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Legal Sidebar

Carson v. Makin: Using Government Funds for Religious Activity

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When the government decides whether to give public funds to religious entities, that decision can raise constitutional questions under both of the First Amendment's Religion Clauses. For many years, Supreme Court precedent focused primarily on whether federal, state, or local governments violated the Establishment Clause by funding religious activity. Accordingly, governments sometimes barred public funds from being given to religious activities or religious groups. In recent years, however, the Supreme Court has made clear that governments may violate the Free Exercise Clause by barring religious entities from receiving public benefits because of their faith. Under prevailing precedent, then, governments might sometimes be constitutionally or statutorily barred from giving public funds to religious activities but also cannot exclude religious entities from eligibility solely because of their religious character.

In *Carson v. Makin*, issued on June 21, 2022, the Supreme Court held that states could not exclude religious schools from an indirect aid program based on the schools' religious use of the funds. This Legal Sidebar explains that decision and discusses possible implications for federal funding, as well as further implications stemming from the Supreme Court's subsequent Establishment Clause ruling in *Kennedy v. Bremerton School District*.

Legal Background

The First Amendment provides that the government "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The intersection of these two clauses—the Establishment Clause and the Free Exercise Clause, collectively described as the Religion Clauses—is a perennial issue in constitutional law.

The Supreme Court has said the Establishment Clause forbids, among other things, "financial support" of "religious activity." For example, the Court in 1973 invalidated a government tuition-reimbursement program that directly provided money to religious institutions but lacked safeguards to ensure that the money was used only "for secular, neutral, and nonideological purposes." Subsequent cases, however, seemed to walk back such Establishment Clause restrictions, and in 1988, the Supreme Court upheld a federal grant program that did not expressly restrict the religious use of funds. That case said absent evidence to the contrary, and particularly when the funds were granted to institutions "that were not

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pervasively sectarian," the Court would assume that religious grantees could carry out the funded programs "in a lawful, secular manner."

At least some opinions since then have suggested that direct government aid still may not actually be used for religious purposes. Despite such decisions, the Court has held that the Establishment Clause does not forbid all government support for religious entities so long as the government is "extending its general state law benefits to all its citizens without regard to their religious belief." Among other programs, the Supreme Court has approved of funds that cover only specific secular services and has approved of indirect aid programs such as school voucher programs, in which citizens can independently choose to use neutral government aid at religious organizations. To highlight this second point: The Supreme Court has distinguished direct aid programs, in which the government gives funds directly to religious entities, from indirect aid programs, in which the government gives aid to third parties who can choose where to spend those funds.

Further, the Supreme Court's more recent cases have suggested that where a government offers benefits that are not *prohibited* by the Establishment Clause, the Free Exercise Clause may sometimes *require* the government to offer those benefits to religious as well as secular recipients. In 2017, the Court held in *Trinity Lutheran Church of Columbia v. Comer* that a state grant program violated the Free Exercise Clause by excluding religious organizations from receiving funds to purchase rubber playground surfaces. The Court said that because the program barred religious organizations from the program based solely on their religious character, this religious penalty was subject "to the 'most rigorous' scrutiny" and could be justified only by "a state interest 'of the highest order.'" In the Court's view, the state's interest in "skating as far as possible from religious establishment concerns" was insufficiently "compelling" in light of the policy's "clear infringement on free exercise."

The *Trinity Lutheran* opinion acknowledged that in a prior case, *Locke v. Davey*, the Court had ruled a state did not violate the Free Exercise Clause by prohibiting students from using publicly funded scholarships to pursue degrees in devotional theology. In *Locke*, the Court recognized the state's "historic and substantial state interest" in not using government funds to support clergy, even though that support was through an indirect aid program that would not violate the Establishment Clause. *Trinity Lutheran* distinguished *Locke*, saying the state in *Locke* had permissibly chosen to deny a scholarship because of what the recipient "proposed *to do*—use the funds to prepare for the ministry." By contrast, in *Trinity Lutheran*, the Court held that the state was impermissibly denying funds because of what the recipient "*was*"—a church. In a concurrence, Justice Gorsuch questioned the "stability" of a line that attempted to distinguish "laws that discriminate on the basis of religious *status* and religious *use*," arguing that in many cases, "the same facts can be described both ways."

Last year, in *Espinoza v. Montana Department of Revenue*, the Supreme Court extended *Trinity Lutheran* to hold that a state violated the Free Exercise Clause when it barred religious schools from a tax credit program benefiting parents of private school students. The Court concluded that the state program excluded religious schools "solely by reference to religious status" by barring schools based on their religious affiliation. Accordingly, the Court ruled that the religious disqualification failed strict scrutiny. While *Espinoza* reaffirmed that governments may not discriminate against beneficiaries solely on the basis of their religious character, it left open the possibility that governments might still be able to bar beneficiaries that would put public funds to religious *uses*.

Facts and Procedural History of *Carson v. Makin*

Maine's constitution requires towns to provide a free public education, but not all of its districts operate public secondary schools. Instead, to provide a secondary education, state statutes allow districts to either (1) contract with public schools in other districts or approved private schools, or (2) pay tuition "at the

public school or the approved private school of the parent's choice." To qualify as an approved private school, among other statutory requirements, the school must be "nonsectarian."

Three sets of parents sued the state, arguing that the restriction on using tuition assistance payments at sectarian schools violated both of the Religion Clauses and the Equal Protection Clause of the Constitution. (Accordingly, the case involves only indirect aid to religious schools and did not address the direct aid aspects of the program relating to contracts.) The district court ruled for the state, and on appeal, the U.S. Court of Appeals for the First Circuit also rejected each of the three constitutional challenges. With respect to the Free Exercise Clause challenge, the appeals court characterized the program as imposing "a use-based restriction." After evaluating whether the restriction was nonetheless *equivalent* to a status-based distinction, the court concluded that Maine had permissibly required "public educational instruction to be nonsectarian for reasons that reflect no hostility to religion" and the exclusion instead reflected "legitimate concerns about excessive entanglement with religion."

The parents appealed this decision to the Supreme Court, which agreed to hear the case on July 2, 2021.

Majority Opinion

In an opinion authored by Chief Justice Roberts, a six-Justice majority concluded that Maine violated the Free Exercise Clause by barring tuition assistance payments to sectarian schools. The majority ruled that the "principles applied in *Trinity Lutheran* and *Espinoza* suffice to resolve this case," rejecting Maine's two attempts to distinguish *Trinity Lutheran*. Maine had first argued its program was designed to provide a *public* education, which inherently entailed a *secular* education. The Court disagreed, ruling that the state could not recast a discriminatory exclusion as a permissible funding condition. Second, seizing on the possible distinction in *Trinity Lutheran* between religious status and religious use, the state said it excluded sectarian schools based on concerns about public funds being used for religious activities. The Court accepted the state's assertion that it was excluding the schools based on their religious use of funds rather than merely their religious identity. Nonetheless, the Court held that "use-based discrimination" is just as "offensive to the Free Exercise Clause," at least in the context of a "neutral" indirect benefit program that did not violate the Establishment Clause. The majority emphasized that religious activities are at the core of a religious school's mission and stated that attempting to scrutinize whether a school is using funds for religious purposes would "raise serious concerns about state entanglement with religion and denominational favoritism."

Accordingly, as in *Trinity Lutheran* and *Espinoza*, the Court ruled the exclusion unconstitutional under a strict scrutiny analysis, saying the religious discrimination could not be justified by an interest in separating church and state beyond what was already required by the Establishment Clause. Although *Locke* had recognized that states have some interest in the separation of church and state, the *Carson* majority said *Locke* recognized only a "narrow" antiestablishment interest that could not be extended "beyond . . . vocational religious degrees."

Dissenting Opinions

Justice Breyer dissented and was joined by Justice Kagan and (in part) Justice Sotomayor. In short, Justice Breyer would have held that the Constitution "sometimes allows a State to further antiestablishment interests by withholding aid from religious institutions," and that "Maine's nonsectarian requirement [fell] squarely within the scope of that constitutional leeway." He argued that the distinction between excluding religious entities versus preventing religious uses of funds was "important" given that "the very point of the Establishment Clause is to prevent the government from sponsoring religious activity itself." Accordingly, he believed Maine could permissibly conclude that "government payment for this kind of religious education would be antithetical to the religiously neutral education that the

Establishment Clause requires in public schools," and that a "religiously integrated education" would not be "a replacement for a civic-focused public education."

Justice Sotomayor filed a separate dissent in which she claimed the majority opinion "continue[d] to dismantle the wall of separation between church and state that the Framers fought to build." She also emphasized that the opinion did not address the contracting portions of the Maine program and said that in her understanding, requiring school districts to "contract directly with schools that teach religion" would "blatantly violate the Establishment Clause."

Considerations for Congress

Carson is likely to have some effect on how existing federal programs are evaluated under the Religion Clauses. A number of federal funding schemes restrict the religious use of funds. After *Trinity Lutheran* and *Espinoza*, the Department of Justice expressed concern about two federal programs in particular: one program excluding certain sectarian institutions from capital financing for historically black colleges and universities and a second program excluding religiously affiliated schools from a charter school grant program. The government's conclusions about those programs appear to be consistent with the decision in *Carson*, to the extent it read those programs as relying on a status-based distinction.

However, in those pre-*Carson* opinions, the Department of Justice concluded that two additional restrictions on religious *uses* of funds did not necessarily violate the Free Exercise Clause. The first program prohibited direct loans from being used for specific religious activities—and a number of other federal programs similarly prohibit using direct funds for sectarian activity. The second program required charter schools to be "nonsectarian" in their operations, similar to the Maine requirement struck down in *Carson*. *Carson* might provide more support for Free Exercise Clause challenges to prohibitions on religious uses.

A key difference between the Maine requirement and these federal provisions, though, is that the latter appear to involve direct funding schemes. As discussed above, the Supreme Court has drawn a constitutional distinction between direct financial aid, which it has said may not be used for religious activities, and indirect financial aid, which may be used for religious activities so long as the government operates the program in a way that is neutral towards religion. Accordingly, *Carson* itself might not implicate federal provisions prohibiting direct assistance from being used for religious activity, particularly if those provisions are not applied to exclude religious entities from a program but merely restrict how both religious and nonreligious entities may use public funds. Instead, under prevailing precedent, the government may still violate the Establishment Clause if it directly funds religious activity.

However, that Establishment Clause precedent on funding religious activity was based in part on an approach that the Court has now abandoned. Much of the Establishment Clause jurisprudence summarized above was based on *Lemon v. Kurtzman*, a Supreme Court case instructing courts to evaluate Establishment Clause challenges by looking to whether a government action had the impermissible purpose or effect of advancing or endorsing religion, or whether the action created an excessive entanglement between church and state. As discussed in this CRS Report, the Court had previously struck down financial aid programs under the *Lemon* test when, for example, a program had the effect of "provid[ing] desired financial support for nonpublic, sectarian institutions" or, as in *Lemon* itself, when programs created an entanglement likely to unduly involve the state in details of religious activity.

On July 27, 2022, the Supreme Court's opinion in *Kennedy v. Bremerton School District* (discussed in this separate Legal Sidebar) stated that the Court had broadly "abandoned" use of the so-called *Lemon* test. Instead, the Court held, courts should evaluate the Establishment Clause by reference to "historical practices and understandings," looking to "original meaning and history."

Kennedy did not involve a government funding practice, but the opinion advised courts in all future Establishment Clause challenges to ask whether specific government practices are consistent with original meaning and historical practices. Pre-*Lemon* cases that evaluated government funding in part by reference to original understandings and historical practices could inform how courts perform that inquiry. But while the Supreme Court announced in *Kennedy* that the *Lemon* test was "abandoned," it did not overrule *Lemon*—or other precedent applying the *Lemon* test to conclude that specific funding schemes violated the Establishment Clause. Accordingly, lower courts must still follow any *Lemon*-based Establishment Clause rulings that appear directly applicable based on the facts of the case, including those involving government funding. It is unclear how courts will apply those rulings as precedent while also following the Supreme Court's direction to no longer apply the *Lemon* test. *Carson*, moreover, approved of Maine's tuition assistance program under the Establishment Clause without reference to analogous historical practices. The opinion, issued a week before *Kennedy*, thus suggests that the Supreme Court may continue to allow the type of indirect funding schemes that it had previously approved under the *Lemon* test. Accordingly, there is some uncertainty regarding how at least certain types of financial aid may be reviewed in the future.

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