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Legal Sidebar

Supreme Court Rules That Excluding Religious Schools from Aid Program Violates Constitution: Implications for Congress

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Based on concerns about impermissibly supporting religion, many state constitutions bar state governments from providing funds to churches and other types of religious institutions—even in circumstances where that support would *not* violate the Establishment Clause of the First Amendment to the U.S. Constitution. However, in recent years, some have questioned whether these state provisions are unconstitutional under Supreme Court precedent that has interpreted the First Amendment's Free Exercise Clause to prevent governments from discriminating against religious organizations when they distribute public benefits. In *Espinoza v. Montana Department of Revenue*, issued June 30, 2020, the Supreme Court weighed in on this question, ruling that Montana's state constitution could not be applied to bar religious schools from participating in a tax credit program benefiting parents of private school students. This Legal Sidebar discusses the legal principles that governed this dispute, explains the Court's *Espinoza* opinion, and explores implications of the decision for Congress. In particular, *Espinoza* could call into question any federal laws that exclude religious entities from receiving federal aid based solely on their religious character.

Legal Background

The First Amendment's Religion Clauses prohibit the government from making a "law respecting an *establishment* of religion, or prohibiting the *free exercise* thereof." In the words of the Supreme Court, the Establishment Clause forbids "sponsorship, financial support, and active involvement of the sovereign in religious activity." But the Supreme Court has also upheld certain government programs that support religious institutions, particularly if they provide general, secular benefits to a broad class of beneficiaries. The Court has also approved of indirect aid programs like some school voucher programs, where the government broadly offers assistance to individuals who may then independently choose to use those benefits at religious institutions.

In *Locke v. Davey*, decided in 2004, the Supreme Court recognized that in at least some circumstances, governments may choose not to fund certain types of religious activities even if government support would not violate the Establishment Clause—that is, even if the exclusion is not *required* by the

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Establishment Clause. In *Locke*, a state barred students "pursuing a degree in devotional theology" from a state scholarship program. The Court characterized the scholarship program as an indirect aid program, and said it would not violate the Establishment Clause for the state to offer scholarships to theology students. The Court nonetheless held that the state could choose not to fund these scholarships, noting the "historic and substantial state interest" in not using government funds to support clergy.

On the other hand, in *Trinity Lutheran Church v. Comer* in 2017, the Supreme Court ruled that a state violated the Free Exercise Clause when it excluded "churches and other religious organizations from receiving grants" to purchase "rubber playground surfaces." The Court held 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" and could be justified only by "a state interest 'of the highest order.'" In the Court's view, the state's interest in "skating as far as possible from religious establishment concerns" was insufficiently "compelling" in light of the policy's "clear infringement on free exercise." *Trinity Lutheran* distinguished *Locke*, saying the state in *Locke* had permissibly chosen to deny a scholarship because of what the recipient "proposed *to do*—use the funds to prepare for the ministry." By contrast, in *Trinity Lutheran*, the Supreme Court held that the state was impermissibly denying funds because of what the recipient *was*—a church. Further, in a footnote joined by only three other Justices, representing a plurality of the Court, Chief Justice Roberts 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." Thus, some described the *Trinity Lutheran* opinion as barring discrimination on the basis of religious *status* but allowing governments to prohibit religious *use* of funds. Further, some questioned whether *Trinity Lutheran* was limited to generally available programs providing *secular* benefits, and whether governments still might be able to exclude religious entities from programs providing funds that could be freely diverted to religious uses.

Facts of *Espinoza*

The *Espinoza* plaintiffs are parents of children who wanted to participate in a tuition scholarship program but were barred from doing so because the students attended religious schools. The Montana program offered tax credits to individuals who donated to "Student Scholarship Organizations," private charitable organizations that managed tuition scholarship programs for qualifying private schools. Although the text of the state law establishing the program had implicitly included religious schools, a state agency had nonetheless promulgated a rule excluding religious schools. The agency was concerned that if the tax credit program included religious schools, it would violate the Montana Constitution's "No-Aid Clause." This provision in the state constitution prohibits the state from making "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 Montana Supreme Court concluded that the tax credit program, as enacted, violated the state constitution's No-Aid Clause by indirectly aiding schools controlled by churches. To remedy this problem, that court struck down the entire tax credit program. Consequently, after the 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. The parents appealed this ruling to the U.S. Supreme Court. They argued that when the state excluded religious schools from the tuition scholarship program, it unconstitutionally discriminated against religion, violating the Free Exercise Clause.

Opinion of the Court

The majority opinion was written by Chief Justice Roberts, who held that Montana's No-Aid Clause violated the Free Exercise Clause to the extent that it disqualified religious schools from receiving public

benefits solely because of their religious character. The Court ruled that, as interpreted by the Montana courts, the provision operated to exclude schools "because of religious status," similar to the playground grant program in *Trinity Lutheran*. The majority opinion noted that, as opposed to *Locke*, the No-Aid Clause did not "zero in on any particular 'essentially religious' course of instruction at a religious school," but rather, generally prohibited aid to schools controlled by churches. Further, Chief Justice Roberts said that unlike the special state interest "in not funding the training of clergy," there was no "'historical and substantial' tradition" that could support a state's "decision to disqualify religious schools from government aid." Instead, the Court concluded that states "have taken a variety of approaches to [supporting] religious schools." Contesting Montana's proffered evidence of state laws barring aid to religious schools, the majority pointed to a history of state support for private schools, including religious schools, in the founding era and early 19th century.

Accordingly, based on this "religious discrimination," the Supreme Court subjected the provision to strict scrutiny, meaning that the exclusion would have to "advance interests of the highest order and must be narrowly tailored in pursuit of those interests." As in *Trinity Lutheran*, the *Espinoza* Court held that the state's "interest in separating church and State" could not qualify as sufficiently compelling. The majority also rejected Montana's arguments that the No-Aid Clause promoted religious freedom by "keeping the government out of" the operations of religious organizations. The Court did "not see how" denying religious organizations the option to participate in the government program promoted religious liberty. And in response to Montana's claim that the No-Aid Clause advanced the state's interest in supporting public education, the Court ruled that the provision was "fatally underinclusive": it did not permissibly serve this goal because it excluded only religious private schools and still allowed public support to be diverted to nonreligious private schools.

Justices Thomas, Alito, and Gorsuch filed separate concurring opinions. In an opinion joined by Justice Gorsuch, Justice Thomas called for the Court to reconsider its Establishment Clause jurisprudence. In brief, Justice Thomas restated his view that the Court should interpret the Establishment Clause more narrowly, asserting that the Court's current jurisprudence "hamper[s] free exercise rights." Justice Alito wrote separately to argue that anti-Catholic bias may have motivated at least some states in adopting these provisions, maintaining that evidence of discriminatory motives was relevant to assessing the constitutionality of Montana's No-Aid Clause. Justice Gorsuch's concurrence expressed doubt about the validity of free exercise decisions distinguishing religious use from religious status.

Justices Ginsburg, Breyer, Sotomayor, and Kagan dissented, with Justices Ginsburg, Breyer, and Sotomayor each writing separate opinions. Justice Ginsburg, joined by Justice Kagan, focused on the procedural posture of the case, arguing that because the Montana Supreme Court had struck down the entire scholarship program, the state could no longer be characterized as impermissibly discriminating against religious schools. After the state court decision, she pointed out, there was no differential treatment placing a burden on the parents' religious exercise; "secular and sectarian schools alike are ineligible for benefits." (In response to this claim, the majority said that the state court's decision to invalidate the program violated the Free Exercise Clause, creating a reversible error of federal law.)

Justice Breyer, joined in part by Justice Kagan, would have concluded that Montana could permissibly have excluded religious schools from the tax credit program. He wrote that, as in *Locke*, Montana had permissibly "chosen not to fund" a religious activity: "an education designed to 'induce religious faith.'" Justice Breyer noted that the case before the court was brought by parents who wanted to use the publicly supported scholarships to attend religious schools, arguing that the parents' Free Exercise Clause claims depended on a conclusion that these schools would be using the state support "to fund the inculcation of religious truths."

Writing for herself, Justice Sotomayor asserted that the Montana Supreme Court had reached its decision based on *state-law* grounds, and that the majority opinion violated ordinary principles of judicial review

when it essentially ruled that the No-Aid Clause was facially invalid under the federal Free Exercise Clause.

Implications for Congress

Although the Court's judgment in this case directly concerns a provision in Montana's constitution, its opinion will nonetheless have national implications. First, as Montana noted in its briefing at the Supreme Court, 37 other states have some version of a No-Aid Clause in their state constitutions. To the extent that other state provisions exclude religious organizations from generally available benefits programs solely because of their religious character, they are subject to similar constitutional challenge. Justice Alito's concurring opinion points to an additional avenue to attack these provisions: historical evidence suggesting that some state constitutional conventions were motivated by anti-Catholic animus.

The Court's opinion in *Espinoza* also has broader repercussions for federal and state governments that exclude religious organizations from certain public aid programs. The Court made clear that while the state was not required to "subsidize private education," once it had decided to do so, it could not "disqualify some private schools solely because they are religious." There are some federal statutes that could be read to exclude religious entities from federal programs based on their religious status. These statutes could be subject to challenge under *Trinity Lutheran* and *Espinoza* as unconstitutional religious discrimination. On the other hand, statutes that prohibit federal funds from being used for religious worship, instruction, or other sectarian activity could be interpreted as permissible exclusions based on religious use. Congress could review federal laws to ensure they are consistent with the Court's ruling in *Espinoza*, possibly eliminating or narrowing some statutory exclusions, and in the future, could consider drawing exclusions more narrowly around certain religious uses of funds.

Espinoza can be seen as expanding the government's ability to support religious organizations, given its affirmation that certain status-based exclusions violate the Free Exercise Clause and its conclusion that there is no historical tradition against supporting religious schools. However, *Espinoza* did involve an indirect aid program similar to ones that the Court has previously said do not raise Establishment Clause concerns. In the words of the Court, "the government support makes its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools." Any government programs that provide direct financial support to religious entities could raise more significant Establishment Clause concerns, although the Court also stated in *Espinoza* that the Establishment Clause is "not offended when religious observers and organizations benefit from neutral government programs." As a consequence, both of the Religion Clauses remain relevant considerations when Congress determines whether and how to include religious entities in public aid programs.

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