

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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KANAWHA COUNTY CIRCUIT COURT
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TRAVIS BEAVER and WENDY PETERS,

Petitioners/Plaintiffs,

Civil Action No. 22-P-24

Civil Action No. 22-P-26

v.

Judge: Hon. Joanna Tabit

RILEY MOORE, in his Official Capacity as State Treasurer of West Virginia; W. CLAYTON BURCH, in his Official Capacity as State Superintendent of West Virginia; MILLER L. HALL, in his Official Capacity as President of West Virginia's Board of Education; CRAIG BLAIR, in his Official Capacity as the President of the West Virginia Senate; ROGER HANSHAW, in his Official Capacity as the Speaker of the West Virginia House of Delegates; and JIM JUSTICE, in his Official Capacity as Governor of West Virginia,

Respondents/Defendants.

PLAINTIFFS' OMNIBUS REPLY TO (1) DEFENDANTS MOORE, BLAIR, HANSHAW AND JUSTICE'S OPPOSITION; AND (2) POTENTIAL INTERVENORS' OPPOSITION IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

In their Opposition Briefs, Opposing Parties acknowledge, as they must, the basic legal principles that govern this dispute. Specifically:

- *Expressio Unius*. Opposing Parties concede the West Virginia Constitution places certain limits on the actions of the Legislature. Proposed Intervenor's Opposition to Motion for Preliminary Injunction ("IO") at 6-11; Opposing Defendants' Response to Motion for Preliminary Injunction ("ODR") at 3-6. Specifically, the Legislature cannot frustrate or exceed Constitutional mandates that "set forth specific means by which the State [can] accomplish a specific end." IO at 6. The Education Article gives the state specific powers and duties in regard to the education of West Virginia's children. The Hope Scholarship Act (the "Voucher Law") cannot stand if it exceeds or frustrates these provisions.
- *Strict Scrutiny*. Opposing Parties confirm that "any denial or infringement of the fundamental right to an education' must satisfy strict scrutiny." ODR at 6-8; IO at 11-13. The Voucher Law cannot stand if it infringes this fundamental right and does not pass strict scrutiny.
- *Expenditure of Public Funds/WVBOE Authority*. Opposing Parties acknowledge that there are certain public funds that can only be used for public education, and that the Constitution vests the West Virginia Board of Education ("WVBOE") with oversight over public education. ODR at 8-11; IO at 13-15. The Voucher law cannot stand if it uses public funds that should only be used for the system of free schools or it usurps the authority of the WVBOE.
- *Special Laws*. Opposing Parties further concede that special laws are unconstitutional. ODR at 11-13; IO at 15-16. The Voucher Law cannot stand if it treats students receiving public funds for education differently.

The fundamental law here is largely undisputed. Each of the above are separate and *independent* grounds for an injunction. If one of these is met, the statute must be enjoined.

Against this legal backdrop, Opposing Parties resort to arguing that the Voucher Law is just "financial aid"—an extra give-away of money. *See, e.g.*, IO at 5 ("Article XII's text has nothing to say about financial aid like the Hope Scholarship Program."); *id.* at 7 (Hope Scholarship is "financial aid"); ODR at 1 (Hope Scholarship Act is a "statute that merely provides optional financial aid to families. . ."). They contend it is not public education at all but a "scholarship" that all children can apply for to supplement their core education.

But these are *not* the facts here. The deceptively entitled “Hope Scholarship”¹ does not operate as a supplement to students’ core public education. In order to receive these funds, a child must forfeit his or her fundamental right to an education. Students can either go to public school or receive \$4300 and fend for themselves. Indeed, students accepting the vouchers have to pay for any public school resources and services they may still need. Pauley Affidavit (“Pauley Aff.”) ¶ 17. That is decidedly not what the Education Article established for the children of West Virginia. Parents have always been free to choose private education or home-schooling for their children at their own expense. But, if public funds are involved, the state takes on a duty to provide a thorough and efficient system of public education—including educational rigor and academic standards, accountability for the expenditure of the public funds, and protections against discrimination. This fundamental right cannot be exchanged for \$4300.

Nor is the Voucher Law “financial aid” for *all* students. The Voucher Law by its structure is necessarily limited to use by:

- Students whose parents are affluent enough to pay for the remaining private school tuition and fees, and other expenses covered in public schools—such as food, transportation, and special education services—beyond the \$4300.
- Students whose parents are affluent enough for one parent, who also has the skills to educate their child, to stay home so the child can be home-schooled.
- Students whose parents will take the funds and *not* make sure their children are educated.
- Students who do not have disabilities or other special needs that can only be met in public schools.
- Students who are not LGBT, as LGBT students would not be accepted at most private schools. *See* Lubienski Reply Aff. (“Lubienski Aff. II”) ¶ 47.

¹ Voucher proponents euphemistically use the term “scholarship” when what they are really describing are private school vouchers. In fact, the West Virginia Legislature “explicitly refers to . . . allotments from the Hope Scholarship Program (HSP) as ‘vouchers’ in its official blog.” PI Motion, Lubienski Aff. ¶ 7.

Thus, to the extent the Voucher Law is “financial aid,” it is only for a select group—more affluent families that can afford to make up the difference between the actual cost of alternative education and the \$4,300 in state funding. The West Virginia Constitution does not allow public funds to be raised or spent on education subsidies for more affluent families.

Likewise, when the Voucher Law is fully implemented, all the students in private and home-schooling will receive this public subsidy, which the West Virginia Department of Education (“WVDOE”) anticipates will cost an additional \$120 million a year over the funds needed to maintain the system of public education. There is not another state in the country that subsidizes all private and home schooling with public money. Nevada is the only state that has tried to do so and their universal voucher statute was enjoined at the outset as unconstitutional. *Schwartz v. Lopez*, 382 P. 3d 886 (Nev. 2016).

The Voucher Law is also an intentional expenditure of public funds that could be used for public education but instead will be given away to a subset of non-disabled, non-LGBT, more affluent students to subsidize their private education. The Opposing Defendants argue that the state is flush with cash—this year. Many states are experiencing the benefits of Covid federal relief monies. But good economies come and go and education is far too important to bear the brunt. *See State ex rel. Board of Educ. v. Rockefeller*, 167 W. Va. 72 (1981). Thus, the framers of the Constitution limited the expenditure of public funds to public education—in good and bad times. If there is money spent on education, it “shall” be for the support of the free schools.

The Voucher Law also necessarily provides a public enticement to lure more affluent students out of the public schools. This intentional act decreases public school funding, which is largely based on enrollment. It will also silo students in poverty and those with special needs in the public schools because these students cannot use the vouchers. It will do so while at the same

time diminishing the available public funds necessary for educating these students.

Simply put: the West Virginia Constitution sets up a very specific structure for the public education of its children. It did *not* set up a framework that allows more affluent students to get “financial aid”; the poor, marginalized, and special needs children to be siloed in the public schools; and the State to abdicate its obligation to a student by paying out \$4300. The Legislature can attempt to modify the Constitution if that is the framework they want to create. But it is not allowed by the current Constitution. Indeed, there is *not a single* universal voucher program in any state. This Court would be allowing the very first.

The time to act is also now. The Opposing Parties argue both that Plaintiffs’ Motion is too soon *and* too late, which confirms the timing is exactly right. *See* ODR at 15 (suggesting Plaintiffs brought the present suit too early) and IO at 1 (suggesting Plaintiffs brought the suit too late). Over three thousand vouchers have been approved, meaning the student count that determines next year’s school funding will be *locked in* for the 2022-23 school year in just a few short months. Pauley Aff. ¶ 8. The unconstitutional statute has been enacted and the unconstitutional flow of voucher funds will begin in August. W. VA. CODE § 18-31-6(d). The Voucher Law must be preliminarily enjoined.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

The West Virginia Constitution expressly states that “The Legislature *shall* provide, by general law, for a through and efficient system of free schools.” W. VA. CONST. art. XII, § 1. The Education Article then sets up funding mechanisms and a Board for oversight. *Id.* art. XII, § 2, 4-5. This is buttressed by the Taxation provision dictating that the power of taxation “shall” support the free schools. *Id.* art. X, § 5.

A. The Doctrine of *Expressio Unius* Bars the Unconstitutional Voucher Law

Under the doctrine of *expressio unius*, the Legislature cannot exceed or frustrate constitutional powers. *State v. Gilman*, 33 W. Va. 146, 146 (1889); *State ex rel. Downey v. Sims*, 125 W. Va. 627, 633 (1943); W. VA. CONST. art. XII, §§ 1, 2, 4 and 5. The Legislature cannot set up a different system with a different Board. It cannot pay \$4300 and leave the student to fend for themselves. It cannot intentionally harm the system of free schools by incentivizing people to leave the public schools or direct public funds to subsidize private education that could be used for its public education system. The Voucher Law does all of this.

1. The Voucher Law Exceeds the Legislature's Powers

Notably, Opposing Defendants relegate to a footnote their review of the *expressio unius* cases cited by Plaintiffs in their opening brief—a sure sign Opposing Defendants know they have a problem. ODR at 4 n.1. In regard to *Gilman*, they say: “the Court held that a constitutional provision granting the *power* to regulate the sale of liquor would be useless unless it was intended to limit legislative authority.” *Id.* This is Plaintiffs’ point exactly. A Constitutional article granting and governing the specific powers and duties of the Legislature over the education of West Virginia’s children would be useless unless it was intended to specifically define the Legislature’s powers and duties over education. The framework established by the Founders did not provide for public schools *or* paying people a subsidy to handle it on their own. It provided solely for a thorough and efficient system of free schools. W. VA. CONST. art. XII, § 1. Opposing Defendants’ analyses of the remaining *expression unius* cases are the same—when the Constitution provides a specific duty, the Legislature cannot do something entirely different.

Proposed Intervenors’ analysis only further supports the application of *expressio unius* here. As they explain, West Virginia cases stand for the proposition that the Legislature cannot frustrate or exceed a constitutional provision that “set[s] forth specific means by which the State

could accomplish a specific end.” IO at 6. In fact, the Education Article sets out a very specific means by which the State would accomplish the education of West Virginia’s children.

Proposed Intervenors then walk through a litany of the obvious. In regard to *Gilman*, they say that a provision regulating alcohol does not impact how to “regulate non-alcoholic items.” *Id.* at 6-7. For *State v. Sims*, they assert a provision on appointments did not impact “any other legislative business.” *Id.* And, for *Dunham v. Morton*, a provision on county commissioner selection did not “limit how the county undertook its other business.” *Id.* Proposed Intervenors then say: “a duty to provide and fund free schools [does not mean the Legislature] cannot enact legislation addressing matters *outside* of free schools—including, as it has done here, financial aid for West Virginians learning outside the public-school system.” *Id.*

But, the Voucher Law is *not* about a totally different topic than that outlined in the Education Article; it is about the very same topic: the education of West Virginia students using public funds. The framers identified a need to educate West Virginia children and decided that a *free* school system was the permissible method of achieving this need. *See* Bastress Affidavit (“Bastress Aff.”) ¶ 2. The Voucher Law takes the Legislature’s obligation to maintain a system of free schools, with all of its attendant standards, and converts it into individual payments to families. This is not a law that offers every family \$4300 a child on top of their public school education to use as they see fit. It is \$4300 *instead* of their public education. The Constitution does not provide for this abdication of responsibility. It also does not authorize a separate system of public education expenditure, governed by separate board, beyond the system of free schools.

Opposing Parties further argue that the Constitution is “a floor, not a ceiling.” IO at 7. Continuing their false illusion that the Voucher Law is just a scholarship program, they argue that nothing stops the state from giving scholarships *in addition* to providing a free education.

This fails on two counts. First, this is not scholarship in addition to public education. It is a \$4300 payment *instead of* a free education. Under the Voucher Law, if a student wants or needs to use any public school resources as a voucher student, that child will now need to pay for these resources. *See Pauley Aff.* ¶ 17. If a child's parents take the funds and does not educate them, there is no protection for that student. On its face the Voucher Law does not meet the floor: "financial aid" in lieu of a public education does not meet the Legislature's mandate.

Second, this would be like saying that the constitutional provision regarding the sale of alcohol at issue in *Gilman* was just a "floor"—the Legislature could do anything it wanted in regard to the regulation of alcohol. Alcohol is a known vice with negative health outcomes; in addition to that provided in the Constitution, the Legislature could take all means of action for the greater good. The court held otherwise. *Gilman*, 33 W. Va. at 146. A power to regulate the sale of alcohol prohibited the Legislature from regulating *possession*. Specific constitutional provisions "by which the State could accomplish a specific end" are a limit on the Legislature. IO at 6. They are not a floor.

Opposing Parties' primary argument, however, is that other states have validated voucher laws under their state constitutions and this court should too. ODR at 4-5; IO at 7-10. In fact, the only court that has addressed a universal voucher law like HB 2013, permanently enjoined the statute under the Nevada Education Article. *Lopez*, 381 P. 3d 886. In regard to a more limited program, the Florida court also struck down a voucher statute under the canon of *expressio unius*. *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006). The remaining cases involve limited voucher programs that were restricted by income, participation levels, and/or specific districts. Two of the cases involve the *same* small "experimental" program in Milwaukee. *Davis v. Grover*, 480 N.W.2d 460 (Wis. 1992); *Jackson v. Benson*, 578 N.W. 2d 602 (Wis. 1998). The other two cases

involve limited programs in Indiana and North Carolina, respectively. *Meredith v. Pence*, 984 N.E. 2d 1213 (Ind. 2013); *Hart v. State*, 774 S.E. 2d 281 (NC 2015). That's it. *Not a single court* in the United States has approved a universal voucher program that allows the State to either educate a child in the public schools or pay the family to take care of it themselves. This Court would be the very first.

The Milwaukee, North Carolina and Indiana cases also all addressed a different issue—uniformity—that is not at issue here. Their state constitutions required a “uniform” system of schools. The Plaintiffs argued that the private schools receiving the voucher funds were not uniform with the public schools. The courts held that the uniformity clause did not preclude vouchers because only the public schools had to be uniform. The West Virginia Constitution does not have a uniformity requirement and, thus, it is not an issue in this lawsuit. These holdings are irrelevant here. Likewise, the Indiana case turned on the fact that the Indiana Constitution expressly gave the Legislature the power to “use all suitable means” to promote education *and* provide for a common school system. *Meredith v. Pence*, 984 N.E. 2d at 1222.² The West Virginia Constitution, like the Florida Constitution, does not have this language. Instead, all of the provisions provide only for the support of a system of free schools. The reasoning in *Meredith* simply does not apply here.

There is a reason that voucher proponents started small—they did not think that large scale programs could pass state constitutional muster. They are right. Nevada was the first state to try a universal voucher program—it was permanently enjoined by the Nevada Supreme Court. *Lopez*, 382 P.3d at 899-902. Other state courts, such as Ohio's, have warned that the same could well result if universal voucher programs were enacted. *Simmons-Harris v. Goff*, 86 Ohio St. 3d

² The *Lopez* court also relied on this language to determine that *expressio unius* did not bar the program—the Constitution's public funding limitations did. *Lopez*, 382 P. 3d 899-902.

1, 11 n.2 (1999). This universal voucher program must be enjoined.

2. The Voucher Law Frustrates the Legislature's Ability to Provide a Thorough and Efficient System of Free Schools

The Legislature also cannot intentionally take action that will frustrate its duty to provide a thorough and efficient system of free schools. *Gilman*, 33 W. Va. at 146 (“Every positive direction contains an implication against everything contrary to it, or which would frustrate or disappoint the purpose of that provision.”); *Geeslin v. Workmen's Comp. Com'r*, 170 W. Va. 347,351 (1982). The Voucher Law does this in no less than four ways: First, it uses public dollars to subsidize the education of private and home-schooled students, which the State estimates will cost ~\$120 million a year—these are funds that are no longer available for public education and that the state must pay over and above the funds needed to maintain the public school system. PI Mot. 1-2; *see Reynolds Affidavit* (“Reynolds Aff.”) ¶¶ 2-3, Ex. 1 & 2 (W. Va. Dep't of Educ. Fiscal Notes); *Pauley Aff.* ¶ 16. Second, it decreases funding to the public schools by decreasing enrollment, as funding is based largely on enrollment. *Burch and Hall's Resp. ISO Grant PI Mot.* (“BH Response ISO PI”) 2, *Pauley Aff.* ¶¶ 7, 10-16. Third, it incentivizes more affluent students and those without elevated needs to leave the public schools; it therefore silos the students from low-income families and students with disabilities in the public schools without sufficient funds to support their education. PI Mot. 4-5; *see also, Lubienski Aff.* ¶¶ 23, 30. This concentration of high-need students increases the cost of public education because the average cost per student increases. *Pauley Aff.* ¶ 15. And, fourth, to the extent a parent accepts the voucher funds but cannot or will not educate their children, it leaves those vulnerable students without an education. *See W. Va. Code* § 18-31-5(d)(3) (mere promise of providing an education acceptable). The Legislature cannot intentionally frustrates its mandate in these ways.

Opposing Parties argue that there is no frustration because the Legislature can simply

fund public schools more in light of the funding losses caused by HB 2013. ODR at 5-6; IO at 11. But, even if this wishful speculation came to pass, it does not remedy the frustration of the Education Article duty. The Legislature cannot intentionally take action that harms the public schools on the promise that it may mitigate this harm in the future. Indeed, Opposing Parties' argument proves the point—the Voucher Law will need mitigation, which is a frustration of the Constitutional mandate and is not allowed.

Moreover, there are two distinct problems created by the Voucher Law that would not be remedied by additional funding. First, there is the siloing of students in poverty and with disabilities. Lubienski Aff. ¶¶ 23, 30. As Opposing Parties' experts in fact note—when people are given the choice, many choose away from poverty and people of color. Egalite Aff. ¶ 6; Scafidi Aff. ¶ 147; *see also* Lubienski Aff. ¶ 18. Because students in poverty and with special needs cannot use the vouchers in any practical sense, they will remain in public schools. This concentration is uniformly recognized as detrimental. Lubienski Aff. ¶¶ 23, 30; Lubienski Aff. II ¶¶ 9, 23. More spending does not remedy the harm caused by the Voucher Law. *Id.*

Opposing Parties argue that HB 2013 will not concentrate higher-need students in public schools. Proposed Intervenors have filed lengthy declarations that purport to show that vouchers are used predominantly by poor students and students of color. In fact, the only voucher programs that exist in the United States are targeted voucher programs for students in poverty (which is highly correlated with race), poor performing schools (which is highly correlated with poverty), or for students with disabilities. PI Mot. at 14. Thus, the “conclusion” is driven by the limitations on the programs themselves. Lubienski Aff. II ¶¶ 43-59. It is not a conclusion at all.

Contrary to Opposing Parties' assertion, a universal voucher program like HB 2013 will be accessed primarily by more affluent students. This is true because of the structure of the

program itself—\$4300 is not enough for private school. This is also supported by an analysis of the Zip Codes for the students who applied, *Farrie Aff.* ¶¶ 6-11, and all of the peer-reviewed social science research. *Lubienski Aff.* ¶¶ 23-24; *Amicus Curiae Brief ISO Plaintiffs* at 16-17.

Likewise, the Voucher Law leaves very vulnerable students unprotected. If an adult decides to take the Voucher dollars and cannot or will not educate the child, the child has no ability to obtain an education.³ No amount of spending will remedy this harm. The Founders wisely provided for a free public education for all students regardless of the vagaries of their circumstance. W. VA. CONST. art. XII, § 1; *Pauley v. Kelly*, 162 W. Va. 672, 705-06 (1979); *see also Peters Aff.* ¶¶ 13-16. The Voucher Law frustrates this fundamental purpose.

Finally, Potential Intervenors assert that public school funding will increase when enrollment declines. IO at 10-11 (citing *Scafidi Aff.* ¶ 160). Potential Intervenors' expert spends 18 pages in his declaration explaining that between 1992 and 2019, school funding increased while in most counties enrollment decreased. *Scafidi Aff.* ¶¶ 13-52. The 1990's were a nadir in public school spending nationwide. *See Lubienski Aff. II* ¶ 30; *Total Expenditure Per Pupil in Public Elementary and Secondary Schools in United States from 1990 to 2019*, Statista.⁴ While birthrates have declined, there have likewise been nationwide efforts to make sure that the children are better supported in public schools. *See id.* The fact that state governments have tried to improve their commitment to education is not proof that funds increase when numbers decrease. It is proof that citizens and policy makers have remembered what the framers of the Constitution knew was right—public education is critical to our democracy, and the need for it

³ Equally problematic are the fly-by night schools that always arise to take public funds without providing an education. *See, e.g., Leslie Postal et al., Florida Private Schools Get Nearly \$1 Billion in State Scholarships with Little Oversight, Sentinel Finds*, ORLANDO SENTINEL, Oct. 17, 2017, available at <https://www.orlandosentinel.com/news/education/os-florida-school-voucher-investigation-1018-htmlstory.html>.

⁴ Available at <http://www.statista.com/203118/expenditures-per-pupil-in-public-schools-in-the-us-since-1990/> (last visited June 29, 2022).

remains regardless of the individual circumstances facing children. *See* MTD Opp. at 8-9.

B. The Voucher Law Fails Strict Scrutiny

Opposing Parties acknowledge that any infringement of the fundamental right to an education must satisfy strict scrutiny. *See* ODR at 6; *see also* *W. Va. Educ. Ass'n v. Legislature of State of W. Va.*, 179 W. Va. 381, 382 (1988) (public education is an “essential constitutional right”); *Cathe A. v. Doddridge County Bd. of Educ.*, 200 W. Va. 521, 525 (1997) (“If the State takes some action which denies or infringes upon a person’s fundamental right to an education, then strict scrutiny will apply”). The funding of public education has a constitutionally preferred status; intentional acts that diminish public school funding must satisfy strict scrutiny. *See State ex rel. Bd. of Ed. v. Rockefeller*, 167 W. Va. 72, 76 (W. Va. 1981) (diminishment of school funding must satisfy strict scrutiny); *State ex rel. Brotherton v. Blankenship*, 157 W. Va. 100, 207 S.E.2d 421 (1973) (arbitrarily diminished school funding is unconstitutional).

Faced with this legal reality, Opposing Parties are forced to argue that the Voucher Law does not reduce funding for public schools. Not so. The Voucher Law, by its very structure, will result in decreased funding to public schools. *See* Meadows Aff. ¶5; Pauley Aff. ¶¶ 7-8, 12-13.

Opposing Parties’ assertion is also fully refuted by the Legislative history. The proponents of the HB 2013 originally claimed the Voucher Law would cost nothing because it would strictly be a *transfer of funds* away from the public schools to the ESAs. *See, e.g.* ODR at 7-8, 14; *see also* Int. Def. Ans. and Def. at 3, ¶ 14. This is an intentional reduction in funding to public schools. The analysts also realized, however, that the Voucher Law, when fully implemented, would for the first time in U.S. history, subsidize the families that always intended to choose private school and home-schooling—which the WVBOE estimate will cost the state an additional ~\$120 million a year. PI Mot. ¶ 2; *see* Reynolds Aff. ¶¶ 2-3, Ex. 1-4.

So the Voucher Law both reduces the funding for public schools because it decreases

enrollment *and* decreases the public funds available for public schools by paying that money out to private and home-schooled students. *Id.*; see PI Mot. at 19; see also ODR at 6 (“a significant majority of the funding formula *is* attributable directly to enrollment figures from the prior year”) (emphasis added). This intentional reduction of actual funds and available funds to provide much-needed resources impairs public school students’ fundamental right to a quality education and must meet strict scrutiny. Indeed, the case law establishes that public school funding is a first priority even when the economy turns south or third party actions like a coal strike diminish incoming funds. See *Rockefeller*, 167 W. Va. at 81. Certainly, the Legislature cannot itself create the harm by designating \$120 million for private school subsidies when public school districts—particularly low-income districts—lack necessary resources. If the state has the money to spend for education, it must be spent for public schools. See *W. Va. Educ. Ass’n v. Leg. of State of W. Va.*, 179 W. Va. 381, 382 (1988) (“financing of education is ... the first constitutional priority”).

Opposing Defendants then claim that, even if strict scrutiny does apply, the Voucher Law meets this standard. ODR at 7. Notably, Proposed Intervenors concede that strict scrutiny cannot be met; they do not even attempt to argue the point.

Opposing Defendants argue the Voucher Law meets the State’s interest in “the promotion of learning activity.” *Id.* But, this interest is not served by HB 2013. Three categories of people can use vouchers: (1) those who always intended for their child to be home-schooled or private-schooled and now get a state subsidy to do so; (2) those in public schools who are affluent enough to pay the remainder of the private education expenses not covered by vouchers or to have one parent, adequate for the task, stay home to educate their children themselves; and (3) those who will take the money but not make sure their child receives an adequate education because of poor motives or difficult circumstances. Categories one and two are children who

would be learning in any event, so there is no promotion of learning activity. Students in category three will be involved in *less* learning activity.

Defendants argue that “numerous studies have demonstrated that private school choice programs have neutral to positive impacts for participating students.” ODR at 16 n.7 (citing *Egalite Aff.* ¶¶ 13-19). This is false. Claims regarding the supposed positive impact of vouchers on student outcomes are not supported by peer-reviewed research, which increasingly shows that vouchers have a negative, or at best, neutral effect on academic performance. *Lubienski Aff II* ¶¶ 4-6, 71-89. Even the sources relied on by Defendants’ expert found that the Louisiana voucher program “lower[ed] math scores by 0.4 standard deviations and also reduce[d] achievements in reading, science, and social studies.” Atila Abdulkadiroglu et al., *Free to choose: Can school choice reduce student achievement?* 10 *AMERICAN ECONOMIC JOURNAL: APPLIED ECONOMICS*, no. 1, Jan. 2018, at 175-206. Moreover, *all* of the research on universal voucher programs like HB 2013—which have only been implemented in three foreign countries—prove that these voucher programs segregate the poor and special needs students in the public schools without the necessary public funds to educate these students with no upside. *Lubienski Aff. II* ¶¶ 43-59. HB 2013 does not serve a compelling governmental purpose.

Defendants further attempt to claim that the Voucher Law is narrowly tailored “because it does nothing to reduce the availability of public education as an option.” *See* ODR at 7-8. This is a non sequitur—it is the scope of the voucher program that matters not the scope of public education. In fact, the Voucher Law is the “most expansive” voucher program in the country. *See* W. VA. HOPE SCHOLARSHIP PROGRAM, *Frequently Asked Questions*.⁵ It does not limit eligibility by family income, school performance, or the particular education needs of the student, nor does

⁵ Available at <http://www.hopescholarshipwv.com/FAQ> (last visited June 29, 2022).

it cap the number of students or place a limit on the amount of public funds that can be spent on the program. *See* W. VA. CODE § 18-31-1 et. seq.; Lubienski Aff. ¶ 8. The Voucher Law requires virtually no educational standards and demands no educational expertise from providers. W. VA. CODE § 18-31-1 1(c); Lubienski Aff. ¶ 11. It fails strict scrutiny.

C. **The Voucher Law Violates Constitutional Requirements That Public Funds be Used only for Public Schools**

The whole of the West Virginia Constitution limits taxation and spending on education to taxation and spending for “the support of free schools.” *See Supra* Section II.A. Section 4 of the Education Article requires that the interest on the School Fund be used for public education and “no other purpose whatever.” W. VA. CONST. art. XII, § 4. This was the original funding mechanism for public education in the Constitution and makes patent that the Framers intended public funds only be used for public education. Section 5 says that the Legislature “shall provide for the support of free schools” by general taxation and other specified revenue. W. VA. CONST. art. XII, § 5 (emphasis added). And, Article X of the Constitution expressly states:

The power of taxation of the Legislature shall extend to provisions for the payment of the state debt, and interest thereon, *the support of free schools*, and the payment of the annual estimated expenses of the state. . . .”

W. VA. CONST. art. X, § 5 (emphasis added).

As Antonin Scalia explains in his book cited by Potential Intervenors: a listing of particulars limits the designated power to those items listed. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 107 (2012). He further states that “[m]andatory words [like shall] impose a duty; permissive words grant discretion.” *Id.* at 112; *see also Terry v. Sencindiver*, 153 W.Va. 651 (1969) (“[T]he word ‘shall’ connotes a mandatory duty.”). The Constitution makes abundantly clear in three provisions, then, that taxation and spending for education is limited to free schools. The Voucher Law violates these

provisions.

Opposing Parties contend that the Voucher Law does not violate the Constitution because it is funded out of the General Revenue Fund, not the School Fund. IO at 10; ODR at 8. But, the fact that the money starts in the General Revenue Fund is true for the majority of money received by the Department of Education, and is irrelevant. It is not the fund the money comes into or goes out of that matters. It is that the Constitution limits taxation and spending on free schools.

Opposing Defendants further claim that the omission of “no other purpose whatever” from Section 5 suggests that the General Revenue was intended to be used for purposes other than the support of free schools. *Id.* at 8-9. But, inclusion of this wording in Section 5 would make no sense. Of course general revenue can be used for purposes other than education. But, when it is used for *education*, it “shall” be used for the support of free schools. W. VA. CONST. art. XII, § 5. Likewise, under the taxation provision, when revenue is raised for education it “shall” be for the free schools. W. VA. CONST. art. X, § 5 (emphasis added).

Potential Intervenors’ citation of *Hart* is inapposite. In *Hart*, the North Carolina Supreme Court addressed a program that allowed a “small number of students [from] lower income families to receive scholarships from the state to attend private school.” *Hart v. State*, 774 S.E.2d 281, 284-85 (N.C. 2015). The North Carolina Constitution said that revenue raised “may be set apart” by the Legislature for the support of the free schools. *Id.* at 288. Unlike in *Hart*, the West Virginia Constitution has mandatory provisions. While North Carolina revenue “may” support free schools—West Virginia revenue must do so. W. VA. CONST. art. X & XII, § 5.

D. **The Creation of the Hope Scholarship Board Usurps the WVBOE’s Constitutional Authority Over Publicly Funded Education**

The Constitution creates the framework by which public monies are raised and spent for education in the state of West Virginia. It vests authority over this system in the WVBOE.

In response, Opposing Parties continue their disingenuous assertion that this is not “public education” but “financial aid.” ODR at 10; IO at 14. Once again, Opposing Parties fail to recognize that the Voucher Law takes the funds that would have been used to educate a student in the public schools and gives it to the student to fend for themselves. It is true that the Constitution refers to the WVBOE’s oversight of the “free schools.” But, that is because the Constitution only allows one system for the expenditure of public funds on education—the system of free schools. The Legislature cannot set up a second system—with a different Board—for education with public funds. The West Virginia Supreme Court of Appeals explains:

“General supervision” is not an axiomatic blend of words designed to fill the pages of our State Constitution, but it is a meaningful concept to the governance of schools and education in this state. Decisions that pertain to education must be faced by those who possess expertise in the educational area. These issues are critical to the progress of schools in this state, and, ultimately, the welfare of its citizens.

W. Va. Bd. Of Educ. v. Hechler, 180 W. Va. at 455.

There is a reason that the Legislature tried to bypass the State’s education experts at the WVBOE in HB 2013—they knew that the WVBOE would not support this unconstitutional plan. They were right. *See* Burch & Hall Response.⁶ The Legislature’s attempt to evade the constitutionally authorized supervisory authority of the WVBOE is unconstitutional.

E. The Voucher Law Violates the Strong Presumption Against Special Laws

Moving Defendants and Potential Intervenors argue that the Voucher Law is not a special law because students attending private schools using funds from the Voucher Law will be treated the same as other students in private school. *See* ODR at 12; IO at 16. In fact, this is not true.

⁶ Opposing Parties point to the Legislature’s creation of a public employee board (governing all public employees, including educators) and a teacher credentialing board to support their contention that the Legislature can appoint other boards to oversee issues that relate to education. ODR at 11 n.5. Whether or not those boards are constitutional is outside the scope of this motion. Moreover, neither of these boards address the use of public funds for K-12 education over which the WVBOE has exclusive authority.

Students receiving vouchers will be charged to use public school resources while non-voucher students in private school or home-schooling will not. W. VA. CODE § 18-31-8(f); Pauley Aff. ¶ 17. Moreover, students receiving vouchers will not be treated the same as students attending public school, who benefit from the full range of anti-discrimination protections.

The fact that all in a subclass created by a statute are treated the same does not change an unconstitutional special law to a general one. *State ex rel. City of Charleston v. Bosley*, 165 W. Va. 332, 339-40 (1980) is instructive. In that case, the court considered a tax on hotel occupancy in municipalities over a certain population threshold. *Id.* at 341. The Court acknowledged that the tax applied uniformly to all the hotels in the larger municipalities. The problem was that it did not apply to *all hotels*. The same is true here. It does not matter that the Voucher Law may be applied uniformly to those using vouchers. What matters is that students receiving a publicly funded education are treated differently from each other.

Potential Intervenors also contend that the Voucher Law is not a special law because it does not change the anti-discrimination laws; the same laws that applied to private schools before the enactment of the Voucher Law still apply. This is in fact the problem with the Voucher Law. Through the Voucher Law, the State has chosen to subsidize with public funds those schools that are permitted to engage in discrimination against various students, including those with disabilities, such as the Plaintiffs' children. Recognizing that the Voucher Law would treat some publicly funded students differently, and in this most harmful way, there was an effort in the Legislature to apply the anti-discrimination laws available to public school students to voucher recipients. *See, e.g., Reynolds Aff. Exs. 5 & 6.* These efforts were rejected. *Id.* As a result, students educated through public funds are treated differently, which is unconstitutional.

III. THE REMAINING FACTORS SUPPORT A PRELIMINARY INJUNCTION

A. Irreparable Harm

Moving Parties do not contest that the implementation of an unconstitutional statute is *per se* irreparable harm arguing instead that “the Act is constitutional. . . .” *See* ODR at 14. Accordingly, if Plaintiffs are likely to succeed on any claim, irreparable harm is shown.

There is also evidence of irreparable harm beyond the *per se* irreparable harm of implementing an unconstitutional statute. To date, over 3,000 applications for vouchers, at the amount of \$4,300 per student, have been accepted. Staff Reports, *More than 2,000 Hope Scholarships have been awarded in W. Va.; application deadline May 16*, EYEWITNESS NEWS WCHS FOX (May 3, 2022).⁷ Public funds will be dispersed to families as early as August 15, diminishing the public funds available for public education. *See* PI Mot. at 29; *see also* W. VA. CODE § 18-31-6(d). Logistically, the State will not be able to claw back these public funds from families already putting them to use. Likewise, these 3,000 students exiting public schools or entering kindergarten, thus not attending the public schools, will reduce the enrollment for districts across the state in a mere few months. These students will be missing from the October 1, 2022 enrollment count, which sets the enrollment figures for funding for the next school year. *See, e.g.* W. Va. Dep’t of Educ., *W. Va. Dep’t of Educ. Releases Certified Enrollment* (Nov. 12 2020).⁸ These harms are imminent and cannot be avoided absent court action.

B. Defendants Will Not Be Harmed

Defendants assert only one harm that would result to them from a preliminary injunction—harm to their “interest in the implementation of duly enacted legislation.” ODR at 15-16. This is no injury. It is well recognized that courts have a “solemn duty” to determine “what acts of the Legislature are constitutional[.]” *Heck’s Discount Ctrs., Inc. v. Winters*, 147 W.

⁷ Available at <http://wchstv.com/news/local/more-than-2000-hope-scholarships-have-been-awarded-in-wva-application-deadline-may-16>.

⁸ Available at <https://wvde.us/west-virginia-department-of-education-releases-certified-enrollment/> (last visited June 29, 2022).

Va. 861, 869 (1963). Defendants have no legitimate interest in implementing unconstitutional legislation.

C. **Public Interest Favors an Injunction**

Finally, the public interest strongly favors an injunction. Giving families money and then trying to claw it back if the Voucher Law is deemed unconstitutional is detrimental to everyone involved—students, families, public schools, and private schools— and much more disruptive than simply waiting to implement the program unless and until it is constitutionality settled.

Potential Intervenors argue that they will be harmed if the Voucher Law is enjoined. IO at 2-3, 18. One says she will have to forego subsidization of private school tuition and the other asserts it will be difficult for her to pay for charter school classes to enhance her home-schooling and for speech therapy. *Id.* For the latter, both the charter school classes and speech therapy are free for students that are enrolled in public school so this family suffers no harm as a result of an injunction. It is only under the Voucher Law that she would be required to pay for public, charter instruction. As to the former, it has always been that private school requires private funds. Continuation for the pendency of the lawsuit is no harm. Both claim they are relying on April 8, 2022 acceptance letters. *Id.* at 1. But, they knew a lawsuit was pending and the program could be halted. No one is served by giving and then clawing back funds, particularly given the multiple constitutional challenges *and* that no court has ever approved a universal voucher law.

IV. **CONCLUSION**

For the foregoing reasons, this Court should grant Plaintiffs' Motion for Preliminary Injunction.

June 29, 2022

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

TRAVIS BEAVER, KAREN KALAR and
WENDY PETERS,

Petitioners/Plaintiffs,

v.

Civil Action No. 22-P-24

Civil Action No. 22-P-26

RILEY MOORE, in his Official Capacity
as State Treasurer of West Virginia; W.
CLAYTON BURCH, in his Official
Capacity as State Superintendent of West
Virginia; MILLER L. HALL, in his
Official Capacity as President of West
Virginia's Board of Education; CRAIG
BLAIR, in his Official Capacity as the
President of the West Virginia Senate;
ROGER HANSHAW, in his Official
Capacity as the Speaker of the West
Virginia House of Delegates; and JIM
JUSTICE, in his Official Capacity as
Governor of West Virginia,

Respondents/Defendants.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on the 29th day of June, 2022, a true copy of the foregoing "Plaintiffs' Omnibus Reply to (1) Defendants Moore, Blair, Hanshaw and Justice's Opposition; and (2) Potential Intervenors' Opposition in Support of Plaintiffs' Motion for Preliminary Injunction" was served on the following counsel by electronic mail and via U.S. Mail, postage prepaid as follows:

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2025 JUL 29 11:40 AM
CATHY S. GIBSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

TRAVIS BEAVER and WENDY PETERS,

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v.

**Civil Action No. 22-P-24
Civil Action No. 22-P-26**

RILEY MOORE, in his Official Capacity as State Treasurer of West Virginia; W. CLAYTON BURCH, in his Official Capacity as State Superintendent of West Virginia; MILLER L. HALL, in his Official Capacity as President of West Virginia's Board of Education; CRAIG BLAIR, in his Official Capacity as the President of the West Virginia Senate; ROGER HANSHAW, in his Official Capacity as the Speaker of the West Virginia House of Delegates; and JIM JUSTICE, in his Official Capacity as Governor of West Virginia,

Respondents/Defendants.

AFFIDAVIT

STATE OF WEST VIRGINIA :

I, Dr. Christopher Lubienski, Ph.D., affirm as follows:

1. I have reviewed the declarations from Dr. Anna Egalite, Dr. Benjamin Scafidi, and Dr. Patrick Wolf which were written in response to my affidavit of March 28, 2002 in the matter of Beaver v Moore.
2. In this affidavit, I respond to claims in the declarations made by Egalite, Scafidi and Wolf (hereafter, the “declarants”). Because of the short time to respond, I focus here only on the main issues and most egregious misrepresentations of evidence. However, the fact that I am not responding to all of their claims is a reflection of time constraints, and does not indicate concession of any points, particularly since declarants failed to disprove anything from my original affidavit.
3. While those declarations were selective and often misleading or inaccurate in their claims, even in light of those claims, it is still indisputable that programs most comparable to West Virginia’s have large, negative effects on student learning.
4. No recent state-wide voucher programs have been found to have positive impacts on learning. Instead, rigorous research, including by Dr. Wolf, demonstrates large, negative effects on achievement of students participating in these programs, what Dr. Wolf has referred to as the “main purpose” of such programs.¹
5. As I show below, in trying to explain-away negative results, these declarants selectively refer to discernable sets of studies largely done by the declarants and their associates, sometimes with questionable methodological designs, and often commissioned by voucher advocates. They also suggest or imply generalizing from such studies despite the weak external validity of the study designs.²
6. Attempts by the declarants to obfuscate the findings of negative effects from comparable voucher programs reflect “muddying” strategies also evident in efforts to deny climate change or the link between tobacco and cancer, introducing unfounded doubt in service of an ideological agenda when the evidence of harm to individuals is in fact actually rather clear.³ Their attempts to focus on non-learning outcomes instead also contradict their own previous elevation of learning measures as the “main purpose” of such

¹ Wolf, Patrick J. “What Happened in the Bayou? Examining the Effects of the Louisiana Scholarship Program.” Education Next, August 13, 2019. <https://www.educationnext.org/what-happened-bayou-examining-effects-louisiana-scholarship-program/>.

² In research, the “external validity” of a study generally refers to the generalizability of its results. Almost all the studies cited in these responses involved research subjects who self-selected (“chose”) to join the school choice programs, and thus were not representative of the larger population. Therefore, it is considered inappropriate to generalize the (questionable) results from these studies to the broader population that would be impacted by the universal HSP. It would be similar to seeking volunteers who met certain criteria for a weight-loss program, designing a small study of their outcomes, and then claiming the results should apply to the whole population, even though there may have been something unique about those who volunteered.

³ Oreskes, Naomi, and Erik M. Conway. *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming*. 1st U.S. New York: Bloomsbury Press, 2010. Specter, Michael. *Denialism: How Irrational Thinking Hinders Scientific Progress, Harms the Planet, and Threatens Our Lives*. New York: Penguin Press, 2010.

programs, as I demonstrate below. Furthermore, efforts to move attention away from the fact that these programs are having a detrimental impact on the learning gains of participating students defy reason by suggesting that relative learning losses are acceptable because these children with lower levels of learning are still more likely to succeed in higher education and in other desirable life outcomes.

7. These three responses did not disprove anything from my original affidavit, but instead attempted to distract and re-prioritize goals for these programs, despite the almost singular focus on learning outcomes the respondents themselves had previously elevated in their own work.
8. I have been studying school choice programs in the US and other countries for almost three decades. Unlike the declarants, my work covers multiple forms of school choice. This is important because, on many dimensions, other choice programs in some cases offer better insights into the Hope Scholarship Program (HSP) than do smaller studies of small-scale, targeted voucher programs.
9. Furthermore, the declarants' contention (which they apply only opportunistically) that we should focus on these smaller-scale voucher studies is incorrect. Oftentimes, larger-scale, even non-voucher choice programs that are not means-tested offer a closer approximation to the state-wide HSP than do their studies of targeted voucher programs in single cities. Furthermore, the contention that evidence from other forms of school choice is irrelevant is itself incorrect. For instance, regarding the relationship between choice programs and segregation, the declarants offer no credible reason as to why evidence that parents often choose more segregated schools in other choice programs such as charter schools would not also offer insights as to how they would behave in a voucher system, especially since private schools are able to exclude students much more explicitly than are charter schools. The declarants also ignore the only other universal voucher programs that exist, in places such as Chile and Sweden, which show clear evidence of greater segregation and evidence of relative declines in learning.
10. Claims that research on voucher programs is irrelevant to Education Savings Account (ESA) programs such as the HSP are incorrect. ESAs essentially function as vouchers in that parents receive money to spend on private education options. The fact that ESAs also allow parents to include other private education expenses does not change that primary function, and most of the ESA spending can be expected to go toward private school tuition. Notably, the West Virginia Legislative Blog describes the HSP as a "voucher."⁴ Moreover, the declarations in support of the HSP also frequently refer to research on voucher programs in order to make claims about the likely impacts, or lack thereof, of the HSP.

⁴ <https://blog.wvlegislature.gov/senate-floor-session/2021/03/17/senate-completes-hope-scholarship-program/>

11. The rest of this present declaration is organized generally around the different declarations of Dr. Egalite, Dr. Scafidi, and Dr. Wolf, although I also discuss some elements thematically where appropriate.

EGALITE

12. I have never met Dr. Egalite. In 2018, I gave an invited lecture at her university, but believe she did not attend. My understanding is that she received her PhD working with Dr. Wolf at the Department of Education Reform (DER) University of Arkansas. The DER and its endowed professorships were created with funding by the pro-voucher Walton Family Foundation.⁵

Purpose of Program

13. Dr. Egalite notes that the HSP will expand access to school choice, and seems to assume that this itself is the purpose of the policy. This is at odds with Dr. Wolf's observation that improving academic outcomes is the "main purpose" of such programs. Furthermore, it begs the question as to whether taxpayers should be required to pay for other people's private choices as an end in itself, or whether taxpayers should be able to expect better outcomes on the main purposes of the policies they fund.

Eligibility

14. In paragraph 8 of her declaration, Dr. Egalite focuses on families that are at the margins of income-eligibility. Her statement makes no comment on the fact that the HSP subsidizes wealthier families, costing taxpayers money for families that previously or would have otherwise paid themselves for their own private choices. Likewise, Dr. Egalite's statement makes no comment on Dr. Wolf's observation that the private school sector will also be increasingly dependent on such subsidies in light of declines in private school enrollment.⁶
15. Dr. Egalite indicates that applicants to these programs tend to be low-income, low-achieving, and/or minority students. She also notes that, unlike the HSP, the other programs she references are means-tested, not universal programs like the HSP. She neglects to weigh this against other evidence that participating families in various choice programs may also be the relatively more advantaged of the disadvantaged, such as that which I have cited about parent education levels in the Milwaukee voucher program. These are important considerations because researchers are only able to measure observable factors such as family income, education level, and so forth. Factors like parent education level point to important *unobservable* factors, such as academic motivation or the degree to which families value education. While researchers cannot easily measure these factors, they are likely associated with observable factors such as parent education level, and they would tend to represent an unobservable difference and advantage for families applying for choice programs compared to their peers who did not apply.
16. Moreover, there is substantial evidence from school choice programs not cited by Dr. Egalite that more affluent families are more likely to benefit from choice programs that are not means-tested, such as with the HSP. For instance, charter schools are generally

⁵ Glass, G. V. "The Strangest Academic Department in the World." *Education in Two Worlds* (blog), 2014.

⁶ <https://www.hoover.org/research/private-school-choice-programs-what-do-we-know-about-their-effects-outcomes-disadvantaged>

open to all students, but even though many charter school students may be disadvantaged, they are, on average, from families that are more advantaged than their counterparts in public schools, including having greater access to educational resources in the home, such as computers, atlases, and newspapers.⁷

Competitive Effects

17. It is incorrect to claim that there is “*No empirical study of the competitive effects of private school choice programs concludes that the effects on the achievement of public school students are negative,*” as does Dr. Wolf (italics in original). In fact, there is much evidence globally of schools sinking into spirals of decline in choice environments, and the peer-reviewed study on Indiana’s voucher program, discussed below, shows clear evidence of harm. All of the declarants fail to consider this peer-reviewed study even though it was published and freely available almost a year before they submitted their declarations.
18. Dr. Egalite repeats speculation that the negative results in Louisiana’s voucher program were due to the fact that lower-performing private schools participated in the program, with a third of them experiencing enrollment declines prior to the voucher subsidy. Of course, such schools may also be expected to participate in a largely unregulated, universal voucher program such as the HSP. Yet, even while Dr. Egalite notes that Louisiana parents reported that academic quality is the top consideration in choosing a school,⁸ the fact remains that those parents were still choosing the lower-performing private schools in Louisiana.
19. The declarants all make assumptions about how they expect schools should respond to competitive pressures: by improving their academic effectiveness. However, the actual strategies schools adopt to compete, indeed, even the causal mechanisms by which they might improve effectiveness, are often complex and largely unspecified. Research demonstrates that competition does not necessarily cause public schools to move resources into efforts at instructional improvement.⁹ Instead, some evidence indicates that competition causes schools to (A) shed more difficult and costly, or less “desirable,” students,¹⁰ and (B) invest in marketing to attract higher-achieving and more affluent students.¹¹

⁷ Lubienski, C., & Lubienski, S. T. (2014). *The Public School Advantage: Why Public Schools Outperform Private Schools*. Chicago, IL: University of Chicago Press.

⁸ Anna Egalite (July 1, 2018). “An Impact Analysis of North Carolina’s Opportunity Scholarship Program on Student Achievement.” presentation to the John Locke Foundation: <https://www.johnlocke.org/guest-voice/anna-egalite/>

⁹ Arsen, David, and Yongmei Ni. “The Effects of Charter School Competition on School District Resource Allocation.” *Educational Administration Quarterly* 48, no. 1 (2011): 3–38.

¹⁰ Mommandi, Wagma, and Kevin Welner. *School’s Choice: How Charter Schools Control Access and Shape Enrollment*. New York, NY: Teachers College Press, 2021. Bergman, Peter, and Isaac McFarlin Jr. “Education for All? A Nationwide Audit Study of Schools of Choice.” NBER Working Paper. Cambridge, MA: National Bureau of Economic Research, December 2018.

¹¹ Le Feuvre, Lauren, Anna Hogan, Greg Thompson, and Nicole Mockler. “Marketing Australian Public Schools: The Double Bind of the Public School Principal.” *Asia Pacific Journal of Education*, August 9, 2021, 1–14. <https://doi.org/10.1080/02188791.2021.1953440>. Zancajo, Adrián. “Educational

20. While Dr. Egalite correctly notes some of the advantages of randomized trials, she also ignores some of the limitations, such as weak external validity as she attempts to advocate for voucher by using these smaller-scale studies. She suggests that one cannot make causal inferences from non-randomized studies, although she herself uses causal language in describing her own, quite limited, quasi-experimental evaluation of North Carolina's voucher program, discussing the "impact of the program."¹² She also cites quasi-experimental studies in making such claims about attainment.

SCAFIDI

21. I have never met Dr. Scafidi, and was unfamiliar with his work, likely because he tends to write many of his papers as non-peer-reviewed pieces for pro-voucher advocacy organizations. Overall, I find his claims often stand in marked contrast to the evidence on voucher programs, and/or are based on misleading and inappropriate comparisons.

Segregation

22. Dr. Scafidi cites Milton Friedman extensively on the issue of segregation and school choice. A model often held up as the best representation of Milton Friedman's¹³ universal voucher proposal is Chile, where the program pre-dates any of the smaller, means-tested programs in the US by at least a decade, and thus offers a long track-record for studying the use of vouchers in a universal program comparable to the HSP. There, the OECD examined student socioeconomic status, finding that the Chilean voucher system was twice as socially stratified compared to systems without vouchers.¹⁴ Although vouchers theoretically allow students from poorer areas to enroll in wealthier schools, thus releasing them from residentially segregated neighborhoods, as school segregation in Chile is actually increasing, schools there are instead more segregated than are neighborhoods.¹⁵ Chile now has the most socially segregated school system of some 60 nations participating in a recent international assessment.¹⁶ In Chile, according to research from Dr. Javier González Díaz of Cambridge University and the SUMMA Laboratory of Education Research and Innovation for Latin America and the Caribbean,

Providers in the Marketplace: Schools' Marketing Responses in Chile." *International Journal of Educational Research* 88 (March 1, 2018): 166–76. <https://doi.org/10.1016/j.ijer.2017.10.009>.

Dimartino, Catherine, and Sarah Butler Jessen. *Selling School: The Marketing of Public Education*. New York: Teachers College Press, 2018. Lubienski, Christopher, Matthew Linick, and Justin York. "Marketing Schools and Equitable Access in the United States." In *The Management and Leadership of Educational Marketing: Research, Practice and Applications*, edited by I. Oplatka and J. Hemsley-Brown, 109–35. Bingley, UK: Emerald, 2012.

¹² Egalite, 2018: <https://www.johnlocke.org/guest-voice/anna-egalite/>

¹³ Dr. Scafidi describes himself as a Friedman Fellow at the EdChoice (formerly the Friedman Foundation for Educational Choice), and cites Milton Friedman's work quite admirably, if misleadingly (see below) in his declaration. Many observers see Chile as the best manifestation of Friedman's ideas, as he and his students were influential in establishing Chile's voucher program.

¹⁴ OECD (2013). PISA 2012 Results: Excellence through Equity. Giving Every Student the Chance to Succeed (Volume II), PISA. Paris: OECD Publishing.

¹⁵ Valenzuela, J. P., Bellei, C., & De los Ríos, D. (2013). Socioeconomic School Segregation in a Market-oriented Educational System. The Case of Chile. *Journal of Education Policy*, 29(2), 217–241.

¹⁶ OECD 2013

in the decade from 1990-2000, “Public schools have become ghettos ‘specializing’ in low-income families.... Simultaneously, private schools decreased the percentage of poor students in their classrooms by 11 percent and increased the percentage of upper- and upper-middle-income students by 9 percent.”¹⁷ Thus, evidence indicates that, either through parent choices or school policies, less affluent families in universal choice schemes may be further excluded from private schools. Consequently, the OECD has concluded that school choice programs are linked with increased segregation and wealthier families tend to benefit more.¹⁸

23. Going beyond the ethical and legal issues concerns about segregation, it is also important to note that segregation is linked to depressed academic outcomes, particularly for the most vulnerable populations.¹⁹ For instance, the pre-eminent sociologist Sean Reardon and colleagues found that racial segregation is “strongly associated” with achievement gaps and is “harmful because it concentrates minority students in high-poverty schools.”²⁰
24. Dr. Scafidi cites research from 1967 indicating that public school attendance zones increase segregation. But the concern that public schools are overly segregated is not being argued. Instead, the question is whether school choice programs worsen or lessen school segregation.
25. Overall, it is clear in the research that school choice is quite often associated with greater levels of segregation; or as the Federal Reserve concluded in its review of the issues, the research “suggests that segregation may indeed increase with the expansion of school choice.”²¹

¹⁷ Gonzalez, Javier. “Putting Social Rights at Risk: Assessing the Impact of Education Market Reforms in Chile.” In *Privatization and the Education of Marginalized Children: Policies, Impacts, and Global Lessons*, edited by Bekisizwe S. Ndimande and Christopher Lubienski, 143–60. New York: Routledge, 2017. P. 151

¹⁸ Achiron, M. (2014, August 29). *Spoiled for choice?* OECD Education and Skills Today. <http://oecdedutoday.com/spoiled-for-choice/>
 OECD. (2012). *Are School Vouchers Associated with Equity in Education?* (PISA in Focus No. 20). OECD Publishing.

Organization for Economic Co-Operation and Development. (2014). *PISA 2012 Results: What Makes Schools Successful (Volume IV): Vol. Paris*. OECD Publishing.

¹⁹ Mickelson, Roslyn Arlin, and Damien Heath. “The Effects of Segregation on African American High School Seniors’ Academic Achievement.” *The Journal of Negro Education* 68, no. 4 (1999): 566–86. <https://doi.org/10.2307/2668155>. Mickelson, Roslyn Arlin. “School Integration and K-12 Outcomes: An Updated Quick Synthesis of the Social Science Evidence,” no. 5 (2016): 4. National Coalition on School Diversity.

²⁰ Reardon, Sean F., E.S. Weathers, E.M. Fahe, H. Jang, and D. Kalogrides. “Is Separate Still Unequal? New Evidence on School Segregation and Racial Academic Achievement Gaps.” Stanford University Center for Education Policy Analysis, September 29, 2021. <https://cepa.stanford.edu/content/separate-still-unequal-new-evidence-school-segregation-and-racial-academic-achievement-gaps>.

²¹ <https://www.chicagofed.org/publications/economic-perspectives/2017/5>

26. But in making the counter-intuitive claim that schools that are allowed to exclude students will increase integration, the declarants engage in a misleading and selective presentation of the evidence. For instance, Dr. Scafidi's list of eight studies on school vouchers and integration (in paragraph 116 of his declaration) presents a remarkably poor and inaccurate case for his claims, since the list includes multiple unpublished, snapshot "studies" of small, means-tested programs as evaluated by voucher proponents, who in at least one case did find evidence of negative impacts, despite Dr. Scafidi's claims otherwise.²²

27. Dr. Scafidi also quotes from a report from Monarrez and Chien to connect public school attendance zones with segregation.²³ But he ignores research from one of those same researchers who — writing for a pro-voucher think tank — finds that choice programs make segregation even worse.²⁴ It is worth noting that evidence of choice programs exacerbating segregation is often from programs, such as charter schools, that like the HSP are not means-tested, but are more regulated and prohibited from excluding certain students than are private schools in the HSP.

28. Thus, Dr. Scafidi concludes, "Given the poor track record of the public education system with respect to integration by income and race since the 1980s and given the evidence of private school choice programs promoting integration, programs like the West Virginia Hope Scholarship Program are likely to ameliorate inequities present in the public education system today." This conclusion makes a wildly inaccurate characterization of the research on school choice and segregation, ignoring voluminous evidence of sorting by race and income, through parent choices and choice school policies, in choice systems.²⁵

Fiscal Impacts

29. Dr. Scafidi makes the counter-intuitive argument that the funding formula in West Virginia is actually favorable to public schools that are losing students to the HSP. He does not explain, then, why, if they would benefit fiscally by losing those students, public

²² Chingos, Matthew M, and Tomas E Monarrez. "Does School Choice Make Segregation Better or Worse?" *Stanford University*, 2020, 24.

²³ Scafidi in paragraph 111 of his declaration; see Monarrez, Tomas & Chien, Carina (2021). *Dividing lines: Racially unequal school boundaries in US public school systems*. Center on Education Data and Policy. Urban Institute, <https://www.urban.org/sites/default/files/2022-03/dividing-lines-racially-unequal-school-boundaries-in-us-public-school-systems.pdf>.

²⁴ Chingos, Matthew M, and Tomas E Monarrez. "Does School Choice Make Segregation Better or Worse?" *Stanford University*, 2020, 24.

²⁵ Lubienski, Christopher, Laura B. Perry, Jina Kim, and Yusuf Canbolat. "Market Models and Segregation: Examining Mechanisms of Student Sorting." *Comparative Education*, December 17, 2021, 1–21. <https://doi.org/10.1080/03050068.2021.2013043>. Moore, D., and S. Davenport. "School Choice: The New Improved Sorting Machine." In *Choice in Education: Potential and Problems*, edited by W. Boyd and H. Walberg, 187–223. Berkeley, CA: McCutchan, 1990. Hsieh, Chang-Ta, and Miguel Urquiola. "When Schools Compete, How Do They Compete? An Assessment of Chile's Nationwide School Voucher Program." Occasional Paper. New York: National Center for the Study of Privatization in Education, January 2002.

school educators and administrators overwhelmingly oppose such plans, and consistently seek to serve all students.²⁶ The National School Boards Association, for instance, clearly opposes vouchers even though Dr. Scafidi claims that many of the districts they represent would benefit financially by losing students to vouchers.²⁷ In my own research, I have interviewed multiple public school administrators who seek to avoid losing students to other options, and often invest in costly marketing campaigns to win them back.²⁸ Even by Dr. Scafidi's own calculations, West Virginia public school districts losing students will lose thousands of dollars per student, not to mention the further erosion of public support for these public institutions.

30. Dr. Scafidi repeatedly makes inappropriate and unsupportable references to historical trends on state-wide school spending and enrollment to argue that enrollment declines due to HSP will not hurt public schools financially. Referencing historical trends — higher spending and enrollment declines — that by Dr. Scafidi's own contention are largely unrelated tells us nothing about the impact of a new program such as the HSP. In fact, if one were to accept the logic the declarants explicitly set out on school competition, public schools *must* be subjected to fiscal losses or they would have no reason to improve.
31. At several points, Dr. Scafidi makes the bizarre claim that “Public K-12 education is the only enterprise in our society (that I am aware of) that retains significant amounts of funding for customers they no longer serve.” Apparently, Dr. Scafidi has not considered the fact that most people also pay for roads, hospitals, higher education, and prisons, as well as private insurance, that they themselves may never use. This is normal in a society that sees benefits from community efforts that may not be effectively or equitably provided through individual choices in the private business sector. At one point, Dr. Scafidi offers the example of possible dissatisfaction with grocery stores, where people then have the “exit” option to pursue another vendor.²⁹ Leaving aside the distasteful assumption that children are commodities, Dr. Scafidi's contention explicitly casts parents as “customers.” In fact, there are many constituencies that benefit from — or which could be said to “consume” — education, including students, employers, and communities. Indeed, in the context Dr. Scafidi cites, the “customers” choose, purchase,

²⁶ See, for instance, the Affidavit filed in this matter by Meanie Meadows, Treasurer for Kanawha County Schools.

²⁷ <https://www.nsba.org/Advocacy/Federal-Legislative-Priorities/School-Vouchers>

²⁸ Lubienski, C. (2005). Public Schools in Marketized Environments: Shifting Incentives and Unintended Consequences of Competition-Based Educational Reforms. *American Journal of Education*, 111 (4), 464-486. Lubienski, C. (2007). Marketing Schools: Consumer Goods and Competitive Incentives for Consumer Information. *Education and Urban Society*, 40 (1), 118-141.

²⁹ The “exit” option is from the classic work in political economy from Hirschman, where he distinguishes private business organizations there are structured to be sensitive to the “exit” of customer, as opposed to public organizations such as schools which are structured to be sensitive to democratic “voice.” Hirschman notes pathologies arise when an organization structured to respond to one type of expression is subjected to the other; an example would be treating public schools as businesses. Hirschman, A. O. *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States*. Cambridge, MA: Harvard University Press, 1970.

and consume goods from the grocery store. Yet in the HSP, those roles are fragmented. Parents choose, but taxpayers must pay for those choices, while employers and the larger society are subjected to the consequences of those choices. Notably, Dr. Scafidi's argument could also be applied to the HSP, as taxpayers are required to fund private schools that they did not choose or use.

32. In paragraph 119, Dr. Scafidi takes issue with my point that ESA programs such as the HSP have a "function of transferring children and often resources from public to private schools." He then counters that, instead, "they provide aid to families that they may use, based on their own private and independent choice, on the educational settings that they deem best for their children." This is simply a semantic restatement of the purpose of the program. He offers no dispute with my observation in terms of actual function of the program.
33. Dr. Scafidi mischaracterizes my affidavit to suggest I raised "the specter that all current homeschool students and private school students might access Hope Scholarships." I never wrote anything of the sort, but he cites New Hampshire's new Education Freedom Account to show that uptake is not universal. It is not clear what we can tell about that program not only because it is in its first year, but also because it is a more limited, means-tested program.
34. Dr. Scafidi also defies common usage of the English language by claiming that funding of public schools is a "subsidy." According to Merriam-Webster,³⁰ a "subsidy" is "a grant or gift of money: such as
 - a. a sum of money formerly granted by the British Parliament to the crown and raised by special taxation
 - b. money granted by one state to another
 - c. a grant by a government to a private person or company to assist an enterprise deemed advantageous to the public"
35. Thus, I am using the term correctly in describing vouchers as a subsidy to private schools and persons; Dr. Scafidi is attempting to impose an ideological framework of the funding of public schools by inappropriately using the term, to suggest that public schools are a business receiving government subsidies.
36. Dr. Scafidi suggests that moving students into private schools through the HSP would save the state money. But in a recent analysis of the costs of a universal voucher program, such as the HSP, Dr. Henry Levin, a leading and widely respected economist on school choice, and a colleague estimate that would raise the total costs for education to taxpayers by 11-33%, largely due to moving private school students onto the taxpayers' expense, administering the duplicative system, and other considerations.³¹

³⁰ <https://www.merriam-webster.com/dictionary/subsidy>

³¹ Shand, Robert, and Henry M. Levin. "Estimating a Price Tag for School Vouchers." National Education Policy Center, May 25, 2021. <https://nepc.colorado.edu/publication/voucher-costs>.

Qualified Teachers

37. Dr. Scafidi argues that there are effective teachers who have not been through teacher preparation programs in his attempt to justify the lack of quality standards in the HSP. I would point out that there have also been, on occasion, people without pilot training who have landed planes. Few people would then argue that we should put school children on busses with unlicensed drivers, much less planes with untrained pilots. Of course, Dr. Scafidi's argument begs the question as to whether teachers who have been through such programs are, on average, more effective.
38. He then cites his own study that he says uses "the large amount of empirical evidence" on teacher effectiveness to argue that "'basic training requirements' on teachers actually lowers teacher quality, as these regulations do not permit individuals to enter teaching who lack the required training." In fact, Dr. Scafidi offers no evidence that going through a teacher preparation program lowers an individual teacher's effectiveness. Moreover, rather than offering "the large amount of empirical evidence" he claims, the paper Dr. Scafidi cites instead offers a theoretical model juxtaposing traditionally trained teachers with those who were trained in "alternative" programs. Those "alternative" programs still had "basic training requirements" for teachers, which Dr. Scafidi even specifies in the article.
39. Dr. Scafidi quotes part of a 2019 study from Prof. Dan Goldhaber that finds difficulty in discerning specific training factors that lead to more effective outcomes in teacher training programs. But this quote, and the article, say nothing about the overall effectiveness teacher preparation programs, just that researchers have not yet identified which specific attributes of effective programs are associated with student success. Moreover, the article Dr. Scafidi cites considers different teacher preparation programs, not teachers prepared in traditional programs as opposed to those with no training, as Dr. Scafidi appears to be arguing.
40. Instead, there are mixed findings in the research literature on the effectiveness of different teacher preparation programs, and those findings often vary by program. But most objective researchers consistently agree that quality teacher preparation can improve student outcomes, and a lack of preparation can hurt outcomes.³²
41. In paragraph 127, Dr. Scafidi frames this as an issue only of what parents want in terms of teacher qualifications, and ignores the taxpayers' interest in the most effective use of their tax dollars.
42. Dr. Scafidi writes that "there is no reason to believe that placing regulations on which teachers may be hired by private and homeschools would improve school quality." This

³² Darling-Hammond, L., Holtzman, D. J., Gatlin, S. J., & Vasquez Heilig, J. (2005). Does Teacher Preparation Matter? Evidence about Teacher Certification, Teach for America, and Teacher Effectiveness. *Education Policy Analysis Archives*, 13, 42. <https://doi.org/10.14507/epaa.v13n42.2005> Goldhaber, Dan D., and Dominic J. Brewer. "Does Teacher Certification Matter? High School Teacher Certification Status and Student Achievement." *Educational Evaluation And Policy Analysis* 22, no. 2 (Summer 2000): 129-45.

is incorrect. In my award-winning research published with the University of Chicago Press, we found that the hiring of uncertified teachers explained a substantial amount of the relative ineffectiveness of many private schools.³³

Sorting and Discrimination

43. The Indiana voucher program is a particularly instructive case, as it started out as a relatively limited, means-tested program focused on disadvantaged students. But over time, policymakers lifted caps on program eligibility, heading in the direction of the HSP (although still not as expansive as West Virginia's HSP). Dr. Scafidi takes exception to the evidence that, over time, Indiana's voucher program is serving "fewer minority students and more high income students," and states that I do "not provide any evidence on this point." In fact, I included three citations that support that finding. The first two citations make the obvious point that raising the income-eligibility cap has led to increases in the participation of more affluent students. The third citation is to a report that finds: "White voucher students are up from 46 percent that first year to 60 percent today, and the share of black students has dropped from 24 percent to 12 percent. Recipients are also increasingly suburban and middle class. A third of students do not qualify for free or reduced-price meals." It concludes: "data show that voucher students are increasing white, suburban and middle class."³⁴ Indeed, Dr. Scafidi's own evidence indicates that there are proportionately fewer African American students in the Indiana voucher program than in Indiana's public schools.
44. Dr. Scafidi writes that "Dr. Lubienski also states that the Indiana Choice Scholarship program has grown to serve higher income students. He provides no evidence on this point." This is incorrect (see the previous paragraph).
45. Dr. Scafidi dismisses evidence of discrimination in choice schools by indicating that victimized families can just go elsewhere. This ignores the point that taxpayers are forced to subsidize discriminatory institutions. It also is substantially similar to the claim that, before the Civil Rights movement, African American riders would at least still be allowed to stand or sit in the back of the bus.
46. In responding to evidence of discrimination, Dr. Scafidi cites a survey of perceptions of school climate relative to LGBTQ+ students in different schools. A survey of perceptions of institutional climate is different than actual evidence of the policies that some private schools use to explicitly exclude these and other students. Nevertheless, Dr. Scafidi writes: "thus it does not appear that public schools 'guarantee' better treatment of LGBTQ+ students." This, of course, is a misrepresentation of what I wrote in my affidavit, as I never said that public schools guarantee this. However, it is a fact that public schools are required to teach these and any such students who enroll, while private schools may exclude these and whole other groups of students. Moreover, Dr. Scafidi fails to recognize the substantial selection bias likely in such a survey, as the only

³³ Lubienski and Lubienski, 2014; see also, Lubienski, S. T., Lubienski, C., & Crane, C. C. (2008). Achievement Differences and School Type: The Role of School Climate, Teacher Certification and Instruction. *American Journal of Education*, 115 (1), 97-138.

³⁴ <https://www.npr.org/sections/ed/2017/05/12/520111511/the-promise-and-peril-of-school-vouchers>

LGBTQ+ students in private schools who are responding to the survey are those in schools that would allow them to enroll.

47. However, in citing the survey, Dr. Scafidi also failed to make note of the distinction between different types of private schools. As the report finds: “Students in private non-religious schools had greater access to most LGBTQ-related school resources and supports than all others. However public school students were most likely to report having a GSA [Gay-Straight Alliances] and most likely to report having LGBTQ-inclusive school library resources. Students in religious schools were least likely to have access to LGBTQ-related school resources and supports.”³⁵ This is an important distinction between religious and non-religious private schools. Notably, in West Virginia, only a small proportion of private schools are non-religious. According to federal data from the National Center for Education Statistics, only eight of 99 private schools in West Virginia are non-religious, and those tend to be progressive schools, such as Montessori. Likewise, West Virginia Department of Education data indicate that three of 46 accredited schools in West Virginia are non-religious, while 13 of 86 non-accredited schools are.³⁶ Moreover, there are large sections of the state where these or other West Virginia students have no viable access to a private school that would accept them.
48. Dr. Scafidi indicates that he takes exception to the fact that I cite two reports from the OECD regarding the sorting or segregative effects of school choice programs, and claims my affidavit “ignores” evidence from the United States. Actually, I cited three — not two — OECD reports, which include evidence from US choice programs as well in reaching their conclusions.
49. But perhaps more importantly, I have noted that there is evidence from across the globe linking school choice programs to segregation; universal voucher programs in Chile and Sweden³⁷ are associated with increasing levels of segregation; and I have noted similar evidence from charter school programs — which, like the HSP, are not means-tested — in the US. The declarants respond largely by citing their own work on means-tested programs, without providing evidence that West Virginia’s HSP will defy the global and national trends evident in the research.
50. Regarding segregation in school choice programs, Dr. Scafidi makes a number of misleading and inaccurate claims. He notes that a “classic” study I cited — showing that parents listed academic quality as a priority, but in their online efforts to research schools, they instead prioritized information on the racial composition of schools — only involved

³⁵ Exec Sum p. 16

³⁶ <https://wvde.us/nonpublic-school-information/accredited-and-registered-non-public-schools/>
I did not include daycare centers, special needs-only schools, and kindergarten schools in my analysis.

³⁷ Anders Böhlmark, Helena Holmlund, and Mikael Lindahl, “Parental Choice, Neighbourhood Segregation or Cream Skimming? An Analysis of School Segregation after a Generalized Choice Reform,” *Journal of Population Economics* 29, no. 4 (October 2016): 1155–90. Brandén, Maria, and Magnus Bygren. “The Opportunity Structure of Segregation: School Choice and School Segregation in Sweden.” *Acta Sociologica*, December 21, 2021, 00016993211068318.
<https://doi.org/10.1177/00016993211068318>.

schools in a public school choice program. His point is irrelevant, since he offers no evidence that the factors important to parents depend on school type. Dr. Scafidi speculates an alternative explanation, that parents may have been “searching for more integrated schools,” ignoring the main point that what they claimed to prioritize (academic quality) was different from what they actually investigated.

51. Dr. Scafidi attempts to distract from the common knowledge that vouchers were embraced by white segregationists to avoid post-Brown integration. To do this, he intentionally misconstrues my observation that “vouchers were initially proposed as a way to subsidize ‘White Flight’ academies seeking to avoid desegregation efforts in southern states.” He cites older programs from Maine and Vermont as the first “voucher” programs, and notes they were not racist. I have been studying school choice for almost three decades, and these 19th century initiatives were not designed with recent ideas of choice and competition associated with modern “vouchers.” They were known as “town-tuitioning” programs, and were started in order to provide education services for children in small towns that had no public schools. They pre-dated the main ideas associated with modern vouchers, such as school competition and choice. Indeed, in many cases, the town still decides which private school a child can attend.³⁸ Even Dr. Wolf, in his declaration, distinguishes between these programs and “voucher” programs (see Wolf’s Exhibit 3), and Friedman makes no reference to them in his famous 1955 proposal for vouchers. Thus, in trying to create this inappropriate diversion, Dr. Scafidi neglects to challenge my observation about the racist use of vouchers to avoid integration. Indeed, perhaps unwittingly, he cites a study from a voucher proponent who was previously the chair of the pro-voucher Department of Education Reform at the University of Arkansas, in which that writer acknowledges that “Offering vouchers to attend racially segregated private academies was one of the strategies used by Southern segregationists to evade efforts to integrate public schools.”³⁹

52. Dr. Scafidi then goes on to claim that the person known to be the intellectual author of the modern voucher movement, Milton Friedman, opposed segregation. This is true, but not completely. A fuller reading of Friedman’s famous 1955 essay proposing vouchers, just as Brown was being decided, offers a more complete picture. Friedman acknowledged that he was aware that segregationists would use his proposal to avoid integration, but — as a libertarian — decided that he preferred segregation through vouchers to government administration of schools. If I may quote Friedman’s justification of this at some length beyond Dr. Scafidi’s selective quote:

Essentially this proposal—public financing but private operation of education—has recently been suggested in several southern states as a means of evading the Supreme Court ruling against segregation. This fact came to my attention after this

³⁸ <https://www.burlingtonfreepress.com/story/news/2021/03/24/vermont-town-tuitioning-school-choice-program-education-equality/6979258002/>

³⁹ Greene, Jay P., and Marcus A. Winters. “An Evaluation of the Effects of D.C.’s Voucher Program on Public School Achievement and Racial Integration after One Year.” New York: Manhattan Institute, January 2006. p. 88.

paper was essentially in its present form. My initial reaction--and I venture to predict, that of most readers--was that this possible use of the proposal was a count against it, that it was a particularly striking case of the possible defect--the exacerbating of class distinctions.... Further thought has led me to reverse my initial reaction. ... I deplore segregation and racial prejudice; [but] it is not an appropriate function of the state to try to force individuals to act in accordance with my--or anyone else's--views, whether about racial prejudice or the party to vote for, so long as the action of any one individual affects mostly himself. These are the grounds on which I oppose the proposed Fair Employment Practices Commissions; and they lead me equally to oppose forced nonsegregation. However, the same grounds also lead me to oppose forced segregation. Yet, so long as the schools are publicly operated, the only choice is between forced nonsegregation and forced segregation; and if I must choose between these evils, I would choose the former as the lesser.

53. Also, it is worth remembering that Friedman and his students also had a hand in creating the voucher system in Chile, which has led to one of the most socially segregated school systems in the world.⁴⁰

54. To defend the idea that choice promotes integration — an idea almost no serious researcher on the topic now holds — Dr. Scafidi makes some irrelevant and misleading claims. First, Dr. Scafidi notes that segregation is a significant issue in public schooling, an observation few honest researchers would dispute, although many link that to residential segregation. But the pertinent question is whether school choice programs, which could break the connection between residence and school placement, are exacerbating or ameliorating school segregation. Researchers have noted both demand-side sorting by families in choice programs, as well as supply-side sorting as schools of choice exclude some students in different ways. Dr. Scafidi challenges the evidence I provided by saying that charter schools are not vouchers. This is true, but irrelevant,

⁴⁰ Gutiérrez, Gabriel, and Alejandro Carrasco. "Chile's Enduring Educational Segregation: A Trend Unchanged by Different Cycles of Reform." *British Educational Research Journal* n/a, no. n/a (2021). <https://doi.org/10.1002/berj.3746>. Elacqua, Gregory. "The Impact of School Choice and Public Policy on Segregation: Evidence from Chile." *International Journal of Educational Development* 32, no. 3 (2012): 444–53. <http://dx.doi.org/10.1016/j.ijedudev.2011.08.003>. Klein, Naomi. *The Shock Doctrine: The Rise of Disaster Capitalism*. 1st ed. New York: Metropolitan Books/Henry Holt, 2007.

Patrick J. McEwan. "Private and Public Schooling in the Southern Cone: A Comparative Analysis of Argentina and Chile." Occasional Paper. New York: National Center for the Study of Privatization in Education, December 2000.

Verger, Antoni, Clara Fontdevila, and Adrian Zancajo. *The Privatization of Education: A Political Economy of Global Education Reform*. International Perspectives on Education Reform. New York, NY: Teachers College Press, 2016.

Valenzuela, Juan Pablo, Cristian Bellei, and Danae de los Ríos. "Socioeconomic School Segregation in a Market-Oriented Educational System. The Case of Chile." *Journal of Education Policy* 29, no. 2 (2014): 217–41. <https://doi.org/10.1080/02680939.2013.806995>.

since Dr. Scafidi fails to identify any differences that would suggest different outcomes with vouchers. In fact, charter schools may be a better case for understanding the potential of the HSP, since neither program is means-tested.

55. But rather than referring to research, Dr. Scafidi returns to the issue of charter schools and makes a claim that I have not seen a serious researcher make since the early 2000s. Dr. Scafidi observes that African American students are over-represented in charter schools in a feeble attempt to prove those schools promote integration overall. But it is well known that charter schools tend to be located more often in urban areas with higher concentrations of minority students, so looking at sector-wide participation tells us nothing about integration in those schools. Under Dr. Scafidi's logic, segregated urban neighborhoods are actually integrated because they also serve a high proportion of African American residents. His claim is so shockingly irrelevant as to be misleading, especially when one considers the vibrant research literature on the issue that has been developed since the early 2000s that was available to Dr. Scafidi when he wrote his declaration.
56. Since segregation is generally a school-level issue, serious researchers study it with schools as the unit of analysis – not whole sectors, as Dr. Scafidi attempts to do. They use Gini coefficients, dissimilarity indices or exposure indices to consider how racially isolated different students are in different schools, not sector-wide participation rates. Perhaps the most respected researcher on the topic is Prof. Erica Frankenberg who, along with colleagues, has examined this issue extensively in charter schools over the last two decades. In one comprehensive study of school-level segregation in charter schools across the US, Frankenberg and Siegel-Hawley found “higher levels of segregation for black students in charter schools compared to traditional public schools. This finding is particularly striking given that the CRP [Civil Rights Project] has reported increasing segregation for black (and Latino) students in public schools for nearly two decades. In other words, charter school segregation levels for black students are even outpacing steadily increasing public school segregation.”⁴¹ Elsewhere, in a peer-reviewed study, they find “charter schools are more racially isolated than traditional public schools in virtually every state and large metropolitan area in the nation.”⁴² More recently, even the pro-school choice Hoover Institution published a paper that reviewed the research on school choice segregation, finding “all of the design-based evidence supports the claim that charter schools have led to increases in the segregation of schools... For the average district in the country, this represents about a 5 to 6 percent increase in segregation. Although these results are modest in magnitude, extrapolating them out to high levels of charter enrollment share suggests sizable rises in segregation.”⁴³ In summarizing the

⁴¹ Frankenberg, Erica, and Genevieve Siegel-Hawley. “Equity Overlooked: Charter Schools and Civil Rights Policy.” Los Angeles: The Civil Rights Project, November 2009.

⁴² Frankenberg, Erica, Genevieve Siegel-Hawley, and Jia Wang. “Choice without Equity: Charter School Segregation.” *Educational Policy Analysis Archives* 19, no. 1 (2011): <http://epaa.asu.edu/ojs/article/view/779>.

⁴³ Chingos, Matthew M, and Tomas E Monarrez. “Does School Choice Make Segregation Better or Worse?” Hoover Institution, Stanford University, 2020, 24. P. 15. See also Tomas Monarrez, Brian

research on charters, they conclude that “the best available evidence indicates that growth in the charter sector leads to modest increases in segregation, on average. At best, there is no effect, and, at worst, the effect is sizable. There is little compelling evidence that charter schools reduce school segregation.”⁴⁴

57. Thus, Dr. Scafidi’s claims about segregation and school choice programs are misleading, based on simplistic citation to broad patterns when more nuanced and rigorous research is available, and at odds within the consensus on the issue that is shared even by supporters of school choice.

58. Dr. Scafidi writes, “The experience in these states indicates that private schools in many states are serving special needs students— contrary to Dr. Lubienski’s suggestion.” But I correctly pointed out that both private and charter schools serve proportionately fewer such students. For instance, according to Dr. Scafidi’s own figures, 3.45% of the students in Indiana’s voucher program have special needs. This compares to about 14.3% of students in Indiana’s public schools.⁴⁵

59. Finally, Dr. Scafidi concludes by quoting and disputing my observation that “public schools are required to teach all who wish to enroll,” which he says “is incorrect,” citing the fact that in a relatively small amount of cases some special education students are taught in specialized private facilities. He neglects to acknowledge that they are taught at the expense of public school districts when those districts deem the outside placement to be more appropriate for that case.

WOLF

60. Dr. Patrick Wolf, of the University of Arkansas, is a prominent evaluator of school voucher programs, and also an advocate for such programs.⁴⁶

61. In his affidavit, he appears to question my expertise on the issue. In fact, I have been invited to serve on panels and a board with Dr. Wolf, all focused on vouchers and school choice. He has cited my work in his papers on school vouchers. He cites the work of a researcher he (erroneously) describes as my former doctoral student to support his claim about vouchers. I am internationally known for my work on school choice, including vouchers, and have been cited more often and more broadly than has Dr. Wolf on the subject. I have been invited to testify on vouchers before legislators at both the federal and state levels, and have presented research on the subject at academic conferences as well as at the Federal Reserve Bank of Cleveland. I have been awarded over a million dollars in external funding for my research on the utilization and leveraging of research

Kisida, and Matthew Chingos, *The Effect of Charter Schools on School Segregation*, working paper (Washington, DC: Urban Institute, 2020).

⁴⁴ Chingos, Matthew M, and Tomas E Monarrez. “Does School Choice Make Segregation Better or Worse?” Hoover Institution, Stanford University, 2020, 24. P. 17.

⁴⁵ <https://www.nclد.org/wp-content/uploads/2017/03/Indiana.Snapshot.v2.pdf>

⁴⁶ For an example of this advocacy, see, for instance, Wolf, Patrick J. “Minnesota Falls behind on School Choice.” *Star-Tribune*, January 28, 2013.

on school choice, including vouchers and including Dr. Wolf's research (as indicated below).

62. Dr. Wolf writes that "Dr. Lubienski studies private school effects in the absence of private school choice programs. He also studies public school choice policies, such as charter schools and public school reforms in New Zealand." He neglects to note that I also study research utilization on these topics, including on private school vouchers. He appears to take issue with the fact that I do not study school voucher programs exclusively, but instead focus on many such school choice programs, the effectiveness of different types of schools.
63. Dr. Wolf claims that my "opinion is fundamentally flawed because it uses public school choice studies to criticize the Hope Scholarship Program, which is a private school choice initiative." Often, this is a meaningless distinction. Yes, there are legal differences between publicly funded schools including charter schools and private voucher programs. However, the latter are also publicly funded. Moreover, much of the research suggests that these distinctions are less relevant than Dr. Wolf suggests, and that insights can be gained from different types of school choice programs. For instance, if parents seek to place their child in a better-funded, more affluent, or more segregated school through a charter program, Dr. Wolf fails to explain why they might not also do the same through a private school voucher program. Likewise, since research indicates that some publicly funded charter schools, which are prohibited from excluding students based on creed, ability or special need, still find ways of excluding such students (as research indicates is happening⁴⁷), it is not clear why we should not consider that research when weighing the potential for private schools accepting a publicly funded voucher to also exclude students based on any number of factors, particularly when programs such as the HSP clearly do not prohibit private schools from doing so. Moreover, on many dimensions, we might gain more insights into the potential workings of a universal school choice program such as the HSP by examining the empirical record of charter schools (for which all students are also technically eligible) or universal voucher programs with longer track records, such as those in Sweden or Chile, than by focusing only on smaller, targeted programs that Dr. Wolf and his associates have evaluated in a handful of US cities.
64. Dr. Wolf is apparently less familiar with international research on school choice issues. For example, he refers to "public school reforms in New Zealand," seemingly unaware that there are major differences in the understandings of categories such as "public" or "private" schools across different countries. In some nations, such as Canada, Australia, New Zealand, the Netherlands, and elsewhere, Catholic schools are often effectively "integrated" into the state system, and may be "public" (in the US understanding of the term) in many respects, such as public funding, unionized teaching force, state control over curriculum and/or assessment. In some countries, "private" schools are more regulated than are "public" schools in the United States. Thus, when Dr. Wolf characterizes my research in New Zealand, where I have been a Fulbright Senior Scholar,

⁴⁷ Mommandi, Wagma, and Kevin Welner. *School's Choice: How Charter Schools Control Access and Shape Enrollment*. New York, NY: Teachers College Press, 2021.

as focused on “public school reforms,” he does not appear to recognize that state schools in New Zealand were largely deregulated and decentralized decades ago. Each school is autonomous and self-governing, must compete for students and funding (as with a voucher system), and there are no entities equivalent to a “school district.” In fact, the leading expert on New Zealand’s decades-long experiment with dramatic decentralization — what some have called “privatization” of schooling⁴⁸ — describes New Zealand’s system as a “quasi-voucher” system.⁴⁹ Thus, it offers a useful case with a long track record for studying issues such as schools’ competitive strategies and impacts on exclusion and segregation, and has been a major subject of interest for scholars of school choice.⁵⁰

65. Likewise, Dr. Wolf writes: “The difference between evaluating the effects of actual private school choice programs, as I do, and studying private-public school differences in the absence of school choice policies, as Dr. Lubienski does, is crucial.” While he is somewhat correct (but not in the way he suggests, as I explain below), to claim that I have been “studying private-public school differences in the absence of school choice policies” is both incorrect and misleading. A simple review of my peer-reviewed publication record demonstrates that most of my publications, grants, and research has, in fact, been focused on “school choice policies,” including vouchers. Dr. Wolf knows this, as he has cited my work on school choice policies in his own research.
66. But Dr. Wolf is partially correct about the crux of the issue. He is an evaluator of voucher programs. Evaluation focuses on determining the extent to which a particular program achieved certain goals. I am a researcher who has, in one line of my research, examined the relative effectiveness of public, private and charter schools. Research focuses on generating new knowledge, and is often (but not always) driven by hypotheses or testing theory. Dr. Wolf has published a number of evaluations of specific voucher programs in places such as Milwaukee, Washington, DC and Louisiana. His evaluation work typically sets out to determine the extent to which those specific programs succeeded on specific goals, such as increased achievement, attainment, or integration.
67. However, it is important to recognize that voucher programs, especially in the US, are based largely on the assumption that private schools are more effective than public schools. This idea goes at least back to the work of James Coleman and associates in the late 1980s and early 1990s, when they studied the relative effectiveness of private

⁴⁸ Gordon, Liz, and Geoff Whitty. “Giving the ‘Hidden Hand’ a Helping Hand? The Rhetoric and Reality of Neoliberal Education Reform in England and New Zealand.” *Comparative Education* 33, no. 3 (1997): 453–68.

⁴⁹ Wylie, Cathy. “Is the Land of the Flightless Bird the Home of the Voucherless Voucher?” *New Zealand Journal of Educational Studies* 34, no. 1 (1998): 99–109.

⁵⁰ See Fiske, Edward B., and Helen F. Ladd. *When Schools Compete: A Cautionary Tale*. Washington, DC: Brookings Institution Press, 2000. Lauder, Hugh, David Hughes, Sue Watson, Sietske Waslander, Martin Thrupp, Rob Strathdee, Ibrahim Simiyu, Ann Dupuis, Jim McGlenn, and Jennie Hamlin. *Trading in Futures: Why Markets in Education Don’t Work*. Buckingham, UK: Open University Press, 1999.

schools, arguing that Catholic schools in particular were more effective at educating some students, even after controlling for the fact that there are demographic differences between the populations of public and private schools.⁵¹ Thus, assuming this “private school effect” is real, it may make sense to create voucher programs to allow students who are shown to benefit from private schooling access to such schools. This was essentially the case made by John Chubb and Terry Moe in their 1990 book, which was widely celebrated by school choice proponents, including voucher advocates.⁵²

68. However, if instead the “private school effect” is illusory or even negative, then the case for subsidizing students to leave public schools for less-effective private schools where they would learn relatively less is more problematic. Yet, in fact, in major studies of nationally representative data of hundreds of thousands of students in different types of schools, that is what we found, rather unexpectedly. That is, we know that private school students tend to score higher on measures of academic achievement, but we also know they tend to be more affluent and enjoy other home factors that give them an academic advantage regardless of school effectiveness. But after accounting for differences in demographics, location, and other factors known to shape academic achievement (similar to Coleman et al, Chubb. & Moe), we found students in public schools were learning more than their demographic peers in most private schools, findings that were later affirmed by researchers at the Education Testing Service (for the National Center of Education Statistics), Stanford University, and the University of Notre Dame.⁵³

69. Obviously, such findings represented a threat to the logic of voucher proponents (including Dr. Wolf), who challenged, but failed to disprove those findings.⁵⁴ Interestingly, one way they attempted to counter the findings on the relative effectiveness of public schools was to cite evaluations of small-scale voucher programs conducted by Dr. Wolf and others.⁵⁵ However, citing research on non-representative samples of students and schools in small-scale voucher evaluations, as Dr. Wolf has attempted to do, is both inappropriate, and does nothing to disprove the findings on the relative effectiveness of public and private schools. Thus, when Dr. Wolf quotes Dr. Henry Levin that “none of the public-private comparisons can be as instructive as the direct

⁵¹ Coleman, James S. “Public Schools, Private Schools, and the Public Interest.” In *The Public Interest on Education*, edited by Nathan Glazer, 229–40. Cambridge, MA: Abt Books, 1984.

Coleman, James S., and Thomas Hoffer. *Public and Private High Schools: The Impact of Communities*. New York: Basic Books, 1987.

⁵² Chubb, John E., and Terry M. Moe. *Politics, Markets, and America's Schools*. Washington, DC: Brookings Institution, 1990.

⁵³ Carbonaro, William. “Public-Private Differences in Achievement among Kindergarten Students: Differences in Learning Opportunities and Student Outcomes.” *American Journal of Education* 113, no. 1 (November 2006): 31–65. Reardon, Sean F., Jacob E. Cheadle, and Joseph P. Robinson. “The Effects of Catholic School Attendance on Reading and Math Achievement in Kindergarten through Fifth Grade.” *Journal of Research on Educational Effectiveness* 2, no. 1 (2009): 45–87. , Henry, Frank Jenkins, and Wendy Grigg. “Comparing Private Schools and Public Schools Using Hierarchical Linear Modeling.” Washington, DC: National Center for Education Statistics, July 2006.

⁵⁴ Wolf, Patrick J. “Comparing Public Schools to Private.” *Education Next* 14, no. 3 (Summer 2014).

⁵⁵ Bedrick, Jason. “Yes, Private Schools Beat Public Schools.” *National Review Online*, March 28, 2014.

evaluation of a voucher intervention,” he neglects to note that it depends on what the question is.⁵⁶ (In that article, Dr. Levin reviews the extant research, finding that choice programs lead to greater levels of segregation.)

70. Thus, although Dr. Wolf may not like my research on school vouchers or other forms of choice, nor my findings, as my publication record and history as an invited expert suggest, I indeed do research on school voucher programs. Nothing in Dr. Wolf’s declaration shows that anything in my affidavit is “fundamentally flawed.” However, he makes some flawed claims in his affidavit, as I show.

Achievement and Attainment

71. Dr. Wolf writes that I neglect to consider other issues besides student learning gains. Actually, it was Dr. Wolf and his colleagues who elevated measures of academic achievement as the primary consideration in determining the success of these programs — the “main purpose,” as he has written. As voucher programs expanded to be state-wide, evaluations started to show evidence of large, negative effects on student learning. Dr. Wolf and his associates “moved the goalposts” and promoted the idea that test scores do not matter, and that we should instead focus on other outcomes besides learning.
72. To understand this shift in focus, it is important to note the difference between “achievement” measures of student learning, and “attainment,” what Dr. Egalite refers to as long-run outcomes. There are indeed good reasons to focus on multiple measures in addition to learning gains, although the research on those measures is more questionable than the declarants indicate (see below).
73. Nonetheless, when their smaller-scale studies were indicating the possibility of small advantages in achievement for voucher students, Dr. Wolf and his associates for years highlighted learning gains as the primary determinant of program effectiveness. For instance, Dr. Wolf’s department chair at University of Arkansas wrote an op-ed for the *Wall Street Journal* in 2002 titled “School Choice = Higher Test Scores,” and celebrated the fact that, even when evaluations of voucher programs indicated no relative gains in learning, at least there was no evidence they did any harm.⁵⁷ But later, when scaled-up programs started to show detrimental impacts on students, he wrote another piece entitled, “If You Mostly Care About Test Scores, Private School Choice Is Not For You.”⁵⁸ Dr. Wolf’s work indicates a similar shift in emphasis as test scores started to turn negative.

⁵⁶ Interestingly, Dr. Levin was the first to publish my working paper on public-private comparisons when he directed the National Center for the Study of Privatization in Education at Columbia University. When I see him, most recently in 2021, he still congratulates me that it has been the most viewed paper they have published.

⁵⁷ Greene, J. P. (2002, January 23). School Choice = Higher Test Scores. *Wall Street Journal*, A22. ABI/INFORM Collection; U.S. Major Dailies; U.S. Newsstream.

⁵⁸ Greene, J. P. (2017, April 28). If You Mostly Care About Test Scores, Private School Choice Is Not For You. *Jay P. Greene’s Blog*. <https://jaypgreene.com/2017/04/28/if-you-mostly-care-about-test-scores-private-school-choice-is-not-for-you/>

74. In my work as a scholar of research utilization, I had the opportunity to analyze Dr. Wolf's publication record as stated on his CV. Near the beginning of his career, around 2000, pretty much all of his publications focused on achievement, and discussions of attainment were relatively rare. But in recent years, as Dr. Wolf's own research, and the research of others indicated the large, negative effects of state-wide voucher programs, his work has shifted to focus now more on attainment. In the first decade of his career, 24 of Dr. Wolf's publications on vouchers focused on achievement as the primary outcome, with only a half-dozen referencing attainment. In the most recent decade, his metrics for assessing school choice were rather different, with 42 publications or testimonies referencing achievement in voucher programs, and 39 focused on attainment measure. Indeed, since 2015, when the negative impacts of voucher programs first started appearing, there is only one year where Dr. Wolf focused more on achievement than attainment. It is not surprising then that Dr. Wolf declares, "The scholarship on private school choice programs clearly signals that the court should consider more than just test scores in assessing the likely effects of the Hope Scholarship Program." This "moving the goalposts" strategy can be considered a form of "cherry-picking" if evaluators change areas of focus in hopes of presenting favored programs in more favorable light.
75. I actually agree that any educational programs should be assessed on multiple measures, using different methodologies. But I also think it is instructive to see Dr. Wolf's claim that I ignore other issues in light of his own explicit and implicit elevation of achievement measures when it was strategically useful. Moreover, I think caution is warranted in avoiding over-reliance on attainment measures. Many of these issues are susceptible to peer-effects, rather than simply being a result of program effects, as the declarants suggest. For instance, if students are learning less in voucher programs, as Dr. Wolf's own research suggests, then one may wonder about the higher graduation rate and college attendance rate of students with less learning. Are demonstrably lower-achieving voucher students somehow performing better on college entrance exams, or are they enjoying the benefits of hearing more affluent peers in private schools discuss college essays and application strategies? If the latter, that is wonderful for those students to attain such positive peer effects from a smaller, means-tested program. But when such programs are scaled up to become universal as with the HSP, such positive peer effects are likely to become diluted and thus less impactful. Moreover, some of the attainment measures themselves are questionable. Comparing graduation rates from public high schools to self-reported graduation rates from private high schools that have varying graduation requirements is not necessarily an apples-to-apples comparison.
76. That said, the declarants' claims on achievement are consistently in a format that has been described as "vote-counting," in which they list studies — often their own — that indicate any positive (or negative) voucher impacts on achievement or other measures (such as integration; see, for instance, Exhibit I & 3 from Dr. Wolf, paragraph 14 from Egalite, or paragraph 116 from Dr. Scafidi). Vote-counting is considered to be about the most blunt and rudimentary way of assessing evidence across studies; attractive for its simplicity, but also simplistic. It glosses over important information, such as the size of the sample, the number of groups and subgroups for which there were positive, negative,

or null outcomes, the quality of the studies, or the consistency of impacts. For instance, Dr. Egalite suggest there are “over a dozen” studies of what she terms “short-run” impacts, meaning impacts on learning.⁵⁹ She then cites “neutral to positive impacts for key student subgroups in six of the cities studied. From this presentation of the evidence, we do not know key information, such as if subgroups in a city saw “neutral” or “positive” impacts; if any city was studied multiple times; if impacts were consistent in any subgroup across all studies, or if they were concentrated in one subgroup or city, for instance. (Having reviewed such claims previously, I can reveal that the impacts were highly inconsistent across subgroups and cities, and modest at best; or as Dr. Cecilia Rouse — who Dr. Wolf correctly noted is “currently Chair of President Biden’s Council of Economic Advisers — concluded in their review of the research evidence, “The best research to date finds relatively small achievement gains for students offered education vouchers, most of which are not statistically different from zero.”⁶⁰)

77. Obviously, a critical factor in the use of the “vote-counting” method is the issue of which studies to include in the analysis — which “votes” get counted. The vote-counting exercises presented in the declarations are problematic in that respect. The declarants make claims about including “all” relevant or rigorous studies, but tend to cite their own research and that of their associates quite frequently, presenting what we found to be an “echo-chamber” of citations to like-minded voucher advocates in our bibliometric analysis of the use of these studies within the research community.⁶¹
78. But the vote-counting exercise loses credibility when poor quality studies are included, or when relevant studies are inexplicitly excluded. On the former, a clear example is evident in paragraph 116 of Dr. Scafidi’s declaration, where he asserts that there are (only) eight empirical studies on the question of school vouchers, focusing means-tested programs mostly in cities in the US, rather than including research on universal programs more similar to the HSP in other countries. He claims that “seven find that existing choice programs in the United States have increased racial and ethnic integration, while the other study finds neutral effects.” He never indicates which ones found positive or neutral effects. We already know that one of the studies he cited, from Egalite et al., also found some negative effects that Dr. Scafidi does not mention. Moreover, while all of the studies he cites were conducted by voucher proponents, only two were peer-reviewed for publication in scholarly journals. The others are a collection of papers published by EdChoice, the DER at University of Arkansas, or some other apparently unnamed

⁵⁹ “Short-run” is an odd term to use to describe learning, considering that learning gains are thought to be cumulative, as Dr. Wolf notes in paragraph 41.

⁶⁰ Lubienski, Christopher, and Joel R. Malin. “Moving the Goalposts: The Evolution of Voucher Advocacy in Framing Research Findings.” *Journal of Education Policy* 36, no. 6 (November 2, 2021): 739–59. <https://doi.org/10.1080/02680939.2020.1730977>.

Rouse, C. E., & Barrow, L. (2009). School vouchers and student achievement: Recent evidence, remaining questions. *Annual Review of Economics*, 1, 17–42.

⁶¹ Goldie, David, Matthew Linick, Huriya Jabbar, and Christopher Lubienski. “Using Bibliometric and Social Media Analyses to Explore the ‘Echo Chamber’ Hypothesis.” *Educational Policy* 28, no. 2 (March 1, 2014): 281–305. <https://doi.org/10.1177/0895904813515330>.

publisher. Two and possibly a third were written before the US Supreme Court ruled on the constitutionality of school vouchers. One, by Greene, just presents a snapshot – that is, a one-time picture of distributions from which it is difficult if not impossible to make causal claims — on racial distributions, comparing public schools in Cleveland to public and private schools across metropolitan Cleveland. The paper from Fuller and Mitchell, which appears to be largely similar to the “study” from Fuller and Greiveldinger (I cannot tell, since no publication information was provided) is also a snapshot one year after the inclusion of religious schools in Milwaukee’s voucher program, comparing a non-representative sample of private schools to all public schools (which most likely involves a predominantly African American district sending its students to formerly predominantly white Catholic schools). Greene and Winters’ 2007 study also offers a snapshot after one year (finding no competitive impact on public school achievement), and makes questionable comparisons of DC’s public schools to a metro-area baseline. This is an atrocious presentation of often highly questionable “research.”

79. On the latter, vote-counting loses credibility when relevant studies are not cited, such as the important literature on segregation in voucher programs in other countries, or in US charter schools. A clear example of this is evident in Dr. Wolf’s declaration on the “competitive effects of private school choice programs in the United states” (Exhibit 3). There, he lists a number of studies, grouped by state, and “summarizes” the findings of each as null and/or positive. Again, many (but not all) of these studies were conducted by voucher enthusiasts, and we know nothing about the rigor, effect sizes, or consistency of impacts across subgroups from these studies. Some appear to be unpublished working papers. For instance, Dr. Wolf cites Egalite’s 2014 paper on competition in Indiana, indicating that the results were “null to positive.” No citation is provided for this claim, so I searched for the paper Dr. Wolf wrote for the Hoover Institution, which he cites in support of the claim.⁶² He cites a 2014 paper that was posted on a pro-voucher website, examining competitive effects from vouchers in Indiana and Louisiana. Looking at her CV, it does not appear that this paper on Louisiana and Indiana was subsequently published in any peer-reviewed research forum.
80. However, in selecting studies to include in his analysis, Dr. Wolf fails to include a comprehensive, peer-reviewed study on Indiana that offers quite a sophisticated and nuanced analysis of the issue. Using a two-way fixed effects regression and event study approach, Canbolat examined the competitive impacts of school vouchers on public schools over the last eight years in Indiana.⁶³ The analysis finds competition initially had a positive impact due to the introduction of voucher competition, but that over time,

⁶² Wolf, P. J. (2020, July 1). *Private school choice programs: What do we know about their effects on outcomes for disadvantaged students?* A background paper for the Hoover Education Success Initiative, Stanford University, Palo Alto, CA, Table 5, p. 29. Retrieved on April 19, 2022 from <https://www.hoover.org/research/private-school-choice-programs-wliat-do-vve-know-about-their-effects-outcomes-disadvantaged>.

⁶³ Canbolat, Yusuf. “The Long-Term Effect of Competition on Public School Achievement: Evidence from the Indiana Choice Scholarship Program.” *Education Policy Analysis Archives* 29, no. 0 (July 19, 2021): 97. <https://doi.org/10.14507/epaa.29.6311>.

performance of public schools subjected to the greatest levels of competition from voucher schools declined and did not rebound as higher achieving students left. It is not clear why Dr. Wolf chose to include an unpublished working paper on Indiana rather than a peer-reviewed article in an open-access academic journal that was freely available to him almost a year before he filed his declaration on the topic.

81. While Dr. Wolf inaccurately accuses me of “cherry-picking” studies (which is not true, since all relevant published studies are considered in my analysis, and he has not demonstrated otherwise), this is certainly an example of cherry-picking by Dr. Wolf, as he neglects to include relevant research that does not conform to his claims in his “vote counting” exercise. In fact, in leveling his accusations of cherry-picking, in paragraph 10 of his declaration, Dr. Wolf quotes P.L. Thomas’s 2010 definition of cherry picking: “Cherry picking is purposefully choosing evidence of subjects that are predisposed to producing desired conclusions. Advocates are prone to cite only those studies that support their positions—even if that evidence is dwarfed by contradictory findings—or to identify only aspects of research supporting their position.” This accurately describes Dr. Wolf’s treatment of the research literature. Moreover, I was not familiar with that quote, but I am familiar with a Dr. P.L. Thomas at Fuhrman University. So I checked with him. Not only did he indeed write that definition quoted by Dr. Wolf, but he says that he wrote it specifically in reference to Dr. Wolf and his associates due to their practice of selectively presenting evidence.
82. As another example of Dr. Wolf’s selective use of evidence, he cites a 2011 evaluation showing positive academic impacts of school choice in Florida to try to disprove my observation of the negative effects of vouchers in all recent studies, even though I clearly noted at more than one point that this pattern is evidence since 2015 (as Dr. Wolf acknowledges in paragraph 41). But Dr. Wolf nonetheless cites the older study to claim “that the program significantly increased student achievement by 4 percentile points in both math and reading.” However, Dr. Wolf for some reason chose to cite the 2011 findings when more recent findings from that evaluation found that “The mean gain for program participants is 0.1 national percentile ranking points in reading and -0.7 national percentile ranking points in mathematics, both statistically indistinguishable from zero.”⁶⁴ (That is, the program appeared to have virtually no impact on student learning, despite the fact that it has been in operation since 2001.) Dr. Wolf’s willingness to cite earlier evaluations when later ones are available stands in stark contrast to the advice he offers in paragraph 41 regarding not focusing on earlier evaluations when later ones are available.
83. Dr. Wolf quotes my affidavit that “These sorting issues are apparent in choice programs at the global level.” He then notes that I also cited a study in Washington, DC, suggesting that “the sources he cites do not support the claims that he makes.” Dr. Wolf ignores the fact that there are at least five other citations to global evidence in my affidavit, including to work by the OECD, which is explicitly cited by name in the first sentence of the paragraph in question. In fact, the DC program is a choice program, and is explicitly cited as an example of the sorting mechanisms we are observing in research around the

⁶⁴ https://www.floridaschoolchoice.org/pdf/FTC_Research_2012-13_report.pdf


globe. The fact that it is not a private school choice program is irrelevant since it was examining parent (not school) behavior regarding stated and revealed preferences for racial/ethnic composition, not governance type. The researchers — including the now Director of the Institute of Education Science at the Department of Education — found that parents tended to state that they prioritized academic quality while their actual search behaviors indicated a focus on demographics of a school. Whether the schools are public or private is irrelevant for conducting that study, but the findings have implications for parents' selection of schools in other types of programs. Thus, Dr. Wolf is either willfully misrepresenting the paragraph he is critiquing, and ignoring the evidence explicitly cited in it, or he failed to actually read it. Furthermore, at no time does Dr. Wolf substantiate the claim that “the sources he cites do not support the claims that he makes,” although he himself repeatedly fails to provide evidence for the claims he makes, as in paragraphs 8 and 12 of his declaration.

84. Dr. Wolf also cites work by Dr. Huriya Jabbar, who he describes as “a former student of Dr. Lubienski.” This is also incorrect. Dr. Jabbar and I have never even been at the same university.
85. It is a clear misrepresentation for Dr. Wolf to claim I noted “null effects,” and then point to graduation rates to try to disprove my observation about the program. I was clearly writing about learning, as the section was explicitly about academic achievement, and the preceding sentence reminded readers I was writing about “learning” metrics. So this is willful mischaracterization. Furthermore, Dr. Wolf unintentionally affirms my point by going on to note that there was “no evidence that it effected math achievement.” (As Dr. Wolf’s own advisor has noted, “Math tests are thought to be especially good indicators of school effectiveness, because math, unlike reading and language skills, is learned mainly in school.”⁶⁵) His claim that there was “suggestive evidence that the program increased reading achievement” falls outside of scholarly conventions to prove program effectiveness.
86. Dr. Wolf does not disprove my observation that “research on the effects of.. .scaled-up programs.. .show significant, large, negative impacts” and that all statewide evaluations of private school voucher programs since 2015 “showed significant relative learning losses for students using vouchers to attend private schools.”
87. While Dr. Egalite and Dr. Wolf consistently claim that voucher programs serve disadvantaged students, even after accounting for the fact that most are means-tested, Dr. Wolf acknowledges that, “Among the largely disadvantaged population of students who apply to private school choice programs, the relatively advantaged among them are more likely to participate in the program over an extended period of time”.
88. In another vote-counting exercise (Exhibit 1) in which two-thirds of the studies cited are his own work or the work of his academic advisor, Dr. Wolf cites a 2013 study he co-

⁶⁵ Peterson, Paul E. “School Choice: A Report Card.” In *Learning from School Choice*, edited by Paul E. Peterson and Bryan C. Hassel, 3–32. Washington, DC: Brookings Institution Press, 1998.

authored to claim that vouchers led to an increase in attainment for students. However, the program, which has been around for some three decades, still suffers from substantial attrition, with children leaving the program due to not liking school, being bored in school, which would tend to skew the results in favor of voucher students who remain in voucher schools. The finding of a boost of 4-6 percentage points appears to be from the preliminary analysis, before the authors included controls for other factors thought to influence the outcome. Once they do the actual analysis, they report findings that are not statistically significant at any conventional level, violating widely accepted scholarly convention.

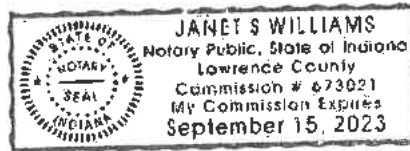
89. Dr. Wolf concludes his declaration by stating that, "When presented accurately and completely, the empirical research on private school choice generally supports the desirability of enacting and expanding programs that support parents in selecting a private school that they judge to be a good fit for their child." Given that he failed to include relevant research that undercut his claims, one can hardly say that Dr. Wolf presented the research "accurately and completely." Also absent from Dr. Wolf's conclusion is any mention of the fact that recent research, including his own, has shown large, negative impacts of school vouchers on student learning.


CHRISTOPHER LUBIENSKI

Taken, subscribed and affirmed to before me this 29 day of Sum, 2022.

My Commission expires: Sept 15, 2023


Notary Public



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

TRAVIS BEAVER and WENDY PETERS,

Petitioners/Plaintiffs,

v.

Civil Action No. 22-P-24

Civil Action No. 22-P-26

RILEY MOORE, in his Official Capacity as State Treasurer of West Virginia; W. CLAYTON BURCH, in his Official Capacity as State Superintendent of West Virginia; MILLER L. HALL, in his Official Capacity as President of West Virginia's Board of Education; CRAIG BLAIR, in his Official Capacity as the President of the West Virginia Senate; ROGER HANSHAW, in his Official Capacity as the Speaker of the West Virginia House of Delegates; and JIM JUSTICE, in his Official Capacity as Governor of West Virginia,

Respondents/Defendants.

AFFIDAVIT

STATE OF WEST VIRGINIA :

I, Danielle Farrie, being duly sworn, depose and say:

- 1. I am the Research Director at Education Law Center. I have held this position since 2008.**

2. I have a B.A. in Sociology from Loyola College (Maryland) and a Ph.D. in Sociology, with a concentration in Urban Sociology and the Sociology of Education, from Temple University. As the Research Director at Education Law Center, I am responsible for the collection and analysis of data on a wide variety of state-level and national educational issues, including school finance, preschool, special education, students with limited English proficiency, student assessments and academic performance, school reform and improvement, and student and school demographics.
3. In my role as Research Director, I have been asked to answer the following question: Are families in wealthier communities more likely to apply for the Hope Scholarship Program (“HSP”)?
4. My answer to this question is yes – data from West Virginia’s Department of Education (“WVDOE”) and the U.S. Census Bureau reflect that families in wealthier communities are more likely to apply for the Hope Scholarship Program.
5. In coming to this conclusion, I reviewed the following data sources:
 - a. Applicant counts by zip code for Kanawha and Monongalia counties from WVDOE.
 - b. Applicant counts by county from WVDOE.
 - c. U.S. Census Bureau American Community Survey, 2020 5-Year Sample, obtained from data.census.com, including information on Number of School-Aged Children (5-17) by ZIP Code Tabulation Areas and County (Table B01001) and information on Median Family Income by ZIP Code Tabulation Areas and County (Table S1901).

- d. U.S. Census Bureau Decennial Census, 2010, obtained from data.census.gov, including Total Population by ZIP Code Tabulation Areas (Table P1).
6. First, I reviewed application data by zip code from the two available counties – Monongalia County and Kanawha County. I focused on within county disparities in the application rates by zip-code median family income.
7. My review of the data from Monongalia County is summarized below:
- a. The HSP application data for Monongalia County includes 126 applications in 17 zip codes, 10 standard and 7 PO Boxes. After merging the Census data, there are only 9 zip codes with valid counts of school-aged children and 8 zip codes with valid income data. 2010 Census data only reports total population counts for 9 zip codes, suggesting that the other zip codes are non-residential.
 - b. Zip codes with family incomes above the Monongalia County median have a higher application rate than zip codes with median family incomes below the county median.
 - c. The Census estimates that there are 7,951 children aged 5-17 in zip codes with median family incomes above the county median (\$83,577) and the WVDOE reports 97 applications in these zip codes, resulting in an application rate of 12.2 applications per 1000 school-aged children. In below median income zip codes, the school-aged population is 4,106 and WVDOE reported 29 applications, resulting in an application rate of 7.1 per 1000 school-aged children.

Monongalia Median Family Income	Total Applications	Population Age 5-17	Application Rate
Above County Median	97	7,951	12.2
Below County Median	29	4,106	7.1
Total	126	12,057	10.5

8. My review of the data from Kanawha County is summarized below:

- a. The HSP application data in Kanawha County includes 251 applications in 78 reported zip codes, 34 standard and 44 PO Boxes. After merging the Census data, there are 42 zip codes with valid counts of school-aged children and 29 zip codes with valid income data. The 13 zip codes that have valid population counts but are missing income data are generally small with an average population of 353 compared to a county average of 4,639. The analysis excludes 5 HSP applications because they are within zip codes without valid income data.
- b. Zip codes with family incomes above the Kanawha County median have a higher application rate than zip codes with median family incomes below the county median.
- c. The Census estimates that there are 13,319 children aged 5-17 in zip codes with median family incomes above the county median (\$62,820) and the WVDOE reports 155 applications in these zip codes, resulting in an application rate of 11.6 applications per 1000 school-aged children. In below median income zip codes, the school-aged population is 13,308 and WVDOE reported 91 applications, resulting in an application rate of 6.8 per 1000 school-aged children.

Kanawha Median Family Income	Total Applications	Population Age 5-17	Application Rate
Above County Median	155	13,319	11.6
Below County Median	91	13,308	6.8
Total	251	27,272	9.2

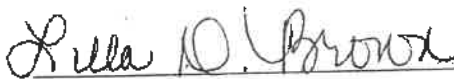
9. Using the county-level data provided by WVDOE, I compared application rates for counties above and below the statewide median family income.
10. Results follow the same pattern as the within county zip code analysis. Counties that are above the state median family income (\$61,707) have a higher application rate (9.4) than counties below the statewide median (6.7).
11. Both the within county zipcode analyses and the statewide analysis by county show that wealthier communities, as measured by median family income, have higher application rates for the Hope Scholarship Program than lower-wealth communities.



DANIELLE FARRIE

Taken, subscribed and sworn to before me this 29th day of June, 2022.

My Commission expires: January 26, 2023.



Notary Public

