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Religious Schools Anticipate Landmark U.S. Supreme Court Ruling

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The U.S. Supreme Court heard argument in December in a case that could significantly alter the way in which religious schools are financed in this country. It is widely expected that, later this term, the court will strike down as unconstitutional under the First Amendment the restriction in a student-aid program in Maine that prohibits using that aid to pay for schools that provide religious, or sectarian, education. If the court issues such a decision in the case, *Carson v. Makin*, No. 20-1088, state and local governments will likely be more cautious about discriminating against religious schools when creating programs to finance students' education.

After briefly discussing the Maine program and the lawsuit challenging the constitutionality of the program, this column will review the decision by the U.S. Court of Appeals for the First Circuit in *Carson v. Makin*, 979 F.3d 21 (1st Cir. 2020), the arguments made by the parties and amici to the Supreme Court, and the probable impact of the Supreme Court's anticipated ruling.

> Given the comments from several justices at December's oral argument, it is very likely that the court will strike down the Maine law on free exercise grounds, eliminating the distinction between "status" and "use" and applying a strict scrutiny standard to both.

Background

Under Maine law, local "school administrative units" (SAUs)—the equivalent of school districts in other states—must support and maintain public schools so that every school-age child in the state has "an opportunity to receive the benefits of a free public education." More than half of Maine's 260 SAUs, however, do not operate a public secondary school of their own. In an effort to ensure that those SAUs make the benefits of a free public education available to the same extent that others do, a Maine law provides that they may either (1) contract with a secondary school—whether a public school in a nearby SAU or an "approved" private school—for school privileges, or (2) "pay the tuition…at the public school or the approved private school of the parent's choice at which the student [from their SAU] is accepted."

To participate in the tuition assistance program, parents select the school they wish their child to attend. If they select a private school, and if it has been "approved" by the Maine Department of Education, the parents' SAU must pay the child's tuition costs up to the legal tuition rate established by law by making tuition payments directly to the school.

To be "approved" to receive such payments, a private school must meet the requirements for basic school approval—and, thus, the state's compulsory school attendance requirements. To meet those requirements, the school

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either must be "accredited by a New England association of schools and colleges" or "approv[ed] for attendance purposes" by the Maine Department of Education, which depends in part on whether the school can show that it meets basic curricular requirements.

Importantly, a private school also must be "nonsectarian in accordance with the First Amendment" and comply with certain separate reporting and auditing requirements.

A number of parents challenged the nonsectarian requirement in a lawsuit they filed against the commissioner of Maine's Department of Education in the U.S. District Court for the District of Maine. The plaintiffs claimed that the nonsectarian requirement (which their complaint referred to as the "sectarian exclusion") violated the U.S. Constitution, including their First Amendment right to the free exercise of religion, because it denied "sectarian options to tuition-eligible students and their parents."

The district court granted summary judgment in favor of the commissioner, and the plaintiffs appealed to the U.S. Court of Appeals for the First Circuit. The three-judge panel included retired Supreme Court Justice David H. Souter, sitting by designation.

The First Circuit's Decision

Before it affirmed the district court, the First Circuit considered the impact of two recent Supreme Court decisions: *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, (2017), and *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020).

In *Trinity Lutheran*, the Supreme Court considered a challenge to a Missouri subsidy for resurfacing playgrounds at preschool and day-care facilities that expressly excepted churches and other religious organizations. The court determined that, under the First Amendment's Free Exercise Clause, the application of that restriction was subject to the strictest scrutiny, because it was based "solely" on the putative recipient's religious "character." The court then concluded that the application of the restriction in that manner could not survive such exacting review.

Espinoza involved a free exercise challenge to a Montana Supreme Court decision that struck down a state program giving tax credits to those who donated to organizations providing scholarships to private schools—including private religious schools. The Montana Supreme Court explained that it was invalidating the program because it conflicted with a provision of that state's constitution that, among other things, prohibited state aid to private schools controlled by a "church, sect, or denomination."

The Supreme Court ruled that, under the Free Exercise Clause, the Montana Supreme Court's decision applying the state constitution's no-aid provision in that manner was subject to strict scrutiny and could not survive such review.

The plaintiffs in *Carson* contended that *Trinity Lutheran* "radically changed the constitutional landscape" of First Amendment free exercise challenges, and that *Espinoza* accorded with their contention that Maine's nonsectarian requirement violated the Free Exercise Clause.

The First Circuit was not persuaded, finding, among other things, that the plaintiffs' free exercise challenge lacked merit.

The circuit court pointed out that the Supreme Court in *Trinity Lutheran* explained that the playground resurfacing program "expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character" and held that, as a consequence, it was subject to "the most exacting scrutiny."

The court then observed that *Trinity Lutheran* indicated that discrimination based solely on "religious character" did not depend on the religious "use" that the recipient would make of the subsidy, and that the Supreme Court "left unaddressed the level of scrutiny that would apply to a restriction of that kind."

The court next observed that *Espinoza* clarified both that discrimination based solely on "religious character" is discrimination based solely on religious "status" and that such discrimination is distinct from discrimination based on religious "use." It said that *Espinoza* expressly rejected the contention that the Montana Supreme Court had held that the no-aid provision of the Montana constitution excluded religious schools from receiving aid "not because of the religious character of the recipients, but because of how the funds would be used—for 'religious education.'" Rather, the circuit court continued, the Supreme Court explained that, as in *Trinity Lutheran*, *Espinoza* "turn[ed] expressly on religious status and not religious use."

The court said that, in addition to clarifying that use-based religious discrimination differed from solely status-

based religious discrimination, *Espinoza* also explained why the latter type of discrimination triggered strict scrutiny: To deny aid to a religious school simply because of what it is "put[s] the school to a choice between being religious or receiving government benefits."

The court added that *Espinoza*, quoting *Trinity Lutheran*, said that such a "choice between being religious or receiving government benefits" is not free from coercion, because a requirement that a school "divorce itself from any religious control or affiliation" to receive aid for which it is otherwise eligible necessarily "punishe[s] the free exercise of religion."

The court then ruled that Maine's "nonsectarian" requirement did not discriminate based solely on religious status but that it was a use-based restriction. As such, it continued, the requirement was not subject to strict scrutiny but, rather, to a lesser "rational basis" standard. Finding that it met that test, and that the Maine student-aid program was neither the product of religious animus nor in violation of the First Amendment's Establishment Clause, the circuit court affirmed the district court's decision.

At the Supreme Court

The briefs filed with the Supreme Court by the parents and by amici supporting the parents focused to a large extent on the status-use distinction. They argued, among other things, that there is no meaningful distinction between discrimination based on religious use or conduct and discrimination based on religious status; that any distinction is "illusory." Notwithstanding that *Espinoza* left open the possibility that "some lesser degree of scrutiny applies to discrimination against religious uses of government aid," they asked the court to hold that discrimination based on religious use or conduct is subject to the same level of scrutiny as discrimination based on religious status.

The commissioner and the commissioner's supporters countered that states have "a strong interest" in retaining control over the substance of state-funded education and especially in retaining the authority "to decide whether taxpayer dollars should support programs that advance religious beliefs, which may include beliefs inimical to the[ir] policies."

A broader ruling by the court will add to the wealth of decisions favorable to religious liberty that it has issued in recent years.

In excluding sectarian schools from the student-aid program, Maine and its amici argued, Maine is "declining to fund explicitly religious activity that is inconsistent with a free public education." Simply put, they concluded, the Constitution does not obligate Maine to include sectarian schools in a program designed to provide a free public education to students who live in SAUs that neither operate public schools nor contract for schooling privileges.

Conclusion

The impact of the court's upcoming decision in *Carson* depends, of course, on its breadth. At the least, given the comments from several justices at December's oral argument, it is very likely that the court will strike down the Maine law on free exercise grounds, eliminating the distinction between "status" and "use" and applying a strict scrutiny standard to both. That alone would yield more funding for religious education if parents and students choose that option.

A broader ruling by the court will add to the wealth of decisions favorable to religious liberty that it has issued in recent years (including religion-based challenges to numerous overly-broad government mandates stemming from the COVID-19 pandemic), and would suggest that the Supreme Court will continue to expand the protections encompassed within the Free Exercise Clause, whether relating to religious school funding or other religion-related functions.