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A Case Against School Choice: Carson Ex Rel. O.C. v. Makin and the Future of Maine's Nonsectarian Requirement

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ABSTRACT

School choice advocates, such as the nonprofit libertarian law firm, The Institute for Justice, have spent decades arguing that states violate the Free Exercise Clause when they exclude private religious schools from public programs that otherwise provide public dollars to non-religious private schools. Recently, in *Espinoza v. Montana Department of Revenue,* the Supreme Court effectively agreed with that sentiment. After this victory, the Institute for Justice returned to the state of Maine to represent three sets of parents in a renewed effort to defeat Maine's nonsectarian requirement in federal court. Maine's nonsectarian requirement provides that private religious schools may not participate in Maine's town tuitioning program, which allows students in towns that do not have public schools to receive state funding to attend a private or public school of their choice.

This Note analyzes that case: *Carson ex rel. O.C. v. Makin*. In *Carson,* the First Circuit affirmed the trial court's decision that Maine's nonsectarian requirement does not violate the Free Exercise Clause. I posit that the reasoning the First Circuit deployed in *Carson* may not be durable and that if the Supreme Court were to grant the plaintiff-appellants' petition for certiorari, the Court would likely invalidate Maine's nonsectarian requirement. I then analyze the effect the elimination of the nonsectarian requirement would have on Maine's public schools and how school choice opponents may wish to move forward. More specifically, I suggest that Maine and the rest of the nation should consider investing in its public schools before outsourcing public education to private entities and interest groups.

I. INTRODUCTION

Despite extensive controversy,[1] the "educational choice" or "school choice" movement has gained significant traction in the past few decades. Educational choice is the ideology that a parent should be to able to use public funds to send her child to the school of her choosing, including a private religious school.[2] There are

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* J.D. Candidate, University of Maine School of Law, Class of 2022. I am grateful to my brother, J. William McCartney, for initially telling me about the *Carson* case, my professors and mentors for their invaluable feedback, and my partner and family for their unwavering support.

1. Brett A. Geier, *Funding God's Schools—A Legal Analysis of Appropriating Public Dollars to Parochial Schools: Does Michigan's Latest Legislation Violate the Separation of Church and State?*, 49 J.L. & EDUC. 285, 296 (2020) ("In particular, school funding raises a contentious debate. Conflicting ideologies have polarized funding discourse at the local, state, and federal levels. Of the issues embedded within school funding, allowing religious schools to receive public funds has proven to be highly controversial.").

2. *Educational Choice*, THE INST. FOR JUST., https://ij.org/issues/school-choice/ [https://perma.cc/7C65-LVST] (last visited Apr. 13, 2021). It should be noted that proponents of school choice still refer to programs that exclude religious schools as "school choice programs." *See School Choice in America*

several types of so-called educational choice programs that state legislatures have implemented, including: (1) voucher programs, (2) town tuitioning programs, and (3) tax-credit scholarships. Voucher programs use public funds to provide families with tuition vouchers that they may use to pay all or part of private school tuition.[3] In contrast, town tuitioning programs, which are seen in Maine, Vermont, and New Hampshire,[4] allow students who live in towns that do not have local public schools to use their education tax dollars at a neighboring public school or an approved private school of the parents' choice.[5] Finally, tax-credit scholarships grant tax credits to people who donate to nonprofits that provide individuals with private school scholarships.[6]

In recent years, school choice gained more political attention because of former President Trump's support of the movement and his divisive decision to nominate Betsy DeVos as the Secretary of Education. Devos is a school choice advocate, and before she worked in the White House she was the board chairwoman of the American Federation for Children, which describes itself as "the nation's voice for educational choice."[7] Although both former President Trump and DeVos pushed for school choice and tried to the rekindle support for such policies after the onset of the Coronavirus pandemic, they ultimately failed to make any significant progress on educational choice policy at a national level.[8]

In the legal realm, the major force behind the educational choice movement is The Institute for Justice ("IJ").[9] IJ is a public interest law firm that litigated two of the key Supreme Court educational choice cases, *Espinoza v. Montana Department of Revenue* and *Zelman v. Simmons-Harris*, as well as many other impactful lower

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Dashboard, EDCHOICE, https://www.edchoice.org/school-choice/school-choice-in-america/ [https://perma.cc/4ACT-DWNF] (last visited Apr. 13, 2021). For example, Maine's town tuitioning program, which is discussed at length in this Note, is often referred to as a school choice program even though it does not provide funds to private religious schools. *See Maine – Town Tuitioning Program*, EDCHOICE, https://www.edchoice.org/school-choice/programs/maine-town-tuitioning-program/ [https://perma.cc/5UN3-K9VJ] (last visited Apr. 13, 2021).

3. *Types of School Choice*, EDCHOICE, https://www.edchoice.org/school-choice/types-of-school-choice/ [https://perma.cc/8AUR-6Y2G] (last visited Apr. 13, 2021).

4. *See School Choice in America Dashboard*, EDCHOICE, https://www.edchoice.org/school-choice/school-choice-in-america/ [https://perma.cc/R2SP-65AJ] (last visited Apr. 13, 2021).

5. *Id.*

6. *Id.* ("Tax-credit scholarships allow taxpayers to receive full or partial tax credits when they donate to nonprofits that provide private school scholarships.").

7. Alia Wong, *Public Opinion Shifts in Favor of School Choice*, THE ATLANTIC (Aug. 21, 2018), https://www.theatlantic.com/education/archive/2018/08/school-choice-gaining-popularity/568063/ [https://perma.cc/A6BK-KMWC] (internal quotation marks omitted).

8. *See* Collin Binkley, *Trump, DeVos Raise School Choice in Appeal to Vexed Parents*, ASSOCIATED PRESS (Sept. 14, 2020), https://apnews.com/article/school-choice-education-betsy-devos-virus-outbreak-archive-ca871432d35abcb71bf12cf7211f9c25 [https://perma.cc/PJC6-E28J]. During the onset of the Coronavirus pandemic and virtual schooling, the Trump administration hoped to "convert [] parents' frustration and anger into newfound support for school choice policies that Education Secretary Betsy DeVos ha[d] long championed but struggled to advance nationally." *Id*.

9. *See generally* THE INST. FOR JUST., https://ij.org/ [https://perma.cc/F4H4-YZGD] (last visited Apr. 21, 2021).

court cases.[10] Most recently, in *Espinoza*, the Court held in favor of IJ's clients, who were parents that wished to use funding from a Montana tax-credit scholarship program to send their children to private religious schools.[11] The Court explained that once a state decides to subsidize private education, "it cannot disqualify some private schools solely because they are religious."[12] After *Espinoza*, school choice advocates believed they had struck gold.[13]

IJ was active in Maine long before *Espinoza* was decided. Including *Carson ex rel. O.C. v. Makin*—the subject of this Note—IJ has filed three school choice lawsuits in the state.[14] The organization's goal is to invalidate a provision of Maine law, commonly referred to as "Section 2951(2)" or "Maine's nonsectarian requirement."[15] The nonsectarian requirement excludes private religious schools from Maine's town tuitioning program.[16] IJ filed its first Maine-based school choice suit in the 1990s, on behalf of parents who wished to use Maine's town tuitioning program to pay for their children's tuition at Cheverus High School, a private Catholic school.[17] The case, *Bagley v. Raymond School Department*, was ultimately unsuccessful.[18] Several years later, IJ brought a very similar and equally unfruitful suit: *Anderson v. Town of Durham.*[19]

A few years after filing *Espinoza* in Montana state court, IJ returned to Maine and filed *Carson* in the Federal District Court for the District of Maine.[20] The facts in *Carson* are quite similar to the facts in *Espinoza*. In both cases, IJ represented parents who wanted to use state funding to send their children to private parochial schools.[21] Because the plaintiffs' motivations in the cases were similar and the actions were filed so closely together, a key educational choice decision—*Trinity*

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10. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020); Zelman v. Simmons-Harris, 536 U.S. 639 (2002); *see also Recent Educational Choice Cases*, THE INST. FOR JUST., https://ij.org/issues/school-choice/ [https://perma.cc/87BW-H29D] (last visited Apr. 21, 2021).

11. *Espinoza*, 140 S. Ct. at 2251, 2262.

12. *Id.* at 2261.

13. *See* John Kramer, *IJ Releases New Educational Choice Guide to State Constitutions After Espinoza*, THE INST. FOR JUST. (July 7, 2020), https://ij.org/press-release/ij-releases-new-educational-choice-guide-to-state-constitutions-after-espinoza/ [https://perma.cc/N972-MQ5U].

14. *See* Carson *ex rel.* O.C. v. Makin, 401 F. Supp. 3d 207 (D. Me. 2019); Anderson v. Town of Durham, 2006 ME 39, 895 A.2d 944, *cert. denied*, 549 U.S. 1051 (2006); Bagley v. Raymond Sch. Dep't, 1999 ME 60, 728 A.2d 127, *cert. denied*, 528 U.S. 947 (1999).

15. *See* 20-A M.R.S.A. § 2951(2) (2018). Prior to the enactment of Section 2951(2) in 1981, religious schools were allowed to apply to become approved private schools for purposes of town tuitioning. *Bagley*, 1999 ME 60, ¶ 5, 728 A.2d 127; *see also* Carson *ex rel.* O.C. v. Makin, 979 F.3d 21, 25 (1st Cir. 2020) (noting that the suit "takes aim at the program's requirement that a private school must be a 'nonsectarian school in accordance with the First Amendment of the United States Constitution' to qualify as 'approved' to receive tuition assistance payments").

16. § 2951(2).

17. *Bagley*, 1999 ME 60, ¶¶ 6-9, 728 A.2d 127.

18. *Id.* ¶ 17.

19. 2006 ME 39, 895 A.2d 944.

20. *See* Espinoza v. Mont. Dep't of Revenue, 435 P.3d 603, *rev'd*, 140 S. Ct. 2246, 2262 (2020) (originally filed on Dec. 16, 2015; decided on June 30, 2020); Carson *ex rel.* O.C. v. Makin, 401 F. Supp. 3d 207 (D. Me. 2019) (originally filed on Aug. 21, 2018).

21. *See Espinoza*, 140 S. Ct. at 2262; Carson *ex rel.* O.C. v. Makin, 979 F.3d 21, 27 (1st Cir. 2020). However, the program at issue in *Carson*—Maine's town tuitioning program—is different than the tax-credit program litigated in *Espinoza*.

Lutheran Church of Columbia v. Comer—played a central role in both matters.[22] In addition, after *Espinoza,* IJ filed a 28(j) letter[23] and tried to use the opinion to bolster the *Carson* case.[24] But, even with the heft of *Espinoza* behind IJ's arguments, the First Circuit decided *Carson* in favor of the Maine Department of Education.[25] The Court distinguished *Carson* from *Espinoza* and its predecessor *Trinity Lutheran*, with the help of the "status-use" distinction, which is discussed in great detail throughout this Note.[26] Although *Carson* provides some much welcome reassurance to Establishment Clause proponents and states that do not wish to fund private parochial schools, it stands on tenuous footing.

This Note examines the constitutionality of school choice programs that provide public aid to private religious schools. Part II of this Note will examine the legal precedent in school funding cases that implicate the Religion Clauses and explain how the Court's jurisprudence has evolved over time. Part III will outline the facts of *Carson* and analyze the First Circuit's reasoning. Part IV will discuss the durability of *Carson*, and Part V will conclude with commentary on the future of school choice in Maine.

II. LEGAL BACKGROUND

The educational choice movement is rooted in the Religion Clauses of the First Amendment, as applied to the states by the Fourteenth Amendment.[27] The Establishment Clause states that "Congress shall make no law respecting an establishment of religion."[28] And the Free Exercise Clause declares that "Congress shall make no law . . . prohibiting the free exercise" of religion.[29] With the growing popularity of school choice programs, our nation's public schools have become "epicenter[s] for religious and state conflict," implicating the Religion Clauses.[30]

At base, the Free Exercise Clause "protect[s] religious observers against unequal treatment."[31] The Supreme Court has held that, in general, neutral and generally applicable laws that happen to burden an individual's exercise of religion do not violate the Free Exercise Clause.[32] On the other hand, a law that burdens religious

22. 137 S. Ct. 2012 (2017); *see Espinoza*, 140 S. Ct. at 2254-55; *Carson*, 401 F. Supp. 3d at 209, 210-12.

23. A "28(j) letter" is a letter that a party may send to the circuit clerk if "pertinent and significant authorities [have] come to [the] party's attention after the party's brief has been filed—or after oral argument but before decision." Fed. R. App. P. 28(j).

24. Appellant's Statement of Supplemental Authority at 2, *Carson*, 979 F.3d 21 (No. 19-1746).

25. *Carson*, 979 F.3d at 49.

26. *Id.* at 37-40.

27. Everson v. Bd. of Educ., 330 U.S. 1, 12 (1947) (citing Murdoch v. Pennsylvania, 319 U.S. 105, 108 (1943) ("The First Amendment, as made applicable to the states by the Fourteenth . . . commands that a state 'shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .'")).

28. U.S. CONST. amend. I.

29. *Id*.

30. Geier, *supra* note 1, at 287.

31. Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 533 (1993).

32. *See, e.g.*, Emp. Div. v. Smith, 494 U.S. 872, 878 (1990) ("[I]f prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.").

exercise "that is not neutral or not of general application must undergo the most rigorous of scrutiny."[33] In other words, laws that exclude religious individuals because of their religious status implicate the Free Exercise Clause and are subject to strict scrutiny.[34] At the same time, the Establishment Clause forbids the government from getting too entangled with religion.[35] Thus, the Religion Clauses are in a sort of eternal tug of war.

A. Everson v. Board of Education of Ewing and Lemon v. Kurtzman

Establishment Clause jurisprudence in the context of school funding has evolved substantially over the years, with the Court's early Establishment Clause cases calling for greater separation of church and state.[36] For example, in *Everson v. Board of Education of Ewing*, the Court proclaimed "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."[37] In that case, the Court ultimately decided that a New Jersey funding program that reimbursed parents who sent their children to private schools—including parochial schools—for transportation costs did not violate the Establishment Clause.[38] In doing so, the Court emphasized that the program was only acceptable because the state was providing funding to the parents of the children, not the private religious schools themselves.[39]

Several decades later, in *Lemon v. Kurtzman*, the Court examined the tougher question of whether states could provide aid directly to private religious schools.[40] There were two programs at issue in *Lemon*: (1) a Pennsylvania program that reimbursed nonpublic schools for the cost of teacher salaries and educational materials in secular subjects, and (2) a Rhode Island program that directly paid

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33. *Church of Lukumi Babalu Aye*, 508 U.S. at 546.

34. *Id. Lukumi* is associated with the line of case law in which the Supreme Court "has increasingly acknowledged 'that nondiscrimination is crucial to religious freedom' and has struck down laws that discriminate against religion." Brooke Reczka, Note, *The Wrong Choice to Address School Choice*: Espinoza v. Montana Department of Revenue, 15 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 237, 241 (2020); *see generally* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2251 (2020).

35. Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 665, 674 (1969)) (establishing a three-part test to ensure that statutes do not violate the Establishment Clause by fostering "an excessive government entanglement with religion"); *Walz*, 397 U.S. at 670 ("[T]he very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement."); Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947); *see also* Stephanie H. Barclay, *Untangling Entanglement*, 97 WASH. U. L. REV. 1701, 1702-03 (2020) (positing that the Court's post-*Lemon* decisions, including *American Legion v. American Humanist Association*, indicate the first two prongs of the *Lemon* test are dead, but the entanglement prong remains somewhat intact).

36. *Everson*, 330 U.S. at 15-16.

37. *Id.* at 18. It should be noted that several scholars argue the majority's position on strict separation of church and state was based on a misconception of U.S. history. *See, e.g.*, John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 285-86 (2010).

38. *Everson*, 330 U.S. at 17.

39. *Id.* at 17-18.

40. *Lemon*, 403 U.S. at 606; *see also* Meek v. Pittenger, 421 U.S. 349, 362, 373 (1975), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000) (plurality opinion) (upholding a Pennsylvania program insofar as it provided textbooks loans to private religious schools, but not insofar as it provided funds for other educational services).

nonpublic school teachers a fifteen percent supplement to their regular salary.[41] The *Lemon* Court determined that both programs violated the Establishment Clause by using a new three-pronged test that aimed to detect "excessive entanglement between government and religion."[42] Despite the holding, the Court started to soften its "high and impregnable" wall rhetoric.[43] Chief Justice Burger declared that the line of separation between church and state is "far from being a 'wall.'"[44] He explained that it is instead "a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[45] As time went on, the line of separation between church and state would become increasingly blurry.[46]

B. Mitchell v. Helms and Zelman v. Simmons-Harris

Mitchell v. Helms, and several cases before it, marked a significant pivot from the Court's stronger Establishment Clause precedent.[47] In *Mitchell,* a plurality of the Court decided that a federal program that provided funding to lend educational materials to public and private secular and non-secular schools did not violate the Establishment Clause.[48] This was the same kind of direct aid to a private religious school that the Court had rejected on Establishment Clause grounds in *Lemon*. However, Justice Thomas, writing for the plurality, explained that the Court had "departed from the rule . . . that all government aid that directly assists the educational function of a religious school is invalid."[49] Justice Thomas proffered that whether a government program violates the Establishment Clause depends upon whether "any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action."[50] Ultimately, the plurality decided that "religious indoctrination" had not occurred in this case because eligibility standards for the aid were neutral, and the materials were secular.[51]

The Court took a step further in *Zelman v. Simmons-Harris,* holding that Ohio

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41. *Lemon*, 403 U.S. at 606-07 (1971).

42. *Id.* at 613 (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 674 (1969)) (proclaiming that, in order to avoid offending the Establishment clause, a statute must (1) "have a secular legislative purpose;" (2) not advance or inhibit religion; and (3) not foster "an excessive government entanglement with religion").

43. *Id.* at 614.

44. *Id.*

45. *Id.*

46. *See infra* Section II(B).

47. *See* Wolman v. Walter, 433 U.S. 229 (1977) (holding that Ohio violated the Establishment Clause by using public funds to provide instructional materials, equipment, and transportation for field trips to private school students), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000) (holding that a federal program which provided funding to lend educational materials to public and private secular and non-secular schools did not violate the Establishment Clause); Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985) (holding that a school district program which used public funds to provide classes to nonpublic school students violated the Establishment Clause), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997) (holding that the Establishment Clause did not prohibit New York from using federal funds to send public school teachers into private religious schools to teach special education to low income students).

48. *Mitchell*, 530 U.S. at 801.

49. *Id.* at 816 (quoting *Agostini*, 521 U.S. at 225).

50. *Id.* at 809; *see Agostini*, 521 U.S. at 230-31.

51. *Mitchell*, 530 U.S. at 830-32.

did not offend the Establishment Clause when it created a publicly funded program that allowed parents to choose to use vouchers to send their children to private religious schools, among other options.[52] The Court determined that Ohio's program was "neutral with respect to religion" and did not offend the Establishment Clause—or involve excess entanglement—because individuals were not forced to choose a parochial school, but rather were given the opportunity to make a "true private choice."[53] After *Zelman*, it was clear that states were free to offer school voucher programs that included private religious schools, so long as individuals were not coerced into choosing the religious schools.

In *Trinity Lutheran* and later in *Espinoza*, the Court would come full circle on its early Establishment Clause precedent and claim that not only *can* a state decide to provide public funds to a religious school without violating the Establishment Clause, but under the Free Exercise Clause, states may be *compelled* to provide religious schools and organizations with public benefits.[54] In these cases, the Court's Establishment Clause inquiry seemed to boil down to the spineless "status-use" distinction, which this Note analyzes and discusses in Parts II(b)(ii), II(b)(iii), III, and IV.[55] After *Trinity Lutheran* and *Espinoza*, the Establishment Clause arguably has an uncertain future.

C. Locke v. Davey

In recent years, the Court has made several key decisions on Free Exercise challenges in the context of school funding. In *Locke v. Davey*, the Court held that it was within the state of Washington's discretion to maintain a publicly funded postsecondary scholarship program that explicitly prohibited participants from using their scholarship funds to pursue degrees in devotional theology.[56] Joshua Davey

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52. Zelman v. Simmons-Harris, 536 U.S. 639, 643-44 (2002). As the text mentioned earlier, *Zelman* was an IJ case.

53. *Id.* at 662.

54. Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012 (2017) (holding that Missouri could not exclude a church, which also hosted a daycare and preschool, from a public program that provided funds for playground resurfacing under the Free Exercise Clause); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020) (holding that Montana could not exclude private religious schools from a publicly funded school tax-credit program without violating the Free Exercise Clause); *see also* Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 271, 276-77 (2019) (observing that in the context of the Religion Clauses and government funding, "the Court has all but rejected the *Lemon* framework, which prohibited the state from subsidizing the religious activities of religious organizations, in favor of a 'neutrality' model, which not only allows but sometimes requires state funding of religion").

55. *See infra* Sections II(D), II(E), III, and IV.

56. Locke v. Davey, 540 U.S. 712, 715-17 (2004). This prohibition on funding for devotional theology majors was created to ensure the program complied with Washington's constitution. *Id.* at 719. Washington's constitution, like many state constitutions, contains a "no-aid" provision, which has been "interpreted as prohibiting even indirectly funding religious instruction that will prepare students for the ministry." *Id.* Thirty-eight states have similar "no-aid provisions." Brief of Respondents at 2, 9, *Espinoza*, 140 S. Ct. 2246 (No. 18-1195). These provisions vary in force and language, but generally state that public aid may not be provided to "sectarian schools." *Id.* at 2. Many no-aid provisions are so-called "Blaine Amendments," named after Senator Blaine of Maine. Depending on who you ask, all of the states' no-aid provisions are rooted in anti-Catholic sentiment. *Compare* Holly Hollman, *Symposium: What's "the Use" of the Constitution's Distinctive Treatment of Religion if it is*

was awarded one of these scholarships, and he wished to use it to pay for his dual degree in pastoral ministries and business management/administration.[57] However, the pastoral ministries degree was inherently devotional, and it was therefore excluded under the program.[58] When Davey lost his scholarship because he refused to drop his major in pastoral ministries, he sued Washington state officials and argued that the program rules violated the Free Exercise Clause, among other claims.[59]

The Supreme Court ultimately rejected Davey's contention that the program was "presumptively unconstitutional because it was not facially neutral with regard to religion."[60] First, the Court acknowledged that the state "could permit [scholarship recipients] to pursue a degree in devotional theology."[61] However, the Court explained that Washington did not have to do so in this case because there is room for "play in the joints" between the clauses, and "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."[62] Second, the majority distinguished the scholarship program from the *Lukumi* line of cases[63] by noting "the State's disfavor of religion (if it can be called that) is of a far milder kind."[64] The Court emphasized that the scholarship program did not impose "criminal [or] civil sanctions on any type of religious service or rite" and did "not require students to choose between their religious beliefs and receiving a government benefit."[65] In bolstering this argument, the Court noted that the prohibition on funding for devotional theology was not born of religious animus.[66] Finally, Chief Justice Rehnquist explained that "since the founding of our country," there has been a general unwillingness to use taxpayer funds to support the

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Disregarded as Discrimination?, SCOTUSBLOG (July 2, 2020, 10:14 AM), https://www.scotusblog.com/2020/07/symposium-whats-the-use-of-the-constitutions-distinctive-treatment-of-religion-if-it-is-disregarded-as-discrimination/ ("Because many no-funding provisions predated the advent of significant Catholic immigration, the religious liberty interests they serve cannot properly be dismissed as related to any anti-religious bias."), *with* Richard D. Komer, Trinity Lutheran *and the Future of Educational Choice: Implications for State Blaine Amendments*, 44 MITCHELL HAMLINE L. REV. 551, 565, 577-78 (2018) (arguing that Blaine Amendments were motivated by anti-Catholic sentiment). Interestingly, even though Senator Blaine was from Maine, Maine does not have a no-aid provision in its constitution. Maine created its nonsectarian requirement for a variety of reasons, including providing a secular public-school equivalent. *See* Carson *ex rel.* O.C. v. Makin, 979 F.3d 21, 47 (1st Cir. 2020).

57. *Locke*, 540 U.S. at 717.

58. *Id.*

59. *Id.* at 717-18.

60. *Id.* at 720.

61. *Id.* at 719.

62. *Id.* at 718-19 (internal quotation marks omitted). The Court first used the phrase "play in the joints" in Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 669 (1969). Judge Lipez of the First Circuit has commented: "'play in the joints' is a slippery phrase with no settled meaning." Kermit V. Lipez, *Reflections on the Church/State Puzzle*, 72 ME. L. REV. 325, 336 n.58 (2020); *see also Locke*, 540 U.S. at 728 (Scalia, J., dissenting) (referring to "play in the joints" as "not so much a legal principle as a refusal to apply any principle when faced with competing constitutional directives").

63. *See* Reczka, *supra* note 34, at 241-42.

64. *Locke*, 540 U.S. at 720.

65. *Id.* at 720-21.

66. The Court reasoned that the no-aid provision in Washington's Constitution was not a "Blaine Amendment" rooted in anti-Catholic sentiment. *Id.* at 723 n.7.

ministry.[67]

The dissenters believed that the Court's reasoning was weak and lacked a workable test, but the next school funding case would fabricate a new rule—the status-use distinction—out of the *Locke* holding.[68]

D. Trinity Lutheran Church of Columbia v. Comer

In 2017, thirteen years after *Locke*, the Supreme Court decided *Trinity Lutheran*. The majority held that Missouri violated the Free Exercise Clause when it excluded a church—which also hosted a daycare and preschool—from a public program that provided funds for playground resurfacing.[69] The Court asserted that Missouri's policy "expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character" and that such a policy required strict scrutiny.[70] Chief Justice Roberts distinguished *Locke* by formulating the status-use distinction.[71] The Chief Justice argued that, unlike Joshua Davey, who "was denied a scholarship because of what he proposed to *do*," the *Trinity Lutheran* plaintiffs were denied the playground resurfacing funds because of who they *were*.[72] Justices Kagan and Breyer joined the majority in *Trinity Lutheran*, likely because the Chief Justice agreed to add his now infamous footnote, which caveated: "[t]his case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination."[73] The Court's decision was condemned by the dissenters,[74] and while some hoped this status-use reasoning would be cabined to a playground case, *Espinoza* dashed those hopes.[75]

E. Espinoza v. Montana Department of Revenue

The program at issue in *Espinoza* was established by the Montana State

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67. *Id.* at 722-23 ("Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an 'established' religion. . . . Most States that sought to avoid such an establishment around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry.").

68. *See id*. at 726-35. Justice Thomas joined Justice Scalia's dissent and added his own brief dissenting opinion. *Id.*; *see infra* Section II(D) (discussing *Trinity Lutheran Church of Columbia v. Comer*).

69. Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012, 2024-25 (2017).

70. *See id.* at 2021. Missouri does have a no-aid provision that prohibits the state from providing aid to "any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such." *Id.* at 2017 (quoting MO. CONST. art. I, § 7). The *Trinity Lutheran* opinion did not discuss whether Missouri's no-aid provision was born of anti-Catholic sentiment.

71. *Id.* at 2016; *see* Andrew A. Thompson, Note, Trinity Lutheran Church of Columbia v. Comer *and the "Play in the Joints Between Establishment and Free Exercise of Religion*, 96 TEX. L. REV. 1079, 1089 (arguing that the Chief Justice invented the status-use distinction "out of whole cloth").

72. *Trinity Lutheran*, 137 S. Ct. at 2016.

73. *Id.* at 2024 n.3.

74. *Id.* at 2038 (Sotomayor, J., dissenting) (arguing that the majority "does not acknowledge that our precedents have expressly approved of a government's choice to draw lines based on an entity's religious status").

75. *See* Reczka, *supra* note 34, at 251; *see generally* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2251 (2020).

Legislature, and it provided tuition aid to parents who chose to send their children to private schools.[76] The program worked by granting a tax credit to anyone who donated to a certain scholarship organization.[77] These scholarship organizations would, in turn, award scholarship funds to children who attended private schools.[78] Shortly after the legislature created the program, Montana's Department of Revenue enacted Rule 1.[79] Rule 1 stated that the scholarships could not be used at sectarian schools, and it was created so that the program would conform with Montana's no-aid provision.[80]

In response to Rule 1, three mothers—represented by IJ—filed suit in Montana state court.[81] The mothers wished to use the scholarships to send their children to religious schools and alleged that the program, and Rule 1, discriminated against them "on the basis of their religious views."[82] The case made its way up to the Montana Supreme Court, which held that the program had to be invalidated altogether.[83] After that decision, the Supreme Court granted the mothers' petition for certiorari.[84]

A five-justice majority held for the mothers.[85] In doing so, it relied heavily on *Trinity Lutheran* and framed the case in terms of a free exercise violation based on "religious status" instead of "religious use."[86] The Court asserted that Montana's no-aid provision barred religious schools, and parents who wished to send their children to said schools, "from public benefits solely because of the religious character of the schools."[87] Thus, the Court concluded, Montana's scholarship program was subject to strict scrutiny.[88]

First, in reaching its decision, the majority distinguished the case from *Locke*, arguing that the tax-credit scholarship program involved pure status-based discrimination.[89] The Court posited that Montana's program, unlike the program at

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76. *Espinoza*, 140 S. Ct. at 2251.

77. *Id.* at 2251.

78. *Id.*

79. *Id.* at 2252.

80. *Id.*; *see* MONT. CONST. art. X, § 6(1). The majority did not determine whether Montana's no-aid provision was born of anti-Catholic sentiment. Instead, it agreed with the state that "the historical record is complex." *Espinoza,* 140 S. Ct. at 2259. Justice Alito passionately—and hypocritically—warned of the evils of discrimination in his concurrence. *Id.* at 2268 (Alito, J., concurring) ("[In *Ramos v. Louisiana*] I argued in dissent that [discriminatory] motivation, though deplorable, had no bearing on the laws' constitutionality . . . . But I lost, and *Ramos* is now precedent. If the original motivation for the laws mattered there, it certainly matters here."). Justice Alito conspicuously failed to mention discriminatory intent in an abortion case decided shortly after *Ramos*. *See* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2153-2172 (2020) (Alito, J., dissenting); *Strict Scrutiny: Trollito*, THE APPEAL (July 6, 2020) (downloaded using Spotify) (commenting on Justice Alito's *Espinoza* concurrence: "it's a very opportunistic, performative humility").

81. *Espinoza*, 140 S. Ct. at 2252.

82. *Id.*

83. *Id.* at 2253.

84. *Id.* at 2254.

85. *Id*. at 2262-63.

86. *Id.* at 2255-56 ("This case also turns expressly on religious status and not religious use."); *see also* Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012, 2021 (2017).

87. *Espinoza*, 140 S. Ct. at 2255.

88. *Id.* at 2257.

89. *Id.*

issue in *Locke*, "does not zero in on any 'essentially religious' course of instruction," but rather "bars all aid to religious schools" because of what they are: religious schools.[90] To bolster its argument that *Locke* is distinguishable, the Court pointed to the lack of founding-era support for Rule 1.[91]

Next, the majority determined that Montana's justification for Rule 1 did not satisfy strict scrutiny.[92] It held that Montana could not justify excluding private religious schools from the program because it wished to achieve a stronger separation of church and state.[93] Notably, the Court declared that: "[a] State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."[94]

Finally, the Court dispensed with Montana's argument that there was no Free Exercise Clause violation "because the Montana Supreme Court ultimately eliminated the scholarship program altogether."[95] Two separate dissenters—Justices Ginsburg and Sotomayor—agreed with Montana's contention.[96] The majority, however, rebutted Montana's assertion by arguing that the Montana Supreme Court had no business terminating the program because it should have recognized that Rule 1 violated the Free Exercise Clause.[97]

In a third dissent, Justice Breyer, joined by Justice Kagan, argued that the majority should have paid more attention to Establishment Clause precedent and further engaged with the principle that there "is room for play in the joints" between the Religion Clauses.[98] The majority flatly rejected this suggestion, stating that the dissent's "'room[y]' or 'flexible' approaches to discrimination against religious organizations and observers would mark a significant departure from our free exercise precedents. The protections of the Free Exercise Clause do not depend on a 'judgment-by-judgment analysis' regarding whether discrimination against religious adherents would somehow serve ill-defined interests."[99]

Espinoza was a major victory for school choice advocates, and it set extremely favorable precedent. However, the decision left the status-use distinction intact, providing a potential opening for school choice opponents and states who do not

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90. *Id.* at 2257 (quoting *Trinity Lutheran*, 137 S. Ct. at 2023).

91. *Id.* at 2257-59; *see also* Lipez, *supra* note 62, at 370.

92. *Espinoza*, 140 S. Ct. at 2261.

93. *Id.* at 2260.

94. *Id.* at 2261.

95. *Id.* at 2261, 2262-63.

96. *Id.* at 2281 (Ginsburg, J., dissenting, joined by Kagan, J.) (noting that because the Montana Supreme Court decision "put all private school parents in the same boat[,]" the "Court had no occasion to address the matter"); *id.* at 2292 (Sotomayor, J., dissenting).

97. *Id.* at 2262 (quoting Espinoza v. Mont. Dep't of Revenue, 435 P.3d 603, 614 (Mont. 2018) ("Had the Court recognized that this was, indeed, 'one of those cases' in which application of the no-aid provision 'would violate the Free Exercise Clause,' the Court would not have proceeded to find a violation of that provision. And, in the absence of such a state law violation, the Court would have had no basis for terminating the program. Because the elimination of the program flowed directly from the Montana Supreme Court's failure to follow the dictates of federal law, it cannot be defended as a neutral policy decision, or as resting on adequate and independent state law grounds.")).

98. *Id.* at 2281-93, 2282 (Breyer, J., dissenting) ("'[P]lay in the joints' should, in my view, play a determinative role here.").

99. *Id.* at 2257.

wish to fund private religious schools.[100] This opening was central to the First Circuit's decision in *Carson.*[101]

III. CARSON EX REL. O.C. V. MAKIN

In *Carson ex rel. O.C. v. Makin*, the First Circuit addressed the question of whether Maine's nonsectarian requirement violated the Free Exercise Clause, among other claims.[102]

A. Facts and Procedural Background

If a school administrative unit ("SAU")[103] in Maine does not (1) maintain a public elementary or postsecondary school or (2) contract with another public elementary or postsecondary school for school privileges, then the SAU must pay tuition "at the public school or the approved private school of the parent's choice at which the student is accepted."[104] In order for a private school to be approved to receive public funds for tuition, it must fulfil the nonsectarian requirement and be a "nonsectarian school in accordance with the First Amendment of the United States Constitution."[105]

The plaintiff-appellants in *Carson*, who are represented by the Institute of Justice ("IJ"), are three sets of parents of children who live in towns where the SAU is obligated to pay tuition at a public or approved private school of the parents' choice.[106] Two of the sets of parents, the Carsons and Gilleses, send their children to Bangor Christian School ("BCS").[107] The other parents, the Nelsons, use town tuitioning to send their daughter to a state approved private school, but would prefer to send her to Temple Academy ("TA"), which is a parochial school.[108] All three sets of parents argued that the nonsectarian requirement discriminated against them on the basis of religion and therefore violated their free exercise rights.[109]

In the trial court, the parents argued that *Trinity Lutheran* had effectively overruled a First Circuit precedential case: *Eulitt v. Maine Department of Education.*[110] *Eulitt*, which had very similar facts to *Carson*,[111] was decided before

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100. *Id.*

101. Carson *ex rel.* O.C. v. Makin*,* 979 F.3d 21, 34 (1st Cir. 2020).

102. *Id.* at 26.

103. Maine uses the term "school administrative unit" instead of the usual term, "school district." Each SAU has a different governance structure. *See Structure & Governance*, ME. DEP'T OF EDUC., https://www.maine.gov/doe/schools/structure [https://perma.cc/CY6C-KL3F] (last visited Apr. 21, 2021).

104. 20-A M.R.S.A. §§ 5203(4), 5204(4) (2018).

105. § 2951(2).

106. *Carson*, 979 F.3d at 26.

107. *Id.* at 27.

108. *Id.*

109. *Id.* at 32 ("The plaintiffs contend that the 'nonsectarian' requirement discriminates against them based on their religion and thereby violates the Free Exercise Clause.").

110. 386 F.3d 344 (1st Cir. 2004); *see* Carson *ex rel.* O.C. v. Makin, 401 F. Supp. 3d 207, 209-11 (D. Me. 2019).

111. Although the facts in *Eulitt* and *Carson* were very similar, there was one difference. In *Eulitt*, the town that the parents lived contracted with a local public school, and therefore the parents could only

Trinity Lutheran, and it relied heavily on *Locke*.[112] In *Eulitt*, the First Circuit interpreted *Locke* to mean that "state entities, in choosing how to provide education, may act upon their legitimate concerns about excessive entanglement with religion, even though the Establishment Clause may not require them to do so."[113] Applying that reasoning, *Eulitt* held that Maine's nonsectarian requirement did not violate the Free Exercise Clause because the state was simply exercising its legitimate right to avoid excessive entanglement with religion.[114] In *Carson*, the district court ultimately disagreed with the plaintiffs and determined that *Trinity Lutheran* did not clearly overrule *Eulitt*.[115] The court applied *Eulitt* to the facts of *Carson* and upheld Maine's nonsectarian requirement.[116] The plaintiffs timely appealed the decision to the First Circuit.[117]

The Supreme Court decided *Espinoza* nearly one year after the trial court's decision in *Carson*.[118] In the wake of *Espinoza*, an IJ attorney released a statement proclaiming that the decision "ensures that no state, whether it has a Blaine Amendment or not, can exclude parents from choosing religious educational options just because they participate in a private educational choice program."[119] In light of their win at the district court, the IJ attorneys representing the plaintiffs in *Carson* hastily filed a 28(j) letter to the First Circuit.[120] In the letter, the attorneys pulled from *Espinoza*'s favorable language, asserting: "[w]hen otherwise eligible recipients are disqualified from a public benefit 'solely because of their religious character,' we must apply strict scrutiny." [121] In response to IJ's new-found support, the state of Maine contended that (1) "[t]he nature of the benefits at issue in *Espinoza* and here are different," and (2) Maine does not exclude sectarian schools because of their "status," but rather because they "use" funds to "promote or advance [a] particular religion."[122] The First Circuit found merit in the State's second argument: that Maine does not exclude sectarian schools because of their "status."[123]

B. The First Circuit's Analysis

After concluding that the parents had standing,[124] the First Circuit explained that

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send their children to private school if it were approved on an "individualized assessment of educational benefit." *Eulitt*, 386 F.3d at 346-47, 349 n.1.

112. *Id.* at 355.

113. *Id.*

114. *Id.* at 356.

115. *Carson*, 401 F. Supp. 3d at 211.

116. *Id.* at 211-12.

117. Carson *ex rel.* O.C. v. Makin*,* 979 F.3d 21, 29 (1st Cir. 2020).

118. *See generally* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020); *Carson*, 401 F. Supp. 3d 207.

119. Kramer, *supra* note 13.

120. Statement of Supplemental Authority at 1, *Carson*, 979 F.3d 2 (No. 19-1746); *see* Fed. R. App. P. 28(j).

121. Statement of Supplemental Authority at 2, *Carson*, 979 F.3d 21 (No. 19-1746).

122. Response to Statement of Supplemental Authority, *Carson*, 979 F.3d 21 (No. 19-1746).

123. *Carson*, 979 F.3d at 38.

124. The state contended that the parents could not show redressability because the private religious schools in question would not "apply to be 'approved' to receive tuition assistance payments if, by receiving such public funding, they would" subject themselves to the Maine Human Rights Act's prohibition against employment discrimination based on sexual orientation. *Id.* at 30. This was an

the precedential case that controlled in the trial court, *Eulitt*, would not determine the outcome of this matter.[125] The court reasoned that *Eulitt* could not control because of an exception to the law-of-the-circuit doctrine.[126] The law-of-the-circuit doctrine proclaims that circuit courts must follow precedent from their own court.[127] However, this general rule must yield when Supreme Court precedent legitimately questions a circuit court's previous opinion.[128] Here, *Trinity Lutheran*, and now *Espinoza*, called *Eulitt* into question because (1) *Eulitt* did not address whether the nonsectarian requirement was based on religious "status" or "use," and (2) both cases offered insight on *Locke* that *Eulitt* did not have.[129] Thus, the court decided that *Eulitt* fell under the exception to the law-of-the-circuit doctrine and could not control.[130]

After deciding that *Eulitt* would not determine the outcome of the case, the First Circuit addressed the parents' Free Exercise Claim in light of *Trinity Lutheran* and *Espinoza*. The parents argued that the nonsectarian requirement "impermissibly single[d] them out for unequal treatment based on religion," and excluded them from a public benefit on the basis of their religious status.[131] To determine whether Maine's nonsectarian requirement involved status-based discrimination, the court examined (1) "[w]hat constitutes discrimination based 'solely on religious status,'" (2) whether the nonsectarian requirement discriminated based on status, and (3) whether, if the requirement did not discriminate based on status, it "punish[ed] the plaintiffs' religious exercise nonetheless."[132]

First, to define the term "status-based discrimination," the court analyzed the language from *Espinoza* and *Trinity Lutheran.*[133] The court observed that in both of those cases—where the state programs did discriminate on the basis of status—the rules excluding religious entities used language like "controlled" or "owned" by a church or "religiously-affiliated."[134] It further observed that in *Espinoza*, the Supreme Court noted that discrimination against a recipient based on its "*affiliation with* or *control by* a religious institution differ[s] from discrimination in handing out that aid based on the religious *use* to which the recipient would put it."[135]

Second, after examining the language and reasoning behind Maine's nonsectarian requirement, the court concluded that the nonsectarian requirement did

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interesting and creative argument on the state's part, and it garnered the attention of the ACLU of Maine. *See ACLU in Court in Case Over Taxpayer-Funded Religious Training*, ACLU MAINE (June 24, 2019), https://www.aclumaine.org/en/press-releases/aclu-court-case-over-taxpayer-funded-religious-training [https://perma.cc/J2T8-A4C4]. Ultimately, the Court dismissed the state's standing argument because even if BCS and TA decided not to participate in town tuitioning, "the invalidation of § 2951(2)'s 'nonsectarian' requirement would restore the plaintiffs' now non-existent opportunity to find religious education for their children that qualifies for public funding." *Carson*, 979 F.3d at 31.

125. *Carson*, 979 F.3d at 32.
126. *Id.* at 32-36.
127. United States v. Lewko, 269 F.3d 64, 66 (1st Cir. 2001).
128. *Carson*, 979 F.3d at 32-33.
129. *Id.* at 33-35.
130. *Id.* at 32.
131. *Id.* at 36-37.
132. *Id.* at 37.
133. *Id.* at 37-38.
134. *Id.*
135. *Id.* at 35 (emphasis added).

not discriminate on the basis of status.[136] The nonsectarian requirement reads: "[a] private school may be approved for the receipt of public funds for tuition purposes only if it . . . [i]s a nonsectarian school in accordance with the First Amendment of the United States Constitution."[137] In other words, a private school may participate in town tuitioning—and be eligible to receive public funds—so long as it is not a religious school. The plain reading of the requirement seems to suggest that the statute discriminates on the basis of status. However, the First Circuit disagreed and instead determined that it "impose[d] a use-based restriction."[138]

The court explained that this was not status-based discrimination because both the former and current Commissioners of the Maine Department of Education and the Attorney General agreed that Maine's "determination [of] whether a school is 'nonsectarian' depends on the sectarian nature of the educational instruction that the school will use the tuition assistance payments to provide."[139] This was in contrast to the states' prohibitions in *Espinoza* and *Trinity Lutheran*, which were based on whether the school was "controlled by a church."[140] Thus, under the First Circuit's reading, if a state excludes a religious entity from a public benefit because it is controlled by a church then it is status-based discrimination. On the other hand, if a state excludes a religious entity from a public benefit because it will use the benefit for a religious purpose, then it is employing permissible use-based discrimination under *Locke*, *Trinity Lutheran*, and *Espinoza*. The court also highlighted that the nonsectarian requirement states that a private school may be eligible to enroll in town tuitioning so long as it is "a nonsectarian school in accordance with the First Amendment of the United States Constitution."[141] The court stated that the phrase "in accordance with the First Amendment" gave credit to the state's argument that the nonsectarian requirement is indeed constitutional.[142] In sum, the court surmised that Maine's nonsectarian requirement did not discriminate on the basis of status.[143]

Finally, the plaintiffs asserted that there was no legitimate difference between discrimination based on status versus use, and therefore, the nonsectarian requirement did punish their religious exercise.[144] In making this argument, the plaintiffs relied on Justice Gorsuch's concurring opinions in *Trinity Lutheran* and *Espinoza*.[145] The court rejected this argument, pointing out that "nothing in either one of Justice Gorsuch's concurrences suggests that the government penalizes a fundamental right simply because it declines to subsidize it."[146] The court determined that the nonsectarian requirement simply declined to subsidize religious education because (1) the program is merely an avenue for "students who cannot get

136. *Id.* at 38.
137. 20-A M.R.S.A. § 2951(2) (2018).
138. *Carson*, 979 F.3d at 38.
139. *Id*. at 37-38.
140. *Id.* at 39.
141. 20-A M.R.S.A. § 2951(2) (2018); *see Carson*, 979 F.3d at 39.
142. *Carson*, 979 F.3d at 39 (internal quotation marks omitted).
143. *Id.* at 42 ("Instead, we understand this restriction to bar BCS and TA from receiving the funding based on the religious use that they would make of it in instructing children in the tuition assistance program.").
144. *See id.* at 42.
145. *Id*. at 40-41.
146. *Id.* at 44.

a public school education from their own SAU . . . [to] get an education that is 'roughly equivalent to the education they would receive in public schools;'" and (2) Maine's decision to restrict religious teachings in its public schools—and its town tuitioning program—"is also wholly legitimate, as there is no question that Maine may require its public schools to provide a secular educational curriculum rather than a sectarian one."[147]

C. Holding

In summary, the First Circuit concluded that, even in light of *Trinity Lutheran* and *Espinoza*, strict scrutiny did not apply, and the nonsectarian requirement did not violate the Free Exercise Clause.[148] In coming to this conclusion, the court determined that (1) Maine's nonsectarian requirement did not discriminate on the basis of status, and (2) Maine's town tuitioning program does not need to provide funding to parochial schools because the program is simply a way of connecting "students who cannot get a public school education from their own SAU" with a public education equivalent, and it is within Maine's discretion to provide a secular public education.[149]

IV. STANDING ON UNSTEADY GROUND

Although *Carson* provides some much welcome reassurance to states that do not wish to fund private parochial schools, the decision rests on precedent that may not prove to be durable. Some argue that the new conservative super-majority may decide to abandon the status-use distinction altogether.[150]

For one, two key conservative justices disfavor the status-use distinction. Justices Thomas and Gorsuch, who joined Chief Justice Roberts' *Espinoza* opinion, have both expressed skepticism of the status-use line. Justice Gorsuch remarked in his *Espinoza* concurrence that "any jurisprudence grounded on a status-use distinction seems destined to yield more questions than answers."[151] Justice Thomas joined Justice Gorsuch's *Trinity Lutheran* concurrence, where the Court originally deployed the status-use distinction.[152] In that opinion, Justice Gorsuch lamented, "I harbor doubts about the stability of such a line."[153] In addition, Justice Sotomayor

147. *Id.* 45-46.

148. *Id.* at 42-54.

149. *Id.* at 40, 42-46. The Court also determined that the nonsectarian requirement did not violate the plaintiffs' free exercise rights on the basis of religious animus. *Id.* at 52-54.

150. *See* Michael Bindas, *The Status of Use-Based Exclusions & Educational Choice After* Espinoza, 21 FEDERALIST SOC'Y REV. 204, 216 (2020) (suggesting that *Espinoza* indicates that the Court may be willing to abandon the status-use distinction); *see also* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2261 (2020) ("A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.").

151. *Espinoza*, 140 S. Ct. at 2275 (Gorsuch, J., concurring).

152. *See* Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012, 2025-26 (2017) (Gorsuch. J., concurring in part, joined by Thomas, J.).

153. *Id.* at 2025.

has also expressed disapproval of the status-use distinction.[154]

Such skepticism is warranted, as the line makes little logical sense. Religious organizations naturally put their funds to religious uses.[155] Further, most religious schools tout religious teachings as a benefit of the education that they offer.[156] Because religious status and use are so enmeshed, it makes little sense for the constitutionality of a law to turn on whether it excludes a religious entity from a benefit based on its religious status or religious use.

Although the status-use standard is mystifying, it is challenging to find a workable alternative. For those who are wary of entanglement of church and state, the only other feasible alternative to the status-use distinction is the principle that there is "play in the joints" between the Religion Clauses.[157] Justice Breyer vouched for this principle in his *Espinoza* dissent,[158] but "play in the joints" is less of a standard and more of an amorphous guideline.[159] Further, with Justice Ginsburg's passing, it is likely that only three Justices would sign on to the "play in the joints" approach.[160] Given the precedent and the conservative composition of the Supreme Court, school choice opponents will likely need to look beyond the courts to stop the school choice movement's momentum.

V. THE FUTURE OF SCHOOL CHOICE IN MAINE

After the First Circuit's decision, IJ immediately filed a petition for certiorari to the United States Supreme Court.[161] IJ Senior Attorney Tim Keller proclaimed that the decision "allows the state of Maine to continue discriminating against families and students seeking to attend religious schools."[162] If the *Carson* plaintiffs are granted certiorari and Section 2951(2) is invalidated, it could have a negative impact on Maine's public education system, specifically, in public schools that have a high percentage of town tuitioning students. Setting aside the issue of religious schools, public schools lose funding when town tuitioning students choose private schools. This is because Maine's public school funding model, Essential Programs and

154. *Id.* at 2030 (Sotomayor, J., dissenting) (questioning the difference between use and status: "[t]he playground surface cannot be confined to secular use any more than lumber used to frame the Church's walls, glass stained and used to form its windows, or nails used to build its altar").

155. *Id.* at 2029-30 (Sotomayor, J., dissenting).

156. In *Carson*, the schools that the plaintiffs wished to send their children to provide a "biblically-integrated education," and pursue a mission of "instilling a Biblical worldview." Carson *ex rel.* O.C. v. Makin, 979 F.3d 21, 27 (1st Cir. 2020).

157. As discussed in Part II(a)-(b), the days of an Establishment Clause that calls for strict separation of church and state have come and gone. *See* Schwartzman & Tebbe, *supra* note 54, at 272.

158. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2282 (2020) (Breyer, J., dissenting).

159. Lipez, *supra* note 62, at 336 n.58.

160. *Espinoza*, 140 S. Ct. at 2281-82 (Breyer, J., dissenting, joined by Kagan, J. in Part I) (Justice Kagan did not join Part II of Justice Breyer's dissent that discussed play in the joints at greater length, but Part I forcefully declared: "'play in the joints' should, in my view, play a determinative role here"); *Trinity Lutheran*, 137 S. Ct. at 2035-36 (Sotomayor, J., dissenting).

161. *Carson*, 979 F.3d 21, *petition for cert. filed*, (U.S. Feb. 9, 2021) (No. 20-1088); Andrew Wimer, *Maine Parents Challenging Law Excluding Religious Schools from State's Tuition Program Will Appeal to Supreme Court*, THE INST. FOR JUST. (Oct. 29, 2020), https://ij.org/press-release/maine-parents-challenging-maine-law-excluding-religious-schools-from-states-tuition-program-will-appeal-to-supreme-court/ [https://perma.cc/J4C5-DFPJ].

162. Wimer, *supra* note 161.

Services ("EPS"), largely doles out funding based on SAU pupil counts.[163] Under EPS, when students leave a school, they take their dollars with them. As Maine school enrollment rates have dropped over the years due to rural population decline,[164] rural public schools have become increasingly dependent on their town tuitioning students to remain solvent.[165] To date, Maine has only approved eight primary private schools and twelve private postsecondary schools for participation in town tuitioning.[166] In short, even though public schools have a relatively small number of private schools to compete with, they are still desperate to retain their town tuitioning students and dollars.[167]

If private religious schools are permitted to participate in the program as well, the number of town tuitioning students choosing private schools would surely grow, making this existing problem worse.[168] Let us take a hypothetical Maine high school as an example of how this would play out. Each grade has one-hundred children in it and thirty of those children are from towns that use town tuitioning. Each of these children attend this school because they have elected to go to the closest public school. However, when more private schools in the area become approved for town tuitioning, twelve children in each grade leave to attend various private schools.[169] When those students leave, the school loses the funding it received for those forty-eight children. While the school may be able to cut some costs, it still needs to pay the teachers the same salary, maintain the same building, bus students, and deliver

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163. *Essential Programs and Services (EPS) Funding*, ME. DEP'T OF EDUC., https://www.maine.gov/doe/funding/gpa/eps [https://perma.cc/QT6Z-E6YG] (last visited Apr. 21, 2021).

164. Maine's student enrollment rates have declined at about 9.4% in recent years, and rural areas have seen the largest enrollment declines. Gordon Donaldson, *Maine Schools in Focus: Declining School Enrollment Likely to Subside in Next Decade*, UNIV. OF S. ME. COLL. OF EDUC. AND HUM. DEV. (Oct. 6, 2016), https://umaine.edu/edhd/2016/10/06/maine-schools-focus-declining-school-enrollment-likely-subside-next-decade/ [https://perma.cc/XG5T-8K8C]. Superintendent Gisele Dionne of the Madawaska School Department lost 43% of her student body from 2007 to 2017. Dionne explained that "the loss of students has forced the school to make major changes" and "[e]ven though the district serves fewer students, many costs such as electricity, heating and transportation remain unchanged." Tyler Blint-Welsh, *The Maine Schools that Have Shrunk the Most*, BANGOR DAILY NEWS (Jan. 23, 2019), https://bangordailynews.com/2017/12/12/education/the-maine-schools-that-have-shrunk-the-most/ [https://perma.cc/D8F4-M3CT].

165. Nell Gluckman, *As Maine Student Numbers Drop, High Schools Compete for Kids, Tuition Dollars*, BANGOR DAILY NEWS (Feb. 14, 2014), https://bangordailynews.com/2014/02/14/news/bangor/as-maine-student-numbers-drop-high-schools-compete-for-kids-and-tuition-dollars/ [https://perma.cc/2P7P-4S6S].

166. *Private Schools Approved for the Receipt of Public Funds*, ME. DEPT. OF EDUC., https://www.maine.gov/doe/sites/maine.gov.doe/files/inline-files/FY21_PrivateSchoolsApprovedTuition_22Oct2020_0.pdf [https://perma.cc/5DKJ-ABLB] (last visited Apr. 21, 2021).

167. Gluckman, *supra* note 165.

168. One older data set showed that about 42% of Maine town tuitioning students choose to attend private schools. John Maddaus & Denise A. Mirochnik, *Town Tuitioning in Maine: Parental Choice of Secondary Schools in Rural Communities*, 8 J. RSCH. RURAL EDUC. 27, 30 (1992). In Alna, Maine, which offers town tuitioning for both private and elementary, more students attend private schools than public schools. Further, individuals are seeking to relocate to Alna to take advantage of the town tuitioning, which has sparked controversy among local residents. *School Choice Costs Spark Turmoil in Small Maine Town*, BANGOR DAILY NEWS (Mar. 7, 2018), https://bangordailynews.com/2018/03/07/news/school-choice-costs-spark-turmoil-in-small-maine-town/ [https://perma.cc/XM3Q-GLVK].

169. Maddaus & Mirochnik, *supra* note 168, at 30.

the same programs and services. Thus, even though the school has fewer children in it—and therefore less funding—it largely maintains the same expenses.[170] To help alleviate some of the funding issues that town tuitioning brings, Maine could decide to exclude private schools from the town tuitioning program altogether.

Even if the *Carson* plaintiffs are denied certiorari and the case ends here, more school choice litigation is on the way. IJ currently has five other educational choice cases pending in other states, and it will likely file more.[171] In fact, IJ has cases that are nearly identical to *Carson* pending in both Vermont and New Hampshire, the other states that have town tuitioning programs.[172] New Hampshire is in the First Circuit, but Vermont is in the Second Circuit which could yield a different interpretation of *Espinoza*. IJ holds itself out "as the nation's preeminent courtroom defender of educational choice programs," and there is surely more action to come.[173]

Given this situation, Maine—and the rest of the country—must consider the impacts of school choice and what it could mean for public education. Proponents of educational choice argue that "[t]hese programs give families financial assistance to choose private schooling that best fits their children's individual needs."[174] On the other hand, skeptics posit that school choice programs primarily benefit families who are already well-off and do not include the conditions necessary "for a fair and equal scheme of school choice."[175] These conditions would include things such as (1) prohibiting parents "from adding money to the voucher they receive, so that income deficiencies are neutralized," and (2) only providing vouchers to economically disadvantaged children.[176] Necessary restrictions such as these are not in the proposals presented by organizations like IJ and American Federation for Children.[177] If our goal is to give children "a chance at a great education, no matter where they live,"[178] we should fund and fix the public school system we already have in place, instead of further fracturing it and out-sourcing public education to private interest groups like private schools and religious organizations.

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170. *See* Blint-Welsh, *supra* note 164.

171. According to its website, IJ has school choice cases pending in Vermont, New Hampshire, and Tennessee; it also has two school choice cases pending in North Carolina. *All Cases*, THE INST. FOR JUST., https://ij.org/cases/all-cases/ [https://perma.cc/HZ29-DWV6] (last visited Apr. 21, 2021).

172. Andrew Wimer, *New Hampshire Grandparents Sue State Over Unconstitutional Restriction on School 'Tuitioning' Program*, THE INST. FOR JUST. (Sept. 3, 2020), https://ij.org/press-release/new-hampshire-grandparents-sue-state-over-unconstitutional-restriction-on-school-tuitioning-program/ [https://perma.cc/52AE-W9DA]; Justin Wilson, *Vermont Parents Sue State Over Unconstitutional School Choice Policy*, THE INST. FOR JUST. (Sept. 10, 2020), https://ij.org/press-release/vermont-parents-sue-state-over-unconstitutional-school-choice-policy/ [https://perma.cc/2DXE-BECX].

173. *Educational Choice*, *supra* note 2.

174. Erica Smith, *Blaine Amendments and the Unconstitutionality of Excluding Religious Options from School Choice Programs*, 18 FEDERALIST SOC'Y REV. 88, 88 (2017) (arguing for school choice and that Blaine amendments are unconstitutional).

175. Yossi Dahan, *Privatization, School Choice and Educational Equality*, 5 L. & ETHICS HUM. RTS. 307, 328 (2011).

176. *Id.* at 324.

177. *See generally School Choice in America*, AM. FED'N FOR CHILD., https://www.federationforchildren.org/school-choice-america/ [https://perma.cc/D352-X4G6] (last visited Apr. 21, 2021); *Educational Choice*, *supra* note 2.

178. *Educational Choice*, *supra* note 2.