NO. 384A14 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

RICHARDSON, ET AL., Plaintiffs-Appellees, v. STATE OF NORTH CAROLINA, ET AL., Defendants-Appellants, CYNTHIA PERRY, GENNELL CURRY, THOM TILLIS AND PHIL BERGER, Intervenor-Defendants-Appellants.	)	From Wake County No. 13-CVS-16484

NO. 372A14 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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HART, ET AL., Plaintiffs-Appellees, v. STATE OF NORTH CAROLINA, ET AL., Defendants-Appellants, CYNTHIA PERRY, GENNELL CURRY, THOM TILLIS AND PHIL BERGER, Intervenor-Defendants-Appellants.	)	From Wake County No. 13-CVS-16771

****

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

****

RELIEF REQUESTED

Pursuant to North Carolina Rule of Appellate Procedure Rule 28(i), Pacific Legal Foundation ("PLF") respectfully moves this Court for leave to file the accompanying *amicus curiae* brief in support of the Defendants/Appellants and Defendant-Intervenors/Appellants in the above-captioned matters.

IDENTITY AND INTEREST OF AMICUS

PLF is a nonprofit, tax-exempt foundation organized for the purpose of litigating important matters of the public interest. Founded in 1973, PLF provides a voice in the courts for citizens who believe in limited government, private property rights, individual freedom, and free enterprise.

PLF has participated in the United States Supreme Court in many cases involving kindergarten through 12th grade (K-12) education reform, including *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (tuition tax credits); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (voucher program); and *Mitchell v. Helms*, 530 U.S. 793 (2000) (state and federal school aid programs).

PLF has also participated in state courts across the country in cases involving K-12 education reform, including *Duncan v. New Hampshire*, 2014 WL 4241774 (N.H. 2014) (Tax Credit Scholarship Program); *Atlanta Indep. Sch. Sys. v. Atlanta Neighborhood Charter Sch., Inc.*, 748 S.E. 2d 884 (Ga. 2013) (charter schools); *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013) (school voucher program); *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009) (school voucher programs); *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006) (opportunity scholarship program); and *Wilson v. State Bd. of Educ.*, 75 Cal.App. 4th 1125; 89 Cal. Rptr. 2d 745 (Cal. Ct. App. 1999) (charter schools).

This case raises important issues of state law as well as policy considerations concerning North Carolina's Opportunity Scholarship Program ("OSP"). PLF submits this brief because it believes its public policy perspective and litigation experience in this area will provide additional viewpoints that will assist this Court in its consideration of this matter.

AMICUS APPLICANT'S FAMILIARITY WITH THE CASE

Counsel for *amici* have reviewed all relevant briefs on file, along with the record in this matter, and are familiar with the facts and issues raised in this appeal.

ISSUES ADDRESSED BY AMICUS

1. Whether the OSP serves a valid public purpose under Article V, § 2(1) of the State constitution.

2. Whether the State constitution allows the Legislature to create educational programs in addition to the "general and uniform system of free public schools," established by Article IX, § 2(1).

NEED FOR FURTHER ARGUMENT

The proposed *amicus curiae* brief provides PLF's unique legal and public policy perspective on the issues before this Court, which PLF believes will provide an additional viewpoint on the issues presented and assist the Court in its deliberation. Specifically, the proposed *amicus* brief provides evidence of the legislative purpose underlying the General Assembly's creation of the OSP, including the desire to provide better options for students of all racial, social, and economic backgrounds. Additionally, the brief discusses the legislative power to create optional educational programs, such as the OSP, which have been upheld under the constitutions of numerous states. Because of its history and experience with regard to issues affecting education, PLF believes this brief will provide additional viewpoints on the issues presented, will assist the Court in its deliberation, and will identify additional reasons why North Carolina's Opportunity Scholarship Program should be upheld.

CONCLUSION

PLF respectfully requests that this Court grant this motion for leave to file the accompanying *amicus curiae* brief in support of Defendants/Appellants and Defendant-Intervenors/Appellants.

Respectfully submitted, this 30th day of December, 2014.

ROBINSON, BRADSHAW & HINSON, P.A.

Electronically Submitted
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed with the North Carolina Supreme Court today and has been served upon each of the parties to this action by depositing same in the United States mail, postage prepaid, in an envelope(s) addressed as follows:

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This 30th day of December, 2014.

Electronically Submitted
Richard A. Vinroot

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BRIEF OF *AMICUS CURIAE*
PACIFIC LEGAL FOUNDATION

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BRIEF OF *AMICUS CURIAE*
PACIFIC LEGAL FOUNDATION

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IDENTITY AND INTEREST OF AMICUS

Pacific Legal Foundation ("PLF") is a nonprofit, tax-exempt foundation organized for the purpose of litigating matters of public interest. Founded in 1973, PLF provides a voice in the courts for citizens committed to limited government, private property rights, individual freedom, and free enterprise. PLF supports school choice programs across the country because they empower parents to select schools that best fit the needs of their children.

To that end, PLF has participated in the United States Supreme Court in cases involving kindergarten through 12th grade (K-12) education reform, including *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (tuition tax credit); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Ohio voucher program); and *Mitchell v. Helms*, 530 U.S. 793 (2000) (state and federal school aid programs).

PLF has also participated in state court cases involving education reform and school choice, including *Duncan v. New Hampshire*, 2014 WL 4241774 (N.H. 2014) (tax credit scholarship program); *Atlanta Indep. Sch. Sys. v. Atlanta*

Neighborhood Charter Sch., Inc., 2013 WL 5302699 (Ga. 2013) (charter schools); *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013) (school voucher program); *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009) (school voucher program); *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006) (opportunity scholarship program); and *Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 745 (Cal. Ct. App. 1999) (constitutionality of charter schools).

SUMMARY OF ARGUMENT

Contrary to Plaintiffs' claims and the trial court's ruling below, the State Constitution does not prohibit the General Assembly from providing tuition assistance to low-income children under the Opportunity Scholarship Program ("OSP"). Instead, the Constitution authorizes—and indeed *encourages*—the State to implement alternative programs, like the OSP, that have successfully improved educational outcomes in other parts of the country.

Plaintiffs in these cases seek to deny North Carolina this option, either because the OSP allegedly does not serve a "public purpose" or violates Plaintiffs' supposed requirement that all public moneys spent on education flow to the uniform system of free public schools. Plaintiffs, however, cannot establish either proposition. To the contrary, the legislative record submitted as evidence in both cases as well as empirical evidence from numerous other school choice programs around the country demonstrate that the OSP serves at least three vitally important

public purposes. First, it aims to give all North Carolina students equal educational opportunities, regardless of income, race, or region. Second, it empowers parents to make constitutionally-recognized and protected choices regarding the educational needs of their children. Finally, by giving parents this choice, the OSP fosters competition that improves the performance of all schools, including traditional public schools.

In short, the Legislature made the very type of policy decision with which it is entrusted under the State Constitution. Plaintiffs, though they may disagree politically, should not be allowed to circumvent or second-guess that decision here under the guise of judicial review. Instead, this Court should affirm the Legislature's commendable effort to ensure that low-income families have the same opportunity to seek the educational options that have long been available to wealthier families.

ARGUMENT

I. THE OPPORTUNITY SCHOLARSHIP PROGRAM FURTHERS AN IMPORTANT PUBLIC PURPOSE.

A. Whether the Program Serves a Public Purpose is A Question Left in the First Instance to the General Assembly.

Whether to provide tuition assistance to low-income families is a decision left to the General Assembly, and its determination that doing so serves a valid

"public purpose" under Article V, § 2(1) of the State Constitution is entitled to great weight upon judicial review.

This Court and the Court of Appeals have now held repeatedly that providing funds to private institutions for the education of the State's citizens constitutes a valid—and important—public purpose. *See Saine v. State*, 210 N.C. App. 594, 602, 709 S.E.2d 379, 386 (2011) ("[P]roviding State funds to a private educational institution constitutes a public purpose." (citing *Hughey v. Cloninger*, 297 N.C. 86, 95, 253 S.E.2d 898, 903–04 (1979));[1] *Education Assistance Authority v. Bank*, 276 N.C. 576, 587, 174 S.E.2d 551, 559 (1970) (holding that state revenue bonds issued to fund loans for adult students served a public purpose); *Kiddie Korner v. Board of Education*, 55 N.C.App. 134, 145, 285 S.E.2d 110, 117 (1981) (holding that providing after-school program for "latch-key" children constituted a public purpose). Other states have echoed that conclusion in the specific context of vouchers. *See, e.g., Davis v. Grover*, 166 Wis. 2d 501, 544, 480 N.W.2d 460, 476 (1992) (upholding a Wisconsin voucher program for low-income students as serving a valid public purpose).

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[1] Mr. Orr, who represents the *Richardson* Plaintiffs in this lawsuit, also represented the plaintiffs in *Saine*, whose claim challenging the provision of funds to Johnson and Wales University for a culinary school was ultimately rejected. There, the plaintiffs argued that the expenditure would have been permissible if the Legislature had provided for the education of K-12 children, as opposed to adult students, because doing so is a traditional role of government. *Saine*, at 603, 709 S.E.2d at 387. The Court of Appeals ruled the distinction was irrelevant. *Id.*

This Court has counseled that the term "public purpose" is not subject to "'a slide-rule definition,'" but instead "'expands with the population, economy, scientific knowledge, and changing conditions.'" *Saine*, at 601, 709 S.E.2d at 385 (quoting *Mitchell v. N. Carolina Indus. Dev. Fin. Auth.*, 273 N.C. 137, 143, 159 S.E.2d 745, 750 (1968)). Thus, whether an expenditure is made for a public purpose turns on two "guiding principles" enunciated in *Madison Cablevision, Inc. v. City of Morganton*: (1) whether the expenditure "involves a reasonable connection with the convenience and necessity" of the State, and (2) whether "the activity benefits the public generally, as opposed to special interests or persons." 325 N.C. 634, 636, 386 S.E.2d 200, 201 (1989).

Because this analysis requires an assessment of the public interest, "[t]he initial responsibility for determining what constitutes a public purpose rests with the legislature, and its determinations are entitled to great weight." *Maready v. City of Winston-Salem*, 342 N.C. 708, 714, 467 S.E.2d 615, 619 (1996) ("[S]o long as an act is not forbidden, its wisdom and expediency are for legislative, not judicial, decision."). In short, the question is left, within broad limits, to the people and their elected representatives.

B. The OSP Equalizes Educational Opportunities for All North Carolinians.

As the legislative history reveals, the General Assembly rightly determined that the OSP would equalize educational opportunities for low-income students and thus serve a valid public purpose.

The legislation creating the OSP[2] was the subject of extensive hearings and debate during the 2013 long session, including two days of hearings before the House Education Committee on 21 and 28 May 2013, as well as debates in the House Appropriations Committee, the Appropriations Subcommittee on Education, and the House floor.[3]

As those hearings revealed, better options for low-income students are badly needed. Statewide, the passage rate on end-of-grade tests for the 2012-13 school year for all students was a shockingly low 32%. *See* Education First NC School Report Cards.[4] The passage rate was *even worse*, however, for economically

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[2] The legislation creating the Program was initially introduced as HB944, which was considered by the Education Committee and later incorporated into the House budget bill by the House Appropriations Subcommittee on Education. These same provisions were ultimately incorporated into the Senate budget bill, S402, by the Conference Committee of the House and Senate and enacted as section 8.29 of the Current Operations and Capital Improvements Appropriations Act of 2013, 2013-360 N.C. Sess. Laws § 8.29, which was signed by the Governor on 26 July 2013.

[3] Transcripts of the House proceedings on the OSP were made part of the record below through the Amended Affidavit of Representative Paul Stam, filed in both cases. Citations are therefore made to the records of *Hart* and *Richardson* respectively.

[4] *Available at*: http://www.ncreportcards.org/src/ (last visited Dec. 15, 2014).

disadvantaged students (17.4%), African-American students (14.2%), and students with disabilities (6.6%). *Id.* The 2012-13 school year was no aberration, either. The statistics show a thirty-percent gap in passage rates between economically advantaged and economically disadvantaged students on end-of-grade tests in 2011-12 as well as 2012-13. *Id.*

These statistics were surprising and unsettling for many legislators. At the initial hearing on the OSP, Representative Hanes (D-Forsyth) stated that he was "quite embarrassed" by the passage rates in his district. *Opportunity Scholarship Act*: *Hearing on HB 944 Before the H. Educ. Committee* , (N.C. May 21, 2013) (statement of Rep. Hanes) (*Hart*, R p 275; *Richardson*, R p 527). He had thought that his district would be an outlier among general low statewide statistics because it contained two magnet schools, which he had attended. He was shocked to learn that reading proficiency overall for third graders in his county was 48% and as low as 26% at some of the schools. *Id.*

The Legislature was also right—and well within its authority—to consider alternatives other than merely increasing funding to traditional public schools. As this Court recognized in *Leandro v. State*, "available evidence suggests that substantial increases in funding produce only modest gains in most schools." 346 N.C. 336, 356, 488 S.E.2d 249, 260 (1997). Contemporary empirical research also supports this conclusion. A recent review of 116 empirical studies regarding

between per-pupil spending and student performance found that the vast majority—sixty-seven percent—showed no link between higher spending and increased student performance. *See* John Hood and Terry Stoops, John Locke Foundation, *Educational Freedom Works: Scholarly Choice Shows Gains from School Choice and Competition*, p. 4 (2013).[5]

The record shows that legislators were motivated by this reality. Representative Brandon (D-Guilford) complained that he had heard the "fantasy" that more funding would result in better schools "thrown around" for "the better part of 50 years . . . ." *Appropriations Act of 2014*: *Hearing on SB 744 Before the North Carolina House of Representatives*, 2014-100, (N.C. June 12, 2014) (statement of Rep. Brandon) (*Hart*, R p 942; *Richardson*, R p 1222); *see also Appropriations Act of 2013-Opportunity Scholarship Act*: *Hearing on SB 402 Before the North Carolina House of Representatives*, 2013-360, (N.C. June 12, 2013) (statement of Rep. Brandon) (*Hart*, R p 915; *Richardson*, R p 1195) (asking members present to recall a time when the Legislature was actually able to adequately fund public education programs, and give him an approximation of when that will take place in the future).

Legislators also acted with the valid—and commendable—purpose of ensuring that "equal educational opportunity" exists for students of all racial,

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[5] *Available at*: http://www.johnlocke.org/acrobat/spotlights/Spotlight454EducationalFreedomWorks.pdf (last visited Dec. 22, 2014).

social, and economic backgrounds. *Parents Involved in Cmty. Schs v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring in part and concurring in judgment). At the initial hearings on the OSP, the committee heard testimony that "[t]he current model . . . discriminate[d] against children who are at the bottom of the [socioeconomic] ladder." *Opportunity Scholarship Act, Hearing on HB 944 Before the H. Educ. Committee*, *supra*, (statement of Joe Hass, N.C. Christian Sch. Ass'n). Legislators accordingly touted the OSP as "an opportunity for the poorest kids in [North Carolina] to find a system that works best for them." *Appropriations Act of 2013-Opportunity Scholarship Act, Hearing on SB 402 Before the North Carolina H. Appropriations-Educ. Subcommittee*, 2013-360, (N.C. June 7, 2013) (statement of Rep. Horn) (*Hart*, R p 294; *Richardson*, R p 546). The program, they contended, was designed to get children "out of a school where they have no hope." *Appropriations Act of 2013- Opportunity Scholarship Act, Hearing on SB 402 Before the H. Appropriations Committee*, 2013-360, (N.C. June 12, 2013) (statement of Rep. Riddell) (*Hart*, R p 303; *Richardson*, R p 555), "rather than consigning them to a future of failure or mediocrity." *Id.*

Other legislators focused on the OSP as an means to provide "minority children the same exact opportunity as every other child[] . . . ." *Appropriations Act of 2014*: *Hearing on SB 744 Before the North Carolina House of Representatives*, 2014-100, (N.C. June 12, 2014) (statement of Rep. Brandon)

(*Hart*, R p 943; *Richardson*, R p 1223). They noted a significant overlap between poor and minority students, who were harmed the most by North Carolina's failing public school system. *Appropriations Act of 2014*: *Hearing on SB 744 Before the North Carolina H. Appropriations Educ. Subcommittee*, 2014-100, (N.C. June 10, 2014) (statement of Rep. Stam) (*Hart*, R p 938; *Richardson*, R p 1218) (noting that 71% of poor students were minorities). Speaker Tillis (R-Mecklenburg) stated he was moved by meetings with auditoriums full of predominantly African-American parents to provide them with "an opportunity to prove that choice works." *Appropriations Act of 2013*: *Hearing on SB 402 Before the North Carolina House of Representatives*, 2013-360, (N.C. June 12, 2014) (statement of Speaker Tillis) (*Hart*, R p 923; *Richardson*, R p 1203).

These debates reflect precisely the type of policy choices that the State Constitution leaves to the General Assembly. Though Plaintiffs may disagree with those decisions, there is no evidence that the Legislature acted for any reason other than to further a valid public purpose—namely, accomplishing the long sought, but never realized, goal of giving all North Carolinians an "equal opportunity at a sound and basic education." *Appropriations Act of 2013*: *Hearing on SB 402 Before the North Carolina House of Representatives*, *supra*, (statement of Rep. Hanes) (*Hart*, R p 862; *Richardson*, R p 1142).

C. The OSP Provides Accountability By Empowering Parents to Choose the Best Educational Approach for Their Children.

Notwithstanding the weight of case law and legislative history against them, Plaintiffs assert that the OSP still does not serve a valid public purpose because the Legislature has not imposed what they deem to be "sufficient controls" on private schools participating in the program. Plaintiffs, however, cannot cite any North Carolina decision holding that such "controls" are constitutionally necessary. More importantly, Plaintiffs ignore that the central feature of the OSP—school choice—provides the very accountability that they assert is constitutionally necessary.

The "underlying thesis" of school choice programs, such as the OSP, is that "less bureaucracy coupled with parental choice improves educational quality." *Davis*, 480 N.W.2d at 476. "[C]ontrol is fashioned . . . in the form of parental choice. . . . If the private school does not meet the parents' expectations, the parents may remove the child from the school and go elsewhere." *Id.* (rejecting claim that Wisconsin voucher program failed to serve a public purpose because it did not impose sufficient "controls").

North Carolina has long recognized that parents' decisions are sufficient to ensure that students receive a sound basic education. Indeed, the principle is incorporated into the State Constitution. Article IX, § 3 provides "that every child of appropriate age . . . shall attend the public schools, *unless educated by other*

means." (emphasis added). As this Court has observed, that provision not only authorizes, but also requires, the State to allow parents to choose alternatives such as home schooling or private schools. *Delconte v. State*, 313 N.C. 384, 401, 329 S.E.2d 636, 647 (1985) (citing *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925)). In those cases, parent choice serves as the primary means of ensuring that these students receive a sound basic education.

Here, the private schools serving students in the OSP will be subject to *the very same* requirements the State imposes on all private schools, *see* N.C. Gen. Stat. §§ 115C-547 through 115C-562 (imposing requirements on non-public schools), *plus* the additional requirements imposed by the OSP itself. *See* N.C. Gen. Stat. 115C-562.5 (requiring schools participating in the OSP to comply with certain reporting, safety, and testing requirements). Plaintiffs cannot show why the involvement of public funds somehow renders these schools, which are otherwise sufficient to satisfy the State's compulsory education requirement, inadequate for purposes of judging OSP's constitutionality.

Again, the legislative record demonstrates adherence to the applicable constitutional principles. The Legislature intended that the OSP "empower the parent." *Appropriations Act of 2013*: *Hearing on SB 402 Before the North Carolina House of Representatives*, *supra*, (statement of Rep. Stone) (*Hart*, R p 312; *Richardson*, R p 1185). One representative explained that the OSP is

designed to let parents choose "what's best for their child when no one else listens," reasoning that when parents are empowered with multiple educational options, they "will make choices that give their kids a sound basic education." *Id.* (statement of Rep. Bryan) (*Hart*, R p 306; *Richardson*, R p 1179). Legislators also concluded that choices will "creat[e] competition," which in turn will lead to better outcomes for children in all schools. In doing so, legislators relied on their own "fortunate" experiences living in a county where they had "three school systems" that "were competitive against each other." *Appropriations Act of 2013, Hearing on SB 402 Before the North Carolina H. Appropriations Committee* (N.C. June 11, 2013) (statement of Rep. Stevens) (*Hart*, R p 302; *Richardson*, R p 1175). Thus the Legislature acted with the commendable motive of expanding that opportunity to children across the state.

In short, the OSP serves and relies on the straightforward principle that "parents ought to have the right to make the determination of what is best for their child because one size does not fit all . . ."—a proposition recognized under Article IX, § 3 of the State Constitution. *See Appropriations Act of 2013*: *Hearing on SB 402 Before the North Carolina House of Representatives, supra*, (statement of Rep. Jones) (*Hart*, R p 908; *Richardson*, R p 1188).

II. THE STATE CONSTITUTION DOES NOT DENY THE LEGISLATURE POWER TO CREATE OPTIONAL PROGRAMS, SUCH AS THE OSP.

The General Assembly's creation of the OSP is hardly a novel experiment. At least twenty-one states have enacted some form of tuition assistance program.[6] Thus, in responding to the needs of low-income students, the Legislature had numerous successful models from which to choose. Nevertheless, Plaintiffs ask the Court to reach an astounding conclusion: The North Carolina Constitution—which speaks so forcefully regarding importance of education—prohibits the General Assembly from creating any educational programs other than the "general and uniform system of free public schools," established pursuant to N.C. Const. Art. IX, §2(1). Plaintiffs are wrong.

A. Nothing in the State Constitution Prohibits the Legislature from Creating Optional Programs in Addition to the Uniform System of Public Schools.

Contrary to Plaintiffs' claims, the North Carolina Constitution does not shackle the Legislature to a single policy option when dealing with education, nor does it prohibit the Legislature from following the lead of other States in creating additional, optional programs, such as the OSP.

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[6] *See* The Friedman Foundation, The ABCs of School Choice, 2014 Edition, *available at* http://www.edchoice.org/Foundation-Services/Publications/ABCs-of-School-Choice.aspx (last visited December 22, 2014).

Unlike the federal constitution, the State constitution is not a grant of power. Thus, "[a]ll power which is not limited by the Constitution inheres in the people, and an act of a State legislature is legal when the Constitution contains no prohibition against it." *McIntyre v. Clarkson*, 254 N.C. 510, 515 (1961) (citing *Lassiter v. Northampton Cnty. Bd. of Elections*, 248 N.C. 102, 112 (1958)). No constitutional provision prohibits the General Assembly from creating optional educational programs such as the OSP.

In fact, the Constitution specifically recognizes non-traditional education. As set forth above, Article IX, Section 3 provides that "every child . . . shall attend the public schools, *unless educated by other means*." (Emphasis added.) Likewise—and contrary to the Plaintiffs' arguments—the State Constitution charges the State with the duty to "guard and maintain," not merely the uniform system of public schools, but the "right to the privilege of education" generally. N.C. Const. Art. I, § 15. Moreover, Article IX, of which the uniform schools provision is only a part, begins with the admonition that: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged." N.C. Const. Art IX, § 1. Together, these provisions establish general authority (and a duty) for the Legislature to further the interests of

education through various means, only one of which is the uniform system of public schools under Art IX, § 2(1).

To establish their sweeping claim, Plaintiffs must rest upon the (inapplicable) canon of *expressio unius est exclusio alterius*—that is, by requiring that the Legislature create a uniform system of public schools, the State Constitution also prohibits it from creating any additional programs. The sole case Plaintiffs can find for that proposition, however, is a non-controlling decision from the Florida Supreme Court, *Bush v. Holmes*, 919 So. 2d 392, 409 (Fla. 2006), which has been rejected by other jurisdictions and roundly criticized by commentators as poorly-reasoned. *See Meredith v. Pence*, 984 N.E.2d 1213, 1230 (Ind. 2013) (holding voucher program did not violate Indiana's uniform school provision, and declining to follow *Bush*, because the doctrine of *expressio unius est exclusio alterius* is inapplicable to constitutional interpretation); Clark Neily, *The Florida Supreme Court vs. School Choice: A "Uniformly" Horrid Decision*, 10 Tex. Rev. L. & Pol. 401, 412-26 (2006).

This Court has also repeatedly rejected the application of the *expressio unius* canon to the State Constitution because "it flies directly in the face of one of the underlying principles of North Carolina constitutional law." *Baker v. Martin*, 330 N.C. 331, 337, 410 S.E.2d 887, 891 (1991). Following that direction, the Court of Appeals has expressly held in the context of charter schools that the uniform

schools provision does not prohibit the Legislature from creating alternative programs, precisely because the canon of *expresio unius* is inapplicable to the State Constitution. *See Sugar Creek Charter School, Inc., v. State*, 214 N.C. App. 1, 21 (2011) (Ervin, J.).

In short, the State Constitution does not require the Legislature to funnel all of its efforts through a single channel when dealing with an issue as important as education. The Legislature may create additional programs, as it has properly done here.

B. Optional Tuition Assistance Programs Have a Proven Track Record in Other States.

Plaintiffs' restrictive and erroneous reading of the State Constitution would effectively deny low-income students—and indeed all North Carolina students—the benefit of innovative educational solutions that have proven effective in other states.

Tuition assistance programs have an established track record. In crafting the OSP, its proponents looked to the success of programs in Milwaukee, where school choice not only "increased the graduation rate for those students who have been failing and left behind before then, but have increased their college matriculation and graduation of those students and students in public schools . . . ." *Appropriations Act of 2013*: *Hearing on SB 402 Before the North Carolina House of Representatives*, *supra*, (statement of Jeanne Allen, Center for

Education Reform) (*Hart*, R p 279; *Richardson*, R p 531). The Legislature also heard testimony about the positive effects of similar programs in Ohio, Pennsylvania, and Washington D.C. *Id.*

Empirical studies reach the same conclusion. *See* Greg Forster, The Friedman Found. for Educ. Choice, *A Win-Win Solution: The Empirical Evidence on School Vouchers* 7 (2013)[7] (finding that students given a choice of schools routinely performed better than students required to attend a school designated by the government); Patrick Wolf, *et al*., U.S. Dep't of Educ., *Evaluation of the DC Opportunity Scholarship Program: Final Report* 41 (2010)[8] (finding that a scholarship increased the probability that a student would complete high school by 12 percentage points); Patrick J. Wolf, *et al.*, *School Vouchers and Student Outcomes: Experimental Evidence from Washington D.C.*, 32 J. Pol'y Analysis & Mgmt 246 (2013) (the use of vouchers in Washington D.C. increased the likelihood of high school graduation by 21%); Matthew M. Chingos and Paul E. Peterson, Brown Center for Education Policy and Harvard Kennedy School of Government, *The Effects of School Vouchers on College Enrollment*, p. iii (2012)[9]

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[7] *Available at*: http://www.edchoice.org/CMSModules/EdChoice/FileLibrary/994/A-Win-Win-Solution--The-Empirical-Evidence-on-School-Choice.pdf (last visited December 23, 2014).

[8] *Available at*: http://ies.ed.gov/ncee/pubs/20104018/pdf/20104018.pdf (last visited December 23, 2014).

[9] *Available at*: http://www.hks.harvard.edu/pepg/PDF/Impacts_of_School_Vouchers_FINAL.pdf (last visited December 23, 2014).

(reporting that African-American students who received assistance under New York's voucher program were 20 percent more likely to enroll in college).

Proponents of the OSP in the Legislature relied on just such empirical studies, citing several that show statistically significant improvement among scholarship recipients, and identifying more than 20 ways that scholarships "delivered spill-over benefits to traditional public schools," during hearings on the program. *Appropriations Act of 2013*: *Hearing on SB 402 Before the North Carolina House of Representatives*, *supra*, (statement of Tami Fitzgerald, NC Values Coalition) (*Hart*, R p 277; *Richardson*, R p 529).

Finally, legislators properly recognized that issues of school choice are not a zero sum game. For years, commentators have advanced the commonsense notion that just as monopolies in other areas "provide poor quality because they have little incentive to serve their clients well," education services deteriorate when public schools are isolated from consumer preferences. Greg Forster, *supra*, at 5. Without parental choice, public schools "lack the healthy, natural incentives for better performance that most other types of services take for granted." *Id.* School choice programs, on the other hand, improve outcomes and encourage competition between schools by empowering less affluent parents to choose the school that best fits the needs of their children. *Id.* at 6-13. That is, school choice programs like

the OSP improve the performance of both traditional public schools and alternative schools.

Ultimately, the Legislature relied on empirical data and the experience of other States to find innovative solutions to challenges facing low-income students. If the states are to serve as the "laboratories" of democracy, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), then the State Constitution should not prevent North Carolina from copying promising aspects of the most successful experiments in other jurisdictions. North Carolina's creation of the OSP is a classic legislative decision, well within its authority under the State Constitution. To the extent Plaintiffs disagree with that decision, their remedy is in the Legislature, not the courts.

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be reversed.

Respectfully submitted, this 30th day of December, 2014.

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N.C. R. App. 33(b) Certification:
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