

# MEMO

TO: Empower Illinois Stakeholders  
DATE: June 2020  
FROM: Nathan C. Hoffman, Policy and Research Director  
SUBJECT: U.S. Supreme Court *Espinoza* ruling analysis



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## EXECUTIVE SUMMARY

On Tuesday, June 30, 2020, the U.S. Supreme Court issued its much-anticipated ruling in the *Kendra Espinoza v. Montana Department of Revenue* case. In a 5-4 decision, Chief Justice John Roberts issued the majority opinion holding that Montana's decision to withhold scholarship aid for students opting to attend a religious private school violated the Free Exercise Clause of the U.S. Constitution. Though the immediate implications for Montana families are unclear, the decision is a historical win that will make it considerably more difficult for opponents of private school choice programs to disallow participation from schools solely on the basis of their religious affiliation in the future. The crux of the ruling is Roberts' insistence that "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."

## BACKGROUND

The Espinoza case traces to the enactment of tax credit scholarship legislation passed in Montana in 2015. The Montana Department of Revenue ("Department") promulgated rules that included the prohibition against using the scholarship dollars at religious schools. Ms. Espinoza and other low-income parents filed suit challenging the specific rule ("Rule 1"). The district court agreed with Ms. Espinoza and issued summary judgement that the program is constitutional without Rule 1. The Department appealed, arguing that absent the rule, the program is still unconstitutional because of the state's Blaine Amendment. The Montana Supreme Court agreed with the Department and reversed the lower court ruling. The ruling, however, went even further, stating that the entire program was unconstitutional. Ms. Espinoza et. al. petitioned the Supreme Court of the United States to reverse the Montana Supreme Court ruling on the grounds that it violated the Free Exercise or the Equal Protection Clause of the U.S. Constitution.

## RULING - MAJORITY OPINION DISCUSSION

Chief Justice Roberts authored the 5-4 majority opinion, arguing that the 'strict scrutiny' standard applies in this case as it did in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, given that otherwise eligible recipients are excluded from receiving a public benefit solely because of their religious status. Under strict scrutiny, "government action must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." The Chief Justice takes issue with the suggestion of the Department, and several of the dissenting justices, that states should be given flexibility to determine such matters on a case-by-case basis. The Chief Justice notes that such a process would be a "significant departure" from other free exercise precedents and that the protections of the Free Exercise Clause "do not depend on a 'judgement-by-judgement analysis' regarding whether discrimination against religious adherents would somehow serve ill-defined interests." Essentially, a state may not choose when it is in their interest to grant the protections of the Free Exercise Clause.

Moreover, the Chief Justice discusses at length the problems with the Department's argument that *Trinity Lutheran* does not apply in this case, but rather *Locke v. Davey* does. Chief Justice Roberts argues that the issue in *Locke* is different than that of *Trinity Lutheran* and *Espinoza* because the plaintiff in *Locke* was denied

a scholarship based on what he proposed to use it for (religious clerical education and training), which ran afoul of the narrow rules put in place in Washington that denied funding for students enrolling in such a program of study based on a reasonable state interest in not funding the education and training of religious clerics. In *Trinity Lutheran* and in this (*Espinoza*) case, the program benefit was denied simply because of the school at which the benefit would be utilized. Put more plainly, at issue is not the Department's contention that use of the scholarship dollars will be used on religious instruction, but rather that the Department promulgated a rule that determined scholarships could not be used based on the religious status of a school, which in and of itself runs afoul of the U.S. Constitution. The Chief Justice goes on to argue that, "Status-based discrimination remains status-based even if one of its goals or effects is preventing religious organizations from putting aid to religious uses."

## IMPLICATIONS – BLAINE AMENDMENTS AND SCHOOL CHOICE

The Court's decision deals a strong blow to the 14 states with strictly interpreted Blaine Amendments. If the political stars align and the willpower is there, the legal impediments are now severely weakened (albeit not eliminated). The impediment to states' suffocation of a federal tax credit scholarship effort is also weakened. *Espinoza* sets a clear precedent that states cannot hide behind the language of their Blaine Amendments (no matter how strong) in prohibiting participation of religious schools.

## IMPLICATIONS – ILLINOIS

Illinois is not one of the 14 states with a strictly interpreted Blaine Amendment. Illinois' Blaine Amendment has historically been narrowly applied, allowing for state dollars to flow to religiously-affiliated institutions for specific purposes, including K-12 education. The Court's decision will have no immediate or significant impact on the Invest in Kids Tax Credit Scholarship Program operations, but does ensure that opponents of private school choice in Illinois cannot invalidate this or other similar programs in the future on such grounds, nor discriminate against religious schools and families seeking to attend the schools (from a scholarship-awarding standpoint) simply on the basis that the school is religiously-affiliated.

## WHAT'S NEXT?

The Court reversed and remanded the case back to the Montana Supreme Court for further proceedings consistent with the U.S. Supreme Court's decision. The Montana Tax Credit Scholarship Program will not immediately return to operation, but further State Supreme Court proceedings consistent with the U.S. Supreme Court's opinion should clear the way for the program to return to full operation in the future. That said, the state legislature could (theoretically) take action to eliminate the program, which would be well within their purview to do regardless of further action by the Montana Supreme Court.

To read the full opinion, click [here](#).

To read our earlier case discussion and background, click [here](#).