

**In the United States Court of Appeals
FOR THE NINTH CIRCUIT**

JOHN AND BREANNA WOOLARD, ON THEIR OWN BEHALF
AND ON BEHALF OF THEIR MINOR CHILDREN A.W., E.W., AND
O.W., ET AL., PLAINTIFFS-APPELLANTS,

v.

TONY THURMOND, IN HIS OFFICIAL CAPACITY AS
SUPERINTENDENT OF PUBLIC INSTRUCTION, ET AL.,
DEFENDANTS-APPELLEES

On appeal from the United States District Court for the Eastern
District of California, Case No. 2:23-cv-02305-JAM-JDP

**AMICUS BRIEF OF LIBERTY JUSTICE CENTER,
SUPPORTING APPELLANT AND REVERSAL**

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INTEREST OF AMICUS CURIAE

Liberty Justice Center (“LJC”) is a national, nonpartisan public-interest law firm committed to protecting constitutional rights and enforcing constitutional limits on government power.

LJC frequently litigates important cases affecting educational freedom and parental choice. For example, in *Kelly v. North Carolina*, 286 N.C. App. 23, 878 S.E.2d 841 (2022). LJC represented the North Carolina General Assembly in successfully defending a legal challenge to the state’s Opportunity Scholarship Program. LJC also represented a coalition of parents and schools in successfully defending the Tennessee Education Savings Account (ESA) program in *Metropolitan Government of Nashville and Davidson County v. Tennessee Department of Education*, 645 S.W.3d 141 (Tenn. 2022).

In addition, LJC filed amicus briefs at the certiorari and merits stages in *Carson v. Makin*, 142 S. Ct. 458 (2021), and Justice Alito cited LJC’s merits-stage amicus brief in *Espinoza v. Montana Dep’t. of Revenue*, 140 S. Ct. 2246, 2268 (2020) (Alito, J., concurring). LJC has also served as amicus curiae in state court actions impacting educational freedom, including *Underwood v. Voss*, 2024 WI 5 (Wis.

2023); *Drummond v. Oklahoma Statewide Virtual Charter School Board*, 2024 OK 53, and *Eidson v. South Carolina Department of Education*, 906 S.E.2d 345 (S.C. 2024).

STATEMENT OF ISSUES

Amicus curiae adopts the statement of the issues submitted by Petitioners.

INTRODUCTION

The Supreme Court has declared that “[e]ducation is perhaps the most important function of state and local governments,” *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954), and the Education Clause of California’s Constitution charges the government to “encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.” Art. IX, § 1. To those ends, parents and policymakers nationwide have increasingly emphasized the importance of providing students with options in education, recognizing that one size does not fit all when it comes to fostering the intellectual development of America’s youth. But while many states have adopted

sweeping school choice programs in recent years, parents in California still have limited options.¹

Among those limited options are charter schools—“by far the largest public school choice program in California”²—and homeschooling, which has increased in California by more than 70 percent between 2017 and 2022.³ The program at issue here provides families enrolled in charter schools with funding for home instruction materials of their choosing. But Respondents-Appellees have effectively excluded religious families from participating in that program by exempting any materials or vendors reflecting a religious worldview.

The Supreme Court has consistently made clear that publicly funded school choice programs that discriminate against religious education in this manner are “odious to our Constitution.”⁴ And this

¹ EdChoice, *School Choice in California*, <https://www.edchoice.org/school-choice/state/california/> (last visited Oct. 11, 2024).

² John Fensterwald, *Public School Choice Exists in California, But Few Districts Offer It*, EdSource (Apr. 11, 2024), <https://edsource.org/2024/public-school-choice-exists-in-california-but-few-districts-offer-it/709533>.

³ Kenneth Schrupp, *California homeschooling up 78% as parents seek better education alternatives*, The Center Square (Nov. 1, 2023), https://www.thecentersquare.com/california/article_ab320702-78e7-11ee-a50d-2bf5deaf4675.html https://www.thecentersquare.com/california/article_ab320702-78e7-11ee-a50d-2bf5deaf4675.html.

⁴ *Carson ex rel. O.C. v. Makin*, 596 U.S. 767, 779 (2022).

unconstitutional religious discrimination deprives students of the benefits of educational programs tailored to fit their needs. This brief highlights those benefits through personal stories that illustrate the real-world consequences of Respondents-Appellees' unconstitutional actions.

ARGUMENT

I. Homeschooling programs provide educational options to a diverse array of students with unique educational needs.

More than one third of homeschooling families choose to provide religious instruction as part of their curriculum.⁵ Thus, by excluding religious curriculum from eligibility, Respondents-Appellees are discriminating against a substantial number of families who wish to raise their children with “[s]ystematic religious instruction and moral training according to the tenets [of their faith].”⁶ As set forth below, this exclusionary policy denies the benefits of homeschooling and educational choice to children in diverse circumstances, from low income students stuck in failing inner-city or rural schools, to those who may have access

⁵ Washington Post-Schar School Home Schooling Poll, Wash. Post (Sept. 25, 2023) <https://www.washingtonpost.com/tablet/2023/09/25/aug-1-10-2023-washington-post-schar-school-home-schooling-poll>.

⁶ *Pierce v. Soc’y. of Sisters*, 268 U.S. 510, 532 (1925).

to generally good public schools but find themselves with unique individualized needs.

A. Low-Income Students

Access to school choice programs gives low-income families the same educational choices and opportunities that other families have long enjoyed. Without those programs, the financial barriers to choice can be cost-prohibitive. Home instruction programs like the one at issue in this case help families with the cost of curriculum, educational materials, or specialized services.

Valerie Bolieu, a parent who began homeschooling her oldest child when she entered kindergarten, touts the advantages of homeschooling within her religious community: “I had support along the way from the church community who were offering things I could use that they liked and tried. We would all go together and go to the homeschool store together, talk to the people there and get ideas from them.” Because of the significant financial burdens (“It can cost a lot, thousands of dollars a year if you choose to use a certain program”), she now works as an advocate for new homeschooling parents, working to make it more

affordable and accessible to working families.⁷ Religious parents like Valerie should not be excluded from programs intended to make this experience more affordable for all.

B. Students in Failing Schools

It is well understood that school choice programs can serve as a lifeboat for children from “low-income and minority families” who lack the “means to send their children to any school other than an inner-city public school.” *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). As Justice Thomas observed:

[W]ide-ranging educational reform[s] allow[] voluntary participation of private and religious schools in educating poor urban children otherwise condemned to failing public schools. The program does not force any individual to submit to religious indoctrination or education. It simply gives parents a greater choice as to where and in what manner to educate their children. This is a choice that those with greater means have routinely exercised.

Id. at 680 (Thomas, J. concurring) (footnote omitted).

Many Californians have a considerable need for such a lifeboat, as their public education system has struggled to prepare many students for academic success. The 2022 National Assessment of Educational

⁷ Valerie Bolieu, Texas, Voices for Choice, American Federation for Children, <https://www.federationforchildren.org/voices-for-choice/valerie-bolieu/> (last visited Oct. 11, 2024).

Progress showed that California students “performed significantly lower than National public” in every age group and subject tested, with only 30% of fourth and eighth graders proficient in reading, and only 31% of fourth-graders and 23% of eighth-graders proficient in mathematics.⁸ By contrast, homeschooling students often outperform their public school counterparts on academic achievement tests by 15 to 25 percentile points on average.⁹ Notably, this advantage persists “regardless of their parents’ level of formal education or their family’s household income.”¹⁰

Consider the story of Victoria Bradley, a student from Detroit whose education was transformed by homeschooling during her senior year of high school. For eleven years, Victoria struggled in traditional classrooms and, despite being tested for IEP eligibility, never received the support she needed. “Homeschooling changed my life,” Victoria reflects. “I do not know where I would be if it wasn’t for that

⁸ The Nation's Report Card, California Overview (2022), https://www.nationsreportcard.gov/profiles/stateprofile/overview/CA?sfj=NP&chort=1&sub=MAT&sj=CA&st=MN&year=2022R3&cti=PgTab_OT (last visited Oct. 15, 2023).

⁹ Brian D. Ray, *Research Facts on Homeschooling*, Ky. Leg. Interim Joint Comm. on Educ. (Sept. 15, 2022), <https://apps.legislature.ky.gov/CommitteeDocuments/28/20735/20Sep2022%20-%20Research%20Facts%20on%20Homeschooling%20Handout.pdf>.

¹⁰ *Id.*

opportunity.” Homeschooling boosted both her self-esteem and academic performance, leading to her college acceptance, full-ride scholarship, and an additional award for academic improvement. Now an advocate for educational freedom, Victoria emphasizes the importance educational choice for all students, regardless of ZIP code or family income: “Under no circumstance should students be denied access to all forms of education[.]”¹¹

C. Bullying Victims

California recently “earned the dubious honor of having the worst bullying problem in the U.S.”¹² Lisa Disbrow, a teacher and mother from San Francisco, details her personal experience with the California public school system: “School safety was horrible. Students were fighting in class and during recess, instruction was minimal, and my son and daughter witnessed terrible situations day after day.” In response, Lisa made the difficult decision to sell her home and relocate to a higher-performing school district—a move that brought significant

¹¹ Victoria Bradley, Michigan, Voices for Choice, American Federation for Children, <https://www.federationforchildren.org/voices-for-choice/victoria-bradley/> (last visited Oct. 11, 2024).

¹² Tony Kurzweil, *California’s bullying problem worst in the nation, study finds*, KTLA5 News (Oct. 11, 2023), <https://ktla.com/news/california/california-tops-states-with-worst-bullying-problems-study-says/>.

financial hardship. She now advocates for a more equitable allocation of educational resources: “Parents should be free to escape destructive schools using the tax dollars available for them . . . School choice will put the proper focus on serving the students and their parents versus serving the existing system.”¹³

The need for educational options is even more substantial for religious families, as “Muslims and Jews experience disproportionately high rates of hate speech and bullying”—a trend that has reportedly increased following October 7, 2023.¹⁴ Recent incidents in California have included, “graffiti saying ‘Kill Jews’ at Berkeley High School, ‘Kill all Zionists’ written at a bus stop used by Berkeley High School students, and a ninth grader bullied after his parent reported anti-Semitic incidents.”¹⁵ Homeschooling offers a safer alternative for many religious families, and Respondents should not be permitted to deny

¹³ Lisa Disbrow, California, Voices for Choice, American Federation for Children, <https://www.federationforchildren.org/voices-for-choice/lisa-disbrow/> (last visited Oct. 11, 2024).

¹⁴ Amaarah DeCuir, *An Urgent Message to School Leaders: Your Arab and Muslim Students Need You*, Education Week (Oct. 27, 2023), <https://www.edweek.org/leadership/opinion-an-urgent-message-to-school-leaders-your-arab-and-muslim-studentsneed-you/2023/10>.

¹⁵ Carlos Castañeda, *U.S. Department of Education probes antisemitism complaint against Berkeley Unified School District*, CBS News (May 8, 2024), <https://www.cbsnews.com/sanfrancisco/news/us-department-of-education-probes-antisemitism-complaint-against-berkeley-unified-school-district/>.

those opportunities to those families who are most in need of that refuge.

D. Students with Special Needs

Neurodivergent students particularly benefit from opportunities to receive an education that meets their unique needs. Consider the experience of Jessica Escalante in California. Her son, diagnosed with ADHD and autism, struggled in traditional schools: “Not only was the school and district intentionally neglecting his needs by not providing him with any support, but they would complain to me that he needed extra support.” After leaving traditional schools, “[h]e has gone from not knowing a single letter or number to being able to add, know placements, spell, recite biblical verses, and do the scientific method along with fun experiments.” However, the financial burden of this choice remains heavy. Jessica struggles with significant debt, exacerbated by rising inflation and mounting monthly expenses. As she puts it: “I can assure you that if I didn’t bankrupt myself into a massive hole of debt for my oldest son’s school this year, I truly don’t know if he would have survived this year because he was suffering mentally and

physically. Families like mine should have access to their education dollars, so this doesn't have to happen.”¹⁶

Similarly, Kieth Zukowski began homeschooling due to the lack of support for his son's special needs in the public school system. “Every kid learns differently,” he notes, “and special needs kids learn completely differently than typical kids.” He therefore believes “that homeschooling is an option that should always be available to parents.”¹⁷

In another example, Megan Gall, an Arizona parent, also struggled to find the right educational fit for her daughter, Kylie, who was diagnosed with autism. “[H]omeschooling is a real challenge unless you're independently wealthy, especially if there are other needs involved like speech therapy or occupational therapy.” Fortunately, Arizona's Empowerment Scholarship Account program (ESA) offered a solution, providing Megan with the resources she needed to customize her daughter's education. This has opened up new opportunities for

¹⁶ Jessica Escalante, California, Voices for Choice, American Federation for Children <https://www.federationforchildren.org/voices-for-choice/jessica-escalante/> (last visited Oct. 11, 2024).

¹⁷ Kieth and Nick Zukowski, Florida, Voices for Choice, American Federation for Children, <https://www.federationforchildren.org/voices-for-choice/kieth-and-nick-zukoski/> (last visited Oct. 11, 2024).

Kylie: “We’re doing a lot of really wonderful things like jiu-jitsu, which is something I never imagined Kylie doing but she’s doing really well with it. It’s addressing motor skills and different things that she needs extra help with. We’re also doing some really great equine therapy and equine assisted counseling.”¹⁸

E. Military Families

California has the largest concentration of military personnel in the United States with nearly 160,000 active-duty service members.¹⁹ This population brings with it unique educational challenges due to frequent relocations and instability. On average, military families change school districts every six to nine months from kindergarten through high school graduation.²⁰ In response, military families have increasingly turned to alternative educational options such as homeschooling. In fact, 13% of military families opt for homeschooling,

¹⁸ Megan Gall, Arizona, Voices for Choice, American Federation for Children, <https://www.federationforchildren.org/voices-for-choice/megan-kylie-gall/> (last visited Oct. 11, 2024).

¹⁹ Geographic stationing of active duty United States Armed Forces personnel in 2022, by U.S. state, Statista (Nov., 2023) <https://www.statista.com/statistics/232722/geographic-stationing-of-active-duty-us-defense-force-personnel-by-state/>.

²⁰ Press Release, U.S. Dep’t of Def., *Month of the Military Child 2023 – Taking Care of Our Military Children* (Apr. 3, 2023), <https://www.defense.gov/News/Releases/Release/Article/3349616/month-of-the-military-child-2023-taking-care-of-our-military-children/>.

a rate 2-4 times higher than the general U.S. population for children ages 5-17.²¹

The experience of Julia McNeil, an Airforce spouse, reflects this trend. After watching her four children struggle to attend three different schools in three years, she decided to homeschool. “To always be the new kid is hard. To provide the stability and consistency of homeschooling within your family is wonderful for military families and I think that’s one of the reasons it’s becoming more and more popular,” she notes.²²

CONCLUSION

Ultimately, these stories underscore the importance of accessible alternatives to traditional schooling that strengthen educational opportunities through diversity and choice. Each child possesses unique needs, abilities, and circumstances. School choice programs, like California’s charter school independent study programs, serve as tools

²¹ Blue Star Families, 2021 Military Family Lifestyle Survey Comprehensive Report: Military Children’s Education, https://bluestarfam.org/wp-content/uploads/2022/03/BSF_MFLS_Results2021_ComprehensiveReport_3_22.pdf. (last visited Oct. 11, 2024).

²² Alese Underwood Dayton, *More Military Families Explore Homeschooling*, Spectrum News 1 (Apr. 29, 2024), <https://spectrumnews1.com/oh/columbus/news/2024/04/19/month-of-the-military-child--a-homeschool-focus>.

to provide high quality, tailored education. These programs should be inclusive for all families, including religious ones, to open doors that would otherwise remain closed to many students, and to offer safe havens for students in failing and unsafe schools, personalized approaches for neurodivergent learners, and stability for military families. Excluding families who wish to incorporate their faith infringes upon the education of countless students and families across California. By reversing the lower court's ruling, this Court could ensure that all children, regardless of their socioeconomic status or religious beliefs, have access to education that helps them reach their full potential.

Respectfully submitted,

s/ Dean McGee

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I certify the following:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because this motion contains 3,184 words.

This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this motion has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

Dated: October 30, 2024

/s/ Dean McGee

DEAN MCGEE

CERTIFICATE OF SERVICE

I hereby certify that on the date below, I filed the foregoing Amici Brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: October 30, 2024

/s/ Dean McGee

DEAN MCGEE