NATIONAL CATHOLIC REGISTER

Will Supreme Court Support State Scholarships for Religious Schools?

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January 23, 2020

A lead attorney who argued a historically significant educational and religious-freedom case at the U.S. Supreme Court Jan. 22 said her team is "very optimistic" about a favorable ruling this spring. A decision in her clients' favor would help more students afford educations at Catholic and other religious schools.

"I think we have four justices firmly on our side, and it's up to Chief Justice Roberts," said Erica Smith, lead co-counsel for appellants in *Espinoza v. Montana*, in an interview with the Register shortly after she argued the case.

The conflict began with Kendra Espinoza trying to do what she thinks is best for her children. She works multiple jobs to keep her two girls in Stillwater Christian School in Kalispell, Montana. She told the court one of the girls was bullied for her faith at a public school.

A new Montana scholarship program offered to ease the tuition-related financial burdens of Espinoza and other parents in similar circumstances who pay education taxes and tuition.

An old state law intervened and put a stop to assistance the Espinoza family and others desperately hoped for.

The state Legislature had established tax credits for private donations of up to $150 to charities that award private-school scholarships. Families would use the scholarships at a variety of accredited schools, whether secular or affiliated with religious institutions.

The Montana Department of Revenue immediately intervened, using the state constitution's Blaine Amendment as the basis for a lawsuit to eliminate sectarian schools as options for scholarship recipients. The Blaine Amendment, like those in 36 other states, prohibits any "direct or indirect" appropriation to any school controlled "in whole or part" by a religious denomination.

The Montana Supreme Court tried to resolve the conflict by shutting down the tax-credit program for all students, whether they attend religious or secular schools.

Supporters of the state court's decision say no one can claim discrimination because no one is getting state-funded scholarships for sectarian or secular schools. All are treated equally, they say, by the state court's decision.

Racial Discrimination Analogy

“That has been a concern among some attorneys familiar with this case,” former federal judge and U.S. Solicitor General Ken Starr told the Register. “There has been some concern the court could circumvent the Blaine issue by saying there is no discrimination here because the state Supreme Court dismantled the program for everyone, whether they attend secular or sectarian schools.”

Smith believes Chief Justice Roberts addressed that concern by asking attorneys for Montana if they could explain any significant difference between two scenarios: one, shutting down scholarships for all students because some of them are religious; and, two, shutting down all swimming pools because some swimmers are black.

“The respondents struggled to express a distinction,” Smith said.

Smith and her colleagues left the courtroom highly confident of support from Justices Clarence Thomas, Samuel Alito, Neil Gorsuch and Brett Kavanaugh. She expressed cautious optimism Roberts would side with those four, while Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan will dissent.

During the hearing, Kavanaugh said Blaine Amendments are rooted in “grotesque bigotry against Catholics.”

When teachers’ unions used Colorado’s Blaine Amendment to stop a scholarship program in 2015, historian Charles Glenn told the state Supreme Court about the prejudicial roots of Blaine Amendments. He documented how the Ku Klux Klan lobbied for the laws.

“Our Harvard-educated historian testified under oath that Blaine was directed at Catholics, Irish immigrants and Jews,” said Craig Richardson, a lawyer and member of Colorado’s Douglas County School Board, in a 2015 interview with the Register.

Two days before the Supreme Court agreed in 2019 to hear *Espinoza v. Montana*, U.S. Secretary of Education Betsy DeVos said she expected the Supreme Court to rule against Blaine Amendments soon.

“Blaine Amendments are the biggest bigoted issue we have, to my knowledge, existing in our country today,” DeVos said. “They were designed basically as an attack on the Catholic Church and Catholic schools.”

Cautious Optimism

Jeanne Allen, the Catholic founder and CEO of the Center for Education Reform, sat through the *Espinoza* hearing and came out of it with cautious optimism for a ruling favoring school choice.

“It is unclear what Roberts is going to do,” Allen said.

She expressed concern about the possibility of a narrow ruling that addresses only the Montana case without negating all Blaine Amendments.

Smith does not share that concern.

“We did not go in there expecting the court to wipe 30-something state laws off the books,” Smith said in reference to Blaine Amendments. “It’s not necessary. All the court has to do is say

these state amendments cannot limit a parent's choice in determining which school is best for a child. We are optimistic they will do that."

Smith and co-lead counsel Richard Komer, both of the Institute for Justice, argued the Montana law violates the First Amendment's prohibition against the federal government interfering in the free exercise of religion. The 14th Amendment, ratified in 1868, generally extends federal constitutional limitations on federal authority to state and local governments and assures all individuals "equal protection" under the law.

"The Constitution's Free-Exercise Clause, the Establishment Clause and the Equal-Protection Clause all require the government to be neutral on matters of religion, not hostile," Smith told the Register. "If you invalidate a scholarship program because it includes a religious option, that's absolutely hostility to religion."

Liberals and conservatives frequently advocate "states' rights" to support a variety of state agendas. Pro-life advocates talk about state's rights when opposing the one-size-fits-all mandate of the high court's pro-abortion ruling in *Roe v. Wade*. Liberals increasingly argue "states' rights" to justify state conflicts with federal laws involving immigration enforcement, marijuana prohibition and Blaine Amendments.

Legal Precedents

The U.S. Supreme Court has a track record of reducing state authority, striking down more than 900 state laws in conflict with federal law since the ratification of the 14th Amendment.

The court's first major school-choice ruling came in 1954. The majority in *Brown v. Board of Education of Topeka, Kansas,* ruled that local school districts could no longer maintain separate schools for black children and white children. Doing so violated the 14th Amendment's Equal-Protection Clause.

"We have had people of different races treated differently by governments, and the Supreme Court has put a stop to it," Smith said. "This is a case of government treating people differently because of their religious beliefs, and the court has a long history of protecting people from being discriminated against on a basis of religious status, beliefs and conduct. Here, the state has violated all three."

Dozens of religious and secular organizations filed amicus briefs asking the court to side with Espinoza to defend the First Amendment and enhance school choice.

A brief by the Jewish Coalition for Religious Liberty urges the court "to declare Montana's Blaine Amendment unconstitutional. This court has repeatedly held that government must be impartial toward religion. However, Montana's Blaine Amendment expressly denies citizens public benefits based solely on their religious faith."

Supporters of Blaine Amendments don't see it that way.

During the Jan. 22 hearing, Justice Breyer spoke of the First Amendment's Establishment Clause as a defense for denying state funds from assisting with tuition at religious schools. The Establishment Clause says, "Congress shall make no law respecting an establishment of religion," a command at the center of legal disputes throughout the country's history.

The American Civil Liberties Union of Montana filed an amicus brief asking the court to uphold the state court's decision, arguing: "The federal Free-Exercise and Equal-Protection Clauses do not compel states to fund religious education equally with secular education."

The Cato Institute, a Washington-based libertarian think tank, filed a brief challenging the argument that Montana's scholarship program tried to expend state money on religious schools.

"A tax-credit program is not a public expenditure," Cato's brief argues. "It merely allows taxpayers to keep more of their own money and gives them incentive to spend it in certain ways."

Catholic Perspective

The U.S. Conference of Catholic Bishops submitted an *amicus curiae* legal brief to the Supreme Court, in support of the appellants seeking to overturn the *Espinoza* decision, and on Jan. 21 released a strongly worded statement denouncing the historical anti-Catholic prejudice that gave rise to the Blaine Amendments.

The U.S. bishops' statement asserted that "religious persons and organizations should, like everyone else, be allowed to participate in government programs that are open to all. This is an issue of justice for people of all faith communities."

"But this case is not only about constitutional law," the statement continued. "It is about whether our nation will continue to tolerate this strain of anti-Catholic bigotry. Blaine Amendments, which are in 37 states' constitutions, were the product of nativism. They were never meant to ensure government neutrality towards religion, but were expressions of hostility toward the Catholic Church. We hope that the Supreme Court will take this opportunity to bring an end to this shameful legacy."

The National Catholic Educational Association states on its website that it "supports the concept [of] full and fair parental choice in education which is supported by tax relief, voucher, scholarships and other aid to parents so they may seek the educational opportunities they want for their children." And school-choice programs already in place in several jurisdictions allow parents to draw on them, if they opt to send their kids to Catholic schools.

Helping Low-Income Students

Though much of the debate revolves around the First Amendment's protection of religious liberty, Smith said a more pragmatic concern involves leveling the playing field for students from homes with low or modest incomes.

"It's about school choice and every parents' ability to choose the right school, no matter how much money they make," Smith said. "It's about expanding options for kids to learn without regard for their family's religion."