

NEBRASKA TAXPAYERS FOR FREEDOM ISSUE PAPER:
PASS SCHOOL CHOICE IN THE LEGISLATURE: YOUR MONEY, YOUR CHOICE.

BACKGROUND. Taxpaying conservatives statewide are rejoicing over the U.S. Supreme Court decision in a Maine court case regarding its tuition assistance program. In its 6-3 ruling, the Court ruled that this program that funnels public funding to schools that accept students from other districts cannot exclude religious schools. Of the 260 school districts in Maine, more than half lack a secondary school. Many Maine school districts in rural areas do not operate their own high schools, and state law requires them to allow students to attend in another district or at public expense pay student tuition at a private non-religious institution, if accepted, but excluding religious schools. The home school district transmits payments to that school to help defray added costs. NE is one of 37 states with a constitutional amendment that prohibits state government from funding religious schools with taxpayer dollars. The Court decision nullifies this amendment.

THE PLAINTIFFS. Two sets of parents sued Maine in 2018 in the case of *Carson v. Makin*. The plaintiffs, who wished to send their children to Christian schools in Bangor and Waterville, secured representation by lawyers from the Institute for Justice, a prominent libertarian law firm. The plaintiffs sought taxpayer dollars to send their children to 2 Christian schools that integrate religion into their classes and maintain policies barring homosexual and transgender students and staff. One family wanted to use tuition aid to send their son to a Christian school called Temple Academy in Waterville but ultimately used it at a secular private high school. The other family used its own savings to send their daughter to Bangor Christian Schools. She has now graduated. "We always knew that we would be unlikely to benefit from a victory but felt strongly that Maine's discrimination against religious schools and the families who choose them violated the Constitution and needed to end," said her mother after the ruling.

THE COURT RULING. Court observers expected this decision after the Court conservative majority appeared to disbelieve the State of Maine arguments in Dec., 2021. Conservative jurists sided with plaintiffs in this state tuition assistance program. The majority opinion held that the 2 plaintiff families wrongly prohibited against sending their children to the school of choice. The vote was 6-3, with leftist Justices Kagan, Sotomayor, and Beyer dissenting. Chief Justice John Roberts wrote in his majority opinion that the Maine nonsectarian requirement for tuition assistance payments violates the free speech clause of the 1st Amendment, continuing that its program identifies and excludes otherwise eligible schools on the basis of religious exercise and faith-based curricula. "The Free Exercise Clause of the 1st Amendment protects against 'indirect coercion or penalties' on the free exercise of religion, not just outright prohibitions, Roberts wrote, "A State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise." Roberts stressed that a neutral benefit program that gives public funds to religious organizations through the independent choices of the recipients of those benefits does not violate the Constitution's establishment clause. He declared that a state caution against violating the establishment clause does not justify excluding people from a public benefit because they are religious. According to the 1st Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Roberts declared that the Court previously decided that states need not subsidize private education, but because Maine chose to do so, it cannot disqualify religious schools. He declared that Maine's exclusion based on a stricter separation of church and state criteria than the Constitution requires. He stated that there is nothing neutral about Maine's program. The State pays tuition for specific students at private schools, only if the schools are not religious, meaning discrimination against religion.¹ When, as the parents alleged, state actions limit fundamental rights such as free exercise of religion, courts apply "strict scrutiny," meaning that public officials must prove they have a "compelling interest" in restricting such a right. When the Supreme Court applies "strict scrutiny," as it did in *Carson*, state restrictions typically fail. This court ruling mirrored its 5-4 decision in *Espinoza v. Montana Dept. of Revenue* in 2020, in which the Court ruled that a state program that funds scholarships with tax credits for students to attend private schools cannot bar private religious schools. The *Carson* decision overturned a lower court decision that had rejected the family claims of religious discrimination. The majority opinion means that children who attend faith-based schools are the primary beneficiaries of the state aid they receive, rather than their schools. This logic reasons that the government is not directly supporting particular religions.²



¹ Joan Biskupic, [John Roberts Played the Long Game on State Funding of Religious Schools](#), June 2, 2022.

² Oma Seddiq, Insider. [Supreme Court Strikes Down Ban on State Funding for Religious Education, a Major Win for Religious Interests](#), June 21, 2022.

THE SIGNIFICANCE. Advocates of school choice say the ruling offers students more options beyond the traditional public school system. There are major consequences for school districts and families across America, including NE. Conservative and religious advocacy groups have sought through the courts more access to public money for religious education, including through voucher or tax programs giving parents choices beyond public schools. Powered by its increasingly assertive conservative majority, the Court has expanded individual and religious rights. Its conservative justices appear receptive to claims by plaintiffs, often conservative Christians, of government hostility toward religion infused into education. The Court decision empowers parents and students, because it eliminates one of the most egregious obstacles to school choice, a constitutional restriction on taxpayer funding for private religious education. This ruling will allow more parents to give their kids an education that includes their religious beliefs.³ The biggest impediments to the expansion of school choice, legally and historically in the U.S., are state constitutional provisions that require discrimination against religious schools. The Supreme Court has ruled that these Blaine Amendments violate religious rights. Maine cannot bar parochial academies from participating in its school choice program. The judgment continues the Court gradual loosening of restrictions on religious institutions receiving direct assistance from the state over the past few years. It makes transparently clear that a state can institute a school choice program but one that must remain neutral between religion and non-religion. It cannot exclude a parental choice of school only because it is religious or teaches religion. The common argument that religion must become excluded, or that a program is impermissible because it includes religion, is a non-issue now.⁴

SORE LOSERS. The liberal Maine Att.-Gen. decried the decision as forcing the public “to pay for an education that is fundamentally at odds with values we hold dear.” He did not define “we.” He intends to try to change the state law to nullify the Court ruling, so that taxpayer dollars supposedly do not promote discrimination, intolerance, and bigotry. The Biden Regime had backed the State of Maine in the case. The radical leftist NE teacher’s union, NSEA, immediately complained that the decision undermines the monopolistic public school system and favors funding religious schools that supposedly serve only a few and discriminate against minority students and LGBTQ staff. “What we worry is we want our public schools to be fully funded and we worry these sorts of programs will impede our ability to do that,” said Daniel Russell, executive director of Stand for Schools, a close ally of the NSEA. Becky Pringle, president of the National Education Association, blasted the Court for what she called a “radical ruling.” Atheists loudly denounced the decision. “With this decision, the Supreme Court has betrayed our nation’s founding principle that the government should not fund religion, including a majority religion like Christianity,” said Geoffrey T. Blackwell, Litigation Counsel at American Atheists. The Freedom From Religion Foundation denounced this decision as a [direct result of “judicial activism”](#) that abandoned the usual concept of the constitutional Establishment and Free Exercise Clauses, whining about the Court supplanting the Maine approach to public education with its own views.

SUPPORT. Conservative Republican senators had submitted an amicus brief to the Supreme Court that urged justices to



rule in favor of the Maine families. Sen. Mike Lee (UT), heading the brief, praised the Court decision that ruled in favor of religious liberty and parental rights to choose the best education for their children. “I was proud to lead a group of senators in supporting this cause,” Lee wrote. Sen. Ted Cruz (TX) also celebrated the ruling, saying it was a massive win for families, the school choice movement, and religious liberty.⁵

Nichole Garnett, a professor at Notre Dame Law School, who focuses on education policy, called the decision a victory both for religious liberty and for American school children. Garnett signed an amicus brief in the Maine case submitted by the Religious Liberty Initiative of Notre Dame Law School on behalf of elementary and secondary schools from 3 faith traditions, Catholic (Partnership for Inner-City Education), Islamic (Council of Islamic Schools in North America), and Jewish (National Council of Young Israel). In her legal brief in support of the plaintiffs, she stated of the ruling that if states do not wish to enlist private schools in educating their children, that is their choice, but if such schools included, the state cannot bar or prohibit them because they are religious schools. Garnett explained that the Court majority clarified that if a government makes a benefit available to private institutions, it must treat religious ones fairly and equitably. She also noted that the opinion cements the constitutional principle that requires government neutrality toward religious believers and institutions. Noting how this decision could impact school choice programs, she said it eliminates a major hurdle to the expansion of parental choice in the U.S. by clarifying that, when states adopt choice programs, they must permit parents to choose faith-based schools for their children. Such schools have a long and solid track record of providing high-quality education, especially for

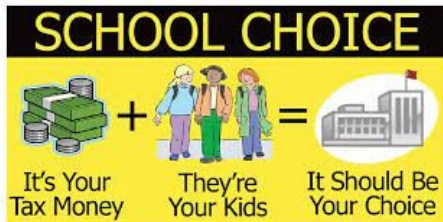
³ Charles J. Russo, U. of Dayton, [State Funds for Students at Religious Schools?](#), June 21, 2022.

⁴ Kevin Mahnken, The 74. [Supreme Court Throws Out Maine’s Ban on Religious Schools Receiving Public Funds](#), June 21, 2022.

⁵ Jeremiah Poff, Education Reporter, Washington Examiner. [Victory for Religious Liberty: Republicans Celebrate Supreme Court Ruling](#), June 21, 2022.

disadvantaged children, and policies that exclude them from private-school choice programs are both unconstitutional and unwise, she added.⁶ Gov. Pete Ricketts applauded the ruling. "I think the Supreme Court got this right because it was clearly discriminating against religious institutions. And our Founders never intended that our religion should be separate from our public life," he said.

AFFECT IN NEBRASKA. NE is 1 of 37 states with a Blaine Amendment embedded in its constitution, which prohibits state governments from funding religious schools with public dollars. *Carson* nullifies these amendments and opposition arguments that school choice is unconstitutional in NE. However, the decision perhaps does not directly affect Nebraska, because we are 1 of 2 states that currently does not allow tax dollars to help parents pay for tuition at non-religious or religious private or parochial schools. State Senators would have to alter this statute. We can only anticipate for the 2023 legislative session, if this new momentum is enough to pass school choice legislation here. Meanwhile, State Sen. Lou Ann Linehan, a champion of school choice in the Legislature, embraced the ruling and plans to reintroduce a bill that would give tax credits to donors of scholarships to private schools for low-income students. She does not believe that only parents who can afford to move or send their children to private schools should have school choice. "Parents are the first teachers. They are the most responsible for their children and they care about their children most," she said. Tom Venzor from the Nebraska Catholic Conference believes the ruling fully allows school choice, including scholarship tax credit programs, education savings accounts, and other opportunities. "We are hopeful this decision will embolden our legislature here in Nebraska to finally pass laws that provide real choice in education to families and students here," said Nate Grasz, policy director for the Nebraska Family Alliance.



TAKE ACTION NOW. This U.S. Supreme Court decision opens the way for taxpayers concerned about where our dollars go to educate our children and how school systems use our tax dollars to vigorously give our opinions to state senators. Before the 2023 legislative session, we must diligently lobby conservative state senators to introduce and pass legislation that will offer families and their children school choice and offer taxpayers additional options regarding the expenditure of our dollars for education. Using the information

above, lobby your state senator immediately to develop one or more education bills, taking advantage of this Supreme Court decision. Email netaxpayers@gmail.com for state senator contact information and join our NTF *Legislature Watch Project*.

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⁶ Carol Zimmerman, Catholic News Service, [Supreme Court Rules Religious Schools can get Tuition Aid](#), June 21, 2022.