

No. 14-0776

IN THE SUPREME COURT OF TEXAS

MICHAEL WILLIAMS, COMMISSIONER OF EDUCATION, IN HIS
OFFICIAL CAPACITY, ET AL.

Appellants/Cross-Appellees

v.

THE TEXAS TAXPAYER & STUDENT FAIRNESS COALITION, ET AL.;
CALHOUN COUNTY ISD, ET AL.; EDGEWOOD ISD, ET AL.; FORT
BEND ISD, ET AL.; TEXAS CHARTER SCHOOL ASSOCIATION, ET AL.;
AND JOYCE COLEMAN, ET AL.

Appellants/Appellees/Cross-Appellants

AMICUS CURIAE BRIEF OF THE U.S. PASTOR COUNCIL

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IDENTITIES OF AMICUS CURIAE AND COUNSEL

Amicus Curiae:

The U.S. Pastor Council is a nonprofit, bi-partisan coalition of pastors based in Texas representing over one thousand churches with a diversity of ethnic, denominational and cultural backgrounds, assisting with the development of Pastor Councils in communities to address social, cultural, policy and justice issues of concern from a Biblical perspective.

The Texas leadership (A.K.A. Texas Pastor Council) includes some of the largest churches in Texas such as Second Baptist Church, Dr. Ed Young (Houston); Grace Community Church, Dr. Steve Riggle (Houston); First Baptist Church, Dr. Robert Jeffress (Dallas); Gateway Church, Dr. Robert Morris (Southlake); Hyde Park Baptist, Dr. Kie Bowman (Austin); Church of the Open Door, Dr. Ronnie Holmes (Waco); World Outreach Center, Pastor Charles Flowers (San Antonio); Iglesia Rios de Aceite, Dr. Hernan Castano, (Houston) and many others.

Many of the pastors and the coalition itself are deeply involved in K-12 education via government schools and church-based private schools; and therefore have a vested interest in addressing the profound issues threatening children's education by the lack of affordable opportunity for choosing the best school for each child. The U.S. Pastor Council advocates for education reform that places

both responsibility and opportunity in the hands of parents, demands academic and moral excellence of our youth and provides equal opportunity for those standards regardless of the socio-economic status of the family being served.

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Rule 11 Amicus Curiae Brief Required Disclosure

This brief was prepared on behalf of The U.S. Pastor Counsel at no cost and in support of Appellants.

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DISCUSSION

I. The Current System Of Public Free Schools Is Unconstitutionally Inefficient And Does Not Produce A General Diffusion Of Knowledge.

The current system of public free schools is unconstitutionally inefficient and does not produce a general diffusion of knowledge. As pastors and religious leaders in the state of Texas we are deeply concerned about the abysmal failure of public education for too many students in the state of Texas. We support and applaud good public schools, of which there are many. However, over fifty percent of the public school campuses in Texas are failing to meet adequate yearly student progress goals established by the “No Child Left Behind” Act.¹ As pastors and religious leaders, we have observed the devastation and the blight of human life that occurs in students who do not receive the general diffusion of knowledge guaranteed to them by the Texas Constitution. The failure to achieve a general diffusion of knowledge is massively demonstrated in the Record.

While there are many wonderful government employees in the current system, and we applaud these, and pray for all of the employees in the current public education system; we know that a government monopoly is an inherently inefficient way of producing quality goods and services for consumers. We believe that parents have the God-given fundamental right to direct the education

¹ USA Today, *Feds Grant Texas No Children Left Behind Waiver*, Sept. 30, 2013, <http://www.usatoday.com/story/news/nation/2013/09/30/feds-grant-texas-no-child-left-behind-waiver/2898159/> (last visited Aug. 11, 2015).

and upbringing of their own children. *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925) “The fundamental theory of liberty upon which all governments of this Union rest excludes any general power of the state to standardize its children by forcing them to accept instruction from public school teachers only.” *Id.* at 535. Consumer choice and free markets, rather than government coercion and compulsion produce far better and the only truly “efficient” results on both the individual and societal level as demonstrated by economics and history.

God loves justice (*see* Psalms 33:5); He commands us to do justice; (*see* Micah 6:8) and justice and righteousness are the foundation of His throne. *See* Psalm 87 and 89. Justice and efficiency go together to produce liberty.

God also commands us to love our neighbors as ourselves and it is not sufficient for those who have more means to be able to choose either a government education or a private education, to simply do so and consign others to blighted, failing public schools. We believe free markets produce a variety of educational styles which efficiently fit the individual needs of students. One size fits all produces inefficiency.

It is highly unusual for us to file an Amicus Brief before the Texas Supreme Court, but we feel that our voices need to be raised on behalf of efficiency at this time.

II. The Texas Supreme Court Has Already Stated That An Efficient System Of Public Free Schools Need Not Be Operated By Solely By Government Employees.

The Texas Supreme Court has already stated that an efficient system of public free schools need not be operated by solely by government employees. In *Edgewood IV*, the Court stated the following footnote:

In Senate Bill 7, the Legislature fulfills its mandate to provide a general diffusion of knowledge by establishing a regime administered by the State Board of Education. The [Texas] Constitution does not require, however, that the State Board of Education or any state agency fulfill this duty. As long as the Legislature establishes a suitable regime that provides for a general diffusion of knowledge, the Legislature may decide whether the regime should be administered by a state agency, by the districts themselves, or by any other means. (footnote 8, Cornyn, J.).

Texas already allows some private providers to run schools under the Texas Open Enrollment Charter school law.² But their number is artificially and arbitrarily limited, which produces inefficiency. These privately operated schools are called public schools, thus establishing that non-governmental employees can provide education under the Texas Education Clause. However, because they are labeled public schools, religious instruction and faith-based character development cannot be included in such instruction.

² *Tex. Educ. Code § 12, et seq.*

III. The Exclusion Of Religious Providers From The Public Education System Severely Implicates Religious Liberty Whereas Their Inclusion Clearly Would Not Violate Religious Liberty Or The Establishment Clause Per *Zelman v. Harris*, 536 U.S. 639 (2002).

The total and complete exclusion of religious providers from the public education system severely implicates religious liberty, whereas their inclusion clearly does not violate religious liberty or the Establishment Clause per *Zelman v. Harris*, 536 U.S. 639 (2002). The parties have not brought this case as a religious liberty case. Consequently, while the issue of religious liberty is not directly before the Court, the exclusion of religious providers from the current system of public education severely implicates religious liberty under the First Amendment of the U.S. Constitution, the Texas Constitution and the Texas Religious Freedom Restoration Act. On the other hand, including religious schools in a system of public free schools where parents have a voluntary choice of which school to send their child, has already been established by the U.S. Supreme Court not to be an establishment of religion. *Zelman v. Harris Simmons*, 536 U.S. 639 (2002). As long as the legislature adopts a school choice program in which financial assistance is available to a broad class of individuals without regard to religion; the benefit is intended for a public purpose and for its educated citizenry; the decision to attend a religious school is entirely voluntary, and thus religious schools are only indirect beneficiaries; and no financial incentives are created to attend private over public

schools, nor are benefits limited to private schools students; then it is perfectly constitutional for the legislature to include private, faith-based, religious schools in its programs. See *Zelman, supra*; *Mueller v. Allen*, 463 U.S. 388 (1983) (tax credits to attend private schools); *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986) (vocational rehabilitation tuition to attend religious seminary); *Zobrest v. Catalina Foothill Sch. Dist.*, 509 U.S. 1 (1993) (publicly paid deaf interpreter at catholic schools saying the Lord's prayer); *Agostini v. Felton* 521 U.S. 203 (1997); (government reading support even on religious school campus).

Thus, clearly, including religious schools does not violate the Establishment Clause.

On the contrary, the current exclusion of religious schools clearly makes the system inefficient and severely implicates religious liberty. From a pure economics standpoint, an efficient system would have the greatest number of suppliers possible. This is what produces efficiency in free markets. The exclusion of suppliers from the market produces inefficiency and serves merely to protect the inefficient suppliers. Judicial notice can be taken of the widely known fact that there are many excellent private religious schools in Texas which do an excellent job of educating and produce many alumni of great benefit and prominence in society. According to a new study by William Jeynes, professor of

education at California State University at Long Beach and Senior Fellow at the Witherspoon Institute of Princeton, he found that religious, mostly Christian, school students were a full year ahead of students who attend public and charter schools.³ Is the exclusion of religious schools based on religious bigotry? These schools achieve a greater diffusion of knowledge with less expense, thus more efficiency. Under the test of the Religious Freedom Restoration Act, there can be no compelling governmental interest in excluding them since private schools demonstrate that they can meet all of the secular requirements of producing a general diffusion of knowledge. There can be no argument for a compelling governmental interest in forcing every child to attend a public school, since this argument was rejected by the Supreme Court in *Pierce v. Society of Sisters, Supra*. Thus, the exclusion of religious schools for no valid economic reason demonstrates a religious bias and hostility and prevents the free exercise of religion. Declaring the current system inefficient and that an efficient system must include all qualified suppliers without regard to religion, will avoid the religious issue and clearly not violate the Establishment Clause.

³ “A Meta-Analysis on the Effects and Contributions of Public, Public Charter, and Religious Schools on Student Outcomes,” Vol. 87, Issue 3 of the Peabody Journal of Education. Jeynes “meta-analysis” utilized very large data sets by combining the data from many different studies.

IV. CONCLUSION

In order to establish justice, in order for the Supreme Court to perform its constitutional duty to enforce the express written terms of the Constitution such as “efficient,” the current public school system should be declared constitutionally inefficient and the legislature should be directed to create an efficient system.

Respectfully Submitted,

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Certificate of Compliance

Pursuant to Tex. R. App. P. 9.4(i)(3), the undersigned certifies this brief complies with the type-volume limitations of Tex. R. App. P. 9.4(i)(2)(B). Exclusive of the exempted portions in Tex. R. App. P. 9.4(i)(1), the brief contains 1,480 words. The brief was prepared using Microsoft Word 2013.

/s/Briscoe Cain

Briscoe Cain

Certificate of Service

I hereby certify that on August 18, 2015, a copy of the foregoing document was served in accordance with Rule 9.5 of the Texas Rules of Appellate Procedure (1) through an electronic filing manager (EFM) upon each person listed below if the email address is on file with the EFM or (2) by email (if the address is available) or first-class mail upon each person below who does not have an email on file with the EFM:

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