

A fair shake for parental choice?

Four years ago, in a case from Missouri, a majority of justices of the Supreme Court agreed that a Lutheran church that operated a day school was entitled to funding from a state program for upgrading playgrounds in the interests of child safety.

Last year, Chief Justice John Roberts, writing for the majority, leaned heavily on that ruling in upholding a Montana program that provides scholarships for students to attend nonpublic schools, including church-sponsored ones. To disqualify religious schools because they are religious would be penalizing religious free exercise, Roberts said.

Now, the Supreme Court is being asked to take the next step – arguably, the only reasonable one. The new case, [*Carson v. Makin*](#), comes from Maine and is scheduled to be argued before the court Dec. 8. A decision is expected next spring or early summer.

In Maine, where 143 of the 260 school districts do not have public high schools, the state provides tuition assistance for students to attend nonpublic schools of their choice, wherever located. Exclusive New England prep schools are among the recipients of these funds. But not church-sponsored schools deemed too religious by the state education department.

Two sets of parents are challenging this exclusionary practice. But the 1st U.S. Circuit Court of Appeals upheld it, reasoning (in the words of the parents' brief to the Supreme Court) that "the exclusion does not bar students from choosing to attend schools with a religious status, but rather bars them from using their aid to attend schools that provide religious, or 'sectarian' instruction."

The parents are represented by a public interest law firm called the Institute for Justice. The dispute has predictably attracted an outpouring of friend of the court briefs on both sides. The opposition to the parents includes not only public school organizations and groups like the Freedom from Religion Foundation and American Atheists Inc., but the Biden administration's Justice Department. U.S. Solicitor General Elizabeth Prelogar has asked and received permission from the court to participate in the oral argument on the opponents' side.

Central to the dispute is a distinction – adopted by the 1st Circuit Court – between a school's "status" as a religious institution and what the school actually does. If the Maine education department determines that a church-sponsored school "promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith," it judges the school "sectarian" and, as such, ineligible for tuition funds.

In practice, this means that to receive state tuition funds in Maine, a religious school can be religious in name but not in fact. Referring to this as "sectarian exclusion," the parents' brief in the *Carson* case calls it a form of invidious discrimination against families who "believe that a religious education is best for their child," forcing them to "choose between a public benefit to which they are entitled and their right to send their child to a religious school."

Over the years, issues pertaining to church schools have come before the Supreme Court frequently. In a landmark decision nearly a century ago, the court unanimously upheld the right of such schools to exist and the right of parents to send children to them, but since then, its rulings have taken a generally negative view of various forms of government assistance to schools, parents or students. More recently, however, the court has begun to shift in their favor. The outcome in *Carson v. Makin* could shed important light on how

far that process might extend.

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