In the Supreme Court of the State of Montana
DA 17-0492

KENDRA ESPINOZA, JERI ELLEN ANDERSON
and JAIME SCHAEFER,

Plaintiffs and Appellees,

v.

MONTANA DEPARTMENT OF REVENUE,
And MIKE KADAS, in his official capacity as
DIRECTOR of the MONTANA DEPARTMENT
OF REVENUE,

Defendants and Appellants.

BRIEF OF EDCHOICE AS *AMICUS CURIAE* SUPPORTING APPELLEES

Kristin Hansen
512 Stadler Road
Helena, MT 59602
Telephone: (406) 461-2456
E-mail: kristinhansen@kristinhansen.com

Russell Menyhart*
TAFT STETTINIUS & HOLLISTER LLP
One Indiana Square, Suite 3500
Indianapolis, IN 46204
Tel: (317) 713-3500
E-mail: rmenyhart@taftlaw.com

Leslie Davis Hiner*
EDCHOICE
111 Monument Circle, Suite 2650
Indianapolis, IN 46204
Telephone: (317) 681-0745
E-mail: leslie@edchoice.org

Attorneys for amici curiae

* *pro hac vice* admission pending

Richard D. Komer
Erica Smith
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Suite 900
Arlington, VA 22203
Telephone: (703) 682-9320
E-mail: dkomer@ij.org

William W. Mercer
HOLLAND & HART, LLP
P.O. Box 639
Billings, MT 59103
Telephone: (406) 252-2166
E-mail: wwmercer@hollandhart.com

Attorneys for Espinoza et al.

Karl J. Englund
KARL J. ENGLUND, P.C.
P.O. Box 8358
Missoula, MT 59807
Telephone: (406) 721-2729
E-mail: KarlJEnglund@aol.com

Jonathan McDonald
McDONALD LAW OFFICE, PLLC
P.O. Box 1570
Helena, MT 59624-1570
Telephone: (406) 442-1493
E-mail: jm@mcdonaldlawmt.com

Attorneys for Amicus Curiae
Montana Quality Education Coalition

Daniel J. Whyte
Brendan Beatty
Nicholas Gochis
MONTANA DEPT. OF REVENUE
Legal Services Offices
P.O. Box 7701
Helena, MT 59604
Telephone: (406) 444-3340
E-mail: dwhyte@mt.gov

Attorneys for Dept. of Revenue

Alex J. Luchenitser
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1310 L. Street, NW, Suite 200
Washington, D.C. 20005
Telephone: (202) 466-7306
E-mail: luchenitser@au.org

Heather L. Weaver
American Civil Liberties Union
915 15th Street NW, Suite 600
Washington, DC 20005
Telephone: (202) 675-2330
E-mail: hweaver@aclu.org

James Goetz
GOETZ, GLADWIN & GEDDES
P.O. Box 6580
Bozeman, MT 59771-6580
Telephone: (406) 587-0618
E-mail: jim@goetzlawfirm.com

John Gore
Eric Treene
Thomas Chandler
Bethany Pickett
DEPARTMENT OF JUSTICE
P.O. Box 14403
Washington, D.C. 20044-4403
Telephone: (202) 307-3192
E-mail: thomas.chandler@usdoj.gov

Kurt Alme
Leif Johnson
U.S. ATTORNEY'S OFFICE
P.O. Box 1478
Billings, MT 59103
Telephone: (406) 657-6101
E-mail: leif.johnson@usdoj.gov

Attorneys for Amicus Curiae
United States

Alex Rate
ACLU OF MONTANA FOUND.
P.O. Box 9138
Missoula, MT 59807
Telephone: (406) 224-1447
E-mail: ratea@aclumontana.org

Attorneys for Amici Curiae
ACLU et al.

Table of Contents

Table of Authorities v

Statement of Identity and Interest of Amicus Curiae 1

Introduction 1

Argument 4

I. DOR's argument that this tax credit program constitutes an appropriation is illogical and would result in a claim by the government to control over funds related to every single tax credit or deduction 4

II. Courts in states with similar constitutional language have repeatedly affirmed the constitutionality of tax credit and voucher programs. 7

A. The ban on "direct or indirect" funding of religious institutions language in Montana's constitution is mirrored in the Florida, Georgia, Missouri and Oklahoma constitutions, and all states with educational choice programs have upheld those programs 7

B. Educational choice programs have been found to be constitutional in two other states with strong Blaine amendments 11

III. Social science research shows multiple benefits of educational choice for both participating students and public schools 13

A. "Gold-standard" research demonstrates that educational choice improves academic outcomes for participating students. 13

B. Public schools exposed to educational choice have improved academic outcomes 17

C. Educational choice has a positive impact on civic values and practices. 18

D. Educational choice saves money 19

Conclusion 22

Certificate of Compliance 23

Certificate of Service 24

Table of Authorities

Cases

Arizona Christian Sch. Tuition Org. v. Winn,
563 U.S. 125, (2011) 5

Bush v. Holmes
919 So.2d 392 (Fla. 2006) 8,9

Citizens for Strong Schools, Inc. v. Fl. State Board of Educ.,
2017 WL 6347096 (Fl. Ct. App., Dec. 13, 2017).....10

Gaddy v. Georgia Dep't of Revenue,
802 S.E.2d 225 (Ga. 2017) 10

McCall v. Scott,
199 So.3d 359 (Fla. Ct. App. 2016)
review denied 2017 WL 192043 (Fla. 2017).....5,9

Meredith v. Pence,
984 N.E.2d 1213 (Ind. 2013).....12.13

Oliver v. Hofmeister,
368 P.3d 1270, 1277 (Okla. 2016) 11

Schwartz v. Lopez,
382 P.3d 886 (Nev. 2016).....12

Trinity Lutheran Church of Columbia, Inc. v. Comer,
137 S.Ct. 2012 (2017) 2

Statutes

Florida Constitution, Article 1, § 3.....8

Georgia Constitution, Article I, § II 8

Indiana Constitution, Article 1 § 6 11

Missouri Constitution, Article I, § 7.....8

Missouri Constitution Article IX, § 8 8

Montana Constitution, Article X, § 6 7

Nevada Construction, Article 11, § 10 11

Oklahoma Constitution, Article II, § 5 8

Other Authorities

EdChoice, America's School Choice Programs by Dates Enacted and Launched (2018), http://www.edchoice.org/school-choice/enacted-and-launched-table/ 4

EdChoice, Empirical Research Literature on the Effects of School Choice, https://www.edchoice.org/school-choice/empirical-research-literature-on-the-effects-of-school-choice/#reviews 18

EdChoice, School Choice in America (2018), available at https://www.edchoice.org/school-choice/school-choice-in-america 3

Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Vouchers*, Friedman Found. for Educ. Choice, (2d ed. March 2011), *available at* http://www.edchoice.org/wp-content/uploads/2015/07/3-2011-Win-Win-National-Study.pdf 14,15,16

Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Choice*, Friedman Found. for Educ. Choice, (3d ed. 2013), *available at* http://www.edchoice.org/wp-content/uploads/2015/07/2013-4-A-Win-Win-Solution-WEB.pdf 15,16

Greg Forester, *A Win-Win Solution: The Empirical Evidence on School Choice*, Friedman Found. for Educ. Choice (4th ed. May 2016), *available at* http://www.edchoice.org/research/win-win-solution ..... *passim*

Susan Aud, "School Choice by the Numbers: The Fiscal Effect of School Choice Programs, 1990-2006," Friedman Found. for Educ. Choice, (April 2007), *available at* http://www.edchoice.org/wp-content/uploads/2015/09/Education-by-the-Numbers-Fiscal-Effect-of-School-Choice-Programs.pdf 19,20

Jeff Spalding, *The School Voucher Audit: Do Publicly Funded Private School Choice Programs Save Money?*, Friedman Found. for Educ. Choice (2014), *available at* http://www.edchoice.org/wp-content/uploads/2015/07/The-School-Voucher-Audit-Do-Publicly-Funded-Private-School-Choice-Programs-Save-Money.pdf 21

Statement of Identity and Interest of *Amicus Curiae*

EdChoice is a 501(c)(3) nonpartisan, nonprofit organization and a national leader in educational choice research, legal and 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 believes that all families—regardless of race, origin, residence or family income—should have a full and unencumbered opportunity to choose schools or other educational resources that work best for their children. The public good is well-served when children have a chance to learn at their maximum potential, regardless of the environment where that learning occurs—public or private, near or far, religious or secular. When children find their best fit for education and succeed, they will thrive as adults. They are our future.

Introduction

In support of the Plaintiff-Appellee parents, EdChoice urges the Court to affirm the trial court and preserve this educational choice program that helps parents in Montana—particularly those of limited economic means—choose the best possible education for their children.

The tax credits at stake in this case—claimed by generous citizens who donate to a nonprofit organization providing scholarships to children seeking a better education—are not public funds that provide aid, directly or indirectly, to religious

schools. The trial court was correct in finding that the scholarships are not "indirect payments of public monies" to religious schools, as claimed by the Defendant-Appellant Montana Department of Revenue ("DOR"), and therefore they do not violate the state constitution. DOR's theory for defining the tax credits as appropriations is both contrary to standard concepts of government expenditures and practically unworkable.

Sister states with similar constitutional language have repeatedly found such educational choice programs—both tax credits and vouchers—to be constitutional. Montana's "direct or indirect" funding language is mirrored in the Florida, Georgia, Missouri, and Oklahoma constitutions. Of those states, three permit both tax credit and voucher programs, and Missouri is now obliged to provide public benefit funds neutrally to both sectarian and non-sectarian institutions as a result of the U.S. Supreme Court's ruling in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017).

Furthermore, extensive social science research provides compelling support for the educational purpose of Montana's tax credit scholarship program. EdChoice works with leading education scholars to provide the kind of fiscal and social science research reviewed in this brief, and also regularly publishes metastudies of educational choice research. The evidence from the over 100 published studies of

educational choice has produced the following four relevant findings in favor of educational choice:

- Educational choice improves academic outcomes for participating students;
- Public schools exposed to educational choice have improved academic outcomes;
- Educational choice has a positive impact on civic values and practices; and
- Educational choice saves taxpayers and public school systems money.

Critics have argued that the literature is not sufficiently clear on the benefits of educational choice, or alternatively that some studies have shown such benefits to be marginal. The gist of these arguments is that Montana should not allow educational choice as long as any doubt remains as to its value, despite the significant empirical research that shows educational choice is a proven tool for increasing learning opportunities for all children. Perhaps the best evidence is the most obvious—Montana is one of 18 states that have enacted a total of 22 tax credit scholarship programs. See EdChoice. School Choice in America at *https://www.edchoice.org/school-choice/school-choice-in-america* (last visited Jan. 18, 2018). At least one state has enacted a new educational choice program every year since 2003, and there are now 1,125,398 families being served by 62 educational choice programs (31 based on tax credits) in 29 states plus the District of Columbia (22 tax credit scholarship programs like Montana's, two refundable tax

credit programs, three tax credits for educational expenses, and four tax deductions for educational expenses). *See* America's School Choice Programs by Dates Enacted and Launched, EdChoice, http://www.edchoice.org/school-choice/enacted-and-launched-table/ (last visited Jan. 18, 2018). Strong empirical evidence supports the value of educational choice. If these programs were not working for families, or were constitutionally suspect, it is unlikely that state legislators would have the will to enact and expand them across the nation.

Argument

I. DOR's argument that this tax credit program constitutes an appropriation is illogical and would result in a claim by the government to control over funds related to every single tax credit or deduction.

DOR asserts that for purposes of this case, the Court should interpret the term "appropriation", as found in Article X, Section 6, with broad strokes instead of a narrow definition. This is a slippery slope toward regarding large swathes of personal income as subject to government ownership and control, and it comes perilously close to regarding all actions of individuals who have received some form of tax benefit as subject to government intervention. If one measure of an appropriation is whether taxes—that might have been collected—are not collected, thereby creating imaginary control by the state over an individual's use of the so-called appropriated money that was not collected, then tax deductions must also be considered appropriations. This would stretch the power of the state far into the lives

of individual citizens, based on a premise that all income retained by private citizens through tax credits or deductions is a form of government expenditure and therefore subject to control of the state. Where should a court draw the line on what is an acceptable use of money kept in an individual's hands through tax credits or deductions, and what use is too religious to be imputed to the state that "appropriated" the tax benefit?

The United States Supreme Court and state courts have avoided the constitutional quagmire DOR asks this court to embrace by determining that there is a point in educational choice funding where the circuit between public and private funds is broken. *See, e.g., Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 141-142 (2011); *McCall v. Scott*, 199 So.3d 359, 365-66 (Fla. Ct. App. 2016), *review denied* 2017 WL 192043 (Fla. 2017). Tax credits and government expenditures are fundamentally different, even if they may have similar economic consequences. *Winn*, 563 U.S. at 141-142.

DOR's position would put the Court is an impossible position of conducting arbitrary line-drawing exercises to judge the constitutionality of existing and future programs. First, it suggests that a one-to-one tax credit is somehow intrinsically different than a partial tax credit, such as the well-established 40% tax credit Montana offers for donations to college endowments. *DOR Br.* at 21; § 15-30-2328(1), MCA. Second, it claims that if the scholarships go to "predominantly

religious schools", it makes the program unconstitutional, while a tax credit that benefits "mainly secular organizations" is not. *DOR Br.* at 12, 22.

Neither argument creates a coherent basis for nullifying this program. First, neither partial nor full tax credits result in funds coming from the state treasury for scholarships. Under DOR's theory, anyone who receives a tax credit (or even a tax deduction) has received an appropriation from the state. Is everyone who receives a tax deduction for a donation to Goodwill now considered to have accepted an appropriation? If that money is spent on sectarian school tuition, does it violate the state constitution? DOR's position, if consistently applied, results in constitutional implications for every tax credit and tax deduction. Yet even DOR admits that "[r]eligious schools and their donors continue to enjoy a range of tax exemptions and deductions." *DOR Br.* at 37. By DOR's logic, the Montana constitution permits religious schools to have a *direct* tax exemption or deduction, but bars tax credits for donations to an independent SSO if the SSO awards some unspecified portion of the scholarships to students attending those same religious schools.

Second, DOR argues that if a program results in many religious schools receiving funds, it is inherently suspect. Even if this Court accepts DOR's claim that the SSO's list is "almost exclusively religious school recipients," it provides no logical basis for distinguishing it from the college endowment tax credit that goes to "mainly secular organizations." *DOR Br.* at 17, 22. Would a surge in donations to

the endowments of sectarian colleges suddenly cause that tax credit to be unconstitutional? Does the fact that the SSO list includes some non-religious schools (as in fact it does) resolve the constitutionality of the program? DOR's position provides no coherent basis for addressing such issues.

II. Courts in states with similar constitutional language have repeatedly affirmed the constitutionality of tax credit and voucher programs.

A. The ban on "direct or indirect" funding of religious institutions language in Montana's constitution is mirrored in the Florida, Georgia, Missouri and Oklahoma constitutions, and all states with educational choice programs have upheld those programs.

The framers of Montana's constitution modeled language for Article X, Section 6 on language found in existing state constitutions (as did many of those that achieved statehood in the late 19th and early 20th century). DOR alleges that inclusion of the term "indirect" aid broadens Montana's constitution to exclude all funding that may, no matter how remotely and no matter the purpose, come into the hands of a religious entity. But other states that have addressed this question do not support DOR's position.

The only other states that include the term "indirect" aid in similar constitutional provisions are Florida[1], Georgia[2], Missouri[3], and Oklahoma[4]. *Amicus* in support of DOR cites *Bush v. Holmes*, a Florida intermediate appellate case widely interpreted as restricting vouchers in the state, as support that the "indirect" language is a bar to school choice programs. *ACLU Amicus Br.* at 8-9. However, *Bush v. Holmes* ultimately did not rely on the "indirect" aid clause of Florida's constitution;

[1] "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution." Florida Const., article 1, § 3.

[2] "Separation of church and state. No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution." Georgia Const., article I, § II, Para. VII.

[3] "That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship." Missouri Const., Article I, § 7. "Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever…" Missouri Const., Article IX, § 8.

[4] "No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such." Oklahoma Const., Article II, § 5.

rather, it was narrowly decided on Florida's uniformity clause. *Bush v. Holmes*, 919 So.2d 392, 409-413 (Fla. 2006).

In a directly applicable case, the Florida Court of Appeals more recently upheld the constitutionality of a tax credit scholarship program precisely for the reasons raised in this case. *McCall v. Scott*, 199 So.3d 359, 365-66 (Fla. Ct. App. 2016), *review denied* 2017 WL 192043 (Fla. 2017). The Florida Tax Credit Scholarship Program (FTCSP) at stake in that lawsuit consisted of voluntary donations to various scholarship organization, for which the taxpayer could seek certain tax credits. *Id.* at 362-63. Parents then applied to the organizations for scholarship to attend schools, including religious schools. *Id.* at 363. The Florida court found that, "[n]o funds under the FTCSP are appropriated from the state treasury or from the budget for Florida's public schools." Because all the funds come from private donations, "tax credits received by taxpayers who have contributed to [the scholarships] are not the equivalent of revenues remitted to the state treasury." *Id.* at 366. Because there was no diversion of state revenues to private schools, the plaintiffs lacked standing because they had no special injury. *Id.* at 366-68 (rejecting appellants' speculative argument that tax credits take away from public school appropriations).

More recently, a Florida court upheld the constitutionality of a voucher program for children with special needs, finding that it did not divert state funding or have any detrimental effect on Florida's system of public schools. *Citizens for Strong Schools, Inc. v. Fl. State Board of Educ.*, 2017 WL 6347096, at *2 (Fl. Ct. App., Dec. 13, 2017). The court also found that it does not negatively impact public school funding or quality, but rather offers an educational benefit for children. *Id.* Florida's voucher, tax credit, and education savings account programs all permit participation by religious schools, despite a constitutional prohibition on indirect aid to religious institutions.

Georgia's tax credit scholarship program was also recently upheld by the state supreme court. *Gaddy v. Georgia Dep't of Revenue*, 802 S.E.2d 225 (Ga. 2017). Analyzing the character of funds donated to scholarship-granting organizations providing scholarships that may be used at religious schools, the Georgia Supreme Court said that the state does not control the funds that are donated to such organizations and does not control the choice of school made by parents. *Id.* at 556-57. There can be no public aid, indirectly or otherwise, where the state has no control of the funds. *Id.* at 558. Georgia also has a voucher for children with special needs which has not been litigated.

The Oklahoma Supreme Court recently found its voucher program to be constitutional, notwithstanding a constitutional provision prohibiting direct or

indirect aid to religious institutions. *Oliver v. Hofmeister*, 368 P.3d 1270, 1277 (Okla. 2016). Oklahoma's constitution has long been considered to have the most restrictive Blaine-type provisions. Yet the state supreme court stated that the purpose of the "no aid" clause is to protect the separation of church and state and to separate churches from the state's control, not to prevent religious influence. *Id.* at 1275-76. Noting that participation in the voucher program is strictly voluntary and no payment is made to any school except at the direction of the parent, not the state, the Court found that, "When the scholarship payment is directed to a *sectarian* private school it is at the sole and independent choice and direction of the parent and *not the State.*" *Id.* at 1276 (emphasis in original). This is similarly true for Big Sky Scholarships. Oklahoma's separate tax credit scholarship program has not been challenged.

B. Educational choice programs have been found to be constitutional in two other states with strong Blaine amendments.

Two other cases of significance are from Nevada and Indiana. Neither state's constitutions contain "indirect" aid language, yet both have Blaine amendments[5]. In Nevada an education savings account program was challenged, and the state Supreme Court's holding speaks directly to the question of whether funding that

[5] "No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose." Nevada Const., article 11, § 10. "No money shall be drawn from the treasury, for the benefit of any religious or theological institution." Indiana Const., article 1, § 6.

reaches a religious school is state aid. *Schwartz v. Lopez*, 382 P.3d 886 (Nev. 2016). The court reasoned that who controls the money matters—in Nevada's program, parents control the use of public funds that are deposited into education savings accounts to pay for their children's education; because parents, not the state, control those funds, the public funds become private funds at the point when the funds are deposited in the child's account. *Id.* at 899.

When Indiana's school voucher program was challenged, the Indiana Supreme Court took its analysis one step further in addressing Blaine restrictions found in its constitution. *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013). The Court eloquently held that voucher funding does not directly benefit religious schools; rather, it directly benefits the parents of school-age children who seek educational options for their children. *Id.* at 1230. It further held that the prohibition on government support for religious institutions was not intended to extend to primary and secondary education, as public education regularly included religious instruction at the time the Constitution was drafted. *Id.* Indiana's tax credit scholarship program has not been litigated.

As in Nevada and Indiana, the underlying issue of importance in this case is who controls the money at the point when choices are made about a child's education. In tax credit scholarship programs, the state has no control over how many donors, if any, will contribute to a scholarship organization or whether contributions

from those donors will reach the cap. The state has no control over which private schools, if any, decide to participate. The state has no control over how many scholarship granting nonprofits are created, if any. And the donor to a tax credit scholarship-granting organization has no control over which school any parent will choose, secular or religious, for a child's education.

III. Social science research shows multiple benefits of educational choice for both participating students and public schools.

As the number of educational-choice programs and participants has increased nation-wide, the body of empirical research on educational choice has similarly expanded. Studies of choice programs throughout the United States overwhelmingly reflect a common conclusion: choice has led to measurable educational benefits for many students; it has been neutral for others; and it does not harm any group of students or schools. *See* Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Choice*, Friedman Found. for Educ. Choice (4th ed. May 2016) ("2016 *Win-Win* Report"), *available at* http://www.edchoice.org/research/win-win-solution (last visited Jan. 18, 2018).[6]

[6] An update of the empirical research since the latest edition of *Win-Win* is available at http://www.edchoice.org/school-choice/empirical-research-literature-on-the-effects-of-school-choice (last visited January 18, 2018).

A. "Gold-standard" research demonstrates that educational choice improves academic outcomes for participating students.

Educational choice programs are most compelling for their proven ability to improve academic outcomes. To date, 18 empirical studies have examined the effect of educational choice on student performance using the random-assignment method, the "gold standard" of social science research.[7] 2016 *Win-Win* Report at 10. Of those, 14 found choice improves student outcomes: six found all students benefit, and eight found some students benefit while others are not affected. *Id.* Two studies found no visible effect, and two studies of Louisiana's voucher program found negative outcomes for all or some students. *Id.*

For example, a 1998 random-assignment study of a Milwaukee educational-choice program found that students who used vouchers from 1990 to 1993 scored six points higher in reading and 11 points higher in math than students in the control group, who were not offered vouchers. Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Vouchers*, Friedman Found. for Educ. Choice, at 9-10 (2d ed. March 2011) ("2011 *Win-Win* Report"), *available at* http://www.edchoice.org/wp-content/uploads/2015/07/3-2011-Win-Win-National-

[7] Random-assignment studies are possible where there are more applicants for a choice program than there are slots, generally resulting in a random lottery for the slots. Students who win the lottery and are offered choice can be compared to those who were not offered choice. Any systemic differences can be attributed to the offer of choice alone, because nothing separates the group but the offer of choice and randomness. 2016 *Win-Win* Report at 10.

Study.pdf (last visited Jan. 18, 2018). In 2001, a researcher studying the effect of educational choice in a privately funded voucher program in Charlotte, North Carolina, found that after one year, voucher students scored six points higher on combined reading and math tests. *Id.* at 10. In 2008, another researcher reanalyzed the data from the Charlotte study, using a different method to account for students who were offered educational choice but declined to exercise it. The 2008 study found that after one year, the voucher students outperformed the control group by eight points in reading and seven points in math. *Id.*

Not every random-assignment study of student achievement has concluded that *all* students offered educational choice improve academically. For example, in 2002, a random-assignment study examined the effect of choice in a privately funded voucher program in New York City. It found a nine-point increase for African-American students after three years on a combined reading and math test, but no visible effect among other students. *Id.* at 11. The New York City data were reviewed a year later by other researchers, who found that students (regardless of race) who left low-quality public schools to use vouchers gained five points on math tests after one year. *Id.* A further reanalysis of these data in 2010 confirmed the 2003 finding of academic gains. Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Choice*, Friedman Found. for Educ. Choice, at 8 (3d ed. 2013) ("2013 *Win-Win* Report"), *available at* http://www.edchoice.org/wp-

content/uploads/2015/07/2013-4-A-Win-Win-Solution-WEB.pdf) (last visited Jan. 18, 2018). A fourth reanalysis of the 2002 New York City data changed the way students were classified by race, using a scientifically questionable methodology, and found no visible impact on academic achievement. 2011 *Win-Win* Report at 11-12.

A long-term study of a privately funded voucher program for low-income elementary school students in New York City in the late 1990s found that African-American students who were offered vouchers in elementary school were 20% more likely to attend college within three years of their expected high-school graduation date; 25% more likely to attend college full-time; and 130% more likely to attend a selective four-year college. 2013 *Win-Win* Report at 8. Three recent random-assignment studies of New York City voucher programs found that educational choice has a positive effect on college enrollment and attainment rates for some or all participating students and no negative effect for any student group. 2016 *Win-Win* Report at 11.

Overall, the empirical evidence using "gold-standard" studies demonstrates a largely positive effect of educational choice on participating students, with 14 of 18 studies showing positive effects for some or all students. 2016 *Win-Win* Report. Apart from the anomalous results of flawed Louisiana and D.C. programs, the research shows that some, if not all, students offered educational choice improve

their academic performance, while none is negatively affected. Such outcomes are the hallmark of responsible public policy. The empirical evidence as a whole supports Montana's decision to support educational choice for families who believe they are not well served by their public school system.

B. Public schools exposed to educational choice have improved academic outcomes.

Theoretically, educational choice should improve both public and private school educations due to the increased competition it fosters. There is now sufficient rigorous academic research to support this theory. Empirical studies show that the positive effect of educational choice on public school performance is at least as strong as the effect on children who are offered choice. Of the 33 total studies, 31 found educational choice improves public schools, one found no visible effect, and one found a negative effect.[8] *Id.* at 16.

The majority of these studies examined Milwaukee's voucher program or Florida's voucher and tax-credit scholarship programs, three of the nation's longest running programs. Several recent studies have provided intriguing (and always positive) results. For example, a study of Florida's tax-credit scholarship program

[8] These studies did not use the random-assignment method discussed above. But this presents less of a problem when studying the effect of choice on public schools, because those studies only need to compare schools whose students are offered a choice with schools whose students are not, "which is usually an easier methodological barrier to overcome." 2016 *Win-Win* Report at 16.

used new variables to measure private school competition (e.g., using the number of nearby houses of worship as a proxy for private school competition). It found a positive effect on public schools in both reading and math for all five separate measures of private school competition. *Id.* at 17. Another study found that when low-performing schools became eligible for vouchers, changes in the schools' institutional practices resulted in improved student performance. *Id.*

Twelve studies have analyzed educational choice in places other than Milwaukee or Florida, and eleven of them found improvements in public schools' academic outcomes. *Id.* at 17-18. Thus, the overwhelming majority of the studies continue to find that educational choice positively impacts the academic performance of public schools exposed to choice. *Id.* at 19.

C. Educational choice has a positive impact on civic values and practices.

Another area of educational-choice research examines the impact of educational choice on civic values and practices. To date, eight studies find educational choice has a positive impact, four studies show no visible impact, and no study has shown educational choice to have a negative effect. EdChoice, *Empirical Research Literature on the Effects of School Choice,* https://www.edchoice.org/school-choice/empirical-research-literature-on-the-effects-of-school-choice/#reviews (last visited January 18, 2018). In a 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 *Win-Win* Report at 31. The study found the positive effect to be significantly stronger in religious schools than in other private schools. *Id.*

A second new study analyzed the long-term impact of Milwaukee's educational-choice program on students' criminal records. *Id.* The study found that participation in the voucher program was correlated to decreased criminal activity, especially for men. *Id.* The longer students remained in the voucher program, the stronger the correlation across multiple measures of criminal records. *Id.* at 31-32. Males who remained in the program throughout high school had better outcomes than their peers in public schools on all measures, including a 79% reduction in felonies, a 93% reduction in drug offenses, and an 87% reduction in theft. *Id.* at 32.

D. Educational choice saves money.

Studies nationwide have shown that educational choice programs save money, which benefits both the public schools and taxpayers. Educational choice saves taxpayers money because the funds made available to parents to choose their child's educational services are typically less than the funds the state would otherwise pay to educate the child in a public school.

EdChoice sponsored an empirical study in 2007 that assessed the fiscal impact of state educational-choice programs. *See* Susan Aud, "School Choice by the

Numbers: The Fiscal Effect of School Choice Programs, 1990-2006," Friedman Found. for Educ. Choice, at 8 (April 2007) ("Aud Study"), *available at* http://www.edchoice.org/wp-content/uploads/2015/09/Education-by-the-Numbers-Fiscal-Effect-of-School-Choice-Programs.pdf (last visited Jan. 18, 2018). The study found that:

- Every existing educational-choice program was at least fiscally neutral, and most programs produce substantial savings.
- In nearly every educational-choice program, the dollar value of the voucher or scholarship was less than or equal to the state's formula spending per student, meaning states were spending less on students in educational-choice programs than they would have spent if the same students had attended public schools.
- Educational choice produced a positive fiscal impact for school districts and state budgets, because reduced costs exceeded the lost per-student revenue.

Id. at 5.

The Aud Study is not an isolated finding. The latest edition of *Win-Win* reviewed 28 empirical studies of the fiscal impact of educational choice. 2016 *Win-Win* Report at 21. Twenty-five of those studies found that educational choice saves money, and just three found that such programs are revenue neutral due to unusual

aspects of those particular programs. *Id.*[9] The latest comprehensive study examined ten educational choice programs from 1990 to 2011. Jeff Spalding, *The School Voucher Audit: Do Publicly Funded Private School Choice Programs Save Money?*, Friedman Found. for Educ. Choice (2014), *available at* http://www.edchoice.org/wp-content/uploads/2015/07/The-School-Voucher-Audit-Do-Publicly-Funded-Private-School-Choice-Programs-Save-Money.pdf (last visited Jan. 18, 2018). The study looked at aggregate savings to state and local government by subtracting the per-student cost of an educational choice program from the per-student reduction in variable educational costs. It found that all ten programs saved taxpayers money—a total of $1.7 billion from 1990 through 2011. 2016 *Win-Win* Report at 23. What is remarkable is not only the aggregate savings, but also the fact that every program independently had a net fiscal benefit for public schools and taxpayers combined.

Opponents of educational choice continue to raise the specter of financial ruin for public schools, but no evidence supports their assertions. With over two decades of results now in, most studies show that educational choice has a net positive effect

[9] Two of the revenue-neutral programs are century-old "town tuitioning" programs in Maine and Vermont, designed to cover school tuition for children living in small towns that do not have public schools. The third revenue-neutral program was a small Utah voucher program for students with special needs that directs 100% of the revenue for each student into the voucher program. 2016 *Win-Win* Report at 22-23.

on public school funding, and no study has found a net negative effect. 2016 *Win-Win* Report at 21.

Conclusion

The District Court correctly granted summary judgment in favor of the Plaintiffs-Appellees. This Court should hold that the tax credit program does not violate the Montana constitution, and should allow this valuable program to go forward.

Dated this 19th day of January, 2018.

Kristin Hansen

By: /s/ Kristin Hansen
Kristin Hansen

Attorney for Amicus EdChoice

Certificate of Compliance

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately space Times New Roman text typeface of 14 points; is double-spaced (except that footnotes and quoted and indented material are single space); with left, right, top, and bottom margins of one inch; and that the word count as calculated by Microsoft Word is 4,925 words, excluding the Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance.

DATED this 19th day of January, 2018.

By: /s/ Kristin Hansen
Kristin Hansen

Certificate of Service

I, Kristin Hansen, hereby certify that I have served true and accurate copies of the foregoing *amicus* brief to the following on January 19, 2018:

Brendan R. Beatty (Attorney)
P.O. Box 7701
Helena, MT 59624
Representing: Department of Revenue
Service Method: eService

Daniel J. Whyte (Attorney)
P.O. Box 7701
Helena, MT 59604
Telephone: (406) 444-3340
Representing: Department of Revenue
Service Method: eService

Nicholas Gochis (Attorney)
P.O. Box 7701
Helena, MT 59604
Telephone: (406) 444-3340
Representing: Department of Revenue
Service Method: eService

William W. Mercer (Attorney)
401 North 31st St.
Suite 1500
PO Box 639
Billings, MT 59103
Representing: Kendra Espinoza
Service Method: eService

Jonathan McDonald (Attorney)
P.O. Box 1570
Helena, MT 59624-1570
Representing: Montana Quality Education Coalition

Service Method: eService

James Goetz (Attorney)
Goetz, Gladwin & Geddes
35 North Grand Avenue
P.O. Box 6580
Bozeman, MT 59771-6580
Representing: ACLU of Montana Foundation, Inc., Americans United for Separation of Church and State, Anti-Defamation League
Service Method: eService

Alex Rate (Attorney)
P.O. Box 1387
Livingstone, MT 59047
Representing: ACLU of Montana Foundation, Inc., Americans United for Separation of Church and State, Anti-Defamation League
Service Method: eService

Richard D. Komer (Attorney)
901 N. Glebe Rd., Suite 900
Arlington, VA 22203
Representing: Kendra Espinoza
Service Method: E-mail Delivery

Erica Smith (Attorney)
901 N. Glebe Rd., Suite 900
Arlington, VA 22203
Representing: Kendra Espinoza
Service Method: E-mail Delivery

Karl J. Englund (Attorney)
401 N. Washington Street
P.O. Box 8358
Missoula, MT 59807
Representing: Montana Quality Education Coalition
Service Method: E-mail Delivery

Alex J. Luchenitser (Attorney)
1310 L. Street, NW, Suite 200
Washington, D.C. 20005
Representing: ACLU of Montana Foundation, Inc., Americans United for Separation of Church and State, Anti-Defamation League
Service Method: E-mail Delivery

Heather L. Weaver
915 15th Street NW, Suite 600
Washington, DC 20005
Representing: American Civil Liberties Union
Service Method: E-mail Delivery

Jennifer Wendt Brody (Attorney)
5 West Mendenhall, Suite 202
Bozeman, MT 59715
Representing: Agudath Israel of America
Service Method: E-mail Delivery

Electronically Signed by: Kristin Hansen
Dated: 1-19-2018