

No. 18-1195

In The
Supreme Court of the United States

KENDRA ESPINOZA, et al.,

Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE, et al.,

Respondents.

**On Writ of Certiorari to the
Supreme Court of the State of Montana**

**BRIEF AMICUS CURIAE OF JERRY
AND KATHY ARMSTRONG, LASHAWN ROBINSON,
GWENDOLYN SAMUEL, YI FANG CHEN, AND
PACIFIC LEGAL FOUNDATION IN SUPPORT
OF PETITIONERS**

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INTERESTS OF AMICI CURIAE¹

Jerry and Kathy Armstrong, Lashawn Robinson, Gwendolyn Samuel, Yi Fang Chen, and Pacific Legal Foundation respectfully submit this brief amicus curiae in support of Petitioners Kendra Espinoza, Jeri Ellen Anderson, and Jaime Schaefer.

Jerry and Kathy are parents of a son who had attended Valley Christian School in Missoula, Montana. Represented by Pacific Legal Foundation, Jerry and Kathy had challenged the Montana Department of Revenue rule at issue in this case in federal court. Although their federal court claim was dismissed on jurisdictional grounds, the Armstrongs still believe in Montana's tax-credit scholarship program and wish to support it however they can. *See Armstrong v. Walborn*, 743 Fed. Appx. 83 (9th Cir. July 19, 2018) (dismissing the Armstrongs' claims under the Tax Injunction Act). As parents who would have sought scholarship assistance for their son and as taxpayers who would utilize the tax credit at issue here, they have an interest in the outcome of this case.

Lashawn Robinson is the mother of five children who attend or have attended Hartford Public Schools. Ms. Robinson has seen first-hand the opportunities that school choice can provide. PLF currently represents Ms. Robinson in her lawsuit to expand educational opportunity for Hartford families. *See*

¹ Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to the brief's preparation or submission. The parties have filed letters with the clerk consenting to the filing of amicus briefs.

Robinson, et al. v. Wentzell, et al., 3:18-cv-00274 (D. Conn. filed Feb. 15, 2018).

Gwen Samuel is the mother of a child that attends a Connecticut public school. Ms. Samuel is an advocate for educational freedom, and currently serves as the president of Connecticut Parents Union, an organization she founded in 2011. The Connecticut Parents Union's objective is to ensure that neither race, zip code, nor socio-economic status is a predictor of a child's success. Pacific Legal Foundation currently represents Connecticut Parents Union in a lawsuit that seeks to expand the educational choices of parents in Connecticut. *See Connecticut Parents Union v. Wentzell*, 3:19-cv-00247 (D. Conn. filed Feb. 20, 2019).

Yi Fang Chen is a mother of a first grader at P.S. 105 in Brooklyn. Ms. Chen was born in China and moved to the United States in 1996. Although she came to this country speaking little English, she eventually obtained a doctorate in statistics from Stanford University, and now works as a data scientist in Manhattan. PLF currently represents Ms. Chen in a lawsuit that seeks to expand the educational choices of parents in New York City. *See Christa McAuliffe Intermediate School PTO, Inc., et al. v. De Blasio, et al.*, 1:18-cv-11657 (S.D.N.Y. filed Dec. 13, 2018).

Founded in 1973, Pacific Legal Foundation is the oldest and most experienced public interest law foundation of its kind. Pacific Legal Foundation provides a voice for Americans who believe in limited government and individual liberty.

Pacific Legal Foundation has participated as amicus curiae in many cases before this Court involving K-12 education reform, including *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011) (tuition tax credit); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Ohio voucher program); and *Mitchell v. Helms*, 530 U.S. 793 (2000) (state and federal school aid programs). Additionally, PLF has filed amicus briefs in numerous state courts, including *Magee v. Boyd*, 175 So. 3d 79 (Ala. 2015) (scholarship program); *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013) (school voucher program); *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009) (school voucher program); and *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006) (opportunity scholarship program).

SUMMARY OF ARGUMENT

Parents want choice. They know their children, they understand the stakes, and they have the intelligence and devotion to make the wisest choice for their family's needs. Sadly, too many disadvantaged families have no choice but to send their children to failing schools. Many states, however, give hope to these parents through school vouchers, education savings accounts, and tax-credit scholarship programs. Tragically, discriminatory state constitutional provisions—like Montana Const. art. X, § 6—act as barriers that prevent educational choice from saving students stuck in failing schools. School choice opponents have dusted off these relics from our prejudiced past and retrofitted them as a political weapon to defeat wide support for choice and stymie educational opportunity for our nation's most vulnerable children. This Court should hold that these

discriminatory constitutional provisions violate the United States Constitution.

ARGUMENT

I. Parents have a right to choose the best education for their children

The right, responsibility, and privilege of educating children rests with parents, not the government. “The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925). In rising to this high duty, parents want and deserve a wide menu that reflects the realities of diverse learning styles, needs, and priorities. After all, part of the parental right to educate their children includes fighting for an “education suitable to their station in life.” *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). The state’s role in education should therefore be to offer parents the power to set the course of their children’s schooling.

Yet not all parents have the resources necessary to tailor their child’s education to her needs. Parents of disadvantaged children are overwhelmingly more likely to end up trapped in underperforming schools. Unsurprisingly, Blacks and Hispanics rate the public schools in their communities more harshly than whites. See 2019 Annual EducationNext Poll.² Unsurprisingly then, minority parents tend to favor school choice programs more than other parents. While 59% of all parents support tax-credit programs

² Available at <https://www.educationnext.org/2019-ednext-poll-interactive/>.

like Montana's, 66% of Blacks and 67% of Hispanics support such programs, significantly higher than the support of whites.³ *Id.* Likewise, while 56% percent of parents support publicly funded assistance to private schools generally, there is a marked disparity in support among racial groups: only 42% of whites support such programs, while 66% of Blacks and 69% of Hispanics support them. *Id.* Multiple surveys demonstrate similar results. See Neal McCluskey, *African Americans Speak for Themselves: Most Want School Choice*, Cato at Liberty (July 25, 2017).⁴ Moreover, these statistics have demonstrated steady growth in support for choice programs. See Michael B. Henderson, et al., *Public Support Grows for Higher Teacher Pay and Expanded School Choice*, EducationNext, Winter 2020, Vol. 2, No. 1;⁵ EducationNext Annual Poll: Trends Through 2019, EducationNext.⁶

Consistent with this data, school choice programs tend to attract students from disadvantaged backgrounds. Patrick J. Wolf, *Programs Benefit Disadvantaged Students*, EducationNext, Spring 2018, Vol. 18, No. 2;⁷ Corey DeAngelis, *Vouchers Tend to Serve the Less Advantaged*, EducationNext

³ Interestingly, this disparity grew when asked whether respondents would support a federal tax-credit program. Sixty-three percent of parents supported such an idea, with 53% of whites supportive, 69% of blacks, and 67% of Hispanics. *Id.*

⁴ Available at <https://www.cato.org/blog/african-americans-speak-themselves-most-want-school-choice>.

⁵ Available at <https://www.educationnext.org/school-choice-trump-era-results-2019-education-next-poll/>.

⁶ Available at <https://www.educationnext.org/ednext-poll-interactive-trends-through-2019-public-opinion/>.

⁷ Available at <https://www.educationnext.org/programs-benefit-disadvantaged-students-forum-private-school-choice/>.

(March 8, 2018).⁸ Hence, “the evidence seems to suggest that the families that are most in need of school choice—minorities, low-income households, and students with lower prior academic achievement—are more likely to apply.” *Id.*

II. Choice programs allow parents to select a school that will let their children thrive

Not only do parents want choice, the success of school choice programs indicates that they know how to use choice to the benefit of their children. “The evidence suggests that even the least advantaged families tend to do a better job than standardized tests at identifying schools that produce the outcomes that matter. Parents know better than do the critics who doubt they can choose the right schools for their children.” Jason Bedrick & Corey A. DeAngelis, *Parents Know Better Than Standardized Tests*, Wall St. J., Aug. 28, 2019.⁹ Children who participate in school choice programs tend to thrive, and this is particularly true of the children who yearn for choice the most—disadvantaged families. *See id.*; Wolf, *supra*.

Participants in private-school-choice programs tend to perform better than their public-school peers. Existing research indicates that voucher programs, for example, have a positive effect on test scores. EdChoice, *123s of School Choice* 11 (2019 ed.).¹⁰ The

⁸ Available at <https://www.educationnext.org/vouchers-tend-serve-less-advantaged/>.

⁹ Available at https://www.wsj.com/articles/parents-know-better-than-standardized-tests-11567033335?reflink=share_mobilewebshare.

¹⁰ Available at <https://www.edchoice.org/wp-content/uploads/2019/04/123s-of-School-Choice.pdf#page=10>

benefits of school choice grow as one looks further into the future. Studies have found that school choice participants fare better in terms of ultimate educational attainment—high school graduation, college graduation, and so on. Wolf, *supra*. Participation in Florida’s tax credit scholarship program, for instance, increased the college enrollment rate by 15% to 43% depending on how long the student participated in the program. *Id.* And a study of Washington, D.C.’s Opportunity Scholarship Program, which gives low-income families choice, raised the likelihood that participating students would complete high school by 12%. *See* Patrick Wolf, et al., U.S. Dep’t of Educ., *Evaluation of the D.C. Opportunity Scholarship Program: Final Report* 41 (June 2010).¹¹ Another study on the same program concluded that the use of vouchers increased the likelihood of high school graduation by 21%. *See* Patrick J. Wolf, et al., *School Vouchers and Student Outcomes: Experimental Evidence from Washington, D.C.*, 32 *J. Pol’y Analysis & Mgmt.* 246 (2013). A study in Milwaukee revealed similar results. *See* Joshua M. Cowen, et al., *School Vouchers and Student Attainment*, 41 *Pol’y Stud. J.* 147, 161 (2013). Students who used vouchers were more likely to graduate from high school, enroll in a four-year university, and remain enrolled in that university. *Id.*

And, beyond that, school choice tends to improve the overall arc of the student’s life. Choice students tend to rise above social problems that often plague disadvantaged populations, such as teen pregnancy, incarceration, low income, and poor health. *See* Corey

¹¹ Available at <https://ies.ed.gov/ncee/pubs/20104018/pdf/20104018.pdf>.

DeAngelis, *Parents don't care about standardized test scores, and parents shouldn't either*, Wash. Examiner, Aug. 7, 2019.¹² School choice also cultivates civic values “such as political tolerance, volunteering in one’s community, political knowledge, political engagement, social capital, and patriotism.” Patrick J. Wolf, *Article on School Choice Ignores Key Evidence*, EducationNext (Feb. 6, 2019).¹³

Recent studies of choice programs in Colombia and Barbados likewise demonstrate how school choice is a boon to low-income students. The Colombia study showed that kids who won a voucher lottery were 17% more likely to complete high school on time than kids who lost the lottery. Bedrick & DeAngelis, *supra*. The lottery winners also earned 8% more than lottery losers by age 33. *Id.* The researchers found that vouchers “greatly increased” the chance that low-income students would break into the middle class. *Id.* The Barbados study found that “attending schools chosen by parents improved student well-being significantly, based on an index of educational attainment, occupational rank, earnings and health.” *Id.*

Choice programs that place private school options within reach also benefit LGBTQ students. The Gay, Lesbian & Straight Education Network’s annual survey of school climate has consistently found that students at private school enjoy a better environment

¹² Available at <https://www.washingtonexaminer.com/opinion/parents-dont-care-about-standardized-test-scores-and-experts-shouldnt-either>.

¹³ Available at <https://www.educationnext.org/article-school-choice-ignores-key-evidence-existing-body-research-impact-vouchers-deep-broad/>.

than their public-school peers. *See* Gay, Lesbian & Straight Education Network, 2017 National School Climate Survey 109-12 (2018).¹⁴ LGBTQ students fare better at private schools in multiple respects: LGBTQ kids at public school are more likely to hear biased language than students at private schools, both religious and nonreligious. *Id.* at 110. Likewise, LGBTQ students experience less bullying at private schools because of sexual orientation or gender identity than their public-school peers. *Id.* Private nonreligious schools were also more likely to have better resources for LGBTQ students. *Id.* at 111-12.

Parents of disadvantaged students want opportunities for their kids. They know what’s at stake, and they know their children. This Court has the chance to decide whether states will be allowed to give these parents the opportunity they want so their children can enjoy a brighter future.

III. Parents fighting for choice in Connecticut and New York demonstrate why choice programs are essential

Minority parents in Connecticut and New York are among the many parents fighting for choice for their kids. Their stories demonstrate how parents struggle against barriers to choice as they fight to fulfil their “high duty” to educate their children. *Pierce*, 268 U.S. at 535.

In Hartford, Connecticut, magnet schools offer students a bright alternative to traditional neighborhood schools that, all too often, fail to serve the students’ needs. The differences are stark. Many

¹⁴ Available at <https://www.glsen.org/sites/default/files/GLSEN-2017-National-School-Climate-Survey-NSCS-Full-Report.pdf>.

of the neighborhood schools are failing, and some are “housed in half-empty buildings that the city schools chief acknowledged were ‘crumbling.’” Vanessa De La Torre, *Left Behind: 20 Years After Sheff v. O’Neill, Students Struggle in Hartford’s Segregated Neighborhood Schools*, Hartford Courant, March 12, 2017.¹⁵ The schools are plagued by “thinning resources,” and “test scores have hit rock bottom.” *Id.* A district assessment at one school “revealed that just one student in [the school’s] entire third grade could read with proficiency.” *Id.*

School choice gives families with children stuck in these failing neighborhood schools hope for a better future. Hartford’s world-class magnet schools provide students with the tools they need to accomplish their goals. Aspiring astronomers might choose a magnet school with a planetarium. Aspiring biologists, a school with a butterfly vivarium and an indoor waterfall. Martin Kaufman & Vanessa De La Torre, *Beyond Reach: Even as Magnet Schools Seats Remain Empty, Racial Quotas Keep Many Black, Latino Students Out*, Hartford Courant, March 13, 2017.¹⁶ In all, magnet schools provide the hope and the resources that are lacking in traditional neighborhood schools.

PLF clients like Lashawn Robinson and Gwendolyn Samuel understand what school choice means to their children and to their community. They are fighting against a racial quota that keeps Black and Hispanic students out of world-class schools with empty seats. *See Robinson v. Wentzell*, No. 3:18-cv-

¹⁵ Available at <https://www.courant.com/education/hc-sheff-left-behind-day-1-20170319-story.html>.

¹⁶ Available at <https://www.courant.com/education/hc-sheff-lottery-empty-seats-day-2-20170313-story.html>.

00274, 2019 WL 1207858, at *2-3 (D. Conn. March 14, 2019). By Connecticut’s own estimate, there are “perhaps as many as 1,165 Hartford public school students” that could be “placed in the magnet schools.” *Sheff v. O’Neill*, No. LNDCV175045066S, 2017 WL 4812624, at *3 (Conn. Super. Ct. Aug. 7, 2017) (unpublished op.).

Access to these schools is vital to many Hartford families—including PLF clients. Among them is a mother whose child was sent to a school where bullying, chaos, and confusion have all but sapped his will to learn. *Robinson v. Wentzell*, 3:18-cv-274, ECF No. 1 ¶ 3. Another is a mother who emigrated from Puerto Rico so that she could give her daughters a better education. *Id.* Still another is a mother whose child has been ranked between 8th and 15th on three different magnet school waiting lists, but who has never received the dream phone call that would give him a shot at the future he deserves. *Id.*

New York parents face a similar struggle. The City’s Specialized High Schools are well-known as some of the most rigorous and prestigious secondary schools in the United States. Among them are brand names like Stuyvesant High School, Bronx High School of Science, and Brooklyn Technical High School. Stuyvesant has produced four Nobel Laureates and numerous leaders in various fields. *See* Stuyvesant High School, *History of the School*.¹⁷ Bronx Science has produced eight Nobel Laureates — more than any other secondary school in the United States. *See* Bronx High School of Science, *The Bronx High School of Science has produced 8 Nobel*

¹⁷ Available at https://stuy.enschool.org/m/pages/index.jsp?uREC_ID=126631&type=d&pREC_ID=251657&hideMenu=1.

Laureates.¹⁸ Brooklyn Tech far exceeded national averages on the SAT, a feat even more remarkable, given that over 60% of the school's 5,838 students are economically disadvantaged. NY State Educ. Dep't, Brooklyn Technical High School Enrollment (2017-18).¹⁹

New York's Specialized High Schools routinely serve the most underserved communities in New York. According to the New York City Department of Education, over half of Asian-American, Black, and Hispanic students offered admissions to Specialized High Schools are poor. See NYC Dep't of Educ., *Specialized High Schools Proposal*.²⁰

These schools serve many families, including those who immigrated to the United States to secure a better future for their children. Among them are PLF clients such as Phillip Wong, a self-employed translator who moved from Hong Kong to the United States in 1974. Yi Fang Chen moved to the United States from China in 1996. Although she came to this country speaking very little English, she eventually received a Ph.D. in statistics from Stanford University, and now works as a data scientist in Manhattan. Chi Wang is a mother of two children. She was born in China and did not speak English until the second grade. Despite this, she took the SHSAT and was accepted into all of the Specialized High Schools.

¹⁸ Available at https://www.bxscience.edu/apps/pages/index.jsp?uREC_ID=3733&type=d&pREC_ID=134193.

¹⁹ Available at <https://data.nysed.gov/enrollment.php?year=2018&instid=800000043516>.

²⁰ Available at https://cdn-blob-prd.azureedge.net/prd-pws/docs/default-source/default-document-library/specialized-high-schools-proposal.pdf?sfvr_sn=c27alelc_5.

Ms. Wang, along with Ms. Fang and Mr. Wong, like other parents, hope that their children too, will gain access to the Specialized High Schools, and the opportunities they offer.

In all, PLF's clients are all too familiar with both the promise that school choice offers and the devastating consequences that flow to parents, children, and communities if those choices are denied. School choice allows parents to "direct the upbringing and education of their children." *Pierce*, 268 U.S. at 535. It enables parents to seek out schools tailored to their children's unique needs, and gives parents a meaningful way to hold schools accountable for their performance. This Court should preserve those choices, and their attendant benefits, for parents and their children.

CONCLUSION

This Court should reverse the decision of the Montana Supreme Court.

DATED: September, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the BRIEF AMICUS CURIAE OF JERRY AND KATHY ARMSTRONG, LASHAWN ROBINSON, GWENDOLYN SAMUEL, YI FANG CHEN, AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS, contains 2,898 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Sept. 16, 2019.



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Respondents.

AFFIDAVIT OF SERVICE

I, Andrew Cockle, of lawful age, being duly sworn, upon my oath state that I did, on the 18th day of September, 2019, send out from Omaha, NE 2 package(s) containing 3 copies of the BRIEF AMICUS CURIAE OF JERRY AND KATHY ARMSTRONG, LASHAWN ROBINSON, GWENDOLYN SAMUEL, YI FANG CHEN, AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS in the above entitled case. All parties required to be served have been served by Priority Mail. Packages were plainly addressed to the following:

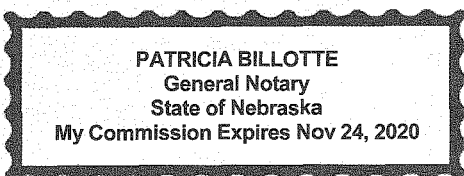
SEE ATTACHED

To be filed for:

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Counsel for Amici Curiae Jerry and Kathy
Armstrong, Lashawn Robinson, Gwendolyn
Samuel, Yi Fang Chen, and Pacific Legal Foundation

Subscribed and sworn to before me this 18th day of September, 2019.
I am duly authorized under the laws of the State of Nebraska to administer oaths.



Patricia C. Billotte
Notary Public

Andrew H. Cockle
Affiant

Service List, 18-1195 Merits

Petitioners Kendra Espinoza, et al.

Erica Joan Smith
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Respondents Montana Department of Revenue, et al.

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