

No. 2023AP001896 - OA

IN THE SUPREME COURT OF WISCONSIN

JULIE UNDERWOOD, CHARLES UPHOFF, RANDY WENDT, FATHER
TOM MUELLER, ANGELA RAPPL, DUSTIN IMRAY
AND SCOTT WALKER,

PETITIONERS,

V.

ROBIN VOS, SPEAKER OF THE WISCONSIN STATE ASSEMBLY, JILL
UNDERLY, WISCONSIN STATE SUPERINTENDENT OF PUBLIC
INSTRUCTION, AND KATHY BLUMENFELD, SECRETARY OF THE
DEPARTMENT OF ADMINISTRATION

RESPONDENTS.

**NON-PARTY BRIEF OF THE
LIBERTY JUSTICE CENTER
IN OPPOSITION TO THE PETITION**

Bernardo Cueto
WISLawyer LLC
PO Box 68
Onalaska, WI 54650
(608) 797-8123
bernardo@wislawyer.com
Counsel for Amici Curiae

Dean McGee
LIBERTY JUSTICE CENTER
190 LaSalle St., Ste. 1500
Chicago, IL 60603
(312) 263-7668
dmcgee@libertyjusticecenter.org

TABLE OF CONTENTS

Statement of Interest.....2

Argument.....3

 Introduction.....3

 The Petitioners’ Requested Relief Would Create an Unworkable
 Burden on the Wisconsin Public School System.....4

Conclusion8

Certificates9

STATEMENT OF INTEREST

The Liberty Justice Center (LJC) is a national non-partisan non-profit public-interest law firm based in Chicago, Illinois. LJC frequently litigates important cases affecting educational freedom and parental choice, having litigated such matters in Arizona, California Idaho, Mississippi, North Carolina, Oklahoma, South Carolina, and Tennessee.

Liberty Justice Center also participates in important educational freedom cases on an amicus basis. For example, LJC filed briefs at the *certiorari* and merits stages in *Espinoza v. Montana Dep't of Revenue*, the latter of which was cited in Justice Alito's opinion. 140 S. Ct. 2246, 2268 (2020) (Alito, J., concurring).

ARGUMENT

Introduction

Petitioners ask the Court to dismantle the oldest school choice program in the United States—a program currently serving more than 65,000 low- and middle-income Wisconsin students—while attempting to bypass any fact development in discovery. Petitioners “recognize” that dismantling school choice in Wisconsin “will impact tens of thousands of children” but nevertheless “feel that” the benefit to children currently attending traditional public schools “outweighs the negative impacts to the children currently benefitting from these programs.” Pet. Br. at 17-18.

Petitioners' feelings are not grounded in reality. In the Milwaukee Public Schools (“MPS”) alone, the Petitioners' requested relief—forcing the sudden reabsorption of more than 38,300 students enrolled in the existing programs—would create an impossible burden. Indeed, a study of the available data reveals the following:

- Milwaukee Public Schools would have a shortfall of more than 17,500 seats.
- Milwaukee Public Schools would have to purchase or construct approximately 17 new school buildings.
- Milwaukee Public Schools would have a shortfall of approximately 2,398 teachers to maintain its current student/teacher ratios.

This *amicus* brief highlights this data for the Court and provides critical context regarding the programs Petitioners are attempting to terminate.

The Petitioners’ Requested Relief Would Impose an Unworkable Burden on the Milwaukee Public School System.

The Petition seeks a permanent injunction that would forever terminate Wisconsin’s private school choice and charter school programs. There are five such programs in total, serving more than 65,000 Wisconsin students:

Program/School Type	2022-2023 Enrollment¹
Milwaukee Parental Choice (“MPC”)	29,003
Racine Parental Choice (“RPC”)	4,038
Wisconsin Parental Choice (“WPC”)	19,205
Special Needs Scholarship Program (“SNSP”)	2,703
Independent Charter Schools	10,802
Total	65,751

¹ See *Private School Choice Programs (MPCP, RPCP, WPCP) & Special Needs Scholarship Program (SNSP) Summary*, [https://dpi.wi.gov/sites/default/files/imce/parental-education-options/Choice/Data and Reports/2023-24/Updated - 2023-24 summary_mpcp_wpcp_rpcp_snspp.pdf](https://dpi.wi.gov/sites/default/files/imce/parental-education-options/Choice/Data%20and%20Reports/2023-24/Updated%20-%202023-24%20summary_mpcp_wpcp_rpcp_snspp.pdf); Russ Kava, State of Wisconsin Legislative Fiscal Bureau, *Charter Schools* (January 2023), https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2023/0032_charter_schools_informational_paper_32.pdf

The private school choice programs are designed to benefit only low- and middle-income families. For example, to qualify for the MPC or RPC programs, a family of four needs to have an annual household income of \$78,600 or less.² For families outside of the Milwaukee area, a family of four would need to earn \$57,640 or less.³ And while the independent charter schools serve all income levels, the most recent data indicate that 71% of those students come from economically disadvantaged households.⁴ As a result, most participants would not be able to afford their current schools without these programs.

In Milwaukee alone, traditional public schools would need to suddenly enroll an additional 38,353 students.⁵ This would create a logistical nightmare—if not an outright impossibility—for MPS. According to MPS’s own data, MPS has 85,746 seats and is currently serving 64,915 in-person students—meaning the schools have an available capacity of 20,831 seats.⁶ This would leave a 17,522-seat shortfall if Petitioners are successful in forcing students from their current schools.⁷

² Wisconsin Dep’t of Pub. Instruction, *2021 – 2022 Overview of Private School Choice Programs in Wisconsin*, https://dpi.wi.gov/sites/default/files/imce/parental-education-options/Overview_of_Private_School_Choice_Programs_in_Wisconsin_Handout.pdf

³ *Id.*

⁴ Wisconsin Dep’t of Pub. Instruction, *School & District Report Cards*, <https://apps2.dpi.wi.gov/reportcards/>

⁵ Combining the enrollment in the MPCP (around 29,003) Milwaukee’s independent charter schools (8,609), and SNSP (741).

⁶ Memorandum to State of Wisconsin Joint Committee on Finance (Aug. 15, 2022), https://docs.legis.wisconsin.gov/misc/lfb/jfc/200_reports/2022_08_15_milwaukee_public_schools_building_inventory.pdf

⁷ This is likely a conservative estimate of the shortfall. Upon information and belief, MPS’ self-reported capacity numbers include vacant buildings. However, a 2018 report identified more than \$280 million in deferred maintenance even in buildings that were occupied, leading to the reason-

The lack of available seats would create an unprecedented need to suddenly purchase, open, or construct nearly 20 new school buildings. A conservative estimate, using grade-level enrollment data only from the MPC program,⁸ breaks down as follows:

Grade Level	New Enrollment	New Schools Needed
Elementary	9,124	12
Middle School	4,093	5
High School	4,303	3

This estimate relies on conservative assumptions, including that any new schools constructed would be equal in size to the largest schools currently serving MPS students, and that MPS could proportionally absorb students across all grade levels among its current estimated excess capacity of 20,831.⁹

In addition to lacking physical infrastructure, MPS lacks the teaching personnel to reabsorb tens of thousands of students. According to the data from Department of Public Instruction, MPS currently has 4,217 teachers serving 67,500 students for a student/teacher ratio of approximately 16:1.¹⁰ The table below depicts the predicted number of

able conclusion that MPS’ vacant buildings are not prepared to serve students. *See* Wisconsin Institute for Law and Liberty, *What Goes Around Comes Around: How MPS and Milwaukee’s Failure to Sell Vacant School Buildings Has Contributed to the District’s Budget Deficit* (Aug. 2018), <https://will-law.org/wp-content/uploads/2020/12/what-goes-around-by-the-numbers.pdf>

⁸ Wisconsin Dep’t of Pub. Instruction, *Milwaukee Parental Choice Program* (Oct. 2023) https://dpi.wi.gov/sites/default/files/imce/parental-education-options/Choice/Data_and_Reports/2023-24/2023-24_mpcp_facts_and_figures.pdf

⁹ The largest Milwaukee K-5 school has enrollment of 717. The school for grades 6-8 has 754, and the largest school for grades 9-12 has 1,360. *See* Wisconsin Department of Public Instruction, *2022-2023 School Report Card Data*, <https://apps2.dpi.wi.gov/reportcards/>

¹⁰ *See* Wisconsin Department of Public Instruction, *Public Staff FTE by Ethnicity and Gender Report*, <https://publicstaffreports.dpi.wi.gov/PubStaffReport/Public/PublicReport/StaffByEthnicityAndGenderReport>.

new teachers that would be needed to address this new influx of students:

Scenario	Enrollment	Required Teachers
Current	67,500	4,217
School Choice Programs Ended	105,853 (+38,353)	6,615 (+2,398)

Put differently, the end of school choice programs would require MPS to increase its teaching staff by about 56.9% to maintain the same student/teacher ratio as currently exists. In an era when Wisconsin Public Schools are already issuing an unprecedented number of “emergency teaching licenses” to meet current needs,¹¹ it would be virtually impossible for MPS to meet this new demand without drastically sacrificing the quality of education available to its students.

In sum, the relief requested by Petitioners would have catastrophic consequences, not only for the tens of thousands of students who would be removed from their current schools, but also for the students currently enrolled in a public school system that would be overwhelmed by the sudden influx of new students it is unprepared to accept.

CONCLUSION

The Court should deny the Petition.

¹¹ Allision Courtright, *Wisconsin Schools Turning to Emergency Teaching Licenses Amid Teacher Shortage*, The Badger Herald, Mar. 23, 2023, <https://badgerherald.com/news/2023/03/23/wisconsin-schools-turning-to-emergency-teaching-licenses-amid-teacher-shortage/>

Dated: November 14, 2023

Respectfully submitted,

Electronically signed by Bernardo Cueto
Bernardo Cueto (WI Bar No. 1076013)
WISLawyer LLC
PO Box 68
Onalaska, WI 54650
(608) 797-8123
Counsel of Record

Dean McGee
LIBERTY JUSTICE CENTER
190 LaSalle St., Ste. 1500
Chicago, IL 60603
(312) 263-7668
DMcGee@libertyjusticecenter.org
Counsel for Amicus Curiae

CERTIFICATE AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1,104 words in the body, as counted by Microsoft Word.

CERTIFICATES SIGNED:

/s/ Bernardo Cueto

Bernardo Cueto
WISLawyer LLC
PO Box 68
Onalaska, WI 54650
Counsel of Record
Wis. Bar No. 1076013