

IN THE SUPREME COURT OF THE STATE OF NEVADA

Ruby Duncan, Rabbi Mel Hecht,
Howard Watts III, Leora Olivas, and
Adam Berger,

Appellants,

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Supreme Court No. 70648
District Court No. A-15-723703-C

v.

State of Nevada Office of the State
Treasurer, Nevada Department of Education,
Dan Schwarz, in his official capacity; Steve Canavero,
in his official capacity,

Respondents

**BRIEF OF AMICI AMERICAN FEDERATION FOR CHILDREN,
HISPANICS FOR SCHOOL CHOICE, SCHOOL CHOICE WISCONSIN,
DR. PATRICK J. WOLF, AND WISCONSIN INSTITUTE FOR LAW &
LIBERTY IN SUPPORT OF THE RESPONDENTS AND SUPPORTING
AFFIRMANCE OF THE DISTRICT COURT DECISION**

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INTEREST OF AMICI CURIAE¹

Each of the Amici is committed to the reform and improvement of the U.S. K-12 school system. The Amici will show in this brief that Senate Bill 302 advances education in Nevada by offering Nevada families a broader array of educational opportunities. The statute thus provides a “suitable means” for the legislature to encourage education in Nevada.

The American Federation for Children (“AFC”) is a leading national advocacy organization promoting school choice with a specific focus on school vouchers, scholarship tax credit programs, and Education Savings Accounts. AFC seeks to improve our nation’s K-12 education by advancing public policy that empowers parents, particularly those in low-income families, to choose the education they determine is best for their children.

Hispanics for School Choice is a non-profit group that undertakes to improve education for all Hispanic students. The group believes all Hispanic families should have quality school options relating to their children’s education including school vouchers or Education Savings Accounts.

Dr. Patrick J. Wolf is a Distinguished Professor of Education Policy and holds the 21st Century Endowed Chair in School Choice in the

¹ No counsel for a party in this case authored this brief in whole or in part and no person or entity other than Amici or their counsel made a monetary contribution to the preparation or submission of this brief.

Department of Education Reform at the University of Arkansas. He is the principal researcher of the School Choice Demonstration Project that evaluates voucher programs across the country. He has authored, co-authored, or co-edited four books and over 120 journal articles, book chapters, and policy reports on education issues, including school choice and special education.²

School Choice Wisconsin is a non-profit group that supports expanded educational options for children through the use of school vouchers, charter schools, and other innovative programs that empower parents to choose the best educational environment for their children.

The Wisconsin Institute for Law & Liberty (“WILL”) is a non-profit, public interest law and policy center dedicated to promoting the public interest in free markets, limited government, individual liberty, and a robust civil society. WILL has represented clients in litigation that advances parental choice. WILL’s education researchers have authored numerous policy reports and studies about school choice and public education in Wisconsin.

² Dr. Wolf represents himself in this brief and not the University of Arkansas.

ARGUMENT

I. It Was Rational for the Legislature to Conclude that Education Savings Accounts are a “Suitable Means” to Encourage Education.

Section 1 of Article XI of the Nevada Constitution requires and empowers the legislature to encourage education “by all suitable means.”

The District Court correctly held that this section of the Nevada Constitution was separate and independent of Article XI, Section 2 which requires the Legislature to create a uniform system of public schools (“the framers indicated they intended to create two duties, a broad one to encourage education by ‘all suitable means,’ and a specific, but separate, one to create a uniform public school system).”³

The Nevada Legislature’s enactment of a program of Education Savings Accounts is an exercise of its independent duty and prerogative to promote education “by all suitable means.” In addition to creating a uniform system of public schools under Section 2, the Legislature has decided to enhance educational opportunity by empowering Nevada’s families to choose alternatives for their children. The Legislature has decided that, in addition to the public schools, parents ought to have the ability to choose another school or an array of educational services if they believe it to be best

³ RA Vol. 13 at 66; District Court Dec. at 23.

for their child. Some parents may decide to remove their children from the Nevada public school system and send them to a private school. Other families – probably a majority – will continue to use their local public schools. Under Senate Bill 302 Nevada families now have a choice.

The Appellants here have a tough - even insurmountable - burden. They must show that the Legislature *may not* provide choice. They must demonstrate that doing so is intrinsically at odds with the duty to provide public schools and can never be a suitable means of encouraging education. They must establish, as a matter of law, that there is no way to have public schools and private choice. They must show that “both/and” is not an option under the Nevada Constitution.

This Court need only determine that the legislature may have reasonably decided that a system involving parental choice could be one of many “suitable means” for encouraging education in Nevada. If so, the Court must defer to the legislature’s decision. *Cramer v. Peavy*, 116 Nev. 575, 582, 3 P.3d 665, 670 (Nev. 2000) *citing Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967) (“When a statute is challenged on constitutional grounds, it is ‘to be construed in favor of the legislative power.’”).

In a case related to this one, *Schwartz v. Lopez*, Nevada Supreme Court Case No. 69611 (this case and *Schwartz* are set for oral argument by this Court at the same time), certain advocacy and special interest groups from Wisconsin (led by the Wisconsin Alliance for Excellence) filed an amicus brief claiming that the school voucher program in Milwaukee, Wisconsin has not worked. This brief is submitted to show that 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, including but not limited to better academic performance for the students whose families take advantage of the program. It is submitted to show that even though Wisconsin has the oldest and largest school choice program in the country, public schools are alive and well.

This Court need not decide whether Wisconsin got it right (although it clearly improved educational opportunities), but the Wisconsin experience has shown that you can have both school choice and public schools. *Amici* believe that Wisconsin's experience shows that the Nevada Legislature has made a wise choice. But even if one might prefer a different policy, what happened in Wisconsin demonstrates that a reasonable legislature might conclude that choice is not just a "suitable" means of promoting education, it is a very good one.

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

In 1989 Wisconsin faced a similar problem to that currently being faced by Nevada.⁴ 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.⁵ The grade point average of MPS students taken as a whole was D+.⁶ A law review article summarizing the situation in Milwaukee put it 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 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.⁷

⁴ According to the “Quality Counts” survey released annually by EDUCATION WEEK, Nevada ranks last when a wide variety of factors related to education are taken into account. See <http://www.edweek.org/ew/qc/2016/2016-state-report-cards-map.html>. A similar examination by the non-partisan Annie B Casey Foundation ranks Nevada 48th overall in their most recent year of rankings. See http://www.aecf.org/m/databook/2014KC_profile_NV.pdf.

⁵ Marge Pitrof, *Milwaukee Voucher Program Turns 25: The History*; <http://wuw.com/post/milwaukee-voucher-program-turns-25-history#stream/0>.

⁶ *Id.*

⁷ Kristen K. Waggoner, *The Milwaukee Parental Choice Program: The First Voucher System to Include Religious Schools*, REGENT U. L. REV., Vol. 7:165 (1996).

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.⁸ 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.⁹ 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 that allowed eligible children to use a state-funded voucher to attend a private school of their choosing.¹⁰

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

⁸ James Kenneth Nelsen, *From No Choice to Forced Choice to School Choice: A History of Educational Options in Milwaukee Public Schools*, 325 *Theses and Dissertations*, August 2012, available at <http://dc.uwm.edu/cgi/viewcontent.cgi?article=1015&context=etd>.

⁹ There are differences between school choice programs that involve vouchers and those that involve Education Savings Accounts, but those differences are not material to any of the issues discussed in this brief. Both vouchers and ESAs empower parents to make educational choices for their children. ESAs afford parents a higher degree of freedom than do vouchers.

¹⁰ Friedman Foundation for Educational Choice, *SCHOOL CHOICE: Wisconsin – Milwaukee Parental Choice Program*, <http://www.edchoice.org/school-choice/programs/wisconsin-milwaukee-parental-choice-program/>.

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

As the oldest choice 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 increased integration in Milwaukee schools and lower rates of criminal activity for participating schools and students. In short, the

research shows that school choice is not only a “suitable means” for encouraging education, but an excellent alternative to a program that locks students into the more traditional and inflexible public school monopoly.

III. The MPCP Has Worked Extremely Well

The Wisconsin legislature first enacted the MPCP in 1989. *See* 1989 Wis. Act 336. The program was very popular and by 2005 the demand exceeded the number of spaces available.¹¹ Moreover from 2005 to 2014, enrollment in the MPCP grew from 15,435 to 26,689, which is a growth rate of 72.9%.¹² In contrast, from 2005 to 2014, enrollment at Milwaukee Public Schools decreased by 16.3% from 92,395 to 77,316.¹³ Whatever the MPCP is offering, parents want it.

As a result, the legislature expanded the Milwaukee choice program to the City of Racine in 2011 (Racine Parental Choice Program)¹⁴, and statewide in 2013 (Wisconsin Parental Choice Program)¹⁵. School choice is

¹¹ School Choice Wisconsin, Enrollment Caps, <http://www.schoolchoicewi.org/index.php/research/issues/mpcp-enrollment-cap/>.

¹² Wisconsin Department of Public Instruction, *Wisconsin Information System for Education Data Dashboard*; Public Policy Forum, Milwaukee Parental Choice Program 2015, 17th Annual Census of MPCP Schools (June 2015), <http://publicpolicyforum.org/research/milwaukee-parental-choice-program-2015>.

¹³ WISEdash, Wisconsin Information System for Education Data Dashboard, <http://wisedash.dpi.wi.gov/Dashboard/portalHome.jsp>.

¹⁴ 2011 Wis. Act 32.

¹⁵ 2013 Wis. Act 20.

on the move in Wisconsin. This is occurring over the opposition of the public school establishment, which reflexively and vociferously opposes any threat to their monopoly power and attendant entitlement to public funds. It is happening because the program works.

A. The MPCP Is Used by a Predominantly Minority Population

For the 2014-2015 School Year there were 26,689 children enrolled in the MPCP.¹⁶ Of those, 44% (approx. 11,743) were African American, 28% were Hispanic, (approx. 7,473) and 3% (approx. 801) were Asian.¹⁷ There is an income limit currently set at 300% above the poverty line, which for a family of four is \$73,401.¹⁸ That means that 68% of Milwaukee families are eligible.¹⁹ The students currently in the MPCP are spread out across 114 different schools.²⁰

¹⁶ The enrollment for 2015-2016 went up to 27,619 (Wisconsin Dept. of Public Instruction, Milwaukee Parental Choice Program, Facts and Figures for 2015-2016) but there is not an accurate racial breakdown available for the 2015-2016 school year.

¹⁷ Wisconsin Department of Public Instruction, *supra* note 12.

¹⁸ 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.

¹⁹ Friedman Foundation for Educational Choice, *SCHOOL CHOICE*: <http://www.edchoice.org/school-choice/programs/wisconsin-milwaukee-parental-choice-program/>.

²⁰ Wisconsin Department of Public Instruction, *supra* note 12.

The families that use the MPCP are mostly those whose children did not do well under the education status quo. The problems experienced by Milwaukee's minority students were among the main reasons for the implementation of the MPCP.²¹ Because it has unquestionably helped these Milwaukee students improve their educational experience, school choice has proven itself as "suitable" education and public policy.

B. The MPCP Has Increased Academic Achievement.

Nationwide, there have been 18 "gold-standard" studies regarding the education benefits of school choice.²² "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 that is given the opportunity to participate in the choice program and the group that is not given that opportunity. Randomization is considered to be the key to valid comparative studies because it theoretically eliminates the problem of other variables that might cause the "test" group to differ from the "control" group. Membership in each group is determined by

²¹ Nelsen, *supra* note 8, at 325-31.

²² GREG FORSTER, A WIN-WIN SOLUTION: THE EMPIRICAL EVIDENCE ON SCHOOL CHOICE, 4th ed. May 2016, available at <http://www.edchoice.org/research/win-win-solution/>.

random selection and not by the choices of the participants or the designers of the program.²³

Because randomization controls for other factors, it allows for a conclusion to be reached that there is a causal relationship between “x” and “y”. 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.

Randomization works in the context of school choice programs like the MPCP because there is a high demand 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 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

²³ ROGER E. KIRK, *STATISTICS: AN INTRODUCTION*, 502-04, 1990.

have resulted from the fact that the test group attended a private school with a voucher and the control group did not.

Taken as a whole, these “gold standard” studies strongly support the claim that school choice works.²⁴ Two of the earliest “gold standard” studies were done specifically on the MPCP.²⁵ 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 years in a private school in the choice program.²⁶ The Rouse analysis showed that being offered a voucher increased math scores by about 8.7 points after four years.²⁷

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

²⁴ FORSTER, *supra* note 22.

²⁵ Jay P. Greene, Paul E. Peterson, and Jiangtao Du. *Effectiveness of School Choice: The Milwaukee Experiment*, EDUCATION AND URBAN SOCIETY 31, no. 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*. QUARTERLY JOURNAL OF ECONOMICS 113, no. 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.

²⁶ Greene, Peterson & Du, *supra* note 25.

²⁷ Rouse, *supra* note 25.

2012. The State of Wisconsin mandated that Milwaukee schools make data available to the SCDP. The study, directed by Amici 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 #30,²⁸ 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

²⁸ The SCDP issued a total of 36 separate reports. Report #30 was later published in the peer-reviewed scientific *Policy Studies Journal* and can also be found at <http://www.uaedreform.org/downloads/2012/02/report-30-student-attainment-and-the-milwaukee-parental-choice-program-final-follow-up-analysis.pdf>.

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 America it would be the high school graduation rate.²⁹

In a brief filed in the related case (*Schwartz v. Lopez*), amicus opponents of school choice (led by the Wisconsin Alliance for Excellence) have tried to use Dr. Witte’s careful qualifications of what can and cannot be concluded from the SCDP (Br. At 27) as evidence that choice has somehow “failed” in Wisconsin. However, Dr. Witte does not agree with them! The meaningful improvement in graduation rates has led Professor Witte to advocate publicly for the continuation of the program.³⁰ 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

²⁹ John Witte, Testimony before the US Senate Committee on Homeland Security and Governmental Affairs, July 20, 2015.

³⁰ Patrick J. Wolf and John F. Witte, *Milwaukee school choice beats the alternative*, WISCONSIN JOURNAL-SENTINEL, available at <http://www.jsonline.com/news/opinion/milwaukee-school-choice-beats-the-alternative-p68doeu-187369091.html>.

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.³¹

In SCDP Report #29,³² 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.³³

In SCDP Report #11³⁴ 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

³¹ *Id.*

³² Report #29 was subsequently published in the peer-reviewed scientific journal *Education Evaluation and Policy Analysis* and can also be found at <http://eric.ed.gov/?id=ED530071>.

³³ 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.

³⁴ School Choice Demonstration Project, *The Effect of Milwaukee's Parental Choice Program on Student Achievement in Milwaukee Public Schools. SCDP Comprehensive Longitudinal Evaluation of the Milwaukee Parental Choice Program. Report #11*, available at <http://eric.ed.gov/?id=ED530091>.

academic needs of students when those students have more opportunities to leave those schools.”³⁵ 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 114 schools in which MCPC students enroll are not and no valid conclusions can be reached by aggregating them. 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 compared the performance of Catholic and Lutheran choice schools – experienced school operators that comprise a large percentage of schools participating in the MPCP. The study focused on students attending schools that were more than 80% African American and 80% poor with public schools that served a similar population.³⁶ While the study was not

³⁵ *Id.* at 9.

³⁶ Wisconsin Institute for Law & Liberty, WILL POLICY BRIEF: *Apples to Oranges?*, February 9, 2015, <http://www.will-law.org/will-policy-brief-apples-to-oranges/>.

longitudinal and may understate the gains from choice, it found that students in the choice schools earned 3 points higher in reading and 6.8 points higher in math on state issued exams.

National, Milwaukee and even global studies show that choice leads to better academic results.³⁷ This is more than enough to demonstrate that the legislature might have reasonably concluded that it is a suitable means of encouraging 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 by Amicus School Choice Wisconsin showed that private schools in the MPCP experience fewer 911 emergency calls than public schools, suggestive evidence that they provide a safer environment for students.³⁸

³⁷ M. Danish Shakeel, Kaitlin P. Anderson, and Patrick Wolf, *The Participant Effects of Vouchers across the Globe*, University of Arkansas, WORKING PAPER SERIES, May 10, 2016, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2777633.

³⁸ School Choice Wisconsin, Sept 23, 2014 Press Release, available at http://www.schoolchoicewi.org/files/4014/1148/6070/Safety_Report_Press_Release_final.pdf.

A different study by De Angelis and Wolf³⁹ used matching methods to compare students in MPS 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. Thus, in addition to better academic performance, parents likely choose voucher schools over public schools because they are safer and contribute to keeping young people out of the criminal justice system.

IV. The Typical Criticisms of School Choice Are Misplaced.

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,

³⁹ University of Arkansas, WORKING PAPER SERIES, *The School Choice Voucher: A "Get Out of Jail" Card?*, March 8, 2016, available at <http://www.uaedreform.org/downloads/2016/03/the-school-choice-voucher-a-get-out-of-jail-card.pdf>.

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 their Results.

One criticism leveled against school choice is the assertion that private choice schools are held to a lower standard of accountability than public schools. In fact, the opposite is true. According to research by Amicus Wisconsin Institute for Law & Liberty (WILL),⁴⁰ private schools in Wisconsin face higher and more comprehensive accountability standards than those applied to public schools in the state.

Under Wis. Stat. §119.23(7)(a), private schools in the choice program must adhere to at least one of four accountability standards. These standards cover a number of areas demonstrably linked to educational achievement, including progress on exams, parental involvement with the school, and attendance metrics. If a school does not comply with at least one of these standards every year, it can be dropped from the choice program.

In addition, private schools in the voucher program get audited (by GAAP standards), every year, for every student, for every state dollar by an

⁴⁰ Wisconsin Institute for Law & Liberty, *Let's Begin By Understanding Where We Are: A report on existing academic accountability for schools in the choice programs and public schools*, available at <http://www.will-law.org/wp-content/uploads/2016/02/2014-12-01-WILL-Report-School-Choice-Accountability.pdf>.

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).⁴¹

These standards are not applied to public schools in Wisconsin. In fact, public schools in Wisconsin are rarely held accountable for their failures. In theory, the State Superintendent of Public Instruction could take action against failing schools. Under Wisconsin Statute §121.006(2)(d), the Department of Public Instruction can withhold state aid for poor performing public schools that fail to adhere to an improvement plan. But this has never happened in Milwaukee, despite the fact that Milwaukee has a very sizable number of poor performing traditional public schools.⁴²

Of course, not all schools participating in the MPCP have succeeded. But those that fail to meet the applicable standards are held accountable. Between 2004 and 2014 at least 50 schools were dropped from the voucher

⁴¹ Similarly, Nevada also holds private schools accountable for their performance and results. *See, e.g.* NRS 394.241 *et. seq.* requiring compliance with minimum standards, inspection and certification, and specifically requiring private schools to establish and maintain procedures for measuring student performance. Nevada also certifies operation of private schools for two years (or in some cases four years), at which time the school must submit a new application and the State can examine schools for compliance with proscribed standards. *See* NRS 394.251.

⁴² Wisconsin Institute for Law & Liberty, *Let's Begin By Understanding Where We Are*, *supra* note 40.

program for various reasons.⁴³ Moreover, private schools – unlike public ones – are disciplined by the market. Parents may choose to go elsewhere – something that could cause some schools to fail.

But public schools fail as well. In 2014-2015, MPS had 53 schools – which educated over 31,000 children - that were failing to meet expectations, according to the state report cards.⁴⁴ Yet the State has done nothing about them. Voucher critics complain that Wisconsin paid \$139 million since 2004 to schools that ultimately were dropped from the program.⁴⁵ Yet, in 2014, the State paid \$ 350 million – over twice the cost of the MPCP – to run 51 schools in which less than ten percent of the students scored were proficient in math and reading.⁴⁶ From 2005 to 2014, the State paid \$ 1.5 *billion* to operate 119 schools which MPS (but not the state) closed and in which, on average only 5.3% of students were proficient or advanced in math and only 4.7% in reading.⁴⁷

⁴³ Molly Beck, WISCONSIN STATE JOURNAL, October 12, 2014.

⁴⁴ Rick Esenberg, CJ Szafir, Dr. Martin Lueken, *Kids in Crisis, Cobwebs in Classrooms*, Wisconsin Institute for Law & Liberty Report, Jan. 12, 2015, at 6, available at <http://www.will-law.org/wp-content/uploads/2016/01/WILL-Report-Kids-in-Crisis.pdf>.

⁴⁵ Beck, *supra* note 43.

⁴⁶ School Choice Wisconsin, *Choose Your School Wisconsin*, Apr. 27, 2015, [http://www.chooseyourschoolwi.org/blog/53-let%E2%80%99s-talk-about-the-cost-of-closed-mps-schools-\\$1-5-billion.html](http://www.chooseyourschoolwi.org/blog/53-let%E2%80%99s-talk-about-the-cost-of-closed-mps-schools-$1-5-billion.html).

⁴⁷ *Id.*

Failing public schools are a national problem.⁴⁸ The United States public education system, on average, is producing students who perform near the bottom in math, science and reading relative to other economically developed countries.⁴⁹ The Nevada Legislature may have reasonably concluded that allowing parents to vote with their feet would not only encourage education for their children, but also cause Nevada's public schools to perform better for the children who remain. That's the way accountability and competition work.

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 have a smaller population of 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. Save family preferences, they do not get to select

⁴⁸ Programme for International Student Assessment (PISA), Results from PISA 2012, Organisation for Economic Cooperation and Development, *available at* <http://www.oecd.org/pisa/keyfindings/PISA-2012-results-US.pdf>. Among the 34 OECD countries, the 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.

⁴⁹ *Id.*

the students they serve and certainly cannot select students based upon whether they have a disability.

According to SCDP Report #35,⁵⁰ the rate of students with disabilities in choice schools is significantly higher than the education establishment typically asserts. This is because the establishment uses the wrong measure.⁵¹ 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.”

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 school.⁵² Private schools in the MPCP educate far more children with

⁵⁰ School Choice Demonstration Project, *Special Education and the Milwaukee Parental Choice Program, SCDP Milwaukee Evaluation #35*, February 2012, available at <http://www.uaedreform.org/downloads/2012/02/report-35-special-education-and-the-milwaukee-parental-choice-program.pdf>.

⁵¹ *Id.* (“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.”).

⁵² *Id.* See also 34 CFR § 300.137 (2007).

disabilities than the educational establishment claims and they do so with less funding than the public schools.

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.⁵³ 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.⁵⁴

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

⁵³ See U.S. Department of Justice Letter to State Superintendent Tony Evers, April 9, 2013, available at <http://mediatrackers.org/assets/uploads/2014/06/DPI-Response-to-Senators.pdf>.

⁵⁴ M.D. Kittle, *DOJ probe into WI School Choice 'another massive power grab' by feds*, Wisconsin Watchdog.org, available at <http://watchdog.org/141162/school-choice-wisconsin-doj/>.

choice program had no discernible effect on segregation in Milwaukee.⁵⁵

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.

Very recent data, in fact, suggests that MPCP schools may be more integrated than MPS schools. In 2015, MPS schools overall were 53.5% African-American and 12.9% white (a differential of 40.6%) while MPCP schools were 44% African-American and 21% white (a differential of 23%).⁵⁶

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 Foundation⁵⁷

⁵⁵ School Choice Demonstration Project, The Milwaukee Parental Choice Program's Effect on School Integration, April 2012, *available at* <http://www.uaedreform.org/downloads/2010/04/report-20-the-milwaukee-parental-choice-programs-effect-on-school-integration.pdf>.

⁵⁶ Wisconsin Department of Public Instruction, *supra* note 12.

⁵⁷ Southern Education Foundation, Research Report: *Race and Ethnicity in a New Era of Public Funding of Private Schools: Private School Enrollment in the South*

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 still spends \$1,000 more per-pupil than the average state and ranks 22nd overall in per-pupil spending.⁵⁸ Indeed, during this period, real per pupil spending on public schools in Wisconsin has increased from \$10,187 to \$11,972.⁵⁹

This is true in Milwaukee as well. Since 2004, even as the MPCP has undergone expansion, per pupil funding has increased in Milwaukee by

and The Nation, available at <http://www.southerneducation.org/getattachment/be785c57-6ce7-4682-b80d-04d89994a0b6/Race-and-Ethnicity-in-a-New-Era-of-Public-Funding.aspx>.

⁵⁸ United States Census Bureau, Public Elementary–Secondary Education Finance Data, <http://www.census.gov/govs/school/>.

⁵⁹ NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS, 1992 ed. & 2016 ed., available at https://nces.ed.gov/programs/digest/current_tables.asp.

more than \$300 dollars, accounting for inflation.⁶⁰ At the same time Wisconsin remains near the top in measures of performance such as the ACT.⁶¹ 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.⁶² A voucher in the MPCP is funded by the state at \$7,214 (in the case of grade school) or \$7,860 (in the case of high school). This represents a funding differential of more than \$6,000 per student in high school and nearly \$7,000 in lower grades.

Indeed, scholars have found that the program saves money for the taxpayers of the state. In a 2008 study, for example, Dr. Robert Costrell

⁶⁰ Wisconsin Department of Public Instruction, Comparative Cost per Member, <https://apps4.dpi.wi.gov/sfsdw/CompCostReport.aspx>.

⁶¹ Erin Richards, *Wisconsin ACT Scores hold steady at No. 2 for Class of 2015*, MILWAUKEE JOURNAL SENTINEL, Aug. 25, 2015, available at <http://www.jsonline.com/news/education/wisconsin-act-scores-hold-steady-at-no-2-for-class-of-2015-b99564647z1-322972401.html>.

⁶² 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).

found that Wisconsin realized more than \$31 million in savings per year from the choice program.⁶³ 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.

CONCLUSION

School choice has been demonstrably effective in Wisconsin in the 27 years that it has been in effect and the Nevada legislature could reasonably conclude that it will have similar benefits in Nevada. Senate Bill 302 is plainly a suitable means for the Nevada legislature to encourage education.

Respectfully submitted,

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⁶³ Robert M. Costrell, *Who Gains, Who Loses? The fiscal impact of the Milwaukee Parental Choice Program*, EDUCATION NEXT, Vol. 9 No. 1 (WINTER 2009), <http://educationnext.org/who-gains-who-loses/>.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared using Microsoft Word 2010 in 14-point font, Times-New Roman, a proportionally spaced font. I further certify that this Brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 6,317 words.

Pursuant to NRAP 28.2, I certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that this Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

Amici American Federation for Children, a non-profit corporation, Hispanics for School Choice, a non-profit corporation, School Choice Wisconsin, a non-profit corporation, Dr. Patrick Wolf, an individual, and Wisconsin Institute for Law & Liberty, a non-profit corporation.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Amici are all non-profit corporations or individuals and have no parent corporations and no publicly held company owns 10% or more of the stock of any of the Amici. The following law firms have appeared and/or are expected to appear in this court:

Muehlbauer Law Office, Ltd.

Wisconsin Institute for Law & Liberty participated as “Of Counsel” with Muehlbauer Law Office, Ltd. in preparing the brief on behalf of the amici, but has not and will not appear in this court.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this **BRIEF OF AMICI** was filed electronically with the Nevada Supreme Court on July 20, 2016 and electronically served on the following parties:

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