

# Supreme Court rules Maine cannot discriminate against religious schools in tuition program

In a major decision in support of religious liberty and parental rights, the Supreme Court on Tuesday struck down a ban in Maine on giving state tuition funds to church-sponsored schools.

Writing for a six-justice majority, Chief Justice John Roberts said Maine's ban violated the free exercise clause of the First Amendment.

"Regardless of how the benefit and restriction are described, the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise," Roberts wrote.

The chief justice was joined by Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett. The court's three liberal members – Justices Stephen Breyer, Sonia Sotomayor and Elena Kagan – joined in a dissenting opinion by Breyer that contended that the state aid in question violated the First Amendment's clause against "establishment" of religion.

The case (*Carson v. Makin*) involved a tuition assistance program under which Maine – a state where 143 of the 260 school districts do not have public high schools – provides tuition assistance for students to attend nonpublic schools of their choice, wherever located.

Among the recipients of the funds are exclusive New England prep schools, but not schools that the state education

department deems “sectarian.”

Central to the dispute is a distinction adopted by a lower court between a school’s “status” as a religious institution and what the school actually does. What this meant in practice, as in *Carson v. Makin*, was that a school receiving state funds could be religious in name but not in fact.

Two sets of parents challenged this practice, but the 1st U.S. Circuit Court of Appeals ruled against them. That decision has now been reversed by the Supreme Court.

The parents were represented in the case by a public interest law firm called the Institute for Justice. In their brief, the parents called Maine’s policy a form invidious discrimination against families who “believe that a religious education is best for their child,” forcing them to choose between “a public benefit to which they are entitled and their right to send their child to a religious school.”

The parents urged the court once and for all to set aside the “sordid doctrine” that state aid can go to “nominally religious” schools but not to schools that “actually do religious things” to promote religious faith.

In his majority opinion, Roberts relied heavily on two other recent Supreme Court decisions.

In one, decided in 2017, the court held that a Lutheran church in Missouri that operated a day school was entitled to receive funds from a state program for upgrading playgrounds as a safety measure (*Trinity Lutheran Church v. Comer*).

In the second case, decided in 2020, the court held that Montana could not exclude families and schools from a student aid program simply because of a school’s religious status. But it left open the question of aid to schools that provide religious or “sectarian” instruction (*Espinoza v. Montana Department of Revenue*).

“A neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause,” Roberts held in the new case.

“Maine’s decision to continue excluding religious schools from its tuition assistance program ... promotes stricter separation of church and state than the federal Constitution requires,” he said.

The chief justice also took note in his opinion of Breyer’s emphasis on “government neutrality” in his dissent.

“There is nothing neutral about Maine’s program,” Roberts wrote. “The state pays tuition for certain students at private schools – so long as the schools are not religious. That is discrimination against religion.”

The Supreme Court has been wrestling with issues like these since at least 1925 when, in a landmark decision, it overturned an Oregon law that sought to force children to attend only public schools. Church-sponsored schools have a right to exist, and parents have the right to choose them for their children, the court said then. The new ruling, in effect, affirms and strengthens both rights.

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