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POLICY NOTE

U.S. Supreme Court anti-discrimination ruling means the end of Washington state's Blaine Amendments

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Key Findings

1. In June 2022, the U.S. Supreme Court held in *Carson v. Makin* the state cannot prevent families from using a generally-available public tuition assistance program to send their children to private religious schools.
2. *Carson*, and the cases leading up to *Carson*, have the effect of repealing Washington state's Blaine Amendments.
3. Washington state's Blaine Amendments no longer have any effect because they violate the First Amendment of the U.S. Constitution.
4. Lawmakers in Washington state are now free to debate school choice bills like the four bills introduced during the 2022 legislative session.
5. These bills would give families who want options up to $10,000 to send their children to private school.

Introduction

On June 21, 2022, the U.S. Supreme Court held 6-3 in the landmark case of *Carson, et al v. Makin* that the state cannot prevent families from using a generally-available public tuition assistance program to send their children to private religious schools. [1] This case and the cases leading up to *Carson* have the effect of repealing Washington state's Blaine Amendments, measures adopted in the 1880s to ban public assistance to private "sectarian" schools, primarily targeting Catholic schools.

Now that the U.S. Supreme Court has ended state policies that discriminate against parent-directed aid for private schools, states with programs that offer families general public aid cannot use the Blaine Amendments to deny families access to private religious schools.

This Policy Note describes and explains the *Carson v Makin* case, and the earlier U.S. Supreme Court decisions in *Espinoza v. Montana Department of Revenue* (2020)[2] and *Trinity Lutheran Church v. Comer* (2017) that addressed anti-religious discrimination. [3]

Legal commentators summarize this line of cases as follows:

> "Over the years, the Supreme Court has gradually moved from the principle of "no aid" to religion to one of "neutrality," which permits aid, provided it is available to a wide range of recipients, not just religious ones."[4]

The following sections explain these legal findings in detail.

Carson v Makin case

In *Carson v. Makin*, the U.S. Supreme Court effectively struck down the Blaine Amendments of Washington state's constitution, and the same provision that occurs in the constitutions of 36 other states. The

1 *Carson, et al. v. Makin*, U.S. Supreme Court, Slip Opinion No. 20-1088, Decided June 21, 2022, at https://www.supremecourt.gov/opinions/21pdf/20-1088_dbfi.pdf.

2 *Espinoza v. Montana Department of Revenue*, 591 U.S.__ (2020), at https://www.supremecourt.gov/opinions/19pdf/18-1195_g314.pdf.

3 *Trinity Lutheran Church of Columbia, Inc. v. Comer, Director, Missouri Department of Natural Resources*, 582 U.S.__(2017) at https://www.supremecourt.gov/opinions/16pdf/15-577_khlp.pdf.

4 "Aid to Parochial School," by Derek H. Davis, The First Amendment Encyclopedia, 2009, at https://www.mtsu.edu/first-amendment/article/902/aid-to-parochial-schools#:~:text=The%20free%20exercise%20clause%20protects,clause%20of%20the%20First%20Amendment.

case involved Maine's high-school tuition assistance program, a long-standing state policy which gives families direct aid to pay the cost of private school when a public high school is not available in the area. The Carson and Nelson families sued the state when Maine officials prevented them from using this state-funded program to send their children to private religious schools. Officials would allow the families to send state education funding to a private, non-religious school however, setting up the religious-based discrimination facts that the court considered in the case.

The Supreme Court ruled in favor of the families. Chief Justice Roberts, who wrote the *Carson* decision, said:

> "…we have repeatedly held that a state violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits."[5]

The Free Exercise Clause of the First Amendment says, "Congress shall make no law respecting an establishment of religion, or prohibiting the *free exercise* thereof." As explained in *Carson*, the First Amendment requires education officials in Maine to be neutral regarding religion, neither favoring nor discriminating against parents who may select religious schools.

Carson relies on the reasoning of the earlier ruling in *Espinoza v. Montana Department of Revenue*.[6]

In that case the Supreme Court said states cannot bar families from selecting a religiously- affiliated school for their children when participating in a tax credit scholarship program available to the general public. The Court also cited the earlier case of *Trinity Lutheran Church v. Comer*, in which the Court ruled Missouri officials unlawfully discriminated against a private religious preschool by excluding the school from receiving a public grant for resurfacing its playground when the same grants were available to non-religious schools. [7] The Court said it is an unconstitutional restraint on the free exercise of religion to deny religious schools access to general public programs that are available to other private schools.

Justice Roberts also explained in *Carson* that the First Amendment prohibits Congress from making laws "respecting an establishment of religion." Carson does not involve the state establishing religion because in *Zelman v. Simmons-Harris* (2002) the Supreme Court said Ohio's voucher program does not violate the establishment clause because religious schools in Ohio receive this funding through the individual choices of families, and not at the direction of the state.[8] Ohio parents are free to choose non-religious private schools as well, indicating the voucher program is not an "establishment" of religion created by the state.

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5 *Carson, et al. v. Makin*, U.S. Supreme Court, Slip Opinion No. 20-1088, Decided June 21, 2022, page 7, at https://www.supremecourt.gov/opinions/21pdf/20-1088_dbfi.pdf.

6 *Espinoza v. Montana Department of Revenue*, 591 U.S.__ (2020), at https://www.supremecourt.gov/opinions/19pdf/18-1195_g314.pdf.

7 *Trinity Lutheran Church of Columbia, Inc. v. Comer, Director, Missouri Department of Natural Resources*, 582 U.S.__ (2017) at https://www.supremecourt.gov/opinions/16pdf/15-577_khlp.pdf.

8 *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), at https://caselaw.findlaw.com/us-supreme-court/536/639.html.

How the court's recent rulings have effectively repealed the Blaine Amendments

Washington's Blaine Amendments were written in the 19th century with the purpose of prohibiting public funding from going to schools or educational institutions run by religious organizations.

These Blaine Amendments no longer have any effect after the rulings in the U.S. Supreme Court in *Carson v. Makin, Espinoza v Montana Department of Revenue,* and *Trinity Lutheran Church v. Comer:*

> "… today's ruling effectively neuters the 'Blaine Amendments' found in well over half of the nation's state constitutions. These provisions, which prohibit public funds from flowing to religious schools, have long been weaponized by teachers' union and other school choice opponents, who wield them to attack school choice bills in state legislatures and school choice programs in courts. With the Blaine Amendments effectively removed as a barrier and legal cloud over choice programs lifted, the path to even greater educational opportunity to our nation's schoolchildren is now clear."[9]

The history of the Blaine Amendment

Senator James G. Blaine wanted to amend the federal constitution to deny public funding to "sectarian," meaning mainly Catholic schools. His federal effort failed, but Senator Blaine succeeded in requiring new states, including Washington state, to accept his amendment as a condition of joining the union.

At the time, backers of the Blaine Amendment were motivated by concern over the large numbers of poor Catholic immigrants who arrived in America during the late 19th century. They expressed this prejudice by excluding from government funding "sectarian" schools. Instead, public funding was to be reserved for "common schools," understood to mean non-sectarian schools based on non-denominational broad-based Protestantism.[10]

Today the U.S. population is much larger and American society is much more diverse, and local public school officials are considered neutral, and in many cases even hostile, to any form of religious faith.

In today's society, opponents of school choice, mainly powerful school-based unions, use the Blaine Amendments to prevent parents from using public funds to seek a better education for their children at any private school.

These opponents often represent powerful and established interests in the public school system such as district bureaucracies and unions which depend on the forced assignment of students to their schools, and on the public funding that comes with them. These opponents fear giving parents an option other than their

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9 "Supreme Court Issues Landmark School Choice Victory for Parents," by *Institute for Justice*, Press Release, June 21, 2022, at https://ij.org/press-release/supreme-court-issues-landmark-school-choice-victory-for-parents/

10 "School Choice; The Blaine Amendments and anti-Catholicism," Briefing before U.S. Commission on Civil Rights, June 1, 2007, at https://www.usccr.gov/files/pubs/docs/BlaineReport.pdf.

assigned public school. As a mandatory, monopoly-based system, union officials and school administrators consider any choice for parents to represent a threat to their position and their funding.

Conclusion

In *Carson v. Makin* the U.S. Supreme Court ruled that it is unconstitutional for state officials to discriminate against families that choose to use a state program to attend a religious school. State officials may not discriminate against religious schools in funding a general education program that includes non-religious private schools. Such discrimination is an impermissible restraint on the free exercise clause of the First Amendment and is a form of anti-religious bigotry.

The *Carson* opinion follows from the reasoning of the *Espinoza* and *Trinity Lutheran* cases that arose from states with Blaine Amendments in their state constitutions.

These three cases mean that state Blaine Amendments no longer have any effect because they violate the First Amendment of the U.S. Constitution.

In Washington state, powerful special interests in the public schools have long argued the state's Blaine Amendments bar lawmakers from introducing education choice bills offering families public support to send their children to private school.

The U.S. Supreme Court has now made it crystal clear this position violates basic civil rights. Lawmakers no longer need to amend the state constitution to create a popular school choice program.

Lawmakers in Washington state are now free to debate choice bills like the four bills introduced during the 2022 legislative session.[11] These bills would have given families who want options up to $10,000 to send their children to private school. If the state legislature were to pass these bills, private religious schools must be included the list of possible options families have to educate their children. With the ending of the Blaine Amendments, anti-religious discrimination by state officials is no longer permitted.

Programs like these would further the state's paramount constitutional duty "to make ample provision" for the education of every child living within its borders.

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11 "Four innovative school choice bills to help children, especially special needs, foster, and low-income students," by Liv Finne, Legislative Memo, *Washington Policy Center*, February 23, 2022, at https://www.washingtonpolicy.org/publications/detail/four-innovative-school-choice-bills-to-help-children-especially-special-needs-foster-and-low-income-students.