IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Columbus City School District et al.,	:	
Plaintiffs-Appellees/ Cross-Appellants,	:	Nos. 25AP-603,
v.	:	25AP-604, &
State of Ohio et al.,	:	25AP-605
	:	(C.P.C. No. 22CV-67)
Defendants-Appellants/ Cross-Appellees,	:	(REGULAR CALENDAR)
Catholic School Family et al.	:	
Intervenors-Appellants.	:	

D E C I S I O N

Rendered on October 15, 2026

***On brief*:** *Weston Hurd*, *LLP*, and *Maria Fair*; *McCarthy*, *Lebit*, *Crystal & Liffman*, *Mark I. Wallach*, and *Lawrence R. Acton*, for plaintiffs-appellees/cross-appellants. **Argued:** *Maria Fair* and *Mark I. Wallach.*

***On brief*:** [*D. Andrew Wilson*], Attorney General, *Mathura J. Sridharan*, *Stephen P. Carney*, and *Elizabeth H. Smith*; *Shumaker*, *Loop & Kendrick*, *LLP*, *Mark D. Wagoner*, *David F. Axlerod*, and *Matthew T. Kemp*, for defendants-appellants/cross-appellees. **Argued:** *Stephen P. Carney*.

***On brief*:** *Kegler*, *Brown*, *Hill & Ritter*, *Robert G. Schuler*, and *Christoper J. Weber*, for intervenor-appellant, Catholic School Family.

***On brief*:** *Robinson Law Firm LLC*, and *Emmett Robinson*; *Institute for Justice*, *Keith Neely*, and *David Hodges*, pro hac vice; *EdChoice Legal Advocates*, *Thomas M. Fisher*, and *Bryan G. Cleveland*, pro hac vice; *Institute for Justice*, and *Michael Bindas*, pro hac vice, for intervenor-appellant, Christopher Boggs. **Argued:** *Keith Neely*.

On brief: *Cooper & Kirk, PLLC*, and *Megan M. Wold*, for amici curiae, Notre Dame Law School Religious Liberty Clinic and Notre Dame Education Law Project, in support of defendants-appellants/cross-appellees.

On brief: *Legal Aid of Southeast and Central Ohio*, *Lucy Schwallie*, *Caitlin DiCresce*, and *Hannah Wagner*, for amicus curiae, Ohio Advocacy and Legal Services Organizations; *Disability Rights Ohio*, and *Kristin Hildebrant*, for amicus curiae, Disability Rights Ohio, in support of plaintiffs-appellees/cross-appellants.

On brief: *Lemmerbrock & Boron, LLC*, and *Brooks W. Boron*, for amicus curiae, Ohio Federation of Teachers; *Ohio Education Association*, and *Kelly Phillips*, for amicus curiae, Ohio Education Association, in support of plaintiffs-appellees/cross-appellants.

APPEALS from the Franklin County Court of Common Pleas

LELAND, J.

{¶ 1} In 2005, the Ohio General Assembly enacted Ohio's Education Choice Scholarship Program ("EdChoice"). 2005 Am.Sub.H.B. No. 66 (effective June 30, 2005). As originally established, EdChoice provided a limited number of state taxpayer-funded scholarships available to students to assist them in attending private schools. However, over the last two decades, the General Assembly has significantly broadened EdChoice's funding and eligibility requirements. In fiscal years 2024 and 2025, for example, EdChoice and the EdChoice Expansion Scholarship Program ("EdChoice Expansion") cost taxpayers almost $1.4 billion. The programs are now available to virtually all Ohio students, regardless of family income or the quality of local public schools.

{¶ 2} In 2022, plaintiffs-appellees/cross-appellants ("Plaintiffs"), Columbus City School District, Cleveland Heights-University Heights City School District, Richmond Heights Local School District, Lima City School District, Barberton City School District, Dayton City School District, Ohio Coalition for Equity and Adequacy of School Funding,[1] and individual students, M.M., F.D., S.H., C.H. ("Student Plaintiffs"), filed a complaint in

[1] According to their complaint, The Ohio Coalition for Equity and Adequacy of School Funding is a council of governments comprised of public school districts and boards of education from across the state of Ohio, organized pursuant to R.C. Chapter 167.

the Franklin County Court of Common Pleas challenging the constitutionality of EdChoice, including its legislative expansions. Specifically, Plaintiffs asserted that EdChoice violates Ohio Const. art. VI, § 2, which requires the state to "secure a thorough and efficient system of common schools" and prohibits the state from allowing religious or other sectarian groups from exercising exclusive control over public-school funds. Student Plaintiffs also asserted that EdChoice violates the Equal Protection Clauses of both the Ohio and United States Constitutions. Defendant-appellants/cross-appellees include the State of Ohio, Superintendent of Public Instruction, the Ohio Department of Education, and the State of Ohio Board of Education ("State Defendants"); intervenor-defendants, Christopher and Chelasea Boggs, Brian Ellis, Kathryn Sliwinski, Marc Omelsky, Benjamin Highley ("Boggs Intervenors"); and intervenor-defendants, Pamela and Clifton Jemison, Mariam Moussa, Rudie Wright, Paige and Christpher Fay, and Miguell and Yecenia Marquez ("Catholic School Family Intervenors") (collectively "Defendants"). Defendants moved for summary judgment on Plaintiffs' claims, and Plaintiffs also moved for summary judgment.

{¶ 3} The trial court ultimately granted summary judgment in Plaintiffs' favor, finding, among other things, that EdChoice violates Ohio Const. art. VI, § 2 with regard to three of the five counts asserted in the complaint. Defendants now timely appeal from that ruling. Student Plaintiffs have filed a cross-appeal with regard to Count 5 of the complaint asserting equal protection arguments for which the trial court found in favor of Defendants on summary judgment.

I. BACKGROUND

A. An Overview of Ohio's Voucher Programs

{¶ 4} EdChoice, as it exists today, did not emerge overnight. Rather, it evolved over three decades through a series of incremental legislative enactments that expanded eligibility, funding, and participation beyond its original scope.

{¶ 5} EdChoice traces its origins to 1995, although it was not yet known by that name. That year, the General Assembly enacted the Pilot Project Scholarship Program for the Cleveland City School District ("the Cleveland Pilot Program"). Am.Sub.H.B. No. 117, 146 Ohio Laws, Part I, 898; *see* former R.C. 3313.974 et seq. (effective June 30, 1995). Enacted as part of the state's biennial budget bill, the Cleveland Pilot Program provided

scholarships to Cleveland students to attend private schools, including religiously affiliated schools.

{¶ 6} From the start, the Cleveland Pilot Program was limited in scope. It applied only to students within the Cleveland Municipal School District ("CMSD"),[2] and only private schools located within the district were allowed to participate in the program. *See* former R.C. 3313.975 and 3313.976(A)(1). Additionally, it primarily targeted low-income families. *Id.*; former R.C. 3313.976(A)(8). Students from families earning less than 200 percent of the federal poverty level were eligible for scholarships that (1) covered up to 90 percent of private-school tuition and (2) were capped at a maximum scholarship of $2,500. *See* former R.C. 3313.978(A). Families above that threshold could receive scholarships covering up to 75 percent of tuition, and they were also capped at $2,500. *Id.*

{¶ 7} Next, as an alternative to receiving vouchers to attend private school, students at CMSD were also given the choice to participate in interdistrict open enrollment by attending a public school in a district adjacent to CMSD. *See* former R.C. 3313.978(A)(1). Importantly, the legislation also required the state superintendent to award "tutorial assistance grants" to students who remained in Cleveland public schools, with the number of grants matching the number of scholarships awarded. Former R.C. 3313.978(B).

{¶ 8} The total number of scholarships available each year under the Cleveland Pilot Program was also limited by legislative appropriations, with the program eventually being funded at approximately $5.25 million annually. *See* former R.C. 3313.975(B). Private-school voucher funds were distributed by the state via check, with the checks made payable to the parents, who were then required to endorse them over to the participating private school. The checks for students enrolling in public schools in adjacent public-school districts were made payable directly to those districts. Former R.C. 3313.979.

{¶ 9} The Cleveland Pilot Program did not give private schools that participated in the program unfettered choice in selecting the voucher students they enrolled. Rather, the program had an anti-discrimination policy built into the legislation, which required that all participating private schools agree to enroll students without regard or discrimination based on protected classes such as race, religion, or ethnic background. The anti-

[2] The district's name changed to the Cleveland Metropolitan School District during the 2007 through 2008 school year. *See* https://signalcleveland.org/timeline-25-years-of-mayoral-control-over-cleveland-public-schools/ (accessed Oct. 12, 2026) [https://perma.cc/923X-R4Z5].

discrimination policy also required that these private schools agree not to foster, teach, or otherwise advocate against a student, person, or group on the basis of race, ethnicity, religion, or otherwise. *See* former R.C. 3313.976(A)(1) through (8).

{¶ 10} The Cleveland Pilot Program further put constraints on a private school's ability to selectively choose which students to enroll by requiring that the school first prioritize the continued enrollment of students who were already enrolled at the school in the year preceding the start of the program, and thereafter, before offering any remaining open spaces to new program voucher students. Former R.C. 3313.977(A)(1)(a). Even then, participating private schools had limited discretion over which voucher students to enroll because the law mandated that voucher students be admitted through a process "by lot."[3] *See* former R.C. 3313.977(A)(1)(c) and (d).

{¶ 11} The Cleveland Pilot Program was almost immediately challenged in court. The case ultimately reached the Supreme Court of Ohio in *Simmons-Harris v. Goff*, 1999-Ohio-77. Opponents argued that the program unconstitutionally supported religious education in violation of the Establishment Clause of the state and federal constitutions, violated Ohio Const. art VI, § 2, which requires the state to "secure a thorough and efficient system of common schools," and had been enacted in violation of Ohio's constitutional one-subject rule, which limits legislation to a single subject. The Supreme Court held that the General Assembly had violated the one-subject rule by embedding the Cleveland Pilot Program within the appropriations bill. Before it reached that holding, however, the Supreme Court concluded that the program itself did not violate the Establishment Clause of the state or federal constitutions and found no violation of Ohio Const. art VI, § 2. In finding no violation, however, the Supreme Court emphasized that a voucher program bigger in scope or scale could push against or exceed the boundaries of constitutionality. Specifically, the Supreme Court stated:

> Section 2, Article VI of the Ohio Constitution also states that "[t]he general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system

[3] The law did state, however, that "[e]xcept where otherwise prohibited by federal law, a registered private school may elect to admit students of only one gender and may deny admission to any separately educated handicap student." Former R.C. 3313.977(A)(2)(b).

> of common schools throughout the State." In *DeRolph v. State* (1997), 78 Ohio St.3d 193, 677 N.E.2d 733, this court held that the state has an obligation to establish a "thorough and efficient system of common schools." It can be argued that *implicit within this obligation is a prohibition against the establishment of a system of uncommon (or nonpublic) schools financed by the state*.
>
> Private schools have existed in this state since before the establishment of public schools. They have in the past provided and continue to provide a valuable alternative to the public system. However, their success should not come at the expense of our public education system or our public school teachers. *We fail to see how the School Voucher Program, at the current funding level, undermines the state's obligation to public education*.

(Emphasis added.) (Brackets in original.) *Goff* at ¶ 33-34. As a footnote to this comment the Supreme Court also went the extra step to add: "It is possible that a greatly expanded School Voucher Program or similar program could damage public education. Such a program could be subject to a renewed constitutional challenge." *Id.* at fn. 2.

{¶ 12} After the Cleveland Pilot Program was invalidated under the one-subject rule, the General Assembly promptly reenacted it as stand-alone legislation. 1999 Am.Sub.H.B. No. 282 (effective June 29, 1999). Opponents then refiled their challenge in federal court, asserting only a First Amendment Establishment Clause claim. The case ultimately reached the United States Supreme Court in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). In a five to four decision, the Supreme Court upheld the program, concluding that it did not violate the Establishment Clause because the program was neutral with respect to religion and directed state funds to religious schools through the choices of parents, rather than through direct governmental endorsement or allocation. *Id.*

{¶ 13} In June 2005, the General Assembly enacted the original EdChoice. *See* 126 Am.Sub.H.B. No. 66 (2005). Unlike the Cleveland Pilot Program, which was limited to CMSD, EdChoice dramatically expanded the geographic scope of state-funded private-school tuition assistance by making vouchers available to eligible students statewide. Initially, students qualified only if they attended a low-performing public school. *See* former R.C. 3310.03 (2005). At the time, Ohio used a five-tier academic accountability system: Excellent, Effective, Continuous Improvement, Academic Watch, and Academic

Emergency. Low-performing public schools were those schools that the Ohio Department of Education[4] had rated as "Academic Emergency" for three consecutive years. *Id.*

{¶ 14} Beginning in March 2006, the General Assembly began passing a series of amendments that expanded student eligibility. Specifically, 2006 Am.Sub.H.B. No. 530 (effective June 30, 2006) expanded eligibility for EdChoice funding to students attending schools that had received the higher "Academic Watch" rating for three consecutive years. Then, in December 2006, the General Assembly further broadened eligibility by extending it to students assigned to schools that had been rated either "Academic Watch" or "Academic Emergency" in two out of the preceding three years. Eligibility for the original EdChoice was capped at 14,000 students. Amendments to the law enacted in 2011 expanded this cap to 30,000 students for the 2011 through 2012 school year and 60,000 for the 2012 through 2013 school year. The latter amendment also expanded eligibility for EdChoice to any student attending a district school that had been ranked in the lowest 10 percent of school buildings statewide for the last 2 out of 3 years.

{¶ 15} While the 2005 EdChoice legislation and its legislative amendments expanded eligibility for taxpayer-funded private-school vouchers, it differed from the Cleveland Pilot Program in the educational options it funded. Unlike the Cleveland Pilot Program, which created the right for eligible students to transfer to different, better performing public schools and required the state superintendent to provide tutorial grants to eligible students attending struggling public schools, the 2005 EdChoice legislation and its 2006 and 2011 amendments remained a taxpayer-funded *private-school voucher program* only.

{¶ 16} A significant change to EdChoice came in 2013, when the General Assembly enacted what became known as the EdChoice Expansion Scholarship Program. *See* 2013 Am.Sub.H.B. No. 59 (effective June 30, 2013). EdChoice Expansion created a separate voucher program that was available to all students, regardless of whether the student's assigned public school was low-performing. *See* former R.C. 3310.032(A) (2013). Instead, eligibility turned solely on whether the student's household income fell at or below

[4] The department has been called the "Ohio Department of Education and Workforce" since October 2, 2023.

200 percent of the federal income poverty level. Former R.C. 3310.032(A). As a result, students became eligible for EdChoice Expansion vouchers based on income alone.[5]

{¶ 17} Additionally, like the earlier amendments to EdChoice, the 2013 EdChoice Expansion did not permit the interdistrict transfer of students to other public schools or provide tutorial assistance to students who remained in their assigned public schools. Students attending high-performing schools could receive a voucher, so long as they met the income eligibility requirements.

{¶ 18} Legislation enacted between 2015 through 2022 continued to broaden the threshold income levels needed to receive EdChoice Expansion voucher funds, expanding the reach of the program beyond low-income earners to middle-income earners. *See* 2015 Am.Sub.H.B. No. 70; 2019 Am.Sub.H.B. No. 166; 2020 Am.Sub.S.B. No. 89; 2021 Am.Sub.H.B. No. 110; 2022 Am.Sub.H.B. No. 583.

{¶ 19} In 2023, the General Assembly enacted 2023 Am.Sub.H.B. No. 33 (effective July 4, 2023), expanding EdChoice Expansion's taxpayer-funded private-school tuition voucher program even further to make virtually every Ohio student eligible,[6] regardless of household income or whether the student attended a low-performing public school ("2023 EdChoice Expansion"). Although the 2023 expansion made the program universal, the value of each voucher remained tied to household income. Students from households earning at or below 450 percent of the federal poverty level qualify for the maximum scholarship—$6,166 annually for kindergarten through 8th grade and $8,408 for grades 9 through 12. *See* R.C. 3310.08(B)(1). Students with household incomes above that threshold remain eligible for vouchers on a sliding scale. *See* R.C. 3310.08(B)(2). The wealthiest families in the state are entitled to taxpayer-funded vouchers of $650 per year for students in kindergarten through 8th grade and $950 per year for students in grades 9 through 12. *Id.*

{¶ 20} Like earlier expansions of the voucher program, the 2023 EdChoice Expansion did not create a right for students to transfer between public schools within or

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[5] The law explicitly disqualified students from EdChoice Expansion if they fell within the eligibility requirements for a different Ohio voucher program—i.e., if they fell within the scope of the original EdChoice by attending a low-performing school or if they attended a school within CMSD. *See* former R.C. 3310.032(A) (2013).

[6] The only students not eligible for the 2023 EdChoice Expansion are those students who qualify for the Cleveland Pilot Program. *See* R.C. 3310.05.

outside their district, nor did it provide tutorial grants for students who remained in public schools.

{¶ 21} Until now, neither the original 2005 EdChoice nor any of the subsequent expansions has been challenged in court. As a result, the last judicial challenge to an Ohio voucher program occurred in *Goff*, where the Supreme Court considered the Cleveland Pilot Program. Although the Supreme Court held that the program's limited scope did not violate Ohio Const. art. VI, § 2, it cautioned that a voucher program any larger in size or scale may run afoul of the Ohio Constitution.

B. Procedural History of This Case

{¶ 22} On January 4, 2022, Plaintiffs filed a complaint for declaratory judgment and injunctive relief against State Defendants. In their complaint, Plaintiffs alleged that EdChoice violated the common schools provision of Ohio Const. art. VI, § 2, and the Student Plaintiffs alleged that it violated their right to Equal Protection under Ohio Const. art. I, § 2.

{¶ 23} On January 7, 2022, the Boggs Intervenors filed a Civ.R. 24 motion to intervene as defendants in the action. On March 14, 2022, the Catholic School Intervenors also moved to intervene as defendants. In their respective motions, both the Boggs and the Catholic School Family Intervenors asserted that they are parents who receive EdChoice funding to send their children to private schools. Following a hearing on the motions, the trial court granted both motions to intervene, thus permitting both sets of intervenors to participate as defendants in the case.

{¶ 24} On May 18, 2022, the State Defendants filed a Civ.R. 12(B)(6) motion to dismiss the complaint. In the motion, the State Defendants argued that the Ohio Coalition for Equity and Adequacy of School Funding did not have standing to sue because it is created by statute and, as a statutory creation, has only the powers afforded to it by the General Assembly via statute, which does not include the right to sue. They additionally argued that while the individual school-district plaintiffs are statutorily authorized to sue, they are not authorized to sue on issues regarding state funding. Lastly, and in the alternative, State Defendants argued that none of the Plaintiffs—i.e., the school-district plaintiffs nor the individual-student plaintiffs—has standing to sue because none has

suffered a direct and concrete injury from students receiving EdChoice funding to attend private schools.

{¶ 25} On May 19, 2022, the Boggs and Catholic School Family Intervenors jointly moved for judgment on the pleadings pursuant to Civ.R. 12(C). Rather than addressing the sufficiency of the pleadings, the motion advanced arguments directed to the merits of the constitutional issues before the trial court.

{¶ 26} Before the trial court ruled on the pending motions, Plaintiffs filed an amended complaint for declaratory and injunctive relief on May 26, 2022. The amended complaint asserted five causes of action.

{¶ 27} In Count 1, Plaintiffs alleged that EdChoice violates Ohio Const. art. VI, § 2 by creating one or more systems of "uncommon schools." Specifically, Plaintiffs alleged that EdChoice created this system by diverting funding from public schools to private schools, thereby depleting public-school resources, providing taxpayer funding to private schools without governmental oversight of educational standards for these schools or expenditures, and financing private schools that impose selective or conditional admissions requirements. (Dec. 21, 2023 Pl.'s Mot. for Leave to File Supp. Compl. Instanter at ¶ 134.)

{¶ 28} In Count 2, Plaintiffs alleged that EdChoice violates Ohio Const. art. VI, § 2 by undermining the state's constitutional obligation to "secure a thorough and efficient system of common schools." Ohio Const. art. VI, § 2. According to the complaint, the program accomplishes this by underfunding public schools in favor of subsidizing private-school education. *Id.* at ¶ 147.

{¶ 29} In Count 3, Plaintiffs alleged that EdChoice violates Ohio Const. art. VI, § 2 because it promotes segregation by contributing to a significant increase in minority students attending public schools while encouraging the departure of white students to private schools.

{¶ 30} In Count 4, Plaintiffs alleged that EdChoice violates Ohio Const. art. VI, § 2 by using public funds to support religious and other sectarian private schools.

{¶ 31} Finally, Count 5 asserted claims on behalf of the individual-student plaintiffs, M.M., F.D., C.H., and S.H. They alleged that EdChoice violates their right to equal protection, under Ohio Const. art. VI, § 2, because they receive less per-pupil funding as

public-school students than they would receive if they accepted EdChoice scholarships to attend private schools.

{¶ 32} State Defendants answered the complaint, and the Boggs and Catholic School Family Intervenors refiled their motion for judgment on the pleadings. Similarly, State Defendants refiled their motion to dismiss.

{¶ 33} The trial court held a hearing on the motions and, on December 16, 2022, the court denied both the State Defendants' motion to dismiss and the Boggs and Catholic School Family Intervenors' motion for judgment on the pleadings.

{¶ 34} On August 7, 2023, the Boggs and Catholic School Family Intervenors filed a joint motion to dismiss the amended complaint, arguing that the claims had become moot in light of the changes to EdChoice enacted through 2023 Am.Sub.H.B. No. 33 (effective July 4, 2023). The trial court denied the Boggs and Catholic School Family Intervenors' motion and granted the Plaintiffs' motion for leave to file a supplemental complaint instanter to address the amendments to the EdChoice program made by 2023 Am.Sub.H.B. No. 33.

{¶ 35} The supplemental complaint asserted the same five claims as the original and amended complaints, with limited revisions to explain how the changes enacted through 2023 Am.Sub.H.B. No. 33 relate to Plaintiffs' constitutional claims.

{¶ 36} Thereafter, the parties filed cross-motions for summary judgment on all claims.

{¶ 37} On June 24, 2025, the trial court issued its decision on the parties' cross-motions for summary judgment, granting the motions in part and denying them in part. Specifically, the court granted summary judgment in favor of Plaintiffs on Counts 1, 2, and 4, which alleged violations of Ohio Const. art. VI, § 2, but denied summary judgment to Plaintiffs and granted it as to the Defendants on Count 5, which alleged a violation of the Equal Protection Clause of Ohio Const. art. I, § 2. The trial court further denied both the Plaintiffs' and the Defendants' motions for summary judgment as to Count 3. The trial court declared EdChoice unconstitutional based on its rulings on Counts 1, 2, and 4, enjoined its continued implementation, and stayed the injunction pending appeal to this court.

II. Assignments of Error

{¶ 38} State Defendants present the following as trial court error:

> [I.] The trial court erred in granting summary judgment to Plaintiffs, and in denying it to Defendants, as to their claim that EdChoice scholarships violate the "common system" aspect of Article VI, Section 2 [of the Ohio Constitution], which provides for "a thorough and efficient system of common schools." (Decision and Entry on the Parties' Motion for Summary Judgment (June 24, 2025) ("Op.") at 21.)
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> [II.] The trial court erred in granting summary judgment to Plaintiffs, and in denying it to Defendants, as to their claim that EdChoice scholarships cause underfunding of public schools in violation of the "thorough and efficient" aspect of Article VI, Section 2, which provides for "a thorough and efficient system of common schools." (Op. at 26.)
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> [III.] The trial court erred in granting summary judgment to Plaintiffs, and in denying it to Defendants, as to their claim that EdChoice scholarships violate Article VI, Section 2's "religious control" clause, which bars any religious sect from having "any exclusive right to, or control of, any part of the school funds of this state." (Op. at 41.)

{¶ 39} The Boggs and Catholic School Family Intervenors present the following as trial court error:

> [I.] The Trial Court erred when it entered summary judgment in favor of Plaintiffs/Appellees and denied summary judgment to Defendants/Appellants on Count I of the Supplemental Complaint.
>
> [II.] The Trial Court erred when it entered summary judgment in favor of Plaintiffs/Appellees and denied summary judgment to Defendants/Appellants on Count II of the Supplemental Complaint.
>
> [III.] The Trial Court erred when it entered summary judgment in favor of Plaintiffs/Appellees and denied summary judgment Defendants/Appellants on Count IV of the Supplemental Complaint.

{¶ 40} The Student Plaintiffs on cross-appeal present the following as trial court error:

> [I.] The trial court erred in granting summary judgment to State Defendants and Intervenors on Count Five of Plaintiffs Appellees' Supplemental Complaint[.]

III. Standard of Review

{¶ 41} We review a trial court's grant of summary judgment de novo, applying the same Civ.R. 56 summary-judgment standard as the trial court. *See Hubbell v. Xenia*, 2007-Ohio-4839, ¶ 21. "De novo review means the reviewing court independently analyzes the record while giving no deference to the trial court's decision." *Allen v. Marre*, 2026-Ohio-1186, ¶ 7 (10th Dist.), citing *Johnson v. Am. Italian Golf Assn. of Columbus*, 2018-Ohio-2100, ¶ 13 (10th Dist.).

{¶ 42} Summary judgment is appropriate under Civ.R. 56 when no genuine issue exists as to any material fact and, viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach only one conclusion, that conclusion being adverse to the party opposing the motion. *See Franks v. Ohio Dept. of Rehab. & Corr.*, 2013-Ohio-1519, ¶ 5 (10th Dist.); *see also Grafton v. Ohio Edison Co.*, 1996-Ohio-336, ¶ 10.

{¶ 43} On summary judgment, the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record demonstrating the absence of a genuine issue of material fact. *See Dresher v. Burt*, 1996-Ohio-107, ¶ 17. This burden cannot be satisfied through conclusory assertions; rather, the movant must identify specific evidence of the type permitted under Civ.R. 56(C) affirmatively demonstrating that the nonmoving party lacks evidence to support its claims. *Id.*; *Vahila v. Hall*, 1997-Ohio-259, ¶ 19. If the moving party satisfies this burden, summary judgment is appropriate unless the nonmoving party responds by affidavit, or as otherwise provided in Civ.R. 56, with specific facts showing that a genuine issue exists for trial. *Id.*; *Vahila* at ¶ 19; Civ.R. 56(E).

{¶ 44} "A fact is material if it ' "might affect the outcome of the suit under the governing law" of the case. ' " *Oko v. Cleveland Div. of Police*, 2021-Ohio-2931, ¶ 23 (8th Dist.), quoting *Turner v. Turner*, 1993-Ohio-176, ¶ 8, quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "A factual dispute is ' "genuine" only if it allows reasonable minds to return a verdict for the nonmoving party.' " *Huntington Natl. Bank v. Blount*, 2013-Ohio-3128, ¶ 32 (8th Dist.), quoting *Sysco Food Servs. of Cleveland v. Titan Devs., Inc.*, 1995 Ohio App. LEXIS 4762, *7 (9th Dist. Oct. 25, 1995).

{¶ 45} This court reviews constitutional challenges to state legislation "de novo, . . . with the understanding that duly enacted laws are afforded a strong presumption of constitutionality[.]" *Put-In-Bay v. Mathys*, 2020-Ohio-4421, ¶ 11, citing *Cleveland v. State*, 2019-Ohio-3820, ¶ 15; *Yajnik v. Akron Dept. of Health, Hous. Div.*, 2004-Ohio-357, ¶ 16. In order to "overcome this presumption, the party challenging the law must prove the law unconstitutional beyond a reasonable doubt." *Id.* Further, "[a] party may challenge a statute as unconstitutional on its face or as applied to a particular set of facts." *Harrold v. Collier*, 2005-Ohio-5334, ¶ 37. In instances where "statutes are challenged on the ground that they are unconstitutional as applied to a particular set of facts, the party making the challenge bears the burden of presenting clear and convincing evidence of a presently existing set of facts that make the statutes unconstitutional and void when applied to those facts." *Id.* at ¶ 38, citing *Belden v. Union Cent. Life Ins. Co.*, 143 Ohio St. 329 (1944), paragraph four of the syllabus.

IV. Discussion

{¶ 46} Preliminarily, it is important to observe that while none of the parties have requested a remand (i.e., for trial or settlement) based on unresolved factual disputes, the record reflects multiple factual disagreements. As noted above, Civ.R. 56(C) only permits summary judgment where there is no genuine issue as to any material fact. The question is whether, as a matter of law, those differences were material.

{¶ 47} For the purposes of Civ.R. 56, a material fact is one which would affect the outcome of the case under the applicable substantive law. *Reiss v. Players Guild of Canton, Inc.*, 2002-Ohio-1589 (5th Dist.). One factual dispute between the parties in this case is how to measure the amount of funding public-school students receive. The Plaintiffs focus on state funding; the Defendants focus on the sum of state, local, and whatever federal funding may or may not have been provided.

{¶ 48} The overarching question on appeal is whether EdChoice violates Ohio Const. art. VI, § 2. That section of the Ohio Constitution requires the General Assembly to "secure a thorough and efficient system of common schools throughout the state[.]" Ohio Const. art. VI, § 2. In the first school-funding case to go before the Supreme Court of Ohio after approving the 1851 Constitution, *Miller v. Korns*, 107 Ohio St. 287 (1923), the Supreme Court observed that "the sovereign people made it mandatory upon the General Assembly

to secure not merely a system of common schools, but a system thorough and efficient throughout the state." *Miller* at 297-298. While voters may or may not choose to approve local bond levies or income taxes to support their local school districts, there is no constitutional requirement for them to do so. As the Supreme Court stated in *Miller*, supporting the schools of the state "is a contribution to the public, and not to a local purpose . . . which must be exacted of every citizen." *Id.* at 306. Defendants' arguments to the contrary are conclusory. Notably, Defendants elide any analysis of the plain language of the constitution. They also fail to cite a single case, statute, or other constitutional provision that might support their argument that the proper measure of per-pupil funding is total funding. *See, e.g.*, Apr. 29, 2025 Oral Argument on the Cross-Motions for Summ. Jgmt. In contrast, the parties generally agree as to how the state funds public schools. They all cite to the same statutes and refer to "foundation funding." R.C. 3317.022.

{¶ 49} Since the Ohio Constitution only addresses the state's obligation to secure a thorough and efficient system of common schools—and there is nothing in the constitution requiring local taxpayers to share this burden—this court finds that the parties' competing funding measures do not create a factual issue requiring a remand for trial. Stated otherwise, the identified funding dispute does not preclude summary judgment as a matter of law.

{¶ 50} We therefore turn to the merits. In their respective assignments of error, Defendants argue that the trial court erred by denying their motions for summary judgment and granting summary judgment in favor of Plaintiffs on Plaintiffs' claims that EdChoice violates Ohio Const. art. VI, § 2. To fully understand the parties' arguments on appeal, it is necessary first to examine the history and meaning of Ohio Const. art. VI, § 2.

A. History and Meaning of Ohio Const. art. VI, § 2

{¶ 51} Ohio Const. art. VI, § 2 provides:

> The [G]eneral [A]ssembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.

{¶ 52} Ohio Const. art. VI, § 2 was adopted as part of the 1851 Constitution in direct response to what has been referred to as the Common Schools Movement. *See also State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 2006-Ohio-5512, ¶ 28. In Ohio, this movement had the central objective of establishing a free, publicly funded statewide system of education for Ohio students. *See id.* Indeed, at the time of the amendment's adoption, and continuing into present day, the term "common schools" has been synonymous with that of a free school, open to educating the public through state taxpayer funding, i.e., a public school. *See id.*; *Commonwealth ex rel. Coleman v. Council for Better Edn., Inc.*, 730 S. W.3d 787 (Ky. 2026); 1995 Ohio Atty.Gen.Ops. No. 95-031, paragraph one of the syllabus ("common schools" is understood to mean "public schools"). Indeed, the parties to the present litigation all agree that common schools is synonymous with public schools.[7] (Apr. 29, 2025 Oral Argument on the Cross-Motions for Summ. Jgmt.)

{¶ 53} Prior to the adoption of Ohio Const. art. VI, § 2, Ohio's schools operated in a fragmented and inconsistent manner, there was little to no state oversight of the schools, and the amalgamation of schools then existing were primarily funded by private tuition. *See Congress* at ¶ 28. The Common Schools Movement sought to remedy these deficiencies by replacing the patchwork of locally governed schools with a statewide system of free public schools operating under uniform standards. *Id.* The adoption of Ohio Const. art. VI, § 2 secured the Common Schools Movement's objective by imposing upon the state an affirmative duty to secure "a thorough and efficient system of common schools throughout the state." *Id.*; *see also* Ohio Const. art. VI, § 2.

{¶ 54} The intellectual foundation for the Common Schools Movement came from several well-known reformers. One of these, Calvin Stowe,[8] issued a report on the Prussian educational system, which became a seminal document in the establishment of state-supported public schooling in Ohio and elsewhere. In his report, Stowe argued that public education was indispensable to the preservation of democratic government, explaining that "[r]epublicanism can be maintained only by universal intelligence and virtue among the people," and warning that "without intelligence and virtue in the great mass of the people

[7] Hereinafter, this court will use the terms "common schools" and "public schools" interchangeably as needed.

[8] Calvin Stowe was the husband of Harriet Beecher Stowe.

our liberties would pass from us." Calvin Stowe, *Report on Elementary Public Instruction in Europe* at 9 (1837).

{¶ 55} Importantly, Stowe did not advocate *merely for the existence of common schools*, instead he advocated for a *system* of common schools that mandated student attendance, required trained teachers, and had a uniform curriculum among other things. *Id*. Thus, his emphasis was on replacing Ohio's then disconnected local schools with a statewide educational system that operated under uniform standards. *Id*.

{¶ 56} Samuel Lewis, Ohio's first Superintendent of Schools, reinforced this message in his first report to Ohio's General Assembly in 1838. In his report, Lewis described Ohio's then existing educational landscape as one that had miserable and inefficient schools, and operated without trained teachers, adequate buildings, or funds. *See* Lewis, *First Annual Report to the 36th General Assembly of the State of Ohio* at 6-10 (1838). His report highlighted the exact conditions that the Common Schools Movement and the adoption of Ohio Const. art. VI, § 2 sought to remedy. *See* Ohio Statehouse, *Ohio Constitution 6 Education for All*, https://www.ohiostatehouse.org/galleries/media/ohio-constitution-6-education-for-all-1005709 (accessed Oct. 12, 2026) [https://perma.cc/SWB8-8YLR]. Indeed, his report was referenced at the 1850-1851 convention during discussion of the common schools amendment. *See* J.V. Smith, *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio, 1850-51*, Vol.2, at 707 (Princeton University); https://babel.hathitrust.org/cgi/pt?id=njp.32101079871172&seq=7 (accessed Oct. 12, 2026) [https://perma.cc/9M6V-7RP9].

{¶ 57} Reformers consistently argued that Ohio's educational system produced unequal educational opportunities that were incompatible with democratic government. *See*, *e.g.*, Stowe Report; *see also* Lewis Report. Indeed, as the Supreme Court of Ohio has recognized one of the original reformers of the Common Schools Movement, Horace Mann, advanced the fundamental belief that all citizens should receive "a common foundation of literacy, morality, and patriotism, regardless of their origins, through free public schools supported by taxes, with compulsory school attendance and supervision at the state level." *Congress*, 2006-Ohio-5512, at ¶ 28.

{¶ 58} The principles advanced by the Common Schools Movement reformers discussed above are precisely those that guided the delegates to the 1850–1851 Constitutional Convention in adopting Ohio Const. art. VI, § 2. *See Ohio Constitution 6 Education for All*, https://www.ohiostatehouse.org/galleries/media/ohio-constitution-6-education-for-all-1005709 (accessed Oct. 12, 2026) [https://perma.cc/SWB8-8YLR]. Every draft of the amendment proposed by the Standing Committee on Education included language requiring the General Assembly to secure "a thorough and efficient system of common schools," thus reflecting the delegates' understanding that the Ohio Constitution would demand more than the mere existence of public schools for Ohio's students. Molly O'Brien, *Symposium: The Ohio Constitution -- Then and Now: An Examination of the Law and History of the Ohio Constitution on the Occasion of its Bicentennial: The Constitutional Common School*, 51 Clev.St.L.Rev. 581, 614 (2004). The amendment thus demanded a functioning statewide system of free schools that was designed to provide students with a foundational education necessary to sustain a democratic society and republic. *Id.*

{¶ 59} The delegates also identified the need for a constitutional amendment that *required* the state to secure the thorough and efficient system of common schools, rather than leaving the option up to the legislature. Indeed, as one delegate put it:

> It has been said, that we ought to trust the management of this interest to the General Assembly. But now, for forty-eight years the General Assembly has been entrusted with this matter. . . . Our acts of Assembly upon this subject have been either wasteful or impracticable,—like the common school law of the session before last [] which has proved utterly impracticable throughout the whole of the military district. Our system of common schools, instead of improving in legislative hands, has been degenerating; and I think it is time that we should take the thing in hands ourselves. Either let us establish and carry out an efficient system of common school education or abandon the thing entirely to the virtue and intelligence of the people.

J.V. Smith, *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio, 1850-51*, Vol. 2 at 707 (Princeton University) https://babel.hathitrust.org/cgi/pt?id=njp.32101079871172&seq=7 (accessed Oct. 12, 2026) [https://perma.cc/9M6V-7RP9].

{¶ 60} The creation of a common school system was, therefore, not simply an administrative goal that could be accomplished with money alone through the construction of school buildings and payment of administration and staff. While these certainly would be components of any system of public schools, the main purpose behind Ohio Const. art. VI, § 2 was broader and more demanding—it was one of democratic necessity that required, among other things in addition to funding, a diverse student body, trained teachers, uniform academic standards, and governmental oversight. *See* Ohio Statehouse, *Ohio Constitution 6 Education for All*, https://www.ohiostatehouse.org/galleries/media/ohio-constitution-6-education-for-all-1005709 (accessed Oct. 12, 2026) [https://perma.cc/SWB8-8YLR].

{¶ 61} It is worth noting parenthetically that Ohio Const. art. VI, § 2 also includes an explicit prohibition against religions or other sects having control over any school funds of the state. Ohio's constitution is not the only state constitution to have a similar prohibition. The Supreme Court of the United States held that such provisions violate the Free Exercise Clause of the Federal Constitution in *Carson v. Makin*, 596 U.S. 767 (2022) and *Espinoza v. Montana Dept. of Revenue*, 591 U.S. 464 (2020). Chief Justice Roberts, however, noted in *Carson* that nothing in that decision, or its precedents, required states to fund religious education. *See Carson* at 785. Rather, those cases hold that once a state makes a benefit available, the state could not then discriminate against religious schools.

B. Whether EdChoice Violates Ohio Const. art. VI, § 2

{¶ 62} We begin where the Supreme Court of Ohio left off in *Goff*, its most recent decision addressing taxpayer-funded private-school vouchers. There, the Supreme Court addressed the constitutionality of the Cleveland Pilot Program. Legislation for that program came as a response to mounting concerns over the condition of the Cleveland public schools, which were then under a federal court order requiring state intervention and supervision due to years of poor academic performance and declining enrollment. *See Zelman v. Simmons-Harris*, 396 U.S. 639, 644 (2002). Supporters of the legislation argued that students could not afford to wait for reforms to the public-school system that might take years to produce results. *See* https://www.edweek.org/policy-politics/battle-waged-over-vouchers-in-cleveland/1997/02 (accessed Oct. 12, 2026) [https://perma.cc/5QQ9-G54B].

{¶ 63} In *Goff*, the Supreme Court upheld the Cleveland Pilot Program on the grounds that it was a narrow, experimental program necessitated by and designed to address the unique and extraordinary failure of a single school district. As the Supreme Court stated, "We fail to see how the School Voucher Program, *at the current funding level*, undermines the state's obligation to public education." (Emphasis added.) *Goff*, 1999-Ohio-77, at ¶ 34. *Goff nevertheless drew a clear constitutional line in the sand.* The Supreme Court acknowledged that while the Cleveland Pilot Program was constitutionally permissible under Ohio Const. art. VI, § 2 in its present form, "implicit within [Ohio Const. art. VI, § 2] is a prohibition against the establishment of a system of uncommon (or nonpublic) schools financed by the state." *Id.* at ¶ 33. The Supreme Court then warned that "a greatly expanded School Voucher Program or similar program could damage public education" and, for that reason, "be subject to a renewed constitutional challenge." *Id.* at fn. 2. In other words, *Goff* did not give the state a blank check to fund private education with taxpayer dollars. Rather, it upheld the Cleveland Pilot Program as a limited response to an extraordinary circumstance, while expressly cautioning that a substantially expanded voucher system could violate the Ohio Constitution.

{¶ 64} Against that background, we now turn to the parties' arguments.

C. EdChoice Expansion Secures a Separate System of Uncommon Schools

{¶ 65} On summary judgment as to Count 1 of their complaint, the Plaintiffs argue that EdChoice violates Ohio Const. art. VI, § 2 by effectively creating a second state taxpayer-funded system of uncommon schools that directly competes with the public-school system that the State is constitutionally obligated to secure and ensure is thorough and efficient. This is a facial challenge. The Defendants respond in the alternative: either the Supreme Court (in *Congress*, 2006-Ohio-5512, a case involving public charter schools) already held that the Ohio Constitution permits two systems, or if two systems are not permitted, vouchers do not create a separate system. The parties also disagree over whether schools receiving EdChoice vouchers can be described as "common" under Ohio Const. art. VI, § 2.

{¶ 66} Ohio Const. art. VI, § 2 only permits the General Assembly to secure a single system of thorough and efficient common schools. The plain language of Ohio Const. art. VI, § 2 is mandatory, not discretionary. It states that the General Assembly "shall"

secure a system of schools. Also, the system of schools to be secured must be singular—hence the use of the singular "a thorough and efficient system"—and it must be common. Indeed, during the 1850-1851 constitutional debates, one delegate noted that the proposed section "directs the Legislature to make full and ample provision for securing a thorough and efficient system of common school education, free to all the children in the State. . . . There is no stopping place here short of a common school education to all children in the State."[9] J.V. Smith, *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio, 1850-51*, Vol. 2 at 14; https://babel.hathitrust.org/cgi/pt?id=njp.32101079871172&seq=7 (accessed Oct. 12, 2016) [https://perma.cc/9M6V-7RP9].

{¶ 67} State Defendants argue that EdChoice and its expansions could not violate Ohio Const. art. VI, § 2's directives, because private schools preexisted the development of EdChoice, and thus the voucher program did not "create" private schools. (Brief of State Defendants-Appellants/Cross-Appellees at 35-36.) This argument is a non sequitur. Ohio Const. art. VI, § 2 does not use the word "create"; it uses the word "secure." Specifically, Ohio Const. art. VI, § 2 requires the General Assembly to "secure" a thorough and efficient system of common schools throughout the state. At the time of the amendment's passing in the 1850s, the word "secure" meant "to protect, insure, or save a right." Bouvier, *A Law Dictionary* (5th Ed. 1854). Uncontested evidence in the record demonstrates that some EdChoice private schools receive a majority of their funding from EdChoice vouchers. Further, uncontested evidence in the record demonstrates that some public-school districts receive less in total State per-pupil funding than EdChoice private schools located within those districts receive in voucher funding. Moreover, in 2024 and 2025, the two fiscal years since the General Assembly passed 2023 Am.Sub.H.B. No. 33, expenditures for original EdChoice scholarships totaled $555,475,463 and EdChoice Expansion vouchers totaled $898,165,655, for a combined total of $1,453,641,118 and an average annual cost of over

[9] *Congress*, *supra*, is inapposite to this case. In *Congress*, the Supreme Court of Ohio held that charter schools do not create a separate system of common schools in violation of Ohio Const. art. VI, § 2 because they are, by definition, public schools. *See Congress*, 2006-Ohio-5512, at ¶ 30 ("[i]n enacting community-school legislation, the General Assembly added to the traditional school system by providing for statewide schools that have more flexibility in their operation"); *see also* R.C. 3314.01(B) (stating a community school "is a public school"). In this appeal, the parties agree EdChoice schools are not public schools and therefore, by extension, are not common schools.

$700,000,000.[10] At its current scope and funding level, EdChoice does far more than provide incidental financial assistance to existing private schools; it amounts to a steady system of financial support for these schools. Given these facts, as applied to the meaning of the word "secure" as it was used in the 1850s, we conclude that EdChoice, as presently structured, secures a separate system of non-public schools contrary to the mandates of Ohio Const. art. VI, § 2.

{¶ 68} We next consider whether EdChoice schools comply with the "common" requirement of Ohio Const. art. VI, § 2. As the Supreme Court of Ohio noted in *Congress*, the "common-school movement . . . held the basic ideology that all citizens should have 'a common foundation of literacy, morality, and patriotism, regardless of their origins, through free public schools supported by taxes, with compulsory school attendance and supervision at the state level.' " *Congress* at ¶ 28, quoting Editor's Comment to Art. VI, Section 2 in Baldwin's Ohio Revised Code Annotated (2004). Aside from the fact that EdChoice schools are not public schools, there are three ways in which they are uncommon: (1) EdChoice schools, not parents, choose which students to admit, (2) EdChoice schools are geographically isolated in the urban counties of the state, and (3) EdChoice schools are not subject to any meaningful state oversight.

{¶ 69} First, EdChoice schools are uncommon in the way that they actually end up depriving families of choice. At this juncture, it is important to clear up a fundamental misnomer concerning the concept of "choice." The Defendants repeatedly invoke "choice" to argue that EdChoice taxpayer-funded private-school vouchers do nothing more than empower parents and students to choose which school, private or public, best serves the student's needs. The inference here is that once the choice is made to attend private school, parents need only enroll their children in the chosen school and use taxpayer vouchers for tuition. While this is how the public-school system works—i.e., if children live in a public-school district, that district must enroll those children—this is not how EdChoice operates.

{¶ 70} Under EdChoice, parents and students may apply to attend a private school, but the private school decides which students it will admit. Indeed, a taxpayer-funded EdChoice voucher does not even become available to a student unless and until that student

[10] Ohio Department of Education and Workforce, *Scholarship Payments Reports for Fiscal Years 2024 and 2025*, reports.education.ohio.gov/report/nonpublic-data-scholarship-payments (accessed Oct. 12, 2026) [https://perma.cc/Y5R5-PK6Y].

is first accepted for enrollment by a participating EdChoice private school. *See* R.C. 3310.07(A). Once admitted, it is the private school that has the parent complete an EdChoice scholarship request form. Ohio Statewide Family Engagement Center, *EdChoice Scholarship Information*, https://ohiofamiliesengage.osu.edu/edchoice-scholarship-info/ (accessed Oct. 12, 2026) [https://perma.cc/8A9B-28YN]. And it is the private school that submits the scholarship application for the enrolled student through the EdChoice online scholarship application system at the Ohio Department of Education and Workforce ("ODEW"). OhioDepartmentofEducation&Workforcehttps://education.ohio.gov/Topics/Other-resources/Scholarships/EdChoice-Scholarship/How-to-Apply-for-an-EdChoice-Scholarship (accessed Oct. 12, 2026) [https://perma.cc/8A9B-28YN].

{¶ 71} Not only does EdChoice allow participating private schools to choose which students they will enroll, but it does so without placing any meaningful constraints on the schools' selection process. EdChoice private schools have broad discretion to decide which students to admit or deny with the only requirement being that the school, in making its decision, "abide[s] by its admission policy fairly and without discrimination with regard to students applying for or having been awarded [EdChoice] scholarships[.]" Adm.Code 3301-11-11(A)(7). A school may therefore deny or discontinue an EdChoice student's enrollment based on its perception that its stated admissions criteria are not met, whatever those criteria may be. Thus, under the program, it is the participating school, not the student or their family, that chooses whether to admit the student and, consequently, whether the student may utilize taxpayer vouchers at that school.

{¶ 72} The discretion afforded to participating private schools to select which EdChoice students to enroll extends beyond academic admissions requirements to other criteria, including gender, sexual orientation, disability, religion, financial status, disciplinary history, and identity. In her deposition, Christine Burns, the acting director of the Office of Non-Public Educational Options at ODEW,[11] testified concerning a racial non-discrimination policy that her office requires EdChoice schools to accept as part of their chartering process and to incorporate into their student-parent handbooks. The policy provides that state-chartered non-public schools may not discriminate on the basis of race,

[11] We cannot help but observe that the office responsible for overseeing EdChoice schools is called "Non-Public Education."

color, ethnic origin, or national origin. Yet when asked whether, to her knowledge, non-public schools may discriminate on categories not expressly identified in that policy, Director Burns answered unequivocally: "yes." (Nov. 21, 2023 Tr. Dep. of Chistine Burns at 73.) She then acknowledged that, depending on the school's internal policies, private schools may discriminate on the basis of gender, sexual orientation, or physical or mental disability. *Id.* Director Burns testified that the type of discriminatory conduct identified above is permissible for non-public schools receiving EdChoice funds and that, to her knowledge, nothing in the EdChoice statutes or regulations prohibits it. *Id.* Indeed, our review of the EdChoice legislation confirms this.

{¶ 73} Although Defendants argue that R.C. 3313.976 prohibits participating private schools from discriminating based on sex, religion, race, and other protected classes, this provision relates only to the Cleveland Pilot Program. EdChoice and its expansions have no such built-in prohibition, other than for race, color, or ethnic or national origin.

{¶ 74} Second, EdChoice schools are uncommon in how they disproportionately serve urban counties. Ohio Const. art. VI, § 2 obligates the General Assembly to secure a system of thorough and efficient common schools "throughout the state." It was over 100 years ago that the Supreme Court of Ohio first recognized that the obligations placed on the state pursuant to Ohio Const. art. VI, § 2 were indeed statewide in nature. *Miller*, 107 Ohio St. at 298 ("[w]ith this very state purpose in view, regarding the problem as a state-wide problem, the sovereign people made it mandatory upon the General Assembly to secure not merely a system of common schools, but a system thorough and efficient throughout the state.") The Court later reaffirmed this understanding as recently as 2006. *See Congress*, 2006-Ohio-5512, at ¶ 29.

{¶ 75} Ohio's public schools satisfy the statewide requirement and exist in all 88 counties. The evidence in the record regarding EdChoice private schools however, reflects a different geographic distribution. During discovery, ODEW provided a list of all EdChoice schools at which at least 75 percent of their students received EdChoice vouchers. (Plf.'s Mot. for Summ. Jgmt., Ex. P.) The list contains the names of 154 private schools. Reviewing the list provided by ODEW, 67 of the 154 schools, or 44 percent, are located in just 3 counties: Cuyahoga, Franklin, and Hamilton. In fact, Ohio's 16 "urban counties" are home to 89 percent of the schools contained on ODEW's list.

{¶ 76} Evidence in the record shows that families in many rural counties have substantially fewer opportunities to use EdChoice vouchers. For instance, no school on the list is located in Northwest Ohio outside of Lucas and Allen Counties. Only one school on the list is located in Southeast Ohio, and no school on ODEW's list is located in Marietta, Athens, Chillicothe, or Steubenville. EdChoice and its expansions are funded through statewide tax revenue but are not accessible to many living in the rural parts of the state. In effect, EdChoice is subsidizing urban private schools with rural dollars.

{¶ 77} Third, EdChoice schools are uncommon due to their lack of meaningful state oversight. As the history of the Common Schools Movement and the 1851 constitutional debates make clear—both of which culminated in the adoption of Ohio Const. art. VI, § 2—a central purpose of requiring the state to secure a "thorough and efficient system of common schools" was to ensure that Ohio's school-aged children received a consistent, high-quality education under uniform state standards. *See* Steinglass & Scarselli, *The Ohio State Constitution*, 334-335 (2004) (noting that Ohio Const. art. VI, § 2 embraced the goals of the Common Schools Movement). As already explained, the amendment's drafters understood public education as essential to a functioning democracy where every child, regardless of ability, financial circumstances, or background, was entitled to access the same foundational educational opportunities so he or she may be prepared to participate fully in civic life. EdChoice turns this foundational principle behind the amendment on its head.

{¶ 78} The record indicates several areas in which participating EdChoice schools are subject to different or less extensive oversight than public schools, including matters of fiscal supervision, ratings and compliance, teacher evaluations, discrimination, and public transparency.

{¶ 79} With regard to fiscal supervision, public-school districts are legally bound to report, twice each year, their five-year financial forecasts which include the district's projected revenues and expenses. *See* R.C. 5705.391; R.C. 3301.07(B)(2) and (3). ODEW then reviews these reports and if a projected financial deficit is shown, the district must submit a recovery plan to the agency that details the ways in which the district plans to reduce spending or seek additional revenue through local tax levies. (Nov. 20, 2023 Tr. Dep. of Aaron Rausch at 54-57.) If a public-school district does not follow its recovery plan,

it is placed on fiscal oversight by the state, which can entail the appointment of a financial planning and supervision committee overseeing the district's finances. *Id.*; R.C. 3316.031. The state auditor may, at times, become involved in the management and supervision of at-risk districts to prevent further financial decline. *Id.* at 58. EdChoice schools, on the other hand, are not subject to comparable reporting requirements for EdChoice funds and are not legally obligated to report their financials, nor is there any obligation for ODEW to monitor the same. (*See* June 7, 2024 Pl.'s Ex. O at 2-3.) Indeed, again in her deposition, Director Burns testified that ODEW has no mechanism to supervise how EdChoice schools spend public tax dollars from the state:

> Q. [] So after the non-public school deposits this check into their account, is there -- does your office monitor, or any office at [O]DEW monitor what happens to those funds after that?
>
> A. No.
>
> Q. So for example, during any reviews of any documents that the non-public school sends to your office, is there ever a point where you look at what the EdChoice funds are used for?
>
> A. No.

(Tr. Dep. of Chistine Burns at 49.)

{¶ 80} With regard to ratings and compliance, there is also no oversight. Public-school districts are required by law to submit data that tracks their performance across a number of categories, which the state then uses to evaluate and rate the schools. Specifically, public schools are rated on the following categories: (1) how well their students perform on state assessment tests, (2) gaps in performance between different subgroups of students, (3) improvement or decline in past performance, (4) early literacy proficiency, (5) college or workforce readiness, and (6) graduation rate. R.C. 3302.03; Adm.Code 3301.28 et seq. This information is then made public by way of a district "report card" that is available on ODEW's website. Public-school districts are subject to audits and site visits to ensure accurate data reporting. *See* R.C. 3323.06(D); R.C. 3301.0714. And they are also subject to loss of funding if they fail to submit accurate data. *See* R.C. 3301.0714.

{¶ 81} Participating EdChoice schools, by contrast, are not subject to comparable performance-reporting requirements, and ODEW does not publish comparable "report cards" for these schools. Outside of attendance data and a yearly student assessment test,

private-school districts do not report, and ODEW does not collect, the same categories of performance data required of public-school districts. (*See* June 7, 2024 Pl.'s Ex. O at ¶ 82-83.) Additionally, even though private schools are required to give student assessment tests, ODEW does not rate private schools based on their students' performance on those assessments. (*See* Tr. Dep. of Chistine Burns at 57.)

{¶ 82} The record also reflects that ODEW has no system of monitoring whether EdChoice schools comply with the minimal EdChoice requirements that do exist. Specifically, Director Burns testified as follows:

> Q. And when you say maintain the operating standards at their school, how does your department monitor that?
>
> A. There is no monitoring system.
>
> Q. So you wouldn't really know if [EdChoice schools are] maintaining the operating standards, because there's no way to monitor it, right?
>
> A. Correct.

Id. at 34.

{¶ 83} Director Burns' testimony also revealed that even basic attendance requirements are effectively self-reported by the schools and remain unverified by the state. Private schools enter students' attendance into the state's online system each month, but the state does not independently verify whether the reported attendance is accurate or not. Indeed, Director Burns acknowledged that a school could receive EdChoice funding for a student who "absent every day in a year," so long as the school entered attendance information. *Id.* at 42.

> Q. So theoretically, a student could be absent every day in a year, and that school will still get paid for the EdChoice scholarship for that student even though that child has been not attending; is that right?
>
> A. Correct.

Id.

{¶ 84} Regarding teacher licensure, EdChoice schools are permitted to employ teachers for whom the sole licensure requirement is possession of a bachelor's degree. R.C. 3301.071(A)(1). Public-school teachers are subject to more demanding credentialing

requirements, including a detailed licensure process that involves attending teacher preparation programs, doing coursework in teaching content areas, and passing exams relevant to their respective teaching files. R.C. 3319.22; Adm.Code 3301-24-05. Public-school teachers are also monitored and evaluated based on statewide standards, their student data, and classroom observations. R.C. 3319.112; R.C. 3319.111. They are also required to obtain professional development hours. *Id.*

{¶ 85} Director Burns testified that while EdChoice schools must report principal and teacher licensure on their initial application to become an Edchoice provider school, they are not required to resubmit that information as part of their annual renewal application. Director Burns identified teacher licensure and required student assessments as recurring compliance issues. Director Burns acknowledged that those violations are generally only identified if a parent or the school itself brings them to the agency's attention.

{¶ 86} Regarding ODEW's response after identifying a violation, Director Burns testified that the state does not verify that it has actually been corrected. According to Director Burns, when a violation occurs, the school is required to submit a corrective action plan for administrative review. If approved, the school's or student's renewal application for EdChoice funding may be returned to "eligible" status. (Tr. Dep. of Chistine Burns at 64.) But when asked whether her office follows up on the plan, Director Burns answered "no." *Id.*

{¶ 87} Additionally, and as noted above, EdChoice private schools are not subject to the same anti-discrimination laws that apply to public schools. For instance, both the state and federal constitutions require public schools to provide free and appropriate education to students with disabilities. *See* U.S. Const. amend. I; U.S. Const. amend. XIV; Ohio Const. art. I, § 2; Ohio Const. art. I, § 7; R.C. Chapter 3323; R.C. 3313.601; 20 U.S.C. 1681 et seq.; 20 U.S.C. 1400 et seq. Director Burns testified that EdChoice private schools may make admissions decisions based on a student's characteristics, including actual or perceived disability. Further, private schools are not subject to public-records acts or open-meeting acts, as public schools are. *See* R.C. 149.43; R.C. 121.22.

{¶ 88} The central purposes behind Ohio Const. art. VI, § 2 were to ensure that children in Ohio received a uniform education from qualified teachers in a school that is free to the public and financially sound. However, the record reflects that the state now

provides approximately $700 million annually in EdChoice funding to participating nonpublic schools that are subject to materially less extensive fiscal reporting, expense monitoring, licensure and operating standards than those applicable to public school districts.[12]

{¶ 89} Regarding this lack of oversight, the State Defendants respond that "Ohio law has long embraced educational choice." (July 5, 2024 State Defs.' Memo Contra to Pls.' Mot. for Summ. Jgmt. at 1.) The State Defendants also argue that it does not violate the Ohio Constitution to have different standards for public schools. (Brief of State Defendants-Appellants/Cross-Appellees at 25.) These arguments miss the point. The point is that the oversight requirements imposed on public-school districts (i.e., fiscal reporting, performance ratings, teacher licensure, and public transparency) reflect the General Assembly's recognition that standards and oversight are necessary to ensure a consistently well-educated population. Further, these standards and oversight are inherent in Ohio Const. art. VI, § 2's mandate that the state secure a statewide system of thorough and efficient common schools. EdChoice schools operate outside of those standards and structure.

{¶ 90} To summarize, Ohio Const. art. VI, § 2 requires the General Assembly to secure a statewide system of common schools. We conclude that EdChoice, in its current form, secures a separate system of non-public schools that does not satisfy the common school requirement. Since the plain language of the Ohio Constitution does not permit the General Assembly to secure a separate, state-financed system of non-public, uncommon schools, we affirm the trial court's granting of summary judgment in favor of Plaintiffs as to Count 1.

V. EdChoice Presents a Three-Pronged Undermining of the Financial Integrity of Public Schools

{¶ 91} In Count 2 of their amended complaint, Plaintiffs argue that EdChoice diverts funds away from public schools to their detriment. Having reviewed the record and

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[12] This lack of financial oversight has recently drawn the attention of state legislators. Indeed, shortly after oral argument in this matter, bipartisan legislation was introduced that would require EdChoice schools to provide financial reports and be given a report card from ODEW. *See* Megan Henry, Ohio Capital Journal, *Ohio Bill Would Require Increased Accountability for Schools Using Private School Vouchers*, Ohio Capital Journal (May 28, 2026) https://ohiocapitaljournal.com/2026/05/28/ohio-bill-would-require-increased-accountablity-for-schools-using-private-school-vouchers/ (accessed Oct. 12, 2026) [https://perma.cc/93LX-84U2].

arguments of the parties, this court concludes EdChoice undermines the fiscal integrity of Ohio's public schools in three mutually reinforcing ways. First, taxpayer funds are diverted to private schools rather than to the public-school system. Second, EdChoice increases the per-pupil cost of educating students who remain in public schools. Third, by encouraging the departure of students from public schools, EdChoice gives voters less reason to approve local school levies. Each of these effects reinforce one another, creating a downward spiral of reduced enrollment, reduced revenue, and increased fiscal pressure on schools.

{¶ 92} In addressing the issue of fiscal integrity, it is first necessary to have a basic understanding of how Ohio funds its public schools.

{¶ 93} Historically, Ohio has relied primarily on a combination of state and local funding to support its public schools. The extent to which that funding structure satisfies the Ohio Constitution's mandate that the state, rather than local taxpayers, secure a "thorough and efficient system of common schools" has been the subject of substantial constitutional litigation. Ohio Const. art. VI, § 2.

{¶ 94} Approximately 30 years ago, the Supreme Court of Ohio held that the state's system of funding public schools violated Ohio Const. art. VI, § 2 because it relied too heavily on local property taxes rather than state contributions. *See DeRolph v. State*, 1997-Ohio-84. This overreliance resulted in property-wealthy districts having more funding, while rural and inner-city districts with less property wealth remained underfunded. *See Id.* The Supreme Court retained jurisdiction over the matter while the General Assembly revised the funding system, but subsequent funding plans were found unconstitutional as well. *See DeRolph v. State*, 2000-Ohio-437; *DeRolph v. State*, 2001-Ohio-1896; *DeRolph v. State*, 2002-Ohio-6760. Ultimately, in 2006, the Supreme Court relinquished jurisdiction over the *DeRolph* line of cases, concluding it had exhausted its procedural authority to continue reviewing the General Assembly's attempts to revise the school-funding system.

{¶ 95} More than a decade later, the General Assembly took up the mantle again. With the assistance of a committee of school superintendents, treasurers, and other knowledgeable stakeholders, it began developing what would become known as the Fair School Funding Plan. The General Assembly enacted the plan in 2020.

{¶ 96} Under the Fair School Funding Plan, the respective contributions of the state and local taxpayers are determined through what is referred to as the State Foundation Formula. R.C. Chapter 3317.

{¶ 97} Although the State Foundation Formula is complicated, its basic premise is straightforward. It begins by determining the average cost of educating a student in a particular public-school district and then subtracts from that amount what the state estimates the district's local taxpayers should be able to contribute toward that cost. This difference is the portion of the average cost per student that the state will fund.

{¶ 98} More specifically, R.C. 3317.022 begins by establishing a "District Base Cost Per-Pupil Amount" for each school district. That figure is intended to capture the overall average cost of educating a student in the district. To reach this number, the total costs associated with operating the local school district are calculated. Those costs include, among other things, employing teachers and administrators, maintaining school buildings, providing guidance counselors, textbooks, student-support materials, and funding athletics and other co-curricular activities. That total is then divided by the district's Average Daily Membership ("ADM"), which is the district's average daily student enrollment. The resulting figure is the District's Base Cost Per-Pupil Amount.

{¶ 99} The state's share of the District Base Cost Per-Pupil Amount is then determined by subtracting the state's estimate of the school district's ability to raise revenue locally through tax levies imposed on the district's residents and property owners. That estimate is referred to as the "Local Capacity Per-Pupil Amount." R.C. 3317.017.

{¶ 100} The calculation of the Local Capacity Per-Pupil Amount is complex and involves numerous steps. *Id.* However, the concept behind the calculation is simple to determine the amount of funding that the state expects local taxpayers to be able to contribute toward their public schools. Once the Local Capacity Per-Pupil Amount is calculated, this amount is deducted from the District Base Cost Per-Pupil Amount to determine how much the state will pay. The funds that the local school district receives from the state come from a pool of money known as the State Foundation Fund.

A. Appropriations via the Fair School Funding Plan

{¶ 101} The General Assembly never fully funded the Fair School Funding Plan. The General Assembly determined that funding for the Fair School Funding Plan would be

implemented gradually over three budget cycles, with full funding implementation by fiscal year 2027. In fiscal years 2021 and 2022, public schools received funding at 16.67 percent and 33.33 percent, respectively, of the amounts the Fair School Funding Plan called for. (June 7, 2024 Exs. to Pls.' Mot. for Summ. Jgmt. with Incorporated Memo. in Support; Am.Sub.H.B. No. 110.) In fiscal years 2023 and 2024, public schools received 50 percent and 66 percent, respectively. The Chief of Budget and School Funding for the ODEW testified that the state did not implement full funding from the outset because it lacked adequate funds to cover the full costs of implementation in earlier years of the program. (Tr. Dep. of Aaron Rausch.) While this phase-in occurred through 2024, by 2025 that phase-in had, by all meaningful measures, been abandoned, ostensibly on the grounds that the state did not have the dollars to fully fund it.[13]

{¶ 102} While the General Assembly did not fund the Fair School Funding Plan at 100 percent of what the formula called for during early years of implementation, it appropriated to EdChoice over $1 billion in taxpayer money for EdChoice vouchers during those same years. Specifically, evidence in the record shows that across fiscal years 2022 and 2023, the legislature appropriated over $600 million for EdChoice. (*See* June 7, 2024 Pl.'s Exs. O & U.) By 2024, after the latest EdChoice Expansion, funding for EdChoice increased to $700 million. (Pl.'s Ex. P.)

{¶ 103} Defendants contend that the EdChoice program is funded separately from the foundation funds distributed to public schools, and that those funds would not necessarily be redirected to public schools if EdChoice were to be enjoined. They further maintain that the Ohio Constitution does not prohibit the state from funding private schools in addition to public schools, and that the legislature's allocation of state taxpayer funds to private schools does not establish that those funds would otherwise have been allocated to public schools.

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[13] Peter Fleisher, *The Price of Education: The funding battle for Ohio's schools | State lawmakers consider scrapping Fair School Funding Plan*, https://www.wkyc.com/article/news/education/educators-speak-out-ohio-considers-scrapping-fair-school-funding-plan/95-887ce915-973e-4761-aede-632b6efobe28 (accessed Oct. 12, 2026) [https://perma.cc/3RC3-UT3Y] (quoting chair of the House Finance Committee, who defended the change: "It (the Fair School Funding Plan) costs $1.8 billion to the taxpayer. We simply don't have it[.]").

{¶ 104} However, contrary to Defendants' assertions, there is, in fact, uncontradicted evidence in the record establishing that EdChoice funding and the state's portion of per-pupil public-school funding come out of the same pot of money and could be redirected towards public schools. Indeed, the record shows that both the money that goes to EdChoice and the money that goes to public schools is earmarked as foundation funding, with both streams of funding coming through the same appropriation line item in the budget. Additionally, the Chief of Budget and School Funding for the Department of Education and Workforce, Director Aaron Rausch, testified during his deposition that if EdChoice funding did not go to private schools—for example, if the law were enjoined, then there is appropriation authority within the line item to direct that funding back to public schools.

{¶ 105} While we agree that the General Assembly has broad authority to make budgetary appropriations as it sees fit, it is not authorized to disregard the constitutional obligation to secure a thorough and efficient system of common schools throughout the state. As discussed earlier, that obligation was made mandatory by the 1851 constitutional amendment because of this very concern that future legislatures would abandon their responsibilities to public education in favor of competing expenditures.

{¶ 106} According to fiscal data in the record, including evidence from ODEW, had EdChoice not been funded in fiscal years 2023 and 2024, the Fair School Funding Plan could have been fully funded at approximately 100 percent. Specifically, in fiscal year 2023, EdChoice schools received $353,676,267 in taxpayer dollars from the state, while public schools received $6.5 billion—approximately $300 million less than the $6.8 billion that they would have received had the Fair School Funding Plan been fully funded. Similarly, in fiscal year 2024, EdChoice schools received $677,612,432 in state taxpayer funding, while public schools received $7.1 billion, but should have received $7.8 billion if fully funded, which is a difference of approximately the same amount used to fund EdChoice. Thus, the amounts directed to EdChoice in each of those fiscal years approximated the amounts by which public-school funding fell short of full-formula funding.

{¶ 107} Although the Defendants argue that EdChoice appropriations do not reduce the foundation funds distributed to public-school districts because EdChoice is funded through separate appropriations, the record belies that claim and indicates a substantial

correspondence between the amounts appropriated for EdChoice and the amounts by which public school foundation funding fell short of full-formula funding during the relevant fiscal years. Or, in other words, Defendants' arguments resemble the old Groucho Marx line: " 'who are you going to believe, me or your lying eyes?' " *Talbott v. United States*, 176 F.4th 720, 746 (D.C.Cir. 2026). While we acknowledge the possibility that the near identical amount appropriated for EdChoice and the amount left unfunded under the Fair School Funding Plan could be nothing more than mere coincidence, Defendants' separate appropriations argument does not stand up to the fiscal reality that state revenue directed to EdChoice was unavailable for other state educational purposes, including full implementation of the Fair School Funding Plan. The record therefore supports the conclusion that, absent the EdChoice program, at least some of that funding would have been available to support Ohio's public schools.

{¶ 108} In effect, the legislature is prioritizing a competing system of uncommon, private schools over its constitutional obligation to ensure the continued functionality and vitality of Ohio's system of common, i.e. public, schools. This legislative action runs directly up against the Supreme Court's warnings in *Goff* that, "implicit within [the state's obligation to secure a through and efficient system of common schools] is a prohibition against the establishment of a system of uncommon (or nonpublic) schools financed by the state," and that the success of private schools "should not come at the expense of our public education system or our public school teachers." *Goff*, 1999-Ohio-77, at ¶ 33-34.

B. EdChoice Schools Cherry-Pick Students from Public Schools

{¶ 109} EdChoice also undermines public schools by allowing private schools to cherry-pick students, including the least expensive students to educate, while leaving the most expensive students for the public schools to educate. The District Base Cost Per-Pupil Amount contained within the foundation formula represents an average of the estimated costs for educating a student within a given district. That average necessarily assumes a student population with varying educational needs that come at varying associated costs. Some students require relatively few resources and are, therefore, less expensive to educate overall, while other students require substantially more resources and are substantially more expensive to educate. For example, a student with autism may require a teacher's aide, additional instructional support, or extra time to complete examinations, resulting in

a cost of education that is higher than the district-wide average. Other students may require fewer resources and cost less than the average to educate. The District Base Cost Per-Pupil Amount thus reflects the average cost per student across the entire student population.

{¶ 110} As discussed above, private schools determine which EdChoice-funded students they will admit. The final enrollment decision rests not with the family but with the private school, based on the student population the school wishes to enroll and the state funding associated with those students. The fact that private schools retain enrollment discretion is demonstrated by a number of EdChoice-provider school admission policies in the record. These admission policies show that private schools explicitly retain discretion to deny or discontinue enrollment of a student under circumstances in which public schools remain obligated to provide educational services, i.e., when the student has behavioral issues, developmental or physical disabilities, or has demonstrated low academic performance.

{¶ 111} Thus, because private schools have discretion to cherry-pick those students who are relatively inexpensive to educate, it leaves public schools with a disproportionate share of students who are relatively *expensive* to educate. This results in a situation where a public school may have fewer students but higher costs on a per-student basis, because it loses the per-pupil funding associated with students who leave for private schools. When students who require relatively few public-school services leave for private schools, the district loses the state funding attached to those students, but its fixed costs do not disappear. The district must still maintain its staff, buildings, busing and other transportation, and other services needed to educate the students who remain. If the remaining student population includes a disproportionate share of students requiring extensive or intensive educational or other services, the district's costs increase even as enrollment declines. This structural effect further supports Plaintiffs' contention that EdChoice undermines the fiscal integrity of Ohio's public-school systems.

{¶ 112} A simplified hypothetical illustrates this effect. Assume the state provides a district with $6,000 in foundation funding for each student. If a student who is relatively inexpensive to educate leaves for a private school, the district loses the $6,000 associated with that student, even though educating that student may have cost the district only $4,000. By contrast, assume that another student gets the same $6,000 in foundation

funding, but requires $8,000 in educational services. When the less expensive student stays in the district, the $2,000 difference between that student's funding and actual cost helps offset the $2,000 shortfall associated with the student who needs more services. However, when the less expensive student leaves the district for private school, the district not only loses $6,000 in funding but also loses the $2,000 cross-subsidy that would defray the costs of educating students with greater needs.[14]

{¶ 113} Accordingly, while the EdChoice program may leave public schools with fewer students to educate, a reduction in enrollment does not necessarily produce a proportional reduction in a school district's costs. Public schools still have remaining fixed costs, with such costs to be spread among fewer students. Additionally, when a lower-cost student leaves, the district loses the student's per-pupil funding and the surplus that would have helped subsidize the higher costs of students requiring greater services, thus raising the overall per-pupil cost of educating the remaining students.[15]

C. Local School Levies

{¶ 114} EdChoice also undermines public schools by slowly eroding support for local school levies. The State Foundation Formula, which is ostensibly designed to determine the state's "fair" share of District Base Cost Per-Pupil Amount funding, does not account for how much local revenue each district *actually raises* through tax levies on its residents.

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[14] Studies corroborate the phenomenon described herein. *See* Wething, *How Vouchers Harm Public Schools: Calculating the Cost of Voucher Programs to Public School Districts*, Economic Policy Institute (Dec. 19, 2024) (explaining how the loss of per-pupil funding to public schools through voucher programs increases the cost of educating students who remain in public school and using the Cleveland public school district as a case study); *see also* Knight and DeMatthews, *The Fiscal Impacts of Expanded Voucher Programs and Charter School Growth on Public Schools: Recommendations for Sustaining Adequate and Equitable School Finance Systems*, National Education Policy Center (Nov. 2024) (in summarizing studies on the financial impact of charter schools on public schools, stating "[b]y enrolling fewer students who receive costly special education services, for example, charter schools increase the proportion of students with disabilities served within the transitional public system").

[15] In concluding that a private school's ability to cherry-pick students financially harms public schools, we are mindful that in *Congress*, the Supreme Court stated that nothing in the Ohio Constitution prohibits the state from withdrawing a student's per-pupil funding from a public school when that student leaves the public school system, so long as the state continues to fund the per-pupil base costs for the students who actually stay in public school. *Congress*, 2006-Ohio-5512, at ¶ 35-37. We nevertheless do not find this dispositive. To begin, this portion of *Congress* was not central to the Supreme Court's holding. *Congress* concerned students leaving public school for public charter schools, which fall under the umbrella of common schools or public schools. The issue before the Supreme Court did not concern students leaving public school for private schools, much less students leaving public schools for private schools at the financial incentive of the state. Also, the Supreme Court, in *Congress*, did not examine the complexities of Ohio's public-school funding system vis-à-vis EdChoice.

Instead, the State Foundation Formula merely guesses at what districts may be *expected* to raise in local revenue from tax levies on its residents. If a district fails to raise the expected amount of funding through local tax levies, the State Foundation Formula does not provide a mechanism for the state to step in and make up for the loss. Rather, the public school is left with two bad options: either reduce some of its expenses, which are likely to be essential, or operate at a financial deficit.

{¶ 115} According to data from ODEW, districts across the state, on average, receive approximately 45 percent of their per-pupil funding from local property taxes, while the state provides approximately 39 percent. The remainder of per-pupil funding comes from federal and other sources, including grants. *See* https://reportcard.education.ohio.gov/district/finance/050500 (accessed Oct. 12, 2026) [https://perma.cc/2H2Z-UB3J]. The contribution from local property taxes represents, on average, the single largest source of funding for Ohio's school districts.

{¶ 116} It is undeniable that Ohio's public schools rely heavily on local taxpayer support,[16] yet the state has constructed an increasingly expansive EdChoice program which, at its very core, gives students/families an economic incentive to leave the public schools. It does this by greatly reducing or even eliminating the primary barrier to attending a private school, i.e., the financial cost of doing so. Indeed, with the passage of the 2023 EdChoice Expansion, eligibility for taxpayer-funded private-school vouchers now even extends to students from Ohio's wealthiest families whereby they are eligible to receive approximately 10 percent of the maximum scholarship amount, i.e., $650 for elementary students or $950 for high school students, for attending a private school.

{¶ 117} When students and families are financially incentivized to leave the public-school system, enrollment in public school is likely to decline. Declining enrollment necessarily means fewer parents, grandparents, aunts, and uncles that have a personal stake in the success of the public school, thus potentially weakening community support for local school levies. Furthermore, and as explained above, state underfunding, enrollment

[16] Indeed, public schools appear to be so heavily reliant on local property tax revenue that the consequences of failing school levies have become so severe enough for the General Assembly to enact legislation allowing local school boards to impose property taxes on residents and property owners even after those voters have explicitly rejected a levy at the ballot box. Not only does this raise concerns about the extent to which local voters' wishes are respected at the ballot box, but it also raises concerns about whether the state is, in effect, abdicating its duty to fund public schools by requiring local taxpayers to do it in its stead.

losses, and cherry-picking of students by EdChoice-provider schools challenge public-school districts' ability to provide the level of educational services that their communities need or expect. When public-school districts are unable to meet those needs and expectations, community confidence in the schools may wane, further eroding community support for school levies.

{¶ 118} We recognize that many factors influence whether levies pass or fail. However, the record supports the conclusion that EdChoice's impact on public schools—through the extraction of resources and the erosion of the public's incentive to remain invested in local schools—is among those factors that may affect levy support.[17]

{¶ 119} In summary, the three fiscal impacts identified above—the state's prioritization of appropriating funds to EdChoice while underfunding public schools, the cherry-picking of students by EdChoice provider schools, and the impact on local levies—operate together to harm public schools through the loss of revenue and increased fiscal strain and are compounded by their cumulative effect. These combined effects undermine the General Assembly's constitutional obligation to secure a thorough and efficient system of common schools throughout the state. That the state is still funding public schools while also funding EdChoice does not cure the constitutional violation, especially at the breadth of scope and level of funding that EdChoice receives. EdChoice, as presently structured and funded, crosses that constitutional threshold by using state tax dollars to draw students and resources away from the public schools in order to sustain a separate system of participating non-public schools, leaving the public schools to bear obligations and financial hardships that private schools do not share. As such, the EdChoice program

[17] Indeed, the affidavit of Marnisha Brown, Superintendent of the Richmond Heights Local School District, starkly illustrates why local levies become necessary when state funding is insufficient. Among other things, Brown explains that Richmond Heights cannot afford competitive teacher salaries and, therefore, relies on substitute teachers to fill many positions, who are not subject to the same licensing requirements as permanent staff. The district also lacks funds to repair or replace the elementary school's broken boiler and heating pumps. Richmond Heights also cannot afford many programs and resources ordinarily associated with a basic public education. The district offers no band, art, music, drama, yearbook, or newspaper programs and cannot afford tutors, foreign-language teachers, English-learner interpreters, or updated textbooks. Brown further explains that administrators spend substantial time and district resources pursuing private and federal grants for tutorial assistance—time that could otherwise be devoted to educating students and managing the district. Richmond Heights has been unable to pass a school levy. Other affidavits in the record from administrators at the Plaintiffs' districts describe similar scenarios where the districts' basic operating costs are not covered and yet a levy cannot be passed.

operates to deprive students of the thorough and efficient system of common schools mandated by Ohio Const. art. VI, § 2. The Supreme Court of Ohio in *Goff* foretold the possibility that someday a greatly expanded voucher program could create a competing system of uncommon schools. Today is that day.

D. Remaining Assignments of Error

{¶ 120} Having determined that EdChoice violates Ohio Const. art. VI, § 2 and is therefore unconstitutional, and having enjoined the law on that basis, we decline to address the parties' remaining assignments of error. Any discussion or determination of those assignments of error is not necessary and would merely be advisory in nature. *See State ex rel. LetOhioVote.org v. Brunner*, 2009-Ohio-4900, ¶ 51 (declining the invite to issue advisory opinions and stating " 'if it is not necessary to decide more, it is not necessary to decide more.' ") *Id.*, quoting *PDK Labs, Inc. v. United States Drug Enforcement Adm.*, 362 F.3d 786, 799 (D.C.Cir. 2004).

VI. Conclusion

{¶ 121} EdChoice, as presently structured and funded, secures with taxpayer funds a competing system of uncommon schools that is not subject to the same obligations imposed on Ohio's system of common schools. This system of uncommon schools violates the mandate of Ohio Const. art. VI, § 2 to secure "a thorough and efficient system of common schools throughout the state." Although statutes are entitled to a strong presumption of constitutionality, that presumption has been overcome here. Participating non-public schools are subject to materially less extensive state oversight, they cherry-pick students from public schools, they are geographically isolated in Ohio's urban centers, and they receive taxpayer funding in a manner that operates at the expense and detriment of Ohio's public schools, and, consequently, the children who depend on those public schools for instruction, support, and opportunities that shape their future.

{¶ 122} Therefore, we affirm the trial court's decision granting summary judgment in favor of Plaintiffs on Counts 1 and 2 of the amended complaint, and we overrule the State and Intervenor Defendants' respective first and second assignments of error. In affirming the trial court's summary judgment determinations on Counts 1 and 2 and concluding that EdChoice and EdChoice Expansion are unconstitutional, we do not suggest that school vouchers in all forms violate the Ohio Constitution. *See Goff* (finding a limited voucher

program constitutionally permissible). Rather, our holding is limited to EdChoice and EdChoice Expansion as presently structured, funded, and challenged in this case.

{¶ 123} Having declared the law unconstitutional through our discussion of State and Intervenor Defendants' first and second assignments of error, we do not reach the remaining assignments of error, including the Student Plaintiffs' cross-appealed assignment of error. Based upon the foregoing, the judgment of the Franklin County Court of Common Pleas is affirmed. This court will stay enforcement of the judgment pending a further anticipated appeal.

Judgment affirmed.

BOGGS, P.J., and DINGUS, J., concur.