

Saving Your Children—and Yourself—from the Politicization of Government-Run Schools

Protecting the right of parents to choose the best schooling option for their children would solve so many problems. It would help defuse—or at least provide an escape route from—the politicization of the government-run schools.

It would allow parents to select a school environment that accords with their religious beliefs. It would allow parents to have real leverage when opposing programs (e.g., explicit sex ed or anti-American civics) that their children might otherwise face. As I have personally written elsewhere:

Letting parents choose their own program neutralizes the pressure from all sides to make the government schools the instrument of particular ideologies. If families can freely take their children elsewhere, public schools will have an incentive to teach what will attract students, rather than what they can get away with forcing on captive children.

And so ACLJ attorneys have weighed in repeatedly, either representing a litigating party or as a friend-of-the-court, in favor of parental choice in education. Our latest foray is an amicus brief urging the U.S. Supreme Court to grant review in a school choice case from Maine, *Carson v. Makin*.

This is not new territory. The Supreme Court has long held that the discriminatory exclusion of religious individuals or entities is unconstitutional. In fact, the court has specifically so held in the context of school choice, as we reported. Yet that is exactly what Maine has done.

Here's the background: In Maine, the majority of school districts do not have a public high school. Instead, the state extends tuition assistance to parents to send their children to the high school of their choice, whether local or distant, in-state or out, and even if the high school is in a foreign country. Very inclusive, right? Except the state won't allow tuition assistance to attend "sectarian" schools. So it's a no-go if parents want to send their children to a high school that "promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith." In other words, you can pick a school that has any perspective or philosophy you like—except a religious one.

Families in Maine challenged this exclusion in federal court, but they lost in the district court. The families appealed, and we filed an amicus brief supporting the parents. But the court of appeals also rejected the families' arguments. And now the families have asked the Supreme Court to hear the case.

In our amicus brief in support of the petition for Supreme Court review, we hammer the blatantly discriminatory—and therefore unconstitutional—exclusion of otherwise eligible high schools just because they are religious. We also focus especially on a prior ACLJ case. As we explained regarding our amicus filing in last year's *Espinoza v. Montana Department of Revenue* case:

The ACLJ had a special role to play in this case because of our previous work on behalf of school choice in the 2004 Supreme Court case of Locke v. Davey. In that case, a divided Supreme Court ruled against our client Joshua Davey, who was at that time a college student. The state stripped Davey of a state scholarship after he announced his intention to major in theology and become a minister. In an unfortunate ruling, the Supreme Court approved the state's barring of scholarship funds to Davey.

In *Espinoza*, the state defendants relied upon *Locke v. Davey* to support the exclusion of religious schools from the scholarship program. We focused heavily on rebutting that argument in our amicus brief, and we were pleased to see the Supreme Court handily reject the state's invocation of *Locke*.

Despite the Supreme Court's rejection of *Locke*-based arguments in *Espinoza* and an earlier case, *Trinity Lutheran Church v. Comer*, the court of appeals in *Carson* again invoked *Locke* in support of its ruling against school choice. Our brief therefore repeats the reasons why *Locke* does not bar the relief the parents seek here, and why *Locke* was wrong when decided. But we added an "Enough is enough!" argument:

As in Trinity Lutheran and Espinoza, this Court can certainly reach the right result here without overruling Locke. However, it would be better for the law to repudiate Locke so that it does not continue to generate errors in the lower courts.

In Trinity Lutheran, the court of appeals relied upon Locke. [This Court reversed.] In Espinoza, the state supreme court likewise relied upon Locke, despite this Court's intervening decision in Trinity Lutheran. [Again this Court reversed.] And in the present case, the court of appeals also invoked Locke for support, . . . despite this Court's rulings in Trinity Lutheran and Espinoza.

Confining Locke to its facts will not do ... What is needed to restore coherence and integrity to the law is this Court's recognition that Locke was a mistake, ill-conceived on both its facts and its reasoning, a decision that merits express renunciation. The sooner this Court takes that step, the better.

We hope the Court will agree to hear the case of *Carson v. Makin*, overturn the lower court's embrace of anti-religious discrimination, and—while it's at it—once and for all overrule

the misbegotten decision in *Locke v. Davey*. {eo}

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