

No. 18-1195

In The
Supreme Court of the United States

KENDRA ESPINOZA, *ET AL.*,
Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari
to the Montana Supreme Court

**AMICUS CURIAE BRIEF OF
THE HONORABLE SCOTT WALKER
IN SUPPORT OF THE PETITIONERS**

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TABLE OF CONTENTS

Table of Contents i

Table of Cited Authorities iii

Interest of Amicus 1

Summary of Argument 2

Argument..... 3

I. Wisconsin Created the Milwaukee Parental Choice Program Because the Milwaukee Public School System Was Failing Its Students 3

II. The MPCP Has Worked Extremely Well 6

A. The MPCP is used by a predominately minority population 7

B. The MPCP has increased academic achievement 8

C. Students attending private schools in the MPCP are less likely to be exposed to or engage in crime 17

III. The Typical Criticisms of School Choice Are Misplaced 18

A.	Private schools in the MPCP are accountable for performance	19
B.	Private schools in the MPCP educate students with disabilities	22
C.	The MPCP has not contributed to racially segregated schools	24
D.	Private schools in the MPCP do more with less funding than public schools and have not adversely affected the funding for public schools.....	25
IV.	Amicus' Expansion of School Choice	28
	Conclusion	30

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INTEREST OF AMICUS

Amicus Scott Walker¹ was the 45th Governor of the State of Wisconsin and is a strong supporter of school choice. As governor from 2011-2018, Amicus signed into law a number of laws to expand school choice in Wisconsin, including the creation of the Racine Parental Choice Program and Wisconsin Parental Choice Program, which allow low-income children in Racine and across the State, respectively, to access a school voucher to attend a private school of their choosing. He also passed a Special Needs Scholarship Program to give a similar benefit to children with disabilities.

All told, during his time as governor, he oversaw dramatic, if not unprecedented, growth in school vouchers from 20,996 students in 102 private schools in 2011 to 40,073 students in 284 private schools in 2018.²

¹ As required by Supreme Court rule 37.6, Amicus states as follows. No counsel for a party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus or its counsel made such a monetary contribution. Counsel of record received timely notice of intent to file this brief under Supreme Court rule 37.2 and consent has been given by all parties for this brief.

² Ola Lisowski, The John K. MacIver Institute for Public Policy, *Our Wisconsin: Education Scorecard* (Feb. 25, 2019), http://s17596.pcdn.co/wp-content/uploads/2019/02/Our-Wisconsin_-Education2.pdf.

Amicus has an interest in advocating for the successes of school choice in Milwaukee, the oldest and one of the largest voucher programs in the country, and encouraging other states, such as Montana, to adopt a similar program.

SUMMARY OF ARGUMENT

The decision of the Montana Supreme Court and decisions like it imperil state programs intended to increase the educational options available to children and their parents. The certiorari petition explains some of the harms that occur when these programs are invalidated, Pet. 33-36, but this brief aims to further highlight the critical importance of the issues raised in this case by explaining exactly what is at stake.

Wisconsin has the oldest and one of the largest school voucher programs in the country. The research on school choice in Milwaukee establishes that empowering parents to make decisions about their children's education leads to positive outcomes for students. This brief outlines the substantial benefits provided by school choice programs like those in Wisconsin – benefits that could be lost in areas across the country if the Court declines to accept review and provide clarity on the constitutional status of choice programs.

ARGUMENT

I. Wisconsin Created the Milwaukee Parental Choice Program Because the Milwaukee Public School System Was Failing Its Students

In 1989 Wisconsin faced a problem. Some of its public schools, especially the public schools in the City of Milwaukee, were failing. Fewer than 60% of freshman in the Milwaukee Public Schools (“MPS”) went on to graduate from high school.³ The grade point average of MPS students taken as a whole was D+.⁴ One source summarized the situation in Milwaukee like this:

Students of MPS, in general, score below the national average on the basic skills tests, and minority students score dramatically below the average. The grade point average on a scale of 4.0 for MPS students in general is 1.60, whereas the GPA for African-American students in the MPS is just 1.31. The educational problems that the nation is experiencing are also evident in the Milwaukee Public Schools, where 55-60

³ Marge Pitrof, *Milwaukee Voucher Program Turns 25: The History*, WUWM (Nov. 17, 2014), <http://wuwm.com/post/milwaukee-voucher-program-turns-25-history#stream/0>.

⁴ *Id.*

percent of MPS students do not graduate from high school or do not graduate in a six-year period of time . . . Th[e] completion rate is down from 57 percent in 1984. Of those who do graduate from high school, 36 percent graduate with a "D" average.⁵

Parents and teachers expressed widespread dissatisfaction with the quality of education available in Milwaukee schools. A majority of MPS teachers even said they would not send their children to their own schools.⁶ The status quo in public education was not working in Milwaukee.

The Wisconsin Legislature changed the landscape by empowering parents to choose a better school for their children through a school voucher program. It enacted a program that provided for school vouchers in Milwaukee, now known as the Milwaukee Parental Choice Program ("MPCP"). This was the first school voucher program in the country

⁵ Kristen K. Waggoner, *The Milwaukee Parental Choice Program: The First Voucher System to Include Religious Schools*, 7 Regent U. L. Rev. 165, 169-70 (1996) (quoting Howard L. Fuller and Sammis B. White, Wis. Pol'y Res. Inst., *Expanded School Choice in Milwaukee: A Profile of Eligible Students and Schools*, Vol 8, No. 5, at 3 (July 1995)).

⁶ James Kenneth Nelsen, *From No Choice to Forced Choice to School Choice: A History of Educational Options in Milwaukee Public Schools*, Theses and Dissertations 325 (August 2012), available at <http://dc.uwm.edu/cgi/viewcontent.cgi?article=1015&context=etd>.

that allowed eligible children to use a state-funded voucher to attend a private school of their choosing.⁷

The program withstood two constitutional challenges by opponents of school choice. In *Davis v. Grover*, 166 Wis. 2d 501, 480 N.W.2d 460 (1992) the Wisconsin Supreme Court held that the School Choice Program was not a private or local bill, did not violate the uniformity clause in the Wisconsin Constitution, and did not violate the public purpose doctrine. After the program was expanded to allow parents to use vouchers at sectarian schools, the Wisconsin Supreme Court held that the School Choice Program did not violate the Establishment Clause of the First Amendment, or the Equal Protection Clause of the Fourteenth Amendment, or the Wisconsin Constitution's Establishment Clause (Wisconsin's Blaine Amendment) or Wisconsin's Compelled Support Clause ("nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry without consent"). *Jackson v. Benson*, 218 Wis. 2d 835, 906, 578 N.W.2d 602 (1998). In *Jackson*, the Wisconsin Supreme Court also again concluded that the program (as it had been amended after the *Davis* case) was not a private or local bill, did not violate

⁷ EdChoice, *SCHOOL CHOICE: Wisconsin – Milwaukee Parental Choice Program*, <http://www.edchoice.org/school-choice/programs/wisconsin-milwaukee-parental-choice-program/> (last visited April 10, 2019).

the uniformity clause, and did not violate the public purpose doctrine.

As the oldest voucher program in the country, Milwaukee's program has been extensively studied by academic and policy experts. Their research shows that the MPCP has resulted in better educational outcomes for students, saved money for the State, and led to additional public benefits, including lower rates of criminal activity for participating schools and students. In short, the research shows that school choice not only provides an excellent alternative to the traditional public school system that locks some students into low-performing schools, it also improves K-12 education overall in Milwaukee.

II. The MPCP Has Worked Extremely Well

The Wisconsin legislature first enacted the MPCP in 1989. *See* 1989 Wis. Act 336. The program has been very popular with dramatic growth in recent years. From 2005 to 2018, enrollment in the MPCP grew from 15,435 to 28,067, which is a growth rate of 81.84%.⁸ In contrast, from 2005 to 2018, enrollment at Milwaukee Public Schools decreased by 18.3% from 92,395 to 75,431.⁹

⁸ *Id.*

⁹ WISEdash, *Wisconsin Information System for Education Data Dashboard*, <http://wisedash.dpi.wi.gov/Dashboard/portalHome.jsp> (last visited April 9, 2019).

As this section establishes, there are a number of reasons on why parents would want to use the MPCP for their children.

A. The MPCP is used by a predominately minority population

For the 2016-17 school year there were 27,102 children enrolled in the MPCP.¹⁰ Of those, 44% (approx. 11,743) were African American, 28% were Hispanic, (approx. 7,473) and 3% (approx. 801) were Asian.¹¹ There is an income limit currently set at 300% above the poverty line, which for a family of four is \$73,401.¹² That means that 69% of families with children are eligible to participate in the MPCP based on their income districtwide.¹³ The students currently in the MPCP attend 133 different schools.¹⁴

¹⁰ Wisconsin Department of Public Instruction, *MPCP Facts and Figures for 2016-2017*, https://dpi.wi.gov/sites/default/files/imce/sms/Choice/Data_and_Reports/2016-17/2016-17_MPCP_Facts_and_Figures_2016-17.pdf (last visited April 10, 2019).

¹¹ Wisconsin Department of Public Instruction, *2016-2017 Accountability Report Cards*, <https://apps2.dpi.wi.gov/reportcards/> (last visited April 10, 2019).

¹² Wisconsin Department of Public Instruction, *2016-17 Income Limits for New Students*, dpi.wi.gov/sites/default/files/imce/sms/pdf/Income%20Limits%20MPCP%20RPCP%202016-17.pdf (last visited April 9, 2019).

¹³ EdChoice, *supra* note 7.

¹⁴ School Choice Wisconsin, *Number of Schools Surges Again for Parental Choice Programs* (February 1, 2019), <https://schoolchoicewi.org/2019/02/01/number-of-schools-surges-again-for-parental-choice-programs/>.

The families that use the MPCP are mostly those whose children did not do well in traditional public schools. Given that MPS' failure to provide adequate opportunities for Milwaukee's minority students was among the main reasons for the implementation of the MPCP,¹⁵ school choice has unquestionably improved educational opportunities for an underserved population.

B. The MPCP has increased academic achievement

That improvement has been well-documented by researchers. Nationwide, there have been 18 “gold-standard” academic studies regarding the impact of school voucher programs.¹⁶ Of those studies, 13 concluded that school vouchers lead to higher academic outcomes.¹⁷

“Gold standard” studies are given that name because they use the highest standards for academic research. They rely on randomization in assigning subjects to one of at least two groups – the group

¹⁵ Nelsen, *supra* note 6, at 325-31.

¹⁶ Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Choice* 9 (4th ed. May 2016), available at <http://www.edchoice.org/research/win-win-solution/>.

¹⁷ Marty Lueken and Michael McShane, *School Choice Research is Not a Rorschach Test*, EdChoice (December 2018), available at <https://www.edchoice.org/blog/school-choice-research-not-rorschach-test/>.

that is given the opportunity to participate in the choice program (the “test” group) and the group that is not given that opportunity (the “control” group). Membership in each of these groups is determined by random selection and not by the choices of the participants or the designers of the program.¹⁸ In theory – and, as a general matter, in practice – this ensures that the test and control groups do not differ in ways that might affect the results.

In the case of school choice, randomization permits a comparison to be drawn between the performance of the students in choice schools and the control group that is not given the school choice opportunity.

Because randomization tends to “control” for confounding differences between these groups, it is more likely to permit researchers to infer a causal relationship between a policy like school choice and outcomes like test scores or graduation rates.

Randomization is possible in the context of school choice programs like the MPCP because there is a high demand for vouchers that, for many years, exceeded the space available. For that reason, the “test group” of students who go to voucher schools are selected at random – by a lottery. Except for the fact that they won the lottery, they are indistinguishable from the “control group” – the

¹⁸ Roger E. Kirk, *Statistics: An Introduction*, 502-04 (1990).

students who did not win and then overwhelmingly attend public schools. Because the two groups were selected at random there should be no significant differences between them except that one group attended choice schools and the other did not. Studying their subsequent performance thus leads to valuable and significant information about the academic performance of voucher schools. And the differences in academic performance between the test group and the control group can be said to have resulted from the fact that the test group attended a private school with a voucher and the control group did not.

Two of the earliest “gold standard” studies were done specifically on the MPCP.¹⁹ Those two studies both showed increased academic performance due to the choice program. For example, the Greene, Peterson and Du analysis showed significantly higher math and reading scores – 10.7 points higher for math scores and 5.8 points higher for reading scores for students who spent 4

¹⁹ Jay P. Greene, Paul E. Peterson, and Jiangtao Du, *Effectiveness of School Choice: The Milwaukee Experiment*, 31 *Education and Urban Society* 2 (Jan. 1999), available at <http://eric.ed.gov/?id=EJ583009>; Cecilia E. Rouse, *Private School Vouchers and Student Achievement: An Evaluation of the Milwaukee Parental Choice Program*, 113 *Quarterly Journal of Economics* 2 (May 1998), available at http://faculty.smu.edu/millimet/classes/_eco7321/papers/rouse.pdf. Of the sixteen other gold standard studies, the vast majority also found that school choice improves student outcomes.

years in a private school in the choice program.²⁰ Additionally, the Rouse analysis showed that being offered a voucher increased math scores by about 8.7 points after four years.²¹

These two early MPCP studies were followed a decade later by the School Choice Demonstration Project (SCDP) a research unit at the University of Arkansas which was given a unique opportunity to study the MPCP from 2007 to 2012. The State of Wisconsin mandated that Milwaukee schools make data available to the SCDP.²² The study, directed by Dr. Patrick Wolf and conducted by scholars at the University of Arkansas and the University of Wisconsin, represents the most comprehensive analysis of any school voucher program in the country to date.

The SCDP focused on the effects of the school choice program in Milwaukee on student achievement and other crucial student outcomes. The SCDP found that Milwaukee students who attended voucher schools rather than public schools demonstrated improved academic performance across a variety of important factors.

Among the most important findings of this research are the effects of school choice on high school and college graduation rates. In SCDP Report

²⁰ *Id.*

²¹ Rouse, *supra* note 19.

²² 2005 Wis. Act. 125, § 8.

#30,²³ researchers utilized sophisticated matching techniques (the cutting edge in econometric research) to determine that enrollment in a private high school through the MPCP increased the likelihood the student would graduate from high school and enroll in college by 4-7 percentage points. In explaining the importance of this result, Professor John Witte from the University of Wisconsin said as follows:

Graduation from high school leads to many good things; dropping out does not. The evidence on this simple difference is overwhelming. Graduates earn much more; create stable families; have more successful children; and are happier throughout their lives. Dropouts earn much less; have more out of wedlock births; have higher rates of incarceration; and express lower levels of happiness. If I had one measure of educational success in

²³ Joshua M. Cowen et al., School Choice Demonstration Project, University of Arkansas, *Student Attainment and the Milwaukee Parental Choice Program: Final Follow-up Analysis* (March 8, 2012), <http://www.uaedreform.org/downloads/2012/02/report-30-student-attainment-and-the-milwaukee-parental-choice-program-final-follow-up-analysis.pdf>. Report #30 was later published in the peer-reviewed scientific *Policy Studies Journal*. The SCDP issued a total of 36 separate reports.

America it would be the high school graduation rate.²⁴

The meaningful improvement in graduation rates has led Professor Witte to advocate publicly for the continuation of the program.²⁵ Arguing against a proposal to end school choice in Wisconsin, Professor Witte said:

Our research signals what likely would happen if [a school choice opponent] got her wish and the 25,000 students in the Milwaukee voucher program and nearly 8,000 children in independent charter schools were thrown out of their chosen schools. Student achievement would drop, as every student would be forced into MPS – the only game in town. Significantly fewer Milwaukee students would graduate high school and benefit from college. Parents would be denied educational choices for their children. That’s not a future we would wish for the good people of Milwaukee.²⁶

²⁴ John Witte, Testimony before the US Senate Committee on Homeland Security and Governmental Affairs, July 20, 2015.

²⁵ Patrick J. Wolf and John F. Witte, *Milwaukee school choice beats the alternative*, Wisconsin Journal-Sentinel (Jan. 17, 2013), *available at* <http://www.jsonline.com/news/opinion/milwaukee-school-choice-beats-the-alternative-p68doeu-187369091.html>.

²⁶ *Id.*

In SCDP Report #29,²⁷ the education scholars compared the performance of disadvantaged students on statewide exams. They found a significantly higher level of performance on the reading exam, a subject integral to success in the job market.²⁸

In SCDP Report #11,²⁹ the team looked at whether the competition provided by the MPCP to public schools had led to benefits to students that remain in traditional public schools. They found that “students in Milwaukee fare better academically when they have more free private options through the voucher program. It appears that Milwaukee public schools are more attentive to the academic needs of students when those students

²⁷ John. F. Witte et al., School Choice Demonstration Project, University of Arkansas, *MPCP Longitudinal Educational Growth Study: Fifth Year Report* (February 2012), <https://files.eric.ed.gov/fulltext/ED530071.pdf>. Report #29 was subsequently published in the peer-reviewed scientific journal *Education Evaluation and Policy Analysis*.

²⁸ Willard R. Daggett and Jerry A. Pedinotti, *Reading Skills and the Career Readiness Gap A Study of High School Students' Preparedness for College and Career*, International Center for Leadership in Education (July 2014), *available at* http://www.leadered.com/pdf/reading_skills_and_the_career_readiness_gap_2015.pdf.

²⁹ Jay P. Greene and Ryan H. Marsh, School Choice Demonstration Project, University of Arkansas, *The Effect of Milwaukee's Parental Choice Program on Student Achievement in Milwaukee Public Schools* (March 2009), <https://files.eric.ed.gov/fulltext/ED530091.pdf>.

have more opportunities to leave those schools.”³⁰ Thus, not only do voucher schools improve the academic performance of their own students, they have the additional effect of causing MPS to increase its own services and performance. That is not surprising. It’s how competition works.

Of course, treating all schools participating in the MPCP as “a system” is misleading. While MPS is under common management, the 133 schools in which MPCP students enroll are not. Some may be better than others and the benefits of choice are experienced by individual children and their families. If choice helps many students but fails a few, the solution is to improve operation of the program and not eliminate it.

For example, a very recent study by the Wisconsin Institute for Law & Liberty compared the performance of all schools on state-mandated testing by taking into account schools’ demographic make-up. In one of the most comprehensive, recent analyses on school performance, the study showed that, overall, private schools in the MPCP scored 4 points higher in math and 5 points higher in reading compared to Milwaukee Public Schools.³¹

³⁰ *Id.* at 9.

³¹ Will Flanders, Wisconsin Institute for Law & Liberty, *Apples 2 Apples: The Definitive Look at School Test Scores in Milwaukee and Wisconsin for 2018* (April 2018), available at <https://www.will-law.org/wp-content/uploads/2018/05/2018-apples-to-apples.pdf>.

The superior academic performance was largely driven by Catholic and Lutheran private schools. Roughly 84 percent of private schools in the Milwaukee Parental Choice Program are religious.³² This underscores the educational importance of including religious schools in any school choice program.

These academic benefits do not end at the point of graduation. A follow-on study to the SCDP released in 2018 found that students who attended choice schools were 6 percentage points more likely to go to college than similar students from traditional public schools.³³

National, Milwaukee and even global studies show that choice leads to better academic results.³⁴

³² Brian Kisida, Laura I. Jensen, and Patrick J. Wolf, School Choice Demonstration Project, University of Arkansas, *The Milwaukee Parental Choice Program: Descriptive Report on Participating Schools 2009-2010* (March 2011), <http://www.uaedreform.org/downloads/2011/03/report-27-the-milwaukee-parental-choice-program-descriptive-report-on-participating-schools-2009-2010.pdf>.

³³ Patrick J. Wolf, John F. Witte, and Brian Kisida, *Do Voucher Students Attain Higher Levels of Education? Extended Evidence from the Milwaukee Parental Choice Program*, Urban Institute 11 (February 24, 2018), available at <https://www.urban.org/research/publication/do-voucher-students-attain-higher-levels-education>.

³⁴ M. Danish Shakeel, Kaitlin P. Anderson, and Patrick Wolf, *The Participant Effects of Private School Vouchers Across the*

This is more than enough to demonstrate that the Montana legislature might have reasonably concluded that it is an education policy tool to improve Montana education. But there's more.

C. Students attending private schools in the MPCP are less likely to be exposed to or engage in crime

While raising academic standards is an important aspect of voucher programs, there are other reasons that parents may choose to educate their children in private voucher schools rather than public schools. For example, a report showed that private schools in the MPCP experience fewer 911 emergency calls than Milwaukee Public Schools, suggestive evidence that they provide a safer environment for students.³⁵

A different study by DeAngelis and Wolf³⁶ used matching methods to compare students in MPS

Globe: A Meta-Analytic and Systemic Review, University of Arkansas (EDRE Working Paper No. 2016-07, May 10, 2016), available at

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2777633.

³⁵ School Choice Wisconsin, Sept. 23, 2014 Press Release, available at <http://schoolchoicewi.org/wp-content/uploads/2017/02/SCW-SafetyReport-2014-update.pdf>.

³⁶ Corey DeAngelis and Patrick J. Wolf, *The School Choice Voucher: A "Get Out of Jail" Card?*, University of Arkansas (EDRE Working Paper 2016-03, March 8 2016) available at <http://www.uaedreform.org/downloads/2016/03/the-school-choice-voucher-a-get-out-of-jail-card.pdf>.

with those in the MPCP on documented encounters with law enforcement. They found that participation in school choice programs decreased the likelihood that students would be accused or convicted of a wide variety of crimes, including felonies.

A more recent study examines the impact of the MPCP on a student's overall character. Analyzing student-level data for 8th and 9th graders in Milwaukee, scholars concluded that the students in the MPCP are less likely to commit drug or property crimes than comparable students at Milwaukee Public Schools.³⁷

All told, the decrease in crime and increases in graduation associated with the MPCP will generate \$473 million in additional economic benefits to Wisconsin through new tax revenue generated and less money spent on the criminal justice system.³⁸

III. The Typical Criticisms of School Choice Are Misplaced

³⁷ Corey DeAngelis and Patrick Wolf, *Private School Choice and Character: More Evidence from Milwaukee*, University of Arkansas (EDRE Working Paper No. 2019-03, February 26, 2019), available at <https://ssrn.com/abstract=3335162>.

³⁸ Will Flanders and Corey DeAngelis, Wisconsin Institute for Law & Liberty, *The Economic Benefit of School Choice in Milwaukee* 3 (December 2016), available at <https://www.will-law.org/wp-content/uploads/2016/12/EBSC-MPCP.pdf>.

Not surprisingly, the popularity and success of the MPCP has drawn the ire of supporters of the Milwaukee Public School system. Public school administrators, school boards and teachers' unions oppose school choice because it disrupts their monopoly on education dollars and holds them accountable for results by subjecting them to serious competition. Their criticisms of voucher schools typically are to claim that such schools are not "accountable," to assert that they under serve students with disabilities, contribute to segregation, and "steal" education funding from public schools. Each of these claims is false.

A. Private schools in the MPCP are accountable for performance

One criticism leveled against school choice is the assertion that private choice schools are not accountable to taxpayers. In Wisconsin, this is not the case. In fact, the opposite is true. Private schools are subject to a number of financial and fiscal requirements that can be – and have been – used to cull bad private schools from the program.

For example, private schools in the voucher program get audited (by GAAP standards), every year, for every student, for every state dollar by an independent CPA. The results of the audit are reviewed and certified by the Wisconsin Department of Public Instruction. Wis. Stat. §119.23(7)(am).

Failure to pass the audit means removal from the program. Wis. Stat. §119.23(10).

Those that fail to meet the applicable standards are held accountable. According to research by the Wisconsin Institute for Law & Liberty, since 2003-2004, 57 private schools were removed from the MPCP because of bad fiscal practices, such as not maintaining accreditation, failing to complete an audit, or not filing the appropriate paperwork with the state.³⁹ Since 2007-2008, 33 private schools have been prohibited by the state from entering the MPCP because of issues pertaining to the schools' financial practices.⁴⁰

Moreover, private schools – unlike public ones – are disciplined by the market. If the schools are not performing, parents can easily choose to go elsewhere. Research has shown that the growth and decline of enrollment for a private school in the MPCP is correlated with the school's academic performance.⁴¹ In other words, parents in Milwaukee

³⁹ School Choice Wisconsin and Wisconsin Institute for Law & Liberty, *Accountability in Action: August 2017* 6, available at <https://www.will-law.org/wp-content/uploads/2017/07/Accountability-Report-7-28-Edt-131.pdf> (last visited April 10, 2019).

⁴⁰ *Id.*

⁴¹ Corey DeAngelis and Will Flanders, Wisconsin Institute for Law & Liberty, *The Education Marketplace: The Predictors of School Growth and Closures in Milwaukee* (November 5, 2018), available at <http://www.will-law.org/wp-content/uploads/2018/11/edmarketplace.pdf>.

are holding private MPCP schools accountable by choosing schools based on academic performance.

Special interest groups who oppose vouchers complain that taxpayers spent \$139 million since 2004 on private schools that ultimately were dropped from the program.⁴² But that number appears tiny when compared to public schools that have closed. From 2005 to 2014, taxpayers spent \$1.5 billion to operate 119 Milwaukee Public Schools that would eventually close. When the schools were open, on average, only 5.3% of students were proficient or advanced in math and only 4.7% in reading.⁴³

Far too many public schools across the country are struggling to provide even an adequate K-12 education.⁴⁴ The United States public

⁴² Molly Beck, *State paid \$139 Million to schools terminated from voucher program since 2004*, Wisconsin State Journal (Oct. 12, 2014), available at https://madison.com/wsj/news/local/education/local_schools/state-paid-million-to-schools-terminated-from-voucher-program-since/article_d4277f72-51ca-5da3-b63d-df2a7834569b.html.

⁴³ School Choice Wisconsin, *Let's Talk About the Cost of Closed MPS Schools – \$1.5 Billion*, <https://www.chooseyourschoolwi.org/lets-talk-about-the-cost-of-closed-mps-schools-1-5-billion/> (last visited April 11, 2019).

⁴⁴ Organisation for Economic Cooperation and Development, *Programme for International Student Assessment (PISA) Results from PISA 2012*, available at <http://www.oecd.org/pisa/keyfindings/PISA-2012-results-US.pdf> (last visited April 10, 2019). Among the 34 OECD countries, the

education system, on average, is producing students who perform near the bottom in math, science and reading relative to other economically developed countries.⁴⁵ To work towards resolving these problems, the Montana Legislature may have reasonably concluded that a school choice program would give parents more high quality educational options for their children, as well as providing more competition to the public schools. That's the way true accountability works.

B. Private schools in the MPCP educate students with disabilities

Another criticism frequently lodged against school choice is the assertion that private schools in the choice program do better because they educate few, if any, students with disabilities. But charges that schools participating in the MPCP discriminate against students with disabilities never prove out. Under the MPCP, private schools must take all comers until they are full.⁴⁶ Save family preferences, they do not get to select the students they serve and certainly cannot select students based upon whether they have a disability.

United States performed below average in mathematics in 2012 and is ranked 27th (this is the best estimate, although the rank could be between 23 and 29 due to sampling and measurement error). Performance in reading and science are both close to the OECD average.

⁴⁵ *Id.*

⁴⁶ Wis. Stat. §§ 119.23(3)(a), 118.60(3)(a).

According to SCDP Report #35,⁴⁷ the rate of students with disabilities in choice schools is significantly higher than the education establishment typically asserts. This is because critics typically use the wrong measure for determining whether students are disabled.⁴⁸ Using “the most conservative” estimates of disability status, Dr. Wolf found that nearly 8% of students in the parental choice program have a disability, a rate “more than four times higher than the MPCP rate of 1.6% reported by DPI.”⁴⁹

Dr. Wolf also noted that MPCP schools must educate students with disabilities with less funding than the public schools because MPCP students with disabilities are only eligible to access funding for “equitable services,” which is determined by the school district and representatives of the private

⁴⁷ Patrick J. Wolf, John F. Witte, and David J. Fleming, School Choice Demonstration Project, University of Arkansas, *Special Education and the Milwaukee Parental Choice Program* (February 2012), available at <http://www.uaedreform.org/downloads/2012/02/report-35-special-education-and-the-milwaukee-parental-choice-program.pdf>.

⁴⁸ *Id.* at 16 (“It is only from those [statewide accountability] test forms that DPI received any information about MPCP students with disabilities. The only disability measure on the test forms was an indicator of whether or not a student was provided a test accommodation due to a disability, not whether or not the student had a disability.”).

⁴⁹ *Id.* at 3.

school.⁵⁰ Private schools in the MPCP educate far more children with disabilities than the educational establishment claims and they do so with less funding than the public schools.

Charges that schools participating in the MPCP discriminate against students with disabilities never prove out. In response to the education establishment's complaints against voucher schools on this issue, the United States Department of Justice opened a formal investigation into the MPCP to investigate whether it violated federal disability law. The DOJ asserted that private schools in the MPCP should be regulated like public schools under Title II of the Americans with Disabilities Act.⁵¹ Yet private schools, according to the text of the ADA and the United States Department of Education, are regulated under Title III, public places of private accommodation. Applying the wrong legal standard notwithstanding, after a four year investigation, the DOJ concluded in December 2015 that it could find no evidence of wrongdoing.⁵²

⁵⁰ *Id.* see also 34 CFR § 300.137 (2007).

⁵¹ See *U.S. Department of Justice Letter to State Superintendent Tony Evers* (April 9, 2013), available at https://www.aclu.org/files/assets/04_09_13_letter_to_wisconsin_dpi_0.pdf.

⁵² Erin Richards, *Feds quietly close long-running probe of Milwaukee voucher program*, Milwaukee Journal Sentinel, (January 4, 2016) available at <http://archive.jsonline.com/news/education/feds-quietly-close->

C. The MPCP has not contributed to racially segregated schools

Again returning to the most comprehensive research conducted on the MPCP, in SCDP Report #20, Dr. Wolf and his colleagues concluded that the choice program had no discernible effect on segregation in Milwaukee.⁵³ The 2010 study from Dr. Wolf's team used sophisticated matching techniques to compare the racial composition of MPCP and MPS schools longitudinally. The authors found that there were no statistically discernible differences in the level of integration between MPS and MPCP schools. The authors also concluded that the effect on integration of students switching to a choice school or to another MPS school is statistically zero.

Finally, it should also be noted that school choice programs in Wisconsin serve African Americans at a disproportionately higher rate and have altered the composition of private schools statewide in the direction of greater integration. A recent study by the Southern Education

long-running-probe-of-milwaukee-voucher-program-b99644914z1-364068331.html/.

⁵³ Jay P. Greene, Johnathan N. Mills, and Stuart Buck, School Choice Demonstration Project, University of Arkansas, *The Milwaukee Parental Choice Program's Effect on School Integration* (April 2010), available at <http://www.uaedreform.org/downloads/2010/04/report-20-the-milwaukee-parental-choice-programs-effect-on-school-integration.pdf>.

Foundation⁵⁴ shows that African Americans represent 14% of the State's private school population while only representing 9.8% of students statewide. Thus, the school choice program has benefitted minority access to private schools in Wisconsin.

D. Private schools in the MPCP do more with less funding than public schools and have not adversely affected the funding for public schools.

Education funding in Wisconsin is not a zero-sum game. Increases in funding for voucher programs need not come with commensurate cuts to public school education.

Indeed, after more than 25 years of school choice, Wisconsin ranks in the top half of all states for public school spending and one of the highest in the Midwest.⁵⁵ Internationally, Wisconsin spends more on its schools than any other country in the OECD except for three.⁵⁶ Much of this has to do with

⁵⁴ Southern Education Foundation, *Race and Ethnicity in a New Era of Public Funding of Private Schools: Private School Enrollment in the South and The Nation*, <https://www.southerneducation.org/publications/raceandethnicityreport/> (last visited April 10, 2019).

⁵⁵ Wisconsin Institute for Law & Liberty, *Truth in Spending: An Analysis of K-12 Public School Spending in Wisconsin 3* (March 2019), available at http://www.will-law.org/wp-content/uploads/2019/03/will-truth_in_spending_web.pdf.

⁵⁶ *Id.* at 4.

Amicus Walker’s historic investment in K-12 spending increases for traditional public schools in 2017-2018.⁵⁷

At the same time, in 2018, the average ACT test score in Wisconsin is the highest in the country amongst states that mandate all students to take the test.⁵⁸ There is no evidence that the choice program has had a negative impact on public schools, either in funding or performance.

And to the extent that there is a funding disparity, it favors the public schools. A child who attends Milwaukee Public Schools receives more taxpayer funding than a child who uses a voucher in the MPCP. State, local, and federal spending combines to more than \$14,000, on average, per pupil at Milwaukee Public Schools.⁵⁹ A voucher in the MPCP is funded by the State at \$7,747 (in the

⁵⁷ *See id.* at 3.

⁵⁸ Ola Lisowski, *Wisconsin students achieved the highest score of any state where all graduates take the exam, though the score itself stayed flat*, MacIver Institute (October 17, 2018), available at <http://www.maciverinstitute.com/2018/10/data-release-average-wisconsin-score-the-best-in-us-national-act-score-dips/>.

⁵⁹ Wisconsin Department of Public Instruction, *Wisconsin District and School Performance Reports*, available at [https://apps2.dpi.wi.gov/sdpr/district-report.action?district=&year=\(select+2013-14+from+the+"School+Year"+dropdown,+select+"Milwaukee"+from+the+"District"+dropdown,+click+"Go"+button,+click+"Staffing,+Finance"+tab,+then+click+"Finance"+tab\)+\(last+visited+April+10,+2019\).](https://apps2.dpi.wi.gov/sdpr/district-report.action?district=&year=(select+2013-14+from+the+"School+Year"+dropdown,+select+"Milwaukee"+from+the+"District"+dropdown,+click+"Go"+button,+click+"Staffing,+Finance"+tab,+then+click+"Finance"+tab)+(last+visited+April+10,+2019).)

case of grade school) or \$8,393 (in the case of high school).⁶⁰

Indeed, scholars have found that the program saves money for the taxpayers of the State. Because vouchers are less than the State's cost to send a child to Milwaukee Public Schools, Wisconsin taxpayers have saved over \$343 million from students using the Milwaukee Parental Choice Program.⁶¹ Students choosing lower cost private schools can actually increase the amount available to the public sector should the legislature determine that additional funding is appropriate.

IV. Amicus' Expansion of School Choice

The successes of school choice in Milwaukee resulted in families all over the State wanting the same opportunity. Amicus Walker and the legislature took notice. In 2011, they created a similar school voucher program in the City of Racine (Racine Parental Choice Program).⁶² Today, over 3,000 students participate in the program in 26

⁶⁰ Wisconsin Department of Public Instruction, *133 schools plan to participate in the Milwaukee Parental Choice Program*, available at <https://dpi.wi.gov/news/releases/2018/133-schools-plan-participate-milwaukee-parental-choice-program> (last visited April 10, 2019).

⁶¹ Martin Lueken, EdChoice, *Fiscal Effects of School Vouchers* 17 (Sept. 20, 2018), available at <https://www.edchoice.org/wp-content/uploads/2018/09/Fiscal-Effects-of-School-Vouchers-by-Martin-Lueken.pdf>.

⁶² 2011 Wis. Act 32.

private schools in Racine.⁶³ There are signs of similar successes to the Milwaukee program. On the 2018 ACT exams, students in the RPCP outperformed students at Racine Unified School District.⁶⁴

In 2013, Amicus and the legislature created a statewide school voucher program for students outside of Milwaukee and Racine.⁶⁵ Although the WPCP – unlike the MPCP and RPCP – has caps and a lower income restriction, it has experienced dramatic growth. This school year, over 7,100 students and 213 private schools are enrolled in the WPCP.⁶⁶ Students in the WPCP score higher, on average, on the state mandated reading test and the ACT, compared to students at public schools.⁶⁷

⁶³ Wisconsin Department of Public Instruction, *27 schools intend to participate in Racine voucher program* (January 31, 2019), available at <https://dpi.wi.gov/news/releases/2019/27-schools-intend-participate-racine-voucher-program>.

⁶⁴ School Choice Wisconsin, *Parental Choice Program Students Again Outperform Peers*, <https://schoolchoicewi.org/2018/10/02/parental-choice-program-students-again-outperform-peers-scw/> (last visited April 10, 2019).

⁶⁵ 2013 Wis. Act 20.

⁶⁶ Wisconsin Department of Public Instruction, *Wisconsin Parental Choice Program has 262 private schools registered for 2019-20* (January 31, 2019), <https://dpi.wi.gov/news/releases/2019/wisconsin-parental-choice-program-has-262-private-schools-register-2019-20>.

⁶⁷ Flanders, *supra* note 31 at 13.

School choice is on the move in Wisconsin, giving more families than ever before the opportunity to send their children to a high performing school. This growth is occurring over the opposition of the special interest groups, which reflexively and vociferously oppose any threat to their monopoly power and attendant entitlement to public funds. It is happening because the program works in Milwaukee.

And, if given the chance, it will work in Montana too.

CONCLUSION

Petitioners respectfully request that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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