Maine's "Nonsectarian" School Choice Policy Violates Free Exercise Clause

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***Carson, as next friend of O.C. v. Makin*, 142 S. Ct. 1987 (June 21, 2022)**

In *Carson, as next friend of O.C. v. Makin,* , a divided Supreme Court held that under the Establishment Clause of the First Amendment, the state of Maine could not provide tuition assistance for students to attend non-religious private schools, while refusing to provide such assistance if the student chose to attend a religious private school.

In Maine, not all public school districts operate high schools. Some districts have arrangements with specific schools to take their high school-age students, while other districts allow students to choose their own high school, including private schools. For the latter group of students, if their families qualify for financial assistance, the state will pay for the associated private school tuition—but only if the students attend "nonsectarian" schools.

A group of Maine parents lived in districts that did not operate high schools and wanted to send their children to religious private high schools. Under state law, these families would qualify for tuition assistance to attend "nonsectarian" schools only. The parents challenged Maine's law as violating the First Amendment. The district court rejected the petitioners' constitutional claims and granted judgment to the State. The First Circuit affirmed.

In a 6 to 3 majority opinion written by Chief Justice John Roberts, the U.S. Supreme Court reversed and remanded. The majority held that "the prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination." The Court applied "the strictest scrutiny" to this state benefit program under which public funds were used to support tuition payments at private schools, just as it had in 2020 in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020). It explained that while "a neutral benefit program" – in

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which public funds flow to religious organizations through *independent* choices of recipients – does not offend the Establishment Clause, *Maine's* decision to exclude religious schools from its tuition program "promotes stricter separation of church and state than the Federal constitution requires," and such an interest "cannot qualify as compelling" under strict scrutiny review.

Justice Stephen Breyer authored a dissent, joined by Justices Elena Kagan and Sonia Sotomayor. Under *Locke v. Davey*, 540 U.S. 712 (2004), Justice Breyer argued Maine was permitted to "preclude parents from designating a religious school to receive tuition assistance payments." The majority distinguished *Locke* by referring to prior decisions in *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), both authored by Chief Justice Roberts. "Both precedents emphasized, as did *Locke* itself, that the funding in *Locke* was intended to be used to prepare for the ministry. Funds could be and were used for theology courses; only pursuing a vocational religious *degree* was excluded." (Internal citations and quotation marks omitted).

While *Locke* expressly identified "the historic and substantial state interest against using taxpayer funds to support church leaders," *Espinoza* made clear that "there is no historic and substantial tradition against aiding [private religious] schools comparable to the tradition against state-supported clergy invoked by *Locke*." (Internal quotation marks omitted).

Key Takeaways:

- *Carson, as next friend of O.C. v. Makin,* signals a victory for school choice proponents, many of whom were represented with amicus curiae briefs supporting the petitioners. As Chief Justice Roberts bluntly stated, when a state pays tuition for students to attend private schools, but will not do the same if the school is religious, "[t]hat is discrimination against religion."
- Now more than ever, state legislatures will need to carefully consider the public policy aims of their respective education systems, and what specific benefits they want to fund.

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- Likewise, private religious schools should be up to speed on their respective states' funding formulas and be sure they are not leaving public assistance on the table for their families.

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