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**Access and Opportunity For All: How New Jersey’s Current Educational System
Disenfranchises Students, and How School Choice Vouchers and Scholarships Would Help
Students Succeed**

Bernadette Menendez*

INTRODUCTION

Benjamin Franklin once said “an investment in knowledge pays the best interest.”¹ These wise words should, by all accounts, be taken to heart by educators and lawmakers across the country. The reality, however, is far different: legislatures throughout the United States are trying to gate-keep success by keeping students in underperforming schools where they are not receiving the best education and individualized care that they need to be the best leaders of tomorrow.

“School choice” has become a hot-button issue in recent years as the political climate becomes more polarizing and the wealth gap widens. School choice is the “process of allowing every family to choose the K-12 educational options that best fit their child.”² Stemming from conversations surrounding school choice is how to help families afford educational institutions that would be out of reach for them because of various economic hardships. Various States across the United States have tried to implement what has become known as “school choice vouchers” to try and remedy the situation. School choice vouchers give parents the freedom to choose a private school for their child to attend with the use of all or part of public funding that has been set-aside for their child’s education.³ Under a school choice voucher program, funds that would be used to pay for a child’s public school tuition would be given to the family in the form of a voucher or scholarship to pay for the tuition of a religious or nonreligious private school.⁴ There are currently sixteen states that

* B.A., Fordham University, 2020; J.D. Candidate, Seton Hall University School of Law, 2024.

¹ Randell Tiongson, The Importance of Investing in Knowledge, INQUIRER.NET, <https://business.inquirer.net/291261/the-importance-of-investing-in-knowledge> (Last visited Mar. 30, 2023).

² What is School Choice?, NATIONAL SCHOOL CHOICE WEEK, <https://schoolchoiceweek.com/what-is-school-choice/> (Last visited Mar. 25, 2023).

³ School Vouchers, ED CHOICE, <https://www.edchoice.org/school-choice/types-of-school-choice/what-are-school-vouchers-2/> (Last visited Mar. 30, 2023).

⁴ School Vouchers, *supra* note 3, at 2.

have implemented a school choice voucher system, with many other states leaning towards adopting similar programs.⁵

New Jersey has faced its fair share of education reforms and troubles. New Jersey is the most densely populated state in the United States, with the State being home to the top four most densely populated municipalities in the country.⁶ This population density means that the State has its fair share of wealth disparity, as well as areas that are heavily populated by minority families. This combination of wealth disparity and racialized neighborhoods directly affects school make-up and funding. The children of New Jersey and their families do not have the opportunity to make their own choices to ensure that they are receiving the best education possible.

This Note will review recent United States Supreme Court decisions directly related to school choice and how New Jersey's current system is unconstitutional when compared with the Court's holdings. Part I presents a brief history of public schools in New Jersey and how the current educational system came to be. Part II discusses the three major Supreme Court cases that have shaped the conversation around school choice. Part III discusses New Jersey's current school choice system and its various requirements and restrictions. Part IV is split into two discussions on school choice legislation: Part A discusses a piece of proposed New Jersey legislation that would have expanded school choice in the State. Part B discusses the most recently passed school choice legislation in Florida that New Jersey can emulate. Part V discusses the constitutionality of both the current system and the proposed system. Finally, Part VI discusses how adopting a school choice system that can be used at all schools, not just public schools, would have a positive impact on low-income, minority communities within New Jersey.

⁵ *School Vouchers*, *supra* note 3, at 2.

⁶ Stephen Stirling, *3D Maps Show Parts of NJ are the Most Densely Populated on the Planet*, NJ.COM, <https://www.nj.com/news/2019/01/3d-maps-show-parts-of-nj-are-the-most-densely-populated-on-the-planet.html> (Last visited on Mar. 25, 2023).

I. THE HISTORY OF PUBLIC SCHOOLS IN NEW JERSEY

New Jersey took the first step towards the establishment of a public school system in 1817, when the legislature created the State School Fund that would allocate some bonds and other forms of capital towards education.⁷ In 1829, after years of having free education solely for poor children, a law to establish “common” schools was passed that authorized the election of township school committees, creation of schools, and reports to the state.⁸ The public reaction to the law was negative, therefore leading to its repeal in 1830 and 1831.⁹ However, in 1838, a convention was held where it was decided that the Legislature should re-enact many features of the Act of 1829.¹⁰ Tuition at this point was not free for all – only poor students could attend school free of cost.¹¹ This began to change, and in 1855, there were 29 townships with free schools.¹²

In 1871, the Legislature passed a law making all New Jersey public schools free for students.¹³ A few years later, a constitutional amendment was accepted, requiring a “thorough and efficient” public education system.¹⁴ At this time, high schools were not prevalent, and in 1890 the first push for public high schools came from a teachers’ college in Trenton.¹⁵ Further change to the public school system arrived in 1894, when school administrative units shifted from neighborhoods to townships, limiting the number of school districts from 1,408 to 374.¹⁶

⁷ NJSBA Staff, Thorough and Efficient: The Evolution of Public Education, NEW JERSEY SCHOOL BOARDS ASSOCIATION, <https://www.njsba.org/news-publications/school-leader/septemberoctober-2014-volume-45-2/thorough-and-efficient-the-evolution-of-public-education/> (last visited March 3, 2023).

⁸ NJSBA Staff, supra note 7, at 3.

⁹ NJSBA Staff, supra note 7, at 3.

¹⁰ NJSBA Staff, supra note 7, at 3.

¹¹ NJSBA Staff, supra note 7, at 3.

¹² NJSBA Staff, supra note 7, at 3.

¹³ NJSBA Staff, supra note 7, at 3.

¹⁴ NJSBA Staff, supra note 7, at 3.

¹⁵ NJSBA Staff, supra note 7, at 3.

¹⁶ NJSBA Staff, supra note 7, at 3.

The turn of the century brought fresh changes to the public education system. In 1907, the Legislature made it mandatory for districts to provide education for children between the ages of 5 and 20.¹⁷ Special education for children that were deemed behind regular students by three or more years was mandated in 1910.¹⁸ School performance, however, began to suffer and deteriorate in the 1920s, leading to the State requiring that all teachers become certified by the State.¹⁹

Funding became an issue for school districts, since they were mainly funded by railroad taxes.²⁰ The state in 1954 then decided to fund schools through local property taxes with the help of state and federal aid.²¹ The NJ Supreme Court, however, found that there was too much reliance on property taxes, so a new law was enacted in 1975 creating new funding.²² Another law in 1976 was passed, enacting the New Jersey Gross Income Tax to fund the new law.²³ This formula, however, led to complications and the State Supreme Court once again became involved through the Abbott v. Burke decisions, finding that the funding law was unconstitutional for 28 poor urban districts.²⁴ A new funding formula was created, ensuring that poorer districts can spend at the same rate as more affluent districts.²⁵

Throughout the years, New Jersey has built an incredibly strong public education system. This system, however, has its flaws like any of the other states.²⁶ Many of these issues, however, could be ameliorated by creating a school voucher system that includes private schools and centers on parents' choice.

¹⁷ NJSBA Staff, supra note 7, at 3.

¹⁸ NJSBA Staff, supra note 7, at 3.

¹⁹ NJSBA Staff, supra note 7, at 3.

²⁰ NJSBA Staff, supra note 7, at 3.

²¹ NJSBA Staff, supra note 7, at 3.

²² NJSBA Staff, supra note 7, at 3.

²³ NJSBA Staff, supra note 7, at 3.

²⁴ NJSBA Staff, supra note 7, at 3.

²⁵ NJSBA Staff, supra note 7, at 3.

²⁶ States with the Highest and Lowest SAT Scores in 2023, LEARNER.COM, <https://www.learner.com/blog/states-with-highest-sat-scores> (Last visited Apr. 27, 2023).

II. SUPREME COURT PRECEDENT AND THE SHIFT TOWARDS EQUALIZING OPPORTUNITY

The forthcoming sections will discuss the three main United States Supreme Court decisions that are crucial in expanding aid to sectarian and nonsectarian private schools. The facts, procedural histories, and summaries of the Court's holdings and reasonings have been provided for each decision.

A. ZELMAN V. SIMMONS-HARRIS

In Zelman v. Simmons-Harris, the Supreme Court faced one of its first constitutional challenges regarding school-choice vouchers. The Cleveland Public School system had been one of the worst performing school systems in the nation for more than a generation.²⁷ The majority of the 75,000 students enrolled in the Cleveland Public School system were from low-income and minority families.²⁸ Students were performing at levels far below that of other students in Ohio.²⁹ Because of these statistics, Ohio enacted the Pilot Project Scholarship Program.³⁰ The program would provide financial services to families in Ohio school districts which have needed court mandated supervision.³¹ At the time, the only school district this pertained to was Cleveland.³²

The program provides two forms of assistance: (1) tuition aid to children in kindergarten through third grade to attend a participating public or private school of their parent's choice; and (2) tutoring to students who decided to stay enrolled in public school.³³ Private schools were allowed to participate so long as the school is located within the boundaries of a participating district and met state educational requirements.³⁴ Families with incomes 200% below the poverty

²⁷ Zelman v. Simmons-Harris, 536 U.S. 639, 644 (2002).

²⁸ Id.

²⁹ Id.

³⁰ Id.

³¹ Id.

³² Id. at 645.

³³ Id.

³⁴ Id.

line could receive 90% of the private school tuition, up to \$2,250.³⁵ For all other families, the State would pay 75% of the private school tuition up to \$1,875.³⁶ Fifty-six private schools participated in the program during the 1999-2000 school year, with forty-six of these schools being religiously affiliated.³⁷ Of the thirty-seven thousand students who participated in the scholarship program, ninety-six percent of the students had enrolled in religiously affiliated schools.³⁸

A group of Ohio taxpayers challenged the program in state court in 1996 under state and federal grounds.³⁹ The Ohio Supreme Court rejected the federal claims but held that the program did violate certain sections of the Ohio Constitution.⁴⁰ This led to the respondents' filing their claims in United States District Court, seeking to enjoin the reenacted program on grounds that it violated the Establishment Clause of the United States Constitution.⁴¹ After the Appellate Court found that the program had the effect of advancing religion in violation of the Establishment Clause, the United States Supreme Court granted certiorari.⁴²

The Supreme Court recognized that the main issue it faced was whether the Ohio program had the effect of advancing or inhibiting religion. The Court recognized that they had confronted Establishment Clause challenges to neutral government programs that provide aid broadly to private individuals who then direct that aid to religious schools or institutions.⁴³ The Court noted that this precedent makes clear that:

³⁵ Id. at 646.

³⁶ Id.

³⁷ Id. at 647.

³⁸ Id.

³⁹ Id. at 648.

⁴⁰ Id.

⁴¹ Id.

⁴² Id.

⁴³ Id. at 649; see Mueller v. Allen, 463 U.S. 388 (1983) (rejecting an Establishment Clause challenge to a Minnesota Program that authorized tax deductions for educational expenses, including private school tuition costs, even though most of the beneficiaries were parents of children in religious schools); Witters v. Washington Dept. of Servs. for Blind, 474 U.S. 481 (1986) (rejected an Establishment Clause challenge to a vocational scholarship program that provided tuition aid to a student studying at a religious school, finding that any aid to religious institutions only

Where 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.⁴⁴

The Court asserted that the Pilot Scholarship Program is a program of true private choice and thus does not offend the Establishment Clause.⁴⁵ Supporting its finding of neutrality, the Court stated that the Ohio program is completely neutral towards religion because it is part of a general undertaking by the State to provide opportunities to children who attend failing schools and is offered to a broad class of individuals irrespective of religion.⁴⁶ All schools are allowed to participate within the district and the scholarships are offered to all families.⁴⁷

The Court also found that there is no financial incentives that skew the program toward religious schools.⁴⁸ These incentives are not present when the aid is based on neutral, secular criteria that does not favor nor disfavor religion and is made available to all kinds of schools on a nondiscriminatory basis.⁴⁹ In actuality, there exists financial disincentives for private schools, because parents will have to copay a portion of the religious school's tuition.⁵⁰ The Court turned to the argument that the Establishment Clause was violated because 46 of the 56 private schools participating in the program are religious.⁵¹ The Court found that this make-up of schools does not violate the Establishment Clause because one must evaluate all options that Ohio provides the

results from the independent decisions made by aid recipients); Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993) (rejected an Establishment Clause challenge to a federal program that allowed sign-language interpreters to assist deaf children in religious schools, finding that government programs that neutrally provide benefits to citizens without reference to religion does not offend the Establishment Clause).

⁴⁴ Zelman, 536 U.S. at 652.

⁴⁵ Id. at 653.

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ Id.; see Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 487-488 (1986).

⁴⁹ Id.; see Agostini v. Felton, 521 U.S. 203, 231 (1997).

⁵⁰ Id. at 655.

⁵¹ Id. at 655-656.

children of Cleveland, and this scholarship program is just one option that is provided for children.⁵²

The Court found in favor of Ohio’s program, but it would not be the last time that it would face the issue of school choice, federal and state funding, and allowing religious schools to receive this funding.

B. ESPINOZA V. MONTANA DEP’T OF REVENUE

Espinoza v. Montana Dep’t of Revenue once again brought the issue of government aid and private schools to the United States Supreme Court. In 2015, the Montana Legislature wanted to support school choice by creating a scholarship program to students in private schools.⁵³ This program was to give a \$150 tax credit to taxpayers who donated to a participating scholarship organization, with the money raised from the donations used to award the scholarships to children for tuition at a private school.⁵⁴ If a child is awarded a scholarship, it can be used at any private school that meets certain accreditation, testing, and safety requirements.⁵⁵ The award cannot be restricted to particular types of schools.⁵⁶

The Montana Legislature allotted three million dollars annually to fund the tax credits while also directing that the program be administered according to Article X, section 6 of the Montana Constitution, which barred government aid to sectarian schools.⁵⁷ The Montana Department of Revenue also promulgated an administrative rule by the name of “Rule 1” that prohibited families

⁵² Id.

⁵³ Espinoza v. Montana Dep’t of Revenue, 140 S.Ct. 2246, 2251 (2020)

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Id. at 2252.

from using scholarships at religious schools.⁵⁸ Rule 1 changed the definition of “qualified education provider” to exclude sectarian schools.⁵⁹

Suit was then brought by three mothers whose children attended a Christian school in Montana which met the criteria for “qualified education provider.”⁶⁰ One of the children had previously received scholarships from Big Sky and the other petitioners’ children were eligible to receive scholarships.⁶¹ Petitioners sued, asserting that Rule 1 conflicted with the statute that created the scholarship program and that the Rule discriminated on the basis of religion.⁶² The case reached the Montana Supreme Court, with the Court holding that the violation of the no-aid provision would require the invalidation of the scholarship program.⁶³ The Court further noted that since there was no mechanism to stop religious schools from receiving aid, the entire program was not viable, thus leading to the tax-credit program being terminated from giving aid to either religious nor secular private schools.⁶⁴ The United States Supreme Court later granted certiorari.⁶⁵

The Supreme Court was faced with the issue of whether the Free Exercise Clause precluded the Montana Supreme Court from applying the no-aid provision to bar religious schools from receiving aid through the scholarship program.⁶⁶ The Free Exercise Clause, which applies to States through the Fourteenth Amendment, “protects religious observers against the unequal treatment and against laws that impose special disabilities on the basis of religious status.”⁶⁷ The Montana Supreme Court was not deterred by previous Court precedent, and applied the no-aid provision to

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ Id.

⁶¹ Id.

⁶² Id.

⁶³ Id.

⁶⁴ Id.

⁶⁵ Id. at 2254.

⁶⁶ Id. at 2254.

⁶⁷ Id.; see Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017)

hold that religious schools could not receive scholarship funding, however this conditions receipt of funds on a recipients willingness to surrender its religious beliefs.⁶⁸ This condition on benefits discourages the exercise of First Amendment rights.⁶⁹ The Court rejected the defendant’s argument that the present case was governed by Locke v. Davey by stating that (1) funds in Locke were denied for use of a distinct category of instruction, specifically training to be a minister; and (2) no “historic and substantial” tradition supports the defendant’s decision to not fund religious schools through scholarships the way that it was a “historic and substantial” state interest not to fund the training of clergy in Locke.⁷⁰

The Court also rejects arguments that the no-aid provision promotes religious freedom.⁷¹ The Court doubts that a school’s liberty is enhanced by eliminating options to participate from the outset.⁷² There is also concern with burdens on the families whose children attend or hope to attend the religious schools, with the Court recognizing that they have long supported a parent’s right to direct the religious upbringing of their children.⁷³ The judgement of the Montana Supreme Court was ultimately reversed, and the case remanded for further proceedings.⁷⁴

C. CARSON AS NEXT FRIEND OF O.C. V. MAKIN

The United States Supreme Court was yet again faced with the issues of Free Exercise Clause and Establishment Clause violations as related to tuition assistance programs in private schools when it decided the case of Carson v. Makin. Maine, as the most rural state in the United States, struggles with ensuring that all students in the State have access to education.⁷⁵ Maine sought to

⁶⁸ Espinoza, 140 S.Ct. at 2256; see Trinity Lutheran Church, 137 S. Ct. at 2022

⁶⁹ 140 S.Ct. at 2256; see 137 S. Ct. at 2022

⁷⁰ Locke v. Davey, 540 U.S. 712, 721-725 (2004).

⁷¹ Id. at 2261.

⁷² Id.

⁷³ Id.

⁷⁴ Id. at 2263.

⁷⁵ Carson as next of friend of O.C. Makin, 142 S.Ct. 1987, 1993 (2022).

alleviate this issue by allowing for tuition assistance to students living in the most rural areas of the state.⁷⁶ Under the program, if a school administrative unit (SAU) neither operates its own public secondary school nor has contracts with other public schools, the SAU must pay the tuition of the public or private school that the parent chooses.⁷⁷ For the school to be approved, there were certain requirements that must be met: (1) school must be accredited by a New England association of schools; (2) school must meet certain curricular requirements, such as English being the main language of instruction and teaching Maine history; and (3) school must maintain below a thirty-to-one student to teacher ratio.⁷⁸ While religiously affiliated schools were allowed to partake in this program prior to 1981, the state in 1981 imposed a new requirement that any school receiving the payments must be nonsectarian.⁷⁹

In this case, one of the plaintiffs lived in a SAU without their own school and who did not contract with another.⁸⁰ They decided to send their daughter to a Baptist high school because of the high academic standards and because it aligned with the families sincerely held religious beliefs.⁸¹ They were paying for the tuition themselves.⁸² The other plaintiffs sent their child to a religious middle school, also because of the high academic standards and because it also aligned with their sincerely held religious beliefs.⁸³ Both schools were accredited institutions and fulfilled attendance requirements, yet neither school was eligible to receive tuition payments under Maine's tuition assistance program because neither school was nonsectarian.⁸⁴

⁷⁶ Id.

⁷⁷ Id.

⁷⁸ Id.

⁷⁹ Id. at 1994.

⁸⁰ Id.

⁸¹ Id.

⁸² Id.

⁸³ Id. at 1995.

⁸⁴ Id.

The petitioners brought suit against the commissioner of the Maine Department of Education, alleging that the program’s nonsectarian requirement violated the First Amendment’s free Exercise Clause and Establishment Clause as well as the Equal Protection Clause of the Fourteenth Amendment.⁸⁵ The United States Supreme Court decided Espinoza v. Montana Dep’t of Revenue while the petitioners’ appeal to the First Circuit was pending, yet the First Circuit nevertheless affirmed the District Court’s grant of judgement in favor of the commissioner.⁸⁶

The Court turned to its previous decisions in Trinity Lutheran and Espinoza as the basis for their analysis of the Main tuition program. The Court noted that Maine offered its citizens the benefit of tuition assistance payments, yet, like the daycare center in Trinity Lutheran, the schools in the present case are disqualified from the payments solely because they are religious schools.⁸⁷ The Court also noted that Maine’s decision to disqualify religious schools from the program promotes a stricter separation between church and state than is required by the Federal Constitution.⁸⁸ This was found to plainly be discrimination against religion.⁸⁹ The Court also turned to Espinoza when replying to the case’s dissents. Justice Roberts asserts that the dissents are wrong to say that under this decision the Court would be forcing Maine to fund religious education.⁹⁰ The Court asserts that Maine made the decision to allow certain parents to direct state tuition payments to private schools – these parents were not forced to make this decision.⁹¹ Turning to Espinoza, the court highlighted that “a State need not subsidize private education. But once a

⁸⁵ Id.

⁸⁶ Id.

⁸⁷ Id. at 1997.

⁸⁸ Id.

⁸⁹ Id. at 1998.

⁹⁰ Id. at 2000.

⁹¹ Id.

State decides to do so, it cannot disqualify some private schools solely because they are religious.”⁹²

The Court ultimately held that Maine’s requirement that a school be “nonsectarian” to receive tuition assistance payments violated the Free Exercise Clause of the First Amendment because the program identifies and excludes schools that are otherwise eligible solely because of religion.⁹³

III. NEW JERSEY’S CURRENT SYSTEM: INTERDISTRICT PUBLIC SCHOOL CHOICE PROGRAM

New Jersey’s current school choice system is named the “Interdistrict Public School Choice Program” (hereinafter “The Program”).⁹⁴ The Program is open to approved choice districts for the enrollment of K-12th grade students who do not reside within their districts at no cost to families.⁹⁵ According to the New Jersey Department of Education, “the program increases educational opportunities for students and their families by providing students with school options outside of their district of residence and giving parents the power to select a school program that best serves their child’s individual needs.”⁹⁶ There are 122 participating “Choice Districts” in the 2023-2024 school year.⁹⁷

“Choice Districts” are defined as a “public school district...which is authorized under the Interdistrict Public School Choice Program to open a school or schools to students from sending districts.”⁹⁸ These Choice Districts are funded through state funds.⁹⁹ “The state pays the choice district the local portion of its adequacy budget in the form of ‘choice aid’ on a per-pupil basis, for

⁹² Id. (citing Espinoza v. Montana Dep’t of Revenue, 140 S.Ct. 2246, 2262 (2020)).

⁹³ Id. at 2002.

⁹⁴ Interdistrict Public School Choice Program, NEW JERSEY DEP’T OF EDUC., <https://www.nj.gov/education/choice/> (Last visited Mar. 12, 2023).

⁹⁵ Interdistrict Public School Choice Program, supra note 93, at 13.

⁹⁶ Interdistrict Public School Choice Program, supra note 93, at 13.

⁹⁷ Interdistrict Public School Choice Program, supra note 93, at 13.

⁹⁸ Interdistrict Public School Choice Program Act of 2010, N.J. 18A:36B-20

⁹⁹ Interdistrict Public School Choice Program Choice Funding, NEW JERSEY DEP’T OF EDUC., https://www.nj.gov/education/choice/cdistricts/faq/#Funding_Choice_Districts.

each choice student.”¹⁰⁰ The resident districts keep local tax income that is levied to cover students who leave the district for another, so this funding stays in the resident district.¹⁰¹

The Program separates students into Tier 1 and Tier 2, with their own requirements. Tier 1 students are “students who are enrolled in a New Jersey public school in their resident school district during the time of application and for the entire year and immediately preceding enrollment in a choice district...Charter school students are considered Tier 1.”¹⁰² Tier 2 students are those who have not attended a school in their resident school district and do not meet the Tier 1 requirements.¹⁰³ This includes students who have been attending schools out-of-district or private schools or are home-schooled.¹⁰⁴ Notably, choice districts are not required to accept Tier 2 applications, and may only do so after all qualified Tier 1 applications have been accepted.¹⁰⁵

The New Jersey’s Department of Education states various benefits to the implementation of the Program, such as smaller class sizes, increased instructional time, and a better school environment for a particular child.¹⁰⁶ Aside from financial benefits to the participating districts, the addition of students from diverse backgrounds that come from various districts can enrich a school community.¹⁰⁷

IV. NEW JERSEY’S CHANCE AT SCHOOL CHOICE

The forthcoming sections discuss New Jersey’s Opportunity Scholarship Act and Florida’s recently passed HB 1 Bill. Section A gives information into the New Jersey Opportunity Scholarship Act, such as the history behind it and what the Act would have done for education in

¹⁰⁰ Interdistrict Public School Choice Program Choice Funding, *supra* note 98, at 13.

¹⁰¹ Interdistrict Public School Choice Program Choice Funding, *supra* note 98, at 13.

¹⁰² Interdistrict Public School Choice Program Policy and Facts, NEW JERSEY DEP’T OF EDUC. <https://www.nj.gov/education/choice/cdistricts/faq/#definitionstier1and2> (Last visited Mar. 14, 2023).

¹⁰³ Interdistrict Public School Choice Program Policy and Facts, *supra* note 101, at 14.

¹⁰⁴ Interdistrict Public School Choice Program Policy and Facts, *supra* note 101, at 14.

¹⁰⁵ Interdistrict Public School Choice Program Policy and Facts, *supra* note 101, at 14.

¹⁰⁶ Interdistrict Public School Choice Program, *supra* note 93, at 13.

¹⁰⁷ Interdistrict Public School Choice Program, *supra* note 93, at 13.

the State. Section B discusses Florida’s recently passed HB 1 Bill and provides information as to what the Bill entails as well as how the Bill is in alignment with Supreme Court precedent.

A. OPPORTUNITY SCHOLARSHIP ACT

On May 10, 2012, six New Jersey Assembly-members from Districts five, six, twenty-one, thirty-six, and seven proposed Bill No. 2830, named the “Opportunity Scholarship Act” (hereinafter “The Act”).¹⁰⁸ The Legislature wanted to provide opportunities for parents of limited resources and their children, who oftentimes cannot select the best learning environment for their children because of their economic situation.¹⁰⁹ The Legislature recognized that a mechanism was needed to provide these families the opportunity to take their children from chronically failing schools¹¹⁰ and expand their educational opportunities.¹¹¹ Thus, the “Opportunity Scholarship Act” was born. Within the bill, it is recognized that the Supreme Court’s case of Zelman v. Simmons_Harris found that a program that provides tuition for low-income children¹¹² to attend either public or nonpublic schools does not violate the Establishment Clause of the United States Constitution.¹¹³

The Act would have directed the state Department of the Treasury to create a four-year pilot program to provide tax credits to corporations which contribute funding to a scholarship organization that would then provide the scholarship to the parent of a low-income child.¹¹⁴ This

¹⁰⁸ Opportunity Scholarship Act, Assemb. B. No. 2830, 215th Leg. § 4 (N.J. 2013)

¹⁰⁹ Opportunity Scholarship Act, supra note 107, at 15.

¹¹⁰ Opportunity Scholarship Act, supra note 107, at 15.; A “chronically failing school” means any public school, other than a charter school, that either (1) the percent of students scoring in partially proficient range in English and Mathematics in standardized tests was equal or greater than 40% in the last two years; or (2) among all the students, the percent of students scoring as partially proficient in English or Mathematics in standardized tests was equal to or greater than 65% in the last two years.

¹¹¹ Opportunity Scholarship Act, supra note 107, at 15.

¹¹² Opportunity Scholarship Act, supra note 107, at 15.; The Act considers a child “low-income” if they live in a home where the income does not exceed 185% of the federal poverty level.

¹¹³ Opportunity Scholarship Act, supra note 107, at 15.

¹¹⁴ Opportunity Scholarship Act, supra note 107, at 15.

would give the student the opportunity to pay tuition at an eligible school that the parent or guardian chooses for the child.

The total funds raised by the corporations – which was to be roughly \$138 million – would be allocated to seven underperforming districts, specifically Asbury Park City District, Camden City School District, Elizabeth City School District, Lakewood City School District, Newark City School District, City of Orange School District, and Passaic City School District.¹¹⁵

The Act states that if the eligible school is a nonpublic school, then the school must agree to continue enrolling that student for a minimum of two full school years and if the school is religious, a student must be allowed to opt out of any religious instruction or activity.¹¹⁶ The majority of the scholarships – 70% – will be awarded to students in kindergarten through eighth grade, with the rest dedicated to high school students.¹¹⁷ The Act also states that target districts must provide transportation services to scholarship students.¹¹⁸

The Act also provides strict requirements that must be adhered to for a nonpublic school to be deemed eligible to participate in the program. Such requirements include (1) an independent financial audit to ensure that the school is financially viable; (2) being a current member of the New Jersey Association of Independent Schools; and (3) the submission of results from the most recent standardized testing to the Commissioner of Education, with standardized testing being necessary for eligibility.¹¹⁹

The Act was majorly supported by then-Governor Chris Christie and considered the crown jewel of his education reform agenda.¹²⁰ The New Jersey Education Association – New Jersey’s

¹¹⁵ Opportunity Scholarship Act, *supra* note 107, at 15.

¹¹⁶ Opportunity Scholarship Act, *supra* note 107, at 15.

¹¹⁷ Opportunity Scholarship Act, *supra* note 107, at 15.

¹¹⁸ Opportunity Scholarship Act, *supra* note 107, at 15.

¹¹⁹ Opportunity Scholarship Act, *supra* note 107, at 15.

¹²⁰ Jessica Calefati, [N.J. Lawmaker’s Advance School Voucher Program for Students in Failing Schools](https://www.nj.com/news/2011/01/nj_lawmakers_advance_school_vo.html), NJ.COM, https://www.nj.com/news/2011/01/nj_lawmakers_advance_school_vo.html (Last visited Mar. 25, 2023).

largest teachers' union – vehemently opposed the Act, arguing that there was not enough accountability for the program and would only help struggling private schools.¹²¹ While there was some division on ideological lines, the bill received bipartisan support, even from then-Newark Mayor Corey Booker.¹²² A vote on the Act was ultimately blocked by an assemblywoman representing Essex County, leading the Act to live in New Jersey history as a “what if?” in the State’s education reform.¹²³

B. FOLLOWING IN THE FOOTSTEPS OF OTHERS: FLORIDA’S HB 1 BILL

Various states and territories across the country have enacted programs similar to school choice vouchers that empower parents to make the best decision for their children’s education.¹²⁴ The most recent state to expand its school choice program is Florida through the passage of the HB 1 Bill. Florida currently offers scholarship programs for eligible, lower income students to attend schools that fit their needs.¹²⁵ HB 1 expands eligibility for Florida’s school choice scholarships and offers school choice vouchers to all children in Florida, regardless of their families’ income nor the zip code they live in.¹²⁶ The vouchers can be used at private schools or for home-schooling.¹²⁷ Priority is given to students whose household income does not exceed 185 percent of the federal poverty level or who are in foster care.¹²⁸ Next on the priority list are students whose

¹²¹ Calefati, *supra* note 119, at 17.

¹²² Jessica Calefati, Newark Mayor Cory Booker Touts Scholarship Bill that Would Allow Some Students to Attend Private School, NJ.COM, https://www.nj.com/news/2012/05/newark_mayor_cory_booker_touts.html

¹²³ Jenna Portnoy, Chris Christie Town Hall in Paterson Turns into Yelling Match Over Education, NJ.COM, https://www.nj.com/politics/2013/03/chris_christie_town_hall.html (Last visited Mar. 25, 2023).

¹²⁴ School Vouchers, *supra* note 3, at 2.

¹²⁵ Historic School Choice, Parental Empowerment Legislation Signed Into Law, THE FLORIDA SENATE, <https://www.flsenate.gov/Media/PressReleases/Show/4430> (Last visited Mar. 29, 2023).

¹²⁶ Jason Delgado, Florida’s School Choice Expansion Bill Now Heads to the Governor’s Desk, SPECTRUM NEWS 13, <https://www.mynews13.com/fl/orlando/news/2023/03/17/florida-house-passes-school-choice-expansion-> (Last visited Mar. 29) ; see also Historic School Choice, Parental Empowerment Legislation Signed Into Law, THE FLORIDA SENATE, <https://www.flsenate.gov/Media/PressReleases/Show/4430> (Last visited Mar. 30, 2023).

¹²⁷ Spectrum News Staff, DeSantis Signs Bill Authorizing School Vouchers for all Florida Students, SPECTRUM NEWS 13, <https://www.mynews13.com/fl/orlando/news/2023/03/27/desantis-signs-bill-authorizing-school-vouchers-for-all-florida-students>.

¹²⁸ House Bill One of 2023, Ch. 2023-16, § 3 (F.L. 2023).

household income exceeds 185 percent of the federal poverty level but does not exceed 400 percent of that said level.¹²⁹ HB 1 will give parents an education savings account to take money that the State of Florida has appropriated for the child's use in public school and allow the parents to use that towards different non-public schools, like religious schools.¹³⁰

There are also various requirements within the bill that ensure academic achievement in private schools. Florida school districts must coordinate with the Department of Education to provide participating private schools with statewide assessments and the materials required for those assessments.¹³¹ For a private school to be eligible to participate in the Family Empowerment Scholarship Program, the private school, whether religious or not, must discuss academic programs, specialized services, and other important policies with parents so that the parents can make the best determination regarding their child's needs.¹³² If the private school fails to do so, the education commissioner may determine that the school is ineligible to participate in the scholarship program.¹³³ Therefore, there are multiple safeguards to ensuring that parents are making an informed choice and that private schools are held accountable, a major fear for those in opposition to the bill.¹³⁴

New Jersey can look to Florida as an example of school choice programs. In the current Supreme Court jurisprudence, I do not believe that HB 1 violates any Supreme Court precedent, especially after Carson. Under Zelman's holding, HB 1 is neutral towards religion since it is applicable to all schools, regardless of whether they are religious or not. Also, the program is available to all students, no matter their income levels, therefore it applies to a broad range of

¹²⁹ Id.

¹³⁰ Id. at § 4.

¹³¹ Id. at § 7.

¹³² Id. at § 9.

¹³³ Id.

¹³⁴ See Delgado, supra note 125, at 17.

citizens.¹³⁵ HB 1 also passes muster under the Free Exercise Clause and Espinoza because there is no language that bars religious schools from participating.¹³⁶ Students and their families do not have to decide between a quality education and their religious beliefs under HB 1. Finally, HB 1 is also acceptable under Carson for similar reasons: the bill does not discriminate against private schools solely because they are religious.¹³⁷ All schools need to meet certain requirements to be eligible to participate, and by allowing money to go to religious education, the State is empowering parents to make their own decisions regarding their child's education, rather than being forced to send their kids to private schools.¹³⁸

V. THE QUESTION OF THE CONSTITUTIONALITY OF NEW JERSEY'S CURRENT INTERDISTRICT PUBLIC SCHOOL CHOICE ACT AND THE OPPORTUNITY SCHOLARSHIP ACT

The forthcoming sections analyze New Jersey's current Interdistrict Public School Choice Act and the once-proposed Opportunity Scholarship Act under Zelman, Espinoza, and Carson. There will be discussions based on these three decisions and whether both Acts pass muster under the Supreme Court's decisions.

A. INTERDISTRICT PUBLIC SCHOOL CHOICE ACT

New Jersey's Program is likely in violation of the Free Exercise Clause because, like in Espinoza, the Act contains a provision that bars sectarian schools from receiving the benefit of aid from students who would like to attend sectarian private schools.¹³⁹ For families to receive this aid, they would have to surrender their religious beliefs and sacrifice their children attending a private school of their choice that will offer better academic options that is based in the family's

¹³⁵ Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002); see also Delgado, *supra* note 125, at 17.

¹³⁶ House Bill One of 2023, Ch. 2023-16, § 4 (F.L. 2023); Espinoza v. Montana Dep't of Revenue, 140 S.Ct. 2246, 2254 (2020)

¹³⁷ House Bill One of 2023, Ch. 2023-16, § 4 (F.L. 2023)

¹³⁸ See Carson as next of friend of O.C. Makin, 142 S.Ct. 1987, 1993 (2022).

¹³⁹ Opportunity Scholarship Act, Assemb. B. No. 2830, 215th Leg. § 4 (N.J. 2013); see also Espinoza v. Montana Dep't of Revenue, 140 S.Ct. 2246, 2254 (2020)

faith. This is exactly the unequal treatment that the Free Exercise Clause tries to protect against.¹⁴⁰ One of New Jersey's main goals should be to do everything in their power to help children receive the best quality education that they can. That is currently not happening under the current system, as more and more children slip through the cracks every day.¹⁴¹

The Program would also most likely fail under Zelman because it is not entirely neutral towards religion.¹⁴² The Program is clearly only open to certain public schools that opt into the program.¹⁴³ The tax funds that are raised to cover the program costs are also only going to the public schools that are participating.¹⁴⁴ Tier 2 students, which includes students in private schools, are at a disadvantage since the very Program states that choice districts do not have to accept these students at all.¹⁴⁵ This provision clearly shows that students in private schools (which include religious schools) are not treated equally with students in public schools.¹⁴⁶ This difference in treatment thus offends the Establishment Clause, showing that the Program is anything but neutral.

The Program is also most likely in violation of Carson v. Makin, because the program disqualifies private religious schools from partaking in the program solely because they are religious, as was the case in Carson.¹⁴⁷ As the Court noted in Carson, completely barring religious schools and private schools from participating in the Program creates stricter separation between

¹⁴⁰ First Amendment and Religion, UNITED STATES COURTS, <https://www.uscourts.gov/educational-resources/educational-activities/first-amendment-and-religion#:~:text=The%20Establishment%20clause%20prohibits%20the,as%20the%20Church%20of%20England> (Last visited Mar. 27, 2023).

¹⁴¹ It should be noted that 14% of all K-12 children in New Jersey are educated in private schools, for a total of 211,700 students; see Best New Jersey Private Schools (2023), PRIVATE SCHOOL REVIEW, <https://www.privateschoolreview.com/new-jersey#:~:text=Best%20New%20Jersey%20Private%20Schools,national%20average%20of%2010%25>).

¹⁴² Zelman v. Simmons-Harris, 536 U.S. 639, 643 (2002).

¹⁴³ Interdistrict Public School Choice Program Choice Funding, *supra* note 98, at 13.

¹⁴⁴ Interdistrict Public School Choice Program Choice Funding, *supra* note 98, at 13.

¹⁴⁵ Interdistrict Public School Choice Program Choice Funding, *supra* note 98, at 13.

¹⁴⁶ Interdistrict Public School Choice Program Choice Funding, *supra* note 98, at 13.

¹⁴⁷ Carson as next of friend of O.C. Makin, 142 S.Ct. 1987, 1997 (2022).

Church and State than is called for by the Constitution.¹⁴⁸ Furthermore, the Program is obviously offering a subsidy to public schools that is not being offered to private nor religious schools. By allowing public schools to reap the benefits of the Program through tax funds and the state's tuition payment for the child, but not allowing religious schools to do the same, New Jersey is disqualifying religious schools from reaping the benefits of the Program solely because they are religious.¹⁴⁹ This program, like Carson, is directly discriminating against religious schools and families who wish to send their children to these schools solely based on the fact that the schools are religious and not secular public schools.

B. OPPORTUNITY SCHOLARSHIP ACT

The Opportunity Scholarship Act does not offend the Establishment Clause as analyzed by Zelman. The Act is a neutral aid program like the program in Zelman, which allowed tuition grants to all children that fell under a certain poverty level.¹⁵⁰ Low-income children from certain failing districts would be receiving scholarships, thus, as the Court finds in Zelman, where a government aid program is neutral and applies to a broad class of citizens, then there is no Establishment Clause issue.¹⁵¹ All children who meet the low-income requirements within the seven failing school districts would be allowed to participate in this program, irrespective of religious background. There is no language singling out religious schools because they are religious. Rather, the program is centered on helping low-income students have greater opportunities to succeed in their education by allowing their families to choose schools that best suit their needs.

The Act is most akin to the program created by the Montana Legislature in Espinoza. The Act, like the program in Espinoza – which allowed for tax credits to taxpayers who donated to

¹⁴⁸ Id.

¹⁴⁹ Id. at 2000.

¹⁵⁰ Zelman v. Simmons-Harris, 536 U.S. 639, 644 (2002).

¹⁵¹ Opportunity Scholarship Act, Assemb. B. No. 2830, 215th Leg. § 4 (N.J. 2013).

scholarship funds that would be used for children to attend private schools – allows children to attend private schools, including religious schools, that follow certain accreditation requirements, like submitting standardized test results and undergoing financial audits.¹⁵² The Act allows the scholarship funds to be used towards all schools: public or not, and religious or not. There is no discrimination against religious schools, and, unlike the Interdistrict Public School Choice Program, the Act does not single out religious schools.¹⁵³ Rather, the Act even requires that religious schools allow children to opt out of religious programming, proof that the Act does not create any form of special treatment towards religious schools and even supports a person’s religious freedom through the option to opt-out of certain programs.¹⁵⁴

The Act would also pass muster under the Free Exercise Clause under Carson v. Makin. The Act, like that of Carson, contained strict requirements to ensure that private schools are performing at levels that lead to success.¹⁵⁵ The Act is open to private schools, and gives full choice to parents to choose to send their children to a religious private school, unlike the program in Carson.¹⁵⁶ The broad application of the Act allows aid recipients to express their religious beliefs as they see fit: either by continuing public education, going to charter schools, or going to religious schools. The Act even states that religious schools must allow students to opt out of religious activities or education if the student or parent wishes.¹⁵⁷ The Act is thus not in violation of the Free Exercise Clause, because the Act goes to great lengths to ensure that parents and students’ religious

¹⁵² Opportunity Scholarship Act, Assemb. B. No. 2830, 215th Leg. § 4 (N.J. 2013); see also Espinoza v. Montana Dep’t of Revenue, 140 S.Ct. 2246, 2251 (2020)

¹⁵³ Opportunity Scholarship Act, Assemb. B. No. 2830, 215th Leg. § 4 (N.J. 2013); see also Interdistrict Public School Choice Program, supra note 93, at 13.

¹⁵⁴ Interdistrict Public School Choice Program, supra note 93, at 13.

¹⁵⁵ Opportunity Scholarship Act, Assemb. B. No. 2830, 215th Leg. § 4 (N.J. 2013); see also Carson as next of friend of O.C. Makin, 142 S.Ct. 1987, 1993 (2022).

¹⁵⁶ Opportunity Scholarship Act, Assemb. B. No. 2830, 215th Leg. § 4 (N.J. 2013).

¹⁵⁷ Id.

beliefs are protected by allowing religious schools to partake in the program and by allowing students to not participate in religious education.

VI. SCHOOL CHOICE AND MINORITY COMMUNITIES: CREATING OPPORTUNITIES FOR ALL

The forthcoming section includes a case study of the town of West New York, located in Hudson County, New Jersey. The case study will analyze the academic achievement of children in the town's grammar schools and compares the financial cost of providing vouchers to these students to attend private elementary schools in Hudson County.

A. CASE STUDY: WEST NEW YORK, NEW JERSEY

New Jersey is a melting pot of different cultures, races, languages, identities, and even finances. New Jersey is also home to the most densely populated county in the United States: Hudson County. Hudson County also has a substantial minority population: 42.5% of residents identify as Hispanic or Latino, and 15.2% identify as Black or African American.¹⁵⁸ This substantial minority population also reflects in the county's school system. One of Hudson County's municipalities, West New York, is a perfect example of the high population of minority communities in public schools, particularly Latinos.

There are 7,993 students enrolled in West New York's public schools, and 94.7% of the students in the West New York schools are Latino.¹⁵⁹ When looking at academic achievement within the schools, District goals are unfortunately not being met. West New York's target for English Language Arts proficiency for the school year of 2018 to 2019 was 48.4%.¹⁶⁰ The proficiency rate, however, for federal accountability was 43.4%, therefore the goal for English

¹⁵⁸ Quick Facts: Hudson County, NJ, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/hudsoncountynewjersey/PST045221> (Last visited Mar. 18, 2023).

¹⁵⁹ NJ School Performance Report: West New York School District, NJ.GOV, <https://rc.doe.state.nj.us/2020-2021/district/detail/17/5670/demographics?lang=EN> (Last visited Mar. 18, 2023).

¹⁶⁰ NJ School Performance Report: West New York School District, *supra* note 158, at 23.

Language Arts proficiency was not met.¹⁶¹ Mathematics rates were even lower: the Annual Target for the school district was 41.9%, yet the Proficiency Rate for Federal Accountability was only 29.9%, a dismally low percentage.¹⁶²

West New York has six public elementary schools, one middle school, and one high school.¹⁶³ The School District spends an average of \$10,450 per-pupil, per year.¹⁶⁴ There are about fifty-eight private schools located in Hudson County, both religious and non-religious elementary schools and high schools.¹⁶⁵ Two of these elementary schools are Academy of St. Joseph's of the Palisades in West New York and Academy of Our Lady of Grace in Fairview. St. Joseph's tuition for the 2022-2023 school year is \$5,935, a little less than half of the per-pupil expenditure of the West New York public schools.¹⁶⁶ Tuition for Academy of Our Lady of Grace for the 2023-2024 school year is \$6,155 for a student whose family is not a member of the parish church and \$4,855 if the student's family are members of the parish church.¹⁶⁷ These tuition rates are still lower than the per-pupil expenditure at the West New York public schools. West New York, and so many school districts like it, are spending large sums of money, yet their students are underperforming in crowded classrooms, while also not receiving the individualized care and attention that smaller schools like Academy of St. Joseph's and Academy of Our Lady of Grace can and do provide for their students.

¹⁶¹ NJ School Performance Report: West New York School District, *supra* note 158, at 23; The Proficiency Rate for Federal Accountability measures is the percentage of students that met or exceeded expectations on the new Jersey Student Learning Assessment and the DLM alternate assessment.

¹⁶² NJ School Performance Report: West New York School District, *supra* note 158, at 23.

¹⁶³ NJ School Performance Report: West New York School District, *supra* note 158, at 23.

¹⁶⁴ NJ School Performance Report: West New York School District, *supra* note 158, at 23.

¹⁶⁵ Top 20 Best Hudson County Private Schools, PRIVATE SCHOOL REVIEW, <https://www.privateschoolreview.com/new-jersey/hudson-county> (Last visited Mar. 18, 2023).

¹⁶⁶ Registration Information: K-8th Tuition & Fees 2022-2023, ACADEMY OF ST. JOSEPH'S OF THE PALISADES, https://www.stjosephpalisadeselem.com/_files/ugd/b55c74_ec45eb9139864960b4a1a59cbf9615bd.pdf (Last visited Mar. 19, 2023).

¹⁶⁷ Tuition and Fees: 2023-2024 Tuition Rates, ACADEMY OF OUR LADY OF GRACE, <https://aolgfairview.org/tuition-fees> (Last visited Mar. 19, 2023).

Also damaging to the students of West New York and other students in low-income, minority neighborhoods across New Jersey is the fact that children are placed in public schools based on “attendance zones.”¹⁶⁸ Attendance zones are geographic zones within a school district that determine which public school a student will be attending. West New York is a majority immigrant, Latino community of working-class individuals. Therefore, the children of West New York are priced out of a free, higher quality public school education solely based on the fact that they live in West New York. These attendance zones very closely correlate with explicitly racist redlining maps that were drawn during the 1930s.¹⁶⁹ New Jersey’s public schools have ranked sixth in the nation of being the most segregated schools in the nation.¹⁷⁰ By having school choice opportunities, like the Opportunity Scholarship Program, New Jersey can tackle the racism of the past by allowing students, like those in West New York, to leave their failing schools and attend religious and private schools like Academy of St. Joseph’s and Academy of Our Lady of Grace.

VII. CONCLUSION

New Jersey faces an up-hill battle in its fight for school choice vouchers and similar scholarship initiatives. The prospects of New Jersey adopting a system like the Opportunity Scholarship Act is dim largely because of the powerful teacher’s union. However, parents are beginning to realize the flaws within the public education system. The children of New Jersey deserve every opportunity to receive the best education that they can and parents deserve to be able to send their children to

¹⁶⁸ Michael Bindas, The Once and Future Promise of Religious Schools for Poor and Minority Students, 132 Yale L.J. Forum 529, 550 (2022).

¹⁶⁹ Bindas, supra note 167, at 24; Between 1930 and 1945, the Homeowner’s Loan Corporation developed color-coded maps for more than two-hundred cities across America assigning grades of A through D to each town. Areas graded A were deemed desirable neighborhoods and were green in color on the maps. Areas graded D were deemed hazardous or dangerous and were red in color. The maps were steeped in racist ideologies against minorities. Neighborhoods associated with Black people, Jews, Asians, and Hispanics received D grades.

¹⁷⁰ Christine Sloan, Farleigh Dickinson University Students Say New Jersey’s Residential Segregation Leads to School Segregation, CBS NEW YORK, <https://www.cbsnews.com/newyork/news/new-jersey-school-segregation/> (Last visited Mar. 27, 2023).

school with peace of mind. The Supreme Court has equipped the States with the law necessary to allow them to create school choice vouchers and scholarships. The time has come for the voices of the children of New Jersey to be heard. The question is: will we listen?