Written by **Michael Tennant** on January 23, 2020

Supreme Court Hears Montana Scholarship Program Religious Discrimination Case

The U.S. Supreme Court on Wednesday heard arguments in a case concerning a Montana scholarship program that the state's high court struck down because some religious schools benefited from it.

The case, *Espinoza v. Montana Department of Revenue*, revolves around a 2015 Montana law establishing a scholarship program for students in elementary and secondary schools. The program offered a nonrefundable tax credit equal to the amount of a taxpayer's contribution (up to $150) to any of various private, nonprofit scholarship organizations. Parents could then apply for those scholarships to use at any private school in the state, whether secular or religious.

Soon after the program took effect, the Montana Department of Revenue unilaterally amended the law by forbidding the use of scholarships at religious schools, basing its decision on an amendment to the state constitution prohibiting state aid to religious schools.

Three mothers who depended on the scholarships to help pay their children's tuition at a Christian school in Kalispell sued. The case went to the state supreme court, which ruled the entire program unconstitutional because of its inclusion of religious schools, which made up the overwhelming bulk of program participants.

The plaintiffs appealed to the U.S. Supreme Court, arguing that the U.S. Constitution's "Free Exercise, Establishment, and Equal Protection Clauses all demand that the government show neutrality — not hostility — toward religion in student-aid programs," according to the Institute for Justice, which is litigating the case.

"This case asks whether the federal Constitution allows the wholesale exclusion of religious schools from scholarship programs," Institute for Justice attorney Richard Komer told the high court. "It does not."

Komer suggested the case was similar to *Trinity Lutheran Church v. Comer* (2017), in which the court found that Missouri had violated the First Amendment by discriminating against a Christian school in disbursing grants for playground resurfacing.

The court's conservative justices seemed to accept this line of reasoning; the liberals did not. When Justice Elena Kagan, who had been in the majority in *Trinity Lutheran*, argued the cases were different because *Espinoza* relates to "subsidiz[ing] religious education," Justice Samuel Alito replied, "[States] don't have to fund private education at all, but if they choose to provide scholarships that are available

to students who attend private schools, they can't discriminate against parents who want to send their children to schools that are affiliated in some way with a church."

"That's the simple argument," he added. "And it's hard to see that that's much different from *Trinity Lutheran*."

Kagan and Justice Ruth Bader Ginsburg also contended that the state was no longer discriminating since it had shut down the whole program and thus no "harm" was now occurring. Chief Justice John Roberts, however, challenged that notion in an exchange with the state's attorney, Adam Unikowsky, as reported by the Associated Press:

> Roberts said no one would defend shutting down all public swimming pools "because a higher percentage of African Americans come and use the pools."
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> "No, of course not," Unikowsky said.
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> "How is that different than religion?" Roberts asked.

What seems to have gone unmentioned is that a nonrefundable tax credit is fundamentally different from a subsidy. Montana was simply allowing taxpayers to donate their own money to scholarship programs rather than pay it to the state in taxes. It wasn't giving tax dollars to private schools. That's not a subsidy; it's freedom.

One could argue that the case should have ended when the Montana Supreme Court ruled on it. Under the original understanding of the U.S. Constitution, the First Amendment did not apply to the states. But given the Supreme Court's later invention of the "incorporation doctrine," Alito, at least, concurred with the plaintiffs' argument that killing the program because it aided religious schools was unconstitutional.

"It is a violation of the federal Constitution," he said, "if a state Supreme Court bases a decision on a ground that discriminates in violation of the Constitution."

Judging from news reports, Roberts may well turn out to be the deciding vote in the case, and it could turn on whether he believes the mothers have standing to sue. "The claimed injury here is to the schools, but we don't have the schools before us in this case," he said. Tossing the case for lack of standing would be an easy solution for the court, but it would not resolve the underlying issues.

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