

No. 18-1195

IN THE
Supreme Court of the United States

KENDRA ESPINOZA, JERI ELLEN ANDERSON
and JAIME SCHAEFER,

Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE, and
GENE WALBORN, in his official capacity as
DIRECTOR OF THE MONTANA DEPARTMENT OF REVENUE,

Respondents.

**On Writ of Certiorari to the
Montana Supreme Court**

**BRIEF OF EDCHOICE, REASON
FOUNDATION, AND THE INDIVIDUAL
RIGHTS FOUNDATION AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICI CURIAE*¹

EdChoice 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.

Reason Foundation (“Reason”) is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason’s mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, and by issuing policy research reports. To further Reason’s commitment

¹ Pursuant to Sup. Ct. R. 37.6, 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. All parties have filed blanket consents for *amicus* briefs.

to “Free Minds and Free Markets,” Reason participates as *amicus curiae* in cases raising significant constitutional, legal, or public policy issues.

The Individual Rights Foundation (“IRF”) was founded in 1993 and is the legal arm of the David Horowitz Freedom Center, a nonprofit 501(c)(3) organization. IRF opposes attempts from anywhere along the political spectrum to undermine freedom of speech and equality of rights, and it participates as *amicus curiae* in appellate cases to combat overreaching governmental activity that impairs individual rights.

EdChoice, Reason, and IRF respectfully ask that the Court reverse the judgment of the Montana Supreme Court and hold that its decision violated the Free Exercise Clause, Establishment Clause, and Equal Protection Clause of the United States Constitution by invalidating a generally available and religiously neutral student-aid program solely because the program affords students the choice of attending religiously affiliated schools.

SUMMARY

State legislatures introduce, enact, and expand school-choice programs despite knowing that they are likely to face legal challenges. *See generally* EdChoice, *ABCs of School Choice* 141-49 (2019) (hereinafter *ABCs of School Choice*), *available at* <https://www.edchoice.org/wp-content/uploads/2019/01/The-ABCs-of-School-Choice-2019-Edition.pdf>. They are well aware of the “Deep Split” between 10 federal Circuit courts and state courts of last resort as to their constitutionality. *See* Petition for Writ of Certiorari of Kendra Espinoza, et al. (No. 18-1195) at 30-33. The Montana program struck down in this case was a tax-credit scholarship program, similar to 23 other tax-credit scholarship

programs established in 18 states. ABCs of School Choice 84-130. The legal challenge to this program was not unexpected, even though approximately 293,000 children nationwide were awarded tax-credit scholarships for the most recent school year. EdChoice, *School Choice in America Dashboard*, <https://www.edchoice.org/school-choice/school-choice-in-america/> (last visited Sept. 13, 2019).

At least one state has enacted a new educational-choice program every year since 2003, and over 1.4 million students and families are currently being served by 65 school-choice programs in 29 states, the District of Columbia, and Puerto Rico. *Id.*; EdChoice, *America's School Choice Programs by Dates Enacted and Launched*, <https://www.edchoice.org/school-choice/enacted-and-launched-table/> (last visited Sept. 13, 2019). These programs include tax-credit scholarships, vouchers, education savings accounts, and individual tax credits or deductions.² ABCs of School Choice 3-4.

² Tax-credit scholarships grant taxpayers full or partial tax credits when they donate to nonprofits that provide private school scholarships. 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 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. 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 3-4. These programs are often collectively referred to as "school-choice programs" or "student-aid programs." "Educational choice" is a more expansive term that includes private choice programs, home schooling subsidies, and other means of enhancing educational options for all children.

Despite this growth in educational choice, children in 21 states, including those as ideologically and culturally diverse as California and North Dakota, New Mexico and Delaware, do not have similar options; what all four of these states share in common is restrictive Blaine amendments. The deep constitutional uncertainty manifested by the decision of the Montana Supreme Court and those of other federal and state courts is limiting the ability or inclination of states to provide a full range of educational options for America's children. As a result, the fortuity of a child's residence may determine whether she will receive student aid to attend a school of her choice, secular or religious, if the school she is assigned to by a local public school board is not fulfilling her educational needs.

As the research summarized in Part I of this brief demonstrates, the benefits of educational-choice programs extend beyond just the 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 educational choice, or alternatively that some studies have shown such benefits to be marginal. The gist of these arguments is that student-aid programs should not exist while any doubt remains as to their value, despite the significant empirical research finding that educational choice increases learning opportunities for all children, and

despite parents continuing to seek choice options for their children.

When a parent chooses to use a voucher or scholarship to send her child to a religiously affiliated school, her decision is to choose an educational environment that will help the child learn and be successful; the particular religion with which the school is affiliated may not be a deciding factor. *See, e.g.*, Leslie Hiner, *Why I Sent My Children to a School of Another Faith*, The Heartland Institute (Dec. 25, 2013), <https://www.Heartland.org/news-opinion/news/why-i-sent-my-child-ren-to-a-school-of-another-faith>. The parent is not obligated or coerced to direct funds to a religious school. On the contrary, parents have free will in student-aid programs and may choose religious, independent, or secular schools and educational resources.

In 2008, a study was conducted to test the Catholic brand and the theory that people of faith will choose schools of another faith for their children. The authors determined that parents “prefer private schools that provide high-quality academic programs and religious instruction, particularly, but not exclusively, in the parents’ preferred religion.” Julie Trivitt & Patrick Wolf, *School Choice and the Branding of Catholic Schools*, 6 *Educ. Finance & Pol’y* 202, 205 (2011). They also found evidence that Catholic schools possess such a strong academic reputation that “many Protestant Christian families prefer a Catholic school as their private school of choice” *Id.*

In denying a parent the right to choose a religiously affiliated educational institution, the Montana Supreme Court and other courts that have ruled similarly argue

that state constitutions compel them to block student-aid programs that in any way involve religious schools. Whereas such courts appear to be upholding the legendary theory of separation of church and state, they are actually *abridging* the parents' First Amendment rights to free exercise and freedom of association. Furthermore, by affirmatively standing between religious entities and their right to participate in neutral student-aid programs, the courts are forcing state legislators to violate the right of religious entities to fully engage in public life. This creates a state entanglement with religion that implicates yet another violation of First Amendment rights under the federal constitution. Ultimately, Montana residents with extremely limited educational options are being denied the ability to provide a better education for their children due to this perhaps well-meaning but misguided interpretation of the First Amendment.

Ongoing state government policy debates about educational choice are unnecessarily constrained by the constitutional uncertainty about what policies are permissible under the federal constitution. The narrow grounds for the holding in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), did not directly address the student-aid question and, therefore, did not lift the cloud of uncertainty over the otherwise-robust policy debates. Elected and appointed officials must now continue to thread a moving needle as different courts interpret and apply this Court's prevailing First Amendment case law differently.

If educational-choice programs were not working for families, it is unlikely that state legislators would have the will and constituent support to enact and expand them across the nation. Yet, as religiously neutral student-aid programs have grown in popular-

ity, the complexity and confusion of legal challenges facing legislators have also increased. Legislators and parents may be in limbo for several years during student-aid program litigation, creating hardship for the very students the programs are designed to help. This was exactly what happened when Oklahoma Governor Brad Henry signed the Lindsey Nicole Henry Scholarship for Children with Disabilities into law in 2010. The very next year two school districts in Tulsa sued the parents of children with special needs who claimed vouchers for their children under the new school-choice program, notwithstanding a prior letter of warning from the Oklahoma Attorney General that public school boards had no authority to ignore the laws of the state or determine their constitutionality. The court ruled in favor of the public school districts, but the Oklahoma Supreme Court reversed, ruling that the public school districts had no standing to sue and that “the parents are clearly not the proper parties against whom to assert these constitutional challenges.” *Indep. Sch. Dist. No. 5 of Tulsa City v. Spry*, 2012 OK 98, ¶ 5, 292 P.3d 19, 20 (2012). Shortly thereafter, another lawsuit was filed against the Oklahoma Department of Education by 12 taxpayers. The lower court ruled that religiously affiliated schools could participate but sectarian schools could not, a true nod to the spirit of Blaine Amendments. *Oliver, Jr. v. Barresi*, No. CV-2013-2072, 2014 WL 12531242 (Okla. Dist. Ct. 2014). On appeal, the Oklahoma Supreme Court then reversed and held the program to be constitutional. *Oliver v. Hofmeister*, 2016 OK 15, 368 P.3d 1270 (2016). Since then, the program has operated without further legal challenges, but during the almost six years of litigation, parents reasonably feared legal actions and unwanted public scrutiny, as well as having hanging over them the possibility of

being forced to remove their children with special needs from schools that worked for them and return them to schools that were detrimental to them. Legislators attempting to serve the best interests of the state's children, meanwhile, were left to watch and hope.

The Deep Split did not happen overnight; since vouchers were enacted in Milwaukee in 1990, the intensity of legal battles and genuine confusion have only grown. Although awareness of the problem with Blaine amendments and compelled support clauses in state constitutions is more widespread, parents who need educational options for their children are no less confused today than in 1990 about why the government would find it acceptable to restrict their choice of private schools in student-aid programs, especially when that restriction limits or prohibits religious schools of their choice. This intensity has not declined at any time in the past thirty years, and has in fact accelerated during the last ten years.

In testimony to a Congressional subcommittee shortly after this Court ruled in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), Institute for Justice attorney Dick Komer commented on jurisprudence regarding state constitutional freedom of religion clauses, including Blaine amendments:

These overbroad interpretations of State constitutions will ultimately result, in our view, in a second Supreme Court decision which will have to address the extent to which State constitutions can restrict religious liberty more so than the Federal Constitution. We fully anticipate that that process will take a very long time.

Statement of Richard Komer, Institute for Justice, *Supreme Court's School Choice Decision And Congress' Authority To Enact Choice Programs*, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 107th Cong., 2nd Sess., 25 (Sept. 17, 2002). Mr. Komer was prescient. Almost 20 years later, the question of whether faith-based entities can be excluded from public benefit student-aid programs—and whether state religion clauses as interpreted by the lower courts are therefore in conflict with the federal constitution—is squarely before this Court. This Court should act to protect religiously neutral student-aid programs from lower court rulings and state government actions that run afoul of the federal constitution.

ARGUMENT

I. Social Science Research Reveals Why Parents Seek School Choice and Why Educational Services Provided by Religious Entities Must Not Be Excluded.

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 Private School Choice Programs in America* (2019) (hereinafter 123s of School Choice), available at <https://www.edchoice.org/wp-content/uploads/2019/04/123s-of-School-Choice.pdf>.

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

School-choice programs are most compelling for their historical ability to improve academic outcomes. A number of empirical studies have examined the effect of school choice on student performance using the random-assignment method, the “gold standard” of social science research.³ 123s of School Choice 7. Of 16 empirical studies to date, 10 found choice improves student outcomes and 4 found no visible effect. EdChoice, *Empirical Research Literature on the Effects of School Choice*, slide 9, <http://www.edchoice.org/school-choice/empirical-research-literature-on-the-effects-of-school-choice> (last visited Sept. 13, 2019). Two analyses of Louisiana’s voucher program found a negative average outcome for all or some groups of students. *Id.*

A 2013 random-assignment study of Washington D.C.’s voucher program found statistically-significant achievement gains of 4.8 scale score points in reading. Patrick J. Wolf et al., *School Vouchers and Student Outcomes: Experimental Evidence from Washington, D.C.*, 32 *J. Pol’y Analysis & Management* 246 (2013). The study also supported prior research from other scholars showing that “private schools provide students with an educational climate that encourages

³ 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 14.

school completion either through the intervention and expectations of school faculty or by having similarly motivated and achieving peers.” *Id.* at 265.

For example, a 1998 random-assignment study of a City of Milwaukee program found that students who used vouchers scored 6 points higher in reading and 11 points higher in math than students in a control group that was not offered vouchers. Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Vouchers* 9-10 (2d ed. 2011) (hereinafter 2011 Forster Report), available at <http://www.edchoice.org/wp-content/uploads/2015/07/3-2011-Win-Win-National-Study.pdf>. In 2001, a researcher studying the effect of school choice in a privately funded voucher program in Charlotte, North Carolina, found that after one year, voucher students scored six points higher on combined reading and math tests. *Id.* at 10. In 2008, another researcher reanalyzed the data from the Charlotte study, using a different method to account for students who were offered school choice but declined to exercise it. The second study found that after one year, the voucher students outperformed the control group by eight points in reading and seven points in math. *Id.*

Not every random-assignment study of student achievement has concluded that *all* students offered school choice improve academically. For example, in 2002, a random-assignment study examined the effect of choice in a privately funded voucher program in New York City. It found a nine-point increase on a combined reading and math test after three years for African-American students, but no visible effect among other students. *Id.* at 11. The New York City data were reviewed a year later by other researchers, who found that students (regardless of race) who used

vouchers to leave low-quality public schools gained five points on math tests after one year. *Id.* A further reanalysis in 2010 confirmed the finding of academic gains. Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Choice* 8 (3d ed. 2013) (hereinafter 2013 Forster Report), available at <http://www.edchoice.org/wp-content/uploads/2015/07/2013-4-A-Win-Win-Solution-WEB.pdf>. A fourth reanalysis of the New York City data changed the way students were classified by race, using a scientifically questionable methodology, and found no visible impact on academic achievement. 2011 Forster Report 11-12.

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. 2013 Forster Report 8. 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 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, Matthew M. Chingos, & Paul E. Peterson, *Experimentally Estimated Impacts*

of School Vouchers on Educational Attainments of Moderately and Severely Disadvantaged Students 2 (Program on Education Policy and Governance Working Paper Series, No. 19-02, 2019), available at https://sites.hks.harvard.edu/pepg/PDF/Papers/PEPG19_02.pdf.

As the aforementioned New York analyses illustrate, equally as important as academic improvement is what happens after secondary schooling is completed. Out of six studies of student attainment, four have found that private school-choice program participants experienced a positive increase in educational attainment, as measured by high school graduation rates, college enrollment, and college completion. 123s of School Choice 20. Two analyses found no visible difference, and none found negative effects for any groups of students. *Id.*

Overall, the empirical evidence demonstrates a largely positive effect of school choice on participating students, which logically leads to higher graduation rates and increased rates of post-secondary education. Such outcomes are the hallmark of responsible public policy. The empirical evidence as a whole supports the Montana legislature's decision to offer educational choice for families who believe they are not well served by their public school system.

B. Parents Consistently Express a Desire for School Choice and That Having the Option of Sending Their Children to Religious Schools Is an Important Component of School Choice.

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

EdChoice's comprehensive educational 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 & Michael Shaw, *Schooling in America* (2018), available at <https://www.edchoice.org/wp-content/uploads/2018/12/2018-12-Schooling-In-America-by-Paul-DiPerna-and-Michael-Shaw.pdf>. In the 2018 survey, when asked what type of school they would select if given the option, parents' first choice was private school (40%), followed by public district school (36%), public charter school (13%), and home schooling (10%). *Id.* at 19, 22. Given such parental aspirations, actual enrollment is quite remarkable: 82% in public district school, 10% in private school, 5% in public charter school, and 3% home school. *Id.* at 19-20, 22. It is these kind of constituent desires that have led to an ever-increasing number of states implementing educational-choice initiatives in an effort to empower parents to better guide their children's education.

Parents are also clear about their desire to have the option of choosing religious schools for their children. Parents participating in school choice programs are generally satisfied with their choices, many of which include religious schools. Of the 28 surveys of parents whose children participate in school-choice programs, 26 found positive outcomes for parental satisfaction. EdChoice, *Empirical Research Literature on the Effects of School Choice*, slide 19, <http://www.edchoice.org/school-choice/empirical-research-literature-on-the-effects-of-school-choice> (last visited Sept. 13, 2019). 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 2* (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 Bedrick and Burke 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 far outranked other considerations. The next three considerations were “safe environment” at 39%, “academic reputation” at 34%, and “small classes” at 31%. *Id.*

A similar survey conducted in Indiana, which has the nation’s largest voucher program, also found moral/character instruction and religious environment to be among the most important factors to parents. Andrew Catt & Evan Rhinesmith, *Why Indiana Parents Choose* 28 (2017), available at <https://www.edchoice.org/wp-content/uploads/2017/09/Why-Indiana-Parents-Choose-2.pdf>. Catt and Rhinesmith found that Indiana’s voucher-recipient parents listed the following as most influencing their choice of school: academics (58%), morals/character/values instruction (53%), safe environment (53%), religious environment/instruction (48%), and small classes (47%). *Id.*

C. Public School Students Exposed to School Choice Are Not Harmed and Have Improved Academic Outcomes.

A philosophical underpinning of school choice is that it should improve both private and public school educations due to the increased competition it fosters. When public schools know that students can use educational-choice funding to enroll elsewhere, they

have a powerful incentive to improve performance to retain and attract students. There is now sufficient rigorous academic research to support 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 26 studies that used appropriate methodological techniques, 24 found that school choice improves public schools, one found no visible effect, and one found a negative effect. 123s of School Choice 32.

This body of research uses new 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. These studies have overwhelmingly found that students in districts exposed to choice experience academic gains. *Id.* Many of these studies examined Milwaukee’s voucher program or Florida’s tax-credit scholarship programs, two of the nation’s longest-running programs. Several recent studies have provided intriguing (and 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). It found a positive effect on public schools in both reading and math for five separate measures of private school competition. 2016 Forster Report 17. 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 continue to find that school choice positively impacts the academic performance of public schools exposed to choice. 123s of School Choice 32.

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

Another line of research examines the impact of school choice on civic values and practices. To date, 11 studies have been completed: 6 found school choice has a positive impact, 5 studies showed no visible impact, and no study has shown school choice to have a negative effect. 123s of School Choice 40. In one study, researchers found higher levels of political tolerance, civic skills, future political participation, and volunteerism in participants in Milwaukee's voucher program when compared to public school students. 2016 Forster Report 31. The study 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 students' criminal records. Corey DeAngelis & Patrick Wolf, *Private School Choice and Crime: Evidence from Milwaukee*, Social Science Quarterly (forthcoming 2019), available at <https://onlinelibrary.wiley.com/doi/abs/10.1111/ssqu.12698>. It found a correlation between long-term participation in the voucher program and decreased criminal charges and convictions, especially for young men. *Id.* The longer students remained in the voucher program, the stronger the correlation across multiple measures of criminal records. *Id.* at 31-32. Males who remained in the program throughout high school had better outcomes than their peers in public schools, including a 22% reduction in felonies, a 29% reduction in drug offenses, and a 41% reduction in theft. *Id.* at 32.

A follow-up study was conducted concerning paternity. The authors found that student exposure to Milwaukee's voucher program in the 8th and 9th

grades is predictive of 38% fewer paternity suits by ages 25–28. Corey DeAngelis & Patrick Wolf, *Private School Choice and Character: More Evidence from Milwaukee* (Univ. Ark. Dept. of Educ. Reform (EDRE), Working Paper No. 2019-03), available at <https://ssrn.com/abstract=3335162>.

Studies of the racial and ethnic composition of private and public schools have also shown that school choice improves integration. The study of educational integration can be conducted by a variety of methods, yet 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 48.

E. Educational Choice Saves States and School Systems Money.

Empirical research and fiscal analyses nationwide have shown that educational-choice programs save money, which benefits both the public schools and taxpayers. School choice saves taxpayers money because the funds made available to parents to choose their child's educational services are typically less than the funds the state would otherwise pay to educate the child in a public school.

One recent study found that tax-credit scholarship programs like Montana's generate significant savings for taxpayers and school districts. Martin Lueken, *The Fiscal Effects of Tax-Credit Scholarship Programs in the United States*, 12 J. Sch. Choice 181 (2018). Lueken found that 10 tax-credit programs in seven different states generated between \$1,650 and \$3,000 in savings per scholarship student. *Id.* at 181. Every program had a positive fiscal effect, resulting in savings of between \$2 million and \$223 million per

state in 2014 alone. *Id.* Because the dollar amounts of tax-credit scholarships (and vouchers) are less than or equal to states' per student spending, a state is almost certain to spend less on a student in an educational-choice program than it would if the same student had attended public school.

EdChoice's review of school-choice research has identified 52 empirical studies of the fiscal impact of school choice. Forty-seven of those studies found that school choice saves money, four found certain programs to be revenue neutral due to unusual aspects of those particular programs, and one found a net cost.⁴ EdChoice, *Empirical Research Literature on the Effects of School Choice*, slide 41, <https://www.edchoice.org/school-choice/empirical-research-literature-on-the-effects-of-school-choice/> (last visited Sept. 13, 2019).

The latest comprehensive study examined 16 voucher programs' fiscal effects from 1990 to 2015 and found near-universal net fiscal benefits for public schools and taxpayers combined. Martin Lueken, *Fiscal Effects of School Vouchers: Examining the Savings and Costs of America's Private Voucher Programs 2* (2018), available at <https://www.edchoice.org/wp-content/uploads/2018/09/Fiscal-Effects-of-School-Vouchers-by-Martin-Lueken.pdf>. Lueken's study looked at aggregate savings to state and local government by subtracting the per-student cost of a school-choice program from the per-student reduction in variable educational costs for school districts. He found that 15 of the programs

⁴ Two of the revenue-neutral programs are century-old "town tuitioning" programs in Maine and Vermont, designed to cover school tuition for children living in small towns that do not have public schools. Susan Aud, *School Choice by the Numbers: The Fiscal Effect of School Choice Programs, 1990-2006*, at 24, 30 (2007).

saved taxpayers money—a total of \$3.2 billion from 1990 to 2015—with one small Louisiana program serving exclusively children with special needs having a minimal net cost. *Id.* at 16, 18.

Opponents of educational choice continue to raise the specter of financial ruin for public schools, but no evidence supports their assertions. With over two decades of results now in, the vast majority of studies have shown that educational choice has a net positive effect on public school per-pupil funding. The first most basic reason for this positive impact is the fact that when a child in a school-choice program leaves a public school, only part of the child’s education funding travels with that child. Typically local and federal funds remain behind at the sending public school.

Social science research has produced statistically valid, reliable reasons why parents favor school choice and why including private religious schools is important to parents. The human equation substantiates all that research: parents choose 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 basic needs. Religious schools are often chosen because, in addition to meeting or exceeding the state’s educational standards, they offer benefits that public schools cannot provide, like spiritual guidance, alignment with a faith-based worldview in general conversation and actions, real safety, and small schools that quietly focus on each student as an individual learner, being respectful of each child’s faith. Generally available student-aid programs provide access to this learning environment, if the parent decides that is what her child needs.

II. Inequalities Between States Allowing Religious Options in Student-Aid Programs and Those Prohibiting Them Violate the Federal Free Exercise Clause.

The empirical research outlined above has shown that educational-choice programs benefit participating students, their public school peers, public schools, and taxpayers, while also fulfilling the desires of parents for their children's education. This is also evidenced by the growing numbers of parents who choose educational choice scholarships for their children. Programs begin with small numbers and grow after parents learn about the opportunities available for their children. School choice has been limited or overly regulated by legislators, but never limited by lack of parent interest.

A 1981 *Newsweek* cover story reported that, for the first time, Americans' interest in private schools included not just the upper class—who had traditionally supported expensive private schools—but also middle class parents seeking a better education and a safer environment for their children. Dennis A. Williams, *The Bright Flight*, *Newsweek*, Apr. 20, 1981, at 66. A study cited by *Newsweek* noted a marked increase in the number of black children attending Catholic schools, as well as an increase in the number of black private schools. *Id.* Almost forty years later, African-American support for educational choice continues, with African-Americans and Hispanics showing the highest levels of approval for vouchers and education tax credits. Education Next, *Program on Education Policy and Governance—Survey 2019*, at 18-21, available at <https://www.educationnext.org/files/2019ednextpoll.pdf> (last visited Sept. 13, 2019). Parents' interest in using their children's state-provided education funding

at a school of the parents' choice is deeply rooted in dissatisfaction with geographically assigned public schools and a desire for higher quality education in a safer environment. This is not a new phenomenon.

Nonetheless, as a consequence of restrictive and non-uniform religion clauses, including Blaine Amendments, in state constitutions, there is now widespread confusion and disagreement as to whether government may or must exclude religious options from otherwise neutral and generally available student-aid programs, thereby limiting educational opportunities parents have sought for their children for many decades. This unequal application of the Free Exercise Clause is on its face a violation of the federal constitution. The First Amendment applies to all, not some, citizens. The National Center for Education Statistics (NCES) at the U.S. Department of Education reports that 67% of private schools in the United States were religious schools in 2015, down from 77% in 1995, while 78% of private school students attended religious schools in 2015, down from 85% in 1995. Although the percentage of nonsectarian private schools was 33% in 2015, up from 23% in 1995, if parents exercising educational choice were prohibited from choosing religiously-affiliated private schools for their children, 23,272 schools across the country would be off-limits. Stephen P. Broughman & Lenore A. Colaciello, *Private School Universe Survey, 1995-96*, NCES 98-220 (1998), available at <https://nces.ed.gov/pubs98/98229.pdf>; Stephen P. Broughman, Adam Rettig, & Jennifer Peterson, *Characteristics of Private Schools in the United States: Results From the 2015-16 Private School Universe Survey First Look*, NCES 2017-073 (2017). available at <https://nces.ed.gov/pubs2017/2017073.pdf>.

A. Student-Aid Programs Fund Children to Access Educational Services: Government Funding for Religiously Neutral Student-Aid Programs Is Not Government Funding of Religious Entities.

When state legislators consider adopting religiously neutral and generally available student-aid programs for K-12 education, they are regularly accused of having an ulterior motive of aiding private religious schools by using student-aid programs to divert funding from public schools to religious schools. Opponents then immediately allege constitutional violations—a pragmatic strategy, as both advocates and opponents can point to court decisions over the years that support their side of the argument.

But such opponents miss the point: no school participating in a student-aid program receives even one dollar of funding unless and until an eligible parent determines that it is the best educational option for her child and expressly directs the state to transmit funds, which have been allocated to her to pay for her child’s education, to a particular school in payment of tuition. The “circuit between government and religion” is broken when the state cannot transmit funding to any private school without this express direction from a parent. *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

The “ulterior motive” argument suggests that legislators are intentionally using parents to put public dollars into the hands of religious schools, as if parents are puppets of the legislature rather than guardians of their own children’s education. But in these neutral educational-choice programs, parents retain the free will to choose any type of school. Indeed, parents need

not participate at all. Although demand for school choice is great, nobody is forcing parents to remove their students from public schools and use vouchers to place their children in private schools. That choice is a private decision, independent of any state action or perceived legislative motive. When a state enacts a scholarship program, the message to parents is simple: scholarship funding is available, if and when you need it for your child. It is a lifeline for many whose children are failing to thrive in public schools, and an insurance policy for those whose children do not need a different educational option at the moment.

This aspect of educational-choice programs has been acknowledged in various contexts by this Court and state courts of last resort. In the context of considering standing, this Court and some state courts have determined that in the provision of tax-credit scholarships, “private citizens create private STOs [student tuition organizations]; STOs choose beneficiary schools; and taxpayers then contribute to STOs. While the state, at the outset, affords the opportunity to create and contribute to an STO, the tax credit system is implemented by private action and with no state intervention.” *Ariz. Christian Sch. Tuition Organization v. Winn*, 563 U.S. 125, 141-42 (2011); *see also McCall v. Scott*, 199 So.3d 359, 365-66 (Fla. App. 2016), *review denied*. Nevada’s Supreme Court, in ruling on whether an education savings account program violated the Nevada constitution, held that once public funds are deposited into an education savings account, they are no longer public funds. *Schwartz v. Lopez*, 132 Nev. 732, 750, 382 P.3d 886, 899 (2016). Because it is the parents who decide how to spend the money for the child’s education, “[a]ny decision by the parent to use the funds in his or her account to pay tuition at a religious school

does not involve the use of ‘public funds’ and thus [does not violate the state constitution].” *Id.* at 750-51.

In considering a state constitutional challenge to a voucher program, the Indiana Supreme Court similarly found that “voucher program expenditures do not directly benefit religious schools but rather directly benefit lower-income families with school-children by providing an opportunity for such children to attend non-public schools if desired.” *Meredith v. Pence*, 984 N.E.2d 1213, 1230 (Ind. 2013). Oklahoma’s constitution has long been considered to have among the most restrictive provisions relative to student-aid programs. Yet its supreme court has found that the purpose of the “no aid” clause is to protect the separation of church and state and to keep churches free from the state’s control, not to prevent religious influence. *Oliver v. Hofmeister*, 2016 OK 15, ¶ 20, 368 P.3d 1270, 1275-76 (2016). In dismissing a challenge to that state’s voucher program for children with disabilities, it found that the program was “completely neutral” with regard to religion and that any funds flowing to a sectarian school were “the sole result of the parent’s independent decision completely free from state influence. . . . We are satisfied that under this scenario, the State is not adopting sectarian principles or providing monetary support of any particular sect.” *Id.*, 2016 OK 15, ¶ 26, 368 P.3d at 1277.

Allowing religiously affiliated schools to participate in generally available public student-aid programs promotes religious tolerance and advances the value of education, particularly when a child of one faith, or no faith, attends a school of a different belief. This is confirmed by the Trivitt and Wolf study that found parents may seek a school for quality academics and religious atmosphere regardless of whether parents

share the specific faith traditions of that school. Trivitt & Wolf, 6 Educ. Finance & Pol'y 202. While religious intolerance remains in clear view today, intolerance does not stem from public support for a child to attend a safe school that values the child and provides real learning opportunities not available in the child's zoned public school.

A far greater source of concern is the academic achievement gap that has been pervasive since the mid-twentieth century, according to a National Bureau of Economic Research study of children born between 1954 and 2001. Eric A. Hanushek et al., *The Unwavering SES Achievement Gap: Trends in U.S. Student Performance* (Nat. Bur. of Econ. Research, Working Paper No. 25648, 2019). The socio-economic status (SES) achievement gap between economically advantaged and economically disadvantaged children remains mostly unchanged from over 50 years ago (by the eighth grade economically advantaged students in the top 10th percentile are three to four years ahead of those in the bottom 10th percentile). *Id.* at 2. Although there have been some achievement gains in the lower grades overall, these gains disappear between ages 14-17. *Id.*

As noted earlier, the strongest support for educational choice is consistently found among black parents, and more recently also among Hispanics. The NBER study revealed strong reasons for this support. Although the black-white achievement gap cannot conclusively be said to contribute to the SES achievement gap (performance between black and white students may be converging), evidence shows that after *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294 (1955), the black-white achievement gap began to close as public schools became desegregated. However, notwithstanding changes in school funding that directed more

resources to districts serving the most disadvantaged, after 1980 the black-white achievement gap rate of closure slowed to a “near stop.” Hanushek, *supra*, at 18. The rate of desegregation also slowed to a near stop at this time (although evidence is mixed as to whether desegregation alone causes an increase in achievement levels for black children). Shockingly, researchers have concluded that the black-white achievement gap would have disappeared for children born in the twenty-first century if the rate of steady gains seen prior to 1980 had continued. *Id.* at 4. Instead, today closing the achievement gap is projected to take more than a century if gains continue at the current rate. *Id.*

While a black, Hispanic, or economically disadvantaged parent participating in a public student-aid program may choose a private religious school for her child, the reason for selecting a religious school may be related to the parent’s religious beliefs or may have nothing to do with religion and everything to do with providing the highest quality education in a setting that is most conducive to her child’s ability to learn. Student-aid programs fund educational services and are explicitly religiously neutral in practice; this religious neutrality should be recognized uniformly in all jurisdictions.

B. Parents Continue to Face a Cloud of Uncertainty When Choosing a Religiously Affiliated Educational Services Provider.

In the 37 states with Blaine Amendments, legislators will continue to face the choice of excluding religious schools from their programs—to the detriment of their constituents—or risking legal challenge. And as the experience in Montana shows, even a subsequent rule excluding religious schools may not be

enough to save the entire program from being invalidated by a Blaine Amendment.

Some thought that *Trinity Lutheran*, 137 S. Ct. 2012 (2017), would resolve the long-standing divide between the lower courts. In *Trinity Lutheran*, this Court reiterated that the U.S. Constitution’s First Amendment does not permit states to punish the free exercise of religion: “The Free Exercise Clause protects against laws that impose[] special disabilities on the basis of . . . religious status.” *Id.* at 2021 (internal quotation marks omitted). On that basis, this Court decided that the state’s policy of denying playground resurfacing grants to religiously affiliated applicants violated the Free Exercise Clause by forcing the religiously affiliated daycare to choose between “participat[ing] in an otherwise available benefit program or remain a religious institution.” *Id.* at 2021-22.

Although a plurality of this Court limited *Trinity Lutheran* to its facts, *id.* at 2024 n.3, its reasoning is relevant to legal challenges to religiously neutral school-choice programs such as the one presented by this petition. When states exclude religious options from school-choice programs, religiously affiliated schools are faced with the same choice as the daycare in *Trinity Lutheran*: participate in the program or retain their religious affiliation. Likewise, many qualifying families are forced to choose between participating in a program for which they qualify or attending the religiously affiliated school of their choice.

Kendra Espinoza removed her daughters from public schools when one of the girls was bullied and called derogatory names for starting a daily Bible study for her friends at recess. Pet. App. 150–51, ¶ 4. Both girls were failing to thrive and struggling academically. Kendra sought to place her girls in a school,

“that teaches the same Christian values that I teach at home.” Pet. App. 152, ¶ 12. She knew how to satisfy her daughters’ educational and social-emotional needs, but she and her daughters had to work multiple jobs to barely afford tuition. When Kendra suffered financial hardship, Montana’s tax-credit scholarships became available. When that program was halted by the Montana Supreme Court, she was devastated and left with no options for religious or secular private school, even though her daughters would once again face harassment for being children of faith if they returned to public schools.

In states like Montana, the mere possibility of a religiously affiliated school benefiting is seen to poison the entire program, leading to the program’s elimination for secular and religiously affiliated schools alike—and devastation for families like the Espinozas. This is contrary to this Court’s holding in *Zelman*, which, in upholding the Cleveland voucher program, stated, “The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributed to the individual and recipients, not the government, whose role ends with the disbursement of benefits.” *Zelman*, 536 U.S. at 652. Parents are silently suffering from this same impossible choice—a suffering that could easily be avoided—over and over across the United States.

Children are suffering, too. As reported to Step-Up for Students, a scholarship organization in Florida, Valentin Mendez, born in Miami, was bullied, beaten and traumatized in two different public middle schools. Valentin begged his mother to let him flee the country to live with his father in Nicaragua so as to avoid the public school trauma. His mother agreed. While

Valentin was living with his father, his mother discovered Florida's tax-credit scholarship program and a friend recommended La Progresiva Presbyterian School in Little Havana.⁵ Jeff Barlis, *School Choice Scholarships "Saved" Bullying Victim*, Stepping Beyond the Scholarship (Dec. 11, 2017), <https://blog.stepupforstudents.org/school-choice-scholarship-saved-bullying-victim/>.

Valentin returned to Miami and his mother used student aid from Florida's tax-credit scholarship program to pay for Valentin's tuition at this faith-based school. He had left his home in Miami as a deeply traumatized sixth grader; when he returned from Nicaragua, he tested at a fifth-grade level at La Progresiva. It took a year for him to overcome flashbacks of the bullying he previously experienced in public schools. La Progresiva embraced Valentin with the love that is part of their faith and educational system, and Valentin began to learn and thrive, graduating with honors and a 3.78 weighted GPA. After graduating he enrolled at Miami Dade College to study accounting. *Id.*

As observed by Petitioners, in *Trinity Lutheran* Justices Gorsuch and Thomas noted that discrimination based on religious "use" is just as constitutionally

⁵ La Progresiva, founded in 1900 in Cuba but taken over by the communist regime in 1961, was re-opened in Miami's Little Havana neighborhood ten years later by Cuban immigrants. La Progresiva believes that a "... sound educational system must be founded in the truth found in the Bible. . .", in particular, First Corinthians Thirteen, which says, "Love is patient, love is kind, and is not jealous," and "Love bears all things, believes all things, hopes all things, endures all things; love never fails." La Progresiva Presbyterian School, *Our Philosophy*, <http://laprogresivaschool.org/philosophy/> (last visited Sept. 13, 2019).

offensive as discrimination based on religious “status.” 137 S. Ct. at 2026 (Gorsuch, J., concurring in part). In Valentin’s case, having the right to freely exercise this religion by using a scholarship from a generally available student-aid program to attend La Progresiva afforded him the opportunity to be loved and healed in this faith community. This created the opportunity for him to return to his home and country, saved him from bullying and despair, and allowed him to learn and thrive. Much like Petitioner Kendra Espinoza’s daughters, the freedom to attend a religious school was responsible for Valentin receiving a quality education; without this freedom, Valentin may have been denied an education altogether. This would be as “odious to our Constitution,” *Trinity Lutheran*, 137 S. Ct. at 2025, as was denying a church a public benefit because it requests to keep its religious character and still receive safe playground materials for children through a generally available public benefit program.

In the briefing before the Montana Supreme Court, the parties extensively discussed *Trinity Lutheran*. The Montana Supreme Court, however, failed to even cite *Trinity Lutheran*, much less grapple with its analysis. Indeed, the Montana Supreme Court swatted away Petitioners’ Religion Clauses arguments with a single sentence: “Although there may be a case where an indirect payment constitutes ‘aid’ under [the Montana Constitution’s Blaine Amendment], but where prohibiting the aid would violate the Free Exercise Clause, this is not one of those cases.” *Espinoza v. Mont. Dept. of Revenue*, 2018 MT 306, ¶ 40, 393 Mont. 446, 468, 435 P.3d 603, 614 (2018).

In another notable post-*Trinity Lutheran* case to consider these issues, the New Mexico Supreme Court landed on the other side of the judicial divide. *Moses v.*

Ruszkowski, 2019-NMSC-003, ¶ 46 (2018). In *Moses*, the New Mexico Supreme Court upheld a textbook loan program after thoroughly discussing *Trinity Lutheran* and deciding to “adopt a construction of [New Mexico’s Blaine Amendment] that does not implicate the Free Exercise Clause under *Trinity Lutheran*.” *Id.*

And in Florida, even though a challenge to the tax-credit scholarship program that saved Valentin failed for lack of standing in *McCall v. Scott*, 199 So. 3d 359 (Fla. App. 2016), *review denied*, Florida’s newly enacted voucher program now faces potential renewed litigation challenging the constitutionality of providing student aid for children to attend religious schools. *Court Fight Looms Over New Florida School Voucher Program*, CBSMiami.com (June 24, 2019), <https://miami.cbslocal.com/2019/06/24/court-fight-looms-over-new-florida-school-voucher-program/>. “When I was in sixth grade, I was bullied, failing, invisible . . . It was a nightmare that wouldn’t end,” said Valentin when his student aid was threatened by litigation. Save Our Scholarships Coalition, *Valentin—Drop the Suit*, YouTube (Jan. 29, 2015), <https://youtu.be/kHQ4ESIHWpg>. Valentin’s mother, Jeannethe Ruiz, said, “Gracias a la beca, mi hijo estará preparado y tendrá un futuro mejor.” (“Thanks to the scholarship, my son will be prepared and have a better future.”) *Id.* Despite public knowledge of the plight of Valentin and too many other children like him, these children and the student-aid programs that help them find schools that fit their needs are continually at risk as a result of a hardened divide in the legal community over this question: does it violate the Religion Clauses or Equal Protection Clause of the United States Constitution to invalidate a generally available and religiously neutral

student-aid program simply because the program affords students the choice of attending religious schools?

CONCLUSION

For the foregoing reasons the judgment of the Montana Supreme Court should be reversed and article X, section 6(1) held unconstitutional as applied to bar religious options from student-aid programs.

Respectfully submitted,

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