



# MEMORANDUM

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## School Vouchers & Scholarships

The ACLJ supports school vouchers because we are committed to the principle that parents are responsible for the education of their children and that parents have the right to choose schools that best serve their children's educational needs. Maximizing educational choices for parents is essential.

*Below is a short legal analysis prepared by ACLJ attorneys on this topic.*

To improve educational opportunities for students, States have implemented various K-12 school vouchers and post-secondary education scholarship programs. The recipients of these school vouchers and scholarships sometimes use them to attend religious schools or to enroll in religious degree programs. Some oppose school vouchers and scholarship programs, claiming that the use of government funds in this manner has the purpose or effect of promoting a religion in violation of the U.S. Constitution's Establishment Clause. The Supreme Court has held, however, that as long as the voucher programs are neutral and the government funds reach the schools as the result of independent private choice of citizens, there is no constitutional violation.

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. While interpreting the clause, the Supreme Court said that the clause "prevents a State from enacting laws that have the *purpose* or *effect* of advancing or inhibiting religion." *Zelman v. Simmons Harris*, 536 U.S. 639, 648-49 (2002) (emphasis added) (citation omitted) (internal quotation marks omitted).

School vouchers and scholarships do not have the purpose or effect of promoting a religion merely because they incidentally assist students in attending religious schools or receive religious training. The Court has stated that as long as a school voucher program is “*neutral with respect to religion*, and provides assistance directly to a broad class of citizens who, *in turn*, direct government aid to religious schools wholly as a result of their own *genuine and independent private choice*,” there is no violation of the Establishment Clause. *Zelman*, 536 U.S. at 652 (emphasis added); *see also Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13–14 (1993); *Witters v. Wash. Dept. of Serv. for Blind*, 474 U.S. 481, 487 (1986); *Mueller v. Allen*, 463 U.S. 388, 399–400 (1983). For the same reason, State scholarships that assist students with post-secondary education expenses may permit recipients to pursue religious training in subjects such as theology without violating the Establishment Clause. *Locke v. Davey*, 540 U.S. 712, 719 (2004).

To sum up, there are two basic requirements. First, the purpose of the school voucher or scholarship program must not be religious, and second, it must also not have the effect of promoting or inhibiting religion. *Zelman*, 536 U.S. at 649. The first requirement can be satisfied if the program has a “valid secular purpose.” *Id.* The second requirement can be fulfilled by showing that the link between government funds and religious schooling is broken—this can occur when the government awards the funds directly to individuals who then *independently* choose to use those funds to enroll in a school or degree program of their choosing, be it religious or non-religious. *Id.* at 652.

An example where these criteria were met is the case of *Zelman v. Simmons Harris*. There, the Supreme Court held that an Ohio school voucher program was constitutional because it had neither the purpose nor the effect of advancing religion. Instead, the purpose of the program was “secular” and aimed at “providing educational assistance to poor children in a demonstrably failing public school system.” *Id.* at 649. The program also did not have the effect of advancing religion in any way—the recipients had a genuine choice of attending either religious or secular schools, there was no financial benefit in choosing a religious school over a secular one, and the program did not create any public perception that the State endorsed religion. *Id.* at 654–55.

While the federal Constitution allows the recipients of school voucher and scholarship programs to enroll in religious schools and religious degree programs, (provided that the program meets the requirements described above), it does not compel the States to use

government funds to aid religious training. Thus, state constitutions and statutes may validly prohibit the use of state scholarship money for religious instruction, such as clergy training. *Locke*, 540 U.S. at 719.

To understand this apparent contradiction, it helps to briefly review the religion clauses in the federal Constitution. Both clauses are provided as follows: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. Const. Amend. I. The two clauses are often in tension with each other. *Locke*, 540 U.S. at 718. For example, a State seeking to avoid violating the Establishment Clause may take excessive measures to avoid promoting religion so that it ends up violating the rights of citizens to exercise their religious beliefs.

Nevertheless, there exists a gap between the Establishment Clause and the Free Exercise Clause—“room for play in the joints,” as the Court puts it. *Id.* This “room for play” allows a State to take certain actions that guard against the Establishment Clause—such as prohibiting state scholarship money from being used for religious training—without infringing upon citizens’ Free Exercise rights. *Id.* at 718–19.

This situation occurred recently in *Locke v. Davey*, where a student who was awarded a scholarship by the State of Washington attempted to use it to enroll in a theology degree program at a Christian college. *Id.* at 717. The State responded by denying him the scholarship under its constitution and state cases which interpreted the clause to prohibit even indirect funding of religious instruction for future clergy. *Id.* at 719.

The student filed suit against the State and the case reached the U.S. Supreme Court. The Court held that the State, pursuant to its own laws, could validly deny the scholarship without violating the Free Exercise Clause because, among other reasons, (1) the scholarship program was facially neutral with respect to religion and thus not presumptively unconstitutional, (2) the State had a substantial interest in refusing to fund theological degrees, and (3) the denial placed only a minor burden upon students such as the plaintiff. *Id.* at 725.

This opinion does not mean that every State *must* deny funding to students pursuing religious training. To the contrary, the Supreme Court declared that there is “no doubt” that the state could, if it wishes, “permit Promise Scholars to pursue a degree in devotional theology.” *Id.* at 719. The Court only ruled that a state is not required to do so.

To summarize, state school voucher programs are constitutional as long as they do not have the purpose or effect of promoting a religion. In addition, indirect and incidental aid given to students attending religious schools under such programs does not by itself violate the Establishment Clause. *Zelman*, 536 U.S. at 649, 652. Furthermore, State scholarships assisting students with post-secondary education expenses can allow recipients to enroll in religious degree programs without violating the Establishment Clause. *Locke*, 540 U.S. at 719. However, States are not compelled to do so under the Constitution—and in accordance with their own constitution and laws, may even prohibit the use of government funds to support religious training, without violating the Free Exercise Clause. *Id.* at 719, 725.