Friends of the Court Submit U.S. Supreme Court Briefs To Support Religious Options in School Choice Programs

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Arlington, Virginia—More than 30 amicus (or "friend-of-the-court") briefs have been filed in *Espinoza v. Montana Department of Revenue* calling for greater educational choice for parents and their children. *Espinoza*, which is being litigated by the Institute for Justice (IJ), is expected to set a landmark precedent when it comes to education reform and will decide whether states may exclude religious schools from generally available scholarship programs, or if such exclusions violate the U.S. Constitution. IJ spelled out its constitutional case for including religious options in a brief it recently filed with the Court.

Espinoza is expected to be argued in early 2020, with a decision to come by the end of June when the Court concludes its term.

Among the amici are:

The United States: In a brief authored by U.S. Solicitor General Noel J. Francisco, the United States argues that the First Amendment's Free Exercise Clause "forbids imposing special disabilities on religious adherents on the basis of their religious status" and that Montana's Constitution, by requiring the exclusion of religious options in student-aid programs, "violates that elementary rule."

Senator Steve Daines (R-MT) and four other Montana legislators: This brief demonstrates that Montana's Blaine Amendment flowed directly from the failed federal Blaine Amendment and argues that it blatantly violates the First Amendment's Free Exercise Clause in excluding religious schools from a generally available public benefit program. This brief also explains why Montana's re-ratification of its Blaine Amendment in 1972 did not neutralize its discriminatory meaning. Indeed, the delegates to the 1972 convention recognized the anti-Catholic motivation for including a Blaine Amendment in the Montana Constitution and voted to retain the provision

anyway. The Independence Institute's brief makes a similarly compelling argument that Montana's Blaine Amendment was intended to disfavor the Catholic religion and thus violates the U.S. Constitution.

Coalition of States: Eighteen states, through their Attorneys General and Governors, argue that the U.S. Supreme Court's existing precedent requires that the Montana Supreme Court's decision be reversed because the First and Fourteenth Amendments forbid the imposition of special disabilities on religious persons and organizations. The states' brief also argues that if the ruling below is affirmed, it will jeopardize numerous school choice programs across the country and pave the way for state discrimination against religion.

Cato Institute: In addition to explaining why it is unconstitutional to disfavor religion in the context of a school choice program, the Cato Institute's brief explains why giving parents a genuine choice of educational options, including religious options, alleviates religious conflicts in the public square. Cato has kept an online database of values-based and identity-based conflicts that have erupted in public schools, including religious conflicts. As Cato's brief explains, "Allowing families . . . to choose schools that share their values would abrogate the need to impose one's values on everyone else, improving the prospects for social and political peace."

EdChoice, Reason Foundation, and the Individual Rights Foundation: Summarizes the existing social research (1) concerning the reasons why parents want school choice programs and (2) demonstrating that school choice improves academic outcomes for both participating and non-participating students, has a positive impact on civic values and on racial and ethnic integration, and saves states and school systems money.

Christian Legal Society, et al.: In a brief on behalf of numerous religious entities, led by the Christian Legal Society, law professors Douglas Laycock and Thomas C. Berg bring their considerable knowledge of religious liberty to bear on the important issues in this case and conclude that denying parents a generally available benefit (*i.e.*, private school scholarships) on the basis of religion violates the fundamental principles of neutrality and private choice that the Supreme Court has repeatedly identified as the touchstones of the First Amendment's Religion Clauses.

The American Center for Law and Justice (ACLJ): The ACLJ explains why the U.S. Supreme Court's 2004 decision in *Locke v. Davey*, which upheld a narrow religious exclusion that prohibited students from using a state-funded college scholarship program to pursue degrees in ministerial training but permitted students to attend religious colleges and even pay for devotional and theological courses as part of non-ministerial degree programs, cannot justify the religious exclusion at issue in Montana. As the ACLJ notes, "*Locke* expressly distinguished a situation like the one here, where someone or something had to choose between their religious beliefs and receiving a government benefit." Additionally, both the ACLJ's brief and a brief filed

on behalf of The Honorable Scott Walker argue that *Locke* was wrongly decided and should be overruled.

Liberty Justice Center and American Federation for Children: The LJC and AFC demonstrate that the Montana Supreme Court's ruling "flips the Establishment Clause on its head" by harming—rather than protecting—adherents of minority religions, such as Orthodox Jews and Muslims, who may find themselves socially isolated, or even bullied, because of their adherence to religious principles. The brief argues that the best way to protect the civil liberties of minority religious adherents is to recognize not only the value of giving parents robust educational options, but the fact that the "Establishment Clause exists to protect these minorities, not to punish them for choosing a faith-filled learning environment for their children."

Jewish Coalition for Religious Liberty: This brief explains the critical importance of Jewish day schools in preparing the children of Orthodox parents to take roles in their Jewish community and argues that a declaration that Montana's Blaine Amendment violates the U.S. Constitution would "benefit the lives of Jewish families and strengthen their communities."

Montana Family Foundation: The Montana Family Foundation shows how the U.S. Constitution's Religion Clauses require the government to remain neutral between religion and nonreligion in the operation of a student-aid program, and that the Montana Constitution's Blaine Amendment violates the neutrality protections required by the First Amendment's Free Exercise and Establishment Clauses.

Pioneer Institute: The Pioneer Institute details the sordid, anti-Catholic prejudice that fueled the failed federal Blaine Amendment, its precursors, and its progeny, such as the Montana Blaine Amendment at issue in this case. The Pioneer Institute argues that state action motivated by religious animus violates the First Amendment. Similar arguments were presented in a brief on behalf of The Becket Fund for Religious Liberty, the Rutherford Institute, the Arizona Christian School Tuition Organization and Immaculate Heart of Mary Catholic School, as well as two amicus briefs filed on behalf of state legislators.

Forge Youth Mentoring: In an amicus brief authored by now-attorney Joshua Davey, the student denied a scholarship to study devotional theology in *Locke v. Davey*, Forge Youth Mentoring argues that if religious discrimination in the context of a student-aid program is upheld, the implications of such a ruling would extend beyond school choice to such things as mentoring and after-school programs, like those provided by Forge Youth Mentoring under contracts with local governments.

Georgia GOAL Scholarship Program: The Georgia GOAL Scholarship Program argues that Blaine Amendments were not merely fueled by anti-Catholicism, but also by "equally opprobrious, racial discrimination." The GOAL brief argues that the enforcement of the Montana

Blaine Amendment to exclude religious options from Montana's school choice program violates parents' freedom of speech and their equal protection rights.

Center for Education Reform: The Center for Education Reform's brief focuses on the fundamental liberty of parents to direct the education and upbringing of their own children and demonstrates why denying parents their choice of schools based on religion violates bedrock constitutional principles of both parental and religious liberty. Similar arguments are also made in the brief on behalf of Montana Catholic School Parents, the Catholic Association Foundation, the Invest in Education Foundation, Americans for Prosperity and Yes, Every Kid, as well as in a brief filed on behalf of parents in Montana, Connecticut, and New York by the Pacific Legal Foundation.

Mackinac Center for Public Policy: The Michigan-based Mackinac Center for Public Policy details the history of school choice programs in Michigan and the poor performance of Detroit public schools and asks for a ruling broad enough to open educational opportunity in The Great Lakes State.

Alliance for Choice in Education: The Alliance for Choice in Education's brief ties together many of the themes present in the numerous amicus briefs filed in support of Kendra Espinoza. The brief first points out that barring religious options from Montana's school choice program perpetuates the historical discrimination and persecution that undergirds Montana's Blaine Amendment. It then shows how excluding religious options for parents hampers the secular purposes of raising student achievement and improving life-outcomes for program participants. Finally, the brief makes a compelling argument for why discriminating against religion in scholarship programs constitutes a "clear infringement on" the free exercise of religion.

Institute for Justice Senior Attorney Richard Komer, who will defend the school choice parents in court, said, "Excluding religious options from generally available student-aid programs violates the religious liberty of families and it is flatly unconstitutional under the federal Constitution. The Institute for Justice will make that point when we argue this case before the U.S. Supreme Court."