

In Supreme Court Case, a Far-Reaching Win for Religious-School Parents

Espinoza v. Montana may pave way for more direct funding of religious schools

BY JOSHUA DUNN

THE SUPREME COURT'S DECISION siding with religious-school parents in *Espinoza v. Montana Department of Revenue* will have implications far beyond Montana. Though the court did not explicitly say so, its decision effectively struck down Blaine Amendments, provisions in 38 state constitutions forbidding aid to religious institutions. If the narrow 5–4 majority of the *Espinoza* decision remains intact, the case will be both one of the most significant religious-liberty and education decisions in decades.

As we reported earlier (“Answered Prayer,” Fall 2019), the *Espinoza* case arose when Montana officials eliminated a tax-credit scholarship program because it allowed religious schools to participate. The state had invoked its Blaine Amendment to justify its decision. The Supreme Court explicitly ruled that the state’s action singled out religious parents, including Kendra Espinoza, and schools for punishment solely because of their religious status. Relying on the opinion he wrote for the court just three years ago in *Trinity Lutheran Church v. Comer*, Chief Justice John Roberts ruled that Montana’s “no-aid provision penalizes” families that choose to send their children to religious schools “by cutting [them] off from otherwise available benefits,” rendering that application of the clause unconstitutional. The chief justice, you could say, finally ran out of his minimalist patience. All Montana would have had to do to avoid this decision was read his opinion in *Trinity Lutheran*.

While there might be some zombie elements of Blaine Amendments that survive this reasoning, it’s not clear what they would be and what force they would have. For instance, *Trinity Lutheran* relied on a distinction between religious use and religious status. That distinction seemed strained and unlikely to last. The court did not have to address whether it should maintain it, since this case was clearly based on religious status. Even more telling is that the dissenters thought this was a death blow against Blaine Amendments, indicating that there’s almost nothing left of them now. Justice Ruth Bader Ginsburg flatly stated that “by urging that it is impossible to apply the no-aid provision in harmony with the Free Exercise Clause, the Court

seems to treat the no-aid provision itself as unconstitutional.”

At least some of the others in the majority would be willing to go even farther. Justice Clarence Thomas, joined by Justice Neil Gorsuch, argued that the court’s reading of the Establishment Clause had distorted its interpretation of the Free Exercise Clause, unconstitutionally limiting the rights of religious believers.



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Kendra Espinoza with her daughters at Stillwater Christian School in Kalispell, Montana

Thomas pointed out that when the Establishment Clause was written it was designed to protect official state churches from having a national established church imposed on them. Thus, it is not clear that it should restrict states at all. But if it does, at most, he argued, all it should do now with its incorporation via the Fourteenth Amendment is forbid official state churches. Now, however, states use the clause to infringe on the free exercise of religion. In short, proper protection of free exercise requires a proper interpretation of the Establishment Clause.

Justice Samuel Alito concurred, but to point out the explicitly discriminatory origins and contemporary operation of Blaine Amendments. Defenders of Blaine Amendments have argued that their sordid discriminatory motivations do not mean that they are discriminatory today. Montana, for instance, had revised

its constitution in 1970, allegedly purging the amendment of its odious past. Alito pointed out that that does not matter because it still has its “originally intended” discriminatory effect.

The long-term consequences of this decision may hinge on the definition of the “otherwise available benefits” mentioned in the opinion. Justice Stephen Breyer’s dissent sees the court’s reasoning as having far-reaching effects. Despite Roberts’s claim that “a State need not subsidize private education,” Breyer writes that the ruling will require states to subsidize private education. It’s hard to see

how he is wrong, though it’s possible that states will attempt to defend a distinction between a service directly provided by a government-run school and one provided by a private school, religious or nonreligious. Breyer asks, “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, then how is a State’s decision to fund only secular *public* schools any less coercive?”

Or, Breyer asks, “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

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is akin to public school funding and those in which it triggers a constitutional obligation to fund private religious schools?” In the end, the court’s reasoning could compel states to fund not just religious schools but religious charter schools as well, if education itself is construed as the “otherwise available benefit.” Breyer and the other dissenters will have to pin their hopes on the chief justice being willing to draw an arbitrary line limiting the reach of his analysis. Given some of his other decisions this term, that hope might be a reasonable one.

For advocates of equal funding of education regardless of whether it’s public or private, this will go down as a landmark decision. States can no longer rely on their Blaine Amendments when categorically excluding religious believers and institutions from state benefits. This decision could also compel the states to expand those benefits to religious believers and institutions well beyond Kendra Espinoza and the Stillwater Christian School of Kalispell, Montana.

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