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Brief of Amicus Curiae Notre Dame Law School Religious Liberty Initiative

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IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

COLUMBUS CITY SCHOOL DISTRICT, *et al.*, Plaintiffs, v. STATE OF OHIO, *et al.*, Defendants, v. CHRISTOPHER BOGGS, *et al.*, Intervenor-Defendants.	Case No. 22-cv-000067 JUDGE JAIZA N. PAGE

BRIEF OF *AMICUS CURIAE* NOTRE DAME LAW SCHOOL RELIGIOUS LIBERTY INITIATIVE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Constitutions and Statutes

Other Authorities

INTERESTS OF AMICUS CURIAE

The Notre Dame Law School Religious Liberty Initiative promotes and defends religious freedom for people of all faiths through scholarship, events, and the Law School's Religious Liberty Clinic. The Religious Liberty Initiative protects not only the freedom for individuals to hold religious beliefs but also their right to exercise and express those beliefs and to live according to them. The Religious Liberty Initiative has represented individuals and organizations from an array of faith traditions to defend the right to religious worship, to preserve sacred lands from destruction, to promote the freedom of religious bodies to govern their central affairs, and to prevent discrimination against religious believers in government programs and benefits.

In addition to defending religious exercise wherever it is curtailed, the Religious Liberty Initiative advocates for an end to discrimination against religious schools and affirms the valuable work those schools do in educating people of all faiths and backgrounds—work that funding programs like the EdChoice Scholarship Program make possible. The Religious Liberty Initiative therefore seeks to ensure that the EdChoice program is not eliminated through the discriminatory—and unconstitutional—application of laws that target religious schools for disfavor or deny them access to otherwise available public benefits.

SUMMARY OF ARGUMENT

Under Count 4 of their complaint, the plaintiffs ask this Court to do something that it unquestionably may not: invalidate Ohio's longstanding EdChoice Scholarship Program on the theory that it violates the "no-funding" provision of Article VI, § 2 of the Ohio Constitution, which bars any "religious or other sect" from receiving "any part of the school funds of this state."[1] *See* Compl. ¶¶ 142–52. Under both state and federal law, this Court must dismiss that claim.

[1] This brief refers to this as the "no-funding" or "no-aid" provision.

For starters, that claim cannot stand for the simple reason that the Ohio Supreme Court already rejected it more than two decades ago. *See Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 (Ohio 1999) (school voucher program does not violate the no-funding provision of Article VI, § 2 because it does not actually direct school funds from the state to religious schools); *see also Protestants & Other Americans United for Separation of Church & State v. Essex*, 275 N.E.2d 603, 608 (Ohio 1971) ("[T]he sole fact that some private schools receive an indirect benefit from general programs supported at public expense does not mean that such schools have an exclusive right to, or control of, any part of the school funds of this state"). As the State demonstrates, this Court has no choice but to reject the plaintiffs' impermissible attempt to resurrect that same claim now. *See* Memo. in Support of Defs. Motion to Dismiss, at 14–15 (May 18, 2022).

Second, even if binding precedent of the Ohio Supreme Court did not stand in the way of the plaintiffs' claim, binding precedent of the United States Supreme Court still would. In recent years, the U.S. Supreme Court has made it abundantly clear that the First Amendment to the U.S. Constitution prohibits a state court from invalidating a school-choice program merely because it allows religious schools to participate in it. Indeed, only two years ago, the Court reversed the Montana Supreme Court for doing exactly what the plaintiffs seek here: striking down a generally available scholarship program under a state constitutional provision that denies funding to religious schools. *See Espinoza v. Montana Department of Revenue*, 140. S. Ct. 2246 (2020). As the Court in *Espinoza* explained, the First Amendment "condemns discrimination against religious schools and the families whose children attend them," and the Montana Constitution's exclusion of them from the scholarship program "is odious to our Constitution and cannot stand." *Id.* (internal quotation marks omitted). The reasoning and result of *Espinoza* leave no room for the claim here.

Finally, this Court should be especially careful not to extend the shameful legacy of anti-Catholic animus that underlies Ohio's no-funding provision. That provision is a relic of a lamentable movement in the 19th century that sought to impose discriminatory laws to suppress a growing population of Catholic immigrants to this country—a movement the U.S. Supreme Court has "not hesitate[d] to disavow." *Mitchell v. Helms*, 530 U.S. 793, 829 (2000) (plurality op.). This Court should do the same and must refuse to allow the unconstitutional and repugnant extension of a law that was "born of bigotry and . . . a time of pervasive hostility to the Catholic Church and to Catholics in general." *Espinoza*, 140 S. Ct. at 2259.

ARGUMENT

I. The First Amendment unequivocally prohibits this Court from invalidating the EdChoice Scholarship Program merely because it includes religious schools.

Recent U.S. Supreme Court precedent makes abundantly clear that this Court must dismiss the plaintiffs' claim under the no-funding provision of Article VI, § 2.

Only two years ago, the U.S. Supreme Court held that the First Amendment to the U.S. Constitution barred a nearly identical claim brought under Montana law. Like Ohio, Montana has enacted a program that helps parents afford the cost of sending their children to the private schools of their choice—religious or otherwise. And, like here, that law was challenged under a Montana constitutional provision that restricts the aid that can be made available to religious schools. *See* MONT. CONST. art. X § 6(1) (prohibiting "any direct or indirect appropriation or payment from any public fund or monies, . . . for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination"). After that claim initially succeeded in state courts, in *Espinoza v. Montana Department of Revenue*, the U.S. Supreme Court confronted the same result that the plaintiffs urge here: the Montana Supreme Court had invalidated the school-choice

program on the theory that it violated the state constitution's no-aid provision. In *Espinoza*, the U.S. Supreme Court made clear that the federal Constitution does not tolerate such a result.

Specifically, the Court in *Espinoza* held that the decision to invalidate Montana's school-choice program violated the First Amendment's Free Exercise Clause. The Court explained that the Free Exercise Clause prohibits a state from creating a public benefit (*e.g.*, school scholarships) and then excluding otherwise eligible recipients based on their religious character. *Espinoza*, 140 S. Ct. at 2255. Because Montana's no-funding provision "plainly excludes schools from government aid solely because of religious status," the application of that provision to the state's scholarship program must be "subject to the strictest scrutiny." *Id.* at 2255–57 (quotation omitted). Unsurprisingly, Montana failed to satisfy that scrutiny, with the Supreme Court explaining, "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools because they are religious." *Id.* at 2261.[2]

Nor could this Court avoid the Free Exercise problem by applying Ohio's no-funding provision "neutrally" to invalidate the entire scholarship program for both secular and religious schools alike. That same argument was made—and rejected—in *Espinoza*. There, Montana argued that, even if the First Amendment might prevent a court from striking down its funding program *only* for religious schools, there was no constitutional impediment to the Montana Supreme Court eliminating the entire program for *all* private schools. *Id.* at 2261–62. The U.S. Supreme Court disagreed. As the Court explained, the supposedly "neutral" remedy of eliminating

[2] In the course of its analysis, the Court in *Espinoza* rejected a plethora of justifications offered to support Montana's choice to deny funding to religious schools, including that Montana had "an interest in separating church and State more fiercely than the Federal Constitution," that the no-aid provision "actually *promotes* religious freedom," and that the provision "advances Montana's interests in public education." *Espinoza*, 140 S. Ct. at 2260–61. To the extent the plaintiffs might hope to offer similar justifications here, they would likewise fail.

the whole program could not avoid the underlying "error of federal law"—the Montana court's choice to deny otherwise available funding to religious schools "pursuant to a state law provision that expressly discriminates on the basis of religious status." *Id.* at 2262. The Supreme Court admonished that when a court is "called upon to apply a state law no-aid provision to exclude religious schools from the program, *it [is] obligated by the Federal Constitution to reject the invitation*." *Id.* (emphasis added). A court must instead "'disregard' the no-aid provision and decide[] th[e] case 'conformably to the [C]onstitution' of the United States"—*i.e.*, let the program stand. *Id.* (quoting *Marbury v. Madison*, 1 Cranch 137, 178 (1803)).

There is no getting around *Espinoza* here. The plaintiffs squarely ask this Court to follow the same course of action that the Supreme Court reversed in *Espinoza*. Like Montana's program, Ohio's school-choice program is neutral on its face, providing funding to enable children to attend all eligible schools, whether religious or secular. And like the Montana Supreme Court, this Court has now been asked to strike down that facially neutral program specifically because it allows religious schools to participate in it. More to the point, like in *Espinoza*, this Court has been urged to find that the program cannot stand thanks to a state constitutional provision that, on its face, disfavors religious schools and denies them access to certain funds. There is simply no daylight between the claim rejected in *Espinoza* and that put forward in this case.

Nor does *Espinoza* stand alone. A long line of Supreme Court precedents reinforces the straightforward proposition that a state may not exclude religious organizations from otherwise available public-benefit programs. The First Amendment's Free Exercise Clause requires that the government, at a minimum, place religious organizations on equal footing as non-religious ones when promulgating and enforcing its laws. *See, e.g.*, *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993);

Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017 (2017); *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). One clear consequence of this principle is that a state may not target religious conduct for special disfavor. *See Lukumi*, 508 U.S. at 535–38; *Tandon*, 141 S. Ct. at 1296; *Fulton*, 141 S. Ct. at 1877–78. And a state must likewise be neutral in its administration of public benefits. Thus, as reflected in *Espinoza*, any time a state denies "a generally available benefit solely on account of religious identity[, it] imposes a penalty on the free exercise of religion that can be justified only by a state interest of the highest order." *Trinity Lutheran*, 137 S. Ct. at 2017 (quotation omitted). A state may not put individuals or institutions "to the choice between being [religious] and receiving a government benefit." *Id.* at 2024.

The direction from the U.S. Supreme Court could hardly be clearer: A state may not, even through its own constitutional law, deny otherwise available benefits to individuals or organizations merely because they are religious. Just like in *Espinoza*, this Court must therefore reject the plaintiffs' invitation to invalidate the EdChoice Program simply because it allows religious schools to participate in it. *Espinoza*, 140 S. Ct. at 2262. "Given the conflict between the Free Exercise Clause and the application of the no-aid provision here," the plaintiffs' claim "cannot stand." *Id.*

II. Judicial enforcement of Ohio's no-funding provision would impermissibly further that provision's shameful legacy of anti-Catholic discrimination.

Worse still, the application of Ohio's no-aid provision in this case would discriminate against religious schools not just *in effect* but *by design*. Indeed, that provision was adopted as part of a nationwide movement, "born of bigotry and . . . a time of pervasive hostility to the Catholic Church and to Catholics in general," that sought explicitly to stamp out the growth of Catholic schools around the United States. *Espinoza*, 140 S. Ct. at 2259. As the plaintiffs' own

complaint makes clear, the very purpose of that clause was to ensure that religious schools would be treated with special disfavor in funding decisions made by the state. *See* Compl. ¶¶ 145–46, 150–51. To invoke that clause to deny benefits that Ohio has long made available to religious schools on neutral and equal terms would continue this "shameful pedigree" of invidious religious discrimination, a result which the U.S. Supreme Court has "not hesitate[d] to disavow." *Mitchell*, 530 U.S. at 828 (plurality op.); *see also, e.g.*, *Espinoza*, 140 S. Ct. at 2259; *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2097 n.3 (2019) (Thomas, J., concurring). This Court must refuse to countenance such a result as well.

A. Ohio's no-funding provision was adopted at a time of virulent anti-Catholic nativism in Ohio and across much of the United States.

When the no-funding provision of Article VI, § 2 was first ratified in 1851, virulent anti-Catholic nativism had already begun to take hold in places like Ohio, where Catholic immigrants were increasingly settling. In Cincinnati, for example, immigrants made up nearly half the population, and the Catholic population of the diocese of Cincinnati grew from about 50,000 in 1844 to about 75,000 in 1850. *See* Margaret C. DePalma, *Dialogue on the Frontier: Catholic and Protestant Relations, 1793–1883*, at 103 (2004); James A. Gutowski, *Politics and Parochial Schools in Archbishop John Purcell's Ohio* 67 (2009) (Ph.D. dissertation, Cleveland State University) [https://perma.cc/R4WW-VE8W]. The boom in the Catholic population was reflected in the city's Catholic schools, whose enrollment went from 2,527 students in 1848 to 4,494 just three years later. Gutowski, *Politics*, *supra*, at 86.

This wave of immigration and the resulting growth in Catholic schools seeded a wave of anti-Catholic nativism. *See Espinoza*, 140 S. Ct. at 2269–70 (Alito, J., concurring). The anti-immigrant, anti-Catholic Know-Nothing Party, something of a precursor to the Ku Klux Klan, epitomized the trend. *See id.* at 2268, 2272. Know-Nothing representatives were elected to

hundreds of seats at the state and federal level, including to numerous offices in Ohio in 1854 and 1855. *Id.* at 2269; Luke Ritter, *Inventing America's First Immigration Crisis* 148 (2021). Ohio was a hotbed of Know-Nothing activity, with more than 120,000 members in the state and two Know-Nothing representatives in Congress. Ritter, *supra*, at 148–53.

The Know-Nothings, along with many others in Ohio, contended that immigrants—and especially Catholics—would destroy the country politically, socially, and economically. Among other things, they warned that Catholics would undermine the social order by subverting the public schools and building a system of independent Catholic schools through which they could control the next generation. DePalma, *supra*, at 82. At the time, the state's public schools had a distinctly Protestant character, and many Ohioans feared Catholic corruption of Ohio's youth both within the public schools and in the nascent Catholic schools. Events in Cincinnati illustrate this well. Catholic Archbishop John Baptist Purcell had been petitioning the city's school board for more than a decade, objecting to the use of the King James translation of the Bible in the public schools and to the schools' use of textbooks that demeaned Catholics. *See* Stephan F. Brumberg, *The Cincinnati Bible War (1869–1873) and its Impact on the Education of the City's Protestants, Catholics, and Jews*, 54 Am. Jewish Archive J. 11, 14 (2002); DePalma, *supra*, at 104; Gutowski, *Politics*, *supra*, at 89–90. In 1853, the Archbishop's objections ignited an anti-Catholic backlash in the city, centered on school funding. *See* DePalma, *supra*, at 104–05. An independent "Free School Ticket" was nominated specifically to prevent the apportionment of tax dollars to "sectarian" schools. *See id.* at 105; James Gutowski, *Bibles, Ballots, and Bills: Political Resistance to Parochial Education in 1870s Ohio*, 36 U.S. Cath. Historian 51, 55 (2018). The Free School Ticket's mayoral candidate, the anti-Catholic James D. Taylor, won 35% of the vote, finishing just 4 points behind the winner. Gutowski, *Bibles*, *supra*, at 55.

Ohio was again at the center of anti-Catholic controversy when the "Cincinnati Bible War" broke out in 1869. In that year, the city's school board introduced a resolution to ban the use of the Bible in public schools. Steven K. Green, *The Bible, the School, and the Constitution* 97 (2012). Many in the city believed this decision was part of a "nefarious Catholic plot" to undermine public education. *Id.* One opponent alleged that Catholics were seeking to remove the Bible from the public schools as part of an effort "to knock out [the Republic's] underpinning, to poison the very wells of its water of life . . . [to] darken the very light by which it lives and breathes," and to "plunge [the nation] into the bottomless pit of Atheism." *Id.* at 99 (internal quotation marks omitted) (quoting Amory D. Mayo, *Religion in the Common Schools* 17, 27 (1869)). The *Christian Advocate*, a Cincinnati newspaper, "declared that Catholic opposition to Bible reading was part of a 'Romanist policy' that sought 'the overthrow, the abolition, of the whole American scheme of Common School Education.'" *Id.* (quoting *Conspiracy Against the School System*, Christian Advocate, Nov. 25, 1869, at 372). Events like these irrevocably linked anti-Catholic prejudice with public-school controversies in Ohioans' public consciousness.

These controversies often boiled over into violence. In Massachusetts, Catholic children in public schools were physically beaten for refusing to read the King James translation of the Bible. *Espinoza*, 140 S. Ct. at 2272 (Alito, J., concurring). In New York, a mob destroyed the home of a Catholic Bishop. *Id.* In Philadelphia, anti-Catholic rioters fired cannons at and burned two Catholic churches, leaving several people dead. *Id.* Ohio's Catholics were not spared such violence. In 1850, a mob in Chillicothe attacked a Catholic school run by the Sisters of Notre Dame. Gutowski, *Politics*, *supra*, at 87. In 1853, a mob besieged Archbishop Purcell's residence and burned a visiting Cardinal in effigy. Ritter, *supra*, at 155. And in 1855, a nativist mob attacked

the Cincinnati German neighborhood of "Over the Rhine," clashing with Catholic residents, firing a cannon in the streets, and destroying ballot boxes. DePalma, *supra*, at 110.

These controversies also infected Ohio politics. In 1875, a Catholic member of the Ohio House of Representatives, John Geghan, introduced a bill that would allow inmates in state prisons access to ministers from their own denominations. Gutowski, *Bibles*, *supra*, at 64. The bill's opponents, however, saw sinister motives. One newspaper opined that it would implant "the insidious tentacles of Rome ever deeper into American life." Gutowski, *Politics*, *supra*, at 145 (citing Edwin Cowles, *Sectarianism in Prison – Mr. Geghan's Substitute*, The Cleveland Leader, Mar. 26, 1875, 4). And when a Catholic newspaper celebrated the bill and expressed support for Geghan's Democratic party, the bill quickly became linked to the issue of school funding. The *Cleveland Leader*, for example, took the statement as a sign that Catholic voters were "taking orders from the archbishop of Cincinnati who had been commanded by Rome to destroy the public school system." Gutowski, *Bibles*, *supra*, at 65 (citing *The Catholic* Telegraph *of Cincinnati*, The Cleveland Leader, Apr. 5, 1875, 4). In 1875, political cartoonist Thomas Nast published a cartoon in *Harper's Weekly* that accused the same Archbishop of aspirations to a throne in Ohio and depicted images of the Pope "reigning in the United States" and a priest standing in the "Ohio Roman Legislature" with a bill labeled "down with public schools." *See infra* App., fig. 1.

Broader political fights were likewise shaped by these controversies. In Ohio's 1875 gubernatorial race, for example, Republican candidate Rutherford B. Hayes connected the Geghan bill to the question of public-school funding throughout his campaign, directing that pamphlets about the Geghan bill and the schools be printed and distributed throughout the state. *See* Gutowski, *Bibles*, *supra*, at 69. The controversy over the Geghan bill resonated nationally, as well. *Harper's Weekly*, for example, opined that Democratic support for the Geghan bill showed

that the Democrats "submit with groveling subserviency to the arrogant demands of the papal hierarchy, and are ready to sacrifice the most cherished principles of our political system" in an "attack upon the system of common-school education in Ohio." *Harper's Weekly*, Aug. 28, 1875, at 698. When the October elections saw Geghan defeated in the House and Hayes elected governor, Nast published another cartoon, this one labeled "Canonized—Ohio, October 23, 1875," which depicted Geghan and his bill being fired from a cannon set up in defense of the public schools. *See infra*, App., fig. 2.

B. Ohio's no-funding provision was designed to put this anti-Catholic bigotry into effect by inhibiting religious schools.

In the midst of this anti-Catholic bigotry, Ohio adopted the no-funding provision of Article VI, § 2 as a means to disfavor religious schools and combat the paranoid fear that Catholic immigrants would harm Ohio's children. In other words, that provision did not merely operate with the incidental effect of burdening the exercise of religious schools; that was the very point.

Ohio's no-aid provision is a relic of the shameful history of so-called "Blaine Amendments"—discriminatory laws that were put into place across the country in the heat of this anti-Catholic fervor in the 19th Century. In 1875, James Blaine proposed a federal constitutional amendment in the House of Representatives, which provided that "no money raised by taxation in any State, for the support of the public schools or derived from any public fund therefor, shall ever be under the control of any religious sect." Steven K. Green, *The Blaine Amendment Reconsidered*, 38 Am. J. Legal Hist. 38, 50 (1992) (quotation omitted); *see also Espinoza*, 140 S. Ct. at 2268 (Alito, J., concurring). At the time, "[i]t was an open secret" that "sect" and "sectarian" were "code for 'Catholic.'" *Espinoza*, 140 S. Ct. at 2259 (maj. op.); *accord Mitchell*, 530 U.S. at 828 (plurality op.). Indeed, the primary motivation behind the Blaine Amendment was "virulent prejudice against immigrants, particularly Catholic immigrants." *Espinoza*, 140 S. Ct. at 2268

(Alito, J., concurring); *see also id.* at 2259 (maj. op.). The Blaine Amendment garnered significant support in Congress, passing the House and falling just two votes short of passing the Senate. *See Espinoza*, 140 S. Ct. at 2268 (Alito, J., concurring).

Despite the fact that Blaine's efforts failed at the federal level, amendments with the same end, animated by the same prejudices, were routinely passed by states—sometimes as a condition of statehood. Thirty-eight state constitutions, including Ohio's, still contain these "little Blaine Amendments." *See id.* at 2269. Thirty-four of those provisions, including Ohio's, contain the "bigoted code language" "sectarian." *Id.* at 2270; *see also Blaine Info Central*, Becket Law, https://bit.ly/3NeXSjO (last visited May 17, 2022). Both the Know-Nothing Party and the Klan were ardent supporters of the Blaine Amendment. *See Espinoza*, 140 S. Ct. at 2268, 2272 (Alito, J., concurring).

As described above, the anti-Catholic hostility that animated these "Blaine Amendments" was evident in 1851 when Ohio's no-funding provision was first adopted—but the animus underlying that provision was made especially clear when it was retained against a challenge at the State's next Constitutional Convention in 1873–74. There, Joseph Carbery, a delegate to the convention and a Catholic, proposed an amendment to remove the provision. Carbery argued that it was unjust to tax Catholics to support public schools that, in good conscience, their children often could not attend. Carbery argued that the "common schools" in many areas were effectively closed to Catholics because they failed to provide the necessary forms of education that their religion demanded and, even worse, taught in ways that either denigrated religion or compelled children to read Bible translations and sing hymns that amounted to "a form of Protestant worship in which we do not believe." 2 *Official Report of the Proceedings and Debates of the Third Constitutional Convention of Ohio* 2209 (Mar. 20, 1874) (statement of Joseph P. Carbery)

[hereinafter *Convention Report*]. His goal was modest: to foster religious toleration and freedom of conscience for Catholics who frequently enjoyed neither. *See generally id.* at 2203–07 (arguing for proportional state support for all religious schools so that no majority religion could "violate . . . man's conscience" and enforce its worldview through the school system).

But Carbery's fellow delegates refused to credit this plea. In response, one intimated that Catholics secretly wished to dominate the country and to eliminate religious liberty entirely. *Id.* at 2207 (statement of J.W. McCormick). Another argued that Catholic immigrants sought "the supremacy of the church over all the world." *Id.* at 2209 (statement of T.E. Cunningham). Arguments like these—that immigrants, and particularly Catholics, wanted to conquer the United States—had long been a trope of the nativist movement. In 1835, for example, Lyman Beecher, president of Lane Theological Seminary in Cincinnati, published *A Plea for the West*, in which he argued that the Pope intended to rule over the entire Mississippi Valley. *See* DePalma, *supra*, at 87.

Debate at the Constitutional Convention centered specifically on a supposed Catholic plot to control the minds of the youth.[3] One delegate warned that the proposal to eliminate the no-aid provision "could be reduced down just to this, an assertion, on the part of the [Catholic] church, of supremacy over the rising generation, the growing generation of this country." *Convention Report*, *supra*, at 2209 (statement of T.E. Cunningham). Another lamented that children in Catholic schools would have "their little minds . . . filled with jealousies, hatred, revilings, envy, and their imaginations . . . racked to invent slanders, detractions and injuries to be heaped on each

[3] Statements like these echoed another favorite trope of the anti-Catholic nativist movement, that Catholic schools were the "*prisons* of the youthful intellect of the country," *Espinoza*, 140 S. Ct. 2269 (Alito, J., concurring) (quotation omitted).

other. God forbid that free America could witness these unholy scenes." *Id.* at 2188 (statement of Asher Cook). Were the clause eliminated, he warned, the "mental agony produced by the strife which must necessarily follow . . . [would] exceed the bodily suffering produced by the rack, under the Inquisition." *Id.* He painted a scene of religious believers "under the insane fervor of religious excitement" attempting to "baptiz[e] the earth in what their frenzied zeal calls infidel blood." *Id.* In his words, "[the framers of Article VI, § 2 had] the evil results of a misguided sectarian education staring them in the face." *Id.*

To combat this supposed "evil," the delegates to the convention clung to the no-funding provision to ensure that Catholic or other "sectarian" schools would not operate on equal terms with all others. Some delegates sought to go further still, proposing an amendment that would have allowed the Ohio legislature to require all students to attend the public schools for a set amount of time during certain ages. *Convention Report*, *supra*, at 2186 (Committee on Education Report by Asher Cook, John D. Sears, Henry F. Page & Rodolph DeSteiguer). Decades earlier, exactly this sort of law had been considered by the state legislature; children would have been required to attend public schools for three months each year, effectively preventing them from attending Catholic ones. Gutowski, *Bibles*, *supra*, at 54. Requirements like these might have closed the Catholic schools completely and, fortunately, they did not win enough support to earn the force of law. But Ohio's no-funding provision did, enshrining much of the anti-Catholic prejudice that resonated in the state and at the Constitutional Convention at the time.

Ohio's no-funding provision, like so many other "Blaine Amendments," cannot be separated from these invidious purposes. *See Espinoza*, 140 S. Ct. 2270 (Alito, J., concurring). This Court should follow the lead of the U.S. Supreme Court and refuse to extend that provision's "shameful pedigree" and the unconstitutional discrimination it purports to require. *See id.* at 2259

(maj. op.). By instead simply following the clear and binding dictates of Supreme Court precedent, this Court can help lay this discriminatory provision to rest.

CONCLUSION

Under controlling precedent of both the Ohio Supreme Court and the U.S. Supreme Court, the plaintiffs' effort to invalidate the longstanding EdChoice Scholarship Program under Article VI, § 2 of Ohio's Constitution cannot stand. *Amicus* respectfully urges this Court to dismiss Count 4 of the Complaint.[4]

Dated: May 19, 2022

Respectfully submitted,

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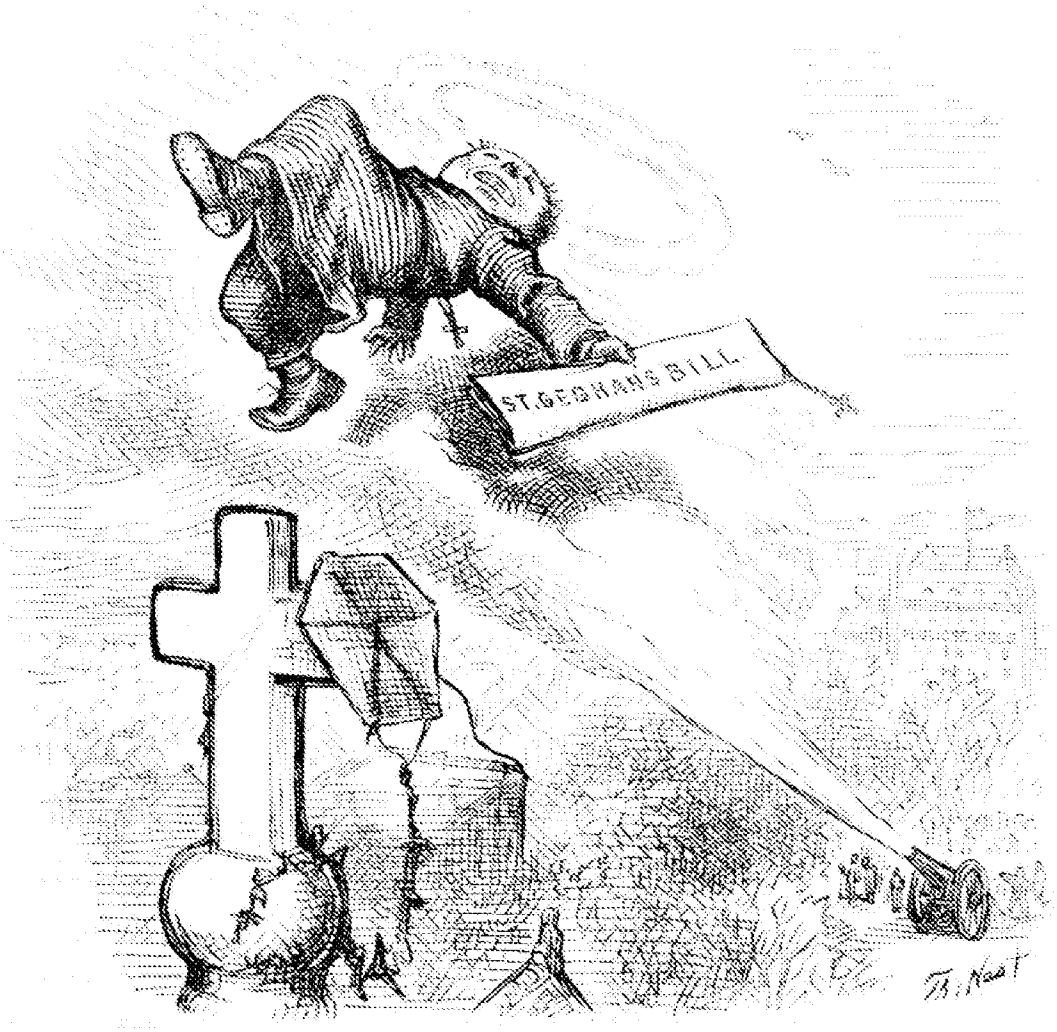
* *Pro Hac Vice* Application Pending

[4] The Notre Dame Religious Liberty Initiative thanks students Timothy Borgerson, Ross D'Entremont, and Daniel Loesing for their assistance in preparing this brief.

APPENDIX

Figure 1: Thomas Nast, *The Established (Foreign) Church of Ohio* (illustration), *in* Harper's Weekly, Aug. 28, 1875.

Figure 2: Thomas Nast, *Canonized—Ohio, October 12, 1875* (illustration), *in* Harper's Weekly, Nov. 13, 1875.



CERTIFICATE OF SERVICE

I hereby certify that, on May 19, 2022, a copy of the foregoing was filed and served on counsel for all parties by the electronic filing system of the Franklin County Court of Common Pleas Clerk of Court pursuant to Civ. R. 5(B)(3) and Local Rule 110.

/s/ Megan M. Wold
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Counsel for Amicus Curiae