



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**



**VIRGIL CAIN et al v. TOM HORNE et al  
CV-08-0189-PR**

**PARTIES AND COUNSEL:**

*Petitioner/Cross Respondent:* Petition for Review and Response to Cross-Petition for Review filed by Tom Horne, Superintendent of Public Instruction, represented by Paula S. Bickett, William A. Richards, and Chad B. Sampson, Assistant Attorneys General.

*Intervenor Petitioners/Cross-Respondents:* Petition for Review and Response to Cross-Petition for Review filed by Jessica Geroux, Andrea Weck, Kristinia Peterson, Kimberly Wuestenberg, Edwin Rivera, and Mike and Shirley Okamura, represented by: Timothy D. Keller and Jennifer M. Perkins of the Arizona Chapter of the Institute for Justice; William H. Mellor and Clark M. Neily, III of the Institute for Justice; and Thomas A. Zlaket (of counsel).

*Respondents/Cross Petitioners:* Cross-Petition for Review, Response to Petitions for Review and Response to Brief *Amicus Curiae* filed by Virgel Cain, Sandy Bahr, Scott Holcomb, Arizona Association of School Business Officials, Arizona Education Association, Arizona Federation of Teacher Unions, Arizona Parent Teacher Association, Arizona Rural Schools Association, Arizona School Administrators, Inc., Arizona School Boards Association, American Civil Liberties Union of Arizona, and People for the American Way, represented by: Donald M. Peters and Wendy L. Kim of Miller, LaSota and Peters; Timothy M. Hogan of the Arizona Center for Law in the Public Interest; and Thomas W. Pickrell.

*Amici Curiae:* Pacific Legal Foundation and Arizona Autism Coalition, represented by James S. Burling, Sharon L. Browne and Elizabeth A. Yi of the Pacific Legal Foundation.

**FACTS:**

In 2006 the Legislature enacted the Arizona Scholarship for Pupils with Disabilities Program, A.R.S. §§ 15-891-891.06 (the “Scholarship program”), and the Arizona Displaced Pupils Grant Program, A.R.S. §§ 15-817-817.07 and 43-1032 (the “Grant program”) (collectively, the “school voucher programs”).

**The Scholarship for Pupils with Disabilities Program**

The purpose of the Scholarship Program is “to provide pupils with disabilities with the option of attending any public school of the pupil’s choice or receiving a scholarship to any qualified school of the pupil’s choice.” The scholarship is initiated when the parent of a public

school pupil with a disability “who is dissatisfied with the pupil’s progress” requests a scholarship, so long as the child has attended a public school for the prior school year and has obtained admission to a qualified school.

A “qualified school” is a “nongovernmental primary school or secondary school or a preschool for handicapped students that is located in this state and that does not discriminate on the basis of race, color, handicap, familial status or national origin.”

Under the statute, the school district is obliged to notify the parent of his or her child’s options and offer him or her an opportunity to enroll the pupil in another public school within the district. The school district must in any event continue to provide statewide testing to the child.

On receipt of a scholarship warrant, the parent restrictively endorses the warrant to the qualified school. The school district is required to report to the Department on all pupils who are attending a qualified school.

The qualified school is not required to “alter its creed, practices or curriculum in order to ... participate as a qualified school.” A public school student with a disability may transfer to a qualified school, and the State will pay a scholarship up to the amount of basic state aid the student would generate for a public school district.

#### The Displaced Pupils Choice Grant Program

Under the grant program, a pupil is eligible to receive a grant if the pupil has been placed in foster care at any time before the pupil graduates from high school or obtains a general equivalency diploma.

Each custodian of a qualifying pupil who completes an application for the program shall receive a grant to be redeemed at the grant school, to be applied toward payment of the tuition and fees payable for the educational and related services at the grant school.

A grant school is defined as a “nongovernmental primary school or secondary school or a preschool for handicapped students that is located in this State [and] does not discriminate on the basis of race, color, handicap, familial status or national origin, ....”

The program is limited to the first five hundred qualifying pupils annually. The school is not required to accept the grant as full payment for educational services and may charge the pupil an additional amount. The school is required to use the grant proceeds solely for educational services for the qualifying pupil.

The grant issued shall be for five thousand dollars or the total amount of tuition and fees charged by the grant school, whichever is less.

### Procedural Background

Plaintiffs Cain *et al.* filed suit to enjoin implementation of the voucher programs. They argued the programs violated Article II, § 12, Article IX, § 10, Article XI, § 1, and Article XX, § 7 of the Arizona State Constitution.

Art. II, §12 (“the Religion Clause”) provides that “[n]o 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.”

Art. IX, § 10 (“the Aid Clause”) mandates that “[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.”

The Education Clauses provide, in Art. XI, § 1 (A) that the legislature shall enact “such laws as shall provide for the establishment and maintenance of a general and uniform public school system....,” and in Art. XX, § 7 that “provision shall be made for the establishment and maintenance of a system of public schools which shall be open to all the children of the State and be free from sectarian control....”

Individual parents intervened and moved to dismiss the complaint. Defendant Horne moved for judgment on the pleadings. The superior court granted Mr. Horne’s motion, holding the programs to be constitutional under the four provisions of the Arizona Constitution cited by Cain *et al.* (the Religion Clause, the Aid Clause, and the two Education Clauses).

The Court of Appeals held that the voucher programs did not violate the State Constitution clause prohibiting appropriations for religious purposes, the Religion Clause, but *did violate* the State Constitution clause prohibiting state aid to private schools, the Aid Clause.

The Court of Appeals reversed and remanded without addressing the issue whether the voucher programs violate the Education Clauses. Mr. Horne filed a Petition for Review challenging the Court’s holding under the Aid Clause. Mr. Cain *et al.* filed a Cross-Petition for Review challenging the Court’s holding under the Religion Clause.

### **ISSUES:**

*Petitioner/Cross Respondent:* Did the Court of Appeals err in holding that the School Choice Programs violate Article IX, § 10 of the Arizona Constitution, even though the State does not appropriate any funds to either sectarian or nonsectarian private schools but instead grants scholarships to certain disabled and foster children who choose to attend a qualified private school?

*Petitioners/Intervenors:* Did the Court of Appeals err in striking down educational

aid programs that allow parents of children with special needs to place those children in the public or private school that best meets their children's needs?

*Respondents/Cross Petitioners:* Do the two school voucher programs that have been enacted by the Arizona Legislature violate Article II, § 12 of the Arizona Constitution, which prohibits public money from being applied to religious instruction or to the support of a religious establishment?

*This Summary was prepared by the Arizona Supreme Court Staff Attorneys' Office solely for educational purposes. It should not be considered official commentary by the court or any member thereof or part of any brief, memorandum or other pleading filed in this case.*