

No. 20-1088

---

---

In The  
**Supreme Court of the United States**

---

---

DAVID CARSON,  
as Parent and Next Friend of O. C., et al.,

*Petitioners,*

v.

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

*Respondent.*

---

---

**On Writ Of Certiorari To The  
United States Court Of Appeals  
For The First Circuit**

---

---

**BRIEF FOR EDCHOICE AND  
MAINE POLICY INSTITUTE AS *AMICI CURIAE*  
IN SUPPORT OF PETITIONERS**

---

---

LESLIE DAVIS HINER  
*Counsel of Record*  
EDCHOICE  
111 Monument Circle  
Suite 2650  
Indianapolis, IN 46204  
(317) 681-0745  
leslie@edchoice.org

RUSSELL MENYHART  
TAFT STETTINIUS &  
HOLLISTER LLP  
One Indiana Square  
Suite 3500  
Indianapolis, IN 46204  
(317) 713-3500  
rmenyhart@taftlaw.com

## TABLE OF CONTENTS

	Page
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	iii
INTEREST OF <i>AMICI CURIAE</i> .....	1
SUMMARY .....	2
ARGUMENT .....	6
I. Education and Religion Have Been Inter- twined Since the Beginning of Our Na- tion's History .....	6
II. The Unconstitutional Underpinning of Maine's Town Tuitioning Prohibition Against Sectarian Schools is Unmasked by Its History .....	9
A. A Dispute Over Which Bible to Read in Public Schools Was Fueled by Ha- tred and Bigotry Twenty Years Before Maine Adopted Town Tuitioning .....	10
B. Different Century, Same Unconstitu- tional Discrimination .....	17
III. Maine's Sectarian Exception Can Be Struck Down; Town Tuitioning Will Then Be a Religiously Neutral Program .....	25
IV. Substantial Social Science Research Re- veals Why Students Seek School Choice and Why Educational Services Provided by Religious Entities Matter .....	29
A. School Choice Improves Academic Out- comes and Long-Term Educational At- tainment for Participating Students ....	30

TABLE OF CONTENTS—Continued

	Page
B. Parents Consistently Express a Desire for School Choice; Having Options to Send Their Children to Religious Schools Is Important .....	32
C. Public School Students Exposed to School Choice Have Improved Academic Outcomes.....	34
D. School Choice Has a Positive Impact on Civic Values and Practices and on Racial and Ethnic Integration.....	34
CONCLUSION.....	35

## TABLE OF AUTHORITIES

	Page
CASES	
<i>Donahoe v. Richards</i> , 38 Me. 379 (1854) .....	13, 14, 16
<i>Espinoza v. Montana Dep't of Revenue</i> , 140 S. Ct. 2246 (2020) .....	<i>passim</i>
<i>Mitchell v. Helms</i> , 530 U.S. 793 (2000) .....	17
<i>Sch. Dist. of Abington Twp., Pa. v. Schempp</i> , 374 U.S. 203 (1963) .....	8
<i>Trinity Lutheran Church of Colombia, Inc. v. Comer</i> , 137 S. Ct. 2012 (2017) .....	24
<i>Zelman v. Simmons-Harris</i> , 536 U.S. 639 (2002) .....	4, 25
CONSTITUTIONAL PROVISIONS	
Establishment Clause .....	<i>passim</i>
Free Exercise Clause .....	24, 29, 36
U.S. Const. amend. I .....	22, 23, 25, 30, 35
U.S. Const. amend. XIV .....	17, 18
RULES	
Sup. Ct. R. 37.6 .....	1
STATUTES	
1981 Me. Laws 2177 .....	21
Me. Stat. tit. 20-A, § 2901 .....	26

## TABLE OF AUTHORITIES—Continued

	Page
Me. Stat. tit. 20-A, § 2951 .....	26
W. Va. Code §§ 18-31-1 to 18-31-13 .....	28
OTHER AUTHORITIES	
4 Cong. Rec. 205 (1876).....	17, 18
4 Cong. Rec. 5191 (1876).....	18
4 Cong. Rec. 5561 (1876).....	19
4 Cong. Rec. 5580-5595 (1876) .....	20
<i>A Campus is Born</i> , The Roundtable, Spring 2021, available at <a href="https://www.johnbapst.org/wp-content/uploads/2021/06/2021_John_Bapst_Round-Table_Online-2.pdf">https://www.johnbapst.org/ wp-content/uploads/2021/06/2021_John_Bapst_ Round-Table_Online-2.pdf</a> .....	23
Alfred Meyer, <i>The Blaine Amendment and the Bill of Rights</i> , 64 Harvard L. Rev. 939 (1951) .....	18
Brock Hornby, <i>History Lessons: Instructive Legal Episodes from Maine’s Early Years—Episode 2</i> , 23 Green Bag 2d 289 (2021), available at <a href="http://dx.doi.org/10.2139/ssrn.3731150">http://dx.doi.org/10.2139/ssrn.3731150</a> .....	13, 14, 16
<i>Dastardly Outrage in Ellsworth, ME</i> , The Liber- ator (Boston), Oct. 27, 1854.....	14
David Dzurec, “ <i>To Destroy Popery and Every- thing Appertinent Thereto</i> ”: William Chaney, the Jesuit John Bapst, and the Know-Noth- ings in Mid-Nineteenth Century Maine, 103(1) Catholic Historical Rev. 73 (2017) ....	10, 11, 12, 13, 16

## TABLE OF AUTHORITIES—Continued

	Page
EdChoice, <i>Education Savings Accounts</i> , <a href="https://www.edchoice.org/school-choice/types-of-school-choice/education-savings-account/">https://www.edchoice.org/school-choice/types-of-school-choice/education-savings-account/</a> .....	27
EdChoice, <i>Fast Facts</i> , <a href="https://www.edchoice.org/school-choice/fast-facts/">https://www.edchoice.org/school-choice/fast-facts/</a> .....	29
EdChoice, <i>School Choice in America</i> , <a href="https://www.edchoice.org/school-choice-in-america-dashboard-scia/">https://www.edchoice.org/school-choice-in-america-dashboard-scia/</a> .....	29
EdChoice, <i>The 123s of School Choice</i> , <a href="https://www.edchoice.org/wp-content/uploads/2021/04/2021-123s-SlideShare_FINAL.pdf">https://www.edchoice.org/wp-content/uploads/2021/04/2021-123s-SlideShare_FINAL.pdf</a> .....	31, 32, 33, 34, 35
EdChoice, <i>The ABCs of School Choice</i> (2021) .....	29
<i>Father Gavazzi on American Schools</i> , Daily Bangor Whig and Courier, Dec. 10, 1853, p. 1, col. 7 .....	12
<i>Fr. John Bapst: A Sketch</i> , Woodstock Letters, vol. 18 (1889), available at <a href="http://jesuitarchives.org/woodstock-letters/#woodstock018">http://jesuitarchives.org/woodstock-letters/#woodstock018</a> .....	12
Frederick Whittaker, <i>Another Viewpoint: Church and State</i> , Bangor Daily News, June 26, 1980, p. 16, col. 4 .....	24
Greg Forster, <i>A Win-Win Solution: The Empirical Evidence on School Choice</i> (3rd ed. 2013) .....	31
Greg Forster, <i>A Win-Win Solution: The Empirical Evidence on School Choice</i> (4th ed. 2016).....	30, 32, 35

## TABLE OF AUTHORITIES—Continued

	Page
Horace Mann, <i>Eighth Annual Report of the Board of Education</i> (1845).....	7
Horace Mann, <i>Twelfth Annual Report of the Board of Education</i> (1849).....	7, 8, 9
Jason Bedrick & Lindsey Burke, <i>Surveying Florida Scholarship Families</i> (2018), available at <a href="https://www.edchoice.org/wp-content/uploads/2018/10/2018-10-Surveying-Florida-Scholarship-Families-byJason-Bedrick-and-Lindsey-Burke.pdf">https://www.edchoice.org/wp-content/uploads/2018/10/2018-10-Surveying-Florida-Scholarship-Families-byJason-Bedrick-and-Lindsey-Burke.pdf</a> .....	33, 34
John B. Sayward, <i>Editorial</i> , Bangor Daily Whig and Courier, Dec. 5, 1853, p. 2, col. 1 .....	8
<i>John Bapst Memorial School: Mission and History</i> , <a href="https://www.johnbapst.org/about/mission-and-history/">https://www.johnbapst.org/about/mission-and-history/</a> .....	21, 23
Maine Leg., <i>Proposed Constitutional Legislation 1820–</i> , <a href="https://legislature.maine.gov/doc/502">https://legislature.maine.gov/doc/502</a> .....	21
Marci Hamilton & Michael McConnell, <i>The Establishment Clause</i> , Nat’l Const. Center, <a href="https://constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/264">https://constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/264</a> .....	6
Mark Paul Richard, “ <i>This Is Not a Catholic Nation</i> ”: <i>The Ku Klux Klan Confronts Franco-Americans in Maine</i> , 82 <i>New England Q.</i> 285 (June 2009).....	20
<i>Mass Meeting in Ellsworth</i> , Bangor Daily Whig and Courier, Oct. 28, 1854, p. 2, col. 3.....	15
Me. Op. Atty. Gen. No. 80-2 (Jan. 7, 1980) .....	21

## TABLE OF AUTHORITIES—Continued

	Page
Paul DiPerna & Michael Shaw, <i>2021 Schooling in America</i> (2021), available at <a href="https://www.edchoice.org/wp-content/uploads/2021/08/2021-Schooling-in-America-PROJECT.pdf">https://www.edchoice.org/wp-content/uploads/2021/08/2021-Schooling-in-America-PROJECT.pdf</a> .....	32
<i>Private School Tuition Funding Illegal</i> , Bangor Daily News, Jan. 10, 1980, p. 17 .....	22
Prenda, <i>Prenda Partners</i> , <a href="http://prenda.com/page/partners">http://prenda.com/page/partners</a> .....	27
Raney Bench, <i>History of Maine—The Rising of the Klan</i> , Maine History Documents 224 (2019), <a href="https://digitalcommons.library.umaine.edu/mainehistory/224">https://digitalcommons.library.umaine.edu/mainehistory/224</a> .....	16
<i>The Housekeeper’s Account of Events at Ellsworth</i> , Woodstock Letters, vol. 18 (1889).....	13
The Reform Alliance, <i>What is a Microschool?</i> , <a href="https://thereformalliance.org/about-microschools/">https://thereformalliance.org/about-microschools/</a> .....	27
William McGuffey, <i>McGuffey’s New Fifth Eclectic Reader</i> (1857) .....	20

**INTEREST OF *AMICI CURIAE***<sup>1</sup>

EdChoice is a 501(c)(3) nonpartisan, nonprofit organization and a national leader in educational-choice research, legal defense and education, fiscal analysis, policy development, and educational training and outreach. The mission of EdChoice is to advance educational freedom and choice for all as a pathway to successful lives and a stronger society. EdChoice 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 is a public school, private school, charter school, home school or any other learning environment.

The Maine Policy Institute (MPI) is a nonprofit organization dedicated to freeing people from dependency, creating prosperity, and redefining the role of government in Maine. Founded in Portland in 2003 by a handful of passionate citizens concerned about the direction the state was headed, MPI has become the leading conservative public policy voice in Maine. MPI seeks to create an exemplary State where a compassionate but prudent government lets flourish the

---

<sup>1</sup> Pursuant to Sup. Ct. R. 37.6, none of the parties to this case nor counsel for any party authored this brief in whole or in part. No entity or person, other than *amici* and its counsel, made any monetary contribution for the preparation or submission of this brief. The parties have filed blanket consents to *amicus* briefs.

prosperity, liberty, and instincts of mutual-support of independent citizens.

EdChoice and MPI respectfully ask this Court to reverse the lower courts and find that when a state prohibits eligible students from choosing schools providing “sectarian” instruction as part of an otherwise generally available student-aid program, the state violates the Religion Clauses and Equal Protection Clause of the United States Constitution.

---

◆

## SUMMARY

Our nation was founded by those who sought freedom from religious bigotry and the liberty to worship freely and openly, according to each person’s conscience. Education plays 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 define and recognize religious bigotry.

Today in Maine, schools operated by or affiliated with religious organizations are eligible to accept town tuitioning<sup>2</sup> dollars only if they do not promote or advance religious beliefs (while also meeting general requirements for private schools). The state alleges it is

---

<sup>2</sup> “Town tuitioning” is a commonly used term for programs, such as Maine’s, that allow students who live in towns without a district public school to use their per-pupil public education dollars to pay tuition at a neighboring town’s public school or an approved private school.

not the status of schools as religiously affiliated or operated entities that matters, but whether the schools will provide an education “comparable” to a free public education. Br. in Opp. i. 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.

Town tuition dollars purchase, from both public and private schools, the core academic course of study that is required by the state. Both secular and sectarian schools must deliver curriculum, like math classes, that will qualify a student to receive a diploma of graduation. But the exclusion of sectarian schools suggests that curriculum that uses the story of Noah’s Ark as a math class multiplication story problem would, in the judgment of the state, be a method to induce Old Testament religiosity in the children and, therefore, less desirable than a multiplication story problem involving loading animals two by two onto a circus trailer.<sup>3</sup>

Students will learn their multiplication tables with or without religious story problems, yet it is the parents who are restricted from choosing a school where their children could learn from teachers speaking from a faith viewpoint. By asserting that

---

<sup>3</sup> In determining whether a school qualifies for tuition assistance, the Maine Department of Education assesses whether, “in addition to teaching academic subjects,” the school “promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith.” Pet. App. 35.

instruction delivered through the viewpoint of a teacher of faith is unacceptable, the state has specifically targeted, and rejected, the religious character of schools delivering the same core educational services as secular schools. Religious schools are rejected because they are religious. The only real difference in the classroom is the viewpoint of the teacher delivering the lessons and Noah's Ark language instead of circus trailer language in the curriculum; two times two equals four either way.

In our pluralist society, when the state funds a child's education and is agnostic on point of delivery, the state does not establish religion or become impermissibly entangled by providing public funds to a family to purchase the same lessons whose mastery is required of all students to achieve a diploma, regardless of location and delivery of those lessons. If a parent chooses a religious school to deliver those lessons, "[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual aid recipients, not the government, whose role ends with the disbursement of benefits." *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

Given that for its first 100 years Maine students attended public schools that included Bible reading and taught Protestant ideals found in the Bible, 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 sectarian denominations. In his concurring opinion in

*Espinoza v. Montana Department of Revenue*, Justice Thomas observed that, “[h]istorical evidence suggests that many advocates for this separationist view were originally motivated by hostility toward certain disfavored religions.” 140 S. Ct. 2246, 2266 (2020). Justice Thomas’s historical reflection in *Espinoza* is well-supported by Maine’s own history. As further discussed in Part II, in 1854 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 Maine curriculum. Any student who sought to use the Catholic Bible was subject to expulsion. 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 in part by a desire to prohibit town tuitioning support for non-Protestant schools.

Students and families in 19th century Maine fought hard against public school constraints that prevented them from exercising their religious freedom. In 21st century Maine the terminology and systems may have changed, but town tuitioning constraints still inhibit students’ free exercise of religion and block sectarian schools from receiving tuition assistance program 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 demonstrated by the quantitative research summarized in Part IV of this brief.

---

◆

## ARGUMENT

### **I. Education and Religion Have Been Intertwined Since the Beginning of Our Nation's History.**

In the early years of this nation's founding, there was little dissension about prohibiting the federal government from establishing a national religion. The same was true in the states, and by 1833, all states had disestablished religion. Marci Hamilton & Michael McConnell, *The Establishment Clause*, Nat'l Const. Center, <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/264> (last visited Sept. 4, 2021). Thus, it is curious that government-run public schools adopted Protestantism as the foundation of moral beliefs to be taught through regular Bible readings, to the exclusion of other faith beliefs.

When public school systems were established in the United States, it was common for school leaders to adopt and promote what they 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 could prevent the rigid class systems that 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. 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 Board of Education* 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 notable that this idea of government choosing one type of religious instruction for all children was seen as acceptable after disestablishment. If all students were to learn shared values rooted in a religion at common schools, it begs the question of what result, or educational opportunity, was expected for children whose values were informed by different religious beliefs.

In practice, public schools were “common” only for those who subscribed to Protestant beliefs. Whereas a large majority of people could be called Protestant in the early years of our founding, later immigrants brought many different faiths, which they expected to exercise freely in the United States. Common schools restricted free exercise and imposed religious beliefs. The scourge of sectarian animus was so deeply ingrained that it became commonly accepted. As Mann reported in his eighth annual report of the Massachusetts Board of Education, jealousies between sects would be “excited” if denominational books were introduced in public schools. Horace Mann, *Eighth Annual Report of the Board of Education* 16 (1845). He went on to declare that “the Bible has nothing in it of a sectarian character. All Christian sects regard it as the

textbook of their faith.” *Id.* Public schools requested that parents and churches cooperate with teachers who delivered religious instructions, but opposed leaving religious instruction to parents and churches out of fear that children may receive no religious instruction “from the lips of an ignorant and a vicious parent.” *Id.* at 17.

Like Mann’s Massachusetts and many other states, Maine’s public schools included daily prayer and reading of a common Bible, most often the King James Version, from their inception through much of the 1900s. 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.

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

Sayward was 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. *See Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203 (1963). Many joined Mann in arguing that Protestantism was the one true faith, that sectarian and denominational texts should be excluded from schools as potentially hostile

and competitive, and that reading and teaching the Bible was simply instilling moral values in children. As Mann professed in his 1849 report:

[O]ne of the moral beauties of the Massachusetts system [is that] the children of all the different denominations are brought together for instruction, where the Bible is allowed to speak for itself;—one place, where the children can kneel at a common altar, and feel that they have a common Father and where the services of religion tend to create brothers, and not Ishmaelites.”

Horace Mann, *Twelfth Annual Report of the Board of Education* 117. This same presumption of Protestant doctrine as a common educational platform permeated the northeastern United States in the mid-1800s.

## **II. 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 similar challenges under the Establishment Clause. Maine’s history is riddled with animus against students with sectarian religious beliefs, rising and falling in intensity over the 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.

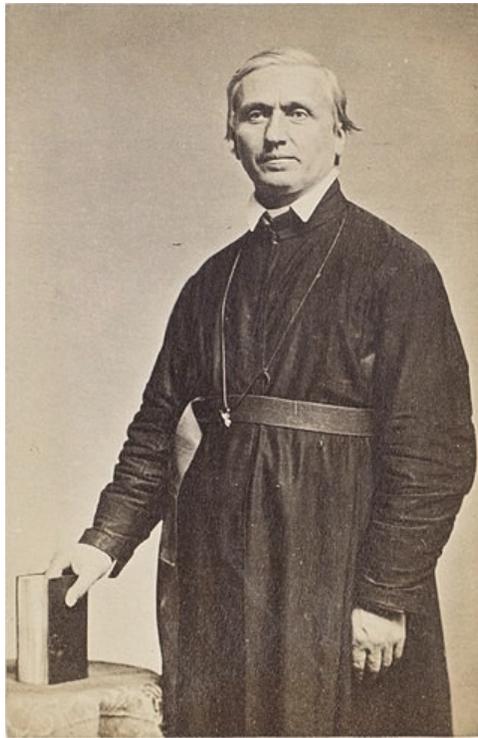
This was merely the first indication of future collisions between public funding of a student's education and a student's choice to receive education in a sectarian environment.

**A. A Dispute Over Which Bible to Read in Public Schools Was Fueled by Hatred and Bigotry Twenty Years Before Maine Adopted Town Tuitioning.**

Around the same time that Mann was exhorting Protestantism as central to common schools, several Catholic students were expelled from the public school in Ellsworth, Maine, for refusing to read from the English Protestant Bible as 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, moved 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 Rev. 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.



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 public school students. 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.* at 134.

Shortly after the Catholic students were expelled, 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*, Daily Bangor 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 at the new Catholic school. When the state failed to respond, 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 local leader of the Know Nothing political party. Dzurec, *supra*, at 81, 88.<sup>4</sup> As the *Herald* editor continuously stoked the flames of conflict, a mob stormed into Father Bapst's home on June 3; finding him away, they harassed his housekeeper and broke all the windows in his home. *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 reassigned Father Bapst to Bangor. *Id.* at 139.

A week later, a canister of gunpowder exploded at the front door of the Catholic school building in an attempt to destroy the school, breaking all the glass in the building. Brock Hornby, *History Lessons: Instructive Legal Episodes from Maine's Early Years—Episode*

---

<sup>4</sup> As eloquently explained by Justice Alito in *Espinoza*, the mission of the Know Nothings was to diminish the political influence of immigrants and Catholics. *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. at 2269 (Alito, J., concurring).

2, 23 Green Bag 2d 289, 291 (2021), *available at* <http://dx.doi.org/10.2139/ssrn.3731150>. At a town meeting on July 8, nativists elected new selectmen and passed a resolution threatening 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.” *Id.*

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. *Id.* But while awaiting the court’s ruling, a most horrific event occurred that fulfilled the earlier promises of the newly elected selectmen: Father Bapst was tarred and feathered.

As reported by the local press, on October 14 Father Bapst stopped in Ellsworth to say Sunday Mass 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,” tied to a tree, covered in hot tar and badly burned, and covered in 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 contrary to their own faith, but also started his own competing private school aligned with their values that offered safety from the 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 Whig and Courier, Oct. 28, 1854, p. 2, col. 3. In addressing the violence against Father Bapst, they referenced him as a man who had been forced out of town for “treasonable interference with our free schools.” *Id.* They regretted 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.”<sup>5</sup> *Id.*

---

<sup>5</sup> 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, the Pope had “intriguing schemes” with “allies, fals-hearted, truth economizing, treacherous office-holders, office-seekers, and their lick-spittles,” and 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.*

The Maine Supreme Court issued its ruling in *Donahoe* on May 30, 1855, upholding the power of local school boards to decide what texts should be read. *Donahoe*, 38 Me. at 413; Hornby, *supra*, at 293. It also held that Catholic students (and, implicitly, students of other faiths) could be compelled to read the Protestant King James Version of the Bible in public school. *Donahoe*, 38 Me. at 410-13.

Local violence did not abate after this ruling. In 1856, the Ellsworth Catholic church built by Father Bapst was burned by a mob. Dzurec, *supra*, at 95. 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 one thousand 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 attempted to set the cornerstone for a new church. Raney Bench, *History of Maine—The Rising of the Klan*, Maine History Documents 224, at 7-8 (2019), <https://digitalcommons.library.umaine.edu/mainehistory/224> (last visited Sept. 4, 2021). Treating Protestantism as the approved religion of government schools caused tremendous strife, exactly what Mann and similar reformers of his time sought to avoid.

## **B. 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 goal 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 proposed federal constitutional amendment supported disestablishment and the free exercise of religion at the state level. 4 Cong. Rec. 205 (1876).<sup>6</sup> Members of Congress who served in Congress during passage of the Fourteenth Amendment—only nine years prior to Blaine's proposal—might have had reason to question whether disestablishment and free exercise were already imposed on the states by the Fourteenth Amendment. However, not a single member of the House mentioned any connection to the

---

<sup>6</sup> "That the following be proposed to the several States of the Union as an amendment to the Constitution. . . . No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations." 4 Cong. Rec. 205.

Fourteenth Amendment, and Blaine's amendment passed the House 180 to 7. 4 Cong. Rec. 5191 (1876). Justice Hugo Black, widely credited with "formulating the Court's modern Establishment Clause jurisprudence," *Espinoza*, 140 S. Ct. at 2266 (Thomas, J., concurring), relied on analysis of Congressional debates of the 39th Congress that adopted the Fourteenth Amendment to conclude that Congress intended the Bill of Rights to be applicable to the states. Alfred Meyer, *The Blaine Amendment and the Bill of Rights*, 64 Harvard L. Rev. 939, 940 (1951). Yet, just seven years after ratification by the states, Congress did not find a connection between the Establishment Clause and the Fourteenth Amendment. If Congress believed the religion clauses already applied to education funding in the states after ratification of the Fourteenth Amendment, the proposed Blaine Amendment would have been unnecessary.

Blaine's amendment also aimed to exclude religious "sects and denominations" from receiving money that government collected from citizens to fund public schools. 4 Cong. Rec. 205. However, Blaine's amendment as it passed the House was silent on whether a sect or denomination could receive taxpayer funds not otherwise dedicated to the support of public schools. This opened the door for the U.S. Senate to amend, and add language to, Blaine's bill. As debate began on what was called, "The School Amendment," U.S. Senator Frelinghuysen asked:

"Why, sir, provide that money raised for schools shall not be appropriated to sectarian

schools and leave it lawful to appropriate to sectarian schools from the general Treasury? Why should we prohibit appropriations to sectarian schools and yet permit schools established by the public money to be made sectarian? Why prohibit appropriations to sectarian schools and permit money to be appropriated to sectarian institutions of another character? Why prohibit appropriations to religious sects and permit them to be made to infidel sects?"

4 Cong. Rec. 5561 (1876). The Senate Judiciary Committee ultimately amended Blaine's proposal to address some of the issues noted by Senator Frelinghuysen.<sup>7</sup>

The 1876 debate is a reminder that the more things change, the more they remain the same. As one might hear today in any state Capital, Senators debated states' rights (whether the federal or state governments should decide if a state should allow funding of religious entities); whether this was an attack on sectarian religious groups, particularly Catholics (debate included a missive written by the Pope); and whether the amendment was a shallow and fraudulent partisan fraud designed to propel Blaine into the next campaign (charged when original language passed by the House allegedly may have surreptitiously favored

---

<sup>7</sup> The Senator's key, and least controversial, amendment was to include language stating, "no religious test shall ever be required as a qualification to any office or public trust under any State." 4 Cong. Rec. 5561. However, the following language struck a chord left unresolved: "This article shall not be construed to prohibit the reading of the Bible in any school or institution." *Id.*

Catholics, a key voting group). 4 Cong. Rec. 5580-95 (1876).<sup>8</sup>

Blaine's unsuccessful efforts to amend the federal constitution ultimately led him to pursue state-by-state adoption. The resulting 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."

Meanwhile, strife between Protestant Christianity and immigrants bringing different faiths laid a fertile ground of opportunity 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 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 in that decade. Mark Paul Richard, *"This Is Not a Catholic Nation": The Ku Klux Klan Confronts Franco-Americans in*

---

<sup>8</sup> The most significant issue debated was the new language allowing public schools to continue readings from the Bible. At that time, McGuffey Readers was the nation's largest textbook supplier. The author, William McGuffey, a peer of Horace Mann, agreed that Bible-based morality should be taught in public schools. The McGuffey Fifth Reader included, "Religion the Only Basis of Society," "The Goodness of God," "My Mother's Bible," "Respect for the Sabbath Rewarded," Bible passages, and stories about God. William McGuffey, *McGuffey's New Fifth Eclectic Reader* (1857).

*Maine*, 82 New England Q. 285, 295-96, 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 entitled “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 Leg., *Proposed Constitutional Legislation 1820-*, at 19, <https://legislature.maine.gov/doc/502> (last visited Sept. 4, 2021). However, Maine voters 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 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 Sept. 4, 2021).

In a stroke of bitter irony, in 1980 the Maine attorney general decided that town tuitioning permitting students to choose sectarian schools violated the Establishment Clause. Me. Op. Atty. Gen. No. 80-2 (Jan. 7, 1980). Soon after his opinion was shared with the legislature, the law was changed to exclude sectarian schools from town tuitioning. 1981 Me. Laws 2177.

John Bapst High School was clearly sectarian. It was also an extremely popular school with locals, many

of whom relied on town tuitioning money to pay tuition. Of the 335 Maine students using funding from town tuitioning to attend religious schools in the autumn of 1980, 124 attended John Bapst High School, representing one-third of the student body. *Private School Tuition Funding Illegal*, Bangor Daily News, Jan. 10, 1980, p. 17. As a result of the new Maine restriction, John Bapst High School was compelled to pick one of three bad choices:

1. Renounce its Catholic affiliation and teachings, adopt a secular pedagogy, and become strictly non-religious;
2. Remain a practicing Catholic school and continue to cherish their faith until compelled to close as enrollment and tuition dwindled; or
3. Preemptively close the school.

Catholics stood at a precipice jarringly similar to 126 years before. In 1854, Father 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 be turned into Protestants. John Bapst Catholic High School opened in 1928 to honor the memory of Father Bapst, but 52 years later was compelled to close when the state feared it would violate the First Amendment if students used town tuitioning funds to attend sectarian schools.

John Bapst Catholic High School closed in June 1980. Later that year, a completely secular school opened as the John Bapst *Memorial* High School. No

hint of Catholic teaching or other spiritual talk or activity is permitted and the school is explicitly nonsectarian and independent. *John Bapst Memorial School: Mission and History*, <https://www.johnbapst.org/about/mission-and-history/> (last visited Sept. 4, 2021).

A few years later, the now non-religious college preparatory school bought the building from the Diocese of Portland. *A Campus is Born*, The Roundtable, Spring 2021, at 9-10, available at [https://www.johnbapst.org/wp-content/uploads/2021/06/2021\\_John\\_Bapst\\_Round-Table\\_Online-2.pdf](https://www.johnbapst.org/wp-content/uploads/2021/06/2021_John_Bapst_Round-Table_Online-2.pdf). Secularization of one of the most outstanding Catholic schools in New England was complete. The non-religious school is first-class, but students who prefer a school of faith must look elsewhere. Just like Bridget Donahoe in 1854, the hand of government came down hard to force modern-day Bridgets to find another place to go to school.

One hundred and sixty-seven years after John Bapst was tarred and feathered and run out of town on a rail for helping children leave their public school where their religious beliefs and values were ridiculed and prohibited, the pattern continues. Denying education funding to children who want to live their faith in their daily learning environment is an ugly form of persecution that runs counter to the blessings of liberty promised by the Establishment Clause and Religion Clauses of our federal constitution.

Action from this Court is needed to clarify our understanding of the First Amendment, with special emphasis on the Establishment Clause and its

applicability to the states. 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 2017, this Court decided *Trinity Lutheran* and held that a state policy 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[ing] a religious institution.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021-22 (2017). This reasoning applies equally here. When states exclude religious 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.

The full meaning of the Establishment Clause and its relation to the states has been a moving target for well over 150 years. The destabilizing impact on religiosity, academic achievement, and educational opportunity for children cannot be overstated.

### **III. Maine’s Sectarian Exception Can Be Struck Down; Town Tuitioning Will Then Be a Religiously Neutral Program.**

The mythical phrase “separation of church and state” is held like a dagger over the heads of legislators and 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, and parents who 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, detractors regularly raise the threat of litigation based on First Amendment grounds to convince legislators to exclude religious schools from educational-choice programs. Despite copious research showing benefits of school choice, as outlined in Part IV, *infra*, state legislatures may choose not to pursue such desired policies, or executive branch agencies charged with drafting rules for new programs may exclude or over-regulate religious schools due to the continued lack of constitutional clarity.

In his dissenting opinion in *Zelman v. Simmons-Harris*, Justice Breyer addressed five concerns regarding the ability of parental choice programs to resolve certain Establishment Clause issues. *Zelman*, 536 U.S. at 717. Three of those concerns were repeated eighteen

years later in his dissenting opinion in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. at 2281.

In *Espinoza*, Justice Breyer first alleged that parental choice programs, “cannot help the taxpayer who does not want to finance the propagation of religious beliefs, whether his own or someone else’s.” *Id.* at 2287. When a parent uses a voucher to pay tuition at a religious school, that parent is purchasing academic instruction that meets state standards for education leading to fulfillment of graduation requirements and a diploma. That education may be delivered in a religious setting from a religious viewpoint, but it is undisputed that the parent has purchased an academic course as required of all students by the state.<sup>9</sup> The taxpayer who objects to paying for “the propagation of religious beliefs” is confusing regular K-12 education with church. A church propagates religious beliefs focused exclusively on religious content. A religious school provides education satisfying state standards as its primary legal obligation, but in a religious environment which many parents prefer and some children require to feel safe and comfortable in their learning environment.

Taxpayers fund education because state constitutions impose a duty to fund K-12 education. The primary purpose of education funding is to finance a child’s educational advancement to graduation. A child

---

<sup>9</sup> In Maine, for example, any private school seeking tuition assistance funds must meet the requirements for basic school approval related to compulsory school attendance laws. Me. Stat. tit. 20-A, §§ 2951, 2901.

attending a religious school may pray at school every morning, and before lunch and test-taking, but what a taxpayer funds is the state-required education being provided to that child.

Second, Justice Breyer said vouchers “will not help religious minorities too few in number to support a school that teaches their beliefs.” *Id.* This may have been true at one time, but it is not true today. A small group of people, as few as ten or less, now are acquiring options for starting microschools, often referred to as learning pods, that offer maximum flexibility in the delivery of education.<sup>10</sup> This may be especially useful to religious minorities that have unique needs. Parents of children in religious minorities may also choose a myriad of educational resources for their children in states offering education savings accounts. *See* EdChoice, *Education Savings Accounts*, <https://www.edchoice.org/school-choice/types-of-school-choice/education-savings-account/> (last visited Sept. 4, 2021). Religious minorities can thrive under a non-discriminatory system that allows each child to choose the best education for the child’s particular needs.

Third, Justice Breyer said that vouchers “will not satisfy those whose religious beliefs preclude them

---

<sup>10</sup> “A microschool is a group of 5-10 learners who meet in-person, usually in the home of their learning guide.” The Reform Alliance, *What is a Microschool?*, <https://thereformalliance.org/about-microschools/> (last visited Sept. 4, 2021). One such microschool network, Prenda, already operates schools in six states. Prenda, *Prenda Partners*, <http://prenda.com/page/partners> (last visited Sept. 4, 2021).

from participating in a government-sponsored program.” *Espinoza*, 140 S. Ct. at 2287. These are individuals who cannot, or refuse to, receive publicly funded education benefits yet are compelled to pay for others to receive this benefit; empty-nesters often voice the same complaint. West Virginia this year adopted the Hope Scholarship, an education savings account program (ESA). W. Va. Code §§ 18-31-1 to 18-31-13 (2021). Some homeschool community members oppose public funding for any type of education, often due to religious beliefs. West Virginia addressed these concerns with language providing a separate category for Hope Scholarship recipients. Although recipients may be educated at home, they are separate and distinct from homeschools, preserving the legal status of those who homeschool but do not want to be eligible for an ESA. Although removal of an unconstitutional barrier will not satisfy all, it is no reason to prevent expansion of public choice that strengthens our protection of the freedom of religion.

Despite claims that school choice will cause religious conflict and strife, this has not occurred outside of appropriate, if vigorous, public debate. Including many religious education providers in a religiously neutral school choice program works, but the threat of “separation of church and state” breeds constant uncertainty.

#### **IV. 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 substantial 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. EdChoice, *The ABCs of School Choice* 139-144 (2021); *see also* EdChoice, *School Choice in America*, <https://www.edchoice.org/school-choice-in-america-dashboard-scia/> (last visited Sept. 4, 2021). At least one state has enacted a new educational-choice program every year since 2003, and over 1.4 million students are served by 76 programs in 32 states, the District of Columbia, and Puerto Rico. EdChoice, *Fast Facts*, <https://www.edchoice.org/school-choice/fast-facts/> (last visited Sept. 4, 2021). These programs include tax-credit scholarships, vouchers (includes town tuitioning), education savings accounts, and individual tax credits or deductions.

Ongoing state government policy debates about educational choice are unnecessarily constrained by uncertainty about which policies are constitutionally permissible, notwithstanding record-breaking growth in enactment of school-choice programs and existing program expansion. This Court's clear and convincing decision in *Espinoza* 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 various courts differently interpret and apply this Court’s prevailing First Amendment case law.

As the number of educational-choice programs and participants has increased nationwide, the body of empirical research on school choice has similarly expanded. Studies of choice programs throughout the United States overwhelmingly reflect a common conclusion: choice leads to measurable educational benefits for many students, is neutral for others, and does not harm any group of students or schools. Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Choice 1* (4th ed. 2016) (hereinafter 2016 Forster Report).

#### **A. School Choice Improves Academic Outcomes and Long-Term Educational Attainment for Participating Students.**

School-choice programs are compelling for their proven ability to improve academic outcomes. Empirical studies have examined the effect of school choice on student performance using the highest standard random-assignment method of social science research.<sup>11</sup>

---

<sup>11</sup> Random-assignment studies are possible where there are more applicants for a choice program than slots, generally resulting in a random lottery for the slots. Students winning the lottery

*Id.* at 10. Of 17 empirical studies to date, 11 found choice improves student outcomes and 4 found no visible effect. EdChoice, *The 123s of School Choice* 11 (hereinafter *123s of School Choice*), [https://www.edchoice.org/wp-content/uploads/2021/04/2021-123s-SlideShare\\_FINAL.pdf](https://www.edchoice.org/wp-content/uploads/2021/04/2021-123s-SlideShare_FINAL.pdf) (last visited Sept. 4, 2021).<sup>12</sup> Two analyses of Louisiana’s voucher program found a negative average outcome for all or some groups of students, as did one analysis of the Milwaukee voucher program. *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 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 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.

<sup>12</sup> EdChoice’s *The 123s of School Choice* report summarizes empirical research on school choice, with individual studies’ underlying aggregated data, too copious to individually cite here, cited to at <https://www.edchoice.org/school-choice-bibliography/> (last visited Sept. 4, 2021).

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 seven studies of student attainment, five found that private school-choice program participants experienced a positive increase in educational attainment, as measured by graduation rates, college enrollment, and college completion. *123s of School Choice, supra*, at 16. 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 graduation rates and increased rates of post-secondary education.

**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 type of educational environment they 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, *2021 Schooling in America* (2021), available at <https://www.edchoice.org/wp-content/uploads/2021/08/2021-Schooling-in-America-PROJECT.pdf>. In

the 2021 survey, when asked what type of school they would select if given the option, parents' first choice was private school (40%), followed by public district school (34%), public charter school (13%), and home schooling (13%). *Id.* at 18. Given such parental aspirations, actual enrollment is quite remarkable: 83% in public district school, 8% in private school, 6% in public charter school, and 3% home school. *Id.* at 16.

Parents want the option to choose religious schools for their children; those with access to school-choice programs, most of which include religious schools, are generally satisfied with their choices. Twenty-eight out of thirty 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. *123s of School Choice, supra*, at 21. The largest-ever survey of parents participating in a private school-choice program found that a school's religious environment and instruction was the most important factor for parents choosing a school. Jason Bedrick & Lindsey Burke, *Surveying Florida Scholarship Families 2* (2018), available at <https://www.edchoice.org/wp-content/uploads/2018/10/2018-10-Surveying-Florida-Scholarship-Families-byJason-Bedrick-and-Lindsey-Burke.pdf>. When Bedrick and Burke asked over 14,000 parents participating in Florida's tax-credit scholarship program which factors most influenced their decision to choose a particular school, 66% said "religious environment/instruction" and 52% said "morals/character/values instruction." *Id.* at 18. These two factors

far outranked other considerations. The next three considerations were “safe environment” at 39%, “academic reputation” at 34%, and “small classes” at 31%. *Id.*

**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 powerful incentive to improve performance to retain and attract students. Rigorous academic research supports this theory. Empirical studies show 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 27 relevant studies, 25 found that school choice improves public schools, 1 found no visible effect, and 1 found a negative effect. *123s of School Choice, supra*, at 27.

**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 showed no visible impact, and no study has shown school choice to have a negative effect. *Id.* at 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. *123s of School Choice, supra*, at 38.

---

◆

## CONCLUSION

Over 165 years ago, Father John Bapst sought to protect children in his community who were forced to renounce their own religious faith to access publicly funded education. Today, students in Maine eligible for town tuition funding are forced to choose between 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 persistent lack of clarity about First Amendment constitutional protections in the educational context. Father John Bapst may rest in peace if this Court clarifies that religiously neutral application

of student-aid programs is both permitted by the Establishment Clause and required by the Free Exercise Clause.

For the foregoing reasons, this Court should reverse the lower court's ruling and order that judgment be entered for the Petitioners.

Respectfully submitted,

LESLIE DAVIS HINER

*Counsel of Record*

EDCHOICE

111 Monument Circle

Suite 2650

Indianapolis, IN 46204

(317) 681-0745

leslie@edchoice.org

RUSSELL MENYHART

TAFT STETTINIUS &

HOLLISTER LLP

One Indiana Square

Suite 3500

Indianapolis, IN 46204

(317) 713-3500

rmenyhart@taftlaw.com