Testimony in Support of H.B. 2218

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House K-12 Education Budget Committee

Chairwoman Williams and members of the committee, my name is Brittany Jones. I am an attorney and the Director of Policy and Engagement for Kansas Family Voice. We represent thousands of members in Kansas, many of whom are looking for alternative avenues to educate their children. I am here today to encourage you to support the Sunflower Education Equity Act (H.B. 2218).

While I could address all the benefits of accounts like the Sunflower Education Equity Account, today I would like to focus on why educational savings accounts are legally sound under the U.S. Constitution and under the Kansas Constitution.

1. The history of Blaine Amendments show that they are invalid to bar families from exercising their religious freedom.

One charge that has been made is that H.B. 2218 violates our restriction on state dollars going to religious institutions. The Kansas Constitution states, "No religious sect or sects shall control any part of the public educational funds."[1] However, the United States Supreme Court has renounced the application of similar state constitutional provisions in this way, multiple times.[2] We will explore these cases more, but first, let's explore the history and foundation of these provisions, also known as Blaine Amendments.

Thirty-seven states have what are known as Blaine Amendments.[3] Like the section of the Kansas Constitution quoted above, Blaine Amendments exclude school funds from going to a religious institution. Blaine Amendments have a long and checkered history in American life.

The first Blaine Amendment was introduced in the 1870s when anti-Catholic and anti-immigrant sentiment was high.[4] Senator James Blaine introduced an amendment to the U.S. Constitution in1876 that would have prohibited funds from going to sectarian

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[1] Kan. Con. §6(c).
[2] *See Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020); *Carson v. Makin*, 142 S. Ct. 1987 (2022); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).
[3] Alabama, Alaska, Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, Wisconsin, Wyoming
[4] Meir Katz, The State of Blaine: A closer look at the Blaine Amendments and their modern application, 12 Federalists Soc'y Rev. 111 (2011).

schools.[5] It passed the House easily but then it failed in the Senate.[6] In fact, speeches from that debate show that the Senators knew that this amendment was based on anti-Catholic animus.[7]

This history has been recounted in multiple Supreme Court cases as a reason not to apply Blaine Amendments as opponents of H.B. 2118 have requested.[8] In fact, the U.S. Supreme Court said in *Mitchell v. Helms* said, "This doctrine, born of bigotry, should be buried now."[9]

2. The U.S. Supreme Court in the modern era has already ruled that the U.S. Constitution nor state constitutional provisions can be used to restrict family's from utilizing school choice programs in the manner of their choosing.

One of the first cases that addressed the specific issue of funding in school choice programs in the modern era was *Mueller v. Allen*.[10] In that case, Minnesota statute allowed parents to deduct tuition and other educational expenses from their taxes. Opponents argued that this tax break largely benefitted families whose children were in parochial schools. Based on three factors, the Court held that it did not violate the Establishment Clause of the U.S. Constitution, primarily because the law only provided only indirect support to parochial schools and really was a benefit to the families instead.

In 2002, the Court built upon this case and gave the final nail in the argument that the Establishment Clause somehow barred states from empowering parents to make educational choices in *Zelman v. Simmons-Harris*.[11] This case was about a Cleveland School Choice program, and it clarified that educational choice programs were allowed as long as they were religiously neutral and were a true private choice. In this case, the families happened to choose to use the school choice program at a private religious school. The government was not directing the dollars to these schools, the parents were. This program helped students from many walks of life and the program was constitutional under the U.S. Constitution.[12]

Recently, the Supreme Court re-affirmed this understanding of the Establishment Clause. In *Trinity Lutheran v. Comer*, the state of Missouri was not allowed to exclude a

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[5] *Id*.
[6] 4 CONG. REC. 5192 (1876); 4 CONG. REC. 5595 (1876),
[7] 4 CONG. REC. 5589 (1876).
[8] See *Espinoza* 140 S. Ct. at 2259 (Gorsuch, J., concurring); *Mitchell v. Helms*, 530 U.S. 530 793, 828-29 (2000); *Zelman v. Simmons-Harris*, 536 U.S. 639, 720-21 (2002)(Breyer, J., dissenting).
[9] *Mitchell v. Helms*, 530 U.S. 793, 829
[10] *Mueller v. Allen*, 463 U.S. 388 (1983).
[11] *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)
[12] *Id*. At 643.

religious institution from a general available program just because it was religious.[13] The Court said that this was imposing a penalty on that institution's free exercise of religion. The state could not use the Establishment Clause to bar churches from this program.

After these decisions, states started proactively excluding private institutions under state constitutional provisions. But the Supreme Court has re-affirmed and clarified that even these state provisions violate the constitution, silencing the application of state Blaine Amendments.

In 2020 in *Espinoza v. Mont. Department of Revenue*, the Court relegated the applications of Blaine Amendments to exclude religious schools to the pages of history.[14] The Court said explicitly excluding families from using scholarship dollars at religious schools, simply because the schools were religious was unconstitutional. The Court said that applying the "no-aid" or Blaine Amendment to the program in this way was discriminatory and unconstitutional.

Justice Gorsuch in his concurrence recounted the discriminatory history of Blaine Amendments and showed his clear disdain for any attempt by a state to use them to block families from making educational choices. While this case did not wipe these provisions from state constitutions, it made them essentially unenforceable & irrelevant.

This holding was re-affirmed this past summer in *Carson v. Makin*, when the Court struck down a Maine rule that did not let parents who were receiving tuition assistance to select sectarian schools for their dollars.[15] The program was designed to exclude schools that would have been eligible for the program but for their religious nature. The Court held that this was not a neutral program, but instead discriminated against religious schools.

In review, the Supreme Court has been very clear – generally available programs cannot discriminate against religious schools or parents simply because of their religious nature. Blaine Amendments are essentially historical relics and should not be used against Kansas kids or families.

3. Lawsuits brought against ESAs in state court have affirmed these decisions, upholding these programs.

At least eight other states have already passed programs similar to H.B. 2218.[16] There have been lawsuits in several of those states that can be instructive in Kansas.

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[13] *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).
[14] *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020).
[15] *Carson v. Makin*, 142 S. Ct. 1987, 1990 (2022).
[16] Arizona, Florida, Indiana, Mississippi, New Hampshire, North Carolina, Tennessee, West. Virginia

One of the earliest lawsuits over an Education Savings Account program was in Arizona in 2013. The state appellate court said that the ESA program did not violate the state constitution because it was neutral towards religion and the funds could be used in many ways, unlike other school choice programs.[17] The Supreme Court refused to take up an appeal of this lower court ruling.[18]

Similarly, in West Virginia, the Supreme Court recently upheld the law stating that it did not violate the state's constitutional provision to provide a thorough and efficient public school system.[19] It said the state could do both.

This is an argument that opponents may use against the Kansas program because we have a similar constitutional provision.[20] If there is a challenge to our Kansas Supreme Court should follow the lead of the West Virginia Supreme Court and recognize that these constitutional provisions do not tie the hands of our legislature in how they ensure educational opportunities for children. This especially true in Kansas in which our state constitution broadly directs the legislature to finance the educational interests of the state, whatever those interest may be.

In conclusion, Blaine Amendments like the one in the Kansas Constitution, were created in prejudice and have long since been discredited and set aside in multiple opinions. This body shoul not allow these prejudices to color their decisions for the Kansas students of today. Like the Supreme Court said in *Mitchell*, "This doctrine, born of bigotry, should be buried now."[21] I ask that you put these arguments to bed, and unleash our student's futures by reporting H.B. 2218 favorably for passage.

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[17] *Niehaus v. Huppenthal*, 310 P.3d 983 (Ariz. App. 2013)
[18] *Niehaus v. Huppenthal*, 2014 Ariz. LEXIS 5.
[19] *State v. Beaver*, 2022 W. Va. LEXIS 700.
[20] Kan. Con. §6(b)("The legislature shall make suitable provision for finance of the educational interests of the state.").
[21] *Mitchell* at 829.