

**In the  
Indiana Supreme Court**

Case No. 49S00-1203-PL-172

Teresa MEREDITH, Dr. Edward E. )  
Eiler, Richard E. HAMILTON, )  
Sheila KENNEDY, Glenda RITZ, )  
Rev. Michael JONES, Dr. Robert M. )  
STWALLEY III, Karen J. COMBS, )  
Rev. Kevin ARMSTRONG, Deborah )  
J. PATTERSON, Keith GAMBILL, )  
and Judith Lynn FAILER, )

Appellants, )

v. )

Mitch DANIELS, in his official )  
capacity as Governor of Indiana; )  
Dr. Tony BENNETT, in his official )  
capacity as Indiana Superintendent )  
of Public Instruction and Director of )  
the Indiana Department of )  
Education; Heather COFFY, and )  
Monica POINDEXTER, )

Appellees. )

Appeal from the Marion County  
Superior Court

Case No. 49D07-1107-PL-025402

Hon. Michael D. Keele, Judge

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**BRIEF OF *AMICI CURIAE* CHRISTIAN ACADEMY OF MADISON, *ET AL.***

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Michael A. Wilkins  
BROYLES KIGHT & RICAFORT  
8250 Haverstick Rd., Ste. 100  
Indianapolis, IN 46240  
(317) 571-3601

Bryan H. Beauman  
ALLIANCE DEFENSE FUND  
P.O. Box 779  
Paris, KY 40362  
(859) 340-1127

Gregory S. Baylor  
ALLIANCE DEFENSE FUND  
801 G Street, N.W.  
Washington, DC 20001  
(202) 393-8690

*Counsel for Amici Curiae*

[Amici and Additional Counsel Listed Inside]



*AMICI*

CHRISTIAN ACADEMY OF MADISON

EVANSVILLE CHRISTIAN SCHOOL

HERITAGE CHRISTIAN SCHOOL

LIBERTY CHRISTIAN SCHOOL

LIGHTHOUSE CHRISTIAN ACADEMY

INDIANA CATHOLIC SCHOOLS OF  
THE ROMAN CATHOLIC DIOCESE  
OF INDIANAPOLIS, EVANSVILLE,  
FT. WAYNE-SOUTH BEND, GARY  
AND LAFAYETTE

INDIANA NON-PUBLIC EDUCATION  
ASSOCIATION

**ADDITIONAL COUNSEL**

John S. (Jay) Mercer  
MERCER BELANGER  
Chase Tower  
111 Monument Circle, Ste. 3400  
Indianapolis, IN 46204  
(317) 636-3551

Joshua D. Hershberger  
CASTOR AND HERSHBERGER  
320 Walnut Street  
Madison, IN 47250  
(812) 265-6110

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**REPORTS:**

Rebecca L. Billick, Stephen C. Hiller, & Terry E. Spradlin,  
Center for Evaluation & Education Policy, *School Choice Issues  
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Angela C. Erickson, Institute for Justice, *Opening the  
Schoolhouse Doors: Indiana’s Choice Scholarship Program  
Extends Long History of Choice-Based Aid* (December 2011) .....25

Greg Forster, The Foundation for Educational Choice, *A Win-  
Win Solution: The Empirical Evidence on School Vouchers*  
(March 2011) .....*passim*

Alexandra Usher & Nancy Kober, *Keeping Informed about  
School Vouchers: A Review of Major Developments and  
Research* (July 2011).....13-19

**OTHER AUTHORITIES:**

Indiana Department of Education, Charter School FAQs,  
*available at* <http://www.doe.in.gov/student-services/charter-schools/faq/how-does-public-charter-school-differ-traditional-public-school> .....21

Indiana Department of Education, DOE Compass, *available at*  
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## INTEREST OF *AMICI CURIAE*

*Amici* are five private religious schools, Catholic schools from throughout Indiana, and an association of private schools from all parts of the state. Collectively, these *Amici* currently serve students through Indiana's Choice Scholarship Program. Although the Choice Scholarship Program is relatively new, the low-income families who have chosen to participate have already become an integral part of *amici's* educational communities. *Amici*, in turn, greatly value these students' and parents' unique contribution to the life of their schools. Because the cost of legal representation—much like the cost of an unsubsidized, private education—is prohibitive for these families, *amici* are compelled to represent the benefits of a private, religious education to this Court. *Amici* do so not as an exercise in self-promotion, but as those who know firsthand the advantages students receive at their institutions of learning, advantages the Indiana General Assembly had ample evidence to conclude would be of considerable benefit to low-income students.

## SUMMARY OF ARGUMENT

Indiana's private schools, most of which are religious, adhere to rigorous standards of academic performance and personal conduct that prepare students for post-graduation success. Through the Choice Scholarship Program, many low-income families are able to access these



programs for the first time. It is hardly surprising that the General Assembly determined such access would greatly benefit students.

Private schools outperform public schools at every turn. This is as true in Indiana as it is nationally. Indeed, the results of every standardized test for which data is publicly available demonstrate that students in Indiana's private schools perform significantly better than their public school peers.

As a matter of public policy, the Choice Scholarship Program also makes good sense. Multiple scientific studies have been conducted on the effects of voucher programs. Their findings are controversial, but two points are clear. First, no study has indicated that voucher programs have negative effects on public school students. Second, the competition generated by such programs may facilitate an increase in student performance across the board.

The Choice Scholarship Program also comports with Indiana's longstanding strategy of increasing low-income families' ability to select educational options that best fit their individual needs. In light of the broad array of public and private school options currently available, the inclusion of private, religious schools is simply an effective means of furthering individual choice. Negating that choice would not only demonstrate a hostility to religion alien to the framers of Indiana's Constitution, but also put many longstanding support programs at risk.

## ARGUMENT

### **I. Students in Indiana's Largely Religious Private Schools Significantly Outperform Their Public School Peers on Standardized Tests.**

The Indiana Department of Education administers standardized tests to students in both public and private schools and makes their results available to the public.<sup>1</sup> These assessments measure students' knowledge of four core academic subjects: English, Math, Science, and Social Studies. In every subject area, the average passage rates of private school students surpass those of their public school peers by at least 12%.

#### **A. Students in Private Schools Surpass Those In Public Schools at Every Grade Level in Every Tested Subject.**

Every year, students in Indiana schools are administered standardized tests under the Indiana Statewide Testing for Educational Progress Plus ("ISTEP+") program. The ISTEP+ program was designed to measure students' knowledge of four basic academic subjects at specific grade levels: English (grades 3 through 8), Mathematics (grades 3 through 8), Science (grades 4 and 6), and Social Studies (grades 5 and 7). Each test consists of applied skills and multiple choice components.

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<sup>1</sup> *Amici* derived the following statistics from data published on the Indiana Department of Education's website, which is publicly available at <http://compass.doe.in.gov/dashboard/istep.aspx?type=state>.

The most recent test scores publicly available are from the 2010-2011 school year. Although they represent but a single snapshot of students' educational progress, the 2010-2011 ISTEP+ scores exemplify a longstanding record of superior performance by students at Indiana's private schools. This trend remains true throughout all grade levels in every tested subject.

**ENGLISH ISTEP+ PASS RATES**

2010-11	Grade 3	Grade 4	Grade 5	Grade 6	Grade 7	Grade 8
Public	83.5%	82.0%	75.3%	75.8%	77.2%	72.4%
Private	94.2%	92.6%	89.9%	91.2%	93.0%	91.6%
Difference	10.7%	10.6%	14.6%	15.4%	15.8%	19.2%

**MATH ISTEP+ PASS RATES**

2010-11	Grade 3	Grade 4	Grade 5	Grade 6	Grade 7	Grade 8
Public	78.5%	78.6%	86.1%	80.3%	75.2%	77.0%
Private	90.8%	88.3%	93.3%	91.7%	90.1%	90.6%
Difference	12.3%	9.7%	7.2%	11.4%	14.9%	13.6%

### SCIENCE ISTEP+ PASS RATES

2010-11	Grade 4	Grade 6
Public	76.4%	61.7%
Private	90.7%	82.0%
Difference	14.3%	20.3%

### SOCIAL STUDIES ISTEP+ PASS RATES

2010-11	Grade 5	Grade 7
Public	67.0%	67.8%
Private	87.3%	87.6%
Difference	20.3%	19.8%

### ISTEP+ Pass Rates - All Grade Levels

2010-11	English	Math	Science	Social Studies
Public	77.7%	79.3%	69.2%	67.4%
Private	92.1%	90.8%	86.5%	87.5%
Difference	14.4%	11.5%	17.3%	20.1%

As shown above, Indiana's private school students significantly outperformed their public school peers. The difference between these two

groups' ISTEP+ passage rates ranged from a low of 7.2% in Fifth Grade Math to a high of 20.3% in Fifth Grade Social Studies and Sixth Grade Science. Two other classes of public school students exhibited passage rates approximately 20% lower than comparable groups in private schools: Sixth Grade Social Studies (19.8%) and Eighth Grade English (19.2%).

The numbers speak for themselves, but several overarching trends are worthy of comment. Public school students' passage rates are uniformly below those of their private school peers, most substantially in classes involving Science and the Humanities. Moreover, this achievement gap tends to grow as pupils reach more advanced grades.

Both of these patterns also appear in Indiana's 2010-2011 ISTEP+ End of Course Assessment ("ECA") results. ECAs are specialized ISTEP+ tests targeted to measure competency in three advanced courses: English 10, Algebra I, and Biology I. Although public school students' Algebra I passage rates were closer to those of their private school peers, these rates significantly declined in English 10 and Biology I, which are generally completed at higher grade levels.

### ECA Pass Rates – All Grade Levels

2010-11	English 10	Algebra I	Biology I
Public	70.7%	71.6%	46.0%
Private	91.0%	84.8%	67.2%
Difference	20.3%	13.2%	21.2%

#### B. Test Scores from Multiple Years Confirm Private Schools' Superior Performance.

Private school students' superior academic performance is not limited to the 2010-2011 school year. ISTEP+ test results covering all four core subject areas are publicly available for the last three years. In each of these years, students at private institutions outperformed their public school counterparts to a similar degree.

#### Public School ISTEP+ Passage Rates – All Grade Levels

2008-11	2008-09	2009-10	2010-11	Average
English	71.65%	75.70%	77.70%	75.02%
Math	73.55%	77.50%	79.30%	76.78%
Science	62.05%	67.90%	69.20%	66.38%
Social Studies	60.30%	65.40%	67.40%	64.37%

### Private School ISTEP+ Passage Rates – All Grade Levels

2008-11	2008-09	2009-10	2010-11	Average
English	89.65%	91.30%	92.10%	91.02%
Math	88.05%	89.90%	90.80%	89.58%
Science	82.95%	86.30%	86.50%	85.25%
Social Studies	84.10%	86.20%	87.50%	85.93%

Comparing the average passage rates for these three-year periods yields a more accurate picture of the measure of private schools' academic success. While test scores increased every year across the board, the achievement gap between public and private school students remained constant. That gap ranged from a low of 12.80% in Math to a high of 21.56% in Social Studies.

### Difference in ISTEP+ Passage Rates – All Grade Levels

2008-11	Public School 3-Year Average	Private School 3-Year Average	Difference
English	75.02%	91.02%	16.00%
Math	76.78%	89.58%	12.80%
Science	66.38%	85.25%	18.87%
Social Studies	64.37%	85.93%	21.56%

Average ECA test scores are highly similar. One notable difference is a wider disparity in public and private school students' English passage rates than appears at earlier grade levels (greater by 6.20%). This pattern is demonstrated below using data from 2009-2011, the only two years for which ECA passage rates are publicly available.

**Public School ECA Passage Rates – All Grade Levels**

2009-11	2009-10	2010-11	Average
English 10	63.50%	70.70%	67.10%
Algebra I	62.00%	71.60%	66.80%
Biology I	36.90%	46.00%	41.45%

**Private School ECA Passage Rates – All Grade Levels**

2009-11	2009-10	2010-11	Average
English 10	87.60%	91.00%	89.30%
Algebra I	79.60%	84.80%	82.20%
Biology I	56.80%	67.20%	62.00%



### Difference in ECA Passage Rates – All Grade Levels

2009-11	Public School 2-Year Average	Private School 2-Year Average	Difference
English 10	67.10%	89.30%	22.20%
Algebra I	66.80%	82.20%	15.40%
Biology I	41.45%	62.00%	20.55%

#### **C. The Evidence Supports the General Assembly's Conclusion that Low-Income Students Have a Higher Probability of Success in Private Schools.**

Testing data uniformly supports the proposition that low-income students have a higher probability of success in Indiana's private schools. And the difference is far from negligible. As demonstrated above, private school students' passage rates are, on average, over 12% higher than their public school counterparts, regardless of subject or grade. This private-school advantage reaches approximately 20% in lower-grade Science (18.87%) and Social Studies (21.56%) courses, as well as in more advanced classes like English 10 (22.20%) and Biology I (20.55%). Hence, the General Assembly had ample grounds to conclude that enhancing low-income students' access to private schools would increase their likelihood of academic success, particularly in non-math related subjects.

## **II. Studies Demonstrate that Voucher Programs Do Not Harm Public Schools and May Help Increase Student Performance Across the Board.**

Studies concerning the effects of school voucher programs generate much controversy, yet two important points are undeniable. Proponents and detractors of school voucher programs have undertaken independent analyses, but not a single study has uncovered evidence that vouchers negatively affect the performance of students in public schools. Moreover, multiple researchers have concluded that the competition created by voucher programs benefits students across the board.

### **A. Empirical Evidence Consistently Indicates That Vouchers Programs Improve Students' Academic Performance Across the Board.**

Researchers have conducted ten empirical studies to gauge voucher programs' effects on participating students using random assignment, the most accurate research method available in the field of social science. See Greg Forster, The Foundation for Educational Choice, *A Win-Win Solution: The Empirical Evidence on School Vouchers* (March 2011) [hereinafter FEC Report] at 1.<sup>2</sup> Nine of these studies determined that students enrolled in voucher programs exhibit improved academic performance. *Id.* Of these nine, six concluded that all voucher participants benefited from the program,

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<sup>2</sup> The Foundation for Educational Choice's report is available at <http://www.edchoice.org/Research/Our-Studies---Reports.aspx>.

while three found that some students experienced progress and others were unaffected. *Id.* Only one analysis concluded that vouchers did not demonstrably benefit participating students. *Id.*

The overwhelming majority of reliable data thus clearly indicates that low-income students enrolled in voucher programs reap some academic benefit. In terms of scope, academic gains are largely moderate. *See, e.g., id.* at 10 (discussing results of 6 to 11 point gains in reading and math assessments). But this is unsurprising given the modest size and narrow scope of most voucher programs previously available for study. *See id.* at 1 (recognizing that these voucher programs applied to few students, were accorded strictly limited funding, and stymied innovation). In any case, it would be appropriate for the General Assembly to conclude that some academic progress is better than none.

Studies have also been conducted on voucher programs' effect on students remaining in public schools. *Id.* Out of the nineteen empirical studies on this topic, eighteen determined that private school vouchers resulted in scholastic changes that improved public school students' academic performance. *Id.* A single study concluded that the availability of school vouchers had no measurable upshot for students remaining in public schools. *Id.* Importantly, no empirical study has concluded that voucher programs harm public school students' educational progress. *Id.* at 1, 15.

To the contrary, the mere threat of voucher availability has been effective in improving public school students' academic performance. *See id.* at 18. A voucher program that previously operated in Florida aptly demonstrates this trend. Under the Florida voucher scheme, schools received annual grades based primarily on students' adequate scoring—or substantial progress—on state standardized tests. *Id.* Two or more F grades in a four-year period rendered a public school's students eligible to receive vouchers. *Id.* Public schools receiving a single F grade made significantly greater academic gains on a year-to-year basis than those receiving a grade of D. *Id.*; *see also* Alexandra Usher & Nancy Kober, *Keeping Informed about School Vouchers: A Review of Major Developments and Research* (July 2011) [hereinafter CEP Report] at 35 (noting that “public schools whose students were offered vouchers outperformed other Florida public schools”).

Multiple studies confirmed that this educational progress was attributable to the voucher threat. Indeed, voucher-eligible schools experienced the most significant academic gains (15 points higher), followed by voucher-threatened schools (9 points higher), schools that consistently ranked in the D range (4 points higher), and schools that occasionally received a grade of D (2 points higher). FEC Report at 19; *see also* CEP Report at 36 (recognizing Florida's public schools “improv[ed] in direct proportion to the challenge they face[d] from voucher competition”).

Accordingly, the objective data available indicates that vouchers have “a positive correlation with test score improvements in the worst-performing public schools.” CEP Report at 35. This trend does not continue when the threat of vouchers is removed. FEC Report at 19-20; *see also* CEP Report at 37 (“Schools that had experienced the stigma of an ‘F’ grade in 1998-99 but no longer faced the competition from vouchers due to improved ratings in subsequent years did not show test score gains like those attained by failing schools that did face voucher competition.”). Before the initiation of the voucher program in Florida, for example, public schools in the F range did not make significantly greater scholastic gains than their D-grade counterparts. FEC Report at 19-20.

Studies of the Milwaukee voucher program yielded comparable results. Public schools that faced the most competition from private school vouchers saw a dramatic improvement in test scores. *See* CEP Report at 30. And these gains were properly attributable to the voucher program because they were measured against three stringent criteria: comparison schools that did not face a voucher threat, the subject schools’ own prior levels of performance, and the trend in the subject schools’ previous academic development. *Id.* Notably, Milwaukee’s successful voucher program only achieved widespread appeal after religious schools were allowed to participate, ostensibly due to the small number of secular, private schools available. *See* FEC Report at 17.

Research on the effects of private school vouchers thus reveals important benefits to participating students and no harm whatsoever to students remaining in public schools. Failing public schools, on the other hand, appear to respond to even the potential loss of voucher students by “chang[ing] their instructional practices in meaningful ways, such as increasing instructional time and teacher resources, reorganizing the learning environment, and targeting high-needs students” for additional assistance. CEP Report at 36. With nothing to lose and everything to gain, the General Assembly undoubtedly possessed sufficient justification to conclude that a state-wide voucher program would be of great academic benefit to Indiana’s students.

**B. No Study of Private School Voucher Programs  
Has Identified Any Adverse Effects on Public  
School Students.**

Significant evidence shows that the competition inspired by voucher programs improves failing public schools’ academic performance. A growing body of research outlines a number of other likely effects. None of these factors impedes the scholastic performance of students remaining in public schools. They do, however, portend significant benefits for low-income students enrolled in voucher programs and society at large.

One likely result of voucher programs is substantial savings to the state treasury. Studies of voucher programs in Milwaukee, Wisconsin and

the District of Columbia reported that the lower cost of a private school education ended up saving local governments' considerable funds. See CEP Report at 23, 39-40. For example, although limited in scope to a single city, the Milwaukee voucher program, resulted in a saving of "nearly \$52 million" in a single year. *Id.* at 23; see also *id.* at 40 (recognizing the D.C. voucher program saved the district a minimum of "\$258,402 due to the greater efficiency of school choice").

Indiana's Choice Scholarship Program will also likely result in substantial savings for the State. Students are only eligible to receive payments in the amount of 50% or 90%—depending on their family's income level—of their customary level of State tuition support. See Indiana Code § 20-51-4-4. The State will consequently recoup either 10% or 50% of the support payments it would otherwise expend on behalf of each voucher student. See Rebecca L. Billick, Stephen C. Hiller, & Terry E. Spradlin, Center for Evaluation & Education Policy, *School Choice Issues in Indiana: Sifting through the Rhetoric* (Summer 2011) [hereinafter CEEP Policy Brief] at 5 (recognizing the money spent "on Choice Scholarships is less than the amount of money the state would spend to educate [a] child in . . . public school" resulting in "a net savings for the state").<sup>3</sup>

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<sup>3</sup> The Center for Evaluation & Education Policy's policy brief is available at <http://www.ceep.indiana.edu/pub.shtml>.

Money saved through Indiana's voucher program is available to meet other State needs, including those of public school systems. See FEC Report at 4 (“[V]oucher programs have historically improved public schools financially.”) What is more, the Choice Scholarship Program in no way lessens the amount of per-pupil, tuition support the State doles out to public schools. See CEEP Policy Brief at 5 (noting that “per-pupil state tuition support w[ill] not decrease”). The only public institutions to experience a financial pinch will thus be those whose abysmal performance effects a mass exodus. And there is every reason to think that students attending such schools will be better served elsewhere. See, e.g., CEP Report at 23 (identifying “lower than average test scores” as the trend in public schools that closed or lost funding under the Milwaukee voucher program).

Voucher programs further benefit students by increasing participants' graduation rates. Studies have shown that students who participated in the Milwaukee and District of Columbia voucher programs were significantly more likely to graduate from high school than their public school peers. See *id.* at 23-24, 38. Indeed, “if the graduation rate for the Milwaukee Public Schools equaled that of voucher students, the number of public school graduates would have been about 18% higher.” *Id.* at 24-25. Students enrolled in the voucher program in the District of Columbia also exhibited “significantly higher [graduation] rates” than their public school



counterparts, besting a public school control group by 12%. *See id.* at 38. This private school advantage extended to higher education in Milwaukee where voucher students were also more likely to enroll in college. *Id.* at 23.

Detractors of voucher programs often argue that such positive results are overstated because only the brightest eligible students are drawn to participate, leaving public schools with those who struggle academically. No evidence exists to support this claim. Studies of voucher programs in both Milwaukee and Cleveland, Ohio confirmed that voucher students either accurately reflect the student population at large or came from families with low income levels, a factor generally associated with poor academic performance. *See id.* at 31.

Students enrolled in the Milwaukee voucher program, for instance, had previously “scored lower on state tests than the average Milwaukee student but about the same as other low-income students who were eligible for vouchers but did not apply for them.” *Id.* Cleveland’s voucher program was also successful in drawing “a reasonably representative sample of students’ from the Cleveland public schools,” and did “not appear to encourage or discourage any particular group of families to apply for a voucher.” *Id.* Indeed, if any unifying characteristic applied to Cleveland and Milwaukee voucher students, it was that they came from “families of lowest income.” *Id.*;

*see also id.* at 27 (explaining that “[v]oucher parents tended to have lower incomes . . . than did Milwaukee public school parents.”).

Even those who generally doubt the utility of voucher programs recognize that they are of academic benefit to racial minorities, particularly African-American students. *Id.* at 45; *see also* FEC Report at 11 (explaining voucher programs in Dayton and New York City increased black students’ combined math and reading test scores). Of benefit to all students enrolled in voucher programs is the fact that private schools are often significantly less racially segregated than their public counterparts. *See* CEP Report at 28, 34. This was true in both Milwaukee and Cleveland where private schools participating in voucher programs were less segregated than their public peers by 13 and 18 points, respectively, according to two “segregation indices” researchers developed. *See id.* Given that private schools “draw students from across neighborhood boundaries,” this natural “potential to desegregate students” is an added social benefit of no small worth. *Id.* at 28.

Voucher programs have thus been shown to have myriad positive effects. Faced with the decision to maintain the status quo or potentially improve students’ academic performance, save taxpayers money, increase graduation rates, and expose students to a broader range of friendships, the General Assembly logically chose to give vouchers a chance. As these

public schools of the transferee corporation.” Ind. Code § 20-8.1-6.1-2. Students may also obtain a public school transfer if they would benefit from “programs or facilities” offered “for children” with specific “physical emotional, or mental” disabilities. Ind. Code § 20-8.1-6.1-4.

Indiana law further provides for the establishment of public charter schools. *See* Ind. Code § 20-24-1-4 (explaining that “[c]harter school’ means a public elementary school or secondary school”). These institutions are autonomous entities independent from local school districts. Indiana Department of Education, Charter School FAQs, *available at* <http://www.doe.in.gov/student-services/charter-schools/faq/how-does-public-charter-school-differ-traditional-public-school>. As such, they are exempt from many district and state regulations and tend to offer more innovative and effective academic programs. *See id.*

Homeschooling is another option available to Hoosier families. *See, e.g.,* Ind. Code §§ 20-33-2-8; 20-33-2-28. Parents who educate their children at home are not required to follow state curricular requirements, Ind. Code § 20-33-2-12, and homeschooled students are not subject to State standardized tests. Accordingly, homeschool programs can be tailored to fit an individual student’s educational needs. Students may also supplement their homeschool studies through particular academic programs offered by

“public and nonpublic” schools, provided they obtain the approval of the relevant administrative authority. Ind. Code § 20-8.1-3-17.3.

If a private school best meets a student’s educational needs, several State programs help families cover the expense. Low-income students may use up to 90% of their state tuition support payments to help cover private school tuition through the Choice Scholarship Program. *See* Ind. Code § 20-51-4-4. Alternatively, students in middle-to-low income brackets may apply for school scholarships granted by private organizations. *See* Ind. Code §§ 6-3.1-30.5-3 & 20-51-1-4.5. Donations to these scholarship-granting organizations are eligible for a 50% state tax deduction, provided total tax write-offs do not exceed \$5 million each fiscal year. *See* Ind. Code §§ 6-3.1-30.5-7, 6-3.1-30.5-8, & 6-3.1-30.5-13.

The Choice Scholarship Program is thus one of many options the General Assembly has made available to Hoosier families in a comprehensive effort to promote educational choice. Existing data suggests that it has not proven overly popular. During the 2011-2012 school year, the first year Indiana’s voucher program was available, participation was limited by statute to 7,500 students. Ind. Code § 20-51-4-2. This restriction proved

superfluous when less than 4,000 students chose to participate,<sup>5</sup> a result hardly commensurate with a deck stacked in private schools' favor.

**B. Vouchers are Simply the Most Recent Form  
of Support Indiana Accords Families  
Utilizing Private, Religious Schools.**

The Choice Scholarship Program is merely the latest form of support the General Assembly has accorded Hoosier families who determine a private school education best meets their individual needs. Comparable programs that assist low-income families with educational expenses have operated for decades without attracting significant comment, despite the fact that Indiana's private schools are predominately religious. Because these longstanding initiatives are indistinguishable from Indiana's voucher program, this legal challenge places an entire system of support for low-income families at risk.

For example, school buses have long provided private school students with public transport. Indeed, public school districts are statutorily obligated to provide transportation to private school students living "on or along [a] highway constituting" a regular bus route to "the point on the regular route that is nearest or most readily accessible to the nonpublic school." Ind. Code

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<sup>5</sup> Ind. Dep't of Educ. Press Release (Nov. 3, 2011), *available at* <http://www.doe.in.gov/news/indiana-choice-scholarship-program-most-expansive-first-year-voucher-program-nation%E2%80%99s-history>.

§ 20-27-11-1. Significant public funds are thus expended every weekday conveying students to and from private, religious schools.<sup>6</sup>

Indiana further reimburses the families of students attending “accredited nonpublic school[s]” for certain educational expenses, provided they establish financial need. See Ind. Code § 20-33-5-9(a). These expenses include payments for textbooks, workbooks, digital content, and other necessary curricular materials. Ind. Code § 20-33-5-9(g). Payments flow from the State to accredited nonpublic schools, which then reimburse eligible recipients. Ind. Code § 20-33-5-9(i).

The General Assembly also ensures that state special education funding is available to private school students. See Ind. Code § 20-43-7-9. Public school authorities are statutorily required to expend state funds attributable to “nonpublic school students with disabilities” on these private school students. Ind. Code § 20-43-7-9(b). Accordingly, special needs students receive public assistance regardless of whether their parents choose to enroll them in a public institution or a private, religious school. See Ind. Code § 20-43-7-9(c) (making state funds available for “educational

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<sup>6</sup> Notably, the General Assembly recently acted to protect private school students’ right to public transportation through the adoption of House Enrolled Act No. 1376, which requires that private school students be dropped off at a point “from which [they] can walk to and from the[ir] nonpublic school,” thus statutorily overruling the Court of Appeals decision in *Roman Catholic Archdiocese of Indianapolis, Inc. v. Metro School District of Lawrence Township*, 945 N.E.2d 757 (Ind. Ct. App. 2011).

evaluations” and any activity or service eligible to receive funding under the federal Individuals with Disabilities Education Act).

Moreover, state funding is used to identify and treat young children with disabilities, including those who experience delays in cognitive, physical, communicative, social, and adaptive development. See Ind. Code § 12-12.7-2-4(a)(1). Although these “early intervention services” must be provided “under public supervision,” Ind. Code § 12-12.7-2-3(a)(1), parents are able to select their own service providers from a list that includes private, religious organizations. See Angela C. Erickson, Institute for Justice, *Opening the Schoolhouse Doors: Indiana’s Choice Scholarship Program Extends Long History of Choice-Based Aid* (December 2011), at 13.<sup>7</sup> Personnel allowed to provide services under this program include “early childhood educators, and special educators,” Ind. Code § 12-12.7-2-3(a)(4)(A), many of whom are employed at religious schools.

Indiana thus provides many support mechanisms to students who select a private, religious education. Functionally, the Choice Scholarship Program is no different: the State provides families with a large number of educational options and then even-handedly accords students certain benefits they take with them to whichever school they choose to attend. Given the

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<sup>7</sup> The Institute for Justice’s research report is available at <http://www.ij.org/about/4197>.

aforementioned support mechanisms' obvious similarity to Indiana's voucher plan, the present legal challenge puts a number of support programs for low-income families at risk.

**C. Indiana's Constitution Does Not Forbid the State from Honoring Families' Independent Decisions to Utilize a Private, Religious School.**

In *Embry v. O'Bannon*, 798 N.E.2d 157 (Ind. 2003),<sup>8</sup> this Court considered a taxpayer challenge to a program through which the State provided funding and instruction to promote the education of students enrolled in private, religious schools. The *Embry* Court upheld the program, although no rationale commanded a majority. *See id.* at 158. *Embry* is nonetheless instructive because it illustrates that Indiana's constitutional ban on expending public funds "for the benefit of any religious or theological institution," Ind. Const. art. 1, § 6, does not completely bar religious schools from reaping indirect financial benefits as a result of state action clearly intended to promote students' academic progress. *See Advisory Opinion re Constitutionality of P.A. 1970, No. 100*, 180 N.W.2d 265, 274 (Mich. 1970)

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<sup>8</sup> This brief's discussion of the *Embry* decision is limited to the plurality opinion authored by now Acting Chief Justice Dickson. It is supplemented by citations to opinions of the Supreme Courts of Michigan and Wisconsin because—as Acting Chief Justice Dickson explained in *Embry*—Article 1, Section 6 of the Indiana Constitution was modeled after language found in the constitutions of those states. 798 N.E.2d at 161.



(“[I]ncidental benefits” to religious schools “do not invalidate an otherwise” valid program “plainly intended and formulated to serve a public purpose.”).

Indeed, the *Embry* Court considered several factors in upholding the dual-enrollment program that are highly relevant to this case. First, this Court noted that the state action in question provided “significant educational benefits to the Indiana children” enrolled in private, religious schools. 798 N.E.2d at 167. The Choice Scholarship Program does the same by providing low-income students access to private academic programs that significantly outperform their public counterparts on state standardized tests, *see supra* Part I, and which are also likely to increase participants’ graduation rates. *See supra* Part II.B. The General Assembly could further expect that competition generated by a voucher program would improve educational outcomes for students who remain in failing public schools. *See supra* Part II.A; *Jackson v. Benson*, 578 N.W.2d 602, 621 (Wis. 1998) (focusing on whether support offered by a voucher program was intended “for the benefit of” students, not “religious institutions” (quotation omitted)).

Second, the *Embry* Court explained that the “dual-enrollment” program was an effective means of furthering the General Assembly’s secular policy “objective to encourage education for all Indiana students.” 789 N.E.2d at 167. No doubt exists that the General Assembly’s broad provision of educational choice encourages the academic progress of all Indiana students.

*See supra* Part III.A. The Choice Scholarship Program, as one piece of that puzzle, simply exists to serve low-income families who independently determine that a private education best meets their individual needs. *See Jackson*, 578 N.W.2d at 621 (inquiring “not whether” a voucher program affords “some benefit” to religious schools “but whether its principal or primary effect advances religion” (quotation omitted)).

Third, the *Embry* Court examined the dual-enrollment program’s impact on the financial solvency of public schools. *See Embry*, 798 N.E.2d at 167. Studies of voucher programs indicate that they result in the substantial saving of public funds, *see supra* Part II.B, freeing up resources the State may then reinvest in public schools. The Choice Scholarship Program was specifically designed to save money and additionally ensures that public schools see no decrease in the per-pupil, tuition support payments they receive from the State. *See supra* Part II.B.

The Choice Scholarship Program thus results in the same positive outcomes members of this Court found to be determinative in *Embry*: (1) “substantial educational benefits to children,” (2) “increased attainment of the State’s objectives,” and (3) “additional funds made available” to public schools. 798 N.E.2d at 167. Any incidental benefits to private, religious schools are merely an indirect result of Hoosier families’ private exercise of educational choice. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002)

(noting that any “incidental advancement of a religious mission” is “attributable to the individual [voucher] recipient, not to the government”).

In keeping with the Indiana’s strong commitment to liberty and religious freedom, *see* Ind. Const. art. I, this Court should refuse to negate that choice, which would demonstrate a hostility to religion repugnant to the framers of Indiana’s Constitution.<sup>9</sup> *See Embry*, 798 N.E.2d at 163 n.5 (explaining the “founder” of Indiana’s public school system had a high regard for religion and was merely concerned that “scarce public resources” be invested in establishing a free educational system open to all); *see also Advisory Opinion*, 180 N.W.2d at 274 (rejecting “arguments” against a support program for students enrolled in religious schools because they “would sanction open hostility to sectarian institutions.”).

### Conclusion

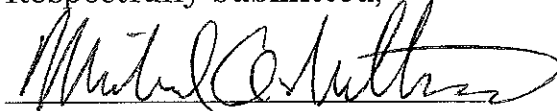
Private, religious schools have thrived in Indiana for over a century and will continue to do so regardless of the fate of the Choice Scholarship Program. The only question for this Court is whether the General Assembly’s provision of true educational choice to low-income families will stand. Given

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<sup>9</sup> As the Supreme Court of Michigan explained in a similar context, “adopting[ing] a strict ‘no benefits, primary or incidental’ rule would render religious places of worship and schools completely ineligible for all State services. There is no evidence, furnished or imaginable, that the people intended such a rule when they adopted [Article 1, Section 6 of the Indiana] Constitution.” *Advisory Opinion*, 180 N.W.2d at 274.

the clear academic benefits Indiana's voucher program provides to both participating and non-participating students, the judgment of the Marion County Superior Court should be upheld.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael A. Wilkins", written over a horizontal line.

Michael A. Wilkins

Attorney No. 14368-02

BROYLES KIGHT & RICAFORT, PC

8250 Haverstick Road, Ste. 100

Indianapolis, IN 46240

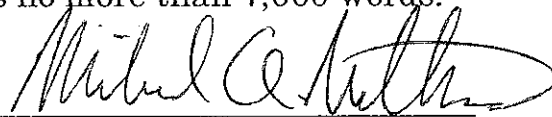
(317) 571-3601 (phone)

(317) 571-3610 (fax)

[mwilkins@bkrlaw.com](mailto:mwilkins@bkrlaw.com)

## Word Count Certificate

I verify that this brief contains no more than 7,000 words.

A handwritten signature in black ink, appearing to read "Michael A. Wilkins", written over a horizontal line.

Michael A. Wilkins

## Certificate of Service

On April 11, 2012, I mailed a copy of the foregoing brief, by first-class

U.S. Mail, to the following counsel of record:

Andrew W. Hull  
Alice M. Morical  
HOOVER HULL LLP  
111 Monument Circle #4400  
P.O. Box 44989  
Indianapolis, IN 46244

John M. West  
Joshua B. Shiffrin  
BREDHOFF & KAISER PLLC  
805 Fifteenth Street, NW, #1000  
Washington, DC 20005

Alice O'Brien  
Kristen L. Hollar  
NATIONAL EDUCATION ASSOCIATION  
1201 16th Street NW  
Washington, DC 20036

William Groth  
429 East Vermont Street, Ste. 200  
Indianapolis, IN 46202

Gregory M. Lipper  
1301 K Street NW, Ste. 850E  
Washington, DC 20005

Lisa Tanselle  
INDIANA SCHOOL BOARDS  
ASSOCIATION  
One North Capitol, Ste. 1215  
Indianapolis, IN 46204

Thomas M. Fisher  
Ashley Tatman Harwel  
Heather Hagan McVeigh  
OFFICE OF THE ATTORNEY GENERAL  
IGC South, Fifth Floor  
302 W. Washington Street  
Indianapolis, IN 46204

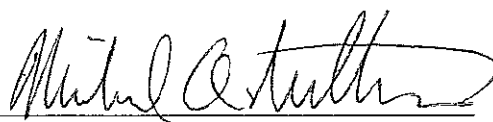
William H. Mellor  
Robert W. Gall  
Richard D. Komer  
INSTITUTE FOR JUSTICE  
901 N. Glebe Road, Ste. 900  
Arlington, VA 22203

J. Lee McNeely  
MCNELLY STEPHENSON THOPY &  
HARROLD  
2150 Intelliplex Drive #100  
Shelbyville, IN 46176

Joel Hand  
1512 N. Delaware Street  
Indianapolis, IN 46202

Eric Hylton  
One American Square, Ste. 2300  
Indianapolis, IN 46282

David J. Hensel  
PENCE HENSEL LLC  
135 N. Pennsylvania Street, Ste. 1600  
Indianapolis, IN 46204



Michael A. Wilkins  
BROYLES KIGHT & RICAFORT, PC  
8250 Haverstick Road, Ste. 100  
Indianapolis, IN 46240  
(317) 571-3601 (phone)  
(317) 571-3610 (fax)  
mwilkins@bkrlaw.com

