

**COLORADO SUPREME COURT**  
**2 East 14th Street, Denver, Colorado 80203**

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Court of Appeals, State of Colorado  
Hon. Jerry N. Jones, Dennis Graham, and Steve  
Bernard  
Case Nos. 11CA1856 and 11CA1857

District Court, City and County of Denver  
Hon. Michael A. Martinez  
Case Nos. 2011CV4424 and 2011CV4427

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**Petitioners:** Taxpayers for Public Education;  
Cindra S. Barnard; Marson S. Barnard; James  
LaRue; Suzanne T. LaRue; Interfaith Alliance of  
Colorado; Rabbi Joel R. Schwartzman; Reverend  
Malcolm Himschoot; Kevin Leung; Christian  
Moreau; Maritza Carrera; and Susan McMahon,

v.

**Respondents:** Douglas County School District;  
Douglas County Board of Education; Colorado  
State Board of Education; and Colorado  
Department of Education,

**and**

**Intervenor-Respondents:** Florence and Derrick  
Doyle, on their own behalf and as next friends of  
their children, A.D. and D.D.; Diana and Mark  
Oakley, on their own behalf and as next friends  
of their child, N.O.; Jeanette Strohm-Anderson  
and Mark Anderson, on their own behalf and as  
next friends of their child, M.A.,

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**BRIEF AMICUS CURIAE OF  
PACIFIC LEGAL FOUNDATION IN SUPPORT OF  
RESPONDENTS AND INTERVENOR-RESPONDENTS**

## **CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 53(a).

It contains 5,620 words.

S/ Joshua P. Thompson  
JOSHUA P. THOMPSON

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## INTEREST AND IDENTITY OF AMICUS CURIAE

Pursuant to Colorado Rule of Appellate Procedure 29, Pacific Legal Foundation (PLF) submits this brief amicus curiae in support of Respondents and Intervenor-Respondents and in support of affirming the decision below.

PLF is a nonprofit, tax-exempt foundation incorporated under the laws of the State of California, organized for the purpose of litigating important matters of the public interest. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF is headquartered in Sacramento, California, and has offices in Washington, Florida, Hawaii, and Washington, D.C. PLF has participated in the United States Supreme Court in many cases involving kindergarten through 12th grade (K-12) education reform including *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); and *Mitchell v. Helms*, 530 U.S. 793 (2000). PLF has also participated in state courts across the country in cases involving K-12 education reform including *Atlanta Indep. Sch. Sys. v. Atlanta Neighborhood Charter Sch., Inc.*, 748 S.E.2d 884 (Ga. 2013); *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013); *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009); *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006); *Wells v. One2One Learning Found.*, 141 P.3d 225 (Cal. 2006); and *Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d

745 (Cal. Ct. App. 1999). PLF has previously participated as amicus curiae before the this Court in *Garcia v. Medved Chevrolet, Inc.*, 263 P.3d 92 (Colo. 2011), and *Raleigh v. Performance Plumbing and Heating, Inc.*, 130 P.3d 1011 (Colo. 2006).

This case raises important issues of Colorado law as well as important policy considerations in the realm of K-12 education. Amicus believes that its public policy perspective and litigation experience provide an additional viewpoint on the issues presented in this case which will be of assistance to the Court in its deliberations.

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

In March 2011, the Douglas County School Board became the first school board in the nation to adopt a private school choice program. See Friedman Found. for Educ. Choice, *Fast Facts on Private School Choice 2* (2014).<sup>1</sup> The Douglas County Choice Scholarship Program (CSP) allows up to 500 Douglas County students to attend public or private schools of their choice. *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, Nos. 11CA1856 & 11CA1857, 2013 WL 791140, at \*3 (Colo. Ct. App. Feb. 28, 2013). If more than 500 students apply for the CSP, a lottery is held to determine eligibility. Friedman Found. for Educ. Choice, *Colorado—*

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<sup>1</sup> Available at <http://www.edchoice.org/Newsroom/Fast-Facts-on-Private-School-Choice.pdf> (last visited Aug. 1, 2014).

*Douglas County Choice Scholarship Pilot Program.*<sup>2</sup> A student who is selected for a scholarship must then apply and be accepted to a private or public school of her parents' choice. *Taxpayers for Pub. Educ.*, 2013 WL 791140, at \*1.

This element of choice is crucial to the CSP's constitutionality. True, independent choice insulates the CSP from plaintiffs' claims that it violates the Colorado Constitution's religion clauses.<sup>3</sup> See Colo. Const. art. II, § 4, art. IX, § 7. This Court has held that the Colorado Constitution does not prohibit tax dollars flowing to sectarian institutions as a result of independent and voluntary choices of non-governmental individuals. *Americans United for Separation of Church & State Fund, Inc. v. State*, 648 P.2d 1072, 1075 (Colo. 1982). Plaintiffs' Article IX, § 7 claim fails also because the scholarship dollars received by sectarian institutions are merely incidental benefits of the CSP's direct beneficiaries: Douglas County students. *Id.* at 1074, 1083-86.

Courts across the country have upheld the rights of parents to choose the best education for their children. The Establishment Clause of the United States Constitution—which informs the scope of the Colorado Constitution, see *Americans*

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<sup>2</sup> Available at <http://www.edchoice.org/school-choice/programs/choice-scholarship-pilot-program.aspx> (last visited Aug. 1, 2014).

<sup>3</sup> Plaintiffs' other constitutional challenges are not addressed in this brief.

*United*, 648 P.2d at 1081-82—permits voucher programs like the CSP. *See Zelman*, 536 U.S. at 662. Furthermore, both the Wisconsin and Indiana Supreme Courts have held that religion clauses very similar to Colorado’s allow voucher programs in those states. *See Meredith*, 984 N.E.2d 1213; *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998).

Independent choice is also the reason private school voucher programs succeed. By introducing competition, school choice programs create incentives for schools to improve the quality of education and control the costs. *See generally* Greg Forster, The Friedman Found. for Educ. Choice, *A Win-Win Solution: The Empirical Evidence on School Choice* (3d ed. 2013).<sup>4</sup> Choice programs improve student achievement and graduation rates almost universally while saving taxpayers millions of dollars. Susan L. Aud, Ph.D., *Education by the Numbers: The Fiscal Effect of School Choice Programs, 1990-2006* (Apr. 2007).<sup>5</sup> And they do so without creating financial problems for traditional public schools. Benjamin Scafidi, Friedman Found. for Educ. Choice, *The Fiscal Effects of School Choice Programs on Public School Districts*

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<sup>4</sup> Available at <http://www.edchoice.org/CMSModules/EdChoice/FileLibrary/994/A-Win-Win-Solution--The-Empirical-Evidence-on-School-Choice.pdf> (last visited Aug. 1, 2014).

<sup>5</sup> Available at [http://www.edchoice.org/CMSModules/EdChoice/FileLibrary/243/voucher\\_savings\\_final.pdf](http://www.edchoice.org/CMSModules/EdChoice/FileLibrary/243/voucher_savings_final.pdf) (last visited Aug. 1, 2014).

(Mar. 2012).<sup>6</sup> By injecting choice into Douglas County, the CSP allows hundreds of families to choose how and where their children are educated. And the CSP provides a model for other Colorado school boards that aim to improve the educational opportunities of students in their districts.

The CSP provides Douglas County students and their families with true educational options. While many states are embracing choice on a state level, Douglas County is the first school district in the nation to enact a private choice program. If it succeeds, as the evidence suggests it will, the CSP could provide a model for school districts throughout Colorado—and the nation—that strive to improve the educational outlook of school children. This Court should affirm the decision below, because the CSP provides scholarships only by way of voluntary, independent choice. Any benefits the program may render to religious institutions are purely incidental to its fundamental purpose of providing quality education to the children of Douglas County.

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<sup>6</sup> Available at <http://www.edchoice.org/CMSModules/EdChoice/FileLibrary/796/The-Fiscal-Effects-of-School-Choice-Programs.pdf> (last visited Aug. 1, 2014).



## ARGUMENT

### I

#### **THE CHOICE SCHOLARSHIP PROGRAM DOES NOT VIOLATE THE COLORADO CONSTITUTION'S RELIGION CLAUSES**

Plaintiffs allege that the CSP violates two provisions of the Colorado Constitution governing the allocation of public funds to sectarian goals or institutions. Article II, § 4 of the Colorado Constitution provides that “[n]o person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent.” Article IX, § 7 of the Colorado Constitution prohibits the government from making “any appropriation . . . to help support or sustain any school . . . controlled by any church or sectarian denomination.” Both claims fail. No individual is compelled to attend a religious school under the Choice Scholarship Program. The only way any state money arrives at a religious institution is through the independent choice of parents. Accordingly, any benefit to religion is incidental and not in violation of the Colorado Constitution.

#### **A. The Choice Scholarship Program Does Not Compel Any Individual to Attend or Support Any Religious Institution**

Under the Choice Scholarship Program, parents have a choice whether to seek a scholarship or to enroll at secular or sectarian institutions. As the lower court

observed, “To the extent students would attend religious services, they would do so as a result of parents’ voluntary choices.” *Taxpayers for Pub. Educ.*, 2013 WL 791140, \*16. Nevertheless, plaintiffs allege that the CSP violates Article II, § 4 of the Colorado Constitution, which prohibits any Coloradan from “attending or supporting” a religious institution without consent. As the cases below demonstrate, this Court, the United States Supreme Court, and other state supreme courts have all held that parental choice is the key factor when determining whether government is compelling individuals to support sectarian causes. When individuals have independent choice—as they do here—there is no constitutional violation.

In *Americans United*, this Court considered the constitutionality of a grant program that would allow students to attend higher education institutions, including sectarian schools, within Colorado. 648 P.2d at 1074-75 (plaintiffs alleged violation of Article II, § 4). This Court upheld the statute, because students—not the state—were free to choose whether to spend the funds at sectarian or secular schools. Article II, § 4 is only implicated when “governmental involvement . . . leads to restraint on free choice in religious matters.” 648 P.2d at 1082.

In arriving at its conclusion, the *Americans United* Court was persuaded by U.S. Supreme Court cases interpreting the First Amendment to the United States Constitution, because Article II, § 4 “embod[ies] the same values of free exercise and

governmental non-involvement secured by the religious clauses of the First Amendment.” See *Americans United*, 648 P.2d at 1081-82 (citing *Walz v. Tax Comm’n of the City of N.Y.*, 397 U.S. 664, 670-71 (1970)). And in cases decided after *Americans United*, the United States Supreme Court has found the existence of independent choice conclusive when determining whether programs violate the Establishment Clause. See, e.g., *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993) (“[T]he statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents,”); *Mueller v. Allen*, 463 U.S. 388, 399 (1983) (“[P]ublic funds become available [to sectarian schools] only as a result of numerous private choices of individual parents of school-age children.”); *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 487 (1986) (“[A]ny aid provided under Washington’s program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.”).

In this case, the Supreme Court’s decision in *Zelman* is particularly instructive, as the Court upheld a voucher program similar to Douglas County’s Choice Scholarship Program. 536 U.S. 639 (2002). In *Zelman*, an Ohio statute offered state-provided tuition directly to parents to cover expenses at either secular or sectarian schools. *Id.* at 645-46, 663. The *Zelman* Court emphasized that the independent

private choices of parents shielded the program from an Establishment Clause violation. *Id.* at 662 (“It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice.”).

Other states with compelled support clauses nearly identical to that of Colorado have upheld voucher programs like the Choice Scholarship Program against charges that they violated that state’s constitution. Last year, in *Meredith*, 984 N.E.2d 1213, the Indiana Supreme Court considered a challenge to that state’s Choice Scholarship Program. Article II, § 4 of the Indiana Constitution requires that “no person shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent.” *Cf.* Colo. Const. art. II, § 4 (“No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent.”). Plaintiffs alleged that this compelled support clause prohibited parents from using vouchers and choosing to send their children to sectarian schools. 984 N.E.2d at 1225.

The Indiana Supreme Court recognized that the state’s compelled support clause “is a restraint upon government compulsion of individuals to engage in religious practices absent their consent.” *Id.* The clause was not intended to limit taxing and spending on religious matters, which were covered by a different clause of

the Indiana Constitution. *Id.* Further, the Court recognized that “compulsion” and “choice” are opposites, and so long as parents had independent choices, the vouchers at issue did not *compel* any individual to support religious institutions. *Id.* at 1226.

Similarly, in *Jackson*, 578 N.W.2d at 620, the Wisconsin Supreme Court found the element of parental choice to be crucial when examining the validity of Wisconsin’s school choice program under the Wisconsin Constitution’s compelled support clause. Again the Wisconsin Constitution contains a prohibition nearly identical to Article II, § 4 of the Colorado Constitution. *Id.* at 621-23. The Wisconsin Supreme Court held that parental choice shielded the program from attack. “A qualifying student only attends a sectarian private school under the program if the student’s parent so chooses.” *Id.* at 623.

In light of *Zelman*, *Meredith*, and *Jackson*, scholars recognize that individuals are not “compelled” to support religious institutions when they retain independent choice. *See, e.g.*, Richard T. Weicher, *If a Public School Is Labeled “Failing,” Could More Really Be Less?*, 77 Notre Dame L. Rev. 293, 294 (2001) (“when the government creates voucher programs that give parents the opportunity to send their children to either sectarian schools or non-sectarian schools, a genuine and independent private choice exists”); Virginia Chase Crocker, *Zelman v. Simmons-Harris: The Establishment Clause and the Fight for School Vouchers*, 58

Ark. L. Rev. 395, 420 (2005) (no compelled support when “the program provides sufficient options for parents to make an independent choice in schooling”); Aaron Jay Saiger, *School Choice and States’ Duty to Support “Public” Schools*, 48 B.C. L. Rev. 909, 946-54 (2007) (arguing that the *Zelman*’s independent choice language informs education clauses in state constitutions); Clint Bolick, *School Choice: Sunshine Replaces the Cloud*, Cato Sup. Ct. Rev. 2001-2002 149, 152 (2002) (independent choice shields state voucher programs).

Douglas County’s Choice Scholarship Program does not require any individual to attend or support a religious school. Indeed, the purpose of the CSP is to provide families a choice of which school their children will attend. *See Taxpayers for Pub. Educ.*, 2013 WL 791140, at \*1. Accordingly, “[n]o student is compelled to participate in the CSP or, having been accepted to participate, to attend any particular participating private school.” *Id.* at \*16. Because the CSP allows true private, independent choice, it does not violate Article II, § 4 of the Colorado Constitution.

**B. The Choice Scholarship Program Does Not Compel the Appropriation of Public Funds for Religious Purposes**

Plaintiffs also challenge the CSP under Article IX, § 7 of the Colorado Constitution, which prohibits the Colorado government from making “any appropriation . . . to help support or sustain any school . . . controlled by any church

or sectarian denomination.” This claim fails for the same reason: parents remain free to choose if and how the scholarship money is spent. “The CSP is neutral toward religion, and funds make their way to private schools with religious affiliation by means of personal choices of students’ parents.” *Taxpayers for Pub. Educ.*, 2013 WL 791140, at \*17.

Plaintiffs’ sectarian appropriation claim fails for an additional reason: any benefit to religious organization under the CSP is incidental to the program’s purpose. In *Americans United*, this Court rejected an Article IX, § 7 claim, in part, because any benefit to religious institutions was incidental to the purpose of the grant program. “Any benefit to the institution appears to be the unavoidable by-product of the administrative role relegated to it by the statutory scheme.” 648 P.2d at 1083. According to this Court, “[s]uch a remote and incidental benefit does not constitute, in our view, aid to the institution itself within the meaning of Article IX, Section 7.” *Id.* at 1083-84.

This reasoning mirrors that in *Zelman*, where the Supreme Court held that “[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.” 536 U.S. at 652. According to the Supreme Court, an incidental benefit to a religious organization, by

itself, does not violate the Establishment Clause. *Id.* at 653; *see also Mitchell*, 530 U.S. at 810 (plurality op.) (the existence of choice makes any benefit to religious organizations incidental and not a violation of the First Amendment.).

The Wisconsin and Indiana Supreme Courts came to similar conclusions when construing their state constitutions. In both *Jackson* and *Meredith*, the state supreme courts were asked to interpret religion clauses similar to Article IX, § 7 of the Colorado Constitution. In Wisconsin, the Supreme Court held that the constitutional prohibition is “is not to be read as requiring that some shadow of incidental benefit to a church-related institution brings a state grant or contract to purchase within the prohibition of the section.” *Jackson*, 578 N.W.2d at 621. Similarly, the Indiana Supreme Court held that its prohibition on appropriations to sectarian institutions did not apply when the benefit was incidental to the program’s purpose. “Any benefit to program-eligible schools, religious or non-religious . . . is ancillary and incidental to the benefit conferred on these families.” *Meredith*, 984 N.E.2d at 1229.

While the lower court found *Jackson* and *Zelman* persuasive<sup>7</sup> against charges that the CSP violated Article IX, § 7, the dissent would have struck down the program under that provision of the Colorado Constitution. *See Taxpayers for Pub. Educ.*,

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<sup>7</sup> The lower court did not consider *Meredith* because it was decided one month after its opinion in this case was issued.



2013 WL 791140, at \*21 (Bernard, J., dissenting). In contrast to the panel’s reliance on *Jackson* and *Zelman*, the dissent was “persuaded by the reasoning” of decisions in four different states. *Id.* at \*24-25 (noting opinions from Washington, Florida, Arizona, and Kentucky). Upon inspection, however, the dissent’s reliance on those four opinions is misplaced.

In *Witters v. State of Washington Comm’n for the Blind*, 771 P.2d 1119, 1120 (Wash. 1989), a blind college student sought to use state rehabilitation funds to pay for a “biblical studies degree from Inland Empire School of the Bible.” The Washington Supreme Court held that the Washington State Constitution forbids the state from spending funds for a “religious course of study at a religious school, with a religious career as his goal.” *Id.* at 1121. Assuming the two state constitutional clauses are sufficiently similar—which they are not<sup>8</sup>—the CSP does not require any religious study. Moreover, unlike in *Witters*, public money is not being tied to a religious education at a particular religious institution. The CSP provides parents with a choice where to educate their child—they may choose secular or sectarian institutions, public or private.

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<sup>8</sup> Compare Colo. Const. art. IX, § 7, with Wash. Const. art. I, § 11.

The decision of the Florida Court of Appeals in *Bush v. Holmes*, 886 So. 2d 340, 347-61 (Fla. Dist. Ct. App. 2004), should carry little weight with this Court. Indeed, the Florida Supreme Court abandoned the lower court's reasoning on appeal, and relied on other provisions of the Florida Constitution to strike down the scholarship program at issue. *See Bush*, 919 So. 2d at 410 (holding that the scholarship program violated the Florida Constitution's requirement for "uniform" public schools). The Court specifically declined to hold that the program violates Florida's religion clauses. *Id.* at 413.

In *Cain*, 202 P.3d at 1185, the Arizona Supreme Court struck down a voucher program that allowed disabled children to attend the school of their choice. The Arizona Court found that it was "immaterial" that parents had a choice of where to send their disabled child. *Id.* at 1184. The *Cain* Court's interpretation of the Arizona Constitution directly conflicts with this Court's interpretation of the Colorado Constitution in *Americans United*. *See* 648 P.2d at 1083-84 (holding that the degree of independent choice is determinative in violations of Article IX, § 7).

Lastly, the Kentucky Supreme Court's opinion in *Univ. of Cumberlands v. Pennybacker*, 308 S.W.3d 668, 679 (Ky. 2010), is not on point. That court only considered whether the state could directly fund the construction of a building at a religious school. *Id.* at 671-73. The *Pennybacker* court correctly held that such direct

appropriation violates the Kentucky Constitution’s prohibition on spending public funds at sectarian institutions. *Id.* at 679. The Kentucky court, however, did not consider whether private, independent choices may protect state programs from such challenges.

Like the program addressed in *Americans United*, the CSP is a “statutory program . . . designed for the benefit of the student, not the educational institution.” 648 P.2d at 1082. In purpose and design the CSP gives parents the choice to send the child to a secular or sectarian institution. The institutions—public and private and religious and non-religious—must compete for students. The benefit they receive is ancillary to the program. Scholarship money flows to private schools only after parents independently decide that their child will receive the best education possible at a private school. Because this benefit is merely incidental to the benefit received by the student, the CSP does not violate Article IX, § 7 of the Colorado Constitution.

## II

### **THE CHOICE SCHOLARSHIP PROGRAM WILL PROVIDE MORE EDUCATIONAL OPPORTUNITIES FOR DOUGLAS COUNTY CHILDREN**

Choice and competition are essential to American life. Americans have the right to choose their food, housing, transportation, and clothing, and consequently, businesses compete with each other to strive to attract and please their customers in

those fields. However, unlike grocery stores and other important services that impact Americans on a daily basis, the current public education system in most states is a monopoly that locks students into particular schools based solely on home addresses. While wealthy parents can move to another area or pay for private school tuition out of pocket when schools underperform or fail to meet their children's needs, these options are not available for most parents. *See generally* Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 Fla. L. Rev. 909, 1063-65 (2013).

Without parental choice, public “schools lack the healthy, natural environment of client empowerment that is essential to producing better performance.” Forster, *supra*, at 4. Just as monopolies in other commodities “provide poor quality because nothing bad will happen to them if they don’t serve their clients well,” so too, education services and responsiveness to consumer demand deteriorate when public schools are immune to consumer preferences. *Id.* School choice programs break that monopoly.

By empowering parents to choose the school that best fits the needs of their children, school choice programs encourage competition between schools, which in turn has been shown to increase student academic achievement. Equally important, school choice gives parents an opportunity to take a larger share of control over one

of their most important and fundamental rights—the right to guide their childrens’ education. *Pierce v. Soc’y of the Sisters*, 268 U.S. 510, 535 (1925) (“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.”). School choice programs succeed at improving students’ academic achievement while saving taxpayers money and making traditional public school more economically efficient.

#### **A. School Choice Improves Academic Achievement**

Studies across the country demonstrate that school choice improves academic achievement. In twelve studies of school choice programs in cities across the nation, researchers used random-selection methods to evaluate students who received an educational voucher allowing school choice. Forster, *supra*, at 7. Results confirmed the benefits of competition. These studies compared the progress of school choice students with a control group of students over time. *Id.* Researchers then randomly evaluated students who received choice options and those who did not, while controlling for external factors such as previous academic achievement. *Id.* The choice students routinely achieved better academic outcomes than the control group. *Id.* Moreover, the studies revealed no negative academic effects for choice students. *Id.* at 8. In all but one study, the positive results demonstrated, with a high level of

statistical certainty, a direct correlation between school choice and improved student achievement of all or most students was directly correlated to school choice. *Id.*

School choice also has a positive effect on graduation rates. In June, 2010, the U.S. Department of Education released a report on Washington, D.C.'s, Opportunity Scholarship Program (OSP), which provides school choice for low-income families. Researchers found that the offer of an OSP scholarship increased, by 12 percentage points, the probability that a student would complete high school. *See* Patrick Wolf, *et al.*, U.S. Dep't of Educ., *Evaluation of the DC Opportunity Scholarship Program: Final Report* 41 (2010).<sup>9</sup> A more recent evaluation concluded that the use of vouchers in Washington, D.C., increased the likelihood of high school graduation by 21%. Patrick J. Wolf, *et al.*, *School Vouchers and Student Outcomes: Experimental Evidence from Washington, DC.*, 32 *J. Pol'y Analysis & Mgmt.* 246 (2013). Another study in Milwaukee revealed that students who used a voucher were more likely to graduate high school, enroll in a 4-year university, and remain enrolled in that university. Joshua M. Cowen, *et al.*, *School Vouchers and Student Attainment*, 41 *Pol'y Stud. J.* 147, 161 (2013).

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<sup>9</sup> Available at <http://ies.ed.gov/ncee/pubs/20104018/pdf/20104018.pdf> (last visited Aug. 1, 2014).

The benefits of school choice programs are not limited to those children who use vouchers to attend private schools. Studies show that when choice programs introduce competition between schools, public schools provide higher quality services. A survey revealed that 22 of 23<sup>10</sup> studies found a positive impact on public schools. Forster, *supra* at 11. One of these studies found that the positive effect of exposure to vouchers was so strong that a school where all its students are eligible for vouchers could be “expected to outperform a school with only half its students eligible by 15 percentile points over four years.” Jay P. Greene & Greg Forster, Manhattan Inst. for Policy Res., *Rising to the Challenge: The Effect of School Choice on Public Schools in Milwaukee and San Antonio*, Civic Bulletin (Oct. 2002).<sup>11</sup> Another study, in Florida, found that students enrolled in schools facing competition improved their test scores more than students in less competitive schools. David Figlio & Cassandra M.D. Hart, *Does Competition Improve Public Schools?: New Evidence from the Florida Tax-Credit Scholarship Program*, 11 Education Next, no. 1, Winter 2011,

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<sup>10</sup> The one exception had a provision that insulated the public school from competition.

<sup>11</sup> Available at [http://www.manhattan-institute.org/html/cb\\_27.htm](http://www.manhattan-institute.org/html/cb_27.htm) (last visited Aug. 1, 2014).

at 78-79.<sup>12</sup> The authors concluded, “that private school competition, brought about by the creation of scholarships for students from low-income families, is likely to have positive effects on the performance of traditional public schools.” *Id.* at 80.

Many additional empirical studies<sup>13</sup> demonstrate that competition introduced through school choice improves public schools. For example, in the Edgewood school district in San Antonio, Texas, which provided choice for every student in the district, researchers found that Edgewood’s year-to-year test score gain outperformed those of 85% of school districts in Texas. Greene & Forster, *supra*, at 6. The researchers chose to study Edgewood because it was a low-income, high-minority district where 93% of the students were eligible for lunch programs and where the district had a 97%

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<sup>12</sup> Available at <http://educationnext.org/does-competition-improve-public-schools/> (last visited Aug. 1, 2014).

<sup>13</sup> Caroline Minter Hoxby, *Rising Tide*, Education Next, Winter 2001, available at <http://educationnext.org/rising-tide> (last visited Aug. 1, 2014); Greene & Forster, *supra*; Rajashri Chakrabarti, *Impact of Voucher Design on Public School Performance: Evidence from Florida and Milwaukee Voucher Programs*, Staff Report 315, Federal Reserve Bank of New York (Jan. 2008), available at [http://www.newyorkfed.org/research/staff\\_reports/sr315.html](http://www.newyorkfed.org/research/staff_reports/sr315.html) (last visited Aug. 1, 2014); Rajashri Chakrabarti, *Can Increasing Private School Participation and Monetary Loss in a Voucher Program Affect Public School Performance? Evidence from Milwaukee*, 92 J. Pub. Econ. 1371 (June 2008), available at [http://econpapers.repec.org/article/eeepubeco/v\\_3a92\\_3ay\\_3a2008\\_3ai\\_3a5-6\\_3ap\\_3a1371-1393.htm](http://econpapers.repec.org/article/eeepubeco/v_3a92_3ay_3a2008_3ai_3a5-6_3ap_3a1371-1393.htm) (last visited Aug. 1, 2014).



Hispanic population. *Id.* Researchers concluded that strong competition from private schools “[drove] public school improvements.” *Id.* at 7.

## **B. School Choice Lowers Educational Costs**

School choice provides students with quality educations at a fraction of the cost. From 1990 to 2006, the nation’s school choice programs saved local school districts a total of \$422 million and state budgets \$22 million. Aud, *supra*, at 37. Additionally, schools in areas where choice is available generally operate on tighter budgets than district schools, receiving from the government only about 80% of the per pupil amount received by district schools. Chester E. Finn, *et al.*, *Charter School Funding: Inequity’s Next Frontier*, Thomas B. Fordham Institute, Fordham Foundation (Aug. 2005).<sup>14</sup>

In a Goldwater Institute study from 2005, analysts found that the State of Arizona and local governments would have had to spend an additional \$260 million during the 1999-2000 school year if they had to educate the more than 44,000 children who attended private schools. Ross Groen, *Survey of Arizona Private Schools: Tuition, Testing, and Curricula*, Goldwater Institute Policy Report No. 199, Jan. 5,

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<sup>14</sup> Available at <http://www.defendcharterschools.org/CharterSchoolFunding.pdf> (last visited Aug. 1, 2014).

2005, at 16.<sup>15</sup> The study estimated that, from 2004 through 2016, if private schools continued to educate just 5% of the state’s K-12 population, roughly 660,000 students would not have to be educated in public schools, saving the state roughly \$2.6 billion. *Id.* at 18. The study noted that the savings from just one child beginning and completing her K-12 education in a private school could save the state and local governments nearly \$100,000 over 13 years. *Id.*

Studies confirm that traditional public schools do not suffer financially when school choice programs allow parents to send their children to private schools. In the first comprehensive study of its kind, economics professor Benjamin Scafidi analyzed the effects of school choice programs on the fiscal health of competing public schools. Scafidi, *supra*. The results showed that public schools competing with private schools trimmed fixed and overhead costs, and found more efficient ways to allocate their funds. *Id.* at 15. “[Studies show] theoretically and empirically that when more money follows the child, the incentives are stronger for public school leaders to improve their schools.” *Id.* at 2.

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<sup>15</sup> Available at <http://goldwaterinstitute.org/article/survey-arizona-private-schools-tuition-testing-and-curricula> (last visited Aug. 1, 2014).

There is no credible evidence to suggest that school choice programs will have a negative fiscal impact on public schools. Instead, the evidence overwhelmingly suggests taxpayer savings.

### **C. The Choice Scholarship Program Allows Greater Parental Involvement and Autonomy in Choices About Education**

School choice not only provides better education at a lower cost to taxpayers, it empowers parents. Under the Choice Scholarship Program, many parents will, for the first time, have a meaningful choice about where and how their child is educated. Indeed, research demonstrates that the majority of public school parents would send their children to private schools if they could afford to do so. Calabresi & Salander, *supra*, at 1063. This is particularly true in lower-income communities where parents traditionally have no option but to send their children to failing public schools.

Studies of programs across the country found that, when given the means through choice programs, parents jumped at the opportunity to become more involved in their children's education. A study comparing the parental involvement of voucher families with that of non-voucher families in Milwaukee, found that parents with children participating in the Parental Choice Program:

- read with or to their children 10 to 15% more often;
- work with their children on math homework 5 to 10% more often;

- work with their children on writing or penmanship 10 to 20% more often;
- watch an educational television program with their children 5 to 10% more often; and
- participate with their children in a sports activity up to 10% more often.

Philip Vassallo, *More Than Grades: How Choice Boosts Parental Involvement and Benefits Children*, Cato Policy Analysis No. 383, Oct. 26, 2000, at 3.<sup>16</sup> Similar findings were reported in a study of the San Antonio Horizon Scholarship Program, where parents participating in the program worked with their children on homework 22% more often and on non-homework-related math and reading lessons 15% more often. *Id.* at 3-4.

The benefits of heightened parental involvement in education are well-documented. A 2001 report by the Michigan Department of Education concluded that when parents are involved, students have higher grades, test scores, and graduation rates, as well as better school attendance, increased motivation, and better self-esteem. Mich. Dep't of Educ., *What Research Says About Parent Involvement in Children's*

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<sup>16</sup> Available at <http://www.cato.org/sites/cato.org/files/pubs/pdf/pa383.pdf> (last visited Aug. 1, 2014)

*Education, in Relation to Academic Achievement*, at 1 (2001).<sup>17</sup> Moreover, the report found that family participation in education was twice as predictive of students' academic success as family socioeconomic status. *Id.* A more recent report analyzed national data. Andrew J. Houtenville & Karen Smith Conway, *Parental Effort, School Resources, and Student Achievement*, 43 *J. Human Resources* 437 (2008).<sup>18</sup> That report determined that increases in parental involvement have a larger positive effect on student achievement than student expenditures and parental education levels. *Id.* at 450.

Even the National Education Association (NEA)—the nation's largest teachers' union—agrees. Citing a “a synthesis of research on parent involvement over the past decade,” the NEA ties parental involvement to better grades, test scores, attendance, graduation rates, and social skills. Nat'l Educ. Ass'n, *Research Spotlight on Parental Involvement in Education*.<sup>19</sup> These findings are typical. A meta-analysis published in 2007, found similar results in virtually every study on the subject. William H. Jeynes, *Parental Involvement and Student Achievement: A Meta-Analysis*, 42 *Urban*

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<sup>17</sup> Available at [http://www.michigan.gov/documents/Final\\_Parent\\_Involvement\\_Fact\\_Sheet\\_14732\\_7.pdf](http://www.michigan.gov/documents/Final_Parent_Involvement_Fact_Sheet_14732_7.pdf) (last visited Aug. 1, 2014).

<sup>18</sup> Available at [http://econpapers.repec.org/article/uwpjhriss/v\\_3a43\\_3ay\\_3a2008\\_3ai\\_3a2\\_3ap\\_3a437-453.htm](http://econpapers.repec.org/article/uwpjhriss/v_3a43_3ay_3a2008_3ai_3a2_3ap_3a437-453.htm) (last visited Aug. 1, 2014).

<sup>19</sup> Available at <http://www.nea.org/tools/17360.htm> (last visited Aug. 1, 2014).

Educ. 82, 90 (2007). These findings consistently emerged whether the outcome measures were grades, standardized test scores, or a variety of other measures. *Id.* at 93.

In short, school choice programs, like the Choice Scholarship Program, result in more parental involvement in education, which in turn results in greater academic achievement by students. The Choice Scholarship Program will improve educational opportunities for Douglas County families.

## CONCLUSION

For the foregoing reasons, Amicus Pacific Legal Foundation respectfully requests that this Court affirm the lower court's decision.

Respectfully submitted on the 4th day of August, 2014.

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## **CERTIFICATE OF SERVICE**

I hereby certify that on August 4, 2014, I electronically filed the foregoing with the Colorado Supreme Court by using the ICCES system.

I certify that all participants in the case will be electronically served via the ICCES system.

S/ Joshua P. Thompson  
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