

Montana Battle Over Aid for Religious Schools Reaches Supreme Court

By Adam Liptak

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WASHINGTON — Kendra Espinoza sends her daughters to Stillwater Christian School, in Kalispell, Mont. The girls are thriving, but the tuition bills are steep. Ms. Espinoza, a single mother, has worked three jobs, raffled off quilts and held yard sales to help make the payments.

She had also hoped to get some money from a state program enacted in 2015 “to provide parental and student choice in education.” Soon after the program started, though, a state agency said students attending religious schools were not eligible.

Ms. Espinoza and two other mothers with children at Stillwater sued, and the Montana Supreme Court ruled against them, shutting down the entire program for all schools, religious or not.

The court relied on a provision of the state’s Constitution that bars the use of government money to aid religious schools. Many state constitutions have similar provisions.

The United States Supreme Court will hear arguments in the case next month, and the justices will consider whether states are free to erect a wall between church and state high enough to exclude religious groups from some state benefits.

Ms. Espinoza and lawyers for the state agree on one thing: The case is a proxy battle over school choice.

“There’s always that push to have every student in public education,” Ms. Espinoza said.

Raph Graybill, chief legal counsel to Steve Bullock, the state’s governor, agreed, to a point.

“I know there are a lot of human stories on the other side of this case,” he said. “But I want to emphasize that this is personal to a lot of people in Montana.”

“I’m a product of our public schools in Montana,” he said. “I went to my local elementary school, publicly funded all the way, and ended up getting a Rhodes scholarship eventually. We have a great public school system, and the protection of that system is really at the heart of this case.”

The central legal issue in the case, though, concerns the First Amendment’s protection of the free exercise of religion. In 2017, in *Trinity Lutheran Church v. Comer*, the Supreme Court ruled that Missouri had violated the First Amendment by barring religious institutions from a state program to make playgrounds safer even though the state’s Constitution called for strict separation of church and state.

“The exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution,” Chief Justice John G. Roberts Jr. wrote for the majority.

At the same time, writing for four justices, Chief Justice Roberts emphasized the narrowness of the court’s decision. “This case involves express discrimination based on religious identity with respect to playground resurfacing,” he wrote. “We do not address religious uses of funding or other forms of discrimination.”

In 2017, the Supreme Court ruled that Missouri had violated the First Amendment by barring religious institutions from a state program to make playgrounds safer.

A 2004 Supreme Court decision, *Locke v. Davey*, allowed Washington State to offer college scholarships to all students except those pursuing degrees in devotional theology. That case involved direct support for religion, Chief Justice Roberts wrote. Playgrounds, he argued, were a different matter.

The program at issue in the Montana case, *Espinoza v. Montana Department of Revenue*, No. 18-1195, is somewhere in the middle. It involves elements of religious instruction, but it does not concern a targeted exclusion of state support for vocational religious instruction.

The Montana program was financed by private contributions eligible for tax credits, and it provided scholarships to students in private schools. In Montana, that meant religious schools: 12 of the 13 schools that participated in the program were religious, and one was a school for children with disabilities. In one year, 94 percent of the scholarships went to religious schools.

The case has a curious element. The Montana Supreme Court struck down the entire program and so it is not obvious that it discriminated against religious groups.

No one contends that the state was required to enact the program in the first place. But the two sides differ about whether the state court was free to strike it down based on the State Constitution's prohibition of government aid to religion.

"The status quo ante is that the Legislature passed a choice program," said Richard D. Komer, a lawyer with the Institute for Justice, which represents Ms. Espinoza and the other plaintiffs. "Once it has passed a choice program, you have to ask, why has it been struck down?"

Mr. Graybill saw things differently. "It would be an odd outcome to say the First Amendment requires Montana to restart a program that doesn't exist and use that program to fund religious schools."

"You can't discriminate against churches because they are churches," he said. "But in a situation like the one the Montana Supreme Court faced, you have two choices: Offer a benefit neutrally or don't offer a benefit at all. Here they've gone a second route."

Where Mr. Graybill saw neutrality, Ms. Espinoza detected bias.

"We're kind of seeing more of a push toward discrimination against people of religious backgrounds or religion in general," she said.

"There's nothing that says they have to have these programs available," she said. "But if the program was there and it was struck down simply so that people of religious faith could not access it, then that's discrimination."

Role: Ms. Espinoza's Lawyer or The Attorney General of the State of Montana

Audience: The United States Supreme Court

Format: Argumentative Essay

Topic: Free Exercise Clause vs. Establishment Clause

Possible Sources:

US. Constitution Amendment I

Supreme Court Cases: Engel v Vitale; Levon v Kurtzman; Wallace v Jaffree; McCreary County v. ACLU

<https://www.nytimes.com/2019/12/23/us/politics/montana-religious-schools-supreme-court.html>

<https://www.oyez.org/cases/2019/18-1195>

https://www.supremecourt.gov/opinions/19pdf/18-1195_g314.pdf

<https://www.scotusblog.com/case-files/cases/espinoza-v-montana-department-of-revenue/>

<https://ij.org/case/montana-school-choice/>

<https://constitutioncenter.org/the-constitution/supreme-court-case-library/espinoza-v-montana-department-of-revenue>

CHS SOCIAL STUDIES WRITING RUBRIC

Name: _____

CONTEXTUALIZATION

Describes a broader historical context relevant to the prompt.

To earn this point, the response must relate the topic of the prompt to broader historical events, developments, or processes that occur before, during, or continue after the time frame of the question. This point is not awarded for merely a phrase or reference.

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THESIS / CLAIM

Responds to the prompt with a historically defensible thesis/claim that establishes a line of reasoning.

To earn this point, the thesis must make a claim that responds to the prompt, rather than merely restating or rephrasing the prompt. The thesis must consist of one or more sentences located in one place, either in the introduction or the conclusion.

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EVIDENCE & SUPPORT FOR ARGUMENT (Must Earn 1 to Earn 2)

- 1. Provides SPECIFIC EXAMPLES of evidence relevant to the topic of the prompt.**

To earn one point, the response must identify **two or more** specific historical examples of evidence relevant to the topic of the prompt.

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- 2. SUPPORTS AN ARGUMENT in response to the prompt using specific and relevant examples of evidence.**

To earn two points the response must use specific historical evidence to support an argument in response to the prompt.

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ANALYSIS & REASONING (Must Earn 1 to Earn 2)

- 1. Uses historical reasoning (e.g. comparison, causation, CCOT) to frame or structure an argument that addresses the prompt.**

To earn the first point, the response must demonstrate the use of historical reasoning to frame or structure an argument, although the reasoning might be uneven or imbalanced.

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- 2. Demonstrates a complex understanding of the historical development that is the focus of the prompt, using evidence to corroborate, qualify, or modify an argument that addresses the question.**

To earn the second point, the response must demonstrate a complex understanding, which must be part of the argument and not merely a phrase or reference. This could include:

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POINTS:

- Explaining nuance by analyzing multiple variables
- Explaining both similarity and difference, both continuity and change, or multiple causes, or both causes and effects
- Explaining relevant and insightful connections within and across periods
- Confirming the validity of an argument by corroborating multiple perspectives across themes
- Qualifying or modifying an argument by considering diverse or alternative views or evidence

TOTAL
/6

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