

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION SUPERIOR COURT
CAUSE NO. 49D07-1107-PL-025402

TERESA MEREDITH, DR. EDWARD E.)
EILER, RICHARD E. HAMILTON,)
SHEILA KENNEDY, GLENDA RITZ,)
REV. MICHAEL JONES. DR. ROBERT M.)
STWALLEY III, KAREN J. COMBS,)
REV. KEVIN ARMSTRONG, DEBORAH J.)
PATTERSON, KEITH GAMBILL, and)
JUDITH LYNN FAILER,)
Plaintiffs,)

v.)

MITCH DANIELS, in his official capacity as)
Governor of Indiana; and DR. TONY BENNETT,)
in his official capacity as Indiana Superintendent)
of Public Instruction and Director of the Indiana)
Department of Education,)
Defendants.)

**DEFENDANTS' MEMORANDUM IN OPPOSITION
TO THE MOTION FOR PRELIMINARY INJUNCTION**

GREGORY F. ZOELLER
Attorney General of Indiana
Atty. No. 1958-98

THOMAS M. FISHER
Solicitor General
Atty. No. 17949-49

ASHLEY TATMAN HARWEL
Deputy Attorney General
Atty. No. 25433-79A

HEATHER HAGAN MCVEIGH
Deputy Attorney General
Atty. No. 24919-49A

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

TABLE OF CONTENTS

FACTUAL BACKGROUND	1
ARGUMENT	11
PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS	12
I. The General Assembly has the Power Under the Constitution to Provide Primary and Secondary Private School Scholarships	12
A. The duty to provide a “general and uniform system of common schools” does not preclude other means of “encourag[ing], by all suitable means, moral, intellectual, scientific and agricultural improvement”	12
1. Article 8, Section 1’s “all suitable means” directive refutes Plaintiffs’ theory that there is only one means for the State to support education.....	13
2. The General and Uniform Clause does not provide a judicially enforceable basis for nullifying the “all suitable means” clause...	14
3. Plaintiffs’ resort to constitutional doctrine of Florida and maxims of statutory construction fall well short of overcoming actual Indiana constitutional text.....	15
4. In 1850-51, citizens and convention delegates alike accepted multiple government-supported approaches to education, and the delegates <i>rejected</i> a provision that would have precluded support for anything but common schools.....	17
5. Plaintiffs’ General and Uniform Clause theory would negate a host of other longstanding educational endeavors.....	21
B. Because school choice scholarships <i>supplement</i> the “general and uniform system of common schools,” they are not governed by the “tuition without charge” and “equally open to all,” clauses of Article 8, Section 1	22
1. That Indiana has a constitutionally compliant uniform and general system of common schools, before and after the advent of the CSP, is undisputed	22

2.	The CSP is not part of this “uniform and general system of common schools,” but exists in part to stimulate improvement of that system.....	24
3.	Accordingly, the “tuition without charge” and “equally open to all” clauses do not apply	26
II.	The CSP Does Not Violate Article 1, Section 6 Because it Is “For the Benefit” of Students and the Educational System as a Whole Without Regard to Impact on Religious Schools, Where Any “Benefit” Would Be Indirect and Incidental..	27
A.	Both history and the Indiana Supreme Court cast doubt on the applicability of Section 6 to parochial schools	28
B.	Article 1, Section 6 requires religious neutrality and permits incidental benefits to religious institutions, which is what the CSP at most permits	30
C.	The CSP is religion-neutral	32
D.	The CSP confers no direct support for religious indoctrination or instruction because any benefits for religious schools are the result of parental choice, not government choice	33
E.	Other State programs besides the CSP allow taxpayer funds to flow to religious institutions by way of private, individual choice.....	37
III.	The Scholarships Do Not Compel Any Person to Support any Religious Entities in Violation of Article 1, Section 4.....	40
A.	Parochial schools are not “ministries” or “places of worship” under Section 4	40
B.	Article 1, Section 4 precludes mandatory tithing and the like, not government expenditure of general tax revenue, which is addressed by Section 6	40
	PLAINTIFFS HAVE NOT DEMONSTRATED IRREPARABLE HARM	44
	PUBLIC POLICY AND THE BALANCE OF EQUITIES FAVOR THE STATE	45
	CONCLUSION	46

FACTUAL BACKGROUND

The General Assembly's decision to create the Choice Scholarship Program (CSP) is one piece of a larger transformation of public education into a competitive model that creates realistic additional educational options for parents and students while providing incentives for public schools to improve. This entire model proceeds from a long-developing public consensus, founded on objective data, that traditional public schools have not been successful over the past several decades. The program arises not from a recent, dramatic shift in educational outcomes, but rather the lack of any such thing. Despite prodigious growth in the size of the State budget for public primary and secondary education over the past few decades, scores on key measures of educational success have either flatlined or declined. The CSP is the latest effort by the General Assembly to build a model of public education that will reverse that trend.

1. Over the past few decades, Indiana's high school dropout rate has been disturbingly high. In 2008, the public high school graduation rate in Indiana was less than 71%, ranking Indiana thirty-second among the states. *See* National Center for Higher Education Management System Information Center, *available at* <http://www.higheredinfo.org>. What is more, the graduation rate has declined over the past twenty years. *See id.* (showing Indiana graduation rates of 75% in 1990). In 2005, nearly 70 percent of students in Indianapolis Public Schools failed to graduate on time. *See Cities in Crisis 2009: Closing the Graduation Gap* 14, *available at* http://www.americaspromise.org/Our-Work/Dropout-Prevention/~/_media/Files/Our%20Work/Dropout%20Prevention/Cities%20in%20Crisis/Cities_In_Crisis_Report_2009.ashx. Many other Indiana public schools also have graduation rates below 65%. *See* Indiana Department of Education 2010 Graduation Report.

Meanwhile, Indiana students' standardized test scores have remained static in recent decades. One commonly used test is the National Assessment of Educational Progress test,¹ on which "Indiana's 4th graders scored 221 in 1992, and 15 years later, they scored 222." Matthew Ladner, *School Choice Issues in the State: Florida's Lessons for Indiana K-12 Reform* 9 (Sept. 2009), available at <http://www.edchoice.org>. Only one in three of Indiana's eighth graders can pass the national math or reading exam, and the percentage of Indiana eighth graders performing at or above proficiency level was the same in 2009 as in 2002. See *The Nation's Report Card: Indiana Public Schools Grade 8 Reading Snapshot Report*, Institute of Education Sciences National Center for Education Statistics (2009), available at <http://nces.ed.gov/nationsreportcard/pdf/stt2009/2010460IN8.pdf>.

The fourth grade reading statistics are similar: In 1992, 30 percent of fourth graders performed at or above the NAEP Proficient level, and in 2009, there was a non-significant increase to 34 percent. See *The Nation's Report Card: Indiana Public Schools Grade 4 Reading Snapshot Report*, Institute of Education Sciences National Center for Education Statistics (2009), available at <http://nces.ed.gov/nationsreportcard/pdf/stt2009/2010460IN4.pdf>. Minority students fared even worse, with only 15 percent of black and Hispanic students performing at the NAEP Proficient level in 2009. *Id.*

To be sure, individual Indiana public schools have enjoyed remarkable achievements in recent years. Just recently, an IPS magnet school, the Center For Inquiry at School #84, received the Dr. Donald R. Waldrip Elementary School of Excellence Award for being one of the top two magnet elementary schools in the country from the Magnet Schools of America, which evaluates approximately 4,000 schools across the country. See *2011 National Winners*, Magnet Schools of

¹ The National Assessment of Educational Progress is considered to be "the best instrument for comparing the academic achievement trends of students in different states." Matthew Ladner, *Florida's Lessons for Indiana K-12 Reform* 8 (Sept. 2009).

America, http://www.magnet.edu/modules/info/2011_national_winners.html; *Who We Are*, http://www.magnet.edu/modules/info/who_we_are.html. In 2010, Keana Parquet, a fourth grade teacher at Crooked Creek Elementary School in Washington Township, was given the 2010 Milken National Educator Award; she was one of only 55 teachers nationwide recognized for “demonstrating innovation in the classroom and exceptional talent as an educator.” See Press Release, Indiana Department of Education, Washington Township Teacher Receives Prestigious Milken Educator Award (Nov. 11, 2010), *available at* <http://www.doe.in.gov/news/2010/11-November/milken.html>. And in 2005, students at Thomas Jefferson Middle School, a public school in Valparaiso, were national runners-up in the Science Olympiad, its team members having placed fifth or higher in nine competitions against teams from all 50 states and Canada comprising more than 1,000 students. Bill Dolan, *Valpo School Runner-up at National Event*, [nwtimes.com](http://www2.valpo.k12.in.us/news/sonwi052205.php), May 22, 2005, *available at* <http://www2.valpo.k12.in.us/news/sonwi052205.php>.

Unfortunately, these individual school successes have been overshadowed by profound failures in other areas. Several Indiana public schools enter the 2011-2012 academic year in their sixth year of probation, which allows the State to intervene to facilitate their turnaround, the prospect of which has prompted two public schools to close. See Ind. Code §§ 20-31-9-2; 20-31-9-4; *see also Schools in Year 4 and 5 Probation for PL 221*, Ind. Dep’t of Educ., *available at* http://www.doe.in.gov/turnaround/docs/tat_list_of_schools_final.doc. This has occurred despite the fact that Indiana increased its spending per student by approximately 148% between 1980 and 2005. See Barry Bull, “School Reform in Indiana Since 1980” in *Hoosier Schools: Past and Present* 203 (William J. Reese, ed., 1998); Digest of Education Statistics, Nat’l Ctr. for Educ. Statistics, *available at* http://nces.ed.gov/programs/digest/d08/tables/dt08_185.asp.

Accordingly, beginning a decade ago, the legislature, with the purpose of improving primary and secondary public education in Indiana, has embarked on a series of reforms that, step by step, have been altering Indiana public education into a model where schools have incentives to improve in order to attract students, culminating in the scholarship program at issue in this case.

2. In 2001, the legislature passed the Charter School Act in order to “[p]rovide parents, students, community members, and local entities with an expanded opportunity for involvement in the public school system.” Pub. L. No. 100-2001, § 21 (recodified in 2005 at Ind. Code § 20-24-2-1). Charter schools were intended to “[s]erve the different learning styles and needs of public school students [by offering] public school students appropriate and innovative choices.” *Id.* The schools would also “[a]fford varied opportunities for professional educators [and a]llow public schools freedom and flexibility in exchange for exceptional levels of accountability.” *Id.*

Indiana law provides both regular educational funds and funds for building or purchasing facilities to charter schools. *See* Ind. Code § 20-24-12 et seq. (2011). Through the Charter Schools Facilities Assistance Program, charter schools can apply for both loans and grants from the fund in order to achieve these ends. Ind. Code § 20-24-12-7 (2011). All new schools in the charter system must “be open to any student” in the State. *See* Ind. Code § 20-24-5-1.

The number of students attending charter schools statewide has steadily increased over the past decade. In the 2002-2003 school year, 1,572 students attended charter schools. Ex. A. By 2007-2008, the number had increased to 11,121. Ex. A. And this past school year, 2010-2011, 22,472 students took advantage of the charter school option. Ex. A. That is a 1300 percent increase since 2003.

3. Another fundamental change that has had the effect of creating more educational choices for parents and schoolchildren is property tax reform. In order to help local governments manage new caps on property tax levies, the General Assembly required the State to assume full control of the general school fund in 2009. Pub. L. No. 146-2008, § 14; Ind. Code. § 4-12-1-15.7(f). Prior to that, when local taxes paid a substantial chunk of public school tuition support, transferring a child to a different school system could be very expensive for parents, as transferee schools would charge transfer tuition. *See* Ind. Code § 20-26-11-13. Because tuition support for public schools now comes exclusively from the State, any transfer tuition charged to out-of-boundary students can no longer include any amount covered by the State, which means that neighboring school districts are now a more attractive option for many parents.²

The results of this change in school finance have been astounding. In the 2006-07 school year, before the State assumed control of the general school fund, fewer than 2,800 students across the State attended an out-of-boundary public school. *See* Ex. A. By school year 2010-2011, only the second school year after the legislature effectively greatly reduced transfer tuition, that number had increased to over 13,700. *See* Ex. A.

4. In 2009, the legislature also created the “School Scholarship Tax Credit” program. Ind. Code § 6-3.1-30.5 et seq. The program was designed to provide tax incentives for Indiana taxpayers to contribute to organizations that grant scholarships to low- and middle-income

² Schools can still choose whether to accept transfers, *see* Ind. Code § 20-26-11-5, but any transfer fees must be “minimal” as long as the student transfers prior to the September ADM count day. *See Transfer Tuition FAQ 1*, Ind. Dep’t of Educ., available at <http://www.doe.in.gov/finance/docs/TransferTuitionFAQ.pdf>. If a student switches schools after the ADM count day, the charged tuition could be higher so as “to offset the loss of state tuition support.” *Id.* However, if a student or parent requests a transfer due to crowded conditions at the school of origin or better curriculum offerings at the destination school, and both schools approve the transfer, the school of origin will include the student in its ADM count and then pay the funds allocated to the student to the destination school. *See id.* at 2; Ind. Code § 20-26-11-5. Students and parents may use a CSP scholarship to pay transfer tuition at an out-of-boundary public school.

students who wish to attend private schools. Ind. Code §§ 6-3.1-30.5-7; 20-51-1-7. Fifty percent of the amount of any contribution made to a scholarship granting organization can be claimed as a tax credit. Ind. Code § 6-3.1-30.5-8. There are no limits as to how much a donor can contribute to a qualified organization, but for fiscal year 2012, the entire tax credit program cannot award more than \$5 million in credits per State fiscal year (thus allowing up to \$10 million in creditable donations). *See* Ind. Code § 6-3.1-30.5-13; School Scholarship Credit, Ind. Dep't of Revenue, <http://www.in.gov/dor/4305.htm> (the cap was raised in 2011 from \$2.5 to \$5 million). A scholarship-granting organization cannot force a scholarship recipient to attend a particular school, nor can it prevent the student from transferring from one school to another after receiving the scholarship. Ind. Code § 20-51-3-5(b). Religious schools may participate. *See* Ind. Code § 20-51-1-6.

In the 2010-2011 fiscal year, \$793,560 was donated to the scholarship granting organizations, leading to \$396,780 in tax credits. Ex. B; Ind. Code § 6-3.1-30.5-8. *See* Indiana Department of Revenue, School Scholarship Credit, *available at* <http://www.in.gov/dor/4305.htm>. There are five organizations currently recognized to award scholarships under the program, three of which submitted reports for 2009-2010 school year showing awards of 387 scholarships in 2010. *See* Ex. A.

Another tax break, Indiana Code section 6-3-2-22, allows taxpayers to deduct unreimbursed education expenditures in the amount of \$1,000 per student.

5. The latest piece of this competitive model, and the one at stake in this case, is the Choice Scholarship Program (CSP), which allows Indiana primary and secondary school students whose families make less than 150 percent of the federal poverty level to receive scholarships to attend private schools or public schools that charge transfer tuition. *See* Ind.

Code § 20-51-4 et seq. Students can use the scholarships to attend out-of-boundary public schools and both religious and non-religious private schools, as long as the school meets certain requirements. *See* Ind. Code § 20-51-1-4.7. Among other things, participating schools must have curricula that conform to most of the requirements in the State’s Mandatory Curriculum. *See* Ind. Code § 20-51-4-1.

The scholarships are statutorily designed to be the lesser of three amounts, including: the amount of the tuition of the eligible school, 90% (if student’s household income is within 100% of amount required for federal free or reduced lunch program), or 50% (if student’s household income is between 100 and 150% of amount required for federal free or reduced lunch program) of the amount of tuition support of student’s school corporation of legal residence, or \$4,500 for first through eighth grade. Ind. Code § 21-51-4-4. The difference between the amount of the choice scholarship and amount of tuition support that would have gone to the student’s school corporation of legal residence is then returned to public schools through a special distribution. *See* H.E.A. 1001, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011).

Indiana Code section 20-51-1-4.5 establishes several criteria that a scholarship recipient must meet. First, there is a residency requirement: the student must have a “legal settlement” in Indiana. *Id.* Second, there is an age requirement: the student must be between five and twenty-two years old on August 1 of the school year for which the student wishes to receive a scholarship. *Id.* Third, there is a financial requirement: the student must live in a household “with an annual income of not more than” 150% of the income level “required to qualify for the federal free or reduced price lunch program.” *Id.* Fourth, the student must either be enrolled in or previously have been enrolled in an accredited school. *Id.* Finally, the student must have

either attended a school for the previous year that did not charge transfer tuition or have received a scholarship to attend school for that year. *Id.*

The statute establishes several criteria that a school must meet in order to accept scholarship students. Ind. Code § 20-51-1-4.7. First, the school must be located in Indiana. *Id.* Second, the school must require students to pay tuition or transfer tuition in order to attend. *Id.* Third, the school must be “accredited by either the state board or a national or regional accreditation agency that is recognized by the state board” and provide the Department of Education with all the same data that a public school would have to provide in order for the Department to assess the school’s improvement. *Id.* Fourth, the school must test all students in compliance with the ISTEP program. *Id.* Fifth, the school must not be either a charter school or a school within the school corporation that the student lives in. *Id.* Finally, the school must accept the student’s application for admission.

The statute sets up a three-step process for determining the amount of scholarship money an eligible student may receive. First, the student’s “state tuition support amount” (STSA) must be calculated according to the formula set out in Indiana Code section 20-51-4-5. This number is an approximation of how much the State would have spent to educate the student if the student had attended a public school in his or her home school corporation. Second, the student’s STSA must be multiplied by a certain percentage, which differs according to the student’s family income level. Ind. Code § 20-51-4-4. Finally, the resulting amount may have to be reduced if it exceeds the total cost of tuition or the statutory cap (\$4,500 for first through eighth grades). *Id.*

Indiana Code Section 20-51-4-3 applies to admission of eligible students to eligible schools. First, it forbids an eligible school from discriminating “on the basis of race, color, or national origin” or on the basis of whether a student has applied for or received a choice

scholarship during the admissions process. *Id.* Second, if a school receives more applicants from choice scholarship students than it has openings, the school must, at a public meeting, choose students in a random drawing of all students “who meet the requirements for admission.” *Id.*

Indiana Code Section 20-51-4-1(a) provides that private schools are not subject to any curricular or administrative regulation as a consequence of accepting a Choice Scholarship. The prohibition on State regulation includes “the regulation of curriculum content, religious instruction or activities, classroom teaching, teacher and staff hiring requirements, and other activities carried out by the eligible school.” *Id.* The only permissible State regulation of nonpublic schools is that which is “necessary to enforce the requirements of the choice scholarship program in place on July 1, 2011.” *Id.*

On July 1, 2011, the Indiana Department of Education adopted emergency rules for administering the program. *See* Emergency Rule, LSA Document #11-399(E), *available at* <http://www.in.gov/legislative/iac/20110713-IR-512110399ERA.xml.pdf>. Under these rules, to apply for a scholarship, a student must submit an application through a password-protected website at the school chosen by the student. Emergency Rule § 3(b)(2); *see also* Indiana Choice Scholarship Program: How to Apply If I’m a Parent/Student 1, Ind. Dep’t of Educ., *available at* http://www.doe.in.gov/schoolchoice/documents/how_to_apply-parent.pdf. The student will be required to provide tax returns or other documents relating to household income. *How to Apply* at 1. In the event of oversubscription, the Department will grant scholarships in the order completed applications are received. Emergency Rule § 4. For its part, a school wishing to admit scholarship students must submit an application (available at <http://www.doe.in.gov/school>

choice/documents/school_application-july_8th-final.pdf), maintain records for verification of student eligibility, and have at least 30 students, among other statutory requirements. *Id.* at § 2.

In addition, the statute provides that if an eligible school is scored in the lowest two “categories or designations” of school improvement under Indiana Code section 20-31-8-3 for two consecutive years, “the department shall suspend choice scholarship payments” for any new students at that school for one year. Ind. Code § 20-51-4-9(a)(1). If the school is in the lowest two categories for three consecutive years, new students will not be able to use choice scholarships at that school until the school improves to the middle or higher category for two years. Ind. Code § 20-51-4-9(a)(2). If the school is ranked in the lowest category for three consecutive years, it will need to improve to the higher categories for three years before it can receive new scholarship students. Ind. Code § 20-51-4-9(a)(3).³

The statute allows the Department to distribute scholarship funds directly to students or their parents. Ind. Code § 20-51-4-10. Under the emergency rule, the funds are allocated to the parents and then distributed to the school after the eligible individual or parents and the eligible school “endorse the distribution on the department’s form.” Emergency Rule § 5(b).

6. An assortment of other changes to public school governance enacted this past legislative session are also critical for developing the competitive public education model. The public school funding formula as it existed prior to this year allowed schools to receive tuition support for a given year based on a rolling three-year Average Daily Membership (ADM) rather than based on the ADM for that year. *See* Pub. L. No. 182-2009(ss), Sec. 332. This permitted districts with shrinking enrollments to retain at least some percentage of tuition dollars for

³ In contrast, traditional public schools do not suffer consequences for failure until after three years in the lowest grade category, at which point an “expert team” is assigned to help the school improve. Ind. Code § 20-31-9-3. Real consequences do not apply until much later: a traditional public school can be ranked in the lowest category for five consecutive years before the State can intervene. *See* Ind. Code § 20-31-9-4.

students no longer in attendance. Ind. Code § 20-43-5-4. Now, however, a school's foundation tuition support amount is based on its ADM count for that year, not on a rolling average. Ind. Code § 20-43-4-7 (effective Jan. 1, 2012). As a result, the model for school financing in Indiana now more closely adheres to the notion that "the money follows the student," so that if a public school fails to compete and loses students, its tuition support from the State will decline accordingly, though the amount will be offset to some degree by the "special distribution" to public schools of tuition support savings attributable to CSP scholarships. *See* H.E.A. 1001, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011).

In order to help traditional public schools compete, the legislature also altered the terms of collective bargaining, limiting bargaining between school corporations and teachers' unions to salary and wage-related benefits. Ind. Code § 20-29-6-4. Only 33 percent of teachers' salary increases can now be based on seniority, so that going forward salaries in large measure will take into consideration the teacher's evaluations and leadership roles as well as the academic needs of the students. Ind. Code § 20-28-9-1. Furthermore, teacher layoffs will no longer be based on seniority but can instead be based on merit. Ind. Code § 20-28-7.5-1(d). These changes put public schools in a better position to bargain for and retain the best teachers.

ARGUMENT

To be entitled to a preliminary injunction, plaintiffs must show a likelihood of success on the merits. *See Apple Glen Crossing, LLC v. Trademark Retail, Inc.*, 784 N.E.2d 484, 487-488 (Ind. 2003). This means "such relief should not be granted except in rare instances in which the law and facts are clearly within the moving party's favor." *Bigley v. MSD of Wayne Twp. Schs.*, 823 N.E.2d 278, 282 (Ind. Ct. App. 2004).

This high burden is *in addition* to the already high burden of successfully challenging the validity of a statutory scheme on constitutional grounds. Statutes come to the courts “clothed with the presumption of constitutionality.” *Bunker v. Nat’l Gypsum Co.*, 441 N.E.2d 8, 11 (Ind. 1982) (quoting *Sidle v. Majors*, 341 N.E.2d 763, 766 (Ind. 1976)). Further, “the burden to rebut this presumption is upon any challenger and all reasonable doubts must be resolved in favor of an act’s constitutionality.” *Bunker*, 441 N.E.2d at 11 (citing *Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207, 214 (Ind. 1981)).

A plaintiff seeking a preliminary injunction must also demonstrate irreparable harm and the favor of both public policy and a balancing of the equities. *See Apple Glen*, 784 N.E.2d at 487. These standards, too, impose a high threshold. The Indiana Supreme Court has stated that “[a]n injunction is to be denied if the public interest would be substantially adversely affected, even if the plaintiff has a claim.” *State ex rel. Att’y Gen. v. Lake Sup. Ct.*, 820 N.E.2d 1240, 1256 (Ind. 2005) (citing *Fumo v. Med. Grp. of Mich. City, Inc.*, 590 N.E.2d 1103, 1108 (Ind. Ct. App. 1992)).

PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS

- I. The General Assembly has the Power Under the Constitution to Provide Primary and Secondary Private School Scholarships**
 - A. The duty to provide a “general and uniform system of common schools” does not preclude *other* means of “encourag[ing], by all suitable means, moral, intellectual, scientific and agricultural improvement”**

The Plaintiffs argue that the State may not provide scholarships to students for use at private schools in light of the State’s constitutional duty to provide a “‘general and uniform system of Common Schools’ that are ‘equally open to all[.]’” Pls.’ PI Br. at 8. The full text of Article 8, Section 1, along with the history of the 1850 constitutional convention, the history of

education in Indiana, and case law, all conclusively demonstrate that the 1850 convention delegates did not intend to imply that public schools could be the *only* means for the State to support education of children.

1. Article 8, Section 1’s “all suitable means” directive refutes Plaintiffs’ theory that there is only one means for the State to support education

When Plaintiffs invoke the legislature’s constitutional duty to provide a “general and uniform system of Common Schools,” they ignore some of the most important text of Article 8, Section 1—text, as it happens, that directly refutes their argument that public schools must be insulated from private school competition for education-finance dollars.

The complete text of Article 8, Section 1 provides 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 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.

Of particular note, this provision directs the legislature to encourage education “by all suitable means.” Using the conjunction “and,” it then *expands* the legislature’s responsibilities by specifically requiring “a general and uniform system of Common Schools[.]” Thus, the command to the General Assembly is to foster knowledge and learning “by all suitable means,” including, but not limited to, provision of a Common School system.

The Indiana Supreme Court has long understood the “all suitable means” clause to permit the General Assembly, not courts, taxpayers or school corporations, to decide what “means” are “suitable” for encouraging “intellectual” (and other) improvement, even if the legislature goes beyond creating a “general and uniform system of public schools.” In a case upholding a 1917

act consolidating school districts, the Court stated that “[i]t is sufficient to say that such act, in the wisdom of the General Assembly, was *an addition to* our common schools system, or *additional ‘suitable means’* concerning intellectual improvement.” *Ehle v. State*, 133 N.E. 748, 750 (Ind. 1922) (emphasis added). In *Bullock v. Billheimer*, the Court stated that “the Legislature may determine how, and by what instrumentalities ‘scientific and agricultural improvement’ may be made.” 94 N.E. 763, 767 (Ind. 1911). And in *Fort Wayne Community Schools v. State ex rel. New Haven Public Schools*, 159 N.E.2d 708, 709 (Ind. 1959), it said that “[t]he legislature has the exclusive right and power to determine how and by what instrumentalities the educational system of this state shall be administered and carried into effect.”

2. The General and Uniform Clause does not provide a judicially enforceable basis for nullifying the “all suitable means” clause

Even aside from the textual refutation of Plaintiffs’ claims provided by the “all suitable means” clause, the Plaintiffs cannot succeed on the merits of a claim purporting to enforce the General and Uniform Clause. In *Bonner ex rel. Bonner v. Daniels*, 907 N.E.2d 516, 518 (Ind. 2009), the Court essentially deemed issues of education policy authorized by the General and Uniform Clause to be political questions off limits to judicial intervention. There, the plaintiffs sought a judicial declaration that the Indiana Constitution imposed an enforceable duty on government to provide an adequate quality education and that Indiana’s system of school financing failed to satisfy that duty. *Id.* at 518-19. Because the Education Clause speaks “only of a general duty to provide for a system of common schools,” the Court upheld the dismissal of the plaintiffs’ challenge, denying all constitutional claims. *Id.* at 518, 521. Importantly, the Court held that, to the extent there is “a right, entitlement, or privilege to pursue public education, any such right derives from enactments of the General Assembly, not from the

Indiana Constitution.” *Id.* at 522. Thus, the Indiana Constitution gives the General Assembly, not the courts, the power to determine what system of schools best serves the needs of Hoosiers.

Plaintiffs in this case nowhere argue that Indiana has failed to provide a general and uniform system of common schools. Instead, they are asking the court to divine what might be called a “dormant Education Clause” whereby the General Assembly may *only* “fulfill the education mandate imposed on it . . . through ‘a general and uniform system of Common Schools.’” Pls.’ PI Br. at 22. But since the Indiana Supreme Court has declined to invent non-textual standards for courts to enforce pertaining to the adequacy and equality of public schools, it would seem even less likely for it to countenance a *counter*-textual standard precluding other “means” for supporting primary and secondary education.

3. Plaintiffs’ resort to constitutional doctrine of Florida and maxims of statutory construction fall well short of overcoming actual Indiana constitutional text

The best Plaintiffs can do in support of their argument is to cite *Bush v. Holmes*, 919 So. 2d 392, 412 (Fla. 2006), where the court ruled that a specific textual requirement that “[a]dequate provision shall be made by law for a uniform . . . system of free public schools,” Fla. Const. art. IX § 1(a), enumerated precisely how the legislature was to carry out a separate command for “adequate provision for the education of all children.”⁴ According to the Florida Supreme Court, “adequate provision” meant one thing and one thing only: public schools. *Holmes*, 919 So.2d at 407. Importantly, that court distinguished *Davis v. Grover*, 480 N.W.2d 460, 473-74 (Wis. 1992), which rejected a similar argument, only by observing that Wisconsin’s constitution did not have Florida’s “adequate provision” clauses. *Id.* at 407 n.10.

⁴ Fla. Const. art. IX § 1(a): “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 . . .”

Indiana's Constitution, of course, not only lacks the text and structure of Florida's dual "adequate provision" clauses, but also includes the "all suitable means" clause that Florida does not have. It is simply not plausible to understand Article 8, Section 1's "all suitable means" directive actually to refer to *one* means only: a uniform and general system of public schools.

On that score, Plaintiffs' reliance on the "*inclusio unius est exclusio alterius*" maxim also runs headlong into constitutional text. First, this maxim would seem to have little significance for determining whether state legislatures, which inherently retain undefined police powers to legislate for the general welfare, may undertake a particular type of legislative activity. As the Indiana Supreme Court has remarked, "power is *generally* vested in the legislature, *See* Ind. Const. art. 4, § 1, and the outer boundary of that general power is marked by the requirement that it be exercised to advance 'peace, safety, and well-being,' Ind. Const. art. 1, § 1." *Whittington v. State*, 669 N.E.2d 1363, 1369 n.6 (Ind. 1996).

The power to legislate in order to advance the "well-being" of Hoosiers surely includes the ability to provide scholarships to students. *See generally Spatt v. State of N.Y.*, 361 F. Supp. 1048, 1055 (E.D.N.Y. 1973), *aff'd* 414 U.S. 1058 (1973) ("State aid to higher education is historically well within the state police power."). Accordingly, our Supreme Court has held that it is for the *legislature* "to select the means of building up and encouraging schools." *Robinson v. Schenck*, 1 N.E. 698, 705 (Ind. 1885).

Next, even by its own terms, the *exclusio alterius* maxim affords plaintiffs no support. The text of Article 8, Section 1 is phrased in terms of legislative mandates (albeit largely judicially unenforceable ones) rather than legislative authorization. For that reason, it certainly makes sense to infer no other legislative *mandates* besides those listed. But it defies text and logic—not to mention precedent such as *Robinson*—to infer preclusion of authority over

education other than the authority to create public schools, particularly since the very text of Article 8, Section 1 *mandates* the legislature’s use of “all suitable means” to support education. While the maxim “*inclusio unius est exclusio alterius*” may be useful for dealing with textual silence or ambiguity, it is at best cumbersome—and at worst illegitimately nullifying—where, as here, the text is clear and on point.

4. In 1850-51, citizens and convention delegates alike accepted multiple government-supported approaches to education, and the delegates rejected a provision that would have precluded support for anything but common schools

Along with having no textual support, Plaintiffs cite no history from the 1850 constitutional convention, or any other period, suggesting any intent on the part of the delegates or citizens to negate legislative power to go beyond the basic requirement of creating a general and uniform system of common schools. Nor should that be surprising, for the history of the times supports the conclusion that the General Assembly has broad authority to provide for the education of the populace.

While the development of public schools was decentralized prior to the 1851 Constitution, public school districts did exist. *See* Art. 2, §§ 30-41, 1843 Ind. Rev. Stat. ch. 15 (recognizing previously established districts and providing for the districting of the remaining territory). In addition to the schools in their own districts, parents could send their children “to school in an adjoining district or township” or to a private school. Act of February 17, 1838, ch. 14, § 11, 1838 Ind. Rev. Stat. ch. 44. If they chose either of the latter options, they were “entitled” by law to receive “the proportion of their school fund” in the form of a rebate from their township government. *Id.*; *see also* art. 5, §§ 114-15, 1843 Ind. Rev. Stat. ch. 15 (providing that parents who found their own district school “inconvenient” could send their child to “an

adjoining district, and receive the like benefit from the public funds.”). They could then use this money to pay their child’s tuition at the school of their choice.

The State also directly funded private schools. *See* Art. 5, §116, 1843 Ind. Rev. Stat. ch. 15. Residents of areas that had no public school were authorized by law to “establish a private school,” and that private school was entitled to receive the same proportion of public funding that a comparable public school would have received. *Id.* Much primary and secondary education was accomplished at “so-called public but really private seminaries” that were “State-regulated, and the beneficiaries of continuous State aid” but also “fee-supported, and dependent upon personal and private enterprise and interest.” Richard Gause Boone, *A History of Education in Indiana* 52 (1892).

When the State constitution was revised in 1851, one focal point was the need for more centralized planning for public education. *Nagy v. Evansville-Vanderburgh Sch. Corp.*, 844 N.E.2d 481, 488 (Ind. 2006)) (noting the formation of “a ten-person Committee on Education” at the constitutional convention). But that did not mean a unitary approach to supporting formal education. In particular, the delegates considered and *rejected* an amendment to prohibit the establishment “at the public charge, [of] any schools or institutions of learning other than district or township schools.” *See Journal of the Convention of the People of the State of Indiana to Amend the Constitution* 63 (1851) (recording the referral of the amendment to the Committee on Education).⁵

⁵ The delegates’ vision was perhaps best expressed by delegate Othaniel L. Clark of Tippecanoe County: “to promote education by the use and expenditure of the money in aiding parents to pay for the tuition of their children; not to collect a large fund for mere show, and call such policy a devotion to the cause of education.” *Report of the Debates & Proceedings of the Convention for the Revision of the Constitution of the State of Indiana 1880* (1850) (opposing the imposition of a tax to replace school funds in the event that they are lost by the county officers appointed to administer them).

Shortly after the adoption of the 1851 Indiana Constitution, the General Assembly created the Indiana public school system. *See generally* Act of June 14, 1852, 1852 Ind. Rev. Stat. ch. 98. The 1852 School Law, containing 147 sections, was the first comprehensive education legislation enacted in Indiana. *See Boone, supra*, at 144. Among other provisions, it reiterated the constitutional provisions regarding the common school fund, imposed a State-level tax and distribution plan, authorized townships to impose their own special education taxes, and established an administrative system of township trustees, a State Board of Education, and a Superintendent for Public Instruction. *Id.* at 144-45.

But the Act did not reverse the longstanding policy of financing private schools. In fact, the School Law of 1855 permitted cities and towns to “recognize any school, seminary, or other institution of learning, which has been or may be erected by private enterprise, as a part of their system, and to make such appropriation of funds . . . as may be deemed proper.” Act of March 5, 1855, § 2, 38th Gen. Assemb., Reg. Sess., 1855 Ind. Acts ch. 87. Yet such action would not “supersede the common schools established under the authority of this State and supported by the public funds.” *Id.* at § 3. And public funds were indeed distributed to private, religious primary schools pursuant to this statute; for example, Quaker schools continued to receive public funding well into the 1860s. *See* Carl F. Kaestle, “Public Education in the Old Northwest: ‘Necessary to Good Government and the Happiness of Mankind,’” 84 *Indiana Magazine of History* 60, 72-73 (March 1988).

Thus, at the dawn of the State’s new Constitution, the legislature was already authorizing multiple means of supporting formal education: constitutionally required “common schools” as well as separately funded “new systems providing free education where before had been none,”

the product of which “vitalize[d] a most interesting period in Indiana’s educational history.” Boone, *supra*, at 161.⁶

The legislature did not stop there with authorizing the allocation of public resources in ways that indirectly support private schools. An 1865 statute required public school trustees to allow private schools free use of vacant public school buildings upon request. Act of March 6, 1865, § 158, 1876 Ind. Rev. Stat. ch. 244. What is more, Indiana has long required public schools to provide free bus transportation to private school students living along bus routes. See Ind. Code § 20-27-11-1; see also Sarah Barringer Gordon, “Free” Religion and “Captive” Schools: Protestants, Catholics, and Education, 1945-1965, 56 DePaul L. Rev. 1177, 1183 n.21 (2007) (observing that Indiana public school districts provided bus service to parochial school children at least as far back as 1938). The Attorney General deemed this practice constitutional in 1967. *Providing School Bus Facilities for Children Attending Non-Public Schools*, 1967 O.A.G. Official Op. 3. And public schools have been authorized to pay for teachers to go to private schools to teach secular subjects to dual-enrolled students. See *Embry v. O’Bannon*, 798 N.E.2d 157, 167 (Ind. 2003).

The argument that the 1851 Constitution excludes all public support for private schools, therefore, is simply not consistent with either the history of the 1850 convention, where the delegates rejected such a proposal, or with the course of State action that followed.

⁶ The Indiana Supreme Court invalidated section 130 of the School Act of 1852, which provided for local taxation in support of public education. *Greencastle Twp. in Putnam County v. Black*, 5 Ind. 566, 572-73 (1854). That decision had nothing to do, however, with using tax money to support private schools, but only to do with what the Supreme Court understood to be an exclusive allocation to the legislature of the power to impose taxes for education. *Id.* at 575-76. In any event, that case was effectively overturned by *Robinson v. Schenck*, 1 N.E. 698, 707 (Ind. 1885), which upheld the authority of the legislature to delegate taxing authority for schools to local governments.

5. Plaintiffs' General and Uniform Clause theory would negate a host of other longstanding educational endeavors

The legislature's tradition of supporting multiple public education efforts continues in the modern day. In fact, the entire State university system, enacted at Title 21 of the Indiana code, rests on the legislature's "all suitable means" mandate and its police power—there is no other specific provision in the Constitution authorizing or instructing the legislature to create post-secondary educational institutions. To infer that Article 8, Section 1's duty to create a uniform and general system of common schools precludes all other educational initiatives would seem to negate the constitutionality of Purdue University and other State institutions of higher learning created by the legislature after 1851.

The General Assembly has also created several scholarship programs that fund post-secondary education, even though the Indiana Constitution does not specifically direct that it do so. *See, e.g.*, Ind. Code § 21-12-6 et seq. (21st Century Scholars program); Ind. Code § 21-12-3 (Higher Education Award: Frank O'Bannon Grant Program); Ind. Code § 21-12-8 et seq. (Part-Time Student Grant Program and Fund); Ind. Code § 21-13-3 et seq. (Nursing Scholarship Fund); Ind. Code § 21-13-2 et seq. (Minority Teacher Scholarships; Special Education, Occupational Therapy, and Physical Therapy Scholarships). Students can use these State scholarships at both public and private post-secondary institutions.⁷

The State also supplies funds that enable Indiana residents to receive tutoring for the GED exam, an alternative to the standard high school diploma, Ind. Code § 22-4.1-20-4(a)(1)(B), and encourages alternative forms of education through its prison education statutes. *See* Ind.

⁷ The State Student Assistance Commission of Indiana maintains a list of colleges where State scholarships can be used: <http://www.in.gov/ssaci/2469.htm> (21st Century Scholars program); <http://www.in.gov/ssaci/2334.htm> (others).

Code § 11-14-2-5 (mandating that prison “boot camp” programs include an educational element that either provides remedial classes or prepares inmates for the GED exam); Ind. Code § 35-50-6-3.3 (incentivizing prison inmates to make use of educational programs by offering sentence credit for completion of educational milestones such as passing the GED exam or completing requirements for a high school diploma).

There is no constitutional distinction between legislative authority to fund primary and secondary education and legislative authority to fund post-secondary education or any other educational endeavor cited above. Any theory whereby the “uniform and general system of common schools” clause would preclude any other forms of financial support for education would of necessity preclude these State-financed programs.

B. Because school choice scholarships *supplement* the “general and uniform system of common schools,” they are not governed by the “tuition without charge” and “equally open to all,” clauses of Article 8, Section 1

Plaintiffs next argue that, because eligible *private* schools may deny admission to school-choice scholarship students for any reason except race, color and national origin, and because they may charge admitted students more in tuition than a State scholarship pays, the new scholarship law runs afoul of the constitutional requirement that *public* schools be “without charge, and equally open to all.” Pls.’ PI Br. at 22. This argument, to put it mildly, is unlikely to succeed.

1. That Indiana has a constitutionally compliant uniform and general system of common schools, before and after the advent of the CSP, is undisputed

As the Indiana Supreme Court has already recognized, the legislature has discharged its constitutional duty “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. In *Nagy*, the Court observed that, “[c]onsistent with its constitutional mandate, the Indiana General

Assembly has enacted a body of law directed at providing a general and uniform system of public schools. It is detailed, comprehensive, and includes among other things provisions for revenue and funding sources, curriculum requirements, and an assortment of special programs and projects. *See generally* Titles 20 and 21 of the Indiana Code.” *Nagy*, 844 N.E.2d at 491.

The legislature has done this by authorizing the creation of local school corporations. *See* Ind. Code § 20-26-5 et seq. (proscribing the “General Powers and Duties” of school corporations). Prior to 1972, Article 3 of Title 20 on Education governed the creation and governance of school corporations. The various chapters of the Article were enacted over the course of several decades beginning in 1933. The Article divided cities into several population based categories and stated “[s]uch cities are hereby declared to be and are made school corporations for school purposes, separate and distinct from the civil corporations of the same cities. . .” *See* Ind. Code § 20-3-1-2 (repealed 1972). The current statutory scheme essentially fixes existing school corporations in place and addresses reorganization and annexation amongst already existing school corporations. *See* Ind. Code § 20-23-4 et seq.

Public school corporations are responsible for “conduct[ing] an educational program for all children who reside within the school corporation in kindergarten and in grades 1 through 12,” Ind. Code § 20-26-5-1(a)(1), and are charged to “establish, locate, and provide the necessary schools” as required by the statute. Ind. Code § 20-26-5-4(2). Public school corporations are entitled to funding from the State for *every* child in attendance on the statewide day for calculating ADM, which this school year is Friday, September 16, 2011. Memorandum from Melissa K. Ambre, Director of the Office of School Finance, Indiana Dep’t of Educ. to all Superintendents 1 (June 2011), available at <http://www.doe.in.gov/finance/docs/11BudgetWorks>

hop/2012-DOE-ME-SR-InTERS-Form-30A.pdf. Furthermore, public school corporations have the authority to issue bonds and levy taxes to finance building construction and renovation and school bus purchases. Ind. Code §§ 20-26-7-18; 20-27-4-4. School corporations also may, in some situations, if authorized by constituents through referendum, issue bonds and levy taxes to pay for educational programs not covered by the tuition support they are already receiving. Ind. Code § 20-46-1-8.

Under this system of public school corporations, all school-age children in Indiana may attend a public school without any charge for tuition. *See Embry*, 798 N.E.2d at 162 n.4 (noting that a “common school” is one that is “open to the children of all the inhabitants of a town or district”) (quoting Noah Webster, *An American Dictionary of the English Language* 988 (Springfield, Mass., Merriam 1856)).

2. The CSP is not part of this “uniform and general system of common schools,” but exists in part to stimulate improvement of that system

The CSP is not a part of the above-described system of common schools, and indeed is part of broad array of educational choices designed to *strengthen* traditional public schools by giving them incentives to improve and compete for student tuition dollars.

The philosophical foundation of Indiana’s school choice model is not so much to replace public schools as it is to create incentives for public schools to improve. The intellectual force behind the modern school-choice movement, Dr. Milton Friedman, constructed his argument for scholarships based in part on the supposition that “[t]he injection of competition would do much to promote a healthy variety of schools,” and that “[t]he development and improvement of all schools would thus be stimulated.” Milton Friedman, *Capitalism and Freedom* 93 (1962). Empirical studies bear out this hypothesis. In a meta-study published in March 2011, Dr. Greg Forster reported that “Nineteen empirical studies have examined how vouchers affect outcomes

in public schools. Of these studies, 18 find that vouchers improved public schools and one finds no visible impact.” Gregory Forster, *A Win-Win Solution: The Empirical Evidence on School Vouchers* 1 (2011).

Again, the CSP is only the latest in a series of initiatives providing parents of school-age children with educational choices *in addition to* the public school where they have legal settlement. Choice-creating programs such as charter schools, scholarship-donation tax credits, and even tuition-follows-the-student policies all contribute to the overall competitive model, of which the “uniform and general system of common schools” remains a vital part. For a substantial portion of the total school financing bill, the General Assembly has created a model whereby each student effectively has an account of money to spend on education. The parents may choose to spend it at the local public school, they may choose to spend it at an out-of-district public school, they may choose to spend it on home schooling by way of the educational spending tax deduction, *see* Indiana Code section 6-3-2-22, and now some disadvantaged families may spend it at a private school. The key is that, for every student that is educated outside the traditional public school of legal settlement, that school is deprived of the student’s tuition support dollars, regardless whether those dollars are spent elsewhere. This gives traditional public schools incentives to improve in order to attract and retain students.⁸

That said, traditional public schools are not just one more co-equal choice existing alongside other options—as part of the “general and uniform system of common schools,” they are still in a class by themselves. Only they may levy taxes or issue municipal bonds to pay for capital improvements, busing, and other expenses associated with educating students. And only

⁸ On this point, it is worth observing that the single study recounted by Dr. Forster that revealed no positive impact of scholarships on public schools analyzed the Washington, D.C. scholarship program, where public schools did not lose any public funding when a former student used a scholarship to attend a private school. Forster, *supra* at 1, 15.

they *must* admit students with legal settlement. They are the bedrock, and in some spectacular instances the pinnacle, of Indiana primary and secondary education.

3. Accordingly, the “tuition without charge” and “equally open to all” clauses do not apply

Because the legislature created school-choice scholarships in order to supplement the traditional Article 8, Section 1 common schools, private schools eligible to receive scholarship students need not provide “tuition without charge” or be “equally open to all” with respect to scholarship students.

The Wisconsin Supreme Court made this point in *Davis*, 480 N.W.2d at 474. Wisconsin’s uniformity provision states 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.” Wis. Const. art. X, § 3. Based on a plain reading of the provision, the *Davis* court held that “the private schools participating in [Milwaukee’s choice program] do not constitute ‘district schools’ for purposes of the uniformity clause.” *Davis*, 480 N.W.2d at 474. Six years later, the court reaffirmed and extended this reasoning when it upheld a provision removing the statutory limitation on the amount of public money a private school could receive. *Jackson v. Benson*, 578 N.W.2d 602, 627 (Wis. 1998) (“As in *Davis*, we conclude that the mere appropriation of public monies to a private school does not transform that school into a district school under art. X. § 3.”).

This logic applies here. Private schools eligible to receive scholarship students are not “common schools” where tuition must be “without charge” and where admission must be “equally open to all” under Article 8, Section 1. Nor do the scholarships alter the character of traditional public schools, over which the legislature has “plenary power,” *see State ex rel. Clark*

v. Haworth, 23 N.E. 946, 948 (Ind. 1890), which the Indiana Supreme Court has already described as “[c]onsistent” with the constitution, *see Nagy*, 844 N.E.2d at 491, and the adequacy of which is not subject to judicial review in any event, *see Bonner*, 907 N.E.2d at 522.

Consequently, Plaintiffs’ claim that the CSP program is invalid because private schools charge tuition and need not accept all students is destined to fail.

II. The CSP Does Not Violate Article 1, Section 6 Because it Is “For the Benefit” of Students and the Educational System as a Whole Without Regard to Impact on Religious Schools, Where Any “Benefit” Would Be Indirect and Incidental

Article 1, Section 6 restrains direct government support for religion by stating that “[n]o money shall be drawn from the treasury, for the benefit of any religious or theological institution.” Nowhere in this text, or in its history or structure within the constitution as a whole, is there evidence that the 1850 convention delegates or the citizens who ratified the Constitution understood Section 6 to mandate hostility toward parochial institutions in the administration of religion-neutral laws designed “to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement.” *See* Ind. Const. art. 8, § 1.

Accordingly, the Indiana Supreme Court held that Section 6 permits religion neutral government programs that may incidentally benefit religious schools. The CSP is completely neutral with regard to the religious nature of eligible schools, and because parents and students decide where to spend the scholarships, it provides no direct benefits to any religious schools. Under that doctrine, the CSP no more constitutes direct benefits to religious institutions than the State’s post-secondary scholarship programs (which can be used to pay for religious instruction and indoctrination at various private Indiana colleges and universities), or its charity support campaign for State employees.

A. Both history and the Indiana Supreme Court cast doubt on the applicability of Section 6 to parochial schools

In *Embry v. O'Bannon*, 798 N.E.2d 157 (Ind. 2003), where the court upheld the “dual enrollment” process whereby public school corporations would enroll students also enrolled in parochial schools, and then provide secular educational services to these students, the lead opinion by Justice Dickson cast doubt on the notion that parochial schools constitute “religious institutions” under Section 6. The Court observed that the framers’ purpose to “prevent the imposition, on the citizen, of any tax to support any ministry or mode of worship against his consent” did not make any reference to educational institutions that were religiously affiliated. *Id.* at 161 (quoting Robert Dale Owen, Address to the People of Indiana, in *Journal of the Convention of the People of the State of Indiana to Amend the Constitution* 964 (1851)). The definition of “ministry” at the time of the convention referred to an ecclesiastical function or profession. *Id.* (citing Noah Webster, *An American Dictionary of the English Language* 716 (1856)). “This may suggest the framers intended Section 6 to prohibit public funds only for ecclesiastical functions.” *Id.*

Justice Dickson supported this line of argument by reference to the constitutions of Michigan and Wisconsin, which were the source of Article 1, Section 6, and which prohibited public funds to be drawn “for the benefit of religious societies, or *theological or religious seminaries.*”⁹ *Id.* at 161-62 (quoting Mich. Const. of 1835, art. I, § 5 (emphasis added by the Indiana Supreme Court)). The lead opinion in *Embry* reasoned that “the choice by the framers of Indiana’s Section 6 to exclude the phrase ‘or religious or theological seminaries’ may indicate that they did not intend it to apply to religious schools.” *Id.* at 162.

⁹ Wisconsin reversed the language (“religious or theological seminaries”). Wis. Const. art. I, § 18. The provisions are nearly identical.

This reading finds a home in the history of public education in Indiana. Prior to the establishment of public schools, a child's education was provided by the child's family or at a private school, usually a religiously affiliated one. *Id.* From 1816 to 1850, secondary education was provided mainly at seminaries, academies, or similar institutions, usually "under private or religious auspices." *Id.* (quoting Donald F. Carmony, *Indiana, 1816-1850: The Pioneer Era* 394 (1998)). "Because the distinction between public and private schools was so unclear, the meager public funds available for education were often distributed to public and independent schools alike, including those run by churches." *Id.* (citing Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society, 1780-1860* 166-67 (1983)). Indeed, during the last half of the 1840s, a majority of Indiana's youth attended either private or denominational schools that were in part financed from taxes and proceeds from public school funds. Carmony, *supra*, at 393.

Given this history, if the 1850 convention delegates had been concerned that public monies not be directed to parochial schools in any manner, they would surely have debated the issue. Yet they adopted the religion clauses of the Bill of Rights without any debate whatever. *Embry*, 798 N.E.2d at 160-61. And while the disestablishment provisions of many late 19th century state constitutions derived from specific efforts to defund Roman Catholic schools, Justice Dickson's lead opinion in *Embry* observed that our delegates were *not* influenced by any such anti-Catholic sentiment. *Id.* at 163-64.

Perhaps unsurprisingly, then, following ratification of the 1850 Constitution, State and local governments continued to pay direct support to parochial schools. For example, as noted, Quaker schools, which incorporated regular Bible reading into the curriculum and sometimes required students to attend religious services, continued to receive public funding well into the

1860s. Carl F. Kaestle, “Public Education in the Old Northwest: ‘Necessary to Good Government and the Happiness of Mankind,’” 84 *Indiana Magazine of History* 60, 72-73 (March 1988).

Ultimately, the court in *Embry* did not decide whether Section 6 applies to parochial schools, but it certainly understood the history of Indiana education finance and religious exercise to be fully compatible with allowing taxpayer funds to benefit parochial schools indirectly, at the very least.

B. Article 1, Section 6 requires religious neutrality and permits incidental benefits to religious institutions, which is what the CSP at most permits

What the Indiana Supreme Court did decide in *Embry* is that religion-neutral government programs may provide incidental benefits to religious institutions without violating Section 6. In *Embry*, opponents of dual-enrollment argued that such practices unconstitutionally benefited private religious schools. The Court disagreed, however, in light of the religion-neutral nature of the programs, the “obvious significant educational benefits” to Indiana children and the “benefit [to] the State by furthering its objective to encourage education for all Indiana students.” *Embry*, 798 N.E.2d at 167 (opinion of Dickson, J.).

Justice Dickson’s lead opinion in *Embry* relied on the analysis of the Wisconsin Supreme Court in two cases of the same name: *State ex rel. Warren v. Nusbaum*, 198 N.W.2d 650 (Wis. 1972) (*Nusbaum I*), which struck down a statute authorizing the State to contract with a church-related university for the purpose of dental education services, *id.* at 660-61, and *State ex rel. Warren v. Nusbaum*, 219 N.W.2d 577 (Wis. 1974) (*Nusbaum II*), which upheld a statute authorizing local school boards to contract with private services to instruct special-needs children if their local schools did not have the resources to do so. *Id.* at 585. The *Nusbaum I* Court determined that “for the benefit of religious societies, or religious or theological seminaries” in

Article I, section 18 of the Wisconsin Constitution does not mean that “some shadow of incidental benefit to a church-related institution” is unconstitutional. *Nusbaum I*, 198 N.W.2d at 659. Rather, “the crucial 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.” *Id.* (quoted in *Embry*, 798 N.E.2d at 165) (internal quotations omitted). The *Nusbaum II* court, when it upheld the special-education contract statute, concluded that “[t]he primary effect of [the statute] is not the advancement of a religious organization but the providing of special educational services to the handicapped children of Wisconsin, a secular purpose.” *Nusbaum II*, 219 N.W.2d at 585 (quoted in *Embry*, 798 N.E.2d at 166).

Later, using the same doctrinal analysis, the Wisconsin Supreme Court upheld the Milwaukee school choice program, which allowed participation by parochial schools. *Jackson v. Benson*, 578 N.W.2d 602, 621 (Wis. 1998).

To overcome the obvious roadblock to their case that *Embry* presents, particularly in light of our Supreme Court’s reliance on some portions of Wisconsin’s benefits clause doctrine, Plaintiffs invoke *State ex rel. Johnson v. Boyd*, 28 N.E.2d 256 (Ind. 1940), where the Court permitted a public school system to pay members of “various orders” to teach secular subjects to school children displaced by the close of parochial schools. *Id.* at 266-67. Yet, given that these instructors, as members of Roman Catholic religious orders, would have had to remit their salaries directly to their religious orders, 1917 (Pio-Benedictine) Code of Canon Law, Canons 580, §2, 594, § 2, taxpayer support for religion was more direct there than in this case.

In *Embry*, moreover, Justice Dickson’s lead opinion relied on *Boyd* as support for accepting religion-neutral laws and programs that happen to afford religious institutions with incidental benefits. Citing *Boyd*, the opinion concluded that “Indiana case law . . . has

interpreted Section 6 to permit the State to contract with religious institutions for goods or services, notwithstanding possible incidental benefit to the institutions, and to prohibit the use of public funds only when *directly* used for such institutions' activities of a religious nature." *Embry*, 798 N.W.2d at 167 (emphasis added). Even Justice Boehm, taking a more narrow view of Section 6 in his concurring opinion, conceded that "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." *Id.* at 170 (Boehm, J., concurring).

Embry, therefore, stands for the proposition that it is permissible for religious schools to benefit incidentally from religion-neutral programs designed to provide broader educational opportunities for students.

C. The CSP is religion-neutral

Like the dual enrollment program at issue in *Embry*, the CSP is religion-neutral and directly benefits *students*, not religious institutions or activities. The program permits any private *or public* school to be eligible to accept CSP scholarships as payment. Ind. Code § 20-51-1-4.7.

Nor can the CSP fairly be viewed in isolation. It is only one part of a larger competitive educational choice model that also features inter-district transfers and charter schools (which by definition are not religious, *see* Indiana Code Section 20-24-1-4). At present there are 61 charter schools in the State, largely concentrated in Indianapolis and Northwest Indiana, but with many scattered around the State. *See* Indiana Charter Schools, Ind. Dep't of Educ., *available at* http://www.doe.in.gov/charterschools/docs/Charter_School_List_Web.pdf. The entire array of schools from which scholarship-eligible students may choose, therefore, is balanced among religious and non-religious schools.

For example, parents of a scholarship-eligible first-grader living within the IPS boundaries might realistically send their child, with government tuition support, not only to one of the 41 parochial elementary schools in Marion County (assuming all apply for CSP eligibility), but also to one of the 20 elementary charter schools, one of the 167 surrounding township public elementary schools, or even one of the 5 non-religious private schools (assuming all apply for CSP eligibility). And this comparison does not even take account of the possibility that, with the advent of CSP and more liberalized charter school laws, *see* Pub. L. No. 91-2011, new non-religious schools will emerge to give parents yet more choices.

Regardless, the main point is that not only CSP, but the entire school-choice model as a whole, is religion neutral. It does not apply exclusively to parochial schools, or even prefer them. Article 1, Section 6 does not codify State hostility to religious schools by disqualifying them from religion-neutral government programs, or by requiring the State to interfere with their programs of religious education as a condition for being eligible to accept State scholarships as payment.

D. The CSP confers no direct support for religious indoctrination or instruction because any benefits for religious schools are the result of parental choice, not government choice

Plaintiffs argue that the CSP “directly and substantially supports and benefits the religious missions of the schools and their sponsoring churches.” Pls.’ PI Br. at 16. This is transparently not the case. The CSP State funds do not wind up in the coffers of religious schools without the voluntary choices of parents to support those schools. Indiana’s long history of permitting tax dollars to pay for religious instruction at the choice of individual students, *see supra* at 17-22, stands four-square behind the eligibility of religious schools for CSP students.

While not controlling, Establishment Clause doctrine is instructive in this regard. The United States Supreme Court has held that private choice is a crucial distinction when it comes to the constitutionality of parochial-school-eligible scholarship programs. In the seminal case *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the Court held that Ohio’s scholarship program for Cleveland public school students did not violate the Establishment Clause because the scholarships were provided on a religion-neutral basis and parents, not the State, decided whether to use them at sectarian or secular institutions. *Id.* at 662-63. The Court embraced the “distinction between government programs that provide aid directly to religious schools . . . and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals.” *Id.* at 649.

As with the Ohio program at issue in *Zelman*, the CSP is “neutral in all respects toward religion.” *Id.* at 653. It “confers educational assistance directly to a broad class of individuals defined without reference to religion,” *id.*, *i.e.*, any school-aged Indiana child residing in a household whose income falls below a certain level. *See* Ind. Code § 20-51-1-4.5. The CSP also “permits the participation of *all* schools within the [state], religious or nonreligious.” *Zelman*, 536 U.S. at 653 (emphasis in original); Ind. Code § 20-51-1-4.7. Furthermore, as discussed in the Factual Background and Part I.B.2, *supra*, it is also “part of a general and multifaceted undertaking by the State . . . to provide educational opportunities to the children of [] failed school district[s].” *Zelman*, 536 U.S. at 653. Indeed, the CSP is just one option on an entire menu of educational choices available to Indiana parents.

Plaintiffs argue, however, that private parental choice—the *crucial* factor in determining the constitutionality of school choice programs under the federal Establishment Clause—has no bearing on Indiana constitutional analysis. *See* Pls.’ PI Br. at 19. But the rationale of *Embry*,

which turned principally on the *indirect* nature of any benefit accruing to a religious school, implies that individual choice is quite relevant. The choice of the individual students and parents to purchase parochial school education with a State scholarship, not the action of the State making that scholarship available, provides the direct, proximate direction of remuneration to the religious school. It is exactly the individual's assumption of the role of causal actor that makes the *State's* action "indirect."

Plaintiffs cite no Indiana cases in support of their assertion that individual choice does not matter, but instead rely on a number of cases from other states whose constitutions, they contend, are "similar to Indiana's." *Id.* at 20. There are, however, significant differences between Indiana's constitution and the constitutions they cite. Unlike Indiana's Constitution, the Virginia, Alaska, Nebraska, and Arizona constitutions at the time of the respective cases cited by Plaintiffs explicitly prohibited public funds from going to *any* private school—the sort of provision *rejected* by Indiana's 1850 constitutional convention. *See* Alaska Const. art. VII, § 1 ("No money shall be paid from public funds for the direct benefit of any religious or other private educational institution"); *Almond v. Day*, 89 S.E.2d 851, 854 (Va. Ct. App. 1955) (citing Section 141 of the Virginia Constitution, which stated that "[n]o appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof"); Neb. Const. art. VII, § 11 ("[A]ppropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof"); Ariz. Const. art. IX, §10 ("No tax shall be laid or appropriation of public money made in aid of any . . . private or sectarian school").

Furthermore, Idaho, Massachusetts and New Hampshire have clear prohibitions on public funds going to sectarian schools. *See* Idaho Const. art. IX, § 5 ("Neither the legislature nor any

county . . . shall ever make any appropriation, or pay from any public fund or moneys . . . for any sectarian or religious purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever”); Mass. Const. amend. art. XVIII, § 2 (“No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any . . . primary or secondary school . . . which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the Commonwealth or federal authority or both); N.H. Const. pt. 1, art. VI (“[N]o person shall ever be compelled to pay towards the support of the schools of any sect or denomination.”). Florida similarly prohibits State funds from going “directly or indirectly . . . in aid of any sectarian institution.” Fla. Const. art. I, § 3; *Bush v. Holmes*, 886 So.2d 340, 357-60 (Fla. Ct. App. 2004) (noting that the Florida compelled support provision is “far stricter” than the Establishment Clause).

Additional cases that Plaintiffs cite are inapposite for other reasons. In the Washington case cited by Plaintiffs, funds were going directly to a grantee’s religious instruction—a Bible studies degree—which also explicitly violated the Washington Constitution’s express prohibition on money from going to religious instruction. See *Witters v. State Com’n for the Blind*, 771 P.2d 1119, 1121-22 (Wash. 1989). The decision Plaintiffs cite from Illinois—whose constitution is coextensive with the federal Establishment Clause—was based on a 1973 understanding of Establishment Clause doctrine. See *People ex rel. Klinger v. Howlett*, 305 N.E.2d 129, 130 (Ill. 1973). The Illinois Supreme Court determined that grants to parents for, among other things, partial payment of private school tuition, were in violation of the Establishment Clause, even

though the grants were religion-neutral. *Id.* The U.S. Supreme Court’s holding in *Zelman*, however, casts serious doubt on the Illinois holding, rendering that case unpersuasive.

If the constitution of any other state bears on this issue, it should be that of Wisconsin, which served as a model for Indiana’s Article 1, Section 6. The Wisconsin Supreme Court *upheld* a private school scholarship program under Wisconsin’s Section 6 analogue (Article I, Section 18 of the Wisconsin Constitution). *Jackson*, 578 N.W.2d at 621. In particular, that court stated that “public funds may be placed at the disposal of third parties so long as the program on its face is neutral between sectarian and nonsectarian alternatives and the transmission of funds is guided by the independent decisions of third parties.” *Id.* And, again, the Indiana Supreme Court in *Embry* cited Wisconsin’s benefits clause doctrine as a guide, at least in some respects, for Indiana’s doctrine. *Embry*, 798 N.E.2d at 165-66.

E. Other State programs besides the CSP allow taxpayer funds to flow to religious institutions by way of private, individual choice

Directing public funds toward religious institutions by private choice is not limited to the CSP. The Frank O’Bannon Grant Program, administered through the State Student Assistance Commission of Indiana (SSACI), provides need-based grants to students completing higher education programs within the State at both public and private institutions. Grant monies are intended to be applied toward tuition and regularly assessed fees and do not require repayment. *See Frank O’Bannon Grant Program*, SSACI, <http://www.in.gov/ssaci/2346.htm>.

Maintaining religious neutrality, eligible private colleges include those that are non-religious—*e.g.*, Rose-Hulman Institute of Technology, Wabash College, and Harrison College—along with those that are religiously-affiliated—*e.g.*, Anderson University, Crossroads Bible College, St. Joseph’s College, and Taylor University. *See Eligible Indiana Colleges*, SSACI, <http://www.in.gov/ssaci/2334.htm>. In Fiscal Year 2011, of the nearly \$186 million granted,

approximately \$50 million were awarded to students attending religious private schools, \$21 million to private non-religious institutions, and \$115 million to public non-religious schools. Ex. C. Overall, approximately 26.7% of the year's O'Bannon Grants were directed to students attending private religious institutions.¹⁰

In addition to the O'Bannon Grant Program, SSACI administers the Twenty-first Century Scholars Program. Twenty-first Century Scholars are middle school-aged children of moderate and low-income families who, if they sign a pledge of good citizenship and fulfill various obligations, receive State-paid tuition at a participating four-year public undergraduate institution upon their graduation from high school. Nevertheless, if the student decides to attend a private university, then the State will still provide "an amount comparable to that of a public institution." See *Twenty-First Century Scholars Program: The Program*, SSACI, <http://www.in.gov/ssaci/2381.htm>. Of the almost \$46.5 million dollars granted in fiscal year 2011, more than \$3.6 million were given to grantees attending a private religious institution, compared to less than \$1 million dollars to students attending a private non-religious school. Ex. C.

Thus, the State already provides sizeable grants indirectly to religious private schools through private choice.¹¹ The CSP is not an aberration from existing Indiana educational policy,

¹⁰ Some degree of religious instruction or worship is mandatory for students at each of these schools. See Anderson University Undergraduate College Catalog, 2010-2012, at 26, available at <http://www.anderson.edu/registrar/catalog1012.pdf> (requiring attendance at chapel-convocation each Tuesday and Thursday for full-time students); Crossroads Bible College 2010-2013 Catalog at 36, available at <http://s3.amazonaws.com/churchplantmedia-cms/crossroadsbiblecollege/2010-catalog-final.pdf> (requiring religious training for each of the college's five degree programs); Saint Joseph's College 2011-2012 Academic Catalog at 70-71, available at http://www.saintjoe.edu/academics/majors/catalog/2011-2012/11-12_Academic-Catalog.pdf (requiring, as part of the College's mandatory "Core" curriculum, courses in Christian Humanism); Taylor University Undergraduate Catalog 2010-2011 at 38, available at <http://www.taylor.edu/dotAsset/7475ca92-b92c-4ada-8dbc-517ea4202f14.pdf> (requiring six "Spiritual Foundation" courses as part of the school's general education curriculum).

¹¹ In addition to these two educational grant programs are the minority teacher, special education, occupational therapy, and physical therapy program and the nursing program, addressed above. In fiscal year 2011, \$79,150 out of a total of \$370,150 went to private religious schools through the minority teacher, special education, occupational

but a continued attempt at expanding student access to schools whose fees would otherwise be prohibitive, by instituting a system of private choice. These programs were not created for the benefit of religious schools or institutions, but for the benefit of students, and only through their choices do taxpayer funds arrive at parochial schools.

Permitting private choice to direct taxpayer funds to religious institutions is not limited to the education context, either. The Indiana State Employees' Community Campaign (SECC), for example, allows State employees to donate to "any charity that has a 501(c)(3) ruling through either a one-time deduction or the convenience of payroll deductions." *See* SECC, <http://www.insecc.org>. A large portion of verified 501(c)(1) charities are religious, which a summary review of the assigned charity codes confirms. *See Search for Existing Charity Codes*, SECC, <http://www.insecc.org/locator/CharityLocator.aspx>.

Like the CSP, the SECC does not direct funds to religious institutions in any sort of systematic way for their particular benefit; the program is facially neutral and taxpayer money is directed to religious institutions only when the individual who has control over the funds so chooses. Nevertheless, a substantial proportion of funds donated go to religious organizations. As of April, 27, 2011, the 2010-11 SECC charitable contribution total was \$1,162,486.02; of that amount, \$240,728.01—or about 20.7%—went to apparently religious charities. Ex. D.

The CSP is thus similar to other religion-neutral State programs that, consistent with Article 1, Section 6, direct formerly public money to religious institutions at the choice of the original individual beneficiaries.

therapy, and physical therapy program. Ex. C. For the nursing program, \$85,200 out of \$335,446 went to religious schools. Ex. C.

III. The Scholarships Do Not Compel Any Person to Support any Religious Entities in Violation of Article 1, Section 4

Article 1, Section 4 of the Indiana Constitution provides, “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.” The Plaintiffs argue that Section 4’s prohibition of compelled “support” includes “the compelled payment of taxes” to support ministries or places of worship. Pls.’ PI Br. at 11. This argument fails for several reasons.

A. Parochial schools are not “ministries” or “places of worship” under Section 4

History does not support the inference that a parochial school is a “place of worship” or “ministry” under Section 4. The Constitution does not define these terms, but it is unlikely that the framers intended them to encompass religious schools. As the above overview of education in Indiana demonstrates, religious schools played an important role in the State education system both before and after the 1850 constitutional convention. In light of the longstanding practice of providing public funding to private (including religious) schools, the drafters would likely have foreclosed that option explicitly if indeed they intended to do so.

B. Article 1, Section 4 precludes mandatory tithing and the like, not government expenditure of general tax revenue, which is addressed by Section 6

The Plaintiffs’ basic religious-establishment argument is straightforward enough: tax money, they argue, is improperly being spent on religious schools. But they do not argue that any person is actually being compelled to subscribe to any faith or ideology. In light of the nature of their claims, the only State constitutional provision that is even plausibly relevant is Section 6, which precludes direct disbursement of tax revenues to churches. If there is no violation of Section 6, it is difficult to understand how plaintiffs’ claim could validly be recast as

asserting a violation of the anti-compulsion provision of Section 4 on the grounds that taxes are compulsory.

In short, Section 4's protection against being "compelled to support any place of worship," is a protection against forced tithing or other similar direct, individual support for churches or ministries. It may even provide protection against a special tax levied specifically to support a state-established church. These, after all, were the classic components of establishmentarianism that Indiana's sister states sought to prevent when adopting similar constitutional text over the prior century. Philip Hamburger, *Separation of Church and State* 90 (2002); see also G. Alan Tarr, *Church and State in the States*, 64 Wash. L. Rev. 73, 81-82 (1989) (describing how James Madison introduced Jefferson's "Bill for Establishing Religious Freedom" to the Virginia legislature in 1784 in direct response to another measure that would have imposed a "general assessment . . . on every one to the support of the pastor of his choice" (quoting 1 Writings of Thomas Jefferson 54 (1894))). But protection against compelled support surely does not refer to being made to pay general taxes, some minute portion of which, through a series of legislative and regulatory actions and individual choices, ultimately winds up being used as a scholarship at a religious school.

This is a structural argument as much as a textual and historical one. The Indiana Bill of Rights contains seven provisions relating to freedom of worship, freedom of conscience and the establishment of religion. See Ind. Const. art. 1, §§ 2-8. Each has its own job to do. Sections 2 through 4 all have to do with preventing government from targeting religious worship in some way. Section 2 protects the individual right to worship, Section 3 protects freedom of conscience, regardless whether that relates to worship, and Section 4 precludes the government

from preferring any particular worship and from requiring anyone to attend, physically erect, or financially support a church or ministry.

In contrast, Sections 5 through 8 prescribe how the normal functions of government are to accommodate religious practices and beliefs without creating religious establishments. Section 5 precludes religious tests for public office, Section 6 precludes using the power to appropriate money to channel taxpayer funds directly to a church, Section 7 precludes disqualifications of witnesses on grounds of religious belief, and Section 8 provides that oaths should be tailored to a person's individual conscience.

This structural understanding of the Bill of Rights demonstrates that Section 4's "compelled support" protection should not be misunderstood to refer to expenditure of general tax revenues, which is the concern of Section 6. The protection against "compelled support" contemplated by Section 4 has, like the rest of Sections 2-4, to do with preventing direct and specific interference by the government with individual and collective religious practices. Section 6's benefits clause has to do with guiding the government in its ordinary activities. There is no justification for treating these very different constitutional protections as if they address the same circumstances or set of concerns, as our Supreme Court insists that each of the thirty-seven provisions in the Indiana Bill of Rights "was calibrated consonant with its overall design." *Price v. State*, 622 N.E.2d 954, 958 (Ind. 1993).

The Wisconsin Supreme Court similarly so held in *Jackson v. Benson*, 578 N.W.2d 602, 632 (Wis. 1998). There, the plaintiffs asserted that the Milwaukee scholarship program violated the State's compelled support analogue, but the state Supreme Court responded that "[t]his argument is identical to the Respondents' argument under the benefits clause. We will not interpret the compelled support clause as prohibiting the same acts as those prohibited by the

benefits clause. Rather we look for an interpretation of these two related provisions that avoids such redundancy.” *Id.* at 622-23. This Court should similarly conclude that Section 4 has nothing to say about the use of taxpayer money to fund scholarships that may be used at religious schools.

Plaintiffs rely on *Chittenden Town School District v. Department of Education*, 738 A.2d 539, 541-42 (Vt. 1999), which invalidated under a compelled support clause a statute providing for the payment of tuition to sectarian schools in a school district that did not maintain its own high school. As the Vermont Supreme Court recognized, however, Vermont’s Bill of Rights does not have the same structure as the Wisconsin Constitutions (nor, therefore, as the Indiana Constitution), and in particular has no benefits clause that does the work of precluding direct government expenditures in support of churches. *Id.* at 560. Accordingly, if any provision of the Vermont Bill of Rights would provide such a barrier, it would have to be the compelled support provision. *See id.* But in that regard, *Chittenden* essentially treated the Vermont compelled support clause as if it were a benefits clause and invalidated a scheme providing for *direct* government payment to parochial schools rather than through the intermediate decisions of parents. *Id.* at 562-63. The *Chittenden* court did *not*, that is, identify some persuasive reason to characterize the use of general tax revenues to fund choice-based religion-neutral scholarships as “compelled support” for religion. Hence there is nothing to compare between that case and this one.

Plaintiffs also cite dictum from *Hammer v. State*, 89 N.E. 850, 852 (Ind. 1909), to the effect that Section 4 and the other religious freedom provisions of the Indiana Constitution “were intended to accomplish” a total separation of church and state—“the complete divorcement of state and church,” in the language of that case. Pls.’ PI Br. at 9. But *Hammer* turned only on the

meaning of “creed” as it relates to individual free exercise protected by Section 4, *see Hammer*, 89 N.E. at 852; it did not address barriers between state and religion. Besides, the Court’s comment about “complete divorcement” is too abstract and general to provide any guidance for other contexts 100 years later. There is no evidence that the 1850 convention delegates tried to erect an impermeable barrier between state tax dollars and religious organizations. As recounted above, the historical evidence is much to the contrary. Such a barrier would indicate an unprecedented hostility to religious practice incompatible with Indiana values at the time of the constitutional convention.

The CSP in no way constitutes direct and specific government interference with anyone’s individual or collective religious exercise. Structurally, it is a rather typical government spending exercise, albeit one that the plaintiffs argue improperly benefits religion. Accordingly, Section 6 provides the only text in the Bill of Rights that remotely bears on the situation, and it does not preclude financing individual parental choices to patronize parochial schools.

PLAINTIFFS HAVE NOT DEMONSTRATED IRREPARABLE HARM

Plaintiffs have asserted standing, not based on any direct injury, but only as taxpayers and citizens. And while the Indiana Supreme Court seems to accept such grounds for standing in lawsuits challenging education funding, *see Embry v. O’Bannon*, 798 N.E.2d 157, 159-60 (Ind. 2003), it is not predicated on *any* sort of actual harm, let alone irreparable harm. Oddly, Plaintiffs attempt to establish irreparable harm by citing *ACLU v. City of St. Charles*, 794 F.2d 267, 274-75 (7th Cir. 1986), where the plaintiff’s injury was predicated not on taxpayer status, but on not having free use of the city’s streets and services without being subjected to viewing a large cross display. Here, Plaintiffs predict no similar individualized injury that would lead to irreparable harm to themselves.

Furthermore, asserting injury to third parties such as public school corporations is insufficient, given that such institutions are political subdivisions of the State, not sovereigns, who in any event have not even attempted to assert their interests here. *Cf. Bd. of Comm'rs of Howard Cnty. v. Kokomo City Plan Comm'n*, 330 N.E.2d 92, 100-101 (Ind. 1975) (holding that political subdivisions cannot sue to enjoin statutes that govern them). Fundamentally, Plaintiffs do not have a special status vis-à-vis any school corporations from which they may presume to argue in defense of those corporations.

PUBLIC POLICY AND THE BALANCE OF EQUITIES FAVOR THE STATE

Plaintiffs urge that the status quo benefits the taxpayers of Indiana. This contention ignores the reality of the public education system. The state of public education in Indiana is in desperate need of reform, and this legislation is a critical “suitable means” by which the legislature seeks to improve the system. The students that would take advantage of this program in the coming academic year—whose interests the Attorney General *may* invoke as *parens patriae*, and some of whom in any event are seeking to appear in this case—will be greatly harmed if the statute is enjoined. The students would lose access to school choice for one year in their extremely limited educational careers. If the statute is enjoined and later ruled constitutional, there is nothing that will give these students that year of quality, freely chosen education back.

Finally, public policy demands that the statutes passed by the elected legislature be upheld. This statute serves the will of the people, and Plaintiffs wish to abrogate the proper legislative process simply because they disagree with the outcome of the democratic process. The public interest favors the proper law making process of a duly elected legislature. *See Ill. Bell Tel. Co. v. Worldcom Techs., Inc.*, 157 F.3d 500, 503 (7th Cir. 1998) (“the court must

consider that all judicial interference with a public program has the cost of diminishing the scope of democratic governance.”); *United States v. Rural Elec. Convenience Co-op. Co.*, 922 F.2d 429, 440 (7th Cir. 1991) (holding that “the government’s interest is in large part presumed to be the public’s interest”).

Accordingly, on balance, both public policy and the equities in this case favor the State Defendants.

CONCLUSION

The preliminary injunction should be denied.

Respectfully submitted,

GREGORY F. ZOELLER
Indiana Attorney General,
Attorney No. 1958-98

By:


Thomas M. Fisher

Solicitor General
Attorney No. 17949-49
Office of the Attorney General
Indiana Government Center South
Fifth Floor
302 West Washington Street
Indianapolis, Indiana 46204-2770
Telephone: 317-232-6255
Fax: 317-232-7979
Tom.Fisher@atg.in.gov
Attorney for Defendants

Ashley Tatman Harwel
Deputy Attorney General
Attorney No. 25433-79A

Heather Hagan McVeigh
Deputy Attorney General
Attorney No. 24919-49A

CERTIFICATE OF SERVICE

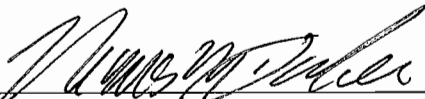
I do hereby certify that a copy of the foregoing Memorandum in Opposition to the Motion for Preliminary Injunction has been duly served upon the parties listed below, by email and by First Class United States Mail, postage prepaid, on this 21st day of July, 2011:

Andrew W. Hull
Alice M. Morical
Hoover Hull LLP
111 Monument Circle, Suite 4400
P.O. Box 44989
Indianapolis, IN 46244-0989
awhull@hooverhull.com
amorical@hooverhull.com

Alice O'Brien
Kristen L. Hollar
National Education Association
1201 16th Street, N.W.
Washington, DC 20036
aobrien@nea.org
khollar@nea.org

John M. West
Joshua B. Shiffrin
Bredhoff & Kaiser, P.L.L.C.
805 Fifteenth Street, N.W., Suite 1000
Washington, DC 20005
jwest@bredhoff.com
jshiffrin@bredhoff.com

J. Lee McNeely
Cynthia A. Bedrick
McNeely Stephenson Thopy & Harrold
2150 Intelliplex Drive, Suite 100
Shelbyville, IN 46176-8547
jlmcneely@msth.com
cabedrick@msth.com



Thomas M. Fisher
Solicitor General

OFFICE OF THE ATTORNEY GENERAL
IGCS, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204

EXHIBIT A

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION SUPERIOR COURT
CAUSE NO. 49D07-1107-PL-025402

TERESA MEREDITH, DR. EDWARD E.)
EILER, RICHARD E. HAMILTON,)
SHEILA KENNEDY, GLENDA RITZ,)
REV. MICHAEL JONES. DR. ROBERT M.)
STWALLEY III, KAREN J. COMBS,)
REV. KEVIN ARMSTRONG, DEBORAH J.)
PATTERSON, KEITH GAMBILL, and)
JUDITH LYNN FAILER,)
Plaintiffs,)

v.)

MITCH DANIELS, in his official capacity as)
Governor of Indiana; and DR. TONY BENNETT,)
in his official capacity as Indiana Superintendent)
of Public Instruction and Director of the Indiana)
Department of Education,)
Defendant.)

DECLARATION OF DALE CHU

I, Dale Chu, declare the following to be true:

1. I am over 18 years of age and am competent to testify in a court of law and have personal knowledge of the information set forth in this declaration.
2. I am Assistant Superintendent for Innovation and Improvement at the Indiana Department of Education ("Department of Education"). In this role, I supervise the tracking of school utilization by Indiana primary and secondary students, including among other things the numbers of students who attend public schools outside of their legal settlements and the number of students attending charter schools. I also oversee the review of applications from organizations that wish to be able to award scholarships under the School Scholarship Tax Credit statutes and submit recommendations to the Superintendent as to whether these applications should be approved. I have reviewed Department of Education data and records related to my responsibilities at the Department and discovered the information set forth in the remaining paragraphs of this document.

3. According to Department of Education data, in the 2006-07 school year, 2,797 students transferred to Indiana public schools outside of their legal settlements.
4. In school year 2010-2011, 13,721 students transferred to Indiana public schools outside of their legal settlements.
5. In the 2002-2003 school year, 1,572 students attended charter schools in Indiana.
6. In 2007-2008, 11,121 students attended charter schools in Indiana.
7. In 2010-2011, 22,472 students attended charter schools in Indiana.
8. As of August 1, 2010, the Department had approved three organizations as able to award scholarships under the School Scholarship Tax Credit statutes. The Educational CHOICE Charitable Trust was approved on January 13, 2010. The School Scholarship Granting Organization of Northeast Indiana, Inc., was approved on March 5, 2010. The Tuition Assistance Fund of Southwestern Indiana, Inc., was approved on May 6, 2010.
9. These organizations are required to submit reports to the Department of Education by August 1 of each year. The 2010 reports for each of the foregoing three organizations, which are maintained by the Department of Education in the ordinary course of business, are provided as Attachment A.
10. The Educational CHOICE Charitable Trust collected 28 donations totaling \$260,043.38 and issued 387 scholarships in 2010. *See Attachment A.*
11. The School Scholarship Granting Organization of Northeast Indiana, Inc., collected \$0 and issued zero scholarships in 2010. *See Attachment A.*
12. The Tuition Assistance Fund of Southwestern Indiana, Inc., collected 3 donations totaling \$1,150 and issued zero scholarships in 2010. *See Attachment A.*
13. As of July 2011, the Department of Education has now recognized two additional organizations able to award scholarships under the School Scholarship Tax Credit statutes. The two were created after the August 1, 2010 deadline for reporting had passed.
14. According to Department of Education data, there are 41 parochial elementary schools, 5 non-religious private elementary schools, and 20 charter elementary schools in Marion County. In addition, there are 167 public elementary schools in Marion County that are not charter schools and not part of Indianapolis Public Schools.

I declare under penalty of perjury under the laws of the United States of America and the State of Indiana that the foregoing is true and correct.

Executed on this 21st day of July, 2011.



Dale Chu, Assistant Superintendent for Innovation and Improvement,
Indiana Department of Education.
151 West Ohio Street
Indianapolis, Indiana 46204

School Scholarship Report Form
2009-2010 School Year (for the period through June 30, 2010)

Educational CHOICE Charitable Trust

Name of Scholarship Granting Organization

Formerly

ONE NORTH CAPITOL AVENUE, SUITE 1250 46204

As of 7-1-10

1435 North Illinois Street Indianapolis, IN 46202

Address of Scholarship Granting Organization (Street, City, Zip)

28

\$ 260,043.38

Total Number of Contributions Received

Total Dollar Amount of Contributions Received

387


\$ 151,558.48

Total Number of School Scholarships Awarded

Total Dollar Amount of School Scholarships Awarded

CERTIFICATION OF SCHOLARSHIP GRANTING ORGANIZATION

I hereby certify, under penalty of perjury, that the information and documentation contained in my application is true and accurate to the best of my knowledge and belief.


Signature of Chief Executive Officer

Timothy T. Wright

Printed Name of Chief Executive Officer

July 27, 2010

Date

Return to:

Jeffery P. Zaring
Indiana Department of Education
151 West Ohio Street
Indianapolis, IN 46204

School Scholarship Report Form
2009-2010 School Year (for the period through June 30, 2010)

Tuition Assistance Fund Southwestern Indiana, Inc
Name of Scholarship Granting Organization

4200 North Kentucky Avenue, Evansville, IN 47711
Address of Scholarship Granting Organization (Street, City, Zip)

3
Total of Number of Contributions Received

\$ 1,150.00
Total Dollar Amount of Contributions Received

- 0 -
Total Number of School Scholarships Awarded

- 0 -
Total Dollar Amount of School Scholarships Awarded

CERTIFICATION OF SCHOLARSHIP GRANTING ORGANIZATION

I hereby certify, under penalty of perjury, that the information and documentation contained in my application is true and accurate to the best of my knowledge and belief.

Margaret D. Boardman
Signature of Chief Executive Officer

MARGARET D. BOARDMAN
Printed Name of Chief Executive Officer

7-26-2010
Date

Return to:

Jeffery P. Zaring
Indiana Department of Education
151 West Ohio Street
Indianapolis, IN 46204

School Scholarship Report Form
2009-2010 School Year (for the period through June 30, 2010)

Scholarship Granting Organization of Northeast Indiana, Inc.

Name of Scholarship Granting Organization

915 South Clinton Street - Fort Wayne, Indiana 46802

Address of Scholarship Granting Organization (Street, City, Zip)

0

Total Number of Contributions Received

\$ 0.00

Total Dollar Amount of Contributions Received

0

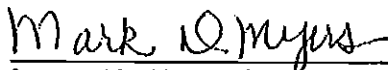
Total Number of School Scholarships Awarded

\$ 0.00

Total Dollar Amount of School Scholarships Awarded

CERTIFICATION OF SCHOLARSHIP GRANTING ORGANIZATION

I hereby certify, under penalty of perjury, that the information and documentation contained in my application is true and accurate to the best of my knowledge and belief.



Signature of Chief Executive Officer

Dr. Mark D Myers

Printed Name of Chief Executive Officer

July 21, 2010

Date

Return to:

Jeffery P. Zaring
Indiana Department of Education
151 West Ohio Street
Indianapolis, IN 46204

EXHIBIT B

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION SUPERIOR COURT
CAUSE NO. 49D07-1107-PL-025402

TERESA MEREDITH, DR. EDWARD E.)
EILER, RICHARD E. HAMILTON,)
SHEILA KENNEDY, GLENDA RITZ,)
REV. MICHAEL JONES. DR. ROBERT M.)
STWALLEY III, KAREN J. COMBS,)
REV. KEVIN ARMSTRONG, DEBORAH J.)
PATTERSON, KEITH GAMBILL, and)
JUDITH LYNN FAILER,)
Plaintiffs,)

v.)

MITCH DANIELS, in his official capacity as)
Governor of Indiana; and DR. TONY BENNETT,)
in his official capacity as Indiana Superintendent)
of Public Instruction and Director of the Indiana)
Department of Education,)
Defendant.)

DECLARATION OF PAUL LEITER

I, Paul Leiter, declare the following to be true:

1. I am over 18 years of age and am competent to testify in a court of law and have personal knowledge of the information set forth in this declaration.
2. I am a Processing Manager for the Indiana Department of Revenue (“Department”).
3. As part of my regular duties, I routinely review changes in Indiana law that may affect the Department’s administration and processing of Indiana income tax returns.
4. In 2009, the legislature created the “School Scholarship Tax Credit” program. Ind. Code § 6-3.1-30.5-3. The program provides tax incentives for Indiana taxpayers to contribute to organizations that grant scholarships to low- and middle-income students who wish to attend private schools. Ind. Code §§ 6-3.1-30.5-3; 20-51-1-5. Taxpayers participating in the program can claim up to fifty percent of the amount of any contribution made to a scholarship granting organization as a tax credit. Ind. Code § 6-3.1-30.5-8. The program does not place a limit on how much a donor can

contribute to a qualified organization, but for FY 2012 the entire tax credit program cannot award more than \$5 million in credits per state fiscal year (thus allowing up to \$10 million in creditable donations). In FY 2011, the cap was set at \$2.5 million.

5. As Processing Manager at the Department of Revenue I am responsible for reviewing applications for school scholarship tax credits, for awarding the credits to qualified taxpayers, for tracking the amount of credits awarded, and for ensuring the amount of credits awarded does not exceed the statutory cap.
6. According to the Department's records, Indiana taxpayers were eligible to claim \$396,780 in scholarship tax credits in FY2011.
7. That amount is based on contributions of \$793,560 for FY2011.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 21st day of July, 2011.



Paul Leiter, Processing Manager Indiana Department of Revenue
5150 Decatur Blvd., Indianapolis, IN 46241

EXHIBIT C

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION SUPERIOR COURT
CAUSE NO. 49D07-1107-PL-025402

TERESA MEREDITH, DR. EDWARD E.)
EILER, RICHARD E. HAMILTON,)
SHEILA KENNEDY, GLENDA RITZ,)
REV. MICHAEL JONES. DR. ROBERT M.)
STWALLEY III, KAREN J. COMBS,)
REV. KEVIN ARMSTRONG, DEBORAH J.)
PATTERSON, KEITH GAMBILL, and)
JUDITH LYNN FAILER,)
Plaintiffs,)

v.)

MITCH DANIELS, in his official capacity as)
Governor of Indiana; and DR. TONY BENNETT,)
in his official capacity as Indiana Superintendent)
of Public Instruction and Director of the Indiana)
Department of Education,)
Defendant.)

DECLARATION OF KRISTIN CASPER

I, Kristin Casper, declare the following to be true:

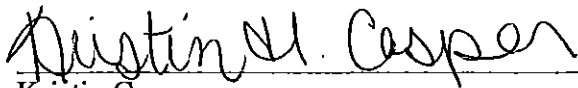
1. I am over 18 years of age and am competent to testify in a court of law and have personal knowledge of the information contained in this declaration.
2. I am the Chief of Staff of the State Student Assistance Commission of Indiana ("Commission").
3. As Chief of Staff of the Commission I assist the Executive Director in administering several programs granting scholarships to post-secondary students funded by state taxpayer dollars and other state funds, some of which are listed in turn in the following paragraphs.
4. The Frank O'Bannon Grant Program provides need-based grants to students completing higher education programs within the State at both public and private institutions. Grant monies are intended to be applied toward tuition and regularly

assessed fees and do not require repayment. According to our records, in fiscal year 2011, the Frank O'Bannon Grant Program granted nearly \$186 million in scholarships. Approximately \$50 million of that amount was awarded to students attending religious private schools, \$21 million to private non-religious institutions, and \$115 million to public non-religious schools.

5. The Twenty-first Century Scholars Program finances post-secondary education for middle school-aged children of moderate and low-income families who sign a pledge of good citizenship. If the students fulfill their obligations, the State will pay for the student's tuition at a participating four-year public undergraduate institution upon their graduation from high school. If the student decides to attend a private university, then the State will still provide a comparable amount. In fiscal year 2011, the Twenty-first Century Scholars Program granted almost \$46.5 million dollars in scholarships. Of that amount, more than \$3.6 million was given to grantees attending a private religious institution, compared to less than \$1 million dollars to students attending a private non-religious school. Most went to public undergraduate institutions for which the full tuition was paid by the State.
6. The Minority Teacher Scholarships; Special Education, Occupational Therapy, and Physical Therapy Scholarships Program provides grants to minority students undertaking a course of academic study designed to culminate in a teaching certificate or to or any student seeking Special Education teaching certification, or Occupational or Physical Therapy certification. In fiscal year 2011, the program issued \$370,150 in scholarships, with \$79,150 financing education at private religious schools.
7. The Nursing Scholarship Fund grants scholarships to students undertaking a course of academic study designed to culminate in a nursing degree. In fiscal year 2011, the Nursing Scholarship Fund issued \$335,446 in scholarships with \$85,200 of that financing education at religious institutions.

I declare under penalty of perjury under the laws of the United States of America and the State of Indiana that the foregoing is true and correct.

Executed on this 21st day of July, 2011.



Kristin Casper

Chief of Staff, State Student Assistance Commission of Indiana

W462 IN Government Center South, 402 W. Washington St., Indianapolis, IN 46204

EXHIBIT D

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION SUPERIOR COURT
CAUSE NO. 49D07-1107-PL-025402

TERESA MEREDITH, DR. EDWARD E.)
EILER, RICHARD E. HAMILTON,)
SHEILA KENNEDY, GLENDA RITZ,)
REV. MICHAEL JONES. DR. ROBERT M.)
STWALLEY III, KAREN J. COMBS,)
REV. KEVIN ARMSTRONG, DEBORAH J.)
PATTERSON, KEITH GAMBILL, and)
JUDITH LYNN FAILER,)
Plaintiffs,)

v.)

MITCH DANIELS, in his official capacity as)
Governor of Indiana; and DR. TONY BENNETT,)
in his official capacity as Indiana Superintendent)
of Public Instruction and Director of the Indiana)
Department of Education,)
Defendant.)

DECLARATION OF JON D. DARROW

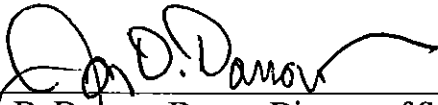
I, Jon D. Darrow, declare the following to be true:

1. I am over 18 years of age and am competent to testify in a court of law and have personal knowledge of the information contained in this declaration.
2. I am the Deputy Director and Chief of Staff of the Indiana State Personnel Department.
3. The State Personnel Department conducts an annual Statewide Employee Community Campaign (SECC) whereby state employees are encouraged to donate to non-profit groups through payroll deduction. As Deputy Director and Chief of Staff of the Department, I am familiar with the details of the SECC, I know how State government implements it, and I have at times pledged a portion of my salary to a non-profit through it, including to a religious organization.
4. Pledges made by state employees as part of the SECC are transferred to the State's fiscal agent. The fiscal agent sends a listing of the pledges to be withheld to the Auditor of State who withholds the appropriate amount from individual paychecks

5. I have reviewed records kept by the Department in the regular course of business relating to SECC and the amounts employees have pledged to various charities in recent years.
6. According to our records, the total 2010-11 SECC charitable contribution pledges were \$1,162,486.02. Of that amount, \$240,728.01 was pledged to non-profits having names suggesting that they are churches or religious organizations.

I declare under penalty of perjury under the laws of the United States of America and the State of Indiana that the foregoing is true and correct.

Executed on this 21st day of July, 2011.



Jon D. Darrow, Deputy Director of State Personnel
402 W. Washington St. Room W161, Indianapolis, IN 46204