

**IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE**

THE METROPOLITAN
GOVERNMENT OF NASHVILLE
AND DAVIDSON COUNTY ET AL.,
Plaintiffs/Appellees,

v.

TENNESSEE DEPARTMENT OF
EDUCATION ET AL.,
Defendants/Appellants,
and

NATU BAH ET AL.,
Intervenor-
Defendants/Appellants,

No. M2020-00683-SC-R11-CV

On Appeal from the Chancery
Court of Davidson County
No. 20-0143-II

**Brief of *Amici Curiae* The Alliance for School Choice,
Southern Christian Leadership Conference-Memphis Chapter,
and Latinos for Tennessee in Support of Appellants' Application
for Permission to Appeal**

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INTERESTS OF AMICI CURIAE

Under Tennessee Rule of Appellate Procedure 31, the Alliance for School Choice (d/b/a AFC Growth Fund), the Southern Christian Leadership Conference-Memphis Chapter, and Latinos for Tennessee (collectively, the “Alliance Amici”) conditionally file this brief with a Motion for Leave to File Brief as Amici Curiae in support of Appellants’ application for permission to appeal.

The Alliance for School Choice is a 501(c)(3) organization that seeks to empower families, especially lower-income families, with the freedom to choose the best K–12 education for their children. Its affiliate, the American Federation for Children, is a 501(c)(4) organization that works to elect education reformers, pass high quality education reforms, and advocate for families’ educational options. The Alliance for School Choice works in states, including Tennessee, to provide families with resources and information on their educational options, including publicly funded school-choice programs.

Latinos for Tennessee is a nonprofit organization whose mission is to provide the Tennessee Latino community with information affecting faith, family, freedom and fiscal responsibility so they can advance their families and communities. Latinos for Tennessee believes all options have a place in our educational system.

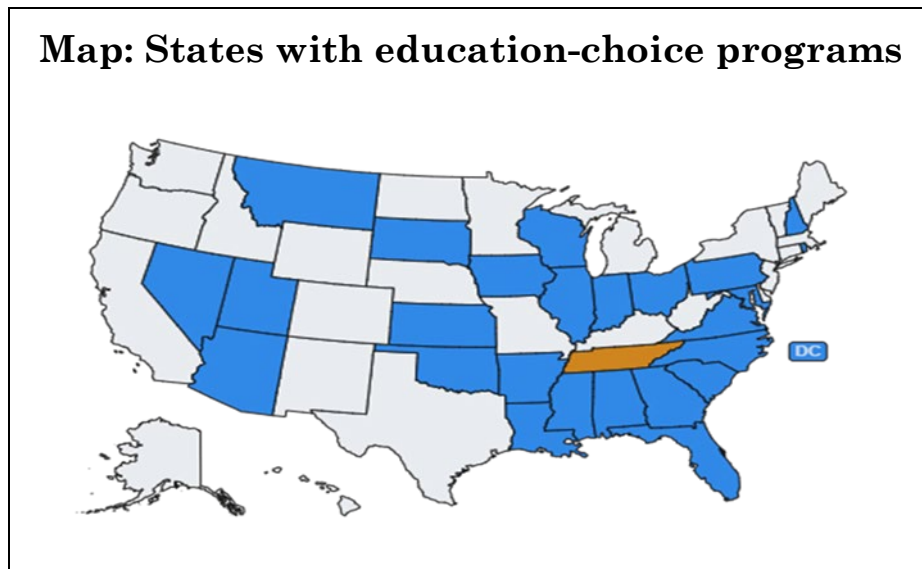
The Southern Christian Leadership Conference (“SCLC”)-Memphis Chapter, is a 501(c)(3) nonprofit, non-sectarian, inter-faith advocacy organization that is committed to nonviolent action to achieve social, economic, and political justice. The SCLC-Memphis Chapter works to

improve educational access and outcomes, increase voter registration, and stand for those on the margins of society.

For the above reasons, the Alliance Amici are interested in the outcome of this litigation and believe that their experience and expertise advocating for education reform and representing lower-income, minority, and faith-based communities will assist the Court.

INTRODUCTION

The purpose of any educational reform is to help children, especially those most in need, get a better education. School-choice initiatives like the Tennessee Education Savings Account legislation do just that—they improve educational outcomes for low-income students who are often stuck in the worst-performing schools. Indeed, an overwhelming body of evidence has shown that such initiatives improve educational outcomes for nearly *all* students, including those who participate in the choice programs and those who remain in school districts where school choice is an option. Recognizing the significant educational and societal benefits of school choice, over half the states in the nation have implemented some kind of education-choice program, as illustrated below.¹



¹ The Alliance Amici created the map for purposes of this brief using data and a similar map prepared by the American Federation for Children Growth Fund. See *2020 School Choice Guidebook*, AMER. FED’N FOR CHILD. GROWTH FUND, 6 (2020), <https://www.federationforchildren.org/wp-content/uploads/2020/11/Guidebook-20Nov13singles-1.pdf>.

Collectively, these programs have created educational options for over 500,000 students.² By enacting the Tennessee Education Savings Account Pilot Program, Tenn. Code Ann. §§ 49-6-2601 *et seq.* (“ESA Pilot Program”), Governor Lee and the General Assembly have taken the first step in joining these states.

For the past 16 years (and probably longer), Tennessee has been unable to improve the academic performance of its low-income students in public schools. The National Assessment of Educational Progress (“NAEP”), known as the “Nation’s Report Card,”³ evaluates how states perform in educating these students. The results show that Tennessee’s strategy is not working. Tennessee has ranked in the *bottom third* among states in educating low-income students, finishing 40th overall on the latest NAEP test.⁴ That ranking puts Tennessee near the bottom

² *Id.* at 6.

³ NAEP “is a congressionally mandated project administered by the National Center for Education Statistics (NCES) within the U.S. Department of Education and the Institute of Education Sciences (IES).” *About NAEP*, NAT’L CTR. FOR EDUC. STATISTICS, <https://nces.ed.gov/nationsreportcard/about/> (last visited Nov. 28, 2020). It is “the only assessment that measures what U.S. students know and can do in various subjects across the nation, states, and in some urban districts. NAEP has provided important information about how students are performing academically since 1969.” *Id.*

⁴ Mark White, *ESA program will help low-income students continue academic improvement*, TENNESSEAN (May 31, 2020, 8:00 AM), https://www.tennessean.com/story/opinion/2020/05/31/education-savings-accounts-benefit-disadvantaged-students-tennessee/5285528002/?fbclid=IwAR3BLuYLEa_fa3MZ-RH25F1_gS_zRY80N_4GnyJUJqMr-wocG3KAtJP_icY.

nationally and, as shown in the below table,⁵ well behind most of its neighboring Southeastern states.

Low Income Students - 2019	
Rank	State
5	Mississippi
7	Kentucky
12	Virginia
17	North Carolina
17	Missouri
24	Georgia
31	Arkansas
40	Tennessee
50	Alabama

Other states, however, have had much greater success. For example, Florida and Indiana have moved to the top of the list of highest-performing states, with their low-income students scoring first and third, respectively, on the latest NAEP test.⁶ How did Florida and Indiana accomplish such enviable results? Along with other reforms, both states adopted robust school-choice initiatives to empower parents with genuine choices in schools.⁷ Those reforms have, in turn, encouraged healthy

⁵ These rankings are derived from NAEP's available data for each state. See *Data Tools: State Profiles*, THE NATION'S REP. CARD, <https://www.nationsreportcard.gov/profiles/stateprofile?chort=1&sub=MAT&sj=&sfj=NP&st=MN&year=2019R3> (last visited Nov. 30, 2020). The most recent scores of each state's low-income students were averaged across the tested subjects (mathematics, reading, science, and writing). The resulting state averages were then ranked from highest to lowest.

⁶ *Id.*

⁷ Florida was among the lowest performing states on NAEP in the 1990s. Through several school-choice reforms and programs, it vaulted to the

competition and fostered innovation—both public and private—for better educational options in low-income neighborhoods.

Like the programs in Florida and Indiana, the ESA Pilot Program is narrowly tailored. The legislation implements a pilot program—defined as “[a] small test project or study to assess the feasibility of an idea, policy, product, etc.,” *Pilot*, BLACK’S LAW DICTIONARY (11th ed. 2019)—that applies to those local education agencies⁸ “that have consistently had the lowest performing schools on a historical basis.” Tenn. Code Ann. § 49-6-2611(a)(1). Importantly, the program will collect data on ESA students’ academic performance, allowing it to be compared to the performance of students who remain in public schools and to guide future policies. *See* Tenn. Code Ann. § 49-6-2611(a)(2)(A). Given the positive results of school-choice programs in other states, the Alliance Amici believe that

top three in 2018. *See* Jeb Bush, *Florida’s Rising NAEP Scores Show Education Reforms Are Working for All Students in the State*, THE 74 (Apr. 18 2018), <https://www.the74million.org/article/jeb-bush-floridas-rising-naep-scores-show-education-reforms-are-working-for-all-students-in-the-state/>. Indiana likewise has a robust school choice program. *See Indiana*, AMER. FED’N FOR CHILD., <https://www.federation-forchildren.org/state/indiana/> (last visited Nov. 28, 2020). Neither state is an outlier, as many states have seen tangible, even transformative, improvements in their educational programs through school-choice initiatives. *See Empirical Research Literature on the Effects of School Choice*, EDCHOICE, at Slide 19 (Apr. 15, 2020), [https://www.edchoice.org/school-choice/empirical-research-%20literature-on-the-effects-of-school-%20-choice/](https://www.edchoice.org/school-choice/empirical-research-%20literature-on-the-effects-of-school-%20choice/).

⁸ A local education agency is “any county school system, city school system, special school district, unified school system, metropolitan school system or any other local public school system or school district created or authorized by the general assembly.” Tenn. Code Ann. § 49-1-103(2).

that Tennessee’s ESA Pilot Program will prove equally successful and lead to similar initiatives statewide.

Unfortunately, the lower courts in this case have foreclosed the legislature’s laudable effort on dubious legal grounds. By incorrectly holding that the ESA Pilot Program violates the Home Rule Amendment, the Chancery Court and the Court of Appeals have blocked thousands of Tennessee’s most disadvantaged students from pursuing alternative educational options.⁹ And there can be no dispute as to the practical effect for those children—they will be relegated, as they have been for years, to our state’s poorest-performing schools. This case presents the Court with an opportunity to correct course and empower these students and their families to choose the best school for them. Because this case raises significant “questions of public interest,” the Alliance Amici urge this Court to grant review. *See* Tenn. R. App. P. 11(a)(3).

ARGUMENT

This Court has recognized that “[t]he value of education to each person and to society in general is immeasurably great.” *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 151 (Tenn. 1993). To obtain that

⁹ The ESA Pilot Program caps the number of participating students at 5,000 for the Program’s first year, then incrementally increases the cap up to 15,000 students for the Program’s fifth year “and for each school year thereafter.” Tenn. Code Ann. § 49-6-2604(c). By contrast, Tennessee has a statewide public-school enrollment of 1,014,502 students. *See State of Tennessee: About the state*, TENN. DEPT’ OF EDUC., <https://reportcard.tnk12.gov/state/0#:~:text=These%20priorities%20will%20guide%20us,million%20students%20across%20the%20state> (last visited Nov. 30, 2020).

immeasurably valuable quality education, students cannot be shoe-horned into a one-size-fits-all model. Quality education must be tailored to fit students' needs, as recognized by other states that have successfully implemented school-choice programs and countries around the world that follow a similar model.

At their essence, school-choice initiatives are based on two fundamental principles. *First*, not every school meets, or should be expected to meet, the needs of all students. Some schools focus on vocation and trade, others focus on college preparation; some schools excel in math and science, others emphasize the liberal and fine arts. Similarly, students have different needs: Some students need the social and extracurricular offerings found in larger schools, while others thrive in a more intimate environment. Some students have disabilities, with needs that cannot be met by traditional schools. And some parents may prefer parochial or religious education¹⁰ because those schools better reflect those families' values or better fit their children's social and educational needs.

¹⁰ Though not at issue in this case, parents using ESA funds to send their children to religious schools presents no constitutional concerns. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (“[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.”); *see also Espinoza v. Montana Dep’t of Revenue*, 140 S. Ct. 2246, 2254 (2020) (no Establishment Clause violation where “the government support makes its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools”). In fact, the legislature could not have excluded religious schools from the Pilot Program because to do so would “deny[]

Second, families, not the government, are in the best position to determine what kind of education will meet their child’s specific needs:

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

m v. Soc’y of Sisters, 268 U.S. 510, 535 (1925). But all too often lower-income families cannot fully exercise the right articulated by the Supreme Court in *Pierce*. Because alternative options are financially out of reach, these families are limited to their assigned public schools, which, in many communities, have fewer resources and struggle to help students achieve proficiency. Initiatives like the ESA Pilot Program empower such families so that choosing an appropriate school is an option for all, not merely a privilege for some. These programs provide access and options that would not otherwise be available.

* * *

In this brief, the Alliance Amici will demonstrate how the ESA Pilot Program can help Tennessee’s most at-risk kids get a better education starting this very next school year—and, longer term, help jumpstart statewide education improvements for all students. Part I demonstrates that school-choice options are needed, popular, and part of a broader

a qualified religious entity a public benefit solely because of its religious character,” which “violates the Free Exercise Clause.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017).

educational reform. It begins with data showing that Tennessee’s public schools still struggle to educate low-income and minority students. Next, it discusses the wide popularity of choice programs with parents. And finally, it explains how school-choice programs support educational pluralism and broader reforms that level the playing field for students regardless of financial means.

Part II shows the documented success of choice initiatives like the ESA Pilot Program across the country. Part II particularly emphasizes the highly successful Florida experience, both for participating students and for students as a whole, and explains how the ESA Pilot Program can encourage those same outcomes in Tennessee.

I. School-choice initiatives like the ESA Pilot Program provide families with needed—and desired—educational options and foster valuable educational pluralism.

To be eligible for the ESA Pilot Program, a student must be “a member of a household with an annual income for the previous year that does not exceed twice the federal income eligibility guidelines for free lunch.” Tenn. Code Ann. § 49-6-2602(3)(D). The Program’s income cutoff ensures that its benefits go to families who could not otherwise afford alternative educational options. Not surprisingly, parents strongly desire such options, as reflected in polling results showing the overwhelming popularity of such initiatives and the freedom to choose alternatives to traditional public schools. And beyond leveling the educational playing field, the Program more broadly encourages an educational pluralism, a system in which families can guide the educational path that best suits their

children’s needs. The ESA Pilot Program is the first step to ensuring that all Tennessee families have access to these alternatives.

A. Tennessee’s low-income and minority students still lag far behind their peers in other states, despite Tennessee’s general statewide educational progress.

Tennessee’s public schools have improved over the past decade. Since 2011, Tennessee has improved from the bottom quarter to near the middle of all states in math and reading.¹¹ Unfortunately, schools in Tennessee’s lowest-income areas have not similarly improved. Instead, those schools “have languished in the bottom third of the states for nearly two decades.”¹² That serious problem persists today in the very schools targeted by the Pilot Program. According to the Tennessee Department of Education (“DOE”), for the 2018–2019 school year:

¹¹ *Tennessee State Comparisons*, THE NATION’S REP. CARD, https://www.nationsreportcard.gov/profiles/stateprofile/overview/TN?-cti=PgTab_ScoreComparisons&chort=2&sub=MAT&sj=TN&fs=Grade-&st=MN&year=2019R3&sg=Gender%3A+Male+vs.+Female&sgv=Difference&ts=Single+Year&tss=2013R3-2019R3&sfj=NP (last visited Nov. 28, 2020). In 2011, Tennessee fourth graders scored behind their peers in 43 states in mathematics and 36 states in reading. Tennessee eighth-grade students scored behind their peers in 44 states in mathematics and 35 states in reading. *Id.* In 2019, however, Tennessee’s scores had improved. At the fourth-grade level, only 15 states outperformed Tennessee in mathematics and reading. And at the eighth-grade level, Tennessee students scored behind 22 states in mathematics and 12 states in reading. *Id.*

¹² White, *supra* note 4.

- Among *economically disadvantaged* public-school students: only 15.5% in Metro Nashville and 17.3% in Shelby County scored on track or better on annual state tests.¹³
- Among *all* public-school students: only 26.4% in Metro Nashville and 22.7% in Shelby County scored on track or better on annual state tests.¹⁴

And dishearteningly, scores are even lower for students in the Achievement School District—only 8.9% of economically disadvantaged students (and only 9.8% of all students) scored on track or better.¹⁵ These results are simply not acceptable.

Equally troubling, these numbers will almost certainly get worse this year, as COVID-19 disproportionately affects lower-income students in more populous urban areas. Lower-income parents are less likely to be able to work from home and to supervise children in remote classes. Relatedly, lower-income families often lack computers or reliable internet access at home necessary for effective virtual learning.¹⁶ Though the

¹³ *Metro Nashville Public Schools: 2018–19 Academic Achievement*, TENN. DEP’T OF EDUC., <https://reportcard.tnk12.gov/districts/190/achievement> (last visited Nov. 28, 2020); *Shelby County: 2018–19 Academic Achievement*, TENN. DEP’T OF EDUC., <https://reportcard.tnk12.gov/districts/792/achievement> (last visited Nov. 28, 2020).

¹⁴ *Id.*

¹⁵ *Achievement School District: 2018–19 Academic Achievement*, TENN. DEP’T OF EDUC., <https://reportcard.tnk12.gov/districts/985/achievement> (last visited Nov. 28, 2020).

¹⁶ Brooke Auxier, *As schools close due to the coronavirus, some U.S. students face a digital ‘homework gap’*, PEW RESEARCH CTR. (Mar. 16, 2020), <https://www.pewresearch.org/fact-tank/2020/03/16/as-schools-close-due-to-the-coronavirus-some-u-s-students-face-a-digital-homework-gap/>.

Tennessee DOE has limited data available for the 2019–20 school year,¹⁷ *The Dallas Morning News* recently described “horrifying” learning setbacks for students in the Dallas Independent School District, a large urban school district comparable to Shelby County Schools or Metro Nashville Public Schools.¹⁸ The Measure of Academic Progress assessment showed that these losses were particularly stark for Black and Latino students—in math, “the percentages of Black students reaching the ‘meets grade level’ projections ranged from 7.5% (in fourth grade) to 17.9% (in eighth grade) compared with a range of 41.8% to 61.2% for white students in the district.”¹⁹ The sobering data from Dallas forecasts similar COVID-19-related learning setbacks in the schools in Plaintiff counties.

These are the students the ESA Pilot Program is designed to help—those most in need, economically disadvantaged, and stuck in Tennessee’s worst-performing schools. Even the ESA Pilot Program’s opponents do not dispute that Tennessee’s public schools—particularly those in Plaintiff counties—are not providing low-income students with the

¹⁷ *State Report Card*, TENN. DEP’T OF EDUC., <https://www.tn.gov/education/data/report-card.html> (last visited Nov. 28, 2020). The Department states that “[a]s a result of COVID-19 and subsequent school closures, very few tests were completed across the state during the 2019–20 school year.” *Id.*

¹⁸ Corbett Smith, *Dallas students suffered ‘horrifying’ learning loss during pandemic, new data suggests*, THE DALLAS MORNING NEWS (Nov. 5, 2020, 5:30 AM), <https://www.dallasnews.com/news/education/2020/11/05-/dallas-students-suffered-horrifying-learning-loss-during-pandemic-new-tests-suggests/>.

¹⁹ *Id.*

quality education they deserve. The ESA Pilot Program simply enables low-income families to do what more affluent parents have always been able to do: choose the school that best meets the needs of their children.

B. Parents express a strong desire for school-choice options, particularly in long-underserved minority communities.

Faced with schools that are failing their children, parents want choices. When given the opportunity, parents often choose something other than their zoned public school, and they value having both public and private options, as a comprehensive annual public-opinion survey demonstrates.²⁰ In 2019, 42% of parents responded that, if given the option, their first choice would be a private school, followed by public district school (32%), public charter school (13%), and home school (13%).²¹ But many parents lack a meaningful opportunity to make that decision: Despite the preferences above, 82% of students in the United States attend a school in their local school district, while only 10% attend a private school, and 5% attend a public charter school.²²

In addition to the desire for school options expressed by parents nationwide, Tennessee voters have specifically endorsed ESA programs. In 2019, Mason-Dixon Polling & Research, Inc. conducted a statewide

²⁰ See Paul DiPerna, Andrew D. Catt, & Michael Shaw, *2019 Schooling in America: Public Opinion on K–12 Education, Busing, Technology, and School Choice*, EDCHOICE 10–17 (Oct. 2019), <https://www.edchoice.org/wp-content/uploads/2019/10/2019-9-Schooling-in-America-by-Paul-DiPerna-Andrew-Catt-and-Michael-Shaw-1.pdf>.

²¹ *Id.* at 15.

²² *Id.*

survey of 625 registered Tennessee voters.²³ 78% of those surveyed said they supported the Tennessee legislature passing an ESA program that would “allow parents to use their education tax dollars to customize their child’s learning and development.”²⁴ Support increased to 80% when voters were shown a “specific” ESA proposal that would put “\$7,500 of your own tax dollars into a bank account for you to spend on your child’s education.”²⁵

Not only do families support school choice as an abstract concept, but they are also satisfied with their actual experiences. Thirty-one surveys have polled parents of children who participate in school-choice programs, and 28 of them found that parents with children in school-choice programs were more satisfied with their current school than with their pre-program school or were more satisfied with their school than parents of non-program students.²⁶ The largest survey found that a school’s religious environment and instruction was the most important factor for parents choosing a school.²⁷ The authors of the study asked more than 14,000

²³ Shaka Mitchell, *New Poll Shows 78% of Tennesseans Support Education Savings Accounts*, AM. FED’N FOR CHILD. (Feb. 7, 2019), <https://www.federationforchildren.org/poll-tennesseans-support-education-savings-accounts/>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Empirical Research Literature on the Effects of School Choice*, *supra* note 7, at Slides 18–19. One study found no visible effect, and two studies—both of Arizona’s school-choice program—found negative effects. *Id.* at Slides 19–21.

²⁷ Jason Bedrick & Lindsey Burke, *Surveying Florida Scholarship Families*, EDCHOICE 2 (Oct. 2018), <https://www.edchoice.org/wp->

parents participating in Florida’s tax-credit scholarship program which factors most influenced their decision to choose a particular school—66% of the respondents said “religious environment/instruction,” and 52% said “morals/character/values instruction.”²⁸ No other factor was listed by more than half the respondents; the next three highest-ranked factors were “safe environment” (39%), “academic reputation” (34%), and “small classes” (31%).²⁹

C. The ESA Pilot Program fosters educational pluralism, a model that allows families to tailor their children’s education to best suit their needs.

While different families will have different preferences and needs, the ESA Pilot Program does not favor one type of school over another, leaving those decisions to parents who can best make them. Indeed, a major premise behind school-choice initiatives is that “default[ing]” families “into a one-size-fits-all model” is an unworkable approach.³⁰ Fortunately, there is an alternative: educational pluralism.

Coined by Johns Hopkins School of Education Deputy Director Ashley Rogers Berner, “educational pluralism” means “changing the structure of public education so that state governments fund and hold accountable a wide variety of schools, including religious ones, but do not

[content/uploads/2018/10/2018-10-Surveying-Florida-Scholarship-Families-byJason-Bedrick-and-Lindsey-Burke.pdf](https://www.jec.senate.gov/public/uploads/2018/10/2018-10-Surveying-Florida-Scholarship-Families-byJason-Bedrick-and-Lindsey-Burke.pdf).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Multiple Choice: Increasing Pluralism in the American Education System*, CONG. JOINT ECON. COMM. (Dec. 10, 2019), <https://www.jec.senate.gov/public/index.cfm/republicans/2019/12/multiple-choice>.

necessarily operate them.”³¹ It represents “a *different way of doing public education* by accommodating both individual belief and the common good. And it suggests a way out of the winner-takes-all mentality that characterizes so many educational debates today.”³² Rather than “pitting one sector against another”—a tactic commonly used by school-choice opponents—“pluralistic systems focus on improving each individual school.”³³

Educational pluralism is not a novel concept but rather the accepted approach in most modern democratic countries. For example, the Netherlands equally supports 35 different types of schools, while England, Belgium, Sweden, and most of the Canadian provinces “provide mechanisms for parental choice.”³⁴ In Australia, the government “has become the top funder of nonpublic schools because of those schools’

³¹ ASHLEY ROGERS BERNER, *PLURALISM AND AMERICAN PUBLIC EDUCATION: NO ONE WAY TO SCHOOL* 3 (2017).

³² *Id.*

³³ Ashley Rogers Berner, *The Case for Educational Pluralism in the U.S.*, MANHATTAN INST. (July 11, 2019), <https://www.manhattan-institute.org/educational-pluralism-in-united-states#:~:text=Educational-%20pluralism%E2%80%94%20school%20system,democratic%20norm-%20around%20the%20world>; see also ROGERS BERNER, *supra* note 31, at 2 (noting that “America’s restrictive public education system stands in sharp contrast to the educational pluralism that other democratic nations take for granted,” and that most such nations have adopted what scholar Charles L. Glenn calls a “civil society” rather than “state control” approach to education); see generally CHARLES L. GLENN, *CONTRASTING MODELS OF STATE AND SCHOOL: A COMPARATIVE HISTORICAL STUDY OF PARENTAL CHOICE AND STATE CONTROL* (1st ed. 2011).

³⁴ ROGERS BERNER, *PLURALISM AND AMERICAN PUBLIC EDUCATION*, *supra* note 31, at 2.

manifest ability to close the achievement gaps between high- and low-income students.”³⁵ And likewise, “Sweden and Poland allow per-capita funding to follow children to their schools of choice.”³⁶ Within this global context, the United States’ default, one-size-fits-all model is an outlier.

At its core, educational pluralism simply allows for a diverse approach to education so parents can find the option best suited to the needs of their child.³⁷ Programs like the ESA Pilot Program support such pluralism by giving families who could not afford the “best suited” school the means to do so. Without such support, children will be left with the default option of a public-school district, which may not meet their particular needs and may prevent them from reaching their full potential.

II. School choice initiatives improve education performance and outcomes.

School-choice programs are not just popular—they work. Consistent research shows that expanding educational choices for children improves academic outcomes for the participating students. School-choice initiatives also act as “the rising tide that lifts all ships,” leading to desirable outcomes for the entire educational system. In nearly every study to examine the issue, school-choice programs not only improve participating-student performance but have a positive or neutral effect on the students who remain in the local public schools. And that same

³⁵ Rogers Berner, *The Case for Educational Pluralism in the U.S.*, *supra* note 33.

³⁶ *Id.*

³⁷ *Id.*

empirical data shows other benefits as well, including fiscal benefits to taxpayers and the public-school system, improved civic values and practices of students, and decreased racial segregation in schools.³⁸

A. Research shows that school choice improves academic outcomes and long-term education attainment for students: the Florida experience.

Florida has succeeded in improving its students' educational outcomes, the primary metric used to assess schools. As one of the most diverse states, Florida is an ideal testing ground to study the effects of education reform. About 2.85 million students are enrolled in Florida public schools.³⁹ Of those students, about 1.8 million (~60%) are minorities.⁴⁰ Roughly 10% of all Florida public-school students are English-language learners, and over 50% are “economically disadvantaged,” defined as “eligible for free and reduced price meals under the National School Lunch Program.”⁴¹ Based on these figures, Florida is a good representative sample of our racially, linguistically, and economically diverse country.

³⁸ Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Choice*, THE FRIEDMAN FOUND. FOR EDUC. CHOICE 2 (May 2016), <http://www.edchoice.org/wp-content/uploads/2016/05/2016-5-Win-Win-Solution-WEB.pdf>.

³⁹ See *PK-12 Public School Data Publications and Reports*, FLA. DEP'T OF EDUC., <http://www.fldoe.org/accountability/data-sys/edu-info-accountability-services/pk-12-public-school-data-pubs-reports/students.stml> (data from “Membership in Florida Public Schools, Final Survey 2, 2019-20 (Excel)” spreadsheet) (last visited Nov. 29, 2020).

⁴⁰ *Id.*

⁴¹ *Florida's PK-12 Education Information Portal: Enrollment*, FLA. DEP'T OF EDUC., <https://edstats.fldoe.org/SASWebReportStudio/gotoReportSection.do?sectionNumber=1> (last visited Nov. 29, 2020) (“State Level” tab);

In the late 1990s, Florida was ranked at or near the bottom nationally in various metrics measured by NAEP. At the time, *nearly half* of Florida’s fourth-graders were functionally illiterate.⁴² Through several pro-school-choice measures starting in 1999, Florida dramatically improved the state’s educational outcomes. Twenty years later, on the 2019 NAEP, Florida’s fourth-graders outperformed the national average across subject areas, while its eighth-graders performed above the national average in writing and at the national average in reading, mathematics, and science.⁴³

Florida’s students are not just outperforming other states’ students, they are improving at a quicker pace than the rest of the country. From 1992 to 2015, “Florida students posted the greatest gain on the Grade 4 NAEP Reading assessment”—up 19 scale score points, versus an average improvement nationally of just 5 scale score points.⁴⁴ Florida also

Definitions, FLA. DEP’T OF EDUC. 2, <https://edstats.fldoe.org/portal%20pages/Documents/Definitions.pdf> (last visited Nov. 29, 2020).

⁴² Bush, *supra* note 7.

⁴³ *Florida Summary Statements*, THE NATION’S REP. CARD, https://www.nationsreportcard.gov/profiles/stateprofile/overview/FL?cti=PgTab_Findings&chort=1&sub=MAT&sj=FL&fs=Grade&st=MN&-year=2019R3&sg=Gender%3A+Male+vs.+Female&sgv=Difference&ts=Single+Year&sfj=NP (last visited Nov. 29, 2020).

⁴⁴ *Florida vs. Top 7 Performing States: Comparing Florida’s 2015 NAEP Scores with the Seven Top-Performing States and the Nation*, NAT’L ASSESSMENT OF EDUC. PROGRESS 2 (2015) <http://www.fldoe.org/core/file-parse.php/7667/urlt/2015TopSeven.pdf>. This improvement was also “significantly greater than that of six of the seven top-performing states.” *Id.* at 11.

outperformed the national average in increases for the other three areas tested: eighth-grade reading (10 points versus 3 points nationally), fourth-grade math (29 points versus 21 points nationally), and eighth-grade math (15 points versus 14 points nationally).⁴⁵ These results show that Florida now ranks among top states in the country in educational performance.⁴⁶

Florida's growth has also outpaced the national average in demographic sub-groups with historically low proficiencies. Since 1998, Black and Hispanic eighth-grade students in Florida have improved their NAEP math scores by 28 points and 30 points, respectively, while eighth-grade math scores nationwide have improved by only 19 points.⁴⁷ In reading, an area that has seen *no* improvement nationwide since 1998, Florida's Black and Hispanic eighth-graders have improved their NAEP scores by 12 points.⁴⁸

⁴⁵ *Id.* at 2 (“Overall, Florida has made some remarkable gains in both mathematics and reading since the 1990s.”).

⁴⁶ It is also important to understand Florida's strong performance in context. Florida has a larger student population than any of the seven highest-performing states (almost twice as many students as New Jersey, which has the largest student population in the top seven), the highest percentage of students who qualify for the national school lunch program (57.5%), the highest percentage of students who are English Language learners (8.7%), and the highest percentage of students who identify as Hispanic (29%). *Id.* at 2-3.

⁴⁷ Patrick R. Gibbons, *NAEP 2019: Where Does Florida Stand*, REDEFINED (Nov. 5, 2019), <https://www.redefinedonline.org/2019/11/naep-2019-where-does-florida-stand/>.

⁴⁸ *Id.*

Florida’s success reflects its commitment to education reform, including school choice. Florida’s rise coincided with reforms that primarily focused on providing broader school choices to families. In 1999, few school-choice options were available in Florida; by 2013, Florida reported that over 27% of its students “have chosen a school other than the one to which they were assigned.”⁴⁹ Florida also has been the nation’s leader in *private* school-choice options.⁵⁰ As of 2020, approximately 173,000 children received scholarships to participate in private school-choice programs—by far the largest number of scholarships offered in any state.⁵¹ The largest of these scholarship programs is the Florida Tax Credit Scholarship, which provided more than 109,000 students scholarship funds in the 2019–2020 school year,⁵² while thousands more participate

⁴⁹ *School Choice Options: Florida Continues to Lead the Nation*, FLA. DEPT’ OF EDUC. 1 (Mar. 2015), <http://www.fldoe.org/core/fileparse.php/7553/urlt/2015ChoiceOptionsBook.pdf>.

⁵⁰ Public and private school-choice programs differ. Public school choice includes programs like open enrollment and charter schools. Private school choice encompasses initiatives that allow families to access tuition-based private schools, including tax credit scholarships, education scholarship accounts, and voucher programs. See *The School Choice Fact Sheet 2019*, AMER. FED’N FOR CHILD. (2019), <https://www.federation-forchildren.org/wp-content/uploads/2016/09/AFC-School-Choice-Fact-Sheet-6-2019.pdf> (last visited Nov. 29, 2020).

⁵¹ *2020 School Choice Guidebook*, *supra* note 1, at 23–27.

⁵² *Florida Tax Credit Scholarship Program Quarterly Report*, FLA. DEPT’ OF EDUC. 3 (Feb. 2020), <http://www.fldoe.org/core/fileparse.php/7558/urlt/FTC-Feb-2020-Q-Report.pdf>.

in the McKay and Gardiner Scholarships, which specifically benefit students with special needs.⁵³

Florida is not the only state with a robust school-choice program that has sparked outstanding academic results for its low-income students. In Indiana, for example, over 36,000 students participated in the state's Choice Scholarship Program in the 2019–2020 school year.⁵⁴ On the most recent NAEP test, low-income students in both Florida and Indiana posted impressive academic performances, improving on each test for the last 16 years. Disadvantaged students in Florida ranked first in the country on the nation's scorecard and those in Indiana ranked third.⁵⁵ By contrast, as noted above, Tennessee's low-income students have languished in the bottom third among states for nearly 20 years and ranked 40th in the country on the latest test.⁵⁶ The following chart⁵⁷ illustrates just how significant this discrepancy is:

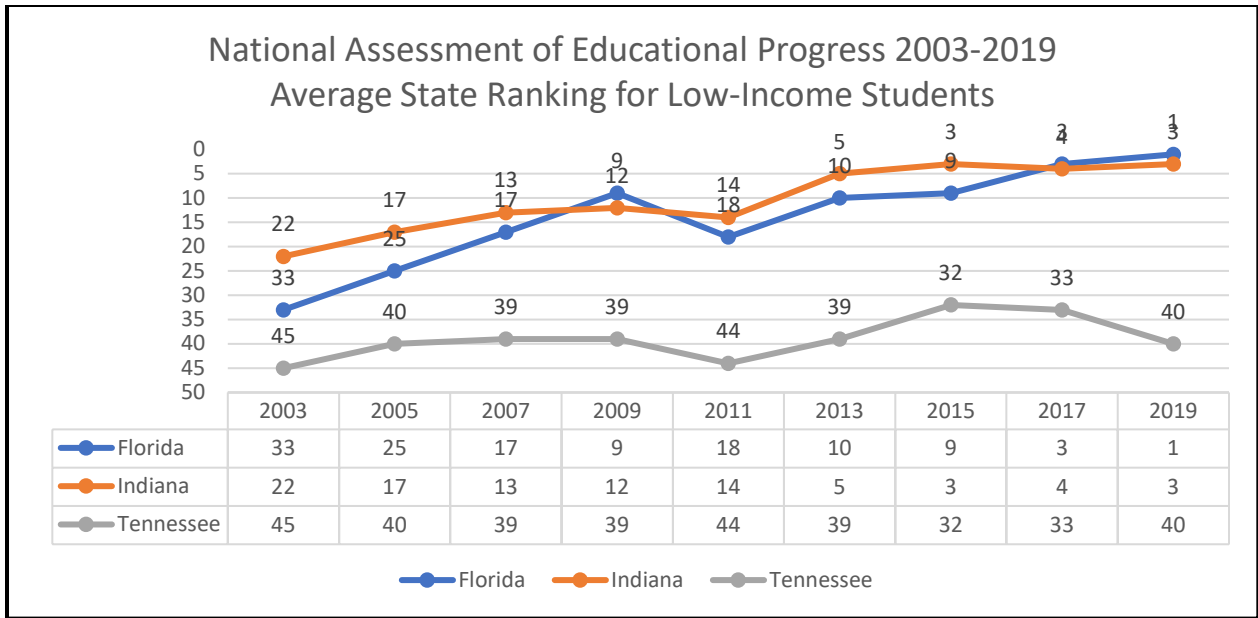
⁵³ *McKay Scholarship*, FLA. DEPT OF EDUC., <http://www.fldoe.org/schools/school-choice/k-12-scholarship-programs/-mckay/> (last visited Nov. 29, 2020); see also *The Gardiner Scholarship Program*, FLA. DEPT OF EDUC., <http://www.fldoe.org/schools/school-choice/k-12-scholarship-programs/gardiner/> (last visited Nov. 29, 2020).

⁵⁴ *Choice Scholarship Program Annual Report: Participation and Payment Data*, IND. DEPT OF EDUC. (June 2020), <https://www.doe.in.gov/sites/default/files/choice/annual-report-june.pdf>.

⁵⁵ See *supra* note 5 (describing the NAEP source data and methodology to obtain the listed rankings).

⁵⁶ White, *supra* note 4.

⁵⁷ See *supra* note 5 (describing the NAEP source data and methodology to obtain the listed rankings).



B. Other states have seen similar improvement through school-choice initiatives.

Florida and Indiana are not alone: The benefits of their school-choice options have inspired reform in other states. Today, 26 states, including South Carolina, Mississippi, Georgia, North Carolina, and Washington, D.C., have some form of private school-choice options for students, with policies ranging from tax-credit and opportunity scholarships, to vouchers and education scholarship accounts.⁵⁸ In all, approximately 576,425 American students participate in private school-choice programs.⁵⁹ These programs are almost exclusively tailored to help low-

⁵⁸ *2020 School Choice Guidebook*, *supra* note 1, at 6.

⁵⁹ *Id.* at 8.

income families whose income varies from 133% to 300% above the federal poverty level.⁶⁰

Data shows that school-choice programs in other states also have significantly improved academic outcomes. Empirical studies on the effect of school-choice options in multiple states overwhelmingly show that choice options improve outcomes for participating students. Of the 17 empirical studies to date, 11 have found that school choice improves students' academic outcomes.⁶¹ For example, a 2013 study of a Washington, D.C. voucher program found a significant improvement in reading proficiency.⁶² Additionally, a study of a New York City voucher program for low-income elementary school students found that African-American

⁶⁰ *Who Uses School Choice Programs?*, EDCHOICE, <https://www.edchoice.org/engage/faqs/who-uses-school-choice-programs/> (last visited Nov. 29, 2020). For example, the Florida Tax-Credit Scholarship Program “limits participation to students from families earning up to 260 percent of the federal poverty level . . . with first priority given to students from families earning up to 185 percent of the federal poverty level.” *Id.* Other states' scholarship programs have similar limits. *See id.*

⁶¹ *Empirical Research Literature on the Effects of School Choice*, *supra* note 7, at Slide 9. Four studies found no visible effect, and three studies found negative effects. *Id.* The exceptions are two studies of Louisiana's voucher program and one analysis of Milwaukee's voucher program. *Id.* at Slide 10. The positive-outcomes data extend beyond educational outcomes. Among 100 studies conducted on the effect of school-choice options, 87 have shown some sort of positive effects on students, with only three purporting to find a negative effect and the remaining ten finding no significant effect. *See* Forster, *supra* note 38, at 2.

⁶² Patrick J. Wolf et al., *School Vouchers and Student Outcomes: Experimental Evidence from Washington, D.C.*, 32 J. OF POL'Y ANALYSIS & MGMT. 246 (2013).

students who received vouchers to attend private school were 24% more likely to attend college than those in a control group and 58% more likely to attend private four-year colleges.⁶³ Other, more recent studies of New York City voucher programs found similar results—that school-choice has a positive effect on college enrollment and attainment rates for some or all participating students and no negative effect for any student group.⁶⁴ The most recent analysis of the program found significant effects on high-school graduation and college enrollment rates among students from moderately disadvantaged households.⁶⁵

C. School choice has a positive effect on academic outcomes for students who remain in their local public schools.

The ultimate goal of school-choice programs is to improve students' education. Any education initiative should improve education for *all* children—both those in the program who chose other schools and those who remained in their zoned public schools. Fortunately, studies show that the competitive pressures put on public schools by school-choice options lead to improved outcomes at local public schools.⁶⁶

⁶³ Sarah Carr, *Study: African American voucher students more likely to go to college*, THE HECHINGER REP. (Aug. 27, 2012), <https://hechingerreport.org/study-voucher-students-more-likely-to-go-to-college/>.

⁶⁴ Forster, *supra* note 38, at 12–14.

⁶⁵ Albert Cheng, Matthew M. Chingos, & Paul E. Peterson, *Experimentally Estimated Impacts of School Vouchers on Educational Attainments of Moderately and Severely Disadvantaged Students* (Program on Educ. Policy and Governance Working Paper Series, Working Paper No. 19-02, 2019).

⁶⁶ *Empirical Research Literature on the Effects of School Choice*, *supra*

Competition fosters innovation: When leaders of public schools know that students are free to choose any school, they are incentivized to improve performance so that they can retain and attract students. Empirical data again bears this out. Numerous studies show a positive effect on public-school academic performance that is at least as strong as the effect on children who participate in the school-choice program. Twenty-seven studies have examined this question with appropriate methodological techniques. All but two—92.5%—have found that school-choice programs improve overall academic performance at public schools.⁶⁷ One study (of Florida programs) found reading and math improvements among public-school students on five separate measures of private-school competition.⁶⁸ Another study of school vouchers found that when low-performing schools became eligible to receive funds, changes in the schools’ institutional practices resulted in improved student performance.⁶⁹ These studies represent the large body of academic work that overwhelmingly and credibly shows, through empirical data, that expanding school-choice options enhances educational quality across the board.

note 7, at Slides 23–28; *The 123s of School Choice: What the Research Says About School Choice Programs in America*, EDCHOICE 32–39 (2020), <https://www.edchoice.org/wp-content/uploads/2020/04/123s-of-School-Choice-2020-4.pdf>.

⁶⁷ *The 123s of School Choice*, *supra* note 66, at 32. Of the two remaining studies, one found no visible effect, and one found a negative effect. *Id.*

⁶⁸ Forster, *supra* note 38, at 17.

⁶⁹ *Id.*

Opponents of school choice often retort that school choice will harm public schools by drawing down public-school funds. But years of evidence shows just the opposite. In the last 20 years, 55 studies have examined the fiscal effect of school-choice programs.⁷⁰ Of those, 49 showed a net-positive fiscal effect on public-school funding, four showed a neutral effect, and only two showed a net-negative effect.⁷¹ To quantify that effect, one study estimates that school-choice options nationwide have saved local districts around \$444 million since 1990.⁷² Florida’s experience, once again, is instructive as its school-choice options have financially benefited both taxpayers and public schools.⁷³ And most specifically, a recent study that examined the ESA Pilot Program’s fiscal effect

⁷⁰ *The 123s of School Choice*, *supra* note 66, at 61.

⁷¹ *Id.*

⁷² See Susan Aud, *School Choice by the Numbers: The Fiscal Effect of School Choice Programs, 1990-2006*, FRIEDMAN FOUND. FOR EDUC. CHOICE 37 (Apr. 2007), <http://www.edchoice.org/wp-content/uploads/2015/09/Education-by-the-Numbers-Fiscal-Effect-of-School-Choice-Programs.pdf>.

⁷³ Forster, *supra* note 38, at 17; *The 123s of School Choice*, *supra* note 66, at 34; see also *Scholarship Tax Credits*, NAT’L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/education/school-choice-scholarship-tax-credits.aspx> (last visited Nov. 29, 2020) (stating that “a nonpartisan analysis of the Florida Tax Credit Scholarship Program” “reported for every \$1 spent on the tax credit program, Florida taxpayers saved an estimated \$1.49”).

found that the Program would save Metro Nashville over \$500 per student and Shelby County over \$2,000 per student.⁷⁴

* * *

Recognizing Tennessee’s K-12 educational challenges and other states’ successes, then-gubernatorial candidate Bill Lee campaigned in 2018 on school choice. After the election, Governor Lee and the General Assembly formulated and enacted the ESA Pilot Program in 2019. Now, up to 15,000 students from disadvantaged backgrounds in Davidson and Shelby counties and the Achievement School District have genuine choices in K-12 schools for the first time. But those choices—and the educational hopes that come with them—are at risk in this case if the Appellees prevail. While other parties will address the constitutional issues related to the Home Rule Amendment, there can be no mistake as to the underlying policy effect of the lower courts’ decisions: without broad educational reform, including school choice, another generation of Tennessee’s poorest students will be abandoned in failing schools.

CONCLUSION

School-choice programs work. They empower parents with resources to choose schools that better fit their children. They foster competition and educational innovation, requiring public and private schools alike to create new and better educational options to attract students and meet the demand for higher-performing schools. Initiatives like the ESA

⁷⁴ Jason Edmonds, *Evaluating ESAs in the Volunteer State*, BEACON CTR. OF TENN. 8–9 (Nov. 12, 2020), <https://www.beacontn.org/wp-content/uploads/2020/10/Evaluating-ESAs-in-the-Volunteer-State.pdf>.

Pilot Program, already in place in states across the nation, have a demonstrable track record of improving student outcomes—particularly for low-income, at-risk, or minority students. These programs provide families the kinds of educational opportunities that traditionally have been available only to families of greater financial means. Research has produced statistically valid, reliable reasons why parents favor school-choice programs and why including private schools is important to parents. The initiatives consistently produce quality outcomes, allow parents to tailor their children’s education to their individual needs, and benefit to the public-school system and broader community generally.

For these reasons, the Alliance Amici respectfully request that the Court grant review and reverse the Court of Appeals.

Respectfully submitted,

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s/ Ty E. Howard

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served in accordance with Tenn. S. Ct. R. 46A through the Court’s e-filing system and was forwarded to the attorneys listed below via e-mail.

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on this the 1st day of December, 2020.

s/ Ty E. Howard

Ty E. Howard