

No. 84362-7

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

MATHEW & STEPHANIE McCLEARY, on their own behalf and on behalf of KELSEY & CARTER McCLEARY, their two children in Washington's public schools; ROBERT & PATTY VENEMA, on their own behalf and on behalf of HALIE & ROBBIE VENEMA, their two children in Washington's public schools; and NETWORK FOR EXCELLENCE IN WASHINGTON SCHOOLS ("NEWS"), a state-wide coalition of community groups, public school districts, and education organizations,

Respondents.

**BRIEF OF AMICUS CURIAE
INSTITUTE FOR JUSTICE**

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INTRODUCTION

Washington historically has provided for, and it continues to develop, a “diverse, pluralistic structure for the delivery of educational services.” *Tunstall v. Bergeson*, 141 Wn.2d 201, 235 n.2, 5 P.3d 691 (2000) (Talmadge, J., concurring). In addition to maintaining a vibrant public school system, it relies heavily on private schools and private providers in fulfilling its “paramount duty” to “make ample provision for the education of all children.” Const. art. IX, § 1. In recent years, it has considered further expanding educational opportunity through parental choice programs that provide additional alternatives to the public schools.

This “diverse, pluralistic structure,” however, is threatened by the trial court’s decision, which conflates the State’s “paramount duty” to provide for education with its separate duty to “provide for a general and uniform system of public schools.” *Compare* Const. art. IX, § 1, *with id.* art. IX, § 2. By confounding these distinct duties and treating them as coterminous, the trial court’s decision reduces the State’s role in education to little more than an exchequer for the public school system.

IDENTITY AND INTEREST OF AMICUS CURIAE

The Institute for Justice is a non-profit, public interest law firm dedicated to protecting individual liberties. Since its founding 20 years ago, the Institute has defended parental choice programs at all levels of

state and federal courts by representing, as defendant-intervenors, parents whose children attend schools on scholarships made available through such programs. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 122 S. Ct. 2460, 153 L. Ed. 2d 604 (2002); *Ariz. Christian Sch. Tuition Org. v. Winn*, ___ U.S. ___, 131 S. Ct. 1436, ___ L. Ed. 2d ___ (2011). A primary legal issue in several of these cases has been whether a state may provide for alternatives to its public schools or whether it must instead dedicate its funding to the public school system exclusively. *See, e.g., Jackson v. Benson*, 218 Wis. 2d 835, 578 N.W.2d 602 (1998); *Simmons-Harris v. Goff*, 86 Ohio St. 3d 1, 711 N.E.2d 203 (1999).

STATEMENT OF THE CASE

The Institute adopts the State’s Statement of the Case but wishes to emphasize an aspect of the trial court’s decision not developed therein—specifically, the court’s conclusion that the State is not satisfying its “paramount duty” to provide for education because it has not calculated or funded the precise dollar amount that “it would cost the State’s *public schools* to equip all children with the basic knowledge and skills included within the substantive ‘education’ mandated by Article IX, §1.”¹ The implication is that the “education” for which the State has a paramount

¹ Findings of Fact/Conclusions of Law (FOF/COL) ¶ 262 (emphasis added); *see also id.* ¶¶ 227, 263.

duty to provide occurs—and must occur—exclusively through the public school system. As discussed below, that is not the case.

ARGUMENT

The State’s “paramount duty” under Article IX, section 1, is to provide “for the education” of Washington’s children—not to provide a public school system. In discharging this “paramount duty,” the State relies not only on its public schools, but also on private schools and private education providers. For example, the State authorizes school districts to place students in private schools for special education services. WAC § 392-172A-04080. It authorizes districts to contract with private providers for the education of students who are academically at risk, suspended, likely to be expelled, or subject to repeated disciplinary actions. RCW § 28A.150.305. It allows the Superintendent of Public Instruction to contract with private providers for the delivery of educational services to juvenile inmates. *Id.* § 28A.193.020. It funds, through grants and reimbursement programs, private early childhood education programs, *id.* § 43.215.415, as well as private education centers for common school dropouts. *Id.* §§ 28A.205.010, .020. It has voucher programs that allow low-income and seasonal workers to choose private preschools or other child care providers for their children. WAC §§ 170-290-0001, -0035(3), -3560(5). And, in recent years, it has considered

adopting new parental choice programs to provide greater educational opportunity at the K-12 level. *E.g.*, S.B. 5346, 62nd Leg., 2011 Reg. Sess. (Wash. 2011) (bill to provide \$3,500 vouchers for children educated outside public school system); H.B. 3112, 60th Leg., 2008 Reg. Sess. (Wash. 2008) (bill to create tax credit scholarship program allowing children with disabilities to attend school of parents' choice).

Despite the substantial role that private schools and private providers play, the trial court looked myopically to the public schools in determining whether the State has satisfied its “paramount duty” to provide for education. The court’s decision reduces the question of whether the State is “mak[ing] ample provision for the education of all children” to whether the State has calculated and disbursed specific dollar amounts for the public schools. By thus conflating the “paramount duty” to provide for education with the separate duty to “provide for a general and uniform system of public schools,” the court effectively curtailed the State’s ability to provide for educational opportunities outside the public school system.

Nothing in Article IX’s text establishes the public schools as the exclusive means by which the State discharges its duty to provide for the education of Washington’s children. Rather, its text allows the State to use other mechanisms, such as parental choice programs, to facilitate

alternatives to the public schools. Historical evidence confirms that the framers of Washington’s Constitution and the ratifying public understood Article IX as affording the State discretion to provide for such alternatives. And there is a substantial body of empirical research demonstrating that parental choice, rather than perpetual public school funding increases, is the more effective means of improving educational outcomes.

A. The Text Of Article IX Allows The State To Provide For Alternatives To The Public Schools In Fulfilling Its “Paramount Duty”

“When interpreting constitutional provisions, [this Court] look[s] first to the plain language of the text and will accord it its reasonable interpretation.” *Wash. Water Jet Workers Ass’n v. Yarbrough*, 151 Wn.2d 470, 477, 90 P.3d 42 (2004). Article IX’s text plainly affords the State discretion to provide for alternatives to the public schools.

The State’s “paramount duty,” according to Article IX, section 1, is to “make ample provision for the education” of Washington’s children—not to provide for a public school system. Although the Legislature does have a separate obligation, under Article IX, section 2, to “provide for a general and uniform system of public schools,” that is merely a “first priority” in the exercise of the State’s paramount duty—not the paramount duty itself. *Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 90 Wn.2d 476, 518, 585 P.2d 71 (1978). As this Court has held, the

“paramount duty” to provide for education exists “[i]n addition to the [public school] requirements [of] article IX, section 2.” *Tunstall*, 141 Wn.2d at 222; *see also id.* at 221-22 (“[T]he State’s constitutional duty to provide educational services does not end with the creation of a ‘general and uniform’ school system.”).

Moreover, nothing in Article IX requires the State to fulfill its paramount duty through the public schools alone. Rather, the constitution leaves the State discretion to “select any method that it s[ees] fit in order to discharge that duty.” *Newman v. Schlarb*, 184 Wash. 147, 153, 50 P.2d 36 (1935).

In fact, this Court has already concluded that the State may provide for educational opportunities outside the public school system. In *Tunstall v. Bergeson*, it upheld the State’s reliance on alternative education providers, including private contractors, to deliver educational services to children incarcerated in adult correctional facilities. *Tunstall*, 141 Wn.2d at 220-23. The Court rejected, as “clearly without merit,” the argument that “school districts are the only entity qualified to provide educational services under article IX.” *Id.* at 232. Noting that “the Legislature allows for alternatives to the ‘common school system’”—including, specifically, private schools—the Court held that the State may rely on private

contractors to fulfill its “paramount duty” with respect to incarcerated children. *Id.* at 232-33; *see also id.* at 235 n.2 (Talmadge, J., concurring).

Other provisions of Article IX expressly contemplate that the State will provide for opportunities at private schools. For example, Article IX, section 4, states that “[a]ll schools maintained or supported wholly *or in part* by the public funds shall be forever free from sectarian control or influence.” (Emphasis added.) Given the public’s obligation to fund public schools in whole,² the language concerning schools maintained or supported “in part” by public funds necessarily refers to private schools and the fact that they, too, may receive public support. In fact, this Court has held that it is “immaterial” if state financial assistance programs allow public funds to flow to private elementary and secondary schools, so long as the schools are not “sectarian.” *Weiss v. Bruno*, 82 Wn.2d 199, 211, 509 P.2d 973 (1973), *overruled in part on other grounds by Gallwey v. Grimm*, 146 Wn.2d 445, 48 P.3d 274 (2002); *see also id.* at 212 (“Read together, [Article IX, sections 1 and 4,] simply mean that the state, in carrying out its paramount duty of education, may not support schools under sectarian control or influence.”).³

² *See Sch. Dist. No. 20, Spokane Cnty. v. Bryan*, 51 Wash. 498, 504, 99 P. 28 (1909); RCW § 28A.150.020.

³ In making this point, the Institute for Justice is not endorsing Article IX, section 4’s denial of educational opportunities at so-called “sectarian” schools. To the contrary, insofar as it denies such opportunities, section 4 arguably violates the U.S. Constitution—

Courts in other states have similarly concluded that constitutional education provisions like Washington’s do not prohibit a state from providing for educational opportunities outside the public school system. For example, in *Jackson v. Benson*, the Wisconsin Supreme Court upheld a voucher program that empowers low-income parents to choose private schools for their children. Choice opponents argued that the Wisconsin Constitution “prohibits the State from diverting students and funds away from the public school system” and, therefore, “requires that the district schools be the only system of state-supported education.” 218 Wis. 2d at 894. The Court rejected the argument, holding that the constitution “provides not a ceiling but a floor upon which the legislature can build additional opportunities for school children in Wisconsin.” *Id.* at 894-95.⁴ By enacting the voucher program, the court explained, “the State has

a possibility that *Weiss* itself appears to recognize. See *Weiss*, 82 Wn.2d at 206 n.2 (“The only possible qualification upon the sweeping prohibition of Const. art. 9, § 4 would result from conflict with the free exercise clause of the first amendment to the United States Constitution.”); see also *Widmar v. Vincent*, 454 U.S. 263, 276, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981) (holding that a state’s interest “in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution” is “limited by the Free Exercise Clause” and is not “sufficiently ‘compelling’” to justify singling out religion for disfavor).

⁴ The Florida Supreme Court came to the opposite conclusion in *Bush v. Holmes*, 919 So.2d 392 (Fla. 2006), holding that the Florida Constitution “does not . . . establish a ‘floor’ of what the state can do to provide for the education of Florida’s children” and, therefore, “does not authorize additional [educational] alternatives.” *Id.* at 408. As the dissent noted, however, nothing in the text of Florida’s constitution, either expressly or implicitly, establishes the public school system as the exclusive means by which the state can provide for education. *Id.* at 414-15 (Bell, J., dissenting). In any event, the majority relied on 1998 amendments to Florida’s education article and not the 1868 version that, as discussed below, served as a model for Washington. *Id.* at 412 n.14.

merely allowed certain disadvantaged children to take advantage of alternative educational opportunities in addition to those provided by” the public school provision of the state constitution. *Id.* at 895; *see also Davis v. Grover*, 166 Wis. 2d 501, 538-39, 480 N.W.2d 460 (Wis. 1992).

The Ohio Supreme Court came to the same conclusion in resolving a challenge to a voucher program for students in the Cleveland City School District. In *Simmons-Harris v. Goff*, choice opponents argued that the program violated a state constitutional provision requiring the legislature to provide for a “thorough and efficient system of common schools throughout the State”—a provision that they claimed is an “implicit . . . prohibition against the establishment of a system of uncommon (or nonpublic) schools financed by the state.” 86 Ohio St. 3d at 11. The court squarely rejected their argument:

Private schools have existed in this state since before the establishment of public schools. They have in the past provided and continue to provide a valuable alternative to the public system. . . . We fail to see how the School Voucher Program, at the current funding level, undermines the state’s obligation to public education.

Id.

In short, the trial court’s suggestion that the State’s “paramount duty” must be accomplished through the public schools alone is erroneous. It finds no support in the text of Article IX, and it contravenes precedent

from this Court and persuasive authority from other states with constitutional education provisions similar to Washington's.

B. Historical Evidence Indicates That The Framers And Ratifying Public Understood Article IX To Allow Provision For Alternatives To The Public Schools

If this Court determines that the language of Article IX is unclear regarding the State's ability to provide for alternative educational opportunities, it may properly consider historical evidence for guidance. *Wash. Water Jet Workers Ass'n*, 151 Wn.2d at 477. "This court's objective," after all, "is to define the constitutional principle in accordance with the original understanding of the ratifying public so as to faithfully apply the principle to each situation which might thereafter arise." *Gallwey*, 146 Wn.2d at 460 (internal quotation marks and citation omitted). Thus, historical conditions in the Washington Territory around the time of the 1889 Convention are particularly instructive in discerning the framers' and ratifying public's understanding of Article IX. *See Malyon v. Pierce Cnty.*, 131 Wn.2d 779, 794-97, 935 P.2d 1272 (1997).

Public funding of private schools was commonplace in Washington around the time of the convention, notwithstanding the fact that the Territorial legislature had established a common school system some three decades earlier. *See* Act of Apr. 12, 1854, ch. I, 1854 Wash. Terr. Laws 319. For example, in 1888-89 alone, one private academy

received \$5,400 in public funds. See Richard J. Gabel, *Public Funds for Church and Private Schools* 684 (1937). District funds in Steilacoom were similarly paid to “a school under the auspices of the Congregational Church,” which served as the town’s public school throughout much of the 1880s. See Carol Neufeld-Stout & Nancy Covert, *Steilacoom Historical School District No. 1: 150 Years of Educating Students* 9-11 (2005) (internal quotation marks omitted). From 1883 to 1887, the private Benjamin P. Cheney Academy was “employed by the Cheney school district to do its teaching work.” J. Orin Oliphant, *History of the State Normal School at Cheney, Washington* 16 (1924) (internal quotation marks omitted); see also *id.* at 2, 12. The Sisters of Providence accepted a three-year contract with the local school district near present-day Toledo for \$40 per month in 1877. See Providence of Our Lady of the Sacred Heart School, Cowlitz Prairie, Washington: Collection Inventory, 1876-1978. And in many other towns, including Bellingham, Waitsburg, and Walla Walla, pre-existing private schools were actually converted into public schools. See Angie Burt Bowden, *Early Schools of Washington Territory* 63, 79, 302 (1935).

Even where private schools were not formally employed by school districts or converted into public schools, districts relied heavily on the facilities and resources of private organizations in providing educational

services. During the late 19th and early 20th centuries, for example, districts commonly located public schools in churches and civic buildings. This occurred in Auburn, Kent, Enumclaw, Bellingham, Aberdeen, Spokane, Asotin, Ritzville, and Newport, among other places. *Id.* at 214, 215, 218, 296, 340, 395, 431, 435, 459.

In short, early Washingtonians exercised creativity and innovation to provide the most effective educational opportunities for Washington's children. As noted above, many of those innovations are still in use today. The State still places children in private schools in certain circumstances and provides vouchers for parents to do so in others. The State still contracts with private providers for the delivery of education services. And the State still provides funding, through grants and reimbursement programs, to private education providers.

If the framers had intended to prohibit such practices, which were well known to them, they would have said as much in the constitution they crafted.⁵ They did not. Instead, consistent with the requirements of the Enabling Act that conditioned Washington's admission to the Union,⁶ they

⁵ *See, e.g.*, Mich. Const. art. 8, § 2 (“No public monies or property shall be appropriated or paid . . . directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student . . . at any such nonpublic school . . .”).

⁶ *See* Act of Feb. 22, 1889, ch. 180, §§ 4, 10, 13, 14, 18, 25 Stat. 676 (1889).

simply imposed two limitations on state funding of private schools: first, private schools could not be funded with revenues from the common school fund or state tax for common schools, Const. art. IX, §§ 2, 3;⁷ and second, private schools could not receive public funding if they were under “sectarian” control or influence, *id.* art. IX, § 4. Apart from these restrictions, the framers did nothing to curtail the “diverse, pluralistic structure for the delivery of educational services,” *Tunstall*, 141 Wn.2d at 235 n.2 (Talmadge, J., concurring), that was already taking hold in 1889.

To the contrary, the evidence suggests that Washington’s framers intended to afford the State continued discretion to fund private educational opportunities. The framers “learn[ed] from past constitutional experimentation in other states” and “borrow[ed] freely from the provisions they thought successful.” Cornell W. Clayton, *Toward a Theory of the Washington Constitution*, 37 Gonzaga L. Rev. 41, 83-84 (2001/02). They copied the “paramount duty” provision nearly verbatim

⁷ Other public funds, however, may be used. *Bryan*, 51 Wash. at 505 (“[E]xperiments in education must be indulged . . . at the expense of the general fund.”); *Weiss*, 82 Wn.2d at 211 (holding that it is “immaterial” if the State uses public funds to provide opportunities at nonsectarian private schools); *Mitchell v. Consol. Sch. Dist. No. 201*, 17 Wn.2d 61, 71, 135 P.2d 79 (1943) (Grady, J., concurring) (“[W]hile the funds referred to in § 2 of Art. IX cannot be used to defray the expense of transportation to or from [non-religious private] schools, I see no reason why other public funds, if made available to the school districts by the legislature, cannot lawfully be used therefor.”).

from the Florida Constitution of 1868.⁸ Historical practices in Florida are therefore particularly instructive in assessing whether they understood the education article they adopted as allowing the State to rely, in part, on private schools in exercising that paramount duty.

As in the Washington Territory, public funding for private educational opportunities was commonplace in late 19th century Florida. From the 1860s to 1890s, the state often provided thousands of dollars annually to private institutions for education services. *See* Gabel, *supra*, at 639 n.63; Thomas Cochran, *History of Public-School Education in Florida* 27 (1921). It regularly funded private academies, which were the “accepted form of secondary education,” Nita Pyburn, *Documentary History of Education in Florida: 1822-1860* 27 (1951), and relied heavily on private providers such as the Freedman’s Bureau and church academies to educate black children. *See* Gabel, *supra*, at 639 & n.63. In fact, during the 1870s, “at least fifteen percent of the budget of private schools came from public funding.” Nathan A. Adams, IV, *Pedigree of an*

⁸ *See* Robert F. Utter and Hugh D. Spitzer, *The Washington State Constitution, A Reference Guide* 153 (2002). The Florida Constitution provided: “It is the paramount duty of the State to make ample provision for the education of all the children residing within its borders, without distinction or preference.” Fla. Const. 1868 art. 8, § 1. Washington’s framers simply added the specific “distinctions” and “preferences” that the State could not make—namely, those “on account of race, color, caste, or sex.” Const. art. IX, 1. They also adopted “uniformity” and “common school fund” provisions substantially similar to those in Florida’s 1868 constitution. *See* Fla. Const. 1868 art. 8, § 2 (“The Legislature shall provide a uniform system of Common Schools”); *id.* art. 8, § 4 (stating that interest from the common school fund “shall be exclusively applied to the support and maintenance of Common Schools”).

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(footnote omitted); *see also id.* at 16-17. Such practices continued into the 20th century. *See Gabel, supra* at 639 & n.63.

That Washington’s framers borrowed so directly from Florida in view of these practices indicates that they understood provision for alternatives to the public schools as consistent with the State’s “paramount duty.” That understanding comports with Washington’s own history and its continued reliance on private providers for educational services today.

C. Empirical Research Confirms The Wisdom Of Allowing The State To Provide For Alternatives To The Public Schools

Contrary to the trial court’s suggestion,⁹ there is no magic public school funding level that will ensure all children meet or exceed State academic standards. Indeed, there is little, if any, correlation between the money a state spends on public schools and the quality of education its children receive. Perhaps cognizant of this fact, this Court has steadfastly refused “to deal definitively with the words ‘ample,’ ‘provision’ or ‘education.’” *Seattle Sch. Dist. No. 1*, 90 Wn.2d at 515. Instead, it has insisted on “giving the Legislature the greatest possible latitude to participate in the full implementation of the constitutional mandate,” *id.*,

⁹ *See, e.g.*, FOF/COL ¶¶ 225, 262

so that the Legislature, in turn, can make “the most effective, efficient, and economically feasible investment of public funds,” *DuPont-Fort Lewis Sch. Dist. No. 7 v. Bruno*, 62 Wn.2d 790, 797, 384 P.2d 608 (1963), and “customize education programs” to “reasonably address [the] special needs” of different groups of students. *Tunstall*, 141 Wn.2d at 222, 223 (internal quotation marks and citation omitted).

Empirical research regarding the effectiveness of parental choice programs vindicates the framers’ and this Court’s decision to afford the State “the greatest possible latitude” to fulfill its paramount duty. Such programs yield significant positive impacts on the academic achievement of private and public school students alike—all the while *saving* money for state and local government.

Ten random-assignment studies, considered the “gold standard” of social science research, have been undertaken to assess how publicly- and privately-funded voucher programs impact participating students. See Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Vouchers* 1, 8 (Found. for Educ. Choice 2nd ed. Mar. 2011). Nine of the ten studies found that such programs improve student outcomes; only one found no visible impact, positive or negative. *Id.*

Results from Milwaukee’s publicly-funded Parental Choice Program are typical. A random assignment study found that after four

years, voucher students scored 10.7 Normal Curve Equivalent (NCE) points higher than the control group in math and 5.8 points higher in reading. Jay P. Greene et al., *School Choice in Milwaukee: A Randomized Experiment*, in *Learning from School Choice* 329, 335 (1998). A separate study found that selection to participate in the program increased math scores 1.5-2.3 points *per year*. Cecilia E. Rouse, *Private School Vouchers and Student Achievement: An Evaluation of the Milwaukee Parental Choice Program*, Q.J. Econ. 553, 584, 593 (May 1998).¹⁰

Empirical evidence demonstrates that parental choice programs also boost the academic achievement of students who remain in the public school system. *See* Forster, *supra*, at 15-23. For example, numerous evaluations of Florida's A+ program, in which students at chronically failing public schools could obtain scholarships to transfer to better performing public or private schools, found that the program raised

¹⁰ Random-assignment studies of privately-funded voucher programs in Charlotte, New York City, Washington, D.C., and Dayton made similar findings. *See, e.g.*, Joshua M. Cowen, *School Choice as a Latent Variable: Estimating "Complier Average Causal Effect" of Vouchers in Charlotte*, 36 Pol'y Stud. J. 301, 309 (2008) (finding that after one year, voucher students in Charlotte scored 8 percentile points higher than control group in reading and 7 points higher in math); John Barnard et al., *Principal Stratification Approach to Broken Randomized Experiments: A Case Study of School Choice Vouchers in New York City*, 98 J. Am. Stat. Ass'n 299, 308-09 (2003) (finding that after one year, voucher students leaving low-performing public schools in New York scored 5 percentile points higher than control group in math); William G. Howell et al., *The Education Gap* 146 (2002) (finding that African-American voucher students in New York, Dayton, and Washington, D.C. gained, on average, 6.6 percentile points in combined math and reading scores after three years).

achievement in Florida's worst public schools and that the public schools facing the greatest competition made the greatest academic gains. *See, e.g.,* Rajashri Chakrabarti, *Impact of Voucher Design on Public School Performance: Evidence from Florida and Milwaukee Voucher Programs* 24-25 (Fed. Reserve Bank of N.Y., Staff Rep. No. 315, Jan. 2008); Martin R. West & Paul E. Peterson, *The Efficacy of Choice Threats Within School Accountability Systems: Results from Legislatively Induced Experiments*, 116 *Econ. J.* C46, C54 (Mar. 2006); Marcus A. Winters & Jay P. Greene, *Competition Passes the Test*, *Education Next* 66, 68-71 (Summer 2004).

Milwaukee's Parental Choice Program has yielded similar benefits for that city's public schools. "The scores of the students in . . . the schools facing the most potential competition from vouchers . . . improved by more in every subject area tested than did the scores of the students facing less or no competition from vouchers." Caroline Hoxby, *Rising Tide*, *Education Next* 69, 72 (Winter 2001); *see also* Jay P. Greene & Greg Forster, *Rising to the Challenge: The Effect of School Choice on Public Schools in Milwaukee and San Antonio* 8 (Manhattan Inst. Oct. 2002).

In addition to improving test scores, parental choice programs boost high school graduation rates. A U.S. Department of Education study of Washington, D.C.'s Opportunity Scholarship Program (OSP) found that the "offer of an OSP scholarship raised students' probability of completing

high school by 12 percentage points overall,” and that “[u]sing a scholarship increased the graduation rate by 21 percentage points.” Patrick Wolf et al., *Evaluation of the DC Opportunity Scholarship Program* xx, 41 (U.S. Dep’t Educ. June 2010).¹¹ A recent study similarly found that participation in Milwaukee’s Parental Choice Program increased the likelihood that a student would graduate from high school and enroll in college. See Joshua M. Cowen et al., *Student Attainment and the Milwaukee Parental Choice Program* 21 (Univ. of Ark. Mar. 2011).

Such improvements do not require exponential public school funding increases. In fact, the parental choice programs on the books in other states have yielded their impressive results while *saving* taxpayer dollars. From 1990 to 2006, for example, parental choice programs saved a net \$444 million in state and local funds. Susan L. Aud, *Education by the Numbers: The Fiscal Effect of School Choice Programs, 1990-2006* 37 (Milton and Rose D. Friedman Found. Apr. 2007). In fiscal year 2010 alone, Milwaukee’s Parental Choice Program yielded a net savings of \$46.7 million in state and local funds. See Robert M. Costrell, *The Fiscal Impact of the Milwaukee Parental Choice Program* 2, 8 (Univ. of Ark. Dec. 2010). Florida similarly realized a net savings of \$38.9 million from

¹¹ For certain subgroups, the impact was even greater. For example, “[f]emale students had a positive impact of 20 percentage points from the offer of a scholarship and 28 percentage points from the use of a scholarship.” Wolf, *supra*, at xx-xxi.

its Corporate Income Tax Credit Scholarship Program in fiscal year 2007-08. *See* Office of Program Policy Analysis and Gov't Accountability, Fla. Legislature, *The Corporate Income Tax Credit Scholarship Program Saves State Dollars 5* (Rep. No. 08-68, Dec. 2008).

In short, empirical research confirms the wisdom of affording the State discretion to facilitate alternatives to the public schools in discharging its “paramount duty.” Parental choice programs improve academic outcomes while saving public money. Massive public school spending increases, on the other hand, often yield no gains in educational achievement. *See* Appellant’s Br. at 28-32.

CONCLUSION

The trial court opined that “[w]ithout funding, reform legislation for basic education may be an empty promise.” FOF/COL ¶ 272. The converse of that statement is more likely true: Without reforms such as parental choice, funding may well be the empty promise. This Court should therefore ensure that any interpretation of the “paramount duty” provision it adopts respects Washington’s “diverse, pluralistic structure for the delivery of educational services,” *Tunstall*, 141 Wn.2d at 235 n.2 (Talmadge, J., concurring), and ensures that private schools can continue to play their role in that structure. The text of Article IX, history, and empirical research all support such an interpretation.

RESPECTFULLY submitted this 31st day of May, 2011.

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DECLARATION OF SERVICE

I, Madeline Roche, declare:

I am not a party in this action. I reside in the State of Washington and am employed by Institute for Justice in Seattle, Washington. On May 31, 2011, I caused to be served a true copy of the foregoing Amicus Curiae Brief upon the following:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 31st day of May, 2011, at Seattle, Washington.

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