ESTADO LIBRE ASOCIADO DE PUERTO RICO
TRIBUNAL SUPREMO

ASOCIACIÓN DE MAESTROSDE PUERTO RICO, su sindicato, ASOCIACIÓN DE MAESTROS DE PUERTO RICO-LOCAL SINDICAL, por sí y en representación de sus miembros; Recurrida, vs. DEPARTAMENTO DE EDUCACIÓN; HON. JULIA KELEHER, en su carácter oficial como Secretaria del DEPARTAMENTO DE EDUCACIÓN, ESTADO LIBRE ASOCIADO DE PUERTO RICO, Peticionario.	TSPR NÚM. CT-2018-0006 TA NÚM. KLAN201800741 TPI NÚM. SJ2018CV01799 SOBRE: INTERVENORS' MERITS BRIEF

[Note to reader: this is the original English version of this brief. It was translated into Spanish before it filed with the Court.]

INTERVENORS' MERITS BRIEF

I. Introduction

Intervenors ("the Parents") all have children who are struggling in public school and who wish to apply for scholarships to send their children to private schools under Puerto Rico's new school choice program, the Free School Selection Program ("the Program"). This Program will finally allow the Parents the opportunity to choose schools that best fit their children's individual needs. If Plaintiffs succeed in their constitutional challenge against the Program, however, this opportunity will disappear.

Plaintiffs allege that the Program violates the fourth clause of Article II, Section 5 of the Puerto Rico Constitution ("the Support Clause") because it provides "support" to private schools. But as the Parents show below, the Program supports families, not schools. The trial court, however, was bound by this Court's decision in *Asociación de Maestros de Puerto Rico v. Torres*, 137 D.P.R. 528, 548 (1994) ("*Maestros*"), which declared that a similar scholarship program violated this clause. Accordingly, the trial court declared the Program unconstitutional on July 6.

This Court should overturn *Maestros* for five reasons. First, a plain reading of the Support Clause shows that the Program does not provide "support" to private schools. Instead, the Program supports only needy families. Second, this conclusion is consistent with the historical evidence. During the 1951-1952 Constitutional Convention, the delegates repeatedly stated that school scholarships for both children and college students were currently operating and should continue to be permitted.

Third, significant changes in the legal landscape have made the *Maestros* decision outdated. In the last 24 years, about 20 courts—including the U.S. Supreme Court—have upheld the constitutionality of school choice programs. Several of these decisions directly undercut the central premise in *Maestros*, holding that school choice does not provide "support" or "aid" to private schools, but instead only aids children. These decisions include those interpreting Illinois' Support Clause—the model for Puerto Rico's clause.

Fourth, interpreting Puerto Rico's Support Clause to prohibit the Program triggers grave concerns under the Federal Constitution. Last year, the U.S. Supreme Court strongly implied that restricting school choice programs to prevent aid to religious-school students was unconstitutional under the Free Exercise Clause. *See Trinity Lutheran Church of Columbia, Inc.*

v. Comer, 137 S. Ct. 2012 (2017). Although Puerto Rico's Clause is not limited to religious schools, the delegates' discussions show religious considerations motivated them to adopt it. Applying the Clause to invalidate the Program would thus raise the same Free Exercise concerns as *Trinity Lutheran*.

Finally, the current crisis in Puerto Rico's education system emphasizes that the Program would help desperate families, not schools. The public schools are suffering from a depressed economy, decreasing population, dismal test scores, violence, and most recently, Hurricanes Irma and Maria. The Parents, and thousands of other families like them, have become increasingly frustrated and hopeless, feeling their children are being left behind. The Program is necessary to give these children a chance.

The Parents request that this Court overturn *Maestros* and uphold the Program.

II. The Facts

This section describes the Program, the Parents' desperate need for scholarships, and a brief procedural history of the case.

A. The Program

On March 29, 2018, the Governor signed into law the *Ley de Reforma Educativa de Puerto Rico*, which created the Program.[1] The Program allows eligible families to apply for scholarships to attend either public schools outside their neighborhood or private schools. Gifted students can also apply for scholarships for university classes and programs. Act, Art. 14.02, 14.04. The Program prioritizes the neediest and most overlooked children in the Commonwealth: (1) low income students, (2) disabled students, (3) students who are adopted, in

[1] The Education Reform Law also included a new program for charter schools, which the trial court also largely invalidated. The Parents intervene regarding only the Free School Selection Program.

shelter homes, or in foster homes, (4) students who have been victims of bullying or sexual harassment, (5) gifted students, and (6) students who are behind in their education. Act, Art. 14.08.

Scholarships are intended to be available starting in the 2019-2020 school year. *See* Act, Art. 16.07. In the first year of the Program, about 9,600 students can qualify (calculated by 3 percent of the Island's total student population). Act, Art. 14.02. In the program's second year, up to five percent of students can qualify. *Id.* Scholarships may not exceed 80 percent of the funds that the Commonwealth currently spends on educating each public school student, Act, Art. 14.01(c), or about $6,400. The Secretary of Education will appoint the Office of the Program of Free School Selection to administer the Program. Act, Art. 14.01.

Similar school choice programs are already succeeding across the country. Currently, 29 states and the District of Columbia all have school choice scholarship programs. Several states have more than one program, resulting in 65 programs nationwide. Puerto Rican families should be allowed to benefit from these programs as well.[2]

B. The Parents

The Parents—Jennifer González Muñoz, Danitza González Carrión, and Jessica Ñeco—all have children in public school but wish to apply for scholarships so that they can send their children to a school that better serves their individual needs. Under the Program statute, their children would each be granted priority for scholarships, whether because they are low-income, disabled, a victim of bullying, or gifted.

[2] *See, e.g.*, EdChoice, School Choice in America Dashboard, https://www.edchoice.org/school-choice/school-choice-in-america/ (listing all the school choice programs). Public dollars fund thirty-three of these programs, like the Program here. The rest of the programs involve private dollars that receive tax credits or tax deductions. *Id.*

Jennifer González Muñoz is a low-income mother with two young sons. Her oldest, Jacob, is six years old and suffers from a speech disability, as well as persistent and violent bullying from his classmates. Although Jennifer has repeatedly asked his school to both treat his disability and stop the bullying, nothing has been done. Jacob now dreads to go to school. Jennifer desperately wants to send her sons to private school, but cannot afford it with her job making sandwiches in a café and her husband's job as a delivery driver. They plan to apply for Program scholarships as soon as they are available.

Danitza González Carrión is a low-income mother with three children, ages 7, 9, and 13. Danitza fears her children are not receiving a good education at their neighborhood public school, which is sometimes violent and often closes early or for the entire day with little or no excuse. Danitza also feels her three children are not getting the individualized attention that they need. For instance, her 13-year old son has been held back the last two years, and she wishes that that his school had been more attentive to him and more communicative with her about his difficulties. Danitza wants better opportunities for her youngest two children.

Danitza especially has high hopes for her 7-year old daughter, Daniela Sofía, who has a 4.0 grade-point average and loves to learn. But although her daughter has a special passion for learning English, her school provides little instruction in English and Danitza cannot help her at home, as she does not speak English herself. Danitza wants to apply for scholarships to send her two youngest children to a nearby bilingual private school, which she believes will provide them the opportunity to have a promising future and good jobs.

Jessica Ñeco has a 14-year old daughter, Saadia, who is gifted and is entering the 11th grade. Although Saadia attends a residential magnet school, Jessica is frustrated that the school is not challenging enough. Jessica also believes that school administrators have discriminated

against Saadia for her families' political beliefs. Jessica wants the opportunity to apply for a scholarship either to send Saadia to a private school or to enroll her in university classes and programs to supplement her education.

The Parents wish to defend the Program not only for their own children, but for the thousands of other children in Puerto Rico who suffer similar circumstances.

C. Procedural History

Plaintiffs filed their complaint for declaratory relief on April 3. The Parents moved to intervene on May 31. The Commonwealth then moved to dismiss the complaint and the Parents moved for judgment on the pleadings. On July 6, after argument on the motions, the Court of First Instance granted the Parents' motion to intervene. It also denied the motion to dismiss and motion for judgment on the pleadings.

Holding that it was bound by this Court's decision in *Asociación de Maestros de Puerto Rico v. Torres*, 137 D.P.R. 528 (1994), the court entered judgment for the Plaintiffs and enjoined the program. This Court granted intrajurisdictional certification on July 13, and gave parties until July 20 to file briefs on the merits. The Parents thus make the following arguments.

III. Argument

The Program provides much needed "support" to families, not schools, and this Court should declare it constitutional under the Support Clause. Although *Maestros* came to the contrary conclusion, this Court should overturn *Maestros* for five reasons.

First, school choice programs are constitutional under a plain reading of the Support Clause. Second, the discussions at the Constitutional Convention show that the delegates understood that school scholarships programs were already in place and they intended that such programs, as well as future ones, be permissible. Third, the legal landscape has changed

dramatically since the *Maestros* decision, with the overwhelming majority of courts now finding that school choice programs support families, not schools. Fourth, overturning *Maestros* would avoid conflict with the federal Free Exercise Clause under *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). Finally, overturning *Maestros* is the only way to allow the bold educational reform desperately needed by the Puerto Rican people.

A. The Plain Meaning of the Support Clause Shows that the Program Does Not Give "Support" to Schools.

The first step in constitutional analysis is to look at the plain meaning of the Constitution, including at the dictionary definitions of the relevant words. *See Ex parte A.A.R.*, 187 D.P.R. 835, 870–71 (2013); *Cruz Parrilla v. Depto. Vivienda*, 184 D.P.R. 393, 405 (2012). The Support Clause states that, "[n]o public property or public funds shall be used for the *support* of" private schools. P.R. Const. Art. II, § 5 (emphasis added).

The *Diccionario de la Lengua Española* defines "support" as "the action and effect of supporting oneself or another" or "maintenance or sustenance."[3] It also defines "to support" as "[t]o provide aid, give encouragement or assistance" or "[t]o give someone that which is necessary for their maintenance."[4] *See also Muni. de San Sebastián v. QMC Telecom*, 190 D.P.R. 652, 671 n.4 (2014) (relying on Royal Spanish Academy's *Diccionario de la Lengua Española* in statutory interpretation).

Thus, the Support Clause prohibits the government from giving "necessary aid" or "assistance" to private schools. That would include, for example, using public funds to create a private school, to aid a private school that is failing, or to assist with a private school's upkeep,

[3] *Sostenimiento*, *Diccionario de la Lengua Española*, http://lema.rae.es/drae/val=sostenimiento.

[4] *Sostener*, *Diccionario de la Lengua Española*, http://lema.rae.es/drae/?val=sostener.

construction, or operations. At a minimum, supporting private schools would require some direct transfer of funds from the government to the school. But the Program does not do this.

Instead, the Program provides "sustenance," "aid," "encouragement," and "assistance" only to needy families, many of whom have no other means to give their child a good education. *See, e.g.*, Law 85-2018, Art. 1.03 para. 7 (stating the Department will grant scholarships "to students). Providing such support to individuals is nowhere prohibited by the Clause. Although some families will obviously use the scholarships to send their children to private schools, the schools are still not receiving support from the government. Not one penny goes to the private schools absent the free and independent choice of families. Moreover, when the families give money to the schools, they are not "supporting" the schools, but are merely paying for services rendered. Thus, the government is not supporting private schools with scholarships any more than the government supports grocery stores with food stamps.

Because the Program does not directly fund any private schools, the Program does not support private schools under the plain meaning of the Support Clause. Discussions of the Support Clause at the Constitutional Convention confirm this conclusion.

B. The Delegates to the Constitutional Convention Intended to Allow School Choice Programs.

The debates at the 1952 Constitutional Convention reveal a clear understanding of what constitutes "support" for private schools and what does not. The delegates intended to prohibit direct subsidies to private schools for expenses like construction costs, administration, and teachers' salaries. In contrast, they intended to allow programs directly benefiting children, such as school scholarships. In fact, the delegates understood that such scholarship programs were

already operating for both college students and elementary students, and were careful to draft the Support Clause in a way that would not inadvertently prohibit either existing or future programs.

The *Maestros* opinion, however, misinterpreted these discussions—or more often, overlooked them completely.

1. *Maestros* misinterpreted the delegates' discussions.

Maestros' discussion of the Convention was limited. It largely focused on one amendment to the Support Clause to substitute the word "support" in place of "instruction." *Diario de Sesiones de la Convención Constituyente ("Diario"), http://www.oslpr.org/v2/PDFS /DiarioConvencionConstituyente.pdf,* 1790–91. The Clause had originally read that public funds should not be used for "instruction in" private schools, and the amendment instead prohibited "support of" private schools. According to *Maestros*, this amendment "gives weight to a broad interpretation of the prohibition's scope." *Maestros*, 137 D.P.R. at 545. In other words, since the delegates sought to broaden the Support Clause, they must have intended to prohibit any program that could conceivably benefit private schools, including student scholarships.

This is a misinterpretation. While the delegates did intend to broaden the scope of the Support Clause with the word "support," they did so for a very specific reason: they understood "instruction" merely prohibited paying for private school teachers' salaries and they wanted also to prohibit non-pedagogical funding for private schools, such as "administrative expenses" and "costs of physical buildings." *See, e.g.*, *Diario* at 1800 (statement by Delegate Benítez). Nowhere did the delegates express intent to prohibit scholarships.

To the contrary, the delegates all agreed that scholarships should be allowed. This is evident in two places in the discussions. First, in the discussion of an (ultimately rejected)

amendment that would have prohibited either "support or benefit" to private schools. And second, in the discussion of the last clause of Article II, Section 5—the Services Clause.

2. The delegates were careful not to prohibit scholarship programs.

The delegates first discussed scholarships while debating an amendment that would have prohibited both support and "benefit" to private schools. The motivation for the amendment, proposed by Delegate Brunet, was to prohibit public expenditures for things like teachers' sabbaticals, as they arguably benefited schools without technically supporting them. *Diario* at 1794. Although the amendment was defeated, the discussion revealed broad consensus on the constitutionality of scholarships.

Delegate Iriarte first raised the scholarship issue. He was concerned that including the word "benefit" may accidently prohibit scholarship programs:

> If scholarships were granted to certain students . . . at institutions that are not of the government of Puerto Rico or that are not of the government of the United States, that are private institutions, administered or directed by religious sects, let's say, it could be interpreted that these institutions would indirectly be receiving benefits by means of the assignment of scholarships to students who are enrolled in those religious institutions.

Id. 1793. Delegate Iriarte's statement led Delegate Monsanto to ask, "[t]hese scholarships that were referred to by the delegate, whom would they benefit, a private school or the scholarship recipient?" *Id.* Mr. Iriarte responded that although "[t]hey benefit the recipient," a court could conceivably interpret scholarships also to benefit institutions, jeopardizing the scholarship programs. *Id.*

While considering this problem, the delegates discussed whether such scholarship programs already existed. Delegate Barrios asked, "does the Government of Puerto Rico currently give scholarships to students who are going to study at a private religious school in the United States or some other country?" *Id.* 1794. Mr. Benítez answered in the affirmative, and

he mentioned existing scholarship programs for college and medical students. *Id.* Delegate Iriarte then urged, "in order to avoid interpretations that could hinder in some way the involvement of students in these schools, I would ask Delegate Brunet to withdraw his amendment." *Id.*

Amendment sponsor, Delegate Brunet, at first tried to brush off these concerns. He claimed Mr. Iriarte's worries were merely "a storm in a glass of water", and that the amendment would not cover scholarship programs. *Id*. As he explained, public funds were currently being used to send students to "to pursue careers at Catholic and Protestant universities" and that this was "being done with the approval of the whole world."[5] According to Delegate Brunet, there was no real risk that anyone would ever declare such programs to be unconstitutional, even under the "benefit" language. All the same, the amendment was subsequently withdrawn.

The debate shows that the delegates never once questioned the constitutionality of scholarship programs. Instead, they all agreed they currently existed and should continue. The only disagreement was in finding the right language to reflect that. *Maestros*, however, never addressed this discussion.

While the trial court briefly touched on this conversation, the court found that the delegates intended only to allow scholarships for *college* students. Sentencia de Primera Instanca, pág. 13 ("Thus, one can conclude that the Support Clause extends only to primary and secondary school."). The trial court provided no support for this distinction.[6] In fact, the

[5] This was the case, even though the then-prevailing Jones Act, Clause 19, prohibited using public funds for the direct or *indirect* benefit of a sectarian institution. 39 Stat. 951 § 2 (1917).

[6] Other courts have rejected a distinction between K-12 and college students in the context of the constitutionality of school scholarships. *See, e.g.*, *Magee v. Boyd*, 175 So.3d 79, 92, 123 (Ala. 2015) (upholding school-choice program for K-12 students under precedent upholding scholarship program for college students); *see also Mitchell v. Helms*, 530 U.S. 806, 809-11 (2000) (treating precedents involving primary-school funding and university funding as

delegates' later discussions showed they believed that scholarships for "children" already existed and should continue.

3. The delegates intended to allow scholarships for both K-12 students and college students.

The delegates understood that school scholarship programs for both college students and children were constitutional. The delegates emphasized that not only did the Support Clause not *prohibit* scholarships for either age-group, but that that the last clause of Article II, Section 5—the Services Clause— specifically provided for scholarships for "children."

The Services Clause states that "[n]othing contained in [Article II, Section 5] shall prevent the state from furnishing to any child non-educational services established by law for the protection or welfare of children." The *Maestros* Court assumed that "non-educational services" were restricted to services like "dentist" and "fire department services." *Maestros*, 137 D.P.R. at 545, 547. But the delegates' understanding of this provision was far broader. As the delegates understood, school scholarships were "non-educational services" because they were "economic aid" for students, and thus expressly contemplated by this Clause. *Id.* at 1794.[7] As Mr. Brunet explained, the Services Clause allows:

> [the] State to provide school cafeteria services, a dentist service, when it can, [and] give it to all the children of Puerto Rico. You can give them scholarships, they are not essentially educational services because [this] is an economic aid to the student, that the student uses, naturally for their education, for their health.

Id. *See also id.* at 1795 (again referring to scholarships as "economic aid."). Indeed, Mr. Brunet noted that such scholarship programs for children were already operating. *Id.* at 1795.

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indistinguishable in determining that a federal school-funding bill did not violate the Establishment Clause).

[7] The delegates considered "educational services" to be expenses like directly paying for teachers to teach students. *See, e.g., Diario* at 1803 (delegates giving "lectures" as an example of educational services).

("Scholarships are being awarded to poor children to study in elementary schools in the villages."); *id.*, 1796 (Mr. Brunet stating "[t]here are children who receive scholarships."). Again, the delegates never questioned that school scholarships for children would be permissible.

Ironically, the delegates' concern was that while the Services Clause clearly allowed scholarships for "children," the Support Clause may be ambiguous about scholarships for college students. *Id.* at 1796. To assuage these concerns, Mr. Brunet assured them that nothing in the Support Clause would bar scholarships to *anyone*. *Id.* ("[T]here is nothing in the constitution, comrade, that prohibits granting scholarships to adults."); *id.* at 1795 ("The money that the people of Puerto Rico give to young Puerto Ricans to study, is a benefit to the student, not to a particular institution."). Thus, the delegates concluded that scholarships for both children and college students currently existed and would be allowed under Article II, Section 5.

The only caveat was that the delegates would have prohibited a scholarship program that completely replaced the public school system. *Id.* at 1800 (Mr. Benítez stating, "The Government of Puerto Rico cannot create scholarships as a substitute for the public school system."). This would run afoul of Article II, Section 5's requirement that the government provide "a system of free and wholly non-sectarian public education." Art. II, Sección 5. As the Program here is limited to just 3 to 5 percent of students, however, there is no risk of that. It is instead merely a supplement to the existing public system.

Therefore, the delegates would have viewed this Program as constitutional. This conclusion accords with modern caselaw.

C. Caselaw Since *Maestros* Shows that School Choice Supports Families, not Schools.

The third reason this Court should overturn *Maestros* is because it relied on caselaw that is now outdated. At the time of the decision, school choice was still a relatively new concept and

few programs existed. As a result, *Maestros* was able to rely on only one case, *Weiss v. Bruno*, 509 P.2d 973, 978 (Wa. 1973). In that case, the Washington Supreme Court had invalidated a school choice program under Washington's Support Clause and the Federal Establishment Clause.

In the 24 years since *Maestros*, the legal landscape has dramatically changed. Not only has *Weiss* largely been overruled,[8] but there are now 55 school choice programs nationwide. Moreover, about 20 courts have upheld the constitutionality of these programs. The decisions of ten of those courts directly undercut the central premise in *Maestros*, that school choice programs provide "support" to private schools. To the contrary, these decisions all found that these programs support families, and any benefit to the schools is purely incidental.

Some of these cases warrant special attention. First is the U.S. Supreme Court's opinion in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). Second are Illinois cases interpreting Illinois' Support Clause, the explicit model for Puerto Rico's Article II, Section 5. And finally is a series of cases interpreting support clauses analogous to—and even stricter than—Puerto Rico's. Although some cases disagree, they have been rare and unpersuasive.

1. The U.S. Supreme Court found that choice supports families, not schools.

[8] The Washington Supreme Court in *Weiss* addressed two programs that granted public funds for tuition, one for students in grades 1 through 12, and the other for students attending college. 509 P.2d 973, 976 (Wash. 1973). The court held they both violated the state's support clause, in article 9, section 4 of the state constitution, and also held that the program for students in grades 1 through 12 violated the Establishment Clause of the U.S. Constitution. *Id.* at 205, 222, 228-29. The Washington Supreme Court expressly overruled a portion of *Weiss* nearly thirty years later, upholding a voucher program for college students under both the Washington Constitution and U.S. Constitutions. *Gallwey v. Grimm*, 48 P.3d 274, 284 (Wash. 2002). Moreover, the portion of *Weiss* striking down the program under the U.S. Constitution's Establishment Clause does not survive *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), where the U.S. Supreme Court upheld a similar voucher program under the Establishment Clause. *Zelman* is discussed below.

The most influential opinion on the constitutionality of school choice is *Zelman*. *Zelman* involved a challenge to a voucher program for low-income students—like this Program. Although that challenge was brought under the Federal Establishment Clause, the question in that case was the same as here: whether the voucher program constituted public "aid" to religious schools. *Id*. at 649. *Zelman* concluded it did not.

As the Court reasoned, the program "provides assistance directly to a broad class of individuals", who in turn freely choose whether or not to use the aid at a private school. *Id.* at 652. It did not matter that the program helped children attend private school; what mattered was the program helped needy children, and any benefit the schools received was purely "incidental," and attributable to the choice of parents, "not to the government." *Id.*

Zelman has had a tremendous influence on school choice caselaw, including on how state courts interpret support clauses like Puerto Rico's. These support clauses include Illinois' Article X, section 3, the explicit model for Puerto Rico's clause.

2. The Illinois Support Clause—the model for Puerto Rico's Support Clause—also indicates that choice supports families, not schools.

Illinois courts interpret their Support Clause to allow school choice programs. This precedent is especially relevant here because the Illinois Support Clause was the model for Puerto Rico's. As primary drafter of Puerto Rico's Support Clause, Mr. Trías Monge, stated, Article II, Section 5 "is basically similar to that of the Constitution of Illinois, which has, in my opinion, served as the basis for this provision." *Diario* at 1792.[9]

[9] While Mr. Trías Monge also mentioned Hawaii's Support Clause serving as a model, it is unclear if he meant that Hawaii was a model for Puerto Rico's Support Clause, or instead just a model for the proposed, but later rejected, "support or benefit" amendment, discussed above. *Diario* at 1792.

Although Illinois' Support Clause is limited to religious schools, it uses similar "support" language as Article II, Section 5. *See* Illinois Const., Art. X, § 3 (prohibiting the use of public funds "in aid of any church or sectarian purpose, or to help *support or sustain* any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever") (emphasis added).[10]

Moreover, we know exactly what the word "support" means in in Art. X, section 3. Illinois Courts have given the word "support" the same meaning as the word "establish" in Establishment Clause jurisprudence. *Bd. of Educ. v. Bakalis*, 299 N.E.2d 737, 745 (Ill. 1973) ("[T]he words 'aid', 'support or sustain', and 'sectarian purpose' [are interpreted to] yield the same results as the United States Supreme Court's interpretation of the word 'establish' in the Federal First Amendment.") (quoting and agreeing with opinion of the Illinois Constitutional Convention)).[11] In other words, "any program that is constitutional under the establishment clause is constitutional under section 3 of article X of the Illinois Constitution." *Toney v. Bower*, 744 N.E.2d 351, 358 (Ill. App. 4th 2001); *Klinger v. Howlett,* 305 N.E.2d 129, 130 (Ill. 1973)

[10] Although the Puerto Rico drafters would have relied on the 1870 Illinois Constitution later amended in 1970, the Support Clause is identical in both constitutions. *See, e.g., Bd. of Educ. v. Bakalis*, 299 N.E.2d 737, 743 (Ill. 1973).

[11] This interpretation makes sense in light of the U.S. Supreme Court often using the word "support" in analyzing Establishment Clause claims. For example, in *Everson v. Board of Education*, 330 U.S. 1 (1947), the Court upheld transportation subsidies for public *and* private school students. The Court said that it would be unconstitutional to "contribute tax-raised funds to the *support* of an institution which teaches the tenets and faith of any church." But the Court held that the religion-neutral transportation subsidies did not amount to such support, as they instead supported students and only incidentally benefited religious schools. *Id.* at 16 (emphasis added); *see also Board of Education v. Allen*, 392 U.S. 236, 244 (1968) (upholding program providing textbooks to private and public school children, stating "[p]erhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of *support* for a religious institution") (emphasis added).

(stating the restrictions in both clauses are "identical"). That means that after *Zelman*, school choice programs are unquestionably constitutional under Illinois' Support Clause.

Here, this Court need not determine if the Puerto Rican delegates also wished to connect their Support Clause to the federal Establishment Clause.[12] What matters is that the reasoning in the Illinois and federal cases is persuasive, and lines up perfectly with both the plain meaning of the Support Clause and the delegates' intent. As the courts reasoned, an education program designed to benefit children is perfectly constitutional, even if it results in an "attenuated financial benefit" to private schools, as long as the benefit is "ultimately controlled by the private choices of individual parents." *See Toney*, 744 N.E.2d at 362 (upholding tax credits for parents' education expenses, including private school tuition) (quoting *Mueller v. Allen*, 463 U.S. 388, 400 (1983)); *Griffith v. Bower*, 747 N.E.2d 423 (Ill. App. 5th 2001) (same).

State courts across the country have relied on the same reasoning to reject constitutional challenges to school choice programs under their own support clauses and similar state constitutional provisions.

3. Other courts have ruled that choice supports families, not schools.

Seven other state supreme courts have held that school choice programs support families, not schools, and that any benefit received by private schools was purely incidental. Several of

[12] There is some evidence of this. *See, e.g.*, *Diario* at 1800 (Mr. Trías Monge stating, "That is, here are two basic principles that are instituted in this section [5]. One is the principle of separation of State and Church, as it has been set forth in the Federal Constitution and which will continue its normal development via the interpretations of the Supreme Court of the United States."); *id.* 1801 ("[T]here are, of course, the decisions of the Supreme Court of the United States, and its decisions on this important area of human rights will govern Puerto Rico."); *Diario* at 1817, 1801, 1803 (delegates embracing the holding and reasoning in the U.S. Supreme Court's decision in *Everson v. Board of Education*, 330 U.S. 1, 18 (1947), discussed below).

these cases involved provisions analogous to—and even stricter than—Puerto Rico's Support Clause

For example, the Alabama Supreme Court upheld a school choice program under its Support Clause. *Magee v. Boyd*, 175 So. 3d 79, 135 (Ala. 2015). Article XIV, section 263 of the Alabama Constitution states "No money raised for the support of the public schools shall be appropriated to or *used for the support* of any sectarian or denominational school." (emphasis added). Like this case, *Magee* involved an interpretation of the meaning of the word "support." The court concluded that the voucher program was constitutional because it was "designed for the benefit of *parents and students*, and not for the benefit of religious schools" and "any aid that may ultimately flow to a religious school as a result of the [program] will do so *only* as a result of the private decision of individual parents rather than flowing directly from the State." *Id.* at 135. *See also Meredith v. Pence*, 984 N.E.2d 1213, 1228–29 (Ind. 2013) (holding that school choice program did not "benefit" religious private schools under Article I, Section 6 of the Indiana Constitution because the "direct beneficiaries under the voucher program are the families of eligible students and not the schools selected by the parents for their children to attend").

The *Oliver* decision from the Oklahoma Supreme Court is particularly significant. *Oliver v. Hofmeister*, 368 P.3d 1270, 1275–76 (Okla. 2016). There, the Oklahoma Supreme Court found that Oklahoma's school choice program was constitutional under even a stricter Support Clause than Puerto Rico's. Unlike Puerto Rico's Clause, which only prohibits laws "directly contributing to" private schools,[13] *Maestros*, 137 D.P.R. at 547, Oklahoma's clause prohibits laws both "directly or *indirectly* . . . benefit[ing] or support[ing]" religious private schools.

[13] Although the predecessor to Article II, Section 5 in the Jones Act included "indirect" language, the drafters chose not to include this language in Article II, Section 5. *Diario* at 1793–94.

Oklahoma Const. Art. II, § 5 (emphasis added). As the Court found, the program did not constitute even indirect benefit to private schools "[b]ecause the *parent* receives and directs the funds," not the schools. *Oliver*, 368 P.3d at 1276.

Four other state supreme courts have used the same reasoning to uphold school choice programs under other state constitutional provisions. *See Simmons-Harris v. Goff*, 711 N.E.2d 203, 211 (Ohio 1999) (upholding school choice program under state Establishment Clause because "[t]he primary beneficiaries of the School Voucher Program are children, not sectarian schools"); *Schwartz v. Lopez*, 382 P.3d 886, 899 (Nev. 2016) (finding school choice program was constitutional under Nevada's religion clause because, *inter alia*, "the funds belong to the parents" and not religious schools); *Hart v. North Carolina*, 774 S.E.2d 281, 292 (N.C. 2015) (upholding school choice program under state's Public Purpose Clause because "the ultimate beneficiary of providing these children additional educational opportunities is our collective citizenry"); *Jackson v. Benson*, 578 N.W.2d 602, 618–21 (Wis. 1998) (upholding school choice program under state Establishment Clause because no aid flows to private schools without the "independent and private choices of aid recipients").

Although some courts have gone the other way, they are in the minority.

4. Courts concluding otherwise are in the minority.

The court below was only able to cite two authorities that coincided with *Maestros*. Op. de Primera Instancia, 18–19 (citing Op. Sec. Just. Haw. Núm. 1 de 7 de febrero de 2003; *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009)). Neither is persuasive or relevant to Puerto Rico's Support Clause.

The first is an attorney general opinion from Hawaii, which opined that school choice would be unconstitutional under that state's Support Clause. *Véase*: Op. Sec. Just. Haw. Núm. 1

de 7 de febrero de 2003, encontrada en http://ag.hawaii.gov/wp-content/uploads/2013/01/03-01.pdf. The opinion relied on "the only reported case" interpreting the Hawaii Support Clause, *Spears v. Honda*, 449 P.2d 130 (1969), which invalidated a law providing bus transportation for both public and private school students.[14] In doing so, the Court rejected the "child benefit theory." *Id.* at 8. This theory holds that a program is constitutional if it primarily benefits children, even if it may also benefit private or religious schools. The U.S. Supreme Court relied on this theory when it upheld an almost identical transportation program as the one rejected in *Spears*. *Everson v. Board of Education*, 330 U.S. 1, 18 (1947).

This Court should not follow the Hawaii attorney general opinion and *Spears*. Not only is it unclear if the Hawaii Supreme Court would reaffirm *Spears* today, but the *Spears* case directly contradicted the philosophy of the Puerto Rican delegates, who embraced both *Everson* and the child-benefit theory. *See* Diario at 1817 (Mr. Geigel discussing *Everson*); *id*. 1801, 1803 (delegates embracing "child benefit theory"); *id.* at 1801 (Delegate Trías Monge explaining that the "doctrine developed by the Supreme Court of the United States has been imported here in a precise and clear manner; that is, the doctrine of benefits to children, that the benefit that the State provides to children of school age, does not constitute support"); *id*. at 1803 (Delegate Benitez saying "We are trying to incorporate here [into the Services Clause], as Mr. Trías Monge was saying, the concept of 'child benefit theory' and nothing else"). Thus, to apply *Spears* and the Hawaii attorney general opinion here would directly conflict with the reasoning and intention of the delegates. Indeed, like in *Everson*, the Program here also mainly benefits students.

[14] The trial court below also referenced decisions relied upon in *Spears*, including *Judd v. Board of Education*, 15 N.E.2d 576 (N.Y. 1938), in which the highest New York Court interpreted its No-Aid Clause (Const. Art XI, § 3) to bar transportation for private students. *Judd* was overruled, however, by *Board of Education v. Allen*, 228 N.E.2d 791 (N.Y. 1967), aff'd, 392 U.S. 236 (1968) (upholding textbook loan program for private school students under New York's No-Aid Clause and the federal Establishment Clause).

Cain is also not relevant here. It held that a school choice program that allowed scholarships for children to attend private school was unconstitutional under Arizona's Support Clause. *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009). Not only is *Cain* an outlier in Support Clause jurisprudence, but the decision has since been substantially limited. In *Niehaus v. Huppenthal*, the Arizona Court of Appeals upheld a state program that provides education savings accounts for children. 310 P.3d 983 (Ariz. App. 2013). Under that program, the state deposits public funds into an account that parents may draw from for eleven educational uses, including for private school tuition and college. *Id.* at 985. The Arizona Court of Appeals held that this was constitutional because the families are the beneficiaries, not the schools, and the parents exercise choice in how to use the funds so that no public money is preordained for private schools. *Id.* at 986-89. Because the Program here can be used to attend private school, public school, or university, it is more like the program in *Niehaus* than in *Cain*.

As a result, there is little authority supporting *Maestros* and the trial court's conclusion that the Program is unconstitutional. The consensus is clear: School choice programs support families, not schools. Indeed, after the *Zelman* decision, it has been rare for a school choice case to be invalidated on constitutional grounds. In fact, last year, the U.S. Supreme Court went a step further and implied that limiting school choice may itself be *unconstitutional.*

D. The U.S. Supreme Court Has Implied that Limiting School Choice Is Unconstitutional.

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), the Court strongly implied it would be *unconstitutional* to limit school choice. That case involved Missouri's practice of excluding religious groups from receiving certain public grants, under that

state's Support Clause.[15] The plaintiff was a religious school that challenged the practice under the Free Exercise Clause. The Supreme Court sided with the school, finding the exclusion impeded religious freedom. As the Court said, the exclusion forced potential applicants to "choose between their religious beliefs and receiving a government benefit." *Id.* at 2023.

Trinity Lutheran strongly suggests that state support clauses cannot be used to limit school choice programs. In fact, the day following its *Trinity Lutheran* decision, the U.S. Supreme Court granted certiorari and vacated the Colorado Supreme Court's decision in *Taxpayers for Public Education v. Douglas County School District*, 351 P.3d 461 (2015), in which the Colorado Supreme Court had invalidated a voucher program under Colorado's Support Clause. The U.S. Supreme Court remanded the case to the Colorado Supreme Court "for further consideration in light of *Trinity Lutheran*." 137 S. Ct. at 2327 (June 27, 2017).[16] Such a "grant, vacate, and remand" (or "GVR") order is appropriate when the U.S. Supreme Court believes there is "a reasonable probability" that the lower court would resolve the case differently "if given the opportunity for further consideration" in light of intervening U.S. Supreme Court precedent—namely, *Trinity Lutheran*'s ruling that Missouri's application of its Support Clause to exclude religious schools violated the Free Exercise Clause.

Here, although Puerto Rico's Support Clause applies to both religious and nonreligious schools, this Court has recognized that the Clause was motivated in large part by religious concerns. *Maestros*, 137 D.P.R. at 539 ("The history of the Constitutional Convention shows that one of the aims of this constitutional provision was to avoid the use of public funds to support parochial private schools.").

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[15] Article I, section 7 of the Missouri Constitution provides that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion."

[16] The case was never decided on remand, as it later became moot.

Thus, for families like some of the Parents who wish to send their children to religious schools, this case raises the same Free Exercise concerns as *Trinity Lutheran*. This Court can avoid these concerns, however, by overturning *Maestros* and upholding the Program. As discussed above, doing so would be consistent with the Support Clause. Doing so would also help provide thousands of children with a better future.

E. Puerto Rico's Education System is in Crisis.

There is a final reason that this Court should overturn *Maestros*: Puerto Rico is a very different place than it was in 1994. Many residents now struggle to survive, let alone thrive, and the education system is in complete crisis. These changed circumstances show that even if a school choice program could have once been interpreted as supporting schools, such a program would now support needy families.

Courts have long recognized that changed factual circumstances can require reconsideration of constitutional conclusions. That is because constitutional conclusions are often based on certain factual premises, and if those change, so can the conclusion. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist."). Indeed, over thirty years after the U.S. Supreme Court upheld the statute at issue in *Carolene Products*, a federal district court invalidated the very same law because of market changes that no longer supported the rationality of the law. *Milnot Co. v. Richardson*, 350 F. Supp. 221, 224 (N.D. Ill. 1972).

This is relatively common across many different areas of law, as "[c]urrent burdens demand contemporary evidence." *Edwards v. District of Columbia*, 755 F.3d 996, 1003-04 (D.C. Cir. 2014) (refusing to rely on decades-old evidence in determining whether a tour-guide

license requirement survived the First Amendment); *see also Granholm v. Heald*, 544 U.S. 460, 492 (2005) (holding law violated commerce clause after determining that improvements in technology rendered the law obsolete); *Detsel v. Sullivan*, 895 F.2d 58, 64 (2d Cir. 1990) (rejecting an agency's interpretation of a statute because "agencies must interpret their regulations in light of changing circumstances").

Here, the factual circumstances have changed as well. Puerto Rico's education system is in crisis and families have a desperate need for these scholarships. This desperate need emphasizes that the true beneficiary of these scholarships is families, not schools.

IV. Conclusion

In conclusion, the Parents urge this Court to overturn *Maestros* and uphold the Free Selection Program. This Legislature designed this Program to give thousands of children, not just those born to the wealthy, the opportunity for a good education. These children should not be deprived of this opportunity because of erroneous and outdated assumptions.

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** Admission application for pro hac vice in process.*

[1] Note that in regards to attorney Smith, the Honorable Supreme Court, mediate *Resolution* of June 27 of 2018, authorized the pro hac vice application for the court's admission. Attorney Keller will present his application promptly and is currently in the process of completing it.