No. 18-1195

In the Supreme Court of the United States

KENDRA ESPINOZA, ET AL.,

Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE, ET AL.,

Respondents.

On Writ of Certiorari to Montana Supreme Court

BRIEF AMICUS CURIAE OF RUSTY BOWERS, SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES, AND OTHER STATE LEGISLATIVE LEADERS IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

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

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STATEMENT OF AMICI CURIAE[1]

This *amicus* brief is submitted by legislative leaders from the states of Arizona, Montana, and Nebraska who support school choice and are interested in bringing its benefits to a wider range of beneficiaries. Rusty Bowers, Speaker of the Arizona House of Representatives, and Karen Fann, President of the Arizona Senate, are joined by Greg Hertz, Speaker of the Montana House of Representatives, and Fred Thomas, Majority Leader of the Montana Senate, and Senator Mike Groene, Chairman of the Nebraska Legislative Education Committee in Nebraska's unicameral legislature.

As they pursue this and other legislative priorities, all of which must make wise and cost-effective use of their states' limited financial resources, *amici* must overcome political and legal opposition. Moreover, the legislative leadership *amici* must make certain that school-choice and other desirable but optional legislative proposals do not derail consideration of necessities like state budgets and appropriations.

In working to provide parents and children with the option of choosing their school, *amici* are aware that school choice programs are very popular.

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[1] All parties consented to the filing of this brief by blanket letter. *See* Sup. R. 37.3(a). Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

Even so, to maximize the reach of school-choice programs, the amici know that they must comply with the Constitution of the United States and their State's constitution. In particular, they know that they must navigate between constitutional and unconstitutional applications of the Establishment and Free Exercise Clauses of the First Amendment to the Constitution of the United States. *See* U.S. Const. amend. I. This Court has pointed out a number of ways to act constitutionally to favor school choice, but the Montana Supreme Court has denied that option to Montana's legislators, parents, and children.

The Montana Supreme Court's ruling upsets *amici's* well-grounded expectations regarding school-scholarship programs. As this Court explained in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), "[O]ur jurisprudence with respect to true private choice programs has remained consistent and unbroken." *Id.* at 649. "[N]eutral government programs that provide aid directly to a broad class of individuals who, in turn, direct the aid to religious schools or institutions of their own choosing," like the Montana program, have been seen as "true private choice programs." *Id.* The Montana Supreme Court, however, upset their well-grounded expectations that such private choice programs are a constitutional alternative available to facilitate school choice.

Amici write to urge this Court to reverse the decision of the Montana Supreme Court. In so doing, this Court can reinforce the distinction between constitutional programs of pure private choice and insure that state legislators can adopt them even

where, as in Montana, a Blaine Amendment purports to stand in the way.

SUMMARY OF ARGUMENT

Even though there are a number of school-choice options, school-choice generally provides benefits to parents, students, and school districts. This case involves one of the available options, a student scholarship organization program that has features like the direct grant program this Court found constitutional in *Zelman*. Like the *Zelman* program, parents, not the State, decide where the money will go, and, to the extent it reaches religious schools, it does so "only as a result of the genuine and independent choices of private individuals." *Id.*, 536 U.S. at 649. Such programs do not violate the Establishment Clause of the First Amendment.

To the extent that the Montana Supreme Court relied on Article X, § 6 of the Montana Constitution, its Blaine provision, in declaring the Montana student scholarship organization program unconstitutional, it did so in violation of the Free Exercise Clause of the First Amendment to the Constitution of the United States. That program does not run afoul of the Establishment Clause, it is one much like the one this Court found constitutional in *Zelman v. Simmons-Harris*. To the extent that it found that the tax credits which support the scholarship program represent an expenditure of government funds, the court is simply wrong. Its judgment should be reversed.

ARGUMENT

In this brief, *amici* will show that the Blaine Amendments, which reflect the position taken by Respondents, are an unconstitutional infringement on the free exercise of religion protected by the First Amendment. They will begin by pointing to the effect that this Court's decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), had on the reasoning of the New Mexico Supreme Court in a case that was remanded for reconsideration in the light of *Trinity Lutheran*. Then, they will show how the Blaine amendments mandate unconstitutional discrimination, and how the Montana program constitutionally follows this Court's First Amendment jurisprudence. *Amici* will conclude by identifying the benefits of school choice programs, which demonstrate in turn why legislative leaders and members might support school choice.

The Montana Supreme Court decided not to deal with "federal precedent," relying instead on the Montana Constitution. *Espinoza v. Montana Dept. of Revenue*, 435 P. 3d 603, 609 (Mont. 2018). It reasoned that it could constitutionally rely on the fact that Montana's limitation on aid to sectarian schools could be "broader and stronger than the First Amendment's prohibition of the establishment of religion." *Id*. at 608 (citing *Locke v. Davey*, 540 U.S. 712, 722 (2004)). Nonetheless, it acknowledged that "an overly-broad analysis . . . could implicate free exercise concerns," but opined that "this is not one of those cases" where the concerns were present. *Id*. at 614.

As discussed below, the Montana Supreme Court got it wrong in both its analysis of the Establishment Clause and in giving short shrift to address the Espinoza Petitioners' Free Exercise Clause claims.

I. The application of Blaine Amendments, both generally and in this case, raise serious constitutional concerns.

The magnitude of the constitutional tensions generated by the Blaine Amendments is illustrated by the New Mexico Supreme Court's action in *Moses v. Ruszkowski*, 2019 NMSC 003 (2018). In response to this Court's decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), and a related remand, the New Mexico Supreme Court reconsidered and reversed its 2015 decision finding New Mexico's program of distributing instructional materials to school districts, state institutions, and private schools unconstitutional under the State Constitution. *See Moses v. Skandera*, 367 P. 3d 838 (N.Mex. 2015).

The New Mexico Constitution provides, in part, "[N]o part of the proceeds from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied, or collected for educational purposes, shall be used for any sectarian, denominational or private school, college or university." N. M. Const. art. XII, § 3. The New Mexico Supreme Court held that the constitution's exclusion of "private' entities from state benefits went farther than the Establishment Clause in the New Mexico Constitution. It rejected the contention that

the direct beneficiaries of the program were the parents of the children, not the schools. 367 P. 2d at 846. Accordingly, the state could not use public funds to provide books to private schools, whether they were secular or religious.

The United States Supreme Court vacated the New Mexico Supreme Court's ruling in *Skandera* and remanded the case for further consideration in the light of *Trinity Lutheran*. *See N. M. Ass'n of Non-Public Schools v. Moses*, 137 S. Ct. 2325 (2017).

On remand, the New Mexico Supreme Court noted that its treatment of the program in *Skandera* "raises concerns under the Free Exercise Clause of the First Amendment to the United States Constitution." *Ruszkowski* at 2. To "avoid" those tensions, the court concluded that "the textbook loan program, which provides a generally available benefit to students, does not result in the [unconstitutional] use of public funds in support of private schools." *Id*. It explained that, even if the prior decision rested on the fact that private schools were involved, "[e]volving First Amendment jurisprudence suggests that courts should consider the historical and social context underlying a challenged government action to determine whether the action was neutral or motivated by hostility to religion." *Id*. at 12.

As discussed in greater detail below, "the federal Blaine amendment originated in anti-Catholic prejudice and . . .Congress, through the Enabling Act, forced New Mexico to adopt a Blaine provision as a

condition of statehood." *Id*. at 13.[2] Even though the court found no proof that Article XII, § 3 was adopted for a discriminatory purpose, "the history of the federal Blaine amendment and the New Mexico enabling Act lead us to conclude that anti-Catholic animus tainted its adoption." *Id*. at 16. To avoid constitutional concerns, it construed Article XII, § 3 to allow the loan of textbooks to private school students, explaining that "[a]ny benefit to private schools is purely incidental and does not constitute 'support' within the meaning of Article XII." *Id*. at 17.

Reversing *Skandera*, the New Mexico Supreme Court "reinstate[d] the provisions of the [Instructional Material Law] that allow private school

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[2] The inclusion of the Blaine amendment in the Montana Constitution and others as a congressionally mandated condition of statehood is of questionable constitutional provenance. In *Coyle v. Smith*, 221 U.S. 559 (1911), the Court held that the power of Congress to admit states into the Union did not include the power to condition Oklahoma's statehood on moving its capitol. That requirement could not be "upheld as legislation within the sphere of the plain power of Congress," as might be the case with a limitation on interstate commerce or commerce with Indian tribes. *Id*. at 574. Given that the Blaine amendment originated in the 1880s, it cannot have been retroactively imposed on the states already part of the Union. Imposing it on New Mexico, Montana and other Western States as a condition of statehood exceeded the powers of Congress. This is particularly the case given its extra-constitutional character, the Blaine amendment never having been adopted as part of the Constitution of the United States.

students to participate in the textbook loan program." *Id*. at 19.

The proceedings in the New Mexico Supreme Court illustrate the constitutional tensions that Blaine amendments create.

A. Blaine Amendments are rooted in anti-Catholic bigotry.

Blaine Amendments were "born of bigotry" and "pervasive hostility to the Catholic Church." *Mitchell v. Helms*, 530 U.S. 793, 828, 830 (2000) (plurality op.); *see also Zelman*, 536 U.S. at 721 (Breyer, J., dissenting) (noting that anti-Catholicism "played a significant role" in the Blaine movement). Justice Thomas explained, "Consideration of the [Blaine] amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'" *Mitchell* at 828.[3] He pointed out, "Nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it." *Id*. at 829. Accordingly, "[t]his doctrine, born of bigotry, should be buried now." *Id*.

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[3] Justice Thomas observed that the Court "coined the term 'pervasively sectarian'" to eliminate the possibility of confusion when discussing a "sectarian" school, which could mean "the school of any religious sect." *Mitchell* at 829 (citing *Hunt v. McNair*, 413 U.S. 734, 743 (1973)). In 1943, the term ""pervasively sectarian' . . .could be applied almost exclusively to Catholic parochial schools." *Id*.

State courts have also noted the discriminatory intent behind the Blaine amendments. The Arizona Supreme Court, for example, noted, "The Blaine amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing Catholic menace." *Kotterman v. Killian*, 972 P. 2d 606, 624 (1999). The New Mexico Supreme Court also pointed to the anti-Catholic animus behind the Blaine amendments in both *Skandera* and *Ruszkowski*. *See Skandera*, 367 P. 2d at 842-43; *Ruszkowski* 2019 NMSC 003 at 6, 16.

This anti-Catholic animus behind the Blaine amendments is constitutionally consequential, both generally and in specific. In *Ruszkowski*, the New Mexico Supreme Court found that anti-Catholic animus grounded in "the history of the Blaine amendment and the New Mexico Enabling Act tainted" the adoption of a state constitutional provision intended to be "religiously neutral." 2019 NMSC 003 at 16. That animus and the court's desire to avoid constitutional problems led the court to reverse its 2015 decision barring the loan of textbooks to private schools.

In a similar way, the Colorado Civil Rights Commission's hostility to a Christian baker invalidated its prosecution of him for violating anti-discrimination laws. *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). By failing to act with neutrality, the Commission violated the Constitution.

B. The application of Montana's Blaine Amendment in this case is unconstitutional.

The Montana program is one of private choice that extends its benefits without regard to the religion of the recipient. In deciding to strike it down on state constitutional grounds, the Montana Supreme Court acted with cross purposes from two lines of the Court's jurisprudence.

1. The Montana program does not violate the Establishment Clause of the U.S. Constitution.

In *Mitchell v. Helms*, the Court held that the instructional and educational materials provided to Louisiana under a federal program could constitutionally be given to private schools, including religious schools, as well as public schools. The plurality relied on *Agostini v. Felton*, 521 U.S. 203 (1997), int rejecting an Establishment Clause challenge, concluding that the federal program "neither results in religious indoctrination by the government nor defines its recipients by reference to religion. " 530 U.S at 808. It explained that a government program that "seek[s] to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose" is one in which "any aid going to a religious recipient only has the effect of furthering that *secular* purpose." *Id*. at 810 (emphasis added). In addition, "[p]rivate choice also helps guarantee neutrality by mitigating the preference for pre-existing recipients that is arguably inherent in any governmental aid program." *Id*.

The plurality pointed to three of its decisions that reflected "[t]he principles of neutrality and private choice." *Id*. In *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), the Court held that the Establishment Clause did not bar a school district from providing a sign-language interpreter to a deaf child attending a Catholic high school. The student's parents chose which school he would attend, so the interpreter was at the school "only as a result of the private decision of individual parents." *Id*. at 10. Likewise, in *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986), the Court held that the Establishment Clause did not prohibit the state from giving vocational rehabilitation assistance to a blind person who was studying to become a pastor or minister at a Christian college. Again, the funds went to a Christian college only because Witters chose to use them there. Finally, in *Mueller v. Allen*, 463 U.S. 388 (1983), the Court held that a state tax deduction for educational expenses could constitutionally be claimed by taxpayers who sent their children to parochial schools.

2. Montana cannot constitutionally exclude potential recipients of generally available benefits because of their religious beliefs.

In *Trinity Lutheran*, this Court held that Missouri could not rely on its state constitution to categorically disqualify churches and church programs from participation in a program otherwise open to non-religious public and private entities. That program provided grants to the recipients to help them buy recycled tire material for their playgrounds.

This Court observed, "The Free Exercise Clause "protect[s] religious observers against unequal treatment" and subjects to the strictest scrutiny laws that target the religious for "special disabilities" based on their "religious status." 137 S. Ct. at 2019 (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 542 (1993) (internal quotation marks omitted)). Missouri's exclusion of Trinity Lutheran from its otherwise open program because of its religious "expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." 137 S. Ct. at 2021.[4]

Trinity Lutheran also disposes of the Montana Supreme Court's attempt to shelter under its state constitution and *Locke v. Davey*. Like the Montana Constitution, Missouri's bars the taking of "money from the state treasury, directly or indirectly, in aid of any church, sect or denomination of religion." Mo. Const., Art. I, § 7. And, the Eighth Circuit concluded that the Free Exercise Clause did not require Missouri to include Trinity Lutheran Church in its otherwise generally available benefit program, pointing to "a monetary grant to a religious institution as a 'hallmark[] of an established

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[4] In footnote 3 of its *Trinity Lutheran* decision, this Court said, "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination." 137 S. Ct. at 2024, n. 3. If that footnote is meant to limit *Trinity Lutheran* to its facts, the Court's reasoning nonetheless shows that Montana is unconstitutionally infringing on Petitioners' Free Exercise rights.

religion.'" *Id*. at 2018-19 (quoting *Locke*, 540 U.S. at 722).

This Court reversed and distinguished *Locke* in doing so. It explained, "*Locke* took account of Washington's antiestablishment interest only after determining . . . that the scholarship program did not 'require students to choose between their religious beliefs and receiving a government benefit.'" *Id*. at 2023 (quoting *Locke*, 540 U.S. at 720-21). The Court noted that, while Davey could use the scholarship at religious institutions or in other ways, "[t]he one thing he could not do was use the scholarship to pursue a degree in that subject [i.e., to prepare for the ministry]." *Id*. at 2024. Missouri could not rely on *Locke* to exclude Trinity Lutheran Church from "participat[ing] in an otherwise generally available public benefit program, for which it is fully qualified." *Id*. at 2024.

Montana does precisely the same thing and justifies it in the same misguided way that Missouri unsuccessfully did.. It relies on its state constitution to engage in express discrimination based on religious identity, which it cannot do constitutionally. Just as Trinity Lutheran Church "assert[ed] the right to participate in a government benefit program without having to disavow its religious character," *id*. at 2022, Montana cannot condition the participation of religious schools in its scholarship program on their surrendering their religious identity.

C. Montana's school choice program is constitutional.

The Montana program is not only not unconstitutional, it is affirmatively constitutional. The school-scholarship program enacted by the Montana legislature is one of true private choice that this Court has found to be constitutional.

"The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the purpose or effect of advancing or inhibiting religion." *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (2002) (internal quotations omitted). *Zelman* involved an Ohio program that provided financial and other aid to low income parents of children in failing public schools. Many of the schools chosen by the recipients were religious schools. Even so, the program did not have the unconstitutional effect of establishing religion.

As the Court noted, its decisions "have drawn a consistent distinction between government programs that provide aid directly to religious schools, . . . and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Id*. at 649. More to the point, the Court's "jurisprudence with respect to true private choice programs has remained consistent and unbroken." *Id*. The Ohio program "confer[red] educational assistance directly to a broad class of individuals defined without reference to religion." *Id*. at 653. Those individual

choices made it clear that the state was not endorsing any alternative.

In *Zelman*, Ohio provided assistance directly to parents. Another school-choice option is school-scholarship organization, which this Court addressed in *Arizona Christian School Tuition Org. v. Winn*, 563 U.S. 125 (2011). While dismissing the challenge on standing grounds, the Court also distinguished government expenditures from tax credits and tax deductions. It explained, "Like contributions that lead to charitable deductions, contributions yielding STO tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations." *Id.* at 144.

Other states have adopted tax credit scholarship programs that have survived legal challenge. The Georgia Supreme Court held that the challengers to Georgia's tuition scholarship program lacked standing to proceed as taxpayers. It reasoned that, while a taxpayer might challenge an expenditure of public funds, "[t]he statutes governing the program demonstrate that only private funds, and not public revenue, are used." *Gaddy v. Georgia Dept. of Revenue*, 802 S. E. 2d 225, 230 (2017). It further distinguished "tax expenditures" from "appropriations noting that "only [appropriations] involve money taken from the State Treasury." *Id.*; *see also Magee v. Boyd*, 175 So. 3d 79, 121-26 (Ala. 2015); *Meredith v. Pence*, 984 N.E. 2d 1213, 1228-29 (In. 2013) ("The direct beneficiaries under the voucher program are the families of eligible students and not the schools selected by the parents for their children to attend.).

II. The Montana Supreme Court's decision is constitutionally flawed.

The Montana Supreme Court reasoned that the Legislature was, in fact, indirectly funneling money to religious institutions in the form of tax credits. *See Espinoza*, 435 P. 3d at 613. Contrary to that reasoning, the better view is that "funds remain in the taxpayer's ownership at least until final calculation of the amount actually owed to the government, and upon which the state has a legal claim." *Kotterman v. Killian*, 972 P. 2d at 619.

This Court and the Supreme Court of Arizona have rejected the Montana Supreme Court's reasoning. In *Winn*, the Court rejected the contention that "income should be treated as if it were government property even if it has not come into the government's hands." *Id*. at 144. It explained, "Private bank accounts cannot be equated with the Arizona State Treasury." *Id*. Likewise, in *Kotterman*, the Arizona Supreme Court rejected the notion that the purpose of a tax return is to return state money to the taxpayer. It pointed out, "For us to agree that a tax credit constitutes public money would require a finding that state ownership springs into existence at the point where taxable income is first determined, if not before." 972 P. 2d at 619; *see also Gaddy* at 230 (rejecting the contention that tax credits come from the State treasury or are the legal equivalent of appropriations).[5]

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[5] The Georgia Supreme Court also pointed to the alarming implications of equating "tax expenditures" with "appropriations," pointing out that it "would open up other tax

In addition, the Montana Supreme Court missed the point in taking note that "the overwhelming majority" of the schools that met the program's criteria were "religiously affiliated." *Espinoza* at 613. In *Zelman*, the Court rejected both the contention that the number of religious schools and the number of eligible students choosing to go to them mattered to the constitutional analysis. It explained, "The constitutionality of a neutral educational program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school." *Id*. at 658. The Court observed that, if these considerations mattered, the Ohio program might pass muster in Columbus, Ohio, where there were fewer religious schools, or would be permissible in Maine or Utah, but not in Nebraska or Kansas. *Id*. at 657-58.

Put simply, what matters is whether the program involves genuine and independent choice by a taxpayer using his or her own money that has not yet reached the State, either actively or constructively. Such individual choices defeat the contention that the State is involved.

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advantages to constitutional scrutiny, such as tax deductions for contributions to religious organizations and tax exemptions offered to religious organizations, because they are also included within the [Georgia] Budget Act's definition of 'tax expenditure.'" *Gaddy*, 802 S.E. 2d at 230-31.

III. School choice is cost- and performance-effective and popular.

The Montana Supreme Court's decision is at odds with this Court's jurisprudence. It further hamstrings Montana's legislators as they consider how to bring the benefits of school choice to Montana. The Montana Supreme Court's decision further encourages the entrenched opponents of school choice to fight on in the courts after losing legislative battles.

The school choice question looks at whether parents or school administrators decide where students attend school and who pays for the education. The movement embodies a simple proposition: the more choice and autonomy parents and children have in selecting a school, the better the educations students will receive. Traditional public schools provide a one-size-fits-all model that is resistant to improvement and innovation. That traditional model fails to accept the fact that no two children are like; they learn in different ways and at different speeds. School choice programs can help students escape failing or unsafe schools.

School choice can take a variety of forms. This Court observed that, under Ohio's program of aid to parents in failing schools, the eligible children "may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll in a magnet school." *Zelman*, 536 U.S. at 655.

They can also include education savings accounts, which were first adopted in Arizona and later by Florida, Tennessee, Mississippi, and Nevada. *See* Butcher, Jonathan and Burke, Lindsey, "School Choice Moves Apace in States," National Review (Mar. 17, 2017).[6]

School-choice programs have been in place in a number of States for years, and they have been the subject of studies that demonstrate their benefit:

(1) In *The 123s of School Choice: What the research says about private school choice programs in America* (2019 ed.), the authors review the research regarding the effects of school choice programs on test scores, educational attainment, parent satisfaction, [7]public school student test scores, civic values and practices, racial and ethnic effects, and fiscal effects. A majority of the studies in each area finds a positive effect, with only a handful of more than 100 studies finding any negative effect. *Id*. at 4. Significantly, the study results for parental satisfaction are uniformly positive, and those for fiscal effects overwhelmingly positive. *Id*. at 24, 52.

(2) Since it was created in 1990, the Milwaukee Parental Choice Program has grown from 341 students at 7 private schools to 25,587 students attending 126 private schools in 2019. Those students can be matched with public school students from the

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[6] Available at nationalreview.com/2017/03/school-choice-states-innovation.

[7] Available at edchoice.org/research/the-123s-of-school-choice

same neighborhood with similar demographics and starting test scores. A recent study shows that the choice program students had higher levels of educational attainment. The authors note, "Students with higher levels of attainment live longer, lead healthier lives, earn more income, and avoid welfare and the criminal justice system at higher rates than their peers with lower levels of attainment. *See* Wolf, Patrick J., Witte, John F, and Kisada, Brian, *Do Voucher Students Attain Higher Levels of Education*? EdWorkingPaper 19-115, at 2 (citing studies).[8] They conclude, choice program students "are more likely to enroll, persist, and have more total years in a four-year college" than their public school peers." *Id*. at 4. The difference was statistically significant for those who entered the program in third through eighth grade. *Id*.; *see also* Lehman, Charles Fain, "School Voucher Kids More Likely to Graduate From College Study Says," Washington Free Beacon (Aug. 16, 2019) (noting, "Other voucher experiments have also shown encouraging results," pointing to a 2013 study of Washington, D.C.'s voucher program and a 2015 analysis of New York City's program.).[9]

(3) In New York, "state test results last week showed that charter schools in every region outperformed traditional public schools in English and math proficiency—by double digits." Bellafiore, Robert, "The war on charters is a war to deny

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[8]Available through http://www.edworkingpapers.com/ai19-115.

[9] Available through https://freebeacon.com/issues/school-voucher-kids-more-likely-to-graduate-from-college-study-says/

minority opportunity," N. Y. Post (Aug. 26, 2019).[10] Nonetheless, they are opposed by "leading Democrats, in the Empire State and nationally," including "the notoriously anti-charter and overwhelmingly white teachers union." *Id*. That opposition contrasts with both national support from Hispanic Democrats (58%) and black Democrats (53%) and with the demographics of the charter school population in New York City, which is 91% black or Hispanic and 80% low-income. *Id*.

(4) Studies show that families care about the safety of their schools. They do not want to send their children to schools they perceive as unsafe. DeAngelis, Corey A. and Leuken, Marty F., *Are Choice Schools Safe Schools: A Cross-Sector Analysis of K-12 Safety Policies and School Climates in Indiana*, EdChoice Working Paper 2019-2 at 9-10; see also *id*. at 11 (Four studies have found a statistically significant positive effect on parent reports of student safety resulting from assignment to a private school chosen by the parents).[11]

A study focused on data from 618 school leaders from Indiana found "robust evidence to suggest that private schools and charter schools experience fewer discipline problems while employing fewer disciplinary practices and expelling fewer students than traditional public schools." *Id*. at 5. In particular, "[d]espite the claims that private and charter schools

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[10] Available at https://nypost.com/2019/08/26/the-war-on-charters-is-a-war-to-deny-minority-opportunity.

[11] Available at edchoice.org/research/are-choice-schools-safe-schools/.

maintain safer environments because of additional freedom to expel and suspend disruptive students, suspension and expulsion rates are not statistically different from one another across sectors." Id. at 7, 22 and Table 6.

(5) Properly designed school-choice programs do not deprive public schools of more funding than they save from educating fewer students than they otherwise might. A study looking at Georgia found:

> [V]oucher and ESA [Education Savings Account] programs that provide funding in amounts equal to a district's state funding per pupil actually raise the district's financial capacity to educate its remaining students because the programs would remove less funding than the district saves by having fewer students to educate. In addition, this report reveals that in all except the smallest districts, vouchers or ESAs could be funded up to the level of average variable cost and leave more than enough money to educate the remaining students at the same expenditure level as before.

Dorfman, Jeffrey H., *The Economics of Building a Voucher or Educational Savings Account Program in Georgia*, Georgia Public Policy Foundation (February 2019) at 1.[12]

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[12] Available at georgiapolicy.org/issue/issue-analysis-economics-building-voucher-esa-program-georgia/

Given their popularity and the positive results that school-choice programs produce, it should be no surprise that they are legislatively attractive. The Montana Supreme Court's ruling constrains legislative activity in Montana and, perhaps, elsewhere, and it does so unconstitutionally. This Court should right the balance in favor of constitutional school choice.

CONCLUSION

For the reasons stated in the Petitioners' brief and this amicus brief, this Court should reverse the judgment of the Montana Supreme Court.

Respectfully submitted,

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