

Supreme Court Finds Religious Schools Entitled to Participate in School Voucher Program

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Key Takeaways:

- Generally-available public benefit programs that exclude religious individuals and organizations from participation on the basis of their religious character infringe on the Free Exercise Clause, and will be held to “the strictest of scrutiny”.
- School voucher programs, in which public funds flow to religiously-affiliated schools through the independent choices of private benefit recipients, do not offend the Establishment Clause.

The United States Supreme Court on Tuesday released its [opinion](#) in *Carson v. Makin*, holding that Maine’s “nonsectarian” requirement for otherwise generally available tuition assistance payments violates the Free Exercise Clause of the Constitution.

The state of Maine created the tuition assistance program to ensure students living in rural school districts that neither operate a secondary school of their own nor contract with a school in another district can still receive a free public education. Under the program, parents can select any approved secondary school—including private schools—they would like their child to attend, and their school district will distribute payments to subsidize the cost of tuition. However, the program limited payments to “nonsectarian school[s] in accordance with the First Amendment of the United States Constitution.” See Me. Rev. Stat. Ann., Tit. 20–A, §2951(2). Generally speaking, a “sectarian school” is one that promotes a faith or belief system in its teachings.

This case arose after two families were denied tuition assistance for schools that did not qualify as nonsectarian. The families sued, alleging the nonsectarian requirement violated their rights under the Free Exercise and Establishment Clauses of the First Amendment, as well as under the Equal Protection Clause of the Fourteenth Amendment. The District Court rejected the constitutional claims and the First Circuit affirmed.

In a 6-3 decision by Chief Justice Roberts, the Court reversed the First Circuit’s decision. The Court found the “unremarkable” principles applied in [Trinity Lutheran](#) and [Espinoza](#) controlled the result, rejecting the First Circuit’s attempt to distinguish this case from these two recent precedents. Both cases support the principle that where a state creates a generally available public funding program, it may not “penalize[] the free exercise of religion” by excluding individuals or entities from participating in the program solely on the basis of their religious character. Where public funding programs do exclude religious entities, they will be subjected to the “strictest of scrutiny.” Here, the Court found the Maine law targeted schools on the basis of their religious character, and applied strict scrutiny. Then, the Court summarily rejected Maine’s argument that its law should survive strict scrutiny because it was promoting the separation of church and state, stating:

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 . . . [and that] . . . an 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.

The Court noted that the First Circuit attempted to distinguish Maine’s nonsectarian requirement from *Trinity Lutheran* and *Espinoza* in two ways: (1) by claiming the sectarian schools are barred from receiving funds not based on religious “status” but on religious “uses” of

public funds and (2) that because the program was meant to provide education roughly equivalent to a public education, Maine may permissibly require that education to be secular.

The Court rejected the first argument, stating that prior precedents never suggested that use-based discrimination is any less offensive to the Free Exercise Clause. And on the second point, the Court found that the private schools the tuition program supports were themselves different from Maine's public schools. The Court ultimately concluded that "[r]egardless of how the benefit and restriction are described the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise."

Following *Carson*, religious schools operating in states with school choice programs should consider evaluating whether *Carson* affects their eligibility to participate in such programs. Relatedly, states that exclude religious institutions from various generally-available public funding programs (including but not limited to those involving education) must consider whether changes need to be made to those programs in light of this decision.

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