

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 19-1056

STATE OF WEST VIRGINIA *ex rel.*,
PATRICK MORRISEY, ATTORNEY
GENERAL,

Petitioner,

vs.

DIOCESE OF WHEELING-
CHARLESTON,
and MICHAEL J. BRANSFIELD, in his
capacity as former Bishop of the Diocese of
Wheeling-Charleston,

Respondents.

RESPONDENTS' Brief

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STATEMENT OF THE CASE

The Attorney General (“AG”) takes the position that this case is a straightforward application of the Consumer Credit and Protection Act (“CCPA”) easily resolved by a plain reading of the statute. The AG also takes the position that his expansive interpretation of the CCPA does not infringe on constitutional rights.

The AG is just plain wrong. Neither the overly broad application of the CCPA, nor the exceedingly narrow reading of the First Amendment is supported by the text of the amendment or the case law. The trial court recognized that the AG exceeded his statutory authority under the CCPA and infringed on the Diocese of Wheeling-Charleston’s (“Diocese”) constitutional rights. J.A. 283-322. In a carefully articulated opinion, the trial court granted the Motion to Dismiss filed by the Diocese, subject to confirmation by this Court.

The trial court correctly identified the fallacies of the AG’s position and properly resolved the questions in favor of the Diocese. *Id.* This Court should concur in the answers of the trial court.

To appreciate the extent of the overreach by the AG in bringing this case, it is helpful to reflect on this Court’s own guidance in interpreting the CCPA. In *State ex rel McGraw v. Bear Stearns & Co., Inc.*, 217 W.Va. 573, 618 S.E. 2d 583, 587 (2005), this Court stated:

The consumer protection act is essentially designed to protect consumers in the relatively common cash and credit transactions in which they engage on a regular basis.

Now, contrasting that guidance to this case, the AG seeks to use the Diocese’s own internal policy created by it under the Charter for the Protection of Children and Young People, adopted by the Catholic Church to fashion an unfair and deceptive practices claim. W.Va. Code §§ 46A-6-104, 46A-1-102(47). J.A. 060. The AG uses decades old predicate acts of abuse to

allege a “duty to warn” over “any material fact”. WV Code 46A-6-102(7)(I)(L)(M). J.A. 076. The AG also seeks to analyze, monitor and oversee the administration of substantive school policies by re-writing the CCPA to give him broad authority in education services. J.A. 245-254. Finally, the AG seeks to rely on acts outside the four year look back period to support his claims. J.A. 117.

Even more startling, he seeks to narrow the constitutional rights of freedom of religion, freedom of expression and association to apply only to “doctrinal matters and hiring decisions”. J.A. 57. The AG urges this Court to depart from settled constitutional precedent such as the principles established by the United State Supreme Court in *Lemon v. Kurtzman* 403 U.S. 602 (1971), and limit a religious freedom analysis based solely on the “ministerial exception.” Pet. Br. at 31. Though the AG admits that some of the remedies available to him under the CCPA would raise constitutional questions for a religious entity, he asks this Court to permit him to prosecute the Diocese first in this case, and at its conclusion, determine which of the remedies he seeks are precluded. J.A. 236-238.

The AG’s theory really has no limits. His imaginative “duty to warn” theory could be asserted against any school or university. J.A. 251-254. As correctly noted by the trial court, it could be asserted against any employer for unknown and unlimited periods of time. *Id.* As this Court has separately held, the CCPA was not intended for such broad purposes.

A. The Allegations of the Amended Complaint.

The Attorney General alleges three causes of action. Count One of the Amended Complaint alleges a claim of advertised services not delivered pursuant to West Virginia Code §46A-6-104 which prohibits unfair methods of competition and unfair deceptive acts or practices in the conduct of any trade or commerce. J.A. 074-075. This allegation is based upon the theory

that although the Diocese advertised on its website that it offers a safe learning environment for its students in its schools and children attending its recreational camps, it failed to clearly and conspicuously disclose that the learning environment is not safe as advertised due primarily to decades-old claims of sexual abuse of minors by priests and certain lay employees. J.A. 074.

Count Two of the Amended Complaint alleges a claim of failure to warn of dangerous services pursuant to W.Va. Code §46A-6-104 and §46A-6-102(7)(L) and (M). J.A. 075-077. §102(7) sets forth sixteen examples of unfair methods of competition and unfair deceptive acts, three of which are cited by the Attorney General (i) false advertising, (ii) conduct that is likely to confuse or create a misunderstanding among credit consumers and (iii) deceptive or fraudulent conduct. J.A. 075.

Count Three alleges a claim of unfair methods of competition, pursuant to W.Va. Code §46A-6-104 and §46A-6-102(7)(L) and (M). J.A. 077-078. This theory of liability speculates that the Diocese gained an unfair advantage over competing private and public schools by not disclosing that, again years ago, a priest accused of misconduct worked in a school. *Id.*

B. The Diocesan Safe Environment Program.

The Diocese's Safe Environment program was required by the Charter for the Protection of Children and Young People ("the Charter"), adopted by the Catholic Church in 2002. J.A. 093. The Charter is a church created policy and based on the Diocese's efforts to ensure a safe environment in its schools, churches, religious education and ministries. J.A. 093. It was not mandated by State or Federal law or policy and the Church received no input from them. It goes beyond what is required under State laws on school safety and the mandatory duty to report. The Diocese adopted the Charter and has implemented detailed policies and comprehensive programs to address the issue of sexual assault and/or abuse in any aspect of the Diocese' ministries. J.A.

093. The Charter is a part of the Diocese's internal policy and procedures that impact the suitability of priests and other ministers, requires reporting of all abuse claims to civil authorities, and mandates that any person found to have sexually abused a child will be permanently removed and barred from ministry. J.A. 092.

Under the specific terms of the Charter, the Diocese created and has maintained a Safe Environment Program which is conducted cooperatively with parents, civil authorities, educators, and community organizations to provide education and training for minors, parents, ministers, employees, volunteers, and others, about ways to sustain and foster a safe environment for minors. J.A. 093. The Safe Environment Program includes full time staff and a network of volunteers, to both source and elevate allegations of abuse and educate its own clergy, employees, volunteers, lay people, students and teachers on how to report such conduct and how to identify warning signs of abuse. J.A. 093. Background checks of all clergy, employees and volunteers are required.¹ J.A. 093. Pursuant to West Virginia Law, W.Va. Code §49-2-803, the Church reports all allegations of abuse of minors within 24 hours of the allegations being received. Credible claims result in the removal of the employee from employment and the priest from ministry. J.A. 093.

The Diocese also urges members of the public including the Catholic community to report allegations of abuse and misconduct to civil and Diocesan authorities and communicates this request through its own channels, over the internet and in external communications. J.A. 093. It utilizes an independent lay board to receive and review all such allegations. J.A. 093. It maintains a zero tolerance policy for those credibly accused and it complies with the mandatory reporting requirements of West Virginia law. J.A. 093.

¹ For example, since 2011, ScreeningOne has checked credit reports for fraud, social security records, county criminal records and the national criminal database, including a search for sex offenders. Prior to that, USIS conducted background checks starting in 2004 and before that, it was Mind Your Business. J.A. 093.

This is the Church policy against which the AG's claims are based. The AG insists that he has plenary authority to analyze the Church's policy for its adequacy and, if it is satisfactory, have the State (in ongoing investigations enforced through the court system) determine whether the Diocese is sufficiently following its policy. J.A. 255-260. If the AG determines that the Church is not sufficiently following its policy, then the AG will sanction the Church, through the State court system, including but not limited to, requiring the Church to either cease advertising all together or to include State approved language in all advertisements² for a period of time to be determined by the State. J.A. 255-260.

C. The Claims Alleged, Individually and Collectively, Do Not Demonstrate Any Ongoing or Recent Issues with Child Protection.

The AG applies three categories of events in his attempt to create CCPA violations where none exist. First, the AG applies the current web site language (inserted in 2014) to sexual abuse events that happened many years and even decades ago to allege such historical events create a present day risk to the safety of Catholic School children thereby demanding extraordinary relief in a "duty" to warn. Second, the AG uses allegations related to two, more current, abuse cases in an attempt to establish current problems; however, each of the cases was reported to legal authorities under the schools' safe environment program. These allegations also occurred outside the four year look back period of the CCPA.³ J.A. 062; 068-070; 073 & 074. Third, the AG alleges examples of failure to perform background checks – all of which occurred outside the four year look back period and did not result in any allegations of abuse. J.A. 071.

² The AG has clearly determined that language on the Diocese website regarding safe schools is an advertisement under the CCPA. Under this broad definition of advertisement, the weekly church bulletin, the monthly Catholic Spirit newspaper sent to all parishioners and other communications are also advertisements. If he so chooses, the AG will monitor and approve the language in these communications as well.

³ Interestingly, while the AG complains that the Diocese did not publicly announce allegations against one school teacher, the AG asserted at his press conference that he went to great lengths to protect the identity of the victims. Apparently, it is virtuous when the AG protects victims' identities, but nefarious when others provide the same protection. Nevertheless, the attorney for the victim contacted counsel for the Diocese and the AG's Office lived that his client had been described in sufficient detail in the Amended Complaint to be identified.

First, some of the examples cited in the Amended Complaint involve conduct of priests and employees in the Church extending back decades:

- Victor Frobias had multiple allegations ranging from 1962 through 1987, not all of which occurred while he served in the Diocese. Although it cannot be disputed that Frobias is a bad actor, it should be noted that the most recent allegations were in the late 1970s, approximately 25 years before the Safe Environment Program was implemented and approximately forty years before the filing of the AG Complaint. J.A. 098.
- Patrick Condon was accused of sexual abuse of a student sometime between 1983 and 1987 at a Diocesan Seminary – not a Catholic High School - which has been closed for decades. J.A. 099. Condon was returned to ministry after completing a residential treatment program - first at a parish, and then at Wheeling Catholic Elementary from 1998-2001. J.A. 065. No allegations were made against Condon after his reassignment. J.A. 065. Nonetheless under the Charter, he was removed from ministry in 2005, fifteen years ago. J.A. 099. The allegation was reported to local authorities.
- The AG describes conduct of an unnamed individual who was reported in 2018 for allegedly abusing a student in 1978-79 while he was a high school principal, prior to his becoming a priest in 1993. J.A. 072. As background, he was accused of boundary violations of a non-sexual nature with boys in 2005. J.A. 101. His priestly faculties were suspended and he voluntarily left the ministry in 2005.
- The AG also cites allegations related to a priest who was credibly accused in another Catholic Diocese and was accepted into the Diocese in 1962. J.A. 069. The priest was subsequently credibly accused of sexual abuse from conduct occurring in the Diocese in the 1970s, and was suspended from ministry in 1986 and died in 1998. J.A. 070.

It is clear that the conduct alleged by the AG occurred decades ago, decades before the Diocese adopted the Charter in 2002 and implemented its safe environment program and before the 2014 website language was posted on its safe environment program in its schools.

Second, the AG offers two more current allegations of abuse in an effort to remedy his problem with the decades old allegations:

- The first involved a 2006 allegation involving a female school teacher and a student. J.A. 062-063. The AG criticizes the Diocese for not publicizing the abuse despite the copious evidence in the file that the Diocese was honoring the victim's and the family's requests to remain anonymous so as to protect the victim from public scrutiny. J.A. 063. In fact, the victim's attorney contacted the Diocese's counsel and AG's office livid that the AG released information in the Amended Complaint that might identify the victim. J.A. 102.

- The second allegation is from 2012, first reported in 2015,⁴ in which a high school teacher allegedly exposed himself to a student. J.A. 070.

In both instances the Diocese implemented its safe environment program and promptly reported the conduct to the authorities. If anything, the allegations disprove deceptive advertising practices. Additionally, even though more current, both instances fall outside the four-year lookback period of the CCPA.

The AG makes a third type of allegation that does not involve abuse; rather, they are allegations of failure to do background checks.

- The AG alleges that Bishop Schmitt hired an unnamed religious order priest who admitted on a 2002 application that he was accused of sexual abuse of a child in 1979.⁵ J.A. 065-066. The AG alleges that rather than conduct a background check on the priest, the Diocese simply called the Archdiocese of Baltimore to inquire regarding allegations. J.A. 066.⁶ Documents provided to the AG by the Diocese show that background checks were performed on the priest. J.A. 100.
- The AG alleges that in 2008, the Diocese failed to conduct background checks on twenty-two employees. J.A. 071. These alleged failures occurred during the same year and, as continuing employees, they had both prior and subsequent background checks done.
- The AG alleges that the Church failed to do a background check on one volunteer in Cabell County from 2004-2016. J.A. 071. However, the AG does not allege that this failure resulted in harm to anybody.
- The AG alleges failure to conduct a background check on Ronald Cooper, a former maintenance worker at Weirton Madonna High School. J.A. 071-072. Cooper failed to disclose on his 2011 employment application that he had been convicted of third degree statutory rape in 1985 in Washington State. J.A. 072. The AG incorrectly alleges that the Diocese did not conduct a criminal background check on Cooper until 2013 after Cooper had been at Weirton Madonna for two years.⁷ J.A. 072. Files previously provided to the AG pursuant to subpoena prior to filing the Complaint conclusively show he did undergo

⁴ He was not teaching at the parochial high school when it was reported but was a part time teacher at a parochial grade school. There were also background checks done in 2012 when he was first hired, and in 2014. J.A. 102.

⁵ The AG verbally provided to the Diocese the identity of the priest. The spreadsheets provided to the AG by the Diocese show that the priest underwent multiple background checks with no criminal conduct disclosed. It is also our understanding that the complaint was determined to be not credible. J.A. 099.

⁶ The priest agreed to leave his assignment due to "the situation" in 2007, after four years of service at a parish that operates an elementary school. J.A. 066. Pursuant to the AG subpoena, the Diocese provided the priest's file to the AG, which documents that the priest suffered from debilitating sciatica which prevented him from conducting his ministerial duties. J.A. 100. It also documents that the priest disclosed the allegation and that his religious order confirmed in writing that there was nothing in his background that would preclude his fitness for ministry. J.A. 100.

⁷ The two spreadsheets provided to the AG's office show that he did undergo multiple background checks. J.A. 101.

multiple background checks, but the prior background checks by a third-party vendor failed to uncover the prior conviction. J.A. 101.

- In regard to the school principal described above, the AG alleges that the Church failed to conduct an adequate background check on him. J.A. 072. The report of the 1978-79 conduct was not received until 2018, thirteen years after he left the ministry and approximately 40 years after the alleged occurrence, which the Diocese promptly reported to local authorities. J.A. 101.

The AG alleges that the failure to promptly conduct background checks was a violation of the safe environment language on the Diocese's website which was not posted until 2014. In so stating, the AG ignores the actual documentation produced, as noted above, that background checks were performed on everyone except one volunteer and a group of teachers who have not been accused of anything. The AG fails to provide any allegations that any of the alleged background check failures resulted in harm. Moreover, even if timely and true, the allegations do not support a claim of deceptive acts or practices as the trial court correctly noted. They simply show that some individuals did not comply with the policy through which over 19,000 background checks were conducted. That does not create deceptive acts or practices. J.A. 093.

SUMMARY OF ARGUMENT

In the forty-six-year history of the CCPA, there has never been an attempt at such a broad and expansive use of the CCPA. As the Circuit Court noted in its opinion, and as the AG previously acknowledged in this case, the AG principally relies on statements contained in the Diocese's website describing its Safe Environment Program posted first in 2014, administered by the Catholic Diocese under the Charter, as the "promises and representations" which he claims were breached. The AG acknowledged in its earlier filings, and the trial court concluded, that the examples of abuse contained in the AG's Amended Complaint are not themselves violations of the CCPA. The AG wraps these claims under a guise of a duty to warn, false advertising and

deceptive practices. Each of these issues deal with operational aspects of its schools, religious camps and churches and none of these deal with consumer transactions governed by the CCPA.

There are several fundamental flaws in the AG's claims. First, the claims rely on allegations of abuse which are many years, and even decades old, to claim that the Catholic School environment is currently unsafe. Second, the claims cannot be squared with the success of the current and ongoing safe environment program acknowledged in the Amended Complaint in Paragraphs 33 through 35. Third, although the AG includes camps in its claims, the safe environment language on the DWC's website relied upon by the AG does not include any language regarding camps; thus, there can be no claims related to camps. Fourth, the Amended Complaint fails to allege any specific consumer transaction but instead deals with the substantive educational services provided by the Church. Fifth, in order to pursue such claims, the AG and this Court, would necessarily have to first construe Church policy. Sixth, in order for the Diocese's safe environment language to constitute unfair methods of competition to competing private and public schools, the competing private and public schools would necessarily have to publish each and every unlawful conduct by its teachers, administrators, volunteers, etc. to each and every family qualified to attend the schools.⁸ They do not.

The AG makes no allegations within the four year look back period to show that the Diocese failed to provide a safe Catholic education to its students – the AG identified no parents making such a claim (§102(I)). The AG failed to identify any complaints of parents or any confused parents of Catholic School students (§102(L)). Finally, the AG failed to identify any

⁸ The public schools throughout the State of West Virginia have likewise faced numerous allegations of sexual abuse and violence, and there are a number of pending cases, including a recent case in Ohio County, as is evident from a cursory google search of the various State newspapers. As the AG does not recognize media coverage of sexual abuse allegations related to Catholic Schools as disclosures to families, and thus, media coverage related to public schools should also not be recognized. As the AG demands of Catholic Schools, public schools would be required to advise each and every parent or guardian of every sexual abuse or violence allegation at each school. Without such publication, public schools are guilty of the same unfair methods of competition as alleged against Catholic Schools.

Catholic School parents who relied on any alleged concealment of sexual abuse. (§102(M)).

Given the saturated news reports over the decades related to sexual abuse claims in the Church, the AG would be hard pressed to find any Catholic School parents who were not aware of the history.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument was originally scheduled for May 19, 2020 and was postponed.

ARGUMENT

I. THE TRIAL COURT CORRECTLY ANSWERED CERTIFIED QUESTION NUMBER 1 BY HOLDING THAT THE REMEDIES ARTICULATED BY THE AG EXCESSIVELY ENTANGLE THE STATE IN DIOCESAN ADMINISTRATION OF ITS SCHOOLS AND CAMPS.

A. PURPOSE AND SCOPE OF CCPA.

Before addressing the fatal flaws in the AG's Complaint, a discussion of the background and purpose of the CCPA is necessary. The CCPA "was enacted in 1974 and is a hybrid of the Uniform Consumer Credit Code and the National Consumer Act and some sections from then-existing West Virginia law." *White v. Wyeth*, 227 W.Va. 131, 136, 705 S.E.2d 828, 833 (2010) (citing *Clendenin Lumber and Supply Co., Inc. v. Carpenter*, 172 W.Va. 375, 379 n. 4, 305 S.E.2d 332, 336 n. 4 (1983)). "The dual legislative purpose underlying the CCPA is to protect consumers and promote sound and fair business practices." *Id.*, 227 W.Va. at 139, 705 S.E.2d at 836. The CCPA "is a comprehensive attempt on the part of the West Virginia legislature to extend protection to consumers and persons who obtain credit in state." *Harper v. Jackson Hewitt, Inc.*, 227 W.Va. 142, 151, 706 S.E.2d 63, 72 (2010).

The purpose of the CCPA is to protect consumers from unfair, unconscionable, fraudulent, and abusive practices of debt collectors. W.Va. Code §46A-1-101, *et seq.* *Chevy Chase Bank v. McCamant*, 512 S.E.2d 217, 204 W.Va. 295 (1998).

The Legislature, in enacting the CCPA, sought to eliminate the practice of including unconscionable terms in consumer agreements covered by the Act and, to further this purpose, the legislature created a cause of action for consumers and imposed civil liability on creditors who include unconscionable terms in consumer agreements. W.Va. Code §46A-1-101, *et seq.*; §46A-5-101(1); §46A-2-121; *Arnold v. United Companies Lending Corp.*, 511 S.E.2d 854, 204 W.Va. 229 (1998).

It is well established that the AG has no common law authority and his power is limited to that granted by the Legislature. *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 777, 461 S.E.2d 516, 523 (1995). It is also well established that the AG's power granted through the CCPA is limited to consumer credit sales, consumer loans, or consumer leases, as noted above.

The fact that the CCPA is limited to the extension of credit to a consumer, or consumer transactions, was supported by the foremost expert in this area of the law, Professor Vincent Cardi. In his oft cited Law Review Article on the CCPA, Professor Cardi articulated the purposes of the CCPA, as follows:

The West Virginia Consumer Credit and Protection Act is intended to: (1) increase the availability of consumer credit by raising allowable finance charges (interest rates) and move toward equalization of rates available to consumers whether they borrow the money from a lender or buy the goods on credit from a seller; (2) regulate the rate of finance charges allowed for consumer credit transactions by prescribing rates and rules for computation; (3) regulate those businesses which make small consumer loans and which were formerly regulated by the small loan act; (4) protect consumers who purchase goods or services on credit or through consumer loans from deceptive selling techniques, unconscionable contract terms, and undesirable debt recovery and collection practices; and (5) protect consumers who purchase goods or services for cash or credit from, and to give them remedies for, defective or shoddy goods and services and unfair and deceptive selling practices.

V. Cardi, *The West Virginia Consumer Credit and Protection Act*, 77 W.Va. L. Rev. 401, 402 (1975).⁹

Since both parties agree that this succinct statement is a fair statement of the scope of the Act as it applies in this case, focusing on that succinct statement presents a clear picture of how far the Attorney General seeks to distort the purposes of the Act. As noted in that summary, it is intended to protect consumers who purchase goods or services from, and to give them remedies for, defective or shoddy goods and services and unfair and deceptive selling practices. The fundamental issue here is that nothing alleged in the Amended Complaint, and none of the predicate acts assert that the educational services provided by the Diocese are defective or shoddy. In point of fact, as noted in earlier responses, during the period covered by the Amended Complaint, Catholic Schools have enrolled approximately 326,000 students from a high of 48 schools to a current 26 schools. The Attorney General asserts no allegations that its educational services are defective or shoddy or that its specific selling practices are unfair or deceptive. In point of fact, the Diocese is not aware of any complaints or allegations that its educational services are defective or shoddy, or that it has charged for services it did not deliver, and its graduates have succeeded in academic, professional, and business careers throughout the period covered by the Amended Complaint. It is hard to imagine how one could have unfair and deceptive selling practices related to services which are neither defective nor shoddy.

The Circuit Court's analysis of the issues in this case are well reasoned and articulated. The trial court understood not only what the AG was seeking with this lawsuit, but also the momentous ramifications if the AG succeeds in taking control of the Church's communications with its faithful,

⁹ This article has been cited with approval by the W.V. Supreme Court in several decisions. See *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 780, 461 S.E.2d 516, 526 (1995); *State ex rel. McGraw v. Bear, Stearns & Co.*, 217 W.Va. 573, 578, 618 S.E.2d 582, 587 (2005); *State ex rel. Morrissey v. Copper Beech Townhome Communities Twenty-Six, LLC*, 239 W.Va. 741, 744, 806 S.E.2d 172, 175 (2017).

as developed in Argument II below. Accordingly, the trial court correctly analyzed the AG's claims in the "... context of the overarching principle of avoiding excessive entanglement of government and religion embedded in the Constitutions of the United States and the State of West Virginia." J.A. 287. The trial court was concerned with the "... substantial difficulties in fashioning an appropriate remedy which would be constitutionally benign and [was] mindful that a statute may be constitutional on its face yet unconstitutional in its application." J.A. 290. It is under this framework that the trial court's Order must be evaluated and upheld.

The trial court astutely recognized that the AG was prosecuting "... a religious entity, the Diocese, under a general consumer protection statute for acts, statements and omissions outside of any individual or commercial transaction, which the State's Attorney General deems violations of statutory provisions." J.A. 304. The trial court was correct in holding that Catholic School education and religious camps do not fall under the CCPA definition of "goods or services". This is particularly true because the AG's claims are not based upon specific individual or consumer transactions which can be covered by the CCPA.

1. The AG's claims fail because the CCPA regulates specific individual and consumer transactions, not substantive educational and recreational services such as the Diocese's schools and camps.

The trial court correctly determined that the CCPA does not apply to substantive education and recreation services provided by the Diocese. J.A. 294-307. In his Brief, the AG concedes that Article 6 focuses on "consumer transactions." AG Brief, p. 15. However, his lawsuit against the Diocese does not involve consumer transactions. The AG cites not one consumer transaction that he finds deceptive, nor does he allege that any consumers have filed complaints. Rather, the AG seeks to regulate the Diocese's relationship with its parishioners under the guise of a false advertising claim based on substantive Catholic Church policy. In

short, the AG seeks to regulate the Diocese's communications with its parishioners and the manner in which it administers its safe environment program.

2. Diocese education and camps are not "services" under the CCPA.

In an effort to convince this Court that Catholic education and camps fall under the definition of "services", the AG misstates settled areas of law and ignores inconvenient words in statutes and definitions.

As a threshold matter, all three of the AG's claims are premised upon West Virginia Code §46A-6-104, which provides: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." Interestingly, the AG avoids the issue of whether religious primary and secondary schools or religious camps, all designed around faith information, actually can constitute a trade or commerce to be subject to such provisions. This is especially true when the alleged acts or practices are premised on the substantive policies of the religious organization related to activities specifically governed by another more detailed statutory structure, such as primary and secondary education.

The central question here is whether Catholic School education and camps fall under the meaning of the term "services" in the context of this case. In recognizing that Article 6 does not contain specific definitions of "services," this Court turned to the definition of the terms contained in Article 1 in the CCPA's general definitions section. *State ex rel. Morrissey v. Copper Beech Townhome Communities Twenty-Six, LLC*, 239 W.Va. 741, 750, 806 S.E.2d 172, 181 (2017). In Article 1, the term "Services" includes: (a) work, labor and other personal services; (b) privileges with respect to transportation, use of vehicles, hotel and restaurant accommodations, education, entertainment, recreation, physical culture, hospital

accommodations, funerals, cemetery accommodations, and the like; and (c) insurance.” W.Va. Code §46A-1-102(7). Although the definition of the term “services” includes the language “privileges with respect to . . . education”, the phrase is broad, ambiguous and undefined. “Undefined words and terms used in a legislative enactment will be given their common, ordinary and accepted meaning.” Syl. Pt. 4, *Osborne v. United States*, 211 W. Va. 667, 567 S.E.2d 677 (2002).¹⁰

With respect to the present issue, the CCPA mentions “education” only five times, most notably in the section on debt collection (Article 2 of the CCPA).¹¹ Outside of the specific reference in the debt collection section, “education” is included in the definition of “services” contained in the general definitions section of Article 1 of the CCPA. The statutory language of the deceptive practices provision contained in Article 6 of the CCPA does not mention “education.” If the Legislature intended for the unlawful acts or practices provisions of the CCPA to apply to education, and in particular, private, parochial or church schools, or schools of a religious order, it would have done so explicitly (as it did with respect to the collection of educational loans in Article 2 of the CCPA). The trial court recognized that the AG was trying to expand the definition of “services” when it stated that the Church’s position regarding the definition is more persuasive. J.A. 295.

¹⁰ The definition of the term “Services” cannot expand the scope of the CCPA beyond its clearly intended purpose so the phrase “privileges with respect to...education” must be interpreted in light of that purpose of scope. *Cf. Whitman v. Am. Trucking Ass’ns.*, 531 U.S. 457, 468 (2001) (Congress... does not alter the fundamental details of a regulatory scheme in vague term or ancillary provisions – it does not, one might say, “hide elephants in mouse holes”).

¹¹ The only specific power over education granted to the AG by the CCPA is that which authorized the AG to establish programs regarding the education of consumers and it is not relevant to the AG’s Complaint. W.Va. Code §46A-7-102(c). The other four references are: W.Va. Code §46A-2-128(c) (collection of attorney fees on delinquent education loans); W.Va. Code §46A-2-103 (reference to federal higher education Act); W.Va. Code §46A-2-138 (return of fees of correspondence educational course); and W.Va. Code §46A-6-102 (definition of “services”).

The AG also takes the term “recreation” in the CCPA and gives it a very broad meaning. Without authority, the AG simply states that recreation means camps. On the contrary, the plain meaning of the word “recreation” is not that broad. According to Webster’s Online Dictionary, “Recreation” means “refreshment of strength and spirits after work *also* : a means of refreshment or diversion : HOBBY.” Nothing in the definition indicates that religious based summer camps fall under the definition of recreation. The AG’s unsupported statement that recreation means religious summer camps is simply further proof that the AG must stretch the CCPA beyond its intended boundaries to pursue this lawsuit against the Church.

The AG tortures the law and case precedents to overcome the trial court’s conclusion that that Catholic education and camps are not “services” under the CCPA. First, the AG contradicts this Court’s prior holdings and proclaims in his brief that the CCPA is not ambiguous (Petitioner’s Brief at p. 14). On the contrary, this Court has stated on many occasions that W.Va. Code § 46A-6-104 is among the most broadly drawn provisions of the CCPA, is ambiguous, and must be construed before it can be applied. *Copper Beech*, 239 W.Va. at 751, 806 S.E.2d at 182. Second, the AG must necessarily eliminate or misconstrue the terms “privileges with respect to” qualifier contained in the definition of services to support his position. Third, he must ask this Court to ignore the substantive laws of this State governing primary and secondary education and the specific delegation of the oversight of the safety of such schools to the State Superintendent of Schools.

Similarly, the AG misconstrues this Court’s holding in *Mountain State Coll. v. Holsinger*, 230 W. Va. 678, 742 S.E.2d 94 (2013) by asserting that this Court “recognized that education is a service under the CCPA”. Petitioner’s Brief, p. 16. This Court did no such thing. The issue was not whether the paralegal education course constituted “services” under Article 6 of the

CCPA; rather, the issue was whether the enrollment agreement between the individual student plaintiffs and the college constituted a consumer credit sale under Article 2 – the Court held that it did not inasmuch as Mountain State did not provide credit to the students, a third party student loan provider did. Nowhere in *Mountain State* does this Court state that education falls under the definition of “services” under the CCPA. *Mountain State* also dealt with a for-profit institution in higher education, not primary and secondary education. The Circuit Court recognized the specific ruling in that case in its Order.

The AG makes several arguments that require this Court to ignore words that the Legislature placed in the CCPA. For instance, the AG tries to persuade this Court to ignore the phrase “privileges with respect to” in the CCPA that modifies terms such as education and recreation. A review of the statute is instructive. In subsection (a) of W.Va. Code § 46A-1-102(7), the Legislature did not use the modifier “privileges with respect to” when it identified “work, labor and other personal services”. However, it did use the modifier in subsection (b) with respect to education and recreation. It must be assumed that the Legislature had a purpose when it used the modifier in subsection (b) but not in subsection (a). Clearly, it is meant to limit the scope of its application.

The AG’s interpretation of subsection (b) simply leaves out the modifier “privileges with respect to” and concludes that all educational and recreational services fall under his power to regulate. The AG seeks an interpretation that gives him unfettered jurisdiction over all aspects of all businesses and organizations that conduct advertising.

The AG incorrectly argues that the trial court limited section (b) to “creditor’s rights to defer payment on a debt or to have a claim paid before a debtor’s other creditors receive payment” and surmises that it is too narrow of a reading of the statute. J.A.295. However, a

review of the trial court's order reveals that the trial court did no such thing. Rather, the trial court cited the Black's Law Dictionary referred to by the Diocese, in contrast to the definition championed by the AG, - "[a] special right, exemption, or immunity granted to a person or class of persons." The trial court also cited an additional Black's Law definition of "privilege" used in civil law as "a creditor's right to priority over a debtor's other creditors."

Importantly, the CCPA provides guidance on its intended meaning in its own definitional sections in Article 1, as the Circuit Court correctly noted. The statute defines the term "credit" in W.Va. Code 46A-6-102(47) to mean a **privilege** granted by a debtor to defer payment of debt or to incur debt and defer its payment. Thus, only matters of credit or deferred payment in connection with educational services and the other services listed are encompassed by the term and, therefore, governed under the Act. The qualifier limits such scope to transactional claims and not substantive services.

After reviewing the definitions and the parties' arguments, the trial court declined to adopt one of the definitions, while stating that it finds the Church's position more persuasive – that "privileges with respect to" connotes that the term applies to creditors and credit. The trial court did not adopt a narrow, restrictive meaning as argued by the AG.

Next, the AG argues that the trial court's interpretation is illogical because hotel and restaurant accommodations, and recreation are not financed by debt. This is simply not true. Common sense and experience reveal the pervasive use of credit cards, contracts, installment payments and the like in the payment of such services as well as the other enumerated services in the statute.

Again, when arguing its definition of "services" the AG ignores words in the definition. The AG urges the court to adopt a definition of "privilege" to mean "privilege with respect to

... education to receive the educational services a customer pays for.” Pet. Br. at 15. Even if accepted, this definition does not apply to the AG’s claims because the Amended Complaint contains no allegations that the Church failed to provide students *educational* services that they paid for. The AG dedicates a significant portion of his brief trying to eliminate the word “privileges” from the statute.

Next, the AG references other sections of the CCPA to allege that all education is covered under the CCPA. The AG relies on: Section 46A-2-138 which discusses application to correspondence courses and directs the State Board of Education to promulgate rules for refund of tuition fees and cancellation of contracts; Section 46A-2-128 which enables the collection of delinquent higher education loans; and Section 46A-2-128(c) which contains limited exceptions to collection of delinquent higher education loans. The AG argues that these sections mean that the CCPA applies to all schools. The AG also fails to see that they deal with transaction issues in sales and credit, not substantive services.

The cited sections actually disprove the AG’s argument in two ways. First, it shows that if the Legislature wanted to grant the AG power over education, it does so by specific and narrowly tailored statutory language. Second, the Sections are all transactional issues in sales and credit and not substantive services. The Legislature instead uses Chapter 18 to regulate primary and secondary education. Applied literally, the AG’s expansive interpretation would permit the AG to use the terms “work, labor and other personal services” to control the communications of all businesses. The vagueness unleashed by the AG’s broad interpretation of the CCPA is limitless.

The FTC cases cited by the AG do not support his argument. Rather, the cases are not applied in context to a Church, or non-profit corporations. Instead the cases deal with the quality

of the product itself or the terms of the transaction giving rise to the sale.¹² The AG has not cited one case where any State or the FTC applied consumer protection law against primary and secondary education entities, let alone Church schools. Rather, the cases involve colleges and trade schools as well as non-educational services. The AG's cases simply do not support his overly broad claims.

Likewise, the *Alsides v. Brown Institute, Ltd.*, 592 N.W.2d 468 (Minn. 1999) and *Malone v. Academy of Court Reporting*, 582 N.E.2d 54 (Ohio 1990) cases relied upon by the AG are distinguishable. *Alsides* involved claims by computer science students enrolled in a post-secondary education, for-profit school, that the school failed to deliver on specific educational services. *Malone* involved claims by paralegal students in a post-secondary education, for-profit school, that the school failed to deliver on specific educational services and promises of well-paid employment after graduation.

Both cases involved direct advertisements and contractual promises made to students about educational services, as the trial court noted, clearly measurable external issues. Neither case involved primary and secondary education (which has a comprehensive statutory scheme of its own). Here, the AG's claim involves the safe environment policies of the Diocese and its disclosures of such policies. The language involved church policy and procedure adopted from the United States Conference of Catholic Bishop's Charter.

¹² The AG cites the unpublished federal district court opinion *FTC v. Cancer Fund of America*, No. 2:15-cv-00884-NVW (D. Ariz. Mar. 29, 2016) for the proposition that the FTC applies to non-profit organizations. However, application to non-profits does not appear to be an issue in the case; rather, the case was settled on false and misleading claims in charitable solicitations in violation of Section 5 of the FTC Act. Moreover, the Unfair Competition and False Advertising sections of the FTC both apply to "Corporations" and use the same FTC definition of "Corporations" "... to include any company ... organized to carry on business for its own profit or that of its members...." 15 U.S.C.A. § 44.

Moreover, the AG's claims of failure to complete background checks is of a different kind and character from the educational services promises in *Alsides* and *Malone*. As the trial court noted, the failure to provide certain promised educational services is such that it can be "... objectively determined and injunctive relief can precisely and objectively be formulated and enforced." J.A. 307. It is easy to determine if the school is accredited as claimed, if its instructors are qualified, if the instruction provided is satisfactory, and whether students are finding employment. On the contrary, as established herein, the determination by the AG as to whether background checks are sufficient under the Diocese's own policy, and the standard for the Diocese to advertise the past deeds of bad actors, is subjective.

This is most evident by the fact that the AG could not articulate at the hearing what conduct is a violation of the CCPA and the appropriate penalty. We still don't know the standard to disclose past bad acts in advertisements that a business or organization must meet or the appropriate penalty. We still do not know if two instances of failing to conduct background checks out of over 19,000 constitutes false and deceptive advertising. We still do not know what constitutes advertising under the CCPA. Is it language on a website? Is it language in the weekly church bulletin? Is it the language in the Catholic Spirit newspaper sent to all parishioners? Is it language in the letters to parents of students?

B. The AG's Theory of Liability Is Overbroad and Not Supported by Education Law.

In Petitioner's Brief, the AG argues that the CCPA does not exempt the Diocese from his creative, aggressive theory of liability. The AG is dead wrong for two reasons. First, the AG's theory does not just include the Diocese - it includes *all* businesses and organizations in his claims because it is overbroad and not workable. The CCPA has never been applied this way in its 45 year history and no other State has applied such a theory. Second, Church schools are

exempt from the AG's theory by W.Va. Code § 18-28-6 which exempts Church schools from all other educational laws except fire, safety, sanitation and immunization. The CCPA fails to overcome this statutory exemption.

First, West Virginia Code § 18-28-6 precludes application of the CCPA to religious schools; therefore, the fact that the CCPA does not exempt religious schools is irrelevant. The AG's argument simply turns the proper analysis on its head. The Legislature has made it unequivocally clear that the Church and Catholic schools are not subject to laws relating to education except laws respecting fire, safety, sanitation and immunization:

No private, parochial or church school or school operated by any other religious group or body as part of its religious ministry or other nonpublic school which complies with the requirements of this article shall be subject to **any other provision of law relating to education except requirements of law respecting fire, safety, sanitation and immunization.**

W.Va. Code Ann. §18-28-6 (Emphasis added).

The AG claims that his authority over Catholic schools is under the term "education" contained in the CCPA. However, the above Code section clearly exempts Catholic schools from "any other provision of law relating to education except requirements of law respecting fire, safety, sanitation and immunization." The CCPA provision relied upon by the AG is in respect to misleading advertising dealing with the Church's own policy, in the administration of its schools. Thus, the CCPA does not apply to Church schools in this context and the only conclusion is that the Legislature did not intend to also regulate Church schools via the CCPA.

Second, the Legislature has enacted comprehensive code sections governing education in the State of West Virginia, for both public and non-public schools, including school safety.¹³ As

¹³ In fact, in the Legislature set forth an education blueprint for 2020 requiring: (5) *School environments that promote safe, healthy and responsible behavior and provide an integrated system of student support services.* –Each school should create an environment focused on student learning and one where students know they are valued, respected and **safe**. Furthermore, the school should incorporate programs and processes that instill healthy, **safe** and

stated, W.Va. Code § 46A-6-104 is among the most broadly drawn provisions of the CCPA, is ambiguous, and must be construed before it can be applied. *Copper Beech*, 239 W.Va. at 751, 806 S.E.2d at 182. The fact that W.Va. Code §§46A-6-104 does not include any *explicit* direction stating that the deceptive practices provisions apply to school safety issues leads to the conclusion that the act does not apply to Catholic school safety.

Under the comprehensive code sections, the State Superintendent of schools is delegated with the authority to supervise the free schools - “public schools” of the State of West Virginia, and under certain circumstances, the private, parochial or church schools or schools of a religious order. W.Va. Code §18-3-1 *et. seq.* The State Superintendent of schools is directed to exercise such other powers and discharge such other duties assigned to him, or as may from time to time be assigned to him by the Legislature and the State Board of Education. W.Va. Code §18-3-10.

In addition to granting certain powers to the State Superintendent, the Legislature created Article 28 of Section 18 of the West Virginia Code to specifically govern and regulate private, parochial or church schools, or schools of a religious order. Specifically, the Legislature set forth the following policy supporting non-public education:

In conformity with the constitutions of the United States and of West Virginia, it is the public policy of the State in matters of education that no human authority shall, in any case whatever, control or interfere with the rights of conscience or with religious liberty and that no person shall be enforced, restrained, molested or burdened, in body or goods, or otherwise suffer, on account of his or her religious opinions or belief, but all people shall be free to profess, and by argument, to maintain their opinions in matters of religion; and further be free to select their religious instructor, and to make for his or her support, such private contract as they shall please, and that religion, morality and knowledge being necessary to good government and the happiness of humankind, the means of education shall forever be encouraged. W.Va. Code §18-28-1.

responsible behaviors and prepare students for interactions with individuals of diverse racial, ethnic and social backgrounds. School and district processes should include a focus on developing ethical and responsible character, personal dispositions that promote personal wellness through planned daily physical activity and healthy eating habits consistent with high nutritional guidelines and multicultural experiences that develop an appreciation of and respect for diversity. W.Va. Code Ann. §18-1-4 (Emphasis added).

While recognizing the public policy in favor of the creation of non-public schools, the Legislature also put into place a mechanism to monitor the “*health and safety*” of those students. In pertinent part, the following statutory requirements are applicable to private, parochial or church schools or schools of a religious order:

- (a) Each school shall observe a minimum instructional term of one hundred eighty days with an average of five hours of instruction per day;
- (b) Each school shall make and maintain annual attendance and disease immunization records for each pupil enrolled and regularly attending classes. The attendance records shall be made available to the parents or legal guardians;
- (c) Upon the request of the county superintendent, a school (or a parent’s organization composed of the parents or guardians of children enrolled in the school) shall furnish to the county board a list of the names and addresses of all children enrolled in the school between the ages of seven and sixteen years;
- (d) Attendance by a child at any school which complies with this article satisfies the requirements of compulsory school attendance;
- (e) **Each school is subject to reasonable fire, health and safety inspections by state, county and municipal authorities as required by law, and is required to comply with the West Virginia school bus safety regulations; and**
- (f) **Each school shall establish, file and update a school specific crisis response plan which complies with the requirements established for it by the state board and the Division of Homeland Security and Emergency Management pursuant to section nine, article nine-f of this chapter.**¹⁴

W.Va. Code Ann. §18-28-2 (Emphasis added). As set forth above, the Diocese and Catholic schools are mandated to comply with state law concerning the health, safety, and welfare of its students, but no other law with respect to education. The State Superintendent of Schools is

¹⁴ In addition to the above statute, the Legislature delegated to the West Virginia Division of Homeland Security and Emergency Management and the State Board of Education to prepare specific crisis response plans for all schools, including non-public schools. Private, parochial and religious schools are required to establish, file and update school specific crisis response plans, that include sexual abuse and harassment incidents. See W.Va. Code, §18-9F-9. Consistent with the crisis response requirements, the Governor of the State of West Virginia has established a “West Virginia Safe Schools Helpline” promoting a safe environment and sexual harassment reporting directions. The DIOCESE complies with this provision as directed by the Division of Homeland Security.

given specific jurisdiction by statute to address school safety, not the AG under an ambiguous provision of the CCPA.

C. Court Precedents Clearly Support the Limitations on the AG's Expansive Use of a Consumer Credit Protection Act.

As the trial court noted, the decision in *Copper Beech*, *supra*, provides insight as well as a method for properly construing ambiguous statutes, and specifically, the one at issue in this case.

That case involved a similar attempt by the AG to bring an action for “unfair and deceptive acts”, against a landlord under Article 6 of the CCPA seeking similar relief to that sought in this case. In that case, this Court addressed the relationship between a landlord and tenant, not dissimilar to this case, involving the relationship between the Church and students and parents participating in Catholic Schools and religious camps. Citing Professor Cardi’s overview of the CCPA and its intended purposes, this Court refused to extend the Act to the landlord-tenant relationship.

There, as here, this Court concluded that the Legislature had enacted extensive, detailed statutory law regulating the landlord-tenant relationship and concluded as follows:

Because the landlord-tenant relationship is so pervasively regulated in these numerous statutory sections outside of the scope of the CCPA, we are compelled to conclude that the legislature did not intend to further regulate the landlord-tenant relationship in an ambiguous provision of our CCPA. Instead, it is clear that when the legislature intends to address the relationship between a landlord and tenant in a particular statute, it does so explicitly.

Many of the same reasons which this Court found compelling in *Copper Beech* are also present in this case. Primary and secondary education are specifically regulated by extensive statutory provisions. It is clear from the origin, history and purposes of the CCPA, that it was not intended to govern primary and secondary education and, in particular, the substantive

policies of such schools. Had the Legislature intended the statute to apply to the substantive policies of schools, it would have done so explicitly, as it did with student loans, correspondence courses and refunds of fees related thereto in Article 2 of CCPA, noted above.

In addition to this case, this Court has the added complexity of Church-State entanglement, as the very policy at the crux of the AG's claims is a church policy which the Court would necessarily have to construe. And importantly, the policy deals with a substantive matter of school administration statutorily governed under more specific legislative enactments. Nothing in this case deals with "privileges" with respect to education or recreation as no specific transaction is involved in this case, no consumer contract, no violation of law, no credit issue, no payment practices, no complaints, no fraudulent charges or fees, just an evaluation of the Church's own internal policies and its adherence to them.

Similarly, in *State ex rel. McGraw v. Bear, Stearns & Co.*, 217 W. Va. 573, 618 S.E.2d 582 (2005), the AG used the "unfair and deceptive" acts provisions of the CCPA to attack the general services provided by an investment banking company. The AG alleged that the defendants' "investment banking components manipulated their supposedly independent research analysts into issuing false forecasts to promote debt and equity securities issued by companies with which the defendants' had undisclosed investment banking relationships in order to reap huge profits at the expense of an uninformed public." *Id.*, 217 W. Va. at 575, 618 S.E.2d at 584. The AG did not file suit regarding specific transactions; rather, it filed suit regarding the substantive services provided.

In that case the AG acknowledged that the CCPA did not apply to the buying and selling of securities, while claiming that it did apply to fraudulent and deceptive practices in providing investment advice. *Id.*, 217 W. Va. at 576, 618 S.E.2d at 585. In holding that the CCPA was

“... not intended to apply to conduct that is ancillary to the buying and selling of securities”, this Court noted two primary things: (1) the intent of the Legislature was to protect consumers in the relatively common cash and credit transactions in which they engage on a regular basis; and (2) the fact that the securities industry is so pervasively regulated by the federal government makes it doubtful that the Legislature intended to give securities investors an added measure of protection above that already provided by the various federal acts and the State securities act, and even more doubtful that the Legislature intended to do so in an ambiguous provision of the consumer protection act. *Id.*, 217 W. Va. at 578–79, 618 S.E.2d at 587–88. The same concerns apply to this case. The allegations of the AG against church schools and camps are not related to common cash or credit transactions undertaken by the general public, but in fact policies that are ancillary to educational services and religious camp services.

D. The AG’s Theory of Liability Is Overbroad, Unworkable and Necessarily Unconstitutional.

The AG is still unable to articulate when or how the theory of liability will be applied. The AG simply promises to decide which businesses and organizations have run afoul of an unknown, undocumented misleading advertising standard and file suit. After suit is filed, the AG will determine the appropriate sanction.

Under the AG’s theory, the Church, and every other business, organization, etc. that advertises, must disclose in every advertisement all past bad behavior that may be deemed material to the AG as the AG holds the sole power to bring the full force and weight of the government against those whom the AG deems are in violation. J.A. 251-253. This duty exists whether or not the advertisement touches on the subject of the past bad behavior or how long ago the past bad behavior occurred, even if it was in excess of 40 years ago. J.A. 064-074. The AG will tell the alleged violators when their penance is completed and they are no longer required to

disclose ancient conduct in all advertisements. The AG will approve the language of all advertisements. Neither the Church, nor its counsel, is aware of any instance where such a standard has been applied nor have they found any business or organization that discloses bad behavior in any of its advertisements or that gives the AG such sweeping powers. Neither the Church, nor its counsel, is aware of any documented standard that places businesses, organizations, etc. on notice as to what conduct must be disclosed in each and every advertisement. The AG admits that the CCPA contains no such language. J.A. 251. Apparently, the AG is the only one aware of this standard and will not notify the public of what it is, unless and until, the AG files suit. J.A. 253-254 & 257-259. The public will learn the standard after the AG serves its complaint. As the AG proclaimed, the standard varies on a case by case basis. J.A. 258. Obviously, the AG is holding the Church to an unknown, undocumented standard that has never been applied to anyone, at any time before.

In his Brief, the AG did not meaningfully address the trial court's excessive entanglement analysis; rather, it narrowed its Constitutional analysis to the ministerial exception. The AG, without legal authority, asserts that the Church's Constitutional rights should be ignored when analyzing the application of the CCPA to the Church and only considered in analyzing Certified Question Number 2. Pet. Br. at 12. Incredibly, the AG is asserting that the application of the CCPA should be viewed without Constitutional scrutiny but fails to articulate how the CCPA is such a special statutory scheme that the Constitution does not apply to it. As established herein, the AG's claim if applied to secular businesses and organizations is sweepingly broad. Inasmuch as the AG would necessarily entangle himself in all advertisements and communications with customers – in regard to religious entities, it is untenable.

The trial court astutely recognized that the AG intended “... *continuous monitoring and supervision of Diocese communications, including policy statements and procedures, for an indefinite time* which will result in the State’s continuing involvement in the relationship between the Diocese (Church) and its prospective students and their families.” J.A. 293. (Italic emphasis in original). The AG would also have the authority to determine what constitutes a sufficient background check and monitor and decide whether the Diocese’s Safe Environment Program meets with the AG’s approval. J.A. 293. Finally, the AG will have authority to determine when the Diocese has sufficiently executed its safe environment program so that the AG may relieve the Diocese of its State imposed duty to disclose the decades old sexual abuse violations in its communications with its parishioners. J.A. 293. If the Diocese objects to any of the State’s aforementioned mandates or decisions, the Diocese will be subjected to judicial review (from another State agency) as to whether it is sufficiently complying. J.A. 293. Indeed, the excessive church-state entanglement is palpable as the Diocese’s communications with parishioners would be subjected to indefinite State control with endless judicial review.

II. THE AG’S UNLAWFUL EXTENSION OF THE CCPA VIOLATES THE DIOCESE’S PROTECTED FIRST AMENDMENT RIGHTS.

The trial court correctly understood that the First Amendment protects against any review of the internal affairs of a church if the inevitable result is excessive entanglement with that church. J.A. 290 (citing *Catholic Bishop of Chicago v. NLRB*, 559 F.2d 1112 (7th Cir. 1977) (aff’d on statutory grounds, 440 U.S. 490 (1979); *Surinach v. Pesquero De Busquets*, 604 F.2d 73 (1979); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1979)). Settled constitutional law likewise recognizes that religious schools are integral to the advancement of the religious ministry of the sponsoring church. *See, e.g., Catholic Bishop of Chicago*, 440 U.S. at 503; *Lemon*, 403 U.S. at 628; *Janasiewicz v. Bd. of*

Educ. of Kanawha Cty., 299 S.E.2d 34, 37–38 (W.V. 1982). For these reasons, to protect the relationship between a religious school and the sponsoring church, the government lacks authority to police the internal affairs of Catholic Schools beyond very basic considerations. This Court has likewise confirmed that the “power of the civil courts to interfere with the internal operations of churches is severely limited by the First Amendment to the Constitution of the United States as applied to the states by the Fourteenth Amendment, and by W.Va. Const., art. III, §15.” *Bd. of Church Extension v. Eads*, 230 S.E.2d 911, 914 (W.V. 1976).

To avoid the obvious unconstitutional impact of extending jurisdiction of the National Labor Relations Act (and the federal NLRB) to Catholic Schools, the Supreme Court construed the Act narrowly, stating that Congress did not intend such jurisdiction (because it could violate the church’s rights under the First Amendment). *Catholic Bishop of Chicago*, 440 U.S. at 507 (because there was “no clear expression of Congress’ intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.”). Similarly, respecting the Legislature’s line-drawing, this Court must be mindful to be vigilant of “excessive government direction of church schools and hence of churches . . . ultimately intrud[ing] on religion and thus conflict[ing] with the Religion Clauses” (emphasis and citations omitted). *Catholic Bishop of Chicago v. NLRB*, 559 F.2d at 1126. “[P]arochial schools involve substantial religious activity and purpose. The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid. . . . [T]he admitted and obvious fact that the *raison d’être* of parochial schools is the propagation of a religious faith.” 440 U.S., at 503 (citing *Lemon*, 403 U.S. at 628).

Here, as described above, the Legislature has already circumscribed the State's legal authority under both the CCPA and the statutes regulating education and schools. The AG urges this Court to overlook the Legislature's judgment and both state and federal constitutional limitations. The AG invited the trial court below to sustain invasive scrutiny of the entirety of the Diocese's safe environment program, the adequacy of its detailed program to select and train employees and staff, parents, and children. He would scrutinize and, if he decides to do so, set aside eighteen years of preventive efforts and revisit fifteen years of favorable compliance audits to provide for unrestricted oversight. Accordingly, and as explained more fully below, the trial court applied the correct constitutional test and reached the correct conclusion that the "cumulative impact of the entire relationship" that would inevitably follow from the AG's proposed application of the CCPA results in "excessive entanglement between government and religion." *Lemon*, 403 U.S. at 613–14. (See also Certified Questions & Order at 10.) Accordingly, this Court should affirm.

A. The Trial Court Applied the Correct Constitutional Test and Reached the Correct Result.

In an implicit concession his Amended Complaint fosters unconstitutional entanglement and interference in the internal affairs of a Church, the AG now argues on appeal that the trial court applied the wrong law to the wrong questions. He would have this Court ignore precedential authority (*Lemon*, *Catholic Bishop of Chicago*, and *Milivojeovich*) and instead urges that either the general applicability analysis under *Employment Div., Dep't of Human Res. of Oregon v. Smith* or the "ministerial exception" analysis under *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC* are the applicable constitutional standards. (Pet. Br. at 31–35.) This is incorrect, for several reasons.

First, *Smith* concerned whether the Free Exercise Clause permits the State to prohibit the religious use of peyote and thus deny unemployment benefits to persons dismissed from their jobs because of such religiously-inspired use. 494 U.S. 872, 874 (1990). *Smith* does not apply where, as here, the otherwise neutral, generally applicable law burdens a Church's internal affairs, or arises in a program under which a state exercises individualized discretion to act (or not). *Id.* at 877 (citing *Serbian* and other cases), and 884 (discussing *Sherbert v. Verner*, 374 U.S. 398 (1963)). Those situations were not present in *Smith*, and the Court concluded that Oregon could enforce its generally applicable prohibition against ingesting peyote, even for religious reasons.

Here, by contrast, the AG's proposed extension of the ordinarily generally applicable CCPA invades the internal affairs of the Diocese and he claims the specific discretion as to what and how far the State will examine. The CCPA, therefore, under the circumstances of this litigation and as the AG attempts to apply it, is not a law generally applicable to the Diocese, but one that the AG intends to apply in detail and with rigor. *Id.* at 881; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) ("The Free Exercise Clause protects against governmental hostility which is masked, as well as overt."); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996) (recognizing that *Smith* does not apply in "hybrid" situations implicating free exercise and church autonomy concerns because "[w]e have demonstrated that the EEOC's attempt to enforce Title VII would both burden Catholic University's right of free exercise and excessively entangle the Government in religion."). Rather than support the AG, *Smith* requires the application of strict scrutiny analysis of a type that the author of *Smith*, Justice Scalia, said States could rarely survive. 494 U.S. at 888.

Second, if *Hosanna-Tabor* is applied here, it, too, supports the Diocese. *Hosanna-Tabor* held that a teacher occupied a position of ministry and thus could not maintain a claim for relief against otherwise generally applicable employment discrimination laws. 565 U.S. 171, 188–95 (2012). The unanimous Court concluded a “ministerial exception”, rooted in both Religion Clauses, protected the internal affairs of the church and its school, from administrative investigation and subsequent litigation that characterizes employment discrimination cases. Although the subjects of these two cases are different, it cannot be doubted that the robust First Amendment rule in *Hosanna-Tabor* protects the Church; it does not enable the State. This case is about whether the AG can police the Diocese’s creation of, and adherence to, its own policies, as well as how it communicates those policies to the public—a point the AG concedes in his principal brief. Pet. Br. at 33. *Hosanna-Tabor* provides clear direction for this Court on that point: “[B]y inquiring into whether the Church had followed its own procedures, the State Supreme Court had ‘unconstitutionally undertaken the resolution of quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals’ of the Church.” *Hosanna-Tabor*, 565 U.S. at 187 (quoting *Serbian*, 426 U.S. at 720).

Hence all applicable precedent supports the trial court. The trial court was correct that the “very process of inquiry” envisioned by the AG violates the First Amendment, for it is not only the result of an investigation—a prosecution or penalty—“which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.” *Catholic Bishop of Chicago*, 440 U.S. at 502. The right of churches to be free of such inquiry is well-established, and is not avoided because the investigatory process is merely administrative or regulatory, or when the subject matter is sensational. *See Corp. of Presiding*

Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 345 (1987)

(Brennan, J. concurring) (noting that the “prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity,” and therefore civil courts must refrain from analyzing the religious nature of the organization’s activities and process of self-definition).

B. The AG’s Unlawful Extension of the CCPA Results in “Excessive Entanglement” with the Diocese in Violation of the First Amendment.

Perhaps acknowledging the overreach of his proposed application of the CCPA against the Diocese, the AG now argues on appeal that he “asks only that the Diocese deal fairly when it advertises its fee-based educational and recreational services to the public.” Pet. Br. at 30. But even though he reframes his argument in a strawman fashion, the AG cannot escape that he conceded below that his actual intent is to use the power of the State—through an unlawful extension of the CCPA—to police the Diocese’s *future communications* with church members and other members of the public. J.A. 255-258. The First Amendment plainly forbids the AG from becoming entangled in the Diocese’s administration and controlling the Diocese’s speech in this fashion. *See Riley v. Nat’l Fed. of the Blind of N. Carolina*, 487 U.S. 781, 791 (1988) (“The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.” (quoting *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring))).

Indeed, the AG contemplates years of future oversight of diocesan communications. During argument below, the AG said he “imagine[s] a scenario *in the future* where the Diocese *starts* fulfilling the promises it makes under its Safe Environment Program . . . [a]nd in that case *perhaps in the future we can see these disclosures about past violations wouldn’t be necessary anymore* because it would be—because what’s happening currently would no longer give parents

and consumers reason to think that the Diocese is not living up to its promises to provide a safe environment.” J.A. 291 (emphasis added). But allegations of past deceptive advertising or fraud (however groundless) do not permit the AG (or any plaintiff) to ask the courts to regulate compliance with a Church’s internal policies or to monitor communications on a going-forward basis to determine whether they are illegal. As the trial court recognized, “the Attorney General foresees *continuous monitoring and supervision of Diocese communications, including policy statements and procedures, for an indefinite time*, which will result in the State’s continuing involvement in the relationship between the Diocese (Church) and its prospective students and their families” J.A. 293 (emphasis in original). Implicating speech as well as religious rights, the AG conceded below that he seeks to use this lawsuit to monitor future communications between the Diocese and the public premised on a set of facts that no longer exist. Moreover, the disclosures the AG seeks to compel and enforce indefinitely until, in his judgment, they are “no longer needed” will almost certainly result in mistrust of church authority. That is a classic unconstitutional prior restraint on protected speech and infringement of the Church’s rights under the First Amendment. *See, e.g., Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976) (“[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.”) It must likewise be rejected by this Court.

The Diocese stresses that it is not seeking to “evade responsibility under neutral laws of general applicability” as the AG contends. Pet. Br. at 31. If the Diocese commits a fraud or a crime, then the State has all of the tools of law enforcement at his disposal to attempt to remedy it. *See Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003) (explaining that “the First Amendment does not shield fraud.” (citation omitted)). But no specific instance of fraud or deceptive advertising is alleged here. Rather, the AG attempts to

envelop the Diocese in his extralegal reading of the CCPA based on assurances offered under the Charter that the Diocese, like all churches, strives to achieve a safe environment for all children. J.A. 074. The AG baselessly asserts that is untrue, not because of ongoing criminal activity, but because he believes the Church has not always protected children. J.A. 074. Thus, the AG claims that the website statement made *after* adoption of the Charter, which reflects the implementation of the Charter's "safe environment program", is illegal because in the past, and indeed *decades ago*, priests who had committed acts of child abuse were assigned to ministry in parishes. The AG, however, has not alleged any facts suggesting that the website statement is currently false or deceptive as it pertains to the Diocese' stated goals with respect to the current learning environment in Diocesan programs.

When the trial court asked the AG to articulate a limiting principle on this new interpretation of the CCPA, he could not provide one. For example, the trial court asked if, on every communication the Diocese sends to promote its educational programs, it has to disclose "that in the past it has employed persons credibly accused of sexual—of a sexual offense?" J.A. 290-291. The AG's position on that point is that he needs more facts—in other words, **he cannot now allege facts that constitute a violation of the CCPA.** J.A. 291. He therefore affirms that he envisions this lawsuit as one where he conducts wide-ranging fact investigation and *then* decides whether there are facts sufficient to prove a *current* CCPA violation based on conduct *occurring years or decades ago*. The AG's intention to "look first and decide later" invites this Court to sustain invasive scrutiny of the entirety of the Church's child protection efforts and the adequacy of its detailed program to select and train employees and staff, parents and children. Plainly, the investigation the AG envisions results in excessive entanglement. *See Catholic Bishop of Chicago*, 440 U.S. at 502.

The AG's reliance upon *Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731 (7th Cir. 2015) and *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006) to deflect that result is misplaced. Both cases in fact illustrate the point Diocese is making here: State regulation under generally applicable laws may be appropriate against religious entities, but only in connection with specific alleged violations occurring in the past that are supported by factual allegations concerning that alleged violation. In *Listecki*, for example, the Seventh Circuit determined that the Free Exercise clause did not bar a claim to avoid a \$55 million transfer because “[w]e do not understand the Archdiocese to be arguing the transfer of the Funds is a religious matter that this court cannot adjudicate . . . we have what was alleged to be a fraudulent or otherwise avoidable transfer, and the court need not interpret any religious law or principles to make that determination . . .” 780 F.3d at 742. *Listecki*, therefore, concerned a past transaction, not whether the Archdiocese complied with its own procedures when it made the transfer or continuous monitoring by the state to ensure that future transfers are not fraudulent. Similarly, in *Petruska*, the Third Circuit concluded the plaintiff's state law-based employment claims were not barred by the First Amendment because the factual allegations asserted did not implicate church governance. 462 F.3d at 310. *Petruska* however did not concern any evaluation of compliance with church policies or regulation of future conduct, as the AG proposes here.

Even where the inquiry is related exclusively to matters of economic interest to the State, the First Amendment protects the Church's institutions from the type of inquiry inherent in the AG's lawsuit. See, e.g., *Surinach*, 604 F.2d at 78–9 (1st Cir. 1979). In that case, the Department of Consumer Affairs initiated an inquiry into the costs of private schools in Puerto Rico pursuant to its rights “to defend and implement the rights of the consumer,” among other powers. The Catholic Schools (like other schools) were directed to produce financial information such as

budgets, sources of funding, costs, expenses, and other data related to the costs of providing educational services to the consuming public. The Catholic Schools office objected on constitutional grounds, and the State responded claiming that, “[t]he gathering of information [was] not viewed as an end in itself.” *Id.* at 75. Rather, it was part of a broader regulatory inquiry, antecedent to any actual decision on action. It was not clear that the State would ever commence a consumer protection action against any Church school. Nonetheless, the U.S. Circuit Court found that because any “end result” would have resulted in unconstitutional interference with a protected activity of the Catholic Church, the inquiry itself was banned under both Religion Clauses. *Id.* at 78–79.¹⁵

That result is not anomalous. *See, e.g., Dayner v. Archdiocese of Hartford*, 23 A.3d 1192, 1199–1200 (Conn. 2011); *United Methodist Church, Baltimore Annual Conference v. White*, 571 A.2d 790, 791–93 (D.C. 1990). Courts have repeatedly emphasized that part of the right of churches to be free of government oversight into the selection and discipline of clergy is a concomitant right to be free of discovery into those matters. *Dayner*, 23 A.3d at 1199–1200 (“the very act of litigating a dispute that is subject to [a church autonomy defense] would result in the entanglement of the civil justice system with matters of religious policy, making the discovery * * * process itself a first amendment violation”); *White*, 571 A.2d at 792–93 (“[t]he First Amendment’s Establishment Clause and Free Exercise Clause grant churches an immunity from civil discovery * * * under certain circumstances”). Where the subject matter itself is not a

¹⁵ The AG’s reliance on *Cuesnongle v. Ramos*, 835 F.2d 1486 (1st Cir. 1987) is similarly misplaced. That the First Circuit concluded that a potentially viable breach of contract claim and specific claim for a refund of \$217 as a result did not constitute an excessive entanglement because it did not entail pervasive, forward-looking regulation. Distinguishing *Surinach*, *Ramos* explained that “[w]e ruled there that such disclosure of ‘extremely detailed information about the expenditure of funds of these Catholic schools,’ had the potential for substantially infringing the schools’ free exercise rights, because it constituted an impermissible entanglement under the teachings of [*Lemon and Walz v. Tax Comm’n*, 397 U.S. 664 (1970)] . . . adjudication over the contract claims without more is insufficient to establish a First Amendment violation” 835 F.2d at 1502 (quoting *Surinach*, 604 F.2d at 78). *Ramos* therefore did not abrogate *Surinach*, as the AG contends (Pet. Br. at 37), but rather distinguishes it on narrow grounds that could not apply here based on the AG’s proposed application of the CCPA.

proper subject for State oversight, the State must not be allowed inquiry even into the records or other materials surrounding the protected act.

Thus, as the trial court recognized, and as explained above, this case is no different from *Catholic Bishop* and *Surinach*. Here, the AG is attempting—for the first time and without express Legislative authority—to regulate on an ongoing basis the Diocese’s current and future child protection policies and compliance efforts (1) through a radical extension of the CCPA and (2) in the absence of any present evidence that the Diocese is engaged in any practice subject to the CCPA or in violation of any person’s rights assured under the CCPA. The essence of the claimed extension of regulatory authority is that because (it is alleged) a handful of persons associated with schools in decades past had committed misconduct, not only are the religious schools presently unsafe but that ongoing regulatory authority is required for the future. Not only does this portend extensive present and future unconstitutional entanglement, but the very persistence of this litigation could act as a wedge between Catholic parents and the schools, parishes and Diocese, by inviting them to distrust Church leaders and abandon Catholic schools which are integral to faith formation in young people. As such, the exercise of illegal authority would poison the Diocese’s associational rights by State supervision of the relationship between the Church and its members.

Given the magnitude of the constitutional concerns involved, and the absence of the intent of the Legislature to include religious schools under the purview of the CCPA, the AG could not overcome his burden “to show that implementation of a regulatory scheme will not ultimately infringe upon and entangle it in the affairs of a religion to an extent which the Constitution will not countenance.” *Surinach*, 602 F.2d at 76. The AG’s desire to direct and oversee the Diocese’s implementation of its safe environment program would be prohibited even

if he had the actual statutory authority to act. *Lemon*, 403 U.S. at 615 (“In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.”) For all these reasons, this Court should accordingly affirm the judgment below.

CONCLUSION

For the reasons stated herein the trial court’s November 6, 2019 Order dismissing this action should be affirmed.

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