

No. 24-394 Vide 24-396

In the
Supreme Court of the United States

OKLAHOMA STATEWIDE CHARTER SCHOOL BOARD, ET AL.,
Petitioners,

v.

GENTNER DRUMMOND, Attorney General of
Oklahoma, ex rel. Oklahoma,
Respondent.

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,
Petitioner,

v.

GENTNER DRUMMOND, Attorney General of
Oklahoma, ex rel. Oklahoma,
Respondent.

*On Petitions for Writ of Certiorari
to the Oklahoma Supreme Court*

**AMICUS CURIAE BRIEF OF THE BUCKEYE
INSTITUTE IN SUPPORT OF PETITIONERS**

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QUESTIONS PRESENTED

1. Whether the academic and pedagogical choices of a privately owned and run school constitute state action simply because it contracts with the state to offer a free educational option for interested students.

2. Whether a state violates the Free Exercise Clause by excluding privately run religious schools from the state's charter school program solely because the schools are religious, or whether a state can justify such an exclusion by invoking anti-establishment interests that go further than the Establishment Clause requires.

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INTEREST OF *AMICUS CURIAE*¹

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 its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute works to restrain governmental overreach at all levels of government. In fulfillment of that purpose, The Buckeye Institute files lawsuits and submits amicus briefs. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3).

Many states have adopted charter schools, an important component of educational choice. This case addresses issues critical to the future of at least one type of charter school. The Buckeye Institute frequently files amicus briefs in cases that affect K–12 education. In the present case, amicus has an interest in upholding educational choice to improve K–12 education across the country.

¹ Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae* made any monetary contribution toward the preparation or submission of this brief. Counsel provided the notice required by Rule 37.2.

SUMMARY OF ARGUMENT

The decision of the Supreme Court of Oklahoma and decisions like it imperil state programs intended to increase educational options available to children and their parents. This amicus brief highlights the critical importance of choice in K–12 education.

The law does not function in a vacuum from the culture. Courts recognize that while they must follow the law, they should also be aware of the effect of their decisions on the people the law is supposed to serve and protect. Wisconsin and Ohio were the epicenters of the beginning of the school choice movement. The movement was initiated by Democrat-dominated cities to benefit inner-city minorities and continued with strong bipartisan support. Over three decades ago, Milwaukee, Wisconsin began a movement—educational choice—that has expanded in many forms throughout the country. Cleveland, Ohio followed closely in adopting a voucher program, which this Court eventually sustained against legal challenges.

Wisconsin and Ohio parents, especially minorities, have been very happy with their freedom to choose educational opportunities that best fit their children. And, for the most part, these alternate educational choices have been effective at improving students' proficiencies in multiple areas of study. Consequently, parents have demanded expanded and differing non-traditional educational choices. One of the additional non-traditional choices has been charter schools, which are open to the public—and hence are called public schools. Charter schools are typically schools that are created via a contract with a state sponsor

and often run by a separate management company (sometimes for-profit and sometimes not-for-profit).

However, the traditional schools, teachers' unions, and others have fought against parental choice in education. Their attack in Oklahoma is to assert that charter schools are state actors and, therefore, the state may not provide funding to schools that provide sectarian education. But just because a charter school is called a public school does not make it a state actor.

There is a legitimate question of whether Oklahoma may fund charter schools that teach sectarian principles, as evidenced by competing opinions by different Oklahoma attorneys general and the split decision below. Given the great importance of educational choice, the Court should accept this case to facilitate lawmakers' ability to formulate charter school legislation that will serve all parents, both those who want a secular education for their children as well as those who want a non-sectarian education.

ARGUMENT

One thing, at least, is undisputed—children in Oklahoma, 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 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.

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.” Fannie Lewis, *School Choice Ruling Reaction, Cleveland Plain Dealer*, June 28, 2002, at A18. 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.” Howard Fuller, *No Struggle, No Progress: A Warrior’s Life from Black Power to Education Reform* (2014).² Finally, after 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. “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.” Oliver Wendell Holmes, *The Common Law* 1 (Boston, Little, Brown & Co. 1881). We cannot

² Excerpt available at <https://www.educationnext.org/origins-milwaukee-parental-choice-program-no-struggle-no-progress-fuller/>.

forget that the law affects real human beings—here, *children*.

The development of educational choice in the law, parental satisfaction, and student achievement are relevant in addressing the arguments Respondents assert in this case. Respondents cling to the notion that public funds going to religious schools is somehow unconstitutional and would ultimately harm 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.

The Court should remember 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 are not for the benefit of private schools; the programs serve the citizens of Oklahoma.

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. *See* Marge Pitrof, *Milwaukee Voucher Program Turns 25: The History*, WUWM (Nov. 17, 2014).³ The grade point average of MPS students taken as a whole was D+. *Id.* Parents and teachers expressed widespread dissatisfaction with the quality of education available in MPS. A majority of MPS teachers even said they would not send their own children to the schools where they taught. *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).⁴

At that time, Democrats controlled the Wisconsin State Assembly (56-43) and State Senate (20-13). Wisconsin Blue Book, 1989-1990, pg. 348. 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

³ <http://wuwm.com/post/milwaukee-voucher-program-turns-25-history#stream/0>.

⁴ <https://dc.uwm.edu/cgi/viewcontent.cgi?article=1015&context=etd>.

known as the Milwaukee Parental Choice Program (MPCP). *See* 1989 Wis. Act 336. 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*, 166 Wis. 2d 501, 516, 480 N.W.2d 460 (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." Pitrof, *supra*. Then-Milwaukee Mayor John Norquist, a Democrat who also supported school choice, remarked that "alternative programs 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." William Snider, *Voucher System for 1,000 Pupils Adopted in Wis.*, *Educ. Week* (Mar. 28, 1990).⁵

The MPCP withstood two constitutional challenges by opponents of school choice. In *Davis v. Grover*, 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. 166 Wis. 2d at 546. The Wisconsin Supreme Court first rejected a public purpose challenge to school choice in 1992. *Id.* at 542–45. In

⁵ <https://www.edweek.org/education/voucher-system-for-1-000-pupils-adopted-in-wis/1990/03>.

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 (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. *Id.*

On December 13, 2023, the Wisconsin Supreme Court unanimously denied an original action petition that asked the court to end school choice in Wisconsin. *Underwood v. Vos*, 2024 WI 5, 6 N.W.3d 701 (2023). 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. Blumenfeld Response to Original Action at 18, *Underwood v. Vos*, No. 23AP1896-OA (Wis. Nov. 14, 2023).⁶ In a recent interview with the Milwaukee Journal Sentinel, Governor Evers said that he did not

⁶ <https://www.wispolitics.com/wp-content/uploads/2023/11/231116Blumenfeld.pdf>.

support the lawsuit seeking to end school choice and that doing so would be “traumatic to a whole bunch of families and kids.” Molly Beck, *Evers criticizes lawsuit seeking to end the Milwaukee Voucher Program*, Milwaukee Journal Sentinel (Jan. 5, 2024).⁷

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.

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

⁷ <https://www.jsonline.com/story/news/politics/2024/01/05/evers-opposes-lawsuit-that-seeks-to-abolish-milwaukee-voucher-program/72097126007/>.

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.

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) (Nos. 00-1751, 00-1777, 00-1779), 2001 WL 1684559.

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. “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. The Buckeye Institute, *Giving Choice a Chance: Cleveland and the Future of School Reform* 16 (1998).⁸ “More than 200 people packed into the crowded church basement for the summit. The crowd of neighborhood parents listened to Polly Williams, the Milwaukee

⁸ <https://files.eric.ed.gov/fulltext/ED438603.pdf>.

legislator who had promoted the vouchers in that city.”
Id. at 16–17.

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.

Brief for Cleveland City Councilwoman Fannie Lewis as Amicus Curiae in Support of Petitioners at 2, *Zelman*, 536 U.S. 639 (Nos. 00-1751, 00-1777, 00-1779), 2001 WL 1684559. “The Cleveland parents invaded the statehouse ‘like a small army,’ knocking on legislators’ doors and handing out leaflets.” *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, at B4). “As a result of these efforts, the Program soon became law.” Brief for Cleveland City Councilwoman Fannie Lewis as Amicus Curiae in Support of Petitioners at 2, *Zelman*, 536 U.S. 639 (Nos. 00-1751, 00-1777, 00-1779), 2001 WL 1684559.

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.” *Giving Choice a Chance: Cleveland and the Future of School Reform*, *supra*, at 18. 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 schools being allowed to participate in the program came under scrutiny.

But that issue was resolved when this Court in 2002 upheld the Cleveland Scholarship program against a federal constitutional challenge. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). 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 652.

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. Brief Amicus Curiae of Rudolph W. Giuliani and John O. Norquist, *Zelman*, 536 U.S. 639 (Nos. 00-1751, 00-1777, 00-1779), 2001 WL 1638647. The Black Alliance for Educational

Options, led by Dr. Howard Fuller, also supported the Cleveland program, as did the State of Wisconsin. Brief of Black Alliance for Educational Options, *Zelman*, 536 U.S. 639 (Nos. 00-1751, 00-1777, 00-1779), 2001 WL 1480658; Brief of the State of Wisconsin, *Zelman*, 536 U.S. 639 (Nos. 00-1751, 00-1777, 00-1779), 2001 WL 1480723.


THE PLAIN DEALER METRO FINAL 35¢

FRIDAY, JUNE 28, 2002

COURT UPHOLDS VOUCHERS

Cleveland tuition program OK'd in 5-4 decision

ELIZABETH ADSTER
Plain Dealer Staff



WASHINGTON — Ohio may continue to spend public money on tuition vouchers that allow thousands of Cleveland students to attend religious schools, a sharply divided U.S. Supreme Court ruled yesterday, in a historic decision that could spur the creation of similar voucher programs across the country.

The landmark 5-4 ruling, written by Chief Justice William Rehnquist, concluded that the Cleveland voucher program does not violate a constitutional prohibition against promoting religion because it is one of various secular and religious options available to parents frustrated with the city's public schools.

A second key factor in the program's constitutionality, Rehnquist said, is that any decision to use vouchers at religious schools is made privately by Cleveland parents, not by the state.

"Any objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general," Rehnquist wrote for the majority, which included Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy and Clarence Thomas.

The ruling, which court observers called one of the most important on education and church-state law in half a century, reverses a federal appeals court ruling that found the Cleveland program unconstitutional.

IMPACT: Ruling likely to affect families and students across nation. **A18**

EDITORIAL: A lesson in freedom. **B6**

COMMENTARY: Columnists Sam Fulwood II, George F. Will and a teachers union president write about the voucher ruling. **B1, B9**

After praising the ruling on school vouchers at a news conference yesterday, a group of pro-voucher parents and students show their support for another subject of court scrutiny: the *Fledge of Abingdon*. The gathering had the feel of a victory party on Russian Noodle, with hugs and tears of joy.

SEE VOUCHERS | A18

II. Expanded school choice programs in Wisconsin and Ohio are today 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. Oklahoma has a similar demographic to Wisconsin in that it has a few large cities and many smaller communities. Oklahoma families all across the state would benefit from school choice.

Families that send their children to independent schools via school choice 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. Nelsen, *supra*, at 325–331. 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.

Fuller, *supra*.

In Wisconsin, the first school choice program was geographically limited to Milwaukee and initially included just seven schools and 337 children. Wis. Dep't of Pub. Instruction, *A Brief History of Voucher Expansion*.⁹ For the 2022-23 school year there were about 28,131 children in 129 schools enrolled in the MPCP. Wis. Legislative Fiscal Bureau, *Private School Choice and Special Needs Scholarship Programs* (2023).¹⁰ 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% (approx. 1,125) were Asian. Wis. Dep't of Pub. Instruction, *2021-2022 Accountability Report Cards*.¹¹ There is an income limit currently set at 300% above the poverty line for the MPCP, which for a family of four is \$90,000. Wis. Dep't of Pub. Instruction, *2023-24 Overview of Private Choice Programs in Wisconsin*.¹²

⁹ https://dpi.wi.gov/sites/default/files/imce/parental-education-options/Choice/Data_and_Reports/2023-24/2023-24_mpcp_payment_history.pdf (last visited Nov. 5, 2024).

¹⁰ https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2023/0030_private_school_choice_and_special_needs_scholarship_programs_informational_paper_30.pdf.

¹¹ <https://apps2.dpi.wi.gov/reportcards/> (last visited Nov. 5, 2024).

¹² https://dpi.wi.gov/sites/default/files/imce/parental-education-options/Choice/Overview_of_Private_School_Choice_Programs_in_Wisconsin_Handout.pdf (last visited Nov. 5, 2024).

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 for the City of Racine (Racine Parental Choice Program or RPCP). 2011 Wis. Act 32. Today, over 4,000 students participate in the program in 35 choice schools in Racine. Wis. Dep't of Pub. Instruction, *RPCP Facts and Figures for 2023-24*.¹³ In 2013, Wisconsin created a *statewide* school voucher program for students outside of Milwaukee and Racine. 2013 Wis. Act 20. 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. Wis. Dep't of Pub. Instruction, *WPCP 2023-24 School Year Student Headcount and FTE*.¹⁴

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

¹³ https://dpi.wi.gov/sites/default/files/imce/parental-education-options/Choice/Data_and_Reports/2023-24/2023-24_rpcp_facts_and_figures.pdf (last visited Nov. 5, 2024).

¹⁴ 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 Nov. 5, 2024).

students outperform their public-school peers in both English Language Arts (ELA) and Math. Will Flanders, *Apples to Apples: Assessing Wisconsin's State of Education*, Wisconsin Institute for Law & Liberty (January 2023).¹⁵ 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. *Id.* at 5. 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. *Id.*

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. *Id.* 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 who attended a traditional public school. 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). 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. Will Flanders, *Ripple Effect: How expanding Wisconsin's*

¹⁵ https://will-law.org/wp-content/uploads/2023/01/WILL_ApplesToApples_PolicyReport-Draft_v6-1.pdf.

school choice programs can lead to more college graduates and a stronger economy, Wisconsin Institute for Law & Liberty 2 (January 2020).¹⁶

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.” *Id.* 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.

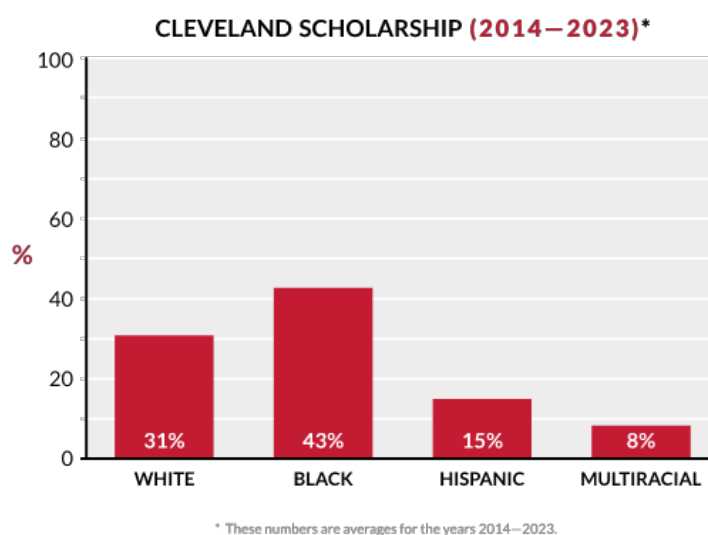
B. Ohio also expanded its program, thus serving more minorities and underserved students.

Following the success of the Cleveland Pilot program, and its constitutionality being affirmed in *Zelman*, Ohio began expanding education choice. First, it expanded the Cleveland voucher program to other parts of the state as the EdChoice Scholarship. Corey A. DeAngelis & Patrick J. Wolf, *Private School Choice and Character: More Evidence from Milwaukee*, *The Journal of Private Enterprise* 28

¹⁶ <https://will-law.org/wp-content/uploads/2020/01/will-ripple-effect-v3.pdf>.

(2020).¹⁷ 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. *Scholarship Historical Information*, Ohio Dept. of Educ. & Workforce.¹⁸

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.

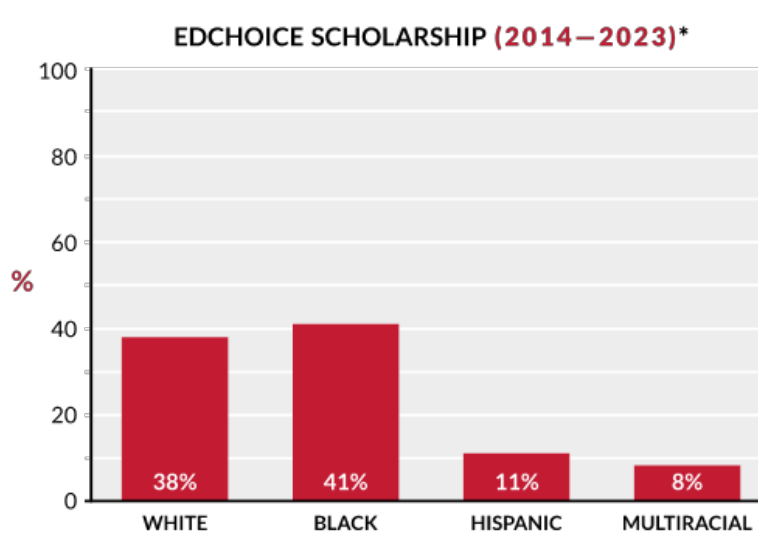


¹⁷http://journal.apee.org/index.php/Parte3_2020_Journal_of_Private_Enterprise_Vol_35_No_3_Fall.

¹⁸ <https://education.ohio.gov/Topics/Other-Resources/Scholarships/Additional-Scholarship-Resources/Historical-Information> (last visited Nov. 5, 2024).

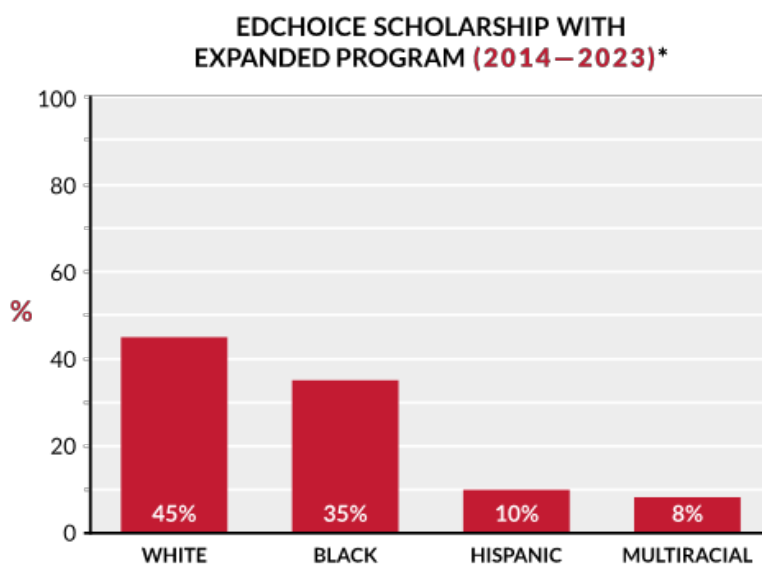
Contrary to the claims of some anti-school choice advocates, these scholarships have not been dominated by White students seeking to flee to private schools but have been used by parents of all races to send their children to better schools. Recently, the Ohio Department of Education and Workforce released 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%. *See Scholarship Payments*, Ohio Dept. of Educ. & Workforce.¹⁹

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



¹⁹ <https://reports.education.ohio.gov/report/nonpublic-data-scholarship-payments> (last visited Nov. 5, 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.



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. *Federal Poverty Guidelines for 2024-2025 Cleveland & EdChoice Scholarship Programs*, Ohio Dept. of Educ. & Workforce.²⁰ This means poor Ohio families that choose to take advantage of the scholarship programs

²⁰ <https://tinyurl.com/mvsj4cvn> (last visited Nov. 5, 2024).

receive even more benefits from the scholarships than high-income families.

And Ohio has continued to expand educational choice with various programs using alternative public schools with reduced regulations, vouchers, tax credits, tax deductions, and homeschooling. These programs include charter schools (called community schools in Ohio), K–12 Non-chartered Private School Tax Credits, K–12 Home Education Tax credits, Ohio Tax-Credit Scholarship Program, Income Based Scholarship program, Jon Peterson Special needs Scholarship Program, EdChoice Scholarship Program, and Autism Scholarship Program. *School Choice in Ohio*, EdChoice.²¹

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.” Katie Brooks, *Families’ Schooling Experiences in Ohio*, ENGAGE by EdChoice 1

²¹ <https://www.edchoice.org/school-choice/state/ohio/> (last visited Nov. 1, 2024).

(2021).²² “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.” *Id.* 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. *Id.* at 8–9.

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 was able to send her son to a private school, getting him away from the bullying he suffered in his public school. Andrea Mew, *Ohio “Broadened Horizons” For All Students Through The Recently Passed EdChoice Expansion – Here’s How*, Independent Women’s Forum (July 13, 2023).²³ Thanks to Ohio’s other school choice programs, she was also able to send her two daughters to private schools. *Id.*

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

²² https://www.edchoice.org/engage/sdm_downloads/families-schooling-experiences-in-ohio/.

²³ <https://www.iwf.org/2023/07/13/ohio-broadened-horizons-for-all-students-through-the-recently-passed-edchoice-expansion-heres-how/>.

III. The Court should accept this case to provide guidance to lawmakers on whether or when charter schools are state actors and if the charter schools can provide religious instruction.

Virtually all states have struggled to correct the deficiencies in traditional public education. As a result, many have greatly expanded educational choice. One of those choices is charter schools. “With over 3.7 million students currently enrolled in charter schools in 43 states and the District of Columbia, charter schools represent the largest experiment in public school innovation in the nation’s history.” Margaret E. Raymond et al., *As a Matter of Fact: National Charter School Study III 2023*, Stanford Center for Research on Educational Outcomes 25 (2023).²⁴ But not all charter schools are the same—there are many types of charter schools with different objectives and different legal structures.

However,

Most charter school programs contain three fundamental elements: (1) a privately organized corporation, or the “entity”; (2) a contract, or the charter, with the state and organizing body; and (3) some state funding. These elements are present, at some level, in all charter school programs. The requirements do, however, differ significantly from state to state depending on the state’s enabling

²⁴ <https://ncss3.stanford.edu/wp-content/uploads/2023/06/Credo-NCSS3-Report.pdf>.

legislation and its intended purpose. It is this degree of variation that makes the fact specific, in-depth analysis prescribed by the Supreme Court necessary to make any conclusions about state action.

Bradley T. French, *Charter Schools: Are for-Profit Companies Contracting for State Actor Status?*, 83 U. Det. Mercy. L. Rev. 251, 253 (2006).

Accordingly, “[e]nabling legislation allows charter school founders and operators to design and tailor organizational structures, staffing and instructional approaches to provide their students with an alternative to local district schools. They pursue different missions, such as STEAM, college prep, social justice or new technologies.” Raymond, *supra*, at 21. Further, charter schools are usually independently operated, operated by charter management organizations (which are private non-profit organizations), or operated by education management organizations (which are private for-profit organizations). Rebecca David, *National Charter School Management Overview 2016-17 2* (2018).²⁵

The Oklahoma Legislature enacted the Oklahoma Charter Schools Act (“Act”) to, among other things, “[p]rovide additional academic choices for parents and students.” Okla. Stat. Ann. tit. 70, § 3-131. The state, via the Statewide Charter School Board, “contracts with each approved public charter school or virtual charter school,” and the charter school may then

²⁵ https://publiccharters.org/wp-content/uploads/2023/01/napcs_management_report-3.pdf.

contract with an educational management organization. Okla. Stat. Ann. tit. 70, § 3-134. Contracting with a private entity does not typically turn that private actor into a state actor, see, *e.g.*, Pet. App. at 34a–35a (Kuehn, J., dissenting), but here, the Oklahoma Supreme Court found that Oklahoma charter schools are state actors.

The Oklahoma Supreme Court seemed to give significant weight to the label of “public” placed on the subject of charter schools to determine if the charter school petitioner is a state actor. But labeling an organization as “public” does not mean it is necessarily a state actor. Irrespective of which state action test is employed, the label of “public” is not an element of any of them. For example, the IRS gives the label “public charity” to organizations that “are churches, hospitals, qualified medical research organizations affiliated with hospitals, schools, colleges and universities [that]

- Have an active program of fundraising and receive contributions from many sources, including the general public, governmental agencies, corporations, private foundations or other public charities,
- Receive income from the conduct of activities in furtherance of the organization’s exempt purposes, or
- Actively function in a supporting relationship to one or more existing public charities.

Charitable Organizations: Public Charities, IRS (updated Aug. 19, 2024).²⁶ See also *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 392–93 (1995) (“congressional label” not controlling Amtrak’s status as a governmental entity); Pet. at 24 (citing additional cases).

In fact, even if Congress creates an entity via a charter, that does not necessarily establish it as a state actor. For example, “[t]he fact that Congress granted [the U.S. Olympic Committee] a corporate charter does not render the USOC a Government agent.” *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 543 (1987) (holding that the USOC is not a government actor).

The Oklahoma Supreme Court cites two other tests—“the ‘entwinement’ test, and the ‘public function’ test.” Pet. App. at 20a.²⁷ But the Oklahoma charter schools are not “entwined” with the state, they are contractually hired to provide “innovative” educational services, Okla. Stat. Ann. tit. 70, § 3-131, they are not *run* by the state. Second, as the Oklahoma Supreme Court recognized, the “provision of education may not be a traditionally exclusive public function” Pet. App. at 21a. But the court is mistaken if its holding means that contracting with a private organization to provide educational services makes those private entities state actors.

²⁶ <https://www.irs.gov/charities-non-profits/charitable-organizations/public-charities>.

²⁷ Because Petitioners have fully addressed these tests, amicus provides only minor commentary on them.

There is confusion about whether charter schools, particularly those in Oklahoma, are state actors and whether those and other “public” charter schools can constitutionally be prevented from providing sectarian instruction. See, *e.g.*, Pet App. at 32a–41a (Kuehn, J., dissenting). The answers to these questions are critical, both legally and practically, because charter schools are now an integral part of the educational systems in many states.

Beyond the importance of clarifying the legal point for the sake of the law, educational choice provides a meaningful solution to failing public schools. And charter schools have been effective. Stanford University reported in a recent study that “[l]ooking at year-to-year academic progress from 2015–19, the typical charter school student in our national sample had reading and math gains that outpaced their peers in the [traditional public school] they would have otherwise attended.” Raymond, *supra*, at 26.

Parents and students alike value choice in education just as much as they value choice in all other aspects of their lives. Charter schools are an important part of educational choice, and the Court should assist them by addressing the constitutional issues raised by those attacking school choice.

CONCLUSION

Amicus respectfully requests this Court grant Petitioners' petition for writ of certiorari.

Respectfully submitted,

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