MAPPING *CARSON*: NEW FRONTIERS OF RELIGIOUS EXCLUSION IN GOVERNMENT PROGRAMS

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INTRODUCTION

"[W]e have repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits."[1] This simple proposition has come to define one of the central features of the Supreme Court's modern free exercise jurisprudence. Yet the apparent clarity of this command masks deeper doctrinal change. *Carson v. Makin* marked the culmination of a long shift—from a period in which the Establishment Clause was understood to prohibit virtually any form of public aid to religion,[2] through *Locke v. Davey*'s "play in the joints" doctrine that allowed States some discretion to withhold funding for religious uses,[3] to a new regime in which such discretion has largely disappeared. The *Carson* doctrine, developed by the Supreme Court over the last decade, announced a rule that seemed both clear and limited: Governments may not open a generally available program to private entities while excluding religion from participation.[4]

At least on its surface, *Carson v. Makin* appeared to resolve the long-standing debate over whether the Constitution permits States to exclude religion from public programs designed to support private participation. But beneath *Carson*'s elegant simplicity lies a set of unresolved questions about how the Free Exercise Clause's prohibition against religious discrimination in government programs applies across a host of public benefits and regulatory settings. What looks like a bright line in theory has, in practice, produced new uncertainty about where the Free Exercise Clause ends and permissible regulation begins.

The Court's "modern trilogy"—*Trinity Lutheran Church of Columbia, Inc. v. Comer*, *Espinoza v. Montana Department of Revenue*, and *Carson v. Makin*—has transformed the constitutional landscape governing religion and public funding.[5] Together, these decisions extend the Free

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1 Carson v. Makin, 142 S. Ct. 1987, 1996 (2022).

2 *See, e.g.*, Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 794–95 (1973); Lemon v. Kurtzman, 403 U.S. 602, 612–14 (1971), *abrogation recognized by*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022); Tilton v. Richardson, 403 U.S. 672, 687–88 (1971) (plurality opinion).

3 *See* Locke v. Davey, 540 U.S. 712, 718–19 (2004) ("[W]e have long said that 'there is room for play in the joints' between them. . . . In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." (quoting Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664, 669 (1970))).

4 *See Carson*, 142 S. Ct. at 1997 ("A State need not subsidize private education . . . [b]ut once a State decides to do so, it cannot disqualify some private schools solely because they are religious." (alteration in original) (quoting Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2261 (2020))).

5 Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449 (2017); *Espinoza*, 140 S. Ct. 2246; *Carson*, 142 S. Ct. 1987.

Exercise Clause to prohibit not only explicit status-based exclusions of religious entities but also many forms of functional or use-based exclusions. *Carson* clarified that once a State opens a public benefit program to private actors, it may not exclude religious participants simply because that participation advances religious purposes. The result is a doctrinal framework that places substantial limits on State efforts to exclude religion from generally available programs, even when those efforts are justified as promoting separation between church and state.

Yet while the Court has spoken with increasing clarity, legislative responses to eliminate religious exclusions have not followed. With some notable exceptions,[6] nearly all States continue to maintain statutes and regulations that exclude religion from otherwise generally available programs—rules that, under *Carson*, are presumptively unconstitutional. Across hundreds of provisions, religion remains formally ineligible for benefits that secular private actors routinely receive.[7]

As a result, the work of implementing *Carson* has fallen largely to the courts. In the absence of legislative fixes, lower courts have become the principal venues for testing *Carson*'s implications and exploring its limits. These decisions reveal both the doctrinal force and the indeterminacy of the new regime. They expose continuing disagreement over what counts as status discrimination, how to identify impermissible use restrictions, when regulatory conditions infringe church autonomy, and how much of *Locke v. Davey* remains after *Carson*. Taken together, these cases mark the next phase of free exercise law: one in which *Carson*'s simple command is being parsed, stretched, and reimagined across a growing body of litigation.

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6 *See, e.g.*, OKLA. STAT. tit. 51, § 253 (2026) (deeming it a substantial burden to "exclude a person or entity from governmental funds, benefits, [or] programs" "based solely on [their] religious character or affiliation"); OKLA. ADMIN. CODE § 1:2025-08 (2026) (directing state agencies to identify and eliminate laws, regulations, and policies that exclude religious individuals and institutions from public programs); S.B. 1307, 60th Leg., 2d Reg. Sess. (Okla. 2026) (removing restrictions that barred the Oklahoma Historical Society from using funds to benefit sectarian institutions); Fla. Att'y Gen. Op. 2026-06 (Apr. 2, 2026) (concluding that state laws excluding religious institutions from public benefits violate the First Amendment and that the office will not enforce them); S.F. 2231, 91st Gen. Assemb., 2d Reg. Sess. (Iowa 2026) (striking "nonsectarian" requirements from several provisions of the state's education laws); *cf.* Memorandum on Directing the Repeal of Unlawful Regulations, 2025 DAILY COMP. PRES. DOC. 1 (Apr. 9, 2025) (directing all executive agencies to identify and repeal regulations inconsistent with recent Supreme Court precedent, including *Carson v. Makin*).

7 *See Protecting Religious Organizations from Discrimination*, RELIGIOUS EQUAL., https://www.religiousequality.net [https://perma.cc/8YP6-Y8X3] (last visited Jan. 23, 2026) (tracking hundreds of state and federal provisions that exclude religion from generally available public programs).

This Essay seeks to map that evolving terrain. Across a growing body of litigation, courts have begun to test *Carson*'s boundaries in a number of contexts: status, use, neutrality, general applicability, autonomy, and clergy training. Each reflects a different way of understanding the reach—and the limits—of *Carson*'s rule. By tracing these lines of development, this Essay aims to identify the emerging structure of free exercise doctrine in the wake of *Carson* and to suggest how its simple command is reshaping the constitutional law of religion.

I. FROM *LEMON* TO *LOCKE* TO *CARSON*

The modern free exercise rule announced in *Carson v. Makin* emerged from a long reconfiguration of the constitutional relationship between church and state. For much of the twentieth century, the Supreme Court treated that relationship through the lens of separationism, refracted through an underlying commitment to secularism. The Establishment Clause was understood not merely to prohibit government sponsorship of religion but to demand that public institutions remain free from any form of religious influence or support. On this approach, "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[8]

The Supreme Court's decision in *Lemon v. Kurtzman* captured this approach in its oft-invoked three-part test, which required that government action (1) have a secular purpose, (2) neither advance nor inhibit religion as its primary effect, and (3) avoid "excessive government entanglement" with religious institutions.[9] Under *Lemon*, secularism defined the constitutional baseline: Public funds could not be directed toward religious institutions or used in ways that might sustain or express religious activity. The result was a constitutional framework in which public benefit programs that incidentally reached religious organizations were viewed as constitutionally suspect.[10]

By the closing decades of the twentieth century, that model began to collapse under the weight of its own inconsistencies.[11] In a series of decisions culminating in *Mitchell v. Helms* and *Zelman v. Simmons-Harris*,

8 Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222 (1963).

9 Lemon v. Kurtzman, 403 U.S. 602, 613, 612–13 (1971) (quoting Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664, 674 (1970)), *abrogation recognized by*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

10 *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947); *Lemon*, 403 U.S. at 612–13; Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772–73 (1973).

11 *See, e.g.*, Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 55 (1997) (describing the Supreme Court's Establishment Clause doctrine as "inconsistent and incoherent").

the Court reoriented its understanding of the Establishment Clause.[12] Separationism gave way to neutrality, a principle that permitted religious participation so long as government benefits were distributed on evenhanded terms.[13] Public aid was no longer constitutionally prohibited merely because it reached religious beneficiaries; it was permissible if it flowed through neutral, generally available programs of private choice.[14] But this shift created a constitutional puzzle. If neutrality permitted religious participation, did it also require it? Could States still exclude religion from generally available programs in the name of separation, or did the Free Exercise Clause now forbid such exclusions?

The Court attempted to resolve that question in its 2004 decision *Locke v. Davey*.[15] To do so, the Court's opinion adapted the concept of "play in the joints" between what the Establishment Clause permits and what the Free Exercise Clause compels[16]—a constitutional space within which states could maintain greater separation than the federal baseline. Washington State's refusal to fund devotional theology degrees, the Court reasoned, did not punish religious exercise but simply declined to support it.[17] The exclusion, in the Court's view, reflected a permissible choice to avoid direct funding of ministerial training.[18] In the years that followed, *Locke* was read expansively.[19] It became the doctrinal anchor for a principle of separationist discretion: States could decline to fund religious uses of public benefits without violating the Free Exercise Clause, even where such exclusions were not required by the Establishment Clause itself.[20]

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12 Mitchell v. Helms, 530 U.S. 793 (2000) (plurality opinion); Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

13 *See Mitchell*, 530 U.S. at 809; *Zelman*, 536 U.S. at 653.

14 *See Zelman*, 536 U.S. at 652 ("[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.").

15 Locke v. Davey, 540 U.S. 712, 718–19 (2004).

16 The Court first used this concept in *Walz v. Tax Commission of New York*, 397 U.S. 664, 669 (1970) ("[T]here is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.").

17 *See Locke*, 540 U.S. at 720–21.

18 *See id.* at 725.

19 *See* Cleland B. Welton II, Note, *The Future of* Locke v. Davey, 96 VA. L. REV. 1453, 1470–80 (2010).

20 *See* Thomas C. Berg & Douglas Laycock, *The Mistakes in* Locke v. Davey *and the Future of State Payments for Services Provided by Religious Institutions*, 40 TULSA L. REV. 227, 228 (2004) (observing that *Locke* "may have signaled that states will have broad discretion in all their funding programs to discriminate against religious educational choices").

The Court's recent trilogy of cases—*Trinity Lutheran v. Comer*, *Espinoza v. Montana Department of Revenue*, and *Carson v. Makin*—transformed that understanding. In *Trinity Lutheran*, the Court confronted Missouri's exclusion of churches from a neutral grant program for playground resurfacing.[21] The Court held that "denying a generally available benefit solely on account of religious identity impose[d] a penalty on the free exercise of religion."[22] To preserve *Locke*, the majority introduced a distinction between status-based discrimination (prohibited) and use-based restrictions (potentially permissible).[23] *Locke*, the Court explained, involved a particular course of study directed to the training of clergy—a circumstance that justified exclusion from a neutral and generally available public program.[24] By contrast, in *Trinity Lutheran*, the church and its preschool sought equal access to a public benefit program designed to serve secular ends, and the State's exclusion impermissibly rested solely on the applicant's religious identity rather than on the nature of the activity funded.[25]

The status-use distinction, while useful to distinguish *Locke v. Davey*, proved unstable. In his *Trinity Lutheran* concurrence, Justice Gorsuch highlighted this instability and questioned whether it could be meaningfully applied. In so doing, he observed that often the very same religious exclusion could be described as both relating to status or relating to use—an ambiguity that made it unclear whether the distinction was conceptually coherent at all.[26] His skepticism exposed the fragility of *Trinity Lutheran*'s attempt to preserve *Locke* while embracing a principle of formal nondiscrimination.

The Court's next foray into religious exclusions in government programs came only three years later in *Espinoza v. Montana Department*

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21 *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 453–54 (2017).

22 *Id.* at 458.

23 *Id.* at 464.

24 *Id.* at 465.

25 *See id.* at 463 ("The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant.").

26 *Id.* at 469 (Gorsuch, J., concurring in part) ("Respectfully, I harbor doubts about the stability of such a line. Does a religious man say grace before dinner? Or does a man begin his meal in a religious manner? Is it a religious group that built the playground? Or did a group build the playground so it might be used to advance a religious mission? The distinction blurs in much the same way the line between acts and omissions can blur when stared at too long, leaving us to ask (for example) whether the man who drowns by awaiting the incoming tide does so by act (coming upon the sea) or omission (allowing the sea to come upon him). Often enough the same facts can be described both ways." (citation omitted) (citing Cruzan *ex rel.* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 296 (1990) (Scalia, J., concurring))).

of Revenue.[27] The decision reaffirmed *Trinity Lutheran*'s nondiscrimination rule but did so while deftly avoiding the conceptual difficulties embedded in *Trinity Lutheran*'s status-use distinction. Once again, the Court struck down a categorical exclusion of "sectarian schools,"[28] describing it as status discrimination: "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."[29] Yet the Montana provision, which disqualified schools "controlled in whole or in part by any church, sect, or denomination,"[30] made the distinction between status and use difficult to sustain. A school's religious identity could not be separated from the ways it carried out its mission; to exclude a school because it was religious was, in substance, to exclude it because of how it used funds. Rather than confront that tension directly, the Court characterized the discrimination as status-based, reaffirming *Trinity Lutheran*'s framework while avoiding the question whether the line between status and use could coherently be maintained.[31]

By the time the Court reached *Carson v. Makin*, the status-use distinction had lost its doctrinal force. Maine's tuition-assistance program allowed parents in towns without public secondary schools to direct state funds to private schools but barred "sectarian" schools—those that, according to the Maine Department of Education, are "associated with a particular faith or belief system and which, in addition to teaching academic subjects, promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith."[32] The State defended the exclusion as use-based, not status-based, arguing that funds could not support religious instruction.[33]

The Court rejected the premise outright: "[T]he prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination."[34] Discarding the status-use distinction, however, required the Court to explain how its decision was consistent with *Locke v. Davey*. In doing so, *Carson* redefined *Locke* rather than overruling it, holding that it "cannot be read beyond its narrow focus on vocational religious degrees"[35]—that is, funding that touched upon the "'historic and substantial state interest' against

27 Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020).

28 *Id.* at 2252.

29 *Id.* at 2261.

30 *Id.* at 2252 (quoting MONT. CONST. art. X, § 6(1)).

31 *See id.* at 2256 (characterizing the Montana provision as discrimination "based on religious status").

32 Carson v. Makin, 142 S. Ct. 1987, 1994 (2022) (quoting Carson v. Makin, 979 F.3d 21, 38 (1st Cir. 2020), *rev'd*, 142 S. Ct. 1987 (2022)).

33 *Id.* at 2001.

34 *Id.*

35 *Id.* at 2002.

using 'taxpayer funds to support church leaders'"[36]—to "generally authorize the State to exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits."[37] The broad discretionary space *Locke* once appeared to recognize had narrowed to a single, fact-bound exception.

What began as a separationist project grounded in secularism thus gave way to a formal rule of neutrality. The Establishment Clause no longer operates as an independent bar to religious participation in generally available public programs; its limiting force has been absorbed into the Free Exercise Clause's nondiscrimination principle. The resulting framework defines equal eligibility as the constitutional baseline: When government opens a program to private actors, it must include religious participants on equal terms. Yet *Carson* leaves unresolved the reach of this principle, especially given ongoing ambiguities over what religious neutrality demands. These questions now occupy the lower courts, where *Carson*'s simple rule continues to reveal its deeper complexities.

II. INTERPRETING THE *CARSON* DOCTRINE

To figure out what the *Carson* rule means requires first figuring out how *Carson* fits into prevailing free exercise doctrine. As it turns out, that question is harder than it looks. The dominant framework for free exercise claims remains *Employment Division v. Smith*, which held that neutral and generally applicable laws do not violate the First Amendment—even when they incidentally burden religious practice.[38] And yet, *Carson* never mentions *Smith*. Neither does *Espinoza*. *Trinity Lutheran* includes a couple of passing references.[39] This omission has led advocates and, apparently, some courts to argue that *Carson* reflects a distinct—and more expansive—rule under the Free Exercise Clause, one that applies in the context of public-benefits programs, independently of *Smith*.[40]

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36 *Id.* (quoting Locke v. Davey, 540 U.S. 712, 722, 725 (2004)).

37 *Id.*

38 Emp. Div. v. Smith, 494 U.S. 872, 879 (1990).

39 *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 460–61, 461 n.2 (2017).

40 *See, e.g.*, Appellants' Opening Brief at 22, St. Mary Cath. Par. in Littleton v. Roy, 154 F.4th 752 (10th Cir. 2025) (No. 24-1267) ("More importantly, of the recent trilogy of Supreme Court cases arising in a factual context analogous to this one, neither *Carson* nor *Espinoza* invokes *Smith*'s rule, and *Trinity Lutheran* cites *Smith* only to distinguish it—relying instead on *Sherbert* when analyzing the plaintiff's claim."); Darren Patterson Christian Acad. v. Roy, 699 F. Supp. 3d 1163, 1185 (D. Colo. 2023) ("In the specific context of excluding religious schools from participation in educational benefits programs, the Supreme Court has thrice held that a state may not exclude religious observers from receiving otherwise available educational funding because of a school's religious status or practice."); *cf. St.*

The argument draws on an older doctrinal line dating back to *Sherbert v. Verner*, which invalidated South Carolina's denial of unemployment benefits to a Seventh-day Adventist who refused to work on Saturday.[41] The Court made clear that "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."[42] In other words—or so the argument goes—the Free Exercise Clause can be violated not only by laws that prohibit religious conduct but also by laws that burden religious exercise through the conditioning of public benefits.[43]

Advocates of this reading find support in how *Carson* frames the constitutional problem. The Court declared that "a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits," citing *Sherbert* as controlling precedent.[44] Likewise, the Court in *Mahmoud v. Taylor* rejected the idea that families dissatisfied with mandatory public school instruction could simply opt for private education: "Public education is a public benefit, and the government cannot 'condition' its 'availability' on parents' willingness to accept a burden on their religious exercise."[45] In both cases, the Court emphasized the problem of burdening religious exercise through conditions on access to otherwise generally available public programs. And in both cases, the Court identified that problem without asking whether the challenged policy was neutral and generally applicable—raising the possibility that *Smith* has been quietly set aside in this particular doctrinal context. On this account, the Supreme Court's precedents are best understood as developing an

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Mary Cath. Par., 154 F.4th at 763 ("The Supreme Court has held that when a state offers subsidies for private education, it cannot categorically withhold those funds from religious institutions. This principle comes from three cases: *Carson v. Makin*, *Espinoza v. Montana Dep't of Revenue*, and *Trinity Lutheran Church of Columbia, Inc. v. Comer*. These cases form an independent line of precedent in the Supreme Court's Free Exercise case law, and the Parish Preschools allege that they control the outcome here." (citations omitted)).

41 *See* Sherbert v. Verner, 374 U.S. 398, 399–401, 409 (1963), *abrogated in part by*, *Smith*, 494 U.S. 872.

42 *Id.* at 404.

43 Petition for a Writ of Certiorari at 26, St. Mary Cath. Par. v. Roy, No. 25-581, 2026 WL 1052111 (U.S. Nov. 13, 2025) ("In reaching these conclusions, this Court has eschewed *Smith*, relying instead on the separate public-benefits line of free exercise caselaw originating with *Sherbert* and passing through *Thomas*, *Trinity Lutheran*, *Espinoza*, and *Carson*. In short, when it comes to free exercise cases concerning access to public benefits, *Carson* is the governing standard, and *Smith* is at best a backup rule."); *see also* Brief for Petitioners at 25–35, *St. Mary*, No. 25-581 (U.S. June 25, 2026); Brief for the United States as Amicus Curiae Supporting Petitioners at 25–37, *St. Mary*, No. 25-581 (U.S. July 2, 2026).

44 Carson v. Makin, 142 S. Ct. 1987, 1996 (2022) (citing *Sherbert*, 374 U.S. at 404).

45 Mahmoud v. Taylor, 145 S. Ct. 2332, 2359 (2025) (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 462 (2017)).

independent line of doctrine that applies *Sherbert's* burden standard—and not *Smith*'s neutral and generally applicable standard—when it comes to public benefit programs.[46] Accordingly, where a public benefit program incorporates restrictions that burden religious exercise—even where such restrictions are neutral and generally applicable—those restrictions violate the Free Exercise Clause.

It remains possible, of course, that the Supreme Court may ultimately embrace such an approach. Indeed, the Court has now granted certiorari in *St. Mary Catholic Parish v. Roy* to decide, among other things, whether *Carson* displaces *Smith* in public-benefits cases.[47] But embracing that approach would present a puzzle. The Court has not yet provided us with a principled doctrinal rationale to adopt a free exercise test unique to public benefit programs—one that applies the *Sherbert* rule only in that limited context.[48] To the contrary, *Smith* expressly acknowledged *Sherbert*'s continued vitality but recast it as a case about individualized exemptions—not as a carve-out for public benefits.[49] While this reinterpretation of *Sherbert* has been oft criticized,[50] the point of *Smith* was to streamline free exercise doctrine by narrowing strict scrutiny to those situations where the State discriminates through nonneutral or non-generally applicable laws. That rationale would seem to extend equally to public benefit programs.

For that reason, it makes more sense, at least until the Court instructs otherwise, to understand *Carson* as applying—not replacing—

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46 *See* Petition for a Writ of Certiorari, *supra* note 43, at 24–25 ("This Court has long held that '[a] person may not be compelled to choose between [religious] exercise' and 'participation in an otherwise available public program,' regardless of whether the exclusion is explicit or 'neutral on its face.'" (alterations in original) (quoting Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 716–17 (1981))).

47 St. Mary Cath. Par. v. Roy, No. 25-581, 2026 WL 1052111 (U.S. Apr. 20, 2026) (mem.) (granting certiorari limited to the first two questions presented).

48 *But see* William J. Haun, *Keeping Our Balance: Why the Free Exercise Clause Needs Text, History, and Tradition*, 46 HARV. J.L. & PUB. POL'Y 419, 450–52 (2023) (arguing that text, history, and tradition could provide a superior and context-sensitive doctrinal approach to *Smith*, and applying it to *Espinoza* and *Carson*, "neither [of which] cites *Smith*," *id.* at 451). To be sure, the United States has urged a version of this reading in *St. Mary*, but its account does not supply the missing rationale. It argues that *Smith* distinguished *Sherbert* on the ground that the conduct there "was not prohibited by law," so that *Smith* governs only "across-the-board criminal prohibition[s]." Brief for the United States as Amicus Curiae Supporting Petitioners at 27–29, St. Mary Cath. Par. v. Roy, No. 25-581 (U.S. July 2, 2026). That distinction turns on whether the burdened conduct is criminal, not on whether a public benefit is at stake. It does not explain why a condition on a benefit should receive stricter review than a direct civil regulation of the same conduct, and the brief itself acknowledges that the Court has applied *Smith*'s framework outside the criminal context. *Id.* at 29 n.4.

49 *See* Emp. Div. v. Smith, 494 U.S. 872, 884 (1990) (construing *Sherbert* as applying where "the State has in place a system of individual exemptions").

50 *See, e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1891–94 (2021) (Alito, J., concurring in judgment).

the *Smith* framework. While the Court in *Carson* did not mention *Smith*, the decision is built more directly on *Trinity Lutheran*—a case which did deploy cases like *Smith* and then later *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* to identify the origin of the Free Exercise Clause's prohibition against laws that target or discriminate against religion.[51] And, like *Trinity Lutheran* and *Espinoza* before it, *Carson* evaluated whether the State had disqualified religious schools from a public benefit program based on religious identity or practice. It framed the constitutional defect as a lack of neutrality: "A State need not subsidize private education," the Court wrote.[52] "[B]ut once a State decides to do so, it cannot disqualify some private schools solely because they are religious."[53] That principle reflects the same logic applied in *Smith* and later elaborated in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*: When a law targets religion—whether overtly or functionally—it is neither neutral nor generally applicable and must satisfy strict scrutiny.[54] Seen through this lens, the *Carson* line of cases represents a specific application of *Smith*, not a doctrinal departure.

Consider how *Trinity Lutheran* illustrates the point. Missouri had excluded a church from a playground-resurfacing grant program that was otherwise open to all nonprofits.[55] According to the Court, denying a benefit "simply because of what it is—a church"—imposed "a penalty on the free exercise of religion."[56] That exclusion, the Court explained, was "not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant."[57] Such discrimination could be justified only by "a state interest 'of the highest order,'" which Missouri failed to identify.[58] And then, explicitly invoking *Smith*, the Court explained that a rule that imposes "special disabilities on the basis of religious views or religious status" cannot be considered neutral or generally applicable.[59]

Carson carries that same logic forward. Where *Trinity Lutheran* and *Espinoza* addressed status-based exclusions, *Carson* confronted a restriction on use—Maine allowed participation only for schools that

51 *Trinity Lutheran*, 582 U.S. at 460–62 (first citing *Smith*, 494 U.S. 872; and then citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)).

52 Carson v. Makin, 142 S. Ct. 1987, 1997 (2022) (quoting Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2261 (2020)).

53 *Id.* (quoting *Espinoza*, 140 S. Ct. at 2261).

54 *See Lukumi*, 508 U.S. at 546.

55 *See Trinity Lutheran*, 582 U.S. at 453–54.

56 *Id.* at 464, 466.

57 *Id.* at 463.

58 *Id.* at 466 (quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978) (plurality opinion)).

59 *Id.* at 460–61 (quoting Emp. Div. v. Smith, 494 U.S. 872, 877 (1990)).

refrained from religious instruction.[60] In doctrinal terms, that restriction was neither neutral nor generally applicable: It singled out religious exercise for exclusion and applied only to those who engaged in religious activity.[61] Under *Smith*'s framework, such a condition triggers strict scrutiny and, as *Carson* held, cannot stand.[62]

That some recent Supreme Court cases have characterized the doctrine using *Sherbert*'s language of conditions is probably best understood not as an exception to the *Smith* regime but as capturing an alternative way to understand the *Carson* rule—through the doctrine of unconstitutional conditions.

The doctrine of unconstitutional conditions, as numerous scholars have noted, may best be described as a "hopeless mess."[63] But at its core, the Court has explained the underlying logic of the doctrine as follows: Government

> may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . . For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly."[64]

Of course, as the Court subsequently made clear, that does not mean that all conditions on government funding are unconstitutional. Courts and commentators have long struggled to identify the principle that distinguishes permissible funding conditions from impermissible ones. Some have emphasized the coercive impact of a condition;[65]

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60 Carson v. Makin, 142 S. Ct. 1987, 1994 (2022).

61 *See id.* at 1997.

62 *Id.*

63 Michael A. Helfand, *There Are No Unconstitutional Conditions on Free Exercise*, 98 NOTRE DAME L. REV. REFLECTION (SPECIAL ISSUE) S50, S55 (2023); *see also* Randy J. Kozel, *Leverage*, 62 B.C. L. REV. 109, 111 (2021) ("Even among the darkest corridors of constitutional law, the doctrine . . . of unconstitutional conditions is famously opaque."); Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283, 1316 (2013) ("[I]f a doctrine is a set of rules or tests, then there is no such doctrine—at least none with more than trivial content."); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1416 (1989) ("As applied, however, the doctrine of unconstitutional conditions is riven with inconsistencies."); Louis W. Fisher, *Contracting Around the Constitution: An Anticommodificationist Perspective on Unconstitutional Conditions*, 21 U. PA. J. CONST. L. 1167, 1168 (2019) ("The doctrine of unconstitutional conditions is notoriously complex, convoluted, and inconsistent.").

64 Perry v. Sindermann, 408 U.S. 593, 597 (1972) (alteration in original) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

65 *See* Berman, *supra* note 63, at 1289 (describing coercion as the "single theme" that has guided—and should guide—the Court's analysis of conditions); *Speiser*, 357 U.S. at 519 (noting that "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech").

others have focused on germaneness or the relationship between the condition and the purposes of the underlying program.[66] Whatever the precise formulation, however, the doctrine reflects a common concern that government not use the leverage of public funding to accomplish indirectly what constitutional limitations prevent it from accomplishing directly.[67]

Viewed through that lens, *Carson* can be understood as applying the doctrine of unconstitutional conditions in the free exercise context. The relevant question is whether the government has used the leverage of public funding to impose a condition that, if enacted as a direct regulatory requirement, would violate the Free Exercise Clause.

This alternative formulation operates in the typical case where the government engages in status or use discrimination. In such cases, we might also say that the government is imposing a condition on receipt of government funding—that an entity be nonreligious. And that condition is nonneutral and therefore is an unconstitutional condition because it uses the leverage of public funding to induce behavior that it could not constitutionally compel through direct regulation.

Indeed, this may be the best way to understand the Court's assertion in *Carson* that "we have repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits"[68]—a sweeping proposition for which the Court cites *Sherbert*, providing advocates with reason to argue that the Court has embraced a public-benefits exception to the *Smith* rule.[69] Viewed through the prism of unconstitutional conditions, however, *Carson* need not be understood to create a freestanding public-benefits exception. Rather, it is simply applying *Smith*'s neutrality principle in the context of government funding. The constitutional defect is not the denial of a public benefit as such, but the government's decision to unconstitutionally condition access to that benefit on the recipient's agreement to refrain from otherwise protected religious exercise. That is simply another form of nonneutral treatment of religion.

Recognizing that violations of the *Carson* rule can be reformulated as unconstitutional conditions helps explain both the decision's reach and its coherence. *Carson* is not merely a rule against nonneutral

66 *See* Sullivan, *supra* note 63, at 1456–76; Michael P. Moreland, *Germaneness and Religious Liberty*, 98 NOTRE DAME L. REV. REFLECTION (SPECIAL ISSUE) S35 (2023); Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 214–15 (2013) (arguing that the "relevant distinction" when determining whether a condition is unconstitutional is the distinction "between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself").

67 *See* Helfand, *supra* note 63, at S54; *see also* Kozel, *supra* note 63.

68 Carson v. Makin, 142 S. Ct. 1987, 1996 (2022).

69 Appellants' Opening Brief, *supra* note 40, at 22.

exclusions of religion; it reflects the broader principle that government may not use the leverage of public benefits to require participants to sacrifice otherwise protected religious exercise. In the ordinary status- or use-discrimination case, the constitutional defect lies in conditioning access to a public program on conduct that violates the Free Exercise Clause's neutrality requirement. But the same logic extends to cases in which the underlying constitutional violation rests on other free exercise principles, such as general applicability or church autonomy. In those instances, the constitutional concern is not simply that the government has denied a public benefit, but that it has conditioned participation in a public program on conduct that the First Amendment protects from governmental interference. Thus, funding rules that require religious institutions to relinquish control over internal governance can be understood as presenting the same basic unconstitutional-conditions problem in the church-autonomy context.

This Essay returns to that point later.[70] For now, though, note how this reading also explains the Court's assertion in *Mahmoud v. Taylor* that "[p]ublic education is a public benefit, and the government cannot 'condition' its 'availability' on parents' willingness to accept a burden on their religious exercise."[71] Standing alone, the Court's reference to a "burden on . . . religious exercise" may suggest that *Mahmoud* embraces a public-benefits exception that sweeps more broadly than *Smith*. And, in time, the Court may adopt such an approach. But as it stands, viewed through the lens of unconstitutional conditions, the Court's reasoning is for now best read as more modest. *Mahmoud* stands for the proposition that parents have a constitutional right to "direct 'the religious upbringing' of their children"[72] and, in turn, the government violates that right when it "'substantially interfer[es] with the religious development' of a child."[73] The constitutional violation therefore lies not in the denial of a public benefit as such, but in conditioning access to that benefit on parents' willingness to surrender a constitutionally protected right. To be sure, the right recognized in *Mahmoud* may extend beyond the protections ordinarily associated with *Smith*'s neutrality rule. But that broader protection stems from the scope of the underlying constitutional right, not from any freestanding public-benefits exception.

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70 *See infra* Section II.D.

71 Mahmoud v. Taylor, 145 S. Ct. 2332, 2359 (2025) (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 462 (2017)).

72 *Id.* at 2350 (quoting Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2261 (2020)).

73 *Id.* at 2353 (alteration in original) (quoting Wisconsin v. Yoder, 406 U.S. 205, 218 (1972)).

Mahmoud thus illustrates the broader point. Once *Carson* is understood through the lens of unconstitutional conditions, the relevant inquiry is not limited to whether the government has engaged in status or use discrimination. Rather, the same principle may apply whenever access to a public benefit is conditioned on the surrender of a right protected by the Free Exercise Clause. In this way, *Carson* channels *Smith*'s neutrality principle through the doctrine of unconstitutional conditions in a way that both clarifies and complicates the free exercise landscape—clarifies, by recognizing that unconstitutional conditions may be predicated on a variety of free exercise violations, not merely nonneutrality; complicates, by expanding the doctrinal terrain on which such conditions may arise.

Finally, it is important to note that a number of recent cases have addressed a different question: not how to apply *Carson*, but whether *Carson* applies at all. These cases involve disputes over the status of programs that are arguably part of the public education system rather than vehicles for private participation.[74] They raise important questions about the boundary between *Carson*'s nondiscrimination rule and the constitutional limits on state-sponsored religious instruction—questions that fall outside the scope of this discussion. My focus here is on how courts have implemented *Carson* once its rule is assumed to apply.

As the next Sections show, lower courts have begun to work through these questions in a growing range of contexts. Taken together, these cases illustrate the multiple forms that *Carson*'s logic can take in practice—sometimes framed as status discrimination, sometimes as use discrimination, sometimes as intrusions on church autonomy, at times as expressions of targeting, and at times as tests of how far *Locke v. Davey* continues to apply. Examining these decisions reveals how courts are translating *Carson*'s abstract rule into operational doctrine—and how, in doing so, they are shaping the emerging contours of free exercise law in the post-*Carson* era.

A. Status Discrimination

The most direct application of *Carson*'s rule concerns what the Court has long called status-based discrimination—the exclusion of religious individuals or institutions "solely because of their religious character."[75] As the first of the modern trilogy, *Trinity Lutheran v. Comer* identified this kind of exclusion as a straightforward violation of the

74 *See, e.g.*, Drummond *ex rel.* State v. Okla. Statewide Virtual Charter Sch. Bd., 558 P.3d 1 (Okla. 2024), *aff'd by an equally divided court sub nom.*, Okla. Statewide Charter Sch. Bd. v. Drummond *ex rel.* Okla., 145 S. Ct. 1381 (2025) (mem.).

75 *Trinity Lutheran*, 582 U.S. at 462.

Free Exercise Clause.[76] Missouri had barred churches from a playground-resurfacing grant program, even though the program was otherwise open to all nonprofit organizations.[77] Chief Justice Roberts, writing for the Court, explained that denying a benefit "simply because of what it is—a church"—imposed a "penalty on the free exercise of religion."[78] That holding captured the core of the *Carson* doctrine: When the government opens a public program to private participation, it cannot condition eligibility on a recipient's religious character or identity.

After *Trinity Lutheran*, some states sought to preserve their longstanding religious-exclusion rules by reframing them. Rather than excluding religion *as such*, they claimed to be defining the nature of the benefit in secular terms.[79] By characterizing the benefit as, for example, "public education," and asserting that a public education is, by definition, "nonsectarian," states could argue that religious institutions were not being excluded because of their faith but because they did not fit the state's definition of the program. Religious providers thus could not claim discrimination when they failed to qualify—they were, by definition, ineligible. This move transformed what looked like status discrimination into a debate over the scope of the underlying benefit itself.

That was precisely the strategy Maine pursued in *Carson v. Makin*. The State argued that its tuition-assistance program was designed to fund a public education and that schools offering religious instruction necessarily fell outside that category.[80] The First Circuit accepted that reasoning, holding that the state's "nonsectarian" requirement was not religious discrimination but merely an effort to ensure that publicly funded education met Maine's conception of civic education.[81] The Supreme Court rejected that logic in emphatic terms. "[T]here is nothing neutral about Maine's program," Chief Justice Roberts wrote, because it "'effectively penalizes the free exercise' of religion."[82] The Court explained that a "State need not subsidize private education . . .

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76 *See id.*

77 *See id.* at 453–54.

78 *Id.* at 464, 466.

79 *See, e.g.*, Carson v. Makin, 142 S. Ct. 1987, 2000 (2022) (rejecting Maine's claim that its tuition-assistance program funded only "public education"); Loffman v. Cal. Dep't of Educ., No. 23-cv-01832, 2023 WL 11963955, at *25 (C.D. Cal. Aug. 9, 2023) (upholding California's "nonsectarian" rule for "public education" contracts), *aff'd in part, vacated in part, rev'd in part*, 119 F.4th 1147 (9th Cir. 2024); RELIGIOUS EQUAL., *supra* note 7 (identifying numerous state statutes that continue to define public benefits in explicitly nonsectarian terms).

80 *See Carson*, 142 S. Ct. at 1998.

81 Carson v. Makin, 979 F.3d 21, 37, 36–40 (1st Cir. 2020), *rev'd*, 142 S. Ct. 1987 (2022).

82 *Carson*, 142 S. Ct. at 1997–98 (quoting *Trinity Lutheran*, 582 U.S. at 459).

[b]ut once a State decides to do so, it cannot disqualify some private schools solely because they are religious."[83] By characterizing religious instruction as a disqualifying "use," Maine had simply repackaged its exclusion of religious status in functional terms. The Free Exercise Clause, the Court held, forbids such definitional maneuvers: "The State pays tuition for certain students at private schools—so long as the schools are not religious. That is discrimination against religion."[84]

Despite the clarity of that holding, the impulse to redefine the benefit persists. The district court's decision in *Loffman v. California Department of Education* illustrates the point.[85] California's "Nonpublic School" (NPS) program allows private schools to contract with public districts to educate students with disabilities who require specialized instruction.[86] The State, however, limits NPS certification to "nonsectarian" schools.[87] When parents of disabled students challenged that exclusion under *Carson*, the court upheld the rule on the ground that the NPS system's "purpose . . . is to deliver a public education—more specifically, a FAPE [(Free Appropriate Public Education)]—to certain students."[88] Because a "public education" was necessarily secular, the court reasoned, religious schools were not being excluded because of their faith but because they could not provide the kind of education the State had chosen to fund.[89] In the court's view, *Carson* was inapposite because Maine's program funded "tuition assistance" rather than a "public education."[90]

The Ninth Circuit reversed. Citing *Carson* directly, the court emphasized that "the definition of a particular program can always be manipulated to subsume the challenged condition," and that allowing a State to "recast a condition on funding" in this way would "be to see the 'First Amendment . . . reduced to a simple semantic exercise.'"[91] The court thus rejected California's argument that it could avoid free exercise scrutiny by labeling the program "public education." Instead, the court held that "the nonsectarian requirement is not neutral to

83 *Id.* at 1997 (alteration in original) (quoting Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2261 (2020)).

84 *Id.* at 1998.

85 Loffman v. Cal. Dep't of Educ., No. 23-cv-01832, 2023 WL 11963955 (C.D. Cal. Aug. 9, 2023), *aff'd in part, vacated in part, rev'd in part*, 119 F.4th 1147 (9th Cir. 2024).

86 *See id.* at *5.

87 *See id.*

88 *Id.* at *25 (emphasis omitted).

89 *See id.*

90 *Id.*

91 Loffman v. Cal. Dep't of Educ., 119 F.4th 1147, 1169 (9th Cir. 2024) (omission in original) (quoting Carson v. Makin, 142 S. Ct. 1987, 1999 (2022)).

religion," and therefore triggers strict scrutiny under the First Amendment's neutrality principle.[92]

Like Maine, California defined its benefit in secular terms and then disqualified religious providers on the ground that they failed to meet that definition. But *Carson* rejected this sort of semantic strategy where the state attempts to narrowly define its benefits and thereby exclude religious options: "'[T]he definition of a particular program can always be manipulated to subsume the challenged condition,' and to allow States to 'recast a condition on funding' in this manner would be to see 'the First Amendment . . . reduced to a simple semantic exercise.'"[93] Once a program enlists private actors to advance a public purpose, the relevant question is not what the State chooses to call the benefit but whether it distributes that benefit on equal terms to religious and nonreligious participants alike.[94] To permit otherwise would be to convert *Carson*'s rule into a drafting game—a State could insulate any religious exclusion simply by redefining the scope of the program. At bottom, as the Court in *Carson* explained, applying constitutional rules ultimately hinges on "the substance of free exercise protections, not on the presence or absence of magic words."[95]

The persistence of this definitional strategy underscores how unsettled the implementation of *Carson* remains. Few states have amended their statutes to conform to the free exercise requirements articulated in *Trinity Lutheran*, *Espinoza*, and *Carson*; many still contain facially nonsectarian clauses that exclude religion under the guise of defining secular benefits.[96] As litigation under *Carson* expands, courts will increasingly face versions of this same question: When does the State's definition of a benefit cross the line from legitimate specification to unconstitutional exclusion? The answer will determine whether *Carson*'s promise of equal participation in public programs becomes a stable constitutional principle or remains, as in *Loffman*, an invitation for continued evasion.

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92 *Id.* at 1153 ("Because the nonsectarian requirement is not neutral to religion, strict scrutiny applies.").

93 *Carson*, 142 S. Ct. at 1999 (omission in original) (quoting Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 215 (2013)); *see also Loffman*, 119 F.4th at 1169 (quoting *Carson*, 142 S. Ct. at 1999).

94 *See Carson*, 142 S. Ct. at 2000 (noting that the Free Exercise Clause is violated "whether the prohibited discrimination is in an express provision . . . or in a party's reconceptualization of the public benefit").

95 *Id.*

96 *See* RELIGIOUS EQUAL., *supra* note 7.

B. Use Discrimination

The collapse of the status-use distinction represents one of *Carson v. Makin*'s most consequential doctrinal shifts. In rejecting the idea that the Free Exercise Clause tolerates discrimination based on religious "use," the Court eliminated the principal justification states had relied upon to exclude religious entities from generally available public programs.[97] *Carson* thus closed the definitional loophole that had long allowed governments to recast discrimination as neutral program design. Where earlier decisions permitted states to draw a formal line between religious status and religious use, *Carson* made clear that both forms of exclusion impose an unconstitutional condition: Participation in a public program is conditioned on the surrender of religious exercise.

But the doctrinal clarity of *Carson* has produced an immediate practical difficulty. By collapsing the distinction, the Court brought the Free Exercise Clause into direct conflict with a dense web of federal and state regulations that still rest on *Lemon v. Kurtzman*'s assumption that public funds may not be used for "pervasively sectarian" purposes.[98] Those regulations, once intended to prevent Establishment Clause violations, now serve as barriers to *Carson*'s implementation. They persist as a form of administrative inertia—simultaneously relied upon by state and local governments to justify continuing religious exclusions and left unrevised by federal agencies whose own rules perpetuate the same outdated premises.

This mutually reinforcing dynamic is most visible in *Board of Education of the City School District of New York v. E.L. ex rel. A.L.*[99] The case involved New York City's refusal, consistent with its general policy, to reimburse the portion of a disabled student's private-school tuition attributable to religious instruction.[100] The city took that position even though the religious instruction at issue was, as a state review officer found and the district court confirmed, "a core part of E.L.'s [free appropriate public education (FAPE)]"—the education guaranteed by the Individuals with Disabilities Education Act (IDEA) and that the city

97 *See Carson*, 142 S. Ct. at 2002.

98 Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 397 (1985), *overruled in part by*, Agostini v. Felton, 521 U.S. 203 (1997); *see* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971), *abrogation recognized by*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022); *Federal Regulations & Statutes*, RELIGIOUS EQUAL., https://religiousequality.net/federal-regulations-statutes/ [https://perma.cc/PX3P-J85P] (last visited Jan. 30, 2026) (collecting federal regulations and statutes that continue to exclude religious organizations and activities from public programs).

99 Bd. of Educ. of the City Sch. Dist. of N.Y.C. v. E.L. *ex rel.* A.L., No. 24-cv-1176, 2025 WL 2781305 (S.D.N.Y. Sep. 30, 2025).

100 *See id.* at *1–2.

had failed to provide.[101] The city argued that federal law prohibited such reimbursements under a Department of Education regulation forbidding the use of public funds for "[r]eligious worship, instruction, or proselytization."[102] It maintained that this rule barred reimbursement for any portion of tuition corresponding to religious instruction and therefore transformed its exclusionary policy from an act of discrimination into compliance with federal law.[103]

The city's argument in *E.L.* read the regulation in a way that placed it in direct conflict with *Carson v. Makin*. By construing 34 C.F.R. § 76.532 to categorically forbid the use of federal funds for religious instruction—even when such instruction was part of an otherwise permissible educational placement[104]—the city effectively treated the regulation as authorizing the very form of religious discrimination that *Carson* condemns. One way to resolve that tension is interpretive: to construe the regulation not as an independent restriction but as coextensive with Establishment Clause limits. There are sound reasons for that approach. As the defendants observed, such a reading accords with *Zobrest v. Catalina Foothills School District*, where the Court noted that Section 76.532 "merely implements . . . (and thus is coextensive with) the requirements of the Establishment Clause."[105] And read in that way, Section 76.532 would not require religious discrimination; it would simply mirror the constitutional baseline, which has shifted in recent decades.

The alternative approach is to acknowledge the conflict and treat the regulation as unconstitutional. On that view, Section 76.532's categorical exclusion of "[r]eligious worship, instruction, or

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101 *Id.* at *4; *see also id.* at *2 (describing the state review officer's determination that the skills taught in Judaic Studies transferred to E.L.'s secular subjects); *id.* at *1 (noting the hearing officer's determination that the city failed to offer E.L. a FAPE).

102 Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment at 1, 1–2, *E.L.*, 2025 WL 2781305 (No. 24-cv-1176) ("[T]he Code of Federal Regulations ('CFR') explicitly bars taxpayer funding of '[r]eligious worship, instruction, or proselytization.' That regulation alone ends the inquiry: DOE is prohibited from paying for the four periods per week of 'religious . . . instruction.'" (omission in original) (citation omitted) (quoting 34 C.F.R. § 76.532(a)(1)) (quote corrected)).

103 *Id.* at 8 ("This Court should apply the plain meaning of the governing federal regulation and hold that it bars tuition reimbursement for religious instruction in this case.").

104 *See* Memorandum of Law in Opposition to DOE's Motion for Summary Judgment, and in Support of Defendants' Cross-Motion for Summary Judgment at 20–21, *E.L.*, 2025 WL 2781305 (No. 24-cv-1176) [hereinafter Memorandum of Law in Opposition].

105 *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 6 n.7 (1993); Memorandum of Law in Opposition, *supra* note 104, at 20; *see also* Russman *ex rel.* Russman v. Sobol, 85 F.3d 1050, 1056 (2d Cir. 1996) ("This regulation [Section 76.532] is coextensive with the Establishment Clause and does not create any separate regulatory limitation on IDEA."), *vacated on other grounds sub nom.*, Bd. of Educ. of the Enlarged City Sch. Dist. of Watervliet v. Russman *ex rel.* Russman, 521 U.S. 1114 (1997) (mem.).

proselytization" cannot survive *Carson* because it singles out religious activity for disfavored treatment even when the program's secular objectives—such as providing a free appropriate public education under IDEA—would be fully served. Excluding reimbursement for religious instruction "because of its religious character" is a form of use-based discrimination subject to strict scrutiny and almost certainly invalid.[106]

The district court ultimately adopted a version of the first approach, construing the regulation in harmony with the Free Exercise Clause rather than striking it down. It emphasized that "a plain language reading of the federal regulation and the State Constitution would violate established Free Exercise principles."[107] While the court stopped short of invalidating the regulation, it cautioned that "[r]eading the federal regulation and the State Constitution to prohibit all funding for all religious instruction would render them contrary to *Espinoza* and *Carson*."[108] In short, *E.L.* chose reconciliation over invalidation—but made clear that the alternative remains on firm constitutional ground.

Board of Education v. E.L. thus exposes the new fault line of free exercise litigation. The constitutional problem now lies not only in state statutes but also in the federal regulatory infrastructure that perpetuates use-based exclusions. These layers of regulation and statutory law operate in tandem: State agencies rely on federal regulations to justify continuing exclusions; federal agencies, in turn, retain those rules on the outdated assumption that the First Amendment requires them. Each layer props up the other, producing a mutually reinforcing cycle that sustains an unconstitutional status quo. *E.L.* illustrates this dynamic and points to two ways of breaking the cycle. One option is interpretive: to construe federal rules in light of *Carson* so that they no longer authorize discrimination. The other is structural: to repeal or revise the underlying regulations entirely.

The second option now finds support in recent executive action. On April 9, 2025, the White House issued a Presidential Memorandum titled *Directing the Repeal of Unlawful Regulations*, ordering agencies to identify and repeal rules inconsistent with Supreme Court precedent and specifically identifying *Carson v. Makin* as a decision requiring agency review.[109] On August 25, 2026, the Department of Justice's Office of Legal Counsel (OLC) took a further step. In an opinion addressing statutory and regulatory conditions on programs

106 *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 466 (2017); Carson v. Makin, 142 S. Ct. 1987, 1996 (2022) ("[A] State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits.").

107 *E.L.*, 2025 WL 2781305, at *3.

108 *Id.*

109 Memorandum on Directing the Repeal of Unlawful Regulations, *supra* note 6.

administered by the Department of Health and Human Services, OLC concluded that those restrictions on religious uses of funds are neither required by the Establishment Clause nor permissible under the Free Exercise Clause.[110] Its reasoning extended beyond the programs under review: "Use-based religious restrictions on generally available federal funding programs are presumptively unconstitutional."[111] OLC further concluded that the statutory restrictions were severable from the underlying programs, providing a basis for executive nonenforcement without awaiting legislative repeal.[112] The opinion thus supplies a constitutional framework for dismantling the regulatory scaffolding that perpetuates use-based exclusions.

Yet recent developments demonstrate that federal executive action alone may not resolve the problem. Consider that on September 30, 2026, responding to the Ninth Circuit's decision in *Loffman*, California enacted Senate Bill 685, which removes the requirement that private schools in its special education placement system be nonsectarian while imposing express restrictions on religious instruction.[113] The legislation prohibits the use of public funds paid under placement contracts for religious instruction, bars participating schools from providing religious instruction to district-placed pupils, and requires schools seeking certification to attest, under penalty of perjury, that the educational services they provide to those pupils are "secular, neutral, and respectful regarding religion and religious views."[114] The statute presents that requirement as "[c]onsistent with" federal law,[115] and its bar on using public funds for religious instruction mirrors 34 C.F.R. § 76.532, the same regulation New York City invoked in *E.L.*[116] California thus opened the door to religious providers while conditioning their participation on the exclusion of religious exercise from the services they provide. On the understanding of *Carson* developed above, these provisions reproduce the constitutional defect of use-based discrimination.

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110 Constitutionality of Religious Restrictions on the Use of Federal Funds, 50 Op. O.L.C. (Aug. 25, 2026) (slip op. at 2, 39), https://www.justice.gov/olc/media/1459056/dl?inline [https://perma.cc/F793-JBJ9].

111 *Id.* at 1; *see also id.* at 26.

112 *Id.* at 38–39.

113 Act of Sep. 30, 2026, ch. 975, §§ 16, 17, 34, 2026 Cal. Stat. (amending CAL. EDUC. CODE §§ 56034, 56035, 56365).

114 *Id.* sec. 34, §§ 56365(e), (d)(2), (f); *see also id.* sec. 31, § 56359 (defining "religious instruction").

115 *Id.* sec. 34, § 56365(e) (first citing 20 U.S.C. § 1412(a)(10)(B); and then citing 34 C.F.R. § 300.146).

116 *Compare id.* sec. 34, § 56365(d)(2) (providing that public funds "shall not be used to pay for religious instruction at a nonpublic school or agency"), *with* 34 C.F.R. § 76.532(a)(1) (2026) (prohibiting the use of grant funds to pay for "[r]eligious worship, instruction, or proselytization").

Litigation like *Board of Education v. E.L.* will therefore remain necessary to enforce *Carson* against overlapping systems of state and federal law. Each case will require courts to determine whether a regulation or statute can be reconciled with the Free Exercise Clause or must be set aside. The result is a transitional period in which the constitutional rule and the regulatory landscape remain misaligned—a period in which enforcing *Carson* will continue to require courts to swim upstream against the momentum of pre-*Carson* administrative law.[117] The persistence of these use-based exclusions thus reveals an ongoing tension at the core of the post-*Carson* regime. The Court's bright-line rule against religious discrimination has achieved conceptual clarity at the constitutional level even as the machinery of government continues to operate on outdated premises and, as California's new statute shows, to enact them anew. Until those premises are revised or repealed, the work of enforcing *Carson* will fall to courts navigating a web of mutually reinforcing federal and state rules—an enterprise that will define the next chapter of the Free Exercise Clause's doctrinal evolution.

C. Neutrality and Targeting

The challenge in applying *Carson* lies not only in determining when a law discriminates against religion but also in distinguishing legitimate statutory harmonization from impermissible targeting. *Carson*, along with *Trinity Lutheran* and *Espinoza*, requires states to include religious institutions within generally available public programs. Once such institutions become eligible for participation, legislatures may need—or believe themselves compelled—to adjust existing statutory or regulatory frameworks to integrate newly eligible religious participants into broader regulatory schemes. These post-*Carson* adjustments can be constitutionally complex. On their face, they may appear to target religion, since they expressly apply to religious schools newly admitted to a funding program. Yet, in principle, they might represent legitimate efforts to extend existing legal requirements to all participants, ensuring uniform application across religious and secular institutions alike.

That tension surfaced immediately in Maine, where the Legislature amended the Maine Human Rights Act (MHRA) in 2021—while *Carson* was pending before the Court—to expand the statute's

117 *See* The State Appellees' Answering Brief at 49, Loffman v. Cal. Dep't of Educ., 119 F.4th 1147 (9th Cir. 2024) (No. 23-55714) ("California has no ability to waive any of the federal regulations that define the NPS system's contours and prohibit use of funds for religious instruction.").

education provisions and narrow the long-standing religious exemption.[118] Before 2021, the MHRA's education section did not treat religion as a protected class, and it exempted "any education facility owned, controlled or operated by a bona fide religious corporation, association or society" from its sexual-orientation provisions, regardless of whether it received public funding.[119] Religious schools thus operated outside the MHRA's prohibitions on religious and sexual-orientation discrimination in education. The 2021 amendments fundamentally altered that structure. They added "religion" as a protected class within the educational provisions and revised the exemption so that it applied only to "a religious corporation, association or society that does not receive public funding."[120] In effect, any religious school choosing to participate in the tuition program would now be subject to the MHRA's prohibitions on discrimination based on religion, sexual orientation, or gender identity.[121]

These statutory changes became the focus of recent litigation in two parallel cases: *Crosspoint Church v. Makin* and *St. Dominic Academy v. Makin*.[122] The plaintiffs—Crosspoint Church, which operates Bangor Christian Schools, and St. Dominic Academy, joined by the Roman Catholic Diocese of Portland—argued that the amendments were enacted to deter religious schools from joining the state's tuitioning program once *Carson* rendered them eligible.[123] They pointed to public statements from Maine officials following *Carson*, including Attorney General Aaron Frey's 2022 assertion that the decision forced Maine "to pay for an education that is fundamentally at odds with values we hold dear" and his pledge to ensure that "public money is not used to promote discrimination, intolerance, and bigotry."[124] Plaintiffs also cited

118 *See* An Act to Improve Consistency in Terminology and Within the Maine Human Rights Act, 2021 Me. Laws 366.

119 ME. STAT. tit. 5, § 4602(4) (2006) (repealed 2021) (providing that the subsection's sexual-orientation provisions "do not apply to any education facility owned, controlled or operated by a bona fide religious corporation, association or society").

120 *See* An Act to Improve Consistency in Terminology and Within the Maine Human Rights Act, sec. 19, § 4602(5); ME. STAT. tit. 5, §§ 4602(1), (5)(C) (2026) (limiting the exemption to a religious entity "that does not receive public funding").

121 *See generally Maine Town Tuitioning Program*, EDCHOICE (Dec. 16, 2025), https://www.edchoice.org/school-choice/programs/maine-town-tuitioning-program/ [https://perma.cc/VRL4-RDG9].

122 Crosspoint Church v. Makin, 719 F. Supp. 3d 99 (D. Me. 2024), *aff'd in part, rev'd in part*, 180 F.4th 354 (1st Cir. 2026); St. Dominic Acad. v. Makin, 744 F. Supp. 3d 43 (D. Me. 2024), *aff'd in part, rev'd in part*, 181 F.4th 11 (1st Cir. 2026); *St. Dominic*, 181 F.4th 11; *Crosspoint*, 180 F.4th 354.

123 *See Crosspoint*, 719 F. Supp. 3d at 104, 107; *St. Dominic*, 744 F. Supp. 3d at 49–50, 56.

124 Opening Brief of Appellant Crosspoint Church at 19–20, *Crosspoint*, 180 F.4th 354 (1st Cir. 2026) (No. 24-1590) (quoting Press Release, Aaron Frey, Att'y Gen., Off. of the Me. Att'y Gen., Statement of Maine Attorney General Aaron Frey on Supreme Court

a June 26, 2022, social media exchange involving then-Speaker of the Maine House of Representatives Ryan Fecteau. In response to a tweet noting that "SCOTUS said Maine couldn't exclude religious schools from their voucher program" and that "Maine just changed the guidelines to exclude schools that discriminate against LGBTQ+ students," Speaker Fecteau replied: "Sure did. Anticipated the ludicrous decision from the far-right SCOTUS."[125] These statements, they argued, confirmed that the Legislature's revisions were motivated by hostility toward schools that maintain religious standards for students and staff.[126] In their view, the 2021 amendments functioned not as neutral extensions of civil-rights law but as deliberate conditions designed to exclude religious institutions from public participation based on their beliefs.[127]

The State, by contrast, characterized the 2021 amendments as a neutral modernization effort. It emphasized testimony from the Maine Human Rights Commission describing the MHRA's education section as "woefully out of date, and inconsistent with the rest of the Act."[128] The Legislature, it contended, merely extended existing nondiscrimination requirements—long applicable to other public-funding contexts—to newly eligible religious schools.[129]

Judge Woodcock, the district court judge presiding in both cases, accepted that rationale in both *Crosspoint* and *St. Dominic*, finding that the objective of the amendments was simply to "ensure uniformity in a legislative scheme that already prohibited these types of discrimination by organizations receiving public funds in the housing and

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Decision in *Carson v. Makin* (June 21, 2022), https://www.maine.gov/ag/news-and-library/press-releases/statement-maine-attorney-general-aaron-frey-supreme-court-decision [https://perma.cc/8GZM-QYD7]); *see also St. Dominic*, 181 F.4th at 45 (recounting both Frey's 2022 statement and his 2021 statement "describ[ing] the schools involved in *Carson* as 'want[ing] to continue to discriminate against individuals based on their status in a protected class'" (second alteration in original) (quoting Press Release, Aaron Frey, Att'y Gen., Off. of the Me. Att'y Gen., Statement from Att'y Gen. Frey on *Carson v. Makin* Oral Argument (Dec. 8, 2021), https://www.maine.gov/ag/news-and-library/press-releases/statement-attorney-general-frey-carson-v-makin-oral-argument-sat [https://perma.cc/XGP4-AUES])).

125 *Crosspoint*, 719 F. Supp. 3d at 107 (quoting Complaint ¶ 87, *Crosspoint*, 719 F. Supp. 3d 99 (No. 23-cv-00146)); *St. Dominic*, 744 F. Supp. 3d at 54 (quoting Verified Complaint ¶ 122, *St. Dominic*, 744 F. Supp. 3d 43 (No. 23-cv-00246)); *see also St. Dominic*, 181 F.4th at 45 (recounting Fecteau's 2022 tweet).

126 *See Crosspoint*, 719 F. Supp. 3d at 120; *St. Dominic*, 744 F. Supp. 3d at 74.

127 *See Crosspoint*, 719 F. Supp. 3d at 120; *St. Dominic*, 744 F. Supp. 3d at 74.

128 *See St. Dominic*, 744 F. Supp. 3d at 75 (quoting Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction, with Incorporated Memorandum of Law at 5, *St. Dominic*, 744 F. Supp. 3d 43 (No. 23-cv-00246) [hereinafter Defendants' Opposition to Plaintiffs' Motion]).

129 *See* Defendants' Opposition to Plaintiffs' Motion, *supra* note 128, at 4–6.

employment contexts" rather than "impede or constrain religion."[130] In reaching that conclusion, the court discounted the probative value of the officials' statements, reasoning that legislative context and statutory structure supplied a sufficient neutral explanation.[131] In so doing, the court noted that the "United States Supreme Court has repeatedly cautioned against relying on the statements of one legislator to ascribe motivations to the entire legislative body,"[132] and further referenced Justice Scalia's caution in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* that "it is virtually impossible to determine the singular 'motive' of a collective legislative body."[133]

The First Circuit reached the same conclusion, reasoning that "whatever subjective states of mind one might infer in Frey and Fecteau as individuals, their . . . post-enactment statements provide little probative value in determining why the State government as a whole adopted the 2021 Amendments."[134] This is because "[i]n enacting laws, Maine speaks and acts through its entire elected legislature and its elected governor."[135] Frey, explained the First Circuit, "who is neither a legislator nor the governor, had no vote at all in enacting the 2021 Amendments."[136] And although "Fecteau did have a role as a legislative leader, '[w]hat motivates one legislator to [tweet] about a statute is not necessarily what motivates scores of others,' so courts must 'eschew guesswork' based on one-off statements by individual legislators."[137]

In rejecting the plaintiffs' animus claim, the First Circuit also entertained an even broader argument against inferring unconstitutional animus from the statements of government officials. "We do not believe government actors," reasoned the court, "must avoid criticizing any practice in which any religious group engages or else be accused of harboring impermissible religious animus."[138] So long as the criticism targeted the allegedly discriminatory practice itself, rather than its religious motivation, the statements in question would not necessarily evince hostility toward religion. In the words of the First Circuit,

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130 *St. Dominic*, 744 F. Supp. 3d at 77 (quoting Swartz v. Sylvester, 53 F.4th 693, 700 (1st Cir. 2022)); *see also Crosspoint*, 719 F. Supp. 3d at 120 (quoting *Swartz*, 53 F.4th at 700).

131 *See Crosspoint*, 719 F. Supp. 3d at 120–23; *St. Dominic*, 744 F. Supp. 3d at 73–77.

132 *Crosspoint*, 719 F. Supp. 3d at 121; *St. Dominic*, 744 F. Supp. 3d at 76.

133 *Crosspoint*, 719 F. Supp. 3d at 122 (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 558 (1993) (Scalia, J., concurring in part and concurring in judgment)); *accord St. Dominic*, 744 F. Supp. 3d at 76 (quoting *Lukumi*, 508 U.S. at 558 (Scalia, J., concurring in part and concurring in judgment)).

134 St. Dominic Acad. v. Makin, 181 F.4th 11, 46 (1st Cir. 2026).

135 *Id.*

136 *Id.*

137 *Id.* (alterations in original) (quoting United States v. O'Brien, 391 U.S. 367, 384 (1968)).

138 *Id.* at 45.

"the record does not suggest that Fecteau or Frey find the discrimination in question any less distasteful when motivated by secular rather than religious reasons or when practiced by secular rather than religious schools."[139] The First Circuit, however, ultimately declined to resolve the animus claim on these broader grounds, relying instead on "the more straightforward" conclusion that the statements provided insufficient evidence of animus given the limited roles Frey and Fecteau played in enacting the 2021 amendments.[140]

Because legislative animus is often difficult to discern, grounding violations of the *Carson* rule solely in evidence of hostility or motive is frequently challenging. As states revise their laws to include newly eligible religious participants, courts will often confront mixed motives and incomplete or ambiguous records. In that setting, it will be important to leverage other doctrinal tools to assess the constitutionality of such legislative fixes. Most notably, courts in such circumstances must supplement motive-based inquiries by asking whether a law's asserted interests are applied consistently across religious and nonreligious institutions alike. In so doing, courts will better be able to detect impermissible targeting without inferring hostility from legislative rhetoric alone. If a state purports to "fix" its laws post-*Carson* but applies its asserted interests selectively—extending new obligations only to religious schools while leaving similarly situated secular institutions unregulated—that inconsistency itself supplies evidence of impermissible targeting.

The Maine litigation offers a helpful example. Under the 2021 amendments, in-state religious schools participating in the tuitioning program became newly subject to the MHRA, while out-of-state schools participating in the same tuitioning program remained entirely beyond its reach.[141] The plaintiffs in *St. Dominic Academy v. Makin* highlighted this disparity as part of their constitutional challenge. As the plaintiffs emphasized, "Maine's religious schools are excluded by rules these out-of-state recipient schools do not face."[142] Framing this part of their constitutional challenge in terms of general applicability, the plaintiffs argued that "[a] law is not generally applicable if it treats 'any comparable secular activity more favorably than religious exercise'"[143]

139 *Id.* at 46.

140 *Id.*

141 St. Dominic Acad. v. Makin, 744 F. Supp. 3d 43, 72 (D. Me. 2024), *aff'd in part*, *rev'd in part*, 181 F.4th 11 (1st Cir. 2026).

142 Plaintiffs' Motion for Preliminary Injunction & Memorandum of Law in Support of Motion for Preliminary Injunction at 8, *St. Dominic*, 744 F. Supp. 3d 43 (No. 23-cv-00246).

143 *Id.* at 12 (emphasis omitted) (first quoting Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam); and then citing Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021)).

and that Maine's post-*Carson* framework amounted to "a religious gerrymander with categorical exclusions from the MHRA's nondiscrimination provisions for out-of-state . . . schools that participate in the program."[144] Because out-of-state institutions, among others, remained free to receive public funds without complying with the MHRA, the plaintiffs contended that the statute was "underinclusive" in the sense condemned in *Church of the Lukumi Babalu Aye*: It "fail[s] to prohibit nonreligious conduct that endangers [the State's nondiscrimination] interests in a similar or greater degree than" the conduct of religious schools.[145]

The State responded by attempting to redefine the scope of the free exercise inquiry so as to neutralize this underinclusiveness problem altogether. Rather than disputing that out-of-state schools were comparable recipients of public funds, or that they posed similar risks to the State's asserted nondiscrimination interests, Maine argued that such schools were categorically irrelevant to the general-applicability analysis "because Maine has no jurisdiction over them."[146] On this view, general applicability should be assessed only within the subset of institutions the State had chosen—and was able—to regulate. By treating jurisdictional limits as dispositive, the State sought to collapse the *Lukumi* inquiry into a formal question of regulatory reach rather than a substantive inquiry into whether its asserted interest was being pursued evenhandedly.[147]

The district court rejected this attempt to redefine the relevant comparator class. The court began by noting that there was "no dispute" that the challenged amendments did not apply to "private postsecondary institutions or to schools located outside of Maine,"[148] while emphasizing that both categories were nevertheless "eligible to receive public funds from Maine."[149] Although the State maintained that this exemption structure resolved the free exercise concern by eliminating religion-based distinctions within the statute's scope, the court concluded that this framing "misconstrues how the Court is to assess general applicability."[150] The relevant inquiry, it explained, is whether the law "prohibit[s] religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar

144 *Id.*

145 *Id.* (second alteration in original) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993)).

146 Defendants' Opposition to Plaintiffs' Motion, *supra* note 128, at 14.

147 *See id.*

148 St. Dominic Acad. v. Makin, 744 F. Supp. 3d 43, 72 (D. Me. 2024), *aff'd in part*, *rev'd in part*, 181 F.4th 11 (1st Cir. 2026).

149 *Id.*

150 *Id.* at 73.

way."[151] Applying that inquiry, the court emphasized that publicly funded out-of-state schools "could adopt any of St. Dominic's policies or practices that allegedly violate the MHRA without fear of enforcement actions or risk of losing access to public funds from Maine."[152] The statutory scheme was therefore "underinclusive" because it "fail[ed] to prohibit nonreligious conduct that endanger[ed] [Maine's] interests in a similar or greater degree than" the conduct of religious schools.[153]

Yet the district court allowed this same underinclusiveness problem to disappear at strict scrutiny. At the outset of its discussion, the court correctly identified the relevant governmental interest: "Maine's asserted interest in eliminating discrimination within publicly funded institutions is compelling."[154] The existence of publicly funded out-of-state schools free from the MHRA's requirements appeared to undermine the compellingness of that interest. As the Supreme Court explained in *Lukumi*, "Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling."[155] The district court avoided that conclusion by recasting Maine's interest. Emphasizing that "the text of the MHRA does not provide for any exceptions," the court concluded that Maine has a compelling interest not in "eliminating discrimination," but in "not creating a system of exemptions . . . that would free in-state schools from complying with state antidiscrimination law."[156] By redefining the compelling interest in this way, the court treated uniform enforcement of the MHRA—rather than the eradication of discrimination in publicly funded education—as the relevant end. What was lost in that move was the very inconsistency the court had already identified at the general-applicability stage: Maine had chosen to tolerate significant categories of publicly funded education free from MHRA obligations, even though those exemptions undermined the State's asserted interest in eliminating discrimination. Once the interest was framed as enforcing the statute against the institutions it covers, rather than preventing discrimination across comparable publicly funded contexts, that selectivity disappeared from view. But under *Lukumi*, it is precisely the

151 *Id.* (quoting Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021)).

152 *Id.*

153 *Id.* (third alteration in original) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993)).

154 *Id.* at 78.

155 *Lukumi*, 508 U.S. at 546–47.

156 *St. Dominic*, 744 F. Supp. 3d at 78.

existence of such tolerated secular conduct that calls into question whether the asserted interest can genuinely be deemed compelling.

The First Circuit took a different doctrinal path but made a strikingly similar analytical move. Rather than recognizing the underinclusiveness problem and allowing it to fall away at strict scrutiny, the court eliminated the problem when assessing comparability at the general-applicability stage. Relying on the Supreme Court's instruction that comparability must be judged according to "the asserted government interest that justifies the regulation at issue,"[157] the First Circuit asked whether discrimination at out-of-state schools undermined Maine's interests "to the same degree" as discrimination at in-state schools.[158] The answer, according to the First Circuit, was no. "Implicit throughout the MHRA," the court reasoned, "is a limited interest in combatting discrimination within Maine specifically."[159] Maine's interests in combating discrimination generally, and state-funded discrimination specifically, in education were therefore "from the start, qualified by the general and pre-existing jurisdictional limitation" governing the MHRA.[160] On that framing, out-of-state schools were not comparable to St. Dominic, and the law was generally applicable.

But the circularity of the First Circuit's analysis effectively gerrymandered Maine's asserted interest at the comparability stage in much the same way the district court had done at strict scrutiny. The court inferred the scope of Maine's interest from the territorial reach of the MHRA and then relied on that geographically limited interest to justify the MHRA's selective reach. Yet a limitation on Maine's ability to regulate conduct beyond its borders does not explain why Maine could not condition the receipt of its own tuition-assistance payments on compliance with its nondiscrimination requirements. The relevant comparison was not between discrimination within Maine and discrimination occurring anywhere outside the State. It was between in-state and out-of-state schools participating in the same Maine funding program. If Maine's asserted concern was, as the First Circuit itself acknowledged, "state-funded discrimination specifically in education,"[161] discrimination by an out-of-state school receiving Maine tuition payments would seem to undermine that interest in much the same way as identical conduct by an in-state school. By defining the State's interest to track the MHRA's existing jurisdictional boundaries, the First Circuit allowed those boundaries to determine which institutions counted as

157 St. Dominic Acad. v. Makin, 181 F.4th 11, 48 (1st Cir. 2026) (quoting Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam)).

158 *Id.*

159 *Id.*

160 *Id.* at 49.

161 *Id.*

comparable in the first place without probing the actual interest advanced by the MHRA.

Consider, as a counterpoint, the Second Circuit's opinion in *Central Rabbinical Congress v. New York City Department of Health & Mental Hygiene*.[162] There, the court considered a regulation requiring written parental consent before performing *metzitzah b'peh*, a circumcision practice—direct oral suction—employed by certain sects of Hasidic Jews.[163] The regulation was justified by the city on the ground that the practice posed a risk of transmitting herpes simplex virus (HSV) to newborn infants based on evidence that HSV can be spread through oral contact and that infants are particularly vulnerable to severe complications from neonatal HSV infection.[164]

Drawing on *Lukumi*, the court in *Central Rabbinical Congress* emphasized that general applicability "protect[s] religious observers against unequal treatment" that arises when governmental interests are "worthy of being pursued only against conduct with a religious motivation."[165] The court concluded, based on the record before it, that the regulation "applies exclusively to religious conduct implicating fewer than 10% of the cases of neonatal HSV infection, while it 'fail[s] to [regulate] nonreligious conduct'" accounting for the remainder.[166] Although the court acknowledged that there "may be reasons" for such selectivity, it refused to credit speculative justifications for the disparity in regulation in the absence of evidentiary support, emphasizing that the record was "almost entirely devoid of explanation, much less evidence in support of explanation."[167] As a result, although the court left the application of strict scrutiny to the district court on remand, it held that the regulation was not generally applicable on the existing record.[168]

The district court and First Circuit in *St. Dominic* both failed to embrace the lesson of cases like *Central Rabbinical Congress*, albeit at different stages of the analysis. The difficulty in both opinions was a failure to preserve evenhandedness when defining the governmental interest against which Maine's selective regulation was assessed. The district court correctly identified at the general-applicability stage that Maine tolerated substantial secular conduct inconsistent with its

162 Cent. Rabbinical Cong. of the U.S. & Can. v. N.Y.C. Dep't of Health & Mental Hygiene, 763 F.3d 183 (2d Cir. 2014).

163 *Id.* at 185–86.

164 *Id.* at 185.

165 *Id.* at 196–97 (alteration in original) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542–43 (1993)).

166 *Id.* at 197 (alteration in original) (quoting *Lukumi*, 508 U.S. at 543).

167 *Id.*

168 *Id.* at 197–98.

asserted nondiscrimination interest but allowed that insight to fall away at strict scrutiny by reframing the compelling interest to track the boundaries of the MHRA. The First Circuit made a similar move one step earlier. By defining Maine's interest as combating discrimination "within Maine specifically," it allowed the MHRA's territorial boundaries to determine which secular conduct counted as comparable in the first place. In both opinions, the result was the same: The same publicly funded out-of-state schools disappeared from the constitutional analysis because the governmental interest was defined to mirror the scope of the State's chosen regulatory scheme.

Central Rabbinical Congress illustrates why avoiding this form of interest gerrymandering is vital. By insisting on evidentiary justification for selective regulation, the Second Circuit refused to define comparable secular conduct out of the analysis; and although it left the application of strict scrutiny for remand, it made clear that any reasons the government supplied would need to account for that selectivity. A government cannot demonstrate evenhandedness simply by defining its interest to encompass the conduct it regulates while excluding otherwise comparable conduct it leaves untouched. Otherwise, the inquiry becomes circular: The scope of the regulatory scheme defines the governmental interest, and the governmental interest then justifies the scope of the regulatory scheme. If evenhandedness is to do real work in the post-*Carson* landscape, courts must ensure that the same commitment to consistent application governs both the identification of comparable conduct and the application of strict scrutiny.

Getting this right matters, particularly in the post-*Carson* landscape. Reliance on legislative animus or motive is often ill-suited to cases involving statutory "fixes," where records are thin, motives are mixed, and overt hostility is rarely evident. The approach exemplified by *Central Rabbinical Congress* avoids those difficulties by focusing not solely on why lawmakers acted but on how the government's asserted interests are actually applied. By insisting on evenhanded pursuit of those interests across comparable contexts, neutrality and general applicability may often provide a more administrable and transparent means of identifying impermissible targeting—one that does not depend on imputing bad faith yet still prevents governments from imposing selective burdens on religious exercise under the guise of neutral regulation.

D. General Applicability, Church Autonomy, and Institutional Conditions

At its core, the *Carson* rule polices neutrality and general applicability, ensuring that religion is neither singled out for exclusion nor burdened by selective application. Government benefit programs routinely come with eligibility requirements, and after *Carson v. Makin*

those requirements can raise free exercise concerns when they discriminate against religion. In typical cases of status and use discrimination, neutrality and general applicability analysis will suffice to identify the constitutional problem.

But some government-imposed eligibility requirements raise free exercise concerns that are not easily captured through neutrality and general-applicability analysis alone. They do not exclude religion outright but instead require religious institutions to participate only on terms that compromise constitutionally protected autonomy. In such cases, viewing the *Carson* rule through the prism of unconstitutional conditions offers a better way of understanding the constitutional harm. The concern is not merely that religion has been treated differently, but that participation in a generally available public program has been conditioned on the surrender of a constitutional right. For this reason, the *Carson* rule extends naturally to cases where the government leverages participation in a public program to require a religious institution to surrender autonomy over matters of internal governance, membership, or doctrine.

The Supreme Court's recent grant of certiorari in *St. Mary Catholic Parish v. Roy* places these questions at the center of the Court's ongoing effort to define the contours of free exercise protections in the public-benefits context.[169] The case arises from Colorado's Universal Preschool (UPK) program, which guarantees at least ten hours per week of state-funded preschool for children in the year before kindergarten, delivered through a network of public, private, and faith-based providers.[170] Participating preschools must comply with nondiscrimination provisions requiring them to provide eligible children an "equal opportunity to enroll and receive universal preschool services regardless of . . . religious affiliation, sexual orientation, [or] gender identity."[171] At the same time, the UPK rules authorize a series of enrollment preferences ranging from sibling priority and disability accommodation to continuity-of-care and multilingual placement.[172] The final category of preferences functions as a "catchall preference," allowing providers, subject to a number of regulatory restrictions, to request approval for new kinds of enrollment priorities:

169 St. Mary Cath. Par. v. Roy, No. 25-581, 2026 WL 1052111 (U.S. Apr. 20, 2026) (mem.) (granting certiorari on, among other questions, what a plaintiff must show to establish a lack of general applicability under *Smith*).

170 COLO. CODE REGS. § 1404-1:4.107(A)(2) (2026); *see also* St. Mary Cath. Par. in Littleton v. Roy, 736 F. Supp. 3d 956, 963 (D. Colo. 2024), *aff'd*, 154 F.4th 752 (10th Cir. 2025), *cert. granted*, No. 25-581, 2026 WL 1052111 (U.S. Apr. 20, 2026).

171 COLO. CODE REGS. § 1404-1:4.110(B) (2026).

172 *Id.* § 1404-1:4.109(A); *see also St. Mary*, 154 F.4th at 758.

> Participating preschool providers may grant preference to an eligible child based: on the child and/or family being a part of a specific community; having specific competencies or interests; having a specific relationship to the provider, provider's employees, students, or their families; receiving specific public assistance benefits; or participating in a specific activity.[173]

Two Catholic parishes sought to participate but objected that the nondiscrimination rule barred them from giving preference to Catholic families and from considering religion, sexual orientation, and gender identity in admissions and employment decisions—practices they viewed as integral to their religious mission.[174] Their complaint alleged that the requirement effectively forced them to surrender their faith-based admissions preferences as the price of receiving public funds.[175]

After a three-day bench trial, the district court largely denied the parishes' request for a permanent injunction.[176] It found the nondiscrimination rule facially neutral because it applied to all participating preschools and included religion only among protected categories.[177] Plaintiffs argued that certain statements by state officials and citations in state filings reflected hostility toward religion, but the court concluded that these materials were mere legal references rather than evidence of animus.[178] On general applicability, plaintiffs argued that the catch-all preference and a temporary waiver provision created systems of individualized exemptions.[179] The district court rejected the claim,

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173 *St. Mary*, 154 F.4th at 758, 758–59 (quoting COLO. CODE REGS. § 1404-1:4.110(A)(9) (2024)).

174 *St. Mary*, 736 F. Supp. 3d at 976 ("Plaintiffs Preschools contend this requirement prevents them from making enrollment decisions in accordance with their religious beliefs, as it prohibits them from preferencing Catholic families in enrollment and from considering whether a child or family is supportive of the Catholic Church's teachings, in particular its teachings on human sexuality.").

175 First Amended Complaint ¶ 180, *St. Mary*, 736 F. Supp. 3d 956 (No. 23-cv-02079) ("The Catch-all Provision and the Enrollment Mandate both require Plaintiffs to choose between their religious exercise and receiving an otherwise generally available benefit. Plaintiffs are thus 'disqualified from this generally available benefit "solely because of their religious character"' and beliefs." (quoting Carson v. Makin, 142 S. Ct. 1987, 1997 (2022))); *St. Mary*, 736 F. Supp. 3d at 979 (summarizing plaintiffs' claim that compliance would require them to accept children or employ teachers whose beliefs or conduct contradict Catholic doctrine).

176 *See St. Mary*, 736 F. Supp. 3d at 964, 1019–20. The court ruled for the plaintiffs only as to the rule's religious-affiliation aspect, because Colorado then allowed faith-based providers to prefer members of their own congregations. *See id.* at 1002–03, 1010. That ruling was not appealed, and Colorado has since removed the congregation preference from its regulations. *See St. Mary*, 154 F.4th at 761–62.

177 *See St. Mary*, 736 F. Supp. 3d at 990.

178 *See id.* at 990–93.

179 *See id.* at 993–94.

reasoning that these mechanisms were administrative tools, not discretionary exemptions undermining general applicability.[180]

The Tenth Circuit affirmed.[181] On neutrality, the panel concluded that "[n]othing about this case—neither the nondiscrimination requirement nor the record of its implementation—looks anything like the clear religious suppression displayed in *Church of Lukumi Babalu Aye*."[182] It emphasized that Colorado had "made every effort to encourage faith-based preschools to participate (short of violating state law by granting exceptions to the nondiscrimination requirement)."[183] Neutrality, the court held, was satisfied.[184]

General applicability proved more difficult. Plaintiffs argued that the program's "catchall" preference authorized precisely the sort of individualized discretion that defeats general applicability, permitting providers to seek approval for open-ended "other" preferences based on membership in a "specific community," particular interests, or participation in defined activities.[185] The trial record supported that claim. The Director of Colorado's Universal Preschool Program testified that a provider could "require all of its children or families to be part of a specific community" and confirmed that this category could include children in foster care, children of veterans or current service members, children interested in music, children of color from historically underserved areas, members of the LGBTQ community, or even a preschool "just for gender-nonconforming children."[186] Approval of such preferences was not governed by fixed criteria but instead depended on discretionary, case-by-case judgment: "[I]t would be a conversation to determine whether that was appropriate or not," followed by agency review.[187] The Tenth Circuit acknowledged that "[a]t first blush, the catchall preference looks a bit like a system of individual exemptions," yet nevertheless concluded that the preference regime was "merely a way of adjusting the algorithm" used to match students to preschools

180 *Id.* at 995–97.

181 St. Mary Cath. Par. in Littleton v. Roy, 154 F.4th 752, 757 (10th Cir. 2025), *cert. granted*, No. 25-581, 2026 WL 1052111 (U.S. Apr. 20, 2026).

182 *Id.* at 768.

183 *Id.*

184 *Id.*

185 *See id.* at 768–69.

186 Reporter's Transcript of Bench Trial at 243, 245, 243–46, St. Mary Cath. Par. in Littleton v. Roy, 736 F. Supp. 3d 956 (D. Colo. 2024) (No. 23-cv-02079) (testimony of Dawn Odean) (confirming that providers could limit enrollment to children in foster care, children of veterans, children interested in music, members of the LGBTQ community, children of color from historically underserved areas, or "just" gender-nonconforming children, *id.* at 245).

187 *See id.* at 245 ("[I]t would be a conversation to determine whether that was appropriate or not. But, yeah. So, we would definitely look into it and follow through.").

and therefore "not a system of individualized exemptions from the nondiscrimination requirement, which is what counts."[188] On that basis, it held the policy generally applicable.[189]

In principle, the difficulty of prevailing on a general-applicability theory in cases like *St. Mary* should not obscure the extent to which the Supreme Court has, in recent years, substantially strengthened that doctrine. In *Tandon v. Newsom*, the Supreme Court emphasized that regulations "are not neutral and generally applicable . . . whenever they treat any comparable secular activity more favorably than religious exercise."[190] As a result, funding programs that afford exceptions and preferential terms to nonreligious grantees while denying religious actors comparable exceptions and preferential terms violate the requirements of general applicability. The Court reiterated this enhanced interpretation of general applicability in *Fulton v. City of Philadelphia*, stating that a law likewise "is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing '"a mechanism for individualized exemptions,"'"[191] and further emphasized that "[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given."[192] These decisions confirm that general applicability now operates as a meaningful constraint in a post-*Carson* landscape: Heightened scrutiny is triggered when the government treats comparable secular activity more favorably, vests officials with discretionary authority to grant exemptions, or relies on the absence of granted accommodations to deny the existence of discretion. Each of those features appeared in *St. Mary*—at least based on a straightforward read of the testimony before the district court.

Yet, the Tenth Circuit's analysis underscores the difficulty of the general applicability inquiry in post-*Carson* litigation. Even where a regulatory scheme contains open-ended exemptions for a wide range of secular communities administered through discretionary and informal decisionmaking, courts may characterize those features as neutral aspects of program administration rather than as constitutionally significant exemption regimes. In *St. Mary*, the court declined to treat testimony confirming discretionary approval of preferences for foster

188 *St. Mary*, 154 F.4th at 768–69. The court also rejected the plaintiffs' argument that Colorado's preferences for children with disabilities and children from low-income families were comparable secular exemptions, reasoning that "not all barriers are the same." *Id.* at 773.

189 *Id.* at 771.

190 Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam) (emphasis omitted).

191 Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021) (alteration in original) (quoting Emp. Div. v. Smith, 494 U.S. 872, 884 (1990)).

192 *Id.* at 1879.

children, LGBTQ families, children of color, and gender-nonconforming children as evidence of individualized exemptions, emphasizing instead that the nondiscrimination rule formally remained in place.[193] The episode illustrates how difficult it can be to pin the government down on a general-applicability theory when discretion is embedded within technical or administrative mechanisms.

It is precisely in these settings that an unconstitutional-conditions framework may offer a clearer account of the constitutional harm. On such an account, the issue at stake is not merely whether Colorado's rule was applied neutrally or with generally applicable exceptions but whether participation was conditioned on relinquishing a protected dimension of religious autonomy. If a religious school's autonomy includes the right to define its own faith community—through the selection of students as well as members—then requiring it to forgo that right in exchange for public funding constitutes precisely the sort of condition *Carson* forbids.[194] The State may not leverage participation in a public program to induce religious institutions to relinquish their constitutionally protected autonomy. The structure of the condition is the same. Just as *Carson* forbids the State from saying, "you may participate only if you forgo religious use," so too it forbids "you may participate only if you abandon control over religious membership." The unconstitutional-conditions framework thus provides a more direct route for identifying constitutional harm when neutrality and general-applicability analysis becomes mired in administrative complexity.

This conclusion draws on a long constitutional tradition protecting internal church governance from civil interference. The Supreme Court has recognized that religious bodies possess the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[195] Subsequent cases have reaffirmed that principle in disputes over discipline, property, and membership.[196] Lower courts have likewise held that church autonomy prohibits courts from "interfer[ing] with the fundamental

193 *See St. Mary*, 154 F.4th at 769–70.

194 *See supra* notes 64–73 and accompanying text.

195 Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952); *see also* Watson v. Jones, 80 U.S. (13 Wall.) 679, 733 (1872) ("But it is a very different thing where a subject-matter of dispute, strictly and purely ecclesiastical in its character,—a matter over which the civil courts exercise no jurisdiction,—a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them,—becomes the subject of its action.").

196 *See, e.g.*, Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich, 426 U.S. 696, 709 (1976); Bouldin v. Alexander, 82 U.S. (15 Wall.) 131, 139 (1872) (recognizing that civil courts may not "question ordinary acts of church discipline, or of excision from membership").

ecclesiastical concern of determining who is and who is not a[] . . . member."[197] Applying that principle in the education context, courts have recognized that religious institutions retain authority to define and enforce religious and moral standards governing student conduct as part of their faith-based mission.[198]

These precedents indicate that the right to choose members—and by extension students—lies within the scope of religious autonomy.[199] Conditioning access to public benefits on surrendering that right transforms a formally neutral funding scheme into a constitutionally suspect exchange. While neutrality and general applicability remain useful diagnostic tools, the doctrine of unconstitutional conditions better exposes the structural flaw: a government-benefits system that trades constitutional rights for eligibility. The difficulties exposed in *St. Mary*—questions now before the Supreme Court[200]—help explain why unconstitutional-conditions analysis is especially important in the post-*Carson* landscape, which implicates not only equal access to public programs but also the independence of religious institutions to govern themselves free from the leverage of state funding conditions.

E. Remains of Locke v. Davey

Although *Carson v. Makin* appeared to complete the Supreme Court's project of prohibiting religious exclusions from generally available public programs, a narrow but conceptually difficult category of post-*Carson* litigation continues to invoke *Locke v. Davey*. The persistence of *Locke*—despite the Court's sweeping reaffirmation of neutrality principles—reflects a lingering question about whether there remains a small domain of "play in the joints" between the Religion Clauses. The problem is not simply that *Locke* has survived, but that the

197 Burgess v. Rock Creek Baptist Church, 734 F. Supp. 30, 33 (D.D.C. 1990); *see also* Grunwald v. Bornfreund, 696 F. Supp. 838, 840–41 (E.D.N.Y. 1988) ("The mere expulsion from a religious society, with the exclusion from a religious community, is not a harm for which courts can grant a remedy."); Dowd v. Soc'y of St. Columbans, 861 F.2d 761, 764 (1st Cir. 1988) (per curiam) ("The Society's own internal guidelines and procedures must be allowed to dictate what its obligations to its members are without being subject to court intervention. It is well-settled that religious controversies are not the proper subject of civil court inquiry.").

198 *See, e.g.*, Gaston v. Diocese of Allentown, 712 A.2d 757, 760–61 (Pa. Super. Ct. 1998); *In re* St. Thomas High Sch., 495 S.W.3d 500, 507–10 (Tex. App. 2016); Doe v. Pontifical Coll. Josephinum, 87 N.E.3d 891, 896–97 (Ohio Ct. App. 2017).

199 The First Circuit rejected a version of this argument, but only because it analyzed the claim solely as a question of whether enforcement would require judicial inquiry into religious doctrine. *See* St. Dominic Acad. v. Makin, 181 F.4th 11, 51–52 (1st Cir. 2026).

200 *See* St. Mary Cath. Par. v. Roy, No. 25-581, 2026 WL 1052111 (U.S. Apr. 20, 2026) (mem.).

Court's later decisions have reinterpreted it in ways that shift its meaning and purpose.

As recounted above, the Court in *Locke v. Davey* appeared to grant legislatures broad discretion to draw their own lines between the Religion Clauses.[201] The Court explained, "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause,"[202] and thus there is some "'play in the joints' between" the Establishment and Free Exercise Clauses.[203] Washington's Promise Scholarship Program excluded only students pursuing a degree in devotional theology, and the Court upheld that exclusion on the ground that it reflected not hostility toward religion but a permissible effort to avoid funding religious instruction.[204] "Far from evincing the hostility toward religion which was manifest in *Lukumi*," the Court explained, "we believe that the entirety of the Promise Scholarship Program goes a long way toward including religion in its benefits."[205] As evidence for its conclusion that the exclusion of degrees in devotional theology did not flow from religious animus, the Court highlighted the "historic and substantial state interest"[206] in "not funding the religious training of clergy,"[207] and concluded the exclusion was "a product of these views, not evidence of hostility toward religion."[208] On this understanding, *Locke* granted states constitutional leeway to exclude religion from funding programs so long as the exclusion was not animated by animus but by a "historic and substantial" concern for maintaining the traditional separation between church and state. The historical interest thus served an evidentiary role—proof that the State's action reflected a permissible accommodation between the Religion Clauses, not discrimination against religion itself.

But when the Court decided *Trinity Lutheran v. Comer* more than a decade later, it reinterpreted *Locke* in a new doctrinal light. In *Trinity Lutheran*, the Court recast *Locke* as a case about *use*-based discrimination. It wrote: "Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry."[209] On this reading, *Locke* did not turn on the existence of a historical state interest; rather, it illustrated that states could permissibly deny funds for religious uses—for

201 *See supra* notes 15–20 and accompanying text.
202 Locke v. Davey, 540 U.S. 712, 719 (2004).
203 *Id.* at 718 (quoting Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664, 669 (1970)).
204 *See id.* at 715, 722–25.
205 *Id.* at 724.
206 *Id.* at 725.
207 *Id.* at 722 n.5.
208 *Id.* at 721.
209 Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 464 (2017).

example, degrees in devotional theology—even while they could not deny benefits on the basis of religious status—for example, excluding religious institutions from a government grant program. The Court thus transformed *Locke*'s reasoning into doctrinal support for the emerging distinction between status and use. The historical interest highlighted by *Locke*, instead of functioning merely as evidence of lack of animus, now served as an example of permitted use discrimination.

Trinity Lutheran's reinterpretation of *Locke* did not last long. In *Carson v. Makin*, the Court once again reinterpreted *Locke*, narrowing it sharply. Maine argued that its exclusion of "sectarian" schools from a tuition-assistance program fell within *Locke*'s logic because it merely declined to fund religious uses.[210] The Court disagreed.[211] *Locke*, it explained, "cannot be read beyond its narrow focus on vocational religious degrees to generally authorize the State to exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits."[212] The Court emphasized that "the funding in *Locke* was intended to be used 'to prepare for the ministry,'" a category distinct from programs that fund general educational services.[213] What remained of *Locke* after *Carson* was thus limited to its facts: a historically grounded exception for ministerial training, not a general authorization for religious-use exclusions.[214] And in rejecting Maine's reliance on *Locke*, the Court implicitly disavowed the status-use distinction that *Trinity Lutheran* had drawn from it, holding that both forms of exclusion—status- and use-based alike—violate the Free Exercise Clause.[215]

Lower courts have since adopted *Carson*'s narrow interpretation of *Locke* while continuing to treat it as binding precedent. The most detailed example is *Hall v. Fleming*, which involved a state tuition-assistance program for higher education.[216] The plaintiff sought to use state grants for degree programs in youth ministry, church leadership, and, ultimately, music and worship.[217] The district court, however, quoted *Carson*'s assessment of *Locke*. True, "*Locke* cannot be read beyond its narrow focus on vocational religious degrees to generally authorize the State to exclude religious persons from the enjoyment of public

210 *See* Carson v. Makin, 979 F.3d 21, 35–36 (1st Cir. 2020), *rev'd*, 142 S. Ct. 1987 (2022).

211 *See Carson*, 142 S. Ct. at 2002.

212 *Id.*

213 *Id.* (quoting *Trinity Lutheran*, 582 U.S. at 464).

214 *See id.* at 2001–02.

215 *See id.* at 2001 ("[T]he prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination.").

216 *See* Hall v. Fleming, No. 25cv186, 2025 WL 2021022, at *1 (E.D. Va. May 9, 2025), *aff'd*, 175 F.4th 510 (4th Cir. 2026), *petition for cert. filed*, No. 26-193 (U.S. Aug. 11, 2026).

217 *Id.* at *1–2.

benefits on the basis of their anticipated religious use of the benefits."[218] But when an individual seeks to secure funding that does fall within the "narrow focus on vocational religious degrees," then "prohibitions on state tuition assistance for religious vocational training . . . remain permissible under the Free Exercise Clause."[219] Thus, because the plaintiff's chosen course of study, "Music and Worship,"[220] fit within *Locke*'s exception, the Free Exercise Clause authorized the state to exclude her from the tuition-assistance program.[221] That being said, the district court was clear that, beyond such vocational training, *Locke* offers no justification for excluding religious individuals or institutions from otherwise neutral public programs.[222]

The Fourth Circuit affirmed.[223] Rejecting Hall's argument that *Trinity Lutheran*, *Espinoza*, and *Carson* had "effectively abrogated and overruled *Locke*,"[224] the court concluded instead "that the Supreme Court has yet to either overrule or abandon its decision in *Locke*."[225] The court emphasized the Supreme Court's repeated characterization of *Locke* as a case involving funding used "to prepare for the ministry" in which "only [pursuing] a 'vocational religious' degree was excluded."[226] In turn, the Fourth Circuit stressed that *Trinity Lutheran*, *Espinoza*, and *Carson* had each highlighted the "historic and substantial state interest" recognized in *Locke* "against using 'taxpayer funds to support church leaders'" as a feature absent from those later cases.[227] Accordingly, the court concluded that *Locke* remains controlling in the limited context of ministerial training even as the broader principles of religious neutrality announced in the *Carson* trilogy govern virtually all other funding disputes. Both the district court's and the Fourth Circuit's opinions reflect *Carson*'s reconstruction of *Locke*: preserving the specific historical exception while rejecting its earlier, more open-ended rationale.[228]

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218 *Id.* at *4 (quoting *Carson*, 142 S. Ct. at 2002).

219 *Id.*

220 *Id.* at *1–2.

221 *Id.* at *1.

222 *See id.* at *4.

223 Hall v. Fleming, 175 F.4th 510, 511 (4th Cir. 2026), *petition for cert. filed*, No. 26-193 (U.S. Aug. 11, 2026).

224 *Id.* at 513 (quoting *Hall*, 2025 WL 2021022, at *2).

225 *Id.* at 516.

226 *Id.* at 515–16 (emphasis omitted) (quoting Carson v. Makin, 142 S. Ct. 1987, 2002 (2022)) (quote corrected).

227 *Id.* at 516 (quoting *Carson*, 142 S. Ct. at 2002).

228 *See id.* at 518 (Richardson, J., concurring) ("*Locke* was an outlier when decided. And it is even more of one today. Absent *Locke*, the Court's more recent decisions in *Trinity Lutheran*, *Espinoza*, and *Carson* would require us to hold that Virginia's program violates the Free Exercise Clause.").

The continued vitality of *Locke* in this narrow form underscores a persistent tension in the Court's new doctrine. In *Locke*, the historical interest in avoiding the funding of clergy education was enough to justify exclusion. But in the *Carson* trilogy, the Court has repeatedly rejected the notion that Establishment Clause concerns can serve as a compelling interest sufficient to justify religious discrimination. In *Trinity Lutheran*, the Court explained that a state's "policy preference for skating as far as possible from religious establishment concerns" does not qualify as a "compelling" interest.[229] *Carson* reaffirmed that conclusion, holding that an "interest in separating church and state 'more fiercely' than the Federal Constitution . . . 'cannot qualify as compelling' in the face of the infringement of free exercise."[230] Yet notwithstanding the Court's rejection of antiestablishment interests as compelling, *Locke* still continues to mark a limited exception, justified by what appears to be a "historic and substantial" antiestablishment interest precisely of that sort. The result is a tension now woven into the doctrine: Antiestablishment interests can no longer justify excluding religion from government programs, with one exception—the historic interest *Locke* recognized in not funding the training of clergy.[231]

The persistence of *Locke* therefore marks both continuity and uncertainty in the post-*Carson* landscape. It embodies the final remnant of "play in the joints," a concept the Court has otherwise left behind. But it also illustrates how the Court's evolving interpretations have transformed the meaning of *Locke* itself—from a decision about the absence of hostility, to one about permissible religious use, and finally to a tightly cabined historical exception. As courts continue to apply *Carson*, the precise scope of that exception—and its relationship to the neutrality principle—will remain a site of doctrinal tension and future litigation.[232]

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229 Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 466 (2017).

230 *Carson*, 142 S. Ct. at 1998 (omission in original) (quoting Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2260 (2020)).

231 *See, e.g.*, Loe v. Jett, 796 F. Supp. 3d 541, 572 n.48 (D. Minn. 2025) ("Although the holding in *Locke* has been narrowly circumscribed to its facts, it has never been overturned."); Mendham Methodist Church v. Morris Cnty., No. 23cv2347, 2024 WL 4903677, at *7 (D.N.J. Nov. 27, 2024) ("But the remains of *Locke* grow more distant."); *Hall*, 175 F.4th at 516 (Richardson, J., concurring) ("I concur because *Locke v. Davey* controls here. I write separately because *Locke* was wrongly decided. It betrays the founding generation's commitment to religious liberty, and the Supreme Court should formally overrule it. But, until the Court does, *Locke* binds us—even as a moth-eaten shell of its former self." (citation omitted)).

232 As of this writing, a petition for certiorari asking the Court to overrule Locke is pending. *See* Petition for a Writ of Certiorari, Hall v. Fleming, No. 26-193 (U.S. Aug. 11, 2026).

CONCLUSION

The post-*Carson* landscape reflects both the culmination and the recalibration of the Supreme Court's free exercise jurisprudence. What began as a rule against overt religious exclusions has evolved into a broader prohibition on structural conditions that penalize religious exercise. Across contexts—status, use, neutrality, general applicability, autonomy, and even the residual domain of *Locke v. Davey*—courts are translating *Carson*'s simple command into doctrine that constrains how governments design and administer public benefit programs. In doing so, they have exposed a constitutional transformation: The Establishment Clause no longer operates as an independent barrier to religious participation, and the Free Exercise Clause now defines the baseline of equal access.

Yet the process of implementation remains incomplete. States continue to test the boundaries of neutrality, agencies still rely on pre-*Carson* regulations, and legislatures have responded with new forms of indirect exclusion. As these disputes unfold, *Carson*'s enduring contribution may lie less in its simplicity than in the complexities it reveals—the need to reconcile neutrality, general applicability, and church autonomy within a single constitutional framework. The next phase of free exercise law will require working through those tensions, refining the doctrinal architecture that now sits beneath *Carson*'s seemingly straightforward command.