

School Choice and the Constitution: *Evaluating the Constitutionality of Educational Choice*

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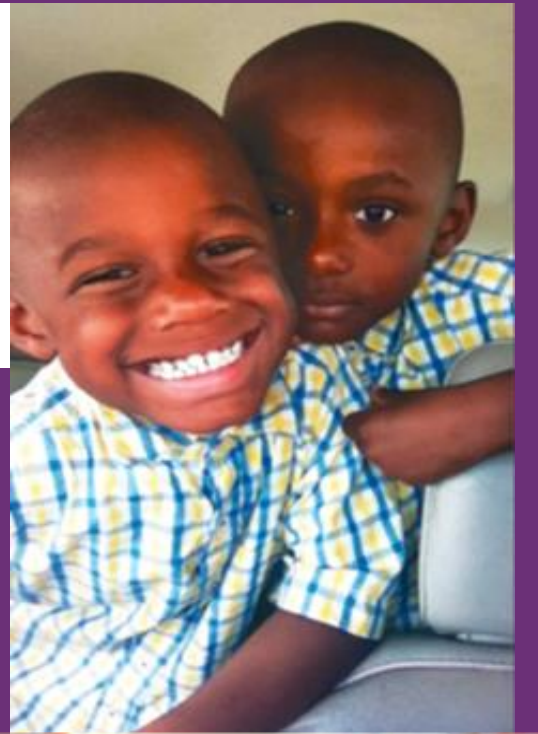
Vice President of Legal Affairs

EdChoice Legal Defense & Education Center

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Their Future Depends on Educational Freedom



➔ Value of Private Education and Parental Rights Upheld by the Supreme Court of the United States – for 95 Years

“The fundamental theory of liberty upon which all governments in this Union repose **excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.** The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”

Pierce v. Society of Sisters, 268 U.S. 510 (1925)

Is Educational Choice Constitutional? YES

- ❖ Let's examine the many varieties of school choice programs.
- ❖ Next three slides will show **results of litigation for the first states to enact each type** of school choice program.
- ❖ Year listed next to the state name is the **year the school choice program was enacted**.

1869 Vermont: **First Town Tuitioning**

Litigated several times over 150 years; current conclusion - no religious schools may participate.

Chittenden Town School District v. VT Dept of Education,
738 A.2d 539 (Vt.), cert. denied, 528 U.S. 1066 (1999)

1955 Minnesota: **First State Individual Tax Deduction for Educational Expenses**

US Supreme Court accepted case on appeal, ruled constitutional; program has secular purpose to provide education, does not advance sectarian aims, no excessive entanglement with the state.

Mueller v. Allen, 463 U.S. 388 (1983)

1987 Iowa: **First State Individual Tax Credit for Educational Expenses**

US Court of Appeals ruled constitutional; no violation of the First Amendment Establishment Clause.

Luthens v. Bair, 788 F. Supp. 1032 (S.D. Iowa 1992)

Is Educational Choice Constitutional? YES.

1990 Wisconsin: **First Voucher (city)**

Wisconsin Supreme Court ruled no violation of Blaine Amendment, uniformity, or other clauses. SCOTUS refused to accept the case on appeal, as there was nothing else to say; Wisconsin court was right.

Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998)

1997 Arizona: **First State Tax Credit Scholarship Program**

US Supreme Court ruled Tax Credit Scholarship programs are constitutional.

Arizona Christian Scholarship Tuition Organization v. Winn, 563 US 125 (2011)

1999 Florida: **First Voucher for Students With Disabilities**

McKay voucher has never been challenged as a stand-alone issue; is routinely added to litigation targeting other choice programs – with no success.

Citizens for Strong Schools v. Dept of Education, Case Number: SC18-67 (FL. 2019)

*1999 Florida: **First Statewide Voucher (see “Three We Lost” in slide 17)**

In a widely panned decision, Florida’s Supreme Court ruled that vouchers violated the uniformity clause of their state constitution – on the premise that vouchers would create a secondary system of education in competition with public schools and constitutionally impermissible. The Court declined to hold the same standard to Florida’s voucher for children with disabilities because that was a smaller population of children whose voucher use would not significantly impact public schools.

Bush v. Holmes, 886 So. 2d 340 (Fla. 1st DCA 2004), aff’d on other grounds, 919 So. 2d 392 (Fla. 2006)

Is Educational Choice Constitutional? YES.

2005 Ohio: **First Voucher Case Accepted by the US Supreme Court**

Court ruled vouchers fund parents on behalf of their children, to provide education services. The choice of school is a true private choice of the parent; no violation of the First Amendment.

Zelman v. Simmons-Harris, 536 U.S. 639 (2002)

2011 Indiana: **First Statewide Broad-eligibility Voucher**

Indiana Supreme Court ruled vouchers do not violate the Indiana Constitution's compelled support and uniformity clauses, and its Blaine Amendment does not apply to education.

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

2011 Arizona: **First Education Savings Account**

Arizona Court of Appeals ruled ESAs do not violate the Arizona Constitution's Blaine Amendment or other clauses because the ESA is neutral as to parent choices. A parent may use an ESA for educational services, therapies, textbooks or tuition; parent not compelled to use for tuition.

Niehaus v. Huppenthal, 310 P.3d 983 (Ariz. Ct. App. 2013)

2013 Alabama: **First Refundable Individual State Tax Credit**

Passed as part of the Alabama Accountability Act education bill the Alabama Supreme Court ruled that Parent-Taxpayer Refundable Credits satisfied all challenges, including Blaine and uniformity.

Magee v. Boyd, 175 So. 3d 79 (Ala. 2015)

➔ Common Points of Agreement in Court Rulings Align With Dr. Friedman's Vision

1955 Modern Voucher Idea of Dr. Milton Friedman, Nobel Laureate Economist:

Parents receive public funds to pay tuition at any school of their choice – including public or private schools, or unforeseen ways to educate in the future.

“Government, preferably local governmental units, would

give each child, ✓

through his parents, ✓

a specified sum ✓

to be used solely in paying for his general education; ✓

the parents would be free to spend this sum at a school of their own choice.” ✓

The Role of Government in Education, by Milton Friedman. From *Economics and the Public Interest*, ed. Robert A. Solo, copyright © 1955 by the Trustees of Rutgers College in New Jersey.

Three Landmark US Supreme Court Cases

Vouchers Are Constitutional

Public funds are given to parents for their children's education. Parents – not the government – control decision over choice of school.

Zelman v. Simmons-Harris **2002**

Tax Credit Scholarship Programs Are Constitutional

Private individuals and corporate entities voluntarily give money from their own private bank accounts to nonprofits that distribute those funds to children who need scholarships to attend schools of their parents' choice.

These are private, not public, scholarship programs.

Arizona Christian Scholarship Tuition Organization v. Winn **2011**

Religious Private Schools Are Constitutional Options For Parents

It is specifically unconstitutional for religious schools to be excluded from school choice programs.

Espinoza v. Montana Dept of Revenue **2020**

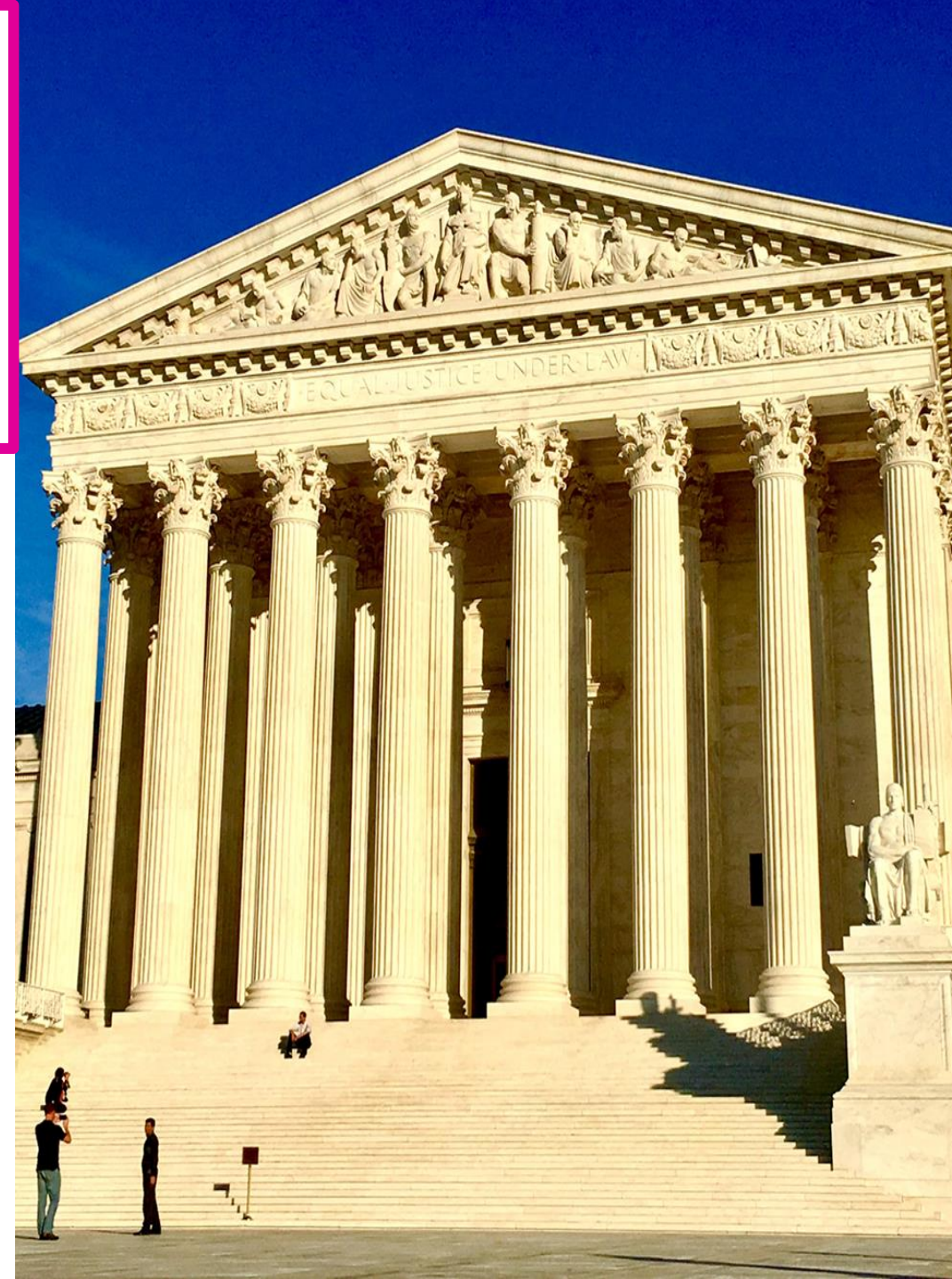
➔ **1995 Ohio: Parents in Cleveland receive Voucher to pay tuition at school of the parent's choice.**

U.S. Supreme Court ruled vouchers constitutional.
***Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)**

Quotes from the Court:

*The instant program is one of **true private choice** . . .*

*The 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.*



➔ **1997 Arizona: Parents receive State Tax Credit Scholarship to pay child's tuition.**

U.S. Supreme Court ruled tax credit scholarships are constitutional.

Arizona Christian Scholarship Tuition Organization v. Winn,
563 US 125 (2011)

Quotes from the Court:

***Private citizens create private STOs;
STOs choose beneficiary schools; and
taxpayers then contribute to STOs. . . .
the tax credit system is **implemented by private action**
and with no state intervention.***

***Private bank accounts cannot be equated with the
Arizona State Treasury.***



→ 2015 Montana: Parents may use school choice funding at religious schools.

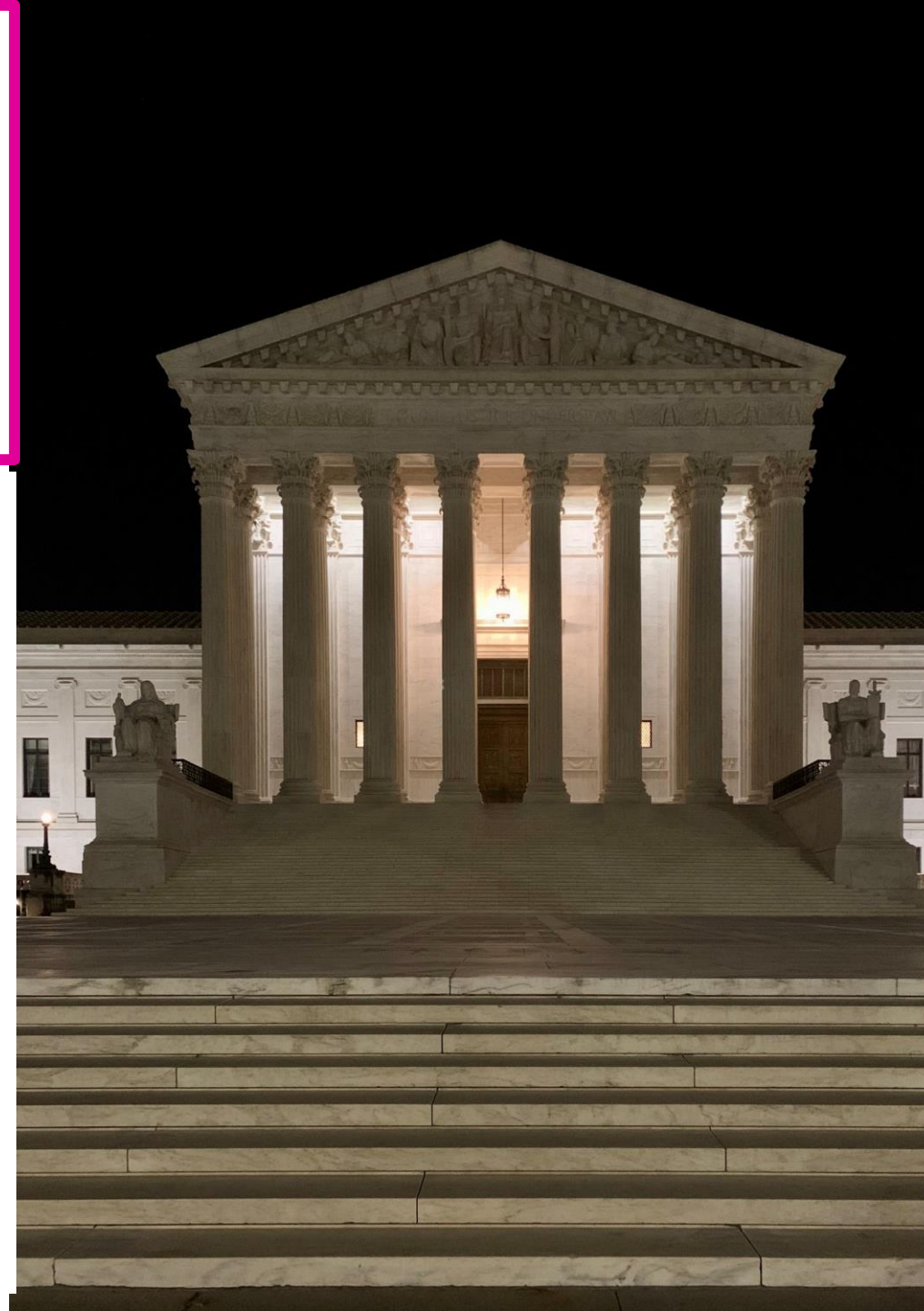
U.S. Supreme Court ruled that excluding religious schools as a choice for parents is unconstitutional.

Espinoza v. Montana Dept. of Revenue, 591 U.S. ____ (2020)

Quotes from the Court:

... government support makes its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools.

A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.



How To Find Legal Cases on the Internet

Recommended Websites: Cornell Legal Information Institute <https://www.law.cornell.edu/>
Justia <https://law.justia.com/>. Institute for Justice <https://ij.org/>.
Harvard Caselaw Access Project (in progress, mostly very old cases online) <https://case.law/>.
Your state universities can direct you to court websites. OR go to the library. OR call EdChoice!

Using search engine of your choice (Google, etc.):

Search for the case name, for example:

Meredith vs Pence

If this does not work, include the full case citation:

984 N.E.2d 1213 (Ind. 2013)

Cases in state courts generally begin in trial or circuit court, proceed to appellate court, then to the State Supreme Court. Note: some states call their courts different names or may not have appellate courts.

In rare cases, the US Supreme Court may accept a case on appeal from a State Supreme Court ruling. Typically, the case must raise a federal question potentially impacting the US Constitution; if federal circuit and appellate courts, and state courts, have previously ruled on the same question with conflicting results, this increases the likelihood that the US Supreme Court will accept the case.

Federal courts are grouped as follows:

- 94 district courts (at least one in each state; like state trial courts)

- 11 regional circuits, each serving multiple states (e.g., UT, CO, KS, NM, OK, WY are in the 10th Circuit)

- D.C. circuit; and Federal circuit (for specialized cases like patents, international trade, etc.).

Supreme courts, state and US, generally have discretion whether to accept cases on appeal (rules vary by state).



Tax Credit Programs that Survived Legal Scrutiny



STATE	ENACTED	CASE NAME	BEGAN	DECIDED
AL	2013	<i>CM., et al., v. Robert J. Bentley, M.D.,</i> 13 F.Supp.ed 1188 (M.D. Ala.2014)	2014	2014
		<i>Magee v. Boyd,</i> 175 So. 3d 79 (Ala. 2015)	2014	2015
AZ	1997	<i>Kotterman v. Killian,</i> 972 P.2d 606 (Ariz.), cert. denied, 528 U.S. 921 (1999)	1997	1999
		<i>Arizona Christian Scholarship Tuition Organization v. Winn,</i> 563 US 125 (2011)	2005	2011
AZ	2006	<i>Green v. Garriott,</i> 212 P.3d 96 (Ariz. Ct. App. 2009)	2006	2009
FL	2001	<i>McCall v. Scott,</i> 199 So. 3d 359 (Fla. 1st DCA 2016), rev. denied, No. SC16-1668, 2017 WL 192043 (Jan. 18, 2017)	2014	2017
		<i>Citizens for Strong Schools v. Florida Dept of Education,</i> Case Number: SC18-67 (FL. Jan 4, 2019)	2009	2019



Tax Credit Programs that Survived Legal Scrutiny



STATE	ENACTED	CASE NAME	BEGAN	DECIDED
GA	2008	<i>Gaddy v. Dept of Revenue</i> , 802 S.E. 2d 225 (2017)	2014	2017
IL	1999	<i>Toney v. Bower</i> , 744 N.E.2d 351 (Ill. App. 4th Dist. 2001), <i>appeal denied</i> , 195 Ill. 2d 573 (Ill. 2001)	1999	2001
		<i>Griffith v. Bower</i> , 747 N.E.2d 423 (Ill. App. 5th Dist. 2001), <i>appeal denied</i> , 258 Ill. Dec. 94, 755 N.E.2d 477 (Ill. 2001)	1999	2001
IA	1987	<i>Luthens v. Bair</i> , 788 F. Supp. 1032 (S.D. Iowa 1992)	1987	1992
MN	1955	<i>Mueller v. Allen</i> , 463 U.S. 388 (1983)	1980	1983
MT	2020	<i>Espinoza v. Montana Dept. of Revenue</i> , 591 U.S. ____ (2020)	2015	2020
NH	2012	<i>Duncan v. State</i> , 102 A.3d 913 (N.H. 2014)	2012	2014



Voucher & ESA Programs that Survived Legal Scrutiny



STATE	ENACTED	CASE NAME	BEGAN	DECIDED
AZ	2011	ESA: <i>Niehaus v. Huppenthal</i>, 310 P.3d 983 (Ariz. Ct. App. 2013)	2011	2013
FL	1999	Voucher: <i>McCall v. Scott</i>, 199 So. 3d 359 (Fla. 1st DCA 2016), rev. denied, No. SC16-1668, 2017 WL 192043 (Jan. 18, 2017)	2014	2017
		<i>Citizens for Strong Schools v. Dept of Education</i>, Case Number: SC18-67 (FL. Jan 4, 2019)	2009	2019
FL	2014	ESA: <i>Tom Faase et.al. v Scott</i>, Second Judicial Circuit In and For Leon Cty, FL Case No. 2014 CA 001859	2014	2015
IN	2011	Voucher: <i>Meredith v. Pence</i>, 984 N.E.2d 1213 (Ind. 2013)	2011	2013
LA	2012	Voucher: <i>Louisiana Fed. of Teachers v. State</i>, 118 So. 3d 1033 (La. 2013) [voucher constitutional, funding unconstitutional and was quickly changed to follow court's guidelines]	2012	2013



Voucher & ESA Programs that Survived Legal Scrutiny



STATE	ENACTED	CASE NAME	BEGAN	DECIDED
ME	1873	Town Tuitioning: <i>Anderson v. Town of Durham</i>, 895 A.2d 944 (Me.), cert. denied, 127 S.Ct. 661, 166 L.Ed.2d 512 (2006)	2002	2006
NV	2015	ESA: <i>Schwartz v. Lopez</i>, 132 NV Adv Op 73 (2016) [<i>Duncan v. State</i> consolidated]	2015	2016
NH	2017	Town Tuitioning: <i>Dept of Education v. Town of Croydon</i> Case dismissed (2017)	2015	2017
NC	2013	Voucher: <i>Hart v. State</i>, 774 S.E.2d 281 (N.C. 2015)	2013	2015
		<i>Richardson v. State</i>, 774 S.E.2d 304 (N.C. 2015)	2013	2015
OH	1995	Voucher: <i>Zelman v. Simmons-Harris</i>, 536 U.S. 639 (2002)	1999	2002



Voucher & ESA Programs that Survived Legal Scrutiny



STATE	ENACTED	CASE NAME	BEGAN	DECIDED
OK	2010	Voucher: <i>Jenks Public Schools v. Spry</i>, 2012 OK 98	2010	2012
		<i>Oliver v. Hofmeister</i>, 2016 OK 5	2013	2016
PR	2018	Voucher: <i>Asociación de Maestros v. Departamento de Educación</i>, 2018 DTS-150, Número del Caso: CT-2018-6	2018	2018
VT	1869	Town Tuitioning: <i>Chittenden Town School District v. Vermont Dept of Education</i>, 738 A.2d 539 (Vt.), cert. denied, 528 U.S. 1066 (1999)	1996	1999
WI	1990	Voucher: <i>Davis v. Grover</i>, 480 N.W.2d 460 (Wis. 1992)	1990	1992
		<i>Jackson v. Benson</i>, 578 N.W.2d 602 (Wis.), cert. denied, 525 U.S. 997 (1998)	1995	1998

➔ Two Cases Lost But Choice Survives; One Case Overturned but Program Lost

STATE	ENACTED	CASE NAME	BEGAN	DECIDED
FL	1999	Voucher. <i>Bush v. Holmes</i>, 886 So. 2d 340 (Fla. 1st DCA 2004), aff'd other grounds, 919 So. 2d 392 (Fla.2006) Violation of the Florida Constitution's Uniformity Clause. Statewide voucher enacted in 2019 remains unchallenged.	1999	2006
AZ	2006	Voucher. <i>Cain v. Horne</i>, 202 P.3d 1178 (Ariz. 2009) (en banc) Violation of the Arizona Constitution's Blaine Amendment. Voucher replaced by Education Savings Accounts, enacted 2011.	2006	2009
CO	2011	Voucher (enacted by Douglas County Public School District). <i>Taxpayers for Public Education v. Douglas County School Dist,</i> 351 P.3d 461 (Colo. 2015) Violation of the Colorado Constitution's Blaine Amendment. <i>Colo. State Bd. of Educ. v. Taxpayers for Pub. Educ.</i>, 137 S.Ct. 2325 (2017) Colorado Supreme Court decision vacated by the US Supreme Court. Remanded with instruction to reconsider in light of <i>Trinity Lutheran Church of Columbia, Inc. v. Comer</i> , 137 S.Ct. 2012 (2017). Douglas Co. School District rescinded voucher program; case dismissed.	2011 2015	2015 2017

➔ PENDING LITIGATION (as of September 2, 2020)

❖ Two slides will show year the program subject to litigation was enacted, state, and type of program, followed by case citation and summary.

1873 Maine. **Town Tuitioning**

Carson v. Hasson, Jr. First Circuit Court of Appeals, Docket No. 19-1746. Decision pending.
Challenging exclusion of religious schools; could be appealed to SCOTUS

2012 Maryland. **Voucher**

Bethel Ministries, Inc v. Salmon, US District Court, Northern District of Maryland,
Case 1:10-cv-01853ELH
Challenging exclusion of certain religious schools based on content of handbooks allegedly in
conflict with Sexual Orientation and Gender Identity (SOGI) Laws

2015 Nevada. **Tax Credit Scholarship**

Morency v. State of NV, District Court, Clark County, Case Number A-19-800267-C (2019)
Challenging repeal of escalator clause, based on legislative procedural grounds

2015. Nevada. **Education Savings Accounts**

Settelmeyer v. State of NV, First Judicial District Court, Clark County,
Case Number 190600127 1B (2019)
Challenging repeal of education savings account law, based on legislative procedural grounds

➔ PENDING LITIGATION (as of September 2, 2020)

2013 North Carolina. **Voucher**

Kelly v. State of North Carolina, Wake Co. General Ct of Justice, Superior Ct Div.,
File No. 20 CVS 8346

Challenging funding and religious issues “as applied”

2013 Ohio. **Voucher – Writ of Mandamus**

State ex rel. Citizens for Community Values v. Gov. Mike DeWine, Ohio Supreme Court,
Case No. 2020-0175

Challenging failure of state to honor broad expansion of EdChoice vouchers

2020 Tennessee. **Voucher (ESA pilot)**

Metropolitan Govt of Nashville and Davidson Co. vs. Tennessee Dept of Education,
Tennessee Ct of Appeals, M2020-00683-COA-R9-CV

Challenging enactment based on alleged home rule constitutional violation

2020 Tennessee. **Voucher (ESA pilot)**

Roxanne McEwen vs Gov Bill Lee, Chancery Court of Davidson County, Case No. 20-0242-II
Challenging funding mechanism, change to the system of education, civil rights issues, targeting Nashville and Memphis in violation of home rule.

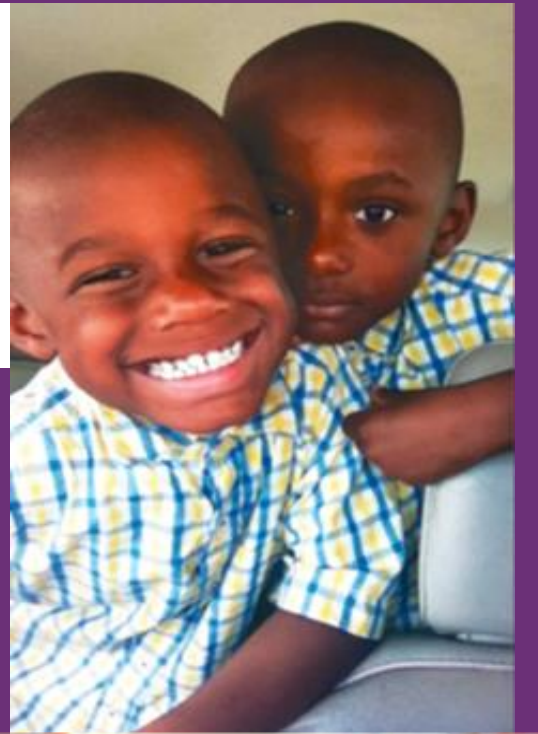
**Litigation
DOES NOT
INTIMIDATE
Those Who
Need Choice**

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

*NV ESA repealed, subject to outcome of litigation.

EDUCATIONAL CHOICE STATES AND PROGRAMS										
STATE	VOUCHER	TCS	ESA	TAX C/D		STATE	VOUCHER	TCS	ESA	TAX C/D
AL		1		1		NH	1	1		
AZ		4	1			NC	2		1	
AR	1					OH	5			
FL	2	2	1			OK	1	1		
GA	1	1				PA		2		
IL		1		1		RI		1		
IN	1	1		1		SC		1		1
IA		1		1		SD		1		
KS		1				TN	1		1	
LA	2	1		1		UT	1	1		
ME	1					VT	1			
MD	1					VA		1		
MN				2		WI	4			1
MS	2		1			DC	1			
MT		1			PR	1				
NV		1	1*		29+2	29	24	6	9	

Their Future Depends on Educational Freedom



***Advancing educational freedom
and choice for all as a pathway
to successful lives and a stronger society.***



If you have questions, please contact us (leslie@edchoice.org) for legal analysis of policies, regulations or other matters related to educational choice. We will also share best practices gathered from other states.