In the Supreme Court of Wisconsin

JULIE UNDERWOOD, CHARLES UPHOFF, RANDY WENDT, FATHER TOM MUELLER, ANGELA RAPPL, DUSTIN IMRAY AND SCOTT WALKER M.D.,

PETITIONERS,

v.

ROBIN VOS, SPEAKER OF THE WISCONSIN STATE ASSEMBLY, JILL UNDERLY, WISCONSIN STATE SUPERINTENDENT OF PUBLIC INSTRUCTION AND KATHY BLUMENFELD, SECRETARY OF THE DEPARTMENT OF ADMINISTRATION,

RESPONDENTS.

NON-PARTY BRIEF OF SCHOOL CHOICE WISCONSIN ACTION, INC., WISCONSIN COUNCIL OF RELIGIOUS & INDEPENDENT SCHOOLS, INC., ST. MARCUS EVANGELICAL LUTHERAN CHURCH, INC., ST. AUGUSTINE PREPARATORY ACADEMY, INC., PIUS XI CATHOLIC HIGH SCHOOL, INC., SETON CATHOLIC SCHOOLS, INC., CATHOLIC MEMORIAL HIGH SCHOOL OF WAUKESHA, INC., GREEN BAY AREA CATHOLIC EDUCATION, INC., IMMANUEL EVANGELICAL LUTHERAN CHURCH, IMPACT CHRISTIAN SCHOOLS, INC., MESSMER CATHOLIC SCHOOLS, INC., NEW TESTAMENT CHRISTIAN ACADEMY, INC., SHORELAND LUTHERAN HIGH SCHOOL FEDERATION, INC., TRINITY EVANGELICAL LUTHERAN CHURCH, ALDIRA ALDAPE, ANTHONY KLOSOWSKI, JR., JOHANNA AND NICHOLAS DENTICE, MARK ADAM, SARAH AND CALEB STORMER, TIM AND JENNIFER MEINHARDT, TONY AND GINA ELLIS, AND SARAH AND JAMES JORDAN IN OPPOSITION TO THE PETITION FOR LEAVE TO COMMENCE AN ORIGINAL ACTION

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INTRODUCTION

Amici are parents, schools, and associations who participate in one or more school choice programs. School choice empowers parents to enroll their children in a school that best fits their children's needs.

School choice began in Wisconsin in the early 1990s with the Milwaukee Parental Choice Program ("MPCP"), a bipartisan effort to address the failings of the Milwaukee Public Schools ("MPS"). Fewer than 60% of MPS freshmen went on to graduate high school, and more than 60% of MPS teachers reported that they would not want to enroll their own children at the school at which they taught. Susan Mitchell, *Why MPS Doesn't Work: Barriers to Reform in the Milwaukee Public Schools*, Wis. Pol'y Res. Inst. Rep., Jan. 1994, at 1, 34; George A. Mitchell, *An Evaluation of State-Financed School Integration in Metropolitan Milwaukee*, Wis. Pol'y Res. Inst. Rep., June 1989, at 69. For many, public education was not working, and the State sought to remedy the crisis. The idea was simple: give low-income families more educational opportunities.

In the following decades, Wisconsinites demanded even more educational options. In 1993, Wisconsin allowed public school districts to create charter schools. 1993 Wis. Act 16, § 2296. In 1997, Wisconsin created the independent charter school program ("ICSP"), allowing other public entities to establish charter schools. 1997 Wis. Act 27, § 2835. In 2011, Wisconsin created the Racine Parental Choice Program ("RPCP"). 2011 Wis. Act 32, § 2532m. In 2013, Wisconsin created a statewide school choice program,

the Wisconsin Parental Choice Program ("WPCP"), and in 2015, it created the Special Needs Scholarship Program ("SNSP") to provide more options to families with disabled children. 2015 Wis. Act 55, § 3224m; 2013 Wis. Act 20, § 1829. All told, about 60,000 children are enrolled in these programs. Russ Kava, *Charter Schools*, Legis. Fiscal Bureau Informational Paper #32, at 11 (2023), https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2023/0032_charter_schools_informational_paper_32.pdf; Maria Toniolo, *Private School Choice and Special Needs Scholarship Programs*, Legis. Fiscal Bureau Informational Paper #30, at 28–29, 38 (2023), https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2023/0030_private_school_choice_and_special_needs_scholarship_programs_informational_paper_30.pdf. These programs have long enjoyed bipartisan support. Just this summer, Governor Tony Evers, a Democrat, worked with a Republican-controlled Legislature to expand funding for school choice as part of a broader increase for education funding in the state budget. 2023 Wis. Act 11; 2023 Wis. Act. 19.

Petitioners ask this Court to declare these programs facially unconstitutional, which would disrupt the lives of tens of thousands of families and throw the operation of both choice schools (which would lose students) and school districts (which would gain students who they lack the capacity and staffing to educate) into chaos. Petitioners' anti-school choice crusade lacks

political support. Accordingly, they ask this Court to hastily and inappropriately exercise its original jurisdiction to engage in judicial fiat.

Amici request that the Petition be denied. First, granting the Petition would be inconsistent with historical practice, and no exigency justifies deviating from that practice. Analogous challenges to the MPCP were heard in the lower courts before being rejected on the merits by this Court, and Petitioners could have brought these claims years ago, which belies their argument that they need a final decision as soon as possible.

Second, Petitioners seek to radically disturb well-settled jurisprudence. To accept Petitioners' public purpose claims or their Superintendent Supervision Clause claims, this Court would have to overrule or modify precedent. This Court would either have to hold that private parties cannot be used to provide a public service or would need to radically superintend public oversight upon such parties. Regarding Petitioners' Uniform Taxation Clause claims, this clause has only been applied to property taxes. If, as Petitioners argue, state aid that is not uniformly distributed violates this clause because a school district that receives less than another might raise property taxes, any analogous distribution of state aid would be similarly unconstitutional. Petitioners' theory logically covers not only the challenged programs, but open enrollment, categorical aid, and, for that matter, any type of state aid that seeks to help poorer communities. A ruling for Petitioners would transform a requirement that property taxes must be uniform into a mandate that state

aid to municipalities which impose property taxes must be uniform. Precedent would also need to be overruled or modified to accept Petitioners' challenge to statutory revenue limits, which Petitioners fails to note can be exceeded if electors so authorize via a referendum.

Lastly, Petitioners' claims are inherently fact-intensive, and this Court is ill-suited to resolve factual disputes. Petitioners' claims fail as a matter of law, but if this Court disagrees, Petitioners could still prevail only if this Court accepts all of their factual allegations as true. Amici dispute these allegations. The Petition is replete with basic errors. Petitioners' claims, if they are to be heard, should first be heard in the circuit court, which is designed to sort through such allegations.

ARGUMENT

This Court is designed to serve as a "court of last resort," not a "court of first resort." *Gymfinity, Ltd. v. Dane County*, unpublished order, No. 2020AP1927-OA, at 2 (Dec. 21, 2020) (Hagedorn, J., concurring). It is a law-declaring court, not a fact-finder. *See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). In performing this function, this Court "benefits from the analyses of the circuit court and court of appeals"—although this Court is not bound by them. *E.g.*, *Deutshe Bank Nat'l Trust Co. v. Wuensch*, 2018 WI 35, ¶19, 380 Wis. 2d 727, 911 N.W.2d 1.

Accordingly, throughout this Court's history, it has "rarely" been receptive to original actions. *Gymfinity*, No. 2020AP1927-OA, at 2. Although it has the power to hear them, the Court has recognized that prudence often

counsels against doing so, especially when the petition—like the one in this action—seeks breathtakingly broad relief, would unsettle well-established jurisprudence, is premised on disputed facts. *See Wisconsin Voters All. v. Wisconsin Elections Comm'n*, unpublished order, No. 2020AP1930-OA, at 2–3 (Dec. 4, 2020) (Hagedorn, J., concurring) (explaining an original action petition was "woefully deficient" partly because the petitioners failed to provide "evidence and arguments commensurate with the scale of the claims and the relief sought").

I. Granting the Petition would be inconsistent with historical practice, and no exigency justifies deviating from that practice.

Days after the MPCP was signed into law, challengers filed an original action petition, which this Court denied. *Davis v. Grover*, 159 Wis. 2d 150, 155 n.1, 464 N.W.2d 220 (Ct. App. 1990), *rev'd*, 166 Wis. 2d 501, 480 N.W.2d 460 (1992). The challengers then intervened in an action in the circuit court, *Davis v. Grover*. *Id.* The challengers' claims were litigated in that court and the court of appeals before reaching this Court. *Davis*, 166 Wis. 2d 501. This Court rejected all challenges on the merits—some of which were materially identical to Petitioners'. *Id.* at 546.

After a statutory expansion of the MPCP, another challenge to school choice likewise began in the circuit court, *Jackson v. Benson*. 218 Wis. 2d 835, 578 N.W.2d 602 (1998). This Court granted the State's petition to "remov[e]" the action from that court, recognizing that the expansion would change the status quo and accordingly, a definitive and timely resolution would serve the

public. *See State ex rel. Thompson v. Jackson*, 199 Wis. 2d 714, 720, 546 N.W.2d 140 (per curiam). This Court, however, divided equally on the merits and returned the action to the circuit court. *Id.* After the action proceeded through the circuit court and the court of appeals, it returned to this Court, which rejected all claims on the merits. *Jackson*, 218 Wis. 2d 835. Like *Davis*, *Jackson* involved claims similar to Petitioners'. *Id.* at 906.

Petitioners do not address the procedural histories of *Davis* and *Jackson*, but they argue the challenged programs "must be halted before the next school year begins . . . ." Pet. at 20. Not so.

Although an exigency occasionally justifies this Court's prompt attention, Petitioners' delay in bringing this action belies the existence of any exigency. *See* Michael S. Heffernan, *Appellate Practice & Procedure in Wisconsin* § 25.3 (9th ed. 2022–23). School choice has been in place for over three decades. Its attributes have not been hidden from public view. In fact, the first-named Petitioner, Julie Underwood, served as counsel in *Davis* to then-Superintendent of Public Instruction Herbert Grover, and in that capacity, she advanced some of the same arguments that she does now. *See* Brief of Herbert J. Grover as Amicus Curiae, at 8, 17, *Davis*, 166 Wis. 2d 501 (No. 90-1807-LV). She could have brought these claims any time in the last 30 years but chose not to do so.

Petitioners were waiting for a perceived ideological shift in this Court's membership to bring these claims; however, political opportunism does not

create an exigency. A mere change in membership should not create an opportunity to challenge precedent—particularly through an exceptional procedure like an original action. *See State v. Lynch*, 2016 WI 66, ¶102, 371 Wis. 2d 1, 885 N.W.2d 89 (Abrahamson & Ann Walsh Bradley, JJ., concurring/dissenting). As one justice explained, "[t]his [C]ourt is more than simply the sum of its current members. . . . The public needs certainty—a stable rule of law—not what amounts to a collection of several law review articles by the members of this [C]ourt." *Id.*, ¶231 (Ziegler, J., dissenting). Although different justices will see the same issue differently, Petitioners' claims are beyond the pale. A single election is not a mandate to radically change the law.

II. Petitioners' claims are without merit and would disturb existing precedent and policy.

Petitioners' claims have more potential to sow confusion than to develop law. Government officials are not facing a novel crisis such that this action is necessary to provide them with immediate guidance. *See Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900. Government officials—and lower courts—have plenty of precedent on all of Petitioners' claims. This action does not involve a newly created program or even an expansion of an existing program such that this Court arguably needs to act to preserve the status quo. The challenged programs are the status quo, and the MPCP has even withstood challenges at this Court before. Petitioners seek to upset the status quo, not preserve it.

For example, Petitioners argue that the challenged programs lack sufficient government oversight and violate the Wisconsin Constitution's public purpose requirement. For context, this Court has held that "public funds can only be used for a public purpose," although nothing in the Wisconsin Constitution explicitly states this requirement. *See State ex rel. Warren v. Reuter*, 44 Wis. 2d 201, 211, 170 N.W.2d 790 (1969). Throughout Wisconsin's history, the state has relied upon private individuals, non-profits, and even for-profit corporations to serve public purposes. Everything from disaster relief to unemployment benefits and pension funding has been challenged—unsuccessfully—on public purpose grounds. *State ex rel. Singer v. Boos*, 44 Wis. 2d 374, 384–87, 171 N.W.2d 307 (1969); *Van Dyke v. Tax Comm'n*, 217 Wis. 528, 542–44, 259 N.W. 700 (1935); *State ex rel. City of New Richmond v. Davidson*, 114 Wis. 563, 578–80, 90 N.W. 1067 (1902).

In both *Davis* and *Jackson*, the challengers argued that the MPCP lacked sufficient government oversight, but this Court disagreed, maintaining deferential standards set forth in precedent. *Davis*, 166 Wis. 2d at 541–46; *Jackson*, 218 Wis. 2d at 897–99. This Court would need to overrule both decisions to side with Petitioners, and it would have to be careful not to weaponize the public purpose requirement in the process. Additionally, to accept Petitioners' public purpose claims, this Court would have to overrule or modify *State ex rel. Warren v. Reuter*. 44 Wis. 2d 201. In *Warren*, this Court upheld the constitutionality of an appropriation to Marquette University's

medical school, rejecting the argument that support of a private school is not a public purpose and noting that this argument confused "the means with the end." *Id.* at 214; *see also Wisconsin Indus. Sch. for Girls v. Clark County*, 103 Wis. 651, 665–70, 79 N.W. 422 (1899) (holding the State may fund an industrial school corporation for "helpless children"); *cf. Hopper v. City of Madison*, 79 Wis. 2d 120, 127, 139–42, 256 N.W.2d 139 (1977) (rejecting a public purpose challenge to a program that provided daycare "tuition aid"). As held in *Warren*, private parties "should not [be] supplant[ed]" if they can aid the State in providing necessary social services. *Warren*, 44 Wis. 2d at 218.

Other precedent would also need to be overruled or modified. Petitioners claim that the challenged programs violate the Superintendent Supervision Clause, which provides that "[t]he supervision of public instruction shall be vested in a state superintendent . . . ." Wis. Const. art. X, § 1. They allege that the superintendent lacks sufficient regulatory power over choice schools. Pet. at 3. Petitioners do not acknowledge that, according to precedent, the superintendent lacks inherent constitutional authority to promulgate administrative rules. *Koschkee v. Taylor*, 2019 WI 76, ¶¶25, 34, 387 Wis. 2d 552, 929 N.W.2d 600. The superintendent's "powers and duties" are prescribed exclusively by statute. *Id.*, ¶34. Petitioners also do not acknowledge that this Court rejected an analogous challenge to statutory revenue limits, explaining that "[r]evenue limits do not absolutely bar school districts from

increased spending—they merely require a voter referendum to do so." *Vincent v. Voight*, 2000 WI 93, ¶¶20, 75–76, 236 Wis. 2d 588, 614 N.W.2d 388.

III. This Court is an improper forum in which to bring these fact-intensive claims in the first instance.

Original actions are the exception and not the rule for many reasons, and the fact-finding needed in this action illustrates one such reason. Petitioners claims all fail as a matter of law, but even if this Court disagrees, Petitioners can prevail only if this Court accepts their factual allegations as to the effect of funding school choice on public schools, the degree of public control, etc. Many of these allegations are false or misleading. If this Court gets to them, a trial will be needed. This Court has frequently rejected invitations to decide original actions with disputed facts, often acknowledging its incompetency to do fact-finding. *Clarke v. Wisconsin Elections Comm'n*, 2023 WI 70, __ Wis. 2d __, 995 N.W.2d 779, 781 (denying three of five issues in an original action petition because "the need for extensive fact-finding (if not a full-scale trial) counsels against addressing them"); *cf. Gahl v. Aurora Health Care, Inc.*, unpublished order, No. 2021AP1787-FT, at 3 (Oct. 25, 2021) (denying a bypass petition largely because "[t]he petition presents unresolved questions of fact").

Petitioners assert they "do not rely on any disputed facts," but they are wrong. *See* Pet. at 20. Below are examples of the fact-finding this Court will require should the Petition be granted. These examples are illustrative—Amici could dispute more of Petitioners' allegations.

A. Petitioners wrongly assert that the challenged programs were intended to hurt and are hurting public schools.

Troublingly, Petitioners repeatedly disparage the challenged programs, insinuating that they were "primarily" designed "as a conduit for public funds to flow to private businesses." *Id.*, ¶89. They call these programs a "cancer," purporting they cause "irreparable harm" to children attending public schools. *Id.* at 4, 7, 20, ¶92. Petitioners even go so far as to allege that the Legislature, in passing the bills that created these programs, intended to "harm Wisconsin's public schools, not to better educate Wisconsin's citizens." *Id.* at 7. These divisive allegations touch on nonjusticiable policy matters. This Court does not decide which policies are "best" or even "good." These allegations are also false.

The MPCP's creators believed that the program would improve public schools by fostering healthy "competition." Brief for Senator Gary R. George as Amicus Curiae, at 22, *Davis*, 166 Wis. 2d 501; Tommy G. Thompson, *Power to the People: An American State at Work* 95 (1996) (explaining "competition would be good for the public schools").

This Court agreed. In *Davis*, it explained that school choice creates "competition" by "empower[ing] . . . low-income parents to choose the educational opportunities that they deem best for their children." 166 Wis. 2d at 533.

Since *Davis*, studies have repeatedly proven the MPCP's creators correct—competition works. *See, e.g.*, Jay P. Greene & Ryan H. March, *The Effect of Milwaukee's Parental Choice Program on Student Achievement in*

Milwaukee Public Schools 9 (2009), https://files.eric.ed.gov/fulltext/ED530091.pdf ("[W]e find that students in Milwaukee fare better academically when they have more private options through the voucher program. It appears that Milwaukee public schools are more attentive to the academic needs of students when those students have more opportunities to leave those schools. . . . This finding is . . . consistent with most prior studies . . . .").

Additionally, public school funding has gone up since the MPCP's creation. According to the National Center for Education Statistics ("NCES"), in the 1989–90 school year (immediately prior to the MPCP being implemented), the average Wisconsin public school spent $5,020 per pupil. NCES, *Current Expenditure per Pupil in Fall Enrollment in Public Elementary and Secondary Schools, by State or Jurisdiction: Selected School Years, 1969–70 Through 2019–20* (2022), https://nces.ed.gov/programs/digest/d22/tables/dt22_236.65.asp?current=yes. Adjusted for inflation, that amount was about $10,311 in September 2019. In 2019–20 (the most recent year for NCES data), per pupil spending was $14,027. *Id.* Per pupil spending has increased, not decreased since school choice began in Wisconsin.

Petitioners' expansive legal theories would put all of this at issue.

B. Petitioners' claims regarding Wisconsin's school finance structure are incorrect.

Petitioners also advance claims under the Uniform Taxation Clause, which are based on a misunderstanding of Wisconsin's school finance structure. While these claims are wrong on the law, even assuming Petitioners understood the law, they do not understand the facts.

Petitioners allege that the challenged programs shift local tax revenue out of a school district when parents enroll their child in the WPCP and send the child to a choice school. *See, e.g.*, Pet., ¶106.

Petitioners are wrong. First, *no local tax revenue is used to fund any challenged programs or taken from one school district and placed into another*. The challenged programs do not result in the loss of any local tax revenue. *See generally* Will Flanders, *Breaking the Chain: Decoupling School Choice Funding in Wisconsin* 5 (2023), https://will-law.org/wp-content/uploads/2023/06/Decoupling.pdf ("It is explicitly not the case that property taxes are directly used to fund the existing voucher programs."). These programs are 100% funded by state tax dollars.

Petitioners seek to avoid this problem with their claims by arguing that, because school districts receive less state aid for each choice student, they are "hurt" when these students leave. These districts, they say, "must" increase property taxes to catch up. Of course, whether a district "must" do anything is debatable. These districts are not required to educate the departing students.

In some instances, they may be left with more revenue per pupil than if these students remained.

Second, even if local tax revenue were sent outside a school district, the choice or charter students still reside in the district and are persons who the district must educate. Just because Petitioners might prefer that these students be forced to attend a school operated by the district does not mean revenue is sent outside that district. It is still used to educate a district resident.

Third, and more fundamentally, many things might cause a school district to have fewer dollars per pupil. If a student leaves a school district to attend a public school in a different district because the student's family moved or participates in open enrollment, the district will also lose some state aid—but any local tax revenue generated for that student is retained in the district. This case is nothing like *Buse v. Smith*, 74 Wis.2d 550, 247 N.W.2d 141 (1976).

C. Petitioners cite incorrect data to make their points.

Petitioners also wrongly allege that the State pays more for a student to attend a choice school than a public school. Pet. at 10. Petitioners reached the wrong conclusion by using incorrect data. The funding formulas are complicated, but Petitioners' error can be illustrated by the very examples on which Petitioners rely.

Petitioners use the Racine Unified School District ("RUSD") as an example. *Id.* at 11. They allege RUSD loses $8,593.75 in state aid for every

Racine student who attends a choice school and that RUSD receives only $7,764.97 in state aid for every student enrolled in RUSD. *Id.*

In actuality, RUSD's state aid was reduced by $7,526.04 per student who participated in the RPCP (and the aid is reduced because RUSD does not incur the cost of educating that student), and RUSD received $12,377.55 in state aid for each student enrolled in RUSD. Therefore, RUSD receives far more in state aid for each public-school student than RUSD loses in aid when a student transfers to a choice school.

First, when Petitioners say that RUSD receives only $7,764.97 in state aid per student, Petitioners count only one type of state aid received by the district—equalization aid. Petitioners do not even calculate the equalization aid per student properly. Petitioners are dividing the total equalization aid sent to RUSD by its total "members." Under Wis. Stat. § 121.07(2), the "members" number they cite is not just RUSD students, it includes students who are enrolled in the challenged programs. The equalization aid formula counts those students for determining how much initial state aid a district should be awarded. An amount is later subtracted for each student who attends a choice school. As a result, the Petition's assertion is incorrect.

More importantly, school districts, including RUSD, receive a substantial amount of state aid beyond equalization aid. *See, e.g.*, Wis. Stat. § 20.255(2) (appropriating various categories of aid). For example, in 2011 Wisconsin Act 32 the Legislature created a new type of state aid for public

schools called "per pupil" categorical aid to ensure that school districts received funds in addition to equalization aid. *See* § 20.255(2)(aq). This amount was originally $50 per student per district, about $39.9 million for the 2012–13 school year. Russ Kava & Maria Toniolo, *State Aid to School Districts*, Legis. Fiscal Bureau Informational Paper #28, at 21 (2023), https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2023/0028_state_aid_to_school_districts_informational_paper_28.pdf. It was increased over ensuing budgets (as school choice expanded) and now stands at $742 per student per district, or $601.4 million total statewide. *Id.* Petitioners have not accounted for millions of dollars of categorical and other non-equalization aid. Last year, the total per pupil categorical aid given to all districts exceeded all the money spent on every challenged program by over $30 million—$601.4 million in per pupil categorical aid v. $568.5 million that Petitioners say was spent on the challenged programs. *See* Pet. at 9. Put differently, the Petitioners ignored an aid category that wipes out the impact of everything they complain of (choice schools do not receive categorical aid).

For the 2022–23 school year, RUSD received *total* state aid of $200,293,575.61. Dep't Pub. Instruction, *State Aid Payments: July 2022 to June 30, 2023* (last visited Nov. 5, 2023), https://dpi.wi.gov/sfs/statistical/basic-facts/state-aid-payments. 16,182 students enrolled in an RUSD school for that school year. *WISEdash Public Portal*, WISEdash (last visited Nov. 5, 2023), https://wisedash.dpi.wi.gov/Dashboard/dashboard/18141. So, for every

student, the State provided RUSD with $12,377.55 in aid ($200,293,575.61 divided by 16,182), which is far higher than Petitioners' alleged $7,764.97 per student in equalization aid.

Second, Petitioners wrongly assert how much RUSD's state aid is reduced as a result of the RPCP, alleging $8,593.75 per pupil. *See* Pet. at 11. Petitioners explain that they calculated this number by dividing $33 million (the total 2022–23 RPCP program cost) by the 3,840 students in the RPCP. *Id*. at 11 n.6. Again, Petitioners misunderstand how the funding formulas work. According to the Legislative Fiscal Bureau, the actual amount of the aid reduction to RUSD was $28.9 million. Toniolo, *Private School Choice and Special Needs Scholarship Programs*, at 21. That means RUSD's state aid was actually reduced by $7,526.04 per pupil ($28.9 million divided by 3,840) and not $8,593.75. The $12,377.55 in state aid per pupil enrolled in RUSD far exceeds the $7,526.04 per pupil state aid reduction for participants in the RPCP. Petitioners also do not factor into their calculations that RUSD no longer had to incur the cost of educating the 3,840 students. If the cost of educating these departing students exceeds the state aid reduction RUSD would actually be better off financially.

Petitioners do not know the "facts," which are hardly "undisputed." The financial impact on a school district when a student leaves for a choice school will vary for every school district (similarly to if a student moved and attended a public school in a different district). The exact impact depends on many

factors. Petitioners may desire to simplify the facts, but they cite wrong numbers and, as a result, even on their novel legal theories, come to wrong conclusions.

D. The challenged programs are sufficiently regulated.

Petitioners paint choice schools as being almost entirely unregulated entities. On the contrary, these programs are heavily regulated. By statute, private schools and independent charter schools in a challenged program are required to offer the same standardized state assessments as traditional public schools, are subject to DPI's "report card" system just like public schools, and must annually provide a copy of that report to each student's parent or guardian. Wis. Stat. §§ 115.385(4), 118.30(1r)–(1t). Furthermore, private schools must undergo independent financial audits, receive independent agency accreditation, administer background checks on all school employees, and comply with education requirements for teachers and administrators. Wis. Stat. §§ 118.60(2)(a)6.–7., (7)(am)2m., 119.23(2)(a)6.–7., (7)(am)2m.

DPI oversees choice schools by promulgating rules for the MPCP, RPCP, WPCP, and SNSP. Wis. Admin. Code PI chs. 35, 48–49. Additionally, choice schools are subject to many of the same requirements that apply to public schools, including nondiscrimination laws and health and safety codes. Wis. Stat. §§ 118.60(2)(a)4.–5., 119.23(2)(a)4.–5.

Independent charter schools are public schools for purposes of federal and state law, and state law imposes significant requirements upon them. *See,*

e.g., Wis. Stat. § 118.40(2r)(b)2., (2x)(b)2. (setting performance standards and requiring verification of pupil enrollment, data reporting, and training).

Of course, the challenged programs receive ultimate oversight from parents. They decide whether their children are receiving a good education and whether they should remain in a school.

CONCLUSION

For the foregoing reasons, Amici request this Court deny the Petition.

Dated: November 13, 2023.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm), and (c) and §809.81(4), as modified by the October 31, 2023 Order of this Court. The length of this brief is 4,400 words as calculated by Microsoft Word.

Dated this 13th Day of November, 2023.

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