

## RELIGIOUS AUTONOMY IN *CARSON V. MAKIN*

BY NICK REAVES<sup>1</sup>

In *Carson v. Makin*, the Supreme Court confirmed that excluding only “sectarian” religious schools from its tuition aid program violated the “unremarkable” constitutional principle of religious neutrality—that one religion cannot be preferred to another.<sup>2</sup> But court watchers who view this case as the simple application of prior precedent may have missed one of its most important points: its embrace of church autonomy principles in the government funding context.

To help explain why Maine could not constitutionally pick and choose *which* religious schools to fund, the Supreme Court—for the first time—called on its line of religious autonomy precedent. The Court, citing *Our Lady of Guadalupe*,<sup>3</sup> explained that the line Maine sought to draw (excluding religious schools that “promote” faith and “inculcate” religious beliefs into the curriculum)<sup>4</sup> misunderstood the very purpose of religious schools. The Court then explained that even the process of “scrutinizing whether and how a religious school pursues its educational mission” unconstitutionally entangled the government in religious questions and could result in “denominational favoritism.”<sup>5</sup>

*Carson* is therefore far more than “Trinity Lutheran 3.0.”<sup>6</sup> First, it confirms that the status/use distinction discussed in prior government funding cases did not bear the weight that some had hoped. Second, it cabins *Locke v. Davey*’s<sup>7</sup> anti-establishment interests to the funding of “vocational religious degrees.”<sup>8</sup> And finally, it anchors the Court’s government funding cases in core Free Exercise doctrine, framing Maine’s actions as “exclud[ing] otherwise eligible schools on the basis of their *religious exercise*.”<sup>9</sup> Together, these doctrinal developments make clear that governments cannot use access to generally available funding as a wedge to interfere with the internal operations of religious organizations.

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<sup>2</sup> *Carson v. Makin*, 142 S. Ct. 1987, 1997–2002 (2022).

<sup>3</sup> *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

<sup>4</sup> *Carson*, 142 S. Ct. at 2002.

<sup>5</sup> *Id.* at 2001.

<sup>6</sup> *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

<sup>7</sup> *Locke v. Davey*, 540 U.S. 712 (2004).

<sup>8</sup> *Carson*, 142 S. Ct. at 2002.

<sup>9</sup> *Id.* (alteration in original) (emphasis added).

## I. MAINE'S TUITION AID PROGRAM

Maine, the most rural state in the Union,<sup>10</sup> provides families living in school districts without a public secondary school with funding to “pay the tuition . . . at the public school or the approved private school of the parent’s choice at which the student is accepted.”<sup>11</sup> The program imposes no geographic limits on schools the state will fund and, until 1981, parents could choose to send their children to any accredited religious or secular private school, with very few restrictions.<sup>12</sup> However, in 1981, Maine’s legislature limited the program to “nonsectarian” schools. While not defined by statute, the Maine Department of Education considers a religious school “sectarian” if it is “associated with a particular faith or belief system” and, in addition to teaching academic subjects, it “promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith.”<sup>13</sup> In 2018, two Maine families challenged this exclusion of “sectarian” schools, but both the district court and the First Circuit upheld the program under prior precedent. Then the Supreme Court granted certiorari.

At the Supreme Court, a win for the families seemed likely after just a few minutes of Maine’s oral argument. In what appeared to be a pre-planned hypothetical, Chief Justice Roberts asked Maine’s attorney how the state would treat two different religious schools under its tuition funding program. The first school, run by “Religion A,” “has a doctrine that they should provide service to their . . . neighbors . . . but there’s nothing in their . . . doctrine about propagating the faith,” so the school “look[s] just like a public school, but it’s owned by” a religious community.<sup>14</sup> The second school is run by “Religion B” and “its doctrine requires adherents to educate children in the faith.”<sup>15</sup> Religion B’s school, therefore, “is infused in every subject with their view of the faith.”<sup>16</sup> Responding to this hypothetical, Maine’s attorney confirmed what the Chief Justice surely already knew: that parents sending their children to the first school would receive tuition funding but parents at the second school would not, based on the religious differences between the two schools.<sup>17</sup>

Similarly problematic, in response to a question from Justice Barrett, Maine’s attorney acknowledged that when parents request funding to send their children to a school not already in the program, Maine’s Department of Education “does a little homework” to figure out whether it considers the school sectarian or non-sectarian.<sup>18</sup> In briefing, Maine explained that the “focus” of this inquiry “is on what the school teaches through its curriculum and related activities, and how the material is presented.”<sup>19</sup> And that “affiliation or association with a church or religious

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<sup>10</sup> *Id.* at 1993.

<sup>11</sup> Me. Revised Statute Annotated, Title 20-A, §5204(4) (Cum. Supp. 2021).

<sup>12</sup> *Carson*, 142 S. Ct. at 1994. Putting aside Maine’s requirement that schools be “non-sectarian,” the state’s only other requirement was that schools either be regionally accredited or satisfy “specified curricular requirements” such as using English as the language of instruction and offering a course in “Maine history.” *Id.* at 1993. For schools that are accredited, they need not also meet Maine’s curricular requirements. *Id.*

<sup>13</sup> *Carson*, 142 S. Ct. at 2007–08 (Breyer, J., dissenting) (alteration in original).

<sup>14</sup> Transcript of Oral Argument at 56, *Carson v. Makin*, 142 S. Ct. 1987 (2022) (No. 20-1088).

<sup>15</sup> *Id.* at 56–57.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 57.

<sup>18</sup> *Id.* at 90.

<sup>19</sup> Brief of Respondent at 6, *Carson v. Makin*, 142 S. Ct. 1987 (2022) (No. 20-1088).

institution” was relevant, but not “dispositive.”<sup>20</sup> And at oral argument, Maine’s attorney added that sometimes these decisions can be made by a cursory review of “the school’s website . . . [o]r maybe . . . the student handbook.”<sup>21</sup>

Oral argument thus confirmed a fundamental flaw in Maine’s tuition assistance program. By excluding only “sectarian” schools, the program attempted to distinguish *between* religious schools based on Maine’s own assessment of *whether* and *how* a religious school “promotes a particular faith and presents academic material through the lens of that faith.”<sup>22</sup> And Maine had no objective criteria or measure for determining which religious schools crossed the line. Instead, the assessment was left to the discretion of Maine’s Department of Education—apparently sometimes based only on a quick skim of the school’s public facing materials.<sup>23</sup>

## II. STATUS VS. USE

Maine’s attempt to distinguish between permissible and impermissible types of religious education also revealed the impossibility of distinguishing between religious *status* and the religious *use* in generally available government aid programs.

Defending its program, Maine argued that it had an overriding anti-establishment interest in denying funding to schools that would put government money to a religious “use.”<sup>24</sup> According to the state, its exclusion of “sectarian” schools mapped directly onto the status/use distinction suggested by the Supreme Court’s holdings in *Trinity Lutheran* and *Espinoza*.<sup>25</sup> The First Circuit and Justice Breyer agreed. As the First Circuit saw it, Maine “does not bar schools from receiving funding simply based on their religious identity,” it instead excludes schools “based on the religious *use* that they would make of it in instructing children.”<sup>26</sup>

In both *Espinoza* and *Trinity Lutheran*, Chief Justice Roberts, writing for the majority, characterized the government aid program as one that discriminated first and foremost on religious status: religious schools need not apply.<sup>27</sup> But the Court, especially in *Espinoza*, was also careful to note that this did not implicitly sanction discrimination based on religious use.<sup>28</sup> The Court simply had no need to address the question.

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<sup>20</sup> *Id.* at 5–6.

<sup>21</sup> Transcript of Oral Argument at 90, *Carson v. Makin*, 142 S. Ct. 1987 (2022) (No. 20-1088) (alteration in original).

<sup>22</sup> *Carson v. Makin*, 142 S. Ct. 1987, 2001 (2022).

<sup>23</sup> Maine argued both at oral argument and in its brief that many schools “self-identify as nonsectarian” and that it is “extremely rare” for Maine to be “forced to make a determination.” Brief of Respondent at 5, *Carson v. Makin*, 142 S. Ct. 1987 (2022) (No. 20-1088). Putting aside the selective (and potentially complaint-driven) enforcement problems with this system, there is also obviously no exemption in the Constitution for “just a little bit” of religious discrimination.

<sup>24</sup> *Carson*, 142 S. Ct. at 2006–07 (Breyer, J., dissenting); Brief of Respondent at 35–40, *Carson v. Makin*, 142 S. Ct. 1987 (2022) (No. 20-1088).

<sup>25</sup> *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246 (2020).

<sup>26</sup> *Carson v. Makin*, 979 F.3d 21, 40 (1st Cir. 2020) (emphasis added); 142 S. Ct. at 2007 (Breyer, J., dissenting) (similar).

<sup>27</sup> *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017) (“The rule is simple: No churches need apply.”); *Espinoza*, 140 S. Ct. at 2256 (“So applied, the provision ‘impose[s] special disabilities on the basis of religious status.’”) (internal citation omitted).

<sup>28</sup> *Espinoza*, 140 S. Ct. at 2257 (“None of this is meant to suggest that we agree with the Department . . . that some lesser degree of scrutiny applies to discrimination against religious uses of government aid.”).

Ignoring the Court's warning in *Espinoza*, Maine nevertheless sought to test the constitutionality of religious use discrimination. When squarely presented, the Court had little trouble showing why Maine's focus on religious use "misreads our precedents."<sup>29</sup> The Court explained that neither *Trinity Lutheran* nor *Espinoza* "suggested that use-based discrimination is any less offensive to the Free Exercise Clause," and relied on Maine's own administration of its tuition aid program to "illustrate[ ] why."<sup>30</sup> As the Court explained, Maine's attempt to distinguish between religious schools based on "whether and how" they "pursue[ ] [their] educational mission" raised serious religious autonomy concerns.<sup>31</sup>

### III. RELIGIOUS AUTONOMY

The principles of religious autonomy discussed in *Carson* are rooted in both Religion Clauses. As early as 1871, in *Watson v. Jones*, the Supreme Court held that civil courts must defer to religious bodies on "questions of discipline, or of faith, or ecclesiastical rule, custom, or law."<sup>32</sup> Later, in *Larson v. Valente*, the Court held that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."<sup>33</sup> The principles of religious autonomy therefore generally prevent the government from interfering in disputes over religious doctrine and in internal governance decisions "that affect[ ] the faith and mission" of religious institutions, including religious schools.<sup>34</sup> Keeping the government out of religious disputes therefore prevents both government entanglement in religious questions and religious favoritism.

One form of unconstitutional entanglement that impinges on religious autonomy is the attempt by governments to distinguish between "sectarian" and "non-sectarian" religious beliefs or organizations. In *Town of Greece*, the Supreme Court explained not only that such a distinction is inconsistent with our nation's history and traditions, but also that drawing this distinction would force courts "to act as supervisors and censors of religious speech."<sup>35</sup> And as Justice Thomas explained in his *American Legion* concurrence, such a distinction would result in "courts 'trolling through religious beliefs'" and making "inevitably arbitrary decisions" regarding what is and is not "sectarian."<sup>36</sup> This would obviously create serious religious autonomy concerns.

Protecting this religious autonomy is particularly important when it comes to religious education. In *Hosanna-Tabor* and *Our Lady*, the Supreme Court confirmed that religious schools must have exclusive control over *who* teaches the faith to protect their "independence in matters

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<sup>29</sup> *Carson*, 142 S. Ct. at 2001.

<sup>30</sup> *Id.* (alteration in original).

<sup>31</sup> *Id.* (alteration in original).

<sup>32</sup> *Watson v. Jones*, 80 U.S. 679, 727 (1871). *See also* *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 115 (1952); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 191 (1960).

<sup>33</sup> *Larson v. Valente*, 456 U.S. 228, 244 (1982) (alteration in original).

<sup>34</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012) (alteration in original). *See also* *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2062 (2020).

<sup>35</sup> *Town of Greece v. Galloway*, 572 U.S. 565, 566 (2014).

<sup>36</sup> *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2096–97 (2019) (Thomas, J., concurring) (cleaned up). *See also* *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 675 (1970) (explaining that government programs requiring "official and continuing surveillance" to administer can lead "to an impermissible degree of entanglement").

of faith and doctrine.”<sup>37</sup> As the Court reasoned, “a wayward” teacher could “contradict” the tenets of the faith and lead students “away from the faith.”<sup>38</sup> This would undermine a crucial component of religious education: transmitting the faith “to the next generation.”<sup>39</sup>

Against this constitutional backdrop, Maine’s tuition aid program raised significant religious autonomy concerns. By determining which schools were eligible for tuition funding based on *what, how, and how much* religion was infused into a school’s curriculum, Maine was conditioning benefits on a religious school’s conformity to the government’s preferred approach to religious education. Parents who needed the state’s tuition assistance were forced to choose schools with a certain religious perspective, and some religious schools may have even felt financial pressure to conform to Maine’s requirements to obtain (or maintain) eligibility. Perhaps even worse, Maine’s evaluation process was both essentially standardless and discretionary, further entangling the government in religious questions.

#### IV. THE FICTION OF VALUE-NEUTRAL RELIGIOUS EDUCATION

To defend its program, Maine argued that it was not expressing hostility or opposition to the schools’ *beliefs*; it just wanted to prevent the “inculcation” or infusion of those beliefs into the curriculum and the school environment.<sup>40</sup> In other words, if religious schools could be religious without *encouraging* religion, they would be eligible for funding. But this argument fundamentally misunderstands religious education (and education more generally).

Maine’s argument assumes that non-sectarian schools (religious, private, or public) do not inculcate *any* values. But no type of education can be completely value neutral. As Justice Barrett explained at oral argument, “all schools, in making choices about curriculum and the formation of children, have to come from some belief system.”<sup>41</sup> “[I]n public schools, . . . the districts are” choosing “the kind of values that they want to inculcate in the students.”<sup>42</sup> Even Justice Breyer recognized as much. As he explained in his dissent, Maine’s public schools “seek first and foremost to provide a primarily civic education” and serve as “the primary vehicle for transmitting *the values* on which our society rests,” which he viewed as including “the preservation of a democratic system of government.”<sup>43</sup>

Education certainly includes the passing on of objective facts, but it also imparts ways of thinking and perspectives on history and current events. It inculcates civil (and sometimes religious) values, and even good (or bad) habits. So understood, Maine’s argument breaks down: because all schools impart values in one way or another, Maine is simply picking and choosing

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<sup>37</sup> *Our Lady*, 140 S. Ct. at 2061.

<sup>38</sup> *Id.* at 2060. *See also* Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of L. v. Martinez, 561 U.S. 661, 680 (“[W]ho speaks . . . colors *what* concept is conveyed.”).

<sup>39</sup> *Our Lady*, 140 S. Ct. at 2063.

<sup>40</sup> Brief of Respondent at 19, Carson v. Makin, 142 S. Ct. 1987 (2022) (No. 20-1088).

<sup>41</sup> Transcript of Oral Argument at 87, Carson v. Makin, 142 S. Ct. 1987 (2022) (No. 20-1088).

<sup>42</sup> *Id.* at 87–88 (alteration in original).

<sup>43</sup> Carson v. Makin, 142 S. Ct. 1987, 2008–09 (2022) (Breyer, J., dissenting) (emphasis added) (citing Plyler v. Doe, 457 U.S. 202, 221 (1982)).

which values it deems appropriate and beneficial and which it deems, as explained further below, “fundamentally at odds with [the] *values* we [the State of Maine] hold dear.”<sup>44</sup>

Thus, while Maine may have sidestepped religious status discrimination, it walked right into the Court’s religious autonomy precedent by privileging some religious beliefs over others based on a discretionary evaluation of how religious schools pass on the faith.

## V. CARSON’S IMPACT

Doctrinally, this decision confirms that state Blaine Amendments—laws often rooted in religious animus that exclude “sectarian” schools from public benefits—are well and truly dead. While *Espinoza* did much of the heavy lifting,<sup>45</sup> *Carson*’s unequivocal rejection of the status/use distinction ensures that states and lower courts can no longer rely on arguments about religious “use” to deny religious organizations equal access to generally available government funding programs.

In a similar vein, *Carson* confirmed that *Locke v. Davey*,<sup>46</sup> a 2004 case in which the Supreme Court upheld the State of Washington’s college scholarship program against a free exercise challenge,<sup>47</sup> “cannot be read beyond its narrow focus on vocational religious degrees” and cannot justify exclusion of “religious persons” based on “their anticipated religious use” of the government benefit.<sup>48</sup> Instead, the Court confirmed that *Locke* is justified only by the unique “historic and substantial state interest” against taxpayer funding for “church leaders.”<sup>49</sup> Outside of a theological seminary, it is hard to see how *Locke* has any life left.

Practically, while *Carson* may signal the end of the status/use distinction, it may also pave the way for the Supreme Court to wade into even deeper waters. On the same day the Court ruled against Maine, the state’s attorney general issued a press release calling the ruling “disturbing,” and associating the beliefs of the prevailing religious families and schools with “discrimination, intolerance, and bigotry.”<sup>50</sup> Tellingly, the attorney general revealed the value-laden motivations behind the state’s defense of its tuition aid program: he described the school’s religious beliefs as “inimical to a public education” and “fundamentally at odds with the values we hold dear.”<sup>51</sup> He then speculated that Maine may still be able to bar disfavored religious schools from its program because, he argued, they engage in “discriminatory practices” in violation of the Maine Human Rights Act’s “anti-discrimination provisions.”<sup>52</sup>

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<sup>44</sup> Statement of Maine Attorney General Aaron Frey on Supreme Court Decision in *Carson v. Makin*, OFFICE OF THE MAINE ATTORNEY GENERAL (June 21, 2022) (alteration in original) (emphasis added), <https://perma.cc/8UAT-2RA5>.

<sup>45</sup> Eric Rassbach, *The End of the Anti-Religion Blaine Amendments is a Victory for Religious Freedom*, REAL CLEAR RELIGION (July 9, 2020), <https://perma.cc/5QUE-Q7J9>.

<sup>46</sup> 540 U.S. 712 (2004).

<sup>47</sup> *Id.* at 725.

<sup>48</sup> *Carson*, 142 S. Ct. at 2002.

<sup>49</sup> *Id.*

<sup>50</sup> Statement of Maine Attorney General Aaron Frey on Supreme Court Decision in *Carson v. Makin*, OFFICE OF THE MAINE ATTORNEY GENERAL (June 21, 2022), <https://perma.cc/8UAT-2RA5>.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

Unwilling to cede defeat, Maine appears poised to continue to exclude religious schools on a new theory: that conduct motivated by a school's sincere religious beliefs (like a school's decision to only hire coreligionists or only admit students who share the school's religious beliefs) violates state antidiscrimination laws. This argument is not new. Variations on this theme are already working their way through the courts. In the religious student group context, for example, courts are confronting cases in which student clubs have been denied generally available benefits not because of their beliefs, but because their beliefs impose certain requirements on club leaders (like requiring leaders to conduct themselves in accordance with the club's statement of faith).<sup>53</sup> Similar dynamics are at play in fights over the application of public accommodation laws and non-discrimination requirements for federal funding.<sup>54</sup>

But—much like the status/use distinction *Carson* rejected—this artificial attempt to distinguish between what religious communities believe and how those beliefs are concretely manifest cannot hold up in practice, for at least four reasons. First, *Carson* itself, by incorporating the principles of religious autonomy, confirmed that religious organizations must have the freedom to operate in accordance with their beliefs. Second, *Fulton* implicitly rejected the argument that religious beliefs could be separated from how a religious ministry puts those beliefs into practice—even in the context of government-contracted services.<sup>55</sup> Third, *AOSI* and *Masterpiece* forbade the targeted use of antidiscrimination provisions and gerrymandered programs to exclude religious applicants.<sup>56</sup> Finally, because Maine has exempted *single-sex* private schools (but not religious schools) from its nondiscrimination requirements, *Tandon* would require the state to justify this disparate treatment under strict scrutiny, which Maine would surely struggle to do.<sup>57</sup>

Maine may think it has “outmaneuver[ed]” the Supreme Court.<sup>58</sup> But *Carson* is further confirmation that the Court has already thought long and hard about these issues and is prepared to continue to protect religious autonomy and, with it, a healthy separation between church and state.<sup>59</sup>

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<sup>53</sup> See, e.g., *Bus. Leaders in Christ v. Univ. of Iowa*, 991 F.3d 969 (8th Cir. 2021); *Intervarsity Christian Fellowship/USA v. Univ. of Iowa*, 5 F.4th 855 (8th Cir. 2021); *InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, 534 F. Supp. 3d 785 (E.D. Mich. 2021).

<sup>54</sup> See, e.g., *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (rejecting argument that government contracting programs are subject to lesser scrutiny under the Free Exercise Clause).

<sup>55</sup> *Id.*

<sup>56</sup> See *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1739 (2018). See also *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 215 (2013); *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring) (“The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.”). Maine even conceded in its briefing that it defined its funding program specifically to exclude “sectarian” schools. Brief of Respondent at 2, *Carson v. Makin*, 142 S. Ct. 1987 (2022) (No. 20-1088) (“As long as the school provides a nonsectarian (*i.e.*, public) education, it may receive public funds.”).

<sup>57</sup> *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021); Me. Revised Statute Annotated, Title 5, §4553(2-A) (exempting single-sex private schools).

<sup>58</sup> Aaron Tang, *There's a Way to Outmaneuver the Supreme Court, and Maine Has Found It*, NY TIMES (June 23, 2022) (alteration in original), <https://perma.cc/EC6K-8B2Y>.

<sup>59</sup> *New survey finds widespread support for letting Church, not State, control internal religious direction*, BECKET (June 17, 2020), <https://perma.cc/FD3C-NBVC>.