

MEMO

TO: Empower Illinois Partners
DATE: February 2020
FROM: Nathan C. Hoffman, Policy and Research Director
SUBJECT: *Kendra Espinoza et. al vs. Montana Department of Revenue*



Recently, the Supreme Court of the United States heard arguments in the *Kendra Espinoza et. al. v. Montana Department of Revenue*. The case hinges on the question of whether the Montana Department of Revenue, in promulgating rules that banned the use of tax credit scholarships being used at religious schools on the grounds that such use violates the state's Blaine Amendment, runs afoul of the Free Exercise and Equal Protection clauses of the U.S. Constitution.

BACKGROUND

The Espinoza case arises out of the enactment of tax credit scholarship legislation passed in 2015. The 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 that 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. Ms. Espinoza et. al. petitioned the Supreme Court of the United States to reverse the Montana Supreme Court ruling on the grounds that it violates the Free Exercise Clause or the Equal Protection Clause of the U.S. Constitution.

BLAINE AMENDMENTS

Dating back to the 19th century, Blaine Amendments were established as anti-Catholic laws that prohibit the public funding of religious schools. The original intent by James Blaine was to pass the language as an amendment to the U.S. Constitution, but he fell short in his quest as Congress failed to pass the amendment by the required $\frac{2}{3}$ majority in both houses. Nevertheless, 37 state constitutions across the United States include Blaine provisions. Though their original aim was to preclude states from providing funding for Catholic schools specifically, today the interpretation is thought to be inclusive of all religiously affiliated schools. In practice, states have interpreted their Blaine amendments differently. Some have taken to a strict interpretation, while others have provided flexibility, specifically as it relates to private school choice programs.

TRADITION OF PUBLIC FUNDING PRIVATE PRE-K AND POST-SECONDARY EDUCATION

The public and quasi-public scholarship funding of students attending private schools is not confined to K-12 education. In fact, both state and federal dollars currently support student attendance at private pre-kindergarten facilities and private colleges and universities. The federal government spends roughly \$30 billion annually on Pell Grants for students needing tuition assistance to attend a public or private college or university. Additionally, Illinois spends hundreds of millions of dollars annually to allow students access to pre-kindergarten at public and private facilities, including religiously-affiliated programs. Perhaps the central

question being asked is why does this same approach of granting tuition assistance to families and students not hold during the time the student is in Kindergarten through 12th grade?

ANITPICITATED OUTCOME

While the outcome of the case is unknown at this point, the public did get a sense during oral arguments of where some of the justices may be leaning. Justices Ginsburg, Sotomayor, and Kagan all seemed skeptical of the petitioner's (Espinoza) argument, even questioning whether Ms. Espinoza, and the other associated families making up the petitioners have standing to bring the case to the High Court. In contrast, Justices Alito, Gorsuch, and Kavanaugh seemed skeptical of the Respondent's (Montana Department of Revenue) argument. Justice Thomas stayed silent throughout oral arguments, but has previously authored opinions that would seem to align his thinking with that of Justices Alito, Gorsuch, and Kavanaugh. The two justices that seemed most undecided were Chief Justice Roberts and Justice Breyer. Both asked questions of each side. It appears likely, the decision will come down to those two members of the Court.

ILLINOIS IMPACT

The Illinois Constitution contains a Blaine amendment as well as a "compelled support" clause. The compelled support clause reads that, "no person shall be required to attend or support any ministry or place of worship without his consent." Illinois' Blaine Amendment contains language that reads, "neither the General Assembly nor any local governmental body shall make an appropriation or pay from any public fund any amount in aid for any church, seminary, or to support any religious school controlled by any church."

Illinois has historically taken a narrow interpretation of the above language, generally allowing religious educational options, including support for religious education in Pre-K and college. Nonetheless, **the outcome of the Espinoza case is not likely to have any immediate impact on the Illinois tax credit scholarship program**, but could either improve the likelihood that new private school choice programs, backed by state legislatures, can be passed and implemented without fear of litigation on these grounds, or cement the use of Blaine Amendments and their associated exclusions in state constitutions.

To find the full case brief, [click here](#).

To listen to the January 22, 2020, arguments, [click here](#).

For more information and analysis, please reach out to Empower Illinois (info@empowerillinois.org).