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And the Wall Between Church and State Continues to Crumble Under the Weight of the High Court's Decision in *Espinoza v. Montana Dep't of Revenue* Allowing State Money to Fund Sectarian Schools Through Scholarship Programs

By Leighann K. Fink

In a 5-4 decision by Chief Justice John Roberts, the Supreme Court of the United States ruled on June 30 that the "no-aid" to sectarian schools provision, in Article X, Section 6, of the Montana Constitution, which was used to strike down a scholarship program established by the Montana Legislature to provide tuition assistance to parents sending their children to private schools, violated the Free Exercise Clause of the Federal Constitution. The High Court, in applying strict scrutiny to the "no-aid" provision, stated: "Montana's interest in creating greater separation of church and State than the Federal Constitution requires 'cannot qualify as compelling' in the face of the infringement of free exercise here." Chief Justice Robert's reasoned that, because the Free Exercise Clause barred the "no-aid" provision in the Montana Constitution, the Montana Supreme Court could not use the "no-aid" provision to strike down the scholarship program in order to bar aid "to schools controlled in whole or in part by churches." Chief Justice Roberts indicated that because "the Judges in every State shall be bound" by the Federal Constitution, and "given the conflict between the Free Exercise Clause and the application of the 'no-aid' provision," the Montana Supreme Court should have disregarded the "no-aid" provision in deciding the case below. In quoting the Court's decision in *Trinity Lutheran*, Chief Justice Roberts concluded that the *'supreme* law of the land' condemns discrimination against religious schools and the families whose children attend them, and "their exclusion from the scholarship program here is 'odious to our Constitution' and 'cannot stand.'" Thus, a state violates the Free Exercise Clause, when it "discriminate[s] against schools" based on "the religious character of the school."

Justices Thomas, Alito, Gorsuch, and Kavanaugh joined in the opinion of the Court, while Justices Ginsburg, Kagan, Breyer, and Sotomayor dissented. Certain Justices also filed their own concurring or dissenting opinions. In her dissenting opinion, Justice Sotomayor stated: "Today's ruling is perverse. Without any need or power to do so, the Court appears to require a State to reinstate a tax-credit program that the Constitution did not demand in the first place." Justice Sotomayor also indicated that, with today's ruling, the Court "rejects the Religion Clauses' balanced values in favor of a new theory of free exercise, and it does so only by setting aside well-established judicial constraints."

Please contact any of the listed attorneys regarding the potential impact of this issue on your district. We welcome any questions.

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