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Schools International, Association of Christian Teachers and Schools, WELS Commission on
11 Lutheran Schools, Wisconsin Council of Religious & Independent Schools, School Choice
Wisconsin Action, California Catholic Conference, Michigan Catholic Conference, Michigan
12 Association of Non-Public Schools, Pennsylvania Catholic Conference, Pennsylvania Affiliate of
the Council for American Private Education, American Federation for Children, Foundation for
13 Excellence in Education, Inc., Catholic Education Partners, Great Lakes Education Foundation, Rio
Grande Foundation, Commonwealth Foundation, School Choice Wisconsin, Colorado Catholic
14 Conference, Colorado Association of Private Schools, Indiana Non-Public Education Association,
Midsouth Association of Independent Schools, Catholic Conference of Oklahoma, Texas Private
15 Schools Association, James Madison Institute, Mississippi Center for Public Policy, Nevada Policy
Research Institute, Roughrider Policy Center, Rhode Island Center for Freedom & Prosperity

16 *Additional Signatures Below for the Following Amici:* Wisconsin Catholic Conference, EdChoice,
17 Liberty Justice Center, Mackinac Center for Public Policy, Buckeye Institute, Goldwater Institute

18 **IN THE UNITED STATES DISTRICT COURT**
19 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
20 **SAN FRANCISCO DIVISION**

21 STATE OF MICHIGAN, et al.,

22 Plaintiffs,

23 v.

24 ELISABETH D. DEVOS, et al.,

25 Defendants.

No. 3:20-cv-4478-JD

**AMICI PRIVATE SCHOOL ASSOCIATIONS' AND
ADVOCACY GROUPS' ADMINISTRATIVE MOTION
FOR LEAVE TO FILE AMICUS BRIEF**

Date: July 29, 2020
Time: 12:00 p.m.
Judge: Hon. James Donato
Trial Date: None set
Action Filed: July 7, 2020

27

* Pro Hac Vice Application Pending

1 **INTRODUCTION**

2 The CARES Act provides \$16 billion in federal funding to support both public and private
3 elementary and secondary schools impacted by the ongoing COVID-19 pandemic. This case
4 involves how that money is distributed between public and private schools. Plaintiffs are a group
5 of States and public school districts who ask this Court to invalidate the Department of Education’s
6 sensible and fair allocation of these funds and instead impose an inequitable distribution that would
7 favor public schools to the detriment of private schools and the students they serve. Amici are a
8 coalition of 38 associations and advocacy groups that represent and serve private schools in both
9 the Plaintiff States and school districts and around the country. They request leave to file the
10 attached amicus brief to call this Court’s attention to the flaws in Plaintiffs’ legal theory and to
11 highlight the harms Plaintiffs’ requested injunction would have on private schools. All parties have
12 consented to the filing of this brief.¹

13 **IDENTITY AND INTEREST OF AMICI²**

14 The United States has over 33,000 private schools, serving over 5.7 million students. *See*
15 *Private School Statistics at a Glance*, Council for American Private Education,
16 <https://www.capenet.org/facts.html> (last checked July 27, 2020). Amici are 38 associations and
17 advocacy groups that represent and support private schools and their families in Wisconsin,
18 Arizona, Arkansas, California, Colorado, Florida, Illinois, Indiana, Louisiana, Michigan,
19 Mississippi, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island,
20 Tennessee, Texas, and throughout the nation. Amici include Catholic, Orthodox Jewish, Islamic,
21 Lutheran, other Christian, and independent secular schools, and serve millions of students. A

¹ Although all parties have consented to the filing of this brief, Amici did not receive Plaintiffs’ consent until about an hour ago. Due to the short timeframe for responses to Plaintiffs’ preliminary injunction motion, the list of Amici did not become final until this morning. In light of that, and given that counsel for the Defendants has not yet appeared in this case, counsel for Amici did not think it practical to attempt to obtain a stipulation on the same day that Defendants’ responses are due. Local Rule 7-11(a). However, Amici can obtain and file a stipulation from the parties if this Court desires.

² No counsel for a party authored the attached amicus brief in whole or part, nor did any person or entity, other than amicus or its counsel, make a monetary contribution to the preparation or submission of the brief.

1 complete list and description of the Amici is in the Amicus Brief and in an appendix to this motion.

2 **REASONS FOR GRANTING THE MOTION**

3 “The district court has broad discretion to appoint amici curiae.” *Hoptowit v. Ray*, 682 F.2d
4 1237, 1260 (9th Cir. 1982), *abrogation on other grounds recognized by Doe v. Kelly*, 878 F.3d
5 710, 720 (9th Cir. 2017). “District courts frequently welcome amicus briefs from non-parties
6 concerning legal issues that have potential ramifications beyond the parties directly involved or if
7 the amicus has ‘unique information or perspective that can help the court beyond the help that the
8 lawyers for the parties are able to provide.’” *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*,
9 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005) (quoting *Ryan v. Commodity Futures Trading*
10 *Comm’n*, 125 F.3d 1062, 1064 (7th Cir.1997)).

11 Plaintiffs’ lawsuit and requested injunction have enormous ramifications for private
12 schools, many of which have been devastated by the COVID-19 pandemic. Plaintiffs ultimately
13 ask this Court to declare invalid and enjoin the Department of Education’s interim final rule
14 establishing how certain CARES Act funds are to be allocated between public and private schools.
15 Dkt. 24:58–59. Plaintiffs seek to prevent private school students from receiving an “equitable”
16 share of these much-needed funds, contrary to what the CARES Act requires. In their preliminary
17 injunction motion, Plaintiffs ask this Court to enjoin enforcement of the Department’s rule within
18 their nine States and four school districts. Dkt. 35-1.

19 Many of the Amici are state-based private school associations or advocacy groups that
20 serve or represent private schools in the jurisdictions represented by the Plaintiffs, schools that will
21 be directly impacted by Plaintiffs’ requested injunction. Many other Amici are national
22 associations or advocacy groups serving private schools across the country, including in the
23 jurisdictions represented by the Plaintiffs. Even for those Amici serving schools in other
24 jurisdictions, this case will have an impact. Any preliminary injunction would necessarily be based
25 on an (erroneous) conclusion that the Department’s interim rule is contrary to the CARES Act,
26 which could set a precedent that would embolden other States and school districts to disregard the
27 Department’s rule, therefore jeopardizing much needed funds for private schools nationwide.
28 Amici collectively represent and advocate for private schools across the country and are therefore

1 an essential voice in this litigation.

2 **CONCLUSION**

3 For these reasons, Amici respectfully request that this Court grant their motion for leave to
4 file the attached amicus brief.

5 Dated: July 29, 2020

6 *Respectfully Submitted,*

7 /s/ Luke N. Berg

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24 *Association of Christian Schools International, Association of*
25 *Christian Teachers and Schools, WELS Commission on Lutheran*
26 *Schools, Wisconsin Council of Religious & Independent Schools,*
School Choice Wisconsin Action, California Catholic Conference,
Michigan Catholic Conference, Michigan Association of Non-
Public Schools, Pennsylvania Catholic Conference, Pennsylvania
Affiliate of the Council for American Private Education, American
Federation for Children, Foundation for Excellence in Education,
Inc., Catholic Education Partners, Great Lakes Education
Foundation, Rio Grande Foundation, Commonwealth Foundation,
School Choice Wisconsin, Colorado Catholic Conference,
Colorado Association of Private Schools, Indiana Non-Public
Education Association, Midsouth Association of Independent
Schools, Catholic Conference of Oklahoma, Texas Private Schools
Association, James Madison Institute, Mississippi Center for
Public Policy, Nevada Policy Research Institute, Roughrider
Policy Center, Rhode Island Center for Freedom & Prosperity

Additional Signatures on the Following Page

* Pro Hac Vice Application Pending.

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* Not formally appearing. Above-signed counsel is authorized to appear as counsel of record for noticing/ECF purposes.

1 **ATTESTATION REGARDING SIGNATURES**

2 Pursuant to Local Rule 5-1(i)(3), I hereby attest that I have obtained concurrence in the
3 filing of this Amicus Brief from all of the signatories above. I am also authorized to appear as
4 counsel of record for noticing/ECF purposes for all Amici, including those with additional
5 attorney signatures above.

6 /s/ Luke N. Berg
7 LUKE N. BERG

8 Dated: July 29, 2020
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APPENDIX – LIST OF AMICI

- **Council for American Private Education (CAPE)** is a coalition of national organizations and state affiliates serving private elementary and secondary schools. CAPE member organizations represent about 80 percent of private school enrollment nationwide.
- **National Catholic Educational Association (NCEA)** is a professional membership organization representing almost 150,000 Catholic educators serving more than 1.7 million students in Catholic elementary and secondary schools. NCEA serves as a national voice for Catholic schools, which are ministries of the Catholic Church in America.
- **Agudath Israel of America**, founded in 1922, is a national grassroots Orthodox Jewish organization. Agudath Israel serves as a liaison between government at the federal, state, and local levels and the entire spectrum of Orthodox Jewish educational institutions in the United States, including approximately 750 day schools educating over 250,000 students.
- **Council of Islamic Schools in North America (CISNA)** is committed to promoting quality education at Islamic schools through advocacy, accreditation services, and professional development. CISNA has 101 member schools serving 23,000 students.
- **Association of Christian Schools International (ACSI)** is a nonprofit association providing support services to 2,500 Christian preschools and elementary and secondary schools and 90 post-secondary institutions in the U.S., including 32 in Michigan alone.
- **Association of Christian Teachers and Schools** is a national association of roughly 200 Christ-centered, Bible-based schools, serving over 26,000 students throughout the country.
- **WELS Commission on Lutheran Schools** exists to provide resources, support, and training for starting and strengthening Lutheran schools of the Wisconsin Synod. WELS schools educate over 42,000 students in its 434 schools located in 33 states.
- **Wisconsin Council of Religious & Independent Schools (WCRIS)** is a nonprofit, nonpartisan, membership organization representing 100,000 children and more than 10,000 teachers and staff in 600 K-12 schools across Wisconsin since 1974.
- **Wisconsin Catholic Conference (WCC)**, led by the Roman Catholic bishops of Wisconsin, is the public policy voice of the Catholic Church throughout the state and represents the nearly 280

Catholic schools in Wisconsin serving roughly 53,000 students.

- **School Choice Wisconsin Action** is a membership organization that advocates on behalf of the 342 private schools participating in the Wisconsin Private Parental Choice Programs.
- **California Catholic Conference (CCC)** is the public policy arm of the Catholic Church in California and speaks on behalf of California's two archdioceses and ten dioceses, which include over 500 elementary and 100 secondary schools with roughly 208,000 students.
- **Michigan Catholic Conference (MCC)** is a Michigan nonprofit membership corporation founded in 1963 that serves as the official voice of the Catholic Church in Michigan on matters of public policy, including education issues, and provides various services to the 222 Catholic schools, with over 50,000 students, throughout the State of Michigan.
- **Michigan Association of Non-Public Schools (MANS)** was formed in 1972 as a service provider and association of nonpublic schools in Michigan and serves 455 schools and their students to ensure they receive required services relating to health, safety, and welfare.
- **Pennsylvania Catholic Conference (PCC)** is an association of the eight Latin Rite and the two Byzantine Rite Dioceses in Pennsylvania. Pennsylvania Catholic schools have for over two centuries served generations of immigrants, the underprivileged, and the marginalized, and currently serve roughly 130,000 students.
- **Pennsylvania Affiliate of the Council for American Private Education (PACAPE)** is a nonpartisan association representing 90% of the private school community in Pennsylvania, which serves over 200,000 students and 50,000 teachers and staff.
- **American Federation for Children (AFC)** is a 501(c)(4) issue advocacy organization with state-based chapters in 11 states that seeks to empower families, especially lower-income families, with the freedom to choose the best K-12 education for their children.
- **Foundation for Excellence in Education, Inc.** ("ExcelinEd") is a national 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.
- **EdChoice** is a 501(c)(3) nonpartisan, nonprofit organization and national leader in educational-choice research, legal defense and education, fiscal analysis, and policy development, whose

mission is to advance educational freedom and choice for all.

- **Catholic Education Partners** works with state Catholic conferences, Bishops and other clergy, school leaders and families, and others to advance policies that allow more families to access Catholic education, while protecting the autonomy and integrity of schools.
- **Liberty Justice Center** is an Illinois-based, nonprofit, nonpartisan, public-interest law firm that seeks to protect fundamental rights through precedent-setting litigation, including its defense of parental choice in education in legal settings nationwide.
- **Mackinac Center for Public Policy** is a Michigan-based, nonpartisan research and educational institute committed to expanding opportunities for Michigan student success by empowering families with access to a variety of effective educational options.
- **Great Lakes Education Foundation** is a Michigan-based foundation committed to researching and promoting educational opportunity for every Michigan family.
- **Rio Grande Foundation** is New Mexico's free market public policy think tank that advocates for educational choice and improved student outcomes in the K-12 system.
- **Buckeye Institute** is an Ohio-based nonpartisan, nonprofit organization founded in 1989 as an independent research and educational institution. The Buckeye Institute has been a longtime proponent of public policy solutions for education reform.
- **Commonwealth Foundation** is an issue-based nonprofit in Pennsylvania that aims to advance public policies that empower parents to choose the best school for their child's needs, regardless of race, income, or zip-code.
- **School Choice Wisconsin** is a Wisconsin-based, nonprofit policy and advocacy organization that seeks to empower parents by developing, supporting, and promoting the ideas and policies that create vibrant, quality options in K-12 education in Wisconsin.
- **Colorado Catholic Conference (CCC)** represents the four Colorado bishops and three dioceses in public policy, advancing Catholic social teaching and the common good, including on behalf of the 54 Catholic schools in Colorado and their nearly 14,000 students.
- **Colorado Association of Private Schools (CAPS)** is an association of 65 private schools operating in Colorado, whose primary mission is to preserve the independence of Colorado's

private schools and to uphold parental choice in education.

- **Indiana Non-Public Education Association** was established in 1974 as a membership association for non-public schools in Indiana. Today, the membership includes about 400 schools, including religious and independent secular schools.
- **Midsouth Association of Independent Schools** is an association representing 122 private schools in Arkansas, Mississippi, Louisiana, and Tennessee, with over 40,000 students.
- **Catholic Conference of Oklahoma** (CCO) represents the Catholic Church in Oklahoma in all matters concerning public policy. In that role, CCO advocates for policies that aid the 35 Catholic schools in Oklahoma that educate more than 5,000 students.
- **Texas Private Schools Association** is a Texas-based association that represents roughly 900 accredited private schools throughout Texas, serving over 250,000 students.
- **Goldwater Institute** is an Arizona-based nonpartisan public policy and research foundation, with a principal goal of defending the right of parents to choose the best educational options for their children, including private options when they see fit.
- **James Madison Institute** (JMI) is Florida's premier free-market think tank. Founded in 1987 by Dr. Stan Marshall, a former president of Florida State University, JMI has long been a proponent of free-market solutions in K-12 and higher education.
- **Mississippi Center for Public Policy** is a Mississippi-based think tank that believes in parents' right to direct their children's education and advocates for policy solutions to expand public and private educational opportunities for Mississippi children.
- **Nevada Policy Research Institute** (NPRI) is a Nevada-based nonpartisan education and research organization fighting to empower parents with the freedom to choose the educational options that best suit their children's unique needs.
- **Roughrider Policy Center** is a North Dakota-based think tank committed to expanding opportunities for student success by empowering families with access to a variety of educational options, using high quality research to inform policymakers and the public.
- **Rhode Island Center for Freedom & Prosperity** is Rhode Island think tank that has worked to advance Education Savings Accounts and other policies promoting educational freedom to

empower citizens to lift their quality of life via educational opportunities.