SUPREME COURT

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Espinoza v. Montana Dep't of Revenue: The Need to Preserve the "Play in the Joints" in the Religion Clauses

The intersection of the Establishment Clause and the Free Exercise Clause has produced vexing issues of constitutional law. To what extent is the government permitted to fund religion under the Establishment Clause? To what extent is the government required to fund religion under the Free Exercise Clause? And to what extent may state constitutions impose additional prohibitions on funding religion that exceed the limitations established under the Establishment Clause before running into Free Exercise issues? This delicate balance between "freedom of religion" and "freedom from religion" is one the United States Supreme Court has sought to preserve over time.

The Supreme Court, in this current term, has the opportunity to address the confluence of these issues when it takes up *Espinoza v. Montana Dep't of Revenue*. In June 2019, the Court agreed to decide whether it violates the religion clauses or the Equal Protection Clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools.[1] The determination could potentially have widespread impact on school-choice programs throughout the country.[2] Currently, there are 23 school-choice programs in 18 states that are similar to the Montana school-choice program in *Espinoza*, and there are 65 school-choice programs nationwide.[3] Additionally, the outcome could have sweeping implications for defining the parameters between the two religion clauses and for the constitutionality of No-Aid provisions in state constitutions.

In 2015, the Montana legislature created a school-choice program that provides a dollar-for-dollar tax credit of up to $150 for individuals and businesses who donate to nonprofit "student scholarship organizations" ("SSOs").[4] The money donated under this program is used to create scholarships for students to attend private schools.[5] The fact that most private schools in Montana are religious created a foreseeable problem—that is, the program would likely conflict with the "No-Aid Clause" in the Montana Constitution. The No-Aid Clause expressly prohibits "direct or indirect" aid to sectarian schools.[6] However, unlike other No-Aid Clauses, Montana has shown that its constitutional amendment does not arise from either anti-Catholic bigotry or non-specific antagonism towards religion in general.[7]

In recognition of the likely conflict between the school-choice program and the No-Aid Clause, the Montana legislature required the state's Department of Revenue to administer the tax credit in a manner that complied with the Montana Constitution.[8] In response, the Montana Department of Revenue promulgated "Rule 1" which prohibits the tax credit from being used to fund religious schools, thereby making the tax credit program compliant with the State's No-Aid Clause.[9]

Kendra Espinoza, a mother whose children received scholarships through an SSO to attend a Christian School, successfully sought an injunction against Rule 1 in 2015.[10] However, the Montana Supreme Court reversed and held that the tax-credit program "indirectly [paid] tuition at private, religious-affiliated schools" in violation of the No-Aid Clause.[11] In a sweeping move, rather than upholding Rule 1, the Montana Court struck down the entire tax-credit program.[12]

The Montana Department of Revenue petitioned the Supreme Court, contending that the state's highest court acted unconstitutionally in striking down the statute as a whole.[13] Instead, they claim that the U.S. Constitution prohibits applying a state constitutional provision in a way that would bar religious options from an otherwise neutral and generally available student-choice program.[14]

The Supreme Court's jurisprudence delineating the restrictions on government funding of religious schools under the Establishment Clause and the permissible exclusion of religion under the Free Exercise Clause has a complex and multivariate history. The issues in such cases are highly complex and do not easily yield uniform responses. To fully appreciate the gravity of *Espinoza*, a review of the jurisprudence leading up to this point is useful:

In a trailblazing decision, *Everson v. Board of Education*, the Supreme Court not only incorporated the Establishment Clause against the states for the first time, but acknowledged that the Estab-

lishment Clause does not necessitate an absolute prohibition on providing aid to religious schools. In *Everson*, the justices confronted the issue of a local board of education's decision to reimburse parents of children for bus fares necessary to attend Roman Catholic schools, as well as public high schools, outside the township.[15] The board of education's reimbursement program found its legal footing in a New Jersey state law that required the equal treatment of children in public and private non-profit schools.[16] Writing for the majority, Justice Hugo Black upheld the state law as applied to the reimbursement program because, in his view, the Constitution prohibits governments from excluding individuals from receiving the benefits of public welfare legislation "because of their faith or lack of it."[17] Thus, because the legislation at issue "does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools," the program does not violate non-establishment clause principles.[18]

What may seem like a win for proponents of school-choice programs was tempered by the Court's ostensibly rigid representation of the Establishment Clause. The majority noted that the nature of the aid "approaches the verge of [constitutional] power."[19] Thus, early on the Court suggested that any substantial or direct funding of religious schools is likely incompatible with the Establishment Clause.[20] Nonetheless, recent developments in Establishment Clause jurisprudence signal a move away from strict separationism in the Court's evaluation of indirect aid programs.[21]

In the years following *Everson*, the nature of the aid—whether direct or indirect—and its connection to education became increasingly important in the constitutional inquiry.[22] In a series of cases, the Court upheld the constitutionality of state programs that were wholly neutral in offering indirect educational assistance to a class defined without reference to religion.[23] These programs also shared a key feature that aided the Court in reconciling the expenditures with the Establishment Clause—that is "genuine," "independent," and "individual" choice.[24] The decisions in this line of cases reflected the underlying assumption that the government was protected from any perceived endorsement of religion when the aid passed through the choices of individual beneficiaries at the outset before benefiting a religious entity.[25] Thus, while there is a constitutional limit on the type of aid a state may provide to a religious school, so long as families are provided a genuine, independent, and individual choice, religious schools may be included in general student-choice programs without being invalid under the Establishment Clause.[26]

Nevertheless, opponents of school-choice programs have relied on state constitutional provisions that provide additional limitations on the state's ability to provide aid to religious schools. The origins of these constitutional amendments, commonly referred to as "No-Aid" provisions or "Blaine Amendments," go back to a failed attempt to amend the Constitution of the United States in 1875 and are deeply tainted with anti-Catholic bigotry.[27] The proposed amendment, introduced in the House by Representative James G. Blaine, would have prohibited the government from funding any religious school.[28] While the Amendment ultimately failed to pass the Senate, 37 states have since incorporated similar "No-Aid" provisions into their constitutions.[29] Some of the No-Aid provisions have been construed narrowly, and are understood as providing minimal restrictions on aid to religious entities,[30] while others reflect a separationist construction that demands a rigid interpretation.[31]

At the other end of the intersection between the Establishment Clause and the Free Exercise Clause is a parallel question: to what extent if any, is the government *required* to fund religious entities? The Court has recognized that there is some "play in the joints" between the two religion clauses, and offered guidance on the matter in *Locke v. Davey*.[32] The issue before the Court was whether the state of Washington, acting pursuant to its own constitution, could exclude students who were pursuing degrees in devotional theology from a college scholarship program created by the state's legislature, without violating the Free Exercise Clause.[33] The Court rejected the student's challenge and stated, "we. . . cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect."[34] *Locke* also illustrates the Court's willingness to respect state constitutional amendments that provide more stringent limitations than that drawn by the Establishment Clause.[35]

After the decision in *Locke* a circuit split developed on whether state governments, relying on No-Aid provisions, may bar religious options from student-choice programs.[36] The circuits that have read *Locke* broadly have inferred a wholesale exclusion of religious schools from student-aid programs.[37] On the other hand, some courts have relied on a narrow reading of *Locke* to invalidate attempts to exclude religious schools from student-choice programs.[38]

In 2017 the Court had another opportunity to address the effectiveness of No-Aid provisions within the context of a grant to a religious organization in *Trinity Lutheran Church of Columbia, Inc. v. Comer*.[39] Writing for a 7-2 majority, Chief Justice John Roberts explained that a Missouri policy that expressly excluded churches from a grant program to resurface playgrounds violated the Free Exercise Clause because it denied an otherwise available public benefit on account of an applicant's religious status.[40] Although a broad reading of the opinion may suggest that the Free Exercise Clause prohibits general aid programs from discriminating against religious institutions, four of the seven justices in the majority tempered the holding

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Such a rule would therefore be in the fiscal interest of local governments as it would allow them to dispose of these cases earlier, cutting down not only on litigation costs, but also the employee time and distractions that come with civil rights litigation.

Oral argument in the *Torres* case is set for the end of March, and the Supreme Court will issue a decision before the end of June.

Notes

As noted at the outset, amicus support at the petition stage can make a huge difference in getting your petition for certiorari granted by the Supreme Court. If you would like IMLA's help with an amicus brief, please reach out to me at: akellar@imla.org or 202-466-5424 x 7116. The earlier in your case that you reach out, the more likely we would be able to help.

1. Municipal Code of Chicago, Ill. § 9-100-120(a).
2. *Id.* § 9-92-080(f).
3. 11 U.S.C. § 362(a)(3) (emphasis added).
4. 11 U.S.C. § 362(b)(4)
5. *In re* Fulton, 926 F.3d 916, 920 (7th Cir. 2019), *citing* Thompson v. GMAC, LLC, 566 F.3d 699, 700 (7th Cir. 2009)
6. *Id.*
7. *Id.* at 923.
8. *See* City of Chicago v. Fulton, Petition for Writ of Certiorari, p. 15-19.
9. *Id.* at 19-26.
10. City of Chicago v. Fulton, Brief of Amicus Curiae International Municipal Lawyers' Association In Support of Petition (hereinafter, "IMLA Amicus Brief"), p. 8.
11. IMLA Amicus Brief, p. 11.
12. *Id.* at 11-12.
13. Torres v. Madrid, 769 F. App'x 654, 657 (10th Cir. 2019)
14. *Id.* ML

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in a footnote.[41] Those justices emphasized that their decision was limited to the facts before them and did "not address religious uses of funding."[42] *Trinity Lutheran* also represents a sudden and unacknowledged move towards principles of nondiscrimination that were not present in past cases.[43]

This cursory review of the Court's religious clause jurisprudence reveals the importance of *Espinosa v. Montana Dep't of Revenue*. The crux of *Espinosa*, like many other Free Exercise cases, comes down to whether the government may treat religious activities differently than secular ones. *Locke* suggests that there should be some "play in the joints" that allows states to exclude funding for religious education. Governments are afforded significant discretion in their ability to accommodate and respond to the religious impulses of society that are not mandated by the Free Exercise Clause.[44] Accordingly, *Locke* aptly affirms that there is an analogous discretion in a state's choice to limit aid to religious organizations. To extend *Locke* to the *Espinosa* would be in line with the Court's historical interest in not funding religious education.

When evaluating government treatment of religion, it is important to acknowledge the Constitutional duality between not discriminating against religion while not promoting it.[45] Critics of *Locke* emphasize principles of nondiscrimination and substantive neutrality.[46] In their view, the Constitution requires the government to minimize the extent to which it either encourages or discourages religious belief, which can only be accomplished if nondiscrimination principles prevail.[47] However, the *Locke* Court rejected a similar argument made by the student that the exclusion of theology majors is presumptively unconstitutional because it is not facially neutral. Ironically, supporters of nondiscrimination and neutrality neglect specific instances where the government may treat religion differently in order to protect freedom of religion.[48] If principles of nondiscrimination and neutrality are strictly adhered to in all religious cases, the government would not be able to provide religious exemptions for burdensome regulation. Instead, the Constitution allows, and in some instances requires, laws to recognize the seminal role religion plays in our society.[49]

The plaintiff in *Espinoza* relies heavily on the Court's decision in *Trinity Lutheran*, but that argument is not without fallibility. In reaching its decision in *Locke*, the Court assumed that the playground was not being used for any religious activities, and specifically stated the case did not apply to "religious uses of funding."[50] For the Court to extend *Trinity Lutheran* to *Espinoza*, the justices will have to confront the fact that Montana's tax-credit program would subsidize not only religious activities but religious instruction, training, and indoctrination on a daily basis. While the Establishment Clause may not prohibit such school-choice programs so long as there is an independent, genuine, individual choice, Montana should have the same type of discretion that the state of Washington was afforded in *Locke* to not fund such religious education.

If the Court rules in favor of Espinoza, No-Aid provisions throughout the country could be effectively meaningless, at least within the context of school-choice programs. The potential breadth of such a holding could be detrimental to No-Aid provisions as a whole. It is hard to distill a meaningful difference between an indirect school-choice program and other forms of indirect aid to religious organizations that could withstand a similar constitutional challenge. Even if the justices side with Espinoza via a narrow disposition, such a holding would open the doors to additional challenges to No-Aid provisions. On the other hand, if the Court sides with the state, the decision would simply reaffirm that there is "room for play in the joints" and that states have discretion when it comes to

funding religious education.

The Court's decision to hear *Espinoza v. Montana Dep't of Revenue* offers an exceptional opportunity to extrapolate future markers pertaining to religion-related funding cases ahead. Whether the Court will allow the continuation of the "play in the joints" remains to be seen.

Notes

1. *See* Espinoza v. Montana Dep't of Revenue, 393 Mont. 446 Mont. 446 (Mont. 2018), *cert. granted*, 139 S. Ct. 2777 (Jun. 28, 2019) (No. DA 17-0492).
2. *See* EdChoice Amicus Curiae, Espinoza v. Montana Dep't of Revenue, 139 S. Ct. 2777 (2019) (No. DA 17-0492).
3. *Id.* at 3.
4. *See* Mont. Code Ann. §§ 15-30-3101 *et seq.*
5. *Id.* § 15-30-3102(7).
6. Mont. Const. art. X, § 6.
7. *See* Brief for Respondent at 14-15, Espinoza v. Montana Dep't of Revenue, 139 S. Ct. 2777 (2019) (No. DA 17-0492).
8. *See id.* § 15-30-3101.
9. *See* Admin. R. Mont. § 42.4.802(1)(a).
10. *See* Espinoza v. Montana Dept. of Revenue 2017 WL 11317587 (Mont. Dist. 2017).
11. *See* Espinoza v. Montana Dept. of Revenue, 393 Mont. 446 (Mont. 2018).
12. *Id.* at 468-69.
13. *See* Petition Cert., Espinoza v. Montana Dep't of Revenue, 139 S. Ct. 2777 (2019) (No. DA 17-0492).
14. *Id.* at 3.
15. *Everson v. Board of Education*, 330 U.S. 1 (1947).
16. *Id.* at 62.
17. *Id.* at 16.
18. *Id.*
19. *Id.*
20. Ira C. Lupu & Robert W. Tuttle, Secular Government, Religious People 87 (2014).
21. Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 Notre Dame L. Rev. 917, 2 (2002).
22. Secular Government Religious People, *supra* note 20 at 93.
23. *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding Ohio's Pilot Project Scholarship Program that provided tuition aid in the form of vouchers for certain students to attend participating public or private schools of their parents choosing); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (holding that the Establishment Clause did not prohibit the school district from providing a sign-language interpreter to a student attending a Catholic high school); Witters v. Washington Dep't of Servs. for the Blind (holding that extending aid granted through Washington's vocational rehabilitation program to assist a blind student in becoming a pastor did not violate the Establishment Clause); *but cf.* Comm. for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (invalidating New York State's program of tuition grants and tax credits for low and middle income parents whose children attended private elementary and secondary schools because the program was a nonneutral attempt to saving religious schools from financial distress).
24. *See Zelman's Future*, *supra* note 21 at 2.
25. Secular Government Religious People, *supra* note 20 at 96-99.
26. *See, e.g.* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986); Muller v. Allen, 463 U.S. 388 (1983).
27. *See* Philip Hamburger, The Separation of Church and State, chaps. III-IV (2002).
28. George Kurian, Encyclopedia of Religion in American Politics, 26 (1998).
29. https://ij.org/issues/school-choice/blaine-amendments/answers-frequently-asked-questions-blaine-amendments/
30. *See* Kotterman v. Killian, 972 P.2d 606, 624 (Ariz. 1999) (construing no-aid provision narrowly because of religious bigotry behind the amendment).
31. *See Zelman's Future*, *supra* note 21 at 57.
32. Locke v. Davey, 540 U.S. 712, 718 (2004).
33. *Id.* at 719.
34. *Id.* at 725.
35. *See id.* at 723-24.
36. The Sixth, Seventh, Eight, and Tenth Circuits hold that government may not prohibit religious options in student-aid programs. The First and Ninth Circuits hold that it may. *See* Brief for Petitioner at 15-16, Espinoza v. Montana Dep't of Revenue, 139 S. Ct. 2777 (2019) (No. DA 17-0492).
37. *See, e.g.,* Eulitt ex rel. Eulitt v. Me. Dep't of Educ., 386 F.3d 344, 355 (1st Cir. 2004).
38. *See, e.g.,* Colorado Christian Univ. v. Weaver, 534 F.3d 1245 (10th Cir. 2008).
39. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S.Ct. 2012 (2017).
40. *See id.*
41. *See id.* at 2024 n. 3.
42. *Id.*
43. *See* Ira C. Lupu & Robert W. Tuttle, *Trinity Lutheran Church v. Comer: Paradigm Lost?* 1-2 (2017) (unpublished manuscript) *available at* https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2554&context=faculty_publications.
44. *See generally* Secular Government, Religious People, *supra* note 20 at 211-248.
45. *See Trinity Lutheran Church v. Comer: Paradigm Lost?*, *supra* note 43 at 1-2.
46. *See e.g.,* Thomas C. Berg and Douglas Laycok, *The Mistakes in Locke v. Davey and the Future of State Payments for Services Provided by Religious Institutions*, 40 Tulsa L. Rev. 227 (2004).
47. *See id.* at 232.
48. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338 (1987).
49. *See Trinity Lutheran Church v. Comer: Paradigm Lost?*, *supra* note 43 at 1-3.
50. *See id.* at 2024 n. 3.

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