AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

To: Interested Persons
Date: October 2022
From: A. Eric Johnston

RE: *Carson v. Makin* – State Funding of Religious Education Protected

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This past term, SCOTUS decided two cases that dealt with the exercise of religious freedom. We reported on one last month and this month the second. It concerns whether a state may choose to fund private education, but exclude religious schools from the funding. This case demonstrates Trump Appointees' use of "originalism" in interpreting the U.S. Constitution. At no place more so than the First Amendment's Free Exercise of Religion Clause has the court persecuted individual liberties. Those were the issues that were the genesis of the Southeast Law Institute.

In *Carson* v. *Makin*, the State of Maine provided tuition assistance to nonpublic schools but excluded sectarian schools. In some rural parts of Maine, there are not public secondary schools and in order to provide students with an education, the financial assistance was provided. The Plaintiffs' in the case wanted to take advantage of the funds, but wished for their children to attend a Christian school. Maine refused and the litigation ensued.

SCOTUS had previously decided *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2007) (see 12-2017 Educational Update) and *Espinoza v. Montana Department of Revenue* (2020) (see 12-2020 Educational Update) both of which dealt favorably with use of state funds related to Christian education. In *Carson*, lower federal courts did not follow these cases making an effort to distinguish *Carson* because Maine limited the funds "based on the [prohibited] religious use that they would make of it in instructing children" and that Maine was only trying to provide "a rough equivalent of the public school education that Maine may permissively require to be secular but that it is not otherwise accessible." In a 6-3 opinion written by Chief Justice John Roberts, *Carson* explained that Maine disqualified sectarian schools "solely because of their religious character." A law that does this is subject to "strict scrutiny," the most searching of judicial tests, *i.e.*, "to satisfy scrutiny, government action 'must advance interests of the highest order and must be narrowly tailored in pursuit of those interests… A law that targets religious conduct for distinctive treatment…' shall survive scrutiny only in rare cases."

The essence of this case is that the "state need not subsidize private education, but once the state decided to do so, it cannot disqualify some private schools solely because they are religious." This reasoning restores some authority to the Free Exercise Clause. It does not create an establishment of religion. That was the fallacy of the earlier jurisprudence. Justice Breyer dissented from this reasoning by relying on the errant jurisprudence from the 1940's until the 21st century. Here is a paragraph from his dissent (citations partially omitted):

> "On the other hand, the Establishment Clause commands a separation of church and state. A state cannot act to aide religion, aide all religions, or prefer one religion over another. *Everson* v. *Board of Education of Erwing (1947)*. This means that a state cannot use its public school system to aide any or all religious faiths or sect in the dissemination of their doctrines and ideals. *Illinois Ex Rel McCollum* v. *Board of Ed of School Dist. No. 71, Champaign Cty* (1948). Nor may a state adopt programs or practices in its public schools… which aide or oppose any religion. *Epperson v. Arkansas* (1968). This prohibition we have cautioned is absolute. See *McCollum* (no prayers, religious teaching in public schools); *Engel v. Vitale* (1962) (no prayers in public schools); *School Dist of Abington Township v. Schempp* (1963) (no bible readings in public schools); *Epperson* (no religiously tailored curriculum in public schools); *Wallace v. Jaffree* (1985) (no period of silence for meditational prayer in public schools); *Lee v. Weisman* (1992) (no prayers during public schools graduation); *Santa Fe Indep School Dist. v. Doe* (2000) (no prayers during public school football games).

You can see the decades long jurisprudence that have attacked the free exercise of religion. The state cannot discriminate against religious activities, while favoring otherwise secular activities. Not every act of religious activity is an establishment of religion. The writers of the Constitution did not intend to take religion out of the public square, but those court opinions above, attempted to do so. We believe SCOTUS is on a better tract now to explain the proper relationship between the Free Exercise Clause and the Establishment Clause in the U.S. Constitution.