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RELIGION LAW

Expert Analysis

Supreme Court Rules in Favor of Religious Liberty in Two School Cases

By **Barry Black**

In late June, the U.S. Supreme Court issued two decisions in cases involving disputes over religious liberty in the school setting. First, in *Carson v. Makin*, No. 20-1088 (June 21, 2022), in an opinion by Chief Justice Roberts, the court ruled that the "nonsectarian" requirement for participation in Maine's tuition assistance program violated the First Amendment's Free Exercise Clause, which provides that "Congress shall make no law … prohibiting the free exercise" of religion.

Days later, in *Kennedy v. Bremerton School District*, No. 21-418 (June 27, 2022), in an opinion by Justice Gorsuch, the court ruled that the First Amendment's Free Exercise Clause as well as the First Amendment's Free Speech Clause, which provides that "Congress shall make no law … abridging the freedom of speech," protected a high school football coach's post-game sideline prayers.

The vote in both cases was 6-3, with Justices Breyer, Kagan and Sotomayor in dissent. The court's two majority decisions suggest that the court is now firmly in favor of protecting religious liberty and also that it is firmly against what Chief Justice Roberts characterized in *Carson* as "discrimination against religion."

Maine's Program

Maine has a tuition assistance program for families that reside in an area with a local school administrative unit (SAU) that neither operates its own public secondary school nor contracts with a particular public or private school for the education of its school age children. In those circumstances, the SAU must "pay the tuition … at the public school or the approved private school of the parent's choice at which the student is accepted."

Parents who wish to take advantage of this benefit first select the school that they wish their child to attend. If they select a private school that has been "approved" by the Maine Department of Education, the parents' SAU "shall pay the tuition" at the chosen school up to a specified maximum rate.

To be "approved" to receive these payments, a private school, among other things, must be a "nonsectarian" school.

Two families that live in SAUs that neither maintain their own secondary schools nor contract with any nearby secondary school challenged the nonsectarian requirement, asserting that it violated the First Amendment. The district court rejected the families' constitutional claims, the First Circuit affirmed, and the case reached the Supreme Court.

The Supreme Court's Decision

In its decision, the court briefly reviewed two of its recent Free

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Exercise decisions involving state efforts to withhold otherwise available public benefits from religious organizations.

First, the court discussed *Trinity Lutheran Church of Columbia v. Comer*, 582 U.S. (2017), which involved a Missouri program that offered grants to qualifying nonprofit organizations that installed cushioning playground surfaces made from recycled rubber tires but that denied such grants to any applicant owned or controlled by a church, sect or other religious entity. The court held that the Free Exercise Clause did not permit Missouri to "expressly discriminate[] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character."

The court next referenced its decision in *Espinoza v. Montana Dept. of Revenue*, 591 U.S. (2020), which involved a Montana program that provided tax credits to donors who sponsored scholarships for private school tuition. The Montana Supreme Court held that the program, to the extent it included religious schools, violated a provision of the Montana constitution that barred government aid to any school controlled in whole or in part by a church, sect or denomination. As a result of that holding, Montana terminated the scholarship program, preventing the petitioners in *Espinoza* from accessing scholarship funds they otherwise would have used to fund their children's educations at religious schools. The court held that barring religious schools from public benefits "solely because of the religious character of the schools" violated the Free Exercise Clause.

The court then applied the *Trinity Lutheran* and *Espinoza* principles to Maine's program, and held that Maine's nonsectarian requirement for its otherwise generally available tuition assistance payments violated the Free Exercise Clause. The court pointed out that Maine "pays tuition for certain students at private schools—so long as the schools are not religious." According to the court, "[t]hat is discrimination against religion."

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The Prayer Case

As the court explained in its decision in *Kennedy*, Joseph Kennedy lost his job as a high school football coach because he knelt at midfield after games to offer a quiet prayer of thanks. He sued the school district, alleging that its actions violated the First Amendment's Free Exercise and Free Speech Clauses. The district court reasoned that if the school district had allowed the coach's postgame prayers, it "would have violated" the First Amendment's Establishment Clause, which provides that "Congress shall make no law respecting an establishment of religion … ."

The Ninth Circuit affirmed, and the case reached the Supreme Court.

The Supreme Court's Decision

In its decision, the court explained that the Free Exercise and Free Speech Clauses "work in tandem," with the Free Exercise Clause protecting religious exercises, whether communicative or not, and the Free Speech Clause providing "overlapping protection for expressive religious activities."

Citing to *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), among other decisions, the court observed that a plaintiff may carry the burden of proving a free exercise violation in various ways, including by showing that a government entity has burdened the plaintiff's sincere religious practice pursuant to a policy that is not "neutral" or "generally applicable." If a plaintiff makes such a showing, the court continued, there is a First Amendment violation unless the government satisfies "strict scrutiny" by demonstrating that its course was justified by a compelling state interest and that it was narrowly tailored in pursuit of that interest.

With this standard in place, the court found that the school district "failed to act pursuant to a neutral and generally applicable rule." The school district's policy was not neutral, according to the court, because it was "specifically directed at … religious practice." The policy also failed the general applicability test, the court ruled, noting that the school district's performance evaluation of the coach advised against rehiring him on the ground that he "failed to supervise student-athletes after games" but that the school district permitted other members of the coaching staff to forgo supervising students briefly after games to do things such as visiting with friends or taking personal phone calls. Thus, the court found, any sort of postgame supervisory requirement was "not applied in an evenhanded, across-the-board way."

The court also found a free speech violation, reasoning that the coach's speech was "private speech" and that to permit the school district to prohibit it "would be to treat religious expression as second-class speech."

Finally, the court ruled that the school district failed to demonstrate that its action satisfied "strict scrutiny" by showing that its restrictions on the coach's protected rights served a compelling interest and were narrowly tailored to that end, or even that its action satisfied the more lenient "intermediate scrutiny" test. The court rejected the school district's reliance on its concern that it would have violated the Establishment Clause if it had not fired the coach, explaining that an Establishment Clause violation "does not automatically follow whenever a public school or other government entity 'fail[s] to censor' private religious speech."

The court acknowledged that the coach's efforts "to pray quietly by himself on the field" would have meant that some people would have seen his religious exercise, and that those close at hand might have heard him, too. However, the court said, "learning how to tolerate speech or prayer of all kinds" is "part of learning how to live in a pluralistic society," a trait of character essential to "a tolerant citizenry."

The court observed that the school district sought to punish the coach for engaging in "a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses," and that the only meaningful justification the school district offered "rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech." The Constitution, the court concluded, "neither mandates nor tolerates that kind of discrimination."

Conclusion

For its upcoming term, the court already has granted certiorari to *303 Creative v. Elenis*, 6 F.4th 1160 (10th Cir. 2021), which involves a challenge by a website design company and its owner to a Colorado law that restricts a public accommodation's ability to refuse to provide services based on a customer's identity. The owner contends that she sincerely believes that same-sex marriage conflicts with God's will and, therefore, that she intends to refuse to create websites that celebrate same-sex marriages.

The issue on which the court has agreed to focus is whether applying a public accommodation law to compel an artist to speak or stay silent violates the First Amendment's Free Speech Clause. The court's decisions in *Carson* and *Kennedy*, and their religious liberty underpinnings, are likely to play important roles in its upcoming resolution of *303 Creative*. Stay tuned!