EdChoice Legal Basics

A guide to landmark litigation and the foundation for school choice constitutionality

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INTRODUCTION

When we introduce new audiences to the concept of school choice, one of the most frequent responses we get is, "That sounds great, but is it legal?"

Yes, school choice programs are legal when they respect both state and federal constitutions. That is why we put together this short guide for policymakers, parents, and partners, explaining why state appellate and supreme courts—and the Supreme Court of the United States—continue to rule that school choice is constitutional.

Parents and families are children's first teachers. Homeschooling families continue as their children's teachers well into grades K–12. Private school education, which began with Manhattan's Collegiate School in 1628, is another common choice. New methods of childhood education are developing at a rapid pace, with a diverse array of private providers offering countless educational resources for families.

Yet, historically, private education has been an option mostly for families who could afford the cost or received financial help. Years of research have shown that many families would choose private schools and other educational resources for their children if they did not face insurmountable financial or geographical limitations.

Private educational choice programs come in various forms, such as refundable tax credits, education savings accounts (ESAs), school vouchers and tax-credit scholarships. They have been making educational freedom attainable for families, ever since Vermont enacted the nation's first town tuitioning vouchers in 1869. Learn more about America's school choice programs and what the research says about them at edchoice.org or request our *EdChoice 101* booklet, *Polling Primer*, and *EdChoice Study Guide*.

ARE SCHOOL CHOICE PROGRAMS LEGAL?

Here's the short answer: School choice is constitutional under the federal constitution and most state constitutions when policies and programs are designed properly.

The U.S. Supreme Court has made it clear that in states with school choice programs, public funding can be allocated to families to spend on their children's K–12 schooling, including faith-based education. Children are

the beneficiaries of public funding for their education through school choice; their parents, not schools, control where those funds are expended. Some state constitutions prohibit the use of public funds to support private education providers, but school choice does not fund private schools or education providers. School choice funds students to access education.

Courts have been clear that when states fund school choice, states relinquish government control over the expenditure of a child's state education funding to parents, who make private and independent choices of schools and educational resources that best fit their children. Government retains limited regulatory control over administration and oversight of the program, but parents choose how and where their children are educated.

EdChoice Legal Basics will help you learn about landmark legal cases affecting school choice. It will inform you of prior cases and outcomes, providing context for the legal landscape. Our experts recommend that all educational choice advocates understand and follow the principles in these cases when considering school choice policies for their states.

As Milton Friedman indicated when he introduced the modern voucher concept in 1955, a school choice program must meet the following minimum standards (which were later articulated by the Supreme Court of the United States):

a. Must be a sum appropriated for a child's education,
b. received by the child's parent or individual with legal authority for the child's education,
c. who will control the expenditure of that specific sum,
d. to be used solely on the child's general education.

After the parent receives control of funds appropriated for the child's education, the educational choices made are attributable solely to the parent, not the government. The parent has the freedom and responsibility to choose the school or educational resource best suited to meet the child's needs.

School choice programs must include all schools and educational resources, regardless of religious affiliation, location, or teaching methodology. School choice programs function best, and have the strongest legal foundation, when parents can choose from multiple options for their children's education. These are the basic rules for building school choice programs that will withstand state and federal constitutional scrutiny. Start here—then call EdChoice for further assistance!

LANDMARK CASES

Setting guidelines for school choice programs across the country

1923

Meyer v. Nebraska, 262 U.S. 390 (1923)

"IT IS THE NATURAL DUTY OF THE PARENT TO GIVE HIS CHILDREN EDUCATION"

This case determined that parents have a fundamental right to choose how a child is educated, including instruction in a foreign language.

Question Presented to the U.S. Supreme Court: Does a local statute forbidding the teaching of any language other than English infringe upon the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment, which states, "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

Answer: Yes. The U.S. Supreme Court held that, while the state may have an interest in promoting a homogeneous citizenry, "the individual has certain fundamental rights which must be respected." The state had no compelling state interest or emergency when it denied parents the right to have their children take a language class other than English. The state's denial wrongfully interfered with the parents' right to educate their children.

"A desirable end cannot be promoted by prohibited means."

1925

Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925)

"THE CHILD IS NOT THE MERE CREATURE OF THE STATE."

This case determined that parents, not the state, have the primary authority to decide how and where a child will be educated. The state cannot force a child to be educated in a public school.

Question Presented to the U.S. Supreme Court: Did the Compulsory Education Act violate the liberty of parents to direct the education of their children?

Answer: Yes. The U.S. Supreme Court overturned Oregon's Compulsory Education Act, which required all children to attend public schools only. The Court held that, "The fundamental 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."

1973

San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973)

"EDUCATION IS NOT AMONG THE RIGHTS AFFORDED EXPLICIT PROTECTION UNDER OUR FEDERAL CONSTITUTION."

This case established that there is no federal constitutional right to education. It also established that policies allowing local property taxes to supplement state minimums for education are rational and permissible. Finally, the Court ruled that the Equal Protection Clause of the 14th Amendment does not give a right to absolute equality.

Question Presented to the U.S. Supreme Court: Does Texas' public education finance system violate the Fourteenth Amendment's Equal Protection Clause by failing to distribute funding equally among its school districts?

Answer: No. The Court held that there is no constitutional right to education found in the federal Constitution. "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." Furthermore, the Court held that the Equal Protection Clause of the 14th Amendment does not require absolute funding equality. Advocates argued that children living in districts with lower property wealth received a "poorer quality education." The Court, however, said the question of whether money determines the quality of education was "unsettled and disputed." The Court held that the Equal Protection Clause does not require "absolute

equality or precisely equal advantages." Also, it observed that many other states had adopted similar funding methods; mixing state and local funds to pay for education was not irrational. The state's guarantee to provide an adequate education, fulfilled by its minimum base funding, was enough to pass constitutional scrutiny.

1983

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

A TAX DEDUCTION FOR EDUCATIONAL EXPENSES "DOES NOT HAVE THE PRIMARY EFFECT OF ADVANCING THE SECTARIAN AIMS OF THE NONPUBLIC SCHOOLS."

This case established that education funding given to a parent on behalf of a child has material constitutional significance, and it does not violate the Establishment Clause of the First Amendment to the Constitution.

Question Presented to the U.S. Supreme Court: Does a Minnesota statute that provides deductions of up to $500 and $700 per child for tuition, textbooks, and transportation payments made by parents of children attending elementary and secondary schools violate the Establishment Clause?

Answer: No. The U.S. Supreme Court determined that the tax deduction had a secular purpose, did not advance or inhibit religion, and did not entangle the state with religion.

2002

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

"THE INCIDENTAL ADVANCEMENT OF A RELIGIOUS MISSION, OR THE PERCEIVED ENDORSEMENT OF A RELIGIOUS MESSAGE, IS REASONABLY ATTRIBUTABLE TO THE INDIVIDUAL RECIPIENT, NOT THE GOVERNMENT WHOSE ROLE ENDS WITH THE DISBURSEMENT OF BENEFITS."

This case determined that in a true private choice voucher program, when a parent receives public funding directly for the benefit of a child, the "circuit between government and religion" is broken. The parent's choice of school is attributable solely to the parent, not the state.

Question Presented to the U.S. Supreme Court: Whether a voucher program enacted for the "valid secular purpose of providing educational assistance" offends the Establishment Clause by having a "forbidden 'effect' of advancing or inhibiting religion."

Answer: No. Ohio's voucher program fulfills part of the state's general obligation to provide educational opportunities to children. The purpose of the voucher is to fund a child's education and the primary recipient of educational aid is the child. No funding reaches any private school unless and until a parent voluntarily elects to participate in the voucher program and chooses the school as the best provider for the child. If the parent chooses a religious school, any appearance of religious endorsement is attributable to the parent. The state does not compel families or schools to participate. It does not choose the school children attend through the program. Therefore, no claim can be made that the state participated in the parent's independent decision. The parent may choose secular and religious options, and there is no advantage to choosing one or the other except in terms of which school will provide the best fit for the child's learning needs.

2013

Arizona Christian School Tuition Organization v. Winn, 563 U.S. 125 (2013)

THERE IS NO BASIS TO ASSUME "THAT INCOME SHOULD BE TREATED AS IF IT WERE GOVERNMENT PROPERTY EVEN IF IT HAS NOT COME INTO THE TAX COLLECTOR'S HANDS. PRIVATE BANK ACCOUNTS CANNOT BE EQUATED WITH THE ARIZONA STATE TREASURY."

The case established that tax-credit scholarship programs are private scholarship programs funded with private funds from private individuals who voluntarily give money to private scholarship granting organizations to fund scholarships for children. State tax credits given to donors who contribute to private scholarship programs represent a diminution of the donor's tax burden. No state appropriation is involved.

Questions Presented to the U.S. Supreme Court:

1. Do the parties challenging the Arizona Tuition Tax Credit have standing to sue because they are taxpayers? Have they suffered an injury in fact, established a connection between

the state's conduct and the injury, and would a favorable decision be likely to resolve the alleged injury?

2. Do the parties challenging the Arizona Tuition Tax Credit have standing to sue under a narrow legal exception recognizing when tax money is collected and used by the state in a way that violates a specific constitutional right?

Answer: The plaintiffs, who were Arizona taxpayers, lacked standing to sue. They could not prove they had suffered a direct injury. They could show no misuse of tax dollars and no increase in costs to Arizona's budget that would require a tax increase. They also could not show that their tax dollars were being collected and then used for an unconstitutional purpose. Their main assertion, that tax credits are government expenditures, was soundly dismissed by the Court. In writing of scholarship tuition organizations (STOs), the Court said, "Private citizens create private STOs; STOs choose beneficiary schools; and taxpayers then contribute to STOs. While the State, at the outset, affords the opportunity to create and contribute to an STO, the tax credit system is implemented by private action and with no state intervention."

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

"MONIES ARE EARMARKED FOR A STUDENT'S EDUCATIONAL NEEDS AS A PARENT MAY DEEM FIT. THE STATE IS NOT DIRECTING WHERE MONIES ARE TO GO."

This case established that education savings accounts are different than vouchers, since funds from the accounts may be used for a variety of educational resources, not only tuition. ESAs do not offend the Arizona Constitution's limits on indirect public funding of private religious schools.

Questions Presented to the Arizona Judiciary:

1. Does Arizona's education savings account (ESA) program violate the Aid and Religion Clauses of the Arizona Constitution?

2. Does it unconstitutionally condition a benefit on its recipient waiving the constitutional right to attend a public school?

Answer: No. Regarding the Religion Clause, the court stated,

"The ESA does not result in an appropriation of public money to encourage the preference of one religion over another, or religion per se over no religion." Parents are only required to educate their children in basic studies, which may be done in a variety of ways without regard for the religiosity of the education provider. The statute is neutral toward religion. Regarding the Aid Clause, the court echoed the U.S. Supreme Court's language in *Zelman v. Simmons-Harris*, and said, "Any aid to religious schools would be a result of the genuine and independent private choices of the parents." There is no appropriation of public money to private schools. The court also rejected the argument that Arizona's legislature could only provide funds for education through public schools. The constitutional right to attend public schools is not waived when a parent chooses a different method of education. The child has a continuing right to return to a public school. Participation in the ESA program is strictly voluntary and does not impact the constitutional obligation for states to provide public schools and for parents to have that option for their children's education.

2013

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

"ANY BENEFIT TO PROGRAM-ELIGIBLE SCHOOLS, RELIGIOUS OR NON-RELIGIOUS, DERIVES FROM THE PRIVATE, INDEPENDENT CHOICE OF THE PARENTS OF PROGRAM-ELIGIBLE STUDENTS, NOT THE DECREE OF THE STATE, AND IS THUS ANCILLARY AND INCIDENTAL TO THE BENEFIT CONFERRED ON THESE FAMILIES."

This case established that the Indiana Constitution's restrictions on public funds going to religious entities does not apply to entities providing K–12 education.

Questions Presented to the Indiana Supreme Court:

1. Does the Indiana Constitution prohibit the state legislature from providing education to Indiana schoolchildren by any means other than a uniform system of common (public) schools?

2. Does the voucher program compel citizens to support places of worship?

3. Is money supporting the voucher program drawn from the state treasury for the benefit of participating religious schools?

Answer: No to all three questions. The Court, citing the plain language of the constitution, made clear that the legislature has two education duties: 1) "to encourage moral, intellectual, scientific, and agricultural improvement;" and 2) "to provide for a general and uniform system of open common schools without tuition." The legislature has authority to provide public schools and any other resource that aids intellectual improvement. Furthermore, the requirement of a uniform system applies to public schools, and vouchers do not disrupt that system. The voucher program does not require the state to compel individuals to attend or support places of worship. The voucher program funds education, not worship. Finally, the Court held that there is no direct benefit to religious schools. The program is voluntary; no funds flow to a religious school unless a parent independently chooses it; and the direct benefit of voucher funding is to the children using the program. Any benefit to a school chosen by a parent is strictly an ancillary benefit that does not run afoul of the Indiana Constitution.

2020

Espinoza v. Montana Dep't of Revenue, 591 U.S. 464 (2020)

"THAT 'SUPREME LAW OF THE LAND' CONDEMNS DISCRIMINATION AGAINST RELIGIOUS SCHOOLS AND THE FAMILIES WHOSE CHILDREN ATTEND THEM. THEY ARE 'MEMBER[S] OF THE COMMUNITY TOO,' AND THEIR EXCLUSION FROM THE SCHOLARSHIP PROGRAM HERE IS 'ODIOUS TO OUR CONSTITUTION' AND 'CANNOT STAND.'"

This case established that if a state excludes a religious school from a school choice program because the school is a religious entity, the state has violated the Free Exercise Clause of the First Amendment to the U.S. Constitution. If a state adopts an educational choice program, religious providers of education cannot be excluded as viable options for parents who choose educational providers for their children.

Question Presented to the U.S. Supreme Court: Does it violate the Free Exercise Clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools?

Answer: Yes. If states enact school choice programs, they cannot disqualify some schools from participating in the program just because they are religious. Prohibiting parents from choosing

schools that are religious would violate the Free Exercise rights of the parents under the First Amendment to the U.S. Constitution.

2022

Carson v. Makin, 596 U.S. 767 (2022)

"THE PROHIBITION ON STATUS-BASED DISCRIMINATION UNDER THE FREE EXERCISE CLAUSE IS NOT A PERMISSION TO ENGAGE IN USE-BASED DISCRIMINATION."

This case clarified that there is no distinction between discriminating against a school because of its *status* as a religious entity and discriminating against a school because of its anticipated *use* of public funds to teach through the lens of faith. The Court ruled, "Any attempt to give effect to such a distinction by scrutinizing whether and how a religious school pursues its educational mission would also raise serious concerns about state entanglement with religion and denominational favoritism."

Question Presented to the U.S. Supreme Court: Does a state violate the Free Exercise Clause of the First Amendment to the United States Constitution by prohibiting students who participate in an otherwise generally available student-aid program from choosing to use their aid to attend schools that provide religious, or sectarian, instruction?

Answer: Yes. The Supreme Court ruled that, in school choice programs, states may not discriminate against religious schools chosen by parents. This is true even if the schools use program funds received from parents to teach and conduct school business in a manner consistent with their faith.

CASE CITATIONS

Meyer v. State of Nebraska, 262 U.S. 390 (1923).

Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925).

San Antonio Indep. School Dist. v. Rodriguez, 411 U.S.1 (1973), reh'g denied 411 U.S. 959 (1973).

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

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

Arizona Christian School Tuition Organization v. Winn, 563 U.S. 125 (2011).

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

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

Espinoza v. Montana Dep't of Revenue, 591 U.S. 464 (2020).

Carson v. Makin, 596 U.S. 767 (2022).

HISTORY OF LEGAL CHALLENGES TO SCHOOL CHOICE PROGRAMS

The first modern-day voucher program was enacted in Milwaukee in 1990. In 1995, opponents sued to overturn the program. They failed. The Wisconsin Supreme Court ruled in 1998 that vouchers are constitutional in Wisconsin. The U.S. Supreme Court declined to review that decision.

The decision, *Jackson v. Benson,* both exhaustive and well-written, set the stage for future litigation against school choice.

Opponents routinely argue that parents who use school choice programs should not have the right to choose religious education for their children. This argument was soundly rejected by the U.S. Supreme Court in *Zelman, Espinoza* and *Carson* (referenced earlier), yet opponents persist in advancing this argument.

Governments, opponents say, should not give parents incentives to remove their children from public schools. Underlying this argument are common themes: a) that all education funding should go to public schools only, and b) that parents are incompetent to choose the best education for their children. These arguments have been rejected by state and federal courts, but opponents are undeterred.

Opponents argue that there should be only one, uniform "system" of funding education in a state. They allege that public schools are "accountable" for academic results and private schools are not, adding that public schools are entitled to receive state funding for each child's education. Only one state court, the Florida Supreme Court in 2005, affirmed their uniformity argument against school choice, in a decision that has been widely discredited (see *Bush v. Holmes* below). Public schools are entitled to be paid for educating students they educate, but they are not entitled to receive funding for children they do not educate, and they are not entitled to force any student to be educated in their schools. That choice belongs to parents.

In short, opponents of school choice do not acknowledge that parents have the right, knowledge, and inherent authority to direct the education of their children unless parents choose to send their children to a public district school. Opponents support giving public funds to the highest income families to send their children to public schools, yet object when a much smaller fraction of public funds is given to the poorest families to send their

children to a different educational setting that better serves the needs of their children. Funded access to any education that enables a child to learn and succeed should be universally available to every child. Unfortunately for too many children, opponents are more interested in who gets public funds than whether families can use public funds to access education that inspires their children to learn at their maximum potential.

These arguments are expressed in numerous ways in the courtroom. Thankfully, both state and federal courts have been unsympathetic to arguments from opponents of school choice, as you will see in the cases listed below.

The following is a summary of legal challenges to school choice programs. For information about pending litigation, please visit our Partnership for Educational Choice website at

foredchoice.org/cases for current information.

TRACK RECORD OF LITIGATION TARGETING SCHOOL CHOICE PROGRAMS

Thirty-four states, plus Washington, D.C., and Puerto Rico, have 75 programs on the books. Since 1980, there have been 52 legal challenges to school choice in 24 states plus Puerto Rico. Several new cases are pending. Of the 52 challenges, 47 challenges were won outright and programs survived. Nevada's ESA survived legal challenge but without funding; funding was not provided. The ESA was repealed but another school choice program survived, saving school choice in Nevada. Arizona and Florida lost challenges, then advocates created bigger school choice programs that survived challenge. Colorado's school choice loss was overturned by SCOTUS but a newly elected hostile school board repealed the program after the victory at SCOTUS. Kentucky lost outright and has no school choice. Yet, of the 24 states plus Puerto Rico that have sustained 52 legal challenges to school choice programs, only two states are without school choice today: Kentucky and Colorado.

The following list of cases illustrates where school choice programs were upheld, upheld with conditions, or upheld based on procedural or related matters. With a nod to transparency, this list also includes cases where school choice programs were overturned.

SCHOOL CHOICE PROGRAMS WERE UPHELD IN SEVENTEEN STATES PLUS PUERTO RICO:

Alabama, Arizona, Florida, Georgia, Illinois, Indiana, Iowa, Maine, Minnesota, Montana, New Hampshire, North Carolina, Ohio, Oklahoma, Puerto Rico, Tennessee, Wisconsin, and West Virginia.

Alabama | Alabama Accountability Act of 2013

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

On March 2, 2015, the Alabama Supreme Court ruled, in an 8-1 decision, that the Alabama Accountability Act (AAA), enacted in 2013, is constitutional. The Court held that the AAA, which includes Alabama's refundable tax credit and tax-credit scholarship program, "did not violate the prohibition against

appropriating money to non-State charitable or educational institutions." It reasoned that "tax-credit programs did not involve moneys that are ever collected by the State or available to the legislature for appropriation." Furthermore, the AAA, "does not violate the constitutional prohibition against appropriating money raised for public schools to the support of religious schools because the AAA does not involve appropriations and because the AAA is neutral with respect to religion, and any governmental assistance to religious schools will flow only through the private choice of the students' parents."

***C.M. v. Bentley*, 13 F. Supp. 3d 1188 (N.D. Ala. 2014)**

On April 8, 2014, a U.S. District Court judge dismissed a claim brought by the Southern Poverty Law Center. The Alabama Accountability Act does not violate the Equal Protection Clause of the 14th Amendment to the Constitution, the court said. The state has legitimate interests in "providing all students in failing schools with the flexibility to leave their assigned, failing schools."

Arizona | Empowerment Scholarship Accounts

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

On March 21, 2014, the Arizona Supreme Court declined to review *Niehaus v. Huppenthal*, in which a state appeals court upheld the state's education savings accounts (ESA) law. The Arizona Court of Appeals ruled ESAs are neutral toward religion and constitutional. It distinguished ESAs (constitutional) from vouchers (unconstitutional), saying that ESA funding can be used for a variety of educational resources in addition to private school tuition.

Arizona | Original Individual Income Tax Credit Scholarship Program

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

On April 4, 2011, the U.S. Supreme Court, in a landmark decision, upheld Arizona's personal tax-credit scholarships. It ruled that taxpayers do not have standing under the U.S. Constitution's First Amendment Establishment Clause to challenge a tax-credit scholarship program. The Court rejected opponents' position that personal income is government property, declaring, "Respondents' contrary position assumes that income should be treated as if it were government property even if it has not come into the tax collector's

hands. That premise finds no basis in standing jurisprudence. Private bank accounts cannot be equated with the Arizona State Treasury."

***Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999), cert. denied, 528 U.S. 921 (1999)**

On January 26, 1999, the Arizona Supreme Court upheld the constitutionality of a tax-credit scholarship program. Opponents of the law appealed the decision to the U.S. Supreme Court. In October 1999, the Court declined to review the case, leaving the Arizona Supreme Court ruling to stand.

Arizona | Low-Income Corporate Income Tax Credit Scholarship Program

***Green v. Garriott*, 212 P.3d 96 (Ariz. App. 2009)**

On March 12, 2009, the Arizona Court of Appeals upheld Arizona's corporate tax-credit scholarships, ruling that, "A system of education, which includes both private and public institutions, stands to gain much by the presence of competition." The court determined that the program offered "true private choice," did "not provide aid directly to religious school," and did not abridge the duty of the legislature to provide for public schools. The Arizona Supreme Court declined to hear an appeal.

Florida | John M. McKay Scholarships for Students with Disabilities Program and Florida Tax Credit Scholarship Program

***Citizens for Strong Schools v. Florida State BD. of Educ.*, 262 So. 3d 127 (Fla. 2019)**

On January 4, 2019, the Florida Supreme Court rejected a claim that the state did not adequately fund education, marking the end of a 10-year litigation effort. The Court also preserved Florida's school choice programs, observing that they did not divert state funding or have any detrimental effect on Florida's system of public schools. Notwithstanding, the Florida Supreme Court's prior ruling against vouchers (*Bush v. Holmes*, see below), the Court also said that the McKay voucher program was beneficial and constitutional.

Florida | Florida Tax Credit Education Savings Account Program

***McCall v. Scott*, 199 So.3d 359 (Fla. 1st DCA 2016), cert. denied, 2017 WL 192043 (Fla. 2017)**

On January 18, 2017, Florida's Supreme Court allowed an appellate court ruling to stand. The lower court had affirmed that the legislature did not exceed its authority in enacting the program. The court held that the plaintiffs, Florida's teachers' unions, had no standing to sue and suffered no special injury from the tax credit scholarship program.

Georgia | Qualified Education Expense Tax Credit

***Gaddy v. Georgia Department of Revenue*, 802 S.E.2d 225 (2017)**

On June 26, 2017, the Georgia Supreme Court rejected the argument that the tax credit scholarship program violated the state constitutional ban on providing support to religious institutions. It observed that the program would not "increase their taxes or drain the state treasury." On the contrary, the Court said, "the Program may actually save the State money."

Illinois | Tax Credits for Educational Expenses

***Toney v. Bower*, 744 N.E.2d 351 (Ill. App. 4th Dist. 2001), appeal denied, 195 N.E.2d 573 (Ill. 2001)**

***Griffith v. Bower*, 747 N.E.2d 423 (Ill. App. 5th Dist. 2001), appeal denied, 755 N.E.2d 477 (Ill. 2001)**

On February 8, 2001, the Illinois Supreme Court declined to review these two appellate court decisions. In doing so, it rejected arguments that two individual tax credit programs for education violated the religion clauses of the state and federal constitutions.

Indiana | Choice Scholarship Program

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

On March 26, 2013, the Indiana Supreme Court held that voucher programs directly benefit students, not schools. "The prohibition against government expenditures to benefit religious or theological institutions does not apply to institutions and programs providing primary and secondary education."

Iowa | Tuition and Textbook Tax Credit

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

On March 17, 1992, the U.S. District Court for the Southern District of Iowa held that the state's individual tax credit program for private educational expenses did not violate the Establishment Clause of the First Amendment to the U.S. Constitution. The court relied on the 1983 U.S. Supreme Court ruling, *Mueller v. Allen* (see below), which upheld Minnesota's similar program.

Maine | Town Tuitioning Program

***Carson v. Makin*, 596 U.S. 767 (2022)**

On June 21, 2022, the U.S. Supreme Court held that a state may not prohibit parents who participate in a school choice program from using funds from it to enroll their children in a religious school. Prohibiting a parent from using school choice funding at a school because it is a religious school (relying on the Court's prior ruling in *Espinoza v. Montana Dep't of Revenue,* see below) or because the school uses funding received from the parent to teach in a manner consistent with their faith would violate a parent's First Amendment religious free exercise rights.

Minnesota | Education Deduction

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

The U.S. Supreme Court held that the state's tax deduction provision cannot be imputed to aid religious schools with the "imprimatur of state approval" when the deduction is available only through the independent choice of individual parents. The Minnesota law does not violate the Establishment Clause, the Justices ruled.

Montana | Tax Credits for Contributions to Student Scholarship Organizations

***Montana Quality Education Coalition v. State of Montana*, MT First Judicial District Court, Cause No. ADV-2017-487 (2022)**

On December 8, 2022, the Montana First Judicial District Court in Lewis and Clark County held that state tax credits are not legislative appropriations. Therefore, the tax credit scholarship program does not violate state constitutional provisions that are based on legislative

appropriations. This case was filed in 2017 while the tax credit scholarship program was in active litigation in another case (*Espinoza v. Montana Dep't of Revenue,* see below). Because of this, the case was held in abeyance pending the conclusion of *Espinoza.* After *Espinoza* was completed, this case was amended to remove a claim that became moot, preserving state constitutional claims only, which were rejected by the court. There was no appeal.

***Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464 (2020)**

On June 30, 2020, the U.S. Supreme Court, in *Espinoza v. Montana Department of Revenue,* ruled in favor of parents who sought the right to choose religious schools for their children through Montana's tax credit scholarship program. The U.S. Supreme Court held that Montana's Supreme Court erred in applying its state constitution's no-aid provision to the tax credit scholarship program. (Montana's no-aid provision was one of many Blaine Amendments found in state constitutions.) The Court ruled that if a state adopts a school choice program, it cannot block a participating parent from using funds on "some private schools solely because they are religious." The Court stated further, "(The) 'supreme law of the land' condemns discrimination against religious schools and the families whose children attend them."

***Armstrong v. Kadas*, No. 16-35422 (9th Cir. 2018)**

The Armstrong family, seeking to overturn Montana's prohibition on participation of religious schools in its tax credit scholarship program filed suit against the state in federal court. On December 7, 2018, the U.S. Court of Appeals for the Ninth Circuit issued the final ruling in the challenge, reasoning that the plaintiffs must first work their challenge through state courts. The U.S. Supreme Court ruling in *Espinoza* (see above) satisfied the concerns raised in this case.

New Hampshire | Education Freedom Account Program

***Howes v. Edelblut*, Merrimack County Superior Court, Case No. 217-2022-CV-01115**

Plaintiff objected to a New Hampshire law that transfers some money from the state lottery to a program that funds Education Freedom Accounts (EFAs), a form of Education Savings Accounts from which families can purchase educational resources. Plaintiff brought three challenges, including a claim that the state had improperly delegated its duty to provide public education by funding EFAs through a third-party organization, the

Children's Scholarship Fund. On November 14, 2023, the Superior Court in Merrimack granted motions from the state to dismiss this case. It held that the state did not delegate its duty to provide adequate education because it had no duty to students who were not enrolled in public school and proper safeguards are in place over spending for EFAs. The plaintiff also failed to prove that funds restricted for public schools were used improperly. Finally, the court noted that Education Freedom Accounts do not prevent students from attending public schools. Plaintiff did not appeal.

New Hampshire | Education Tax Credit Program

***Duncan v. State*, 102 A.3d 913 (N.H. 2014)**

On August 28, 2014, the New Hampshire Supreme Court dismissed a lawsuit brought by the American Civil Liberties Union (ACLU) and Americans United for Separation of Church and State (AU). It ruled that the plaintiffs could not show how they were harmed and, therefore did not have standing to sue. The justices overturned an earlier lower court ruling that had disallowed scholarships to schools that were religiously affiliated.

North Carolina | Opportunity Scholarships

***Hart v. State*, 774 S.E.2d 281 (N.C. 2015)**

***Richardson v. State*, 774 S.E.2d 304 (N.C. 2015)**

On July 23, 2015, the North Carolina Supreme Court upheld, in *Hart v. State,* the constitutionality of all aspects of the state's voucher program for children of low-income households. The program serves a public purpose, is consistent with the constitutional admonishment to encourage the "means of education," and funds students, not schools. The Court held that the state may appropriate funds for education outside of the public school system without impacting the uniformity of that system. It further held that there is no obligation for participating private schools to meet the same basic education standards as public schools. The state constitution recognizes the right of parents to educate their children in ways other than public schools. The lower court decision in *Hart v. State,* No. 13-CVS-16771 (August 28, 2014), was overturned.

***Walker Kelly v. State of North Carolina*, Court of Appeals of North Carolina, 2022-NCCOA-675, No. COA21-709**

On April 19, 2023, the North Carolina Association of Educators (teachers' union) filed a notice of voluntary dismissal of its case against the Opportunity Scholarships voucher program. The teachers' union alleged that the voucher program, "as applied," funds religious discrimination, lacks meaningful educational requirements, discriminates against students based on "homosexuality, bisexuality, or gender non-conformity," and fails to accomplish a public purpose. Prior to the teachers' union asking for a dismissal, the North Carolina Court of Appeals rejected its right to challenge the statute "as applied." If plaintiffs had not dismissed their own case, they would have been required to proceed with a "facial challenge" to the statute as written.

Ohio | Cleveland Scholarship Program

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

On June 27, 2002, the U.S. Supreme Court ruled, in *Zelman v. Simmons-Harris*, that the Cleveland school voucher program does not violate the First Amendment of the U.S. Constitution. Vouchers are constitutional, it said, when parents have an independent, private choice of schools that neither favors nor disfavors religion. By design, the voucher program is "school neutral," and "entirely neutral with respect to religion." Parents may "exercise genuine choice among options public and private, secular and religious," the Court said, and this program of true private choice "does not offend the Establishment Clause."

Oklahoma | Lindsey Nicole Henry Scholarships for Students with Disabilities

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

On February 16, 2016, the Oklahoma Supreme Court ruled, in *Oliver v. Hofmeister*, that the state's voucher program is constitutional, in a 9-0 decision with one concurring opinion. "When the parents and not the government are the ones determining which private school offers the best learning environment for their child, the circuit between government and religion is broken," it said. Among the points the Court made: 1) participation is voluntary; 2) the choice of school is strictly independent of government; 3) public funds flow to parents, not schools; 4) the program is neutral regarding religion; 5) any benefit to a school comes from the parent; 6) religious school autonomy is not impacted by the program; and 7) any voucher given is not a "gift," as there is substantial state benefit.

***Independent School District No. 5 of Tulsa County v. Spry*, 2012 OK 98, 292 P.3d 19 (2012)**

On November 20, 2012, the Supreme Court of Oklahoma dismissed on procedural grounds a suit brought by Jenks and Union Public School Districts against several parents of special needs students residing in their districts. Plaintiffs challenged parents who accessed vouchers under the Lindsey Nicole Henry Scholarships for Students with Disabilities Program. The Court ruled that, while taxpayers have a public right to challenge legislation using public funds, school districts are not taxpayers. School districts do not have a constitutionally protected interest themselves when the legislature withholds certain funds from its general grant to the districts through the department of education. The Court added that "the parents are clearly not the proper parties against whom to assert these constitutional challenges."

Puerto Rico | Free School Selection Program

***Asociación de Maestros v. Departamento de Educación*, 2018 DTS 150 (2018), Case Number: CT-2018-6**

On August 9, 2019, the Supreme Court of Puerto Rico overturned a prior ruling prohibiting vouchers (*Asoc. De Maestros v. Sec. De Educación*, 137 D.P.R. 528 (1994)). Four concurring opinions offered multiple reasons for upholding vouchers. (There were also two dissenting opinions.)

Tennessee | Education Savings Account Program

***Metro. Gov't of Nashville and Davidson Cnty. v. Tenn. Dep't of Educ.*, 645 S.W.3d 141 (Tenn. 2022)**

On May 18, 2022, the Tennessee Supreme Court ruled that the state's ESA program does not violate their state constitution's Home Rule provision. This provision prohibits the legislature from targeting a particular county for legislation without the approval of voters in that county. The ESA applies in two counties and has since been expanded. The Tennessee Supreme Court remanded the case back to the lower courts for consideration of remaining constitutional challenges that were held in abeyance pending the Tennessee Supreme Court decision on home rule (*McEwen v. Lee*, now pending).

West Virginia | Hope Scholarship Program

***State v. Beaver*, 887 S.E.2d 610 (2022)**

On November 17, 2022, the West Virginia Supreme Court of Appeals released its written opinion in *State v. Beaver*. The Court permanently overturned the Circuit Court of Kanawha County's injunction against the Hope Scholarship Program and ordered a judgment in the state's favor. The injunction was dissolved by the Supreme Court on October 6, 2022, prior to issuing its final written decision. The Court declared that the Hope Scholarship does not interfere with the legislature's obligation to provide a thorough and efficient system of public schools. While the legislature funds public schools, it also may provide additional forms of schooling. The Court also ruled that a child's fundamental right to public education is not infringed by the Hope Scholarship program. Participation is voluntary, and a child's access to public education is unaffected by the program.

Wisconsin | Milwaukee Parental Choice Program

***Underwood v. Vos*, 2024 WI 5, Appeal No. 2023AP001896-OA (2023)**

On December 13, 2023, the Supreme Court of Wisconsin dismissed a petition calling on it to hear a case without it having been heard in lower courts. The petition challenged the Independent Charter School Program, Milwaukee Parental Choice Program, statewide Parental Choice Program, and Special Needs Scholarship Program. It alleged that these programs violated the state constitution's Uniform Taxation Clause, its annual school tax requirement, the superintendent supervision clause, and the public purpose document. In a one-word ruling, the Court said, "Denied." There was no further comment or consideration.

***Jackson v. Benson*, 218 Wis. 2d 835, 578 N.W.2d 602 (1998), cert. denied, 525 U.S. 967 (1998)**

On June 10, 1998, the Wisconsin Supreme Court held that the Milwaukee voucher program does not violate either the state's Compelled Support Clause or its Blaine Amendment. The program has a secular public purpose, is neutral toward religion, and does not create entanglement between government and religion. It is a program of true private choice. "Not one cent flows from the State to a sectarian private school ... except as a result of the necessary and intervening choices of individual parents." The benefit is to families; schools "are not enriched by the service they render. Mere reimbursement is not aid," it said, borrowing from a much earlier case. The Court also affirmed the conclusions of *Davis v. Grover* (below), an earlier unsuccessful challenge to the school choice program. A uniform system of public schools,

it said, "provides not a ceiling but a floor upon which the legislature can build additional opportunities for school children in Wisconsin." Challengers to the Milwaukee program filed equal protection claims, which the Court rejected, saying there was a lack of evidence that the statute was anything but race-neutral or enacted for a discriminatory purpose.

***Davis v. Grover*, 166 Wis.2d 501, 480 N.W.2d 460 (Wis. 1992)**

On March 3, 1992, the Wisconsin Supreme Court held, in *Davis v. Grover*, that the Milwaukee voucher program was constitutional. The Court held that the voucher legislation was not an impermissible private or local bill, and the program did not disturb the uniformity of public school districts or violate the public purpose doctrine. Justice Ceci, in a concurring opinion, said, "Let's give choice a chance!"

SCHOOL CHOICE PROGRAMS UPHELD WITH CONDITIONS IN FOUR STATES:

Louisiana, Maine, Nevada, Vermont.

Louisiana | Louisiana Scholarship Program

***Louisiana Federation of Teachers v. State*, 118 So. 3d 1033 (La. 2013)**

On May 7, 2013, the Louisiana Supreme Court ruled, in *Louisiana Federation of Teachers v. State*, that the state constitution's Minimum Foundation Program cannot be used to pay tuition costs at nonpublic schools. The Court declined to rule on whether a voucher program funded through other means would be constitutional. This left the voucher program intact, but unfunded. After the Louisiana Supreme Court struck down the voucher's funding mechanism, in June 2013, Gov. Bobby Jindal and the state legislature passed a budget that would fund, through general appropriations, the nearly 8,000 students approved for vouchers in the 2013–14 school year. The voucher program continues to be funded.

Maine | Town Tuitioning Program

***Joyce v. State*, 951 A.2d 69 (Me. 2008)**

On July 1, 2008, Maine's Supreme Judicial Court expanded upon its 2006 ruling in *Anderson* (below) and held that the law excluding religious schools

from Town Tuitioning also applied to municipalities that consider offering a general fund subsidy for tuition at a sectarian school.

***Anderson v. Town of Durham*, 895 A.2d 944 (Me. 2006), *cert. denied*, 127 S.Ct. 661, 166 L.Ed.2d 512**

On April 26, 2006, Maine's Supreme Judicial Court refused to overturn Maine's 1981 law excluding religious schools from Town Tuitioning. Justices did this despite the U.S. Supreme Court ruling in *Zelman v. Simmons-Harris* (see above), which upheld the constitutionality of including religious schools in a voucher program for Cleveland, Ohio. Maine's highest court said the state was not compelled to offer direct or indirect tuition payments to sectarian schools.

***Eulitt v. Maine Department of Education*, 386 F.3d 344 (14th Cir. 2004)**

On October 22, 2004, the U.S. Court of Appeals for the First Circuit disagreed with the lower court's reasoning but agreed that Maine's exclusion of religious schools from Town Tuitioning did not violate the Equal Protection Clause of the 14th Amendment.

***Strout v. Commissioner, Maine Department of Education*, 178 F.3d 57 (1st Cir. 1999)**

On May 27, 1999, the U.S. Court of Appeals for the First Circuit upheld the lower court's ruling that excluding religious schools was a constitutional act.

***Bagley v. Raymond School Department*, 728 A.2d 127 (Me.), *cert. denied*, 528 U.S. 947 (1999)**

On April 23, 1999, the Maine Supreme Judicial Court upheld the exclusion of religious schools. The U.S. Supreme Court declined to review the Maine Court's ruling. Since the mid-1980s, there have been many challenges to this exclusion.

Me. Op. Att'y Gen. No. 80-2 (Jan. 7, 1980)

On January 7, 1980, Maine Attorney General Richard S. Cohen released an opinion that funding a child to attend a school with a "pervasively religious atmosphere" would be unconstitutional. It would be impossible to examine each school for pervasively sectarian activity. Thus, children accessing Maine's Town Tuitioning voucher program could no longer attend religious schools – a first for the program that began in 1873.

Nevada | Educational Savings Account (ESA)

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

***Duncan v. State of Nevada*, District Court of Clark County, Case No: A723703 (2015)**

On September 29, 2016, the Nevada Supreme Court resolved together two cases against the state's nearly universal ESA program. *Lopez v. Schwartz* was filed in September of 2015 in Carson City and *Duncan v. State of Nevada* was filed one month later in Las Vegas; these two courts reached opposite decisions on ESA constitutionality. On appeal, Nevada's Supreme Court affirmed the lower court finding in *Duncan v. State of Nevada* that the ESA law was enacted within the legislature's power and authority, the requirement for a uniform system of common schools was untouched by the ESA program, and there was no constitutional violation using public funds for sectarian purposes because funds in ESA accounts belong to parents. However, the Court also held that the method of funding ESAs did not follow constitutional procedures for appropriations. As a result, the ESA was upheld, albeit "without an appropriation." Lawmakers in Nevada could have funded this program much like Louisiana did after courts there declared a similar program's funding method unconstitutional. Sadly, this did not happen. Lacking funding, the program was repealed three years later. Nevada's tax credit scholarship program was not impacted by this ruling and continues to serve Nevada children today.

Vermont | Town Tuitioning Program

***Valente et al., v. French et al.,* U.S. District Court for the District of Vermont, Case 2:20-cv-00135-cr (2023)**

On February 16, 2023, the U.S. District Court for the District of Vermont rendered a stipulated judgment declaring that the U.S. Supreme Court's *Carson v. Makin* decision (see Maine, above) renders unconstitutional the Vermont Supreme Court precedent requiring "adequate safeguards against the use of [tuition] funds for religious worship." Further, it said, the state cannot "deny or restrict payment of tuition to independent schools based on their religious status, affiliation, beliefs, exercise, or activities" within a school choice program.

***Chittenden Town School District v. Vermont Dept of Education*, 738 A.2d 539 (Vt. 1999)**

On June 11, 1999, the Vermont Supreme Court prohibited town tuitioning programs from making payments to religious schools, notwithstanding a

previous ruling holding that a program allowing parents to use a voucher at a religious school did not violate the Establishment Clause. Nonetheless, the Court ruled in this case that such a program requires taxpayers to support religious worship, which violates the state's compelled support clause. The Court held that there were no safeguards in place to separate religious instruction from religious worship in schools.

SCHOOL CHOICE PROGRAM COURT AND LEGAL RULINGS RELATED TO PROCEDURAL OR RELATED MATTERS UPHOLDING VIABILITY OF PROGRAMS IN FOUR STATES:

Arkansas, Louisiana, Maryland, Wisconsin.

Arkansas | Arkansas Children's Educational Freedom Account Program

***Arkansas Department of Education v. Jackson*, 2023 Ark. 105, 669 S.W.3d 1.**

On October 12, 2023, the Arkansas Supreme Court held, in *Arkansas Department of Education v. Jackson*, that the Arkansas legislature did not violate the constitutional requirement that emergency legislation be enacted by two separate votes in both the House and Senate. The Court recognized the House and Senate Journals as the official legislative records, which showed two separate votes recorded on the LEARNS Act.

Louisiana | Louisiana Scholarship Program

***Brumfield v. La. State Bd. Of Educ.*, 806 F.3d 289 (5th Cir. 2015)**

On November 11, 2015, the Fifth Circuit Court of Appeals, by a 2-1 decision, overturned a district court ruling granting the U.S. Department of Justice (DOJ) pre-clearance review of the Louisiana Scholarship voucher program (LSP). The Court of Appeals ruled that the lower court exceeded its scope of authority. At issue was the U.S. Department of Justice actions to use a 1975 federal desegregation order, *Brumfield v. Dodd*, 405 F. Supp. 338 (E.D. La. 1975), to prohibit children in affected schools from participating in the voucher program on the grounds that they left public schools less integrated. The department was unable to produce evidence to support its claim. The Appeals Court observed, "DOJ's attempt to shoehorn its regulation of the voucher program into an entirely unrelated 40-year-old case represents more than ineffective lawyering." The Court said DOJ attempted "to regulate

the program without any legal judgment against the state." There was "no basis for DOJ to intrude into the affairs of Louisiana and its disadvantaged student population."

Maryland | Broadening Options and Opportunities for Students Today (BOOST) Program

***Bethel Ministries, Inc. v. Salmon*, Civil Case No.: SAG-19-01853 (D. Md. 2021)**

On December 10, 2021, the U.S. District Court of Maryland held that the state board administering the BOOST voucher program violated the First Amendment free speech rights of Bethel Christian Academy. The board had removed and excluded the school from the voucher program based on its statement of faith, which declared that marriage is "a covenant between one man and one woman," and that gender is bestowed by God "at birth as male or female to reflect His image." The court ruled that the state violated the Constitution when it "conditioned government funding on a viewpoint-based restriction of speech" and violated the Unconstitutional Conditions doctrine, but it declined to comment on the constitutionality of the program. The state of Maryland did not file an appeal.

Wisconsin | Milwaukee Parental Choice Program

U.S. Department of Justice

On December 23, 2015, the U.S. Department of Justice, Civil Rights Division of the Educational Opportunities Section (U.S. DOJ) concluded an investigation prompted by an ACLU complaint filed in June 2011. The ACLU alleged that the Milwaukee voucher program violated federal laws prohibiting discrimination against students with disabilities. A rigorous investigation determined that no further action was warranted, which the U.S. DOJ informed Wisconsin's state superintendent of public instruction in a letter. The investigation, it added, was closed. There were no findings of wrongdoing related to the voucher program.

SCHOOL CHOICE PROGRAMS OVERTURNED IN FOUR STATES:

Arizona, Colorado, Florida, Kentucky.

Arizona | Vouchers

***Cain v. Horne,* 202 P.3d 1178 (Ariz. 2009) (en banc)**

On March 25, 2009, the Arizona Supreme Court invalidated Arizona's two voucher programs. The Arizona Scholarship for Pupils with Disabilities and The Displaced Pupils Grant Program, it said, violated the state's Aid Clause, which prohibits "appropriation of public money ... in aid of any ... private or sectarian school." The Court reasoned that vouchers could only be used at private schools and did not accept the argument that students, not schools, were the true beneficiaries.

But the Court also said that voucher programs were "well-intentioned" efforts to assist students and that there may be another way to accomplish this goal. As a result, advocates designed Education Savings Accounts (ESAs), which were subsequently held by Arizona's courts to be constitutional. ESAs that do not require recipients to use the funds at a private school do not violate the state's Aid Clause. See *Niehaus v. Huppenthal* above. ESAs are now sweeping the nation as one of the most flexible and popular school choice programs.

Colorado | Douglas County Public School District Choice Scholarship Pilot Program

***Doyle, Florence v. Taxpayers for Public Education*, U.S. Supreme Court Certiorari Summary Disposition 15-556**

***Douglas County School District v. Taxpayers for Public Education*, U.S. Supreme Court Certiorari Summary Disposition 15-557**

***Colorado State Board of Education v. Taxpayers for Public Education*, U.S. Supreme Court Certiorari Summary Disposition 15-558**

On June 27, 2017, the U.S. Supreme Court granted writs of certiorari for these three cases. All judgments of the Colorado courts were vacated and remanded back to the Colorado Supreme Court for further consideration in light of the U.S. Supreme Court ruling in *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U. S. 449 (2017). Prior judgments in state courts included a loss at the trial court for advocates of school choice, a win at the court of appeals,

and split decision at the Colorado Supreme Court, wherein the high court held that petitioners lacked standing to sue. Notwithstanding plaintiffs' lack of standing, the Colorado Supreme Court held that the Douglas County voucher program violated the state's constitutional prohibition against public funds being used in any way that aided private schools controlled by "any church or sectarian denomination."

The U.S. Supreme Court directed Colorado courts to reconsider their opinion in light of the recent U.S. Supreme Court ruling in *Trinity Lutheran,* which held that,"The exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand." The U.S. Supreme Court ruled in *Trinity Lutheran* that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion." The Douglas County public school district's voucher program was struck down precisely because religious entities were permitted to participate. This runs counter to the ruling in *Trinity Lutheran.* Douglas County, however, never had the chance to present this argument to the Colorado courts. In November 2017, people who were hostile to school choice were elected to the Douglas County school board, and during their December 2017 public meeting, they eliminated the district's voucher program. No further court action was necessary.

Florida | Opportunity Scholarship Program

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

On January 5, 2006, the Florida Supreme Court held Opportunity Scholarship Program vouchers to be unconstitutional. The Court held that vouchers violate the state's constitutional requirement to make "adequate provision" for "a uniform, efficient, safe, secure, and high quality system of free public schools." Notwithstanding this ruling, today Florida parents enjoy two ESA programs with universal eligibility: the Empowerment Scholarship and the Family Empowerment Scholarship for children with disabilities. The state also has vigorous tax credit scholarship and tax credit ESA programs.

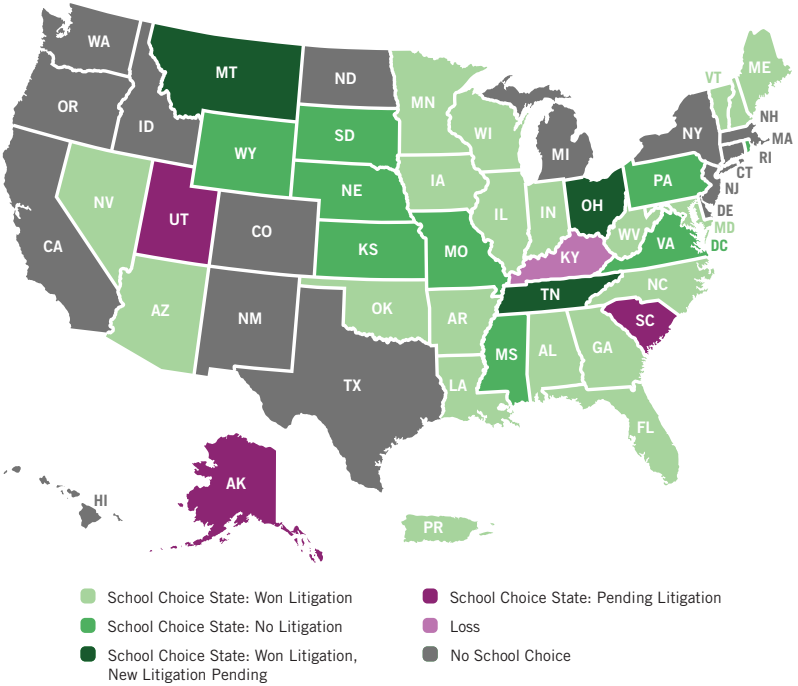
Kentucky | Education Opportunity Act

***Commonwealth ex rel. Cameron v. Johnson*, 658 S.W.3d 25 (Ky. 2022)**

On December 15, 2022, the Kentucky Supreme Court held that Kentucky's tax credit-funded ESA violated the state's constitution. Specifically, the

constitution prohibits raising or collecting any sum for education "other than in common schools" unless a public vote favors it. This provision is unique to Kentucky's constitution. The phrase, "No sum shall be raised or collected" for any education except public schools is far broader than the funding language found in other state constitutions.

Kentucky voters will, in the November 2024 general election, consider an amendment to their state constitution to allow for educational choice.



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