LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
WEDNESDAY, DECEMBER 8, 2021

GUEST COLUMN

An unconstitutional condition on religious exercise

By Mitchell Keiter

The U.S. Supreme Court will hear oral argument Wednesday in *Carson v. Makin*, and the case could profoundly change American education. Because Maine has many rural districts that lack a public school, the state pays to send students to private schools — but excludes religious schools from the program. Parents who wish to enroll their children in a religious school have challenged the exclusion as unconstitutional.

Defenders of the exclusion cite *Locke v. Davey*, 540 U.S. 712 (2004). After the Supreme Court held in 2002 that the establishment clause *permits* states to indirectly fund religious education when families choose it, the court considered whether the free exercise clause *requires* states to do so. The court held there was no such obligation, so Washington state could subsidize students pursuing degrees in engineering or medicine but not theology.

Maine's program differs, however, because schools participating in the program must teach all the prescribed secular curriculum. Religious schools are excluded from the menu of options, not because they teach religion *instead of* secular subjects as in *Locke*, but because they teach religion (and pray) *in addition to* secular subjects. This presents the question of whether Maine is constitutionally *refusing to fund* religious activity, or unconstitutionally *penalizing* it.

On the one hand, states may pursue their priorities by funding some activities without having to fund alternatives, even where those alternatives are constitutionally protected. So a state may fund expenses for childbirth but not abortion (*Maher v. Roe*, 432 U.S. 464 (1977)), charities' non-lobbying activity but not their lobbying activity (*Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983)), or libraries' educational materials but not pornography (*U.S. v. American Library Assn.*, 539 U.S. 194 (2003)). States may not *prohibit* protected activities, but may *inhibit* them through selective funding. Washington could thus fund the study of medicine but not theology.

But states may not penalize the exercise of a constitutional right. *Perry v. Sindermann*, 408 U.S. 593 (1972). The plaintiff there was a college instructor teaching classes in social science and government. He *also* engaged in protected speech by criticizing the school's administration, which then did not renew his contract. Though the facts were disputed, if the teacher could prove his protected speech was the cause of the nonrenewal, that would be an unconstitutional penalty for exercising his First Amendment rights.

Considering states' discretion in setting funding priorities, and the later logic of *Locke*, it follows that the school could have constitutionally chosen to discontinue the government classes (and faculty) and replace them with classes in other subjects, just as Maine or Washington could prioritize secular instruction over religious instruction. But so long as a teacher or school properly teaches the prescribed curriculum, the state may not impose an penalty due to additional speech — whether criticism as in *Perry*, or prayer and religious study as in *Carson*.

A more recent decision (authored by Chief Justice John Roberts) further explained this principle. *Agency for Intl. Dev. v. Alliance for Open Soc'y Intl.*, 570 U.S. 205 (2013) (AID). Congress funded organizations that worked against HIV/AIDS worldwide, but conditioned funding on organizations' expressly opposing prostitution. The Supreme Court held that so long as the organizations fulfilled their assigned task by working against HIV/AIDS, the government could not "leverage funding to regulate speech" beyond the program itself. Just as the government could not use the teacher's employment in *Perry* as leverage to *curtail* his speech (against the administration), Congress could not use funding to *compel* speech (against prostitution).

The unconstitutional conditions in *Perry* and *AID* show there are limits to state discretion in selective funding. *Maher v. Roe* holds that if a pregnant woman chooses to abort one twin and deliver the other, the state could decide to fund

Mitchell Keiter *is a certified appellate law specialist in Beverly Hills. www.CaliforniaAppellateAttorney.com. He filed an amicus brief on behalf of the parents in* Carson.

only the latter. But it could not penalize the woman for the abortion of the first twin by denying her funding for the delivery of the second. Likewise, though *American Library* held the government could limit funding to libraries' educational materials, and not subsidize pornography, the government not deny a library user access to those subsidized educational materials just because he also had viewed pornography on his own computer. And the same reasoning that protects pornography protects prayer no less.

To be sure, the government need not pay for the additional expressive activity. But organizations' silence regarding prostitution did not cost Congress a dime, nor did the teacher's speech cost any state funds. And the same is true in Maine, where religious schools seek no more than the same funding received by any secular school. They can teach both secular and religious subjects without extra state funds in part because many of their teachers see their work as a calling, and are motivated to work longer hours than public school teachers, for no more (and usually less) income.

Because religious schools would receive the same amount of funding, for teaching the same secular curriculum, the state funding furthers the state purpose of secular instruction. "[I]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose ... any aid going to a religious recipient *only has the effect of furthering that secular purpose." Mitchell v. Helms*, 530 U.S. 793, 810 (2000) (emphasis added).

In sum, a state may create a program and decide what to fund. It could decide, for example, to provide free clothing to needy children, but not include religious garments like *hijabs* or *kippot. Cf. Locke* at 721: "The State has merely chosen not to fund a distinct category." But the state may not *penalize* families who engage in such religious exercise by also withholding the shirts, pants, and shoes they would otherwise receive.

That is what Maine does. Reading, writing, and arithmetic are the shirts, pants, and shoes, and families forfeit all their funding for such secular instruction because students also pray or study the Bible. The exclusion of religious schools thus imposes an unconstitutional condition on religious exercise.

Reprinted with permission from the *Daily Journal*. ©2021 Daily Journal Corporation. All rights reserved. Reprinted by ReprintPros 949-702-5390.