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Briefly Mentioned : On Monday, the court released orders from the June 25 conference. The justices did not grant any new cases for oral argument next term and invited the federal government to file a brief sharing its views in two cases.
On Tuesday, the court will release opinions at 10 a.m.
The justices have scheduled an additional conference on Wednesday. The court will release orders from that conference on Thursday at 9:30 a.m.

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Symposium: *Espinoza v. Montana Department of Revenue*: The battle between may fund and must fund

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In 2017, SCOTUSblog published a symposium on *Trinity Lutheran Church v. Comer*. In *Trinity Lutheran*, the Supreme Court invalidated a Missouri grant program for playground resurfacing that excluded religious schools. My piece for the symposium focused on the problems *Trinity Lutheran* might raise given the court's 2002 decision in *Zelman v. Simmons-Harris*, which upheld a school-voucher program in Cleveland, Ohio, that overwhelmingly benefited religious schools. Does *Trinity Lutheran* mean that states must fund vouchers or provide other aid to religious schools in violation of state constitutions when they make aid available to nonreligious entities? *Espinoza v. Montana Department of Revenue* may be the case that answers this question.

The court should answer "no" and uphold the decision of the Montana Supreme Court to invalidate a tax-credit program under the state constitution. That program, while limited in scope, overwhelmingly would have benefited — and may have had the unstated (read: not openly stated) purpose of benefiting — religious private schools. The likelihood is, however, that the court will answer "yes," and overturn the Montana Supreme Court's decision. There are several reasons why this would be a mistake.

There is a significant difference between holding that a state may fund tax credits or provide other aid to those attending religious private schools and holding that a state must fund these programs even when doing so conflicts with a state constitution. In *Locke v. Davey*, a case in which the Supreme Court ruled that a Washington state scholarship program that excluded students pursuing devotional degrees did not violate the First Amendment, the court held that there is "play in the joints" between state constitutional concerns about promoting religion and the U.S. Constitution's free exercise clause. However, *Locke* predated the Supreme Court's decision in *Trinity Lutheran*, and the holding in *Locke* can be read as limited given the facts of that case.

The state should win in *Espinoza*, not because the "play in the joints" concept has a clear scope, but rather because that concept reflects a broader interest in balancing federalism concerns with federal free exercise concerns when state law imposes nondiscriminatory limitations on funding for religious education. The petitioners in *Espinoza* would likely object that this assumes that the Montana constitution's limitation on funding for religious education is nondiscriminatory. After all, one of their main assertions is that the result and reasoning of the Montana Supreme Court decision discriminates against religion.

The key to this issue is how one reads the interaction between *Locke* and *Trinity Lutheran* in light of the realities of private education in most parts of the U.S. Will the court impose its increasingly broad reading of discrimination under the free exercise clause on state education funding and on state constitutional limits on using tax dollars to support religious education? Or will the court decide that states can enforce their constitutional interest in not promoting religious education with taxpayer dollars?

I support the holding in *Trinity Lutheran* under the facts of that case, and have argued strenuously that it is possible to balance strong free exercise rights with other fundamental rights. Yet applying *Trinity Lutheran* to tax-credit, voucher or other school funding programs would undermine state

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> This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.

Footnote 3 was the only part of the opinion in *Trinity Lutheran* not joined by Justices Neil Gorsuch and Clarence Thomas, and therefore it only commanded a plurality of justices. The substantive limitation suggested in the note, however, would also likely be supported by Justice Stephen Breyer who concurred in the judgment, and Justices Ruth Bader Ginsburg and Sonia Sotomayor who dissented. On its face, footnote 3 seems to limit *Trinity Lutheran* to situations in which the funding does not support programs that have any sort of direct religious content. Yet the impact of footnote 3 on the broader holding in *Trinity Lutheran* is unclear. *Trinity Lutheran* clearly prevents states from excluding religious entities from "public benefit" programs based solely on the fact that the entities are religious. The most logical reading of footnote 3 is that it creates an exception when the "public benefit" program at issue is an education tax-credit or voucher program that would primarily benefit religious schools.

This case involves just such a system. Of course, application of the *Trinity Lutheran* doctrine to the tax credits at issue here has significant implications for larger tax credits and for vouchers. Simply put, if vouchers to religious schools must be funded when a state program allows vouchers for nonreligious private schools — and, make no mistake, *Espinoza* is being carefully watched by voucher advocates — the result would be a different sort of structural discrimination.

Applying *Trinity Lutheran* to funding for private education opens the door to forcing states to include religious schools in any program open to secular ones, including voucher programs. Most private schools are religious, and in most areas religious schools that can afford to take voucher students represent only a few denominations that are able to highly subsidize religious education. The practical result of voucher programs in many areas is that religious minorities and dissenters have to choose between sending their children to a school at which they may be proselytized and leaving them in public schools that will be further drained of funding and children because of the voucher program. In this way, voucher programs may give religious minorities a stark choice between protecting their children's material interests and protecting their children's religious interests.

It is also important to note that the relevant provision of the Montana Constitution is not a baby Blaine Amendment. Baby Blaine Amendments are state constitutional amendments based, at least in part, on the anti-Catholicism that animated many supporters of the failed federal constitutional amendment proposed by Senator James G. Blaine in 1875. These baby Blaine Amendments are problematic because they were often, at least in part, motivated by reprehensible anti-Catholic animus. If the Montana provision were a baby Blaine Amendment, this case could raise the question of whether state constitutional provisions that were based in animus, but may have come to serve different purposes over time, violate the U.S. Constitution. Article X, Section 6, of the Montana Constitution as set forth by the 1972 Montana constitutional convention re-enacted and slightly amended a no-aid provision from the 1889 Montana constitution. Regardless of whether the 1889 provision was a baby Blaine Amendment, when the 1972 state constitutional convention considered and approved Article X, Section 6, anti-Catholicism played no role: The primary focus was promoting and protecting public education.

Finally, the Montana Supreme Court's decision does not violate the First Amendment even under a broad reading of *Trinity Lutheran*. The Montana Supreme Court held that the entire tax-credit program, whether applied to religious or nonreligious private schools, violated the state constitution. The *Espinoza* petitioners argued in their petition for certiorari, and will certainly argue on the merits, that the Montana Supreme Court reached that result solely because the funding could have gone to religious entities. Yet, as Justice Antonin Scalia pointed out in his *Locke* dissent, and as the *Locke* majority would surely have agreed, one way to avoid discrimination in violation of the free exercise clause is not to provide any public funding for private education, whether religious or not. That is the result of the Montana Supreme Court's decision, and there is no evidence in the decision of religious animus of the sort the court found problematic in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.

Although the Montana Supreme Court's ruling is consistent with Supreme Court precedent, including *Trinity Lutheran,* the Supreme Court is likely to overturn it. *Trinity Lutheran* is the second installment in a line of cases stemming from *Church of Lukumi Babalu Aye v. City of Hialeah* and leading to *Masterpiece Cakeshop*. *Lukumi Babalu Aye* explained that laws that are not generally applicable or neutral toward a religion — that is, laws that discriminate against a religion — are subject to strict scrutiny.

In *Trinity Lutheran* the court expanded the nondiscrimination concept from *Lukumi Babalu Aye* to situations in which a public benefit without religious content — in that case, rubber chips for resurfacing playgrounds — is denied to an entity specifically because the entity is religious. The nondiscrimination concept was further expanded in *Masterpiece Cakeshop*. In that case, the court held that the Colorado Civil Rights Commission had discriminated against Masterpiece Cakeshop, which had refused to make a cake for a same-sex wedding. The court based its finding of discrimination on an anti-religious statement made by one member of the commission (along with statements by other commissioners that did not evince animus, but that the court oddly found could be read to do so), and on the supposedly differential treatment by the commission of a claim filed by William Jack against bakeries that refused to make cakes with an anti-LGBT religious message. However, the William Jack situation differed significantly from the Masterpiece Cakeshop situation. Simply put, the court's finding of discrimination by the commission in *Masterpiece Cakeshop* was highly questionable.

The expansion of the nondiscrimination principle in *Trinity Lutheran* and the questionable finding of discrimination against the bakery in *Masterpiece Cakeshop* suggest that the court will continue to expand the *Trinity Lutheran* reasoning in *Espinoza*. It is likely that the court will find that the Montana Supreme Court's application of Article X, Section 6, of the Montana Constitution to the tax-credit program was discriminatory because it was based specifically on a desire not to fund religious education, even if the result of the decision was to prohibit tax credits for all private education, religious or not.

The court might also find that the tax-credit system at issue in the case did not directly benefit religion. The program was complex, and the court might attribute the disproportionate benefit it was likely to provide to religious education to the choices of the people receiving the tax credits. This argument could be used to minimize state concerns about promoting religious education when measuring the "play in the joints" with federal free exercise concerns.

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