public Instruction,
Defendant-Appellee,

and

JESSICA GEROUX, *et al.*, Intervenors-Appellees.

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS' REQUEST FOR AFFIRMANCE

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Identity and Interests of *Amicus Curiae*

Americans United for Separation of Church and State is a national, nonsectarian, public-interest organization that has more than 120,000 members and supporters. Since its founding in 1947, Americans United has been dedicated to defending the constitutional principles of religious liberty and separation of church and state. Americans United regularly serves as a party, as counsel, or as an *amicus curiae* in leading church-state cases before the U.S. Supreme Court and other federal and state courts nationwide. Many of these cases have involved state aid to parochial schools, including *Locke v. Davey*, 540 U.S. 712 (2004), *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), *Eulitt ex rel. Eulitt v. Maine, Dep't of Educ.*, 386 F.3d 344 (1st Cir. 2004), *Anderson v. Town of Durham*, 895 A.2d 944 (Me. 2006), *Bush v. Holmes*, 919 So.2d 392 (Fla. 2006), and *Owens v. Colo. Cong. of Parents, Teachers & Students*, 92 P.3d 933 (Colo. 2004).

All parties have consented to the filing of this brief.

Introduction

One of the cornerstone principles behind numerous state constitutional provisions, such as Arizona's, is that the use of public funds to support any manner of religious instruction erodes the separation of church and state. The Arizona Scholarship for Pupils with Disabilities Program and the Arizona Displaced Pupils Choice Grant Program — through which the State pays for churches and other religious institutions to provide religious training and instruction to Arizona schoolchildren — strike at the heart of that principle.

To be sure, these voucher programs aim to further important goals in improving education for disabled children and foster children. But those goals do not give the state license to ignore the state constitution. In any event, as a number of studies show, there is no evidence that vouchers are any more effective in serving students than are the public schools.

Argument

I. The Voucher Statutes Violate the Fundamental Principle That State Funds Should Not Be Used to Support Religious Instruction.

Thomas Jefferson emphatically wrote that one of the principal cornerstones of our republic is a "wall of separation between Church and State." 8 Writings of Thomas Jefferson 113 (H. Washington ed. 1861), *quoted in Wallace v. Jaffree*, 472 U.S. 38, 92 (1985). Largely due to the maintenance of that wall, hundreds of diverse faith groups coexist peacefully in the United States. These groups speak out on issues of justice, ethics, and morality without risking the government's use of the public fisc to exact a penalty or impose a rebuke.

The tenet of church-state separation with the longest and deepest historical pedigree is the prohibition on the expenditure of taxes to support religion in general or religious training in particular. *See Locke v. Davey*, 540 U.S. 712, 722 (2004); *Flast v. Cohen*, 392 U.S. 83, 103 (1968). Since the founding of the United States, "popular uprisings" have arisen against attempts to channel taxpayer funds to churches and other religious organizations. *Locke*, 540 U.S. at 722-23. For instance, when "A Bill Establishing A Provision for Teachers of the Christian Religion" was proposed in the Virginia Legislature, a public outcry resulted in rejection of the bill. *Id.* at 722 n.6 (citations omitted). The Virginia legislature instead adopted the "Virginia Bill for Religious Liberty," originally written by

Thomas Jefferson, which guaranteed "that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever." *Id.* (citations omitted).

James Madison — who, along with Jefferson, was one of the leading architects of our constitutional order — subsequently observed in his famous Memorial and Remonstrance Against Religious Assessments that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." 2 Writings of James Madison 183, 186 (Hunt ed. 1901), *quoted in Flast*, 392 U.S. at 103. "The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general." *Flast*, 392 U.S. at 103-104.

Accordingly, near the time of the nation's founding, many states placed formal — and generally very broad — prohibitions in their state constitutions against the use of tax funds to support religious worship or instruction. *See, e.g.*, GA. CONST. art. IV, §5 (1789); PA. CONST. art. II (1776); N.J. CONST. art. XVIII (1776); *see also Locke*, 540 U.S. at 723 (citing other state constitutions). The

Arizona Constitution, though enacted much later, has two such provisions. The voucher programs at issue here contravene both of them.

The first of these constitutional provisions, Article II, Section 12, is an analogue of the Federal Establishment Clause. *See Cain v. Horne*, 183 P.3d 1269, 1273 (Ariz. Ct. App. 2008). At the time Arizona adopted its constitution, the Federal Bill of Rights had not yet been applied to the states, and the state constitution's drafters assumed that the Arizona Constitution would be the principal means of protecting religious freedom in Arizona. *See Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 773 P.2d 455, 461 (Ariz. 1989). Thus, although the U.S. Supreme Court narrowly upheld an Ohio school-voucher program under the Federal Establishment Clause in *Zelman v. Simmons-Harris*, 536 U.S. 639, 652-53 (2002),[1] this Court is not bound to interpret Article II, Section 12 of the Arizona Constitution the same way. *See* Plaintiffs-Appellants' Supplemental Brief at 2-10, 13-14 (providing thorough argument in support of construing the Arizona constitutional provisions independently from the Bill of Rights, and explaining why the challenged voucher programs violate Article II,

[1] *Zelman* only upholds voucher programs that provide adequate public and secular educational options for parents and lack incentives for parents to select religious schools in lieu of secular schools. *See Zelman*, 536 U.S. at 662-63. Two older Supreme Court cases invalidating voucher programs under the Federal Constitution remain good law. *See Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 798 (1973); *Sloan v. Lemon*, 413 U.S. 825, 832-33 (1973).

Section 12). And, as the Supreme Court made clear in *Locke*, states remain free to enforce state constitutional provisions that place stricter limits on public funding of religion than does the Federal Establishment Clause. *See* 540 U.S. at 718-19.

In addition to violating Section 12 of Article II, the voucher statutes run afoul of the "no-aid" provision of the Arizona Constitution, which states, "No tax shall be laid or appropriation of public money made in aid of any . . . private or sectarian school . . . ." ARIZ. CONST. art. IX, § 10. No-aid provisions like this one exist in many state constitutions as a supplement to basic church-state protections, and voucher schemes like the two at issue here contradict their plain meaning.[2] In striking down the voucher schemes under the no-aid provision, the Arizona Court of Appeals followed in the footsteps of a number of other states that have deemed voucher programs to violate various provisions of state constitutions. *See, e.g.*, *Bush v. Holmes*, 919 So.2d 392, 412-13 (Fla. 2006) (invalidating program based on constitutional mandate to provide a free and uniform public education); *Owens v. Colo. Cong. of Parents, Teachers & Students*, 92 P.3d 933, 943-44 (Colo. 2004)

[2] While these so-called "Blaine Amendments" are sometimes alleged to be the product of anti-Catholic bigotry and nativism, there is no evidence that the no-aid provision of the Arizona Constitution was the product of such bigotry, and no authority suggests that a court may disregard constitutional provisions merely because it suspects them to be "tainted by questionable motives." *See Cain*, 183 P.3d at 1273. This issue was thoroughly briefed before the Court of Appeals. *See* Brief of *Amicus Curiae* Nat'l Sch. Bds. Ass'n at 3-15.

(holding Colorado voucher system unconstitutional as a violation of a local-control provision); *Chittenden Town Sch. Dist. v. Vt. Dep't of Educ.*, 738 A.2d 539, 563-64 (Vt. 1999) (rejecting tuition reimbursement policy that amounted to taxpayer support of religious worship); *Opinion of the Justices*, 616 A.2d 478, 480 (N.H. 1992) (unconstitutional for school districts to pay partial tuition to reimburse parents using private schools); *Witters v. State Comm'n for the Blind*, 771 P.2d 1119, 1121-22 (Wash. 1989) (use of vocational rehabilitation grant at religious college contrary to state constitution); *Sheldon Jackson College v. State*, 599 P.2d 127, 132 (Alaska 1979) (rejecting tuition grant program that disbursed public funds to benefit private religious schools); *State ex rel. Rogers v. Swanson*, 219 N.W.2d 726, 735 (Neb. 1974) (tuition grants to students for private colleges of their choice unconstitutional); *Almond v. Day*, 89 S.E.2d 851, 859 (Va. 1955) (finding vouchers unconstitutional because they violated constitutional provision prohibiting appropriations to non-public schools).

Here, the Arizona voucher programs channel taxpayer money away from public education and into private, and in some cases parochial, schools. In addition to the obvious financial benefit they provide to sectarian private schools (in the form of publicly funded tuition payments), the voucher provisions aid the religious missions of these schools and of the religious groups that operate them.

Although sectarian private schools undoubtedly seek to provide their students with a quality education, that is far from their sole raison d'être. Such schools are, more fundamentally, extensions of a religious ministry, and an integral part of their mission is to provide students with a *religious* upbringing. *See, e.g., Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971) ("[P]arochial schools involve substantial religious activity and purpose."); Pope John Paul II, *Catechesi Tradendae*, ¶ 69 (1979) ("The special character of the Catholic school, the underlying reason for it, the reason why Catholic parents should prefer it, is precisely the quality of the religious instruction integrated into the education of the pupils.").

Of course, an education that integrates religious training and instruction with learning is an important and protected option for those who prefer it. *See Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534-36 (1925). But while religious education is part of the American tradition, public funding of religion is not.

II. Academic Studies Show That School Vouchers Do Not Improve Student Performance.

Intervenors-Appellees contend that the challenged voucher programs are necessary and beneficial for children because they purportedly offer additional and superior educational options to students and their families. But many researchers

have found little, if any, evidence that voucher programs improve either the academic achievement of participating students or the performance of public schools. *See* MARTIN CARNOY, ECON. POLICY INST., SCHOOL VOUCHERS: EXAMINING THE EVIDENCE 5-30 (2001), *available at http://www.epi.org/studies/vouchers-full.pdf.*

For example, Congress approved a voucher program in Washington, D.C. beginning in 2004. But a 2008 Department of Education study revealed that students participating in the voucher program generally did no better than their public school peers on reading and math tests two years later. *See* Maria Glod & Bill Turque, *Report Finds Little Gain From Vouchers*, WASH. POST, June 17, 2008, at B6, *available at http://www.washingtonpost.com/wp-dyn/content/article/2008/06/16/AR2008061602537.html.* Likewise, the Department's 2007 report found no impacts, positive or negative, on student achievement. *See* U.S. DEP'T OF EDUC., EVALUATION OF THE DC OPPORTUNITY SCHOLARSHIP PROGRAM: IMPACTS AFTER ONE YEAR 44 (2007), *available at http://ies.ed.gov/ncee/pdf/20074009.pdf.*

A Parental Choice Program in Milwaukee has met with no greater success. A recent study reports that elementary students participating in that program had slightly *lower* math and reading scores than their public-school counterparts, and

that there was no difference among scores for middle-school students. *See* SCH. CHOICE DEMONSTRATION PROJECT, MPCP LONGITUDINAL EDUC. GROWTH STUDY BASELINE REPORT 32 (2008), *available at http://www.uark.edu/ua/der/SCDP/Milwaukee_Eval/Report_5.pdf.*

Finally, the Center on Education Policy conducted a nationally representative longitudinal study of students in public, private, and parochial schools and concluded that students in school-choice programs performed no better on achievement tests than those who attended traditional public schools. *See* CTR. ON EDUC. POLICY, ARE PRIVATE HIGH SCHOOLS BETTER ACADEMICALLY THAN PUBLIC HIGH SCHOOLS? 2 (2007), *available at http://www.cep-dc.org* (follow "Vouchers" hyperlink at left). Furthermore, students in the school-choice programs ended up no more likely to attend college or to report job satisfaction by age twenty-six. *Id.*

The studies have further shown that there are many proven ways to improve the quality of education in the public schools, such as reducing class size. *See* ALEX MOLNAR, KEYSTONE RESEARCH CTR., SMALLER CLASSES NOT VOUCHERS INCREASE STUDENT ACHIEVEMENT 38 (1998), *available at http://epicpolicy.org/files/smClasssizes.pdf.* These approaches have been shown to yield far greater success than voucher schemes. *See id.*

Although the policy debate on how best to improve America's schools is best left to the legislative rather than the judicial arena, we cite these studies only to inform the Court that the data is far less conclusive than the Intervenors-Appellees suggest.

Conclusion

The Arizona Constitution should be construed to give voice to the principle, dating to the Founding era, that the use of public funds to support the ministry erodes the separation of church and state. The decision of the Arizona Court of Appeals should be affirmed.

Respectfully submitted,

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December 1, 2008

CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 14, I certify that the attached brief

_____ Uses a proportionately spaced type of 14 points, is double-spaced using a Roman font, and contains approximately 2193 words and

_____ Does not exceed page limitations.

12/1/08
Date

Cynthia A. Ricketts, Esq.

CERTIFICATE OF SERVICE

The undersigned counsel for *amicus curiae* Americans United for Separation of Church and State certifies that on December 1, 2008, an original and seven copies of the foregoing brief were mailed for filing to:

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From: Don Peters [don@mlp-law.com]
Sent: Wednesday, November 19, 2008 4:47 PM
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Subject: RE: Amicus inquiry for Cain v. Horne

I don't think I gave you written consent. You have the consent of Plaintiffs-Appellants.

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From: Courtney Rice [mailto:rice@au.org]
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Cc: Don Peters; Ayesha Khan
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Mr. Keller:

We are writing to seek the intervenor appellants' consent to Americans United for Separation of Church and States filing an amicus brief on behalf of the appellees in *Cain v. Horne*. We intend to comply with the agreed-upon mailing deadline of December 1, 2008 for the brief. If you are prepared to consent to our participation, please indicate your consent by responding to this email.

Thank you,
Courtney Rice

Courtney A. Rice, Steven Gey Fellow*
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Ms. Rice,

You have the Intervenors' consent.

Best wishes,

Tim Keller

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Thank you,
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Ms. Bickett:

We are writing to seek the appellants' consent to Americans United for Separation of Church and States filing an amicus brief on behalf of the appellees in Cain v. Horne. We intend to comply with the agreed-upon mailing deadline of December 1, 2008 for the brief. If you are prepared to consent to our participation, please indicate your consent by responding to this email.

Thank you,
Courtney Rice

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