KIRKLAND & ELLIS LLP

MEMORANDUM

FROM: Paul D. Clement

DATE: June 12, 2020

RE: *Espinoza v. Montana Department of Revenue*

On January 22, 2020, the Supreme Court of the United States heard oral argument in *Espinoza v. Department of Revenue*, which presents the question whether invalidation of a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools violates the United States Constitution. The case specifically concerns a provision of the Montana Constitution that forbids "any direct or indirect appropriation or payment from any public fund or monies … for any sectarian purpose or to aid any church [or] school … controlled in whole or in part by any church, sect, or denomination." The Montana Supreme Court held that this provision prohibits a state program that provides a tax credit for donations to private scholarship organizations that use the donations to give scholarships to families sending their children to private schools, including religious and nonreligious schools. The court further held that this prohibition did not violate the Free Exercise, Establishment, or Equal Protection Clauses of the United States Constitution.

A decision by the Supreme Court of the United States is imminent; absent a break from tradition, it will be issued no later than June 30. Depending on its outcome and reasoning, the Court's decision may have broad implications for state funding of school choice programs and could have particularly sweeping implications in states saddled with so-called "Blaine Amendments." The state funding bar at issue is Montana's version of a Blaine Amendment, which describes a state constitutional provision prohibiting public funding from aiding religious schools. Dozens of states have similar provisions; most were enacted in the late nineteenth and early twentieth centuries, frequently out of anti-Catholic animus. *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion). Should the Supreme Court hold that Montana's provision is incompatible with the United States Constitution based on reasoning that could apply to other state provisions, the decision could portend the demise of those provisions as well. It is possible, however, that the Court could issue a narrow holding that enjoins application of Montana's provision, but based on reasoning that is cabined to Montana or the particular facts of the case (such as the history of the state provision, the construction given the provision by state courts, or the operation of the scholarship program). And, of course, it is possible that the Court could hold that Montana's provision is consistent with the United States Constitution, employing either broad reasoning that would make future challenges to other Blaine Amendments difficult, or narrow reasoning that leaves case-by-case challenges viable.

A Supreme Court decision invalidating application of Montana's provision will present opportunities to target similar provisions in other states, at least as they apply to neutral and generally available school funding programs. The means for doing so, however, depend not only on the breadth of the Court's opinion, but also on each state's specific provision, how the provision has previously been construed, and the realities of state politics. In some states, legislation may

be sufficient to enjoin application of a Blaine Amendment. In other states, an advisory opinion (from the Attorney General or state supreme court) may be the preferred course. In still other states, it may be necessary to bring a declaratory judgment action seeking a court ruling. And a state's particular law and circumstances may call for some combination of these efforts—even all three. In all events, the ideal time to leverage a favorable Supreme Court decision is in its immediate aftermath, when the prevailing party and its supporters have momentum and before opponents devise new strategies aimed at thwarting implementation of the Court's holding.