

# BUT IT'S ILLEGAL....

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Understanding the legal landscape  
and how to respond



# GOALS

- Understand legal landscape post *Espinoza & Carson*
- Be able to understand the legal arguments being made at federal and state levels
- Develop strategies to engage in conversations around the law & school choice

# Federal Arguments – What We Hear

School choice violates the First Amendment

School choice violates the separation of church and state

School choice violates the free exercise clause

# Legal Basics – First Amendment

Congress shall make no law respecting an **establishment of religion**, or prohibiting the **free exercise** thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

# Parental Authority

- Parents have the primary authority to decide how and where a child is educated.
- “The child is not the mere creature of the state.”
- *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*





# Money Matters

- At the moment when a parent receives public funding directly for the benefit of a child, the “circuit between government and religion” is broken
- Parent’s choice of school is attributable solely to the parent, not the state
- *Zelman v. Simmons-Harris*



# Espinoza & Carson

- *Espinoza*
  - “A State need not subsidize private education, [b]ut once a State decides to do so, it cannot disqualify some private schools solely because they are religious.”
- *Carson*
  - “[T]he prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use based discrimination.”

# Talking the talk

## When you hear...

- School choice violates the First Amendment.
- School choice violates the separation of church and state.
- School choice violates the free exercise clause.

## You can say...

- Since 1925 the Supreme Court has recognized parents' right to decide how a child is educated.
- School choice is a method of funding education. Parents control how and where dollars are spent.
- School choice programs are open to all types of religious schools that meet required state criteria.



# State Arguments – What We Hear

School choice is unconstitutional because it defunds the public schools.

Tax Credit Scholarships are funded with public dollars and therefore reduce public school funding.

**Argument #1:** School choice is illegal because it defunds public schools

SCHOOL CHOICE  
DOES NOT  
DEFUND PUBLIC  
EDUCATION

# Fiscal Effects on Taxpayers and Public Schools from All Empirical Studies *(continued)*

Study	Location	Program Type	Any Positive Effect	No Visible Effect	Any Negative Effect
Trivitt and DeAngelis (2020)	Louisiana	V	•		
Trivitt and DeAngelis (2018)	Arkansas	V	•		
Wisconsin LAB* (2018)	Wisconsin	V		•	
DeAngelis and Trivitt (2016)	Louisiana	V	•		
Spalding (2014)	Florida	V	•		
Wolf and McShane (2013)	Washington, D.C.	V	•		
Costrell (2010)	Milwaukee, WI	V	•		
Aud (2007)	Vermont	V		•	
Aud (2007)	Maine	V		•	
Aud (2007)	Florida	V	•		
Aud (2007)	Florida	V	•		
Aud (2007)	Washington, D.C.	V	•		
Aud (2007)	Cleveland, OH	V	•		
Aud (2007)	Ohio	V	•		
Aud (2007)	Utah	V		•	
Aud (2007)	Milwaukee, WI	V	•		
Aud and Michos (2006)	Washington, D.C.	V	•		
Nikolov and Mangum (2021)	Virginia	TCS	•		
Lueken (2021)	Alabama	TCS	•		•
Lueken (2021)	Arizona	TCS	•		
Lueken (2021)	Arizona	TCS	•		
Lueken (2021)	Arizona	TCS	•		
Lueken (2021)	Arizona	TCS	•		
Lueken (2021)	Florida	TCS	•		

V=Voucher TCS=Tax-credit scholarship

\*State of Wisconsin Legislative Audit Bureau

‡LOEDR stands for Legislative Office of Economic and Demographic Research (State of Florida)

\*\* Results could not be broken out by program.

§OPPAGA stands for Office of Program Policy Analysis and Government Accountability (State of Florida)

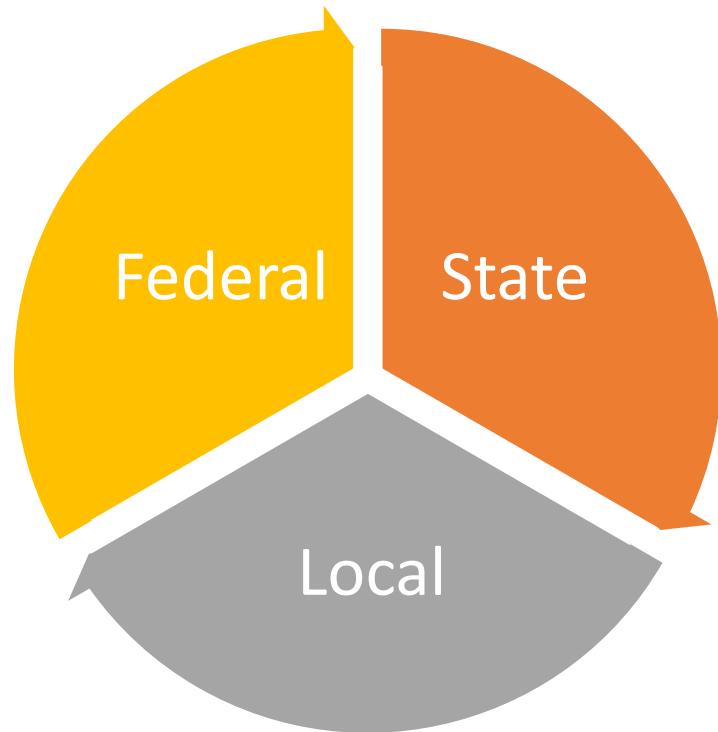
†The Florida Supreme Court declared that the private school voucher component of the program was unconstitutional in January 2006.

# Joint Legislative Committee on Performance Evaluation and Expenditure Review

*Notes:* This table shows all empirical studies using all methods; the total fiscal effect of school choice programs is referenced. Table excludes any analyses that fail to make a reasonable attempt to account for both sides of the ledger, i.e. both costs and savings from school choice programs. If a study's analysis produced any positive or negative results or both, we classify those studies as positive, negative or both. Studies that did not produce any statistically significant results for any subgroup are classified as "no visible effect." Lueken (2021) employs the same methods as: Martin F. Lueken (2018). *Fiscal Effects of School Vouchers: Examining the Savings and Costs of America's Private School Voucher Programs*. Retrieved from EdChoice website: <https://www.edchoice.org/wp-content/uploads/2018/09/Fiscal-Effects-of-School-Vouchers-by-Martin-Lueken.pdf>

# Funding Basics and Program Design

## K-12 Education Funding

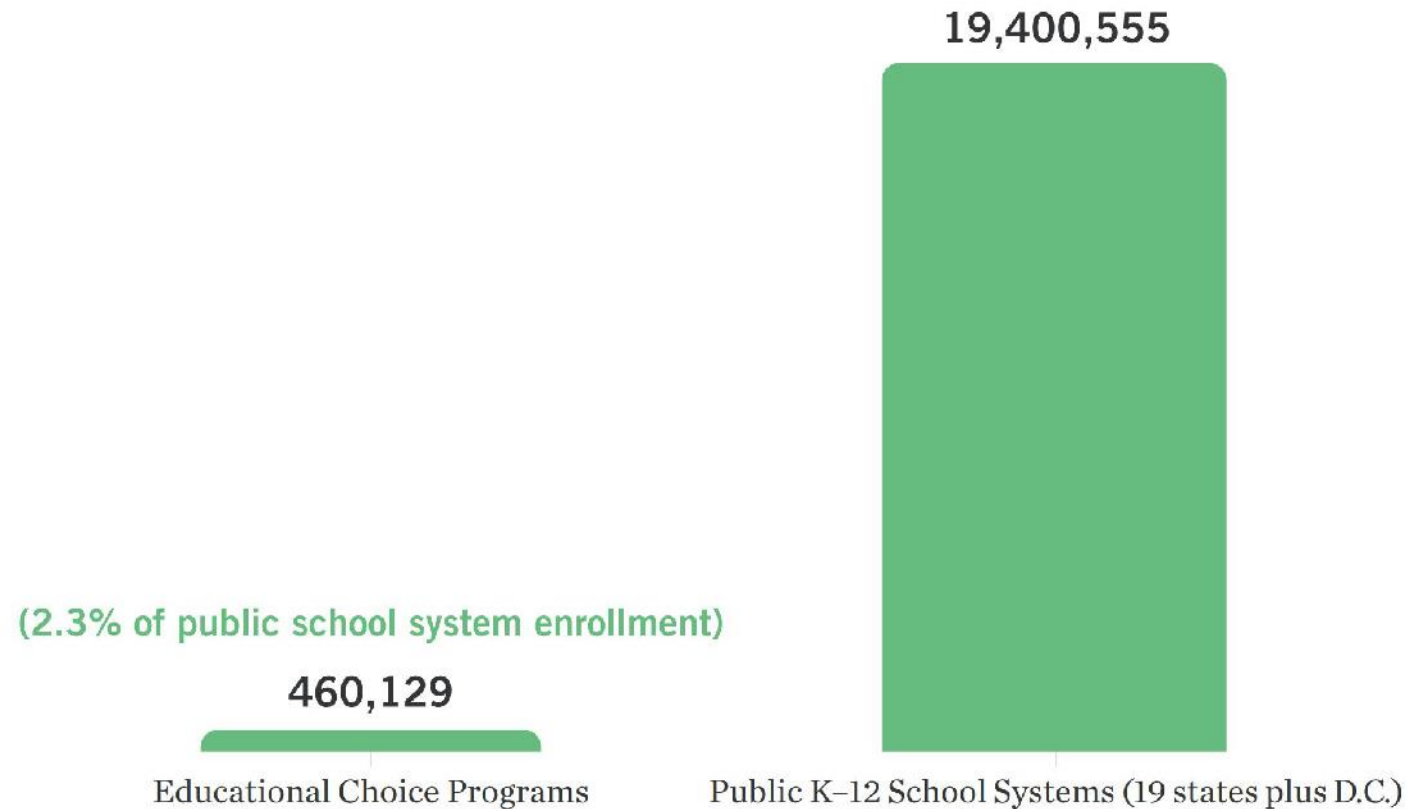


## Program Designs

- Tax Credit Scholarships
- Appropriation funded ESAs
- Formula funded ESAs

# Eligibility Does Not Equal Enrollment

Total number of students enrolled in educational choice programs and public K-12 school systems in 19 states plus, DC, FY 2018



# EDUCATIONAL CHOICE: 32 STATES, plus D.C. & Puerto Rico; 76 PROGRAMS

STATE	VOUCHER	TCS	ESA	TC ESA	TAX C/D
AL		1			1
AZ		4	1		
AR	1	1			
FL	2	2	1		
GA	1	1			
IL		1			1
IN	1	1	1		1
IA		1			1
KS		1			
KY				1	
LA	2	1			1
ME	1				

STATE	VOUCHER	TCS	ESA	TC ESA	TAX C/D
MD	1				
MN					2
MO				1	
MS	2		1		
MT		1			
NV		1			
NH	1	1	1		
NC	2		1		
OH	5	1			2
OK	1	1			
PA		2			
RI		1			

STATE	VOUCHER	TCS	ESA	TC ESA	TAX C/D
SC		1			1
SD		1			
TN	1		1		
UT	1	1			
VT	1				
VA		1			
WI	4				1
WV			1		
DC	1				
PR	1				
<b>TOTAL</b> <b>76</b>	<b>29</b>	<b>26</b>	<b>8</b>	<b>2</b>	<b>11</b>

**Litigation DOES NOT INTIMIDATE Those Who Need Choice**

“Voucher” includes Town Tuitioning.  
 “Tax C/D” includes Refundable Tax Credits.

# Talking the talk

## When you hear...

- School choice is illegal because it defunds the public school system.

## You can say...

- School choice programs affect public schools' funding and resources in the same way they're affected when a student leaves because their family moved to a new district—except with school choice programs, public schools get to keep almost all of the federal and local tax dollars and usually a portion of the state funds allocated for each child
- Just because students are eligible for a program does not mean every child will utilize the program.



**Argument #2:** Tax Credit  
Scholarships are funded with  
public dollars and therefore  
reduce public school funding.

# Tax Credits Scholarships - Basics

Private Donors

- Tax Credits are a reduction of tax liability
- Personal decisions made by private donors or corporations

Scholarship Granting Orgs

- Private charitable organization awards scholarships

Scholarship to Students

- Students receive scholarships to customize their education

# Talking the talk

## When you hear...

- Tax Credit Scholarships are funded with public dollars and therefore reduce public school funding.

## You can say...

- Tax Credit Scholarships are funded through individual decisions made by people or corporations that reduce a tax liability.
- Tax Credit Scholarships are made possible by private donors to private scholarship organizations.
- At no time does the government own, control, or possess the monies that fund the private school scholarships.

# Tips & Tricks

- Ask questions – clarify what someone means when they say a program is illegal or unconstitutional.
- Narrow the universe – address the question (or find someone who can).
- Use data.
- Ask an expert.
- Discourse is good!