Blaine Fights Back

By JOSHUA DUNN

IN JUNE 2020, the U.S. Supreme Court seemingly dealt a deathblow to Blaine Amendments—provisions adopted by 37 states to prevent government funding of parochial schools. In *Espinoza v. Montana Department of Revenue*, the court held that states could not use these amendments to discriminate against religious parents or religious schools by excluding them from a "generally available" government benefit. Yet despite this ruling, a number of Blaine Amendment cases are still working their way through the courts.

MACKINAC CENTER FOR PUBLIC POLICY

The Hile family is among those suing, seeking the ability to use their Michigan 529 savings plan to pay tuition at a private Christian school.

Perhaps the most interesting one, *Hile v. Michigan*, was filed in federal court in September 2021. In *Hile*, five families acting with the support of the Mackinac Center for Public Policy, a free-market think tank, challenged the state's decision to prevent them from using their 529 savings plans for tuition at private religious schools. Authorized by federal tax law but sponsored by individual states, 529 plans allow individuals to invest after-tax income in accounts where the money grows tax-free and can be used for education expenses. Initially, these plans were allowed only for higher education, but in 2017 the Tax Cut and Jobs Act extended the program to K–12 expenses, including costs at private and religious schools.

Despite the change in the law and the court's ruling in *Espinoza*, Michigan refused to extend this benefit to private-school parents because the state's Blaine Amendment forbids using public funds "to aid any nonpublic elementary or secondary school," and "tax benefits" are one of the prohibited forms of aid. Michigan's position is that because all private schools, not just religious ones, are constitutionally excluded, the state's policy does not constitute religious discrimination.

The parents in *Hile* have offered several arguments against the state's position. Most important, they argue that the First Amendment's Free Exercise Clause prohibits any government action motivated by religious animus. Two cases in particular suggest that the courts might conclude that such animosity is in play in the *Hile* circumstances. In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Supreme Court held that a town ordinance passed solely to exclude the Santeria Church from locating in Hialeah, Florida, violated the Free Exercise Clause's requirement that government be neutral toward religion. Similarly, the court ruled in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* that the blatant hostility expressed by members of the commission toward a religious believer violated the government's "high duty" of neutrality.

Michigan's Blaine Amendment, the *Hile* plaintiffs claim, has at most a veneer of neutrality. The amendment was added to the state constitution in 1970 in response to a proposal for the state to provide $150 in assistance to each private-school student. At the time, nearly all of the state's private-school

students were attending religious schools, most of them Catholic. In what became one of the most unsubtle choices in American politics, the primary sponsor of the amendment called itself the Council Against Parochiaid. In fact, opponents of the state funding simply called the money "parochiaid." The group explicitly asked its supporters to "contact all Protestant Church ministers and Jewish Rabbis in your area asking them to sermonize against Parochiaid and encourage their congregation to vote YES" on the amendment. Another supporter of the amendment, Americans United for Separation of Church and State, bluntly stated, "More than 90 percent of all parochiaid funds go to schools owned by the clergy of one politically active church."

The *Hile* plaintiffs also argue that even though all private schools are excluded from the 529 plan, Michigan still treats "comparable secular activity more favorably," because the state allows public-school students to transfer to a different district if the family pays tuition—and parents can use their 529 savings in these instances. Moreover, the plaintiffs argue that Michigan is forcing families to "divorce" themselves from religious control or affiliation as a condition of receiving a government benefit, in violation of *Espinoza.*

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Because of the unusual facts behind both the 529 policy and the Blaine Amendment, there is a chance that Michigan's decision could survive judicial scrutiny. However, some justices on the Supreme Court have clearly wanted to use the bigoted history behind Blaine Amendments as justification enough to declare them unconstitutional. For instance, Justice Samuel Alito's concurring opinion in *Espinoza* documented the anti-Catholic bigotry motivating Blaine Amendments and contended that that history shows that the amendments are inherently discriminatory and, thus, unconstitutional. One newspaper warned its readers about Catholicism and in particular Catholic education, saying, "Popery is the natural enemy of *general* education. . . . If it is establishing schools, it is to make them *prisons* of the youthful intellect of the country." The court, Alito asserted, should directly consider that history. But so far, following Chief Justice John Roberts's minimalist disposition, the court has not done so. In *Hile,* though, lower courts will not be able to avoid a direct consideration of that history, nor will the Supreme Court, if the case makes it that far. One cannot simply sweep a label like "parochiaid" under the historical rug.

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