

CARSON V. MAKIN

A new era for the interpretation of the 1st Amendment's religion clauses and public financing of religion.

(Slip Opinion)

OCTOBER TERM, 2021

1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CARSON, AS PARENT AND NEXT FRIEND OF O. C., ET AL. *v.*
MAKIN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

No. 20–1088. Argued December 8, 2021—Decided June 21, 2022

Maine has enacted a program of tuition assistance for parents who live in school districts that neither operate a secondary school of their own nor contract with a particular school in another district. Under that program, parents designate the secondary school they would like their child to attend, and the school district transmits payments to that school to help defray the costs of tuition. Participating private schools must meet certain requirements to be eligible to receive tuition pay-

1ST AMENDMENT HISTORY

Since adoption until now, the 1st Amendment has been interpreted to create a separation of church and state.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

1ST AMENDMENT HISTORY

The two clauses balance each other to create a secular government and allow a religious citizenry

“Congress shall make no law respecting an establishment of religion”

- Establishment Clause

“[Congress shall make no law] prohibiting the free exercise thereof”

- Free Exercise Clause

1ST AMENDMENT HISTORY

Separation of
church and state

The basics

- No official religion
- No public funding of religion
- No religious practices in public education
- No constraints on private exercise of religion

1ST AMENDMENT HISTORY

Context for
conduit issuers
and public
finance

- May issuer issue bonds for religious organizations?
 - Issuer faces Establishment Clause and state no-aid prohibitions
 - Bond counsel must evaluate whether it can render an unqualified opinion
- May issuer exclude religious borrowers from its bond financing program?
 - Issuer faces Free Exercise Clause scrutiny

1ST AMENDMENT CONTEXT

Bond Counsel Opinions

- Bonds must be valid indebtedness of the issuer.
- One role of bond counsel is to render an unqualified opinion regarding such validity.
- Except for Supremacy Clause issues, for state law issues, the relevant court is the highest court of the state.
- For federal law issues, the relevant court is the U.S. Supreme Court.

1ST AMENDMENT CONTEXT

Establishment
Clause:

Pervasively
Sectarian
Standard

Hunt v. McNair, 1973

- Only U.S. Supreme Court (USSC) case relating to bonds and religion clauses
- South Carolina public authority issued bonds for Baptist college
- Court applied Lemon Test:
 - Not pervasively sectarian
 - Sectarian uses separable from non-sectarian uses
 - Bonds funded non-sectarian uses

1ST AMENDMENT CONTEXT

Establishment
Clause:

Pervasively
Sectarian
Standard

What is Lemon Test? - Lemon v. Kurtzman, 1971

- State provided a salary supplement to teachers in nonpublic, religious schools.
- USSC concluded the state violated the Establishment Clause because it invited excessive entanglement between government and religion.

1ST AMENDMENT CONTEXT

Establishment
Clause:

Pervasively
Sectarian
Standard

The "Lemon Test"

1. Does the law have a secular legislative purpose?
2. Does the law have a principal or primary effect of advancing or inhibiting religion?
3. Does the law foster an excessive entanglement between government and religion?

1ST AMENDMENT CONTEXT

Establishment
Clause:

Pervasively
Sectarian
Standard

What is pervasively sectarian? *Tilton v. Richardson*, 1971

- Sectarian attributes include:
 1. imposing religious restrictions on admissions;
 2. requiring attendance at religious activities;
 3. compelling obedience to doctrines and dogmas of faith;
 4. requiring instruction in theology and doctrine; and
 5. propagating a particular religion in every way possible.

1ST AMENDMENT CONTEXT

Establishment
Clause:

Incidental Benefit
Exception

Hunt v. McNair, 1973

- Bond financing is a “special sort” of aid which is not truly public funding or the kind of government aid contemplated by the Establishment Clause

VA College Building Authority v. Lynn,
2000 (VA Supreme Court)

- Bond proceeds are private funds, not public support

Steele v. IDB, 2006 (6th Circuit)

- Conduit bonds are equivalent to religiously neutral tax exemptions

1ST AMENDMENT CONTEXT

Establishment
Clause:

Private Choice
Concept

Mueller v. Allen, 1983

- State tax deductions for schools including parochial schools
- Aid was stemming from private choice and sufficiently incidental
- No direct precedent for the private choice concept for muni bonds

1ST AMENDMENT CONTEXT

Establishment
Clause:

Neutrality
Principal

Mitchell v Helms, 2000

- If government aid is for a secular purpose and such aid is provided without regard to religion, then providing such aid to a religious recipient would further the secular purpose

1ST AMENDMENT CONTEXT

Establishment
Clause:

Strict Scrutiny

Locke v. Davey, 2003

- WA scholarship for postsecondary education was available for theology degrees, but not for vocational religious degrees
- USSC upheld because there was a "historic and substantial state interest" against using "taxpayer funds to support church leaders" and that the program was narrowly focused to exclude vocational religious degrees

1ST AMENDMENT CONTEXT

Free Exercise
Clause

Status and Use-
Based
Discrimination

Trinity Lutheran v. Comer, 2017

- Missouri subsidy for preschool playgrounds was prohibited by state constitution for religious schools
- Subsidy did not run afoul of the Establishment Clause
- Trinity argued that it would have to renounce its doctrine to qualify, which would amount to a Free Exercise infringement.

1ST AMENDMENT CONTEXT

Free Exercise
Clause

Status and Use-
Based
Discrimination

Trinity Lutheran v. Comer, 2017

- USSC applied strict scrutiny standard, since the subsidy involved Free Exercise
- Strict scrutiny requires government need of the “highest order”
- Missouri could not meet the standard
- Is this a status-based case or a use-based case?

1ST AMENDMENT CONTEXT

RECAP for muni bonds

After Trinity Lutheran v. Comer:

- Generally, stay away from pervasively sectarian projects following Hunt v. McNair and Lemon v. Kurtzman, unless your state has other precedent
- Trinity Lutheran and others might give wiggle room if bonds provide only incidental benefit

1ST AMENDMENT CONTEXT

Free Exercise
Clause

Status Based
Discrimination

Espinoza v. Montana Dept of Rev,
2020

- State tax credit program to subsidize private school tuition
- MT constitution prohibited program's use for religious schools
- USSC ruled program violated parents' Free Exercise rights
- Espinoza expanded scope of Trinity Lutheran analysis

1ST AMENDMENT CONTEXT

Free Exercise Clause

Carson v. Makin, 2022

- Maine subsidized private school tuition to compensate for its public school deficits in rural communities
- ME constitution prohibited program's use for sectarian schools
- USSC ruled program violated parents' Free Exercise rights

1ST AMENDMENT CONTEXT

Free Exercise
Clause

Strict Scrutiny

- Under the Free Exercise Clause, restrictions on generally available governmental benefit programs based on an organization's religious status or religious use must be subjected to strict scrutiny
- To satisfy strict scrutiny, governmental action must (1) advance a compelling state interest and (2) be narrowly tailored in pursuit of those interests
- Strict scrutiny is a very high standard

1ST AMENDMENT CONTEXT

Free Exercise
Clause

Fail to Advance
Compelling State
Interest

- The Court applied strict scrutiny to Maine's nonsectarian requirement
- Maine's program did not advance a compelling state interest because there is no historic and substantial tradition against aiding private religious schools
- A state need not subsidize private education, but once it does, it cannot disqualify some private schools because they are religious

1ST AMENDMENT CONTEXT

Free Exercise
Clause

Status and Use
Based
Discrimination

- Attempt to distinguish Maine's case from the *Trinity Lutheran* and *Espinoza* cases because the funding restrictions in those cases were solely status-based religious discrimination vs. a use-based restriction
- Because "educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school," a separation of status from use is effectively precluded

1ST AMENDMENT CONTEXT

Free Exercise Clause

Importance of Confirmation of Holding in *Locke*

- The Court confirmed its holding in *Locke*
- *Locke* is an example of a governmental aid program that survived strict scrutiny
- Compelling state interest: a historic and substantial state interest against using taxpayer funds to support church leaders
- Narrowly Tailored: program only excluded vocation religious degrees

1ST AMENDMENT RECAP

Establishment
Clause

Free Exercise
Clause

State Law

Supremacy Clause

- Issuance of conduit bonds for religiously affiliated borrowers is governed by these four legal constraints
- Case law prior to *Carson* has been focused mostly on the Establishment Clause and State Religious Aid Restrictions
- After *Carson*, the focus will be on the Free Exercise Clause

CONDUIT
FINANCING
AFTER
CARSON V. MAKIN

Review
and
re-evaluate

- Conduit bond financing programs are state benefit programs, just like the tuition assistance program in *Carson*
- Authorities should review statutes, applications, policies, covenants and websites to determine if there are any religious restrictions on borrowers or on the use of proceeds
- Applies to tax-exempt as well as taxable bonds

CONDUIT
FINANCING
AFTER
CARSON V. MAKIN

Common
religious
restrictions to
review include:

- Prohibition on pervasively sectarian schools
- Prohibition on bond proceeds being used on facilities for sectarian instruction or study
- Prohibition on bond proceeds being used as part of a program or a school or department of divinity

CONDUIT FINANCING AFTER *CARSON V. MAKIN*

Common
religious
restrictions to
review include:

- Prohibition on bond proceeds being used on facilities used for religious worship
 - Gyms/Multi-purpose space/Classrooms
 - Churches, synagogues, mosques and chapels
- Requirements for accreditation

CONDUIT
FINANCING
AFTER
CARSON V. MAKIN

Bond Counsel
Concerns

Bond Counsel's opinion is based on compliance with the issuer's statutes

- Are there any religious restrictions in the Authority's statutes?
- Is there a religious use covenant in the Loan Agreement?

CONDUIT FINANCING AFTER *CARSON V. MAKIN*

Bond Counsel Concerns

- Bond Counsel should not read out of the statute language that is questionable after *Carson*
 - statutory change
 - court or Attorney General decision
- Bond Counsel opinion that the Loan Agreement is a valid and binding agreement on the Authority will be impacted if the Loan Agreement contains a Use Covenant which is likely unconstitutional after *Carson*
 - Qualifying the Use Covenant assists with ability to provide opinion

CONDUIT
FINANCING
AFTER
CARSON V. MAKIN

Borrower Counsel
Concerns

- Borrower's Counsel opinion that Loan Agreement is a valid and binding agreement on the Borrower will be impacted if Borrower is asked to agree to Use Covenant that is likely unconstitutional after *Carson*
- Qualifying the Use Covenant assists with ability to provide opinion

CONDUIT FINANCING AFTER *CARSON V. MAKIN*

Authority Concerns

- Non-Statutory Restrictions: Applications, policies and website language that are not based on statutes can be changed
- Statutory Restrictions: Authorities with statutory restrictions that are likely unconstitutional after *Carson* may be in a difficult position if a borrower that is not eligible to obtain financing under such statutes makes an application for financing based on *Carson*
- Will programs need to be closed until statutory change or court or AG opinions can be obtained?

Carson v. Makin

QUESTIONS?

SPEAKER
CONTACTS:

Thank you!!

Matthias Edrich

Kutak Rock LLP

303-292-7887

matthias.edrich@kutakrock.com

Jenna Magan

Orrick Herrington & Sutcliffe LLP

916-329-7980

jmagan@Orrick.com