

CLIENT NEWS BRIEF

Supreme Court Disallows Exclusion of Religious Schools from State Scholarship Program

On June 30, 2020, the United States Supreme Court held that Montana's exclusion of religious schools from a state scholarship program discriminated against religious schools and the families whose children attend or hope to attend them, and violated the Free Exercise Clause of the United States Constitution. (*Espinoza v. Montana Department of Revenue* (2020) 591 U.S. __ (Espinoza).) In doing so, the Supreme Court builds on its 2017 decision in *Trinity Lutheran Church of Columbia, Inc. v. Carol S. Comer* (2017) 582 U.S. __, and further expands the rights of religious schools to receive government benefits aimed at other private schools and nonprofit organizations.

Espinoza involved a program established by the Montana Legislature in 2015 that granted a tax credit to any taxpayer that donated to a participating "student scholarship organization." The scholarship organizations would then use the donations to award scholarships to children for tuition at a private school of their choice. The program was intended to foster "school choice" by allowing parents to send their children to private schools if desired. Under the original legislation, virtually all Montana private schools qualified, including private religious schools. However, the Montana Department of Revenue subsequently issued a rule that excluded schools "owned or controlled in whole or in part by any church, religious sect, or denomination" from the program. This was consistent with the State's "no-aid" law, which bars government aid to sectarian schools.

Kendra Espinoza attempted to use a scholarship obtained under the legislation to send her child to a private Christian school. She was blocked from doing so by the Department of Revenue rule, so Ms. Espinoza, along with two other mothers, sued the Department of Revenue. The Montana Supreme Court agreed with Ms. Espinoza that the Department of Revenue did not have the authority to modify the program to exclude religious schools. However, now viewing the program as applied directly to religious schools, the Montana Supreme Court ultimately invalidated the entire program, holding that the program violated the State's no-aid law by allowing government aid to flow to religious schools.

The United States Supreme Court ruled against the State, finding that the State's application of its no-aid law impermissibly discriminated against religious schools and the families that attend them in violation of the Free Exercise Clause of the First Amendment. In reaching its conclusion, the court relied on its 2017 decision of *Trinity Lutheran Church of Columbia, Inc. v. Carol S. Comer*. In *Trinity*, Missouri provided grants to help nonprofit organizations pay for playground resurfacing, but a state policy disqualified any organizations "owned or controlled by a church, sect, or other religious entity." The *Trinity* court held that because Missouri's program discriminated against the church based solely on the religious status of the church (as opposed to the conduct of the church), Missouri's actions were subject to the strictest scrutiny, which it failed. The *Espinoza* court reasoned that, as in *Trinity*, the Montana Supreme Court's application of Montana's no-aid law barred religious schools from public benefits solely because of the religious character of those schools, and barred parents who wish to send their children to a religious school from those same benefits. Because the State's application of its no-aid law to bar religious schools

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Devon B. Lincoln
Partner
Monterey Office
dlincoln@lozanosmith.com



Bradley R. Sena
Associate
Walnut Creek Office
bsena@lozanosmith.com



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and families from scholarship funds did not serve a “historic and substantial” purpose, Montana’s application of its no-aid law was found unconstitutional.

The *Espinoza* decision builds on *Trinity*’s expansive reading of the First Amendment’s Free Exercise Clause, which prohibits the enactment of laws that prohibit the free exercise of religion, and the court’s narrower reading of the Establishment Clause, which prohibits the enactment of laws respecting an establishment of religion. In reaching its decision, the court declined to rely on *Locke v. Davey*, a 2004 Supreme Court opinion in which the court held that the Free Exercise clause was not violated when the State of Washington denied a scholarship to a recipient planning to pursue a theology degree. Unlike in *Locke*, the court reasoned, Montana’s application of its no-aid law did not further a compelling purpose, and broadly discriminated against religious schools solely based on their status as religious schools, rather than on their conduct.

The *Espinoza* opinion leaves several open questions. While the decision does not expressly declare unconstitutional the no-aid laws currently in place in over 30 states (including California), the case does raise uncertainties regarding the extent to which states may continue to rely on these laws to limit available government benefits to religious organizations. The extent to which government programs may limit aid to individuals and organizations on the basis of religious actions or conduct, rather than status, is also unclear. In any event, the decision will require a careful evaluation of existing scholarship and other public benefits programs in order to ensure that they do not improperly discriminate against religious organizations based upon their religious status.

Despite the above uncertainties, private religious schools nationwide will likely consider the decision a victory, as it may expand their access to available government benefits currently offered only to non-religious private schools. Those in favor of private school choice and voucher programs may also benefit from the decision, and use the decision as an opportunity to re-open discussions regarding the introduction of voucher programs and public funding for private schools.

If you have any questions regarding *Espinoza*, please contact one of the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcast](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).