

No. 18-1195

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IN THE  
**Supreme Court of the United States**

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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.*

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**On Petition for a Writ of Certiorari to the  
Montana Supreme Court**

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**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*<sup>1</sup>

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

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<sup>1</sup> 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 made any monetary contribution for the preparation or submission of this brief. Pursuant to Sup. Ct. R. 37.2(a), counsel for the parties received timely notice of this filing and all parties have consented to the filing of this brief.

commitment 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 the Court to grant the petition in this matter and determine whether the Montana Supreme Court’s decision violated the Religion Clauses or 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* EdChoice, *ABCs of School Choice* 141-49 (2019) (hereinafter *ABCs of 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 Choice* 84-130. The legal challenge to this program was not unexpected, even though approximately 275,000 children were awarded tax-credit scholarships for the school year ending in 2019. *Id.* at 84.

At least one state has enacted a new educational-choice program every year since 2003, and over 1.3 million students and families are now being served by 65 school-choice programs in 29 states, the District of Columbia, and Puerto Rico. *Id.* at 7, 131-32; EdChoice, *America's School Choice Programs by Dates Enacted and Launched*, <https://www.edchoice.org/school-choice/enacted-and-launched-table/> (last visited Apr. 9, 2019). These programs include tax-credit scholarships, vouchers, education savings accounts, and individual tax credits or deductions.<sup>2</sup> *ABCs of Choice* 3-4.

Despite this growth in educational choice, children in 21 states, including those as ideologically and culturally diverse as Texas and California, Missouri

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<sup>2</sup> 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 (2019). 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.

and Connecticut, do not have similar options. The deep constitutional uncertainty manifested by the decision of the Montana Supreme Court and those of other federal and state courts, as outlined in detail in the petition, 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, civic skills, 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 other 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 critical 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-children-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.

The Deep Split regarding whether government may bar religious entities from participating in generally available student-aid programs, to date involving six federal circuits and four states, has cast a shadow over legislative efforts to provide families with expanded educational choice. The ongoing policy debates within state government about educational choice are unnecessarily constrained by the constitutional uncertainty about what policies are permissible under the federal constitution. The narrow grounds for the decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), did not 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.

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 possible violation of First Amendment rights. 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.

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 grow in popularity with parents, the complexity and confusion of legal challenges facing legislators has also grown. This Court should grant the petition to provide legal clarity for the many states seeking to increase educational opportunities for all children.

## ARGUMENT

### **I. Social Science Research Reveals Why Parents Seek School Choice and Why Educational Services Provided by Religious Entities Matter.**

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 many students, is neutral for others, and does not harm any group of students or schools. Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Choice 1* (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>.<sup>3</sup>

**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 proven 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.<sup>4</sup> 2016 Forster Report 10. Of 16 empirical studies to date, 11 found choice improves student outcomes and 3 found no visible effect. EdChoice, *Empirical Research Literature on the Effects of School Choice*, slide 9, <http://www.edchoice.org>.

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<sup>3</sup> The 2016 edition of *A Win-Win Solution* was the last EdChoice organizational report to describe specific studies in the context of a systematic review of school choice research. An updated review of the empirical research is available at <http://www.edchoice.org/school-choice/empirical-research-literature-on-the-effects-of-school-choice> (last visited Apr. 9, 2019).

<sup>4</sup> Random-assignment studies are possible where there are more applicants for a choice program than there are slots, generally resulting in a random lottery for the slots. Students who win the lottery and are offered choice can be compared to those who were not offered choice. Any systemic differences can be attributed to the offer of choice alone, because nothing separates the group but the offer of choice and randomness. 2016 Forster Report 10.

org/school-choice/empirical-research-literature-on-the-effects-of-school-choice (last visited Apr. 9, 2019). Two analyses of Louisiana’s voucher program found a negative average outcome for all or some groups of students, as did one analysis of the Washington D.C. voucher program.<sup>5</sup> *Id.*

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

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<sup>5</sup> EdChoice analysis interpreted one study, Jonathan Mills & Patrick Wolf, *The Effects of the Louisiana Scholarship Program on Student Achievement After Three Years* (2017), to have found both positive and negative results.

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. They were also 25% more likely to attend college full-time and 130% more likely to attend a selective four-year college. 2013 Forster Report 8. 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. 2016 Forster Report 11.

Equally as important as academic improvement is what happens after secondary schooling is completed. Out of six studies of student attainment, five found that private school-choice program participants experienced a positive increase in educational attainment, as measured by graduation rates, college enrollment, and college completion. EdChoice, *Empirical Research Literature on the Effects of School Choice*, slide 14, <http://www.edchoice.org/school-choice/empirical-research-literature-on-the-effects-of-school-choice> (last visited Apr. 9, 2019). One analysis found no visible difference. *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 Options of Sending Their Children to Religious Schools Is Important.**

Parents know what they want, 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. See 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 control their children's education.

Parents are also clear about their desire to have the option of choosing religious schools for their children and are generally satisfied with their choices, many of which include religious schools. Twenty-six surveys of parents whose children participate in school-choice programs have all 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 Apr. 9, 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 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 performance is at least as strong as the effect on children who are offered choice. Of 26 relevant studies, 24 have found that school choice improves public schools, one found no visible effect, and one found a negative effect. EdChoice,

*Empirical Research Literature on the Effects of School Choice*, slide 25, <http://www.edchoice.org/school-choice/empirical-research-literature-on-the-effects-of-school-choice> (last visited Apr. 9, 2019).

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 always 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. *Id.* at 19.

#### **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. EdChoice, *Empirical Research Literature on the Effects of School Choice*, slide 31, <https://www.edchoice.org/school-choice/empirical-research-literature-on-the-effects-of-school-choice/> (last visited Apr. 9, 2019). In one recent 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 second recent study analyzed the long-term impact of Milwaukee's educational-choice program on students' criminal records. *Id.* It found a correlation between participation in the voucher program and decreased criminal activity, especially for 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 on all measures, including a 79% reduction in felonies, a 93% reduction in drug offenses, and an 87% reduction in theft. *Id.* at 32.

Studies of the racial and ethnic composition of private and public schools have also shown that school choice improves integration. The study of integration is not a perfect science, yet six out of seven studies using a variety of methods of comparison have found that school choice has a positive impact on integration, while one study showed no effect. EdChoice, *Empirical Research Literature on the Effects of School Choice*, slide 36, <https://www.edchoice.org/school-choice/empirical-research-literature-on-the-effects-of-school-choice/> (last visited Apr. 9, 2019).

### **E. Educational Choice Saves Money.**

Studies 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 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 amount of tax credits (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 50 empirical studies of the fiscal impact of school choice. Forty-five 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.<sup>6</sup> EdChoice, *Empirical Research Literature on the Effects of School Choice*, slide 41, <https://www.edchoice>.

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<sup>6</sup> 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 school. Susan Aud, *School Choice By the Numbers: The Fiscal Effect of School Choice Programs, 1990-2006*, at 24, 30 (2007).

org/school-choice/empirical-research-literature-on-the-effects-of-school-choice/ (last visited Apr. 9, 2019).

The latest comprehensive study examined 16 voucher programs 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>. The 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, and found that 15 of the programs saved taxpayers money—a total of \$3.2 billion from 1990 to 2015—with one small Louisiana program 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.

## **II. The Deep Split in State and Federal Courts Creates a Cloud of Uncertainty for Parents When Choosing a Religiously Affiliated Educational Services Provider.**

The empirical research outlined above has shown that educational-choice programs benefit participating students, their classmates, public schools, and taxpayers, while also fulfilling the desires of parents for their children's education. Yet as discussed in the petition, there is now a Deep Split, involving 10 federal

Circuits and state courts of last resort, as to whether government may or must exclude religious options from otherwise neutral and generally available student-aid programs. That the current split is five to five shows that no clear consensus is forming on either side. This long-standing judicial divide means that whether a low-income child is allowed to benefit from such a program is determined by his or her residence. In some states, the split in the courts has forced families to choose between attending the religious school of their choice and participating in public programs for which they otherwise qualify. In other states, such as Montana, even students wishing to attend nonreligious private schools have been harmed due to educational-choice programs being invalidated in their entirety by the courts. This has produced a situation in which families—through no fault of their own—are placed at a disadvantage to their counterparts in other states.

**A. Student-Aid Programs Fund Educational Services, Not Religious Entities: Government Funding for Religiously Neutral Student-Aid Programs Is Not Government Funding of Religion.**

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. In adopting student-aid programs, a state never chooses to fund religious schools—it merely funds a child’s education. Parents alone decide which school is the best fit for their child and may, or may not, choose a religiously affiliated school. The “ulterior motive” argument suggests that legislators are intentionally using parents to put public dollars into the hands of religious schools. But in these neutral educational-choice programs, parents retain the free will to choose any type of school. The schools in turn owe a duty to provide an education that meets state standards in exchange for any tuition funding they may receive from the parents. No school participating in a student-aid program, religious or not, receives even one dollar of funding unless and until a parent determines that it is the best educational option for her child.

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 there is a point in the provision of educational-choice tax credits where the circuit between public and private funds is broken. *See, e.g., Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 141-42 (2011); *McCall v. Scott*, 199 So. 3d 359, 365-66 (Fla. Dist. Ct. 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 educational savings account, they are no longer public funds. *Schwartz v. Lopez*, 382 P.3d 886, 899 (Nev. 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.*

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*, 368 P.3d 1270, 1275-76 (Okla. 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.* at 1277.

**B. Without Intervention, the Deep Split Is Likely to Continue and the Inequalities Between Those States Allowing Religious Options in Student-Aid Programs and Those Prohibiting Them Will Be Magnified.**

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 Church of Columbia, Inc. v. Comer*, 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 forced the religiously affiliated daycare to choose between “participat[ing] in an otherwise available benefit program or remain a religious institution,” thereby violating the Free Exercise Clause. *Id.* at 2021-22.

Although a plurality of this Court limited *Trinity Lutheran* to its facts, *see 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. 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.

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. Dep’t of Revenue*, 393 Mont. 446, 468 (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. *See Moses v. Ruszkowski*, 2019-NMSC-003, 2018 WL 6566646 (N.M. Dec. 13, 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.* at \*12, ¶ 46.

In short, even after *Trinity Lutheran*, the Deep Split between courts on this issue appears to have calcified. And as the research discussed in this brief illustrates, many people will be harmed if this Court declines to decide the issues presented. The families, taxpayers, and communities that find themselves on the wrong side of the judicial divide will continue to be deprived of the substantial educational, fiscal, and civic benefits that religiously neutral educational-choice programs provide.

### CONCLUSION

The petition for a writ of certiorari should be granted.

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April 12, 2019

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