School "Choice" for Some: *Carson v. Makin*

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On June 21, 2022, the U.S. Supreme Court's 6-3 decision in *Carson v. Makin* presents an avenue to redefine school choice … *for some*.[1] Although the Court presents a neutral application and analysis, this decision opens the debate regarding school choice, religious rights, educational equity, and policies around access and inclusion. In *Carson*, the question was presented to the Supreme Court as to whether a restriction on government subsidies for secondary education excluding nonsectarian schools in Maine violated the Free Exercise Clause of the First Amendment.[2] The Court held that Maine must allow funding for religious private schools through its tuition assistance program.[3] This decision continues a recent trend of court decisions that exalt the First Amendment's Free Exercise Clause over the once equally powerful Establishment Clause and fail to recognize the "play in the joints" between the two.[4]

Given Maine's rural geography, over half of its residents live in a school district without a secondary school.[5] Districts without a public high school can either contract with a nearby district to accommodate their students, or they can cover the cost of tuition, up to $11,000, at an approved private school of the parent's choosing.[6] Prior to the Supreme Court's ruling in *Carson*,

[1] Carson v. Makin, 142 S. Ct. 1987 (2022).
[2] *Carson*, 142 S.Ct. 1987.
[3] *Id.* at 2002.
[4] *Id.* at 2002.
[5] Nina Totenberg, *Supreme Court Rules Maine's Tuition Assistance Program Must Cover Religious Schools*, NAT'L PUB. RADIO (Jun. 21, 2022), https://www.npr.org/2022/06/21/1105348236/supreme-court-rules-maines-tuition-assistance-program-must-cover-religious- .
[6] *Id.*

one requirement for a private school to be "approved" was that the school be nonsectarian.[7] However, the Court's holding in *Carson* changes this. Parents of children in these rural school districts may now send their children to religious private schools with government subsidies.

The Court, reversing the U.S. Court of Appeals for the First Circuit's decision, held that Maine's exclusion of religious schools from state tuition assistance violated the Free Exercise Clause of the First Amendment and, further, that providing such a benefit would not violate the Establishment Clause.[8] The Court emphasized that "a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause."[9] Supreme Court precedence dictates that the state's "interest in separating church and state 'more fiercely' than the Federal Constitution ... 'cannot qualify as compelling' in the face of the infringement of free exercise."[10]

Maine tried to distinguish *Carson* from prior cases involving funding-based government policy and religious discrimination claims. In *Trinity Lutheran Church v. Comer,* the Court addressed whether a Missouri grant policy that impermissibly excluded a religious school from resurfacing its playground was constitutional.[11] In *Espinoza v. Montana Department of Revenue,* the court held that a Montana income tax credit for private school donations leading to scholarships at religious schools was allowed.[12] In his dissent, agreeing with Maine's position, Justice Breyer characterized *Carson* as a question of whether a state can withhold aid based on

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[7] ME. REV. STAT. ANN. tit. 20-A, § 2951 (2022).
[8] *Id.* at 1994-96.
[9] *Id.* at 1997.
[10] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2260 (2020) (quoting Trinity Lutheran Church v. Comer, 137 S. Ct. 2012, 2024 (2017). As additional support, the Court in *Carson* also cited a higher education case, *Widmar v. Vincent*, 454 U.S. 263 (1981), in which the Court made clear that "the state interest ... in achieving greater separation of church and State than is already ensured under the Establishment Clause ... is limited by the Free Exercise Clause." *Id.* at 276.).
[11] Trinity Lutheran Church v. Comer, 137 S. Ct. 2012 (2017).
[12] Espinoza, 140 S. Ct. 2246.

how that aid will be used, *i.e.,* a "use" test.[13] In other words, can a state withhold aid when that aid promulgates a religious purpose or perspective? The Court disagreed with that distinction.[14] Writing for the majority, Chief Justice John Roberts held that "*Trinity* and *Espinoza* … never suggested that 'use-based' discrimination is any less offensive to the Free Exercise Clause."[15] Roberts also cited precedent which stated, "we have repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits."[16] The majority takes the position that Maine subsidizing tuition at secular private schools, given that they are not religious, is discrimination against religion.[17] According to the Court, while a state is not required to fund religious schools, funding cannot be denied to these schools if public funding is extended to secular private schools.[18]

Carson expands the reach of public dollars to education by allowing opportunities for students to use the tuition assistance program for education at religious schools.[19] States may no longer "discriminate" by withholding funding from religious private schools when said funding is offered to secular private schools to fill a need or provide a choice.[20] Further, it allows religious schools to instill their defined values onto the students (or parents who register their children into those schools) using state dollars. *Carson* also strips away state voices and the "legislative leeway" they once had in these cases.[21] Previously, states could "choos[e] not to fund certain religious activity where States have strong, establishment-related reasons for not doing

[13] *Carson*, 142 S. Ct. at 1992.
[14] *Id.* at 2001.
[15] *Id.*
[16] Sherbert v. Verner, 374 U.S. 398 (1963).
[17] *Carson*, 142 S. Ct. at 1998.
[18] *Id.* at 1997 (quoting Espinoza v. Mont. Dep't of Revenue, 140 S. Ct 2246, 2261 (2020)).
[19] *Id.* at 2002.
[20] *Id.* at 1997.
[21] *Id*. at 2002 (Breyer, J., dissenting).

so."[22] *Carson* fuses the Free Exercise and Establishment Clauses, which say "[the Government] shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," rather than recognizing the longstanding "play in the joints" between the two.[23] As Justice Breyer explains,

> [W]e have made clear that States enjoy a degree of freedom to navigate the Clauses' competing prohibitions. This includes choosing not to fund certain religious activity where States have strong, establishment-related reasons for not doing so. And, States have freedom to make this choice even when the Establishment Clause does not itself prohibit the State from funding that activity. The Court today nowhere mentions, and I fear effectively abandons, this longstanding doctrine.[24]

Thus, states no longer have the same voice to direct funds, especially in ways where they choose not to involve religion in educational spending.

A broader concern is that *Carson* could open the door to more charter schools being run by religious organizations.[25] Charter schools are public schools that are government funded and must provide secular education, even if run by a religious organization.[26] However, an argument could be made that charter schools are more like private schools.[27] The Manhattan Group, a conservative think tank, has already expressed such an argument.[28] If a religious organization were to open a charter school and challenge this, a court might agree that the school is not a "state actor." Although *Peltier v. Charter Day School*, a recent North Carolina case, found

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[22] *Id.* at 2004 (Breyer, J., dissenting).
[23] *Id.* at 2002 (Breyer, J., dissenting).
[24] *Id.* at 2004 (Breyer, J., dissenting).
[25] Kevin Welner, *How the Supreme Court Ruling Lays Groundwork for Religious Charter Schools*, WASH. POST (June 21, 2022), https://www.washingtonpost.com/education/2022/06/21/supreme-court-ruling-religious-charter-schools/.
[26] *Id.;* Matt Barnum, *'The Next Frontier': Supreme Court Case Could Open the Door to Religious Charter Schools*, CHALKBEAT (Feb 24, 2022), https://www.chalkbeat.org/2022/2/24/22949483/supreme-court-maine-carson-makin-religious-charter-schools.
[27] *Id.*
[28] Nicole Garnett, *Religious Charter Schools: Legally Permissible? Constitutionally Required?*, MANHATTAN INST. (Dec. 1, 2020), https://www.manhattan-institute.org/religious-charter-schools-legally-permissible-constitutionally-required.

charter schools to be "state actors," North Carolina has factors that separate it from other states.[29] For example, North Carolina is among a small number of states with a law stating teachers are state employees regardless of the legal status of their employer.[30] While not controlling, this was likely a significant consideration for the court in their decision, suggesting that the case could have been decided differently in a state without such a law.[31] If such a case were to come before the Supreme Court, a restriction on religious teaching could be seen as a violation of the Free Exercise Clause.[32] If this happened, the Establishment Clause would be almost non-existent as it relates to education, charter schools would become nearly indistinguishable from private schools in terms of freedom in their curriculum, and government funding would go directly to religious schools.

While *Carson* may appear only to affect Maine, its decision has implications that will inevitably ripple throughout the legal and educational landscape in many ways. It served as another blow to the Establishment Clause and continued a trend of conservative jurisprudence from the Court. The dust has yet to settle regarding *Carson's* impact, but one thing is sure: more litigation concerning religion in the education setting is inevitable.

[29] Welner, *supra* note 24.
[30] *Id.*
[31] *Id.*
[32] *Id.*