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<i>Bush v. Holmes</i> , 919 So. 2d 392 (Fla. 2006).....	15, 16
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<i>Everson v. Bd. of Educ.</i> , 330 U.S. 1 (1947).....	22, 36
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Pa. Const. art. 3, § 1526

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Pa. Const. art. 3, § 1543

Wis. Const. of 1848, art. 1, § 18,
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School Websites and Information

Anderson University,
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Bishop Chatard High School Calendar – 2011 – 2012 Academic Year,
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Cardinal Ritter High School Calendar – August 2011,
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<i>2011-2012 School Calendar</i> , Corpus Christi Catholic School, http://www.edline.net/files/_MPFyH_/0ef80e38799ed6533745a49013852ec4/2011-2012_School_Calendar.xls (last visited July 19, 2011).....	49
<i>Evansville Lutheran School Calendar – August 2011</i> , Evansville Lutheran School, http://www.evansvillelutherschool.com/Monarchs/Calendar.html (last visited July 19, 2011)	50
<i>Good Shepherd School 2011-2012 Calendar</i> , Good Shepherd School, http://www.gsparish.org/GSS/Calendar/11-12/School%20Calendar%202011-2012doc.pdf (last visited July 19, 2011)	50
<i>Holy Rosary School 2011-2012 School Calendar</i> , Holy Rosary School, http://hrparish.org/school/docs/2012calendar.pdf (last visited July 19, 2011); <i>Westside Catholic School Calendar</i> , Westside Catholic School, http://wccsevv.org/starnet/media/2011-12_Calendar.pdf (last visited July 19, 2011)	50
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<i>Mater Dei High School Calendar, August, 2011</i> , Mater Dei High School, http://materdeiwildcats.com/modules/calendar/showCalendarMonth.phtml?oc_id[]=9926&year=2011&month=08&day=01&sessionid=160eb337b8a21acd6c23279920cba7d8 (last visited July 19, 2011)	49
<i>Reitz Memorial High School Calendar, August 2011</i> , Reitz Memorial High School, http://reitzmemorial.org/modules/calendar/showCalendarMonth.phtml?com=t&oc_id[]=7681&sessionid=a34abac085b6ab275fb953735e99b81b (last visited July 19, 2011)	49
SSACI, Activity and Program Report For Academic Year 2008-2009 (2009), <i>available at</i> http://www.in.gov/ssaci/files/AnnualReport08-09.pdf	37
SSACI, Activity and Program Report for Academic Year 2009-2010 (2010), <i>available at</i> http://www.in.gov/ssaci/files/AnnualReport2009-10.pdf (last visited July 19, 2011)	37, 38
<i>2011-2012 Calendar</i> , St. Mary’s Catholic Academy, http://smcanewalbany.org/?page_id=1048 (last visited July 19, 2011).....	49

St. Monica Catholic School Calendar – August 2011,
<http://stmonicaindy.org/school/wp-content/uploads/2010/03/Family-Calendar69.pdf>
 (last visited July 19, 2011)50

Westside Catholic School Calendar, Westside Catholic School,
http://wccsevv.org/starnet/media/2011-12_Calendar.pdf (last visited July 19, 2011)50

Other Authorities

Advisory Opinion re Constitutionality of P.A. 1970,
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George Anastaplo, “Law, Education, and Legal Education: Explorations,”
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David J. Bodenhamer and Randall T. Shepard,
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*The Past Should Not Shackle the Present: The Revival of a Legacy of Religious Bigotry
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Claudia Goldin & Lawrence Katz,
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 (Nat’l Bureau of Econ. Research, Working Paper No. 9958, 2003).....27, 46

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Journal of the Convention of the People of the State of Indiana (1850).....	30
Lloyd P. Jorgenson, The State and the Non-Public School: 1825-1925 (1987)	27, 28, 29
Richard D. Komer, <i>School Choice and State Constitutions' Religion Clauses</i> , 4 J. of Sch. Choice 331 (2009).....	21
Philip Hamburger, Separation of Church and State (2002).....	22
“Go Forth and Do Good,” (Wilson D. Miscamble, C.S.C. ed. 2003), available at http://undpress.nd.edu/book/P00875	30
Vincent Phillip Munoz, <i>James Madison's Principle of Religious Liberty</i> , 97 Am. Pol. Sci. Rev. 17 (2003).....	43
Clark Neily, <i>The Florida Supreme Court vs. School Choice: A "Uniformly" Horrid Decision</i> , 10 Tex. Rev. Law & Pol. 401 (2006).....	16
Northwest Ordinance of 1787, 1 Stat. 50.....	20
Samm Quinn, <i>School vouchers offer path to the future</i> , Evansville Courier & Press, July 14, 2011, http://www.courierpress.com/news/2011/jul/14/no-headline--- ev_vouchersinfosession/ (last visited July 19, 2011).....	48
L.C. Rudolph, <i>Hoosier Faiths: A History of Indiana Churches & Religious Groups</i> (1995).....	28
<i>School Choice</i> , Indiana Department of Education, http://www.doe.in.gov/schoolchoice (last visited July 19, 2011)	48
David Tyack, <i>The Kingdom of God and the Common School: Protestant Ministers and the Educational Awakening in the West</i> , 36 Harv. Educ. Rev. 447 (1966)	16

Recent Cases: State Constitutional Law - Education Clause - Florida Supreme Court Declares State's School Voucher Program Unconstitutional - Bush v. Holmes, 919 So. 2d 392 (Fla. 2006), 120 Harv. L. Rev. 1097 (2007).....16

Recent Developments,
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INTRODUCTION

Plaintiffs seek to take away scholarships from Parents' children.¹ These scholarships, awarded under the Choice Scholarship Program, have allowed Parents and similarly situated families to choose the best available elementary or secondary school for their children. In some cases that school-of-choice could be a public school operated by a district in which the families do not reside, in other cases parents may choose a nonreligious private school, and in still others they may choose a religious private school. In *all* cases it is parents—and not government officials—who choose which school their children will attend under the Choice Scholarship Program, and in all cases parents will use the scholarship proceeds to defray tuition for their children's education.

Plaintiffs allege that the Choice Scholarship Program violates three provisions of the Indiana Constitution. They argue that the Choice Scholarship Program violates Article 8, Section 1's command that Indiana will maintain a general and uniform system of Common Schools, tuition-free and open to all. But Indiana continues to maintain just such a system; the only difference the Choice Scholarship Program makes is that low- and middle-income Hoosiers now have the same range of educational options previously enjoyed only by their better-off neighbors, including private education. Plaintiffs misread Section 1 as *limiting* Indiana to supporting a traditional public school system *only*, by ignoring language in Section 1 that gives the Indiana Legislature broad discretion to fund education programs outside the public system—a discretion the legislature has long used to fund programs supporting private-school students. Plaintiffs'

¹ Heather Coffy and Monica Poindexter are parents of children receiving scholarships under the Choice Scholarship Program whose children will be attending private schools and who seek intervention as Defendant-Intervenors. Henceforth they will refer to themselves collectively as "Parents."

interpretation would invalidate all such programs, including scholarship programs at the college and university level legally indistinguishable from the Choice Scholarship Program.

Plaintiffs also allege that Sections 4 and 6 of Article 1 prohibit the Choice Scholarship Program because, they contend, it compels taxpayers to support religious ministries without their consent and provides funds drawn from the treasury for the benefit of religious institutions. They assert that many religious schools are religious ministries of their sponsoring churches and that the students' scholarship proceeds are state funds derived in part from taxes paid by Plaintiffs and drawn from the treasury for the benefit of religious institutions, i.e., religious schools. But Plaintiffs disregard the fact that the funds are drawn *for the benefit of the parents*, not whatever schools they happen to choose. Nor is the state supporting either the religious schools or their possible status as religious ministries; it is *the parents* who are "supporting" the schools by buying an education from them, in part with state scholarships.

Moreover, Plaintiffs have known ever since May 5, 2011, when Governor Daniels signed the bill creating the Choice Scholarship Program, that it would go into effect for the 2011-2012 school year. Parents and similarly situated families have relied on the Choice Scholarship Program in making educational decisions for their children for the coming school year, decisions made well before the effective date of the legislation and Plaintiffs' initiation of this lawsuit on July 1. Because only low- and middle-income families like Parents are eligible for scholarships, many, if not all, of them lack the financial resources to maintain their children in their chosen schools during the pendency of this litigation if this Court should issue a preliminary injunction. Their children will be

forced to leave their chosen schools and go to the public schools. This will constitute a great hardship on the parents and the children, as well as the schools they are forced to leave and the public schools they are forced to attend. Thus, not only do Plaintiffs lack a substantial likelihood of prevailing on the merits of this lawsuit, but a preliminary injunction would harm the true beneficiaries of this Program, families like Parents’.

STATEMENT OF FACTS

Parents generally agree with Plaintiffs’ description of the Choice Scholarship Program, and will not burden the Court with a redundant recital here. Parents, however, will note an important factual disagreement with Plaintiffs’ characterization of the program. Plaintiffs claim that “[t]he statute places no restrictions on the purposes for which [religious schools] may use the public funds received under the [Choice Scholarship Program], and the schools are accordingly free to use these funds for purposes such as religious instruction, worship, and other activities.” Pls.’ Br. in Supp. of Mot. for Prelim. Inj. (“Pls.’ Br.”) at 4. Actually, there is only one purpose for which any school in the program, religious or not, may use the funds received on behalf of participating scholarship students, which is to defray the tuition charged to that student’s family. The scholarship funds are given to participating families to subsidize *a responsibility of the family*, the payment of tuition, and not to the school to defray its institutional costs.

The difference between helping parents pay tuition costs and giving money to schools is not some formalistic quibble; it is the difference between a student-assistance program—like a Pell Grant or the GI Bill—and a school-assistance program. For example, an Indiana student attending an Indiana college or university can receive a

Frank O'Bannon Grant to help pay his or her college tuition. *See* Ind. Code § 21-12-1-10. Indiana makes no effort, nor need it, to ensure the proceeds of the grant are not spent on religious aspects of the student's education at a religious college. By contrast, Maryland has a Selinger Grant Program under which it provides private colleges in Maryland institutional assistance based on their number of full-time students. Because the number of students is used only to calculate the amount of the grant to the institution and the resulting grant in no way defrays students' personal costs, the Maryland grants are not student assistance.²

That distinction is critical. Just as a state employee can use a portion of her salary to tithe to her church—or, more to the point, send her child to a private religious school—the fact that the money she is using originated in the state treasury does not mean the state is funding a religious ministry, nor that Plaintiffs are being compelled to support it. The employee has earned the money and, in the case of the school, is buying educational services with it. Similarly, here Parents are using state funds given to them to buy an education from whatever schools they choose. Once they have received the money, it is theirs to spend on the particular purpose for which it was given (the education of their children) and no longer belongs to the state. Whatever religious activities occur at the private schools are voluntarily accepted by the families as a result of choosing that particular school. The religious nature of the schools Parents choose and whatever religious activities occur therein are simply irrelevant because the state has not sent the children there and is not responsible for the private schools' activities.

² This program is described in a case sustaining it against an Establishment Clause challenge in *Roemer v. Board of Public Works*, 426 U.S. 736 (1976).

Parents also note the lack of any discussion in Plaintiffs' statement of facts of the legislature's intent in enacting the Choice Scholarship Program. Both the statute's wording and the structure of the program make it clear that the intended beneficiaries of the program are scholarship recipients, not the schools—private, public, religious, or nonreligious—they happen to choose. Plaintiffs present no evidence whatsoever that the program was enacted “for the benefit of” any religious schools the parents choose, which is significant because Article 1, Section 6—one of the provisions Plaintiffs allege the program violates—prohibits the state from drawing “funds from the treasury for the benefit of any religious or theological institution.” At most, what Plaintiffs have alleged is that the schools will “benefit” incidentally from having an increased number of patrons who choose their services.

ARGUMENT

Plaintiffs have failed to meet the standard for entry of a preliminary injunction.³ Under current Indiana case law they have no likelihood of success on the merits. In addition, the threatened injury to Parents and similarly situated families from a preliminary injunction far outweighs any alleged harm to the Plaintiffs.

I. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIM THAT THE CHOICE SCHOLARSHIP PROGRAM IS UNCONSTITUTIONAL.

Plaintiffs assert that the Choice Scholarship Program is unconstitutional in two ways. First, they allege that Article 8, Section 1's requirement that the state provide a “general and uniform system of Common Schools” forbids the General Assembly from

³ The party seeking a preliminary injunction must show all of the following: “(1) irreparable harm, (2) likelihood of success on the merits, (3) balance of harms, and (4) public interest.” *Ind. Family & Soc. Servs. Admin. v. Walgreen Co.*, 769 N.E.2d 158, 162 (Ind. 2002).

supplementing that system with a program that enables families of modest means to enjoy the broader range of educational opportunities that wealthier families do, including private schools. Second, because many private schools in Indiana are religious, just as they are in other states, Plaintiffs allege that the Choice Scholarship Program violates constitutional provisions that prevent the state from compelling people to support religious ministries (Article 1, Section 4) and prohibit the state from drawing funds from the treasury for the benefit of religious institutions (Article 1, Section 6). Parents explain below why these claims lack merit and provide no basis for enjoining an educational aid program of true private choice.

A. Article 8, Section 1, Does Not Bar the General Assembly from Creating the Choice Scholarship Program.

Plaintiffs' argument that the Choice Scholarship Program violates Article 8, Section 1, faces a strong presumption of constitutionality that it falls well short of rebutting. *See Ledbetter v. Hunter*, 842 N.E.2d 810, 815 (Ind. 2006) ("The presumption of constitutionality [of a statute] continues unless 'clearly overcome' by a contrary showing.").⁴ This is particularly true because Plaintiffs' argument is based on a fundamental misunderstanding of the broad discretion the General Assembly enjoys

⁴ The court in *Ledbetter* also emphasized that:

In considering challenges to the constitutionality of a statute, we accord it "with every reasonable presumption supporting its validity and place the burden upon the party challenging it to show unconstitutionality." [*Johnson v. St. Vincent Hosp.*, 273 Ind. [374,] 381, 404 N.E.2d [585,] 591 [(1980)]. Any claimed fatal constitutional defects must be "clearly apparent." *Id.* All doubts are resolved against the party challenging the constitutionality of a statute. *State v. Rendleman*, 603 N.E.2d 1333, 1334 (Ind.1992).

842 N.E.2d at 815.

under Article 8, Section 1, to provide for the education of Indiana students. That Plaintiffs fundamentally misconceive Article 8, Section 1, is strongly suggested by their careful and persistent omission of key language from that provision that completely undermines their argument.

1. Article 8, Section 1, contains two educational duties, not just one.

Plaintiffs abridge Article 8, Section 1, as follows:

Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly . . . to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.

Pls.' Br. at 21.

Plaintiffs then argue that the above language creates a single duty of educating Indiana children through the exclusive means of providing a general and uniform system of common schools. The General Assembly, according to this argument, can provide no other publicly funded educational options to Indiana students.

The folly of Plaintiffs' interpretation becomes readily apparent when one looks at the language of Article 8, Section 1, in full:

Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly *to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and* to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.

Ind. Const. art. 8, § 1 (language omitted by Plaintiffs appears in italics).

Under the plain language of this provision—read as a whole rather than as truncated by Plaintiffs—the General Assembly has two educational duties, not just the one upon which Plaintiffs solely focus. The first, which is entirely omitted from

Plaintiffs' presentation of Section 1, is to encourage moral, intellectual, and scientific improvement by all suitable means. The second duty—which is separated from the first with the word “and”—is to provide for a general and uniform system of open common schools without tuition. Ind. Const. art. 8, § 1.

The General Assembly is supposed to honor both duties, not just the second. And that is exactly what it is doing. It is continuing to fulfill its second duty under Article 8, Section 1, to provide a general and uniform system of common (i.e., public) schools that are open to all and do not charge tuition. As parents explain below, it is also working to fulfill its first duty of encouraging moral, intellectual, and scientific improvement by all suitable means—in this case, through the Choice Scholarship Program.

2. Article 8, Section 1, allows the General Assembly to undertake educational initiatives outside of the common school system.

The General Assembly had the inherent authority to create the Choice Scholarship Program, subject to the limits of the state (and federal) constitution. *See McCullough v. McCullough*, 705 N.E.2d 190, 194 (Ind. Ct. App. 1999) (“The Indiana Supreme Court has held on many occasions that the General Assembly may enact any law, so long as it does not conflict with the Indiana or federal Constitutions.”). Recognizing this, Plaintiffs seek to transform the second duty regarding common schools into an implicit limitation on the General Assembly’s power that allows it to provide publicly funded educational options for Indiana children only within the public school system. They cannot do so, however, because the language in Article 8, Section 1, describing the first duty expressly

acknowledges the plenary power of the General Assembly to undertake a wide variety of educational initiatives—including, as explained below, initiatives outside of that system.⁵

Plaintiffs deal with this first duty by . . . ignoring it entirely. Perhaps this omission can charitably be explained by an assumption that the two duties articulated in Section 1 are really one and the same. But that assumption is wrong. Indeed, the Indiana Supreme Court recently reaffirmed that these two duties are both separate and very different from one another. The Court, emphasizing the verb “encourage” in the first duty, described that duty as “general and aspirational.” In contrasting the first duty with the second duty, the Court described the latter as one that assigns a “specific task with performance standards.” *Bonner v. Daniels*, 907 N.E.2d 516, 520 (Ind. 2009). Because the first duty is so broad, the Court stated that, “[j]udicial enforceability is more plausible as to the second duty than the first.” *Id.* In other words, the legislature has much more discretion in determining how it will exercise the first duty than it has in regard to the second. *See Bullock v. Billheimer*, 175 Ind. 428, 94 N.E. 763, 767 (1911) (“[T]he legislature may determine how *and by what instrumentalities* ‘scientific and agricultural improvement’ may be made. It is even less hampered in this respect than it is with respect to the school system [over which, the Court had just noted, it has broad discretion], which is required to be ‘uniform and general.’” (emphasis added)).

Certainly, in maintaining a system of common schools, the General Assembly will encourage moral, intellectual, scientific, and agricultural improvement, but that is not

⁵ Plaintiffs say that they are relying on the *expressio unius est exclusio alterius* maxim of statutory interpretation. Pls.’ Br. at 22. But that is not the case. They have instead effectively created a novel maxim of statutory construction that allows the interpreter, in order to reach her desired result, to treat a statement of a duty in one part of a constitutional provision as a negation of the express statement of a broader duty in that same provision.

the *only* means by which it may do so. Nothing in the cases regarding Section 1 upon which Plaintiffs rely is to the contrary. Indeed, the Indiana Supreme Court has regularly cited to the first duty as permitting educational initiatives outside of the public school system. *See, e.g., Russell v. Trs. of Purdue Univ.*, 168 N.E. 529, 534 (Ind. 1929) (citing the General Assembly’s duty under Article 8, Section 1, “to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement” as support for holding that Purdue, which is not a common school, could use eminent domain to acquire land to build dormitories); *Sch. City of Marion v. Forrest*, 168 Ind. 94, 78 N.E. 187, 187-88 (1906) (holding that the creation of library boards overseeing public libraries was within the discretion of the legislature as part of “encouragement of intellectual improvement ‘by all suitable means’”); *cf. Bd. of Zoning Appeals v. Schulte*, 241 Ind. 339, 172 N.E.2d 39, 44 (1961) (citing duty to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement in support of its decision to allow a church to build a school in a residential neighborhood over the local zoning board’s objections).

Moreover, if the drafters of the provision had intended to confine the General Assembly’s exercise of its first duty to the single means of maintaining common schools, they would have—in addition to eliminating the phrase “by all suitable means”—used the words “by providing” instead of “and to provide” in front of the command to provide a system of common schools. This they did not do, and Article 8, Section 1, cannot be read as if they had. *See City Chapel Evangelical Free Inc. v. City of South Bend*, 744 N.E.2d 443, 447 (Ind. 2001) (“The language of each provision of the Constitution must be treated with particular deference, as though every word had been hammered into place.”); *Tucker*

v. State, 218 Ind. 614, 35 N.E.2d 270, 291 (1941) (“It is a cardinal principle of constitutional construction that words are to be considered as used in their ordinary sense; and that their ordinary and common meaning is to be attributed to them.”).

Significantly, the drafters knew how to restrict expenditures exclusively to public schools when that was the result they desired. For example, Article 8, Section 2, establishes the Common School Fund, and Section 3 provides that “the income thereof shall be inviolably appropriated to the support of Common Schools, and to no other purpose whatever.” Ind. Const. art. 8, §§ 2, 3. If the drafters of Section 1 wanted to prevent the General Assembly from spending other money for educational purposes outside the Common Schools, they could have used the same kind of wording in Section 1.

Instead, the drafters left it to the broad discretion of the General Assembly as to how it would encourage moral, intellectual, scientific, and agricultural improvement.⁶ The General Assembly has chosen to do so in this instance by enacting the Choice Scholarship Program, which allows parents who are not satisfied with their children’s public schools to send them to private schools outside of the public school system.⁷

⁶ It appears that the ambit of the General Assembly’s discretion in carrying out the first duty may have become even greater in the 1851 Constitution than it was in the 1816 Constitution. The 1816 Constitution provided that “[t]he General Assembly shall from, time to time, pass such laws as shall be calculated to encourage intellectual, Scientific, and agricultural improvement, by allowing rewards and immunities for the promotion and improvement of arts, sciences, commerce, manufactures, and natural history; and to countenance and encourage the principles of humanity, honesty, industry, and morality.” *Nagy v. Evansville-Vanderburgh Sch. Corp.*, 844 N.E.2d 481, 487-88 (Ind. 2006). Article 8, Section 1, now contains a more compact description of that duty, conspicuously stating that the General Assembly may carry it out by “all suitable means,” not just through “allowing rewards and immunities.”

⁷ Eligible students may also use their Choice Scholarships to attend public schools outside the school corporation in which the student has legal settlement. Ind. Code § 20-

Because private schools are, by definition, not public, there is no requirement that they be general, uniform, open to all, and not charge tuition. *See Davis v. Grover*, 480 N.W.2d 460, 474 (Wis. 1992) (rejecting the argument that a private school becomes public once it receives tax dollars). Of course, there is still a duty that the legislature provide a general and uniform system of common schools that do not charge tuition and are open to all—and the legislature has *not* abandoned that duty: the public school system remains firmly in place and fully available to parents who wish to send their children there.

When the Wisconsin Supreme Court rejected the argument that the uniformity clause of the Wisconsin Constitution⁸ disallowed the publicly funded scholarship plan the legislature had created for Milwaukee, it held that there would have only been a problem if the legislature had “deprive[d] any student the opportunity to attend a public school with a uniform character of education.” *Davis*, 480 N.W.2d at 474. But because all students were free to attend public school if they desired to do so, the state was not violating its duty to provide a uniform, free, and open system of schools. Here, just as was the case with the Milwaukee program, all students still have the opportunity to attend schools within the public school system.⁹

Thus, Plaintiffs are incorrect that there is anything improper about the Choice Scholarship Program under Article 8, Section 1. In fact, adopting their reading of Article

51-1-4.7(6). Plaintiffs do not challenge the constitutionality of this specific component of the program.

⁸ That clause (art. X, § 3) reads as follows: “The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years.” *Davis*, 480 N.W.2d at 473 n.6.

⁹ In fact, by allowing students to use Choice Scholarships to transfer to public schools in districts in which they do not reside, the Choice Scholarship Program also increases educational opportunities within the public school system.

8, Section 1, would, as Plaintiffs seem implicitly to understand, require treating that provision's statement of the duty to encourage moral, intellectual, and scientific improvement by all suitable means as mere surplusage. Such treatment, of course, is impermissible. "One of the fundamental rules of constitutional construction is that no word shall be assumed to be mere surplusage. It is an essential corollary that every word must be given a meaning if possible." *Hendricks v. State*, 245 Ind. 43, 196 N.E.2d 66, 70 (1964).

Indeed, even if it were permissible for Plaintiffs to take an eraser to the first duty in Section 1, *Davis v. Grover* shows that *even in that circumstance* it would be improper to read the second duty as barring the funding of educational options outside of the public school system. Wisconsin's uniformity clause has nothing comparable to the duty in Section 1 to encourage moral, intellectual, and scientific improvement by all suitable means. Thus, it is similar to—and shares the same function as—the second duty in Section 1. Just as the Wisconsin Supreme Court recognized that the single duty in Wisconsin's uniformity clause to provide a public school system could not be transformed into a prohibition on the funding of educational options outside that system, the second duty of Section 1 cannot be transformed into a similar prohibition. This is because nothing in the language of that second duty—even if the first duty is cast aside—suggests that it is setting forth an exclusive means to deliver publicly funded education to Indiana children.

Of course, the first duty cannot be cast aside for the reasons described above. And notably, because Section 1 contains the first duty's explicit acknowledgment of the legislature's broad discretion within the educational arena—something Wisconsin's

uniformity clause lacks—the Choice Scholarship Program is on even firmer constitutional footing than is the Milwaukee program.

3. Plaintiffs’ reading of Article 8, Section 1, would have the radical result of uprooting several other educational programs.

Furthermore, if Plaintiffs were correct that the state could only provide for the education of Indiana children through the expenditure of funds on public schools, then many other publicly funded educational programs besides the Choice Scholarship Program—at the elementary, secondary, and post-secondary levels—would be placed in constitutional jeopardy. These programs—which do everything from providing textbook assistance for children in non-public schools, to offering bus service for children attending non-public schools, to paying for special-needs students to attend private schools, to providing scholarships that students may use to attend private colleges and universities—are discussed in more detail below. *See infra* at pp. 35-38. What all of them have in common is that they involve the spending of public dollars on the education of children who are *not* in public schools. Accordingly, under Plaintiffs’ reading of Article 8, Section 1, all of these programs, some of which have existed for decades, run afoul of that provision. Moreover, if this Court accepted Plaintiffs’ contention—based on their crabbed view of Section 1—that the only way the General Assembly can “provide for an education system” is through public schools, Pls.’ Br. at 22, then it is hard to see how the General Assembly could even provide support to public universities and colleges, which are not considered to be common schools, but are certainly part of the state’s education system. *City of Lafayette & Martin v. Jenners*, 10 Ind. 52, 59 (1857) (“Colleges, academies, and charitable associations, are not included within the ordinary

or technical meaning of the term common schools. The state is left, by her constitution, free to encourage education to any extent she may deem expedient, by such agencies.”).

4. *Bush v. Holmes*, upon which Plaintiffs principally rely, is inapposite.

Rather than grapple with the actual language of all of Article 8, Section 1, Plaintiffs place most of their reliance on the Florida Supreme Court’s decision in *Bush v. Holmes*. In *Holmes*, the Florida Supreme Court held that Florida’s Opportunity Scholarship Program, which allowed certain Florida students to use publicly funded scholarships to attend private schools, violated Article IX, section 1 of the Florida Constitution. *Bush v. Holmes*, 919 So. 2d 392, 413 (Fla. 2006). That provision gives the state the “paramount duty . . . to make adequate provision for the education of all children residing within [Florida’s] borders.” Fla. Const. art. IX, § 1. The issue in *Holmes* was whether the plaintiffs were correct in asserting that that duty could only be fulfilled through the means of the public school system, or whether the provision left open other means by which the legislature could fulfill that single duty. *Holmes*, 919 So. 2d at 405.¹⁰

That the Florida Supreme Court agreed with the plaintiffs in that case is of no help to Plaintiffs here. This is not merely because the decision has been roundly

¹⁰ The language under consideration in *Holmes* was:

The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.

Holmes, 919 So. 2d at 403 (emphasis removed).

criticized for the alchemic manner in which it—unlike the Wisconsin Supreme Court in *Davis*—turned a provision with no language stating that the public schools are the only way Florida can provide for the education of children into one that does.¹¹ More significantly, there is simply nothing in Article IX, section 1, of the Florida Constitution comparable to the broad duty—again, going beyond the public school system—imposed by Article 8, Section 1 to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement. Thus, one cannot reasonably look to *Holmes* for any guidance regarding that duty or the means by which it may be fulfilled.¹² And one certainly cannot rely on *Holmes*—as a decision that at least purported to take the full

¹¹ For but a small sample of this criticism, see *Holmes*, 919 So. 2d at 413-14 (Bell, J., dissenting) (stating that the majority’s opinion ignored basic rules of statutory construction, constitutional avoidance, judicial deference, and “‘first principles’ of state constitutional jurisprudence”); *Recent Cases: State Constitutional Law - Education Clause - Florida Supreme Court Declares State’s School Voucher Program Unconstitutional - Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), 120 Harv. L. Rev. 1097, 1100 (2007) (noting that the majority employed “strained constitutional analysis”); *Recent Developments*, 33 Fla. St. U.L. Rev. 1227, 1237 (2006) (“In further scrutiny, the reasoning of the majority and its application of *expressio unis* lacks logical flow.”); Clark Neily, *The Florida Supreme Court vs. School Choice: A “Uniformly” Horrid Decision*, 10 Tex. Rev. Law & Pol. 401, 412 (2006) (“The majority’s opinion in *Holmes III* is among the most incoherent, self-contradictory, and ends-oriented court decisions in recent memory.”); George F. Will, *In Florida, ‘Uniform’ Foolishness*, Wash. Post, Mar. 23, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/22/AR2006032202169.html> (“The court’s ruling was a crashing non sequitur [and] was neither constitutional law nor out of character.”).

¹² Plaintiffs argue that *Bush v. Holmes* should be persuasive in this instance because that decision “was not a result of anything specific to that state’s constitution.” Pls.’ Br. at 23. But, to the contrary, the majority in *Bush v. Holmes* tied the result in the case to the history of Article IX, section 1. *Holmes*, 919 So. 2d at 402-05. And the majority clearly relied on the specific wording of Article IX, section 1, particularly the language stating that it is a “paramount duty of the state to make adequate provision for the education of all children within its borders” of Article IX, section 1. See, e.g., *Holmes* at 407 n.10 (attempting to distinguish *Davis v. Grover* on ground that the uniformity clause under consideration there did not contain language stating that it is a “paramount duty of the state to make adequate provision for the education of all children within its borders”)

language of Article IX, section 1, seriously—for the proposition that the first duty in Section 1 is a nullity that may be ignored.

* * *

In conclusion, when read in its entirety, Article 8, Section 1, not only permits but encourages educational initiatives beyond the baseline duty to provide a free system of common schools, as the General Assembly has done. Accordingly, so long as the legislature stays within other constitutional bounds—which, as demonstrated below, it has—it retains considerable discretion for determining the most “suitable” means of encouraging moral, intellectual, scientific, and agricultural improvement.

B. The Scholarship Program Aids Parents and Their Children and Does Not Violate Article 1, Sections 4 and 6.

Rather than being the mere passive conduits of aid to religious institutions that Plaintiffs imply they are, the parents and their children who receive scholarships under the Choice Scholarship Program are in fact the direct and intended beneficiaries of the Program. The schools that the parents select for their children to attend are at most incidental beneficiaries of the program, selling their educational services to the parents. The Choice Scholarship Program simply empowers parents to exercise their pre-existing constitutional right to send their children to private schools, including religious ones, by providing them financial assistance in doing so.

The literal language of Article 1, Sections 4 and 6, does not encompass student-assistance programs like the Choice Scholarship Program,¹³ and the historical context in

¹³ Section 4 reads as follows: “No preference shall be given, by law, to any creed, religious society, or mode of worship; and no person shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent.”

which these provisions arose confirms that their prohibitions are aimed at direct support for religious ministries and religious institutions.¹⁴ Plaintiffs' expansive and ahistorical reading of these provisions conflicts with the most recent construction of these provisions by the Indiana Supreme Court and would call into question numerous existing Indiana student-assistance programs that "incidentally" benefit religious schools and colleges. Cases from all of Indiana's neighboring states that share its origins in the old Northwest Territory and whose constitutions contain very similar provisions uniformly have rejected the application of their provisions to student-assistance programs, including Michigan and Wisconsin Supreme Court cases construing provisions that served as the model for the inclusion of Section 6 in Indiana's 1851 Constitution. Acceptance of Plaintiffs' overextension of these provisions would also raise serious questions under both the Indiana and federal Constitutions' Free Exercise of Religion and Free Speech clauses.

1. The Choice Scholarship Program provides benefits to families and does not compel taxpayers to support religious ministries in violation of Section 4 or provide funds for the benefit of religious institutions in violation of Section 6.

Plaintiffs repeatedly describe the Choice Scholarship Program as "channel[ing funds] to the religious schools through the parents of participating students." Pls.' Br. at 10, 18-20. This language implies the parents are mere passive conduits by which the state provides funds to any schools chosen by the parents. Parents do not dispute that,

Section 6 reads as follows: "No money shall be drawn from the treasury, for the benefit of any religious or theological institution."

¹⁴ "Generally, questions arising under the Indiana Constitution are to be resolved by examining the intent of the framers, the language of the text in the context of the history surrounding its drafting and ratification, and case law interpreting the specific provisions. However, these 'constitutional talismans' or guideposts are not always instructive. Under such circumstances, it becomes appropriate to look elsewhere, including case law from other states interpreting similar provisions in their constitutions." *Jordan v. Deery*, 778 N.E.2d 1264, 1268 (Ind. 2002) (internal citations omitted).

because of the current prevalence of religious schools among the private-school universe, and because of the quality of those schools, most parents who choose private schools will select religious schools. But Parents object to the idea that they are simply channels for state aid to religious schools. In fact, Parents and their children are the direct and intended beneficiaries of the Program, and any “benefits” received by the schools Parents choose will be received as payment for services rendered to the children, not as aid to them as institutions. The parents—and no agency of the state—determine where the children will go to school, and, consequently, where the payment for services will go.

The plain language of Article 1, Sections 4 and 6, reflects that they are intended to prevent the *state* from supporting religious ministries, worship, and institutions. The parents aided by the Choice Scholarship Program are neither *agents of the state* nor *directed by the state* to use any religious schools they happen to prefer for their children’s educations; they are free and independent actors making decisions in the best interests of their children and exercising the exact same right their better-off neighbors do in choosing a private school to educate their children. Plaintiffs acknowledge, as they must, that the United States Supreme Court long ago rejected efforts by advocates for the public schools to require all children to attend public schools and upheld parents’ constitutional right to select a private- or religious-school education for their children. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); Pls.’ Br. at 10. Now similar advocates seek to prevent Indiana from enabling low- and middle-income Hoosiers to actually exercise that right through providing their children with scholarships. Properly understood, neither provision of the Indiana Constitution that Plaintiffs cite requires such an outcome. The issue is not, as Plaintiffs would have it, “the public funding of religious education,” Pls.’

Br. at 11, but rather, as with numerous other education programs in Indiana, the provision of public aid to low- and middle-income Hoosiers who otherwise would be unable to take advantage of educational opportunities.

Nothing in the historical context in which these provisions were drafted suggests that they were intended to reach beyond their plain language and prevent aid to individuals who might use that aid to purchase an education for their children from a religious school. Both provisions were intended to do exactly what their language says: to prevent compelling taxpayers to provide aid directly to religious ministries and places of worship (Section 4) or to provide funds for the benefit of religious institutions (Section 6). Neither says anything about providing public funds for the benefit of fellow citizens, nor requires limiting their educational choices for their children. Plaintiffs expand the meaning of these two provisions beyond their plain language and original intent as a constraint on action by the state, seeking to make their reach include actions by private individuals. Although some courts in other states have done this, the United States Supreme Court has refused to so extend the Establishment of Religion Clause, as have the courts of the four neighboring states that share the earliest stage of Indiana's constitutional history.¹⁵

¹⁵ Indiana, Ohio, Michigan, Wisconsin, and Illinois were formed from the original Northwest Territory, for the governance of which the First Congress passed the Northwest Ordinance of 1787, 1 Stat. 50. The Ordinance constituted the organic law for the Territory and provided the common source for their political systems; in effect it can be considered the first "state constitution" for the states of this region. George Anastaplo, *Law, Education, and Legal Education: Explorations*, 37 Brandeis L.J. 585, 680 (1999).

a. **Article 1, Section 4, prohibits only actions traditionally regarded as establishing a religion.**

Plaintiffs correctly trace the origins of Article 1, Section 4, to similar language in the 1682 Frame of Government granted to William Penn for the colony of Pennsylvania, which was later included in Pennsylvania's 1776 constitution. Pls.' Br. at 11. The New England states generally established Congregationalism as their state religions, while the southern states established Anglicanism. Pennsylvania, the most religiously pluralistic of the former 13 colonies, never had an established religion, the compelled-support language preventing it from doing so.¹⁶ When, after the Revolution, states such as Connecticut and Virginia wished to disestablish their churches, they adopted "compelled support" provisions modeled on Pennsylvania's and similar to Indiana's Section 4.¹⁷ New states, such as Indiana in 1816, usually included similar compelled-support language in their new constitutions to likewise prevent any establishment of a state religion.¹⁸

The language of compelled-support clauses like Indiana's Section 4 prohibits the most common elements of an established religion. Thus, Section 4 prohibits compelling any person to attend a church of the established religion, assist in erecting a church of the established religion, or to "support" any place of worship or ministry. These are all common elements of what it meant to have an established church or religion. In this

¹⁶ Richard D. Komer, *School Choice and State Constitutions' Religion Clauses*, 4 J. of Sch. Choice 331 (2009).

¹⁷ *Id.*

¹⁸ The First Amendment to the U.S. Constitution is deliberately addressed to Congress ("Congress shall make no law . . ."), specifically to leave to the states whether to establish a state religion or not. It was not until 1940 that the U.S. Supreme Court applied the Establishment Clause to the states in *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Consequently, all state constitutions contain their own religion clauses, with 27 states including compelled-support clauses like Section 4 to prevent a religious establishment.

context, “to support a place of worship or ministry” meant to pay tithes to support the established religion, to pay for the upkeep of its churches and, most importantly, to pay the salaries of the ministers of the church.¹⁹ Thus, as Plaintiffs themselves note, “‘the compelled support’ language appeared in Thomas Jefferson’s ‘Virginia Bill for Religious Liberty’ of 1785 . . . to counter a proposal to create a tax to support teachers of the Christian religion [i.e., ministers].” Pls.’ Br. at 11. That proposal from Patrick Henry sought to re-impose a more liberal requirement in place of the previous compelled-support law that required support of Anglican ministers’ salaries only. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 35-42 (1947) (Rutledge, J., dissenting).

The compelled-support actions that Section 4 and similar provisions in other constitutions prohibit are all *direct* forms of support for religious ministries. Forcing one to attend, erect, or pay for the upkeep of a church and its minister are all forms of direct support for the ministry of that church. They are a far cry from permitting taxpayers to decline to pay taxes to support their fellow citizens’ educational choices, as Plaintiffs read Section 4. Nothing in the plain language of Section 4 nor in the historical context in which it arose suggests an intention that it extend so far.

Indeed, limiting the compelled-support language of Section 4 to direct support for churches and ministers *qua* ministers comports with the history of early education in Indiana and elsewhere. Although the 1816 Constitution called for a general system of education and for the disbursement of funds to public schools and seminaries (high schools), creation of such a system was hampered by a lack of resources and

¹⁹ Philip Hamburger, *Separation of Church and State* 90 (2002).

coordination.²⁰ Because of the lack of a centralized system before 1850, churches tried to fill the educational void and nearly every preacher was also a teacher.²¹ Some denominational schools were classified as “public” and thus entitled to receive public funds.²² In 1821 the state began providing funds for county seminaries, the high schools of the time, and by that time some of the most prominent principals of those schools were Protestant ministers.²³

For the state to be paying Protestant ministers for their services as principals of religious “public” schools is obviously inconsistent with Plaintiffs’ reading of Section 4, but not with Parents’ reading, which prohibits only the paying of ministers for service *as ministers*. There is, however, another more important reason for preferring Parents’ reading of Section 4—under Plaintiffs’ interpretation, Section 6 is entirely subsumed in Section 4 and there is no reason for the addition of Section 6 in the 1851 Constitution. Section 6 prohibits state funding of religious institutions and Parents tend to agree with Plaintiffs that religious institutions include religious schools and colleges, as well as other religious institutions such as religious hospitals and orphanages. Like religious schools and colleges, these other religious institutions are often operated as religious missions of their sponsoring churches. Consequently, under Plaintiffs’ overly broad reading, Section 4 prohibits compelling taxpayers to support these sorts of institutions as well. This renders Section 6 entirely redundant of Section 4 and thus superfluous. Under Parents’

²⁰ Richard Gause Boone, *A History of Education in Indiana* 21-23 (1892).

²¹ Logan Esarey, *A History of Indiana from its Exploration to 1850*, Vol. I 291 (1915); see also David Tyack, *The Kingdom of God and the Common School: Protestant Ministers and the Educational Awakening in the West*, 36 *Harv. Educ. Rev.* 447, 454 (1966).

²² Boone, *supra* n.20, at 35.

²³ *Id.* at 52.

reading of Section 4 as directed at preventing taxpayers from having to provide direct aid to churches, the addition of Section 6 to the 1851 Constitution was, rather than a redundancy, a covering of new ground. And as Parents show in the next section, Section 6 did indeed respond to a new concern of the Protestant establishment—although not in a manner that aids Plaintiffs’ interpretation of that provision.

Before turning to Section 6, however, one fact about Plaintiffs’ argument concerning Section 4 must be noted: it cites no Indiana case as relevant to the merits of their argument that Plaintiffs are being compelled to support religious ministries. They cite *City Chapel Evangelical Free, Inc. v. City of South Bend*, 744 N.E.2d 443 (Ind. 2001), and *Hammer v. State*, 173 Ind. 199, 89 N.E. 850 (1909), but neither of those cases involve claims of Section 4 violations. Instead, Plaintiffs rely nearly exclusively on a Vermont Supreme Court case, while ignoring a relevant Indiana appellate case construing Section 4, *Center Township of Marion County v. Coe*, 572 N.E.2d 1350 (Ind. Ct. App. 1991). A brief discussion of that case suggests why.

In *Coe*, a government agency was sued by homeless persons who complained that the agency had contracted with religious missions operated by the Salvation Army to provide emergency shelter services and that all the available missions required that they attend religious services as a condition of receiving shelter. 572 N.E.2d at 1360. This plainly implicated Section 4 by compelling the aid beneficiaries to attend religious services as a condition for receiving the statutorily mandated benefits and the Court of Appeals found a violation of the Section. *Id.* The Court held the agency could contract with the religious missions but not allow them to condition benefits on attendance at

religious services. *Id.* The “compulsion” plainly arose from the lack of any alternative not involving attendance at religious services.

Under the Choice Scholarship Program, participation is entirely voluntary, and parents always have the alternative of remaining in or returning to the public schools. They also can choose non-resident public schools and non-religious private schools participating in the Program. Also, in the Choice Scholarship Program it is the parents who contract for the relevant services, not the state. Thus, any participation in religious activities is truly voluntary, in schools with which the parents have entered into agreements.

The Vermont case on which Plaintiffs rely, *Chittenden Town School District v. Vermont Department of Education*, 738 A.2d 539 (Vt. 1999), concludes that Vermont’s compelled-support language prohibits participation by religious schools in Vermont’s tuitioning system, whereby local school districts without public schools pay tuition for their residents to attend other districts’ public schools or private schools. The Vermont Supreme Court held that where religious worship takes place in religious schools as part of the educational experience, Vermont’s analogue to Section 4 prevents students from choosing those schools. *Id.* at 342-43. Despite its extensive but flawed foray into the historical underpinnings of its provision,²⁴ the Vermont Supreme Court ignored the fact that none of that history involves educational institutions like schools or educational

²⁴ The Vermont court in *Chittenden* failed to discuss the extent to which the *public* schools of the time in question contained elements of religious worship (prayer, hymn singing, etc.), including in Pennsylvania and Virginia, where such practices continued into the 1960’s, ending only with the U.S. Supreme Court’s decision in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963). If taxpayers were compelled to support in public schools what is today regarded as religious worship, it is anomalous to treat religious worship in private schools differently.

programs permitting students to select schools. As such, *Chittenden* is unpersuasive and should not be followed.²⁵

b. Article 1, Section 6, does not prohibit enacting programs for the direct benefit of individuals such as Parents.

Section 6 forbids drawing money from the state treasury “for the benefit of any religious or theological institution.” This language plainly reflects its historical origins in rebuffing the efforts of a particular church (the Catholic Church) to obtain institutional subsidies for its schools equal to those provided to the nondenominational Protestant public schools. The language and purpose of Section 6 reflect no intention of forbidding religiously neutral aid to *students*, whose parents may choose to use their state aid to send them to religious schools, among others.

Section 6 is a typical state precursor to the failed federal Blaine Amendment of 1875, which sought to prevent funding of sectarian schools, with “sectarian” being a code word for Catholic.²⁶ In prohibiting direct funding for religious *institutions* of all types, Section 6 is broader than some amendments found in the education article of state constitutions that apply only to direct funding of religious *schools*. *See, e.g.*, Pa. Const. art. 3, § 15 (“No money raised for the support of the public schools of the

²⁵ The Vermont Supreme Court is well-known for treating its constitution as a highly malleable document. In *Chittenden* the Vermont Supreme Court recognized that the Vermont Constitution “is the shortest and least amended Constitution in the United States.” 738 A.2d at 558. It is also one of the oldest, adopted in 1793. Nevertheless, shortly before its decision in *Chittenden* the Vermont Supreme Court held that Vermont’s venerable public-education-financing system violated its constitution because of its reliance on local revenues, *Brigham v. State*, 692 A.2d 384 (Vt. 1997), and shortly after *Chittenden*, that Court held that the Vermont constitution required the legislature to provide for civil unions or same-sex marriage, *Baker v. State*, 744 A.2d 864 (Vt. 1999).

²⁶ “Consideration of the [Blaine] Amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that ‘sectarian’ was a code word for ‘Catholic.’” *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op. of Thomas, J).

Commonwealth shall be appropriated to or used for the support of any sectarian school.”). But when applied to elementary and secondary education, Section 6 accomplished the same purpose as those narrower state Blaine Amendments, which was preserving the Protestant monopoly over school funds and rebuffing the efforts of the Catholic Church to obtain equal public subsidies for its parochial schools.²⁷

Contrary to Plaintiffs’ assertion that “[a]s much as religion is a part of American life and tradition, public funding of religion is not,” Pls.’ Br. at 11, the public or common schools began as nondenominational Protestant institutions.²⁸ As one of Plaintiffs’ own sources states: “A common education for all Protestant children required that public schools be nonsectarian *but did not require that they be secular*. That happened much later.”²⁹ That same source notes that “[t]he separation of church and state for [Horace] Mann and others, it should be noted, did not bar the teaching of religion. Nonsectarian schools in the nineteenth century did not imply secular, ‘Godless’ school rooms.”³⁰ The nondenominational Protestantism of the public schools rendered them inhospitable to the

²⁷ See generally Lloyd P. Jorgenson, *The State and the Non-Public School: 1825-1925* (1987). See also *Kotterman v. Killian*, 972 P.2d 606, 624 (Ariz. 1999) (“The Blaine Amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing ‘Catholic’ menace.”); Robert W. Gall, *The Past Should Not Shackle the Present: The Revival of a Legacy of Religious Bigotry By Opponents of School Choice*, 59 N.Y.U. Ann. Surv. Am. L. 413 (2003).

²⁸ Robert Baird, *Religion in America* (1856); Tyack, *supra* n.21, at 448 (“Schools and churches were allies in the quest to create the Kingdom of God in America.”).

²⁹ Claudia Goldin & Lawrence F. Katz, *The ‘Virtues’ of the Past: Education in the First Hundred Years of the New Republic* 28-29 (Nat’l Bureau of Econ. Research, Working Paper No. 9958, 2003) (emphasis added). “Much later” is footnoted to *Abington School District v. Schempp*, 374 U.S. 203 (1963), when the U.S. Supreme Court prohibited Bible reading and recitation of the Lord’s Prayer in public schools.

³⁰ Goldin & Katz, *supra* n.29, at 28.

growing Catholic minority, which began to leave the public schools to create its own religious schools after its efforts to obtain accommodations within those schools failed.

As New Englanders moved west, they brought their ideas regarding the importance of religion in the public schools with them.³¹ Many of the early school leaders in Indiana were Protestant clergymen.³² Through their connections with the leaders of the Common School Movement in the East as well as their extensive religious connections, there can be no doubt that Hoosiers were aware of the growing conflicts between Catholics and the established Protestant denominations that controlled the public schools.

In 1835, the influential anti-Catholic Presbyterian minister Lyman Beecher of Cincinnati, Ohio, issued his “Plea to the West.”³³ In it, he argued that elements of the Catholic religion were not compatible with core republican principles, such as free inquiry and reading of the Bible, and that Catholic influence could subvert republican institutions. He urged frontier states to support an education system to counteract the presence of Catholic schools that corrupt Protestant students.³⁴ That same year, Indiana’s

³¹ According to one Indiana historian, during this period, “Sunday schools and public schools functioned as ‘a partnership on which thousands of Hoosier communities counted as primary bearers of their faith and culture.’” David J. Bodenhamer and Randall T. Shepard, *A History of Indiana Law* 227 (2006) (quoting L.C. Rudolph, *Hoosier Faiths: A History of Indiana Churches & Religious Groups* 357 (1995)).

³² Jorgenson, *supra* n.27, at 52.

³³ According to Jorgenson, “Lyman Beecher was one of the most prominent of New England divines and an indefatigable promoter of the common schools. From his pulpit in Boston, Beecher waged an unrelenting war against Romanism, and his inflammatory sermons were at least partially responsible for the burning of the Ursuline Convent in 1834.” *Id.* at 34. The Ursuline Convent operated a girls’ school with many Protestant students. In 1834, Beecher moved to Cincinnati where he helped found a theological seminary to supply preachers to the West. *Id.*

³⁴ Lyman Beecher, *A Plea to the West* 84-87 (1835).

neighbor Michigan included the very first state precursor to the federal Blaine Amendment in its original 1835 Constitution.³⁵

Increasing Catholic immigration into the cities of the East spawned several controversies over what became known as the School Question, which received national attention. The first, in New York City, occurred in 1840-42 and ended in a Protestant victory whereby legal sanction for Bible reading in the public schools was assured and Catholic schools were denied public aid.³⁶ The second, the Philadelphia Bible Riots, triggered by Catholic efforts to be allowed to read their version of the Bible in public schools, ended in 1844 with several Catholic churches burned and 58 dead (including 14 soldiers called in to quell the rioting triggered by anti-Catholic nativists) and 140 wounded.³⁷ These two controversies spurred Catholic leaders to the realization that the only adequate solution was a system of Catholic schools, so they turned their efforts to the creation of such schools and to demands that they be given public funds for their operation.³⁸

These events form part of the national context in which the Indiana constitutional convention considered adding Section 6 to the 1851 Constitution. Catholicism in Indiana was growing, and by 1849 there were over 30,000 Catholic residents, served by 35

³⁵ That provision (Article I, Section 5), read: “No money shall be drawn from the treasury for the benefit of religious societies, or theological or religious seminaries.”

³⁶ Jorgenson, *supra* n.27, at 74-76.

³⁷ *Id.* at 76-83.

³⁸ *Id.* at 83. These conclusions were formalized in 1852 at the First Plenary Council, held in Baltimore. *Id.* at 83-85.

priests.³⁹ Another milestone was reached that year—the University of Notre Dame, chartered by the Indiana General Assembly in 1844, awarded its first degrees.⁴⁰

The 1850 convention retained Section 4 with its compelled-support language and added Section 6 prohibiting drawing money from the state treasury for the benefit of religious institutions. Delegate Owens prepared an address to explain to the people of Indiana the changes proposed in the revised constitution, which explained that Section 6 was modeled on similar provisions of the Michigan and Wisconsin Constitutions.⁴¹ Also, substantial amendments were made to improve state funding for the public school system.⁴²

In adding Section 6, the convention ended the previous practice of providing direct support to religious schools. Such direct aid was clearly for the benefit of the schools receiving the aid, and the addition of Section 6, when taken in conjunction with the addition of Article 8 and the increased funding for the public schools, meant that henceforth all direct funding would be for the nondenominational Protestant common schools. Catholic parochial schools would now be ineligible for direct state support, precisely as intended by the Protestant advocates of the Common School Movement.

Nothing in this history of Section 6, however, suggests that it was intended to go beyond aid provided directly to religious schools *qua* schools. Unlike direct assistance to religious schools, student-assistance programs did not exist at that time and thus the

³⁹ Charles Blanchard, *History of the Catholic Church in Indiana* 75 (1898).

⁴⁰ “Go Forth and Do Good,” (Wilson D. Miscamble, C.S.C. ed. 2003), *available at* <http://undpress.nd.edu/book/P00875>.

⁴¹ *Journal of the Convention of the People of the State of Indiana* 964 (1850).

⁴² *Id.* at 969.

convention had no reason to prohibit them.⁴³ Where such programs, like the Choice Scholarship Program, are enacted for the benefit of the students and provide only incidental “benefits” for the schools they choose, they are constitutional under Section 6 and *Embry v. O’Bannon*, 798 N.E.2d 157 (Ind. 2003). Parents discuss that decision in the next section.

c. In *Embry*, the Indiana Supreme Court interpreted Section 6 to permit incidental benefits for religious schools where the program is not enacted for the benefit of religious schools.

As Plaintiffs note, there is no controlling majority opinion in *Embry*, so it is necessary to look at the plurality opinion as well as Justice Boehm’s concurrence. Parents tend to agree with Justice Boehm and Plaintiffs that the term “religious institutions” used in Section 6 includes religious schools, as well as religious colleges, hospitals, and orphanages. Justice Boehm, joined by Justice Sullivan, concurred separately in *Embry* to express his disagreement with Justice Dickson’s opinion, which suggested without deciding that religious schools might not be encompassed by the term “religious institutions.” Justice Boehm did, however, concur in the result, which he stated as follows: “[the] expenditure of public funds for proper educational purposes is not ‘for the benefit’ of a religious institution even if the delivery point of the educational services is a parochial school.” *Embry*, 298 N.E.2d at 169 (Boehm, J., concurring in the result).

⁴³ After the Michigan Supreme Court ruled in 1970 that its provision on which Section 6 was modeled did not prohibit providing public-school teachers to teach secular subjects in religious schools, *Advisory Opinion re Constitutionality of P.A. 1970, No.100*, 180 N.W.2d 265 (Mich. 1970), opponents of the program passed an initiative that stated that the legislature could provide no assistance “to support the attendance of any student at any . . . nonpublic school.” Mich. Const. art. VIII, § 2. The Michigan Constitution demonstrates the ease with which constitutional language could have been drafted to explicitly accomplish the ends Plaintiffs seek in this case.

To Justice Boehm, the key question to be answered under Section 6 was “whether a particular expenditure is ‘for the benefit’ of the school.” *Id.* at 169. He noted that this is the key question for both the Michigan and Wisconsin courts when interpreting their similar provisions, and that “both states focus on whether legislation has the primary effect of advancing religion, and whether the legislature designed the legislation to benefit a parochial school.” *Id.* at 170. Here, there is absolutely no evidence that the Indiana General Assembly *designed* the Choice Scholarship Program for the benefit of religious schools, rather than for the benefit of its obvious beneficiaries, Parents and similarly situated families.

It is noteworthy that the Wisconsin case on which Justice Boehm relied for his analysis of how Wisconsin understands its analogue to Section 6 is *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), which upheld the Milwaukee Parental Choice Program, a school choice program identical to the Choice Scholarship Program in all relevant aspects. He expressed no discomfort whatsoever about the outcome in *Jackson* and viewed it as reaching a similar conclusion as that reached by Justice Dickson in *Embry*, namely that the question is not “whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion.” *Embry*, 798 N.E.2d at 170 (Boehm, J., concurring in the result) (adopting language from *Jackson*, 578 N.W.2d at 621).

Justice Dickson in his opinion joined by Justice Rucker framed the question under Section 6 as whether the phrase “for the benefit of” “was intended to erect an absolute prohibition against any expenditure of public money that might confer merely pecuniary incidental benefit to a religious institution.” *Embry*, 798 N.E.2d at 164. After reviewing

Indiana's limited Section 6 case law and cases from Michigan and Wisconsin construing their similar provisions, he concluded that the dual-enrollment program did not confer substantial benefits upon religious institutions nor directly fund activities of a religious nature. *Id.* at 166-67.

Under the Choice Scholarship Program, any benefits conferred on religious schools are clearly incidental to the parents having chosen those schools. The children are the intended beneficiaries of the program, and any benefit the schools receive is incidental to their agreements with the parents to educate their children in exchange for tuition payments. Any funding of religious activities at those schools is at most indirect, funded through the parents' payment of tuition, voluntarily undertaken.

The two Indiana appellate decisions Justice Dickson discussed in *Embry* illustrate what he meant by substantial benefits for religious institutions and direct funding of activities of a religious nature, and confirm the reading of his opinion as consistent with the conclusion that the Choice Scholarship Program is constitutional. In *State ex rel. Johnson v. Boyd*, 217 Ind. 348, 28 N.E.2d 256 (1940), the Indiana Supreme Court upheld a local school district's hiring of members of various religious orders as public-school teachers. The plaintiffs apparently alleged the teachers would contribute their salaries to their religious orders. The Court held that paying the salaries of the teachers did not constitute benefits to a religious institution. *Boyd*, 28 N.E.2d at 266.

In *Center Township of Marion County v. Coe*, 572 N.E.2d 1350 (Ind. Ct. App. 1991), discussed above, the Court of Appeals held that a government agency could contract with private religious missions to provide emergency shelter assistance for the homeless, but that the religious missions could not require homeless persons to attend

religious services as a condition of receiving services. Paying the shelters for their sheltering the homeless was not a violation of the “benefits” language of Section 6, but conditioning the aid on attendance at religious services plainly violated the beneficiaries’ free-exercise rights because they had no other options. *Coe*, 572 N.E.2d at 1360.

In *Boyd*, the salaries paid to the priests and nuns teaching in the public schools did not constitute payments for the benefit of the religious orders to which they belonged and to whom they may have donated their salaries. They were paid under contracts with the school district for the services they rendered. *Boyd*, 28 N.E.2d at 265. In *Coe*, there were no providers of emergency shelters that did not condition receipt of their services on participation at religious services. Thus, the payments to religious missions resulted in compelling homeless people to attend religious services involuntarily as a condition of receiving statutorily mandated services. *Coe*, 572 N.E.2d at 1359. Under the Choice Scholarship Program, however, the parents, unlike the homeless persons in *Coe* who had no choice at all, always have the option of keeping their children in the nonreligious public schools, applying to nonresident public schools, or applying to nonreligious private schools. It is the parents who receive the direct and primary benefit of the program, by being enabled to choose a school for their children’s education. Parents contract directly with the private schools, whose only “benefit” is having more potential buyers of their educational services. And

In conclusion, the Choice Scholarship Program is consistent with all three of Indiana’s appellate decisions interpreting Section 6: *Boyd*, *Coe*, and *Embry*, including both Justice Dickson’s and Justice Boehm’s opinions. Plaintiffs’ arguments that the Choice Scholarship Program would directly fund religious education and substantially

benefit the religious schools chosen by the parents ignore the fact that under the Choice Scholarship Program the state is not “directly” funding religious education (the parents are).⁴⁴ Nor would the financial benefits be any different in kind or extent than the financial benefits that private schools reap through the dual-enrollment program in *Embry* or through contracting with the state to provide educational services.

2. Indiana historically has provided assistance to families selecting private education.

Indiana has provided many forms of assistance to families that select private education, at both the elementary and secondary level and the post-secondary level. The language of both Sections 4 and 6 applies to both levels of education, to the extent Section 4 applies to education at all. To date, none of these programs has been challenged in the Indiana courts, with the exception of the dual-enrollment program upheld under both Sections in *Embry*. Similar programs have, however, been upheld by the U.S. Supreme Court against Establishment Clause challenges and by other state supreme courts against challenges under their similar provisions. Plaintiffs’ reading of Sections 4 and 6 would invalidate *all* of these programs.

a. Plaintiffs’ interpretations of Sections 4 and 6 would invalidate Indiana’s programs that assist families at the elementary and secondary education level.

Like many other states, Indiana provides free transportation to private-school students where it provides such assistance to public-school students. Ind. Code § 20-27-11-1. Indiana also provides free secular textbooks to private-school students. Ind. Code

⁴⁴ Parents do not argue that the state can directly fund religious education, but only that the state can aid them in exercising their pre-existing right to provide their children an education at a religious school that meets all of Indiana’s interests in having a well-educated populace, the right upheld in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

§ 20-26-12-16. And as discussed in the *Embry* case, Indiana provides public-school teachers to teach certain classes in private schools where the students are “dual-enrolled.” Perhaps in part because the U.S. Supreme Court upheld similar transportation and textbook programs in other states against Establishment Clause challenges,⁴⁵ no one has challenged Indiana’s programs under Sections 4 and 6.

In addition to the Choice Scholarship Program, Indiana also recently enacted a program to provide state funds to supplement the federal funds that the federal Individuals with Disabilities Education Act (IDEA) requires be spent on services for children with special needs enrolled in private schools by their parents. Ind. Code § 20-43-7-9. Under Plaintiffs’ reading of Sections 4 and 6, Indiana’s transportation, textbook, and special-education supplementary funding are all unconstitutional, because they make it easier for children to attend religious schools, which—under Plaintiffs’ theory—constitutes a “substantial benefit” to the school and “support” to their religious ministries. Parents’ position is that all of these programs, including the Choice Scholarship Program, defray costs that private-school parents routinely pay for when they enroll their children in private school⁴⁶ and thus directly aid the families and only incidentally aid the schools their children attend.

⁴⁵ The U.S. Supreme Court upheld New Jersey’s transportation program in *Everson v. Board of Education*, 330 U.S. 1 (1947), after the New Jersey Supreme Court upheld the program under a compelled-support clause of the New Jersey constitution. 44 A.2d 333 (N.J. 1945). The U.S. Supreme Court upheld New York’s textbook program in *Board of Education v. Allen*, 392 U.S. 236 (1968), after the New York Court of Appeals upheld the programs under the state constitution’s Blaine Amendment. 228 N.E.2d 791 (N.Y. 1967). The New York Court of Appeals specifically held that the provision of free textbooks did not directly or indirectly aid the religious schools chosen by the families, but provided at most “incidental benefits.” *Id.* at 804.

⁴⁶ The dual-enrollment program of *Embry* does not fit this pattern but rather is a program where districts provide benefits directly to students in private schools in a manner similar

b. Plaintiffs' interpretations of Sections 4 and 6 would invalidate Indiana Programs that assist students at the post-secondary education level.

The term "religious institutions" as used in Section 6 includes religious colleges, among other institutions. Indiana has several student-assistance programs at the post-secondary education level that are structured the same way as the Choice Scholarship Program. These include the Frank O'Bannon Grant Program and the Twenty-First Century Scholarships Program. Ind. Code §§ 21-12-3-1 to -21, 21-12-4-1 to -8, 21-12-6-1 to -15. These programs provide eligible students with assistance in attending the colleges of their choice without regard to the religious nature of the college chosen. As such, they parallel federal student-assistance programs like the Pell Grant program. 20 U.S.C. § 1070a. The State Student Assistance Commission of Indiana (SSACI), administers these programs. In the 2008-09 school year, 27 religious colleges in Indiana enrolled more than 10,000 Indiana grant recipients, with those students receiving over \$70 million dollars in assistance.⁴⁷ Some religious colleges, which enroll primarily Indiana undergraduates, have a substantial proportion of their undergraduates receiving assistance under these programs, to the tune of millions of dollars in scholarship payments.⁴⁸

to the federal Title I program in which public-school teachers provide remedial education classes in private schools, including religious ones. In *Agostini v. Felton*, 521 U.S. 203 (1997), the U.S. Supreme Court upheld this practice against an Establishment Clause challenge.

⁴⁷ SSACI, Activity and Program Report For Academic Year 2008-2009 45-48, 51-54 (2009), available at <http://www.in.gov/ssaci/files/AnnualReport08-09.pdf>.

⁴⁸ For example, Anderson University is associated with the Church of God and requires its students to attend chapel twice a week and take two religion classes. See Anderson University, <http://www.anderson.edu> (last visited July 19, 2011). Nearly a quarter of its students receive Indiana state scholarships totaling approximately \$2.4 million per year. See SSACI, Activity and Program Report for Academic Year 2009-2010 51 (2010),

Under Plaintiffs' interpretations of Section 4 and Section 6, religious post-secondary-education institutions may not participate in these programs and the students currently using their state grants to attend these schools must transfer elsewhere to retain their benefits. Although Indiana's post-secondary-education scholarship programs have not been challenged to date, other states' programs have, though rarely successfully and none since the U.S. Supreme Court clarified that such programs are permissible for elementary and secondary education in its decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).⁴⁹ The implications for these programs of an adverse ruling on the Choice Scholarship Program are clear.

3. Cases from Indiana's neighboring states that share its historical origins in the old Northwest Territory uniformly support the constitutionality of the Choice Scholarship Program.

As both opinions in *Embry* discussed, the 1850 Indiana constitutional convention modeled Section 6 on similar provisions in Michigan and Wisconsin. Michigan included its provision in its original 1835 Constitution, along with a compelled-support provision very similar to Indiana's Section 4. The Michigan Supreme Court found neither provision to bar Michigan from providing teachers paid with state funds to teach secular

available at <http://www.in.gov/ssaci/files/AnnualReport2009-10.pdf> (last visited July 19, 2011). Marian University, associated with the Catholic Franciscans, has 11 services per week and requires students to take two theology courses and attend convocation during their senior seminar. *See* Marian University, <http://www.marian.edu> (last visited July 19, 2011). Over 30 percent of its students receive state scholarships, totaling approximately \$3.4 million per year. *See* SSACI, Activity and Program Report for Academic Year 2009-2010 54 (2010), *available at* <http://www.in.gov/ssaci/files/AnnualReport2009-10.pdf> (last visited July 19, 2011).

⁴⁹ The only state higher-education scholarship case since *Zelman* involved Colorado's exclusion of a "pervasively sectarian" college from its program. The U.S. Court of Appeals for the Tenth Circuit held that it violated the federal religion clauses by discriminating among religions without constitutional justification and required unconstitutionally intrusive scrutiny of religious belief. *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245 (10th Cir. 2008).

subjects in religious schools. The Michigan Supreme Court found that any benefits to religious schools were incidental to aid provided to the students and that neither of its cognate provisions would be violated. *Advisory Opinion re Constitutionality of P.A. 1970, No.100*, 180 N.W.2d 265 (1970).

Similarly, both *Embry* opinions discussed Wisconsin's provisions and cases and concluded that Wisconsin's Supreme Court permits incidental benefits to religious institutions. 798 N.E.2d at 165-66, 170. Wisconsin included both a compelled-support clause and Blaine Amendment language in its constitution enacted in 1848, when Wisconsin became a state. Wis. Const. of 1848, art. 1, § 18, *available at* <http://www.wisconsinhistory.org/turningpoints/search.asp?id=1627>. Justice Boehm specifically discussed the Wisconsin Supreme Court's 1998 decision in *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), where it upheld Milwaukee's Parental Choice Scholarship Program, a program similar in legal structure to the Choice Scholarship Program, though limited to one city. *Embry*, 798 N.E.2d at 170 (Boehm, J., concurring in the result). He concluded that Justice Dickson took a similar approach to the *Jackson* court in determining whether the Wisconsin program was "for the benefit" of the religious schools participating in the program, *id.*, and then indicated his agreement with Justice Dickson that the program does not expend funds for the benefit of a religious institution. *Id.*

The other two states that share Indiana's origins in the old Northwest Territory, Ohio and Illinois, also have compelled-support provisions like Section 4 in their constitutions (Article I, Section 7, and Article I, Section 3, respectively), although only Illinois also has a state Blaine Amendment (Article X, Section 3). Both states interpret

their provisions to permit school choice programs such as the Choice Scholarship Program. Ohio's Supreme Court has upheld a program modeled on the program the Wisconsin Supreme Court upheld in *Jackson*, the Cleveland Scholarship and Tutoring Program, finding no violation of either the Ohio compelled-support clause or the federal Establishment Clause. *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999).⁵⁰

Like Ohio, Illinois interprets its compelled-support clause and state Blaine Amendment to parallel the federal Establishment Clause. Thus, the Illinois Supreme Court approved a statute providing for the transportation of private-school students in 1973, based on the U.S. Supreme Court's *Everson* decision upholding New Jersey's transportation program. *Bd. of Educ. v. Bakalis*, 299 N.E.2d 737 (Ill. 1973). In *Bakalis*, the Illinois Supreme Court held that its state Blaine Amendment imposes restrictions concerning the establishment of religion that are *identical* to those imposed by the U.S. First Amendment. 299 N.E.2d at 745. That same year, in *People ex rel. Klinger v. Howlett*, 305 N.E.2d 129, 130 (Ill. 1973), the Illinois Supreme Court reaffirmed its position on the parallel nature of the Illinois and federal constitutions' religion provisions. After holding its decision in abeyance until the U.S. Supreme Court issued its decision in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), which involved a similar program from New York, the Illinois Supreme Court struck down a program providing tuition grants to families with children in private elementary schools because it could lead to subsidization of religious services. The Illinois Supreme Court based its ruling on its understanding of the federal Establishment

⁵⁰ This is the same program that the U.S. Supreme Court subsequently upheld against an Establishment Clause challenge in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

Clause, under which the U.S. Supreme Court had held that tuition grants in the New York program were forbidden.

The Illinois courts have continued their parallel interpretation of the Illinois religion clauses, an approach now known as the “lockstep doctrine.” In *State v. Falbe*, 727 N.E.2d 200, 207 (Ill. 2000), the Illinois Supreme Court extended the *Bakalis* lockstep doctrine to Illinois’ compelled-support provision as well. Then, in *Toney v. Bower*, 744 N.E.2d 351 (Ill. App. Ct. 2001), *appeal denied*, 754 N.E.2d 1293 (Ill. 2001); and *Griffith v. Bower*, 747 N.E.2d 423 (Ill. App. Ct. 2001), *appeal denied*, 755 N.E.2d 477 (Ill. 2001), two Illinois appellate courts applied the lockstep doctrine and held that because a tax credit for educational expenses, including private-school tuition, would not violate the Establishment Clause, it did not violate the Illinois Constitution, either. Both courts relied on the same line of cases that shortly thereafter led the U.S. Supreme Court in *Zelman* to uphold a program similar to the Choice Scholarship Program. Although *Howlett* has not been explicitly overruled, the U.S. Supreme Court’s *Nyquist* decision on which it relied has been cabined by *Zelman*,⁵¹ and a program identical to the Choice Scholarship Program clearly would pass constitutional muster in Illinois.

This is because, under the Establishment Clause, the U.S. Supreme Court has applied a different standard to student-assistance programs like the Choice Scholarship Program than to direct-aid programs:

Our decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools

⁵¹ “To the extent the scope of *Nyquist* has remained an open question in light of these later decisions, we now hold that *Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individuals without regard to religion.” *Zelman*, 536 U.S. at 662.

only as a result of the genuine and independent choices of private individuals. While our jurisprudence with respect to the constitutionality of direct aid programs has “changed significantly” over the past two decades, our jurisprudence with respect to true private choice programs has remained consistent and unbroken.

Zelman, 536 U.S. at 649 (citations omitted). The Court then discussed the standard established in its private choice decisions:

Mueller, *Witters*, and *Zobrest* thus make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach *religious institutions* only by way of the deliberate choices of numerous individual recipients. The *incidental advancement* of a *religious mission*, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not the government, whose role ends with the disbursement of benefits.

Zelman, 536 U.S. at 652 (emphasis added).

Parents have emphasized “religious institutions,” “incidental advancement,” and “religious mission” in the above quotation because the first and third terms appear in Sections 6 and 4, respectively, and the concept of “incidental advancement” is very similar to Justice Dickson’s use of “incidental benefit” and “merely pecuniary incidental benefit” in his *Embry* opinion. 798 N.E.2d at 164, 167. In short, Parents suggest the Choice Scholarship Program clearly qualifies as “a program of true private choice” that is “not readily subject to challenge under the Establishment Clause.” Applying this distinction to the Choice Scholarship Program in the context of Sections 4 and 6 of the Indiana Constitution comports with the language of those Sections, the cases interpreting them, and the numerous programs similar to the Choice Scholarship Program enacted by the Indiana Legislature. Indiana’s neighbors Michigan, Illinois, Ohio, and Wisconsin

have already interpreted their similar constitutional provisions in ways consistent with *Zelman*, and Parents urge this Court to do likewise.⁵²

4. A true private school-choice program in which parents choose the schools implicates parents' rights to direct the upbringing of their children.

Plaintiffs recognize Parents' rights to direct the upbringing of their children, which the U.S. Supreme Court held in *Pierce* includes the right to send their children to a religious school. Plaintiffs, however, assert that "the issue here . . . is not religious education, but rather public funding of religious education. As much as religion is a part of American life and tradition, public funding of religion is not." Pls.' Br. at 10-11.

Parents submit that the real issues here are (1) whether Section 4 creates a taxpayers' veto

⁵² Unlike Indiana's neighbors, with which it shares its early history as part of the old Northwest Territory, other states have interpreted their state Blaine Amendments and/or compelled-support clauses to reach decisions inconsistent with the standard *Zelman* enunciated for true private-choice programs. These cases, several of which are cited by the Plaintiffs, were rendered without the benefit of the U.S. Supreme Court's definitive treatment of the Establishment Clause in *Zelman*. Many other states interpreted their religion clauses prior to *Zelman* in ways consistent with that decision, several of which Parents have previously cited. As long ago as 1945, New Jersey interpreted its compelled-support clause to permit the transportation of religious-school students, *Everson v. Bd. of Educ.*, 44 A.2d 333 (N.J. 1945), *aff'd*, 330 U.S. 1 (1947), and in 1967 New York interpreted its state Blaine Amendment to not reach incidental benefits in *Bd. of Educ. v. Allen*, 228 N.E.2d 791 (N.Y. 1967), *aff'd*, 392 U.S. 236 (1968). Pennsylvania, whose 1776 constitution contains the grandfather of all compelled-support clauses in the United States, and which later added a state Blaine Amendment (Pennsylvania Const. art. I, § 3 and art. 3, § 15) interprets these provisions as no more restrictive than the Establishment Clause, and does not prohibit incidental aid to religious institutions. *Springfield Sch. Dist. v. Dep't of Educ.*, 397 A.2d 1154 (Pa. 1979). Now that *Zelman* has clarified the federal religion-clause standard for student-assistance programs, those states that previously took a more restrictive view may reconsider their past cases, particularly in light of a growing academic recognition that such programs comport with James Madison's view of those clauses. See Vincent Phillip Munoz, *James Madison's Principle of Religious Liberty*, 97 Am. Pol. Sci. Rev. 17, 31 (2003) ("A Madisonian interpretation of the Establishment Clause would allow a general program of school vouchers, including vouchers to private religious schools, so long as religious schools are in no way singled out for special privileges or particular penalties.").

of parents' right to select a religious education for their children under a religiously neutral student-assistance program, and (2) whether Section 6, enacted at a time characterized by pervasive public funding of religion, now serves to prevent even incidental benefits to religious schools when freely chosen by parents.

The Vermont Supreme Court in *Chittenden* read its compelled-support clause as requiring it to not allow students to select any school containing elements of religious worship. 738 A.2d at 563. It viewed this result as required by a provision giving taxpayers the right to object to supporting religious worship, even that occurring in religious schools as a part of education provided there to other families' students who freely chose the schools at which to use their education funds. Because in Vermont the only districts involved were those that maintained no public schools, parents who selected a religious school lost their entitlement to a publicly funded education.

Plaintiffs here assert Indiana's Section 4 requires a similar limitation on the schools parents can choose, namely the exclusion of any school that is part of a religious ministry. But to allow the religious nature or content of a school's educational program to determine whether a family can receive religiously neutral educational scholarships raises serious First Amendment free-exercise and free-speech concerns under both the Indiana and U.S. Constitutions that can be avoided by a less intrusive reading of Sections 4 and 6.⁵³ The right to free thought, speech, writing, and printing secured by Article 1,

⁵³ Just as Indiana courts interpret statutes to avoid constitutional questions if possible, *Brown v. State*, 868 N.E.2d 464, 469 (Ind. 2007); *State v. Barker*, 809 N.E.2d 312, 317 (Ind. 2004); *State v. Downey*, 476 N.E.2d 121, 123 (Ind. 1985), constitutional provisions should also be interpreted so as to avoid conflict with other constitutional provisions. *Beavers v. State*, 141 N.E.2d 118, 122 (Ind. 1957) ("If possible, the provisions of the constitution must be construed together, and not so as to create a conflict."); *Tucker v. State*, 35 N.E.2d 270, 279 (Ind. 1941) ("We must attribute to the framers an intention to

Section 9, of the Indiana Constitution, the right to worship in Section 2, and the right to freedom of religious opinions and rights of conscience in Section 3 are all implicated in a parent's right to educate his or her child, *see, e.g., Mazanec v. N. Judson-San Pierre Sch. Corp.*, 614 F.Supp. 1152, 1160 (N.D. Ind. 1985), *aff'd*, 798 F.2d 230 (7th Cir. 1986); *People v. DeJonge*, 501 N.W.2d 127, 143 (Mich. 1993), and surely extend to the right to choose a teacher or school as one's surrogate to teach one's child. Preventing a parent from choosing a teacher or school because of the religion or religious content of what that teacher or school will teach the child interferes with the parent's rights. Plaintiffs' theory of Sections 4 and 6 requires the state, instead of adopting a neutral position towards religion that respects parents' rights, to disfavor religion because of the objections of taxpayers. As such, it should be abhorred and avoided.

Indeed, the state must—as it has done with the Choice Scholarship Program—adopt a neutral stance towards religion. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (holding that, although it did not have to, once a public university undertook to subsidize student publications, it could not refuse to fund religious publications).⁵⁴

This principle of neutrality, in addition to preventing discrimination against religions, also prohibits the government from discriminating among religions. For

construct the instrument as a consistent whole, without contradictory provisions at cross-purposes, and we must attribute to the separate provisions a meaning consistent with such an intention, if that is possible.”)

⁵⁴ Like Virginia in *Rosenberger*, Missouri argued in *Widmar v. Vincent*, 454 U.S. 263, 276 (1981), that its religion clauses required a greater separation of church and state than the federal Constitution did, to which the Court replied: “the state interest asserted here—in achieving a greater separation of church and state than is already ensured under the Establishment Clause of the Federal Constitution – is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well.”

example, in *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), the Tenth Circuit held that to exclude some religious colleges from a student-assistance program as “pervasively sectarian” while including other religious colleges violated the Free Exercise and Establishment Clauses. The court found that the inquiries necessary to distinguish between those that were pervasively sectarian and those that were not violated the Establishment Clause by excessively entangling the state with religion because the state had to decide which religious colleges were “too” religious. *Id.* at 1258. Under Plaintiffs’ theory of Section 4 that is what this Court would ultimately have to do—decide which schools constitute religious ministries and which do not. Similarly, under Plaintiff’s theory of Section 6, this Court would have to decide which schools provide “religious education” and which do not, an inquiry equally fraught with peril. Plaintiffs would avoid the necessity of such inquiries by invalidating the Choice Scholarship Program altogether, but the constitutionally preferred alternative is to avoid the inquiries themselves by recognizing that they are unnecessary *ab initio*, because not required by proper interpretation of Sections 4 and 6.

Plaintiffs state that “public funding of religion” is not a part of American life and tradition. With respect to education that statement is a myth. Public education in general and in Indiana in particular began suffused with nondenominational Protestantism, with the leaders of the Common School Movement committed to seeing that the public schools “welcome[d] the religion of the Bible.”⁵⁵ The origin of the Catholic parochial schools derives from the incompatibility of this original public school system with Catholic religious beliefs, although its continued existence derives from the ongoing

⁵⁵ Goldin & Katz, *supra* n.29 at 28 n.42; *see also Embry*, 798 N.E.2d at 162 n.5 (discussing history of public education in Indiana).

Catholic belief in the importance of religion in education. Section 6 arose at a time when Catholics had begun agitating for an equal share of school funds, and to extend it now to prevent families from freely and independently choosing religious schools would be to transmute an engine of discrimination against Catholics into an engine of discrimination against religion in general. The Establishment Clause prohibits programs having a primary effect of “inhibiting” religion, as well as those “advancing” religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). Programs like the Choice Scholarship Program, which are neutral towards religion, do neither. Plaintiffs’ reading of Sections 4 and 6 would require the legislature to only enact programs that “inhibit” religion—thus bringing the sections into conflict with the Establishment Clause. For this reason as well, Plaintiffs’ reading of the provisions should be rejected.

II. PLAINTIFFS HAVE NOT MET THE REMAINING REQUIREMENTS FOR A PRELIMINARY INJUNCTION.

As discussed above, Plaintiffs have not shown any likelihood of success on the merits. Thus, their request for an injunction should be denied on that ground alone. Below, Parents demonstrate that Plaintiffs have also failed to satisfy the other three requirements for obtaining a preliminary injunction.⁵⁶

A. Plaintiffs have failed to demonstrate irreparable harm to themselves.

Plaintiffs have failed to demonstrate that they will be irreparably harmed without a preliminary injunction. Parents do not dispute that the actual violation of constitutional

⁵⁶ Because Plaintiffs have failed to demonstrate the existence of any constitutional violation, they cannot invoke the “per se rule” in order to avoid having to meet the other three requirements for obtaining a preliminary injunction. *See Combs v. Daniels*, 853 N.E.2d 156, 162 (Ind. Ct. App. 2006) (“In sum, the closure of Silvercrest violates neither statutory nor constitutional law. We therefore find that the per se rule does not apply in this case.”).

rights constitutes irreparable harm. But, as demonstrated above, Plaintiffs have simply failed to show that the Choice Scholarship Program violates the Indiana Constitution. Absent this showing, Plaintiffs are not harmed—irreparably or otherwise—merely because their tax dollars may go towards a program with which they disagree on policy grounds. *Cf. Hinrichs v. Bosma*, 440 F.3d 393, 397 (7th Cir. 2006) (“The true injury is whether the plaintiff’s tax dollars are being spent in an illegal manner.”), *rev’d on other grounds* 506 F.3d 584 (7th Cir. 2007).

B. Both the balance of harms and the public interest do not favor Plaintiffs.

Plaintiffs make the same argument in regard to the balancing of harms as they do in regard to the public interest: that Defendants will only suffer delay in the implementation of the program, and that other groups, including parents and students participating in the Choice Scholarship Program, will only suffer “minimal potential for harm.” Pls.’ Br. at 29-30.

But the reality is that implementation of the program is already well under way. *See School Choice*, Indiana Department of Education, <http://www.doe.in.gov/schoolchoice> (last visited July 19, 2011) (“This exciting new program is up and running for the 2011-2012 school year.”). Parents and families across the state are applying for and receiving Choice Scholarships in order to attend eligible schools to which their children have already been admitted. *See, e.g., Coffy Aff.* ¶ 11; *Poindexter Aff.* ¶ 8; Samm Quinn, *School vouchers offer path to the future*, *Evansville Courier & Press*, July 14, 2011, http://www.courierpress.com/news/2011/jul/14/no-headline---ev_vouchers_infosession/ (last visited July 19, 2011). Like Parents, these families are relying on Choice Scholarships, and they will suffer severe financial disruption if Defendants are

enjoined from continuing to implement the Choice Scholarship Program—disruption that will harm family finances and could ultimately result in them having to remove their children from the schools that are meeting their educational needs.

At least since May 5, when Governor Daniels signed the bill creating the Choice Scholarship Program, Plaintiffs have known that the program will go into effect for the upcoming school year. Yet they waited to file their lawsuit until July 1, almost two months later—knowing that their motion would not even be considered until late July at the earliest. Pls.’ Mot. for Oral Arg. on Mot. for Prelim. Inj. ¶ 5 (“Pls.’ Oral Arg. Mot.”); *see also N. Ind. Pub. Serv. Co. v. Dozier*, 674 N.E.2d 977, 990 n.11 (Ind. Ct. App. 1996) (stating the “equitable maxim” that “equity aids the vigilant, not those who slumber on their rights.”). Had Plaintiffs filed their lawsuit more quickly, they would at least have had a better argument that an injunction will not cause the kind of severe financial and educational disruption described above. But by waiting as long as they did, they have *guaranteed* that such disruption will take place if their motion for preliminary injunction is granted. Indeed, some schools that are participating in the Choice Scholarship Program will begin their classes before the hearing on Plaintiffs’ motion is scheduled.⁵⁷

⁵⁷ At least one school, St. Mary’s Catholic School in New Albany, starts classes on August 1. *See 2011-2012 Calendar*, St. Mary’s Catholic Academy, http://smcanewalbany.org/?page_id=1048 (last visited July 19, 2011). Schools starting classes on August 8 include: Corpus Christi Catholic School, Mater Dei High School, and Reitz Memorial High School. *See 2011-2012 School Calendar*, Corpus Christi Catholic School, http://www.edline.net/files/_MPFyH_/0ef80e38799ed6533745a49013852ec4/2011-2012_School_Calendar.xls (last visited July 19, 2011); *Mater Dei High School Calendar, August, 2011*, Mater Dei High School, [http://materdeiwildcats.com/modules/calendar/showCalendarMonth.phtml?oc_id\[\]=9926&year=2011&month=08&day=01&sessionid=160eb337b8a21acd6c23279920cba7d8](http://materdeiwildcats.com/modules/calendar/showCalendarMonth.phtml?oc_id[]=9926&year=2011&month=08&day=01&sessionid=160eb337b8a21acd6c23279920cba7d8) (last visited July 19, 2011); *Reitz Memorial High School Calendar, August 2011*, Reitz Memorial High School, [http://reitzmemorial.org/modules/calendar/showCalendarMonth.phtml?com=t&oc_id\[\]=7681&sessionid=a34abac085b6ab275fb953735e99b81b](http://reitzmemorial.org/modules/calendar/showCalendarMonth.phtml?com=t&oc_id[]=7681&sessionid=a34abac085b6ab275fb953735e99b81b) (last visited July 19, 2011).

Thus, an injunction could actually cause some students to have to leave their schools—a result that even Plaintiffs concede would cause great harm.⁵⁸

As explained above, Plaintiffs suffer no harm whatsoever to their constitutional rights as a result of the Choice Scholarship Program. Thus, the balancing of harms clearly favors Parents, as well as families across the state who are counting on the Choice Scholarship Program for this upcoming school year. No public interest is served in

In Evansville alone, five more schools start classes on August 9: Evansville Lutheran School, Good Shepherd School, Holy Rosary School, Westside Catholic School, and Holy Spirit School. See *Evansville Lutheran School Calendar – August 2011*, Evansville Lutheran School, <http://www.evansvillelutheranschool.com/Monarchs/Calendar.html> (last visited July 19, 2011); *Good Shepherd School 2011-2012 Calendar*, Good Shepherd School, <http://www.gsparish.org/GSS/Calendar/11-12/School%20Calendar%202011-2012doc.pdf> (last visited July 19, 2011); *Holy Rosary School 2011-2012 School Calendar*, Holy Rosary School, <http://hrparish.org/school/docs/2012calendar.pdf> (last visited July 19, 2011); *Westside Catholic School Calendar*, Westside Catholic School, http://wccsevv.org/starnet/media/2011-12_Calendar.pdf (last visited July 19, 2011); Holy Spirit School, <http://teacherweb.com/IN/HolySpiritSchool/SchoolHomePage/sdhp1.aspx> (see calendar, located on the lower right side of home page) (last visited July 19, 2011).

Bishop Chatard High School, which Heather Coffy's oldest son will attend, starts classes on August 12. See *Bishop Chatard High School Calendar – 2011 – 2012 Academic Year*, <http://www.bishopchatard.org/Calendars/Calendar1112.pdf> (last visited July 19, 2011). Cardinal Ritter High School, which Monica Poindexter's daughter will attend, starts classes on August 18. See *Cardinal Ritter High School Calendar – August 2011*, <http://www.cardinalritter.org/news-and-events/calendar> (last visited July 19, 2011). St. Monica Catholic School, which Heather Coffy's two younger children will attend, starts classes on August 23. See *St. Monica Catholic School Calendar – August 2011*, <http://stmonicaindy.org/school/wp-content/uploads/2010/03/Family-Calendar69.pdf> (last visited July 19, 2011).

⁵⁸ “If a decision on the motion for preliminary injunction does not come until after school begins, a [sic] injunction issued at that time could be disruptive for the students who have moved from public to private schools, for the private schools themselves, and for the public schools that would be required to absorb the [Choice Scholarship Program] students on short notice.” Pls.’ Oral Arg. Mot. ¶ 3.

abruptly upsetting their expectations and denying to their children the educational opportunities that the Choice Scholarship Program is providing them.⁵⁹

CONCLUSION

The Plaintiffs have not shown any reasonable likelihood of success on the merits of their constitutional claims and they have failed to demonstrate that the direct and substantial harm to parents and children is outweighed by any potential harm to themselves from denial of the preliminary injunction. Parents respectfully request that the Court deny Plaintiffs' motion for a preliminary injunction and allow the Choice Scholarship Program to proceed.

Dated this 21st day of July, 2011.

⁵⁹ If this Court does grant an injunction, the disruption caused to families will be significant; no amount of money can make up for the lost opportunity of hundreds of children to receive a quality education in a school best suited to meet their needs. But, at the very least, the total value of Choice Scholarships that will be taken away is quantifiable. Thus, the granting of an injunction should be accompanied by a requirement that Plaintiffs post a bond at least as great as the amount of the value of Choice Scholarships that parents who have signed up for the program will lose. *See* Indiana Trial Rule 65(c) (requiring that no preliminary be granted unless the party seeking the injunction provides "security . . . in such sums as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."); *see also AGS Capital Corp., Inc. v. Product Action Int'l, LLC*, 884 N.E.2d 294, 317 (Ind. Ct. App. 2008) (stating that the "size of the bond should approximate the damage the enjoined party will suffer if it is found that the injunction was wrongfully entered.").

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 2011, a true and correct copy of BRIEF OF APPLICANTS FOR INTERVENTION HEATHER COFFY AND MONICA POINDEXTER IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION has been served upon the following counsel of record via electronic mail and First Class U.S. Mail, postage prepaid:

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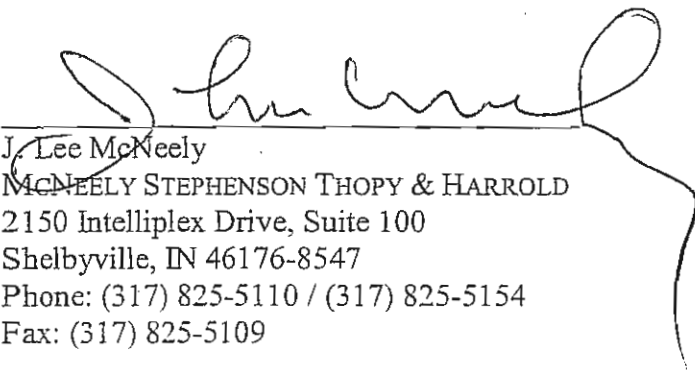
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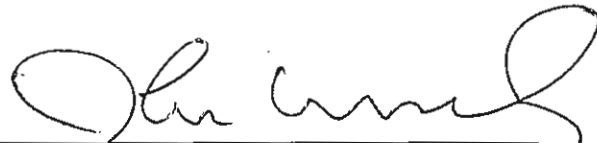

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