News

Students at All Saints Catholic School in Bangor, Maine, Nov. 11, 2021. (CNS photo/courtesy Diocese of Portland)

Carol Zimmermann

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A majority of the Supreme Court justices viewed a Maine school choice program that excludes religious schools as discriminatory Dec. 8.

In oral arguments that took nearly two hours, several of the justices found fault with the state's decision process in determining just how religious a school was to decide if it could participate or not.

Those deemed as schools that could potentially "infuse" religion in classes were excluded while other schools deemed by the state's board of education to be the "rough equivalent" of public schools — or religiously neutral — could take part in the tuition program.

"That's discrimination based on doctrine. That's unconstitutional," Chief Justice John Roberts said.

Justice Samuel Alito questioned if a school that is religious — that says everyone is equal and worthy of respect and does charitable work but doesn't have dogma — would be disqualified.

Christopher Taub, Maine's chief deputy attorney general, said such a school would be similar to a public school.

"Maybe, but close to Unitarian Universalism," Alito replied, questioning why that would qualify but other religious schools wouldn't, to which Taub countered by saying Unitarianism is a religion and a school promoting that would not qualify for the state program.

Justice Brett Kavanaugh gave the example of two neighbors wanting to use the program — one neighbor wants to use the funds to send their child to a school with religious instruction and another wanted to use funds for secular private school.

Noting that one would get the benefit and the other wouldn't, he said this was "discrimination on the basis of religion right there at the neighborhood level."

When questioned about hypothetical schools that for example could teach Marxism or white supremacy, Taub said they also would be disqualified from participating because they are outside the bounds of the state's program.

Michael Bindas, the attorney for two Maine Christian families who sued the state in federal court over religious schools being blocked from the tuition assistance program, stressed that the money would be given directly to families, not to schools, and that the state's religious discrimination was preventing families from benefiting from a program they should be able to participate in.

Justices Sonia Sotomayor, Elena Kagan and Stephen Breyer sided with the state program. Kagan said it appeared to be designed to avoid raising "questions of religious favoritism, religious division and so forth," and Breyer noted that with so many religions, there is a reason the courts have not wanted the states to pay for education at religious schools.

Kagan and Breyer also noted that these tuition funds could be going directly to schools that discriminate against LGBTQ faculty or students and wondered whether some religious schools would even accept public funds if it could subject them to more regulations.

Currently, the program remains in place because it was upheld because the U.S. Court of Appeals for the 1st Circuit said religious schools could be excluded because state funds would go toward religious instruction.

In a similar case last year, the Supreme Court ruled in Espinoza v. Montana Department of Revenue that states are not required to subsidize private education, but they can't exclude religious schools from receiving tuition funding simply because they are religious.

The U.S. Conference of Catholic Bishops praised the Espinoza decision, saying it means "that religious persons and organizations can, like everyone else, participate in government programs that are open to all."

The Maine case takes the Montana decision a step further asking if the state can prevent students from using state funds to attend schools that provide religious instruction.

During the arguments, justices brought up Locke v. Davey, a 2004 court ruling which said federally funded scholarships were not required to go to college students who were receiving divinity degrees, and the Trinity playground case of 2017, which said state taxpayer-funded grants for playgrounds could not be denied to a school run by a church.

The Religious Liberty Initiative of Notre Dame Law School filed an amicus brief in this Maine case on behalf of elementary and secondary schools from three faith traditions — Catholic (Partnership for Inner-City Education), Islamic (Council of Islamic Schools in North America), and Jewish (National Council of Young Israel).

Nicole Garnett, a law professor at Notre Dame Law School who signed the brief, said in a statement that the "protection of school choice in the form of tuition reimbursement programs is a fundamental right for American families.

Government blocking of tuition reimbursement for religious institutions, she said, is "a direct violation of this constitutional standard."

Becket, a religious liberty law firm, similarly filed an amicus brief emphasizing that states have had a long history of excluding religious institutions from public benefits, often in part from the Blaine Amendments passed during a time of anti-Catholic sentiment in the last 19th century.

The Blaine Amendment to prohibit direct government aid to educational institutions that have a religious affiliation was first proposed in Congress in 1875 by Rep. James G. Blaine of Maine.

After the arguments, Diana Thomson, senior counsel at Becket, said in a statement: "It shouldn't take multiple Supreme Court rulings to stop Maine from treating religious people like second-class citizens, but now that the issue is back before it, the Supreme Court should not hesitate to protect religious people not just for who they are but also for what they do."

The case, Carson v. Makin, could have a significant impact on the tuition aid for religious schools. An opinion is expected by late June.