A Landmark Ruling for Religious Schools

The future implications of *Espinoza v. Montana Department of Revenue*

THE FULL REACH OF THE U.S. SUPREME COURT'S landmark decision in *Espinoza v. Montana Department of Revenue* has yet to be seen, but it has the potential to reshape the school-choice landscape. That 2020 ruling, which prohibited Montana from excluding students at religious schools from a tax-credit scholarship program, is already sweeping away some of the discriminatory underbrush in the school-funding thicket.

One example comes from Vermont, where a legal battle over state funding for dual enrollment courses recently played out. A program there allows Vermont high school juniors and seniors to take two college courses paid for by the state. Until recently, though, students at religious schools were excluded because of a provision in the Vermont constitution forbidding state aid to such schools.

In 2019, the Alliance Defending Freedom filed a federal suit against the state on behalf of the Catholic Diocese of Burlington and its students and parents. The trial court ruled against them. Then in June 2020, the Alliance filed an emergency motion to the Second Circuit requesting an injunction against the state.

On August 5, a Second Circuit panel granted the request, citing the *Espinoza* decision of June 30. "In light of the Supreme Court's recent decision in *Espinoza v. Montana Department of Revenue*," the panel concluded, "[a]ppellants have a strong likelihood of success on the merits of their claims."

It is likely that *Espinoza* will figure prominently in many other cases in the months and years to come. The extent of its influence will depend on what happens when the decision fully confronts the court's jurisprudence on the Establishment Clause of the First Amendment.

Landmark Case

Espinoza arose in 2015 when the Montana legislature created a tax-credit scholarship program allowing individuals and businesses to contribute up to $150 to qualified scholarship organizations. Big Sky Scholarships, the only such organization that formed, provided assistance to low-income students to attend private schools, both religious and

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Montana resident Kendra Espinoza poses in front of the Supreme Court with her daughters Naomi (right) and Sarah (left) in Washington, D.C., on January 19, 2020.

secular. However, Montana's Department of Revenue ruled that students could not use the scholarships to attend religious schools because of the state constitution's Blaine Amendment, which says 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." Like Montana and Vermont, 36 other states have such statutory provisions, most of which were added to the states' constitutions in an outburst of anti-Catholic bigotry in the late 1800s and early 1900s. In response to the Montana revenue department's 2015 decision, three mothers whose children had used the scholarships to attend a Christian school sued. They won at trial but lost before the state supreme court, which struck down the whole tax-credit scholarship program.

J. SCOTT APPLEWHITE / AP PHOTO

The justices of the U.S. Supreme Court who decided* Espinoza *included Ruth Bader Ginsburg, who died in September. Her replacement will shape the court's future rulings on the constiutional limits or requirements with respect to government funding for religious schools.

The decisions of both the Montana revenue department and the state supreme court were surprising, for three reasons. Twenty-two other states had similar scholarship programs (they have proven to be politically popular) and not a single one had been struck down in the courts, even in states with Blaine Amendments. As well, the U.S. Supreme Court had considered a similar program in 2011's *Arizona Christian School Tuition Organization v. Winn.* In that case, the court held that when people give to scholarship organizations they give "their own money," not money collected "from other taxpayers." The fact that the government does not tax the donations does not make that money public money, the court said. Thus, taxpayers lacked standing to challenge the program as a violation of the Establishment Clause, because there were no taxes at issue. Most state supreme courts hesitate to interpret their own constitutions in ways completely at odds with the U.S. Supreme Court, making Montana's decision unusual.

Finally, and most important, the Supreme Court sent a very strong signal in 2017 to states and their courts to stop discriminating against religious individuals and institutions solely because of their religious status. In *Trinity Lutheran v. Comer,* the court ruled 7–2 that Missouri's decision to deny a church a state grant to resurface its playground based on the state Blaine Amendment violated the Free Exercise Clause of the U.S. Constitution's First Amendment. The court had long held that "laws that . . . impose disabilities on the basis of religion" are unconstitutional, making Blaine Amendments themselves potentially unconstitutional. The court's decision in *Espinoza* was in line with precedent.

While the court did not officially declare Blaine Amendments unconstitutional in *Espinoza,* it certainly deflated them. Chief Justice John Roberts, writing for a five-member majority, ruled that Montana's "no-aid provision" unconstitutionally penalizes parents who send their children to religious schools because it cuts them "off from otherwise available benefits," that is, public benefits enjoyed by other citizens.

After this decision, the only potential leverage left in Blaine Amendments lies in a distinction the Supreme Court had made in *Trinity Lutheran* between religious "status" and religious "use." In *Trinity* and *Espinoza,* the states had discriminated solely on the basis of the religious status of the institutions. The court left the door open a crack to possible state-funding restrictions if those constraints were based on religious use. That is, the courts might distinguish between funding for a playground and funding for religious education.

However, it seems the majority has little appetite for such limitations. In Justice Neil Gorsuch's concurrence in *Espinoza,* he asserted that the status-versus-use distinction does not work under the Free Exercise Clause. He noted that the clause guarantees exercise of religion, not just the right to believe or hold a religious "status." Believers must be able to act on their beliefs. Justice Clarence Thomas also wrote a concurrence that cast doubt on the legitimacy of applying the Establishment Clause against the states; acceptance of that line of reasoning would lead to an even more robust Free Exercise Clause. Justice Samuel Alito's

concurrence recounted the sordid bigotry surrounding the passage of Blaine Amendments.

The dissents, however, particularly Justice Stephen Breyer's, suggest that much of the litigation coming in *Espinoza*'s wake will hinge on how far the court is willing to go in protecting so-called religious use. Breyer, who joined the majority in *Trinity Lutheran*, said *Espinoza* was different because Montana's scholarship program clearly subsidized religious instruction, as opposed to the funding of playground resurfacing, which he views as categorically different. Breyer argued that the long-term consequences will depend on the construed meaning of "otherwise available benefits." Those consequences, he wrote, will be substantial. Roberts said in the majority opinion that "a State need not subsidize private education." Breyer found this less than reassuring. In fact, he argued that the *Espinoza* ruling requires states to subsidize private religious education. "If making scholarships available to only secular nonpublic schools exerts 'coercive' pressure on parents whose faith impels them to enroll their children in religious schools," he asked, "then how is a State's decision to fund only secular *public* schools any less coercive? Under the majority's reasoning, the parents in both cases are put to a choice between their beliefs and a taxpayer-sponsored education."

Or, Breyer continued, "What about charter schools? States vary widely in how they permit charter schools to be structured, funded, and controlled. How would the majority's rule distinguish between those States in which support for charter schools is akin to public school funding and those in which it triggers a constitutional obligation to fund private religious schools?"

New Legal Challenges

The *Espinoza* decision has set the stage for further legal claims against discriminatory school funding. There are at least four kinds of organizations or individuals that might pursue such challenges. In order of their likelihood of jumping into the fight, they are:

1. Faith-based schools that have been denied the right to participate in choice programs because of their religious affiliations.
2. Religious organizations that want to run a charter school but on a nonsectarian basis.
3. Religious organizations that want to run explicitly religious charter schools.
4. Individuals who argue that government funding of public schools is an "otherwise available benefit" that should also support vouchers to attend a religious school.

The first example involves straightforward applications of *Espinoza,* including two current cases, neither of which comes from a state with a Blaine Amendment. One case comes from Maine (Blaine's home state, which ironically never adopted the amendment bearing his name) and is being litigated by the Institute for Justice, the libertarian public-interest firm behind *Espinoza*. In 1873, the state legislature established a program to subsidize tuition for students to attend private secondary schools when their town did not have a public option. Today, out of the state's 260 school administrative units (akin to districts), 143 do not operate a secondary school. The state has in fact paid tuition for students to attend private schools for more than 200 years, but the 1873 act created a formal "tuitioning system." For most of the time since then, the benefit included tuition at religious schools, but in 1982, the state legislature passed a law excluding them. Since then, opponents have mounted two unsuccessful challenges to the law. The third attempt, a case known as *Carson v. Hasson*, is currently in federal court. The Institute for Justice had launched this case following *Trinity Lutheran*, figuring that the Supreme Court's reasoning made it clear the state's policy and the prior decisions of Maine's Supreme Judicial Court violated the Free Exercise Clause. In 2019, U.S. District Court Judge David Brock Hornby ruled against the Institute for Justice, saying *Trinity Lutheran* only applied to playground resurfacing, not "religious uses of funding or other forms of discrimination."

Thirty-eight states have statutory provisions called Blaine Amendments, most of which were added to the states' constitutions in an outburst of anti-Catholic bigotry in the late 1800s and early 1900s.

The Institute for Justice is currently appealing to the First Circuit Court of Appeals. The organization says *Espinoza* has greatly strengthened its hand. Immediately after the court's ruling, the Institute for Justice issued a press release saying that "the decision in *Espinoza* means that Maine's exclusion of sectarian schools must be struck down."

Making the appeal more interesting is that Maine has explicitly relied on the court's distinction between religious status and religious use. During discovery, the Institute for Justice learned that Maine had in fact been subsidizing students who had attended a religious school, but the state argued it was religious in name only. Erica Smith, one of the Institute for Justice's lead attorneys in *Espinoza*, told me in an interview that Maine is essentially saying, "We're not arguing against religious status. We let kids go to this one school. We're just discriminating against religious use because we're just not letting kids go to school where religion is being taught in a proselytizing way."

Smith said she sees that argument as the final "battlefront"

for states under their Blaine Amendments. Some states will try to argue they "can stop scholarships from going to kids at very, very religious schools." Smith thinks that's a losing argument that will fail either before the First Circuit or, ultimately, the Supreme Court. One way or another, the court's tenuous distinction between religious status and use will fall: "We see the Blaine Amendments like they're down and they're about to die at any moment," she said.

Another case, *Bethel Ministries v. Salmon*, comes out of Maryland. In 2016, the state created the Broadening Options and Opportunities Program, or BOOST, which provides vouchers for low-income students to attend eligible private schools. More than 3,000 children receive vouchers averaging about $2,000 each year. To be eligible, a school "cannot discriminate in student admissions, retention, or expulsion on the basis of race, color, national origin, sexual orientation or gender identity or expression." However, the same statute says "nothing herein shall require any school or institution to adopt any rule, regulation, or policy that conflicts with its religious or moral teachings."

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For two years Bethel Christian Academy in Anne Arundel, Maryland, participated in the program. Eighty-five percent of the school's students are of a racial or ethnic minority, and 25 percent come from low-income families. Seventeen students received BOOST scholarships in 2016–17 and 18 did in 2017–18. Prompted by a complaint from the Maryland Parent Teacher Association in 2017, the BOOST advisory board began reviewing the handbooks of participating schools. Bethel's handbook says the school "supports the biblical view of marriage defined as a covenant between one man and one woman, and that God immutably bestows gender upon each person at birth as male or female to reflect His image. Therefore, faculty, staff, and student conduct is expected to align with this view." The school told the state it "does not ask about, or consider" sexual orientation or gender identity "in its student admission decisions" nor "ask about, or consider" sexual orientation, gender identity, or gender expression in those decisions. It also affirmed that it "has not, and will not, discriminate against any student based on sexual orientation, either in admissions or beyond" and that its "conduct policies apply equally to every student and only when at school."

The state was not satisfied. In August 2018, just weeks before the start of school, the BOOST advisory board notified parents they could not use BOOST scholarships at Bethel. The board also informed the school it would have to refund the more than $100,000 in scholarship money it had already received.

Represented by the Alliance Defending Freedom, the school sued in federal court, contending that it had complied with the nondiscrimination requirement and that the state and BOOST advisory board were punishing the school in violation of the provision banning any requirement that schools change their religious teaching. So far, the school has lost, but John Bursch, an attorney for the Alliance, told me he is confident the case will ultimately be resolved in the school's favor. Maryland's decision, he said, was made "only because Maryland officials disliked the religious views" of the school, so "if you simply apply the language of *Espinoza* to what the Maryland officials did, it should be a fairly easy case." In fact, he said he thinks that, after *Espinoza*, requiring schools to ignore their own rules about sexuality will be considered unconstitutional.

The other three situations, so far, are hypothetical, but they are likely to become real soon enough. Consider the scenario of a church or religious nonprofit requesting to run a charter school but promising to do so in a nonsectarian fashion. The organization might say that the educational options for students in its community are substandard and that it proposes to offer an alternative, but one that would not require courses in religion or chapel services nor oblige teachers or students to subscribe to a statement of faith. Assuming the organization's charter application succeeded on its merits, its denial by a state or school district would seem to violate *Espinoza.* John Bursch contends that if a state "passed a rule that said that no religious organizations are allowed to participate by becoming charter schools, that would absolutely be prohibited under E*spinoza.*" Roberts' opinion said that once a state decides to subsidize private education, "it cannot disqualify some private schools solely because they are religious." The same reasoning would seem to apply to this hypothetical case. States do not have to allow charter schools, but once they do, and they allow nonprofits to run them, they cannot exclude religious nonprofits.

But this apparently straightforward outcome also depends on the court's inscrutable Establishment Clause jurisprudence, which one federal judge called a "vast, perplexing desert." For decades the court applied, if only intermittently, the three-pronged *Lemon* Test, which arose from a 1971 Supreme Court case, *Lemon v. Kurtzman.* The test holds that laws and government programs must have a secular legislative purpose, must neither primarily advance nor inhibit religion, and must not cause "excessive entanglement" between government and religion. Under this test, one could argue that having a religious entity run a publicly

funded charter school would create an excessive entanglement. However, the test has long confounded litigators because it is not grounded in the text of the Constitution and it lacks coherence—for example, to ensure that public funding given to religious schools was not "advancing religion," the government would have to closely monitor the schools' activities, which would of necessity cause excessive entanglement.

The court all but officially eliminated the test in the 2019 decisionmaking. Generally, one would expect the clarity of a legal standard to win out over personal analysis.

The court has occasionally invoked two other rules when interpreting how the Establishment Clause applies in a case. The first is the Endorsement Test, which stipulates that a government action can neither endorse nor disapprove of a religion, as judged by a "reasonable, informed observer." Since both secular and faith-based nonprofits would be allowed to run schools, reasonable

ANNALIESE NURNBERG / *MISSOURIAN* VIA AP

The playground at Trinity Lutheran Church in Columbia, Missouri. The Supreme Court ruled 7–2 in 2017 that churches have the same rights as any other charitable organizations to seek state money for new playground surfaces and other nonreligious needs.

case *American Legion v. American Humanist Association*, but one cannot make confident predictions based on that decision. The court did not officially declare the end of the *Lemon* Test, and the doctrine has more than once been summoned from the grave after appearing dead. The *American Legion* case did not involve schools but a religious monument on public land. It is conceivable that five of the justices might want to retain some kind of entanglement test in matters specifically related to schools. In the absence of a reliable standard, we are left to guess at how this scenario would strike the justices. But the *Espinoza* decision could work in favor of the religiously run charter school. That ruling establishes a clear standard, while relying on Establishment Clause jurisprudence involves ad hoc observers could not infer that government was favoring religion over nonreligion or one faith over another. The second doctrine is the Coercion Test, under which judges weigh whether a policy forces people to directly support or participate in religion against their will. Since parents choose to enroll their children in charter schools, it is hard to infer any element of coercion.

On balance, then, one would expect charter schools run by faith-based organizations that forgo the teaching of religion to pass judicial scrutiny. That outcome, though, is less likely in the third scenario, in which a sectarian institution wants to run an explicitly religious charter school. It's not that the logic of *Espinoza* does not apply here, because it does. One could argue that refusing to authorize this kind of school denies an otherwise

available benefit based on religion, just as in the previous scenario. This situation, however, also leaves more guesswork as to how it would strike the majority of justices. Both Erica Smith and John Bursch say there is no way at least five justices would approve of such schools. Smith says "it wouldn't even matter what the nuances of the Establishment clause doctrine are," and Bursch says that if a charter school were explicitly inculcating a particular faith, "that would probably cross a line that virtually any of the justices would find impermissible." Essentially, despite the court's gutting of the *Lemon* Test, a majority of justices likely still think that the direct funding of an overtly religious school violates some principle of entanglement. When even the strongest defenders of educational choice cannot find a way to count five votes in favor of such schools, it seems unlikely they will become a reality anytime soon. However, if Trump's Supreme Court nominee Amy Coney Barrett is confirmed by the Senate, she may well prove more sympathetic to these kinds of claims, and the judicial politics and the math would become easier. Chief Justice Roberts clearly wants to avoid 5–4 votes on controversial issues, but Barrett creates a potential sixth vote, perhaps making Roberts more likely to extend the logic of *Espinoza* to these kinds of cases.

States do not have to allow charter schools, but under *Espinoza,* once they do, and they permit nonprofits to run them, they cannot exclude religious nonprofits.

Even more unlikely would be claims that the meaning of "otherwise available benefit" should compel states to provide vouchers for students to attend religious schools. Again, one could certainly string together an argument for such a claim: just read Justice Breyer's dissent in *Espinoza.* Or consider the history of Blaine Amendments. When the common school movement was making education broadly available—providing a general benefit—it was done in a way that effectively punished those outside the then dominant Protestant establishment. Catholics, Jews, and anyone else objecting to the moral framework of public schools had to either send their children to those schools or create their own, shouldering the cost while also paying taxes to support public schools. The same argument could be made today. No one seriously believes public education is morally neutral. In fact, opponents of school choice often rest their claims on the necessity of instilling in students a uniform worldview. As well, on Twitter, teachers have lamented that with the new reality of remote teaching, parents might now discover what schools are teaching their children. One teacher even said, "Parents are dangerous."

As Alito wrote in his *Espinoza* concurrence, "Many parents of many different faiths still believe their local schools inculcate a worldview that is antithetical to what they teach at home." One could argue that those who choose a religious school instead are being deprived of the "otherwise available benefit" of support for their children's education.

Despite the parallels to 19th century discrimination, this reasoning would probably not gain much purchase with the court. By compelling states to give funding to charter schools, courts would only be extending the application of an existing program to religious entities. In the case of vouchers, however, even if the court's conservatives wanted to mandate public support for this form of school choice, they would probably have serious concerns about separation of powers and judicial policymaking. Judicial conservatives have long argued that courts are unsuitable instruments for crafting public policy, both because that role is constitutionally committed to legislatures and executives and because judges lack the capacity to make informed policy choices, particularly when reshaping large public institutions like schools.

Delivering on the Promise

While we will have to wait to know the full effects of *Espinoza*, we already know it will provide a powerful lever in both the legal and the political efforts to expand school choice. Blaine Amendments have hindered states from providing more options for students and from thinking of new ways to improve educational alternatives. Now, as Daniel Suhr explained, *Espinoza* allows school choice advocates to "go on offense." The decision, he said, is bringing "new energy to legislative and policymaking efforts. In a lot of states that don't have choice, the obstacle has been Blaine." Legislatures no longer have it as "an excuse," he said.

Florida, for example, has had to limit its popular Tax Credit Scholarship Program because of concerns over the state's Blaine Amendment. John Bursch said that now the legislature can "come in and they can actually make that a government-funded program and allow that to go forward on a widespread basis, and not rely on the generosity of benefactors who will help pay for low-income kids." This points to the sad history of Blaine Amendments. They were designed to punish religious minorities, but more recently, they have effectively punished low-income parents—who are disproportionately members of racial minorities—seeking better opportunity for their children. Liberated from the threat of losing in litigation, more state policymakers may proceed to deliver on the promise of equal educational opportunity.

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