In the
Supreme Court of Indiana

No. 49S00-1203-PL-172

TERESA MEREDITH, *et al.*,
Appellants-Plaintiffs,

v.

MITCH DANIELS, *et al.*,
Appellees-Defendants.

Appeal from the
Marion Superior Court
No. 49D07-1107-PL-25402
Honorable Michael D. Keele, Judge

Brief *Amicus Curiae* of The Friedman Foundation for Educational Choice

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Statement of Interest of *Amicus Curiae*

The Friedman Foundation for Educational Choice ("Foundation") is a 501(c)(3) nonprofit and nonpartisan organization, dedicated to advancing Milton and Rose Friedman's vision of school choice for all children. The Foundation, headquartered in Indianapolis and one of the nation's leading school-choice advocates, continues its founders' mission of promoting school choice as the most effective and equitable way to improve the quality of K-12 education in the United States. As explained below, the Foundation urges the Court to affirm the judgment below, to uphold the legality of Indiana's Choice Scholarship Program, and to reject Plaintiffs' constitutional challenge.

Introduction

A first-rate education is the goal; a system of public schools is one of several delivery mechanisms. Traditional public schools represent an essential, but not exclusive, means of delivering the education necessary to ensure students obtain the knowledge and learning they need to compete in a global economy and to participate fully as informed citizens in a free society. Under the Indiana Constitution, the legislature must provide a public-school system, but it is has the authority to devote taxpayer resources to other, competing educational options.

For too long, policymakers measured educational progress in terms of inputs (spending levels) and gave scant attention to outputs (knowledge and learning). One consequence of this misplaced focus is that the track record for educational outcomes has been mixed. Despite prodigious growth in government expenditures for public primary and secondary education in recent decades, various objective measures of educational attainment have flat-lined or fallen. Although public schools in affluent communities are often top-notch, their counterparts in urban or rural communities are frequently mediocre or worse, even though per-pupil expenditures at these schools typically exceed those at suburban schools.

Many of the problems associated with modern education have been attributed to the public-school monopoly. Monopoly schools, particularly urban schools, have had little incentive to improve, given the ready supply of customers (students) within the established school-district territory and the steady flow of taxpayer dollars that accompanied their enrollments. These students seldom had meaningful options outside their immediate neighborhood school, as their families could not afford to pay twice for education—once in taxes and again in private-school tuition.

Over the last generation, school reformers have worked diligently to change the public-education model. The culmination of these efforts is the

Choice Scholarship Program at issue here, which empowers lower-income families to make the same kinds of school choices enjoyed by the more affluent. Now children of eligible families can attend their neighborhood public school or a charter school, or they can use the proceeds of a Choice Scholarship to attend an out-of-district public school, a private school, or a parochial school of their choosing. This and other school-reform efforts enable parents to "use public funds set aside for education to send their children to the school of their choice—public or private, near or far, religious or secular—whatever works best for their children." "What Is School Choice?", *available at* http://www.edchoice.org/School-Choice/What-is-School-Choice.aspx.

To put the legal issues in this case into context, the Foundation recounts some sobering educational statistics that highlight recent problems with our public schools and describes recent policy changes to address those shortcomings. The result is that public dollars now follow the students more directly, and students have meaningful choices beyond their immediate neighborhood school.

Statement of Facts

A. Recent education statistics reflect a system in need of reform.

Indiana's high-school dropout rate has been disturbingly high. In 2011, the public high-school graduation rate in Indiana was less than 79 percent. *See*

Indiana Dep't of Educ., 2011 Non-Waiver Graduation Rate, *available at* http://www.doe/ind.gov.improvement/accountability/graduation-cohort-rate. Several public schools in Indiana have graduation rates below 70 percent. *See* Indiana Dep't of Educ., 2010 Graduation Report, *available at* http://www.doe.in.gov/improvement/accountability/graduation-cohort-rate. And as recently as 2005, nearly 70 percent of students in Indianapolis Public Schools *failed* to graduate on time, putting it last among school districts serving the 50 largest U.S. cities. *See Cities in Crisis 2009: Closing the Graduation Gap* 14 (Graduation Rates for the Principal School Districts Serving the Nation's 50 Largest Cities), *available at* http://www. americaspromise.org/Our-Work/Dropout-Prevention/Cities-in-Crisis.aspx.

Meanwhile, Indiana's standardized test scores have remained static. One commonly used test is the National Assessment of Educational Progress (NAEP) exam. On this test, considered to be "the best instrument for comparing the academic achievement trends of students in different states", Indiana's fourth graders scored 221 in reading in 1992 and again in 2011, showing no net improvement in that 19-year span. Nat'l Center for Educ. Statistics, Summary of NAEP Results for Indiana, *available at* http://nces.ed.gov/nationsreportcard/states. The same report shows only one in three Indiana eighth graders performing at or above the NAEP Proficient level in reading in 2011, and that percentage is

unchanged from 2002. *See id.* Fourth-grade reading statistics are comparable. In 1992, 30 percent of fourth graders performed at or above the NAEP Proficient level, and in 2011 there was a modest increase to 33 percent. *See id.*

Several public schools in Indiana entered the 2011-12 academic year in their sixth year of academic probation. After a school experiences five years of sub-par performance, the State can intervene with a turn-around effort. Just the threat of State intervention has prompted two public schools to close, Paul Harding High School in Allen County and Central Elementary School in Lake County. *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/sites/default/files/accountability/schools-year-four-academic-probation.xls; http://www.doe.in.gov/sites/default/files/news/110722probationyearfivewith2011results.xls; http://www.doe.in.gov/ improvement/accountability/2011-public-law-221-pl-221. Schools continue to fail despite a nearly 100-percent increase in per-pupil spending between 1980 and 2006 in constant, inflation-adjusted dollars. *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.

B. Indiana responds with needed reforms.

Beginning a decade ago, our legislature embarked on a series of reforms to improve primary and secondary education in Indiana. Among these reforms are programs that make public funds available so students can pursue alternatives to traditional public schools.

In 2001, the legislature passed the Charter School Act 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 I.C. §20-24-2-1). Charter schools were intended to "[s]erve the differing learning styles and needs of public school students [by offering them] appropriate and innovative choices." *Id.* The schools also would "[p]rovide 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 acquiring facilities for charter schools. *See* I.C. §20-24-12 *et seq.* Through the Charter Schools Facilities Assistance Program, charter schools can apply for both loans and grants from the fund to achieve these ends. *Id.* §20-24-12-7. All new schools in the charter system must "be open to any student" in the State. *Id.* §20-24-5-1. In the 2002-03 school year, 1,572 students attended charter

schools in Indiana. [Appellees' App. 282 ¶5.] By 2007-08, the number had increased to 11,121. [Appellees' App. 282 ¶6.] And as of the 2010-11 school year, charter-school enrollment amounted to 22,472 [Appellees' App. 282 ¶7], representing a 1,300-percent increase in less than 10 years.

Property-tax reform represents another fundamental change that has created more educational choices for parents and schoolchildren. To help local governments manage new property-tax caps, the General Assembly required the State to assume full control of the general school fund in 2009. Pub. L. No. 146-2008, §14; I.C. §4-12-1-15.7(f). Before, when local taxes paid a substantial part of public-school tuition support, it could be very expensive for parents to transfer a child to a different school system, because transferee schools would typically charge transfer tuition. *See id.* §20-26-11-13. Because the State now pays all tuition support for public schools, the transferee school can no longer charge an out-of-boundary student for any transfer tuition covered by the State. The result is that neighboring school districts are now a more attractive, affordable option for many parents.[1]

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[1] Schools can still elect not to accept transferring students, *see* I.C. §20-26-11-5, but any transfer fees charged by participating schools must be minimal if the student transfers before the September ADM (average daily membership) day. *Id.* §§20-26-11-6, 20-26-11-13; 511 Ind. Admin. Code 1-3-1 (definition of ADM). If a student changes schools after the ADM count day, the tuition charged could be higher to offset the loss of state tuition support. Students and parents may use a Choice Scholarship to pay transfer tuition fees to an out-of-boundary public school.

In the 2006-07 school year, before the State assumed control of the general school fund, fewer than 2,800 Indiana students attended out-of-boundary public schools. [*See* Appellees' App. 282 ¶3.] Only four years later, by school year 2010-11—after the legislature had slashed transfer tuition—the number of out-of-boundary transfers had increased nearly five-fold to more than 13,700. [*See* Appellees' App. 282 ¶4.]

In 2009, the legislature also created the "School Scholarship Tax Credit" program. I.C. §6-3.1-30.5 *et seq.* 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. *Id.* §§6-3.1-30.5-7, 20-51-1-7. Fifty percent of the amount contributed to a scholarship-granting organization can be claimed as a tax credit. *Id.* §6-3.1-30.5-8. There are no limits on how much a particular donor can contribute to a qualified organization. And beginning in fiscal year 2012, the entire tax-credit program can award up to $5 million in credits per State fiscal year, thus allowing as much as $10 million in creditable donations. *See id.* §6-3.1-30.5-13; Ind. Dep't of Revenue, School Scholarship Credit, http://www.in.gov/dor/4305.htm (in 2011 cap was raised from $2.5 million 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. I.C. §20-51-3-5(b). Religious and non-religious schools can participate. *See id.* §20-51-1-6.

In the 2010-11 fiscal year, $793,560 was donated to scholarship-granting organizations, leading to $395,780 in tax credits. [*See* Appellees' App. 279 ¶¶6-7]; I.C. §6-3.1-30.5-8; Indiana Dep't of Revenue, School Scholarship Credit, *available at* http://www.in.gov/dor/4305.htm. Five organizations are currently authorized to award scholarships under the program, three of which submitted reports for the 2009-10 school year showing awards of 387 scholarships in 2010. [*See* Appellees' App. 282 ¶¶8-10.] And yet another tax break allows taxpayers to deduct unreimbursed education expenses up to $1,000 per student, regardless of where the student attends school. I.C. §6-3-2-22.

Another recent change, which took effect this year, involves the State's public-school funding formula. Previously, the formula awarded tuition support for a given academic year based on a school's rolling three-year enrollment average, measured by ADM (average daily membership). Under this approach, schools with growing enrollments were educating more students in the current year than they were being reimbursed for. *See* Pub. L. No. 182-2009(ss), §332. In contrast, schools with declining enrollments were receiving funds for students no longer enrolled. I.C. §20-43-5-4. Effective January 1, 2012, a school's tuition support is now based on its enrollment count for *that* year. *Id.* §20-43-4-7. A

consequence of this change is that public schools now lose funding more directly when students vote with their feet and enroll elsewhere.

All of these reforms show that parents and their children take advantage of educational alternatives when they are made available. The most far-reaching of these reforms is the Choice Scholarship Program.

Summary of Argument

Indiana's Choice Scholarship Program, which is designed to improve the quality of education by affording parents greater school options and imposing a form of market discipline on an entrenched public-school system, withstands all three of Plaintiffs' constitutional challenges.

Article 8, Section 1 offers no basis for invalidating the Program. This provision was intended to require that the General Assembly encourage educational improvements "by all suitable means" and provide for a general and uniform system of public schools. It was not intended to foreclose the legislature from using public funds to support other educational initiatives that compete with public schools.

The Program likewise survives scrutiny under the two religion clauses. Article 1, Section 4—the compelled-support clause—prevents the State from establishing an official state church, and from mandating church attendance and compelling financial support for any particular church or religion. This

provision, which dates back to the original 1816 Constitution, does not bar direct government aid to religious schools. Such aid was routinely provided before adoption of the 1851 Constitution.

Nor is the Program invalid under Article 1, Section 6. This provision was intended to bar direct public aid to religious institutions. There is no violation of Section 6 where, as here, public dollars flow to religious institutions based on the private choices of individual citizens, and public funds merely reimburse such institutions for the services they render to participants.

Argument

I. Plaintiffs' Claim that the Choice Scholarship Program Violates Article 8, Section 1 Is Without Merit.

Nothing in the text or history of Article 8, Section 1 prevents the General Assembly from creating taxpayer-funded educational options that provide parents with meaningful choices outside the public-school system. By its terms, this constitutional provision imposes two duties on the legislature: (i) to encourage intellectual, scientific, and other improvement "by all suitable means" and (ii) to provide for a general and uniform system of "common" (*i.e.*, public) schools:

> 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 (emphasis added).

Contrary to Plaintiffs' argument, this provision does not cabin legislative discretion, but expands it. The legislature must, to be sure, provide a general and uniform system of open, tuition-free public schools. And it has done so. Traditional public schools are, and will remain, an available option for parents who want to send their children there. But the legislature has a further obligation—to encourage moral, intellectual, scientific, and agricultural improvement "by all suitable means". This plenary power gives the legislature the flexibility to create educational choices outside the public-school system. The Choice Scholarship Program is well within the legislature's prerogative.

A. Article 8, Section 1 does not limit the permissible educational options to public schools alone.

The text of Article 8, Section 1 does not support Plaintiffs' contrary position. If the framers shared Plaintiffs' view that the duty to encourage intellectual and other improvement was limited to providing public schools, they could have made their intention unmistakably clear. One option would have been to impose a single duty of encouraging educational improvement through the exclusive means of providing a public-school system:

> 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 by providing ~~provide, by law,~~ for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.

Of course, this is not what the framers did. Instead, they imposed *two* duties and gave the legislature broad discretion—"all suitable means"—to fulfill the first of them. The Court, accordingly, should reject a wrenched interpretation of a constitutional provision based on language the framers did not adopt, and which would leave an explicit duty—the duty to "encourage"—superfluous and a nullity.

Nor does Article 8, Section 3 vindicate Plaintiffs' misguided interpretation of Section 1. Section 3 states in full: "The principal of the Common School fund shall remain a perpetual fund, which may be increased, but shall never be diminished; *and the income thereof shall be inviolably appropriated to the support of Common Schools, and to no other purpose whatever.*" Ind. Const. art. 8, §3 (emphasis added). The plain, obvious meaning of Section 3 does not cast doubt on the validity of the Choice Scholarship Program. It merely provides that proceeds from the Common School fund must be devoted exclusively to common schools. So long as that mandate is honored, nothing in Section 3 precludes the legislature

from funding *other* educational initiatives, such as the Choice Scholarship Program, with *other* public resources.

B. The Choice Scholarship Program also is consistent with the history surrounding the adoption of Article 8, Section 1.

In addition to the text, the relevant history underscores that the Choice Scholarship Program is consistent with Article 8, Section 1. This provision was intended to centralize state control over the public-school system by reducing local control and the resulting patchwork quilt of disparate educational offerings. But it was never designed to eliminate the state's ability to promote education through means other than public schools.

1. The 1816 Constitution outlined aspirational education reforms.

In the early years of statehood, Indiana's education system, such as it was, was weak and largely a matter of local preferences, with little guidance or support from the State. *See* Martha McCarthy and Ran Zhang, "The Uncertain Promise of Free Public Schooling" *in The History of Indiana Law* 238 (David J. Bodenhamer and Randall T. Shepard, ed., 2006) (hereinafter "McCarthy & Zhang"). Parents bore most of the financial responsibility for their children's education, and they decided who would serve as teachers and what their curriculum would be. *Id.* at 239.

Article IX of the 1816 Constitution represented an ambitious statement of Indiana's belief in the importance of education. Section 1 imposed a duty on the legislature to improve federal lands granted for the use of schools and to apply funds raised from such lands for educational purposes. Ind. Const. of 1816, art. IX. §1.

Section 2 directed the legislature to provide a general system of education, tuition-free, through the college level for all (white) citizens. But the directive was precatory, requiring legislative action only "as soon as circumstances will permit": "It shall be the duty of the General Assembly, as soon as circumstances will permit, to provide, by law, for a general system of education, ascending in a regular gradation, from township schools to a state university, wherein tuition shall be gratis, and equally open to all." *Id.* at §2.

And Section 3 described how local funds were to be directed to support the envisioned system of general education.

> Sect. 3. And for the promotion of such salutary end, the money which shall be paid, as an equivalent, by persons exempt from militia duty except, in times of war, shall be exclusively, and in equal proportion, applied to the support of County seminaries; also all fines assessed for any breach of the penal laws, shall be applied to said seminaries, in the Counties wherein they shall be assessed.

Id. at §3.

2. Educational realities did not match constitutional rhetoric.

Although these "sweeping" provisions were "unprecedented among states constitutions" and "drew praise from school reformers nationally", the legislature did not implement them "in any serious way." McCarthy & Zhang, *supra,* at 215. There remained a "huge gap" between "the lofty constitutional ideals and educational realities". *Id.* Education was a "low priority", at least in part because of the common belief that it was "primarily the responsibility of families or churches" to provide it. *Id.*

A significant part of Indiana's prevailing educational system included seminaries, which at the time were simply places of education that could be religious or secular. *See Embry v. O'Bannon*, 798 N.E.2d 157, 162 n.4 (Ind. 2003) (citations omitted); Barclay Thomas Johnson, Article, *Credit Crisis to Education Emergency: The Constitutionality of Model Student Voucher Programs Under the Indiana Constitution*, 35 Ind. L. Rev. 173, 194-95 (2001) (hereinafter, "Johnson"). Such "seminaries", even the religious ones, received some of their funding directly from the state "through fines and other official sources of revenue". *Id.* at 195.

The common-school movement, led by Horace Mann in Massachusetts, "influenced the growth of public education in Indiana" beginning in the 1830s.

McCarthy & Zhang, *supra*, at 216. Caleb Mills, one of the founders of Wabash College, believed the situation was so dire that Indiana residents

> are the most ignorant of the *free States*, and are far below even some of the *Slave States*. *One-seventh part* of our adult population are unable to read the word of God, or write their names. Some of our counties are enveloped in a thicker intellectual darkness than shrouds *any State* in the Union.

Johnson, *supra*, at 199 (quoting Donald F. Carmony, *Indiana: 1816-1850: The Pioneer Era* 387-88 (1998) (hereinafter "Carmony") (emphasis in original)).

By the middle of the 19th century, the pressure was mounting to establish a more formal "system of state-supported education". McCarthy & Zhang, *supra*, at 216. In addition to the State's fiscal collapse, brought about by the failure of the Internal Improvements System of 1836, another crisis prompting the 1851 Constitution was the failure to have established a system of general education. "[B]y mid-century, the majority of Indiana's children were receiving no education at all." Johnson, *supra*, at 197 (quoting Carmony, *supra*, at 379).

Although the development of public schools was decentralized before 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 districting of remaining territory). Parents could send their children to school not only within their own district, but also "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 parents chose either the adjoining-district or private-school 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 school districts "inconvenient" could send their children to "an adjoining district, and receive the like benefit from the public funds."). Parents could then use this money to pay their children'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", which 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 not only "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) (hereinafter "Boone").

3. The 1851 Constitution establishes a unitary, statewide approach to public education.

The constitutional fix adopted in 1851 was to abandon the informal educational system established by the 1816 Constitution, in favor of a "general and uniform system of Common Schools". Ind. Const. of 1851, art. 8, §1. When

the State constitution was amended in 1851, one focal point was the need for more centralized planning for public education. *Nagy v. Evansville-Vanderburgh School Corp.*, 844 N.E.2d 481, 488 (Ind. 2006) (noting formation of "ten-person Committee on Education" at constitutional convention). But that meant a unitary approach to supporting formal education.

Notably, the delegates considered and *rejected* a proposed constitutional amendment that would have prohibited 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 referral of amendment to Committee on Education). The delegates' vision was 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." 2 *Report of the Debates & Proceedings of the Convention for the Revision of the Constitution of the State of Indiana* 1880 (1850) (hereinafter "2 Report of the Debates") (opposing imposition of tax to replace school funds in case they are lost by county officers appointed to administer them).

4. The Legislature implements recently adopted constitutional reforms in education.

Soon after adoption of the 1851 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 Indiana's first comprehensive education legislation. *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 of public instruction. *Id.* at 144-45.

The Act did not, however, reverse the longstanding policy of public support for private schools. And the later-enacted School Law of 1855 explicitly 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 an appropriation of funds . . . as may be deemed proper." Act of March 5, 1855, §2, 38th General 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 (even religious) primary schools under 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, in the immediate aftermath of the 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.[2]

The legislature did not stop there in 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, 1865 Ind. Rev. Stat. ch. 244. And, more recently, Indiana began requiring public schools to provide free bus transportation to private-school students living along bus routes. *See* I.C. §20-27-11-1; *see also* Sarah Barringer Gordon, *"Free" Religion and "Captive" Schools:*

[2] The Court invalidated section 130 of the School Act of 1852, which authorized local taxation to support public education. *Greencastle Twp. in Putnam County v. Black*, 5 Ind. 566, 572-73 (1854). That decision had nothing to do with using tax money to support private schools, but with what the Court considered to be the *legislature's* exclusive province 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 legislature's prerogative to delegate taxing authority to local governments.

Protestants, Catholics, and Education, 1945-1965, 56 DePaul L. Rev. 1177, 1183 n.21 (2007) (observing Indiana public-school districts provided bus service to parochial-school children since at least 1938). The Indiana Attorney General deemed this practice to be constitutional in 1967. *See 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*, 798 N.E.2d at 167.

Plaintiffs' argument that the 1851 Constitution forecloses public support for private schools is, accordingly, not consistent with either the history of the 1850 convention, where the delegates expressly rejected such a proposal, or with subsequent State action.

II. Plaintiffs' Religion-Clause Claims Also Lack Merit.

Neither Section 4 nor Section 6 of Article 1 supports Plaintiffs' contention that the Choice Scholarship Program is unconstitutional.

A. Article 1, Section 4 does not prohibit even direct aid to religious schools, let alone the Choice Scholarship Program's individual-choice model.

Section 4's compelled-support clause, which dates virtually unchanged to the 1816 Constitution, prohibits the compelled support of "any place of worship" or "ministry" without consent: "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." Ind. Const. of 1851, art. 1, §4[3] (emphasis added).

This provision's text and history demonstrate it was intended to prohibit mandatory tithing and other forms of *individual* compelled support, whether spiritual or financial, for any religion, church, or place of worship. In other words, it prevented the State from telling a citizen how to practice his or her faith or to spend his or her own money.

During colonial times, most of the original 13 colonies had an established church (always a Protestant denomination), which was sponsored and supported by the colonial government. Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 Ind. J. Global Legal Stud. 503, 507 (2006). In parts of New York and most of the South, the established church was the Church of England, whereas in the northern colonies it was

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[3] In the 1816 Constitution, the compelled-support clause was in Article I, Section 3:

> "That all men have a natural and indefeasible right to worship Almighty God, according to the dictates of their own consciences: *That no man shall be compelled to attend, erect, or support any place of Worship, or to maintain any ministry against his consent*: That no human authority can, in any case whatever, control or interfere with the rights of conscience: And that no preference shall ever be given by law to any religious societies, or modes of worship; and no religious test shall be required as a qualification to any office of trust or profit."

Ind. Const. of 1816, art. I, §3 (emphasis added).

predominantly the Congregational Church. *Id.* Although these churches "did *not* have centuries of accumulated wealth" (referring to the Catholic Church), they "did have dominant social and political position; they were supported by taxes collected by the government; and they provoked substantial resentment". *Id.* (emphasis in original).

During and after the American Revolution, each new state wrote a constitution. Within each state, members of churches that were not established—so-called "dissenters", because they dissented from the teachings of the established church—insisted that the new state constitutions address the issue of religious liberty. *Id.* at 508. Eventually, in all states the established churches were disestablished, meaning they were deprived of government sponsorship and tax support. *Id.*

In Indiana, the 1816 Constitution included a religious-liberty clause, including a no-support clause that remains to this day. By adopting this language, Indiana was preventing mandatory church attendance and compelled financial support that characterized the establishment of a particular religion as the state's official religion. What Indiana was not prohibiting, however, was direct government aid to religious schools. As discussed in the prior section, this practice was commonplace before adoption of the 1851 Constitution, when the 1816 Constitution's identical compelled-support clause was prevailing law. What

that means, now as then, is that the compelled-support clause prohibits something *other* than direct government aid to religious schools. Thus, the framers' dismantling of Indiana's seminary system in 1851 cannot be read as an effort to de-fund religious schools, because seminaries then referred to all schools, public and private, and not just religious ones. Johnson, *supra*, at 196.

As discussed next, it was the addition of Article 1, Section 6 to the 1851 Constitution that barred the practice of providing direct government aid to religious schools, thus demonstrating that was not the purpose of Article 1, Section 4.

B. Article 1, Section 6 does not prohibit government payments to religious institutions for services rendered.

Article 1, Section 6—the "benefits" clause—was intended to prohibit direct government aid to religious institutions, not to forbid the State from paying for services these institutions rendered.

Of relevance here, the most significant change in the 1851 Constitution was the addition of Section 6: "No money shall be drawn from the treasury, for the benefit of any religious or theological institution." Ind. Const. of 1851, art. 1, §6 (quoted in *Constitution Making in Indiana, Vol. 1: 1780-1850* at 296 (Charles Kettleborough, ed., 1916) (1971 reprint) (emphasis in original). According to the president of the 1850 constitutional convention, Section 6's "for the benefit of" language was "found in the Constitutions of Michigan, Wisconsin, and others of

recent date". 2 *Report of the Debates* at 2042 . Like Indiana, Wisconsin and Michigan also were part of the former Northwest Territory and, since statehood, have rejected similar constitutional challenges alleging that student-assistance programs are unlawful under their respective "benefits" clauses. *See Jackson v. Benson*, 578 N.W.2d 602, 620-23 (Wis. 1998); *In re Legislature's Request for Opinion on Constitutionality of Chapter 2 of Amendatory Act No. 100 of Public Acts of 1970*, 180 N.W.2d 265, 273-74 (Mich. 1970).

The most recent, comprehensive judicial treatment of Indiana's "benefits" clause was this Court's decision in *Embry*, 798 N.E.2d 157. At issue in *Embry* was the constitutionality of Indiana's dual-enrollment programs. Under these programs, public schools received additional funds to provide secular instructional services to parochial-school students, on the premises of the parochial school, in return for securing those students' enrollment in their respective public-school corporations. *Id.* at 159. The plaintiffs alleged the dual-enrollment programs violated Section 6, Indiana's "benefits" clause, because they resulted in public dollars being expended to benefit parochial schools, and thus relieved such schools of the need to spend their own money on the secular subjects underwritten by the taxpayers. *Id.* at 160.

Rejecting this claim, the Court observed that "the dual-enrollment programs provide obvious significant educational benefits to the Indiana

children for whom participation in a dual-enrollment program affords educational resources and training in subjects they would not otherwise receive." *Id.* at 167. The Court continued by recounting the benefits to the State: "The programs likewise benefit the State by furthering its objective to encourage education for all Indiana students." *Id.* The Court then compared these benefits to the State and its school children against what it characterized as the "relatively minor and incidental benefits" to the parochial schools: "[A]ny alleged 'savings' to parochial schools and their resulting opportunities for curriculum expansion would be, at best, relatively minor and incidental benefits of the dual-enrollment programs." *Id.* The Court based its conclusion on prior case law addressing Section 6, which has been interpreted "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." *Id.* at 167.

Applying *Embry*'s holding here, the Choice Scholarship Program is likewise constitutional. As in *Embry*, the Program affords obvious benefits to the State and to the eligible families that elect to redeem their scholarships at the schools—including the parochial schools—of their choosing. Students are not forced to choose parochial schools at all. And the Program is religion-neutral; scholarships for attending religious schools are not more generous than those for

attending non-religious schools. Nor, significantly, are students who attend parochial schools *forced* to participate in religious activities. If students attend religious activities at all, they do so by their own (or their parents') private, individual choice.

On the other side of the ledger, whatever benefits parochial schools derive from the Program are at most incidental to the benefits being provided to the State and the children. The Choice Scholarship proceeds are not a subsidy to support the parochial school's religious mission. They are a payment for the educational services they render. If the flow of public funds to a religious school or institution under a neutral program were enough to invalidate the Choice Scholarship Program, then a host of other state programs would likewise be called into doubt.

For example, The Frank O'Bannon Grant Program (formerly, the Indiana Higher Education Grant), is a needs-based program that provides public grants to assist eligible students with college tuition. *See Frank O'Bannon Grant Program, available at* http://www.in.gov/ssaci/2346.htm. These grants can be used at dozens of institutions of higher learning in Indiana—public, private, and religious—such as Indiana University, Wabash College, Valparaiso University, and the University of Notre Dame. *See Eligible Indiana Colleges, available at* http://www.in.gov/ssaci/2334.htm.

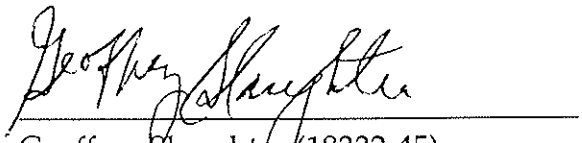
The same is true of Indiana's Medicaid program. Public dollars follow eligible patients, who can obtain needed medical care at any participating hospital or other provider, regardless of religious affiliation. The State pays for services rendered, regardless of where the patient receives treatment—a public facility (Wishard), a private facility (Community Hospital), or a religious one (St. Francis or St. Vincent).

There is no principled reason under Article 1, Section 6 for treating O'Bannon Grants or Medicaid payments any differently than Choice Scholarships. All three programs are religion-neutral; they provide public dollars to eligible participants, who decide at what institution (public, private, or religious) to redeem their grant, voucher, or scholarship; and the resulting public payment is for the services rendered by such institutions. In all these cases, the funds flow to the recipient institutions as a result of participants' individual choices. And the payments are not a direct state subsidy of any sect's religious mission. They are merely reimbursement for services rendered.

Conclusion

For these reasons, the Court should affirm the entry of judgment for Defendants and against Plaintiffs on each of Plaintiffs' three claims for relief.

Respectfully submitted,



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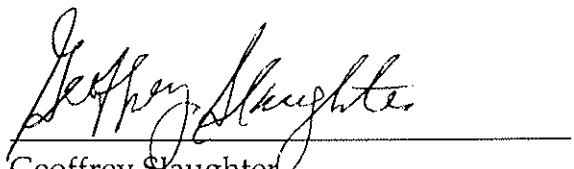

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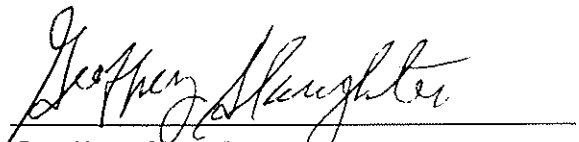

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