

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

IN ITS ORIGINAL JURISDICTION

Appellate Case No. 2023-001673

Candace Eidson, on behalf of herself and her minor child; Coneitra Miller, on behalf of herself and her minor child; Joy Brown, on behalf of herself and her minor children; Crystal Rouse, on behalf of herself and her minor children; Amanda McDougald Scott, on behalf of herself and her minor child; Penny Hanna, on behalf of herself and her minor children; the South Carolina State Conference of the NAACP; and the South Carolina Education Association..... Petitioners

v.

South Carolina Department of Education; Ellen Weaver, in her official capacity as State Superintendent of Education; South Carolina Office of the Treasurer; and Curtis M. Loftis, Jr. in his official capacity as State Treasurer of South Carolina Respondents,

and

Henry D. McMaster, in his official capacity as Governor of the State of South Carolina; Thomas C. Alexander, in his official capacity as President of the South Carolina Senate; and G. Murrell Smith, Jr., in his official capacity as Speaker of the House of Representatives Intervenors-Respondents.

PROPOSED BRIEF OF *AMICI CURIAE* T. JAMESON BREWER, JOSHUA COWEN, SUZANNE ECKES, CHRISTOPHER LUBIENSKI, JULIE MEAD, AND KEVIN WELNER WHO ARE EDUCATION SCHOLARS IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE

As Amici Curiae, the Education Scholars listed in the Appendix, submit this brief in support of Petitioners. Amici are researchers of school vouchers who seek to provide the Court with evidence regarding the national experience with voucher programs. In doing so, they seek to assist the Court in considering the likely harms that Senate Bill 39 (Education Scholarship Trust Fund) will cause to students in South Carolina. Amici draw on their training and expertise in education policy, decades of cumulative research related to school choice policies that has generated dozens of peer-reviewed studies, and their experience as K-12 educators.

SUMMARY OF ARGUMENT

Education research may be useful to this Court in helping to clarify and inform two core legal issues: (1) the possible violation of the public purpose clause in Article X, Section 5 of the South Carolina State Constitution; and (2) possible violation of the State Constitution's Article XI, Section 3, which mandates a system of free public schools and other public institutions of learning, as follows: "The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State and shall establish, organize and support such other public institutions of learning, as may be desirable." In addition, Section 4 of Article XI straightforwardly restricts the use of public money for private education.

These provisions, read together, raise the issue of what is entailed by an educational system that is "public" and "open to all," and relatedly is designed in such a way that the publicness is not undermined by private decisions that deny access to the full public. Our intent in this amicus brief, then, is to straightforwardly present the bodies of educational research that inform these issues.

South Carolina's Education Savings Trust Fund (ESTF) law establishes the 30th voucher program in the US and the 13th voucher program that uses a form of voucher called an Education Savings Account. Based on the body of research into other states' programs, we see no way to legitimately characterize these programs as satisfying the publicness requirement in South Carolina's Constitution. In fact,

because of the non-public design of the ESTF law, we can reliably forecast that access to the resources provided by the ESTF will be very uneven and inequitable, that the educational quality provided on average to the ESTF students will be dramatically lower – particularly in mathematics – than those students would have received in their public schools, and that many private schools participating the ESTF program will discriminate against students, including students with disabilities, in ways that are disallowed for public schools.

ARGUMENT

I. SOUTH CAROLINA'S VOUCHER PROGRAM SHARES KEY FEATURES WITH OTHER STATES' PROGRAMS

Throughout this brief, we use the term “vouchers” to refer to policies that pay for private-school tuition with subsidies from taxpayers. The only subsidy policies we do not include as “vouchers” are those found in 10 states that provide individual tax benefits, through deductions or credits, for tuition payments made by parents or guardians. South Carolina’s *Refundable Educational Credit for Exceptional Needs Children*, adopted in 2015, is one such individual-tax-credit program that we are not considering as a voucher for purposes of the below discussion.

Voucher policies fall into three general categories: Conventional vouchers were the first type to be adopted, followed by tax-credit vouchers, and most recently education savings account (ESA) vouchers. The *Education Scholarship Trust Fund* created by SB 39 uses the ESA voucher approach.

The nation’s oldest voucher programs, dating back to the early- to mid-1990s in places like Milwaukee and Cleveland, offer conventional vouchers whereby the state brings tax money into its general fund and then sends government payments to private schools chosen by parents for their voucher-eligible children. In 1997, Arizona adopted a tax-credit voucher policy, adding two additional players into the process: taxpayer “donors” and non-profit “school tuition organizations” (STOs). A person owing state taxes in Arizona is allowed to donate some of that amount to an STO, which then bundles that donation with others and sends payments (vouchers) to private schools chosen by parents for their voucher-eligible children. The

taxpayer then receives a 100 percent tax credit for the donated amount, thereby putting the state, not the donor, on the hook for the amount of the voucher payment.

Arizona also was the first to implement ESA vouchers, in 2011. Twelve additional states, including South Carolina, then passed ESA voucher laws over the following dozen years, according to EdChoice (formerly the Milton Friedman Foundation for Educational Choice). EdChoice, *What is an Education Savings Account (ESA)?*, available at <https://www.edchoice.org/school-choice/types-of-school-choice/education-savings-account/>. Instead of issuing a payment voucher, the state provides the parent with an account from which that parent can spend money for approved expenses, such as private-school tuition.

Many states have more than one voucher program – combining, for instance, a tax-credit voucher with an ESA voucher. Moreover, each state’s voucher program will differ in some details from the program of another state, even if they are the same basic type. Two states’ ESA vouchers, for example, may differ on student eligibility, on the amount deposited annually in the parent’s account, on allowable expenses, on the level and type of accountability and transparency, on the nature of oversight and administration, and on methods of disbursement.

To illustrate these differences, while SB 39 sets the initial value of an account at \$6,000, the program in Arkansas sets its initial value at \$6,614 and the program in New Hampshire deposits about \$5,250. Likewise, while the laws in Florida, Arkansas, and Utah create universal eligibility, New Hampshire makes

only about half of its families eligible (higher income families are not eligible), and many ESA vouchers are targeted just at students with special needs. SB 39 sets eligibility (when the law is fully implemented) as students from households earning no more than 400% of the Federal Poverty Limit – or about 71 percent of families. Again, these figures are according to one of the country’s most prominent voucher-advocacy groups. EdChoice, *School Choice in America Dashboard*, available at <https://www.edchoice.org/school-choice-in-america-dashboard-scia/>

Such differences in details are important to keep in mind, but they in no way obviate our ability to cautiously draw general research conclusions. Almost 800,000 students now receive some type of voucher, with over 65 programs operating in 30 states. From those programs, and the students’ experiences in them, we have learned a great deal. Accordingly, we offer the following discussion of research in hopes that it assists the court in understanding the likely impacts of SB 39.

II. RESEARCH ON VOUCHER PROGRAMS IN OTHER STATES PROVIDES VALUABLE EVIDENCE FOR SOUTH CAROLINA

A. Access Barriers

A school is not public if public access is denied. It is difficult to imagine a public park or road or library that rations access based on religion, special education status, or gender. Private schools, however, often use such factors to make access decisions – as well as factors such as academic achievement, past disciplinary record, and ability to pay tuition and other expenses.

Such access restrictions overwhelmingly are left untouched by voucher laws that provide taxpayer subsidies. Suzanne E. Eckes, Julie Mead, & Jessica Ulm,

“Dollars to Discriminate: The (Un)intended Consequences of School Vouchers,” *Peabody Journal of Education*, 91(4), 537-558 (2016). Families accepted into the SB 39 voucher program, in fact, must sign an annual agreement “to acknowledge and agree to comply with the education service provider’s prescribed curriculum, dress code, and other requirements of enrolled students.” S.C. Code Ann. § 59-8-115(E)(4)(b). In addition, “education service providers shall not be required to alter their creeds, practices, admissions policy, or curriculum in order to accept payments by a parent from an ESTF account.” S.C. Code Ann. § 59-8-150(F)(5).

Research concerning discrimination-related access barriers in voucher schools is addressed later in this brief. Here, we focus on research about financial barriers.

Almost all voucher programs across the U.S. allow participating private schools to charge parents additional tuition exceeding the voucher amount. U.S. Government Accountability Office (GAO), *School Choice: Private School Choice Programs Are Growing and Can Complicate Providing Certain Federally Funded Services to Eligible Students*, GAO-16-712, available at <https://www.gao.gov/products/gao-16-712>. Since voucher levels often do not cover the full cost of attendance at private schools, the usefulness of vouchers to lower-income families is decreased by the potential burden of these additional tuition costs. Private-school students are also often required to provide their own personal and private daily transportation to and from the school.

Both of the cost issues – additional tuition and transportation costs – will shape access for many families that might otherwise want to use an ESTF voucher. SB 39 does not prohibit participating private schools from charging tuition or fees above the \$6,000 amount of the voucher. S.C. Code Ann. § 59-8-115(G). While some participating private schools can be expected to charge \$6,000 or less, others will charge more – particularly high schools and schools with more resources (i.e., more elite schools).

In the event that the \$6,000 ESTF voucher does cover the initial full sticker-price of tuition at a participating South Carolina school, this may not last very long. Other states have witnessed participating private schools responding to the newly available voucher subsidy in an economically rational way: raising tuition. Recent analyses by journalists showed that private schools in Arizona and Iowa increased tuition costs by thousands of dollars following the expansion or implementation of their voucher program. Neal Morton, *Arizona Gave Families Public Money for Private Schools. Then Private Schools Raised Tuition* (2023), available at <https://hechingerreport.org/arizona-gave-families-public-money-for-private-schools-then-private-schools-raised-tuition/>; Ty Rushing, *Kim Reynolds' Private School Voucher Plan Led To Tuition Hikes* (2023), available at <https://iowastartingline.com/2023/05/12/kim-reynolds-private-school-voucher-plan-led-to-tuition-hikes/>. Again, the difference between what the voucher covers and the raised tuition level must be borne by the individual families.

These access issues tied to tuition and other costs result in the subsidies being of more use to a subset of the public. SB 39 vouchers will be available, by the program's third year, to any family with income below 400 percent of the federal poverty level, which is about \$30,000 for a family of four – meaning that a family with an annual income of \$120,000 would be eligible. S.C. Code Ann. § 59-8-110(4). This broad swath of eligibility has implications for which families within that range, varying from poor to well-off, are likely to make use of the voucher.

In fact, evidence from other states documents the skewed usage of vouchers, which have emerged as a subsidy for the relatively affluent. In Indiana, the voucher program was initially proposed to help impoverished children leave their neighborhood public schools but has increasingly become a subsidy for wealthier families, many with children already in private schools. Cory Turner, Eric Weddle, & Peter Bolonon-Rosen, *The Promise and Peril of School Vouchers* (2017, May 12), available at <https://www.npr.org/sections/ed/2017/05/12/520111511/the-promise-and-peril-of-school-vouchers>; Eric Weddle, *Indiana's School Voucher Program Use at All-Time High, but There's Fewer Low-Income Families* (2023, June 13), available at <https://www.wfyi.org/news/articles/indiana-private-school-voucher-program-2022-2023-report>.

Similarly, the Arizona Department of Education found that 75% of applications for its newly expanded voucher program were from students who were not in public schools. Howard Fischer, *Most Applying for Arizona Vouchers Already go to Private Schools* (2022), available at

https://tucson.com/news/local/education/most-applying-for-arizona-vouchers-already-go-to-private-schools/article_34d75b9a-2968-11ed-812b-f7dad22200b5.html.

This means that most of the money being used in Arizona's voucher program is subsidizing students who would already attend, or were already attending, private schools.

The same pattern was seen in Florida, when it recently eliminated income caps on voucher eligibility. In the wake of this policy change, 69% of all new applications for vouchers came from students who were already attending private schools. Danielle Prieur, *Florida Policy Institute asked for School Voucher Data. Here's What Step Up for Students Provided WMFE* (2023, September 14), available at <https://www.wmfe.org/education/2023-09-14/florida-policy-institute-school-voucher-data-step-up-for-students>. Under these Arizona and Florida expansions, students are eligible even if they never attended public school. For Iowa's new ESA program, students have to either (a) have previously attended a public school, (b) be entering kindergarten, or (c) have a family income that does not exceed 300 percent of the federal poverty level; 60 percent of users nevertheless appear to have never attended public school. Office of Governor Kim Reynolds, *Iowa's Students First Education Savings Account program generates more than 29,000 applications* (July 6, 2023), available at <https://governor.iowa.gov/press-release/2023-07-06/iowas-students-first-education-savings-account-program-generates-more>.

Access issues also have an urban/suburban versus rural element. Georgia, like South Carolina, has many rural areas. A recent analysis by the Georgia Budget

and Policy Institute concluded that the use of vouchers in Georgia caused disproportionate harm to rural communities as vouchers favor wealthier and more populated urban counties that have more private schools. Stephen Owens, *Fact Sheet: Voucher Dollars Take from the Many to Benefit the Few* (2023), available at <https://gbpi.org/fact-sheet-voucher-dollars-take-from-the-many-to-benefit-the-few/>.

B. Students with Disabilities and Discrimination

When parents enroll their children in taxpayer-funded voucher programs, they give up several protections that they would have received in public schools. In fact, most private schools eligible to receive public funds from voucher programs are not open to all students; they can discriminate against students on a variety of factors including disability, religion, sexual orientation, gender identity, or language. See Julie Mead & Suzanne Eckes, “Vouchers as a Mechanism for State-Sanctioned Private Discrimination,” in Kevin Welner, Gary Orfield, & Luis A. Huerta (eds), *The School Voucher Illusion: Exposing the Pretense of Equity* (2023).

Schools are not public, in any meaningful sense, when access is directly denied through admissions policies or indirectly denied through policies that fail to provide needed educational services for a given population – students with disabilities or students who are not yet fluent in English. Indeed, S.C. Code Ann. § 59-8-150(F) contains a broad list of prohibitions preventing the state of South Carolina from regulating service providers. The state, for example, may not regulate service providers’ educational programs, impose additional regulatory requirements on them, or interfere with their “creeds, practices, admissions

polic[ies], or curriculum” as a condition of granting them ESTF funds. S.C. Code Ann. § 59-8-150(F). Racial discrimination by service providers is prohibited, but discrimination on the basis of other protected categories, such as religion or sexual orientation, is not prohibited by the statute. And even the prohibition on racial discrimination contains an express carve-out to not “preclude any independent or religious educational provider from exercising an exemption allowed under federal law.” S.C. Code Ann. § 59-8-150(A)(3).

In addition, as a condition of their participation in the Program, students must agree — apparently without limitation — “to comply with the education service provider's prescribed curriculum, dress code, and other requirements of enrolled students.” S.C. Code Ann. § 59-8-115(E)(4)(b). As has been seen in other states with voucher programs, this lack of regulation in SB 39 will almost certainly lead to a system of taxpayer-funded schools that are not open to all students.

To illustrate how the language in SB 39 permits the voucher program to selectively exclude some populations of students, consider specifically the dilemma facing students with disabilities. Federal laws do not hold private schools to the same standards as public schools when providing for students with disabilities. There are three federal laws that protect individuals with disabilities: Section 504 of the Rehabilitation Act (29 U.S.C. §794), the Americans with Disabilities Act (ADA) (42 U.S.C. §12101 *et seq.*), and the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §1400 *et seq.*). But these laws do not hold private schools to the same standards as public schools when providing for students with disabilities.

Section 504 and the ADA prohibit discrimination on the basis of disability and establish pathways for individuals to challenge any such discrimination. Title II of the ADA prohibits discrimination in public programs, which includes public schools, while Title III of the ADA applies to places that provide “public accommodations” and applies to private schools. The ADA, however, exempts religious schools. Section 504 applies only to recipients of federal funds, and it provides for the loss of federal funds as a penalty. States, local school districts, and charter schools are all considered recipients for Section 504 purposes. Although some private schools may directly receive federal funds, the majority do not. *See* Julie Mead & Suzanne Eckes, “Vouchers as a Mechanism for State-Sanctioned Private Discrimination,” in Kevin Welner, Gary Orfield, & Luis A. Huerta (eds.), *The School Voucher Illusion: Exposing the Pretense of Equity* (2023). Even those private schools that are subject to Section 504 need only provide “minor adjustments” to existing programs in order to satisfy the law’s non-discrimination mandate (34 C.F.R. § 104.39).

IDEA is a federal funding law that provides states agreeing to follow its procedural requirements with funds for special education and related services. *See generally* Julie Mead, “Fundamentals of Federal Disability Law,” in Janet R. Decker, Maria M. Lewis, Elizabeth A. Shaver, Ann E. Blankenship, & Mark A. Paige (eds), *The Principal’s Legal Handbook* (2017). Under IDEA, local educational agencies (including charter schools) must provide services necessary for a child to receive a free appropriate public education (FAPE). The FAPE standard means that

the educational program provided must provide meaningful academic and functional benefit in light of the child’s unique circumstances, as the U.S. Supreme Court recently explained in *Endrew F. v. Douglas County School Dist.*, 580 U.S. 386 (2017). Although IDEA places no obligations on private schools, it requires local school districts to provide services to children with disabilities who are enrolled in private schools. This provision, typically referred to as the “equitable participation” or “equitable services” provision (20 U.S.C. § 1412(a)(10)(A)), requires school districts to spend a proportional amount of their federal IDEA funds on students in private schools. This requirement for equitable participation does not guarantee the FAPE standard, however. See U.S. Government Accountability Office (GAO), *Private School Choice: Federal Actions Needed to Ensure Parents are Notified about Changes in Rights for Students with Disabilities*, GAO-18-94 (2017), available at <https://www.gao.gov/assets/690/688444.pdf>.

In contrast to the IDEA requirements that apply to public schools, if the private school does not already provide a particular special education service that a child requires, it may deny the service or deny the child enrollment without penalty. While Title III of the ADA’s applicability does not hinge on receipt of federal funding, as noted above, it exempts religious schools. Also, like Section 504, it requires only reasonable modifications to existing programs – a significantly lower standard than applies to public schools. As a result, even non-sectarian schools participating in state voucher programs do not have to accept children with disabilities whose needs would not be met by existing programs. And private

religious schools do not have to accept these children even if existing programs are in place, given ADA's exemption. Thus, a private school's exclusion of children with disabilities does not generally constitute "discrimination" under federal law, except in the most serious circumstance of a private non-religious school that refuses to make even minor adjustments to an existing program.

Investigative journalism has shown that voucher-receiving schools – especially in long-existing programs – develop ways to discriminate against students with disabilities by avoiding state oversight on admissions procedures. For example, reports from Wisconsin show that private schools taking voucher payments quietly counsel out or in some cases even expel students with disabilities, justifying their decision on the basis of student-school fit or match. Phoebe Petrovic, "False Choice: Wisconsin Support Schools That Can Discriminate" (2023), available at <https://wisconsinwatch.org/2023/05/wisconsin-voucher-schools-discrimination-lgbtq-disabilities/>.

Relatedly, voucher-receiving schools appear to be more likely to "push out" children with lower test scores. *See, e.g.*, R. Joseph Waddington, Ron Zimmer, & Mark Berends, "Cream skimming and pushout of students participating in a statewide private school voucher program," *Educational Evaluation and Policy Analysis* (2023) ("we find that lowest-achieving voucher students are exiting private schools at a modestly higher rate than their similarly low-achieving voucher-eligible [public school] peers as well as their higher-achieving voucher private school peers" p. 5). Some of these reports also indicate that Black students suffer

disproportionately from push-out activities. See Deven Carlson, Joshua M. Cowen, & David J. Fleming, “Life after vouchers: What happens to students who leave private schools for the traditional public sector?,” *Educational Evaluation and Policy Analysis* 35, no. 2 (2013), pp. 179-199.

Looking beyond students with disabilities or students with low levels of academic achievement, voucher-receiving schools are also not generally required to provide services or protections for English learners, LGBTQ+ students, and students from non-dominant religions. See Julia Donheiser, *Choice for Most: In Nation’s Largest Voucher Program, \$16 Million Went to Schools with Anti-LGBT Policies* (2017), available at <https://www.chalkbeat.org/2017/8/10/21107318/choice-for-most-in-nation-s-largest-voucher-program-16-million-went-to-schools-with-anti-lgbt-polic/>; see also Mead & Eckes, *supra*. Other evidence suggests that voucher-receiving private schools avoid students with problematic disciplinary records. See U.S. Government Accountability Office (GAO), *School Choice: Private School Choice Programs Are Growing and Can Complicate Providing Certain Federally Funded Services to Eligible Students*, GAO-16-712 (Washington, D.C.: Aug. 11, 2016), available at <https://www.gao.gov/products/gao-16-712>. Past discriminatory practices have also harmed teachers with disabilities, but religious private schools are largely exempt from legal claims under Title VII and similar statutes due to the ministerial exception. See *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. ----, 140 S.Ct. 679 (2020).

These problems of exclusion and discrimination are inconsistent with the South Carolina Constitution's Article XI, Section 3 mandate that the "General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State."

C. Dreadful Academic Outcomes

The primary rationale offered publicly for the adoption of voucher policies, from the 1990s until recently, has been that vouchers will lead to improved academic achievement for students who switch from public schools to private schools. See Christopher Lubienski, T. Jameson Brewer, & Joel Malin, "Bait and Switch: How Voucher Advocates Shift Policy Objectives," in Kevin Welner, Gary Orfield, & Luis A. Huerta (eds), *The School Voucher Illusion: Exposing the Pretense of Equity* (2023). See also EdChoice, *The 123s of School Choice: What the Research Says about Private School Choice Programs in America, 2020 edition*, (2020), available at <https://www.edchoice.org/wp-content/uploads/2020/04/123s-of-School-Choice-2020.pdf>. Further, leading voucher proponents have long claimed that they are promoting a policy solution that has empirically demonstrated benefits for students and does not result in any academic harm. Jay P. Greene, Paul E. Peterson, & Jiangtao Du., "School Choice in Milwaukee: A Randomized Experiment," in *Learning From School Choice* (Paul E. Peterson & Brian Hassel eds., 1998); Greg Forster, *Lost Opportunity: An Empirical Analysis of How Vouchers Affected Florida Public Schools* (2008), available at <https://files.eric.ed.gov/fulltext/ED508458.pdf>; Kenneth Campbell, Paul Diperna,

Robert C. Enlow, Greg Forster, Jay P. Greene, Frederick M. Hess, Matthew Ladner, Michael J. Petrilli, & Patrick J. Wolf, *What Research Says About School Choice* (2012), available at <https://www.edweek.org/ew/articles/2012/02/22/21campbell.h31.html>; Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Choice*. (2013), available at <https://files.eric.ed.gov/fulltext/ED543112.pdf>; Jason Bedrick, *Yes, Private Schools Beat Public Schools* (2014), available at <https://www.nationalreview.com/corner/yes-private-schools-beat-public-schools-jason-bedrick/>.

As recent research has been showing evidence of large negative academic impacts on students using vouchers, voucher advocates have relied on a highly flawed “vote-counting” method that simply tallies studies as positive, neutral, or negative. See EdChoice. *The 123s of School Choice: What the Research Says about Private School Choice Programs in America, 2023 edition*. (2023), available at <https://www.edchoice.org/wp-content/uploads/2023/07/123s-of-School-Choice-WEB-07-10-23.pdf>. For a critique, see Christopher Lubienski, *NEPC Review: The 123s of School Choice: What the Research Says About Private School Choice Programs, 2023 Edition* (2023), available at https://nepc.colorado.edu/sites/default/files/reviews/NR%20Lubienski_0.pdf. Among the problems are the following: (1) unjustified criteria for inclusion of a study in these advocates’ vote-counting exercises conveniently exclude high-quality studies; (2) a study chosen for inclusion in the vote-counting is counted even if it is studying the same data as another study; (3) a study is also included as a positive vote even if

only one sub-group shows positive results or if the effect size is very small (e.g., if one sub-group of voucher students shows a tiny benefit); and (4) perhaps most importantly, a study of a small program including only a few hundred participants is counted the same as a study of a large program with tens of thousands of voucher recipients. Who would feel safe taking a pharmaceutical that showed slightly positive benefits for one sub-group of small studies 30 years ago when that same pharmaceutical showed dramatically negative benefits for the full population of large recent studies?

And that is the reality here. The most recent and larger-scale studies of state-wide voucher programs have concluded that academic achievement in math declines – often at shocking levels, as explained below – for students using vouchers relative to peers who remain in public schools. See, e.g., David Figlio & Krzysztof Karbownik, *Evaluation of Ohio’s EdChoice Scholarship Program: Selection, Competition, and Performance Effects* (2016), available at <https://edexcellence.net/publications/evaluation-of-ohio%E2%80%99s-edchoice-scholarship-program-selection-competition-and-performance>; Atila Abdulkadiroğlu, Parag A. Pathak, & Christopher R. Walters, “Free to Choose: Can School Choice Reduce Student Achievement?,” *American Economic Journal: Applied Economics*, 10(1), pp. 175-206 (2018); R. Joseph Waddington & Mark Berends, *Impact of the Indiana Choice Scholarship Program: Achievement Effects for Students in Upper Elementary and Middle School*, 37 *Journal of Policy Analysis and Management* (2018); Mark Dynarski, Ning Rui, Ann Webber, & Babette Gutmann, *Evaluation of*

the DC Opportunity Scholarship Program: Impacts Two Years after Students Applied. NCEE 2018-4010. (2018), available at <https://files.eric.ed.gov/fulltext/ED583552.pdf>. Importantly, some of these negative impacts associated with student voucher use were reported by otherwise pro-voucher researchers. See, e.g., Jonathan N. Mills & Patrick J. Wolf. “Vouchers in the Bayou: The Effects of the Louisiana Scholarship Program on Student Achievement after 2 Years,” *Educational Evaluation and Policy Analysis*, 39(3), pp. 464-484 (2017).

The large negative effects in test scores are particularly notable in mathematics, which researchers agree is important because math skills are typically learned in school, as opposed to reading, which many children learn at home from their parents. Stephen P. Heyneman, “Student Background and Student Achievement: What is the Right Question?” *American Journal of Education*, 112(1), 1–9 (2005); Paul E. Peterson, “School Choice: A Report Card,” in Paul E. Peterson & Bryan C. Hassel (eds.), *Learning from School Choice* (1998), pp. 3–32. Learning losses in math achievement in these recent studies are between 0.15 and 0.50 standard deviations, which is on par with the COVID-19 pandemic’s test scores impacts and is even larger than Hurricane Katrina’s impacts on test scores in New Orleans. Using the 0.50 sd result, this means that a student scoring at the 50th percentile before using the voucher would drop to the 31st percentile after using it. (Using the 0.15 result, the student would drop to the 44th percentile.) Thus, these large relative declines in voucher students’ mathematics achievement indicate that

voucher schools, rather than family background effects (which the studies account for), are most the most likely explanation for these findings.

In apparent response, voucher advocates “moved the goalposts” away from claims that vouchers improve academic outcomes, to focus instead on other possible policy objectives. Christopher A. Lubienski & Joel R. Malin, “Moving the Goalposts: The Evolution of Voucher Advocacy in Framing Research Findings,” *Journal of Education Policy*, 36(6), pp. 739-759 (2021). In particular, voucher advocates are now moving away from their previous promises regarding achievement in favor of what they often refer to as “attainment,” that is, other factors besides direct evidence of student learning – such as high school graduation or college attendance rates. However, the evidence on attainment is also mixed, with the most recent studies showing no attainment benefits to offset student learning loss. *See, e.g., Differences in School Voucher Studies* (2022, September 1), available at <https://www.brookings.edu/articles/apples-to-outcomes-revisiting-the-achievement-v-attainment-differences-in-school-voucher-studies/>. Moreover, even the scant studies suggesting attainment benefits are problematic, since these measures often reflect student socioeconomic factors rather than a school’s impact on student learning — the “main purpose” for voucher programs. *See, e.g., Patrick J. Wolf, “What Happened in the Bayou? Examining the Effects of the Louisiana Scholarship Program,” Education Next* (2019, August 13), available at <https://www.educationnext.org/what-happened-bayou-examing-effects-louisiana-scholarship-program/>. Finally, such “attainment” outcomes are more easily

manipulable, such as when private schools set their own graduation requirements, which makes it unhelpful to compare those graduation rates to those of public schools.

When voucher advocates attempt to divert attention from measured academic achievement, they sometimes argue that school choice policies such as vouchers create positive incentives within the so-called education marketplace, generating improvements in public schools. This possibility that competition incentivizes schools to increase effectiveness is disputed in the research literature.

On the one hand, some studies have posited that the threat of losing students and funding compels schools to put more resources and effort into instruction in order to increase academic productivity. Caroline M. Hoxby, “School Choice and School Productivity: Could School Choice Be a Tide that Lifts All Boats?,” in Caroline M. Hoxby (ed.), *The Economics of School Choice*, pp. 287–341, (2003). Some high-quality research does estimate small but positive competition effects in Florida of 0.003 to 0.007 standard deviations for each 10 percent increase in program size, but these are apparent only in communities where school funding loss is severely threatened – particularly among communities of color. David N. Figlio, Cassandra M.D. Hart, & Krzysztof Karbownik, “Effects of Maturing Private School Choice Programs on Public School Students,” *American Economic Journal: Economic Policy*, 15(4), 255-294 (2023); see also Rajashri Chakrabarti, “Can Increasing Private School Participation and Monetary Loss in a Voucher Program Affect Public

School Performance? Evidence from Milwaukee,” *Journal of Public Economics*, 92(5–6), 1371–93 (2008).

On the other hand, other research disputes this, finding no improvement in outcomes, or even negative effects, for schools placed into competitive circumstances; instead, schools in such circumstances may divert resources into marketing and similar efforts. Yusuf Canbolat, “The Long-term Effect of Competition on Public School Achievement: Evidence from the Indiana Choice Scholarship Program,” *Education Policy Analysis Archives*, 29(97), (2021), available at <https://doi.org/10.14507/epaa.29.6311>; see also David Arsen & Yongmei Ni, “The Effects of Charter School Competition on School District Resource Allocation,” *Educational Administration Quarterly*, 48(1), 3–38 (2011).

In some contexts, research has identified “sink schools,” or schools in “spirals of decline,” which are unable to compete due to continued loss of resources, with detrimental impacts for the students in those schools. Ee-Seul Yoon, Christopher Lubienski, & Jin Lee, “The Geography of School Choice in a City with Growing Inequality,” *Journal of Education Policy*, 33(2), 279–298 (2018); see also Tim Butler & Gary Robson, “Plotting the Middle Classes: Gentrification and Circuits of Education in London,” *Housing Studies*, 18(1): 5–28 (2003); Hugh Lauder & David Hughes, “Trading in Futures: Why Markets in Education Don’t Work,” *Ed.gov* (1999), available at <https://eric.ed.gov/?id=ED453584>; Diane Reay, “Unruly Places’: Inner-city Comprehensives, Middle-class Imaginaries and Working-class Children.”

Urban Studies, 44(7), 1191–1201 (2007); Diane Reay & Helen Lucey, “The Limits of ‘Choice’: Children and Inner City Schooling,” *Sociology*, 37(1), 121–142 (2003).

Vouchers and other types of school-choice approaches can certainly help some students, even as they hurt others. Most education policies and programs do have impacts that are observed across a distribution approximating a normal curve. Any such distribution includes strongly positive and negative data points. The research we present here is intended to describe overall effects, cumulative body of recent high-quality research of large-scale programs such as the one that SB 39 would create shows that, overall, positive achievement outcomes are not evident.

Regardless, public education systems like the one framed by the South Carolina Constitution are intended to promote not just individual options and advantages, but equitable opportunities, ideally leading to enhanced academic and social outcomes for all students. Accordingly, even setting aside the remarkably poor outcomes on average, because today’s voucher programs tend to be of greater use to more advantaged students, the opportunity to potentially experience an individual benefit is not equitably available.

D. Waste, Fraud, and Conflicts of Interest

Public schools and other taxpayer-supported public institutions are invariably subject to regulations designed to prevent waste, fraud, and conflicts of interest. In their most basic form, these regulations focus on transparency and accountability for the use of those public funds.

Section 59-8-125 of the South Carolina voucher law provides that up to 2% each year of the ESTF “amount” can be used by the state’s Department of Education “to cover the costs of overseeing the accounts and administering the program.” This provision and others also allow for the Department to outsource its administrative and accountability responsibilities via contracts with “qualified organizations” – although the law provides no guidance on what would make an organization qualified (or unqualified). Our reading of the law is that the “amount” cited in S.C. Code Ann. § 59-8-125 would be calculated as follows: By the 2026-27 school year, the program can provide \$6,000 per year to 15,000 students, which would presumably generate an ESTF “amount” of \$90 million, resulting in a total administrative budget of up to \$1.8 million.

That amount is arguably insufficient. But of greater concern is that state regulatory oversight is minimal. The Department is permitted, but not required, to audit accounts, disqualify parents from the program for “substantial misuse” of funds, and refer cases of fraud to law enforcement. S.C. Code Ann. § 59-8-145(D)-(F). Because these actions appear to be within the Department’s sole discretion, it needn’t conduct any audits at all. The Department may also, at its discretion, remove service providers (e.g., private schools) from the program for a limited set of reasons, such as failing to comply with the program’s accountability standards or failing to provide students with services funded by their accounts. S.C. Code Ann. § 59-8-140(C). Again, however, it needn’t step in at all.

Even if made non-discretionary, these provisions would be necessary but insufficient safeguards to prevent fraud and abuse within the voucher program. Private providers seeking to participate in similar programs elsewhere have been significantly more likely to be financially distressed schools – often borderline insolvent. Yujie Sude, Corey A. DeAngelis, & Patrick J. Wolf, *Supplying Choice: An Analysis of School Participation Decisions in D.C., Indiana, and Louisiana* (2017), available at <https://educationresearchalliancencola.org/files/publications/Sude-DeAngelis-Wolf-Supplying-Choice.pdf>. Correspondingly, available evidence indicates that up to 40% of providers close at some point in time after receiving taxpayer funds. Michael R. Ford & Fredrik O. Andersson, “Determinants of Organizational Failure in the Milwaukee School Voucher Program,” *Policy Studies Journal*, 47(4), pp. 1048-1068 (2019).

In states with more robust financial oversight provisions, schools have been removed from receiving public funds for failure to demonstrate long-term financial viability. Corri Hess, *Christian School Removed from Choice Program* (2023), available at <https://urbanmilwaukee.com/2023/08/24/christian-school-removed-from-choice-program/>. Transparency also helps ensure that schools do actually provide what they claim to offer parents insofar as educational opportunities are concerned. In states that have established financial transparency and academic accountability requirements more robust than those required by the voucher program in South Carolina, low-scoring or least effective private providers are identified, while academic outcomes for students in those programs improve after

such warning signs are publicly issued over time. John F. Witte, Patrick J. Wolf, Joshua M. Cowen, Deven E. Carlson, & David J. Fleming, “High-Stakes Choice: Achievement and Accountability in the Nation’s Oldest Urban Voucher Program,” *Educational Evaluation and Policy Analysis*, 36(4), 437-456 (2014).

The waste of public funds and ineffectiveness of the program, however, should be considered separately from outright fraud. In Florida, voucher schools hired teachers without college degrees and falsified fire-safety and health records. One school hired staff with criminal convictions, and the principal at another was a 24-year old college student. Leslie Postal, Beth Kassab, & Annie Martin, *Florida Private Schools Get Nearly \$1 Billion in State Scholarships with Little Oversight*, *Sentinel Finds* (Oct. 17, 2017), available at <https://www.orlandosentinel.com/2017/10/17/florida-private-schools-get-nearly-1-billion-in-state-scholarships-with-little-oversight-sentinel-finds/>. In North Carolina, watchdog groups have uncovered data indicating that a number of private schools claim more payment from the state than the number of students actually enrolled in their classrooms. Kris Nordstrom, *New Analysis Shows Many Private Schools Have More Vouchers Than Students* (2023), available at <https://www.ncjustice.org/analysis-nc-private-school-voucher-program/>. Similarly, in Florida, see Gus Garcia-Roberts, *McKay Scholarship Program Sparks a Cottage Industry of Fraud and Chaos* (June 23, 2011), available at <https://www.miaminewtimes.com/news/mckay-scholarship-program-sparks-a-cottage-industry-of-fraud-and-chaos-6381391>. And a Milwaukee private-school

principal cashed voucher checks for students who did not attend the school, using that taxpayer money to buy a couple Mercedes-Benz cars. Sarah Carr, *Choice Funds Used to Buy 2 Mercedes* (2004, Feb. 17), available at <https://archive.jsonline.com/news/education/163337666.html>. Private schools in North Carolina have received voucher payments to physical addresses with no building or other entity actually existing in an educational space. Ann Doss Helms, *What We Know–And Don’t–About Discrepancies in NC School Voucher Program* (2023), available at <https://www.wunc.org/2023-06-28/what-we-know-and-dont-about-discrepancies-in-nc-school-voucher-program>.

In both Arizona and Florida, parents have claimed voucher payments for expenses such as kayaks, trampolines, and tickets to SeaWorld and Disney World, prompting those states to tighten the list of qualified education expenses approvable. See Linda Jacobson, *Arizona Parents Are Using Public \$ for Kayaks, Trampolines and SeaWorld Tickets* (2023), available at <https://news.yahoo.com/arizona-parents-using-public-ed-121500653.html>. See also Nick Papantonis, *Florida Allows Taxpayer-funded ‘School Choice’ Vouchers to Pay for Kayaks, Disney Tickets* (2023), available at <https://www.wftv.com/news/local/florida-allows-taxpayer-funded-school-choice-vouchers-pay-kayaks-disney-tickets/GLAC7OS7JVFDHIKJAE3E35TZ6A/>.

In Arkansas, open records requests showed the state educational agency to be approving tuition reimbursement payments to existing private school parents who used vague provisions in the state statute to claim a special educational need or

disability with as little as a doctor's note, in order to "jump the line" ahead of other families waiting to receive a payment. *Arkansas Times*, "Department of Education Lowers Disability Standards for Vouchers, Lets Private School Families Cut in Line" (2023, October 20), available at <https://arktimes.com/arkansas-blog/2023/10/20/dept-of-ed-lowers-disability-standards-for-vouchers-lets-private-school-families-cut-in-line>.

We are not predicting that all of these fraudulent behaviors will emerge in South Carolina. Instead, we point to this research to highlight the non-publicness implications of a lightly regulated private-school system for delivering taxpayer-funded education.

III. CONCLUSION

As other states' experiences with vouchers have shown, the nature and design of South Carolina's new voucher law means that it lacks any meaningful elements of publicness. It does not serve the public interest. Moreover, the academic literature finds that school vouchers exacerbate discriminatory practices that target the non-affluent and students who are disabled while simultaneously harming academic outcomes for the students who use vouchers. For the foregoing reasons, Amici respectfully request that this Court determine that the law violates the South Carolina Constitution.

Respectfully submitted,



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January 31, 2024
Columbia, South Carolina

APPENDIX
LIST OF AMICI EDUCATION SCHOLARS

THE FOLLOWING EDUCATION SCHOLARS ARE
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** Affiliations are provided for identification purposes only. Each individual is expressing personal views and does not represent the views of their institution.*