

Case No. SC18-67

In The Supreme Court Of Florida

Citizens for Strong Schools, Inc., *et al.*

Petitioners,

v.

Florida State Board of Education, *et al.*,

Respondents,

and

Celeste Johnson, *et al.*,

Intervenors/Respondents.

ON PETITION FOR REVIEW OF THE FIRST
DISTRICT COURT OF APPEAL DECISION IN CASE NO. 1D16-2862

BRIEF OF FLORIDA STATE HISPANIC CHAMBER OF COMMERCE
AND EDCHOICE AS AMICI CURIAE IN SUPPORT OF INTERVENORS

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Identity and Interest of the Amici Curiae

The Florida State Hispanic Chamber of Commerce (FSHCC) was founded to promote the economic advancement of Florida’s Hispanic business community and improve the quality of life of every Hispanic in Florida. As Florida’s only statewide economic development organization dedicated to promoting the interests of Hispanic business owners, FSHCC actively promotes the economic growth and development of Hispanic entrepreneurs and represents the interests of over 604,000 Hispanic-owned businesses across the state—businesses that contribute over \$90 billion to Florida’s economy each year.

FSHCC recognizes that education is the cornerstone of economic success and believes it is imperative for every Hispanic child to be educated at a school that best fits the child’s educational needs. Hispanic children consistently compose the largest percentage of children receiving scholarships from the Florida Tax Credit Scholarship Program (“FTC Program”).

EdChoice is a 501(c)(3) nonpartisan, nonprofit organization and a national leader in educational choice research, legal and fiscal analysis, policy development, and educational training and outreach. EdChoice’s mission is to advance educational freedom and choice for all as a pathway to successful lives and a stronger society. EdChoice believes that all families—regardless of race, origin, residence, or family income—should have a full and unencumbered

opportunity to choose schools or other educational resources that work best for their children. The public good is well-served when children have a chance to learn at their maximum potential, regardless of the environment where that learning occurs—public or private, religious or secular. When children find their best fit for education and succeed, they will thrive as adults. They are our future.

Summary of Argument

Amici curiae urge the Court to approve the First District’s decision and reject Petitioner’s continued challenges to Florida’s educational choice programs. Amici curiae offer the Court their expertise with regard to Petitioners’ standing argument that tax credits can be functionally equivalent to direct expenditures of public funds and Petitioners’ attack on educational choice programs as simply ways to make states pay for private school tuition. Both arguments are fundamentally flawed.

First, Petitioners’ standing argument disregards the facts and the law. The FTC Program is not funded by any disbursement of funds from the state treasury. Every dollar received by a scholarship granting organization is from a private entity. The tax credits at issue are claimed by generous citizens who choose to donate to help fund scholarships for children seeking a better education. Those credits are not public funds.

No court has accepted Petitioners' standing argument. To the contrary, where tax credit scholarship programs have been challenged on grounds that private donations somehow equate to state spending, every court has rejected that approach. To do otherwise would negatively transform standing jurisprudence.

Furthermore, extensive social science research regarding educational choice programs demonstrates their benefits to students and public schools. Evidence from over 100 published studies choice has produced the following findings in favor of educational choice:

- Educational choice improves participating students' academic outcomes;
- Public schools exposed to educational choice have improved academic outcomes;
- Educational choice has a positive impact on civic values and practices; and
- Educational choice saves taxpayers and public school systems money.

Critics contend that the literature is insufficiently clear and that Florida should not allow educational choice as long as any doubt remains as to its value. But significant empirical research shows educational choice programs to be a proven tool, benefiting students and public schools. Public policy favors their use.

Argument

In 2009, Petitioners brought a multi-faceted judicial challenge to Florida’s K-12 public education system. After nine years, an unsuccessful trial, and an unsuccessful appeal to the First District, Petitioners ask this Court to allow them yet another trial using standards they hope this Court will engraft onto Article I, section 1(a)’s language directing the Legislature to provide an “adequate,” “efficient,” and “high quality” school system. As the State’s Answer Brief demonstrates, the trial court and the First District correctly declined to do so.

Petitioners also request a new trial regarding uniformity challenges they predicated on two school choice programs—the FTC Program and the John M. McKay Scholarship for Students with Disabilities Program. Here, amici curiae can lend their school choice expertise in two particular respects. First, amici curiae will demonstrate that tax credit programs such as the FTC program are correctly recognized not to implicate the legislative taxing authority and therefore cannot be challenged as appropriations. Second, contrary to Petitioners’ contention that “FTC tax credits are earmarked for the chosen purpose of paying private school tuition,” *Ini. Br.* at 48, amici curiae will show that choice programs are genuinely intended to, and in fact do, improve student outcomes and public schools.

I. Petitioners’ Argument That Tax Credits Can Be Functionally Equivalent To Direct Expenditures Of Public Funds Distorts The Facts And The Law.

Petitioners argue that, with expert testimony, they could show that tax credits extended to private donors are “functionally equivalent to direct expenditures” of public funds. Ini. Br. at 48. This argument distorts the facts and the law. Such arguments have long been rejected, as the trial court rejected them in this case (*see* Resp. App’x at pp. 166-67 ¶¶441-42), and correctly so, particularly in the context of school choice programs. Were it otherwise, then any private expenditure that qualifies for a tax credit or even a tax deduction could be assumed to impact general revenue and thus any potential state expenditure, opening the door to challenges to limitless legislative decisions and creating chaos for charities and other businesses that benefit from such private expenditures.

A. Florida Has Long Required A Special Injury To Challenge The Constitutionality Of Governmental Action.

For over 100 years, as a fundamental matter of equity, this Court has permitted a taxpayer to challenge the lawfulness of governmental action only if the taxpayer can show injury distinct from that affecting the public at large. *Rickman v. Whitehurst*, 73 Fla. 152, 156-57, 74 So. 205, 207 (1917). In 1972, this Court followed the United States Supreme Court’s decision in *Flast v. Cohen*, 392 U.S. 83 (1968), and adopted an exception to this rule where a taxpayer alleges that legislative action violates a constitutional provision restricting the Legislature’s

taxing and spending power. *Department of Administration v. Horne*, 269 So. 2d 659, 663 (Fla. 1972). This Court has repeatedly reaffirmed its commitment to these principles. *E.g.*, *Sch. Bd. of Volusia Cnty. v. Clayton*, 691 So. 2d 1066, 1068 (Fla. 1997); *N. Broward Hosp. Dist. v. Fornes*, 476, So. 2d 154, 154-56 (Fla. 1985).

B. Contributions Are Voluntary, Receiving Tax Credits Is Optional, And Taxes Avoided Through Credits Are Not Necessarily Funds That Would Otherwise Be Spent On K-12 Public Education In The FTC Program's Absence.

Where a tax credit is offered based on a taxpayer's voluntary expenditure, no money passes into government hands. Nor does any money pass from government hands to anyone else. In the context of school choice programs, no money passes from the state to a scholarship granting organization, to a parent, or to a donor.

In fact, under the FTC Program, it is not until after a private contribution is made to a scholarship granting organization that a donor may request a tax credit for the contribution. *See* § 1002.395(5)(b), Fla. Stat. Where a donation eligible for a tax credit is made, there is no requirement that a credit be requested. As a result, upon private citizens' request, the FTC Program simply recognizes the laudable actions of generous private businesses who choose to support the program through their charitable, private contributions.

These contributions are voluntary—and uncertain from year to year. A business that has cash flow available for charitable contributions in one year may

have more or less money available for donations in the following year. It is also common for businesses to donate to a variety of charities or to alternate their giving preferences. If all decided for any reason or no reason at all to give their donations to other charities, then the FTC Program would not exist.

If the FTC Program did not exist, then nothing permits any assurance that the absence of such credits would result in the payment of taxes. Businesses that would support the program in any given year might choose to support another program or take other financial steps that reduce their tax liabilities. In addition, even if businesses that would support the FTC Program in a particular year paid taxes they would otherwise avoid through the program, there can be no assurance that those increased contributions to general revenue would result in increased K-12 public school appropriations. Simply put, the matter is one of pure speculation.

Furthermore, if tax credits can be found to be functionally identical to public funds, then taxpayers could have standing to challenge any state tax credit, if not any tax deduction, on similar grounds. The result could be chaos for charities and other businesses that benefit from such private expenditures, all predicated on the fabricated legal fiction that funds retained through a tax credit can be public funds.

Indeed, Florida utilizes a wide panoply of tax incentives for various purposes. *See Florida Tax Incentives for Businesses*, Florida Dep't of Revenue, http://floridarevenue.com/taxes/taxesfees/Pages/tax_incentives.aspx. If one

measure of an appropriation is whether a tax that might have been collected by the state is in fact not collected, thereby creating imaginary state control over an individual's use of monies the state never collected, then tax deductions and other incentives—indeed, anything that reduces an individual's or corporation's tax liability from the standard tax rate—could also be considered appropriations. This is a slippery slope toward regarding large swathes of personal income as subject to government ownership and control, and it comes perilously close to regarding all actions of individuals who have received some form of tax benefit as subject to government intervention.

C. The Internal Revenue Service And Courts Nationwide Have Rejected Petitioners' Standing Theory.

No court has adopted Petitioners' standing theory. To the contrary, it has been soundly rejected in every decision to consider such argument.

In *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011), the United States Supreme Court explained that the taxing and spending power exception set forth in *Flast*, and which this Court adopted in *Horne*, is rooted in an injury to the challenging taxpayer. Thus, “[a] dissenter whose tax dollars are ‘extracted and spent’ knows that he has in some small measure been made to contribute to an establishment in violation of conscience,” but “[w]hen the government declines to impose a tax, by contrast, there is no such connection between dissenting taxpayer and alleged establishment” and “[a]ny financial injury

remains speculative.” 563 U.S. at 142. The Supreme Court held that finding standing under these circumstances would not just stretch *Flast* to the limits of its logic but would depart from *Flast*’s very rationale. *Id.*

The Supreme Court also directly rejected the notion that tax credits constitute public funds, holding:

Like contributions that lead to charitable tax deductions, contributions yielding [tax credits] are not owed to the State and, in fact, pass directly from taxpayers to private organizations. Respondents’ contrary position assumes that income should be treated as if it were government property even if it has not come into the tax collector’s hands. That premise finds no basis in standing jurisprudence. Private bank accounts cannot be equated with the Arizona State Treasury.

Id. at 144.

Most recently, the Georgia Supreme Court agreed. In *Gaddy v. Georgia Dep’t of Revenue*, 802 S.E.2d 225 (Ga. 2017), that court examined the character of funds donated to scholarship-granting organizations providing scholarships that could be used at religious schools. The court held that the state does not control the funds that are donated to such organizations and does not control the choice of school made by parents. *Id.* at 230. There can be no public aid, indirectly or otherwise, where the state has no control of the funds. *Id.* at 231-32. Likewise, in *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999), the Arizona Supreme Court suggested that the appropriate point at which private monies become public funds is “at least” where a final calculation is made of the amount actually owed, “upon

which the state has a legal claim.” *Id.* at 618. *See also Toney v. Bower*, 744 N.E.2d 351, 357 (Ill. Ct. App. 2001).

Of course, the First District reached the same result under Florida law in *McCall v. Scott*, 199 So. 3d 359 (Fla. 1st DCA 2016). *McCall* involved an identical challenge to the FTC Program and an identical standing defect. Concluding that the plaintiffs there had no injury sufficient to predicate standing, the First District held that any remedy must be had at the polls, not through the courts. *Id.* at 374.

These decisions confirm not only the soundness of the standing result in this case but the extraordinary nature of the standing claim that Petitioners make. Standing is a fundamental requirement, and every court to decide the matter agrees that it is lacking under the circumstances of this case.

II. Educational Choice Programs Provide Benefits For Participating Students And Public Schools.

Petitioners contend that “FTC tax credits are earmarked for the chosen purpose of paying private school tuition” *Ini. Br.* at 48. Petitioners falsely impugn educational choice programs, which exist not to benefit private schools but to improve the educational experience of participating students and to improve public school quality. Studies from across the country support these conclusions and the Legislature’s public policy decision to utilize educational choice programs.

To date, 28 states and the District of Columbia have enacted a total of 65 educational choice programs. See EdChoice, *School Choice in America Dashboard*, <https://www.edchoice.org/school-choice/school-choice-in-america>. The first program was town tuitioning (similar to a voucher), enacted in 1869 in Vermont. It is still operating today.

Across the country, educational choice programs have been added or expanded every year since 2003. They serve over 1.3 million families and include 24 voucher programs, 6 education savings accounts, 3 town tuitioning programs, 2 refundable tax credit programs, 23 tax credit scholarships, 3 tax credits and 4 tax deductions for educational expenses. See *id.* Strong empirical evidence supports the value of educational choice.

As the number of educational choice programs and participants has increased nationwide, the body of empirical research on educational choice has expanded. Studies of choice programs throughout the United States reflect three common conclusions: choice has led to measurable educational benefits for many students; it has been neutral for others; and it does not harm any group of students or schools. See Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Choice*, Friedman Found. for Educ. Choice (4th ed. May 2016) (“2016 Win-Win Report”), available at <http://www.edchoice.org/wp-content/uploads/2016/05/A-Win-Win-Solution-The-Empirical-Evidence-on-School-Choice.pdf>.

See also EdChoice, *Empirical Research Literature on the Effects of School Choice*, <http://www.edchoice.org/school-choice/empirical-research-literature-on-the-effects-of-school-choice> (providing most recent update on empirical research). The benefits are substantial.

A. Educational Choice Improves Students' Academic Outcomes.

Educational choice programs are most compelling for their proven ability to improve academic outcomes. To date, eighteen empirical studies have examined the effect of educational choice on student performance using the random-assignment method, the “gold standard” of social science research.¹ 2016 *Win-Win* Report at 10. Of those, thirteen studies found choice improves student outcomes, three studies found no visible effect, and three studies found negative outcomes for all or some students in the Louisiana and D.C. voucher programs. *Id.* Notably, the most recent study of Louisiana’s voucher program shows negative effects beginning to dissipate, especially in math. Jonathan N. Mills and Patrick J. Wolf, *The Effects of the Louisiana Scholarship Program on Student Achievement After Three Years* (Louisiana Scholarship Program Evaluation Report No. 7) (2017),

¹ Random-assignment studies are possible where there are more applicants for a choice program than there are slots, generally resulting in a random lottery for the slots. Students who win the lottery and are offered choice can be compared to those who were not offered choice. Any systemic differences can be attributed to the offer of choice alone, because nothing separates the group but the offer of choice and randomness. 2016 *Win-Win* Report at 10.

available at http://educationresearchalliancencola.org/files/publications/ERA1706-Policy-Brief-Louisiana-Scholarship-Program_170804_161627.pdf.

A 1998 random-assignment study of a Milwaukee educational-choice program found students who used vouchers from 1990 to 1993 scored six points higher in reading and eleven points higher in math than students in the control group, who were not offered vouchers. Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Vouchers*, Friedman Found. for Educ. Choice, at 9-10 (2d ed. March 2011) (“2011 *Win-Win* Report”), *available at* <http://www.edchoice.org/wp-content/uploads/2015/07/3-2011-Win-Win-National-Study.pdf>. Similarly, in 2001, a researcher studying the effect of educational choice in a privately funded voucher program in Charlotte, North Carolina, found that after one year, voucher students scored six points higher on combined reading and math tests. *Id.* at 10.

In 2008, another researcher reanalyzed the data from the Charlotte study, using a different method to account for students who were offered educational choice but declined to exercise it. *Id.* The 2008 study found that after one year, the voucher students outperformed the control group by eight points in reading and seven points in math. *Id.*

A long-term study of a privately funded voucher program for low-income elementary school students in New York City in the late 1990s found that African-

American students who were offered vouchers in elementary school were 20% more likely to attend college within three years of their expected high-school graduation date; 25% more likely to attend college full-time; and 130% more likely to attend a selective four-year college. Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Choice*, Friedman Found. for Educ. Choice, at 8 (3d ed. 2013), available at <http://www.edchoice.org/wp-content/uploads/2015/07/2013-4-A-Win-Win-Solution-WEB.pdf>. Three recent random-assignment studies of New York City voucher programs found that educational 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. 2016 *Win-Win* Report at 11.

As a result, the empirical evidence using “gold-standard” studies demonstrates a largely positive effect of educational choice on participating students, with thirteen of eighteen studies showing positive effects for some or all students. Apart from the anomalous results of flawed Louisiana and D.C. programs, the research shows that some, if not all, students offered educational choice improve their academic performance, while no one is negatively affected. Such outcomes are the hallmark of responsible public policy.

B. Educational Choice Improves Public Schools.

Academic research proves educational choice improves public schools due to increased awareness and interest in education. In fact, empirical studies show

that the positive academic effect of educational choice on students who remain in public schools is at least as strong as the effect on children who are offered choice. Of the 34 total studies, 32 found educational choice improves public schools, one found no visible effect, and one found a negative effect. *Id.* at 16.

The majority of these studies examined Milwaukee's voucher program as well as Florida's tax credit scholarships—three of the nation's longest running programs. Several recent studies have provided insightful (and always positive) results. For example, one study used new variables to measure private school competition, such as using the number of nearby houses of worship as a proxy for private school competition. That study found a positive effect on public schools in both reading and math for all five separate measures of private school competition. *Id.* at 17. Another study found that when low-performing schools became eligible for vouchers, changes in the schools' institutional practices resulted in improved student performance. *Id.*

Thirteen studies analyzed educational choice in places other than Milwaukee or Florida, and twelve of them found improvements in public schools' academic outcomes. *Id.* at 17-18. Thus, the overwhelming majority of the studies found that educational choice positively impacts the academic performance of public schools exposed to choice. *Id.* at 19.

Very recently, an in-depth study of state K-12 education rankings showed that Florida ranks third in the country for educational achievement and first in the nation for efficiency of education expenditures. The authors found a clear correlation between efficiency of education spending and educational achievement. They show that efficiency in the use of funds for public education has a greater impact on student achievement than the amount of public funds expended on education. As the authors note, “most states have reached a sufficient level of spending such that additional spending does not appear to have any impact on achievement.” See Stan J. Liebowitz & Matthew L. Kelly, *Fixing the Currently Biased State K-12 Education Rankings* (May 25, 2018), available at <http://dx.doi.org/10.2139/ssrn.3185152>. Even more recently, a report from the Florida Department of Education showed that efforts to improve public education are working. Florida Dep’t of Education, *Florida School Grades, 2017-2018 School Grades and School Improvement Ratings* (June 2018), available at <http://www.fldoe.org/core/fileparse.php/18534/urlt/SchoolGradesResultPacket18.pdf>.

These most recent studies post-date the trial in the case. Amici curiae cite them not to alter the factual record in this case but simply to support their public policy arguments that educational choice programs benefit students and the public schools.

C. Educational Choice Improves Civic Values And Practices.

Other research examines the impact of educational choice on civic values and practices. Eight studies have found that educational choice has a positive impact, four studies show no visible impact, and no study has shown educational choice to have a negative effect. EdChoice, *Empirical Research Literature on the Effects of School Choice*, <https://www.edchoice.org/school-choice/empirical-research-literature-on-the-effects-of-school-choice/#reviews> (slide 24).

In a recent study, researchers found higher levels of political tolerance, civic skills, future political participation, and volunteerism in participants in Milwaukee's voucher program when compared to public school students. 2016 *Win-Win Report* at 31. The study found the positive effects to be significantly stronger in religious schools than in other private schools. *Id.*

A second new study analyzed the long-term impact of Milwaukee's educational choice program on students' criminal records. *Id.* The study found that participation in the voucher program was correlated to decreased criminal activity, especially for men. *Id.* The longer students remained in the voucher program, the stronger the correlation across multiple measures of criminal records. *Id.* at 31-32. Males who remained in the program throughout high school had better outcomes than their peers in public schools on all measures, including a 79%

reduction in felonies, a 93% reduction in drug offenses, and an 87% reduction in theft. *Id.* at 32.

D. Educational Choice Saves Money.

Studies nationwide have shown that educational choice programs save money, to the benefit of public schools and taxpayers. Educational choice saves taxpayers money because the funds made available to parents to choose their children's educational services are typically less than the funds the state would otherwise pay to educate the child. As the Georgia Supreme Court opined in a challenge to Georgia's tax credit scholarship program, such a program might "create a tax savings while relieving public schools of the burden of educating the students who choose to attend private schools." *Gaddy*, 802 S.E.2d at 225.

EdChoice sponsored an empirical study in 2007 that assessed the fiscal impact of state educational choice programs. *See* Susan Aud, "School Choice by the Numbers: The Fiscal Effect of School Choice Programs, 1990-2006," Friedman Found. for Educ. Choice, at 8 (April 2007) ("Aud Study"), *available at* <http://www.edchoice.org/wp-content/uploads/2015/09/Education-by-the-Numbers-Fiscal-Effect-of-School-Choice-Programs.pdf>. The study found that:

- Every existing educational-choice program was at least fiscally neutral, and most programs produce substantial savings.

- In nearly every educational choice program, the dollar value of the voucher or scholarship was less than or equal to the state’s formula spending per student, meaning states were spending *less* on students in educational choice programs than they would have spent if the same students had attended public schools.
- Educational choice produced a positive fiscal impact for school districts and state budgets, because reduced costs exceeded the lost per-student revenue.

Id. at 5.

The Aud Study is not an isolated finding. The latest edition of *Win-Win* reviewed 28 empirical studies reviewing the fiscal impact of educational choice. 2016 *Win-Win* Report at 21. Twenty-five of those studies found that educational choice saves money, and just three found that such programs are revenue neutral due to unusual aspects of those particular programs. *Id.*²

Opponents of educational choice continue to assert that choice programs will spell the financial ruin for public schools, but no evidence supports their assertions.

² Two of the revenue-neutral programs are century-old “town tuitioning” programs in Maine and Vermont, designed to cover school tuition for children living in small towns that do not have public schools. The third revenue-neutral program was a small Utah voucher program for students with special needs that directed 100% of the revenue for each student into the voucher program. 2016 *Win-Win* Report at 22-23.

With over two decades of results available, most studies show that educational choice has a net positive effect on public school funding, and no study has found a net negative effect. *Id.* at 21.

CONCLUSION

For all of the foregoing reasons, amici curiae Florida State Hispanic Chamber of Commerce and EdChoice respectfully request that this Court approve the First District's decision in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2018, a true and correct copy of the foregoing motion was served by e-mail on all counsel of record, including the following:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

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