

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

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The Future is Educational Freedom



Is Educational Choice Constitutional? YES

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)

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)

Is Educational Choice Constitutional? YES.

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. Jan 4, 2019)

*1999 Florida: **First Statewide Voucher**

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)

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)

Is Educational Choice Constitutional? YES.

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

1955 The Voucher Idea Is Born:

Parents receive funds to pay tuition at a school of their choice.

“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, Dr. Milton Friedman, Nobel Laureate Economist

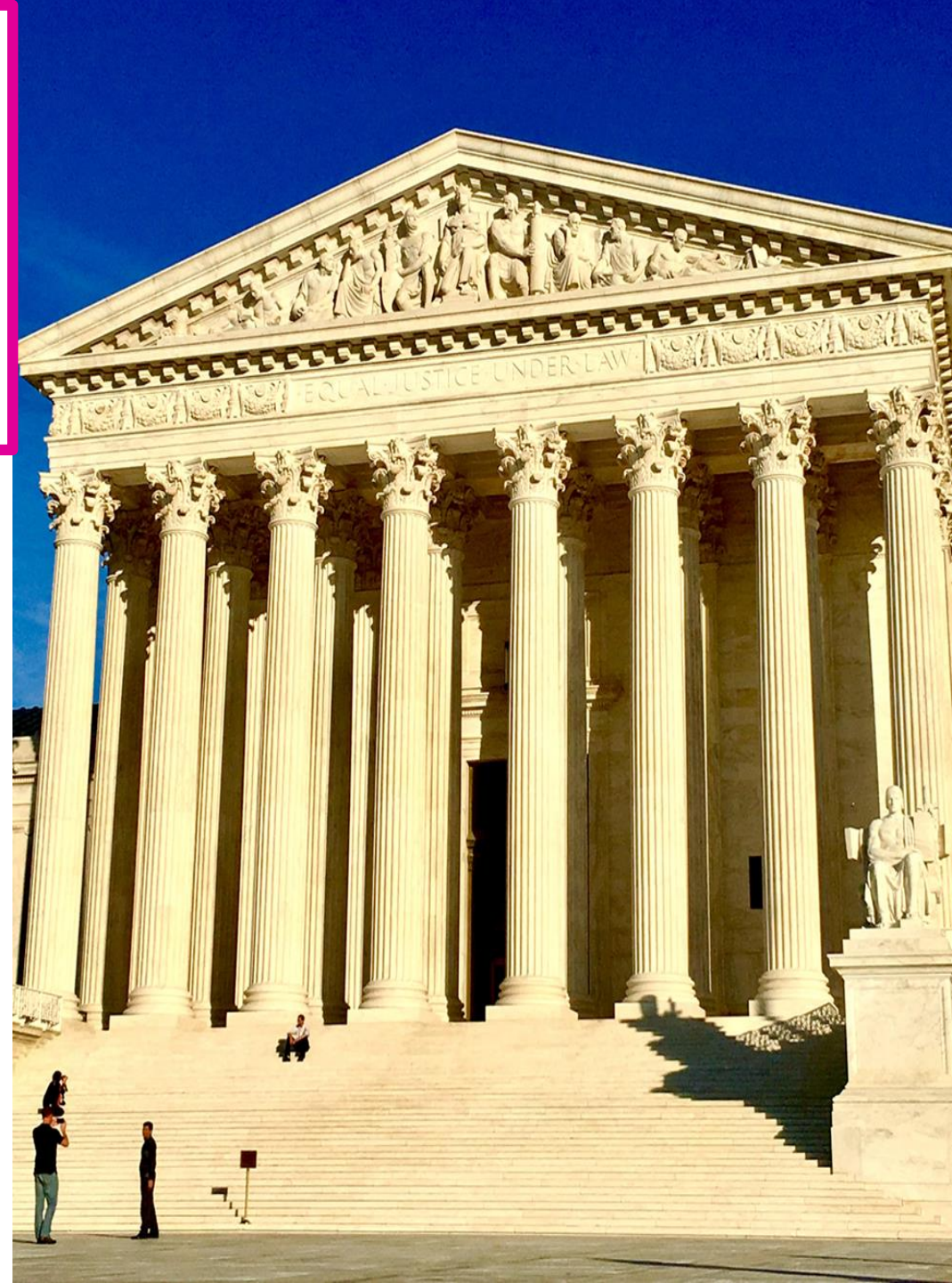
1995 Ohio: Parents in Cleveland receive Voucher to pay tuition at school of the parent's choice.

U.S. Supreme Court ruled vouchers constitutional.

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

*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)

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.***



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 Litigated, Ruled Constitutional



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 Litigated, Ruled Constitutional



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
NH	2012	<i>Duncan v. State</i> , 102 A.3d 913 (N.H. 2014)	2012	2014



Voucher & ESA Programs Litigated, Ruled Constitutional



STATE	ENACTED	CASE NAME	BEGAN	DECIDED
AZ	2011	ESA: Niehaus v. Huppenthal, 310 P.3d 983 (Ariz. Ct. App. 2013)	2011	2013
FL	1999	Voucher: McCall v. Scott, 199 So. 3d 359 (Fla. 1st DCA 2016), rev. denied, No. SC16-1668, 2017 WL 192043 (Jan. 18, 2017)	2014	2017
		Citizens for Strong Schools v. Dept of Education, Case Number: SC18-67 (FL. Jan 4, 2019)	2009	2019
IN	2011	Voucher: Meredith v. Pence, 984 N.E.2d 1213 (Ind. 2013)	2011	2013
LA	2012	Voucher: Louisiana Fed. of Teachers v. State, 118 So. 3d 1033 (La. 2013)	2012	2013



Voucher & ESA Programs Litigated, Ruled Constitutional



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 Litigated, Ruled Constitutional



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

Three We 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 on other grounds, 919 So. 2d 392 (Fla.2006) Violation of the Florida Constitution's Uniformity Clause.	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.	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 back with instruction to reconsider in light of <i>Trinity Lutheran Church of Columbia, Inc. v. Comer</i> , 137 S.Ct. 2012 (2017). Case dismissed for mootness after Douglas Co. School District rescinded the voucher program.	2011 2015	2015 2017

Your Constitutional Clauses Impacting Educational Choice

Constitutional Clauses	AL	AR	AZ	IA	MI	MN	MO	MS	OK	UT	VA	WI	WY
BLAINE +	YES		YES		YES	YES	YES	YES	YES	YES	YES	YES	YES
COMPELLED SUPPORT (for religion, other private entity)	YES	YES	YES	YES	YES	YES	YES				YES	YES	
EDUCATION		YES					YES		YES	YES	YES	YES	YES
UNIFORMITY, and OTHER RELEVANT CLAUSES			YES					YES				YES	
EDUCATIONAL CHOICE? UPHeld BY COURTS?	YES	YES	YES	YES	NO	YES*	NO	YES	YES	YES	YES	YES	NO
	YES	?	YES	YES ?		YES		?	YES	?	?	YES	

PENDING LITIGATION

1873 **Maine. Town Tuitioning.**

Carson v. Hasson, Case no. 1:18-cv-00327-DBH

2012 **Maryland. Voucher**

Bethel Ministries, Inc v. Salmon, US District Court, Northern District of Maryland, Case 1:10-cv-01853ELH

2015 **Nevada. Tax Credit Scholarship.**

Morency v. State of NV, District Court, Clark County, Case Number A-19-800267-C (2019)

2015. **Nevada. Education Savings Accounts.**

Settlemyer v State of NV, First Judicial District Court, Clark County, Case Number 190600127 1B (2019)

2015 **Montana. Tax Credit Scholarship.**

Lost at Montana Supreme Court. [US Supreme Court granted Petition for Writ of Certiorari on June 28, 2019.](#)

Espinoza v. Montana Dept of Revenue, Docket No. 18-1195

EDUCATIONAL CHOICE STATES & PROGRAMS

STATE	VOUCHER	TCS	ESA	TAX C/D
AL		1		1
AZ		4	1	
AR	1			
FL	2	2	1	
GA	1	1		
IL		1		1
IN	1	1		1
IA		1		1
KS		1		
LA	2	1		1
ME	1			
MD	1			
MN				2
MS	2		1	
MT		1*		
NV		1	1*	

STATE	VOUCHER	TCS	ESA	TAX C/D
NH	1	1		
NC	2		1	
OH	5			
OK	1	1		
PA		2		
RI		1		
SC		1		1
SD		1		
TN	1		1	
UT	1			
VT	1			
VA		1		
WI	4			1
DC	1			
PR	1			
29+2	29	23	6	9

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

*MT TCS halted by State Supreme Ct; on appeal at SCOTUS.

*NV ESA repealed, subject to litigation outcome.

Oklahoma Blaine Amendment

“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. Art. II, § 5.



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. Oliver v. Hofmeister, 2016 OK 5

Nevada Blaine Amendment

“No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose [sic].”

Nevada Const. Art. 11, § 10.

... public funds are deposited into an account established by a parent, who may then choose to spend the money at a religious school or one of the other participating entities. Those funds, once deposited into the account, are no longer public funds . . .

Schwartz v. Lopez, 132 NV Adv Op 73 (2016)



Indiana Blaine Amendment

“No money shall be drawn from the treasury, for the benefit of any religious or theological institution.”

Indiana Const. Art. 1, § 6.

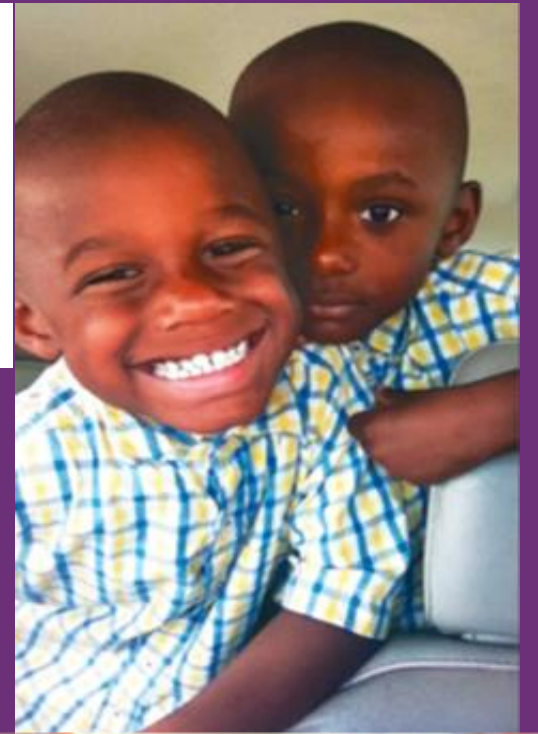
. . . . the voucher program expenditures do not directly benefit religious schools but rather directly benefit lower-income families . . .



. . . the prohibition against government expenditures to benefit religious or theological institutions does not apply to institutions and programs providing primary and secondary education.

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

Their Future Depends on Educational Freedom



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

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