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Resolved: The US should permit state aid—including tuition—to religious schools.

Religious School Choice Case May Yield Landmark Supreme Court Decision

The New York Times, By Erica L. Green, Jan. 21, 2020

With oral arguments coming on Wednesday, both sides of the long-running fight over vouchers for religious schools are preparing for a watershed moment for public education.

WASHINGTON — A potentially landmark education case before the Supreme Court on Wednesday has pulled in heavy hitters on both sides of the school choice debate who are trying to shape a ruling that could end decades of wrangling over school vouchers and religious education.

Oral arguments in the case, Espinoza v. Montana Department of Revenue, have attracted briefs from President Trump's Justice Department, which hopes the high court will bolster the administration's marquee education issue: public funding for private schools.

On the other side, Democratic state governments, school boards and teachers' unions argue that a ruling in favor of a disbanded voucher program in Montana could open the floodgates for publicly funded religious education while draining traditional public schools.

Such a decision would be a "virtual earthquake" in the public education system, said Randi Weingarten, the president of the American Federation of Teachers. She added that it would send money cascading away from public schools.

"It will basically change 200 years of practice," Ms. Weingarten said.

The case challenges a decision to shut down a program that provided tax breaks to donors who funded scholarships that families could use at private schools, including religious ones. Montana discontinued the program after a ruling by its high court found that it had violated a provision in its Constitution that prohibited the use of government funding, either directly or indirectly, for religious purposes. Such provisions, known as no-aid provisions or Blaine Amendments, exist in 37 states and were driven initially by anti-Catholic bias. They are now seen as the last line of defense against widespread acceptance of school voucher programs.

The conservative-leaning high court could finally settle whether vouchers blur the constitutional line between church and state.

Lawyers at the Institute for Justice, the libertarian law firm that is representing three Montana families, said the case could produce one of the most significant education rulings in the last half-century. The Supreme Court has ruled that states may include religious schools in publicly funded school choice programs, but a ruling that would essentially require it would be groundbreaking.

"If we win this case, it will be the U.S. Supreme Court once again saying that school choice is fully constitutional and it's a good thing," said Erica Smith, a senior lawyer at the Institute and co-counsel in the Espinoza case. "And that will provide momentum to the entire country."

Education Secretary Betsy DeVos has proposed a $5 billion federal tax credit scholarship program that would allow states to adopt initiatives much like the one Montana struck down. Ms. DeVos, who sent her own children to private religious schools, tried to defeat the Blaine Amendment in her home state, Michigan.

"These amendments only serve to keep too many children away from a better education, including one that better aligns with their family's values," Ms. DeVos said in a statement.

However the court decides, education policy experts and court observers see an effect far beyond voucher programs.

Lawsuits could compel public agencies to provide comparable funding and benefits to religious schools if the agencies support other private schools. If the court rules that state prohibitions on the use of government funding for religious purposes are rooted in bigotry, plaintiffs could emerge to say other major issues, like the Electoral College, have the same roots.

"If it's unconstitutional to exclude private religious schools from a program that provides aid for public schools, it's hard to see where the line is drawn and where the neutrality principle ends," said Kevin Welner, the director of the

National Education Policy Center and a professor at the University of Colorado at Boulder School of Education. “It’s a fascinating Pandora’s box they could open.”

About 18 states offer tax credit scholarship programs — which overwhelmingly serve low-income families or those of color — and Ms. Smith said several other states have interpreted their provisions to prohibit the programs.

In 2017, the Supreme Court issued a narrow ruling in a similar case, Trinity Lutheran v. Comer, where it said Missouri had violated the First Amendment by barring religious institutions from a state-funded program to make playgrounds safer. In a footnote of the majority opinion, Chief Justice John G. Roberts Jr. wrote that the case “involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.”

When Justice Brett M. Kavanaugh, who has defended religious groups’ access to public benefits and a school voucher program in Florida, joined the court in 2018, advocates on both sides of the choice debate anticipated that any ambiguity around that footnote would soon be settled.

In the wake of the Trinity Lutheran decision, Ms. DeVos said she would no longer enforce a provision in federal law that bars religious organizations from providing federally funded educational services to private schools. Last week, she proposed several more changes to enhance religious groups’ access to federal funding, and in an opinion piece, she wrote that the department was eager for the Supreme Court to “put an end to the ‘last acceptable prejudice’” — Blaine Amendments.

Montana’s tax credit, enacted in 2015, provided up to $150 to donors who supported scholarships “to provide parental and student choice in education.” The state’s Department of Revenue later determined that religious schools — about 70 percent of Montana’s private schools — could not participate.

The Montana Supreme Court ultimately found the entire program violated the state’s Constitution, and the state shut it down. The Institute for Justice will argue before the Supreme Court that the shutdown violated its clients’ rights to free exercise of religion and equal protection under the law.

Montana has argued that the “no aid” amendment in the state’s Constitution does not prohibit any religious practice, nor does it discriminate against any one religion. While the provision dates to 1884, it was re-ratified in 1972 by delegates who stated that it was to avoid “religious entanglement” and to preserve funds for public schools. The decision to discontinue the tax credits for secular and religious schools was aimed at both goals, they said.

Where the state saw neutrality, Kendra Espinoza, the named plaintiff in the case, saw bias. Ms. Espinoza, a single mother of three girls who works three jobs, wants to use the program to keep her daughters in Stillwater Christian School, in Kalispell, Mont. She believes the decision to shut down the program was in part a “push to have every student in public education.”

“If the program was there and it was struck down simply so that people of religious faith could not access it, then that’s discrimination,” Ms. Espinoza said in an interview with The New York Times last month.

Justice Department lawyers argued that the application of the constitutional amendment in Montana “penalizes parents who choose a religious rather than a secular school for their children.”

Amicus briefs have poured in. Several public education groups, such as the AASA, the School Superintendents Association, wrote that at play was a “voucher scheme” that “shifts public funds away from the local public school, to the detriment of students who have no real choice but to remain.”

Civil liberties groups, like Americans United for Separation of Church and State and the American Civil Liberties Union, argued in a brief that a ruling against Montana would force taxpayers to fund religious indoctrination and discrimination in schools. The groups cited curriculums and handbooks from religious schools that participated in the Montana program. One school said its biology students would “see the contradictions between what is popular science today and the truth of God’s word.” Another required its students to “come from a family that celebrates biblical values” and that at least one parent “be born again.”

Choice-friendly research groups, like EdChoice, argued that the high court’s intervention was necessary to resolve a “deep split” in lower courts.

“The families, taxpayers and communities that find themselves on the wrong side of the judicial divide will continue to be deprived of the substantial educational, fiscal and civic benefits that religiously neutral educational-choice programs provide,” the groups wrote.

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States Must Aid Some Church Programs, Justices Rule

The New York Times, By Adam Liptak, June 26, 2017

WASHINGTON — The Supreme Court ruled on Monday that states must sometimes provide aid to religious groups even when their state constitutions call for a strict separation of church and state. The decision concerned a state program to make playgrounds safer that excluded those affiliated with churches, and it had implications for all kinds of government aid to religious institutions.

The vote was 7 to 2, though some of the justices in the majority differed about how broadly the court should have ruled.

Chief Justice John G. Roberts Jr., writing for the majority, said unjustified government discrimination against churches and other religious institutions is odious and unconstitutional. Officials in Missouri, Chief Justice Roberts wrote, were not entitled to reject a 2012 application from Trinity Lutheran Church, in Boone County, Mo., for a grant to use recycled tires to resurface a playground.

"The consequence is, in all likelihood, a few extra scraped knees," Chief Justice Roberts wrote. "But the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand."

Justice Sonia Sotomayor summarized her dissent from the bench, an indication of deep disagreement.

"This case is about nothing less than the relationship between religious institutions and the civil government — that is, between church and state," Justice Sotomayor wrote in her dissent, which was joined by Justice Ruth Bader Ginsburg. "The court today profoundly changes that relationship by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church."

The Missouri Constitution bars spending public money "directly or indirectly, in aid of any church," and the state Supreme Court has called for "a very high wall between church and state." Thirty-eight other states have similar provisions.

The Missouri recycling program was not available to all applicants. But the church ranked fifth among 44 applicants, and it was rejected solely because of its religious character. The state awarded 14 grants that year.

"In this case, there is no dispute that Trinity Lutheran is put to the choice between being a church and receiving a government benefit," Chief Justice Roberts wrote. "The rule is simple: No churches need apply."

Chief Justice Roberts added a footnote that limited the sweep of his opinion.

"This case involves express discrimination based on religious identity with respect to playground resurfacing," he wrote. "We do not address religious uses of funding or other forms of discrimination."

Justice Neil M. Gorsuch, joined by Justice Clarence Thomas, refused to endorse that footnote.

"I worry that some might mistakenly read it to suggest that only 'playground resurfacing' cases, or only those with some association with children's safety or health, or perhaps some other social good we find sufficiently worthy, are governed by the legal rules recounted in and faithfully applied by the court's opinion," Justice Gorsuch wrote.

"Such a reading would be unreasonable for our cases are 'governed by general principles, rather than ad hoc improvisations,'" he wrote, quoting an earlier decision.

"And the general principles," Justice Gorsuch wrote, "here do not permit discrimination against religious exercise — whether on the playground or anywhere else."

Where Justices Gorsuch and Thomas would have written more broadly, Justice Stephen G. Breyer, who voted with the majority but did not adopt its reasoning, said he would have written more narrowly.

"Public benefits come in many shapes and sizes," Justice Breyer wrote. "I would leave the application of the Free Exercise Clause to other kinds of public benefits for another day."

A 2004 Supreme Court decision, Locke v. Davey, allowed Washington State to offer college scholarships to all students except those pursuing a degree in devotional theology. That case involved direct support for religion, Chief Justice Roberts wrote. Playgrounds, he argued, were a different matter.

In her dissent, Justice Sotomayor said the court had made a grave error in ruling for the church.

"The church has a religious mission, one that it pursues through the learning center," she wrote. "The playground surface cannot be confined to secular use any more than lumber used to frame the church's walls, glass stained and used to form its windows, or nails used to build its altar."

More broadly, she wrote, states should be allowed to make their own judgments about whether to support religious groups.

"The constitutional provisions of 39 states — all but invalidated today — the weighty interests they protect, and the history they draw on deserve more than this judicial brush aside," Justice Sotomayor wrote, adding that the decision may have unintended consequences.

"In the end, the soundness of today's decision may matter less than what it might enable tomorrow," Justice Sotomayor wrote. "The principle it establishes can be manipulated to call for a similar fate for lines drawn on the basis of religious use."

The case, Trinity Lutheran Church v. Comer, No. 15-577, took some twists and turns at the Supreme Court.

The court agreed to hear the case in January 2016, the month before Justice Antonin Scalia died. Apparently fearing a deadlock, it waited more than a year to schedule arguments, an exceptionally long time.

It was finally argued in April, soon after Justice Gorsuch joined the court, and it was easily the most important case of his freshman term.

Not long before the argument, Gov. Eric R. Greitens of Missouri, a Republican, announced a change in state policy. The state would no longer discriminate against religious groups in evaluating grant applications for programs like the one at issue in the case, he said.

Chief Justice Roberts wrote that the case was not moot under the doctrine of "voluntary cessation." The state remained free, he wrote, to "revert to its policy of excluding religious organizations."

The Supreme Court Could Force Taxpayers to Subsidize Religious Schools

Slate, By MARK JOSEPH STERN, JAN 22, 20205:53 PM

The Supreme Court heard arguments on Wednesday in a case that poses a bizarre question: Once states provide public funds to private schools, are they obligated to fund parochial schools, too? The answer should be obvious: Of course the Constitution does not require states to subsidize religious education—to the contrary, it limits the government's ability to finance religion. Yet the court's conservative majority may be prepared to turn the First Amendment on its head, compelling states to underwrite the religious indoctrination of children.

Wednesday's case, Espinoza v. Montana Department of Revenue, demonstrates just how far the Supreme Court has shifted to the right in recent years. SCOTUS did not uphold vouchers for parochial schools until 2002's Zelman v. Simmons-Harris, a 5–4 decision that drew sharp dissents from the liberal justices. Zelman opened the door to "indirect funding" for religious education, which proliferated in its wake: Today, 29 states, the District of Columbia, and Puerto Rico provide either vouchers or tax credits that reimburse parents who send their children to sectarian institutions.

Montana is one of those states, but it might not be for much longer. In 2015, the legislature enacted a program that gave a tax credit of up to $150 to individuals who donate to scholarship organizations. These groups then use the donations to award scholarships to students who attend private schools, including religious ones. But the Montana constitution bars the state from using public funds to aid any school that is "controlled in whole or in part by any church, sect, or denomination." In light of this provision, the Montana Supreme Court ruled the tax credit scheme unlawful in 2018. Rather than limit state funding to secular schools, the court invalidated the entire program.

The plaintiffs in Espinoza, who are represented by the libertarian Institute for Justice, are parents who wanted scholarships to keep their children at a Christian school. They allege that the Montana Supreme Court violated the First Amendment's free exercise clause by axing the scheme. But the plaintiffs have a problem. The core of their argument is that once states fund private schools, they have to include religious schools. Montana, however, can no longer fund any private schools, secular or sectarian. So, the plaintiffs make the broader claim that states cannot stop funding all private schools to avoid giving money to religious ones.

During arguments on Wednesday, the liberal justices were skeptical of all this. Because of the Montana Supreme Court's decision, Justice Elena Kagan told the Institute for Justice's Richard Komer, "whether you go to a religious school or you go to a secular private school, you're in the same boat." So "there is no discrimination at this point going on, is there?" Komer claimed that the Montana Supreme Court itself discriminated against religious students by shooting down the tax credit program. Does that mean, Justice Sonia Sotomayor wondered, that Montana has "to keep the program alive?" Yes, Komer said: Once "the state chose to give aid," it could not stop giving aid to refrain from helping parochial schools.

This claim is, to put it mildly, a stretch. There is some precedent for the idea that states can't deny funding to religious institutions because they are religious. In 2017's Trinity Lutheran v. Comer, the court held that Missouri violated free exercise by refusing to let a church daycare center compete for a grant to resurface its playground. The exclusion of a church from a public benefit "solely because it is a church," the court declared, "is odious to our Constitution." But Trinity Lutheran was explicitly limited to "express discrimination based on religious identity with respect to playground resurfacing," and disclaimed any impact on "religious uses of funding."

Everyone agrees that religious schools, unlike the daycare center, will use taxpayer money to indoctrinate students. So Komer's argument is pretty radical, a far cry from Trinity Lutheran. Just how radical? In his brief, Komer wrote that a student may not be "forced to choose between attending a school that accords with her beliefs or receiving thousands of

dollars in government benefits." But doesn't that mean states have to fund religious education in par with public education? Komer's claim would seem to give every child a First Amendment right to attend religious schools on the taxpayer's dime.

Justice Stephen Breyer raised this point with Jeffrey Wall, principal deputy solicitor general, who supported the plaintiffs. If a state spends $500 million on public education, Breyer asked, does it have to give the same amount to parochial schools? Wall said no, but Breyer wasn't satisfied. "What," he asked, "is the difference?" Chief Justice John Roberts—who was remarkably perky given his side hustle presiding over the Senate's impeachment trial—had the same question. He asked Adam Unikowsky, who represents Montana, whether Komer's theory "leads to a situation where the funding that goes to public schools" would "have to go to religious schools," as well. Unikowsky wasn't sure, but the chief seemed troubled by the possibility.

Predictably, Justices Samuel Alito and Brett Kavanaugh went to bat for Montana's religious families, framing them as victims of appalling discrimination. Kavanaugh told Unikowsky that "grotesque religious bigotry against Catholics" was the "clear motivation" for Montana's ban on sectarian aid. But as Unikowsky told Kavanaugh, Montana's ban was enacted in 1972, not to burden religion but to protect it from state interference. Thirty-seven states have similar provisions in their constitutions, and school choice proponents assert that they were motivated by anti-Catholic bias. It's true that Reconstruction-era nativists favored these provisions—but so did advocates for universal education regardless of creed.

Alito tried a different angle: Imagine if a state shut down a scholarship program because money was "mostly going to blacks and we don't like that." If that's unconstitutional—and it surely is—isn't it also unconstitutional to shut down a program because money went to religious schools?

"We just don't think that race and religion are identical for all constitutional reasons," Unikowsky said. "Basically, what you're saying," Alito snapped, is that "the difference between this and race is: it's permissible to discriminate on the basis of religion." Breyer jumped in to help: "Yes," he said, "race is different from religion. Why? There is no establishment clause in regard to race. What is the establishment clause? Well, it has something to do with not supporting religion. And there is nothing more religious, except perhaps for the service in the church itself, than religious education."

Here, Breyer came the closest of any justice to acknowledging a foundational principle oddly obscured in this case: The Constitution mandates the separation of church and state for good reason. Stillwater Christian School, where the plaintiffs send their children, inculcates students with a theology-based anti-LGBTQ ideology. So do at least three other schools that participate in the scholarship program, as HuffPost reported on Thursday. One places "homosexual and lesbian behavior" in the same category as "incest" and "bestiality" while stating that no "non-Christian" or "uncommitted Christian" could teach there. Another expels students on the basis of "lesbian, gay, bisexual and/or transgender conduct" and requires employees "to affirm that they have not and will not engage in such behaviors."

Christian schools have a right to teach this ideology, and Christian parents have a right to send their children to these schools. But shouldn't Montana taxpayers also have a right not to subsidize these teachings, which may violate their own religious beliefs or freedom of conscience? Can't state embrace the principles of the establishment clause by declining to compel residents to fund faiths that clash with their own beliefs? If parents want their children to learn that same-sex intimacy is no different from bestiality, is everyone else obligated to help pay for those lessons?

The fate of Espinoza lies, as usual, in Roberts' hands. Because the chief seemed concerned about the alarming implications of the plaintiffs' argument, he might join with the liberals to throw out the case. But it's just as likely that the five conservatives will order Montana to revive its tax credit scheme and proclaim that once states give money to private schools, there's not takebacks because religious schools would otherwise face discrimination. That outcome might appear narrow, because it does not force states to fund religious schools in the first place. But it would actually constitute a revolutionary rewrite of the First Amendment. However this case turns out, it is only a matter of time before the court's conservatives again manipulate the free exercise clause to finance religious exercise with taxpayer money.

First Amendment to the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Establishment Clause

From Wikipedia, the free encyclopedia

In United States law, the Establishment Clause of the First Amendment to the United States Constitution, together with that Amendment's Free Exercise Clause, form the constitutional right of freedom of religion. The relevant constitutional

text is: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...".

Financial assistance

The Supreme Court first considered the question of financial assistance to religious organizations in Bradfield v. Roberts (1899). The federal government had funded a hospital operated by a Roman Catholic institution. In that case, the Court ruled that the funding was to a secular organization – the hospital – and was therefore permissible.

In the twentieth century, the Supreme Court more closely scrutinized government activity involving religious institutions. In Everson v. Board of Education (1947), the Supreme Court upheld a New Jersey statute funding student transportation to schools, whether parochial or not. Justice Hugo Black held,

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

The New Jersey law was upheld, for it applied "to all its citizens without regard to their religious belief." After Everson, lawsuits in several states sought to disentangle public monies from religious teaching, the leading case being the 1951 Dixon School Case out of New Mexico.[19]

The Jefferson quotation cited in Black's opinion is from a letter Jefferson wrote in 1802 to the Baptists of Danbury, Connecticut, that there should be "a wall of separation between church and state." Critics of Black's reasoning (most notably, former Chief Justice William H. Rehnquist) have argued that the majority of states did have "official" churches at the time of the First Amendment's adoption and that James Madison, not Jefferson, was the principal drafter. However, Madison himself often wrote of "perfect separation between the ecclesiastical and civil matters" (1822 letter to Livingston), which means the authority of the church (that which comes from the church) is decided by church authority, and that which is decided in civil government is decided by civil authorities; neither may decree law or policy in each other's realm. Another description reads: "line of separation between the rights of religion and the civil authority... entire abstinence of the government" (1832 letter Rev. Adams), and "practical distinction between Religion and Civil Government as essential to the purity of both, and as guaranteed by the Constitution of the United States" (1811 letter to Baptist Churches).

In Lemon v. Kurtzman (1971), the Supreme Court ruled that government may not "excessively entangle" with religion. The case involved two Pennsylvania laws: one permitting the state to "purchase" services in secular fields from religious schools, and the other permitting the state to pay a percentage of the salaries of private school teachers, including teachers in religious institutions. The Supreme Court found that the government was "excessively entangled" with religion, and invalidated the statutes in question. The excessive entanglement test, together with the secular purpose and primary effect tests thereafter became known as the Lemon test, which judges have often used to test the constitutionality of a statute on establishment clause grounds.

The Supreme Court decided Committee for Public Education & Religious Liberty v. Nyquist and Sloan v. Lemon in 1973. In both cases, states—New York and Pennsylvania—had enacted laws whereby public tax revenues would be paid to low-income parents so as to permit them to send students to private schools. It was held that in both cases, the state unconstitutionally provided aid to religious organizations. The ruling was partially reversed in Mueller v. Allen (1983). There, the Court upheld a Minnesota statute permitting the use of tax revenues to reimburse parents of students. The Court noted that the Minnesota statute granted such aid to parents of all students, whether they attended public or private schools.

While the Court has prevented states from directly funding parochial schools, it has not stopped them from aiding religious colleges and universities. In Tilton v. Richardson (1971), the Court permitted the use of public funds for the construction of facilities in religious institutions of higher learning. It was found that there was no "excessive entanglement" since the buildings were themselves not religious, unlike teachers in parochial schools, and because the aid came in the form of a one-time grant, rather than continuous assistance. One of the largest recent controversies over the amendment centered on school vouchers—government aid for students to attend private and predominantly religious schools. The Supreme Court, in Zelman v. Simmons-Harris (2002), upheld the constitutionality of private school vouchers, turning away an Establishment Clause challenge.