No. 20-1088

IN THE

Supreme Court of the United States

DAVID and AMY CARSON, as parents and next friends of O.C., and TROY and ANGELA NELSON, as parents and next friends of A.N. and R.N.,

Petitioners,

v.

A. PENDER MAKIN, in her official capacity as Commissioner of the Maine Department of Education,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF EDCHOICE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICUS 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 supports school choice policies that recognize the right of families to direct their children's education, by empowering families with financial support and freedom of choice necessary to access educational opportunities that best fit the needs of their children—whether that's a public school, private school, charter school, home school or any other learning environment.

EdChoice respectfully asks this Court to grant the petition in this matter and determine whether a state that prohibits eligible students from choosing schools providing "sectarian" instruction in an otherwise generally available student-aid program violates the Religion Clauses or Equal Protection Clause of the United States Constitution.

SUMMARY

Our nation's founders sought freedom from religious bigotry and the liberty to worship freely and openly, according to each person's conscience. Education plays

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[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 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.

an important role in encouraging our children to think about issues as weighty as liberty and religion.

That is an important task, because it is often difficult for people and institutions to discern what is, or is not, religious bigotry. Thankfully, at times this Court has an opportunity to deliver guidance on adherence to our constitutional precepts, including freedom of religion. This petition is such an opportunity. Given the many benefits of school choice for students, as shown by the school-choice research summarized in Part III of this brief, this petition also provides this Court with an opportunity to give states clearer guidelines on how they can offer students the widest possible range of educational options without fearing a barrage of constitutional challenges.

When systems of public schools were established, it was common for such schools to adopt and promote what school leaders believed were generally accepted principles of common good and shared values. This idea was promoted by Horace Mann, an early public education visionary who believed public schools would eliminate any semblance of a class system, as existed in other parts of the world. Mann further advocated for including the King James Bible in public education as a means of instilling Christian morals in children through the common schools. By adopting Protestantism as the foundation for those ideals, common schools could avoid acting "as an umpire between hostile religious opinions." Horace Mann, *Twelfth Annual Report of the Secretary of the Board of Education of Massachusetts* 117 (1849). This is no doubt true; if no other religious viewpoint is tolerated, enforcing only one religious viewpoint requires no umpire. However, it is curious that this idea of government choosing one type of religious instruction for all children was seen

as acceptable. If all students were to attend common schools, it begs the question of what result, or educational opportunity, was expected for children who held different religious beliefs.

Like many states, Maine's public schools from their inception through much of the 1900s included daily prayer and reading of a common Bible, most often the King James Version. As editorialized by the *Bangor Daily Whig and Courier*:

> The Bible has been generally read in the common schools of New England, from the birth of such. It makes a part of the system, and will be the last book abandoned. It is the great charter of free thought, and one might as well pluck out the right eye of a New Englander as to exclude the Bible from the public schools. In no place has it yet been done, and in no place will it be done, until the race shall degenerate to a point far below par, and below zero.

John B. Sayward, *Editorial*, Bangor Daily Whig and Courier, Dec. 5, 1853, p. 2, col. 1.

Sayward was perhaps spared the need to pluck out an eye because reading from the Bible in public schools was not decreed unconstitutional by this Court until 110 years after he wrote those words. *Sch. Dist. of Abington Twp., Pa. v. Schempp,* 374 U.S. 203 (1963).

Today in Maine, schools operated by or affiliated with religious organizations are eligible to accept town tuitioning dollars from a student only if the school does not promote or advance religious beliefs (while also meeting general requirements for private schools). The state alleges that it is not the status of the schools as religiously affiliated or operated entities that

matters, but whether the school will provide an education "comparable" to a free public education. Embedded in this assertion is the presumption that an education provided by teachers who deliver instruction from a religious viewpoint is not "comparable"—in other words is inferior to—an education that avoids religious principles.

Under this policy, the goal of providing education in Maine is not necessarily to give a child the opportunity to learn in an environment that is preferred by the student. On the contrary, it ensures that town tuitioning will never support a child who freely chooses a school where learning is touched by religious principles—even though a student's religious beliefs may be an integral part of the student's perspective on life and learning.

Given that for its first 100 years Maine students attended public schools that promoted Protestantism, it must be asked whether the creeping resistance to religious instruction in education was rooted in constitutional principles or in a less honorable opposition to other religions. In his concurring opinion in *Espinoza v. Montana Dep't of Revenue*, Justice Thomas opined that, "Historical evidence suggests that many advocates for this separationist view were originally motivated by hostility toward certain disfavored religions." 140 S. Ct. 2246, 2266 (2020) (Thomas, J., concurring).

This historical reading has particular relevance in Maine. In 1854, Father John Bapst, a Jesuit priest, was tarred, feathered, and run out of town on a rail for helping Catholic students in public schools challenge the rule that only the King James Bible could be used for classroom recitation of the Bible, which was then part of the curriculum. Any student who sought to use the Catholic Bible was subject to expulsion for using a

Bible not recognized by the school as Protestant. Emily Burnham, *164 Years Ago this Bangor Priest Was Tarred, Feathered, and Ridden on a Rail*, Bangor Daily News, June 19, 2018. This anti-Catholic sentiment continued to present itself visibly in Maine in the decades ahead. In the 1920s, the rise of the Ku Klux Klan in Maine was fueled by a desire to prohibit town tuitioning support for non-Protestant schools.

This historical resistance to other religions influences town tuitioning policy to this day. In 1980, Maine's attorney general opined that allowing a student using town tuitioning dollars to attend a "sectarian" school would be unconstitutional under the federal constitution. Although direct evidence has not been found linking the attorney general's opinion in 1980 with any renewed increase in anti-Catholic or anti-religion activity in the 1980s, anti-religion sentiments can surge periodically. We do know that the legislature acted swiftly to prohibit students from accessing religious schools, which suggests it had significant constituent support.

Students and families fought for religious freedom in 19th century Maine, and public school constraints were used to prevent them from exercising their religion. In 21st century Maine the terminology and systems may have changed, but town tuitioning constraints still inhibit students' free exercise of religion and block towns from including religious schools as choices for education funding, based on a misconstrued interpretation of the Establishment Clause. Whether the motives are the same or different, good-hearted or ignoble, conscious or unconscious, the result is still unconstitutional restraints on religious freedom. In turn, those restraints limit school-choice options that we know help students succeed, as shown

in the quantitative research summarized in Part III of this brief.

Justice Thomas's historical reflection in *Espinoza* is well-supported by the facts in Maine, as will be illustrated in greater detail below.

ARGUMENT

I. The Unconstitutional Underpinning of Maine's Town Tuitioning Prohibition Against Sectarian Schools is Unmasked by Its History.

Bigotry against religion plays an important role in explaining the significance of this litigation and the challenges under the Establishment Clause that continue to this day. Maine's history is riddled with animus against students with sectarian religious beliefs, rising and falling in intensity over many generations. In the years preceding adoption of Maine's town tuitioning method of funding elementary and secondary education, Catholic animus surfaced against Father John Bapst in a gruesome manner that sparked nationwide condemnation. This was merely the first indication of future collisions between public funding of a student's education and the student's choice to receive education in a religious environment.

A. Dispute Over Which Bible to Read in Public Schools Was Fueled by Religious Bigotry 20 Years Before Maine Adopted Town Tuitioning.

Several Catholic students were expelled from the public school in Ellsworth, Maine, in 1853 for refusing to read from the English Protestant Bible, which was part of their required curriculum. This act fueled litigation and ignited long-simmering resentment towards Catholic immigrants, culminating in extreme

violence against a Catholic priest, Catholic school, and Catholic church.

In January of 1853, a young, dedicated Jesuit priest from Switzerland, Father John Bapst, was directed to move to Ellsworth to continue what had been his successful religious work in northeast Maine. Father Bapst was a personable, inspirational teacher of the faith. He convinced many locals to join the faith and oversaw construction of a bigger church shortly after his arrival. David Dzurec, *"To Destroy Popery and Everything Appertinent Thereto": William Chaney, the Jesuit John Bapst, and the Know-Nothings in Mid-Nineteenth-Century Maine*, 103(1) Catholic Historical Review 73, 78 (2017) (hereinafter Dzurec).

Father Bapst's success in converting several young women from prominent Protestant families was disconcerting to local ministers, who denounced Bapst from their pulpits. The ministers warned Father Bapst to stop proselytizing and "reducing free-born Americans to Rome's galling yoke." *Id.* at 82-83.

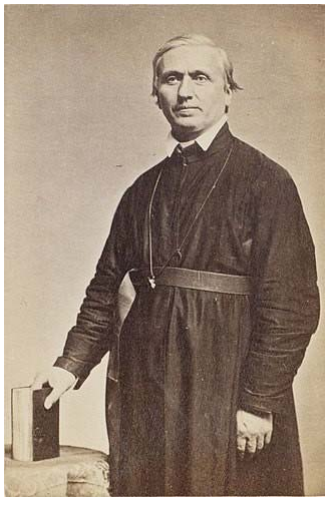

Photo: New England Historical Society

Further acrimony occurred when Catholic students attending the public school told Father Bapst that they were being forced to read from the Protestant Bible in school. Before the start of the new school year in 1853, Bapst advised the Catholic students that they should decline to read the Protestant Bible and refuse to say prayers not approved by the Catholic Church. In October, the Ellsworth school committee passed a law mandating the reading of the Protestant Bible by all students in school. In response, Father Bapst gathered the signatures of over 100 Catholic parents and presented it to the school committee for reconsideration. *Id.* at 84. Rejecting the petition, one of the school committee members stated, "We are determined to protestantize the Catholic children; they shall read the Protestant Bible or be dismissed from the schools; and should we find them loafing around the wharves we will clap them into jail." *Fr. John Bapst: A Sketch*, Woodstock Letters, vol. 18, 129, 134 (1889), *available at* http://jesuitarchives.org/woodstock-letters/#woodstock018.

On November 14, 1853, sixteen Catholic students who refused to read the Protestant Bible in school were expelled. In response, Father Bapst opened a school for the Catholic children. As Bapst wrote in his notes, "I was therefore obligated to provide means of instruction for these dear little confessors of Christ. I opened a Catholic school in our old chapel." *Id.*

Shortly after the Catholic students were expelled for refusing to read a Bible not of their faith, an argument familiar to those participating in modern educational choice debates was heard: if Catholics wanted to read their own Bible, and keep their students in "blindness, ignorance, and slavery… [then] they should not have the right to the school fund of American schools. If they

will have Roman Catholic schools, let them pay their teachers." *Father Gavazzi on American Schools*, Bangor Daily Whig and Courier, Dec. 10, 1853, p. 1, col. 7.

The father of Bridget Donahoe, one of the expelled students, billed the state for his daughter's tuition. After the state failed to respond, in April 1854, Mr. Donahoe sued the Ellsworth school committee. The lower court referred the case to the Maine Supreme Court to determine whether there was sufficient basis in law for the lower court to try the case. *Donahoe v. Richards*, 38 Me. 379 (1854).

After the lawsuit was filed, Father Bapst faced tremendous public pressure. This was fueled primarily by the editor of a local newspaper, the *Ellsworth Herald*, who was also a leader of the Know Nothing political party. Dzurec, *supra*, at 81, 88. As eloquently explained by Justice Alito in *Espinoza*, the mission of the Know Nothings was to diminish the political strength and civic acceptance of immigrants and Catholics. *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. at 2269 (Alito, J., concurring). As the *Herald* editor continuously stoked the flames of conflict, on June 3, 1854, a mob stormed into Father Bapst's home; finding him absent, they harassed his housekeeper and broke all the windows. *The Housekeeper's Account of Events at Ellsworth*, Woodstock Letters, vol. 18, 136, 138 (1889). On June 6, windows in the new Catholic church were broken. On June 7, Bishop Fitzpatrick of Boston ordered Father Bapst to leave Ellsworth. *Id.*

On June 13, a canister of gunpowder exploded at the front door of the Catholic school building, breaking all the glass in the building, in an attempt to destroy the school. At a town meeting on July 8, nativists elected new selectmen and passed a resolution threaten

ing to give Bapst "an entire suit of new clothes such as cannot be found at the shops of any Tailor; and that when thus appareled, he be presented with a free ticket to leave Ellsworth upon the first *railroad operation* that may go into effect." Dzurec, *supra*, at 90.

At the same town meeting, the selectmen appropriated money to fight the *Donahoe* case and hired Richard Henry Dana Jr., a famous New England lawyer, to represent them. The case was argued on July 22, 1854. D. Brock Hornby, *History Lessons: Instructive Legal Episodes from Maine's Early Years – Episode 2* (Nov. 15, 2020), *available at* http://dx.doi.org/10.2139/ssrn.3731150.

B. Father John Bapst Was Tarred and Feathered for Protecting the Students' Freedom of Religion.

While awaiting a ruling from the Court, a most horrific event occurred: the newly elected selectmen of Ellsworth made good on their earlier promise, and Father Bapst was tarred and feathered on October 14, 1854.

As reported by the local press, Father Bapst stopped in Ellsworth to celebrate Mass one Sunday on his way to another town. Local "ruffians" learned he was in town and mobbed him while he was walking to a friend's home. Bapst was robbed of his watch and wallet, then stripped, his coat torn "in a thousand pieces," "denuded," and covered in tar and feathers. He was then mounted on a rail and dumped at a shipyard a half-mile away. While suffering this violence, his attackers mocked him, asking, "Will the Virgin Mary save you?" Pleas to hang him were quieted by the leader of the mob. *Dastardly Outrage in Ellsworth, ME,* The Liberator (Boston), Oct. 27, 1854, p. 3, col. 5.

Father Bapst was abused in such a vile manner because he not only helped students defy the public school board when faced with a curriculum forcing them to deny their own faith, but also helped them leave the public school as soon as he could offer an alternative school aligned with their values that offered safety from such commonplace brutish anti-Catholic scorn and abuse.

Newspapers across the country denounced the incident. However, this did little to dissuade the deep-rooted local bigotry against Catholics and immigrants. On October 24, 1854, the town of Ellsworth held a "Mass Meeting" and published the minutes. *Mass Meeting in Ellsworth*, Bangor Daily Whit and Courier, Oct. 28, 1854, p. 2, col. 3. In addressing the violence against Father Bapst, they first referenced him as a man who had been forced out of town for "treasonable interference with our free schools." *Id.* Next, they regretted the unhappiness of the people of Ellsworth, and the return of the "designing Jesuit" with "indiscretion and bravado" after making himself "so exceedingly obnoxious to all respectable Protestants and true lovers of their country."[2] *Id.*

The Maine Supreme Court issued its ruling in *Donahoe* on May 30, 1855, upholding the power of local school boards to decide what books should be read.

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[2] The diligent town scribe went on to note that the Town affirmed the sacred birthright of the Puritan fathers whose blood purchased freedom, including free school with free use of the Bible, that the Pope had "intriguing schemes" with "allies, false-hearted, truth-economizing, treacherous office-holders, office-seekers, and their lick-spittles," and that the town residents were ready to "shoulder our muskets" to fight for more liberty and frowned on "wire-pulling demagogues" who supported the "treasonable efforts" of John Bapst. *Mass Meeting in Ellsworth*, *supra*.

Donahoe v. Richards, 38 Me. 379. In a nutshell, the Maine Supreme Court held that Catholic students (and, implicitly, students of other faiths) could be compelled to read the Protestant version of the Bible in public school. *Id.*

Local violence did not abate after this ruling. In 1856, the Catholic church that Father Bapst built in Ellsworth was burned by a mob. Father Bapst was not the only Catholic to face extreme discrimination. In 1854 in Bath, Maine, when an anti-Catholic speaker was addressing an audience of over 1,000 people, the crowd became so over-zealous that they marched to the relatively new Irish Catholic church, smashed pews, and set fire to the church. Just one year later, a congregation was chased away and beaten when the Bishop of Portland set the cornerstone for their church. Raney Bench, *History of Maine – The Rising of the Klan*, Maine History Documents 224 (2019), https://digitalcommons.library.umaine.edu/mainehistory/224 (last visited Mar. 8, 2021).

C. Different Century, Same Unconstitutional Discrimination.

The bigotry of the 19th century set the stage for the 20th century, and beyond. Tensions sometimes subsided, but were never resolved.

James G. Blaine, arguably Maine's most famous 19th century politician, worked relentlessly in the mid to late 1800s to ensure that states would not allow public funding to flow to "sectarian" schools; the primary goal of this effort was to bar public financial support for Catholic parochial schools at a time of "pervasive hostility" toward all Catholics. *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). Blaine's unsuccessful efforts to amend the federal constitution led him to

pursue state-by-state adoption, and clauses inserted in many state constitutions in the late 1800s that prohibited public funds from going to sectarian schools became commonly known as "Blaine Amendments."

This laid fertile ground for the rise of the Ku Klux Klan, which, like the Know-Nothings of the 19th Century, was hostile to immigrants and Catholics (or any religion that was not mainstream Protestant). The Klan renewed Blaine's arguments and slowly gained momentum. In 1920s Maine, anti-Catholic and anti-immigration activity began to flourish. The Klan is widely credited with electing a governor and placing a restrictive Blaine amendment on the ballot. Mark Paul Richard, *"This Is Not a Catholic Nation": The Ku Klux Klan Confronts Franco-Americans in Maine*, 82 New England Q. 285, 295-296, 301 (June 2009).

Legislative efforts to craft a sectarian limitation were successful in 1925, when the Maine Legislature enacted a bill requiring a constitutional referendum with this language: "Shall the Constitution be Amended as Proposed by a Resolution of the Legislature, Prohibiting the Use of Public Funds for Other Than Public Institutions and Public Purposes?" Maine Legislature, *Proposed Constitutional Legislation 1820 - *, at 19, *available at* https://legislature.maine.gov/doc/502 (last visited Mar. 8, 2021). However, when this question was put to the voters in a referendum in September 1926, Mainers rejected the amendment by a vote of 94,148 to 65,349. *Id.* The Ku Klux Klan's influence in Maine waned markedly thereafter. On the heels of this turmoil, the Catholic church opened a new school on September 20, 1928, in Bangor, paying tribute to the brave Father John Bapst. John Bapst Catholic High School quickly became one of the most sought after schools in the

northeast. *John Bapst Memorial School: Mission and History*, https://www.johnbapst.org/about/mission-and-history/ (last visited Mar. 8, 2021).

In a stroke of bitter irony, in 1980 the Maine attorney general decided that town tuitioning that permitted students to choose sectarian schools must conflict with the federal constitution. Soon after his opinion was shared with the legislature, the law was changed, and sectarian schools were excluded from town tuitioning.

John Bapst High School was clearly sectarian. At the time it was an extremely popular school with locals, many of whom relied on town tuitioning money to pay tuition. As a result of the new Maine restrictions, John Bapst High School was compelled to pick one of two bad choices:

1. Renounce its Catholic affiliation and teachings and adopt a secular curriculum prescribed by the state, or

2. Remain a practicing Catholic school and continue to cherish their faith until compelled to close as enrollment and tuition dwindled.

The school stood at a precipice that seemed jarringly similar to 126 years before. In 1854, Father John Bapst was run out of town because he was Catholic and objected to the idea that Catholic children should be compelled to attend public school and turned into Protestants. John Bapst Catholic High School opened in 1928 to honor the memory of Father Bapst, but was then compelled to close because the state feared it would violate the First Amendment if students could use town tuitioning funds to attend a sectarian school of the student's own choice.

John Bapst Catholic High School closed permanently in June 1980. Later that year, a completely secular school opened as the John Bapst *Memorial* High School, where no hint of Catholic teaching or any other spiritual talk or activity is permitted. In 1988, the new non-religious college preparatory school bought the building from the diocese. *Id.* The end of one of the most outstanding Catholic schools in New England was complete. The non-religious school is excellent, but those students who prefer a school of faith must look elsewhere.

One hundred and sixty-seven years after John Bapst was tarred and feathered, the pattern continues. Whether the attorney general's 1980 opinion was written based on animus or a misguided view of First Amendment law, it is clear that action from this Court is needed to clarify our understanding of the First Amendment, with special emphasis on the Establishment Clause. As Frederick Whittaker, past president of Bangor Theological Seminary, has written, "If nothing else positive comes from the John Bapst situation, at least it has dramatized the need for a re-examination of the 200-year-old American concept of 'separation' of church and state." Frederick Whittaker, *Another Viewpoint: Church and State*, Bangor Daily News, June 26, 1980, p. 16, col. 4.

In *Trinity Lutheran*, this Court decided that a state policy of denying playground resurfacing grants to religiously affiliated applicants violated the Free Exercise Clause by forcing a religiously affiliated daycare to choose between "participat[ing] in an otherwise available benefit program or remain a religious institution." *Trinity Lutheran Church of Colombia, Inc. v. Comer*, 137 S. Ct. 2012, 2021-22 (2017). This reasoning is relevant here. When states exclude reli-

gious options from school-choice programs, religiously affiliated schools like the formerly Catholic John Bapst High School are faced with the same choice as the daycare in *Trinity Lutheran*—participate in the program or retain a religious identity. Likewise, students are forced to choose between participating in a program for which they qualify or attending the religious school of their choice.

II. Without Intervention, Inequalities Between States Allowing Religious Options in Student-Aid Programs and Those Prohibiting Them Will Be Magnified.

The mythical phrase "separation of church and state" is held like a dagger over the heads of those who wish to worship and instruct their children in the values of their faith, in peace. This term is used too often to threaten school-choice programs, private schools who fear government intervention in curriculum and expression of faith, or parents that allow their children to learn anything different than what is taught in public schools.

Thanks to this Court's decision in *Espinoza*, many legislators in the 37 states with Blaine Amendments are thrilled to be working anew on developing school choice programs. However, the possibility of being sued based on religious use of program funding presents a new opportunity for detractors to convince legislators to exclude religious schools from educational choice programs. Despite the copious research showing benefits of school choice, as outlined in Part III, *infra*, state legislatures may choose not to pursue such desired policies due to the lack of constitutional clarity.

Oklahoma's constitution has long been considered to have among the most restrictive provisions relative to student-aid programs, yet a recent battle in the Oklahoma courts over a voucher program for children with disabilities exemplifies the uncertainties resulting from the lack of clarity on First Amendment issues in the educational funding context. When taxpayers challenged the voucher program as violating the Oklahoma Constitution, a lower court ruled that the program was unconstitutional. *Oliver, Jr. v Barresi*, No. CV-2013-2072, 2014 WL 12531242, at *1 (Okl.Dist. Sep. 10, 2014). After years of litigation, the state supreme court found that the purpose of the state constitution's "no aid" clause is to keep churches free from state control, not to prevent religious influence or any flow of public funds to a religious institution. *Oliver v. Hofmeister*, 368 P.3d 1270, 1275-76 (Okla. 2016). In dismissing the challenge to the voucher program, the court opined, "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. But similar litigation at the state and federal level will continue until this Court provides clarity as to the application of the Establishment Clause and Free Exercise Clause in the context of religiously neutral educational funding.

III. Substantial Social Science Research Reveals Why Students Seek School Choice and Why Educational Services Provided by Religious Entities Matter.

EdChoice's core mission includes compiling research data regarding educational choice programs nationwide. Notwithstanding all-too-frequent legal challenges, state legislatures continue to regularly introduce, enact, and expand school-choice programs based on constituent

demand. *See* EdChoice, *ABCs of School Choice* 139-144 (2021), *available at* https://www.edchoice.org/wp-content/uploads/2021/01/2021-ABCs-of-School-Choice-WEB-2-24.pdf. At least one state has enacted a new educational-choice program every year since 2003, and over 1.2 million students and families are served by 67 programs in 29 states, the District of Columbia, and Puerto Rico. *Id.* at 7, 13, 25, 85, 135. These programs include tax-credit scholarships, vouchers, education savings accounts, and individual tax credits or deductions.

The ongoing state government policy debates about educational choice are unnecessarily constrained by the constitutional uncertainty about what policies are permissible under the federal constitution. This Court's clear and convincing decision in *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020), greatly improved state leaders' understanding of the Free Exercise Clause and the blatant bigotry of state Blaine amendments. However, the siren song of "separation of church and state" continues to push elected state officials into the murky abyss of uncertainty regarding the Establishment Clause. Elected and appointed officials must continue to thread a moving needle as different courts interpret and apply this Court's prevailing First Amendment case law differently.

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) *available at*

http://www.edchoice.org/wp-content/uploads/2016/05/A-Win-Win-Solution-The-Empirical-Evidence-on-School-Choice.pdf (hereinafter 2016 Forster Report).

A. 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. 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] 2016 Forster Report, *supra*, at 10. Of 17 empirical studies to date, 11 found choice improves student outcomes and 4 found no visible effect. EdChoice, *Empirical Research Literature on the Effects of School Choice*, slide 9 (hereinafter *Empirical Research on School Choice*), https://www.edchoice.org/school-choice/empirical-research-%20literature-on-the-effects-of-school-%20choice/ (last visited Mar. 8, 2021).[4] Two analyses of Louisiana's voucher program found a negative average outcome for all or some groups of

[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 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, *supra*, at 10.

[4] EdChoice's *Empirical Research Literature on the Effects of School Choice* web page summarizes the empirical research on school choice, with the individual studies underlying the aggregated data cited to on the web page.

students, as did one analysis of the Washington D.C. voucher program.[5] *Id*.

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. Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Choice* 8 (3rd ed. 2013). 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. 2016 Forster Report, *supra*, at 11.

Equally as important as academic improvement is what happens after secondary schooling is completed. Out of six studies of student attainment, four found that private school-choice program participants experienced a positive increase in educational attainment, as measured by graduation rates, college enrollment, and college completion. *Empirical Research on School Choice*, *supra*, slide 14. Two analyses found no visible effect, 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

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[5] EdChoice analysis interprets 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.

graduation rates and increased rates of post-secondary education. Such outcomes are the hallmark of responsible public policy.

B. Parents Consistently Express a Desire for School Choice; Having Options to Send Their Children to Religious Schools Is Important.

Parents know what they want, but often are not able to access the educational environment they most desire for their children. 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, *2020 Schooling in America* (2020), *available at* https://www.edchoice.org/wp-content/uploads/2020/12/2020-SIA-Wave-2-Final.pdf. In the 2020 survey, when asked what type of school they would select if given the option, current parents' first choice was private school (41%), followed by public district school (33%), public charter school (13%), and home schooling (12%). *Id.* at 61. Given such parental aspirations, actual enrollment is quite remarkable: 83% in public district school, 8% in private school, 5% in public charter school, and 3% home school. *Id.*

Parents with access to school-choice programs, most of which include religious schools, are generally satisfied with their choices. Twenty-eight out of 30 surveys of parents whose children participate in school-choice programs have found positive outcomes for parental satisfaction; one found no visible effect and two found both positive and negative effects. *Empirical Research on School Choice*, *supra,* slide 19. The largest-ever survey of parents participating in a private school-choice program found that a school's religious environ-

ment 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.*

C. Public School Students Exposed to School Choice Have Improved Academic Outcomes.

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 28 relevant studies, 26 have found that school choice improves public schools, one found no visible effect, and one found a negative effect. *Empirical Research on School Choice*, *supra*, slide 25.

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. *Empirical Research on School Choice*, *supra*, slide 31. 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, *supra*, at 31. The study found the positive effect to be significantly stronger in religious schools than in other private schools. *Id.*

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. *Empirical Research on School Choice*, *supra*, slide 36.

Over 165 years ago, Father John Bapst sought to protect children in his community from being forced to renounce their own religious faith in order to pursue an education. Today, students in Maine eligible for town tuition funding are being forced to choose between availing themselves of generally available education funding and the free exercise of their religious beliefs. That this remains a substantial concern despite the multiple and varied reasons school choice helps children, as outlined above, is due in part to the persistent lack

of clarity about First Amendment constitutional protections in education. Father John Bapst would approve of this Court taking this opportunity to clarify that religiously neutral application of student-aid programs is both permitted by the Establishment Clause and required by the Free Exercise Clause.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

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