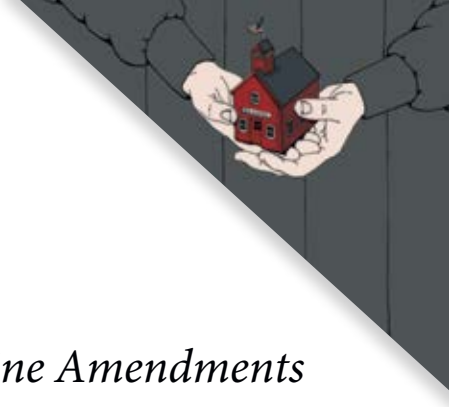

Answered Prayer?

Montana Case Could Prompt Last Judgment for Blaine Amendments

by JOSHUA DUNN

SCHOOL-CHOICE SUPPORTERS HOPED that the U.S. Supreme Court would declare Blaine Amendments unconstitutional in the 2017 case *Trinity Lutheran Church v. Comer*. But the court declined to do so, leaving advocates to pray for another test case to reach the court. A state-court decision out of Montana last year could well provide that test.

Blaine Amendments—provisions in 38 state constitutions forbidding public aid to sectarian institutions—were largely adopted during a spasm of anti-Catholic sentiment in the late 1800s and early 1900s. The Supreme Court has long held that the free exercise clause of the First Amendment forbids "laws that . . . impose disabilities on the basis of religion." Despite that conflict, school-choice opponents have often relied on these amendments in state litigation. In December 2018, Montana officials successfully invoked that state's Blaine Amendment in convincing the state supreme court to strike down a tax-credit scholarship program in *Espinoza v. Montana Department of Revenue*.

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The Montana legislature created the tax-credit program in 2015; it was a modest measure allowing individuals and businesses to contribute up to $150 to private scholarship organizations, with a $3 million cap on donations from all sources. Only one organization, Big Sky Scholarships, which offered assistance to low-income families, formed to participate in the program. But the state department of revenue issued a rule declaring that students attending religious schools were ineligible to receive scholarships under the tax-credit program because of Montana's Blaine Amendment, which states that "the legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies . . . to aid any . . . [institution] controlled in whole or in part by any church, sect, or denomination." Following the department's decision, three low-income mothers whose children had received Big Sky scholarships to attend a Christian school sued, claiming that the tax credits were not public funds and that, even if they were, Montana's Blaine Amendment violated the First and Fourteenth Amendments.

In 2017 a trial court ruled in favor of the mothers on both claims and issued a permanent injunction forbidding enforcement of the revenue department's rule. The department appealed to the state supreme court, which voted 5–2 to overturn the trial court's ruling and declare the entire tax-credit program unconstitutional.

That decision came as a surprise to many, largely because 22 similar tax-credit programs in 17 states have been upheld by state courts, and not a single one had been struck down previously. The court's reasoning, if taken to its limits, would forbid granting tax-exempt status to churches, since such exceptions clearly constitute indirect aid to sectarian organizations.

As other courts have recognized, funds donated to scholarship organizations only involve private individuals giving to private institutions; this money never reaches state coffers. This point was also made in 2011 by the U.S. Supreme Court when it voted 5–4 to uphold the first such tax-credit program, in *Arizona Christian School Tuition Organization v. Winn*. In that case, the court ruled that taxpayers could not challenge the program as a violation of the First Amendment's establishment clause simply because they pay taxes. When people give to scholarship organizations, the court noted, they give "their own money," not money collected "from other taxpayers." The fact that the government does not tax the donations does not make the uncollected taxes public money. The Montana Supreme Court's ruling, by contrast, would seem to imply that the private choices of citizens about how to spend or donate their money are indeed the government's business.

Less than three months after the Montana court's ruling, Espinoza's counsel, the libertarian Institute for Justice, appealed the decision to the Supreme Court, asking it to finish what it started in *Trinity Lutheran*. Because that ruling was decided on narrow grounds, the appeal alleged, it had spread confusion among lower courts. If the Supreme Court accepts Espinoza's case, it's possible that Chief Justice John Roberts will move with his characteristic caution and orchestrate another narrow ruling. But it's also possible that the court will honor what it asserted in *Trinity Lutheran*—that the exclusion of the church "from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution." If the justices choose the latter route, then the last judgment for Blaine Amendments could come as early as the court's next term.

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