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 the Supreme Court of Montana

Amicus Curiae Brief of the Tennessee Education Association in Support of Respondents

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

OTHER AUTHORITIES

The Tennessee Education Association (TEA) submits this brief as *amicus curiae* in support of the Respondent.[1]

INTEREST OF *AMICUS CURIAE*

The TEA is Tennessee's largest professional organization representing thousands of elementary and secondary teachers, school administrators, education support professionals, higher education faculty, and students preparing to become teachers in Tennessee's public schools. The TEA's mission is to promote, advance and protect public education, the education profession, and the rights and interests of its members. The TEA actively advocates learning without limits, and our work centers around our core values—community, effectiveness, independence, justice, relevancy, success, unity, and the worth and dignity of individuals. TEA has a particular interest in this case because of Tennessee's own recent enactment of legislation under which taxpayer dollars that otherwise would go to fund public education will be diverted for the benefit of individuals through "education savings accounts."

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[1] The parties have lodged blanket consents to the filing of *amicus curiae* briefs. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

Public education serves primarily societal purposes. Meanwhile, vouchers, tax-credit scholarships, "education savings accounts," and comparable vehicles through which public funds are used to finance "school choice" have as their focus the individual. These types of programs divert much needed tax dollars away from the public schools and into the hands of individuals to facilitate their own education consumption. Elevating individual desires over the public good, these programs ultimately undermine the important social and societal benefits of public education.

Montana's constitution contains a "No-Aid Clause" that limits the use of its tax-credit scholarship program for religious schools. There is no proof that Montana's constitutional limitation was motivated by the sort of anti-Catholic bias that produced the failed "Blaine Amendment." In the absence of compelling evidence of such bias, the Court should refrain from striking down Montana's "No-Aid Clause." In order to avoid undue harm to the societal benefits of public education, states must remain free to implement reasonable restrictions on "school choice" programs.

ARGUMENT

(a) Montana, like many states, has enacted a "school choice" program under which taxpayers finance individual private school tuition. In 2015 the Montana Legislature enacted a program of tax credits to repay donations made to school scholarship organizations supporting private education. According to EdChoice, Montana is one of

eighteen states to have enacted tax-credit scholarships, under which taxpayers receive tax credits when they donate to nonprofits that provide private school scholarships. https://www.edchoice.org/resource-hub/fast-facts/#. These tax-credit scholarship programs are one of several methods that states have adopted to implement public funding of private schools. Other prominent methods include voucher programs adopted in eighteen states, and "education savings account" programs adopted in five states.[2] In voucher programs parents receive taxpayer-generated public funds to use to pay private school expenses. Similarly, in education savings account (ESA) programs parents receive a deposit of taxpayer-generated public funds into government-authorized savings accounts to be used for private school expenses. Funding in these programs is typically determined on a per-student basis, and in general is accomplished by shifting funds that otherwise would have been spent on the public schools. These types of programs have grown in recent years. The current administration, under the leadership of U.S. Secretary of Education Betsy Devos, has encouraged these types of programs and has even proposed to implement a federal-level tax credit scholarship plan.

(b) Tennessee has implemented a comparable program of taxpayer financing of private school tuition. In 2015 the Tennessee

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[2] In addition to these methods, five states provide individual tax credits for approved educational expenses that can include private school costs, and four states allow tax deductions for such expenses.

Legislature enacted an "Individualized Education Account (IEA) Program," a school choice program for students with disabilities under which parents may opt to have their disabled child taught in a private school and may receive an amount equal to the per-pupil total of state and local funds that would have been attributed to that child in public school funding. The payment of IEA funds to the parents of a disabled child results in a direct reduction of funding for the local public school system where the child otherwise would have enrolled.

In 2019 the Tennessee Legislature enacted the Education Savings Account (ESA) Pilot Program. The ESA Pilot Program faced heavy legislative opposition when Tennessee's first-term Republican Governor Bill Lee proposed it. Tennessee's Republican super-majority in the Legislature eventually wrote the program so that it applies only in two urban areas, Shelby (Memphis) and Davidson (Nashville) Counties, that are represented primarily by Democrat legislators and served by Democrat mayors. To secure the votes for passage, other urban areas represented by Republican legislators were removed from the scope of the Program. These Republican legislators who did not want the program in their hometowns were protected by the late addition of a "reverse severability" clause in the law, under which the entire Program will be struck down if it is determined that the geographic limitation is invalid. In addition, to secure support from rural legislators, a provision was included to direct that funds appropriated but not earmarked for the Program would be distributed to low-performing rural school districts.

Under Tennessee's ESA Pilot Program, an eligible family may receive an account funded with an average of $7,300 per year, a sum approximately equal to the per-pupil total of state and local funds that would have been attributed to their child if enrolled in public school, to help defray private school tuition and fees. Parents will be able to spend those taxpayer-generated dollars on private school tuition, tutoring, online courses, computer equipment, and other specified items related to their decisions to send their children to private schools. The payment of ESA funds to the parents of the child moving to a private school will result in a direct reduction of funding for the local public school system where the child otherwise would have enrolled.[3]

(c) Modern "school choice" programs undermine the societal benefits of public education by diverting needed funds from the public schools. While the moniker of "school choice" has been attached to these types of programs, that phrase is an overly simplistic description of the phenomenon that is at work. "School choice" has always been present throughout the history of our nation. School choice exists without state laws like the Montana tax-credit scholarship scheme or the Tennessee IEA Program and ESA Pilot Program. These new state laws take school choice a step farther by

[3] The ESA Pilot Program includes funds to reimburse the Shelby and Davidson County school systems for a portion of their funding losses in the Program's first three years, but those funds are "subject to appropriation" and are not guaranteed, and they do not continue after the first three years.

providing public taxpayer funding of purely private school choice. This use of taxpayer funds to facilitate individual school choice comes at the expense of public education and without due regard to the societal good that public education serves.

While education in America may have begun as more of an individual endeavor, it has evolved into one of our most important societal functions. The Boston Latin School opened in 1635 as the first taxpayer-supported public school in the United States. However, public education in the early days of our nation was not the rule. In the South public schools were uncommon, and the affluent used private tutors to educate their children.

Our nation's founding fathers recognized the societal need for an organized system of public education. Thomas Jefferson frequently referenced the importance of a system of public education. In 1786 Jefferson wrote about the importance of collecting a tax for the "diffusion of knowledge among the people." In his 6th Annual Message, Jefferson said that education was placed among the "articles of public care" because "a public institution alone can supply those sciences which … are necessary to complete the circle, all parts of which contribute to the improvement of the country, and some to its preservation." Later in his life, Jefferson wrote to Joseph C. Cabell, who was instrumental in the establishment of the University of Virginia, that "[a] system of general instruction, which shall reach every description of our citizens," was the first and last of his public concerns.

Jefferson was not alone. To John Adams, "Laws for the liberal education of youth, especially of the lower class of people, are so extremely wise and useful, that, to a humane and generous mind, no expense for this purpose would be thought extravagant."[4] Adams also wrote:

> "The whole people must take upon themselves the education of the whole people and be willing to bear the expenses of it. There should not be a district of one mile square, without a school in it, not founded by a charitable individual, but maintained at the public expense of the people themselves."

Still, the development of a system of public education in America was slow. In 1837, through the leadership of Horace Mann, Massachusetts created the first state Board of Education. Mann's philosophy was that free schools should be available to all citizens as a means to build wealth and provide opportunities for all. Meanwhile, education in the South remained predominantly private for the well-off until Reconstruction. After the Civil War, the original United States Department of Education was created in 1867 "to collect information on schools and teaching that would help the States establish effective school systems."[5] By 1900, more than thirty states required school attendance for students ages 8 to 14; and by

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[4] John Adams, *Thoughts on Government*, Apr. 1776 Papers 4:86-93.

[5] https://www2.ed.gov/about/overview/fed/role.html.

1918, every state required students to complete elementary school.

But as more states developed their public education systems, the societal benefit of an educated citizenry fell victim to the continued substandard treatment of African-Americans through the establishment of schools separated by race. This Court acknowledged the widespread and accepted presence of segregated schools in *Plessy v. Ferguson*, 163 U.S. 537 (1896) (approving Louisiana's establishment "separate but equal" railway accommodations), when it remarked, "[W]e cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures." *Id*., at 550-551.

It took *Brown v. Board of Education*, 347 U.S. 483 (1954), for this Court to unanimously cast aside *Plessy*'s "separate but equal" doctrine. *Brown* squarely addressed the constitutionality of racial segregation in public schools that had been "equalized" with respect to "tangible" factors. *Brown*, at 492. Before concluding that segregated schools were inherently unequal, the Court explained the societal importance of public education:

> "We must consider public education in the light of its full development and its present place in American life throughout the Nation.... Today,

> education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Id*., at 492-493.[6]

That the civil rights movement found much of its momentum in the field of education should come as no surprise. Justice Thurgood Marshall, who would later become a pioneer of the civil rights movement before joining the Court, had himself been a victim of racial discrimination when he was denied admission to the University of Maryland Law School. The two areas where segregation and racism were most evident in the first half of the twentieth century were housing and education. African Americans, particularly in the south, tended to live in the poorest areas, and the worst financed schools were also the schools that served the African American students in those areas. The

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[6] *Cf*., *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) (reaffirming the power of the State to reasonably regulate all schools to require "that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.")

correlation between education and community standard of living was evident. The leaders of the civil rights movement recognized that the most effective path to equal opportunity in general was through equal educational opportunity.

This Court has repeatedly recognized the importance of public schools "in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). Public education "ranks at the very apex of the function of a State." *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). While public education is not a right granted by the Constitution, "neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions and the lasting impact of its deprivation on the life of the child mark the distinction." *Plyler v. Doe*, 457 U.S. 202, 221 (1982). Public schools are a "most vital civic institution for the preservation of a democratic system of government." *Id.* (quoting *School District of Abington Township v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring)).

The general public finances the cost of public education primarily through state taxes and local property taxes, with federal tax dollars supplying a relatively smaller portion of the overall funding. Public education in turn transmits social values that benefit the collective good of society. "Public education entails the provision of common experiences under conditions consistent with equal protection, due process, free

speech, and religious neutrality," bedrock American values preserved in our Constitution.[7] The consumer-based systems of private education are not guaranteed to preserve these societal values, and in the case of religious schools may very well be contrary to these values.

Although individual students benefit from public education, society's overall benefit is what justifies the distribution of the costs of public education among all members of society, including those with no children to receive direct individual education benefits.[8] "Citizens should ensure that all children – regardless of their socioeconomic status, gender, race, ethnicity, or religion – receive an education that prepares them for effectively exercising their rights and responsibilities as future citizens."[9] But quality public education requires more than just buildings and classrooms. Student achievement is affected by many factors such as the support for learning that the student receives at home and from his or her community; characteristics of the student's family such as income, poverty, and language use; school factors such as school leadership, class sizes, curriculum, resources (e.g., books or computer labs), instructional time, security and

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[7] Derek W. Black, *Charter Schools, Vouchers, and the Public Good*, 48 Wake Forest L. Rev. 445, 447 (2013).

[8] *See*, Fred Inglis, *Education and the Good Society (2),* Education and the Good Society 23, 23 (Fred Inglis ed., 2004).

[9] Amy Gutmann, *Can Publicly Funded Schools Legitimately Teach Values in a Constitutional Democracy?*, 43 Moral and Political Education (2002), p. 170, 175.

physical safety, and the availability of specialists, aides, and tutors; and the student's health and access to medical and dental care and to nutritious food. Effective public education requires attention to these other factors as well as to classroom instruction.

Today we have the benefit of research that confirms facts about education that we have long known instinctively. According to the U.S. Department of Education, there are structural barriers, including inequitable funding systems, that impede the nation's progress in improving education. https://www.ed.gov/equity. This is especially true in low-income communities that historically have suffered the most from inadequate schools. "While one might expect schools in low-income communities to receive extra resources, the reverse is often true; a Department of Education study found that 45 percent of high-poverty schools received less state and local funding than was typical for other schools in their district." *Id*. Or as a recent examination of school finance indicators by the Rutgers University Graduate School of Education and the Albert Shanker Institute revealed:

> "[M]ost state finance systems are either non-progressive (high- and low-poverty districts receive similar funding) or regressive (low-poverty districts receive less funding). Moreover, while there are, to be sure, laudable exceptions, the results of our models of how much states would have to spend in order to achieve national average test scores (i.e., adequacy) indicate that the vast majority of states spend only a fraction

> of estimated requirements, particularly among their highest-poverty districts."[10]

Tax-credits, ESA's, and vouchers take needed funds away from the public schools, and they do so without the collective good in mind. In those programs, education is regarded essentially as a commodity. The focus of all of these programs is on the individual consumer of that commodity. Because the focus is on the individual consumer of a commodity, rather than the societal good, there is no justification for compelled societal funding of individual consumption, via taxation, that occurs through these programs.[11] That is especially so given that the good of the individual comes at the expense of the collective good because of the shifting of public funds away from the public schools to fund the cost of vouchers, ESA's, or tax credits.[12]

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[10] *The Adequacy and Fairness of State School Finance Systems*, Baker, DiCarlo, and Weber (1st ed., April 2019).

[11] "Based on their track record thus far, charters and vouchers, on the whole, are not operating in furtherance of the public good. Rather than promote the public good, they tend to promote the individual good and operate in ways that actively undermine the public good." Derek W. Black, *Charter Schools, Vouchers, and the Public Good*, 48 Wake Forest L. Rev. 445, 447 (2013).

[12] Public schools "have a relatively static set of fixed costs, largely because, by design, they serve communities in their entirety." Derek W. Black, *Charter Schools, Vouchers, and the Public Good*, 48 Wake Forest L. Rev. 445, 473 (2013). Although a voucher or ESA may shift a set amount of per-pupil funding from the public school to a private school of the recipient's choice, that shift is not accompanied by a concomitant reduction in the cost of operating the public school.

"[M]odern governmental programs have self-perpetuating and self-expanding propensities. These internal pressures are only enhanced when the schemes involve institutions whose legitimate needs are growing and whose interests have substantial political support." *Lemon v. Kurtzman*, 403 U.S. 602, 624 (1971). The types of school-choice-at-taxpayer-expense programs at issue here frustrate the societal purposes of public education by diverting government funds that otherwise would be spent to achieve those societal purposes.[13] Montana's No-Aid Clause serves as a check on the "self-expanding propensities" of the program. In the absence of a clear showing that the limitation was motivated by a constitutionally suspect concern, Montana's limitation is consistent with general public policy supporting public education for the benefit of society as a whole and should be regarded as encompassed within the "room for play in the joints" between the Establishment Clause and the Free Exercise Clause of the First Amendment. *Locke v. Davey*, 540 U.S. 712, 718 (2004) (quoting *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 669 (1970)).

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[13] It is undeniable that in the South, court-ordered desegregation of public schools led to the development of "segregation academies," private schools that were intended to facilitate white flight from integrated public schools. Many of those academies still exist. While they may not legally discriminate against African Americans, their enrollment tends to remain predominantly white. It is perverse indeed to consider that vouchers or other comparable programs may be used to divert public funds from the public schools in order to prop up these academies.

(d) Reversal of the Montana Supreme Court's decision will do harm to states' efforts to preserve the societal benefits of public education. Striking down the Montana No-Aid Clause without any proof that it was motivated by the sort of anti-Catholic bias that produced the failed "Blaine Amendment" might not open proverbial floodgates, but it would certainly do harm to states' ability to preserve the societal values inherent in public education by enacting limitations that prevent undue diversions of public funds to private schools when voucher-like programs experience their "self-perpetuating and self-expanding propensities." *Lemon*, *supra.* The concern of such harm is present in a state like Tennessee with its relatively new ESA Program.

Unlike Montana, Tennessee does not have a No-Aid Clause in its constitution, although the Tennessee constitution does guarantee freedom of religion and prohibits the state from establishing religion:

> That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship.

Tenn. Const. art. I, § 2. This provision ensures that religion will remain "a private matter for the

individual, the family, and the institutions of private choice." *Lemon*, 403 U.S. at 625.

The Tennessee constitution also requires the Tennessee Legislature to provide for a system of free *public* schools:

> The state of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools.

Tenn. Const. art. XI, § 12 (1978). The Tennessee Supreme Court has held that this latter constitutional provision, together with the state constitution's equal protection clause, required that the educational opportunities provided by Tennessee's public schools be substantially equal. *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139 (Tenn. 1993).

Despite the duty the Tennessee constitution places on the Tennessee Legislature, Tennessee still ranks among the bottom ten states in spending per pupil on public education. As the proponents of taxpayer-funded "school choice" push to expand the ESA Program, it will be critical that the Tennessee Legislature have the ability to implement reasonable limitations on that program in order to insure that the needed funds are available to meet its own Tennessee constitutional mandate to support public education. Many of Tennessee's private schools are church-based. Limitations the legislature may choose to place on education savings accounts will inevitably affect such schools. Small church-based schools tend to have lower

tuition rates than established private sectarian schools and academies and therefore stand to be the primary beneficiaries of Tennessee's new education savings accounts. Limitations that the Tennessee legislature may place on those accounts might therefore be expected to have a disproportionate effect on the small church-based private schools. Yet, achievement of the societal benefits of public education in Tennessee, and satisfaction of state constitutional mandates, may require the state to limit the ESA Program in ways that are adverse to the interests of those church-based schools.

A ruling in this case that strikes down Montana's No-Aid Clause, without any evidence of anti-religious bias in its formation and without any evidence that it was discriminatorily applied, would send a strong signal even to states like Tennessee without such a clause that they may be powerless to limit the "self-perpetuating and self-expanding propensities" of voucher-like programs once the programs have been created –regardless of how necessary such limitations may be for the perfectly legitimate reason of achieving the societal benefits that come from spending those funds on public schools. *Lemon*, *supra.*

CONCLUSION

For these reasons, TEA respectfully urges the Court to affirm the decision of the Montana Supreme Court and reject the Petitioner's federal constitutional challenge to Montana's No-Aid Clause.

Respectfully submitted,

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