Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

Espinoza v. Montana and the Refusal to Provide Public Funds to Religious Schools

January 17, 2020

Can a state refuse to extend public aid to religious schools? The Supreme Court may consider this question in *Espinoza v. Montana Department of Revenue*, a case in which oral arguments are scheduled for January 22, 2020. The Montana Supreme Court previously ruled that a state tax credit program that indirectly supported religious schools violated a provision of the Montana constitution prohibiting the state from giving public funds to any religious school. Parents of students that attend religious schools appealed this decision to the U.S. Supreme Court, arguing that the state decision violates the U.S. Constitution by impermissibly discriminating against religion. The case presents significant questions relating to whether these so called "no-aid" clauses in state constitutions may violate the federal Free Exercise Clause. More generally, the case raises questions about how federal and state governments may structure public aid programs. This Legal Sidebar discusses the legal principles at issue in this appeal—and explains why the Court might not resolve these broader questions, given the somewhat complicated background of this case.

Legal Background

The Establishment and Free Exercise Clauses of the U.S. Constitution provide that the government "shall make no law respecting an *establishment* of religion, or prohibiting the *free exercise* thereof." The Establishment Clause prohibits the government from impermissibly supporting churches. The Supreme Court has noted that a law "may be one '*respecting*'" the establishment of religion even if it does not itself establish an official religion, if the law represents "a step that could lead to such establishment." Accordingly, governments may violate the Establishment Clause if they, for example, give direct payments to religious schools. Even if the government intends the direct aid to be used for secular purposes, the aid may be unconstitutional if the school can nonetheless use it for religious purposes. On the other hand, the Court has also recognized that governments may sometimes indirectly aid religious schools without violating the Establishment Clause, if the public aid is given to private third parties who then choose to use that support to attend a religious school.

But while the federal Establishment Clause may allow certain types of aid to be provided to religious schools, many states have taken a stricter position. Most state constitutions contain provisions that wholly prohibit states from giving public funds to religious schools. These states have cited anti-establishment

Congressional Research Service
https://crsreports.congress.gov
LSB10397

interests similar to those that motivated the adoption of the federal Establishment Clause, stating a commitment to protecting churches from governmental influence and to "ensuring that public education remain[s] free from religious entanglement." However, some scholars contest the original purpose of these state constitutional clauses, arguing that many such provisions reflect anti-Catholic bias. These commentators generally describe these provisions as "Blaine Amendments," after a Member of Congress who proposed an amendment to the federal constitution that would have prohibited states from giving public funds to schools "under the control of any religious sect." The federal amendment failed, but a number of states amended their own constitutions to include similar prohibitions. (Some state constitutions already contained similar provisions predating the Blaine Amendment, though.) There is historical evidence suggesting that states were motivated to adopt these Blaine Amendments, at least in part, because of hostility to a growing Catholic population. Partly because of this history, some have argued that these state constitutional provisions unconstitutionally discriminate against religion.

The Supreme Court has said that the government may violate the Free Exercise Clause if it discriminates against religion by imposing "special disabilities" based on "religious status." In particular, the Supreme Court has recognized that anti-establishment provisions can raise constitutional concerns under the Free Exercise Clause, if they lead the government to exclude religious entities from generally applicable public assistance programs. In *Trinity Lutheran Church v. Comer*, issued in 2017, the Supreme Court ruled that a Missouri grant program unconstitutionally excluded "churches and other religious organizations from receiving grants" to purchase "rubber playground surfaces." Missouri believed this exclusion was required by a no-aid provision in the state constitution. Chief Justice Roberts, who wrote the majority opinion, stated that because the program "expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character," it was subject "to the most exacting scrutiny." Accordingly, the Court said that "only a state interest 'of the highest order'" could justify the exclusionary policy. Ultimately, the Court held that the state's interest in "skating as far as possible from religious establishment concerns" could not qualify as "compelling," in light of the policy's "clear infringement on free exercise."

By contrast, in 2004's *Locke v. Davey*, the Supreme Court rejected a Free Exercise challenge to a Washington scholarship program that excluded students who were "pursuing a degree in devotional theology." Again, the state said that this exclusion was required by a provision in the state constitution that prohibited the state from providing public money "to any religious worship, exercise or instruction." The Court concluded that the state could permissibly decide not to fund training for a religious profession because this training was "an essentially religious endeavor," and fundamentally distinct from funding training for secular professions. Noting the state's historically grounded "antiestablishment interests" and the fact that the scholarship program did otherwise include religious schools and some religious courses, the Court held that the exclusion did not reflect impermissible hostility towards religion.

In *Trinity Lutheran*, the Court distinguished *Locke* by saying that the scholarship applicant "was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry." By contrast, the Court stated that the church applying for playground funds "was denied a grant simply because of what it is—a church." Further, in a footnote joined by only three other Justices, representing just a plurality of the Court, the Chief Justice described the *Trinity Lutheran* decision as involving only "express discrimination based on religious identity with respect to playground resurfacing," emphasizing that his opinion did "not address religious uses of funding or other forms of discrimination." While the precise effect of this footnote is not entirely clear, Chief Justice Roberts seemed to be distinguishing exclusions based on religious *status* or *identity*, which are impermissible, from exclusions based on religious *uses* of public money.

Facts of the Case

At issue in *Espinoza* is a Montana program that gave tax credits to individuals who donated to a "Student Scholarship Organization." These private charitable organizations manage programs that offer tuition scholarships to attend qualifying private schools. On its face, the statutory definition of qualifying education providers implicitly included religiously affiliated schools. However, the Montana Department of Revenue promulgated a rule excluding religious schools. The state agency was concerned that if the program included religious schools, it would violate the Montana constitution, which provides that the legislature "shall not make any direct *or indirect* appropriation or payment from any public fund or monies . . . for any sectarian purpose or to aid any . . . school . . . controlled in whole or in part by any church, sect, or denomination." (The state refers to this as its "No-Aid Clause.")

A number of parents whose children attended religious schools and wanted to apply for tuition scholarships sued the state, challenging this agency rule. The parents argued that by excluding religious schools, the state was unconstitutionally discriminating against religion, violating the Free Exercise Clause of the U.S. Constitution. The Montana Supreme Court agreed that the agency rule was invalid, but not on constitutional grounds. Instead, the state court concluded that the agency had exceeded its rulemaking authority in promulgating the rule because it was "inconsistent" with the statutory definition. Looking to the tax credit program more generally, however, the Montana Supreme Court determined that it did violate the state constitution because the statute allowed the state "to indirectly pay tuition at private, religiously-affiliated schools." To remedy this problem, the court struck down the *entire* tax credit program. Consequently, after this ruling, the state no longer offered these tax credits to anyone donating to these scholarship organizations, regardless of whether the scholarships were used at religious schools.

Arguments at the Supreme Court

The parents appealed this decision to the U.S. Supreme Court, raising a number of constitutional challenges. They primarily argue that the Montana Supreme Court contravened *Trinity Lutheran* and impermissibly discriminated against religion by interpreting the state constitution "to bar any religious options in student aid programs." They claim that the ruling "discriminates against the religious beliefs, conduct, and status of religious families who choose a school because it shares their faith" and "discriminates against the religious status of the schools themselves." As opposed to the scholarship exclusion that the Supreme Court approved in *Locke*, the petitioners argue that the state court's decision demonstrates hostility to religion because it excludes all religious schools, as opposed to creating a more narrow disqualification for training clergy. They contend that if students are not allowed to participate in the scholarship program because they want to attend a religious school, this exclusion impermissibly conditions public benefits on the students' willingness to "ceas[e] religiously motivated conduct." Elsewhere in their briefs, the petitioners say that the Court should overrule the Montana Supreme Court because the state's No-Aid Clause was adopted against a background of anti-Catholicism, asserting "that bigotry was a 'motivating factor'" leading the state to adopt the provision.

In response, the state concedes that there might be free exercise concerns if it was prohibiting religious institutions from receiving benefits that are otherwise generally available to similarly situated non-religious institutions. But because the Montana Supreme Court struck down the *entire* tax credit program, the state emphasizes, there are no generally available public benefits; unlike the church in *Trinity Lutheran*, even if the petitioners "abandoned their faith, they still would not get scholarships." Thus, the state primarily argues that the state court's decision did not demonstrate impermissible hostility towards religion by invalidating a generally available program, and claims that the Court does not need to evaluate whether the ruling discriminates on the basis of religious status or religious use because there is no longer a state program that discriminates on the basis of religion. If the Court does reach this issue, however, Montana argues that its state constitution "denies aid to schools on the basis of religious use," rather than status, deeming the schools sectarian because of what they *do*: namely, provide a religious education.

Moreover, Montana denies that its No-Aid Clause is "the product of anti-religious animus," disputing the petitioners' historical evidence. Finally, the state maintains that if the Court sides with the petitioners and revives the tax credit program, it will strike "a serious blow to federalism," saying that states should be permitted to adopt a stricter approach to the separation of church and state.

The United States has filed a brief in support of the petitioners and echoes their free exercise claims. The Solicitor General focuses on the permissibility of the No-Aid Clause itself, rather than the remedy. The federal government claims that the state constitution is unconstitutional because it facially "discriminates on the basis of religious status," preventing religious schools from receiving public assistance because of what they *are*, in violation of *Trinity Lutheran*. Accordingly, says the United States, even though there is no longer a tax-credit program that excludes religious schools, the No-Aid Clause continues to violate the Constitution. And the Solicitor General argues that the Montana Supreme Court's decision is invalid because the court "had no authority to enforce" that state provision.

Implications for Congress

The Court's review of *Espinoza* could have significant consequences nationwide. Montana notes that 37 other state constitutions have similar provisions prohibiting public funds from going to religious schools, although the provisions vary in substance and in the circumstances leading to their adoption. There are other cases pending in the lower courts that argue that these provisions are unconstitutional, citing *Trinity Lutheran*. On the other hand, the New Jersey Supreme Court affirmed the constitutionality of its own "Religious Aid Clause" in 2018, concluding that even after *Trinity Lutheran*, the state can forbid religious uses of public funds. If the Supreme Court clarifies how *Trinity Lutheran* applies to state no-aid clauses, the case could influence the course of those decisions and spark new litigation over state provisions.

More broadly, if the Court rules on the permissibility of excluding religious schools from public aid programs, the decision could affect how state and federal governments structure tax credits, grants, or other aid that may benefit religious institutions. A number of federal statutes generally allow religious organizations to receive assistance on the same basis as other entities, but appear to prohibit religious uses of federal funds. For example, one provision in a statute governing the Community Services Block Grant program provides that religious organizations may not use funds "for sectarian worship, instruction, or proselytization." Other federal statutes provide that funds may not be used for any "sectarian activity" or for divinity schools. But in November 2019, the Department of Justice concluded that one federal statute that bars federal loans to schools if "a substantial portion of [the school's] functions is subsumed in a religious mission" violated the Free Exercise Clause by discriminating "on the basis of an institution's religious character." And on January 16, 2020, the Trump Administration announced that executive departments would be amending rules relating to their treatment of religious organizations, including clarifying statutory language relating to the use of public funds. For example, the Department of Education is proposing to narrow regulatory definitions of sectarian instruction and divinity schools. Clarification of the religious-status/religious-use distinction that Chief Justice Roberts suggested in *Trinity Lutheran* could provide Congress and the executive branch with further guidance on how to structure public aid programs without violating either the Free Exercise or the Establishment Clauses.

It is possible that the Court could agree with Montana's view of the case and rule that the unique posture of the case prevents it from ruling on these religious issues: because the tax credit program no longer exists, it cannot violate the Free Exercise Clause. However, as the Solicitor General argues, the fact that the Supreme Court granted certiorari in this case could suggest that the Court disagrees with the state and believes it can reach the merits of the petitioners' arguments. Oral arguments may provide hints of the Justices' views on these issues.

Author Information

Valerie C. Brannon
Legislative Attorney

Disclaimer