

Two New Lawsuits Seek to Stop Discrimination Against Religion

The cases seek to expand Supreme Court precedent and establish equality for sectarian education.

August 20, 2018

By Tim Keller and
Michael Bindas

Dave and Amy
Carson live with
their 15-year-old
daughter, Olivia, in

Glenburn, Maine. Like many small towns across the state, Glenburn, population 4,543, is too small to maintain its own public high school. Instead, the local government gives families the money it would otherwise spend on education and lets them choose a public or private school for their children.

There's a catch: Maine won't allow parents to spend taxpayer money on a religious school. Families like the Carsons, who believe a religious school is the best choice for Olivia, get nothing.

In *Trinity Lutheran Church v. Comer* (2017), the U.S. Supreme Court ruled that the First Amendment prohibits states from discriminating against religion in the operation of government programs. Two new federal suits, in Washington state and Maine, seek to build on that precedent to end government-mandated religious discrimination in programs that pay for work-study programs and high-school tuition. Although the plaintiffs in these cases live at opposite ends of the country, they face similar discriminatory laws rooted in antireligious animus. A victory in their cases could clear the way for states to adopt programs that empower parents—rather than government—to direct the education of their children.

In Washington, the state government operates a work-study program that pays a portion of college students' wages for part-time jobs, often in fields related to their majors. The program allows students to earn money for school, reduce reliance on student loans, and gain valuable job experience. Students may work for almost any type of employer—public or private, for-profit or nonprofit.

Employers the state deems "sectarian," however, are excluded, no matter what job

the student may perform. A student could be paid to feed the homeless at a shelter, provided it isn't run by a church. A student could tutor a child at a private elementary school, but not if that school is religious. Our organization, the Institute for Justice, filed a lawsuit last week to end that discriminatory practice.

Maine's tuition program dates to the 19th century, and for most of that time, parents were free to select a religious school for their children. But in 1980 the state attorney general declared that allowing religious options in the program violated the First Amendment's Establishment Clause. In conjunction with the First Liberty Institute, we're filing a federal challenge to Maine's antireligious actions Tuesday.

Two Supreme Court decisions pave the way for eliminating the discrimination against religious options in Washington and Maine. First, in *Zelman v. Simmons-Harris* (2002), litigated by the Institute for Justice, the justices held that school-voucher programs that include religious options don't violate the Constitution. The decision established a simple test for determining whether such programs are permissible: The government must remain neutral with regard to religion—neither favoring nor disfavoring it—and the participants must exercise a genuine choice between religious and nonreligious options.

The educational programs in Maine and Washington, like the one in *Zelman*, are programs of true private choice, but they are hardly neutral toward religion. Religion is the one choice that Maine and Washington prohibit.

The second decision is *Trinity Lutheran*, which established that religious neutrality isn't optional. A Missouri preschool, the court held, couldn't be excluded from a playground improvement program that was open to nonreligious private schools. Chief

Justice John Roberts, in a decision joined by five other justices, explained that "the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution . . . and cannot stand."

Missouri's exclusionary rule was based on the "Blaine amendment" in its state constitution. James G. Blaine, perhaps Maine's most accomplished politician, is sadly remembered for an explicitly anti-Catholic amendment he proposed to the U.S. Constitution. It would have prohibited government funding for so-called "sectarian" schools, while preserving funding for the then-Protestant common schools most states operated. As the U.S. Supreme Court recognizes, at the time, "sectarian" was code for "Catholic."

Despite the failure to pass an amendment at the federal level, nativist politicians were able to get Blaine Amendments added to most state constitutions. Although Maine never incorporated such language into its constitution, the decision to ban religious schools from the education program accomplished a similar result. Washington's constitution does contain Blaine language, and it is the reason cited by the government for excluding sectarian employers from its work-study program.

The Supreme Court has made clear that Blaine Amendments and other discriminatory government regulations don't square with the First Amendment. It is time for federal courts to follow *Zelman* and *Trinity Lutheran* and give families across the country the full freedom of choice that is their right.

Messrs. Keller and Bindas are attorneys with the Institute for Justice, which litigates educational choice programs nationwide.