INSTITUTE FOR JUSTICE

Testimony by Erica Smith in Support of HB 1369

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My name is Erica Smith, and I am a senior attorney at the Institute for Justice. Thank you for inviting me to speak.

I was asked to speak about HB 1369's constitutionality because the bill allows families to choose to spend their account funds on religious schools and other religious options. I can testify that there are no constitutional problems with this. This is true under both the North Dakota Constitution and the U.S. Constitution. In fact, the U.S. Supreme Court just issued a new opinion on this issue in *Espinoza v. Montana Department of Revenue* last summer.

Before I address constitutionality, let me first give you some background on my law firm and my expertise. The Institute for Justice, also known as "IJ," is a national nonprofit firm that protects constitutional rights. One of our areas of expertise is educational choice. We are the leading legal experts on this issue. I am a member of IJ's educational choice team, and I have litigated choice issues for over a decade. For example, I was co-counsel on the *Espinoza* case.

There is no constitutional problem with students using their account funds to attend a religious school or pay for any other religious option. Article VIII, Section 5 of North Dakota's Constitution states that "No money raised for the support of the public schools of the state shall be appropriated to or used for the support of any sectarian school." This provision is also known as North Dakota's Blaine Amendment. The Blaine Amendment does not apply to the proposed program for two reasons. First, the program uses money from the general fund for the accounts, not funds raised for public schools. Second, the program does not appropriate money to sectarian schools or support those schools. Instead, the program gives money to families, to support those families. Any benefit to religious schools is incidental.

In addition, to the extent that the Blaine Amendment does bar sectarian schools from participating in the proposed program (or any other educational choice program), the Blaine Amendment would be unconstitutional under the U.S. Constitution. In *Espinoza*, the Supreme Court held that state constitutions could not be interpreted to bar religious options in educational choice programs. In fact, the *Espinoza* case involved a Blaine Amendment similar to North Dakota's.

Let me discuss the facts of *Espinoza*. In 2015, the Montana Legislature had passed an educational choice program. Like most choice programs, Montana's program allowed families to use scholarships to attend the school of their choice, whether that school was religious or nonreligious. But immediately after the legislature passed the program, things took a wrong turn. The state agency that was in charge of administering the program promulgated a rule. And that rule said that kids could only use scholarships at

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nonreligious schools. We believed this rule was unconstitutional under the federal Constitution.

So, we paired up with Montana families and sued the agency. We argued that the rule violated the Religion Clauses in the federal Constitution, including the Free Exercise Clause. We also argued that to the extent that Montana's Blaine Amendment required the rule, the Blaine Amendment was itself unconstitutional.

The case wound its way through the court system. And finally, it made its way to the US Supreme Court. The Court issued its decision in June 2020. In its decision, the Court held that Montana's Blaine Amendment could *not* be interpreted to exclude religious options from a choice program. To do so would violate the Federal Free Exercise Clause's protections for religious liberty. As the Court said, "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." This was a 5-4 decision written by Chief Justice Roberts.

The *Espinoza* ruling is a landmark decision and forever changes the legal landscape for choice programs, including in North Dakota. After *Espinoza*, North Dakota's Blaine Amendment can no longer be interpreted to bar religious options in a choice program. That includes in HB 1369. And to the extent that North Dakota's Blaine requires a religious bar, it is unconstitutional under the U.S. Constitution. The protections in the U.S. Constitution *always* trumps state constitutions.

Finally, I will note that *Espinoza* applies regardless of the type of choice program. Whether the program is a tax credit, a voucher, or an education savings account like in HB 1369, it does not matter. Religious options can and must be included alongside nonreligious options.

Thus, if the North Dakota Legislature wishes to enact HB 1369, they can rest assured that the Blaine Amendment in North Dakota Constitution is not an obstacle.

Thank you for your time.