

# Harvard Model Congress Boston 2024

# ELIZABETH SMITH V. THE VERMONT ATHLETICS' ASSOCIATION

*By Eva Frazier*

**UNITED STATES DISTRICT COURT**

Justice Eva Frazier Presiding

# Elizabeth Smith

Plaintiff

**V.**

## Vermont Athletics

## Association

Defendant

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Case No. HMC-DC-2023-FRAZIER-1

## SUMMARY OF FACTS STIPULATED

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On **September 13<sup>th</sup>, 2022**, Dan Frenchie, the head of the Vermont State Department of Education wrote to Superintendents of Vermont Public School Districts. In this memo, Frenchie told all superintendents that they could not deny sending public school tuition to approved religious schools, under the new supreme court ruling in *Carson v. Malkin*.

One religious school that then began to receive funding, was the school Our Lady of God, in Rutborro, Vermont. Upon receiving state funding, Our Lady of God was then eligible to join the Vermont Athletics Association (VAA). The Vermont Athletics Associate is the governing body for all Vermont high schools eligible to compete in the Vermont State Sports Bracket. In order to be eligible, a school must receive state funding. Previously to Dan Frenchie's announcement, all private religious schools compete in a separate sports league managed by the Independent Council of Vermont Religious Schools.

Our Lady of God entered the VAA in time for the 2023 winter sports season in Vermont and was slated to play Appleville High School's girls basketball team on **January 15<sup>th</sup>, 2023**. Leonie Mack, the star player for Appleville's girls basketball team is an outspoken advocate for abortion rights and wears a Planned Parenthood bracelet at all Basketball games. Our Lady of God, a deeply conservative and religious school, does not support abortion. Elizabeth Smith found out about Leonie's activism through Instagram and informed the Bishop at Our Lady of God and her coach. In line with their school's guiding principle, to not condone any activity that violates their religious doctrine, the Principle of Our Lady of God, **Bishop King wrote to the VAA** and stated that they refused to play Appleville's Girls basketball team, **because of** Leonie Mack's outspoken reproductive rights advocacy. The VAA requires all schools to complete the entire season barring extenuating circumstances, under their **No Cancellation Policy**. Because Our Lady of God refused to reschedule this Basketball game and would not sit down to meet with Appleville High School, per the VAA's bylaws, all teams from **Our Lady of God were banned from competing for the rest of the season and would face extensive stipulation to rejoin the VAA in later seasons**. The head of the VAA, Jackie Christoff, delivered this information, to Bishop King **one month** after the game's cancellation, on **February 15<sup>th</sup>**, as stipulated by the VAA's by-laws.

Our Lady of God's lead basketball player, Elizabeth Smith, is the school's spokesperson and a high school junior relying on this season to receive a basketball scholarship to her top private religious college. Outrage by the season cancellation, due to her school's religious values, Elizabeth expressed this to Mark Fongenue, the basketball coach. He shared this with Bishop King. The bishop, in response, felt like Our Lad of God's ability to operate as a religious school funded by the state was compromised. Elizabeth Smith has opened a suit against the VAA for the violation of the 1<sup>st</sup> amendment, and *Carson v. Makin*, which she feels has cost her athletic and academic future.

## INDICTMENT

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The Grand Jurors chosen, selected, and sworn, in and for the County of Chittenden, in the State of Vermont, IN THE NAME AND BY THE AUTHORITY OF THE PEOPLE OF THE STATE OF VERMONT, upon their oaths present that on or about the Fifteenth

day of February 2023 at and within Chittenden County, Vermont, The Vermont Athletics Association, in denying Our Lady of God High School accommodations to stay in the VAA for the 2023 season, despite violating the VAA's "No Cancellation" policy out of religious beliefs violated the 1<sup>st</sup> amendment's Free Exercise Clause. The Grand Jurors upon their oaths present that the VAA **will owe compensatory damages to Elizabeth Smith** if their actions constitute violations of US C 1 A.

## APPLICABLE STATUTES

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### *Vermont School Tuitioning Plan*

#### **Title 16 : Education**

#### **Chapter 021 : Maintenance Of Public Schools**

- **16 VSA § 822. School districts to maintain public high schools or pay tuition (Vermont Department of Education, 2023).**

(a) Each school district shall maintain one or more approved high schools in which high school education is provided for its resident students unless:

(1) the electorate authorizes the school board to close an existing high school and to provide for the high school education of its students by paying tuition to a public high school, an approved independent high school, or an independent school meeting education quality standard, to be selected by the parents or guardians of the student, within or outside the State; or

(2) the school district is organized to provide only elementary education for its students.

(b) For purposes of this section, a school district that is organized to provide kindergarten through grade 12 and maintains a program of education for only the first eight years of compulsory school attendance shall be obligated to pay tuition for its resident students for at least four additional years.

(c)(1) A school district may both maintain a high school and furnish high school education by paying tuition:

(A) to a public school as in the judgment of the school board may best serve the interests of the students; or

(B) to an approved independent school, or an independent school meeting education quality standards, if the school board judges that a student has unique educational needs that cannot be served within the district or at a nearby public school.

(2) The judgment of the board shall be final in regard to the institution the students may attend at public cost. (Added 1969, No. 298 (Adj. Sess.), § 53; amended 1977, No. 33, § 2; 1989, No. 271 (Adj. Sess.), § 3; 1991, No. 24, § 2; 1997,

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No. 71 (Adj. Sess.), § 85, eff. March 11, 1998; 2009, No. 44, § 13, eff. May 21, 2009; 2013, No. 92 (Adj. Sess.), § 96, eff. Feb. 14, 2014; 2015, No. 23, § 22.)

## *First Amendment and Separation of Church and State* *(Congress.gov, 2023)*

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances” (Constitution.congress.gov, 2023).

## *Vermont Independent Schools* *(Vermont Department of Education, 2023)*

“Vermont Statute provides two choices for Independent Schools:

1. Approved: An approved independent school is a school other than a public school that provides a program of elementary or secondary education, or both, that is approved pursuant to 16 VSA. § 166 (b).
2. Recognized: A recognized school is an independent school that meets the requirements for recognized independent schools for any school year, pursuant to 16 VSA § 166 (c), that is not a home study program.”

## APPLICABLE CASE LAW

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### *Carson v. Makin 596 US 1 (US 2022)*

Maine, as a very rural state, operates an educational plan through school administrative units (SAU). Many areas of Maine cannot sustain a public high school, so students from those regions of Maine can either attend other public schools in the state or those SAUs can pay the tuition for students to attend approved independent schools. Approved independent schools must meet accreditation and were required to be non-secular under Maine’s constitution. Three families, the Carsons, Gillises, and Nelsons, all lived in school districts without a public high school (Oyez, 2022).

These three families all opted to send their children to private schools and would have been eligible for tuition vouchers. The three families sued the state of Maine, for denying their children educational vouchers because of their school’s religious affiliation under the First Amendment.

The US Supreme Court ruled in a 6-3 decision that Maine’s requirement of approved independent schools to remain nonsecular violated the free exercise clause of

the First Amendment (Oyez, 2022), and based this ruling on two key cases, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, and *Espinoza v. Montana Department of Revenue*.

The schools that the students in question from Maine attended, notably, held very strong anti-LGBTQ+ viewpoints and stated this in both of their charters (Schermele, 2022).

### *Christian Legal Society Chapter v. Martinez 561 US 661 (2010)*

At the University of California, Hastings College of Law, the Christian Legal Society (CLS) filed a civil suit for violation of the 1<sup>st</sup> amendment when the University refused to approve CLS's application to become an official student organization.

CLS's application for official student standing was denied because state law required all state university organizations to allow all students to equally participate and lead organizations. CLS requires all members to affirm support and belief in only Jesus Christ.

The U.S. Court of Appeals for the Ninth Circuit held that the statewide policy affecting all state universities was not intended to limit religious freedom and that it was equally applied across all student groups. Based on this passement, the Court held that Hastings College of Law did not violate the 1<sup>st</sup> amendment by refusing to authorize CLS (Oyez, 2009).

### *Fulton V. City of Philadelphia 593 U.S (2021)*

*Fulton v. City of Philadelphia* concerned the right of a Catholic adoption agency to deny same-sex couples' licensees to become foster parents under religious rights. In the spring of 2018, the City of Philadelphia banned the Catholic Social Services its license to place children in foster care because of the agency's policy of barring LGBTQ couples from entering the adoption process.

The CSS sued the City of Philadelphia for a violation of the 1<sup>st</sup> amendment, under the claim that the City of Philadelphia's policy of not lining foster care agencies that discriminate against protentional foster care parents targeted the CSS's expression of religious values.

The United States Court of Appeals for the Third Circuit declared that the city of Philadelphia's existing policy did not unjustly discriminate against the CSS. This conclusion was made based on the fact that this policy applied uniformly to all similar agencies and was not made with the intention of limiting the CSS's expression of religion. (Oyez, 2020).

## PRE-TRIAL MOTIONS

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1. Elizabeth Smith accused the VAA of religious discrimination under the 1<sup>st</sup> amendment, and that this has caused her damages through the loss of her junior year basketball season.
  2. The Vermont Athletics Association asserts that there is no legal basis for trial and requests summary judgment due to their blanket No Cancellation policy.
  3. The Honorable Eva Frazier presiding has denied the plaintiff's motion for summary judgment on the grounds that there are unresolved issues of state tutoring relevant to the enforcement of case *596 US 1 (US 2022)*.
  4. The Honorable Eva Frazier Presiding has called a jury trial to resolve these questions of right and practice.
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## POST-SUMMATION JURY INSTRUCTIONS

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The State of Vermont has charged the defendant, Vermont Athletics Association, with a violation of the right to **Free Religious Practice**, in violation of US C. 1.

In order for you to find the defendant guilty of this crime, the People are required to prove, from all the evidence in the case, beyond a reasonable doubt, that a law has violated all of the following elements of the *Lemon Test*. A violation of any one of these principles will render a law to be in violation of the 1<sup>st</sup> amendment.

1. The Law Must Be Secular in nature
2. The Law Must Have a Predominately Secular Effect
3. And must not foster excessive entanglement” between government and religion

While the US Supreme Court has largely abandoned the Lemon Test, it still applies to all lower court rulings (Pew Research Center, 2009).

## WITNESS LIST

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**Plaintiff:**

Bishop King  
Elizabeth Smith  
Mark Fongeneue

**Defendant:**

Leonie Mack  
Dan Frenchie  
Jackie Christoff

*Note on the Order and Gender of Witnesses*

The order of witnesses specified above is random and not binding. Teams should feel free to present witnesses in whatever order they deem most rewarding.

**AFFIDAVIT OF BISHOP KING**

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*Witness for the Prosecution*

My name is Bishop King. I am 51 years old and started and have run Our Lady of God High School for the past 30 years. I am a man of God called to spread the wisdom of our Lord. At Our Lady of God, we offer a godly education for those called by our lord to serve him in his earthly kingdom. In Vermont, we face much pushback to our way of life, however, for the past 30 years, we have quietly served in the name of our mission.

We were thrilled when Dan Frenchie announced that superintendents could not deny students called to our mission public funding through the School Tuitioning plan. Many of our students cannot afford the tuition that we require to continue our work. After opening up our school to students across different socioeconomic backgrounds we have seen a stronger community working towards advancing our godly mission.

Our girls' basketball team is a highlight of our educational programming. Elizabeth Smith was well on track to be recruited by a top division one college, that would allow her to continue her mission towards serving God. However, our educational mandate requires that we do not support any ways of life that do not support our religious values, including the act of abortion. Appleville High School has made the unfortunate mistake of openly supporting this way of life, but Our Lady of God does not concern ourselves with the work of others unless we must directly confront it. At our January 15<sup>th</sup> basketball game, we were forced to confront the shameful "advocacy: of Leonie Mack. Elizabeth Smith shared her Instagram with Coach Mark, who shared it with me, and I was deeply concerned by the statement playing Ms. Mack would make.

In order to meet our educational mandate, we could not engage in this game, because it would equivocate that our godly players are equals with this person. We simply had to boycott this game but did not pursue it further with Appleville or the VAA. On February 15<sup>th</sup> when Jackie Christoff informed us that we had been banned from the VAA, I was in shock. By removing Our Lady of God from the remainder of the winter sports season, our religious way of life and right to educate how we wish has been compromised. The VAA forced us to choose between our educational mission and the future educational goals of our students. This outright religious discrimination cannot stand, which is why our school has raised this suit against the VAA. As a school entitled to federal school tuition funding, and our religious right, this action has damaged and hurt our ability to serve as an educational center, and gravely hurt our star player.

Bishop King

Subscribed and sworn to me on this, the 29<sup>th</sup> day of June 2021

Kitty Frazier

Kitty Frazier, Notary Public



**AFFIDAVIT OF ELIZABETH SMITH**

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*Witness for the Prosecution*

My name is Elizabeth Smith. I am 17 years old, and the captain of the girls basketball team for Our Lady of God. I have dreams of playing Division 1 basketball at Glorious Mercy University, to continue both my athletic care and religious education. I hope to one day return to Our Lady of God and build upon the work Bishop King has done to establish a home for religious education consistent with our family values in Vermont.

On February 15<sup>th</sup>, the VAA stole all my dreams from me. Our Lady of God was on track to attend the Vermont State Championships, and there were supposed to be coaches from Glorious Mercy University. When that letter was sent to Coach Fongenue, I was so upset. I cried for days. Why should our team be punished because we won't associate with those people, who would ask us to violate our founding principles of holiness and a sin-free life?

That girl, on their team, wears that bracelet every game. Their school has a club too, that supports killing children. Our Lady of God doesn't seek to change the actions of other schools. We know that we are the chosen ones and that only those who are called to serve Him can serve. But to play in that game would have meant I would have had to play that girl as an equal, despite how it would invalidate our religious calling. I was sad to miss that game on the 15<sup>th</sup> but would have been sad to compromise the values that call me to a higher life.

But now, I'm being punished for this, along with all of my teammates. We attend Our Lady of God out of choice, but the VAA asked us to choose between our religious way of life and our future educational career. Without a basketball scholarship, I can't afford to attend college. I'm from a town without a public high school, and I've been using the tuitioning plan to attend Our Lady of God. So, I'm one of the students who allowed our Lady of God to belong to the VAA in the first place! I went to our Lady of God before Dan Frenchie's letter, but because of the generosity of our donors. I thought that letter would change things, and that Our Lady of God would finally have been seen as an equal school in the larger community of Vermont high schools. Now, however, the VAA has sent a message that we will never be allowed to both practice our religion and participate in statewide sports, and it's cost me my future.

**Elizabeth Smith**

Subscribed and sworn to me on this, the 29<sup>th</sup> day of June 2021

**Heather Roberts**

Heather Roberts, Notary Public

**AFFIDAVIT OF MARK FONGENUE**

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*Witness for the Prosecution*

My Name is Mark Fongenue, and I am 29 years old. I went to Our Lady of God when I was in high school, and after going on a mission trip to South America, I was called to return to Rutborro to spread the godly word to a new generation at Our Lady of God. I teach religious Studies in Application to Social studies, where students learn how their religious values can be leveraged to create cultural change. Getting students through the tuition plan has been huge in our ability to serve.

I also coach the girls Basketball team, which is one of Our Lady of God's best sports teams. We were really excited for the 2023 season. After preseason in December, the team was looking like they would advance to the Vermont State Championships.

Elizabeth is our star player; she really controls the court. She is so dedicated to our team, and the mission of Our Lady of God, and is the prime example of why it was so exciting for Mr. Frenchie to allow students like Elizabeth to attend Our Lady of God through federal funding. Not only can she now easily afford our lifesaving education, but now we can compete in VAA which receives much more support than the Independent Council of Vermont Religious Schools. When Elizabeth Smith told us about the actions of Leonie, we unfortunately had no choice but to refuse to play the game, or risk invalidating our religious principles and mandate, since we believe that abortion is a sin.

The VAA damaged both our educational mission and religious freedom through its harmful ban. When we alerted the VAA that we could not play Appleville High School due to our religious mandate, they failed to work with us to stay in the VAA while still exercising our religious freedom. We had no intention to boycott other games, but our mandate calls us to refuse to engage with people like those on the team at Appleville. Elizabeth Smith has paid the ultimate price for these actions, We had full plans to remain active members of the VAA, but Jackie Christoff had other plans.

When I received her letter informing me of immediate removal from this VAA season, I shared it with the girls. They were devastated, at both the loss of their season and the lack of protection of their religious freedom. Shame on the VAA, and the State of Vermont for allowing this unjust banning to occur.

**Mark Fongenue**

Subscribed and sworn to me on this, the 29<sup>th</sup> day of June 2021

**Frank Twarog**  
Frank Twarog, Notary Public

**AFFIDAVIT OF LEONIE MACK**

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*Witness for the Defense*

My name is Leonie Mack, and I am a Junior on the Appleville Girls' Basketball team. I'm 17 and I hope to get recruited to play Division One basketball. I love playing basketball, and I was really excited about the game against Our Lady of God. They're one of our biggest competitors, and I really love a good game. I think being one of the smaller schools in Vermont, we don't always get to play a similarly sized school, so I was looking forward to it. I was really confused when Coach said that they'd refused to play us. We had a team meeting two days before the game, and he said he wasn't sure what was going on. Then, the next day, he pulled me aside and said they'd mentioned me personally. I guess he called their coach or something.

I was really upset when Coach Jack told me that the reason, we couldn't play Our Lady of God was my advocacy. I've been really involved with Planned Parenthood since I was a freshman, which is an organization that supports reproductive health. I have done a lot of lobbying for increased access to Abortion in Vermont and founded a club at my school that helps students get to appointments.

I've encountered a lot of pushback to my advocacy, I wear a Planned Parenthood bracelet to all of our games and have organized several events with our basketball team. A lot of people in the community don't like it, but it's never slowed down my work. I know what I'm doing is right. The VAA also has protected the right for my events, and other work undertaken by other students before. They have a nondiscrimination policy and mandate a safe sport environment for all.

Our Lady of God is entitled to their beliefs if they want, but I am deeply upset by the fact that they have claimed that this act by the VOA to prevent further acts like this is a violation of their religious liberty. All I want to do is play basketball and maintain my activism. The VAA acted within its code to allow this to continue. While I feel for Elizabeth's loss of her season, I am not responsible for her beliefs.

**Leonie Mack**

Subscribed and sworn to me on this, the 29<sup>th</sup> day of June 2021

**Mia Twarog**  
Mia Twarog, Notary Public

**AFFIDAVIT OF DAN FRENCHIE**

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*Witness for the Defense*

My name is Dan Frenchie, and I am the head of the Vermont Department of Education. Vermont's unique school tuitioning plan is hard to understand if you don't live in a rural area. Many rural areas of the state cannot support a public high school due to a lack of students, educators, or funding. Some students may have to travel hours to the nearest public health school. Because of this, we have a unique school tuitioning plan where students from districts that do not operate a public high school can take the money that the state would have spent on their education and apply it to private school tuition. For many families, this looks like attending a boarding school where their child can then minimize the long commute they would face from a rural community. After the most recent SCOTUS decision in *Carson v Makin*, I sent out a memo to all Vermont Superintendents, that we cannot ban students in areas without a public high school, from applying these funds to independent religious high schools. I defer to the Supreme Court, and up until January 15<sup>th</sup>, I had not seen the effects of this ruling play out at a state level.

Religious schools like Our Lady of God, and all private schools, must go through a process to be a state-approved independent high school. Our Lady of God cleared this approval process and became an approved independent high school. As a result, they become eligible for students like Elizabeth Smith to use school vouchers at Our Lady of God and compete in organizations under the Vermont Department of Education like the Vermont Athletics Association.

However, the Vermont Athletics Association has a policy of sanctioning schools that refuse to comply with the VAA's No Cancellation which includes failing to complete the season without reasonable extenuating circumstances, like snow days or serious illness outbreaks. Our Lady of God failed to prove extenuating circumstances for their refusal to finish the usually scheduled series of basketball games.

Immediately after Jackie heard about this incident prior to the January 15<sup>th</sup> game, she discussed with me the implications of Our Lady of God's status as an independent religious high school. We both arrived at the distinction that all schools must abide by the VAA's policies to remain eligible as they do not single out individual schools. After this discussion, Jackie sent a memo to Our Lady of God stating that they were no longer able to participate in the VAA.

**Dan Frenchie**

Subscribed and sworn to me on this, the 29<sup>th</sup> day of June 2021

**Phoebe Dennison**  
Phoebe Dennison, Notary Public

## AFFIDAVIT OF JACKIE CHRISTOFF

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### *Witness for the Defense*

My name is Jackie Christoff, and I am the head of the Vermont Athletics Association. I'm a former High School principal and Soccer coach, and I have always been excited to get to help shape the landscape of Vermont high school athletics. Sports are such an important way for our high schoolers to grow and connect.

High school sports have also always been a contentious arena for social issues. Between parents who take games personally, or overheated exchanges between athletics, the VAA has had to adopt some guidelines in order to ensure our organization functions smoothly. One of these guidelines is that no team may unduly forfeit games, except for extenuating circumstances. We do our best to work with teams who are willing to reschedule these games so that they don't face penalties. For example, we always work with teams to reschedule games due to inclement weather which is a regular occurrence in Vermont. However, in this case, there was no attempt to reschedule this game. Our Lady of God informed Appleville High School, and then the VAA two days before the game that they would not play Appleville, and that they would not reschedule the game.

Our Lady of God cited that their religious beliefs would not permit them to play a team with a player supporting abortion rights. After discussing this with Dan Frenchie, we determined that this refusal to stay within the regularly schedule season did not count as a sufficient extenuating circumstance.

I notified Our Lady of God of this decision and was surprised by the pushback, since. After all, if they had offered to reschedule the game, the VAA would not have been forced to make such a tough decision to remove them from the league for the season.

While I regret that Our Lady of God's players have missed out on their season due to this, the VAA holds this policy for a reason. In order to protect the state of high school sports in Vermont, we must hold our teams to a standard that will allow the smoothest seasons possible.

Jackie Christoff

Subscribed and sworn to me on this, the 29<sup>th</sup> day of June 2021

Harry Sanders  
Harry Sanders, Notary Public

## WORKS CITED

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