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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT
Appellate Case No. 2023-001673

Candace Eidson, on behalf of herself and her minor child; Coneitra Miller on behalf of herself and her minor child; Joy Brown on behalf of herself and her minor children; Crystal Rouse, on behalf of herself and her minor children; Amanda McDougald Scott, on behalf of herself and her minor child; Penny Hanna, on behalf of herself and her minor children; the South Carolina State Conference of the NAACP; and the South Carolina Education Association,..... Petitioners,

v.

South Carolina Department of Education; Ellen Weaver, in her official capacity as State Superintendent of Education; South Carolina Office of the Treasurer; and Curtis M. Loftis, Jr. in his official capacity as State Treasurer of South Carolina Respondents,

and

Henry D. McMaster, in his official capacity as Governor of the State of South Carolina; Thomas C. Alexander, in his official capacity as President of the South Carolina Senate; and G. Murrell Smith, Jr., in his official capacity as Speaker of the House of Representatives Intervenor-Respondents.

BRIEF OF *AMICI CURIAE* WISCONSIN INSTUTE FOR LAW & LIBERTY AND THE BUCKEYE INSTITUTE IN SUPPORT OF THE RESPONDENTS

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COUNTER-STATEMENT OF ISSUES ON APPEAL

- I. Does the Education Scholarship Trust Fund Act violate South Carolina Constitution Article XI, Section 4 if eligible families can use the funds for a range of educational expenses they need help with, not just independent school tuition?
- II. Does the Education Scholarship Trust Fund Act violate South Carolina Constitution Article XI, Section 3 when the Education Scholarship Program will only continue to improve *all* types of schooling in South Carolina including the public schools?
- III. Does the Education Scholarship Trust Fund Act violate South Carolina Constitution Article XI, Section 2 by assigning the Superintendent of Education with administrative oversight of the scholarship program if South Carolina Article VI, Section 7 expressly states that the duties of the Superintendent's office "shall be prescribed by law"?
- IV. Does the Education Scholarship Trust Fund Act violate South Carolina Constitution Article X, Section 5 and 11, if the program benefits eligible families and students and does not directly benefit private institutions?

INTRODUCTION

One thing, at least, is undisputed—children in South Carolina, and across the nation, deserve a high-quality education to prepare them for life and to be able to contribute to their communities as productive members of society. Many groups—students, parents, teachers, administrators, teachers' unions, taxpayers, and politicians—agree that this is the aim, even if they disagree about the means. Of those groups, it is hard to argue that the most important are *not* the students and their parents who are responsible for their children. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000) (“the ‘liberty of parents and guardians’ includes the right ‘to direct the upbringing and education of children under their control.’”) (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). But of all of these groups, students and parents

have perhaps the weakest voice in the political world of education. Hence, it is imperative that their voices be heard in the courts. In this brief, organizations from Wisconsin and Ohio, states that were early innovators on school choice, share their experiences.

The educational choice movement was started by parents and grandparents—and poor ones at that. They wanted, for their children, the educational choices that wealthy people had. For the poor and unpowerful, a good education always seems to be what the other people get. They are assigned to educational systems in places where they can afford to live. Unfortunately, those systems have sometimes failed parents and their children and, because teacher unions and public bureaucracies are powerful and poor families are not, they are often operated for the good of those who work in them, rather than the children they serve.

For decades those systems have made excuses. After decades of excuses, parents took things into their own hands. Fannie Lewis, a minority grandmother and the instigator for the Cleveland voucher program declared: “Poor people have a chance if they come together and work together.”¹ In Wisconsin, former Milwaukee Public Schools Superintendent Dr. Howard Fuller noted that “[m]any of us in the community were searching for radical ideas that would give poor and working class parents alternatives to public schools that were failing their children.”² Finally, after

¹ Fannie Lewis, *School Choice Ruling Reaction*, Cleveland Plain Dealer, June 28, 2002, at A18.

² Howard Fuller, *No Struggle, No Progress: A Warrior's Life from Black Power to Education Reform* (2014). Excerpt available at

the poor obtained those opportunities from the legislature, powerful special interests tried to take them away in court. Fortunately, those powers failed.

The same establishment players are again trying to take away these opportunities once reserved to the rich and powerful. Wisconsin and Ohio were the first to begin to provide equal school choice opportunities to the poor and minorities. And while this Court is obligated to follow the law, the law was adopted and applied in a given context and its interpretation and application is affected by that context. “The life of the law has not been logic; it has been experience The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”³ We cannot forget that the law affects real human beings—here, children.

Petitioners have asked the court to prevent the implementation of SB 39, which created the Education Scholarship Trust Fund program. 2023 S.C. Acts 8 (SB 39). This brief supports Respondents’ opposition to this attempt to frustrate the will of South Carolinians’ request and aims to highlight the critical importance of the issues raised in this case by explaining exactly what is at stake—more educational freedom for families in South Carolina.

This brief outlines the history of bipartisan support for school choice programs like those in Wisconsin and Ohio as well as how that support arose from a demand by students in both urban and rural communities for alternatives to public

<https://www.educationnext.org/origins-milwaukee-parental-choice-program-no-struggle-no-progress-fuller/>.

³ Oliver Wendell Holmes, *The Common Law* 1 (Boston, Little, Brown & Co. 1881).

education—alternatives that could be lost to students in South Carolina if the Court were to enjoin the State from enforcing SB 39.

The development of educational choice in the law, parental satisfaction, and student achievement are relevant in addressing the arguments Petitioners assert in this case. Petitioners cling to the notion that educational choice is bad, and that it harms public schools and minorities. But the experiences of many students and parents in Wisconsin and Ohio, the initial innovators, have shown the opposite. Parents and students have demanded choice and have demanded more of it. And not just any parents and students—mostly Black and Hispanic, the very demographics that the teachers unions claim they are protecting.

This Court is entitled to know how parents and students, especially those whom Petitioners and their supporters claim to protect, actually feel about educational choice. They initiated it, they use it, and they like it. The Court should not forget the least powerful as it considers the issues before it. And it is legally relevant. Their experience illustrates how educational choice serves a public purpose. These programs aren't for the benefit of private schools; they serve the citizens of South Carolina.

INTEREST OF AMICI CURIAE

Amici Wisconsin Institute for Law & Liberty and The Buckeye Institute have an interest in advocating for the success of school choice throughout the country. They are well familiar with such success based upon their familiarity with such programs in Wisconsin and Ohio.

Wisconsin Institute for Law & Liberty (WILL) is a public interest law and policy center dedicated to advancing the public interest in limited government, free markets, individual liberty, and a robust civil society. A significant focus of this mission includes advocating for educational freedom. The research on school choice in Wisconsin establishes that empowering parents to make decisions about their children's education leads to positive outcomes for students. WILL is also part of the Wisconsin Coalition for Education Freedom⁴ which successfully advocated for per-student funding increases for choice and charter school students.⁵ As such, WILL has a direct interest in advocating for successes of school choice in Wisconsin and encouraging other states, such as South Carolina, to uphold a similar program.

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute assists executive and legislative branch policymakers by providing ideas, research, and data to enable lawmakers' effectiveness in advocating free-market public policy solutions. The Buckeye Institute is a non-partisan, nonprofit, tax-exempt organization, as defined by I.R.C. § 501(c)(3). As it relates to this case, The Buckeye

⁴ Wisconsin Coalition for Education Freedom, <https://www.wisconsineducationfreedom.org>.

⁵ 2023 Wisconsin Act 11, <https://docs.legis.wisconsin.gov/2023/related/acts/11>.

Institute advocated for the pilot school choice program in Ohio and continues to advocate for expansion of Ohio’s school choice programs.

STATEMENT OF THE CASE

Almost a year ago, on January 31, 2023, the South Carolina Senate passed SB 39, creating the Education Scholarship Trust Fund.⁶ The Education Scholarship Trust Fund will allow parents of eligible students to pay for qualifying expenses—vastly expanding options for parents and students that would otherwise not be available to them. This bill was subsequently passed by the House of Representatives on April 27, 2023, signed by the Governor on May 4, 2023, and went into effect on June 3, 2023.⁷ Petitioners filed their Petition for Original Jurisdiction and Complaint on October 26, 2023, which was granted by this Court on December 12, 2023.

STANDARD OF REVIEW

This Court has a limited scope of review when determining whether a statute is constitutional. *Craft v. State*, 281 S.C. 205, 208, 314 S.E.2d 330, 331 (1984). All statutes are presumed constitutional, and if necessary, will be construed to render them valid. *Id.* This Court is reluctant to find any statute unconstitutional. *Knotts v. S.C. Dep’t of Nat. Res.*, 348 S.C. 1, 6, 558 S.E.2d 511, 514 (2002). A legislative act is only determined unconstitutional when its repugnance to the constitution is clear and beyond reasonable doubt. *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 181 S.E. 481, 484 (1935). The party challenging the constitutionality of the statute bears the

⁶ 2023 S.C. Act 8.

⁷ *Id.*

burden of proving the statute is clearly repugnant to the constitution beyond any reasonable doubt. *Knotts*, 348 S.C. at 6, 558 S.E.2d at 514.

ARGUMENT

I. School Choice Programs in Wisconsin and Ohio Demonstrate a History of Bipartisan Support.

School choice in both Wisconsin and Ohio is the result of years of bipartisan commitment to educational options and bipartisan compromise to deliver results and options for families, and both Wisconsin and Ohio have seen their respective school choice programs withstand various legal challenges. School choice programs like the Education Scholarship Trust Fund program at issue in this case expand families' educational options by providing students with assistance for tuition and fees at private schools.

A. Wisconsin: First in the Nation

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 freshmen in the Milwaukee Public Schools (MPS) went on to graduate from high school.⁸ The grade point average of MPS students taken as a whole was D+.⁹ Parents and teachers expressed widespread dissatisfaction with the quality of education available in MPS.

⁸ See Marge Pitrof, *Milwaukee Voucher Program Turns 25: The History*; WUWM (Nov. 17, 2014), <http://wuwmm.com/post/milwaukee-voucher-program-turns-25-history#stream/0>.

⁹ *Id.*

A majority of MPS teachers even said they would not send their own children to the schools where they taught.¹⁰

At that time, Democrats controlled the Wisconsin State Assembly (56-43) and State Senate (20-13).¹¹ The Wisconsin Legislature changed the landscape of education in Wisconsin by empowering parents to choose a better school for their children through a school choice program. It enacted a program, now known as the Milwaukee Parental Choice Program (MPCP).¹² The bill that led to the enactment of the MPCP was introduced by a bipartisan coalition of 47 members of the assembly and 9 senate co-sponsors. *See Davis v. Grover*, 480 N.W.2d 460, 464 (1992).

After passing the assembly, the bill was incorporated into the biennial budget, passed through both houses' Democratic majorities, and signed into law by Republican Governor Tommy Thompson. Governor Thompson noted that school choice would give options to Wisconsin families and especially those "who are locked into a school district that they have no opportunity to decide if that's a good school district for their sons and daughters."¹³ Then-Milwaukee Mayor John Norquist, a Democrat who also supported school choice, remarked that "alternative programs

¹⁰ See 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 <https://dc.uwm.edu/etd/12>.

¹¹ Wisconsin Blue Book, 1989-1990, pg. 348.

¹² See 1989 Wis. Act 336.

¹³ Milwaukee Voucher Program Turns 25: The History, WUWM 89.7 FM (Nov. 17, 2014), <https://www.wuwm.com/education/2014-11-17/milwaukee-voucher-program-turns-25-the-history>.

provide healthy competition for the Milwaukee public schools and will add to the overall effort toward quality education for all children in the city of Milwaukee.”¹⁴

The MPCP 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 did not violate the uniformity clause in the Wisconsin Constitution and did not violate the public purpose doctrine. Petitioners in this case similarly contend that the program in South Carolina uses public funds “without a valid public purpose.” Pet. Br. at 29. But school choice programs plainly serve a public purpose—education—and both parents and government provide the requisite control. The Wisconsin Supreme Court first rejected a public purpose challenge to school choice in 1992. *Davis*, 166 Wis. 2d at 542—45. In *Davis*, the court held that school choice satisfies the public purpose requirement in part because “[public] [c]ontrol is . . . fashioned . . . in the form of parental choice. . . . If the private school does not meet the parents’ expectations, the parents may remove the child from the school and go elsewhere.” *Id.* at 544.

After the program was expanded to include sectarian schools, the Wisconsin Supreme Court again rejected a public purpose argument and held that the school choice program did not violate the Establishment Clause of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, or various clauses of the Wisconsin Constitution. *Jackson v. Benson*, 218 Wis. 2d 835, 906, 578 N.W.2d 602

¹⁴ William Snider, *Voucher System for 1,000 Pupils Adopted in Wis.*, Educ. Week (March 28, 1990), <https://www.edweek.org/education/voucher-system-for-1-000-pupils-adopted-in-wis/1990/03>.

(1998). In *Jackson v. Benson*, the Wisconsin Supreme Court also again concluded that the program (as it had been expanded after the *Davis* case) did not violate the uniformity clause and did not violate the public purpose doctrine.

Recently, on December 13, 2023, the Wisconsin Supreme Court unanimously denied an original action petition that asked the Court to end school choice in Wisconsin.¹⁵ Of the three named respondents in the case, two of them, Republican Speaker Robin Vos and the Secretary of the Department of Administration under Democrat Governor Tony Evers, urged the court to not take the case.¹⁶ In a recent interview with the Milwaukee Journal Sentinel, Governor Evers said that he did not support the lawsuit seeking to end school choice and that doing so would be “traumatic to a whole bunch of families and kids.”¹⁷

Despite years of political change in a purple state, school choice programs have remained something that a vast majority of legislators and voters can agree on. After all, the programs were designed with the intent of improving Wisconsin education, in both private and public schools. *Davis*, 166 Wis. 2d at 512-13.

¹⁵ *Underwood v. Vos*, Slip Copy, 2024 WI 5, 2023 WL 9417989 (Dec. 13, 2023).

¹⁶ *Underwood v. Vos, Blumenfeld Response to Original Action*, p. 18 (Nov. 14, 2023) available at <https://www.wispolitics.com/wp-content/uploads/2023/11/231116Blumenfeld.pdf>.

¹⁷ Molly Beck, *Evers criticizes lawsuit seeing to end the Milwaukee Voucher Program*, Milwaukee Journal Sentinel (Jan. 5, 2024) available at <https://www.jsonline.com/story/news/politics/2024/01/05/evers-opposes-lawsuit-that-seeks-to-abolish-milwaukee-voucher-program/72097126007/>.

B. Ohio Follows Wisconsin's Lead

In the mid-90's, the public schools in Cleveland, Ohio, "suffered [a] total fiscal and administrative collapse . . ." *Reed v. Rhodes*, 934 F. Supp. 1533, 1539 (N.D. Ohio 1996), *aff'd*, 179 F.3d 453 (6th Cir. 1999). The "politically dominated 'reform' Cleveland Board of Education" had caused so many problems for the district that a federal court had to order the State to take over. *Id.* at 1538-539. The best solution for parents who did not want to wait and see if the State could sort out the school system was to send their children to schools outside of their districts. However, this was expensive.

Thus, in 1996, following the Wisconsin MPCP, Ohio launched the second voucher program in the nation. The program began with a pilot scholarship targeted at Cleveland residents. The driving force behind the Cleveland Scholarship program was Fannie Lewis, a Black, Democratic City Councilwoman representing Cleveland's seventh ward. Councilwoman Lewis' seventh ward

comprises core inner-city neighborhoods and is populated by some of the poorest people in the United States. [In 2001, m]ore than 40 percent of Cleveland's residents-and more than 70 percent of the residents of Ward 7-live[d] in poverty. Seventy percent of the students in the City's schools [were] on Aid to Families with Dependent Children.¹⁸

Knowing the importance of a good education system in combating crime and other lifestyle problems, Councilwoman Lewis looked for a solution to Cleveland's education crisis. *See id.* at 1-2.

¹⁸ Brief Amicus Curiae for Cleveland City Councilwoman Fannie Lewis, 2001 WL 1684559 (Nov. 9, 2001).

“The failure of repeated efforts to reform the system from within led [Councilwoman Lewis] to become involved with” the Cleveland Pilot program. *Id.* at 2. In December 1994, Councilwoman Lewis and The Buckeye Institute “organized a ‘Summit on Vouchers’ in the basement of a church” in Councilwoman Lewis’ ward.¹⁹ “More than 200 people packed into the crowded church basement for the summit. The crowd of neighborhood parents listened to Polly Williams, the Milwaukee legislator who had promoted the vouchers in that city.”²⁰

In January 1995, concerned that members of the legislature were not accurately representing the views of inner-city residents- and especially African Americans-on the subject of school choice, [Councilwoman Lewis] led several busloads of inner-city residents to Columbus to make known their views. This group- including more than 300 people of various races, political persuasions, and faiths-testified at committee hearings and appealed to every member of the legislature.²¹

“The Cleveland parents invaded the statehouse ‘like a small army,’ knocking on legislators’ doors and handing out leaflets.”²² “As a result of these efforts, the Program soon became law.”²³

¹⁹ The Buckeye Institute, *Giving Choice a Chance: Cleveland and the Future of School Reform* 16 (1998), available at <https://files.eric.ed.gov/fulltext/ED438603.pdf>.

²⁰ *Id.* at 16–17.

²¹ Brief for Cleveland City Councilwoman Fannie Lewis as Amicus Curiae in Support of Petitioners at 2, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

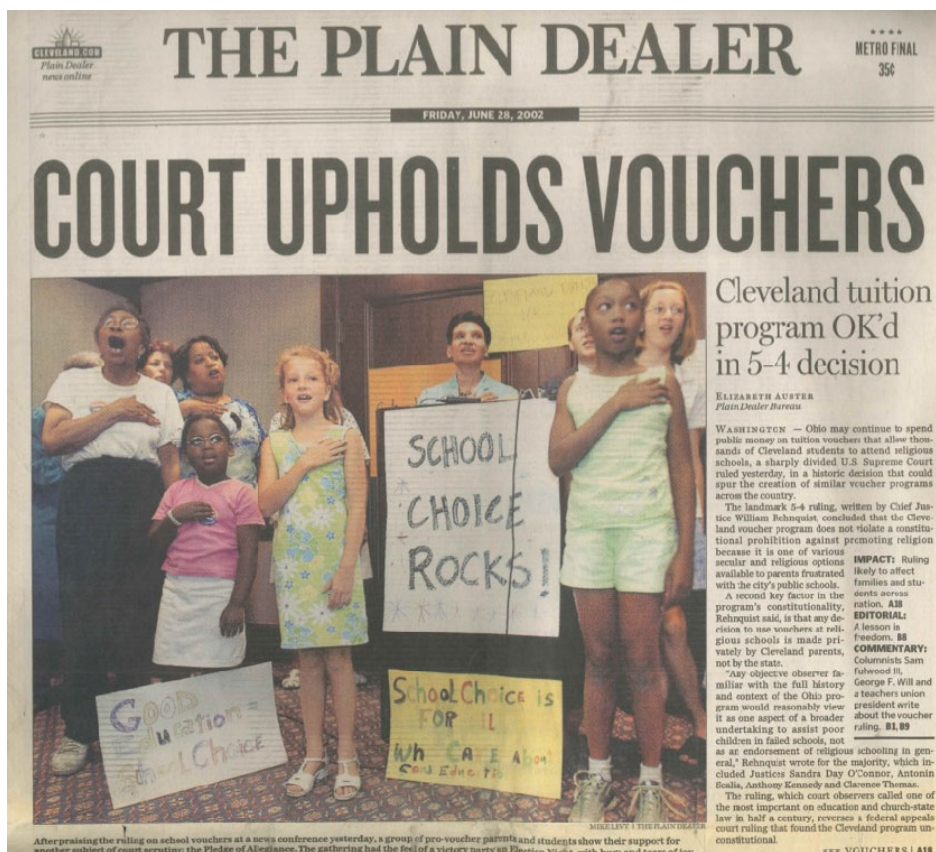
²² *Giving Choice a Chance: Cleveland and the Future of School Reform*, *supra*, at 17 (quoting Thomas Sudes, *School vouchers face House Debate Thursday*, Cleveland Plain Dealer, Apr. 4, 1995, B4).

²³ Brief for Cleveland City Councilwoman Fannie Lewis as Amicus Curiae in Support of Petitioners at 2, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

However, Councilwoman Lewis and the Cleveland parents could not have done it on their own. “The activist parents from Cleveland found a champion in [Republican] Governor Voinovich. As the former mayor of Cleveland, the Governor knew firsthand the problems faced by the [Cleveland] parents who came to Columbus.”²⁴ With the support of Republicans, Democrats, and the Cleveland parents, the pilot Cleveland Scholarship program became an example that Ohio would later expand to include more school districts and more eligible students.

C. United States Supreme Court Upholds the Constitutionality of the Cleveland Program

By 2000, approximately ten years after the MPCP was created in Wisconsin, school choice was expanding across the country. As a result, the issue of religious



²⁴ *Giving Choice a Chance: Cleveland and the Future of School Reform*, supra, at 18.

schools being allowed to participate in the program came under scrutiny. But that issue was resolved when the United States Supreme Court in 2002 upheld the Cleveland Scholarship program against a federal constitutional challenge. *Zelman*, 536 U.S. 639.

The Court ruled that allowing parents to use state funds for private schools, even if they include religious schools, does not violate the Constitution. *Id.* at 2467. In a bipartisan amicus brief, former Milwaukee Mayor Norquist (a Democrat) joined New York City Mayor Rudy Giuliani (a Republican) in defending the constitutionality of school choice.²⁵ The Black Alliance for Educational Options, led by Dr. Howard Fuller, also supported the Cleveland program, as did the State of Wisconsin.²⁶

II. School choice programs in Wisconsin and Ohio are used by both urban and rural communities and students of all races.

A. Minority students in Wisconsin benefit from a school choice expansion.

School choice in Wisconsin was initially limited to an urban setting and was mostly utilized by minority students. Since its inception, the program has increased in popularity and expanded. South Carolina has a similar demographic to Wisconsin in that it has a few large cities and many smaller communities. South Carolina families all across the state will benefit from school choice as the ESTF is implemented.

Families that send their children to independent schools via school choice

²⁵ Brief Amicus Curiae of Rudolph W. Giuliani and John O. Norquist, 2001 WL 1638647 (Nov. 8, 2001).

²⁶ Brief of Black Alliance for Educational Options, 2001 WL 1480658 (Nov. 9, 2001); Brief of the State of Wisconsin, 2001 WL 1480723 (Nov. 9, 2001).

programs are mostly those for whom traditional public schools are not the right fit. In Milwaukee, the failure by MPS to provide adequate opportunities for the minority students was among the main reasons for the implementation of the MPCP.²⁷ As Dr. Howard Fuller recounts in his memoir,

Our efforts to change the system hadn't worked, and so we had to have a way for low-income parents to opt out of it. Families with means already had the freedom to choose. If they didn't like their neighborhood schools, they had the resources to move their children elsewhere. I believed poor and working-class families should have that same opportunity.²⁸

In Wisconsin, the first school choice program was geographically limited to Milwaukee and initially included just seven schools and 337 children.²⁹ For the 2022-23 school year there were about 28,131 children in 129 schools enrolled in the MPCP.³⁰ Based on estimates from the state report card, about 47% (approx. 12,380) of choice students were African American, 34% were Hispanic (approx. 9,556) and 4%

²⁷ 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 <https://dc.uwm.edu/cgi/viewcontent.cgi?article=1015&context=etd> at 325-31.

²⁸ *No Struggle, No Progress: A Warrior's Life from Black Power to Education Reform* (2014). Excerpt available at <https://www.educationnext.org/origins-milwaukee-parental-choice-program-no-struggle-no-progress-fuller/>.

²⁹ Wisconsin Department of Public Instruction, <https://dpi.wi.gov/sites/default/files/imce/eis/pdf/vhist.pdf>; MPCP Membership and Payment History, https://dpi.wi.gov/sites/default/files/imce/parental-education-options/Choice/Data_and_Reports/2023-24/2023-24_mpcp_payment_history.pdf.

³⁰ Wisconsin Legislative Fiscal Bureau *Information Paper #30*, https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2023/0030_private_school_choice_and_special_needs_scholarship_programs_informational_paper_30.pdf.

(approx. 1,125) were Asian.³¹ There is an income limit currently set at 300% above the poverty line for the MPCP, which for a family of four is \$83,250.³²

The success of school choice in Milwaukee resulted in families all over the state wanting the same opportunity. In 2011, Wisconsin created a school choice program similar to the one in Milwaukee in the City of Racine (Racine Parental Choice Program or RPCP).³³ Today, over 4,000 students participate in the program in 35 choice schools in Racine.³⁴ In 2013, Wisconsin created a statewide school voucher program for students outside of Milwaukee and Racine.³⁵ Although the Wisconsin Parental Choice Program (WPCP)—unlike the MPCP and RPCP—has enrollment caps and a lower income restriction, it has experienced dramatic growth. Over 19,000 students are enrolled in 330 schools in the WPCP.³⁶

³¹ Wisconsin Department of Public Instruction, *2021-2022 Accountability Report Cards*, <https://apps2.dpi.wi.gov/reportcards/> (last visited January 17, 2024).

³² Wisconsin Department of Public Instruction, *2023-24 Overview of Private Choice Programs in Wisconsin*, https://dpi.wi.gov/sites/default/files/imce/parental-education-options/Choice/Student_Application_Webpage/Final_-_Overview_of_Private_School_Choice_Programs_in_Wisconsin_Handout_23-24.pdf (last visited January 17, 2024).

³³ 2011 Wis. Act 32.

³⁴ Department of Public Instruction *RPCP Facts and Figures*, https://dpi.wi.gov/sites/default/files/imce/parental-education-options/Choice/Data_and_Reports/2023-24/2023-24_rpcp_hc_fte_by_school_and_grade_with_all_pupils.pdf (last visited January 17, 2024).

³⁵ 2013 Wis. Act 20.

³⁶ Department of Public Instruction *WPCP 2023-24 School Year Student Headcount and FTE*, https://dpi.wi.gov/sites/default/files/imce/parental-education-options/Choice/Data_and_Reports/2023-24/2023-24_wpcp_hc_fte_by_school_and_grade_with_all_pupils.pdf (last visited January 17, 2024).

School choice programs in Wisconsin have experienced success, and the data on academic proficiency supports this. The Wisconsin Institute for Law & Liberty (WILL) puts out an annual report called *Apples to Apples* in which it compares student proficiency based on Wisconsin's Department of Public Instruction (DPI) data. After including DPI data from the 2021-22 report cards, WILL found that choice students outperform their public school peers in both English Language Arts (ELA) and Math.³⁷ Proficiency rates were about 3.2% higher in ELA and 2.1% higher in math among students participating in school choice statewide compared to their public school peers.³⁸ Students in the more established MPCP fair even better. Proficiency rates were 8.1% higher in ELA and 8.3% higher in math at choice schools than at their public school counterparts.³⁹

Research by other scholars has shown higher high school graduation rates for MPCP students. Based on seven years of data, University of Minnesota Professor John Robert Warren estimated that the graduation rate for students in the MPCP was about eighteen percent higher than those in the Milwaukee Public School District.⁴⁰ Studies have also shown that students in the MPCP are thirty-eight percent more likely to have graduated from a four-year college than similar students

³⁷ Will Flanders Ph.D., *Apples to Apples: Assessing Wisconsin's State of Education*, Wisconsin Institute for Law & Liberty (January 2023), https://will-law.org/wp-content/uploads/2023/01/WILL_ApplesToApples_PolicyReport-Draft_v6-1.pdf/.

³⁸ *Id.* at 5.

³⁹ *Id.*

⁴⁰ Joshua M. Cowen et. al., *School Vouchers and Student Attainment: Evidence from a State-Mandated Study of Milwaukee's Parental Choice Program*, Policy Studies Journal (February 2013).

who attended a traditional public school.⁴¹ This is in line with other peer-reviewed studies showing how students at private schools on a voucher have higher high school graduation and college attendance rates.⁴²

In addition to better academic outcomes, school choice programs have been instrumental in keeping students out of trouble. Patrick Wolf, the head of the Education Reform Department at University of Arkansas, and Corey A. DeAngelis, a scholar and author, found that exposure to MPCP in the “eighth or ninth grade is associated with lower rates of conviction for criminal activity and lower rates of paternity suits by the time the students are twenty-five to twenty-eight years old.”⁴³ Their results specifically showed that students who entered into the MPCP by the eighth or ninth grade had fifty-three percent fewer drug convictions, eighty-six percent fewer property damage convictions, and thirty-eight percent fewer paternity suits than their MPS counterparts.

B. Ohio also expanded its program, thus serving more minorities and underserved students.

Following the success of the Cleveland Pilot program, and its constitutionality

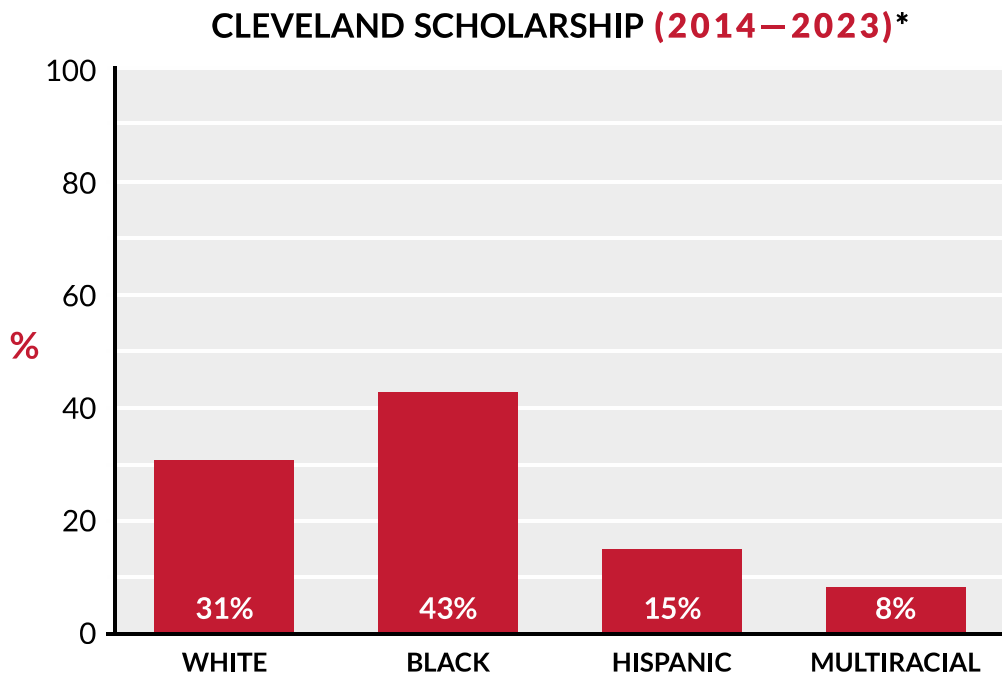
⁴¹ Will Flanders, Ph.D., *Ripple Effect: How expanding Wisconsin’s school choice programs can lead to more college graduates and a stronger economy*, Wisconsin Institute for Law & Liberty, p. 2 (January 2020), <https://will-law.org/wp-content/uploads/2020/01/will-ripple-effect-v3.pdf>.

⁴² *Id.*

⁴³ Corey A. DeAngelis and Patrick J. Wolf, *Private School Choice and Character: More Evidence from Milwaukee*, *The Journal of Private Enterprise*, p. 28 (2020), available at http://journal.apee.org/index.php/Parte3_2020_Journal_of_Private_Enterprise_Vol_35_No_3_Fall.

being affirmed in *Zelman*, Ohio began expanding the program to other parts of the state as the EdChoice Scholarship.⁴⁴ As a testament to its success, and to continue focusing on Cleveland residents, the Cleveland Scholarship program still exists today as a standalone program, despite a comprehensive state-wide program.⁴⁵

To this day, the Cleveland Scholarship and Ohio’s EdChoice Scholarship continue to support poor and minority residents. As shown in the graph below, the program has overwhelmingly been utilized by racial minority families.



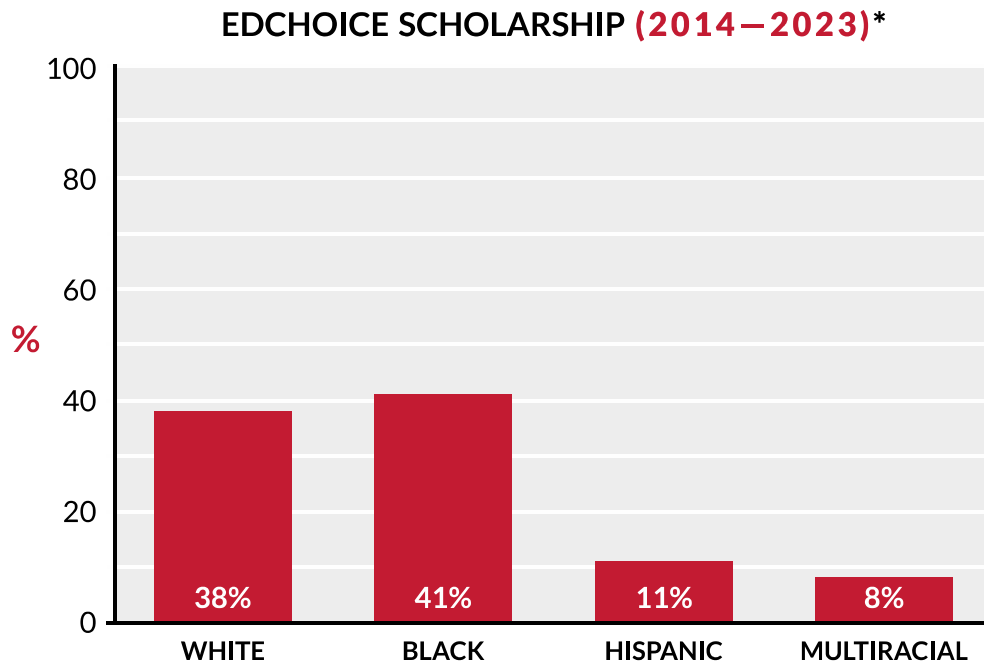
* These numbers are averages for the years 2014–2023.

⁴⁴ *Scholarship Historical Information*, Ohio Dept. of Educ. & Workforce, <https://education.ohio.gov/Topics/Other-Resources/Scholarships/Additional-Scholarship-Resources/Historical-Information> (last visited Jan. 18, 2024).

⁴⁵ See Cleveland Scholarship Program, edchoice, <https://www.edchoice.org/school-choice/programs/ohio-cleveland-scholarship-program/> (last visited Jan. 18, 2024).

Contrary to the claims of some anti-school choice advocates, these scholarships have not been dominated by White students seeking to flee to private schools but have been used by parents of all races to send their children to better schools. Recently, the Ohio Department of Education and Workforce released statistics of scholarship participants. For the years 2014-23, Black students made up an average of 43% of Cleveland Scholarship participants, Hispanics 15%, multiracial students 8%, and White students 31%.⁴⁶

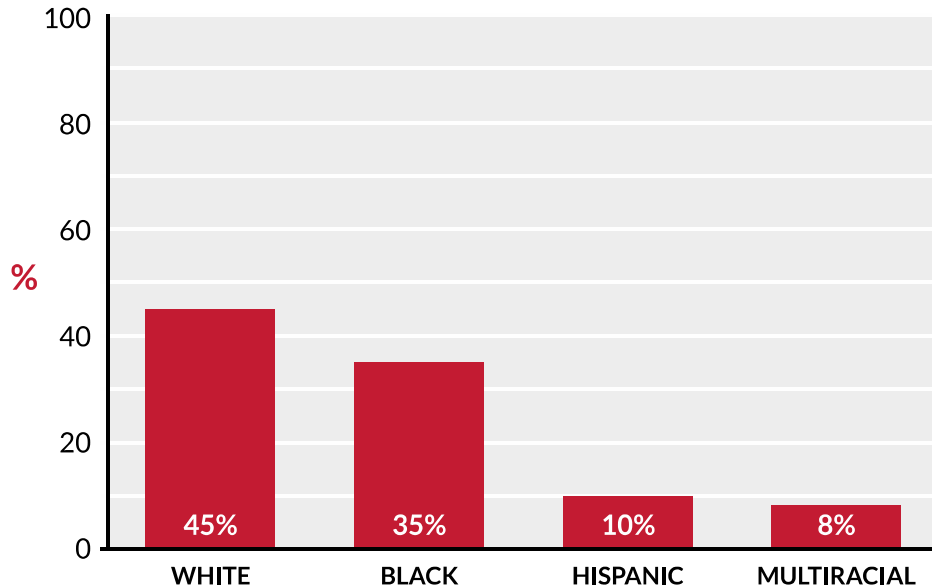
Ohio's EdChoice Scholarship has similar numbers. *Id.*



⁴⁶ See *Scholarship Paid Participants*, Ohio Dept. of Educ. & Workforce, <https://reports.education.ohio.gov/report/nonpublic-data-state-scholarship-participants> (last visited Jan. 18, 2024).

And, even after Ohio expanded its EdChoice Scholarship program to allow higher income individuals to receive a prorated portion of the EdChoice Scholarship funds (known as EdChoice Expansion), minority students still make up the majority of EdChoice Scholarship recipients:

EDCHOICE SCHOLARSHIP WITH EXPANDED PROGRAM (2014–2023)*



Importantly, under both the Cleveland Scholarship program and the traditional EdChoice Scholarship program, Ohio families at or below 200 percent of the Federal Poverty Guidelines do not have to pay any tuition that is not covered by the scholarship.⁴⁷ This means poor Ohio families that choose to take advantage of the scholarship programs receive even more benefits from the scholarships than high income families.

⁴⁷ *Federal Poverty Guidelines for 2023-2024 Cleveland & EdChoice Scholarship Programs*, Ohio Dept. of Educ. & Workforce, <https://education.ohio.gov/getattachment/Topics/Other-Resources/Scholarships/DRAFT-Scholarships/EdChoice-Expansion/2023-2024-Federal-Poverty-Guidelines.pdf.aspx?lang=en-US> (last visited Jan. 22, 2024).

Ohio's Cleveland Scholarship and the EdChoice Scholarship continue to help minority students leave their failing schools for better education options. Providing these students with the choice of a better education can only benefit them.

And, Ohio parents have been pleased with Ohio's scholarships. According to a recent study, "[n]early nine out of 10 Educational Choice Scholarship Program parents (89%) are satisfied with the voucher program, and approximately four out of five Cleveland Scholarship Program, Autism Scholarship Program, and Jon Peterson Special Needs Scholarship Program parents are satisfied with their respective school choice programs."⁴⁸ "Academics is the most influential factor for Educational Choice Scholarship Program parents when choosing a school, and the percentage saying so was approximately double that of homeschool, community school, and traditional public school parents."⁴⁹ The study also revealed that scholarship parents became more involved in their children's education. The increased involvement included working on math or arithmetic and reading with or to their child at home and participating in volunteering and school activities.⁵⁰

Ohio parents' satisfaction with their private schools, made available through various school choice voucher programs, is epitomized by one Ohio parent's story. Thanks to Ohio's school choice voucher program for disabled students, Tera Myers

⁴⁸ School Choice Ohio & EdChoice, *Families' Schooling Experiences in Ohio* 1 (2021), <https://www.edchoice.org/wp-content/uploads/2021/11/10-2021-Ohio-K-12-School-Choice-Survey-updated-logo.pdf>.

⁴⁹ *Id.*

⁵⁰ *Id.* at 8–9.

was able to send her son to a private school, getting him away from the bullying he suffered in his public school.⁵¹ Thanks to Ohio’s other school choice programs, she was also able to send her two daughters to private schools.⁵²

Like Tera Myers and her children, thousands of Ohio parents and students have benefited from Ohio’s school choice voucher programs.

CONCLUSION

Bipartisan support for school choice in Wisconsin and Ohio demonstrates that voters and legislators value giving parents the ability to choose the educational environment that best fits the needs of their children. Expansion of school choice in Wisconsin and Ohio, which have programs utilized by urban and rural communities and families of all races, indicates that these programs will improve the lives of South Carolina families as well. *Amici Curiae* therefore support Respondents’ position and request that this Court decline to prevent South Carolina from implementing the Education Scholarship Trust Fund Act.

Respectfully Submitted,

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⁵¹ Andrea Mew, *Ohio “Broadened Horizons” For All Students Through The Recently Passed EdChoice Expansion – Here’s How*, Independent Women’s Forum (July 13, 2023), <https://www.iwf.org/2023/07/13/ohio-broadened-horizons-for-all-students-through-the-recently-passed-edchoice-expansion-heres-how/>.

⁵² *Id.*

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**pro hac vice pending*

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