Supreme Court Hears Blockbuster Case On Religious School Choice

Josh Hammer

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The U.S. Supreme Court this morning heard oral argument in the crucial First Amendment religious liberty case of *Espinoza v. Montana Department of Revenue*. The legal issue, as framed by SCOTUSblog, is "[w]hether it violates the religion clauses or the equal protection clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools."

Amy Howe of SCOTUSblog contextualizes the importance of *Espinoza* through the prism of the Court's recent First Amendment religious liberty jurisprudence:

Two and a half years ago, the Supreme Court ruled that Missouri's policy of excluding churches from a program to provide grants to resurface playgrounds violated the Constitution. In a footnote in their opinion in *Trinity Lutheran Church v. Comer*, the justices emphasized that their decision was limited to the facts before them and did "not address religious uses of funding or other forms of discrimination." [In *Espinoza*], the justices will return to the question they left open in *Trinity Lutheran*, when they review a decision by the Montana Supreme Court invalidating a tax-credit program because the scholarships created by the program could be used at religious schools.

The Montana state constitutional provision challenged in *Espinoza* is a so-called "Blaine Amendment" — an unfortunate area of law that has its insidious origins in blatant anti-Catholic bigotry. First Liberty Institute's Jeremy Dys explained the sordid history yesterday in a Daily Wire op-ed calling for the Court to end "Blaine Amendments" once and for all:

In 1875, … [James] Blaine introduced a proposed amendment to the United States Constitution that would prevent any government aid to "sectarian schools," targeting Catholic schools in particular.

His federal amendment failed, but various states borrowed his proposal and their own constitutions were amended instead. Today, almost 40 states have a constitutional provision that prevents government aid to religious institutions. These state constitutional amendments have

empowered states to legally discriminate against religious organizations when they perform the same work secular institutions do.

For years, activists have used Blaine Amendments to successfully exclude religious individuals and organizations from benefitting from public benefits. Justice Clarence Thomas wrote of Blaine Amendments in the 2000 decision of *Mitchell v. Helms*, "This doctrine, born of bigotry, should be buried now."

Ilya Shapiro, who filed a "friend of the court brief" on behalf of Cato Institute's Robert A. Levy Center for Constitutional Studies, is optimistic that the Court will do precisely what Justice Thomas called for it to do in *Mitchell*. Speaking exclusively with The Daily Wire, Shapiro opined: "The Supreme Court has the opportunity here to remove the last legal barrier to school choice, and I think it's poised to do so. Constitutional principles of free exercise and equal protection don't allow Montana to exclude religious groups from public benefits solely because of their religious nature. Similarly, there's no room in Supreme Court precedent to exclude religious schools from programs structured around private choice (as opposed to, say, direct taxpayer funding of devotional education)."

In an additional Daily Wire op-ed published this morning, Jewish Coalition for Religious Liberty (JCRL) General Counsel Howard Slugh also lambasted the bigotry of Blaine's legacy. "Espinoza has a strong legal basis for her claims," Slugh wrote. "The Supreme Court recently indicated [in *Trinity Lutheran*] that excluding a religious organization 'from a public benefit for which it is otherwise qualified, solely' because it is religious 'is odious to our Constitution … and cannot stand.' The Supreme Court should strike down Montana's Blaine Amendment based on the same reasoning."

Slugh, who filed a "friend of the court brief" on behalf of JCRL, was in attendance this morning at the Supreme Court oral argument. Speaking exclusively with The Daily Wire, Slugh described what he saw: "I was very pleased with how the oral argument went. It seemed that at least five justices understood that the key issue in this case is whether it was permissible for the Montana Supreme Court to act pursuant to a law that, on its face, requires discrimination against religious people without even considering whether such discrimination is permissible under the U.S. Constitution. The answer to that question is that it is not permissible, and at least five justices seemed to support that position."

Proponents of religious liberty and school choice ought to hope that Slugh's intuition proves prescient.