KIRKLAND & ELLIS LLP
MEMORANDUM

TO: Foundation for Excellence in Education
Center for Education Reform

FROM: Paul D. Clement
George W. Hicks, Jr.

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RE: 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 unattaintable 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.

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 non-public 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

[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.

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.

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]

[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.

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.

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.