

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

IN THE ORIGINAL JURISDICTION

Appellate Case No. 2020-001069

Dr. Thomasena Adams, Rhonda Polin,
Shaun Thacker, Orangeburg County School
District, Sherry East, and the South Carolina
Education Association Petitioners,

v.

Governor Henry McMaster, Palmetto
Promise Institute, South Carolina
Office of the Treasurer, and South Carolina
Department of Administration Respondents.

**BRIEF OF *AMICUS CURIAE* EDCHOICE
IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICUS CURIAE*

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 believes that all families—regardless of race, origin, residence, or family income—should have a full and unencumbered opportunity to choose schools and 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.

SUMMARY OF ARGUMENT

The Safe Access to Flexible Education Grants (SAFE Grants) program provides critical relief to students, families, and public schools forced into chaos by a global pandemic. Social science research demonstrates that the benefits of educational-choice programs, like the SAFE Grants Program, extend beyond just the participating students and their families. Public schools and the community are also served. There is demand for these programs. At least one state has enacted a new educational-choice program every year since 2003, and over 1.4 million students and families are currently being

served in 65 school choice programs in 29 states, the District of Columbia, and Puerto Rico.¹

With record unemployment² caused by COVID-19 parents and children are facing difficult questions. Should my child attend in-person schooling? Will my school be open in the fall? What will I do if I must return to work, but my child's school district remains on a virtual platform? SAFE Grants aims to provide a lifeline for many parents struggling with these questions.

Private schools accounted for nearly 50,000 South Carolina students in the 2017-2018 school year.³ Research projects a high cost in state and local tax dollars if families of these students cannot afford to continue to pay private school tuition and are reabsorbed into the public school system. For other students, their family will face financial crisis if their public school only delivers education remotely, but their parents must return to work to support the family. SAFE Grants aims to empower parents and provide needed relief for funding the ecosystem of education in South Carolina that relies on private schools.

SAFE Grants do not violate Article XI, Section 4 of the South Carolina Constitution. SAFE Grants provide direct financial aid to low- and middle-income

¹ EdChoice. *School Choice in America Dashboard*, <https://www.edchoice.org/school-choice/school-choice-in-america/> (last visited August 21, 2020).

² *Poll: Nearly 1 in 5 Households has Lost Work Because of Pandemic*, NPR, <https://www.npr.org/2020/03/17/817158521/poll-nearly-1-in-5-households-have-lost-work-because-of-pandemic> (last visited Aug. 21, 2020).

³ Robert Enlow. *The K-12 Financial Cliff: What States Could Face If Students Switch Schooling Sectors*. (2020), available at <https://www.edchoice.org/engage/the-k-12-financial-cliff-what-states-could-face-if-students-switch-schooling-sectors/> (last visited August 21, 2020).

families. This generally available and religiously neutral program allows the parent to direct funds to the school of their choice.

ARGUMENT

I. The SAFE Grants Program and Similar Student-Aid Programs Fund Educational Services for Students Through Direct Grants to Parents – Not to Religious or Secular Private Institutions

When states consider adopting religiously neutral and generally available student-aid programs for K-12 education, like the SAFE Grants program, state leaders are regularly accused of having an ulterior motive of aiding private religious schools by using student-aid programs to divert funding from public schools to religious schools. Opponents then allege constitutional violations, arguments that are normally found to be without merit.

Opponents miss a critical point. In adopting the SAFE Grants Program, South Carolina never decided to fund religious schools – the state merely found and decided to use a different way to fund a child’s education. Funding is provided directly to parents. Not one dollar of SAFE Grants funding will be used to pay private school tuition unless and until a parent requests and then receives a SAFE Grant to fund the child’s education. Parents are not intermediaries; they are direct beneficiaries and their participation is voluntary. Parents alone decide which school is the best fit for their child using the SAFE Grants Program. These parents may, or may not, choose a religiously affiliated school. In this religiously neutral education grant program, parents retain the free will to choose any type of school, which is aligned with other educational choice programs. The schools chosen by the parents in turn owe a duty to provide an education that meets state standards in exchange for tuition funding they receive from the parents. No school, religious or not, participating in the SAFE Grants program or any student-aid program receives funding from a parent unless and until a parent determines that it is the best

educational option for her child. It is the parent, not the state, that chooses the school. It is the parent, not the state, that uses grant funds to pay tuition at the parent's school of choice. The US Supreme Court in *Zelman vs. Simmons-Harris*, 536 U.S. 639 (2002), defined this type of program, one of "true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." The Court went on to say,

"our jurisprudence with respect to true private choice programs has remained consistent and unbroken. Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges."

Id. at 649.

Zelman represented the fourth time such challenge was rejected by the US Supreme Court. Furthermore, the Court clearly explained that the state's control over funding ends at the point when a parent receives government funds for the child's education. The Court said any advancement or perceived endorsement of religion is attributable to the parent who chooses a religious school using government funds, "not to the government, whose role ends with the disbursement of benefits." *Id.* at 652.

This language from the US Supreme Court is particularly applicable to this case. Article XI, Section 4 of the South Carolina Constitution prohibits direct public funding of a religious entity "or other private educational institution."⁴ It is clearly established in case law over recent decades that public funding for educational choice is direct funding to a parent for the educational benefit of the parent's child, and that the point at which the parent receives control over public funding is the point when funds pass from state to

⁴ S.C. Const. art XI, § 4.

individual control; therefore, a decision made by the parent regarding where to use those public funds for the child's education is solely, and entirely, a private decision over which Article XI, Section 4 of the South Carolina Constitution does not apply.

Until recently there was a deep divide in this nation about whether states could freely create these religiously neutral and generally available student-aid programs. States were restricted by state constitutional amendments prohibiting aid to religious institutions. This deep divide recently came to an end when the Supreme Court of the United States ruled in *Espinoza v. Montana Dept. of Revenue*, 591 U.S. ____ (2020).

In *Espinoza*, the Court reversed a Montana Supreme Court decision striking down a statewide tuition program that permitted families to choose religious schools holding, while a state “need not subsidize private education...once [it] decides to do so, it cannot disqualify some private schools solely because they are religious.” 591 U.S., at ____ (slip op., at 20). When the state subsidizes a child's private education, the parent has a right, guaranteed by the Free Exercise Clause of the First Amendment to the US Constitution, to choose a religious school or any school that best serves the educational needs of the child. State courts must not give effect to state constitutional provisions in conflict with federal law, as the court stated,

The Supremacy Clause provides that “the Judges in every State shall be bound” by the Federal Constitution, “anything in the Constitution or Laws of any State to the Contrary notwithstanding.” Art. VI, cl. 2. “[T]his Clause creates a rule of decision” directing state courts that they “must not give effect to state laws that conflict with federal law[.]” *Armstrong v. Exceptional Child Center, Inc.*, 575 U. S. 320, 324 (2015).

591 U.S., at ____ (slip op., at 22).

Emphasizing this point, the Court said, “That “supreme law of the land” condemns discrimination against religious schools and the families whose children attend them.” *Id.*

The SAFE Grants program is religiously neutral and generally available to parents who may choose private schools in South Carolina that meet normal safety, accreditation, and accountability standards. The SAFE Grants program allows *parents* to determine the best educational fit for their child and empowers *parents* to direct funds to the school that works best for their child. Attempts to argue otherwise are without merit and have been uniformly rejected by the Supreme Court of the United States of America.

II. Social Science Research Reveals Why Parents Seek Student-Aid Programs and Educational Services Provided by Religious Entities.

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.⁵

a. Parents Consistently Express a Desire for School Choice and That Having the Options of Sending Their Children to Religious Schools Is Important

Parents know what they want, but they often are not able to access the type of educational environment they desire for their child’s education. 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

⁵ Greg Forester, *A Win-Win Solution: The Empirical Evidence on School choice* (4th ed. 2016), available at <http://www.edchoice.org/wp-content/uploads/2016/05/A-Win-Win-Solution-The-Empirical-Evidence-on-School-Choice.pdf>

remaining in public district schools.⁶ In the 2019 survey, when asked what type of school they would select if given the option, parents' first choice was private school (42%), followed by public district school (32%), public charter school (13%) and homeschooling (13%). Given such parental aspirations, actual enrollment is quite remarkable: 82% in public district school, 10% in private school, 5% in charter school, and 3% in homeschool. It is these kind of constituent desires that have led to an ever-increasing number of states implementing educational-choice initiatives to empower parents to better control their children's education.

Parents are also clear about their desire to have the option of choosing religious schools and schools with morals/charter/values instruction for their children. 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.⁷ 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."⁸ 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%.⁹

⁶ Paul DiPerna, Drew Catt & Michael Shaw, *Schooling in America* (2019) available at <https://www.edchoice.org/wp-content/uploads/2019/10/2019-9-Schooling-in-America-by-Paul-Diperna-Andrew-Catt-and-Michael-Shaw-1.pdf>

⁷ Jason Bedrick & Lindsey Burke, *Surveying Florida Scholarship Families* (2018), available at <https://www.edchoice.org/wp-content/uploads/2018/10/2018-10-Surveying-Florida-Scholarship-Families-byJason-Bedrick-and-Lindsey-Burke.pdf>.

⁸ *Id.*

⁹ *Id.*

Parents' desires have only become more important and varied since COVID-19. EdChoice's general population polling shows a 21 percentage point spike in parents' concerns about COVID exposure from June to July.¹⁰ Parents are increasingly favoring homeschooling,¹¹ and overwhelmingly, 69% of parents think schools and districts should offer multiple learning options this fall.¹²

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

A philosophical underpinning of school choice is that it should improve both private and public educations due to the increased competitions it fosters. When public schools know that students can use educational-choice funding to enroll elsewhere, they have a powerful incentive to improve performance and retain and attract students. In fact, empirical studies looking at the outcomes for students who remain in public schools that face increased competition from private choice programs find modest increases in test scores.¹³ Of 27 relevant studies on this matter, 25 have found that school choice improves public schools, one found no visible effect, and one found a negative effect.¹⁴

A 2007 study by Cecilia Rouse, Jane Hannaway, Dan Goldhaber, and David Figlio examined these accountability structures in Florida.¹⁵ Florida hosts one of the

¹⁰ EdChoice. Public Opinion Tracker. *All Adults: July -20 Report*, slide 7, available at <https://edchoice.morningconsultintelligence.com/assets/41494.pdf>

¹¹ *Id.* at slide 9.

¹² *Id.* at slide 14.

¹³ EdChoice. *The 123s of School Choice* (2020), 32, available at <https://www.edchoice.org/wp-content/uploads/2020/04/123s-of-School-Choice-2020-4.pdf>

¹⁴ *Id.*

¹⁵ Cecilia Rouse, Jane Hannaway, Dan Goldhaber, and David Figlio, *Feeling the Florida Heat? How Low-Performing Schools Respond to Voucher and Accountability Pressure*, *American Economic Journal: Economic Policy*, available at: <https://pubs.aeaweb.org/doi/pdfplus/10.1257/pol.5.2.251>

nation’s largest school choice programs serving over 100,000 low-income families.¹⁶ This study reviewed the effects of a new accountability program in Florida, which allowed, in part, for students to utilize a school choice program to attend another public or private school if their school repeatedly was found to be low-performing. The study found “low-performing schools improved when their students could become eligible for vouchers if the schools did not improve.”¹⁷

The SAFE Grants program is a one-year program that provides relief from COVID-19’s impact on K-12 education. While this is a time-limited program, research supports that traditional public schools will not be harmed. In fact, they may even experience positive effects.

c. School Choice has a Positive Impact on Civic Values and Practices

An important line of research examines the impact school choice has on civic values and practices. To date 11 studies have been conducted. Six studies found positive effects. Five found no visible effect, and none found negative effects.¹⁸

A recent study analyzed the long-term impact of Milwaukee’s educational-choice program on students’ criminal records.¹⁹ It found a correlation between participation in

¹⁶ EdChoice: School Choice Programs, <https://www.edchoice.org/school-choice/programs/florida-tax-credit-scholarship-program/> (last visited August 21, 2020).

¹⁷ Greg Forester, *A Win-Win Solution: The Empirical Evidence on School choice* (4th ed. 2016), available at <http://www.edchoice.org/wp-content/uploads/2016/05/A-Win-Win-Solution-The-Empirical-Evidence-on-School-Choice.pdf>

¹⁸ EdChoice. *The 123s of School Choice* (2020), 42, available at <https://www.edchoice.org/wp-content/uploads/2020/04/123s-of-School-Choice-2020-4.pdf>

¹⁹ Greg Forster. *A Win-Win Solution: The Empirical Evidence on School Choice*. (2016), available at <http://www.edchoice.org/wp-content/uploads/2016/05/A-Win-Win-Solution-The-Empirical-Evidence-on-School-Choice.pdf>

the voucher program and decreased criminal activity, especially for men.²⁰ The longer students remained in the voucher program, the stronger the correlation across multiple measures of criminal records.²¹ Males who remained in the program throughout high school had better outcomes than their peers in public schools on all measures, including a reduction in felonies, a reduction in drug offenses, and a reduction in theft.²²

III. The SAFE Grants Program Supports Parents Seeking Student-Aid for Private School Tuition, Providing Relief to the Traditional Public K-12 System That Would Be Overwhelmed by the Cost If Compelled to Reabsorb Those Private School Students.

With Americans facing unemployment²³ and uncertainty around schools reopening,²⁴ the novel COVID-19 virus has upended nearly every aspect of American life. Private education is not immune from the reach of this global pandemic.²⁵ Nearly 50,000 South Carolina students were educated in South Carolina through a private school in 2017-2018.²⁶ The SAFE Grants program provides critical relief to parents, students, and an ecosystem that relies on private education.

²⁰ *Id.*

²¹ *Id.* at 31-32.

²² *Id.* at 32.

²³ *Poll: Nearly 1 in 5 Households has Lost Work Because of Pandemic*, NPR, <https://www.npr.org/2020/03/17/817158521/poll-nearly-1-in-5-households-have-lost-work-because-of-pandemic> (last visited Aug. 21, 2020).

²⁴ *Back to school, and into uncertainty*, CBS News, <https://www.cbsnews.com/news/coronavirus-back-to-school-and-into-uncertainty/>, (last visited Aug. 27, 2020).

²⁵ *COVID-19 Permanent Private School Closures*, Cato Institute, <https://www.cato.org/covid-19-permanent-private-closures> (last visited August 21, 2020).

²⁶ Robert Enlow. *The K-12 Financial Cliff: What States Could Face If Students Switch Schooling Sectors*. (2020), available at <https://www.edchoice.org/engage/the-k-12-financial-cliff-what-states-could-face-if-students-switch-schooling-sectors/> (last visited August 21, 2020).

EdChoice projected what could happen if private schools closed and enrollment in private education dropped.²⁷ If 10% of private school students return to the public system nationally, the combined state and local cost would be \$6.7 billion with \$3.3 billion falling to the states.²⁸ If 30% of private school students have to be reabsorbed into the public system nationally that cost jumps to roughly \$20 billion, with states responsible for just over \$10 billion.²⁹

South Carolina is no exception to the important role private schools play in the K-12 education ecosystem. In the 2017 – 2018 school year, private schools educated 49,788 South Carolina students.³⁰ If just 10% of private school students return to the public system the cost to state and local dollars is projected to be more than \$58.6 million.³¹ If 30% of students are forced to be reabsorbed to the public system, the cost to state and local dollars is projected to be more than \$175.8 million.³²

The projected cost to reabsorb students into the public K-12 system only tell a part of the story, however. The COVID-19 recession puts public employee pension plans at even greater risk.³³ Before the COVID-19 recession hit, states around the nation faced more than \$1 trillion in unfunded liabilities for their pension systems.³⁴ South Carolina

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Martin Lueken. *The Trillion Dollar Problem: Pandemic Puts State Pension Plans At Even Greater Risk.* (2020) available at, <https://www.edchoice.org/engage/the-trillion-dollar-problem-pandemic-puts-state-pension-plans-at-even-greater-risk/> (last visited August 21, 2020).

³⁴ *Id.*

represented unfunded liabilities \$22 billion in fiscal year 2018.³⁵ If the economic recession caused by COVID-19 resembles the economic recession of 2008 there will be an even greater burden on South Carolina's pension system for public school teachers and other public employees.³⁶

The SAFE Grants Program alleviates some financial uncertainty in a system under tremendous pressure from COVID-19. At a maximum value of \$6,500 per student, this \$32 million dollar program represents a possible subscription of nearly 5,000 students. Assuming these 5,000 students did not have SAFE Grants and had to be reabsorbed into the traditional system, the projected cost is nearly \$58 million dollars. This program helps offset the potential economic impact the traditional public education system faces if it is forced to reabsorb students it was not previously educating. Simply put, this program is a pressure relief valve, providing the traditional public system with stability in very volatile times.

Conclusion

The Safe Access to Flexible Education Grants (SAFE Grants) program provides critical relief to students, families, and public schools forced into chaos by a global pandemic. While it may not fulfill the needs of everyone in the education sector, it offers one way to lessen the burden being shouldered by families at this time, while providing relief for those public schools concerned about taking in new students at a time when they are struggling to handle their current enrollment during Covid. The method of funding is consistent with educational choice programs that have been upheld by state and federal courts, including the Supreme Court of the United States. Direct beneficiaries

³⁵ *Id.*

³⁶ *Id.*

of the program are parents and students; not one penny flows to a private school without the express consent and voluntary choice of students and parents; as such, this program is not contrary to the South Carolina Constitution. Finally, the SAFE Grants program honors the ultimate intent of Congress – to help states weather the pandemic storm and do the best they can to help citizens live their lives as uninterrupted as possible. Plaintiff’s request for a final declaratory judgment and injunctive relief should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on August 28, 2020 the undersigned counsel for EdChoice, Inc served one (1) copy of the **BRIEF OF *AMICUS CURIAE* EDCHOICE IN SUPPORT OF RESPONDENTS** by electronic mail delivery of same to the recipients listed, at their Attorney Information System provided email addresses below, via the attached E-mail:

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