CER CENTER FOR EDUCATION REFORM

A MEMORANDUM

Making the Most of Espinoza v. Montana Department of Revenue to Advance Education Opportunity

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The Supreme Court's recent decision in *Espinoza v. Montana Department of Revenue* provides significant opportunities for proponents of education opportunity. In *Espinoza*, the Court examined a state constitutional provision prohibiting aid to "sectarian" educational institutions—a provision known as a "Blaine Amendment." The Court held that this state provision could not be used to exclude religiously affiliated schools from a generally applicable program providing tax credits for use at private schools, as that would violate the Free Exercise Clause of the First Amendment to the United States Constitution.

By removing barriers to restrictions on educational choices that are rooted in religious discrimination, the *Espinoza* decision opens the door to a variety of changes in law at the state level often considered unattainable given Blaine Amendments. The opinions accompanying the Court's decision provide additional helpful guidance for states seeking to establish programs that provide greater choice opportunities for parents and students. Accordingly, while each state's particular law and political climate may require different tailored strategies, now is the ideal time to leverage the many favorable aspects of the *Espinoza* decision. Those aspects include the following:

- *Espinoza* should prevent opponents from blocking choice programs (either in the legislature or in court) by invoking Blaine Amendments similar to the provision at issue in Espinoza. These provisions are prevalent in a number of states and have previously been invoked to impede the ability of states to provide parents with significant authority to choose schools other than their assigned public school.
- *Espinoza* should also empower advocates in challenges by opponents who invoke other state-law provisions that, while not traditional Blaine Amendments, also purport to treat religious schools differently from other schools.
- *Espinoza* can be employed, albeit more aggressively, to prevent opponents from blocking education reform by invoking state laws that exclude all private schools, religious and secular, from state funding, if the basis for that prohibition can be traced to an interest in prohibiting aid to religious schools.
- *Espinoza* can be utilized to put pressure on legislative inaction regarding educational choice programs, particularly given the *Espinoza* dissents' characterization of the breadth of the decision.

Above all, *Espinoza* signals a willingness by the Supreme Court to ensure that educational opportunities for students are not thwarted by state laws that are in tension with federal constitutional principles. Proponents of school choice should not just welcome but capitalize upon the Court's increasingly skeptical view of efforts to stymie evenhanded state funding measures by invoking outdated state provisions irreconcilable with federal law. Because *Espinoza* has changed the calculus as to Blaine Amendments and other state provisions, educational choice that previously crossed the line into prohibited territory may now be permissible.

This memorandum first provides an overview of the *Espinoza* decision and the opinions issued by the Justices. It then performs an analysis that identifies global takeaways from those opinions that can be utilized to advance school reform in the states. Finally, the memorandum applies those takeaways to state-level circumstances based on the states' current law, both as a general matter and specifically as to certain state examples.

THE *ESPINOZA* DECISION

To best understand the opportunities created by *Espinoza*, it is helpful to describe the background giving rise to that decision, and then the decision itself.

A. Background

The First Amendment provides that "Congress shall make no law respecting an establishment of religion" (the Establishment Clause) "or prohibiting the free exercise thereof" (the Free Exercise Clause). For decades, opponents of school reform argued that any government assistance—federal or state—to religiously affiliated schools violates the Establishment Clause. In 2002, however, the Supreme Court held in *Zelman v. Simmons-Harris* that "where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice," there is no Establishment Clause violation.

Following *Zelman*, opponents seeking to block educational choice turned their focus from the federal Establishment Clause to state law. In legislatures and in courts, they argued that, even if the Establishment Clause permits the kind of neutral, private-choice-directed programs addressed in *Zelman*, these programs were still prohibited under state law. Frequently, opponents invoked state constitutional provisions known as "Blaine Amendments." Generally speaking, such provisions broadly prohibit any state funding to religious entities, particularly religious schools. They originated in the states in the late nineteenth century, following a failed federal constitutional amendment introduced in 1875 by Senator James G. Blaine.

Espinoza addressed whether it violates the Free Exercise Clause of the United States Constitution to use a state Blaine Amendment to prohibit a generally applicable state funding program from extending to religious schools. *Espinoza* involved a tax-credit program established by the Montana state legislature. The program grants a tax credit to any taxpayer who donates to a participating scholarship organization. The organization then uses the donations to award scholarships to children for tuition at a private school. The program allows families to use the scholarship at any private school, including religious schools.

Shortly after the program was enacted, the Montana Department of Revenue issued a rule prohibiting families from using scholarships at religious schools. The Department did so to comply with Montana's Blaine Amendment, which states in full:

> **Aid prohibited to sectarian schools. ...** The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.

Three sets of parents who intended to use scholarship money for their children to attend a private Christian school sued the Department. They argued that using the Blaine Amendment to prevent them from using the scholarship money for a private Christian school violated the federal Free Exercise Clause.

The Montana Supreme Court held that the scholarship program violated the state Blaine Amendment, which "broadly and strictly prohibits aid to sectarian schools." In the court's view, the program "flouted the State Constitution's guarantee to all Montanans that their government will not use state funds to aid religious schools." Furthermore, the court said, applying the Blaine Amendment did not violate the Free Exercise Clause. The court then held that because the program violated the Blaine Amendment, the entire scholarship program was impermissible. As a result, the tax credit was unavailable for scholarships at all private schools, religious and non-religious.

B. Chief Justice Roberts' Majority Opinion

The Supreme Court granted review of the Montana Supreme Court's decision. In a 5-4 decision, it held that applying Montana's Blaine Amendment to prohibit religious schools from the scholarship program violated the Free Exercise Clause. Writing for the majority, Chief Justice Roberts made the following observations useful for education choice proponents:

- The Free Exercise Clause "protects religious observers against unequal treatment and against laws that impose special disabilities on the basis of religious status."
- Montana's Blaine Amendment, as applied, violated that principle because it "bars religious schools" and "parents who wish to send their children to a religious school" from "public benefits solely because of the religious character of the schools."
- A state "punishes the free exercise of religion" by disqualifying the religious from government aid as Montana did.
- Montana's use of its Blaine Amendment was not permissible just because, in the late 19th century, "more than 30 States," including Montana, adopted Blaine Amendments. Those provisions were modeled after the failed federal constitutional amendment, which would have prohibited states from aiding "sectarian" schools. At that time, "it was an open secret that 'sectarian' was code for Catholic." Thus, the federal Blaine Amendment was "born of bigotry and arose at a time of pervasive hostility to the Catholic Church and to Catholics in general," and "many of its state counterparts" have "a similarly shameful pedigree."
- A state's interest in "separating church and State more fiercely than the Federal Constitution" does not justify using a Blaine Amendment to discriminate based on a school's religious character.
- A state's "interests in public education" and in "ensuring that government support is not diverted to private schools" does not justify using a Blaine Amendment to discriminate based on a school's religious character. While "a state need not subsidize private education," once "a state decides to do so, it cannot disqualify some private schools solely because they are religious."
- The constitutional violation did not go away just because the Montana Supreme Court eliminated the scholarship program entirely, even though that meant that religious schools

were no longer being treated differently. That remedy would not have been necessary without Montana's application of its Blaine Amendment "to exclude religious schools from the program" in the first place.

C. Concurring Opinions

Three Justices who joined the majority opinion also wrote concurring opinions. Justice Alito's concurring opinion is the most relevant to utilizing *Espinoza* to advance education choice programs. Justice Alito wrote that if a state provision arose out of religious discrimination, that history should prevent modern-day efforts to rely that provision, even if the provision was later readopted with benign intent. More specifically, Justice Alito observed:

- Under Supreme Court precedent, the original motivations for enacting laws are relevant to whether those laws may be later be struck down as unconstitutional.
- Montana's Blaine Amendment was the product of anti-Catholic animus in the mid-19th century. At the time, public schools' teachings were imbued with Protestant views. Catholics and other minority adherents who immigrated to the United States sought public funding to set up their own (non-Protestant) schools. A federal amendment was proposed to prohibit funding of "sectarian" (i.e., Catholic) schools. Although the federal amendment failed, many states adopted such provisions in their state constitutions.
- It "emphatically does not matter" whether Montana or other states later readopted their Blaine Amendments "for benign reasons."
- Regardless, any animus giving rise to Montana's Blaine Amendment was not entirely erased, because the terms "sect" and "sectarian" remain in the provisions today—"disquieting remnants" that keep the provision "tethered" to its "original bias."

Justice Gorsuch's concurring opinion suggested that Montana's application of the Blaine Amendment discriminated on the basis of "religious use," not just "religious status." That is, while the Chief Justice's majority opinion held that Montana's Blaine Provision impermissibly prohibited religious schools from receiving funds because of "what they are"—religious schools—Justice Gorsuch believed that the provision impermissibly prohibited religious schools from receiving funds because of "what they do"—propagate faith. More specifically, he wrote:

- Although the majority opinion characterized the Blaine Amendment as discrimination on the basis of "religious status," the state's discrimination "focused on what religious parents and schools *do*—teach religion."
- The Free Exercise Clause protects against discrimination based not only on religious status but also on religious activity, because the clause "protects not just the right to be a religious person, holding beliefs inwardly and secretly; it also protects the right to act on those beliefs outwardly and publicly."
- Regardless, whether Montana discriminated based on religious status or religious activity, it "makes no difference," because it is all unconstitutional.

Finally, Justice Thomas wrote a concurring opinion questioning whether the Establishment Clause should apply to the states at all, and arguing that it is incorrect that states must remain completely separate from and virtually silent on religion to comply with the Establishment Clause. Justice

Thomas's view, combining a robust Free Exercise Clause with an Establishment Clause that does not restrict the states at all, would create a legal environment that strongly favored educational choice.

D. Dissenting Opinions

The four dissenting Justices wrote three separate opinions. First, Justice Ginsburg contended that the Court should not have taken the case in the first place. She explained:

- Because the Montana Supreme Court struck down the program in its entirety, all schools were treated equally, so there was no discrimination on the basis of religion.
- Thus, the only question was whether applying the Blaine Amendment to prohibit all state funding of private schools violates the Free Exercise Clause, which it does not; even the majority acknowledged that the state need not fund all private schools.
- There was no need for the Court to address the hypothetical scenario where a state distinguishes between secular and religious schools in a funding program.

Justice Breyer challenged the merits of the Court's decision. He observed:

- The Court's opinion forbids a state from "drawing any distinction between secular and religious uses of government aid to private schools."
- Applying Montana's Blaine Amendment was permissible because it barred funding based on religious activity, not religious status. The problem was what the families wanted "to do" with the state funds: "to obtain a religious education."
- The Court was "putting states in a legislative dilemma, caught between the demands of the Free Exercise and Establishment Clauses," without any "breathing room."
- The majority's statement that states "need not subsidize private education" could not be reconciled with the rest of its opinion. Justice Breyer asked: "If making scholarships available to only secular nonpublic schools exerts 'coercive' pressure on parents whose faith impels them to enroll their children in religious schools, then how is a State's decision to fund only secular public schools any less coercive?" In both cases, parents are forced to choose "between their beliefs and a taxpayer-sponsored education."

Finally, Justice Sotomayor issued a dissent questioning the Court's taking the case and its decision. In her view:

- Because the Montana Supreme Court invalidated the program entirely, there was no differential treatment or coercion.
- The Constitution does not "compel Montana to create or maintain a tax subsidy," and "short of ordering Montana to create a religious subsidy that Montana law does not permit, there is nothing for this Court to do."
- The majority seemingly "announced its authority to require a state court to order a state legislature to fund religious exercise."
- The majority's decision appeared to "require a state to reinstate a tax-credit program that the Constitution did not demand in the first place."

ANALYSIS

The *Espinoza* decision is a substantial victory for proponents of education choice. For decades, opponents of all efforts to provide parents the opportunity to choose private schools for their students, including religious schools, invoked the federal Establishment Clause to prevent states from providing assistance to schools outside the traditional public-school monopoly, on the ground that some (or even just a handful) of those nonpublic schools were religiously affiliated. The *Zelman* case (which upheld the Ohio school choice program in 2002) put an end to that gambit, at least with respect to state programs that provide government support to private schools only as a result of independent choices by private third parties.[1] In the nearly twenty years since *Zelman*, education choice opponents, now without a federal prohibition to invoke, have turned to state-level prohibitions—principally, but not limited to, the sort of Blaine Amendment at issue in *Espinoza*. Those efforts met with success in some states, dealing a temporary blow to school-reform efforts. The *Espinoza* decision, however, not only precludes efforts to invoke Blaine Amendments as impediments to reform, but also can be used to challenge obstacles to other parent choice programs that fall outside the immediately apparent scope of the Court's holding.

Although the variety of contexts in which *Espinoza* can be employed is nearly as disparate as the number of states, the decision provides education choice proponents with a number of general takeaways that can be applied to the specific circumstances in their respective states:

1. Proponents can invoke *Espinoza* to stop opponents (in legislatures and courts) from relying on Blaine Amendments to block education reform simply because that reform might result in aid to religiously affiliated schools. Relying on a Blaine Amendment as a justification for providing government assistance only to public and non-religious private schools is clearly foreclosed by *Espinoza*.

2. Proponents can apply *Espinoza*'s reasoning to stop opponents from invoking *any* state constitutional provision (or other state law) that permits aid only to public and non-religious private schools, and not to religious private schools—even if that provision is not a traditional Blaine Amendment. If a state's interest in complying with a state Blaine Amendment does not justify discrimination against religious private schools, it is unlikely that any other state law, whether constitutional or statutory, could justify such discrimination.

3. Proponents can use *Espinoza* to argue that opponents cannot impede education choice by relying on state laws purporting to exclude aid to all private schools (secular and religious), if such laws originated out of a desire to avoid assisting religiously affiliated private schools or if they have a sordid history similar to many Blaine Amendments (like Montana's). In particular, Justice Alito's concurring opinion can be invoked to support arguments that state provisions with origins in religious discrimination cannot be applied today, even if they were later readopted for benign reasons.

4. Proponents can employ *Espinoza* to challenge legislative inaction on education choice, particularly given the dissenting opinions' views about the Court's majority opinion.

1 As the Court noted in *Zelman,* government programs that provide aid *directly* to religious schools—*i.e.,* without involving an intermediate decision of "true private choice"—might still violate the Establishment Clause.

The specific reasoning in the *Espinoza* majority opinions, concurrences, and even dissents provides support for the foregoing arguments. The majority held that applying Montana's Blaine Amendment to prohibit a religiously affiliated school from receiving otherwise available public benefits simply because of that school's "religious character" violates the Free Exercise Clause. School-reform proponents can cite that reasoning to prevent states—or education reform opponents—from invoking Blaine Amendments to provide assistance to public and non-religious private schools but not to religiously affiliated private schools. The same reasoning forecloses arguments by reform opponents—either in a legislature or in court—that Blaine Amendments or similar state provisions prohibit the enactment or operation of a generally available funding program for private schools simply because that funding might eventually find its way to religiously affiliated schools.

These arguments hold true even if the Blaine Amendment or other state law broadly and clearly forbids aid to religious organizations—an argument reform opponents might try to make. After all, in *Espinoza*, the Blaine Amendment was sweeping and unambiguous, providing: "The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination."

Choice opponents might also argue that a state's particular provision was not the product of religious animus, and therefore can still be invoked to impede such programs. Whether or not that is true (and often it is not), that is not a necessary condition for enjoining application of a Blaine Amendment or other state law, according to *Espinoza*. The majority opinion did not rely on animus as a basis for striking down reliance on Montana's Blaine Amendment. Although Justice Alito's concurring opinion documented the sordid history of many such state provisions, and the majority opinion noted this history as well, the majority opinion rested on the fact that, by invoking its Blaine Amendment to disallow funding to religious schools, Montana had impermissibly discriminated on the basis of religion. In short, even if a Blaine Amendment or other state provision has a completely benign origin, it still cannot be used to discriminate against schools and parents based on religious status.

The Court's majority opinion also rejects other arguments education-reform opponents frequently make: that using Blaine Amendments (or other state provisions) to prohibit otherwise available aid from going to religiously affiliated schools is justified in the name of "separating church and state" more than the federal Establishment Clause, or because it actually *promotes* religious freedom, or because it advances a state's interest in public education. In fact, the majority opinion does not identify or even suggest *any* interest that might justify using Blaine Amendments or other state provisions to bar state funding on the basis of religious status.

Another argument that opponents might make in continuing to invoke Blaine Amendments and similar provisions as a means of prohibiting aid to religiously affiliated schools is that the provisions are not discriminating against religiously affiliated schools because of the schools' religious *status* or *character*, but because of the school's religious *activity*. That is, opponents would contend that a Blaine Amendment *can* be invoked to prohibit funding to religiously affiliated schools because the funding would be used for religious education or other religious aspects of the receiving entity. Opponents would likely note that Montana made this argument in

Espinoza and that the majority opinion seemingly sidestepped that issue because the case, in its view, "turns expressly on religious status and not religious use."

Proponents of education opportunity have a number of persuasive responses to this argument, however. *First*, the Montana Supreme Court explicitly noted its concern that the funding could be used for "sectarian education" or "religious education," and Montana argued before the Supreme Court that the state funding was "unrestricted" and would not be used for "completely non-religious" purposes. But the Court did not remotely suggest that either of these arguments could support Montana's application of the Blaine Amendment. In fact, it noted that "status-based discrimination remains status based even if one of its goals or effects is preventing religious organizations from putting aid to religious uses." *Second*, both Justice Gorsuch's concurrence and Justice Breyer's dissent argued that, at bottom, the funding here necessarily *is* used for religious education and religious purposes—both noted, for example, that the plaintiffs stated that they wanted to send their children to the school at issue because it taught the "same Christian values" they taught at home. Therefore, it could plausibly be argued that this case *did* concern religious discrimination based on "religious use" or "religious activity," meaning that the majority opinion precludes reliance on Blaine Amendments or other state provisions even if opponents invoke the specter of parents using state money for "religious education." *Third*, the majority opinion did not suggest that Montana would have prevailed had it been discriminating on the basis of religious activity rather than religious character. To the contrary, it expressly disclaimed the proposition that "some lesser degree of scrutiny applies to discrimination against religious uses of aid." Relatedly, efforts to distinguish between religious status and religious activity (such as worship) have not fared well before the Supreme Court in closely related cases. All told, then, while the majority opinion may have couched its analysis in terms of religious *status*, arguments by school-reform opponents that Blaine Amendments or other state provisions may still be invoked to discriminate on the basis of religious *activity* or the eventual *use* of state funds toward religious ends should face difficult odds in a court.[2]

Lawmakers seeking to enact education choice programs can also employ *Espinoza*, albeit more aggressively, to challenge state laws that purport to bar funding not just to religious schools but to *all* private schools. To be sure, the *Espinoza* majority opinion observes that a state "need not subsidize private education"—only that once it "decides to do so," it "cannot disqualify some private schools solely because they are religious." Nonetheless, there are at least two possible avenues of opportunity for states to enact programs that allow parents to use public funds to support private school choices. First, although a state law may facially prohibit funding for all private schools, that law is more vulnerable after *Espinoza* if proponents can show that it originated out of a desire not to avoid funding all private schools, but to avoid funding religiously affiliated schools (which in many places comprise the vast majority of private schools in fact). For example, if it can be shown that a state enacted a prohibition on funds to all private schools as an "easier" or more administrable way of complying with a Blaine Amendment's prohibition on funds to religious schools, that prohibition should be vulnerable. It would be anomalous that states cannot discriminate on the basis of religious status but can still accomplish that goal simply by prohibiting state aid not just to, for example, the 100 religiously affiliated private schools in the state but also to those 100 schools *and* an additional handful of secular private schools.

2 Even if a court accepted the premise that a Blaine Amendment could be applied to prohibit funding of religious activity, the argument would still face challenges because of the difficulties of determining how much funding is directed to "religious activity" as opposed to non-religious education. Cases in the Establishment Clause context, such as *Zelman*, hold that the mere fact that some portion of funding might ultimately support religious activity at a religiously affiliated school does not justify a blanket prohibition on funding.

Second, and relatedly, as Justice Alito explained in his concurrence, if the origin or purpose of a broad prohibition on all funding for private education is less than benign—*i.e.*, not simply grounded in the state's desire to comply with a Blaine Amendment, or the state's preference to establish a higher "wall" between church and state than the federal Establishment Clause requires—then the prohibition is even harder to square with constitutional principles. As Justice Alito noted, the "original motivation for laws … matters." Accordingly, if state provisions barring funding for private schools can be shown to be rooted in religious (or other) discrimination, they should fall. This would, of course, cover the many traditional Blaine Amendments modeled after the failed federal Blaine Amendment—which, as the *Espinoza* majority observes, was "born of bigotry" against Catholics—but it would also encompass state constitutional, statutory, or decisional law that extends to *all* private education, and even if that law was later reaffirmed in a time less fraught with religious bigotry. Although Justice Alito's concurrence is not controlling law, identifying a state prohibition's sordid origins would, at the very least, make that provision less attractive to defend either on the floor of a legislature or in a courtroom.

Importantly, the foregoing reasoning could be utilized to defeat reliance on state provisions that have been or could be invoked to prohibit voucher programs and thus leave states with only the less-desirable option of a tax-credit program. If the relevant state provision was rooted in religious discrimination or a desire to exclude religious schools from general benefits programs, *Espinoza* could be employed to prevent application of that provision, just as it was employed to prohibit Montana's Blaine Amendment from impeding a tax-credit system.

Certain other aspects of *Espinoza* can be used to attack, as a policy matter, legislative inaction on providing options for parents that includes private schools. For example, policymakers might oppose a program that provides funding to parents for private schools because now it must necessarily include religiously affiliated schools, which they would prefer not to include—or think they cannot include because of a Blaine Amendment. That line of reasoning would be inconsistent with *Espinoza* in several respects. First, a Blaine Amendment is no longer a viable basis for excluding religiously affiliated schools from a funding program, and differential treatment of religious schools is impermissible. Second, the *Espinoza* dissents argued that because the Montana Supreme Court struck down the *entire* program there, schools and parents were in the same position as if there were no program at all, with nobody treated differently because of religious status—yet the Supreme Court still held that Montana violated the Free Exercise Clause. In other words, by *failing* to act (and leaving all private schools equally situated), the legislature would be doing in the first instance what the Montana Supreme Court tried to do as a remedial matter (leaving all private schools equally situated)—which the Supreme Court rejected. To be sure, this "failure to legislate" would not be actionable as a legal matter, but as a matter of policy and public relations, it should be difficult for opponents to defend legislative inaction when that inaction amount to analogous circumstances the Supreme Court recently addressed and found unconstitutional.

The *Espinoza* dissents can be marshaled to support changes in law that allow educational choice programs, too. Although dissents do not have the force of law, choice proponents can invoke the dissents' characterizations of the supposed far-reaching impact of the majority opinion. For example, both Justice Ginsburg and Justice Sotomayor, in separate dissents, accused the Court of unnecessarily reaching out to decide the case because the Montana Supreme Court's decision striking down the entire scholarship program "maintained neutrality between sectarian and non-

sectarian private schools." The necessary corollary of that criticism is that the majority opinion believed that reverting to the status quo ante did *not* "maintain[] neutrality" and required judicial intervention, a point that proponents could leverage against legislative inaction on education choice programs, premised on a desire to avoid funding religiously affiliated schools. Put differently, after the Montana Supreme Court's decision, the situation in Montana was that religious and non-religious private schools were treated equally: *none* of them was entitled to state funding. But the Supreme Court nevertheless intervened, ultimately issuing a decision that, under the federal Constitution, Montana *had* to fund *both* religious and non-religious private schools—in other words, *all* private schools. Accordingly, if a state's current status quo is one where neither religious nor non-religious private schools are receiving funding—because of a concern about funding religious schools, a concern about funding all private schools, or a state provision barring such funding—this is essentially the same *status quo* that the Supreme Court did not let stand in Montana, a point that proponents can leverage in arguing against that no-funding scenario.

Similarly, as noted, proponents could use Justice Breyer's characterization of the majority opinion as permitting the "funding [of] the study of religion" and other religious "uses" to defeat arguments that a state may permissibly exclude religiously affiliated schools from funding programs because of what the school "does," not what the school "is." Justice Breyer also asked, "If making scholarships available to only secular nonpublic schools exerts 'coercive' pressure on parents whose faith impels them to enroll their children in religious schools, then how is a State's decision to fund only secular *public* schools any less coercive?" State lawmakers could leverage this statement (and its characterization of the majority opinion) to support challenges to state decisions to "fund only secular public schools." Proponents could also capitalize upon Justice Sotomayor's question: "Has this Court just announced its authority to require a state court to order a state legislature to fund religious exercise, overruling centuries of contrary precedent and historical practice?" That characterization of the majority opinion, and Justice Sotomayor's related statement that "the Court has declared that once Montana created a tax subsidy, it forfeited the right to eliminate it if doing so would harm religion," create opportunities for proponents in legislatures and in courts. At a minimum, Justice Sotomayor's observations undermine arguments by choice opponents for a narrow reading of the majority decision.

Finally, education choice proponents should be heartened by the Supreme Court's willingness to grant review in *Espinoza* and to declare that application of Montana's Blaine Amendment to exclude religiously affiliated schools from the scholarship program violates the federal Constitution—even though the Montana Supreme Court enjoined the entire program, arguably leaving no school or parent differentially treated. The Court's assertive intervention suggests a growing inclination by the Court to give closer scrutiny to state-level obstacles hindering choice efforts. For many decades, the federal Establishment Clause operated to prevent meaningful school reform; as a result, various state laws were permitted to lurk in the background with little oversight. In the years following the *Zelman* decision, those provisions have come to light, with opponents invoking even the most marginal state laws to impede choice programs. The *Espinoza* decision indicates that the Court has an increasing interest in ensuring that these provisions are employed consistent with federal constitutional principles. While a constitutional hook like the Free Exercise Clause may not be immediately evident in every case, the broad and unequivocal *Espinoza* decision signals that the Supreme Court—and by extension, lower federal courts as well as state courts obliged to follow the federal Constitution—will look more skeptically on efforts by states or choice opponents to evade federal constitutional strictures.

ESPINOZA'S APPLICATION TO THE STATES

Although the foregoing analysis provides global arguments that can be utilized to advance educational opportunity at the state level, *Espinoza*'s value to such efforts can also be demonstrated by applying those arguments to certain scenarios in the states themselves. States have adopted an array of approaches to provide more educational options for parents, dictated by their own state constitutions and the way that certain provisions—including state Blaine Amendments—have been interpreted by courts. The analysis below divides states into five groups—those with Blaine Amendments and that follow the federal Establishment Clause, states with Blaine Amendments that have interpreted that provision permissively, states with Blaine Amendments that have interpreted that provision restrictively, states without Blaine Amendments but other relevant provisions, and states with idiosyncratic approaches. It then provides specific recommendations as to how school-reform proponents can utilize *Espinoza* to advance reform in each group of states—including the advancement of voucher programs rather than simply tax-credit programs—using specific states as examples.

A. States With Blaine Amendments and that Follow the Establishment Clause

Eleven states follow the federal Establishment Clause when construing their own state-level prohibitions regarding government assistance to religiously affiliated entities: Illinois, Iowa, Kansas, Louisiana, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, West Virginia, and Wisconsin. As noted, after *Zelman*, the federal Establishment Clause does not prohibit government support of religiously affiliated schools when there is intervening choice by a third party. In these states, the following strategies are available to leverage *Espinoza*:

Even before *Espinoza*, these states' Blaine Amendments or other similar state provisions should have posed no independent barrier to government support of religiously affiliated schools that was permissible under the federal Establishment Clause—for example, as in Zelman, neutral programs of government support that aided religious schools only because of independent third-party choice.[3]

- Nevertheless, if opponents seek to block education choice by invoking Blaine Amendments or other state provisions, proponents can now argue that a program is permissible not only because the state interprets its law the same as it interprets the federal Establishment Clause, but also because, under *Espinoza*, Blaine Amendments or other state provisions cannot be used to limit otherwise permissible education choice on the basis that it might aid religious schools.
- Choice proponents can also invoke *Espinoza* to prevent efforts by opponents to change the state's alignment with the federal Establishment Clause (via either the state supreme court or state constitutional amendment). Previously, such efforts could have resulted in

3 As noted above, state programs that *directly* provide funds or services to religious schools, without intervening private choice, are not necessarily permissible under the Establishment Clause. *Espinoza* has no effect on a program that is not permissible under the Establishment Clause.

the states' Blaine Amendments or other provisions becoming an independent state-law barrier to choice programs. *Espinoza*, however, rejects the use of Blaine Amendments or other provisions as an independent, "higher" barrier when providing aid to religious schools—thus rendering this effort by opponents largely pointless.

- *Espinoza* can also be utilized to challenge legislative inaction on educational choice if that inaction appears motivated by a desire to avoid funding private schools because religious schools might benefit. As noted above, the Supreme Court's decision to review the *Espinoza* case, and the characterizations of the majority opinion by the dissenting opinions, provide ammunition for proponents to push back on various excuses for not advancing school reform.

Example: Illinois

Illinois's Blaine Amendment provides as follows:

Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose.

This provision is a classic Blaine Amendment. It was adopted in 1870, at the height of the period when similar provisions were adopted in other states. And it still repeatedly employs the "sectarian" terminology that was "code" for anti-Catholicism.

The Illinois Supreme Court has held that this provision is to be interpreted as the federal Establishment Clause is interpreted. Thus, any state action valid under the Establishment Clause is also valid under its Blaine Amendment. Accordingly, the Illinois Blaine Amendment was already no barrier to any program that is permissible under the Establishment Clause.[4] Nevertheless, *Espinoza* provides a helpful backstop in Illinois, because any effort to invoke the Illinois Blaine Amendment to block funding for school choice programs because funding would go to religious schools should meet the same fate as in *Espinoza*, which addressed Montana's materially identical Blaine Amendment. Furthermore, as explained above, *Espinoza* can also be utilized to push back against legislative inaction on meaningful educational opportunity.

4 Illinois choice programs previously found impermissible may now be permissible—not because of *Espinoza*, but because the Supreme Court's Establishment Clause jurisprudence has evolved over time. For example, in *People ex rel. Klinger v. Howlett*, 305 N.E.2d 129 (Ill. 1973), the Illinois Supreme Court noted that Illinois's Blaine Amendment is interpreted as the federal Establishment Clause is interpreted. It then held that a voucher program was unconstitutional under the federal and Illinois constitutions because it violated the Establishment Clause. But the court's reasoning relied heavily on Supreme Court cases that have since been abrogated or sharply limited. For example, the Illinois Supreme court relied heavily on *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). In *Zelman*, however, the Supreme Court clarified that *Nyquist* "does not govern neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion"—*i.e.*, a traditional voucher program of the sort that gave rise to the *Klinger* decision in Illinois. Choice proponents, therefore, should feel emboldened to pursue vouchers in Illinois, but support will come largely from *Zelman*, and less so *Espinoza*.

Example: Pennsylvania

Pennsylvania's Blaine Amendment states: "No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school." Another constitutional provision states: "No appropriation shall be made for charitable, educational or benevolent purposes to any person or community nor to any denominational and sectarian institution, corporation or association." The first of these is a classic Blaine Amendment, having been adopted in 1874 and containing "sectarian" language. The second was adopted in the 1930s but likewise contains "sectarian" language.

The Pennsylvania Supreme Court has held that the limitations in these provisions do not extend beyond those provided by the Establishment Clause. Thus, any state action by Pennsylvania that would pass muster under the Establishment Clause will satisfy the foregoing state constitutional provisions as well. *Espinoza* can be applied to choice efforts in Pennsylvania just like it can in Illinois and other states listed in this section, as described above.

The Pennsylvania Constitution does contain an additional, unusual provision stating: "No appropriation shall be made to any charitable or educational institution not under the absolute control of the Commonwealth, other than normal schools established by law for the professional training of teachers for the public schools of the State, except by a vote of two-thirds of all the members elected to each House." This provision essentially bars direct funding of any private institution absent a supermajority, and it could be invoked by choice opponents to prohibit vouchers even if a tax-credit program is permissible. Efforts to apply this provision could nevertheless be vulnerable after *Espinoza* if the original intent behind this sweeping prohibition was religious discrimination or a desire to exclude religious institutions (including, and especially, religious schools) from generally available direct-funding programs. One of the lessons of *Espinoza* is that an even-handed denial of funding *because of desire to prevent funding to religious entities* is forbidden.

B. States with Permissive Blaine Amendments

Fifteen states can be generally categorized as having Blaine Amendments or similar state provisions that courts have permissively interpreted: Alabama, Georgia, Indiana, Minnesota, Mississippi, Nebraska, New Mexico, Nevada, New York, North Dakota, Ohio, Oklahoma, South Carolina, Texas, and Utah. In general, for states in this group, courts have held that school reforms are not prohibited by a Blaine Amendment—not because the Blaine Amendment is interpreted coextensive with the federal Establishment Clause, but because the particular reform at issue did not violate the state's Blaine Amendment. *See, e.g.*, *Americans United v. Independent School District*, 179 N.W.2d 146 (Minn. 1970); *Chance v. Mississippi State Textbook Rating & Purchasing Board*, 200 So. 706 (Miss. 1941); *Cunningham v. Lutjeharms*, 437 N.W.2d 806 (Neb. 1989); *Schwartz v. Lopez*, 382 P.3d 886 (Nev. 2016); *Board of Education v. Allen*, 228 N.E.2d 791 (N.Y. 1967), *aff'd*, 392 U.S. 236 (1968); *Oliver v. Hofmeister*, 368 P.3d 1270 (Okla. 2016).

Efforts to enact educational choice in these states can leverage *Espinoza* as follows:

- Although state case law was already favorable to choice efforts, proponents should

feel emboldened by *Espinoza* to seek additional legislative changes. *Espinoza* prevents opponents from invoking the state Blaine Amendments to prohibit choice just because a religious school might receive some of the state assistance.

- For example, if a state has a particular type of choice program that was found to pass muster under a Blaine Amendment, but another type that was previously struck down by the courts, did not advance in legislation, or was never introduced as legislation due to Blaine Amendment concerns, proponents should redouble their efforts regarding such a program. Because *Espinoza* has changed the calculus as to Blaine Amendments, educational choice that previously crossed the line into prohibited territory may now be permissible.
- The New Mexico Supreme Court, for instance, recently upheld an educational program—lending textbooks to private school students—that had previously been struck down as violating New Mexico's Blaine Amendment. After the Supreme Court's recent decisions, the court held that the program "provides a public benefit to students" and any "benefit to private schools is purely incidental and does not constitute 'support' within the meaning of" the state's Blaine Amendment. *Moses v. Ruszkowski*, 458 P.3d 406, 420 (N.M. 2018). In particular, the court emphasized the history of the federal and state Blaine Amendments and reconsidered the case through a "lens … that focuses on discriminatory intent"—much like the Espinoza majority decision and Justice Alito's concurrence.
- By capitalizing on *Espinoza* and pushing the bounds of traditional education efforts and state jurisprudence even further in these states, proponents would also be establishing a model to courts in other states addressing education choice efforts—including states traditionally less sympathetic to education choice programs.
- In securing broader school-reform legislation, and then, in the courtroom, obtaining a decision (bolstered by *Espinoza*) finding that legislation permissible under the state constitution, a new marker is set that serves as a legislative and decisional example for legislators and courts in other states, aiding the overall educational choice movement.

Example: Nebraska

Nebraska's Blaine Amendment provides, in relevant part: "appropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof." The Nebraska Supreme Court has interpreted this provision permissively. It "prohibits appropriations made to a nonpublic school," but it does not "prohibit any use of public funds which might either directly or indirectly aid a private school." *Father Flanagan's Boys Home v. Dept. of Soc. Services of State of Neb.*, 583 N.W.2d 774, 781 (Neb. 1998).

Nebraska advocates, therefore, should feel especially encouraged after *Espinoza* that educational choice that is permissible under the Establishment Clause will not be blocked by Nebraska state law. While Nebraska law prohibits direct "appropriations made to a nonpublic school," state funding is not prohibited simply because it "might either directly or indirectly aid a private school." And after *Espinoza*, to the extent a program directly or indirectly aids a private school, the fact that it also aids a *religious* private school cannot be a basis for striking down the program.

Example: Texas

Texas has two Blaine Amendments. One provides: "No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes." The other provides: "The permanent school fund and the available school fund may not be appropriated to or used for the support of any sectarian school." Although these provisions have not often been interpreted by the Texas Supreme Court in the context of aid to schools, decisions to date have not construed these provisions restrictively. In any event, after *Espinoza*, these provisions should not be an impediment to enacting school reform measures that are consistent with the Establishment Clause. Not only does *Espinoza* forbid the use of such provisions to prohibit aid programs that extend aid to private religious schools, but the provisions themselves contain the hallmarks of classic Blaine Amendments—"sectarian" language and enactment in the late 1800s—that *Espinoza* disparaged.

C. States with Restrictive Blaine Amendments

Thirteen states have Blaine Amendments that have been interpreted restrictively by courts: Alaska, California, Delaware, Hawaii, Idaho, Kentucky, Massachusetts, Michigan, Missouri, Montana, South Dakota, Virginia, and Washington. These states present ideal opportunities to capitalize on *Espinoza*. In these states, Blaine Amendments have been construed as prohibiting state aid programs on the ground that the programs might benefit a religious institution or religious school, in violation of the Blaine provision. That is precisely what *Espinoza* held violates the Free Exercise Clause. Accordingly, in these states:

- Choice proponents should seek to introduce new legislation—either what might have previously been prohibited due to the Blaine Amendment, or perhaps even broader reform efforts. Provided that the proposed program is consistent with the federal Establishment Clause, the state's Blaine Amendment should pose no barrier to the program, under *Espinoza*.
- Choice proponents do not need to affirmatively go into court to challenge previous decisions that may have struck down past efforts, nor do they need to seek favorable attorney general opinions or similar administrative approval. Instead, lawmakers need only propose and enact new legislation, invoking *Espinoza* in the face of legislative or judicial efforts to block or enjoin a new program.
- As in the states described above, moreover, the Court's willingness to grant review in *Espinoza* should be leveraged, along with the dissents' broad characterizations of the majority decision, to argue against efforts to preserve the status quo ante lacking meaningful school reform.

Example: Missouri

Missouri has two Blaine Amendments. One states: "That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship." The other states: "Neither the general assembly, nor any county, city,

town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever."

These provisions are classic Blaine Amendments: they were enacted in 1875, contain "sectarian" language, and were readopted without change in 1945. They have previously been interpreted strictly; for example, they were invoked to strike down a state law requiring public school boards to provide textbooks to private school students, because that law was "in aid of a sectarian purpose." *Paster v. Tussey*, 512 S.W.2d 97, 104 (Mo. 1974). Such reasoning is now in serious jeopardy after *Espinoza*, as it relies on the use of "religious status" to prohibit otherwise available aid from going to religious private schools and strikes down a general aid program for that reason—similar to what the Montana Supreme Court did in *Espinoza*. In fact, the first of the Missouri provisions above was at issue in a predecessor case to *Espinoza*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), where the Supreme Court held that the provision could not be used to disqualify a church from receiving generally available benefits because of its religious status.

Accordingly, proponents in Missouri should feel emboldened to push for educational choice knowing that Missouri's heretofore strict interpretation of its Blaine Amendments, and its previous decisions invoking those provisions to bar state aid just because the aid happened to benefit religious schools, are no longer good law in light of *Espinoza*. Provided legislation is consistent with the federal Establishment Clause, *Espinoza* should prevent opponents from invoking the Blaine Amendments to erect another hurdle to school reform in Missouri.

Example: Kentucky

Kentucky's Blaine Amendment provides: "No portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school." This is a classic Blaine Amendment; it was enacted in 1891 and uses "sectarian" language. As with Missouri, previously restrictive interpretations of this provision by the Kentucky Supreme Court should no longer be viable in light of *Espinoza*.

The Kentucky Constitution also contains the following provision: "No sum shall be raised or collected for education other than in common schools until the question of taxation is submitted to the legal voters, and the majority of the votes cast at said election shall be in favor of such taxation." This provision appears to limit all educational funding to "common schools," meaning that, absent approval through a higher bar (i.e., by popular referendum), it bars government support not just of religious private schools but of non-religious private schools, too.

Opponents of education choice can be expected to argue that *Espinoza* does not reach state provisions like this one that "neutrally" prohibit aid to (or impose higher barriers for aid to) all

private schools. But to the extent that such a no-aid-to-any-private-school provision prohibits all such aid in order to prevent aid to religious schools, it shares the same basic defect as the more typical no-aid-to-religious-school provisions, as set forth in the global analysis above. For example, if Kentucky's provision originated not out of a desire to avoid funding all private schools but out of a desire to avoid funding religiously affiliated schools, Espinoza would cast skepticism toward invoking the provision. Similarly, a provision rooted in religious discrimination, particularly toward a specific faith, is on more unstable ground following *Espinoza*. To the extent the history of Kentucky's provision demonstrates these aspects, proponents should continue to seek reform legislatively; then, when opponents invoke this provision, proponents should argue that, under *Espinoza*, the provision cannot be applied to bar state aid.

Example: Massachusetts

Massachusetts likewise has an extremely restrictive provision that bars government support not just of religious institutions but of many private institutions, whether or not affiliated with a religion:

> No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the [C]ommonwealth or federal authority or both ... ; and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society.

When addressing government aid to private school students, including religiously affiliated private schools, the Massachusetts Supreme Court has applied the first clause in the foregoing provision. *See Caplan v. Town of Acton*, 92 N.E.3d 691, 702 (Mass. 2018). The court has interpreted the provision to permit transportation of students to private schools (including religiously affiliated schools), *Atty. Gen. v. Sch. Comm. of Essex*, 439 N.E.2d 770, 772 (Mass. 1982), and to permit assistance to disabled students in private schools lacking programs available in public schools, *Com. v. Sch. Comm. of Springfield*, 417 N.E.2d 408, 409 (Mass. 1981), but to reject tax deductions for textbook and tuition expenses for private-school students, *Op. of the JJ. to the Sen.*, 514 N.E.2d 353, 358 (Mass. 1987). Recently, in *Caplan*, the court applied the second clause of the provision to prohibit a direct grant of public money to a church for historic-preservation purposes. 92 N.E.3d at 712.

While this broad prohibition presents more obstacles to publicly funded choice programs than a typical Blaine Amendment, there are several bases for demonstrating that such a provision may be just an over-inclusive effort to block aid to religious schools, and thus vulnerable under *Espinoza*. First, there is text. The textual references to "aiding any church, religious denomination, or society" in the Massachusetts provision strongly suggests that it is not about limiting aid to public schools but is just an overinclusive effort to preclude state aid to churches and denominational schools. Second, there are judicial decisions. To the extent that restrictive

interpretations of the Massachusetts provision are the result of court decisions that interpreted that provision just as the Montana Supreme Court did in *Espinoza—i.e.*, to bar government aid to religiously affiliated schools given language in constitutional provisions purporting to require such a prohibition—that interpretation is unsustainable after *Espinoza*. Third, there is drafting history. As noted in the Kentucky discussion above, *Espinoza* provides several lines of argument for use against prohibitions that purport to bar aid to *all* private schools, including if history shows that the provision originated out of a desire to avoid funding religious schools or out of hostility toward a particular religious faith.

The Massachusetts provision provides an example of how these arguments could have some force in practice. The Massachusetts Supreme Court itself has explained that the current no-aid provision—which bars aid to all private schools, not just religiously affiliated schools—originated from a previous provision that was ratified in 1855 and stated that public money "shall never be appropriated to any religious sect for the maintenance exclusively of its own schools." *Caplan*, 92 N.E.3d at 698 n.8 (describing former Art. 18 of the Massachusetts Constitution). That provision was "targeted specifically against Catholic schools," given "[h]ostility toward Irish Catholics" following "a massive influx of immigrants." *Id.* at 699. And while that previous provision was superseded by the current provision, the change took place out of concerns that "private religious schools and hospitals continued to receive public funding," which led citizens, in 1917, to amend the Constitution to "tighten the prohibition of public support for religious education." *Id.* at 699-700. In short, the current Massachusetts constitutional provision was born not only of "bigotry," *Espinoza*, 140 S. Ct. at 2259, but also of a desire to avoid funding religious schools in particular—two motivations upon which *Espinoza* casts serious doubt. Indeed, Massachusetts may be exactly what Justice Breyer—himself a Massachusetts resident—had in mind when he asked how, under the majority's opinion, "a State's decision to fund only secular *public* schools" is "any less coercive" than "making scholarships available to only secular nonpublic schools," *id.* at 2291 (Breyer, J., dissenting), thus underscoring that *Espinoza* can be employed even in states that purport to exclude all private schools from funding.

Example: Michigan

Michigan has a more traditional Blaine Amendment that states: "No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose." In addition, similar to Massachusetts, Michigan has a broader prohibition on the use of public money for "any private, denominational or other nonpublic" school, specifically singling out various methods that school-reform proponents have employed in recent years:

No public monies or property shall be appropriated or paid or any public credit utilized by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students ....

Notwithstanding this broad prohibition, the same strategies described above as to Kentucky and Massachusetts could be employed by proponents in Michigan. Specifically:

- Proponents should show that this provision originated out of a desire not to avoid funding all private schools, but to avoid funding religiously affiliated schools, perhaps because (in practice) they comprise the vast majority of private schools and it was considered preferable simply to prohibit aid to all private schools. That would cast doubt upon the prohibition, because *Espinoza* holds that states cannot discriminate against religious schools in administering a generally applicable program. It would contradict the spirit (if not the letter) of *Espinoza* if a state could accomplish this same result by the expedient of barring aid to *all* private schools. The provision's reference to "denominational" schools indicates that this provision is not strictly about limiting aid to public schools, but just an over inclusive effort to preclude aid to denominational schools.
- Proponents should also attempt to show that this provision is rooted in discriminatory animus against religious schools or religious faiths. As Justice Alito observed in his concurrence, citing prior Supreme Court precedent, the "original motivations" for enacting a law are relevant to whether that law is constitutionally suspect. If Michigan's provision can be shown to be rooted in religious discrimination or other sordid origins, a court may be less likely to uphold its application to block school reform.
- Proponents could also leverage Justice Breyer's question in his dissenting opinion, where he asked how a state's "decision to fund only secular public schools"—*i.e.*, precisely what Michigan's provision reflects—is "any less coercive" on parents "whose faith impels them to enroll their children in religious schools" than a prohibition on funding only religious schools.
- Proponents could also tout the fact that the Supreme Court granted review and reversed in Espinoza even though the Montana Supreme Court's decision re-established the status quo ante of no funding of any private schools—exactly the current situation in Michigan. The logical corollary of that outcome—as the dissents recognized—is that the supposed "neutrality" of not funding any private schools may be far from neutral. Indeed, Justice Sotomayor's dissent criticized the majority for, in her view, "requir[ing] a state court to order a state legislature to fund" religious schools, a characterization that proponents could employ in challenging efforts by opponents to invoke Michigan's provision.

D. States Without Blaine Amendments but with Other Relevant Prohibitions

Several states lack a state Blaine Amendment or other constitutional no-aid provision, but do have prohibitions on compelled support: Arkansas, Connecticut, Maryland, New Jersey, and Vermont.[5] The compelled-support provisions of Arkansas, Connecticut, Maryland, and New Jersey have as of yet either received little judicial attention or not been interpreted to preclude

5 A "compelled support" clause can be colloquially defined as a provision that restricts the extent to which state governments can require citizens to "support" religious institutions.

the use of funds (other than those specifically allotted for public schools) to support school-reform efforts. *See, e.g.*, *Board of Educ. v. State Board of Educ.*, 709 A.2d 510 (Conn. 1998) (transportation for private school students did not violate state constitution's Compelled Support Clause).

Over two decades ago, the Vermont Supreme Court held that permitting parents to choose religious schools as part of a tuition-payment program—where the town pays tuition to the parent's school of choice rather than maintaining public schools—violated the state's compelled-support clause. *See Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539, 544 (Vt. 1999). The state supreme court held that "a school district violates [the clause] when it reimburses tuition for a sectarian school … in the absence of adequate safeguards against the use of such funds for religious worship." *Id.* at 541-42. It further observed that the clause "is not offended … unless the compelled support is for the 'worship' itself." *Id.* at 550. The absence of "restrictions that prevent the use of public money to fund religious education" resulted in the state constitutional violation. *Id.* at 562. This line of reasoning implicates the status-vs.-use distinction in *Espinoza*, discussed above. And as noted, justifying the exclusion of religiously affiliated schools from generally available assistance programs because of what the schools *do—i.e.*, provide "religious education"—as opposed to what they *are*, is likely to be met with greater resistance given *Espinoza*. The *Chittenden* decision, therefore, may be vulnerable to legal challenge after *Espinoza*—and that challenge may be especially robust if the history of the compelled support clause is rooted in discrimination against religion broadly or certain faiths specifically. Indeed, a suit has already been brought challenging the exclusion of religious schools from the tuition-payment program, and the Second Circuit, in an order temporarily enjoining the practice, recently observed that, given *Espinoza*, the plaintiffs "have a strong likelihood of success." *E.M. v. French*, No. 20-1772 (2d Cir. Aug. 5, 2020). Oral argument in the case will be heard on October 13, 2020.

The state of Maine has statutory law (but not a constitutional provision) prohibiting religious schools from participating in its tuition-assistance program. The state law asserts that "[a] private school may be approved for the receipt of public funds for tuition purposes only if it … [i]s a non sectarian school in accordance with the First Amendment," and it was originally enacted in 1983. Me. Rev. Stat. tit. 20-A, § 2951(2). In 2019, following the *Trinity Lutheran* case (as noted, a predecessor to *Espinoza*), parents of secondary school students challenged the law. *See Carson v. Makin*, 401 F. Supp. 3d 207 (D. Me. 2019). The district court held that the law did not violate the Free Exercise Clause because, in its view, *Trinity Lutheran* did not sufficiently undercut prior First Circuit case law rejecting a similar challenge. *See id.* at 211-12 (citing *Eulitt ex rel. Eulitt v. Maine, Dep't of Educ.*, 386 F.3d 344 (1st Cir. 2004)). The case is currently on appeal to the First Circuit (argued Jan. 8, 2020, decision currently pending). Given *Espinoza*, the case for overturning Maine's statute should be strong: as in *Espinoza*, the statute appears to discriminate on the basis of religious status, and the statute employs the word "sectarian," which hearkens back to anti-Catholicism. While *Trinity Lutheran* may have been an insufficient basis for deeming *Eulitt* abrogated and the Maine law unconstitutional, *Espinoza* goes further than *Trinity Lutheran* and provides a substantial basis for enjoining the Maine statute. At a minimum, the First Circuit's forthcoming decision in *Carson* will serve as one of the first indicators of how the lower courts are interpreting *Espinoza* and what obstacles to recognizing *Espinoza*'s full potential may remain.[6]

6 In an interesting development, one of the three judges on the *Carson* panel in is former Supreme Court Justice Souter, who occasionally hears First Circuit appeals.

In each of the states falling into this category, the absence of Blaine Amendments generally leaves education choice proponents in largely the same position as in states that follow the federal Establishment Clause—but with even less concern that state jurisprudence could eventually diverge from the Establishment Clause and give state-level prohibitions an opening to operate. That said, several of the states do have compelled-support clauses that could be interpreted along the lines of a no-aid provision, as in *Chittenden*, and even absent constitutional provisions, states could enact statutory law like that in Maine that has the same effect as a constitutional prohibition. In both scenarios, for the reasons explained, *Espinoza* provides support for enjoining such efforts. Likewise, it affords arguments against legislative inaction on instituting choice programs. For example, New Jersey has no voucher or tax-credit programs. In 2018, two bills establishing Educational Savings Accounts for low income/special needs students were introduced, but neither advanced out of committee. To the extent such efforts are made again, and opponents invoke New Jersey's compelled-support provision as a basis for excluding religiously affiliated schools, *see* New Jersey Const. Art. I, ¶ 3 ("[N]or shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry[.]"), *Espinoza* renders that argument meritless. Indeed, as noted above, even if opponents invoke the compelled-support provision as a basis for rejecting savings accounts for use at *any* private school (and, thus, for rejecting the program entirely), an assertive reading of *Espinoza* can be advanced against that argument.

E. Remaining States

Finally, some states—Arizona, Colorado, Florida, New Hampshire, and Wyoming—defy clear categorization. The global takeaways of *Espinoza* nevertheless provide arguments for these states as well. In particular, in two states—Colorado and New Hampshire—*Espinoza* casts doubt on the reasoning of court decisions that opponents could have employed to impede choice efforts. And in a third—Arizona—*Espinoza* could be used utilized to move the state from a tax-credit-only system to a direct-funding voucher program.

Florida has a no-aid provision that was used to challenge a voucher program in *Bush v. Holmes*, 919 So.2d 392 (Fla. 2006). An intermediate appellate court held that the program violated the provision, but the state supreme court did not address the issue, instead holding that the program violated a provision in the Florida Constitution requiring the state to provide for "the education of all children residing within its borders" and provide "by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education." Fla. Const. Art. IX, §1(a). *See Holmes*, 919 So.2d at 407. Given the unusual nature of the ruling, *Espinoza* does not map well onto these particular facts. Nevertheless, to the extent that *Espinoza* indicates that the Supreme Court is inclined to look more skeptically at state-created barriers to educational choice efforts, the decision at least can provide momentum to legislative efforts to craft initiatives that comply with the *Holmes* ruling, with the comfort that challenges to such programs based on Florida's no-aid provision will be more difficult in light of *Espinoza*. And to the extent that *Espinoza* spawns more legislative choice achievements in Florida (that nevertheless comply with *Holmes*), creating increasing popular support for such measures, an opportunity could arise for a state constitutional amendment to the provision that was at issue in *Holmes*.

Wyoming has two Blaine Amendments and very little judicial interpretation of those provisions. One states: "No money of the state shall ever be given or appropriated to any sectarian or religious society or institution." Wyo. Const. Art. 1, §19. The other states: "No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association." Wyo. Const. Art. 3, § 36. Given that neither provision has been construed in the context of school-reform efforts, Wyoming provides an opportunity for school-reform proponents to leverage *Espinoza* in both the legislative and judicial arenas and achieve innovation while building on the momentum of the Court's decision.

Example: Colorado

Colorado has two Blaine Amendments. One states: "No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association." The other states: "Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever; nor shall any grant or donation of land, money or other personal property, ever be made by the state, or any such public corporation to any church, or for any sectarian purpose." Both of these provisions are classic Blaine Amendments; each was enacted in 1876 and each contains "sectarian" language. Accordingly, efforts by reform opponents to rely on these provisions to impede school reform should fail following Espinoza for the reasons explained herein. Recently, in Taxpayers for Public Education v. Douglas County School District, 351 P.3d 461 (Colo. 2015),

Three out of seven members of the Colorado Supreme Court ruled that a voucher program violated the Blaine Amendment provisions because it included religious schools. But under Espinoza, that reasoning endorses straightforward discrimination based on religious status in violation of the Free Exercise Clause; thus, it is no longer viable. Indeed, the analysis of those three members is strikingly similar to that of the Montana Supreme Court in Espinoza—which addressed a strikingly similar state provision—culminating in their observation that the provision "prohibits school districts from aiding religious schools" and the "Supreme Court has recognized that state constitutions may draw a tighter net" than the Establishment Clause permits. Espinoza rejected both of these propositions in a materially similar context. What is more, the Supreme Court of the United States vacated the Douglas County decision after Trinity Lutheran, a predecessor case to Espinoza.7 Accordingly, proponents seeking to enact choice legislation in Colorado can and should emphasize that the reasoning espoused by reform opponents and adopted by three members of the state supreme court in Douglas County has been expressly rejected by the Supreme Court of the United States—once in Trinity Lutheran, in a summary vacatur decision, and again in Espinoza, where the majority employed an analysis squarely at odds with the plurality in Douglas County. In combination with the above arguments applicable to states with traditional

7 The scholarship program at issue in *Taxpayers for Public Education* was repealed during proceedings on remand, so the Colorado Supreme Court did not have occasion to address the program again.

Blaine Amendments, these arguments should give force to reform efforts in Colorado, which should no longer be impeded by those provisions of the state constitution in light of Espinoza.8

Example: New Hampshire

New Hampshire has two relevant provisions. The first states that "no person shall ever be compelled to pay towards the support of the schools of any sect or denomination." The second states that "no money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination." In *Opinion of the Justices (Choice in Education)*, 616 A.2d 478 (N.H. 1992), the New Hampshire Supreme Court, in a non-binding advisory opinion, addressed the legality of a program under which a student could choose to attend a school besides his current public school and have his current school district pay a portion of the tuition. The court advised that because the program included "sectarian schools," it would violate the state's constitution because there was an "unrestricted application of public money to sectarian schools." The court also noted that "sectarian schools … appeared to predominate among the nonpublic schools."

As with the reasoning in the *Douglas County* decision out of Colorado, the reasoning in *Opinion of the Justices* would not appear to survive *Espinoza*, which precludes excluding religiously affiliated schools from funding programs on account of their religious character. Accordingly, school reform proponents in New Hampshire should proceed with legislative efforts, secure in the knowledge that *Espinoza* removes a considerable obstacle from meaningful reform. As in other states with similar provisions, New Hampshire's provisions can no longer be employed to impede choice programs simply because state funding might benefit religious schools along with non-religious schools.

Example: Arizona

Arizona has a state Blaine Amendment, but courts' interpretation of that provision is not easily classified as either restrictive or permissive. This is primarily due to an Arizona Supreme Court case, Cain v. Horne, which upheld two voucher programs under the state's Blaine Amendment because the provision was construed to mirror the federal Establishment Clause, but which also determined that the programs violated another clause (the "Aid Clause") that prohibits "appropriation of public money … in aid of any … private or sectarian school." Ariz. Const. Art. 9, §10. See 202 P.3d 1178 (Ariz. 2009). The voucher programs were struck down because the Aid Clause "does not permit appropriations of public money to private and sectarian schools." Id. at 1185. The court was unpersuaded by an attempted distinction between voucher program aiding students as opposed to directly aiding the schools themselves. As such, Arizona permits tax credits and educational savings accounts, but, due to Cain, traditional vouchers are barred by the Aid Clause. Insofar as the Aid Clause is similar to the Massachusetts and Michigan provisions prohibiting support for all private schools, however, the same arguments from Espinoza can be employed against it. Indeed, the Arizona Aid Clause continues to use the word "sectarian," which signals the sort of sordid history that characterized the Montana no-aid provision at issue in Espinoza and may well remain a "disquieting remnant" of that history, as Justice Alito observed.

8 In *Douglas County,* a fourth member of the state supreme court ruled that the voucher program violated the state's Public School Finance Act, providing the necessary fourth vote to strike down the program. No other member endorsed this view, however, and even the three who concluded the program violated the Blaine Amendments believed that the plaintiffs lacked standing to challenge a violation of the Act.

CONCLUSION

The Supreme Court's *Espinoza* decision creates significant opportunities for school choice proponents. The majority opinion and various concurring and dissenting opinions can be marshaled to defeat reliance on state provisions that prohibit aid to religious schools, to oppose the application of provisions that prohibit aid to all private schools, to challenge legislative inaction on school choice, and potentially to expand programs from tax-credit systems to direct-funding voucher programs. Choice opponents can no longer credibly rely on state provisions that discriminate against religious schools on their face or have their origins in religious bigotry or a desire to exclude religious institutions from generally applicable government assistance. Moreover, *Espinoza* teaches that a failure to fund all private schools out of a desire to not fund religious schools is impermissible. Although each state presents different circumstances given its respective constitutional provisions, case law, and political climate, proponents should feel emboldened by the Supreme Court's willingness to ensure that constitutionally suspect state laws will not impede meaningful educational reform for parents and students.