NO. 372A14 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

HART, et al.,	)	
	)	
Plaintiffs-Appellees,	)	
	)	
v.	)	
	)	From Wake County
STATE OF NORTH CAROLINA, et al.,	)	13-CVS-16771
	)	
Defendants-Appellants,	)	
	)	
and	)	
	)	
CYNTHIA PERRY, GENNELL CURRY, THOM TILLIS AND PHIL BERGER, et al.,	)	
	)	
Intervenor-Defendants-Appellants.	)	

****

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF OF THE CHRISTIAN LEGAL SOCIETY; NORTH CAROLINA CHRISTIAN SCHOOL ASSOCIATION; THE ROMAN CATHOLIC DIOCESE OF CHARLOTTE, NORTH CAROLINA; THE ROMAN CATHOLIC DIOCESE OF RALEIGH, NORTH CAROLINA; NORTH CAROLINA FAMILY POLICY COUNCIL; LIBERTY, LIFE, AND LAW FOUNDATION; ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL; AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS; AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF DEFENDANTS-APPELLANTS AND INTERVENOR-DEFENDANTS/APPELLANTS

****

RELIEF REQUESTED

Pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, the Christian Legal Society; the North Carolina Christian School Association; the Roman Catholic Diocese of Charlotte, North Carolina; the Roman Catholic Diocese of Raleigh, North Carolina; North Carolina Family Policy Council; Liberty, Life, and Law Foundation; Association of Christian Schools International; American Association of Christian Schools; and National Association of Evangelicals respectfully move this Court for leave to file the accompanying *Amici Curiae* Brief in Support of Defendants-Appellants and Intervenor-Defendants-Appellants in the above-captioned matters.

IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are (1) national and North Carolina state associations of Christian schools and (2) non-profit organizations committed to religious liberty, the family, and parents' control over the education of their children. The specific interests of *amici* are detailed in the Appendix to this motion and in the Statement of Interest of *Amici Curiae* in the accompanying brief. All of these *amici* support the Opportunity Scholarship Program (OSP) as a valuable means of increasing parents' ability to choose schools for their children; and all of these *amici* oppose restrictions, such as those in the

Superior Court's order in this case, that would exclude religious schools from participation in the program and thereby impede the religious liberty of parents to choose such schools, and of the schools to follow their religious missions.

Counsel for *Amici Curiae* has contacted counsel for all parties and none have raised any objections to the filing of the proposed *amicus curiae* brief.

ISSUE TO BE ADDRESSED BY *AMICI CURIAE*

The issue to be addressed in the brief is whether treating the actions of private religious schools as those of the state for the purposes of Article I, section 19 of the North Carolina Constitution violates core principles of North Carolina constitutional law, as well as the First Amendment to the Constitution of the United States.

REASONS WHY THIS BRIEF IS DESIRABLE

Amici can assist the Court in the disposition of this case by explaining the severe constitutional problems that arise if Article I, section 19 of North Carolina's Constitution—prohibiting religious "discrimination by the State"—is applied to the actions of private religious schools in favoring co-believers in employment and in student admissions. The Superior Court fundamentally misunderstood Article I, section 19 by applying it in this case.

The seriousness of the court's error is shown by the clashes it creates with rights of religious neutrality, freedom of speech, free exercise of religion, and freedom of expressive association.

WHEREFORE, movants respectfully request leave to file the attached *Amici Curiae* Brief in this case.

Respectfully submitted, this 30th day of December 2014.

Electronically Submitted
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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served a copy of the foregoing Motion for Leave to File Amicus Curiae Brief by electronic mail addressed to the following persons at the following e-mail addresses which are the last e-mail addresses known to me:

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Respectfully submitted, this 30th day of December 2014.

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APPENDIX: STATEMENTS OF INTEREST OF INDIVIDUAL *AMICI CURIAE*

The **Christian Legal Society** ("CLS") is an association of Christian attorneys, law students, and law professors, with student chapters at approximately 90 law schools. Since 1975, CLS's Center for Law & Religious Freedom has promoted religious liberty through its work in the courts, legislature, and public square. CLS believes that pluralism, which is essential to a free society, prospers only when the First Amendment rights of all Americans are protected. The North Carolina program at issue in this case advances pluralism by providing North Carolina families with a variety of educational options from which to choose a school that best suits the needs of the individual child. Besides advancing sound educational policy, the program is entirely constitutionally permissible and respects the constitutional rights of North Carolina parents and their families.

The **North Carolina Christian School Association** ("NCCSA") is one of the largest state associations of Christian schools in the entire United States of America. The NCCSA currently serves over 14,000 students enrolled in 67 member schools. Since its inception in 1989, the NCCSA provides programs and services every year to tens of thousands of parents seeking a Christian education for their children. The purpose of the NCCSA is to aid in the promotion, maintenance, and improvement of the moral,

spiritual, and academic standards of Christian schools in the state of North Carolina; to protect and preserve the freedom of Christian schools to exist and flourish. The Opportunity Scholarship Grants (OSG) along with the Children with Disabilities Scholarship Grants enacted by the NC General Assembly have been wonderful avenues to give parents additional choices to provide an education for their children. Single mothers and parents who might not have great wealth have now been afforded previously denied opportunities to choose a school that best meets the needs of their children. The NCCSA supports the OSG because they remove the wall of discrimination, which for too long has disenfranchised needy children and prevented their parents from having choices for their education. The NCCSA believes that the freedom provided to parents by the OSG is one of the most effective and equitable ways to improve the quality of K-12 education in North Carolina. The State of North Carolina has not established a particular religion, but through the Opportunity Scholarship Grants provides an environment in which diversity, parental choice, and quality education can grow and flourish.

The Roman Catholic Diocese of Charlotte, North Carolina, is an unincorporated Church entity which serves the western half of North Carolina from Greensboro to Murphy. The Diocese operates 19 Catholic

Schools servicing a total of approximately 8,000 students in various grades from pre-K to 12. The Diocesan Schools' Office mission is to proclaim the Good News of the Gospel and to provide a religious and academic program that allows each student to develop spiritually, intellectually, emotionally, physically and socially, so that each is prepared to live and serve in a changing society as a self-respecting and responsible citizen.

The Roman Catholic Diocese of Raleigh, North Carolina, is an unincorporated Church entity which serves the eastern half of North Carolina from Burlington to the Outer Banks. The Diocese operates 32 Catholic Schools servicing a total of approximately 9,000 students in various grades from pre-K to 12. The Diocesan Schools' Office mission is to engage our school communities in creating quality education within a Catholic environment that fosters the current and future development of the whole child.

The **North Carolina Family Policy Council** is a nonpartisan, nonprofit research and education organization that provides information to policy makers and other citizens on many policy issues that affect the family, including education.

Liberty, Life, and Law Foundation ("LLLF") is a North Carolina nonprofit corporation established to promote the legal defense of religious

liberty, sanctity of human life, liberty of conscience, family values, and other moral principles. LLLF is gravely concerned about the growing hostility to religious expression in America and the related threats to conscience and other liberties.

The **Association of Christian Schools International** ("ACSI") is a nonprofit, non-denominational, religious association providing support services to 24,000 Christian schools in over 100 countries. ACSI serves 3,000 Christian preschools, elementary, and secondary schools and 90 post-secondary institutions in the United States. Member-schools educate some 5.5 million children around the world, including 825,000 in the U.S. ACSI has 93 North Carolina member-schools with a combined enrollment of 24,760 students. ACSI accredits Protestant pre-K–12 schools, provides professional development and teacher certification, and offers member-schools high-quality curricula, student testing and a wide range of student activities. ACSI members advance the common good by providing quality education and spiritual formation to their students. Our calling relies upon a vibrant Christian faith that embraces every aspect of life. This gives ACSI an interest in ensuring expansive religious liberty with strong protection from government attempts to restrict it. Thus, ACSI's services include

helping students and member-schools participate in parental choice initiatives, like the North Carolina Opportunity Scholarship Grants.

The **American Association of Christian Schools** ("AACS") serves Christian schools and their students through a network of thirty-eight state affiliate organizations and two international organizations, including the North Carolina Christian School Association. The AACS represents more than one hundred thousand students in more than eight hundred schools. Sixty-seven of those schools are in North Carolina. The AACS believes that parents' freedom to choose where their children are educated is the most effective and equitable way to improve the quality of K-12 education. The State of North Carolina scholarship program establishes no particular religion, but does establish an environment in which diversity, individual choice, and educational quality can flourish. The AACS fully supports those core values and applauds the State of North Carolina for this remarkable and critical effort to offer educational choice and to foster educational quality.

The **National Association of Evangelicals** ("NAE") is the largest network of evangelical churches, denominations, colleges and independent ministries in the United States. It serves 41 member denominations, as well as numerous evangelical societies, missions, nonprofits, colleges, seminaries and independent churches. NAE serves as a collective voice of evangelical

churches and other religious ministries. It believes that religious freedom is God-given and that the government does not create such freedom, but is charged to protect it. NAE is grateful for the American legal tradition of safeguarding religious freedom, and believes that this jurisprudential heritage should be maintained in this case.

NO. 372A14 TENTH JUDICIAL DISTRICT

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HART, et al., Plaintiffs, v. STATE OF NORTH CAROLINA, et al., Defendants, and CYNTHIA PERRY, et al., Intervenor-Defendants.	)))))))))))	From Wake County 13-CVS-16771

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****

INTEREST OF *AMICI CURIAE*

Amici curiae respectfully file this brief in support of defendants/ appellants in *Hart, et al., v. State of North Carolina, et al*. The Opportunity Scholarship Grants (OSG) program advances pluralism by providing North Carolina families with a variety of educational options from which to choose a school that best suits the needs of their individual children. Besides advancing sound educational policy, the program is entirely constitutionally permissible and respects the constitutional rights of North Carolina parents and their families.

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SUMMARY OF ARGUMENT

The Opportunity Scholarship Grants (OSG) program enacted by the North Carolina General Assembly 2013 serves the laudable—and at the very least constitutionally permissible—goal of increasing the choices that families have for educating their children. The Superior Court enjoined the program on multiple questionable grounds; the *amici* joining this brief focus only on the court's mistaken holding that the OSG violates Article I, section 19 of the North Carolina Constitution.

Article I, section 19 provides that "[n]o person shall be subject to discrimination by the State because of . . . religion." The Superior Court struck down the program because it allegedly "allows funding of private schools that discriminate on the basis of religion in violation of Article I, Section 19." In short, the court equated religious discrimination by the state with religious discrimination by private religious schools whose students have chosen to use their Opportunity Scholarship at the school. But the rules governing the state are not the same as the rules governing private religious schools. To hold private schools to the rules governing the state is to commit a basic constitutional category mistake.

First, the court's ruling is inconsistent with both Article I's text and the relevant case law. The text requires state action—"state discrimination" because of religion—and the law makes clear that private schools do not become state

actors simply by receiving state funds. Moreover, multiple U.S. Supreme Court cases make clear that when a program of educational aid involves "true private choice"—where a religious school receives government aid only because individuals choose, under neutral criteria, to use that aid at the school—then the actions of the school are not attributable to the state to show an establishment of religion in violation of the First Amendment. The same principle should apply under Article I, section 19, which this Court has long held secures similar rights and demands the same state neutrality as the Establishment Clause.

Second, to apply religious non-discrimination rules to religious schools—institutions that by definition are founded on and seek to promote religious beliefs—is entirely inappropriate and creates severe tensions with state and federal constitutional rights. The prohibition on religious discrimination could forbid scores of acts by a religious school that are crucial to maintaining and expressing the beliefs that define it. The prohibition itself discriminates against religious schools and parents; because religion is the one belief system that is the subject of an anti-discrimination rule, religious schools would be the only ideologically grounded schools that cannot favor prospective students, leaders, or staff who commit to the schools' ideological beliefs. Such singling out of religion creates severe tensions with freedom of speech, free exercise of religion, and freedom of expressive association. Moreover, in many cases the rule against religious

discrimination might interfere with the religious school's right of internal governance protected by the First Amendment.

These tensions are entirely unnecessary; they can be avoided if this Court simply interprets Article I, section 19 according to its text. Private religious schools are not the state; religious preferences by such schools are a legitimate means for them to maintain and express their identity. And at the very least, when a school receives aid only because of the "true private choice" of its students, its actions are not attributable to the state.

ARGUMENT

I. ARTICLE I, SECTION 19 PROHIBITS THE "STATE" FROM DISCRIMINATING BASED ON RELIGION, AND PRIVATE INSTITUTIONS DO NOT BECOME THE "STATE" MERELY BY ACCEPTING OPPORTUNITY SCHOLARSHIP FUNDS.

Article I, section 19 of the North Carolina Constitution prescribes a forthright and admirable code: "No person shall . . . be subjected to discrimination *by the State* because of . . . religion." N.C. Const. art. I, § 19 (emphasis added). The Superior Court mistakenly treated private schools as the state in holding that the opportunity scholarship program unconstitutionally "allows funding of private schools that discriminate on the basis of religion in violation of Article I, Section 19." Super. Ct. Order and Final J., para. 3(g), at 4. The State of North Carolina, in the statute at issue, does not discriminate on the basis of religion; it provides

money neutrally to students, who will spend it at the schools of their choosing, including some that might "discriminate" on the basis of religion in hiring personnel or admitting students. The Superior Court erred in holding private religious schools to the same religious non-discrimination standard as the state. This Court should reverse the Superior Court's strained interpretation of Article I, section 19 and hold that the actions of private schools are not attributable to the state merely because they accept funds—indirectly—from the state.[1]

A. Private Schools Are Not State Actors and Do Not Become So Merely By Receiving Funds Indirectly From the State.

The North Carolina Declaration of Rights, which includes Article I, section 19, protects the people of North Carolina from the state, and only the state. This has long been settled in the law. Indeed, this court has recognized:

> The civil rights guaranteed by the Declaration of Rights in Article I of our Constitution are individual and personal rights entitled to protection against *state* action . . . The fundamental purpose for [the] adoption [of the Declaration of Rights] was to provide citizens with protection from the *State's* encroachment upon these rights.

Corum v. Univ. of N. Carolina Through Bd. of Governors, 330 N.C. 761, 783 (1992) (emphasis added) (*citing State v. Manuel*, 20 N.C. 144 (1838)).

[1] *Amici* likewise agree with the defendants that Plaintiffs lack standing to sue under Article I, section 19 because they have not been personally subjected to discrimination based on religion. *See, e.g.*, State Defendants-Appellants' Brief, Section V.

Simply put, a private school's actions are not state actions. *See Gorman v. St. Raphael Acad.*, 853 A.2d 28, 37 (R.I. 2004) (explicitly stating "[a] private school is not a state actor").[2] Likewise, a private school does not become a state actor merely by receiving state funds. *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982) (private school receiving state funds was not a state actor and thus its discharging of employees was not state action); *see also Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982) (private nursing home was not a state actor even though the state paid for the medical expenses of 90 percent of patients).

Because the actions of private schools—even those receiving OSG funds—are not actions of the state, Article I, section 19 is in no way offended in the present case. This Court should reverse the Superior Court's order because it treats private schools as state actors, which is contrary to well established law.

B. Individuals' Choice Of Schools Under Religion-Neutral Criteria Breaks Any Nexus Between The State And Private Schools.

Under the non-establishment mandates of both the North Carolina and

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[2] *See also Wisch v. Sanford School, Inc.*, 420 F. Supp. 1310, 1314 (D. Del. 1976) (private high school that expelled student was not considered state actor even though school partially funded and regulated by the state); *Stock v. Texas Catholic Interscholastic League*, 364 F. Supp. 362, 364–65 (N.D.Tex.1973) (decision of private school accredited by state to terminate plaintiff student's participation in sports was not under color of state law, when state accreditation not connected with the challenged activity); *Morgan v. St. Francis Preparatory School*, 326 F. Supp. 1152, 1154 (M.D. Pa. 1971) (private school's expulsion of student not considered state action).

federal constitutions, the actions of private schools are not attributable to the state merely because the state provides scholarships on a religion-neutral basis and some parents choose to use them at religious schools. The U.S. Supreme Court has repeatedly recognized that when citizens ultimately choose who receives the state funds, the nexus between the state and the private institution receiving the funds is severed. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), *infra*, and cases cited therein. The same is true here. Because North Carolinians, and not the state, determine which schools receive OSG funds, any nexus between the state and private schools ultimately receiving those funds is broken. Hence, religious discrimination by private schools benefitting from OSG funds cannot be attributed to the state and does not violate Article I, section 19.

As previously stated, Article I, section 19 guarantees that "[n]o person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of . . . religion." N.C. Const. art I, § 19. Article I, section 13 of the state constitution guarantees that "[a]ll persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience." N.C. Const. art. I, § 13. The First Amendment to the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

U.S. Const. amend. I. This Court has previously stated that "[t]aken together, these provisions . . . coalesce into a singular guarantee of freedom of religious profession and worship, as well as an equally firmly established separation of church and state." *Appeal of Springmoor, Inc.*, 348 N.C. 1, 5, 498 S.E.2d 177, 180 (1998) (internal citations and quotations omitted) (*quoting Heritage Village Church and Missionary Fellowship, Inc. v. State*, 299 N.C. 399, 406 n.1, 263 S.E.2d 726, 730 n.1 (1980)). This joint constitutional mandate

> is one of secular neutrality toward religion. . . . [W]hile the religion clauses of the state and federal Constitutions are not identical, they secure similar rights and demand the same neutrality on the part of the State. Thus, [courts] may utilize Establishment Clause jurisprudence to examine legislation for aspects of religious partiality prohibited by both constitutions.

Id. (quotations omitted).

The U.S. Supreme Court has dealt with Establishment Clause attacks against voucher programs essentially identical to the OSG. The Court has repeatedly rejected "Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing." *Zelman*, 536 U.S. at 649 (*citing Mueller v. Allen*, 463 U.S. 388 (1983) (upholding program of tax deductions to parents for various educational expenses, including tuition for religious and other private schools)); *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481 (1986) (upholding rehabilitation aid to a blind student studying

at bible school to become pastor); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993) (upholding provision of sign-language interpreters to deaf children enrolled in religious schools).

The Court has upheld these programs because they involve "true private choice": that is, "government aid reach[es] religious institutions only by way of the deliberate choices of numerous individual recipients." *Zelman*, 536 U.S. at 652. Accordingly, "[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." *Id.*; *see also Zobrest*, 509 U.S. at 10 (because student's parents choose the school, "an interpreter's presence there cannot be attributed to state decision-making"); *Witters*, 474 U.S. at 488 (application of aid to student who chose bible school did not "resul[t] from a *state* action sponsoring or subsidizing religion") (emphasis in original).

Programs of true private choice also satisfy the principle of secular neutrality required by North Carolina's Constitution. In *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995), the U.S. Supreme Court emphasized that "the guarantee of neutrality [toward religion] is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad

and diverse." *Id.* Programs with "neutral, secular criteria that neither favor nor disfavor religion" also respect private choice because they create "no 'financial incentive[s] for parents to choose a sectarian school.'" *Zelman*, 536 U.S. at 653-54 (brackets in original) (*quoting*, *e.g.*, *Zobrest*, 509 U.S. at 10). And by the very terms of Article I, section 19, a state program that is neutral toward religion does not involve "discrimination by the State because of . . . religion."

Here, the OSG respects the requirements of true private choice and religious neutrality. Any child, of any faith, can receive a scholarship and choose to use it at either a religious or non-religious school by endorsing the check transmitted to the school in question. The state, using neutral criteria, has extended benefits to parents and students of all ideologies and viewpoints, including those who wish to use those benefits at private religious schools.

Under the federal Establishment Clause, public schools, or schools acting for the state, cannot inculcate religion: such activity would be considered an impermissible establishment of religion. *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963). But *Zelman* and other decisions hold that state money indirectly obtained by private schools does not establish religion. It follows that state money indirectly obtained by private schools does not make those private schools the state, or else their religious teaching and inculcation would constitute a state

establishment. Where "true private choice" exists under *Zelman*, there simply is no nexus between the state and private schools.

There is every reason to follow *Zelman* and the other "true private choice" cases in the interpretation of Article I, section 19. Although the North Carolina and federal provisions may "in some cases [have] differences in scope of their application," *Heritage Village*, 299 N.C. at 406 n.1, 263 S.E.2d at 730 n.1, this is definitely not such a case. The Constitution of North Carolina, like the First Amendment, demands secular neutrality towards religion, and programs of true private choice—the voucher program in *Zelman*, the OSG here—are neutral in their terms. As the Court pointed out in *Zelman*, 536 U.S. at 649, its own approval of true private choice programs "has remained consistent and unbroken." Vouchers and other "true private choice" programs do not establish religion; the actions of a private school receiving voucher students do not become attributable to the state, for if they did, the school's religious activity would be an establishment of religion under *Lemon v. Kurtzman*, 403 U.S. 602 (1971). And if anything, Article I, section 19 makes the constitutional distinction between state and private action even more explicit, by prohibiting only "discrimination *by the State* because of . . . religion" (emphasis added). Thus, the approval of "private choice" programs should govern under North Carolina law as well.

II. THE SUPERIOR COURT'S MISTAKEN INTERPRETATION OF ARTICLE I, SECTION 19, TREATING PRIVATE INSTITUTIONS AS STATE ACTORS, SHOULD BE AVOIDED BECAUSE IT DISCRIMINATES AGAINST RELIGIOUS SCHOOLS AND INTERFERES WITH THEIR INTERNAL GOVERNANCE DECISIONS.

The Superior Court's order, holding religious schools to the same religious non-discrimination standard as the state, creates severe—and entirely unnecessary—tensions with other constitutional provisions, state and federal. Certainly the state has an interest in ensuring that its own government does not discriminate against persons based on their religion; it is sensible to prohibit such discrimination by the one institution that must remain religiously neutral and avoid establishing any particular faith. But it is fundamentally different, indeed fundamentally confused, to apply the same rule against religious discrimination to religious preferences adopted by private religious schools. As we will now detail, the Superior Court's tenuous interpretation of Article I, section 19 creates unnecessary conflicts with other constitutional provisions: this Court can and should avoid those conflicts.

A. Extending the Prohibition on State Religious Discrimination to Private Religious Organizations Itself Discriminates Against Religion.

When Article I, section 19 is interpreted to turn actions by private religious schools into actions of the "State," as the Superior Court did, the result is devastating for religious liberty—the liberty guaranteed by both sections 13 and 19

of Article I, as well as by the First Amendment to the federal Constitution. Choosing members and leaders of an organization based on religious beliefs and ideology is necessarily an endeavor in which only religious institutions partake. Thus, when private schools are treated as the state, and held to its religious non-discrimination standard, only the rights of religious institutions will be offended—creating tension between sections 13 and 19. Likewise, because section 19's command is one of secular neutrality, and this interpretation burdens only religion, the Superior Court's ruling itself violates section 19. Discrimination against religious schools also creates severe tensions with federal rights of free speech, free exercise of religion, and freedom of expressive association.

Although the Superior Court enjoined the OSG because of schools that "discriminate on the basis of religion," it did not give examples of what it meant by such discrimination. The prohibition against religious discrimination could cover a multitude of acts by a religious school, including the very acts that are essential to making the school religious.[3] In order to conform to the Superior Court's

[3] *Amici* have doubts about using the term "discrimination" to cover a religious school's preference for fellow adherents in employment or admissions. "It is tempting and common, but potentially misleading and distracting to attach the rhetorically and morally powerful label of 'discrimination' to decisions, conduct, and views whose wrongfulness has not (yet) been established." Richard W. Garnett, "Religious Freedom and the Nondiscrimination Norm," in Austin Sarat, ed., *Legal Responses to Religious Practices in the United States: Accommodation and Its Limits* 194, 197 (Cambridge U. Press 2012). Some forms of "discrimination" are not wrongful—for example, discrimination among foods,

understanding of Article I, section 19, a private religious school might be forbidden, in hiring a principal, to favor a member of its faith over a devout atheist. Forbidding such "religious discrimination" would risk requiring that private religious schools hand their activities over to those who disavow their core principles, viewpoints, and beliefs. And religious schools alone would face this disability. No other school participating in the OSG would be forbidden from requiring that leaders or teachers commit to its ideology or beliefs: a Waldorf school could favor those who adhere to the Waldorf philosophy, military schools could favor staff who support imposing stern discipline and physical challenges.

Likewise, conducting a required class or chapel service from the point of view of one religious belief could be seen as religious discrimination. *See, e.g., EEOC v. Townley Engineering and Mfg. Co.*, 859 F.2d 610, 613 (9th Cir. 1988) (company's policy "requiring employees over their objections to attend devotional services cannot be reconciled with Title VII's prohibition against religious discrimination"). But non-religious schools would be free to have required classes or assemblies promoting their ideologies.

The plaintiffs focus on schools' alleged religious preferences in admitting students (although, as just noted, their theory is not so limited). But religious

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beverages, or art works of varying quality, *id.*—and as we show in the ensuing paragraphs, a religious institution's preferences for staff, members, or students who share its beliefs are likewise legitimate, not wrongful. In any event, such policies by a religious school do not involve discrimination by the state.

preferences in admissions may also bear a close relation to a school's distinct religious identity and teaching. A school that integrates a religious perspective throughout its educational program may wish to ensure that parents, or a "critical mass" among them, will support that perspective and reinforce it at home, where of course students do a great deal of their schoolwork. A Lutheran leader's statement about religion-conscious admissions policies in his denomination's institutions of higher education applies to religiously affiliated schools in general:

> Limiting enrollments consistent with institutional mission will allow an institution to maintain a distinctive purpose. . . .
>
> [Lutheran educational] institutions are at a critical juncture in their history. If Lutheran affiliation is to permeate the lifeblood of an institution, it will be necessary to retain a solid core of Lutheran students [through considering religious belief in admitting students].

Garry A. Greinke, *Survival with a Purpose: A Master Plan Revisited* 62 (Lutheran Education Conference of North America, 1978).

If these practices are covered as prohibited "discrimination," as the Superior Court here ruled, then a private religious school must either (1) forego participating in the generally available benefit that alone may make the school affordable for some students, or else (2) cease operating according to the core principles that constitute the school's very identity. Again, only religious institutions will be burdened with this choice, and they will be harmed no matter which course they choose. Under the Superior Court's ruling, schools that base their teaching in other ideologies or philosophies beside religion are free to

participate in the OSG while still favoring leaders, staff, or students and parents who the school believes will reinforce its viewpoints. Again, therefore, under the Superior Court's flawed interpretation of Article I, section 19, religious schools alone will face a significant restriction on their efforts to ensure that employees, students, and parents are receptive to the school's foundational views.

Religion is both a set of beliefs and a viewpoint. Private religious institutions are associations formed so that a group of people, sharing a similar set of beliefs and viewpoints, might come together and share or otherwise express those beliefs. The prohibition on religious discrimination singles out religious beliefs and viewpoints, so that when it is applied to religious organizations, they are the only ones that cannot favor leaders and members who share their beliefs. The Superior Court's ruling thus singles out religion, creating several serious problems under constitutional principles, state and federal.

1. Discrimination against religious viewpoints under the Free Speech Clause.

That private schools must hire staff and admit students of all religious views is uncontroversial in most cases. But when applied to schools that are organized around shared religious beliefs, this restriction is unfair, counterproductive, disabling, and unconstitutional. Religions are themselves beliefs and viewpoints, as we have already stated. The religious non-discrimination rule singles out religion as the only viewpoint that a school may not adopt and enforce through

standards for leadership or membership. Under the Superior Court's misinterpretation, Article I, section 19 will exclude one, and only one, set of schools—those with a religious viewpoint—from eligibility to participate in the OSG.

The U.S. Supreme Court has repeatedly held that singling out of religious organizations constitutes viewpoint discrimination in violation of the Free Speech Clause. *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001) (holding that when a forum is opened for speech regarding character and moral development, it is viewpoint discrimination to exclude speech to that end from religious viewpoints); *Lamb's Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384 (1993) (holding that it is viewpoint discrimination to prohibit use of a limited public forum for religious purposes); *Rosenberger*, 515 U.S. 819 (holding that it is unconstitutional for a school to refuse to refund student newspaper's otherwise reimbursable costs because the newspaper included editorials from a religious viewpoint); *Widmar v. Vincent*, 454 U.S. 263 (1981) (applying strict scrutiny and striking down a school's policy excluding student religious organizations from otherwise available facilities). Just as the various levels of government had done in *Widmar* through *Good News Club*, the Superior Court here has singled out private religious schools for exclusion from a benefit based on their religious viewpoint.

This viewpoint discrimination cannot be defended by saying that the religious non-discrimination rule applies to all schools participating in the OSG, not just religious schools. Only religious organizations use religious beliefs and viewpoints as the criterion of their identity: that is the very definition of a "religious organization." The Superior Court's misreading of Article I, section 19 imposes far more than a disparate impact on religious schools. The religious nondiscrimination rule on its face refers to religious beliefs and viewpoints. By its terms and in its structure, it singles out religion as the one category of beliefs a private organization may not apply in choosing members and leaders. Therefore, to apply Article I, section 19 to private religious schools is non-neutral between religious and other viewpoints by its very nature, not just its impact.

Applying this rule to private religious schools also bears little relation—indeed, it undercuts—the rationale for proscribing religious discrimination in the first place. Article I, section 19's religious non-discrimination rule is meant to protect religious faith against exclusion from the activities of government and civil society, but applying the rule to private religious institutions singles out those institutions, and thus their animating religious views, for uniquely unfavorable treatment. *See* Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. Davis L. Rev. 889, 916 (2009). Applying the rule to religious groups therefore undercuts its very purpose and should be recognized as

viewpoint discrimination. *Id.*

2. <u>Violation of the very neutrality toward religion required by Article I, section 19 itself.</u>

As previously mentioned, Article I, section 19's "mandate is one of secular neutrality toward religion." *Springmoor*, 348 N.C. at 5, 498 S.E.2d at 180; *Heritage Village*, 299 N.C. at 406, 263 S.E.2d at 730. "The principal or primary effect of the law must be one that neither advances *nor inhibits* religion." *Springmoor*, 348 N.C. at 10, 498 S.E.2d at 183 (emphasis added); *Heritage Village*, 299 N.C. at 407–08, 263 S.E.2d at 731; *Lemon v. Kurtzman*, 403 U.S. at 612–13 (emphasis added).

The OSG legislation, as it was intended to operate, is a classic example of legislation that meets the mandate of secular neutrality. It has a secular purpose: to allow students free choice of the schools they are to attend. Its principal or primary effect does not advance or inhibit religion: the nexus between the state and the schools is broken because the parents are the ones who choose the institution that receives the funds. *Accord Zelman*. And it does not foster excessive government entanglement with religion: again, the nexus between the state and the schools is broken by true choice.

If, however, Article I, section 19 applies to private schools, the law of North Carolina will fail *Lemon's* second prong: it will inhibit religion, requiring religious schools (and those alone) to forfeit their ability to control their institutions in

accordance with their governing viewpoints in order to be eligible for generally available government programs like the OSG. The Superior Court's interpretation of Article I, section 19 fails that section's own requirement of neutrality and inhibits religion.

3. Discrimination against religion under the Free Exercise Clause.

For reasons we have already stated, the religious non-discrimination rule the Superior Court has put forth is not neutral toward religion; it singles out religious institutions in violation of the Free Exercise Clause. Because religion is the one set of animating beliefs that private schools may not consider with regards to its leaders and members, the Superior Court's interpretation is not neutral toward religion. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993); *Employment Div. v. Smith*, 494 U.S. 872 (1990).

Again, the application of the religious non-discrimination rule to religious schools cannot be defended on the ground that the rule applies to all private schools, religious or otherwise. *Lukumi* makes clear that "[f]acial neutrality is not determinative"; the Free Exercise Clause "forbids subtle departures from neutrality" too. 508 U.S. at 534 (quotation omitted). *Lukumi* held that ordinances prohibiting the ritual sacrifice of animals were neither neutral nor generally applicable, not just because of their text but because of their "real operation" in conjunction with other laws: they prohibited Santeria sacrifices while leaving

unpunished "killings that are no more necessary or humane in almost all other circumstances." *Id.* at 535–36. Similarly, in its "real operation," treating private schools as the state acts to bar religious schools from limiting leadership to those who share the institutions' beliefs, but allows almost all other groups to do so. Again, this involves more than a disparate impact on religious groups; the very text of Article I, section 19, if applied to private schools, singles out religion as the one belief on which a group may not discriminate.

4. <u>Interference with freedom of expressive association.</u>

Moreover, treating private religious schools as the state for purposes of Article I, section 19 erodes religious schools' freedom of expressive association. In *Boy Scouts of America v. Dale*, the U.S. Supreme Court recognized that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." 530 U.S. 640, 648 (2000) (requiring the Boy Scouts to include in its membership a person who openly disagreed with the organization's core values violated its expressive association rights). Although the right to expressive association is not absolute, in order to override this right the government is required to show a "compelling state interest, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.*

In the abstract, telling private schools they must abide by the religious non-discrimination rule if they wish to receive state funds may sound unobjectionable. But the concrete consequence of this rule is to tell private religious schools that if they want to be eligible to receive state funds, they cannot require that their principals, or their religion teachers, or some or all of their students believe in the school's foundational faith. The religious non-discrimination rule that the Superior Court applied includes all of these restrictions that fundamentally frustrate a religious school's ability to maintain its identity and mission.

* * *

The Superior Court's tenuous, mistaken interpretation of section 19, needlessly creates discrimination against private religious schools, in sharp tension with North Carolina constitutional provisions and with rights guaranteed by the First Amendment. This Court should hold that religious discrimination by private schools is not attributable to the state merely because the schools benefit from their students using Opportunity Scholarship funds.

B. Treating Private Schools as the State Excludes Families and Schools from Eligibility Unless the School Accepts Restrictions on its Internal Governance.

Under the Superior Court's ruling, if a school wants its students to be eligible for generally available state funds, it must relinquish any policy of discrimination based on religion—even if that policy is important to guiding the

leadership and governance of the schools. That is certainly a high price to pay. In *Tubiolo v. Abundant Life Church, Inc.*, the court of appeals stated that "[m]embership in a church is a core ecclesiastical matter as power to control church membership is ultimately the power to control the church. It is an area where the courts should not become involved." 167 N.C. App. 324, 328, 605 S.E.2d 161, 164 (2004). As the *Tubiolo* court essentially recognized, if a religious organization cannot conduct itself in accordance with its foundational faith—including requiring that leaders and members be committed to the faith—then it will have surrendered control over its identity and mission. By substituting the religious non-discrimination rule for the religious institution's policies, the Superior Court became involved in what should be purely ecclesiastical matters, exactly what *Tubiolo* proscribes.

The importance of religious institutions being able to control their own direction is also highlighted in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012). In *Hosanna-Tabor*, the Supreme Court held that a private religious school affiliated with the Lutheran Church could fire a teacher—who the church considered to be a minister—for threatening to take legal action against the school. In recognizing the "ministerial exception," the Court found that

> [t]he members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted

> minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.

Id. at 706. The Court held that the ministerial exception prevents the government from imposing unwanted ministers upon churches in violation of the Free Exercise Clause, which protects "a religious group's right to shape its own faith and mission through its appointments." *Id*. Similarly, the ministerial exception prevents Establishment Clause violations, ensuring that the government will not become entangled with ecclesiastical matters. *Id.*

Religious schools' right to shape their own faith and mission through their appointments is fundamental to the integrity of those institutions. As the North Carolina Court of Appeals and the U.S. Supreme Court have observed, this is not an area where the courts should become involved. Applying the exceedingly broad ruling of the Superior Court places the government in the middle of religious schools' decisions regarding what should otherwise be purely ecclesiastical matters. This Court should reverse the Superior Court's holding, so as to protect religious groups' right to shape their own faith and mission through their appointments.

C. Discrimination Against Religious Schools Is Constitutionally Suspect, and Should be Avoided, Even When It Takes the Form of Exclusion from Generally Available Benefits.

The discrimination against religious schools we have described, and the interference with their internal governance, do not become permissible simply because the Superior Court excluded religious schools from OSG scholarships rather than imposing legal liability on them. Principles of neutrality toward religious viewpoints apply even when the state is distributing benefits. *See, e.g.*, *Rosenberger*, 515 U.S. 819 (state university committed viewpoint discrimination by excluding religious publications from program of subsidizing expenses for student organizations).

Nothing in the U.S. Supreme Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), gives approval to the broad exclusion of religious educational institutions from programs of true private choice. In *Locke*, the Court permitted Washington State, which had created state-funded scholarships for modest-income students attending college, to deny a scholarship to a student at an evangelical college who was pursuing a degree in "devotional" theology training for the ministry. *Id.* at 716. But *Locke* is readily distinguishable.

For one thing, the Court there found that denying scholarships for "the pursuit of devotional degrees . . . places a relatively minor burden on" religious exercise, *id.* at 725; students could still take theology and other courses from a

"devotional" perspective as long as they were not majoring in devotional theology. *Id.* at 725 & n.9. The Court emphasized that "[t]he State has merely chosen not to fund a distinct category of instruction"—"training for religious professions [versus] secular professions." *Id.* at 722; *id.* at 722 n.5 ("the only interest at issue here is the State's interest in not funding the religious training of clergy"). By contrast, excluding religious schools altogether from the OSG is far more burdensome and discriminatory: it excludes training for the whole range of secular subjects that these schools teach, simply because they do so from a religious perspective. *See, e.g.*, *Board of Education v. Allen*, 392 U.S. 236, 247 (1968) (recognizing that religious K–12 schools provide secular as well as religious education and "pla[y] a significant and valuable role in raising national levels of knowledge, competence, and experience"); *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008) (McConnell, J.) (reasoning that *Locke* "does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support," and striking down state exclusion of entire institutions deemed "pervasively sectarian").

Even more relevant for purposes of this case, Washington's exclusion of devotional theology majors from scholarships was explicit and clear. By contrast, here North Carolina did not single out religious schools for exclusion, but the

Superior Court twisted the words of Article I, section 19 to accomplish such exclusion by reading the prohibition on "[religious] discrimination by the State" to cover religious discrimination by private religious schools that benefit from state funds. There is no reason to create the conflicts with religious liberty that follow from singling out religious schools for exclusion from the OSG. This Court can avoid those constitutional problems by simply reading Article I, section 19 in accordance with its text and with precedent. When a religious school receives state funds only because families choose to use their benefits at that school, the school's policies of considering religion in hiring or admissions are not attributable to the state.

CONCLUSION

Article I, section 19 protects the people from the state. Private religious schools are not the state, and in the context of a true private choice program, their actions are not attributable to the state. Holding religious schools to the same religious non-discrimination standard as the state creates a plethora of problems, not least of which is unconstitutional discrimination against private religious beliefs, viewpoints, and activities. For these reasons, and the reasons set forth herein, this Court should reverse the Superior Court's finding that the OSG legislation violates Article I, section 19 of the North Carolina Constitution.

Respectfully submitted, this 30th day of December 2014.

Electronically Submitted

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing BRIEF *AMICUS CURIAE* OF THE CHRISTIAN LEGAL SOCIETY; NORTH CAROLINA CHRISTIAN SCHOOL ASSOCIATION; THE ROMAN CATHOLIC DIOCESE OF CHARLOTTE, NORTH CAROLINA; THE ROMAN CATHOLIC DIOCESE OF RALEIGH, NORTH CAROLINA; NORTH CAROLINA FAMILY POLICY COUNCIL; LIBERTY, LIFE, AND LAW FOUNDATION; ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL; AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS; AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF DEFENDANTS/APPELLANTS AND INTERVENOR-DEFENDANTS/APPELLANTS, pursuant to Rule 26 (c), by email addressed to the following persons at the following email addresses which are the last email addresses known to me:

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