Montana Law Review Online

Volume 80 | Article 8

1-11-2020

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Recommended Citation

Katy Lindberg, Oral Argument Preview, Espinoza v. Montana Department of Revenue: *Does Montana's Blaine Amendment Violate the Free Exercise Clause?*, 80 Mont. L. Rev. Online 60 (2019), http://scholarship.law.umt.edu/mlr_online/vol80/iss1/8/.

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PREVIEW: Espinoza v. Montana Department of Revenue: *Does Montana's Blaine Amendment Violate the Free Exercise Clause?*

Katy Lindberg

The United States Supreme Court is set to hear oral argument on this matter Wednesday, January 22, 2020, at 10:00 am, in the Supreme Court Building, Washington D.C. Richard D. Komer is likely to appear for Petitioners, and Adam G. Unikowsky is likely to appear for Respondents.

I. INTRODUCTION

This case raises the issue of whether the Free Exercise and Establishment clauses of the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment, require a state to allow generally available and religiously neutral student aid to students attending a religious school.[1] The United States Supreme Court's decision on the Montana Supreme Court's interpretation of Montana's Blaine Amendment could have important implications for states with constitutional prohibitions on state aid to religious schools.

II. FACTUAL AND PROCEDURAL BACKGROUND

In 2018, the Montana Supreme Court invalidated a 2015 tax program that provided a dollar for dollar tax credit, up to $150, for donations to Student Scholarship Organizations, which provided scholarships to students attending private schools, including religious schools.[2] Justice McKinnon, writing for the majority, held the Program, allowed the Legislature to indirectly pay tuition and therefore impermissibly aided religious schools under Montana's Blaine Amendment, Article X, Section 6.[3] Because "the overwhelming majority" of the schools receiving the scholarships

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[1] *See* Brief for Petitioners, at i, Espinoza v. Montana Dept. of Revenue (U.S. Sep. 11, 2019) (No. 18-1195); Brief of Respondents at i, Espinoza v. Montana Dept. of Revenue (U.S. Nov. 8, 2019) (No. 18-1195).

[2] Espinoza v. Montana Department of Revenue, 435 P.3d 603, 606 (Mont. 2018).

[3] *Id*. at 612.

were religious schools,[4] and because taxpayers could not direct funds to a specific school, the court found the Legislature could not ensure the funds went only to secular education.[5] Further, if a religious school did receive funds, there was no way to know "where the secular purpose ended, and the sectarian began."[6]

Justice Gustafson concurred, agreeing the Program violated the Establishment Clause and the Free Exercise Clause of the First Amendment.[7] Justice Baker dissented, asserting a tax credit is not an indirect appropriation.[8] Justice Rice also dissented, asserting the Program was neutral with respect to religion, and thus constitutional under both Montana's and United States' constitutions.[9]

III. ARGUMENTS

a. *Petitioners*

Petitioners argue Montana's application of Article X, Section 6 violated the Free Exercise and Establishment clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.[10]

Petitioners assert that Montana's application of Article X, Section 6 violates the Free Exercise clause because it prohibited all religious groups from receiving funding under the tax credit program.[11] Petitioners argue the invalidation of the program discriminated against their religious beliefs, conduct, and status.[12] Further, because religious schools were excluded from the program, the schools also faced discrimination for their beliefs, status and conduct.[13] Petitioners urge the Court to examine the lower court's

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[4] 12 out of 13 schools that benefited from the program were religious schools.

[5] *Id*. at 613.

[6] *Id*. (citing *State ex rel. Chambers v. School Dist. No. 10 of Deer Lodge County*, 472 P.2d 1013, 1021 (Mont. 1970)).

[7] *Id*. at 620-21 (Gustafson, J., concurring). Justice Sandefur also concurred.

[8] *Id*. at 626-30 (Brennan, J., dissenting).

[9] *Id*. at 632-33 (Rice, J., dissenting).

[10] Brief for Petitioners, *supra* note 1, at 13.

[11] *Id*. at 26–28.

[12] *Id*. at 17–19.

[13] *Id*. at 19–20.

application of the Article X, Section 6 under strict scrutiny and that no sufficient compelling state interest exists.[14]

Additionally, Petitioners argue Article X, Section 6 violates the 14th Amendment's Equal Protection clause because it draws an impermissible line between students attending religious schools and secular schools and it discriminates against students seeking a religious education.[15] Petitioners assert that because Article X, Section 6 was enacted out of animus toward Catholics, Montana's application of the clause violated the Equal Protection Clause.[16] Several amici argue for total invalidation of Article X, Section 6 under the Equal Protection Clause as well.[17]

Finally, Petitioners argue Article X, Section 6 as applied demonstrates prohibited state hostility toward religion, violating the Establishment Clause.[18] The lower court's "unbending commitment to secularism . . . tramples upon [petitioner's] religious rights."[19]

b. *Respondents*

The Montana Department of Revenue's primary argument centers around the Free Exercise Clause.[20] Because the lower court invalidated the Program in its entirety, the Department argues there was no prohibition on, or coercion of, religious practice.[21] The Department also asserts that Article X, Section 6 violates neither the Equal Protection Clause nor the Establishment Clause.[22]

Addressing Free Exercise concerns, Respondents distinguish the present facts from those in *Trinity Lutheran*, arguing

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[14] *Id*. at 20–21.
[15] *Id*. at 29–31.
[16] *Id*. at 44–45.
[17] *See generally* Amicus Brief for the Becket Fund for Religious Liberty at 4–17, Espinoza v. Montana Dept. of Revenue (U.S. Sep. 11, 2019) (No. 18-1195); Amicus Brief for Senators Steve Daines, et al. at 27–30, Espinoza v. Montana Dept. of Revenue (U.S. Sep. 11, 2019) (No. 18-1195); Amicus Brief for the Montana Family Foundation at 12–13, Espinoza v. Montana Dept. of Revenue (U.S. Sep. 11, 2019) (No. 18-1195).
[18] *Id*. at 14.
[19] *Id*. at 47.
[20] *See* Brief of Respondents, *supra* note 1 at 10–49.
[21] *Id*. at 11–13.
[22] *Id*. at 49–55.

neither the lower court decision, nor Article X, Section 6 constitute a prohibition on the free exercise of religion.[23] Unlike *Trinity Lutheran*, Respondents argue the lower court's decision was not coercive because all groups stopped receiving aid through the program—regardless of their religious affiliation.[24]

Finally, Respondents address Equal Protection and Establishment Clause concerns. Because the lower court decision invalidated the program, denying aid to all schools, Respondents argue there is no unequal treatment, and therefore no Equal Protection Clause violation.[25] Additionally, Respondents challenge Petitioner's animus claim by discussing the history and purpose of Article X, Section 6, and similar clauses across the country, and explaining the clauses were enacted not out of bigotry, but to protect religious freedom.[26] Further, Respondents argue Article X, Section 6 as applied protects religious freedom rather than enforcing secularism, and does not violate the Establishment Clause because it is not hostile toward religion.[27]

IV. ANALYSIS

The Court's decision will likely turn on whether Article X, Section 6, as applied to invalidate the Program, served to exclude religious schools from a generally available benefit, violating the Free Exercise Clause.

Arguably, this a strange case for the Court to make a shift in its Free Exercise jurisprudence. Petitioners argue Montana's application of Article X, Section 6 violated the Free Exercise Clause. Yet, the Montana Supreme Court invalidated the program completely, so Petitioners are left to argue that the Court should require Montana to enforce a program that, under the Montana Supreme Court's interpretation, violates the Montana Constitution.[28] Respondents assert such action by the Court would grossly violate federalism because it would remove a state's choice in determining whether state funded school-choice programs can

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[23] *Id*. at 13.
[24] *Id*. at 14.
[25] *Id*. at 50–51.
[26] *See Id*. at 17–36.
[27] *Id*. at 52–54.
[28] *Id*. at 46.

fund religious schools.[29] Further, Respondents argue the Court should not force Montana to administer a law that violates its own constitution.[30]

If the Court agrees with Petitioners and finds Montana's application of Article X, Section 6 violated the Free Exercise Clause, Blaine Amendments around the country could be rendered toothless.[31] Many states rely on their constitution's no-aid clauses to strike down school-choice programs providing aid for religious education.[32] If Montana's application of Article X, Section 6 violates the Free Exercise Clause, states that wish to limit state aid to religious schools under their no-aid clauses may have their hands tied.[33]

Many amici have asserted that clauses like Article X, Section 6 violate the Free Exercise Clause, and have asked the Court to invalidate Blaine Amendments as a whole.[34] If the Court invalidates Article X, Section 6, similar clauses existing in 37 state constitutions could also be invalidated.[35] Many of these clauses were enacted in the early 1800s,[36] and it would be unprecedented for the Court to overturn these provisions.[37]

This case is flanked by two crucial religious freedom cases: *Locke v. Davey*[38] and *Trinity Lutheran Church of Columbia, Inc. v. Comer*.[39] The *Locke* court recognized there is "play in the joints" between the Establishment and Free Exercise clauses, and decided a state's choice to not fund religious instruction fell within this

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[29] *Id*.

[30] *Id*. at 46–47.

[31] *Id*. at 44.

[32] *See* Cain v. Horne, 202 P.3d 1178, 1184 (Ariz. 2009); Bush v. Holmes, 886 So. 2d 340, 366 (Fla. 1st Dist. App. 2004).

[33] Brief of Respondents, *supra* note 1 at 44.

[34] *See generally* Amicus Brief for the Becket Fund for Religious Liberty at 4–17, *supra* note 17; Amicus Brief for Senators Steve Daines, et al. at 27–30, *supra* note 17; Amicus Brief for the Montana Family Foundation at 12–13, *supra* note 17.

[35] *Id*. at 41.

[36] *Id*.

[37] Brief of Respondents, *supra* note 1 at 44.

[38] 540 U. S. 712 (2004).

[39] 137 S.Ct. 2012 (2017).

gap.[40] Currently, there is a circuit split about how much "play" exists between the "joints" of the religious clauses. While some courts interpreted *Locke* to allow states to exclude all religious schools from aid programs,[41] other courts held religious schools should receive aid under *Locke*.[42]

More recently, the Court in *Trinity Lutheran* held a state cannot deny a generally available benefit to a church without violating the Free Exercise Clause.[43] However, the majority specifically noted in a footnote that their analysis did not address "religious uses of funding or other forms of discrimination."[44] Justices Thomas and Gorsuch did not join this footnote, asserting a state cannot discriminate based on religious use or religious status.[45]

This case gives the Court an opportunity to expand on, and/or distinguish between, *Locke* and *Trinity Lutheran*, resolving whether *Trinity Lutheran*'s holding extends to religious uses of state aid. With a conservative majority, the court seems poised to expand upon *Trinity Lutheran* and prohibit states from denying generally available aid to religious schools for religious education. This outcome could render Blaine Amendments across the country useless or could even invalidate such provisions entirely. The extent of the Court's decision will likely come down to Chief Justice Roberts.

While the Petitioners primarily focus on the Free Exercise Clause, they also assert Equal Protection and Establishment clause violations.[46] Whether Montana's application of Article X, Section 6 violated the Equal Protection Clause depends on the Court's interpretation of the clause's history, specifically whether it "represents a bare . . . desire to harm a politically unpopular

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[40] *Locke*, at 719.

[41] *See* Eulitt ex rel. Eulitt v. Me. Dept. of Educ., 386 F.3d 344, 355 (1st Cir. 2004); Anderson v. Town of Durham, 895 A.2d 944, 961 (Me. 2006).

[42] *See* Colorado Christian University v. Weaver, 534 F.3d 1245, 1258 (10th Cir. 2008); Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 780 (7th Cir. 2010).

[43] *Trinity Lutheran Church of Columbia, Inc.*, at 2022.

[44] *Id*. at 2024 n.3.

[45] *Id*. at 2026 (Gorsuch, J., concurring in part).

[46] Brief for Petitioners, *supra* note 1, at 28.

group."[47] If the Court finds it was, it is likely to conclude Montana's application of the clause, or the clause itself, violates the Equal Protection Clause because the state's differing treatment of students attending religious and non-religious schools was "born out of animosity."[48]

The Establishment Clause argument also hinges on whether Montana's application of Article X, Section 6 represents impermissible hostility towards religion.[49] The Establishment Clause prohibits states from actively supporting or hindering the exercise of religion.[50] If the Court determines that Montana's application of Article X, Section 6, or the clause itself, "foster[ed] a pervasive . . . hostility to religion,"[51] it will overturn Montana's decision under the Establishment Clause.

V. CONCLUSION

The Court's decision has the potential to settle the post-*Locke* debate of how much "play" exists between the Free Exercise and Establishment clauses, and whether the "play" allows states to exclude religious schools from receiving state aid. If the Court decides Article X, Section 6 as applied by the Montana Supreme Court violated the Free Exercise Clause, the decision could have large implications for the 37 states with no-aid clauses.

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[47] *See* Brief for Respondents, *supra* note 1, at 40–44; Brief for Petitioners, supra note 1, at 31–45.

[48] Romer v. Evans, 517 U.S. 620, 634 (1996).

[49] Brief for Petitioners, *supra* note 1, at 45–46.

[50] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993).

[51] Rosenberger v. Rector and Visitors of U. of Virginia, 115 S. Ct. 2510, 2525 (1995).