

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-616

STATE OF WEST VIRGINIA,

Petitioner,

and

KATIE SWITZER AND
JENNIFER COMPTON,

Intervener Petitioners,

v.

TRAVIS BEAVER, WENDY PETERS,
DAVID L. ROACH, State Superintendent of Schools,
and L. PAUL HARDESTY, President of the West Virginia Board of Education,

Respondents.

From the Circuit Court of Kanawha County
Civ. Act. Nos. 22-P-24 & 22-P-26 and
Intermediate Court of Appeals of West Virginia
No. 22-ICA-1

**BRIEF *AMICI CURIAE* OF PASTORS FOR CHILDREN, THE NATIONAL
EDUCATION ASSOCIATION, THE WEST VIRGINIA EDUCATION
ASSOCIATION, THE AMERICAN FEDERATION OF TEACHERS, AFT-WEST
VIRGINIA, THE NETWORK FOR PUBLIC EDUCATION, THE SOUTHERN
EDUCATION FOUNDATION, THE NATIONAL CENTER FOR YOUTH LAW,
AND THE INTERCULTURAL DEVELOPMENT RESEARCH ASSOCIATION IN
SUPPORT OF RESPONDENTS**

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INTEREST OF AMICI¹

The *amici curiae*,² Pastors for Children, the National Education Association, the West Virginia Education Association, American Federation of Teachers, AFT-West Virginia, the Network for Public Education, the Southern Education Foundation, the National Center for Youth Law, and the Intercultural Development Research Association, respectfully submit this brief to provide the Court with evidence regarding the national experience with voucher programs so that the Court may consider the likely impact and harm that House Bill 2013 will cause to West Virginia students and public schools. *Amici* draw on their longstanding experience and expertise in educational policy, civil rights, and religious liberty advocacy to provide the Court with this critical context for evaluating House Bill 2013.

INTRODUCTION

This case turns on the question of whether House Bill 2013, W. Va. Code § 18-31-1, *et seq.* (the “Voucher Law”), complies with West Virginia law and not on questions of public policy. The circuit court correctly concluded that the Voucher Law violates West Virginia’s constitutional duty to provide a “thorough and efficient system of free schools” for its children, W. Va. Const. art. XII, § 1, as well as mandates to protect funding for those public schools. W. Va. Const. art. XII, §§ 2, 4, 5. As a matter of law, the Voucher Law impermissibly diverts public funds from public schools to fund private education and homeschooling, violating this “absolutely mandatory” duty to the children of West Virginia. *Pauley v. Kelly*, 162 W. Va. 672, 689, 255 S.E.2d 859 (1979).

¹ No counsel for any party authored this brief in whole or in part. No party made a monetary contribution specifically intended to fund the preparation or submission of the brief, nor did any person other than the *amici curiae*, their members, or their counsel make such a monetary contribution.

² For additional information about *Amici*, see the accompanying motion.

However, in presenting their case to this Court, both Defendants and their *amici* have advanced a false narrative about voucher programs that may color the Court’s perception of the legal issues. Defendants intimate that voucher programs “open more doors” for vulnerable students and help families access the “best education” for their children; they also assert that the Voucher Law builds from the “success” of similar voucher programs in other states.³ Those contentions do not square with research on voucher programs. To the contrary, voucher programs tend to close, not open doors to our most vulnerable students, and do not improve academic performance. Nor have voucher programs delivered success in other states: in fact, vouchers are the rare example of an educational intervention that has been proven to harm students. We present this evidence of the harms caused by voucher programs to counter Defendants’ false narrative and illustrate the risks posed by the Voucher Law to West Virginia students and public schools.

Those risks are built into the structure of the Voucher Law, which has been described by pro-voucher advocates as “the most expansive” program in the country.”⁴ Unlike some programs, it does not target any particular need or subset of students; in as little as four years, it could make eligible all West Virginia students. The Voucher Law contains virtually no standards or oversight provisions, yet would allow the transfer of hundreds of millions of taxpayer dollars to unaccountable schools and individuals who merely promise to meet its minimal requirements for participation.

The Voucher Law would authorize funding of private “Educational Savings Accounts,” or “ESAs,” a type of voucher scheme that “embrace[s] privatization and non-transparency by design.

³ Petitioner State of West Virginia’s Opening Brief at 1. *See also* Brief of Petitioners Katie Switzer and Jennifer Compton at 2 (asserting that the Voucher Law helps “families afford educational options that ‘better meet the individual education needs’ of their children.” (Citing W. Va. Code § 18-31-5(a))).

⁴ *West Virginia: Hope Scholarship Program*, EdChoice (2022), <https://www.edchoice.org/school-choice/programs/hope-scholarship-program/>.

Accountability systems are absent, and data are limited[.]”⁵ ESA voucher programs “contain no requirements regarding curriculum, teacher qualifications, or admission.”⁶ The Voucher Law would allow participants to either enroll in private schools or choose an “individualized instructional program” defined as “a customized educational experience that takes place either in the home or another location.” W. Va. Code § 18-31-8(a)(4). The Voucher Law would forfeit educational quality in favor of allowing parents to use public funds on whatever educational programming they wish, including at institutions that do not guarantee access or nondiscrimination. W. Va. Code R. § 112-18-2.16.⁷

The Voucher Law further specifies that it will not “expand the regulatory authority of the state, its officers, or any school district to impose any additional regulation” on educational service providers beyond what is needed to enforce the extremely limited rules imposed to implement the program. W. Va. Code § 18-31-11(e). Indeed, the Law guarantees that participating private schools, homeschoolers, and educational vendors “shall be given *maximum freedom* to provide for the educational needs of Hope Scholarship students without governmental control.” W. Va. Code § 18-31-11(c) (emphasis added). By design, the Voucher Law is unaccountable.

ARGUMENT

In this brief, *Amici* present evidence from other states’ experiences with voucher programs to demonstrate the likely harms of the Voucher Law to West Virginia students and public schools. In Part I, we review the lack of academic accountability and standards that characterize voucher

⁵ Oscar Jimenez-Castellanos et al., *The State of Education Savings Account Programs in the United States*, Nat’l Educ. Pol’y Ctr., 4 (Jan. 2018), https://nepc.info/sites/default/files/publications/PB_Jimenez-Castellanos_ESA_1.pdf.

⁶ *Id.* at 12.

⁷ The regulations provide that an “Individualized Instructional Program (IIP) means a customized educational experience that takes place either in the home or another location. Hope Scholarship students with an IIP are not enrolled in a participating school”.

programs, as well as the extensive body of research showing that vouchers at best have neutral impacts on student achievement, and often have significant negative impacts. Part II describes how voucher programs operate without transparency and accountability, creating conditions for abuse and fraud. Part III shows how a systemic lack of accountability and standards for voucher programs facilitates discrimination and disproportionately harms vulnerable students.

I. Voucher Programs Consistently Fail to Demand or Produce Academic Results

Defendants suggest that the Voucher Program will improve the quality of education that is delivered to students in West Virginia.⁸ And *amicus* EdChoice—citing not to empirical research, but exclusively to its own advocacy pieces⁹—brazenly claims that of 17 studies on voucher programs, most have shown positive effects on academic achievement, and only two have shown negative effects. This is an egregious misstatement of what research on voucher programs has found.¹⁰ Not only do most voucher programs lack sufficient accountability and enforcement mechanisms to ensure quality, but in fact, the research on student outcomes consistently shows that vouchers have neutral to negative effects on participating students’ academic performance.¹¹ Further, there is evidence that large-scale voucher programs pose risks to the education system as a whole.

⁸ *See, supra* at note 3.

⁹ EdChoice, formerly known as the Friedman Foundation for Educational Choice, has long been known as “the nation’s leading advocate of vouchers.” Editorial Board, *Extra Credit*, The Wall Street J. (Sept. 5, 2001), <https://www.wsj.com/articles/SB999644023712952343>; EdChoice, *Our Legacy*, <https://www.edchoice.org/who-we-are/our-legacy/> (last visited Sept. 12, 2022)..

¹⁰ *Amicus Curiae* Brief of EdChoice and Foundation for Excellence in Education in Support of Petitioners at 15.

¹¹ *See, e.g., Hattie Ranking: 252 Influences and Effect Sizes Related to Student Achievement*, Visible Learning, <https://visible-learning.org/hattie-ranking-influences-effect-sizes-learning-achievement/> (last visited Sept. 16, 2022) (ranking school choice programs as a very low factor influencing student achievement).

A. Voucher Programs Lack Academic Accountability, and Fund Schools That Do Not Meet the Most Basic Academic Standards

Although they use public money, state voucher programs and the private entities they fund are subject to few requirements that evaluate and ensure the quality of the educational services they provide. And those requirements that do exist are minimally enforced. This impairs the ability of parents and the public to assess vouchers programs' equity and efficacy,¹² and may both enable and obscure academic harm to students.

For example, a 2020 survey from Education Week found that voucher programs generally do not require funding recipients "to follow standard policies used to ensure transparency and accountability in the nation's public schools."¹³ The survey considered voucher programs in 29 states and found only four that required public reporting of demographic data on participating students.¹⁴ Only eight required all participating private schools to publicly report the results of standardized tests.¹⁵

Similarly, a 2019 U.S. Government Accountability Office ("GAO") report on tax credit voucher programs found that some states require participating schools to teach core subjects and meet minimum attendance requirements, but demand little else in terms of academic standards.¹⁶

¹² As even free-market groups that favor vouchers acknowledge, "school choice markets might not produce their hypothesized benefits" where parents "have limited information about schools." John Valant, *Better Data, Better Decisions: Informing School Choosers to Improve Education Markets* at 1 (Am. Enter. Inst. 2014), <https://eric.ed.gov/?id=ED555547>.

¹³ Arianna Prothero & Alex Harwin, *Private School Choice Programs Fall Short on Transparency, Accountability*, EducationWeek (Feb. 28, 2020), <https://www.edweek.org/policy-politics/private-school-choice-programs-fall-short-on-transparency-accountability/2020/02>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See U.S. Gov't Accountability Office, ACC, *Private School Choice: Accountability in State Tax Credit Scholarship Programs*, 14-15 (2019), <https://www.gao.gov/products/gao-19-664> [hereinafter *GAO Accountability*].

Only 11 of the 22 states surveyed by the GAO required schools to administer academic tests, with only three specifying parity with public school requirements.¹⁷ Only eight of the 22 surveyed programs required that schools receiving vouchers be accredited by the state.¹⁸ And just 12 of the 22 required that teachers meet even minimal professional qualifications, with six of the 12 providing that any college degree will suffice.¹⁹

This systemic lack of accountability has dire consequences. In constructing its voucher programs, Florida deliberately chose not to impose any accountability standards, “endorsing a philosophy that the free market would sift out poor-quality schools.”²⁰ An extensive 2017 investigation of Florida’s voucher programs concluded: “Private schools in Florida will collect nearly \$1 billion in state-backed scholarships this year through a system so weakly regulated that some schools hire teachers without college degrees, hold classes in aging strip malls, and falsify fire-safety and health records.”²¹ In Louisiana, investigative journalists found that two-thirds of the 6,900 students participating in the \$40 million-per-year voucher program attended private schools performing at the “D” or “F” level.²² Arizona’s ESA program channeled over \$160 million

¹⁷ *Id.*

¹⁸ *Id.* at 14.

¹⁹ *Id.* at 16.

²⁰ Leslie Postal et al., *Schools Without Rules: An Orlando Sentinel Investigation*, Orlando Sentinel (Oct. 17, 2017), <https://www.orlandosentinel.com/news/education/os-schools-without-rules-story-gallery-storygallery.html>.

²¹ *Id.*

²² Kim Chatelain, *The Cost of Choice: How Louisiana's Voucher Program Steered Families into D and F Private Schools*, WWNO Public Radio (May 7, 2019), <https://www.wwno.org/education/2019-05-07/the-cost-of-choice-how-louisianas-voucher-program-steered-families-into-d-and-f-private-schools>.

to private education in the 2021-2022 school year,²³ despite evidence that four-fifths of awards go to students departing “A” and “B” rated public schools²⁴ for schools of unknown quality.²⁵

Rather than putting pressure on low-quality schools, such programs steer students toward—and in fact, prop up—failing schools that would not survive without public money. The Florida investigation documented how operators of failed public charter schools had reorganized as private schools to access voucher money, and, in another case, the CEO of a private Christian school charged with molestation reincorporated under a different name and continued to receive public funds.²⁶ The Louisiana report concluded that “some low-performing private schools exist solely because of the voucher program[.]”²⁷

Without effective oversight, failing private schools face few consequences. In 2015, Florida officials visited only 27 of nearly 2000 schools receiving vouchers and found that just four met the minimal program requirements.²⁸ Florida does not impose any consequences on voucher schools that leave children worse off academically; nor do state officials have the power to address complaints about the academic and curricular choices of participating schools.²⁹ Accountability in

²³ Ariz. Dep’t of Educ., *Empowerment Scholarship Account (ESA) Quarterly Report to the Arizona State Board of Education, Fiscal Year 2022 2*, 4 (Apr. 2022), <https://www.azed.gov/sites/default/files/2022/06/FY2022%20Q3%20SBE%20Report.pdf> (reflecting 2021-22 enrollment of at least 10,669 students at an average cost of \$15,225.39 per student).

²⁴ Rob O’Dell & Yvonne Wingett Sanchez, *State Money Helping Wealthier Arizona Kids Go to Private Schools*, Ariz. Republic (July 7, 2016), <https://www.azcentral.com/story/news/arizona/politics/education/2016/02/23/state-money-helping-wealthier-arizona-kids-go-private-schools/80303730/>.

²⁵ Arizona does not collect any information about the academic performance of ESA providers. *See* Ariz. Rev. Stat. 15-2401 *et seq.*

²⁶ Postal, *supra* note 20.

²⁷ Chatelain, *supra* note 22.

²⁸ Postal, *supra* note 20.

²⁹ *Id.*

the Louisiana program is also weak: “F”-rated schools cannot accept new voucher students in the next school year, but continue to receive public funding for those already enrolled.³⁰

The Voucher Law is similarly unaccountable: it restricts regulation in favor of “maximum freedom” for program participants, hampering its ability to ensure academic standards.

B. Studies of Voucher Programs Consistently Find Neutral to Negative Impacts

Contrary to what Defendants and their *amici* claim, there is no evidence that vouchers improve student achievement. Even the first targeted voucher programs were not the “silver bullet” promised by advocates.³¹ The “best research” of those early programs found academic impacts “not statistically different from zero.”³² As voucher programs have proliferated and expanded further to the general student population, achievement data for participating students have only worsened.³³

Despite what Defendants and their *amici* suggest, seven of nine recent major studies of voucher programs’ impact on student achievement, including some championed by voucher advocates, found *detrimental* effects.³⁴ The studies routinely found that public school students outperform similarly situated voucher students. For example, a 2018 analysis of Washington,

³⁰ Chatelain, *supra* note 22.

³¹ Brian P. Gill, et al., *Rhetoric Versus Reality: What We Know and Need to Know about Vouchers and Charter Schools* 74, xviii (RAND Corp. 2d ed. 2007), https://www.rand.org/content/dam/rand/pubs/monograph_reports/2007/RAND_MR1118-1.pdf. (hereafter “RAND”).

³² Cecilia E. Rouse & Lisa Barrow, *School Vouchers and Student Achievement: Recent Evidence, Remaining Questions*, Fed. Rsv. Bank of Chi. 37 (2008), <https://files.eric.ed.gov/fulltext/ED505648.pdf>. See also Dennis Epple, Richard E. Romano, & Miguel Urquiola, *School Vouchers: A Survey of the Economics Literature*, 55 J. Econ. Lit. 441 (2017), <https://www.aeaweb.org/issues/469> (“the empirical research on small-scale programs does not suggest that awarding students a voucher is a systematically reliable way to improve educational outcomes, and some detrimental effects have been found.”).

³³ See Christopher Lubienski & Joel Malin, *The New Terrain of the School Voucher Wars*, The Hill (Aug. 30, 2019), <https://tinyurl.com/2p87f8ed>.

³⁴ *Id.* The remaining two studies showed no statistically significant effects.

D.C.'s voucher program found that students who received a voucher saw statistically significant drops in math scores compared with students who applied for but did not receive a voucher.³⁵ The Brookings Institution, reporting on Louisiana and Indiana studies that “used rigorous research designs that allow for strong causal conclusions” found that “public school students that received vouchers . . . subsequently scored lower on reading and math tests compared to similar students that remained in public schools. The magnitudes of the negative impacts were large.”³⁶ Moreover, the results were not explained by the temporary adjustment involved in changing schools.³⁷ Similarly, an Ohio study funded by voucher advocates concluded that voucher students “fared worse academically compared to their closely matched peers attending public schools.”³⁸

Indeed, as one researcher observed, state voucher programs’ performance is so abysmal that they exemplify the rare case of an educational intervention with a clearly negative impact.³⁹

³⁵ Mark Dynarski, *et al.*, *Evaluation of the D.C. Opportunity Scholarship Program: Impacts Two Years After Students Applied*, Nat’l Ctr. for Educ. Eval. & Regional Assistance (May 2018), <https://files.eric.ed.gov/fulltext/ED583552.pdf>

³⁶ Mark Dynarski, *On Negative Effects of Vouchers*, Econ. Studies at Brookings, 1 (May 26, 2016), <https://www.brookings.edu/research/on-negative-effects-of-vouchers/>.

³⁷ See Jonathan N. Mills & Patrick J. Wolf, *The Effects of the Louisiana Scholarship Program on Student Achievement After Four Years*, 4, 24 (Univ. of Ark. Dep’t of Educ. Reform, Working Paper No. 2019-10, 2019), <http://files.eric.ed.gov/fulltext/ED590218.pdf> (finding “large negative effects” particularly pronounced in math). See also Dynarski, *supra* note 36, at 2; R. Joseph Waddington & Mark Berends, *Impact of the Indiana Choice Scholarship Program: Achievement Effects for Students in Upper Elementary and Middle School*, 37 J. Pol’y Anal. & Mgmt. 783, 796 (2018), <https://edre.uark.edu/resources/pdf/berendslectureimpactindiana.pdf> (Indiana voucher students’ losses on standardized tests remained consistent over time).

³⁸ See David Figlio & Krzysztof Karbownik, *Evaluation of Ohio’s EdChoice Scholarship Program: Selection, Competition, and Performance Effects*, Thomas B. Fordham Inst., 2 (2016), <https://edre.uark.edu/resources/pdf/berendslectureimpactindiana.pdf>.

³⁹ Dynarski, *supra* note 36, at 1-2.

Voucher advocates point to a select few studies suggesting neutral to small positive results,⁴⁰ but those studies suffer from critical flaws. For example, the National Education Policy Center found that an earlier, substantially similar version of the report *amicus* EdChoice cites in its brief misrepresented the existing research and makes exaggerated claims based on studies that are cherry-picked and often not peer reviewed.⁴¹ And many of the studies cited by voucher advocates fail to acknowledge the lack of randomness among students who use vouchers.⁴² Those studies simply cannot claim that the voucher program, rather than other factors, accounted for any improvement in student achievement.⁴³

Having failed to establish empirical gains, voucher advocates have turned to subjective measures like graduation rates and parental satisfaction in an attempt to show that vouchers can provide some benefits. Those arguments ignore, among other things, that private schools are not required to use the same graduation standards as public schools. And research shows that both public and private school parents overwhelmingly are satisfied with their schools.⁴⁴ Evidence of

⁴⁰ See, e.g., *The 123s of School Choice: What the Research Says About Private School Choice Programs in America*, EdChoice (2019), <http://www.edchoice.org/wp-content/uploads/2019/04/123s-of-School-Choice.pdf>.

⁴¹ See, e.g., T. Jameson Brewer, *NEPC Review: The 123s of School Choice: What the Research Says About Private School Choice*, Nat'l Educ. Pol'y Ctr., 8-9, 12 (2019), <https://nepc.colorado.edu/thinktank/school-choice>.

⁴² See, e.g., Corey DeAngelis & Patrick J. Wolf, *Private School Choice and Character: More Evidence from Milwaukee* 24 (Univ. of Ark. Dep't of Educ. Reform, Working Paper No. 2019-03, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335162 (acknowledging an “important limitation” of the study is that the students “were not randomly assigned vouchers to attend private schools”).

⁴³ See, e.g., *id.* at 24-25.

⁴⁴ Megan Brenan, *K-12 Parents Remain Largely Satisfied with Child's Education*, Gallup (Aug. 26, 2021), <https://news.gallup.com/poll/354083/parents-remain-largely-satisfied-child-education.aspx>.

parental satisfaction may be little more than choice-supportive bias,⁴⁵ and correlates, if at all, only weakly with student achievement.⁴⁶

West Virginia’s voucher program is likely to underperform even the Louisiana, Ohio and Indiana programs. Researchers have long noted that the effects of particular voucher programs are greatly influenced by their design.⁴⁷ In particular, a 2007 review of voucher programs from the RAND Corporation observed that “[s]pecific variations in the details of voucher/charter policies are likely to make a big difference in many of the empirical outcomes.”⁴⁸ The RAND authors made several recommendations to ensure optimal results including targeting programs to low-income students, requiring open admissions, imposing and enforcing testing requirements, publicizing school performance so families could make informed choices, and prohibiting schools from charging additional tuition to voucher students.

Early voucher programs—which at least tended not to have *large* negative impacts for students—followed some of these recommendations. All had limited enrollment and were targeted at low-income students or students in academically-struggling public schools. The first voucher program enacted in Milwaukee in 1990, along with two other early programs in Cleveland and Florida, required participating schools to practice open admissions. The Indiana, Ohio and Louisiana programs are much larger and reach well into the middle class, making between thirty

⁴⁵ Adam Hornsby & Bradley Love, *How Decisions and the Desire for Coherency Shape Subjective Preferences over Time*, 200 Cognition 1 (Jul. 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7315129/>.

⁴⁶ Atila Abdulkadiroglu, et al., *Do Parents Value School Effectiveness?* (Nat’l Bureau of Econ. Research Working Paper No. 23912, 2017), <http://www.nber.org/papers/w23912>.

⁴⁷ See, e.g., Rajashri Chakrabarti, *Impact of Voucher Design on Public School Performance: Evidence from Florida and Milwaukee Voucher Program*, Fed. Rsrv. Bank of New York 32 (2008), <https://files.eric.ed.gov/fulltext/ED517585.pdf> (“[U]nderstanding the effect of different voucher designs is essential to the formulation of effective voucher policies.”).

⁴⁸ RAND *supra* note 31, at xviii.

and eighty percent of students eligible statewide; allow schools to choose students, including by engaging in forms of discrimination that are prohibited in public schools; and disadvantage poorer students by allowing schools to charge additional tuition and fees. But even they at least contain some income limits, impose perfunctory testing and reporting requirements, and require schools to be credentialed in some way such as through accreditation. The West Virginia voucher program would do none of this.

It would be bad enough if voucher programs only put individual students' educational progress and therefore future prospects in question. But there is also evidence that large-scale voucher programs like West Virginia's pose risks to students throughout the education system, and to the system as a whole. The scope of West Virginia's program is unprecedented in the United States. But numerous studies of large-scale voucher programs in other countries "suggests a tendency toward increased stratification on the dimensions of race/ethnicity and socioeconomic status" throughout the education systems in which the programs are implemented.⁴⁹ Based on this dismal track record, academics have posited that "a universal voucher system would undoubtedly harm large numbers of disadvantaged students."⁵⁰ For example, Chile—which implemented the earliest universal school voucher program with the assistance of Milton Friedman⁵¹—now "displays one of the highest levels of school-level stratification by socioeconomic status in the OECD."⁵² And after Sweden implemented a universal school voucher program in the early 1990s,

⁴⁹ *Id.* at 188-91.

⁵⁰ Helen F. Ladd, *School Vouchers: A Critical View*, 16 J. Econ. Perspectives 3, 7-8 (2002), <https://www.aeaweb.org/articles?id=10.1257/089533002320950957>.

⁵¹ RAND, *supra* note 31, at 59.

⁵² Epple, *supra* note 32, at 473. See also Chang-Tai Hsieh & Miguel Urquiola, *The Effects of Generalized School Choice on Achievement and Stratification: Evidence from Chile's Voucher Program*, 90 J. Pub. Econ. 1477 (2006), [http://www.columbia.edu/~msu2101/Hsieh-Urquiola\(2006\).pdf](http://www.columbia.edu/~msu2101/Hsieh-Urquiola(2006).pdf).

not only did voucher students scored below public school students on tests,⁵³ the country's PISA scores slid and social segregation increased.⁵⁴

In sum, given how the Voucher Law is designed to allow wholesale privatization of the state's educational system with no accountability, the program would pose great risks to both participating students and the state education system as a whole.

II. Voucher Programs Lack Fiscal Accountability and Oversight, Leading to Fraud, and Abuse

If the Voucher Law is upheld, West Virginia would join a group of states that have sacrificed educational quality, accountability, and oversight to the chimera of educational choice, and in so doing created conditions ripe for waste, fraud, and abuse.

A. Voucher Programs are Neither Transparent nor Accountable

Voucher programs provide few protections against misuse of public funds. Just four of the voucher programs analyzed in the GAO study require financial audits of participating schools, and even among those four, the requirements are not comprehensive.⁵⁵ The Florida audit requirement, for example, applies only to schools receiving more than \$250,000 in public funding.⁵⁶ Similarly, the West Virginia Voucher Law would severely limit audits of educational service providers, including private schools and home-schooling parents and vendors, providing that the governing

⁵³ Björn Tyrefors Hinnerich & Jonas Vlachos, *The Impact of Upper-Secondary Voucher School Attendance on Student Achievement: Swedish Evidence using External and Internal Evaluations*, 47 Lab. Econ. 1 (Aug. 2017), <https://ideas.repec.org/a/eee/labeco/v47y2017icp1-14.html>.

⁵⁴ Susanne Wiborg, *The Big Winners from Sweden's For-Profit 'Free' Schools Are Companies, Not Pupils*, *The Conversation* (Sept. 9, 2014), <https://theconversation.com/the-big-winners-from-swedens-for-profit-free-schools-are-companies-not-pupils-29929>. See also Epple, *supra* note 32, at 452, 473, 482 (noting that Sweden's program produced "sorting effects" even though schools were restricted in their ability to screen students and were not allowed to charge tuition in excess of the voucher amount, and the country "has seen significantly deteriorating performance in the years since vouchers were implemented.").

⁵⁵ *GAO Accountability*, *supra* note 16, at 17.

⁵⁶ *Id.*

Board “may” conduct an audit only if it determines the provider has: “(1) Intentionally and substantially misrepresented information or failed to refund any overpayments in a timely manner; or (2) Routinely failed to provide students with promised educational goods and services.” W. Va. Code § 18-31-10(c). West Virginia would not conduct ongoing oversight, acting only if it elects to do so and has the enforcement resources.

Many voucher programs do little to ensure that entities receiving funds are financially sound. The GAO found just five state programs that require surety bonds to demonstrate financial viability.⁵⁷ Even where those requirements exist, they are very limited; Louisiana, for example, requires bonding only for newly participating schools receiving large amounts of public funding through the program.⁵⁸ Similarly, the West Virginia Voucher Law authorizes the Board to set policies requiring bonding of education providers receiving more than \$100,000 in public funds, W. Va. Code § 18-31-9, but no such standards are in place. The promulgated rules state only that such providers “*may* be required to provide a surety bond *upon request* of the Board.” W. Va. Code R. § 112-18-11 (emphasis added).

B. The Lack of Accountability in Voucher Programs Leads to Abuse and Fraud

Given the lack of accountability, transparency, and enforcement in voucher programs, misuse of funds is inevitable. The experience in Arizona, which passed the nation’s first ESA voucher program in 2011, demonstrates the considerable risk of fraud and abuse. In 2016, the Arizona Auditor General reviewed the ESA voucher program, then serving just 3200 students, and found \$102,000 of misspent public funds during a five-month period.⁵⁹ Over one-third of that loss

⁵⁷ GAO Accountability, *supra* note 16, at 17-18.

⁵⁸ *See id.*

⁵⁹ Yvonne Sanchez & Rob O’Dell, *Arizona school-voucher expansion*, AZCentral (Feb. 1, 2017), <https://www.azcentral.com/story/news/politics/arizona-education/2017/01/31/arizona-school-vouchers->

resulted from parents who accepted ESA funds and then enrolled their students in public schools. Auditors also flagged funds transferred out of state to “what appeared to be a tutor”—and could get no response from parents about the nature of the transactions.⁶⁰ The audit documented an instance in which a program participant used \$3,600 dollars from their ESA to buy educational materials from a bookstore, only to return them subsequently for gift cards used on non-educational items including a sock monkey and a “Walking Dead” board game.⁶¹ Significantly, Arizona state officials only learned of the fraudulent spending because the bookstore reported the purchases; the Auditor flagged this 2011 incident to highlight that the program systems failed to detect abuse.⁶²

West Virginia’s program would not even require regular audits. But an audit alone cannot, on its own, stop abuse or recoup squandered funds. The Arizona audit found that the State had recovered just \$14,500 of the \$102,000 in misspent funds.⁶³ Even when abuses were referred to the Attorney General, next to nothing was recovered. Budgets for administration and oversight are slim.⁶⁴ Two years after the 2016 audit, the Arizona Auditor General found that “many of the issues related to misspending of the program monies identified in the 2016 performance audit persist and, in at least one case, has worsened.”⁶⁵ The follow-up report found that the Arizona Department of Education had not followed its own policies to monitor and control rampant account misspending

expansion-audit/97163702/; Debra K. Davenport, Arizona Department of Education—Empowerment Scholarship Accounts Program, Auditor General Report No. 16-107 (June 9, 2016), https://www.azauditor.gov/sites/default/files/16-107_Report.pdf [hereinafter *AZ Audit*].

⁶⁰ *AZ Audit*, *supra* note 59, at 17.

⁶¹ *Id.* at 19.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Lindsey A. Perry, Arizona Department of Education—Empowerment Scholarship Accounts Program 24-Month Followup (Oct. 25, 2018), https://www.azauditor.gov/sites/default/files/16-107_24Mo_Followup.pdf.

nor pursued effective enforcement and recovery efforts: In fact, 140 fraud cases remained open with the Attorney General, and only two percent of the \$500,000 squandered had been recovered.⁶⁶ Among ESA voucher programs, West Virginia stands apart. The Voucher Law declines to set standards and provide oversight, creating conditions that have led to fraud in other states.

III. Voucher Programs Facilitate Discrimination and Harm Vulnerable Students.

Education is foundational: denying young people access to educational opportunities can prevent them from meaningfully advancing and competing in the world at large.⁶⁷ And state sanctioned discrimination is particularly destructive and “generates a feeling of inferiority as to [children’s] status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 494 (1954). Accordingly, civil rights battles and anti-discrimination advocacy have focused on initiatives to ensure equitable access to quality public education,⁶⁸ and public schools must be free and open to all children.

By contrast, most private schools are selective in their admissions practices and frequently deny admission to students based on their sex, religion, disability, sexual orientation, gender identity, or for a wide variety of other reasons. The West Virginia Voucher Law takes no action to mitigate discriminatory policies. Instead, it specifically exempts participating schools from the majority of the obligations placed on public schools, promising that any “participating school ... is not required to alter its creed, practices, admission policy, hiring policy, or curriculum,” and that the program “does not expand the regulatory authority of the state” to police against such

⁶⁶ *Id.*

⁶⁷ Corydon Ireland, *The Costs of Inequality: Education’s the One Key That Rules Them All*, Harv. Gazette (Feb. 15, 2016), <https://news.harvard.edu/gazette/story/2016/02/the-costs-of-inequality-educations-the-one-key-that-rules-them-all/>.

⁶⁸ *School Segregation and Integration*, Library of Congress, <https://www.loc.gov/collections/civil-rights-history-project/articles-and-essays/school-segregation-and-integration/> (last visited June 21, 2022).

discrimination. W. Va. Code §§ 18-31-11(d), (e). As in other states with similar programs, the West Virginia Voucher Law will facilitate discrimination and exclusion, perpetuate the disadvantages experienced by high-need and historically under-served students, and deny students the safeguards they need to thrive in school.

A. Students Applying to and Attending West Virginia Private Schools Lack Basic Civil Rights Protections

Public schools are obligated to enroll and meet the needs of each and every student according to the mandates of state and federal civil rights laws. For example, Title VI of the Civil Rights Act of 1964 prohibits segregation and discrimination in public schools based on religion. 42 U.S.C. §§ 2000d *et seq.* Title IX of the Education Amendments Act of 1972 protects students and staff from discrimination on the basis of sex, sexual orientation, and gender identity. 20 U.S.C. §§ 1681-1688. Section 504 of the Rehabilitation Act provides that students and staff with disabilities receive comparable education and employment benefits as individuals without disabilities. 29 U.S.C. § 794. And the Individuals with Disabilities Education Act (“IDEA”) guarantees students with disabilities a free and appropriate public education designed to meet their needs. 20 U.S.C. §§ 1400 *et seq.* The Voucher Law does not require participating private schools and educational vendors to meet any of these standards.

Federal civil rights laws typically only apply to private schools that receive federal funding and are riddled with exemptions—particularly for religious private schools. Even then, private schools have challenged even these basic conditions on federal support. Private schools and states recently sued the U.S. Department of Agriculture in order to participate in the federally funded school lunch program without complying with Title IX provisions that bar discrimination on the

basis of sexual orientation and gender identity.⁶⁹ Last month, the Department issued a statement clarifying that religious institutions did not need to comply with those provisions of Title IX in if those provisions conflicts with the participating schools’ religious tenets.⁷⁰

West Virginia private schools that take funds under the Voucher Law will be permitted to discriminate on any ground other than race and national origin including religion, sexual orientation, gender identity, and disability. Eighty-eight percent (88%) of West Virginia private schools are religiously affiliated,⁷¹ and may make admission decisions based on religion.⁷² Furthermore, many religiously affiliated schools explicitly state in admissions materials and student handbooks that applicants who practice “homosexual lifestyles” will not be accepted and that gender nonconformity on the part of the students or their families is grounds for expulsion.⁷³

⁶⁹ Jack Jenkins, *USDA Exempts Religious Schools from Nondiscrimination to Keep Kids Fed*, Religious News Service (Sept. 1, 2021), <https://religionnews.com/2022/09/01/government-says-religious-schools-that-use-meal-program-exempt-from-nondiscrimination-rules/>. The complaints are available at <https://reason.com/wp-content/uploads/2022/08/pr22-24-complaint.pdf> and <https://adflegal.org/sites/default/files/2022-07/Grant-Park-Christian-Academy-v-Fried-2022-07-27-Complaint.pdf>.

⁷⁰ USDA, *Religious Exemptions Under Title IV of the Education Amendments of 1972*, August 12, 2022, <https://www.usda.gov/sites/default/files/documents/religious-exemption-clarification.pdf>.

⁷¹ Nat’l Ctr. for Educ. Statistics, *Private School Search*, <https://nces.ed.gov/surveys/pss/privateschoolsearch/> (enter “West Virginia” in “State” search field, then compare all West Virginia results with results filtered only for schools with a “nonsectarian” affiliation).

⁷² See, e.g. *Enrollment Application*, Greater Beckley Christian School, <https://greaterbeckley.org/wp-content/uploads/2022/03/Secondary-Student-Application-2022-2023.pdf> (application includes statement of faith and pastor’s recommendation).

⁷³ See, e.g., *Admissions Process*, Victory Baptist Academy, <http://www.vbasaints.com/admissions/> (last visited June 21, 2022); *Student-Parent Handbook*, Elk Valley Christian School 6 (2014), https://www.elkvalleychristian.com/s/Student_Handbook.pdf; *Family Handbook*, Buckhannon Christian Academy, 18 (2021), <https://www.bcawv.org/admissions>; *What We Believe*, Faith Christian Academy, <https://www.faithchristianacademy.net/about/statement-of-faith> (last visited June 21, 2022); *Admission Guidelines*, Cross Lanes Christian School, <https://crosslanes.org/admissions-guidelines/> (last visited June 21, 2022).

B. Students with Disabilities are Particularly Vulnerable Under the Voucher Law

In West Virginia, 44,812 students attending public schools in the 2021-2022 school year required some form of special education services—over one-sixth of the total student body, and roughly four times the entire private school student population of the state.⁷⁴ The special education and related services provided to these students may include additional personnel; educational evaluations; supplementary classroom materials for the provision of specially designed instruction; assistive technology services or devices; equipment; construction (*i.e.*, ramp or handicap accessible bathroom); and special transportation.⁷⁵ In 2018, West Virginia found it cost at least three times the average per pupil expenditure, or \$33,824, to educate some of the state’s highest need students with disabilities.⁷⁶

When students with disabilities use vouchers, they forego the vast majority of their federally guaranteed protections and accommodations. Key IDEA provisions, including the right to an individualized education designed to meet the needs of the disabled student, do not apply in the private school setting.⁷⁷ Students who enroll in private schools also relinquish IDEA protections against long-term discipline, including expulsion, for behaviors that are a

⁷⁴ 2021-2022 Headcount Enrollment Summary, W.Va. Dep’t of Educ., <https://zoomwv.k12.wv.us/Dashboard/dashboard/2056> (last visited June 21, 2022).

⁷⁵ See *Regulations for the Education of Students with Exceptionalities*, W.Va. Dep’t of Educ., 53-54 (Aug. 14, 2017), https://wvde.us/wp-content/uploads/2018/01/Policy2419_2017.pdf.

⁷⁶ See Memorandum from Pat Homberg, Executive Dir., Office of Special Educ., to County Superintendents, County Special Educ. Directors, W.Va. Schools for the Deaf and Blind, Office of Diversion and Transition (Mar. 14, 2018) <http://wvde.state.wv.us/osp/FY2018HighCostReimbursementMemoStatePlan.pdf>.

⁷⁷ See 20 U.S.C. § 1412(a)(10); U.S. Gov’t Accountability Office, GAO-18-94, Private School Choice: Federal Actions Needed to Ensure Parents Are Notified About Changes in Rights for Students with Disabilities, 9 (2017), <https://www.gao.gov/assets/gao-18-94.pdf> [hereinafter *GAO, Notified*]; *Choice & Vouchers—Implications for Students with Disabilities*, Nat’l Council on Disability, 59-66 (2018), https://ncd.gov/sites/default/files/NCD_Choice-Vouchers_508_0.pdf.

“manifestation” of their disability.⁷⁸ Indeed, the application for the West Virginia voucher program—like those in Arizona, Colorado, Florida, Georgia, Oklahoma, Mississippi, Tennessee, and Wisconsin—explicitly requires that parents waive their child’s IDEA rights as a condition of their participation.⁷⁹

Students with disabilities also lose IDEA and Section 504 protections against intra-school segregation and discrimination. The guarantees of integration into regular educational environments often do not apply to private schools.⁸⁰ When they do, private schools can either reject students with disabilities who require more than “minor adjustments” or raise their prices if they can show that there is a “substantial increase in cost” involved in providing services to the student with a disability.⁸¹ Additionally, the few requirements that apply to private schools under the ADA as public accommodations do not cover religious schools.

Under the Voucher Law, West Virginia private schools would be free to reject or limit necessary accommodations for students with disabilities. For example, Victory Baptist Academy in Raleigh County stipulates in its application materials that “[p]rospective students who are

⁷⁸ See 20 U.S.C. § 1415(k)(1)(E)-(F); GAO, *Notified*, *supra* note 77, at 8; see Claire Raj, *Coerced Choice: School Vouchers and Students with Disabilities*, 68 Emory L.J. 1037, 1040 (2019).

⁷⁹ *The Hope Scholarship Parent Handbook*, Hope Scholarship, 8 (Mar. 1, 2022), https://hopescholarshipwv.com/Portals/hopescholarshipwv/content/Documents/2022-23%20WV%20Hope%20Parent%20Handbook%20FINAL_AW.pdf; See Dana Goldstein, *Special Ed School Vouchers May Come With Hidden Costs*, N.Y. Times (Apr. 11, 2017), <https://www.nytimes.com/2017/04/11/us/school-vouchers-disability.html>.

⁸⁰ See 20 U.S.C. § 1412(a)(10), 29 U.S.C. § 794(b)(1); see also GAO, *Notified*, *supra* note 77.

⁸¹ See 34 C.F.R. § 104.39(a)-(b); Selene Almazan & Denise Stile Marshall, *School Vouchers and Students with Disabilities: Examining Impact in the Name of Choice*, Council of Parent Att’ys & Advocates, 8 (2016), https://cdn.ymaws.com/copaa.site-ym.com/resource/resmgr/2016_Conference/COPAA_Voucher_paper_final_R6.pdf.

physically challenged must be able to safely maneuver themselves without staff or student assistance (i.e., restroom, books, eating lunch, etc.).”⁸²

Private schools, not the families of disabled students, are the true beneficiaries of “choice” in voucher programs. Participating private schools are free to set admission criteria that effectively preclude students with disabilities from attending; assess costs to cover student needs; or choose not to provide adequate special services or accommodations to enrolled students.⁸³

C. The Voucher Law Will Not Benefit and Could Harm Students Living in Poverty or Experiencing Homelessness, as Well as Families in Rural Areas

Many West Virginia children live in poverty and/or experience homelessness, and West Virginia is largely rural. The Voucher Law does not serve or benefit such students; rather, it is structured to provide financial subsidies only to the fraction of the state population that can access and afford private schools. Further, poor, rural students would be disproportionately harmed by the overall weakening of public schools the Voucher Law could cause.

1. Students Living in Poverty or Experiencing Homelessness

Although voucher programs are touted as empowering families who could not otherwise afford private education, these programs often benefit only wealthier families who can afford the significant portion of private school tuition and expenses that public funds do not cover. A 2017 study showed the gap between average private school tuition and average cost covered by “school choice” options was as high as \$6,091 (in Arizona).⁸⁴ If specialized services are provided by the

⁸² See, e.g., *Admissions Process*, Victory Baptist Academy, <http://www.vbasaints.com/admissions/> last visited June 21, 2022).

⁸³ *National Disability Policy: A Progress Report*, Nat’l Council on Disability, 60 (Sept. 18, 2012), https://ncd.gov/sites/default/files/NCD_2012ProgressReport_Sep14FIN508.pdf.

⁸⁴ *School Vouchers, Education Savings Accounts, and Tax Incentives: The Hidden Costs*, Nat’l Ctr. For Learning Disabilities, 1-2 (2017), <https://www.nclld.org/wp-content/uploads/2017/10/SV-ESA-TI-Hidden-Costs.pdf>.

private school—for example, to students with disabilities or English-language learners—the gap between the value of voucher and the cost of an adequate education will be even greater.⁸⁵ For students with learning disabilities, the gap between the average voucher amount and private school tuition could be as much as \$33,000 (in Tennessee).⁸⁶

West Virginia ranks forty-seventh in the nation in median family income for families with children.⁸⁷ More than twenty percent (20%) of West Virginia’s children live in families below the federal poverty level and over two-thirds of West Virginia public school students qualify for free or reduced lunches.⁸⁸ The average base tuition for private schools in the state is more than \$6,300 for elementary schools and over \$6,900 for high schools, which does not include fees for transportation, textbooks, meals, and other educational needs.⁸⁹ The \$4,300 stipend provided by the Voucher Law in 2022-23 would not cover the full cost of enrollment at an average private school. Quite simply, the Voucher Law would neither serve nor benefit students living in poverty.

Students experiencing homelessness—during the 2018-19 school year, over 10,000 known homeless students attended West Virginia public schools⁹⁰—are also excluded and disserved by

⁸⁵ Almazan & Marshall, *supra* note 81.

⁸⁶ *School Vouchers, Education Savings Accounts, and Tax Incentives: The Hidden Costs*, *supra* note 84.

⁸⁷ *Median family income among households with children in the United States*, The Annie E. Casey Foundation: Kids Count Data Center <https://datacenter.kidscount.org/data/tables/65-median-family-income-among-households-with-children?loc=1&loct=1#ranking/2/any/true/1729/any/365>.

⁸⁸ *The State of West Virginia’s Children*, WEST VIRGINIA KIDS COUNT, 12 (2021), https://wvkidscount.org/wp-content/uploads/2021/10/2021-WV-KIDS-COUNT-Data-Book-FINAL_1.pdf; See also David Gutman, *More than 1 in 4 W.Va. kids live in poverty*, West Virginia Education Association, <https://www.wvea.org/content/more-1-4-wva-kids-live-poverty>, (last visited June 21, 2022).

⁸⁹ *Best West Virginia Private Schools* (2022), Private School Review, <https://www.privateschoolreview.com/west-virginia> (last visited June 21, 2022).

⁹⁰ Angela Jones-Knopf, *Counting West Virginia’s Rising Numbers of Homeless Children*, WVU Med. News (Feb. 12, 2021), <https://wvumedicine.org/news/article/west-virginia-kids-count-releases-issue-brief-on-youth-homelessness/>.

the Voucher Law. State and federal laws recognize that homeless students face barriers to accessing an equitable education and require that public schools attempt to bridge those barriers. The McKinney-Vento Homeless Assistance Act of 1987 provides protection to all homeless students eligible for public education to ensure they can succeed in school; the Act requires public schools to enroll homeless students, develop policies to retain them, and train staff to meet their unique needs. *See* 42 U.S.C. §§ 11431-11435. But those requirements do not apply to West Virginia private schools. Moreover, homeless students are unlikely to be able to take advantage of any supposed benefits offered by vouchers because of the financial and administrative barriers to entry posed by private schools.

The Voucher Law is both discriminatory and regressive, subsidizing wealthy families able to cover marginal costs, while leaving poor families in increasingly underfunded public schools.

2. Families Living in Rural Areas

The Voucher Law drives resources to urban and suburban families that can access private schools, not to rural families who overwhelmingly attend public schools.⁹¹ Even voucher advocates now acknowledge that so-called “school choice” initiatives were designed to benefit large urban populations and may not work in rural areas.⁹² In rural communities, challenges such as transportation, enrollment and funding, and teacher recruitment and retention limit private school options,⁹³ and virtual learning and homeschooling opportunities are hampered by a lack of

⁹¹ *Vouchers Don’t Work in Rural Areas*, Nat’l Coalition for Public Educ.
<https://www.ncpecoalition.org/ruralvouchers> (last visited Sept. 23, 2022).

⁹² M. Danish Shakeel & Robert Maranto (2019) *Left Behind? School Choice in Rural Communities*, *Journal of School Choice*, <https://www.tandfonline.com/doi/full/10.1080/15582159.2019.1691852>; Johnson, M., Robson, K., O’Neal Schiess, J., (2020). *Portfolio of Choice: School Choice in Rural Communities*. Rockville, MD: National Comprehensive Center at Westat, <https://compcenternetwork.org/sites/default/files/Portfolio%20of%20Choice%20Rural%20School%20Choice.pdf>.

⁹³ Johnson, Robson & O’Neal Schiess, *supra* note 92, at p. 2.

access to broadband.⁹⁴ Voucher programs offer no plausible benefit to large numbers of students in states that are largely rural, geographically diverse, and lacks infrastructure.⁹⁵

West Virginia statistics prove that the Voucher Law does not address the needs of the state's rural families. More than one-third of West Virginians live in counties without a single private school.⁹⁶ Less than one-third of West Virginia counties have even *one* accredited private school; half of all accredited schools are concentrated in just five of the state's 55 counties.⁹⁷ Even where there is a private school, that school may not serve all students. For example, the sole accredited private school in all of Randolph County is a sectarian school that serves Seventh Day Adventists; the only private school in Summers County is single-sex; and Fayette County's one private school offers education only through Sixth grade.⁹⁸ For many in rural counties, this "school choice" program offers no real choice at all and discriminates in favor of those students living in more populated areas.

⁹⁴ *Id.* at 17; *See Fourteenth Broadband Deployment Report* 20, FCC (Jan. 19, 2021), <https://docs.fcc.gov/public/attachments/FCC-21-18A1.pdf> (last visited Sept. 9, 2022) (Approximately 17% of Americans in rural areas lack coverage from fixed terrestrial 25/3 Mbps broadband, as compared to only 1% of Americans in urban areas).

⁹⁵ *West Virginia State Health Plan: Rural Plan*, W.Va. Health Care Authority, <https://hca.wv.gov/policyandplanning/Documents/Background%20Material/shpRurPiper.pdf> (last visited June 21, 2022) (about two-thirds of West Virginians live in small rural communities, compared to one-fifth of the country on the whole); *see also*, *West Virginia*, Report Card for America's Infrastructure, , <https://infrastructurereportcard.org/state-item/west-virginia/> (last visited June 21, 2022) (29% of the state's major roads are in poor condition and 21% of the state's 7,291 bridges are structurally deficient).

⁹⁶ *Best West Virginia Private Schools* (2022), *supra* note 89 (of West Virginia's fifty-five (55) counties, twenty (20) have no private school options and fourteen (14) counties offer only one private school option).

⁹⁷ *Id.* (even including non-accredited schools, most counties have only one or two private schools) *See Accredited and Registered Non-Public Schools*, W.Va. Dep't of Educ. (June 8, 2022) <https://wvde.us/nonpublic-school-information/accredited-and-registered-non-public-schools> (showing small number of accredited private schools in WV).

⁹⁸ Highland Adventist School, <https://www.highlandadventistschool.org/> (last visited June 21, 2022); Greenbrier Academy for Girls, <https://greenbrieracademy.com/> (last visited June 21, 2022); SS Peter & Paul Catholic School, <https://ssppcatholic.org> (last visited June 21, 2022).

Finally, rural communities are particularly vulnerable to the harm that expansive voucher programs can inflict on public education as a whole. *See supra* Part I. Public schools serve an important economic and social role in small towns. They often provide employment opportunities, wrap-around services such as medical care or food distribution, and a place for community events.⁹⁹ Loss of school enrollment and funding can lead to the elimination of courses, athletic programs, and extra-curricular activities.¹⁰⁰ Across the country, public schools have been closed and consolidated in the interests of exploiting gains through economies of scale, and the result has been the devastation of the many small towns for which the school acted as a central, unifying community institution.¹⁰¹ The Voucher Law could similarly harm rural students and families.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the trial court granting summary judgment for Plaintiffs.

Respectfully submitted,

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⁹⁹ AASA, The School Superintendents Association. *Leveling the Playing Field for Rural Students* 4 (Nov. 2017), h https://www.aasa.org/uploadedFiles/Equity/AASA_Rural_Equity_Report_FINAL.pdf; Johnson, Robson & O’Neal Schiess, *supra* note 92, at 19.

¹⁰⁰ *Leveling the Playing Field for Rural Students*, *supra* note 100, 4; Johnson, Robson & O’Neal Schiess, *supra* note 92, at 19, 21.

¹⁰¹ Mara Casey Tieken, *School Closures can hit Rural Communities Hard*, Conversation (Jan. 9, 2020) <https://theconversation.com/school-closures-can-hit-rural-communities-hard-128837>.

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2022, I served the foregoing *Amici Curiae* Brief of Pastors for Children, *et al.* via the Court's e-filing system, and, for those parties who are not capable of receiving electronic service, by email, as agreed by the parties, on the following counsel:

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