TO: Senator Roger Chamberlain, Chair, Senate Education Finance and Policy Committee

cc: Members, Senate Education Policy and Finance Committee

FROM: Lee McGrath, Institute for Justice

DATE: March 3, 2021

RE: Constitutionality of Minnesota Education Choice legislation – SF 1525

QUESTION PRESENTED

Is financial aid to parents for private school tuition and related expenses constitutional under the U.S. or Minnesota constitution?

SHORT ANSWER

Yes. SF 1525, a bill to provide Education Savings Accounts (ESAs) to students, is constitutional.

Counter to claims from opponents of educational choice, this is true because the jurisprudence surrounding the constitutionality of educational tax credits has changed significantly in the forty-seven years since *Minnesota Civil Liberties Union*. In that case, the Minnesota Supreme Court largely relied on the United States Supreme Court holding of the same year in *Committee for Public Education and Religious Liberty v. Nyquist*. However, several landmark United States Supreme Court decisions have been issued since *Nyquist* that significantly undermine—and largely overrule—its holding. Under this new jurisprudence, your proposal is constitutional and provides vital opportunities for families to enroll their children into non-public schools.

DISCUSSION

In previous years, opponents argued that educational tax credits and other choice programs are potentially unconstitutional. Opponents have based their argument on a 1974 Minnesota Supreme Court case striking down an education tax credit for private school tuition, *Minnesota Civil Liberties Union v. State*.[1] In that case, the Minnesota Supreme Court held that the tax credit was an unconstitutional violation of the Establishment Clause of the First Amendment of the United States Constitution. However, in coming to that conclusion, the court relied on the now-outdated federal precedent of *Committee for Public Education and Religious Liberty v. Nyquist*.[2]

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[1] *Minnesota Civil Liberties Union v. State*, 224 N.W.2d 344 (Minn. Nov. 26, 1974).
[2] *Id.* at 350–54 (citing *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (June 25, 1973)).

The Court in *Nyquist* held that a New York statute providing aid programs for private elementary and secondary schools, including tuition reimbursements for low-income parents of private school students, was an unconstitutional violation of the Establishment Clause.[3] The Court found that although the statute had a secular purpose, the programs would subsidize or advance religion because (1) the language of the act did not guarantee a separation of secular and religious educational functions and (2) practically all of the schools that qualified were religiously-affiliated.[4] Relying on this holding, the Minnesota Supreme Court in *Minnesota Civil Liberties Union* held the 1971 educational tax credits invalid under the Establishment Clause of the First Amendment.[5] The court also affirmed that the Blaine Amendment of the Minnesota State Constitution[6] was properly ratified, but declined to comment on the validity of the tax credit under that provision.[7]

Opponents have relied on this line of cases. However, numerous cases have come before the United States Supreme Court in the forty-seven years since *Minnesota Civil Liberties Union* that fundamentally undermine its persuasiveness in this context. These include *Mueller v. Allen*,[8] *Zelman v. Simmons-Harris*,[9] *Arizona Christian School Tuition Organization v. Winn*,[10] *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[11] and *Espinoza v. Montana Department of Revenue*.[12]

First, nearly exactly ten years after its decision in *Nyquist*, the Supreme Court reviewed a Minnesota tax deduction for educational expenses, including the costs of tuition, textbooks, and transportation in *Mueller v. Allen*.[13] As in *Nyquist*, the *Mueller* Court found that the statute had a secular purpose, namely advancing education.[14] However, the Court distinguished the statute from its holding in *Nyquist*, the Court found that the Minnesota tax deductions provided only indirect support to sectarian schools, and did not foster excessive entanglement between religion

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[3] *Nyquist*, 413 U.S. 756 (1973).
[4] *Id.* at 780 ("In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and non-ideological purposes, it is clear from our cases that direct aid in whatever form is invalid.").
[5] *Minnesota Civil Liberties Union*, 224 N.W.2d at 233.
[6] MINNESOTA CONST. ART. XIII, § 2 ("In no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught.").
[7] *Minnesota Civil Liberties Union*, 224 N.W.2d at 234. *Cf. Minnesota Federation of Teachers v. Mammenga*, 500 N.W.2d 136 (Minn. Ct. App. 1993) (holding that a statute allowing high school students to enroll in private college classes at the state's expense did not violate the Blaine Amendment because any benefits flowing to religious colleges were indirect and incidental).
[8] 463 U.S. 388 (1983).
[9] 536 U.S. 639 (2002).
[10] 563 U.S. 125 (2011).
[11] 137 S.Ct. 2012, 2025 (U.S. 2017)
[12] 140 S. Ct. 2246, 2261–2262
[13] *Mueller*, 463 U.S. 388 (June 29, 1983)
[14] *Id.* at 395.

and the government.[15] While the *Mueller* Court acknowledged that providing financial assistance to parents of parochial school children may economically advance the religious institution, it emphasized the attenuated nature of those financial benefits.[16] Ultimately, the *Mueller* Court upheld the statute, even though an annual statistical analysis showed that the deductions primarily benefitted religious institutions.[17] The Court thus enunciated a clear rule that

> 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.[18]

Based on this rule, the Supreme Court upheld state-sponsored scholarships for private schooling of Ohio students in the 2002 case *Zelman v. Simmons-Harris*.[19] Explicitly distinguishing *Nyquist*,[20] the Court in *Zelman* affirmed the *Mueller* Court, holding that state financial assistance only reached sectarian schools through numerous, deliberate, individual choices by recipients.[21] According to the Court, any incidental advancement of the religious institution was reasonably attributable to the individual aid recipients.[22]

Then, in 2011 the Court made clear that tax benefits for education, such as credits and deductions, are on even sounder constitutional grounds than the direct scholarships upheld in the Ohio case.[23] In *Arizona Christian School Tuition Organization v. Winn*, taxpayers challenged the constitutionality of a state tuition tax credit.[24] However, the Supreme Court held that the

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[15] *Id.* at 399–400.
[16] *Id.* at 399 ("It is true, of course, that financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children. It is also true, however, that under Minnesota's arrangement public funds become available only as a result of numerous, private choices of individual parents of school-age children.").
[17] *Id.*
[18] 536 U.S. at 652 (citing *Mueller*, 463 U.S. 388; *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993)).
[19] 536 U.S. 639 (2002).
[20] *Id.* at 661 ("*Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion.")
[21] *Id.* at
[22] *Id.* at 662. ("[T]he Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice.").
[23] *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011).
[24] *Id.*

taxpayers lacked standing to assert their claim that the state had violated the Establishment Clause.[25]

Finally, over the past four years, the Court issued two decisions that removed any doubt that denying a benefit based on a school's religious status violates the Free Exercise Clause of the First Amendment.

First, in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Court held that denying a generally available benefit due to a recipient's religious status violated the Free Exercise Clause.[26] There, the Court rejected the government's policy of excluding religious organizations from a grant program. Under strict scrutiny review, the Court explained that "only a state interest 'of the highest order' can justify [a state's] discriminatory policy."[27] The Court found that Missouri's interest in achieving a greater separation between church and state than required by the Establishment Clause failed to satisfy strict scrutiny.[28]

Second, in *Espinoza v. Montana Department of Revenue*, the Court applied *Trinity Lutheran* to hold that Montana violated the Free Exercise Clause when it applied its "no-aid" provision to exclude religious schools from the state's tax credit scholarship program. The Court held that the exclusion violated the Free Exercise Clause because it barred "religious schools from public benefits solely because of the religious character of the schools" and "plainly exclude[d] schools from government aid solely because of religious status."[29] The Court pointedly noted that "once a state decides [to subsidize private education], it cannot disqualify some private schools solely because they are religious."[30]

In sum, the last significant Minnesota case to weigh in on private school tuition has been effectively overruled by four decades of subsequent Supreme Court opinions. If Minnesota chooses to enact an educational choice program, it will have no trouble passing muster under the U.S. or Minnesota Constitution.

[25] *Id.* at 146.
[26] 137 S.Ct. at 2025.
[27] *Id.*
[28] *Id*. at 2024.
[29] 140 S. Ct. at 2255–56 (internal quotation marks omitted).
[30] *Id.* at 2262.