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The Supreme Court Takes Up Religious Liberty—Again

Organizations that get state money shouldn't have to disavow their faith.

By Michael A. Helfand and Nathan J. Diament
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Faith & Freedom Coalition Chairman Ralph Reed speaks during a rally in Washington, April 19, 2017.
PHOTO: MARK WILSON/GETTY IMAGES

The Supreme Court will hear arguments next week over whether state government funding programs can discriminate against religion—the third time the court has taken up the issue in the past five years. It has already prohibited excluding religious institutions simply because they are religious institutions, but it equivocated on whether governments can deny funding that would be used for religious *purposes.* The justices should now make clear that all forms of religious exclusion in government funding are unacceptable.

Trinity Lutheran v. Comer (2017) concerned a church-run school that sought a grant from Missouri for playground renovations. Although the school was eligible on the basis of secular criteria, its application was denied because it was a religious institution. A 7-2 majority held that denying a church funds "simply because of what it is" violated the First Amendment. But the court intimated that it may be permissible for a state to deny funding solely based on what the funds are used for. A state that provides funds to buy books but explicitly bans Bible purchases could be acting constitutionally.

In next week's case, *Carson v. Makin,* the justices will have to decide whether this theoretical distinction between status and use will become part of the constitutional rule. The case concerns the constitutionality of the tuition assistance program in Maine, where more than half of school districts don't have public secondary schools. In those jurisdictions Augusta pays tuition on the student's behalf at approved private schools. But otherwise-qualified "sectarian" schools are explicitly excluded.

Maine previously argued that court precedents required governments to avoid supporting religion, even if that meant they were not acting neutrally. Yet the Supreme Court has steadily moved away from that approach over the past few decades. Maine parents brought this suit, claiming the tuition support program's rules violate the First Amendment. (We have filed a friend-of-the-court brief in this case.) A federal appeals court upheld the "sectarian" exclusion because it withholds money from the schools based not on their status as religious schools but for using the funds to teach religious curricula.

This sort of semantic gamesmanship provides one of the most obvious reasons why such an arbitrary construction must be abandoned. Status and use are permeable categories

that can be contorted to achieve preferred but unprincipled legal outcomes. Moreover, the status-use distinction undercuts existing government programs that distribute public funds promoting important secular goals. The federal government and many states provide grants to religious institutions that fund health and educational services, security and disaster relief, and much more. Excluding faith-based institutions from receiving funds that serve societal goals because use of those funds happens to overlap with religious uses is the constitutional equivalent of cutting off your nose to spite your face.

The status-use distinction is also discriminatory. Consider Jews committed to fulfilling the commands of Jewish law, which governs everything from how Jews should pray, eat and dress to safety regulations, medical ethics and commercial practices. Jewish law has such wide scope that it infuses the performance of seemingly secular activities with religious purpose.

This comprehensiveness means the status-use distinction will yield terrible consequences. Some rabbinic organizations have ruled that Jewish law, which "obligates us to care for our own health and to protect others from harm and illness," imposes a religious obligation to take a Covid-19 vaccine. On such a basis, could states exclude Jewish institutions from vaccine-related funding because it would be a religious use?

Jewish law's safety regulations also require that construction be done in such a way to remove and protect against life-threatening obstacles. Could states, in the allocation of historic-preservation grants, choose to provide funding to Jewish institutions, but withhold funds to promote safety because such funds would be used for a religious purpose?

It's clearly unjust for states to withhold funds simply because they have secular and religious uses. Doing so is premised on a worldview that takes for granted a neat division between the secular and the religious. Few religions have such dividing lines. If the court is serious about protecting all faith communities equally, then it should prohibit religious discrimination based on status and use alike.

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