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**COMMONWEALTH OF KENTUCKY  
SUPREME COURT**

No. 2021-SC-0522

(Consolidated with Nos. 2021-SC-0518, -0519, -0520)

**AKIA MCNEARY and NANCY DEATON**

*Appellants*

v.

**COUNCIL FOR BETTER EDUCATION, INC., et al.**

*Appellees*

Appeal from Franklin County Circuit Court  
Hon. Phillip Shepherd  
Civil Action No. 21-CI-00461

**BRIEF OF *AMICUS CURIAE* EDCHOICE KENTUCKY  
IN SUPPORT OF APPELLANTS**

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## CERTIFICATE OF SERVICE

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## PURPOSE OF BRIEF & INTRODUCTION

*Amicus curiae* EdChoice Kentucky is a coalition that supports public and private education in the Commonwealth and which includes representatives of schools from a variety of backgrounds, including both secular schools and faith-based schools in the Christian and Jewish traditions. EdChoice Kentucky promotes public understanding and acceptance of educational-choice policies to ensure that every child receives the best education available. EdChoice Kentucky therefore seeks to ensure that Kentucky's Education Opportunity Account (EOA) Program is upheld in order to safeguard the tremendous opportunities it makes available to children and parents, especially those most in need. Specifically, EdChoice Kentucky addresses the lower court's misguided assertions that it is "difficult to see" how expanding families' access to the public and private schools of their choice would serve a public purpose, 16 R. at 2400, and that the EOA Program would "exacerbate the inequality and increase the disparity in educational opportunities available to all children." *Id.* at 2406. The experience of private schools in Kentucky and across the United States shows that this could hardly be further from the truth.

Since our country's founding, private schools—religious and secular alike—have played a central role in educating children and forming them to be productive and virtuous members of society. Nearly one hundred years ago, the Supreme Court of the United States observed that private schools have "long [been] regarded as useful and meritorious." *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925). Indeed, for centuries, private schools have provided essential support to children from all walks of life. Private schools have been shown to excel at educating and forming students to become engaged, productive members

of their communities. And they provide these critical services often to those children who need them most. Indeed, a private education has been shown to have an especially important impact on lower-income or minority students and is a significant indicator of future success. Private schools likewise help fill many other needs that public schools are unable to meet alone, including for children of different abilities and backgrounds.

For these reasons, Kentucky has given more families the opportunity to have their children attend the school—public or private—that best suits their needs. That opportunity should not be denied based on the erroneous decision of the court below or because of equally erroneous concerns that educational choice is somehow a reform to be feared.

## ARGUMENT

### **I. Private schools have long served the critical public function of educating and forming children to be productive members of their communities.**

No one doubts the significant public interest in K–12 education. *Cf. Univ. of Cumberlands v. Pennybacker*, 308 S.W.3d 668, 674 (Ky. 2010) (“[E]ducation is definitely a public purpose.”). And, for centuries, that critical responsibility has been borne largely by private schools. Indeed, for many decades, private schools were essentially the *only* source of childhood education in the United States. It is a role those schools served—and continue to serve—well. Any suggestion to the contrary defies the history of education in this country and denigrates the tremendous public service its many private schools provide.

#### **A. Private schools have long been critical sources of education in America.**

The suggestion that only state-run schools can serve the public’s interest in ensuring widespread K–12 education ignores the reality of schooling in America.

In the early United States, if children were to be formally educated at all it was typically to be in a private school. See Michael W. McConnell, *Scalia and the Secret History of School Choice*, in Scalia's Constitution 72–73 (Peterson & McConnell, eds., 2018). Well into the nineteenth century, American “education was almost without exception under private sponsorship and supervision.” *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 239 n.7 (1963) (Brennan, J., concurring). Today's public-school system is the outgrowth of the common-school movement of the mid-nineteenth century. Before then, nearly all schools were privately operated, often by religious organizations, even when funded by public money. See McConnell, *supra*, at 72–74. Indeed, in Kentucky, private schools have always been a necessary supplement to public education. In the 1800s, for example, public schools were inaccessible to many, and private schools rose to “fill[] [that] important void as Kentucky struggled to found and sustain a public school system.” William E. Ellis, *A History of Education in Kentucky* 34 (2011). And, “[a]s a result of this diverse system of [private] schooling, the young nation enjoyed a high rate of literacy; by 1840, for example, 90% of northerners and 81% of southerners were literate.” Dick M. Carpenter II & Krista Kafer, *A History of Private School Choice*, 87 *Peabody J. Educ.* 336, 337 (2012).

Today, private schools continue to perform the critical task of educating children in the United States and Kentucky. Nationally, private schools educate more than 5 million pre-K–12 students a year. Nat'l Ctr. For Educ. Stats., *Table 205.10: Private Elementary & Secondary School Enrollment* (Oct. 2021), <https://bit.ly/3wCDmDp>. In Kentucky, private schools educate roughly 70,000 students a year. EdChoice Ky., *Exploring Kentucky's*

*Private Education Sector* 11 (Mar. 2022), <https://bit.ly/3QaU6dQ>. An estimated ten percent of Kentucky’s future workforce is being educated in private schools. Dawn Yankeelov, *Private Schools, Public Impact*, *The Lane Report* (May 7, 2021), <https://bit.ly/3lgB7jT>. And Kentucky explicitly relies on private schools to provide educational opportunities where public schools cannot. For example, Kentucky requires school districts to pay the cost of educating children with certain needs at private schools in areas where the public schools cannot. *See* KRS § 157.280(1)–(2). It can hardly be doubted that Kentucky’s children would suffer—and along with them, the public’s vital interest in education—if it were not for the efforts of these private schools.

**B. Private schools prepare students to excel in and out of the classroom.**

Private schools not only do the critical work of educating children but they do a tremendous job of it. This Court has previously identified several core goals of a childhood education, which focus primarily on preparing students for further academic study or the workforce, developing children’s self-awareness and wellbeing, and promoting civic understanding and engagement. *See Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989); *see also Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (state’s interest in education is to prepare “individuals to be self-reliant and self-sufficient participants in society”). Private schools undeniably provide an education that serves each of these goals.

First, private schools boast an impressive record of academic success. These schools often have demanding academic requirements and “private school students generally perform higher than their public-school counterparts on standardized achievement tests.” Nat’l Ctr. for Educ. Stats., *Private Schools: A Brief Portrait* 21–22

(2002), <https://bit.ly/3McPSil>. For example, a study of nearly two million high-school students who took the ACT in 2015 found that “[i]n every racial and ethnic subgroup, ACT-tested students in private schools outscored their public school counterparts.” Council For Am. Priv. Educ., *Private School Students More Likely to Be Ready for College*, CAPEoutlook (Nov. 2015). A recent study of education across more than 50 countries likewise found that, as the proportion of students enrolled in private schools increases, so does student performance in math, reading, and science; the author estimates that even a 10% increase in private-school enrollment would significantly increase the United States’ standardized test scores and international ranking in student achievement. See Corey A. DeAngelis, Cato Inst., *The Public Benefit of Private Schooling* 7–10 (Jan. 22, 2018). And the vast majority of empirical research on private school choice programs has found that such programs “improve[] academic outcomes.” Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Choice* 1 (May 2016), <https://bit.ly/39ufbiD>. These studies show that school choice leads to both “modest positive effects on academic performance over time” and “more-significant longer-term effects on noncognitive variables, including high school graduation rates [and] college matriculation and persistence.” Nicole Stelle Garnett, *Post-Accountability Accountability*, 52 U. Mich. J. L. Reform 157, 175 (2018).<sup>1</sup>

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<sup>1</sup> These results are borne out in Kentucky. For example, in 2011, students in elementary schools operated by the Archdiocese of Louisville scored 22–26% above national averages on the Annual Terra Nova standardized test. Archdiocese of Louisville, *Catholic Elementary School Report* 14 (2012), <https://bit.ly/3CMA8mk>. Last year, a staggering 95% of graduates in the Archdiocese pursued post-secondary education and 98% of graduates from the Covington Diocese went on to college, trade schools, or the armed forces. Archdiocese of Louisville, *Catholic School Selection Guide (2021–22)*, <https://bit.ly/3m8zbdx>; Alliance for Catholic Urban Educ., *Christ the Teacher Society:*

But the benefits of private schools, and therefore the promise of expanding access to them through parental choice, extends beyond academics. This Court has long trusted private schools to “instruct children to become intelligent citizens” and to “participate in the democratic system.” *See Ky. State Bd. v. Rudasill*, 589 S.W.2d 877, 884 (Ky. 1979); *see also Yoder*, 406 U.S. at 221 (Amish “alternative to formal secondary school education” satisfied Wisconsin’s interest in enabling citizens to “participate effectively and intelligently in our democratic process”). Real-world experience shows that private schools do just that. Studies have shown that, overall, private schools and especially faith-based schools “do a better job of preparing students to be engaged members of a diverse, democratic society.” Margaret F. Brinig & Nicole Stelle Garnett, *Lost Classroom, Lost Community* 144 (2014). Students who attend private schools are “significantly more likely to engage in community service . . . , [are] more likely to learn civic skills in school, [are] better informed about the political process, and [are], on average, more politically tolerant than students in public schools.” *Id.* And even “spending one year in a private school led to a considerable increase in a student’s political tolerance and political knowledge.” *Id.* at 145. Correspondingly, studies have shown that private-school-choice programs “improve[] civic values and practices,” including students’ “respect for the rights of others.” Forster, *supra*, at 1–2; *see also* Garnett, *Post-Accountability*, *supra*, at 175 (school-choice programs lead to “a reduced likelihood of involvement in the criminal justice system”).

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*Major Donor Recognition Program* (2021), [bit.ly/3lxU55t](https://bit.ly/3lxU55t). And the Piarist School in Hagerhill—which educates a high proportion of underprivileged students—has sent *all* of its students to college. Maggie Menderski, *This Catholic School Doesn't Charge Tuition and All of its Graduates Have Gone to College*, *Louisville Courier J.* (Sep. 2, 2021).

**II. Private school choice provides educational opportunities to children and families most in need.**

Private schools provide these tremendous educational resources to an array of children, including those children who need them most. The lower court’s suggestion that only “a few select children” will benefit from Kentucky’s educational-choice program or that private schools tend to “discriminate on any basis they choose,” such as by “exclud[ing] children with learning disabilities,” is flatly wrong. 16 R. at 2386, 2403. Rather, private schools have long provided educational opportunities to those families and children who might otherwise be left behind without them, including: children of color, children from low-income families, and children with special learning needs.

**A. School choice especially benefits children in disadvantaged communities.**

It is no secret that inequalities often leave certain communities—especially families of color or lower incomes—at a significant disadvantage when it comes to educational resources. Rather than “exacerbat[ing] the inequality and increas[ing] the disparity in educational opportunities available to all children” (as the lower court surmised, *id.* at 2406), Kentucky’s EOA Program is an important step toward *ending* that disparity and making superior educational opportunities accessible to all.

Programs which open the doors to private schools by making them more affordable help disadvantaged families the most. Indeed, an estimated 90% of participants in private-school-choice programs nationwide come from working class or low-income families—a

pattern that is repeated across the country.<sup>2</sup> Tommy Schultz, *Enrollment Characteristics for Private School Choice Programs*, Am. Fed'n for Children (Jan. 31, 2020), <https://bit.ly/2Zjj8lm>. For many private schools, serving the underprivileged is their mission—like the Cristo Rey Network, a national network of 38 Catholic high schools across the United States that exclusively serve families with limited economic means and which send 90% of their graduates onto college. *College Success*, Cristo Rey Network, <https://bit.ly/39513wd> (last visited June 14, 2022). According to a recent survey, a “sizable portion of the private school student body” in Kentucky—an average of 22% across schools—qualifies for the federal free and reduced lunch program. EdChoice Ky., *supra*, at 8. Four of the schools surveyed reported that *all* of their students qualify for free or reduced lunch. *Id.* As one teacher at the Piarist school, discussed above, described, “A lot of people have this misconception that private school equals rich, affluent families. That’s not the case at all. Here . . . we have kids who are from that rich, affluent family, and we have kids who are barely scraping by.” Menderski, *supra*.

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<sup>2</sup> For example: The average household income in Florida’s school choice program is 9.1% above the poverty line. *Florida Tax Credit Scholarship*, Off. of Pol’y and Pub. Aff., Step up for Students (Jan. 2019), <https://bit.ly/3zhzwCm>. In North Carolina, “[f]amilies that receive vouchers are among the lowest-income households in the state.” Anna J. Egalite et al., *A Profile of Applicants to North Carolina’s Opportunity Scholarship Program 1* (May 2019), <https://bit.ly/38XDqFX>. Most of D.C.’s school-choice applicants came from the lowest income neighborhoods. Jill Feldman et al., *Evaluation of the D.C. Opportunity Scholarship Program*, Inst. of Educ. Sci. 17 (Oct. 2014), <https://bit.ly/3x2OJV3>. Nearly half of Indiana’s school-choice participants come from households earning less than \$50,000 per year. Ind. Dep’t of Educ., *Choice Scholarship Program Annual Report 28* (Apr. 2021), <https://bit.ly/3ahAkws>. And over 60% of students in the largest scholarship organization participating in New Hampshire’s school-choice program are eligible for the federal free meal program. *Scholarship Organization Report*, N.H. Dep’t of Revenue Admin., ED-05 (2020–21), <https://bit.ly/3PNx2S2>.



Children of color especially benefit from the opportunities afforded by parental choice programs. As Justice Clarence Thomas observed in upholding a similar program in Ohio, minority families tend to “support school choice programs because they provide the greatest educational opportunities for their children in struggling communities.” *Zelman v. Simmons-Harris*, 536 U.S. 639, 682 (2002) (Thomas, J., concurring). These programs “arm minorities with the education to defend themselves from some of discrimination’s effects.” *Id.* at 683. Indeed, many of the original school-voucher plans in the 1960s “were self-consciously designed to maximize equity and racial justice,” by providing inner-city minorities with opportunities they didn’t have otherwise. James Forman, Jr., *The Secret History of School Choice: How Progressives Got There First*, 93 *Geo. L.J.* 1287, 1310 (2005); *see also* Carpenter & Kafer, *supra*, at 340 (“[L]iberals in the 1960s . . . advocat[ed] for voucher plans for poor and minority students trapped in failing schools.”).<sup>3</sup>

This story remains true today. Around the country, the majority of participants in private school-choice programs are children of color. Schultz, *supra*. A recent poll found overwhelming support for school-choice across all races. *See New Poll: School Choice Support at All-Time High*, Am. Fed’n for Children (June 29, 2021), <https://bit.ly/39F4EAX>. And, contrary to the lower court’s suggestion of discrimination, nine of ten empirical studies that explored school choice and segregation found that “school

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<sup>3</sup> Private schools’ service to children of color well precedes the civil rights movement. During Reconstruction, for example, the American Missionary Association helped educate Black children when resources for them were scarce. Ellis, *supra*, at 73–74. In the 1850s, the Columbia Male and Female High School, founded by Presbyterians in Adair County, was among the first integrated schools in the Commonwealth. *Id.* at 34.

choice moves students into *less* racially segregated classrooms”—and none found that school choice increases segregation. Forster, *supra*, at 26 (emphasis added).

Further, children from disadvantaged communities often excel once given access to private schools. Black students at Catholic schools, for example, have higher grades than both Black students in public school and their White Catholic school classmates. Anthony Setari & R. Renee Setari, *Trends in Catholic School Minority Enrollment and Higher Education Entrance Over the Recession*, 19 J. Catholic Educ. 4, 5 (2016). Students of color generally have fewer behavioral issues, are more likely to graduate, and are better prepared for college when they attend Catholic school. *Id.* Indeed, attending a Catholic high school has been shown to “significantly improve[] an urban student’s likelihood of graduating, with the largest benefits redounding to minority students” and “improved urban students’ chances of graduating from college, again, with minority students benefiting most.” White House Domestic Pol’y Council, *Preserving a Critical National Asset* 7 (2008), <https://bit.ly/3O9m9Z8>. When these schools close, the ones harmed the most are minority and low-income students whose parents cannot afford to transfer their children to similar schools elsewhere. Michael McShane, *Closing Catholic Schools Harms Minority Students*, Nat’l Catholic Reg. (Oct. 15, 2014), <https://bit.ly/3M8z3G2>; *see also* Brinig & Garnett, *supra*, at 157–66 (discussing harm of Catholic-school closures on urban communities).

**B. Private school choice provides critical options for children with diverse and specialized learning needs.**

Second, private schools’ smaller size and innovative teaching methods allow them to offer a diversity of learning environments to match the needs of individual children. Contrary to the lower court’s baseless warning that private schools might “exclude children

with learning disabilities,” 16 R. at 2386, such children (and many others) stand to benefit tremendously from increased access to the schools that best suit them.

It is common knowledge that children have a multitude of different learning needs and that a “one-size-fits-all” approach to schooling threatens to leave many behind. *See, e.g.,* Stavros Yiannouka & Zineb Mouhyi, *There Is No One-Size-Fits-All School Model: Developing a Flexible and Innovative Education Ecosystem*, Brookings Inst. (Apr. 3, 2018), <https://brook.gs/3FwiBgo>. Those particular needs—and the corresponding school environments best suited to address them—vary widely. For some parents, this may mean choosing a school with the resources to help a child with a particular learning disability; for others, it may mean a school that can provide more individual attention. But in all events, freedom from rigid standardization allows for a diversity among private schools that provides parents with a multitude of options to serve their children.

Specialized instruction for students with disabilities is a prime example of the value of educational pluralism. Experience shows that students with disabilities benefit from personalized learning—*i.e.*, environments that are “tailored to their individual needs, skills, and interests.” Nat’l Ctr. for Learning Disabilities, *Personalized Learning and Students with Disabilities* (June 11, 2017), <https://bit.ly/3M9kotu>. Private schools promise just that sort of pluralism.<sup>4</sup> According to a recent survey, nearly 70% of Kentucky’s private schools

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<sup>4</sup> Different approaches to special-needs education in private schools abound. Consider just a few examples from schools in Louisville. Immaculata Classical Academy, for example, is an inclusive school which incorporates one to two children (for 15–20% of its total student body) with special needs like Down Syndrome into every classroom to provide unique opportunities for typically and specially developing children to interact and learn together. *Inclusive Education*, Immaculata Classical Academy, <https://bit.ly/3aZFJJc>

enrolled students with special needs last year, and students with special needs make up 20% of a private school's student body on average. EdChoice Ky., *supra*, at 9. At least eight private schools in Kentucky are devoted entirely to serving children with special needs, and nearly fourteen thousand students in the State receive ADD/ADHD support in their private schools. *Top 3 Best Kentucky Special Education Private Schools (2022)*, Priv. Sch. Rev., <https://bit.ly/3r39O0v> (last visited June 14, 2022); *Top 20 Best Kentucky Private Schools Offering Programs/Support for Students with ADD/ADHD (2022)*, Priv. Sch. Rev., <https://bit.ly/3CKIDK1> (last visited June 14, 2022). Research has shown that parents armed with school-choice programs “are more likely to obtain desired services for their children” with special needs and that substantially more of them report being satisfied with their child's school than do parents of children with special needs in public schools. *Can School Choice Help Students with Special Needs?*, EdChoice, <https://bit.ly/3LYPaWO> (last visited June 14, 2022); *see also* Nat'l Council on Disability, *Choice & Vouchers—Implications for Students with Disabilities* 11 (2018) (“Many students with disabilities and their families turn to choice options after experiencing intolerable conditions in public schools . . .”).

Diverse schooling options are critical to a number of other students. Research has shown, for instance, that “there are vast differences in what [English-language learners]

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(last visited June 14, 2022). Or the de Paul School, which has served children with learning disabilities for over fifty years, combines visual, auditory, tactile, and kinesthetic instruction to create a multisensory learning environment for students with dyslexia, ADHD, and other learning differences. *The de Paul School Difference*, The de Paul School, <https://bit.ly/2ZfGhoG> (last visited June 14, 2022). Finally, the Meredith-Dunn School serves students specifically with language-based learning disorders and offers diagnostic testing and services to every child in the community. *Support Services*, Meredith-Dunn School, <https://bit.ly/3cLv7Lm> (last visited June 14, 2022).

need and how they perform in school” and that such students need a variety of learning environments rather than to be simply “lump[ed] into one group.” Corey Mitchell, *A “One-Size-Fits-All” Approach to English-Learner Education Won’t Work. Here’s Why*, EducationWeek (Aug. 15, 2019), <https://bit.ly/3MIPR75>. The same is true of students with particular social and emotional needs—like those who experience bullying—who benefit greatly from the ability to find the schools in which they fit best. *See, e.g.*, Mike Long, *School Choice Leads Families and Students to Freedom from Bullying*, Carolina J. (Nov. 3, 2021); *The Hope Scholarship*, Fla. Dep’t of Educ., <https://bit.ly/3sWZBTs> (last visited June 14, 2022) (Florida school-choice program for children who have been harassed in public school).<sup>5</sup> And, historically, we have often seen the need for schools tailored to particular groups, like religious immigrants, who do not find their children welcome in the public schools. *See, e.g.*, *Espinoza v. Mont. Dep’t of Rev.*, 140 S. Ct. 2246, 2272 (2020) (Alito, J., concurring) (discussing growth of Jewish and Catholic schools in 19th century when public schools were openly hostile to their children); Emma Green, *The Fear of Islam in Tennessee Public Schools*, The Atlantic (Dec. 16, 2015), <https://bit.ly/3wK6UzS>.

Finally, the recent experience of COVID-19 made especially clear the need for flexibility and choice in education. While public schools across the country relied on remote instruction as the pandemic wore on, private schools found ways to return children to the classroom safely. *See, e.g.*, Kathleen Porter-Magee, *Learning to Thrive*, City J. (Apr.

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<sup>5</sup> The last two years have seen an alarming decline in childhood mental health, making the need for these diverse schooling options more urgent than ever. *See* Jonathan Butcher & Chloe Shoemaker, *Youth Mental Health Crisis Gives More Urgency to School Choice Movement*, Heritage Found. (Mar. 31, 2022), <https://herit.ag/3jWfwMZ>.

5, 2021), <https://bit.ly/38g9wMM> (in Fall 2020, fewer than half of public schools reopened for in-person instruction compared to 92% of Catholic schools). And students in schools that spent more time in remote instruction—which disproportionately included schools in high poverty areas—suffered substantially greater losses in academic growth. Thomas Kane, *Remote Learning Likely Widened Racial, Economic Achievement Gap*, Harv. Gazette (May 5, 2022), <https://bit.ly/3aCyZRj>; see also Kevin Wheatley, *Most JCPS Students Struggle with Reading and Math at Grade Level, Diagnostic Testing Shows*, WDRB (May 20, 2022), <https://bit.ly/3mFGIRo> (discussing “pandemic’s impact on learning” in Jefferson County Public Schools). Unsurprisingly, during this time, 72% of private-school parents reported being “very satisfied” with their children’s schooling, compared to only 36% of public-school parents. Porter-Magee, *supra*. This helps explain why last year alone more than twenty states “voted to create, expand, or improve school choice programs.” *Expanding Choice During a Pandemic*, Am. Fed’n for Children (Aug. 31, 2021), <https://bit.ly/38Q10mD>.

To be sure, not *every* private school will be the appropriate fit for *every* student—just as not every public school is. But this simple observation underlies the very point of educational choice programs. The goal of school-choice programs is to provide families with the ability to find and enroll their children in the schools that *are* the best fit for them, rather than to be left in schools that are a poor fit without any alternative. The fact that some private schools may not have the means to serve every child is hardly a reason to reject the promise of a program that opens up the universe of schooling options so that families may find those that work best for them. Programs like Kentucky’s empower

families to do just that, to the great benefit of all but especially to those who need alternative educational options the most.

### CONCLUSION

*Amicus curiae* respectfully urges this Court to reverse the erroneous decision below.<sup>6</sup>

Respectfully submitted on June 15, 2022.

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