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**NOS. 2021-SC-0518, 2021-SC-0519, 2021-SC-0520, 2021-SC-0522)**

COMMONWEALTH OF KENTUCKY EX REL. ATTORNEY GENERAL DANIEL CAMERON APPELLANT

v. Franklin Circuit Court, No. 21-CI-461

HOLLY JOHNSON, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE FINANCE AND ADMINISTRATION CABINET, ET AL. APPELLEES

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**BRIEF OF PUBLIC FUNDS PUBLIC SCHOOLS, AMERICAN FEDERATION OF TEACHERS, KENTUCKY CONFERENCE OF THE NAACP, PASTORS FOR CHILDREN, PASTORS FOR KENTUCKY CHILDREN, AND SOUTHERN EDUCATION FOUNDATION AS AMICI CURIAE SUPPORTING APPELLEES**

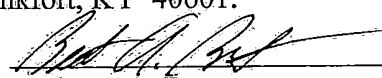
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|---|---|
| Jessica Levin ( <i>pro hac vice</i> pending)<br>Wendy Lecker ( <i>pro hac vice</i> pending)<br>EDUCATION LAW CENTER<br>60 Park Place, Suite 300<br>Newark, New Jersey 07102 | Bethany A. Breetz<br>STITES & HARBISON PLLC<br>400 West Market St., Suite 1800<br>Louisville, Kentucky 40202-3352 |
|---|---|

*Attorneys for Amici*

**Certificate of Service**

I certify that on June 14, 2022, a copy of this brief was sent via U.S. Mail to: Matthew F. Kuhn, Brett R. Nolan, Alexander Y. Magera, Office of the Attorney General, 700 Capital Ave., Suite 118, Frankfort, KY 40601; Byron E. Leet, Virginia Hamilton Snell, Mitzi D. Wyrick, Sean G. Williamson, Wyatt, Tarrant & Combs, LLP, 400 W. Market St., Ste. 2000, Louisville, KY 40202; Jeffrey S. Walther, John K. Wood, Walther, Gay & Mack, PLC, 163 E. Main St., Ste. 200, Lexington, KY 40507; Alice O'Brien, Kristen L. Hollar, National Education Assoc., 1201 16<sup>th</sup> Street, NW, Washington, D.C. 20036; Matthew D. Doane, Doane & Elliott, PSC, 120 E. Adams St., LaGrange, KY 40031; Joshua A. House, Benjamin A. Field, Inst. for Justice, 901 N. Glebe Rd., Ste. 900, Arlington, VA 22203; Brian C. Thomas, Wm. Robert Long, Jr., Bethany Atkins Rice, Fin. & Admin. Cabinet, 702 Capital Ave., Rm 392, Frankfort, KY 40601; Michael A. Owsley, Regina Jackson, Lindsay Porter, English, Lucas, Priest & Owsley, LLP, 1101 College St., P.O. Box 770, Bowling Green, KY 42102; Timothy Crawford, Crawford Law Office, 317 N. Main St., P.O. Box 1206, Corbin, KY 40701; Hon. Phillip Shepherd, Judge, Franklin Circuit Court, 222 St. Clair St., Frankfort, KY 40601.

  
Bethany A. Breetz

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## INTEREST OF AMICI

The *amici curiae*<sup>1</sup>—Public Funds Public Schools, the American Federation of Teachers, the Kentucky Conference of the NAACP, Pastors for Children, Pastors for Kentucky Children, and the Southern Education Foundation—respectfully submit this brief to provide the Court with important information about the negative effects of private school voucher programs, which undermine states’ constitutional obligations to provide uniform, high-quality public education to all students. *Amici* draw on their longstanding experience and expertise in civil rights and education law and policy to provide the Court with this crucial context.

## INTRODUCTION

In striking down House Bill 563, which would establish Kentucky’s first private school voucher program,<sup>2</sup> the circuit court emphasized the central importance of the right to public education guaranteed by the state constitution. (TR 2382.) Indeed, the Kentucky Supreme Court has recognized Section 183’s guarantee of an efficient system of common, i.e. public, schools as a “fundamental right in Kentucky.” *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 206 (Ky. 1989). *Rose* further held that “every child” in the Commonwealth “must be provided with an equal opportunity to have an adequate education” and spelled out standards for the quality of the public education that must be available equitably to all students. *Id.* at 211-12 (emphasis in original). The flip side of this reverence for the public education system is that Kentucky courts “[have]

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<sup>1</sup> For additional information about *Amici*, please see the accompanying motion.

<sup>2</sup> Voucher programs take various forms, including the blend of two forms—Education Savings Account or “ESA” vouchers and “tax credit scholarship” vouchers—seen in the program established by HB 563. Tax credit scholarship vouchers are commonly called “neovouchers.” See, e.g., Kevin G. Welner, *NeoVouchers: The Emergence of Tuition Tax Credits for Private Schooling* (2008).

been undeviating in holding that public funds cannot be expended in support of private education.” (TR 2382 at 16.) The Kentucky Supreme Court has further held that funding private schools is not a public purpose, defined as one “calculated to aid all the people in the state.” *Fannin.v. Williams*, 655 S.W.2d 480, 482 (1983) (quotation omitted); *see also* TR 2382 at 19. As the Court aptly noted, “[n]onpublic schools are open to selected people in the state, as contrasted with public schools which are open to all people in the state.” *Fannin*, 655 S.W.2d at 482 (quotation omitted).

The dangers of private school voucher programs demonstrate the wisdom of Kentucky’s prohibition on funding private education. In this brief, *Amici* present evidence from other states’ experiences with voucher programs to elucidate the likely harms of the voucher program authorized by HB 563, both to students—especially the most vulnerable—and to public schools. Although voucher programs are promoted as “school choice” for families, they in fact place all the decision-making power about whom to admit and how to serve them in the hands of the account-granting organizations that distribute vouchers and the private schools receiving voucher funds.

#### ARGUMENT

Even as powerful pro-voucher legislators and interest groups have pushed to enact new state voucher programs—including HB 563—across the county, public support for vouchers has declined.<sup>3</sup> Research on voucher programs supports the public’s distaste for them. Study after study reveals that private school vouchers negatively affect student achievement, exacerbate segregation, facilitate state support for discrimination, and

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<sup>3</sup> Michael B. Henderson et al., *Hunger for Stability Quells Appetite for Change: Results of the 2021 Education Next Survey of Public Opinion*, Educ. Next, <https://tinyurl.com/3b76vdv6> (last updated Aug. 31, 2021) (documenting a drop in public support for all types of vouchers).

undermine the public school systems that serve all students. The Kentucky Constitution strongly protects funding for the State’s system of open and high-quality public schools for compelling social reasons that remain as important as ever.

**I. Voucher programs do not improve—and often harm—student outcomes.**

Rigorous scholarship assessing the effects of voucher programs has consistently demonstrated that they do not result in better educational outcomes.<sup>4</sup> To the contrary, some statewide voucher programs are emerging as the “rare” example of an educational intervention with an outright negative impact.<sup>5</sup> Seven of nine large-scale studies conducted between 2015 and 2019—some spearheaded by voucher advocates—found detrimental effects from voucher programs, while the remaining two showed no statistically significant effects.<sup>6</sup>

Researchers comparing voucher students to similarly situated public school students routinely find that voucher students perform worse academically. For example, a study funded by voucher advocates concluded that Ohio voucher students “fared worse academically compared to their closely matched peers attending public schools.”<sup>7</sup> The Brookings Institution reported that “[r]ecent research on statewide voucher programs in Louisiana and Indiana has found that public school students that received vouchers . . . subsequently scored lower on reading and math tests compared to similar students that

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<sup>4</sup> See, e.g., *Hattie Ranking: 252 Influences and Effect Sizes Related to Student Achievement*, Visible Learning, <https://tinyurl.com/59fntf2x> (last visited June 13, 2022) (ranking school choice programs as a very low factor influencing student achievement).

<sup>5</sup> Mark Dynarski, *On Negative Effects of Vouchers* 1, 2, Evidence Speaks Reports (May 26, 2016), <https://tinyurl.com/28s8ye2x>.

<sup>6</sup> See Christopher Lubienski & Joel Malin, *The New Terrain of the School Voucher Wars*, The Hill (Aug. 30, 2019), <https://tinyurl.com/5yejzb8t>.

<sup>7</sup> See David Figlio & Krzysztof Karbownik, Thomas B. Fordham Inst., *Evaluation of Ohio’s EdChoice Scholarship Program: Selection, Competition, and Performance Effects 2* (2016), <https://tinyurl.com/4d846dbt>.

remained in public schools. The magnitudes of the negative impacts were large.” Dynarski, *supra* note 5, at 1. The Louisiana and Indiana studies “used rigorous research designs that allow for strong causal conclusions.” *Id.* Moreover, the results were not likely to be explained by the temporary adjustment involved in changing schools.<sup>8</sup> At best, voucher programs have a neutral impact on student performance.<sup>9</sup>

Voucher advocates typically emphasize selected studies suggesting neutral to small positive results,<sup>10</sup> but those studies suffer from critical flaws. For example, an analysis by pro-voucher group EdChoice purports to survey the existing literature and concludes most studies show vouchers have positive effects. *Id.* at 4. But, a National Education Policy Center review of this analysis found it to be “a misrepresentation of what research has been conducted” because it makes exaggerated claims based on studies that are cherry picked and often not peer reviewed.<sup>11</sup> Additionally, many of the studies cited by voucher proponents do not control for the fact that students who use vouchers

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<sup>8</sup> 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 (EDRE), Working Paper no. 2019-10, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3376230](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3376230) (finding “large negative effects” particularly pronounced in math); 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) (finding Indiana voucher students’ losses on standardized tests remained consistent over time).

<sup>9</sup> Joan M. Barth et al., *Evaluation of the Alabama Accountability Act: Academic Achievement Test Outcomes of Scholarship Recipients 2016-2017* ii (2018), <https://tinyurl.com/ysjryf2p> (state-mandated evaluation of voucher program finding no significant improvement on test scores and performance below U.S. average); Ann Webber et al., U.S. Dep’t of Educ., Inst. of Educ. Scis., *Evaluation of the DC Opportunity Scholarship Program: Impacts Three Years After Students Applied* 4–8 (May 2019), <https://tinyurl.com/3hscrz5s> (finding no statistically significant improvement in reading or math after three years).

<sup>10</sup> See, e.g., EdChoice, *The 123s of School Choice: What the Research Says About Private School Choice Programs in America, 2019 Edition* (2019), <https://tinyurl.com/2f8c9hbu>.

<sup>11</sup> T. Jameson Brewer, Nat’l Educ. Pol’y Ctr., *NEPC Review: The 123s of School Choice: What the Research Says About Private School Choice: 2019 Edition* (EdChoice, April 2019) 8–9, 12 (2019), <https://tinyurl.com/2hwkcu5c>.

are rarely drawn at random, meaning this research cannot establish causal effect.<sup>12</sup>

## **II. Voucher programs, with a history tainted by racism, continue to foster school segregation.**

Voucher programs did not arise in significant numbers until the U.S. Supreme Court invalidated racial segregation in public schools in *Brown v. Board of Education*, 347 U.S. 483 (1954).<sup>13</sup> The uncomfortable truth is that today's private school voucher programs "have their roots in a history of racism and school segregation" as "school vouchers became a popular tool for perpetuating the segregation the Court had ruled unconstitutional."<sup>14</sup> While today's voucher proponents no longer espouse segregationist goals or intent, these programs continue to have significant segregative effects.

Private schools across the country disproportionately serve white students. A 2018 report showed that, nationally, white students were "substantially overrepresented" in private schools, while Hispanic and Black students were underrepresented.<sup>15</sup> In Kentucky, the vast majority of private school students are white: 89% in 2018,<sup>16</sup> compared to 77% in public schools.<sup>17</sup> Private school voucher programs funnel public funding to this inequitable system, exacerbating racial segregation of students.

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<sup>12</sup> See, e.g., Corey DeAngelis & Patrick J. Wolf, *Private School Choice and Character: More Evidence from Milwaukee* 24–25 (Univ. of Ark. Dep't of Educ. Reform (EDRE), Working Paper no. 2019-03, 2019), <https://tinyurl.com/3ruvp9pn> (acknowledging an "important limitation" of the study is that the students "were not randomly assigned vouchers to attend private schools").

<sup>13</sup> See Kern Alexander & M. David Alexander, *American Public School Law* 219 (8th ed. 2012).

<sup>14</sup> Raymond Pierce, *The Racist History of "School Choice,"* *Forbes* (May 6, 2021), <https://tinyurl.com/2m4cuzrx>; see also Steve Suitts, *Overturning Brown: The Segregationist Legacy of the Modern School Choice Movement* (2020).

<sup>15</sup> Jongyeon Ee et al., *Private Schools in American Education: A Small Sector Still Lagging in Diversity* 15 (UCLA Civil Rights Project, Working Paper, 2018), <https://tinyurl.com/surr7hfr>.

<sup>16</sup> To determine this percentage, Public Funds Public Schools generated Kentucky student counts by race weighted for overall population using an "SAS" dataset for the 2017–2018 school year compiled by the National Center for Education Statistics. See *Private School Universe Survey*, Nat'l Ctr. for Educ. Statistics, <https://tinyurl.com/2hwxetpt> (last visited Sept. 10, 2021).

<sup>17</sup> See *Common Core of Data: America's Public Schools*, Nat'l Ctr. for Educ. Statistics, <https://tinyurl.com/2n32scxw> (last visited Sept. 10, 2021) (table showing number of students by race in Kentucky public schools).

A report from the Center for American Progress presents Indiana's current voucher program as a "case study" in the segregating effects that persist even in the absence of overt racial motivation: "Indiana's voucher program increasingly benefits higher-income white students, many of whom are already in private schools, and diverts funding from all other students who remain in the public school system."<sup>18</sup> Indeed, around 60% of Indiana voucher recipients come from white families, and around 50% have never attended a public school. *Id.* Meanwhile, Black students' participation in Indiana's program has declined from 24% to 12% since its inception in 2013. *Id.*

Voucher programs can exacerbate existing segregation. A Century Foundation study established that Black students in Louisiana generally relied on vouchers to exit school systems in which they were overrepresented only to attend private schools where the same was true, while white students tended to leave public schools where their race was underrepresented to join schools where it was the opposite.<sup>19</sup> As a result, "[o]nly a third of all voucher transfers in [the program] resulted in more integrated public and private schools, while the other two-thirds . . . exacerbated segregation in one or both sectors." *Id.* at 17. The study concluded that "voucher programs on balance are more likely to increase school segregation than to decrease it or leave it at status quo." *Id.* at 2.

### **III. Voucher programs facilitate discrimination and harm vulnerable students.**

Public schools are obligated to enroll and meet the needs of each and every student according to the mandates of state and federal law. Although voucher programs receive public funding, private schools participating in these programs can deny

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<sup>18</sup> Chris Ford et al., Ctr. for Am. Progress, *The Racist Origins of Private School Vouchers* 8 (2017), <https://americanprogress.org/wp-content/uploads/2017/07/VoucherSegregation-brief2.pdf>.

<sup>19</sup> Halley Potter, Century Found., *Do Private School Vouchers Pose a Threat to Integration?* 16 (2017), <https://tinyurl.com/xah7p2mv>.

admission, disenroll, discipline, or refuse necessary services to students for almost any reason—including those that are outright discriminatory.<sup>20</sup>

**A. Students with disabilities**

To ensure the unique needs of students with disabilities are met by their public schools, and to prevent their exclusion or segregation, federal law provides three sets of statutory protections. *First*, the Individuals with Disabilities Education Act (“IDEA”) ensures public school students receive a “free appropriate public education” (“FAPE”), including a detailed, written “individualized education program” (“IEP”) and services delivered by certified special education teachers. 20 U.S.C. §§ 1401(26)(A), 1412(a)(1), (a)(4), (a)(14)(C), 1414(d). The IDEA also protects students with disabilities from segregation within the school system by requiring, to the maximum extent appropriate, that their education take place together with their non-disabled peers in the “least restrictive environment” (“LRE”). 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 104.34. Additionally, the IDEA protects students from discipline, such as lengthy suspension or expulsion, based on behavior caused by their disabilities. 20 U.S.C. § 1415(k)(1)(E)–(G); 34 C.F.R. §§ 300.530–.536. Finally, the IDEA gives parents the right to request a due process hearing to resolve special education disputes. 20 U.S.C. §§ 1415(b), (f); 34 C.F.R. § 300.507(a)(1).

*Second*, and independently, Section 504 of the Rehabilitation Act prohibits disability-based discrimination in programs or activities that receive money from the U.S. Department of Education. 34 C.F.R. § 104.4(a). Section 504 also requires school districts to provide all eligible students with disabilities a FAPE in the LRE, 34 C.F.R. §§

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<sup>20</sup> See, e.g., Kimberly Quick, Century Found., *Second-Class Students: When Vouchers Exclude* (Jan. 11, 2017), <https://tinyurl.com/4ruaxvve>.

104.33(a), 104.34(a), and it applies to a broader range of students than the IDEA, *see* 29 U.S.C. §§ 705(20), 794; 34 C.F.R. § 104.3(j). *Third*, Title II of the Americans with Disabilities Act (“ADA”) prohibits disability-based discrimination by state and local governments, including public schools, and requires that public schools be physically accessible. 42 U.S.C. §§ 12131(1), 12132; 28 C.F.R. § 35.130(a). State laws, including Kentucky’s, also provide substantial protections to students with disabilities in public schools. *See, e.g.*, KRS 157.195–157.290.

When students with disabilities use vouchers to attend private schools, they forego the vast majority of these protections. They lose the right to an individualized education designed to meet the needs of each eligible student, as well as protection against unfair discipline and intra-school segregation. *See* 20 U.S.C. §§ 1412(a)(10), 1415(k)(1)(E)–(F); 29 U.S.C. § 794(b)(1).<sup>21</sup> And parents typically give up their rights under IDEA to receive notification of, provide input on, and seek judicial remedies regarding most changes to their children’s education and services.<sup>22</sup> Often, there is no notice to parents of the loss of these rights. GAO, *Notified*, *supra* note 21, at 24–29.

Finally, Title II of the ADA does not apply to private schools. While some private schools are covered by Title III of the ADA, which prohibits discrimination by public accommodations, that statute neither limits private schools’ ability to deny enrollment to students with disabilities nor requires them to provide an appropriate

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<sup>21</sup> *See also* U.S. Gov’t Accountability Office, *Private School Choice: Federal Actions Needed to Ensure Parents Are Notified About Changes in Rights for Students with Disabilities* 8-9, Tbl.2 (2017), <https://tinyurl.com/ye5v5vzd> (“GAO, *Notified*”) Nat’l Council on Disability, *Choice & Vouchers— Implications for Students with Disabilities* 59–66 (2018), <https://tinyurl.com/y6tqe8r7>; Claire Raj, *Coerced Choice: School Vouchers and Students with Disabilities*, 68 Emory L.J. 1037, 1059 (2019).

<sup>22</sup> *See* GAO, *Notified*, *supra* note 21, at 9, Tbl.2; Raj, *supra* note 21, at 1058–59; U.S. Dep’t of Educ., *Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools* 30 (2011), [tinyurl.com/s6ww83kw](https://tinyurl.com/s6ww83kw).



education or services. *See* 42 U.S.C. §§ 12181–12189. Moreover, Title III does not cover private religious schools at all, 42 U.S.C. § 12187, even though they comprise the majority of private schools nationwide<sup>23</sup> and in Kentucky.<sup>24</sup> In such schools, in the absence of state-law protections, students with disabilities are not entitled even to basic ADA accommodations such as accessible entrances, desks, and toilets.

Some private schools have admissions criteria that effectively preclude students with disabilities from attending, while others provide no special services or accommodations to students who need them.<sup>25</sup> Furthermore, those private schools that enroll students with disabilities may charge additional fees and costs for special education services that public schools are required to provide for free, which will often be borne out of pocket by parents rather than covered by a voucher.<sup>26</sup> In Florida, for example, the largest voucher is \$13,000 while private school tuition for a student with disabilities at most schools ranges from \$40,000 to \$100,000. *Id.* These costs are often prohibitive.

#### **B. English learners**

Federal law requires public schools to remove barriers that “impede equal participation by [English learner (“EL”)] students in [their] instructional programs.” 20 U.S.C. § 1703(f) (the Equal Educational Opportunities Act (“EEOA”)).<sup>27</sup> State

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<sup>23</sup> *See* Stephen P. Broughman et al., U.S. Dep’t of Educ., Inst. of Educ. Scis., *Characteristics of Private Schools in the United States: Results from the 2015–16 Private School Universe Survey 2* (2017), <https://tinyurl.com/6d22ubk5>.

<sup>24</sup> *Best Kentucky Private Schools* (2021), Private Sch. Rev., <https://tinyurl.com/2a29tnea> (last visited June 13, 2022).

<sup>25</sup> *See, e.g.*, Nat’l Council on Disability, *National Disability Policy: A Progress Report* 60 (2012), <https://tinyurl.com/rhtsbp4a>.

<sup>26</sup> Selene Almazan & Denise Stile Marshall, The Council of Parent Attorneys & Advocates, *School Vouchers and Students with Disabilities: Examining Impact in the Name of Choice* 16 (2016), <https://tinyurl.com/4c2jzy5e>.

<sup>27</sup> *See also Lau v. Nichols*, 414 U.S. 563, 566–68 (1974) (upholding regulations under Title VI of the Civil Rights Act that required public schools to take “affirmative steps” to address ELs’ educational needs).

educational agencies and public school districts are legally obligated to identify ELs who may need language assistance; sufficiently staff and support such programs; guarantee equal opportunities to participate in all curricular and extracurricular activities; avoid unnecessary segregation; monitor and evaluate students' progress; and appropriately communicate with parents who do not speak English, among other requirements.<sup>28</sup>

But, the EEOA applies only to states and their public schools, and Title VI only to recipients of federal funding.<sup>29</sup> As of 2019, the majority of state voucher programs provided *no* protection against discrimination based on language proficiency for students.<sup>30</sup> HB 563 contains no bar on discrimination based on English proficiency.<sup>31</sup>

Private schools are not obligated to enroll all voucher students who apply and voucher schools may elect not to provide language assistance services, as two thirds of private schools participating in D.C.'s voucher program in 2017 did not.<sup>32</sup> Other barriers—including the difficulty in navigating the enrollment process for parents who

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<sup>28</sup> U.S. Dep't of Justice Civil Rights Div. & U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: English Learner Students and Limited English Proficient Parents* 8–9 (Jan. 7, 2015), <https://tinyurl.com/bpf4rjgm>.

<sup>29</sup> Julie F. Mead & Suzanne E. Eckes, Nat'l Educ. Pol'y Ctr., *How School Privatization Opens the Door for Discrimination* 10 (2018), <https://tinyurl.com/t5z8j7ws>. To be sure, state educational agencies are themselves subject to Title VI, and some commentators have argued that instituting a publicly funded voucher program without providing for meaningful access for ELs constitutes a denial of a state "benefit" through a "contractual or other arrangement" in violation of Title VI. *Id.* at 10–11. Nevertheless, a majority of voucher program statutes at most incorporate the language of Title VI, thereby tying Title VI protections to the receipt of federal funds. *Id.*

<sup>30</sup> Bayliss Fiddiman & Jessica Yin, Ctr. for Am. Progress, *The Danger Private School Voucher Programs Pose to Civil Rights* 3, 9–11 (May 13, 2019), <https://www.americanprogress.org/article/danger-private-school-voucher-programs-pose-civil-rights/>.

<sup>31</sup> Anna Baumann, *HB 563 Diverts Public School Dollars to Unaccountable Private Entities*, Ky. Ctr. for Econ. Pol'y (Mar. 24, 2021), <https://tinyurl.com/5ax73696>.

<sup>32</sup> See Tony Hana, *How School Vouchers Affect English Learners*, New America (July 24, 2017), <https://tinyurl.com/27u75kks>; see also Mandy McLaren & Emma Brown, *Trump Wants to Spend Millions More on School Vouchers. But What's Happened to the Millions Already Spent?*, Wash. Post (July 15, 2017), <https://tinyurl.com/m398rsew>.

are not native English speakers—may also result in the exclusion of ELs from voucher schools that might admit them. *See* Hana, *supra* note 32.

**C. Students experiencing homelessness or housing insecurity**

In January 2019, Kentucky had 23,964 known homeless students; all but eleven were enrolled in a Kentucky public school the prior year.<sup>33</sup> The federal McKinney-Vento Homeless Assistance Act of 1987 provides protection to all homeless students eligible for public education to ensure they can enroll, remain, and succeed in school. 42 U.S.C. §§ 11431–11435. State educational agencies and local school districts must develop policies to identify barriers to identification, enrollment, and retention of homeless students, including fees, fines, transportation, and absences, and public schools must have staff trained in the identification and education of homeless students. 42 U.S.C. §§ 11432(g)(1)(I)-(J), (g)(6)(A)(ix). Kentucky law mandates public schools provide these students a range of accommodations to promote successful completion of school. KRS 156.60(1)(p) (for example, schools must award credit for courses completed in a previous school).

Neither the McKinney-Vento Act nor KRS 156.60(1)(p) applies to private schools. The barriers to entry in private schools for homeless students are evident in the fact that the tens of thousands of homeless students in Kentucky are enrolled in public schools. *See* Snow, *supra* note 33.

**D. LGBTQ students and families**

Federal law protects LGBTQ students enrolled in public schools against discrimination based on sexual orientation and gender identity, but this does not apply to

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<sup>33</sup> David B. Snow, *School Districts Help Local Homeless Students in Many Ways*, Paducah Sun (Apr. 17, 2021), <https://tinyurl.com/5jchf2es>.

private schools unless they receive federal financial assistance.<sup>34</sup> Even with the receipt of federal dollars, private schools run by religious organizations may be exempt from Title IX’s sex-discrimination prohibition. *See* 20 U.S.C. § 1681(a)(3). Many private schools enforce explicit anti-LGBTQ policies, and many state laws, including Kentucky’s HB 563, expressly allow voucher schools to base admissions decisions on their religious beliefs, which often oppose homosexuality.<sup>35</sup> As a result, many private schools receiving voucher funds openly discriminate against LGBTQ students and families.<sup>36</sup>

#### **E. Religious minority students and families**

A host of federal protections prevent public schools from discriminating against students because of their religion, but no such requirements apply to private schools.<sup>37</sup> To the contrary, private schools can, and do, “discriminate against students in the enrollment process (particularly in regard to religion),” and “restrict student speech” regarding religious beliefs different from those espoused by the school.<sup>38</sup>

A large majority of private schools nationally are religious. Broughman et al.,

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<sup>34</sup> *See* 20 U.S.C. §§ 1681–1688; *Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, 86 Fed. Reg. 32,637 (June 22, 2021) (to be codified at 34 C.F.R. ch. 1); Mead & Eckes, *supra* note 29, at 11; *see also Bostock v. Clayton County*, 140 S. Ct. 1731, 1741–42 (2020).

<sup>35</sup> *See* Kevin G. Welner & Preston C. Green, *Private School Vouchers: Legal Challenges and Civil Rights Protections* 8 (UCLA Civil Rights Project, Working Paper, 2018), <https://tinyurl.com/76zv45k8>; Adam Mengler, *Public Dollars, Private Discrimination: Protecting LGBT Students from School Voucher Discrimination*, 87 Fordham L. Rev. 1251, 1264 (2018) (quoting Ariz. Rev. Stat. § 15-2404 (2018)); HB 563 § 15.

<sup>36</sup> *See, e.g.,* Leslie Postal & Annie Martin, *Anti-LGBT Florida Schools Getting School Vouchers*, Orlando Sentinel (Jan. 23, 2020), <https://tinyurl.com/h4uu78t8>; Brian Gordon, *NC Religious Schools with Anti-LGBTQ Policies Receive Top Opportunity Scholarship Dollars*, Citizen Times (Aug. 27, 2020), <https://tinyurl.com/3z4kt6ez>.

<sup>37</sup> *See* 42 U.S.C. §§ 2000c–c-9, 2000d–d-7; Cynthia Brougher, Cong. Rsch. Serv., R42626, *Religious Discrimination in Public Schools: A Legal Analysis* 5 (July 25, 2021), <https://tinyurl.com/26vded4p>; *Johnson v. Pinkerton Acad.*, 861 F.2d 335, 337 (1st Cir. 1988). Public school-sponsored religious speech is also prohibited under the Establishment Clause.

<sup>38</sup> Derek W. Black, *Preferencing Educational Choice: The Constitutional Limits*, 103 Cornell L. Rev. 1359, 1390 (2018); *see also* Fiddiman & Yin, *supra* note 30.

*supra* note 23, at 2. Likewise in Kentucky, 77% of private schools are religiously affiliated, the majority with Christianity. *Best Kentucky Private Schools*, *supra* note 24. Out of 152 schools in the eight counties covered by HB 563 § 7(2)(b), 134 schools explicitly state on their website or that of their affiliated supervisory entity that they restrict student admissions on one or more bases, including religion. (TR 708 ¶ 13.) Thus, religious minority students may have limited, if any, opportunities to attend private schools, and may face discrimination if they are admitted. *See, e.g., id.* ¶ 15.

**IV. Voucher programs support private schools with minimal quality standards, accountability to taxpayers, or governmental oversight.**

Although funded with public dollars, private schools participating in voucher programs are generally subject to only a fraction of the quality and accountability standards imposed on public schools. A recent GAO report found that only eleven out of twenty-two states with tax credit voucher programs required that schools administer academic tests, with only three specifying the test must be the same as in public schools.<sup>39</sup> Remarkably, eight of the twenty-two programs did not even require that schools receiving vouchers meet the minimal standard of state accreditation. *Id.* at 14. And a mere twelve required that teachers meet minimal professional qualifications. *Id.* Only five states with voucher programs in 2020 required that all teachers in participating schools hold a license.<sup>40</sup> Voucher schools may not be required to disclose whether their teachers possess sufficient skills and training to provide special education instruction. *See, e.g.,* GAO, *Notified*, *supra* note 21, at 23. A review of voucher programs in twenty-

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<sup>39</sup> *See* U.S. Gov't Accountability Office, *Private School Choice: Accountability in State Tax Credit Scholarship Programs* 14–15 (2019), <https://tinyurl.com/w8mauz7r> (“GAO, *Accountability*”).

<sup>40</sup> Arianna Prothero & Alex Harwin, *Private School Choice Programs Fall Short on Transparency, Accountability*, EducationWeek (Feb. 28, 2020), <https://tinyurl.com/j6spf4ac>.

nine states found only four required public reporting of demographic data on participating students and only eight required all participating private schools to publicly report the results of state and national tests. Prothero & Harwin, *supra* note 40. It concluded that “few [voucher programs] require private schools to follow standard policies used to ensure transparency and accountability in the nation’s public schools.” *Id.*

Moreover, few safeguards are in place to protect against misuse of voucher funds. Few of the programs analyzed by the GAO required financial audits or reviews. *See* GAO, *Accountability*, *supra* note 39, at 17. A government audit in Arizona uncovered that in just five months in 2015 and 2016, more than \$102,000 was misspent in contravention of program rules.<sup>41</sup> And in Florida, a press investigation revealed that voucher schools hired staff with criminal convictions, falsified records of health and safety inspections, and placed students in facilities with exposed wiring and no books, computers, or furniture.<sup>42</sup>

**V. Voucher programs, including tax credit voucher schemes, harm public education.**

Kentucky public schools, like those in other states, receive state funding at least partly based on the number of students enrolled. Thus, when students leave a public school district, that district’s funding is reduced accordingly. Voucher programs provide incentive for students to leave public schools and attend private schools.

But, public schools have substantial fixed costs of operation—including facilities repair and maintenance, teacher and staff pensions, long-term contracts, and more.

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<sup>41</sup> *See* State of Ariz., Office of the Auditor Gen., *Arizona Department of Education: Department Oversees Empowerment Scholarship Accounts Program Spending, but Should Strengthen its Oversight and Continue to Improve Other Aspects of Program Administration* 13 (2016), <https://tinyurl.com/uu44hkff>.


<sup>42</sup> Leslie Postal et al., *Florida Private Schools Get Nearly \$1 Billion in State Scholarships with Little Oversight, Sentinel Finds*, Orlando Sentinel (Oct. 17, 2017), <https://tinyurl.com/2f2z4583>.

Because voucher students exit their public school districts from different schools, grade levels, and classrooms, school districts often cannot proportionally reduce those fixed costs to compensate for the loss in funding.<sup>43</sup>

Voucher programs can also concentrate higher-need students—whose education tends to be more costly—in the public school system. As noted above, private schools can refuse to admit or serve students with disabilities, English learners, students who are homeless, and others who may require increased resources to learn. And even when those students are admitted into private schools, they may be “counseled out” or expelled if they are deemed “high cost”<sup>44</sup> or as a result of perceived disciplinary problems stemming from a disability.<sup>45</sup> In some cases, students who exit the public school system return once parents find that their children are not receiving adequate services or that continued enrollment in private school requires they waive crucial legal protections. *See, e.g., Nat’l Council on Disability, Choice & Vouchers, supra* note 21, at 35. Public schools overwhelmingly serve these higher-need populations, and voucher programs can increase this disproportionality. Public schools need more, not fewer resources in order to educate all students, particularly their most vulnerable.

#### CONCLUSION

This Court should affirm the judgment of the circuit court.

  
Bethany A. Breetz

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<sup>43</sup> *See, e.g.,* Stuart S. Yeh, *The Cost-Effectiveness of Five Policies for Improving Student Achievement*, 28 Am. J. Evaluation 416, 427 (2007).

<sup>44</sup> Luis Bénveniste et al., *All Else Equal: Are Public and Private Schools Different?* 114 (2013).

<sup>45</sup> *See, e.g.,* Dana Goldstein, *Special Ed School Vouchers May Come With Hidden Costs*, N.Y. Times (Apr. 11, 2017), <https://tinyurl.com/y89cnvzq>; Raj, *supra* note 21, at 1059.