

No. 18-1195

IN THE
Supreme Court of the United States

KENDRA ESPINOZA, JERI ANDERSON,
AND JAIME SCHAEFFER,

Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE, AND GENE
WALBORN, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF
THE MONTANA DEPARTMENT OF REVENUE,

Respondents.

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

**BRIEF OF AMICUS CURIAE PUBLIC FUNDS PUBLIC
SCHOOLS IN SUPPORT OF RESPONDENTS**

JESSICA LEVIN
WENDY LECKER
EDUCATION LAW CENTER
60 Park Place, Suite 300
Newark, NJ 07102
(973) 624-1815

TAMERLIN J. GODLEY
Counsel of Record
JESSICA REICH BARIL
APRIL YOUPEE-ROLL
MUNGER, TOLLES & OLSON LLP
350 S. Grand Avenue, 50th Floor
Los Angeles, CA 90071
(213) 683-9232
Tamerlin.Godley@mtto.com

Counsel for Amicus Curiae Public Funds Public Schools

TABLE OF CONTENTS

	Page
INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. ARTICLE X, SECTION 6 REFLECTS MONTANA’S COMMITMENT TO FUNDING PUBLIC EDUCATION.....	4
A. Convention transcripts demonstrate that retention of a no-aid provision was motivated by support for public schools.....	5
B. Montana voters understood Section 6 to prohibit diversion of state funding to nonpublic schools.	9
C. Section 6 must be read in the context of Article X as a whole, which evidences the delegates’ concern for the provision of quality education to all Montana’s students.	12
II. RESEARCH DEMONSTRATES THAT THE DIVERSION OF FUNDS FROM PUBLIC SCHOOLS HARMS STUDENTS.....	14
A. Diverting public money to private schools harms student achievement.....	15

B.	Research cited by <i>Amici</i> supporting Petitioners is flawed.....	19
CONCLUSION		27

TABLE OF AUTHORITIES

	Page(s)
 CASES	
<i>Espinoza v. Montana Department of Revenue</i> , 435 P.3d 603 (Mont. 2018)	6, 26
<i>Helena Elementary Sch. Dist. No 1. v. State</i> , 769 P.2d 684 (Mont. 1989)	12, 13
<i>Kvaalen v. Graybill</i> , 496 P.2d 1127 (Mont. 1972)	11
 CONSTITUTIONAL PROVISIONS	
Mont. Const. art. X, § 1.....	12, 13
Mont. Const. art. X, § 6.....	passim
Mont. Const. of 1889 art. XI, § 8	7
 OTHER AUTHORITIES	
<i>2 Montana Constitutional Convention Proceedings</i> 776 (1981).....	6, 7, 12
<i>6 Montana Constitutional Convention Proceedings</i> 2016 (1981).....	5, 6, 7, 9
<i>7 Montana Constitutional Convention Proceedings</i> 2575 (1981).....	8

- Ann Weber, et al., *Evaluation of the DC Opportunity Scholarship Program: Impacts Three Years After Students Applied*, U.S. Dept. of Ed., Institute of Education Science (May 2019)..... 17
- Anna Egalite & Patrick Wolf, *A Review of the Empirical Research on Private School Choice*, 91 Peabody J. Educ. 441 (2016) 23
- Atila Abdulkadiroğlu, Parag Pathak & Christopher Walters, *Free to Choose: Can School Choice Reduce Student Achievement?*, 10 Am. Econ. J.: Applied Econ. 175 (2018) 23, 25
- C. Kirabo Jackson, Cora Wigger & Heyu Xiong; *Do School Spending Cuts Matter? Evidence from The Great Recession*, NBER (January 2018, Revised August 2019)..... 26
- C. Kirabo Jackson, et al., *The Effects of School Spending on Educational and Economic Outcomes: Evidence from School Finance Reforms*, Nat'l Bureau of Econ. Research, NBER Working Paper Series (Jan. 2015), <https://bit.ly/2TfiwUH> 15
- Carol Juneau and Denise Juneau, *Indian Education for All: Montana's Constitution at Work in Our Schools*, 72 Mont. L. Rev. 111 (2011) 13

- Christopher Lubienski, *NEPC Review: 12 Myths and Realities about Private Educational Choice Programs*, National Education Policy Center (Mar. 7, 2019) <https://nepc.colorado.edu/thinktank/voucher-myths> 15
- Christopher Lubienski & Joel Malin, *The new terrain of the school voucher wars*. The Hill (Aug. 30, 2019, 11:00 AM), <https://thehill.com/blogs/congress-blog/education/459400-the-new-terrain-of-the-school-voucher-wars>..... 15
- Christopher Lubienski & Sarah Theule Lubienski, *The Public School Advantage: Why Public Schools Outperform Private Schools* (2014)..... 25
- Corey DeAngelis & Patrick Wolf, *Private School Choice and Character: More Evidence from Milwaukee*, Univ. Ark. Dept. of Educ. Reform, Working Paper No. 2019-03 (Feb. 26, 2019)..... 21
- David Figlio & Cassandra M. D. Hart, *Competitive Effects of Means-Tested School Vouchers*, 6 Am. Econ. J.: Applied Econ. 133 (2014) 24

David Filgio & Krzysztof Karbownik, <i>Evaluation of Ohio's EdChoice Scholarship Program: Selection, Competition, and Performance Effects</i> , Thomas B. Fordham Institute (July 2016).....	18, 22
Henry Braun, Frank Jenkins, & Wendy Grigg, <i>Comparing Private Schools and Public Schools Using Hierarchical Linear Modeling</i> , National Center for Education Statistics (2006).....	25
John Hattie, <i>Visible Learning: A Synthesis of Over 800 Meta-Analyses Relating to Achievement</i> (2009).....	20
Jonathan Mills and Patrick Wolf, <i>The Effects of the Louisiana Scholarship Program on Student Achievement after Four Years</i> , EDRE Working Paper No. 2019-10 (May 10, 2019), https://ssrn.com/abstract=3376230 or http://dx.doi.org/10.2139/ssrn.3376230	18
Jonathan Mills, Anna Egalite & Patrick Wolf, <i>How has the Louisiana Scholarship Program Affected Students?</i> , Education Research Alliance for New Orleans (Feb. 22, 2016).....	18

- Joseph R. Waddington & Mark Berends,
*Impact of the Indiana Choice
 Scholarship Program: Achievement
 Effects for Students in Upper
 Elementary and Middle School*, 37
*Journal of Policy Analysis and
 Management* 783 (2018)..... 17
- Mark Dynarski, et al., *Evaluation of the
 DC Opportunity Scholarship
 Program: Impacts Two Years After
 Students Applied*, U.S. Dept. of Ed.
 Institute of Education Science (May
 2018)..... 24
- Mark Dynarski, *On negative effects of
 vouchers*, Evidence Speaks Reports
 Vol. 1, No. 18, Brookings (May 26,
 2016)..... 15, 17, 20, 23
- Montana Office of Tourism, *Fun Facts
 About the Big Sky State*,
[https://www.visitmt.com/montana-
 stories/montana-
 pressroom/pressroom-resources/fun-
 facts.html](https://www.visitmt.com/montana-stories/montana-pressroom/pressroom-resources/fun-facts.html) (last visited Nov. 7, 2019)..... 26
- Patrick J. Wolf, *What Happened in the
 Bayou? Examining the Effects of the
 Louisiana Scholarship Program*,
Education Next (Aug. 13, 2019),
[https://www.educationnext.org/what-
 happened-bayou-examing-effects-
 louisiana-scholarship-program/](https://www.educationnext.org/what-happened-bayou-examing-effects-louisiana-scholarship-program/) 16

- Rob Natelson, *Documentary History of the Ratification of the Montana Constitution: The Brown Collection*, <https://www.umt.edu/media/law/library/MontanaConstitution/brown/Const.%20Conv.%20newspaper%20clippings%20ocr.pdf>..... 10
- Rob Natelson, *Documentary History of the Ratification of the Montana Constitution: Montana Newspapers from Mansfield Library, Billings Gazette March 1972*, <https://www.umt.edu/media/law/library/MontanaConstitution/MT%20Newspapers%20Mansfield/Billings%20Gazette%200372%20ocr.pdf>..... 11
- Rob Natelson, *Documentary History of the Ratification of the Montana Constitution: Montana Newspapers from Mansfield Library, Great Falls Tribune March 1972*, <http://www.umt.edu/media/law/library/MontanaConstitution/MT%20Newspapers%20Mansfield/Great%20Falls%20Tribune%200372%20ocr.pdf> 10
- Sean Reardon, Jacob Cheadle, & Joseph Robinson, *The effects of Catholic school attendance on reading and math achievement in kindergarten through fifth grade*, 2 J. of Research on Educ. Effectiveness 45 (2008) 25

- T. Jameson Brewer, *NEPC Review: The 123s of School Choice: What the Research Says About Private School Choice: 2019 Edition (EdChoice, April 2019)*, National Education Policy Center (June 2019), <https://scholar.colorado.edu/cgi/viewcontent.cgi?article=1473&context=nepc>; 20, 21
- Tyler M. Stockton, *Originalism and the Montana Constitution*, 77 Mont. L. Rev. 117 (2016) 4, 11
- United States Census Bureau, *2010 Census: Population Density Data*, <https://www.census.gov/data/tables/2010/dec/density-data-text.html> (last visited Nov. 7, 2019) 26
- Visible Learning, *Hattie Ranking: 252 Influences And Effect Sizes Related To Student Achievement*, <https://visible-learning.org/hattie-ranking-influences-effect-sizes-learning-achievement/> 20
- William Carbonaro, *Public-Private Differences in Achievement among Kindergarten Students: Differences in Learning Opportunities and Student Outcomes*, 113 Am. J. of Educ. 31 (2006) 25

INTEREST OF *AMICUS CURIAE*¹

Public Funds Public Schools (“PFPS”) is a national campaign to ensure that public funds for education are used to maintain and support public schools. PFPS is a collaboration of the Southern Poverty Law Center, Education Law Center, and Munger, Tolles & Olson LLP, who have participated as *Amici Curiae* or as counsel in cases promoting public education rights—including cases to prevent the diversion of public funds from public schools—in states across the nation.

The Southern Poverty Law Center, based in Montgomery, Alabama, is a nonprofit civil rights organization founded in 1971, dedicated to fighting hate and bigotry and to seeking justice for the most vulnerable members of society.

Education Law Center, founded in 1973, serves as the leading voice for New Jersey’s public school children and has become one of the most effective advocates for equal educational opportunity and education justice in the United States.

Munger, Tolles & Olson LLP is a national law firm with offices in Los Angeles, San Francisco, and Washington, D.C. that is committed to pro bono legal work and giving back to the community. Munger, Tolles & Olson led the legal team that successfully challenged an expansive voucher program in Nevada.

¹ Counsel for all parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amicus*, its members, and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

PFPS opposes all forms of private school vouchers, including Education Savings Accounts and tax credit scholarships, as well as direct aid to private schools and other diversions of public funds from public education. PFPS uses a range of strategies to protect and promote public education. This includes engaging in litigation challenging school vouchers and other diversions of public funds to private schools, as well as supporting public interest, civil rights, and private bar attorneys in doing so.

PFPS submits this brief in support of Respondents Montana Department of Revenue and its Director to provide important historical context for the central purpose of Article X, Section 6 of Montana's Constitution: ensuring that public funds are used solely for public education. *Amicus* further submits this brief to make the Court aware that, contrary to the statements of various *Amici* supporting Petitioners, the majority of peer-reviewed social science research establishes that voucher programs have a detrimental impact on students.

INTRODUCTION AND SUMMARY OF ARGUMENT

Article X, Section 6 (“Section 6”) of the Montana Constitution—the “no-aid” clause—was debated, revised, and enacted as a result of Montana’s well-documented 1972 constitutional reform process. Petitioners and *Amici* in support of Petitioners focus the lion’s share of their briefing on constitutional debate and historical context from the 1800s. That is not the relevant inquiry. The meaning, intent, and popular understanding of Section 6 derive from the 1972 Constitutional Convention, from a statewide ratification process, and from Section 6’s role as an integral part of the state constitution’s guarantee of a system of free, quality public education.

Montana is a sparsely populated state and, at the time of the 1972 Constitutional Convention, virtually all of the non-public schools in Montana were sectarian. Discussions about public versus private schools were by definition discussions of public versus sectarian schools. But the actions of the delegates and the ratifiers in 1972 were not motivated by anti-Catholic animus. As the legislative history and voting materials make clear, the purpose of Section 6 as enacted in 1972 was to make sure that Montana’s limited state funds supported *public* education—and only public education. Section 6 thus constitutes an integral part of Montana’s constitutional guarantee of public education and must be read in context. The will of the State of Montana and its citizens must be upheld.

Montana’s decision to bolster its public education system by prohibiting the diversion of the State’s public funds to nonpublic schools has ample support in social science research. Peer-reviewed studies consistently show that programs diverting public funds to

private schools negatively affect student achievement. The research cited by *Amici* supporting Petitioners suffers from several critical flaws. Some *Amici* single out small, individualized studies but claim broad conclusions. And many of the cited studies equate correlation with causation, failing to take into account how individuals or families who utilize vouchers, including tax-credit programs, have different characteristics from families who do not. When researchers do compare students who use vouchers to attend nonpublic schools with their similarly matched peers attending public schools, those using vouchers are found to have lower academic outcomes. The weight of peer-reviewed research has shown time and again that the diversion of public funds to private schools harms student achievement.

ARGUMENT

I. ARTICLE X, SECTION 6 REFLECTS MONTANA'S COMMITMENT TO FUNDING PUBLIC EDUCATION.

Over the course of two months in 1972, one hundred elected delegates introduced, debated, and then unanimously adopted a new constitution for the State of Montana. Tyler M. Stockton, *Originalism and the Montana Constitution*, 77 Mont. L. Rev. 117, 120 (2016). Voters ratified the document later that year. Montana's constitutional reform process was contemporaneously memorialized in records that illuminate the purpose and meaning of each provision. These contemporaneous records establish that the core purpose of Section 6 was to ensure that public funds be used solely to fund public schools, in order to safeguard Montana's mandate to provide its children a quality public education.

A. Convention transcripts demonstrate that retention of a no-aid provision was motivated by support for public schools.

The intent of Section 6 is made abundantly clear by the Convention Transcripts. One delegate's remarks are illustrative:

“I am speaking to you today not as a Mason or as a Protestant, but as one who is dedicated to preserving our public school system. And that's what this issue is all about. I don't think we ought to dilute that in any way. . . . We have the finest public school system, open to all, that has ever been devised by any society.”

6 *Montana Constitutional Convention Proceedings* 2016 (1981) (hereinafter “Transcript”) (comments of Delegate McNeil).

As reflected in Delegate McNeil's comments, the decision to retain a no-aid provision in the new constitution was motivated by the delegates' support of public education. Notably, despite a thorough discussion of the history of the 1889 provision, no delegate proposed striking the no-aid language. All parties accepted the prohibition on the diversion of state funds to nonpublic education as central to the success of the public schools.

Importantly, the delegates understood that nearly all private education in the state was religious in

nature.² 2 *Montana Constitutional Convention Proceedings* 776 (1981) (hereinafter “Committee Proposals”) (demonstrating that roughly two-thirds of all nonpublic schools in Montana were sectarian, and roughly 88% of the 11,645 students attending nonpublic schools attended sectarian schools). In this context, religion entered the discussion by necessity, but the content of that discussion addressed the impact on *public* education of diverting public funds to *nonpublic* schools.

With neither side seeking to remove the no-aid provision safeguarding public funds intended for public schools, the debate focused on the section’s potential application to federal funds designated for nonpublic schools. On March 11, 1972, the delegates debated three proposals, each introduced by an individual delegate who addressed its impact on public schools. *See* Transcript at 2008—31. First, the majority of the Education and Public Lands Committee recommended retention of the provision as written in the State’s 1889 constitution.³ *See*

² The same holds true today. *See* Appellees’ Appendix to Answer Brief at 39-40, 7, *Espinoza v. Montana Department of Revenue*, 435 P.3d 603 (Mont. 2018) (No. DA 17-0492).

³ The majority’s proposed Section 6 read as follows:

Section 6. AID PROHIBITED TO SECTARIAN SCHOOLS. Neither the legislative assembly, nor any county, city, town, or school district, or other public corporations shall ever make directly or indirectly any appropriation, or pay from any public fund or monies whatever, or make any grant of lands or other property in aid of any church, or for any sectarian purpose, or to aid in the support of any school, academy, seminary, college, university, or other literary, scientific

Committee Proposals at 716, 728-730; Transcript at 2008. The majority identified “the unequivocal support [the original language] provide[d] for a strong public school system” as the “primary and significant advantage” to retaining the text. *Ibid.* The committee report also emphasized that, “[u]nder federal and state mandates to concentrate public funds in public schools, the educational system ha[d] grown strong in an atmosphere free from divisiveness and fragmentation.” Committee Proposals at 729.

A minority of the Education and Public Lands Committee, motivated by concern over the 1889 provision’s history, recommended changing—not striking—the text. The minority proposed removing the section’s prohibition on indirect aid, and adding a single sentence stating that Section 6 would not apply to “funds from federal sources provided to the state for the express purpose of distribution to non-public education.” Committee Proposals at 744. Delegate Harbaugh, speaking for the minority, explicitly argued that the power of Section 6 and its commitment to public education would not be undermined by the amendment. Transcript at 2010.

Delegates supporting the minority proposal explicitly engaged with the 1889 provision’s history as a so-called “Blaine Amendment” and viewed the minority proposal as curative of perceived animus. In response, proponents of the majority reiterated their support of public schools and explicitly rejected any notion that bigotry motivated the majority’s proposal

institution, controlled in whole or in part by any church, sect, or denomination whatever.

Committee Proposals at 728. This provision was located at Article XI, Section 8 of the 1889 Constitution. *Ibid.*

to retain the 1889 language. Delegate McNeil, quoted at length above, expressed concern that the federal pass-through “dilute[d]” support for public schools. *Id.* at 2016. Delegate Mahoney later echoed these comments and worried that any diversion of funds could support “a proliferation of private schools.” *Id.* at 2024-2025. Delegate Harper, identifying himself as a “churchman,” rejected the suggestion that supporters of the majority proposal were motivated by bigotry. *Id.* at 2013, 2021.

This discussion spurred a compromise amendment, introduced by Delegate Loendorf, that quickly absorbed the support of delegates in favor of the minority proposal. The compromise retained the prohibition on indirect aid, in keeping with the majority report, but added the federal pass-through language contained in the minority proposal. *Id.* at 2013. Delegate Loendorf stressed that the pass-through would have no negative impact on Montana’s public schools—the focus of Section 6. *Id.* at 2014. Delegate Harbaugh, who introduced the minority proposal, endorsed the Loendorf compromise shortly after its introduction, and later reassured other minority proponents that the amendment “doesn’t change the intent of what we’re trying to accomplish.” *Id.* at 2015, 2024.

At the conclusion of this discussion, the Loendorf amendment carried by a vote of 53 to 40. *Id.* at 2026. It became the current Section 6 after the Style and Drafting committee made only stylistic changes to modernize the provision’s language. 7 *Montana Constitutional Convention Proceedings* 2575 (1981). The delegates adopted Section 6 in its final form by a vote of 80 to 17. *Id.* at 2672.

To the limited degree that Petitioner and *Amici* in support of Petitioner reference the 1972 Convention, they fail to acknowledge the full context and accurate outcome of the delegates' debate. Petitioner cites comments made by Delegates Harbaugh, Driscoll, and Schiltz to suggest that the Constitutional Convention retained the no-aid provision in spite of recognized religious animus. Pet. Br. at 44. *Amici* supporting Petitioner echo this theme, arguing that the delegates "debated scrapping" the no-aid provision, and that opponents of the majority proposal "fell short" in their quest to remove it. Brief for Senators Steve Daines, Tim Scott, John Kennedy, and Marsha Blackburn and Representative Greg Gianforte as *Amici Curiae* Supporting Petitioners at 25-26.

However, the transcript reveals that none of the delegates on whose statements Petitioner relies opposed the no-aid provision; rather they supported the minority proposal to narrowly amend the 1889 language. Transcript at 2010—12. Like every other delegate who spoke in favor of the minority proposal, these delegates voted in favor of the compromise. *Id.* at 2025—26. No amendment that would have removed the no-aid provision was ever introduced, debated, or voted on. Contrary to the suggestions of Petitioner and *Amici*, the record reflects that delegates engaged in a full debate of the 1889 provision's history, rejected that any religious animus motivated retention of a no-aid provision, and voted for Section 6 to ensure the adequate funding of Montana's public schools.

B. Montana voters understood Section 6 to prohibit diversion of state funding to nonpublic schools.

The meaning of Section 6 is illuminated not only by the delegates' debates, but by the information

available to the Montana voters who ultimately ratified the 1972 constitution. As demonstrated by statewide contemporaneous newspaper coverage and a Voter Information Pamphlet distributed to all Montana voters, the ratifiers understood Section 6 to prohibit the diversion of public funds to nonpublic schools.

Newspaper coverage during the convention framed both the delegates' debate and the outcome in "public" and "nonpublic" terms. As the delegates prepared to debate the provision, newspaper coverage described the two committee proposals as a disagreement between those supporting "public" and "nonpublic" education. Rob Natelson, *Documentary History of the Ratification of the Montana Constitution: The Brown Collection* at 163, <https://www.umt.edu/media/law/library/MontanaConstitution/brown/Const.%20Conv.%20newspaper%20clippings%20ocr.pdf> (last visited Nov. 12, 2019). Once the delegates passed the Loendorf compromise, the Great Falls Tribune reported:

No state funds for private schools. While retaining the present prohibition against use of state funds for sectarian schools, the new article would not apply to funds 'from federal sources provided to the state for the express purpose of distribution to non-public education.'

Rob Natelson, *Documentary History of the Ratification of the Montana Constitution: Montana Newspapers from Mansfield Library, Great Falls Tribune March 1972* at 19, <http://www.umt.edu/media/law/library/MontanaConstitution/MT%20Newspapers%20Mansfield/Great%20Falls%20Tribune%200372%20ocr.pdf> (last visited Nov.

12, 2019). Likewise, the Billings Gazette described the provision as “retain[ing] the existing strict ban against using any state funds directly or indirectly for nonpublic education.” Rob Natelson, *Documentary History of the Ratification of the Montana Constitution: Montana Newspapers from Mansfield Library, Billings Gazette March 1972* at 10, <https://www.umt.edu/media/law/library/MontanaConstitution/MT%20Newspapers%20Mansfield/Billings%20Gazette%200372%20ocr.pdf> (last accessed Nov. 12, 2019).

Montanans voted to ratify their new constitution on June 6, 1972. Stockton, 77 Mont. L. Rev. at 124. Pursuant to the Convention’s enabling act, a Voter Information Pamphlet, authored by the Secretary of State, was distributed to all registered voters. *Id.* at 121, 143; *Kvaalen v. Graybill*, 496 P.2d 1127, 1130 (Mont. 1972).

The Voter Information Pamphlet included the text of the proposed Section 6, and a brief description, which read: “Revises 1889 constitution by specifying that **federal** funds may be distributed to private schools. Proposed section still prohibits **state** aid to private schools.” *Proposed 1972 Constitution for the State of Montana: Official Text with Explanation* 15 (1972) (hereinafter “Voter Information Pamphlet”) (emphases in original). This description, from the only officially-authored contemporaneous explanation of the provision distributed to all ratifiers, confirms that the people of Montana understood Section 6 to protect state funds from diversion to “private” schools.

C. Section 6 must be read in the context of Article X as a whole, which evidences the delegates' concern for the provision of quality education to all Montana's students.

Delegates to Montana's 1972 Constitutional Convention did not adopt Section 6 in a vacuum, but rather as an integral part of Article X, in which the delegates articulated goals and standards for Montana's public education system. The text of Article X thus provides additional context and support for Montana's investment in the protection of its public schools.

Article X, Section 1 obligates the state legislature to provide a system of "free quality public elementary and secondary schools," guarantees "[e]quality of educational opportunity," and sets the objective of "develop[ing] the full educational potential of each person." Mont. Const. art. X, § 1(1), (3); *Helena Elementary Sch. Dist. No 1. v. State*, 769 P.2d 684, 690 (Mont. 1989) ("We specifically conclude that the guarantee of equality of educational opportunity applies to each person of the State of Montana, and is binding upon all branches of government whether at the state, local, or school district level."). In recommending the adoption of Section 1, the 1972 Convention's Education and Public Lands Committee expressed concern that economic disparities might translate to educational barriers for poorer children. The delegates resolved that Montana's public education system "must be directed to the elimination of blatant injustices which may predetermine a lifelong disadvantage." Committee Proposals at 723.

Section 1 also reflects the delegates' awareness of and concern regarding the legacy of American Indian

education and the historical treatment of the native nations within Montana's borders. Carol Juneau and Denise Juneau, *Indian Education for All: Montana's Constitution at Work in Our Schools*, 72 Mont. L. Rev. 111, 113—114 (2011). Known as "Indian Education for All," this part of Section 1 provides that Montana "recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity." Mont. Const. art. X, § 1(2). As the Montana Supreme Court has recognized, Indian Education for All "establishes a special burden in Montana for the education of American Indian children which must be addressed as a part of the school funding issues." *Helena Elementary*, 769 P.2d at 693. In guaranteeing Indian Education for All, Montana's delegates entrusted their public school system to right the historical wrongs of western education in American Indian communities, and reaffirmed the State's goal of providing a free quality public education to *all* Montana's students—with the accompanying commitment to adequately fund these constitutional mandates.

The delegates' decision to include these egalitarian goals in Article X provides additional context and support for the inclusion of strong protection against the diversion of public funds to private schools. Further, the delegates' decision to place the no aid provision within Article X itself evidences that the no-aid provision was intended to protect public schools. Section 6 cannot be separated from this important context.

In short, the purpose of Section 6—as intended by the drafters and understood by the ratifiers of Montana's 1972 Constitution—is expressly to

“prohibit[] state aid to *private* schools.” Voter Information Pamphlet at 15 (emphasis added). The convention debates made clear the commitment of the delegates to the funding of the public schools. The debates also demonstrated that the delegates flatly rejected the notion that the no-aid provision was the product of religious animus. Section 6 is an integral component of the commitment to educating all students, including a renewed commitment to the public education of Native American students, that was enshrined in Article X of the 1972 Constitution. Montana’s constitutional commitment to the education of all of its students without diversion of limited state funds to private schools must be upheld.

II. RESEARCH DEMONSTRATES THAT THE DIVERSION OF FUNDS FROM PUBLIC SCHOOLS HARMS STUDENTS

The delegates to Montana’s 1972 Constitutional Convention—and the voters who ratified their proposal—were right about the dangers of diverting limited public funds to private schools. A well-established and growing body of research demonstrates that voucher programs harm student achievement, both for students receiving vouchers and students in public schools experiencing the impact of diminished resources. *Amici* that assert the contrary are simply wrong, and resort to citing unreliable or discredited scholarship for support.

A. Diverting public money to private schools harms student achievement.

Recent scholarship has consistently found voucher programs negatively affect student achievement.⁴ Importantly, seven of nine recent, large-scale studies show detrimental effects from voucher programs, and the remaining two studies show no effect.⁵ The researchers, who include several voucher advocates, “conducted nine rigorous, large-scale studies since 2015 on achievement in voucher programs. In no case did these studies find any statistically positive achievement gains for students using vouchers. But seven of the nine studies found that voucher students saw relative learning losses. Too often, these losses were substantial.”⁶ Peer-reviewed, rigorous studies have shown time and again that programs diverting public funds from public education to private schools have a negative effect on student achievement.⁷

⁴ Mark Dynarski, *On negative effects of vouchers*, Evidence Speaks Reports Vol. 1, No. 18, Brookings (May 26, 2016).

⁵ Christopher Lubienski & Joel Malin, *The new terrain of the school voucher wars*. The Hill (Aug. 30, 2019, 11:00 AM), <https://thehill.com/blogs/congress-blog/education/459400-the-new-terrain-of-the-school-voucher-wars>; see also C. Kirabo Jackson, et al., *The Effects of School Spending on Educational and Economic Outcomes: Evidence from School Finance Reforms*, Nat'l Bureau of Econ. Research, NBER Working Paper Series (Jan. 2015), <https://bit.ly/2TfiwUH> (finding that funding increases led to more completed years of education, higher wages, and reduced poverty).

⁶ *Id.*

⁷ Christopher Lubienski, *NEPC Review: 12 Myths and Realities about Private Educational Choice Programs*, National Education Policy Center, 10-11 (Mar. 7, 2019)

Researchers comparing students who choose to utilize voucher programs to similarly situated students who remain in public schools find that students who utilize voucher programs perform worse academically. The Brookings Institution concluded:

Recent research on statewide voucher programs in Louisiana and Indiana has found that public school students that received vouchers to attend private schools subsequently scored lower on reading and math tests compared to similar students that remained in public schools. The magnitudes of the negative impacts were large. These studies used rigorous research designs that allow for strong causal conclusions. And they showed that the results were not explained by the particular tests that were used or the

<https://nepc.colorado.edu/thinktank/voucher-myths> (“Although a vocal group of voucher advocates have tried to spin the evidence, most independent researchers who have examined this issue agree that, if there is any academic benefit for students in voucher programs, it is marginal at best, and even then inconsistent across student groups and subject areas, and vouchers have recently been linked to large negative impacts on the learning of students using them.”); Patrick J. Wolf, *What Happened in the Bayou? Examining the Effects of the Louisiana Scholarship Program*, *Education Next*, 54 (Aug. 13, 2019), <https://www.educationnext.org/what-happened-bayou-examing-effects-louisiana-scholarship-program/> (“The main purpose of the scholarship program was to improve academic outcomes. On that goal, it clearly fell short. Using gold standard experimental methods, Jonathan Mills and I determined that the effects of the program on student scores on the state accountability test tended to be negative, especially in math, as long as four years after initial scholarship use.”).

possibility that students receiving vouchers transferred out of above-average public schools.⁸

A 2019 evaluation by the Institute for Education Sciences—the statistics, research, and evaluation arm of the U.S. Department of Education—found that the Washington, D.C. voucher program had no statistically significant effect on student achievement in reading or math after three years, and concluded that the program did not improve parent satisfaction with schools or perceptions of school safety.⁹ A 2018 longitudinal study of the Indiana Choice Scholarship Program found that low-income students who switched from public to private school using a voucher starting in the 2011-12 school year experienced, on average, an achievement loss of 0.15 standard deviations in mathematics on the statewide standardized assessment during their first year of private school compared to matched students who remained in public schools, and this loss remained consistent regardless of the length of time spent in private school.¹⁰

Similar results have been found across the country. A 2016 study of Louisiana’s private school voucher

⁸ Mark Dynarski, *On negative effects of vouchers* at 1.

⁹ Ann Weber, et al., *Evaluation of the DC Opportunity Scholarship Program: Impacts Three Years After Students Applied*, U.S. Dept. of Ed., Institute of Education Science (May 2019).

¹⁰ Joseph R. Waddington & Mark Berends, *Impact of the Indiana Choice Scholarship Program: Achievement Effects for Students in Upper Elementary and Middle School*, 37 *Journal of Policy Analysis and Management* 783, 796 (2018).

program found that students who performed at about the 50th percentile in math and reading prior to participation in the voucher program dropped approximately 24 percentage points in their first year of private school, and continued to perform well below non-vouchers students in their second year.¹¹ Another 2016 study of the Ohio private school voucher program conducted by a conservative think tank and funded by voucher advocates found that voucher students “have fared worse academically compared to their closely matched peers attending public schools” and “[s]uch impacts also appear to persist over time, suggesting that the results are not driven simply by the setbacks that typically accompany any change of school.”¹²

Study after study has confirmed that voucher programs do not increase student achievement. The weight of academic research has concluded that voucher programs often result in significant academic setbacks for students compared to similarly situated students remaining in public schools.

¹¹ Jonathan Mills, Anna Egalite & Patrick Wolf, *How has the Louisiana Scholarship Program Affected Students?*, Education Research Alliance for New Orleans, 4 (Feb. 22, 2016); see also Jonathan Mills and Patrick Wolf, *The Effects of the Louisiana Scholarship Program on Student Achievement after Four Years*, EDRE Working Paper No. 2019-10 (May 10, 2019), <https://ssrn.com/abstract=3376230> or <http://dx.doi.org/10.2139/ssrn.3376230>.

¹² David Filgio & Krzysztof Karbownik, *Evaluation of Ohio's EdChoice Scholarship Program: Selection, Competition, and Performance Effects*, Thomas B. Fordham Institute, 2 (July 2016).

B. Research cited by *Amici* supporting Petitioners is flawed.

Several briefs submitted by *Amici* in support of Petitioners claim to rely on social science research extolling the benefits of voucher programs. However, this research suffers from critical flaws. First, most of the cited research is not peer-reviewed. In addition, relying on older, small-scale studies, *Amici* in support of Petitioners cite only the research aligning with their viewpoint—ignoring the weight of recent, peer-reviewed studies pointing to the opposite conclusion. Finally, several of the articles *Amici* cite improperly equate correlation with causation. Because students who choose to utilize voucher programs are rarely randomly assigned, a study that fails to control for this merely establishes a correlation. Without eliminating confounding variables and evaluating voucher-users with comparable public school students, a study cannot properly establish a causal effect.

The Brief for *Amici Curiae* Center for Education Reform, *et al.* cherry picks small, outdated, and non-peer reviewed studies to support the conclusion that allowing public funds to be diverted to private schools improves students' educational outcomes. Brief for *Amici Curiae* Center for Education Reform, *et al.*, in support of Petitioners at 10-15. While early, small-scale studies, often funded and conducted by voucher advocates, showed negligible and inconsistent gains for students using vouchers, recent, large-scale studies establish the opposite conclusion. This brief also states that in *Amici's* experience, "the factor most closely related to positive educational outcomes is parents' ability to select the school that their children attend." *Id.* at 1. The brief does not include a citation to any research supporting this proposition. Decades

of data, meta-analyses, and volumes of research do not place school choice as a meaningful predictor of educational outcomes.¹³

The brief of EdChoice, Reason Foundation, and the Individual Rights Foundation similarly cites throughout to studies claiming to show voucher programs improve student achievement. Brief of EdChoice, Reason Foundation, and the Individual Rights Foundation as *Amici Curiae* in Support of Petitioners; see also Brief Amicus Curiae of Jerry And Kathy Armstrong, Lashawn Robinson, Gwendolyn Samuel, Yi Fang Chen, and Pacific Legal Foundation in Support of Petitioners, at 6-9 (citing to similar studies). Very little of the research cited is peer-reviewed, and recent studies continue to validate the opposite conclusion.¹⁴

The brief of EdChoice, Reason Foundation, and the Individual Rights Foundation also cites throughout to EdChoice's own study, *The 123s of School Choice*, which has been found to have significant flaws. One review of *The 123s of School Choice* concludes: "Given that the underlying studies are likely the result of cherry-picking, questionable vote-counting methods that blur, obscure, and overstate findings, ideological echo chambers, and the use of non-peer-reviewed sources, the findings of the EdChoice report and the

¹³ See John Hattie, *Visible Learning: A Synthesis of Over 800 Meta-Analyses Relating to Achievement* (2009); see also Visible Learning, *Hattie Ranking: 252 Influences And Effect Sizes Related To Student Achievement*, <https://visible-learning.org/hattie-ranking-influences-effect-sizes-learning-achievement/> (ranking school choice programs as a very low influencer of student achievement).

¹⁴ Mark Dynarski, *On negative effects of vouchers* at 1.

representation of the underlying studies are exceedingly questionable.”¹⁵ *Amici Curiae* EdChoice, Reason Foundation, and the Individual Rights Foundation also cite to a study purporting to show a correlation between voucher participation and decreased criminal activity. Brief of EdChoice, Reason Foundation, and The Individual Rights Foundation at 17. However, the researchers themselves acknowledge that an “important limitation” of the study is that the students “were not randomly assigned vouchers to attend private schools.” Corey DeAngelis & Patrick Wolf, *Private School Choice and Character: More Evidence from Milwaukee*, Univ. Ark. Dept. of Educ. Reform (EDRE), Working Paper No. 2019-03, 24 (Feb. 26, 2019). The researchers further admit that “[i]f our baseline matching procedure does not fully establish equivalence on important unobservable characteristics that predict subsequent risky behavior, our results may be merely correlational rather than causal.” *Id.* at 24-25. Without fully taking into account factors other than voucher programs that could cause the finding of decreased criminal activity, the research merely shows a correlation and should not be cited as

¹⁵ T. Jameson Brewer, *NEPC Review: The 123s of School Choice: What the Research Says About Private School Choice: 2019 Edition* (EdChoice, April 2019), National Education Policy Center, 12 (June 2019), <https://scholar.colorado.edu/cgi/viewcontent.cgi?article=1473&context=nepc>; see *ibid.* (calling the EdChoice report “a misrepresentation of what research has been conducted and what it has found through the use of questionable methodology that gives the appearance of stacking the deck to create an illusory compilation of studies that purport to bolstered the organization’s predetermined commitment to cheerleading school vouchers.”).

demonstrating that the voucher program caused the positive result.

Indeed, a common problem throughout the research cited by *Amici* in support of Petitioners is equating correlation with causation. Many of the studies fail to take into account how students who apply for or receive vouchers differ from students who do not. *See, e.g.* Brief for Alliance for Choice in Education as *Amicus Curiae* Supporting Petitioners, at 9-23. Vouchers to pay for nonpublic schooling are seldom randomly assigned, and there are a number of ways in which students who participate in these programs may differ from students who remain in public schools, and these differences may correlate with differing achievement. These distinctions may include access to information or demographic information. Without taking into account confounding factors, a correlation between voucher use and increased student performance could be due to a number of outside causes, and the correlation certainly does not establish causation. When researchers do appropriately compare students who use vouchers to attend private schools to their “closely matched peers attending public schools,” the conclusion is that the voucher students perform worse—not better—academically.¹⁶

Research cited in the *amicus* brief submitted by certain states in support of Petitioners is similarly based on localized studies with problems regarding causality and validity. Brief of Oklahoma, Georgia,

¹⁶ David Figlio & Krzysztof Karbownik, *Evaluation of Ohio’s EdChoice Scholarship Program: Selection, Competition, and Performance Effect*, at 2 (“The students who use vouchers to attend private schools have fared worse academically compared to their closely matched peers attending public schools.”).

Arizona, Alabama, Alaska, Arkansas, Kansas, the Commonwealth of Kentucky By and Through Governor Matt Bevin, Louisiana, Governor Phil Bryant of The State of Mississippi, Missouri, Nebraska, Ohio, South Dakota, Tennessee, Texas, Utah, and West Virginia as *Amici Curiae* in Support of Petitioners, at 28-38. *Amici* argue that “students receive a better education when their parents are able to choose the best school for them,” but cite to reviews of a small sample of highly localized studies. *Id.* at 31. These studies have limitations regarding causality, methodology, scalability, and external validity that are not addressed or acknowledged by the authors. *See ibid.*¹⁷ The weight of academic research has concluded that programs that create “choice” for parents by diverting public funds away from public schools do not increase student achievement.¹⁸ *Amici* also cite to a Florida study finding modest increases in educational outcomes for public school students following a tax-credit program. Brief of Oklahoma, *et*

¹⁷ Anna Egalite & Patrick Wolf, *A Review of the Empirical Research on Private School Choice*, 91 *Peabody J. Educ.* 441 (2016).

¹⁸ *See e.g.*, Atila Abdulkadiroğlu, Parag Pathak & Christopher Walters, *Free to Choose: Can School Choice Reduce Student Achievement?*, 10 *Am. Econ. J.: Applied Econ.* 175, 198 (2018) (showing reduced academic achievement in the Louisiana Scholarship Program, “lowering mean test scores and increasing the likelihood of failure in math, reading, science, and social studies.”); *see also* Mark Dynarski, *On negative effects of vouchers at 2* (analyzing research showing lower scores for students who received vouchers to attend private schools.).

al. as *Amici Curiae*, at 31-32.¹⁹ However, this study does not explain how the researchers concluded there was a valid causal connection between the voucher program and the change in students' test scores; rather, the researchers assumed that the voucher program was the only or most significant factor that could have affected public school students' performance during the relevant time period.²⁰ Furthermore, the study fails to consider that there may be qualitative differences between students or families who participated in the voucher program and those who did not.²¹

The *Amicus Curiae* Brief submitted by certain legislative leaders from the states of Arizona, Montana, and Nebraska asserts that “[s]chool choice is cost- and performance-effective and popular.” Brief *Amicus Curiae* of Rusty Bowers, Speaker of the Arizona House of Representatives, and Other State Legislative Leaders in Support of Petitioners at 18. However, *Amici* cite to no peer-reviewed articles in support of this statement. *Id.* at 18-23. Rather, the brief cites to advocacy group summaries and parent perception studies. *Ibid.* As explained above, academic, objective studies reach the opposite conclusion.²²

¹⁹ David Figlio & Cassandra M. D. Hart, *Competitive Effects of Means-Tested School Vouchers*, 6 *Am. Econ. J.: Applied Econ.* 133 (2014).

²⁰ See *id.* at 133-35, 152-55.

²¹ See *ibid.*

²² See Mark Dynarski, et al., *Evaluation of the DC Opportunity Scholarship Program: Impacts Two Years After Students Applied*, U.S. Dept. of Ed. Institute of Education Science (May 2018)

Finally, The Brief of *Amici Curiae* Center for Education Reform, et al., misstates the research regarding educational outcomes in private schools, including religiously affiliated schools. Brief for *Amici Curiae* Center for Education Reform, et al., at 10-15. *Amici* cite to a Catholic school website and education magazine, which list research from the 1980s and 1990s. These sources ignore numerous recent, peer-reviewed studies finding that public schools often outperform non-public schools, including religiously affiliated schools.²³

Research relied upon by *Amici* fails in this context for another reason; it ignores that diversion of funds from public education visits particular harm on students due to Montana's unique geography. While Montana is the fourth largest state in the country, it

<https://ies.ed.gov/ncee/pubs/20184010/pdf/20184010.pdf>; Atila Abdulkadiroglu, 10 Am. Econ. J.: Applied Econ. At 175–206, <https://dx.doi.org/10.1257/app.20160634> at 198 (concluding that school choice can lead to reduced student achievement one year after program entry).

²³ William Carbonaro, *Public-Private Differences in Achievement among Kindergarten Students: Differences in Learning Opportunities and Student Outcomes*, 113 Am. J. of Educ. 31 (2006); Sean Reardon, Jacob Cheadle, & Joseph Robinson, *The effects of Catholic school attendance on reading and math achievement in kindergarten through fifth grade*, 2 J. of Research on Educ. Effectiveness 45 (2008); Henry Braun, Frank Jenkins, & Wendy Grigg, *Comparing Private Schools and Public Schools Using Hierarchical Linear Modeling*, National Center for Education Statistics (2006); Christopher Lubienski & Sarah Theule Lubienski, *The Public School Advantage: Why Public Schools Outperform Private Schools* (2014).

ranks 50th in population density.²⁴ Only eight out of Montana’s fifty six counties have accredited, non-public schools, and many are located in the state’s more densely populated areas. See Appellees’ Appendix to Answer Brief at 39-40, 7, *Espinoza v. Montana Department of Revenue*, 435 P.3d 603 (Mont. 2018) (No. DA 17-0492). In this context, protecting public funds from diversion to private schools is particularly important because diversion would further diminish state resources available to educate rural students. Research has found the diverting funding for public schools harms public school student achievement, particularly for children in socio-economically disadvantaged neighborhoods.²⁵ Research lauding voucher programs in the abstract or in a different context fails to reflect the situation in Montana, where “school choice” is often illusory and public schools serve a unique and amplified role given the state’s rurality.

In sum, the best available research validates Montana’s constitutional commitments to providing a free quality public education and to protecting that public education system from diversion of funds.

²⁴ Montana Office of Tourism, *Fun Facts About the Big Sky State*, <https://www.visitmt.com/montana-stories/montana-pressroom/pressroom-resources/fun-facts.html> (last visited Nov. 7, 2019) (noting Montana’s large geographical size); United States Census Bureau, *2010 Census: Population Density Data*, <https://www.census.gov/data/tables/2010/dec/density-data-text.html> (last visited Nov. 7, 2019) (ranking among the states, the District of Columbia, and Puerto Rico).

²⁵ C. Kirabo Jackson, Cora Wigger & Heyu Xiong; *Do School Spending Cuts Matter? Evidence from The Great Recession*, NBER, 1 (January 2018, Revised August 2019).

CONCLUSION

For the reasons set forth herein, the Court should uphold the decision of the Montana Supreme Court.

Respectfully submitted,

JESSICA LEVIN
WENDY LECKER
EDUCATION LAW CENTER
60 Park Place, Suite 300
Newark, NJ 07102
(973) 624-1815

TAMERLIN J. GODLEY
Counsel of Record
JESSICA REICH BARIL
APRIL YOUPEE-ROLL
MUNGER, TOLLES & OLSON LLP
350 S. Grand Avenue, 50th Floor
Los Angeles, CA 90071
(213) 683-9232

November 15, 2019