

**IN THE TENNESSEE SUPREME COURT**

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METROPOLITAN GOVERNMENT	)	
OF NASHVILLE AND DAVIDSON	)	
COUNTY, et al.,	)	
	)	Case No.
Plaintiffs-Appellees,	)	M2020-00683-SC-R11-CV
	)	
v.	)	
	)	Court of Appeals Case No.
TENNESSEE DEPARTMENT OF	)	M2020-00683-COA-R9-CV
EDUCATION, et al.,	)	
	)	Davidson County Chancery
Defendants-Appellants,	)	Court Case No. 20-0143-II
	)	
and	)	Appeal by Permission under
	)	Tenn. R. App. P. 11
NATU BAH, et al.,	)	
	)	
Intervening Defendants-Appellants.	)	

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**BRIEF OF AMICI CURIAE EDCHOICE, INC. AND  
FOUNDATION FOR EXCELLENCE IN EDUCATION, INC. IN  
SUPPORT OF DEFENDANT-APPELLANTS  
AND INTERVENING DEFENDANTS-APPELLANTS**

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## INTEREST OF *AMICI CURIAE*

EdChoice, Inc. is a 501(c)(3) nonpartisan, nonprofit organization and a national leader in educational choice research, legal defense and education, fiscal analysis, policy development, and educational training and outreach. The mission of EdChoice is to advance educational freedom and choice for all as a pathway to successful lives and a stronger society. EdChoice believes that all families—regardless of race, origin, residence, or family income—should have a full and unencumbered opportunity to choose schools and other educational resources that work best for their children. The public good is well served when children have a chance to learn at their maximum potential, regardless of the environment where that learning occurs—public or private, near or far, religious or secular. When children find their best fit for education and succeed, they will thrive as adults. They are our future.

The Foundation for Excellence in Education, Inc. (“ExcelinEd”) is a nonprofit, nonpartisan organization founded in 2008 whose mission is to build an American educational system that equips every child to achieve his or her individual potential. ExcelinEd designs and promotes student-centered education policies, creates model legislation, and provides rule-making expertise, implementation assistance, and public outreach.

None of the parties to this case nor counsel for any party authored this brief, in whole or in part, and no entity or person other than *amici curiae* and their members made any monetary contribution for the preparation or submission of this brief.

EdChoice and ExcelinEd respectfully ask this Court to overturn the ruling of the Court of Appeals and hold that the Tennessee Education Savings Account Pilot Program (“ESA Pilot”) is not in conflict with the Tennessee Constitution’s Home Rule provision. Tenn. Const. art. XI § 9.

## SUMMARY

Any discussion of school choice programs should begin with reference to the rights of parents to choose what they deem to be the proper education for their children, best aligned to meeting their own children’s needs. This fundamental principle was established by the U.S. Supreme Court in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925):

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

*Id.* at 535.

If fundamental principles elucidated by the U.S. Supreme Court in *Pierce* are to have meaning, parents must have a reasonable expectation that they should be able to access funds from the state that were appropriated to fund their children’s K-12 education. The primary purpose of appropriating money for K-12 education is to fund the education of children residing in the state; the schools where those funds are used are an important, but secondary, consideration.

When the Tennessee legislature enacted the ESA Pilot, the number of state-based education savings account and voucher programs that year swelled to 34. See EdChoice America’s School Choice Programs by Dates Enacted and Launched, *available at* <https://www.edchoice.org/%20school%20choice/enacted-and-launched-table/> (last visited March 4, 2021). Those education savings accounts and vouchers are found in 17 states, plus the District of Columbia and Puerto Rico, and as a result, 278,300 children are accessing the education of their family’s choice. EdChoice, *School Choice in America Dashboard*, <https://www.edchoice.org/school-choice/school-choice-in-america/#filter-table> (last visited March 4, 2021).

At least one state has enacted a new school choice program every year since 2003, and nearly 1.3 million students and families are currently being served by 67 school choice programs in 29 states, the District of Columbia, and Puerto Rico. *Id.* These programs include tax-credit scholarships, vouchers, education savings accounts, and individual tax credits or deductions. See generally EdChoice, *ABCs of School Choice: The Comprehensive Guide to Every Private School Choice Program in America* (2021 ed.), at 7-12, 135 (hereinafter “*ABCs of School Choice*”), <https://www.edchoice.org/wp-content/uploads/2021/01/2021-ABCs-of-School-Choice-WEB-2-24.pdf>.<sup>1</sup>

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<sup>1</sup> Vouchers give parents the freedom to choose a private school for their children, using all or part of the public funding set aside for their children’s education. Education savings accounts (“ESAs”) allow parents to withdraw their children from public district or charter schools and receive a deposit of public funds into government-authorized savings accounts with restricted, but multiple, educational uses. Tennessee’s

As the research summarized in Section I of the argument demonstrates, *see infra*, the benefits of school choice programs extend beyond participating students and their families. Public schools and taxpayers benefit fiscally. The community benefits from students who learn greater political tolerance and civic skills and exhibit increased future political participation and volunteerism. Even the businesses that ultimately will employ the participating students benefit from a better-educated workforce.

Critics have argued that the literature is not sufficiently clear on the benefits of school choice, or alternatively that some studies have shown such benefits to be marginal. The crux of these arguments is that school choice programs should not exist while any doubt remains as to their value, despite (1) the significant empirical research finding that school choice improves cognitive and non-cognitive outcomes for participants and (2) parents are continuing to seek choice options for their children.

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ESA Pilot allows multiple educational uses after private school tuition is funded. Tax-credit scholarships grant taxpayers full or partial tax credits when they donate to nonprofits that provide private school scholarships. Individual tax credits and deductions allow parents to receive state income tax relief for approved educational expenses, which can include private school tuition, books, supplies, computers, tutors, and transportation. *ABCs of School Choice*, at 3-4. These programs are often collectively referred to as “school choice programs” or “student-aid programs.” “School choice” is a more expansive term that includes private choice programs, home schooling subsidies, and other means of enhancing educational options for all children.

If educational choice programs were failing families, it is unlikely that state legislators would have the will and constituent support to enact and expand them across the nation. This is true particularly in Tennessee, where legislators have sacrificed careers and devoted countless hours over several years to bring school choice opportunities to families in need.

## **ARGUMENT**

### **I. Social Science Research Reveals Why Parents Seek School Choice.**

As the number of educational choice programs and participants has increased nationwide, the body of empirical research on school choice has similarly expanded. Studies of choice programs throughout the United States overwhelmingly reflect a common conclusion: choice leads to measurable educational benefits for most students. *See generally* EdChoice, *The 123s of School Choice: What the Research Says About School Choice Programs in America* (2020 ed.) (hereinafter *123s of School Choice*), available at <https://www.edchoice.org/research/the-123s-of-school-choice/> (last visited March 4, 2021). Research demonstrates that school choice improves academic outcomes and long-term educational attainment for participating students.

#### **A. Research Demonstrates That School Choice Improves Academic Outcomes and Long-term Educational Attainment for Participating Students.**

School choice programs improve academic outcomes. Several empirical studies have examined the effect of school choice on student

performance using the random-assignment method, a rigorous standard for ensuring the validity of social science research.<sup>2</sup> *123s of School Choice* at 10. Of 17 empirical studies on program participant test scores to date, 11 found choice improves student outcomes and four found no visible effect. EdChoice, *Empirical Research Literature on the Effects of School Choice*, at Slide 9, <https://www.edchoice.org/school-choice/empirical-research-%20literature-on-the-effects-of-school-%20choice/> (last visited March 4, 2021). Two analyses of Louisiana’s voucher program and one analysis of Milwaukee’s voucher program found a negative average outcome for some or all groups of students. *Id.* at Slide 10.

For example, a 2013 random-assignment study of Washington D.C.’s voucher program found statistically significant achievement gains in reading. Patrick J. Wolf, et al., *School Vouchers & Student Outcomes: Experimental Evidence from Washington, D.C.*, 32 JOURNAL OF POLICY ANALYSIS & MANAGEMENT 246-70 (32:2 Feb. 2013), <https://dx.doi.org/10.1002/pam.21691>. The study also supported prior research from other scholars showing that “private schools provide students with an educational climate that encourages school completion either through the intervention and expectations of school faculty or by having similarly motivated and achieving peers.” *Id.* at 265.

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<sup>2</sup> Random-assignment studies are possible where there are more applicants for a choice program than there are slots, generally resulting in a random lottery for the slots. Students who win the lottery and are offered choice can be compared to those who were not offered choice. Any systematic differences can be attributed to the offer of choice alone, because nothing separates the group but the offer of choice and randomness. *123s of School Choice*, at 13-14

A long-term study of a privately funded voucher program for low-income elementary school students in New York City in the late 1990s found that African American students who were offered vouchers in elementary school were 20% more likely to attend college within three years of their expected high school graduation date. Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Choice* 8 (3d ed. 2013), available at <https://files.eric.ed.gov/fulltext/ED543112.pdf>. They were also 25% more likely to attend college full-time and 130% more likely to attend a selective four-year college. *Id.* Three recent random-assignment studies of New York City voucher programs found that school choice has a positive effect on college enrollment and attainment rates for some or all participating students and no negative effect for any student group. Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Choice* (4th ed. 2016) (hereinafter “2016 Forster Report”), available at <http://www.edchoice.org/wp-content/uploads/2016/05/A-Win-Win-Solution-The-Empirical-Evidence-on-School-Choice.pdf>.

The most recent analysis of this program found significant effects on high school graduation and college enrollment rates among students from moderately disadvantaged households. Albert Cheng & Paul E. Peterson, *Experimentally Estimated Impacts of School Vouchers on Educational Attainments of Moderately and Severely Disadvantaged Students*, Program on Education Policy and Governance Working Paper Series, PEPG 20-02 (2020), available at [https://www.hks.harvard.edu/sites/default/files/Taubman/PEPG/research/PEPG20\\_02.pdf](https://www.hks.harvard.edu/sites/default/files/Taubman/PEPG/research/PEPG20_02.pdf).

As the New York analyses illustrate, academic attainment is as important as academic outcomes. This is particularly relevant in Tennessee, as a majority of students in Shelby County and Metro Nashville public schools are not prepared for college or careers after graduation. Tennessee Department of Education, *State Report Card* (2018 – 2019) (released Nov 25, 2019), available at <https://reportcard.tnedu.gov/state/0> (last visited Mar. 9, 2021).

Out of six studies of student attainment, four have found that school choice program participants experienced a positive increase in educational attainment, as measured by high school graduation rates, college enrollment, and college completion. *Empirical Research Literature on the Effects of School Choice*, at Slide 14. Two analyses found no visible effect, and none found negative effects for any groups of students. *Id.*

Overall, the empirical evidence demonstrates that enhanced choice leads to largely positive effects on student outcomes. Such outcomes are the hallmark of responsible public policy.

Parents whose children are enrolled in Metro Nashville and Shelby County public schools have an interest in Tennessee’s ESA Pilot. In the weeks between the launch and abrupt closure of the program, the Department of Education received ESA Pilot applications for 2,526 students. See Laura Testino, “For Families in Davidson and Shelby Counties, Voucher Ruling Brings Joy and Pain,” MEMPHIS COMMERCIAL APPEAL (May 5, 2020) (quoting Tennessee Department of Education) <https://www.commercialappeal.com/story/news/education/2020/05/05/tennessee-education-school-vouchers-esa-families-reactions/3084598001/>.

According to the latest Tennessee Report Card measuring performance in public schools, only 26.4% of students in Metro Nashville public schools are achieving at or above grade level; specific groups of students are at much lower achievement levels. Only 18.5% of Black, Hispanic, and Native American students, 16.3% of English language learners, 15.5% of economically disadvantaged students, and 9.8% of students with disabilities are achieving at grade level. In Shelby County public schools, 22.7% of students achieve at or above grade level. Of those students, 21.1% of English language learners, 20.1% of Black, Hispanic, and Native American students, 17.3% of economically disadvantaged students, and 12.9% of students with disabilities achieve at grade level. Tenn. Report Card, Metro Nashville Public Schools, <https://reportcard.tnedu.gov/districts/190/achievement>, and Shelby County, <https://reportcard.tnedu.gov/districts/792/achievement> (last accessed Mar. 4, 2021).

Students who are part of the over 75% of children achieving below grade level in Metro Nashville and Shelby County public schools have the most compelling and immediate need to find other options for education. The ESA Pilot offers a chance for them to access those options, and research affirms the likelihood of their improved academic outcomes.

**B. Parents Consistently Express a Strong Desire for School Choice, with Strongest Support Found Within Minority Communities Long Underserved by the Traditional System.**

Parents know what they want for their children, but they often are not able to access the type of educational environment they most desire.

EdChoice’s comprehensive school choice public opinion survey, conducted annually, has shown a consistent desire for private school options despite a large majority of children remaining in public district schools. Paul DiPerna, Andrew D. Catt, & Michael Shaw, 2020 *Public Opinion on K–12 Education During the COVID-19 Pandemic* (2020), available at <https://www.edchoice.org/wp-content/uploads/2020/12/2020-SIA-Wave-2-Final.pdf>. In the 2020 survey, when asked what type of school they would select if given the option, parents’ first choice was private school (41%), followed by public district school (33%), public charter school (13%), and home schooling (12%). *Id.* at 61. Enrollment patterns show that many parents cannot access schools of choice: 83% of students in the United States attend a district school, while only 8% attend private schools, and 5% attend public charters. *Id.* Parent demands to access the schools they otherwise could not afford has led to a large increase in the number of states implementing school choice initiatives in the past decade.

Of the 30 surveys of parents whose children participate in school choice programs, 28 found significantly higher rates of parental satisfaction, one study found no difference, and two found that parents were less satisfied. *Empirical Research Literature on the Effects of School Choice*, at Slide 19.

The largest-ever survey of parents participating in a private school choice program found that a school’s religious environment and instruction was the most important factor for parents choosing a school. Jason Bedrick & Lindsey Burke, *Surveying Florida Scholarship Families* (2018), available at <https://www.edchoice.org/wp->

<content/uploads/2018/10/2018-10-Surveying-Florida-Scholarship-Families-byJason-Bedrick-and-Lindsey-Burke.pdf>. When the surveyors asked over 14,000 parents participating in Florida’s tax-credit scholarship program which factors most influenced their decision to choose a particular school, 66% said “religious environment/instruction” and 52% said “morals/character/values instruction.” *Id.* at 18. These two factors outranked other considerations—the next three highest- ranked options were “safe environment” at 39%, “academic reputation” at 34%, and “small classes” at 31%. *Id.*

**C. Public School Students Exposed to School Choice Are Not Harmed and Academic Outcomes Improve.**

A philosophical foundation of school choice is that it should improve education for children in both private and public schools. When district schools know that students, regardless of income, can choose to attend school elsewhere, they have a powerful incentive and renewed interest in improving performance to retain and attract students. Rigorous academic research supports this theory. Empirical studies show that the positive effect of school choice on public school academic performance is at least as strong as the effect on children who are offered choice. Of 28 studies that used appropriate methodological techniques, 26 have found that school choice improves test scores in public schools, one found no visible effect, and one found a negative effect. *Empirical Research Literature on the Effects of School Choice*, at Slide 25.

This body of research uses various statistical tools—such as measuring distance to choice schools, computing density of choice schools, and estimating the percentage of students in a district or public school

eligible for choice programs—to determine competitive pressures. Several recent studies yielded positive results. For example, a study of Florida’s tax-credit scholarship program used novel variables to measure private school competition (e.g., using the number of nearby houses of worship as a proxy for private school competition). *2016 Forster Report*, at 17. It found a positive effect on public schools in both reading and math for five separate measures of private school competition. *Id.* Another study found that when low-performing schools became eligible for vouchers, changes in the schools’ institutional practices resulted in improved student performance. *Id.* Overall, the overwhelming majority of studies have found that school choice positively impacts the academic performance of public schools exposed to choice. *123s of School Choice*, at 32. Claims by opponents that Tennessee’s ESA Pilot will cause irreparable harm to public schools in Shelby County and Metro Nashville are broadly overstated. These studies demonstrate that allowing public funds to flow to families for use at private schools will cause an enhanced interest in providing quality education and will increase the educational quality at both public and private schools.

**D. School Choice Has a Positive Impact on Civic Values and Practices and Racial and Ethnic Integration.**

Another line of research examines the impact of school choice on civic values and practices. Of 11 studies to date, six found school choice has a positive impact, five showed no visible effect, and no study has shown school choice to have a negative effect. *123s of School Choice*, at 42. In one study, researchers found higher levels of political tolerance,

civic skills, expected future political participation, and volunteerism in participants in Milwaukee's voucher program when compared to public school students. *2016 Forster Report*, at 31. The study also found the positive effect to be significantly stronger in religious schools than in other private schools. *Id.*

A 2019 study of the same program analyzed its long-term impact on student criminal records, finding a correlation between exposure to the voucher program in grades 8 and 9 and decreased criminal convictions and lower rates of paternity suits by ages 25 through 28, especially for young men. Corey DeAngelis & Patrick Wolf, *Private School Choice and Character: More Evidence from Milwaukee (February 26, 2019)*, *EDRE Working Paper No. 2019-03*, available at SSRN: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3335162](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335162). The study found that students in the voucher program are less likely to commit drug and property crimes and become involved in paternity suits than students in Milwaukee's public schools. This effect was also greater for males than females. The authors caution that this study is only the third to delve deeply into the effect of voucher participation and on civic behavior and that additional studies are needed. Studies of the racial and ethnic composition of private and public schools have also shown that school choice improves integration. Six out of seven studies using student-level data have found that school choice has a positive impact on integration, while one study showed no effect. *123s of School Choice* at 49.

Social science research has produced statistically valid, reliable reasons why parents favor school choice and why including private

schools is important to parents. The human equation substantiates all that research: parents use student-aid programs to fund their children's education when their children are not thriving and need a school that is a better fit for their individual needs.

### **E. School Choice Saves Money for States and for School Systems.**

Opponents of school choice continue to assert that choice programs will spell financial ruin for public schools, but no evidence supports this assertion. Critics claim that students who remain in public schools will be harmed because these programs siphon funding from public schools. Even when the students are no longer present to educate, representatives of school districts argue that schools have fixed costs, such as building and maintenance, and that no costs are variable.

However, these same schools that argue all costs are fixed when students leave will also argue that all costs are variable when enrollment increases. If all costs were fixed, new students would not generate additional costs. Benjamin Scafidi, *The Fiscal Effects of School Choice Programs on Public School Districts* (Friedman Foundation for Educational Choice) (March 2012) <https://files.eric.ed.gov/fulltext/ED529881.pdf> (last accessed March 4, 2021). But whether enrollment goes up or down, the plea for more money is constant. Today, a new school choice program becomes a convenient reason for demanding more money, yet the truth is that public schools demand more money before, during, and after school choice programs are proposed—regardless of whether a school choice program is enacted.

With over two decades of results available, including 56 studies on the fiscal impact of school choice programs, 50 studies show that school choice has a net positive effect on public school funding, four studies show a cost-neutral effect, and only two studies have found that school choice programs generated increased net costs. *Empirical Research Literature on the Effects of School Choice*, at Slide 41.

## **II. School Choice Programs Are Targeted to Children and Families, Not Counties.**

### **A. The Supreme Court of the United States Found That Parents Are the Beneficiaries of School Choice Funding.**

The landmark voucher case, clarifying the constitutional underpinnings of school choice, was decided by the United States Supreme Court in 2002. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). Ohio enacted a voucher program for the children of Cleveland. The level of academic distress was serious and continuing. Only one in ten students could pass a basic proficiency exam. Of those who managed to stay in school and graduate, few were prepared to lead successful adult lives. *Id.* at 644.

There are startling comparisons between that voucher program, which was limited to families in only one city, and Tennessee's ESA Pilot program, which is limited to families in only two local education agencies (as defined by Tenn. Code Ann. § 49-1-103(2)).

In Shelby County, only two in ten students are at grade level academically. That number falls to less than two in ten for economically

disadvantaged students.<sup>3</sup> Only two in ten students are prepared to lead successful adult lives; that number falls to less than two in ten for students who are Black, Hispanic, or Native American, while only one in ten economically disadvantaged students are learning at grade level.<sup>4</sup> Tennessee Report Card, Shelby County Schools, <https://reportcard.tnedu.gov/districts/792/achievement> (last accessed March 4, 2021).

In Metro Nashville, less than three in ten students are at grade level; that number falls to two in ten for students who are Black, Hispanic, or Native American. Only three in ten students are prepared to lead successful adult lives past graduation; that number falls to two in ten for students who are Black, Hispanic, or Native American, while less than two in ten economically disadvantaged students are prepared for life after high school. Tennessee Report Card, Metro Nashville Public Schools, <https://reportcard.tnedu.gov/districts/190/achievement> (last accessed March 4, 2021).

The U.S. Supreme Court opined that Ohio was not attempting to coerce families to send their children to private religious schools. Families had multiple options for their children’s education—using a voucher to attend a private school was just one of many. *Zelman*, 536 U.S.

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<sup>3</sup> According to the Tennessee Department of Education’s Tennessee Report Card, “Academic Achievement shows whether students are performing on grade level on state exams.”

<sup>4</sup> According to the Tennessee Department of Education’s Tennessee Report Card, “Ready Graduate” measures whether students are ready for college and careers after high school.”

at 655. The same is true for both Shelby County and Metro Nashville schools. Both school districts offer multiple education options, including charter schools, magnet schools, and a variety of other personalized learning options. See Shelby County Schools, School Choice, *available at* <http://www.scsk12.org/schoolchoice/> (last accessed March 4, 2021); Shelby County Schools Charter Schools, *available at* <http://www.scsk12.org/charter/schools> (last accessed March 4, 2021); Metro Nashville Public schools, *School Options: Find the Best School for Your Child*, <https://www.mnps.org/school-options> (last accessed March 4, 2021).

It was significant to the U.S. Supreme Court in *Zelman* that voucher funding was given directly to families and children, and it was relevant that those families and children had educational options in their assigned public school districts. The Court said that the voucher provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice. *Zelman*, 536 U.S. at 662.

Although the Tennessee ESA Pilot is currently available only for children and families in two local education agencies, there is little doubt that the state's intent was to provide a lifeline to students whose public schools were drastically underperforming and who did not have access to higher performing alternatives that provided a good fit for those students. And although the program is a "pilot" for children residing

within only two local education agencies, the undeniable focus of this legislation was educational need. Public schools within the two local education agencies are trying to help students achieve better results, but nonetheless, there are high numbers of students who are not achieving in both local education agencies. This state program had to begin somewhere, and for many reasons, legislators decided the program could not apply across the state all at once. However, Tennessee's ESA Pilot will surely apply statewide within a short period of time after parents across the state see the program working in places most at need. It is common for school choice programs to expand regularly as demand from parents grows over time. The focus of Tennessee's ESA Pilot is children and families, not counties.

It is devastating for children and their families when children face lives of uncertainty after high school. Empowering parents with Tennessee's ESA Pilot to access multiple educational resources plus a school that is a better fit for the child, offering a chance at improved learning, is worth the effort for state government leaders. States become successful when the citizens of that state are successful and thriving.

**B. The First Modern Voucher, Geographically Targeted to Milwaukee, Survived a Constitutional Challenge Like Tennessee's Home Rule Provision.**

The first modern-day voucher was adopted for the City of Milwaukee in 1990 and survived two court challenges. In the second challenge, *Jackson v. Benson*, 218 Wis. 2d 835, 578 N.W.2d 602 (1998), the court reaffirmed part of the ruling in the prior case and said:

“Clearly, improving the quality of education and educational opportunities in Wisconsin is a matter of statewide importance. The best location to experiment with legislation aimed at improving the quality of education is in a first class city, a large urban area where the socioeconomic and educational disparities are greatest and the private school choices are most abundant.”

*Jackson*, 218 Wis. 2d at 889, 578 N.W.2d at 625 (quoting *Davis v. Grover*, 166 Wis. 2d 501, 480 N.W.2d 460 (1992)).

In 1992, Milwaukee faced educational achievement challenges similar to those found later in Cleveland, and now in Shelby County and Metro Nashville. The state had to meet a multi-pronged test to justify applying the voucher program to only one city. Although the test and language of the home-rule prohibition against passing “private or local legislation” is not identical to Tennessee’s, *compare id. with* Tenn. Const. art. XI § 9, the concerns brought to the Wisconsin court’s attention are aligned with those brought to this Court’s attention in this case. On the one hand, public schools believe they are unlawfully targeted by the legislation; on the other hand, Tennessee’s ESA Pilot supporters believe children and families, not counties or schools, were targeted by legislation that is narrowly applied to address a statewide concern that K-12 education is failing to meet the needs of too many children in Tennessee. The Wisconsin Supreme Court decided to accept the argument that, given the extreme educational needs of children in Milwaukee—the largest city in the state—it was impossible to disagree this was a problem for the state as a whole. The “experimental” status of Milwaukee’s voucher (like the Tennessee ESA’s “pilot” status) made it

clear to the Wisconsin Supreme Court that the Milwaukee voucher was intended as a statewide program that started small and would expand, if it worked. It did. Today Wisconsin has four voucher programs, and one individual tuition state tax deduction. *ABCs of School Choice*, at 12.

A recent study of an Illinois' school choice program offers further insight into why choosing two consistently underperforming county school districts may have resulted in serving the needs of those children most at need from a statewide perspective. Illinois' school choice options are distributed to mirror state appellate court districts. In this way, scholarships must be allocated statewide. This method of distribution, the first of its kind in school choice programs, prevents scholarships from being disproportionately taken by students in Chicago, which could eliminate scholarship options for children in other areas of the state who are also significantly in need of help. This method of distribution ensures that those students most in need, whether located in Chicago or Springfield, will be able to access a scholarship. Andrew D. Catt & Michael Shaw, *Geographic Disproportionality in the First Year of Illinois's Tax-Credit Scholarship Program* (EdChoice Working Paper 20-01) (May 11, 2020) <https://www.edchoice.org/wp-content/uploads/2020/05/Geographic-Disproportionality-in-the-First-Year-of-Illinois-Tax-Credit-Scholarship-Program-NEW.pdf> (last accessed March 4, 2021).

In Tennessee, the reverse is true. Those students most in need, according to performance measurements, were primarily located in Shelby County and Metro Nashville at the time the Tennessee ESA Pilot legislation was adopted. While there are surely other children in other

areas of the state who would also benefit from receiving funding from the ESA Pilot to attend a school better fitting the students' needs, the most critical need appeared to be in local education agencies relating to the Shelby County and Metro Nashville public schools.

In both cases, educational needs of students compelled the legislation. Tennessee and Illinois targeted their school choice programs to serve students with the greatest need for educational options.

### **III. The Court Should Hold that the ESA Pilot Does Not Violate the Tennessee Constitution.**

Tennessee's home rule provision serves a legitimate role in enabling local communities to govern themselves, to the extent permitted under Tennessee's constitution. Tenn. Const. art. XI §9. However, the importance of quality K-12 education for children is never isolated to the concern only of single locales. When children in local communities consistently fail to achieve at even modest levels, their educational needs may properly be considered matters of statewide importance. In Tennessee, the education of children in Tennessee's two largest cities reflects the importance, or lack of concern, of the state for the success and happiness of its citizens. Nashville, the state capitol, and Memphis are cities known internationally as being exceptionally exciting and attractive to tourists and those considering relocation in Tennessee. The failure of a majority of children in these cities to achieve academic success and receive sufficient preparation for their lives after high school casts doubt on the desirability of both cities as places to visit or reside. This is a concern not only for people in these two cities, but also for the entire

state. Success or failure of education in these two cities impacts the state as a whole and is a legitimate interest for state leaders whose role is to sustain and grow the prosperity of the state.

The *amici curiae* request that this Court consider the Tennessee ESA Pilot to be a statewide program being piloted initially in areas where children live who are most in need, thereby not in conflict with the Tennessee Constitution's Home Rule provision.

### CONCLUSION

*Amici curiae* EdChoice and ExcelinEd respectfully request that the judgment of the Court of Appeals be reversed and that the Court hold that the ESA Pilot is valid.

Dated March 9, 2021.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Brief complies with the formatting and word-limitation requirements of Tenn. R. App. P. 31 and Tenn. Sup. Ct. R. 46 § 3.02 and has 5,230 words as counted by Microsoft Word.

This 9<sup>th</sup> day of March 2021.

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The undersigned certifies that a copy of this pleading has been served via the Court's e-filing system and via email upon the following:

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