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In the

Supreme Court of The United States

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ESPINOZA

petitioner,

v.

MONTANA DEPARTMENT OF REVENUE

respondent,

=====

On writ of Certiorari to

The Supreme Court of Montana

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BRIEF FOR PETITIONER

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and
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Judge Barefoot Sanders H.S
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Issue on Appeal

Does it violate the Free Exercise Clause of the First Amendment to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools?

Table of Contents

Cover Page.....	1
Question Presented.....	2
Table of Contents.....	3
Table of Authorities.....	3
Statement of the Facts.....	3
Summary of the Argument.....	4
Argument.....	4,5,6,7
Conclusion.....	7
Prayer.....	7

Table of Authorities

<i>Trinity Lutheran Church of Columbia v. Comer</i> , 582 U.S. __ (2017).....	5,6
<i>Locke v. Davey</i> , 530 U.S. 712 (2004).....	6
<i>Zelman v. Simmons-Harris</i> , 536 U.S. 639 (2002).....	6
<i>Rosenberger v. Rector and Visitors of University of Virginia</i> , 515 U.S. 819 (1995).....	6
<i>Widmar v. Vincent</i> , 454 U.S. 263 (1981).....	5
<i>Committee for Public Education & Religious Liberty v. Nyquist</i> , 413 U.S. 756 (1973).....	6
<i>Everson v. Board of Education of Ewing Twp.</i> , 330 U.S. 1 (1947).....	6
<i>Lemon v. Kurtzman</i> 403 U.S. 602 (1971) [Under Nyquist].....	6
<i>McDaniel v. Paty</i> , 435 U.S. 618 (1978) [Under <i>Trinity</i>].....	6
<i>Lyng v. Northwest Indian Cemetery Protective Ass’n</i> , 485 U.S. 439 (1988) [Under <i>Trinity</i>]..	5,6

Constitutional Provisions

1st Amendment:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....”

Montana Constitution, Article X, Section 6:

“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 in part by any church, sect or denomination.”

Other Sources

George Washington’s Thanksgiving Proclamation (1789).....	4,5
Debate on the First Amendment (August 15th, 1789).....	5

Statement of the Facts

In 2015, the Montana legislature enacted the “Tax Credit for Qualified Education Contributions” Act. The law allowed people to donate money to private, nonprofit scholarship organizations, and receive up to \$150 in tax credit. One scholarship organization in

particular, called Big Sky Scholarships, sought to award scholarships to students at both religious and nonreligious schools.

The plaintiff, who are mothers whose children attend Stillwater Christian School, wanted their children to obtain the Big Sky Scholarship. This was originally possible, until the Montana Revenue Department issued Rule 1, which banned the scholarships from being used in schools who are even partly controlled by the church. This Rule was made in order to comply with the Montana Constitution which outlaws the government to appropriate direct and indirect funds to a religious institution.

The plaintiff brought suit arguing that the original Tax Credit Program was constitutional and that the additional Rule 1 was unconstitutional.

They won in District Court, which found the original Tax Credit Program to be constitutional, while leaving the possibility that Rule 1 may be unconstitutional.

On Appeal to the Montana Supreme Court, the judgement was reversed and the court held that the original Tax Credit Program violated the Montana Constitution, and that the addition of Rule 1 makes the program constitutional.

Statement of the Argument

May it please the court, my name is Arianna Jenkins. And my name is Scott Garcia Calvillo. Together we represent the petitioner (the Espinoza family) in this case. The question before this court is **Does it violate the Free Exercise Clause of the First Amendment to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools?** The Montana Supreme Court has already decided that the original program was in violation of its state constitution. However, what we as the petitioners will argue is that the Montana Constitution Article X itself is unconstitutional under the free exercise clause of the 1st amendment. Therefore, the Montana Supreme Court cannot use it to eradicate Big Sky. The Montana Constitution, Article X, Section 6 says that the government may not directly or indirectly appropriate funds to institutions which are even partly controlled by religion.

This portion of the Montana constitution goes against our U.S constitution for two reasons. One, the Montana constitution goes against the founding fathers intent by completely separating the government from religion. And two, the Montana constitution unfairly discriminates against religious institutions, while helping otherwise similar non-religious institutions.

Argument

Starting with the first argument, that the complete separation between church and state was never the founding fathers' purpose. The founding fathers wanted to prevent the government from becoming excessively entangled with religion. History up to that point had multiple examples of government violating unalienable rights under the mantle of religious purity. From the infamous Charlemagne to modern day China, the promise of having the government deny freedoms to religious minorities is what the founding fathers wanted to avoid in their new country. The first amendment served as an attempt to separate church and state and prevent the government from ever having the chance to discriminate based on religion. However even as simple of a solution as the complete separation between church and state sounded, the founding fathers knew that a complete division between church and state was impossible. Afterall, some of the founding fathers themselves were religious.

When people argue for separation between church and state, the concept is not for the sake of separation of church and state, the underlying reason and intent is to verify that the government will serve the people first, and not a specific deity.

That is why the 1st president of the United States, found it reasonable to make Thanksgiving a federal holiday. Contrary to popular belief, Thanksgiving is not about the natives and colonists, exchanging presents. The holiday, according to how George Washington described it, was a day for "prayer to be observed by acknowledging with grateful hearts the many signal favors of Almighty God".(George Washington's Thanksgiving Proclamation) The proclamation goes on to say that the people on the last Thursday of November, should "all unite in rendering unto him", meaning god, "our sincere and humble thanks". It is clear now that the "thanks" in "thanksgiving" is directed at god, and that the barrier between church and state is not as solid as it seems. Although it may be argued that George Washington himself is simply wrong, that is not the case. Thanksgiving, is a slight entanglement with religion, but does not discriminate. George Washington making Thanksgiving a national holiday doesn't violate the Establishment Clause, because like the Free Exercise Clause you have the right to freely exercise your religion or lack thereof. In other words, the government isn't coercing you into celebrating Thanksgiving. If you don't want to, you don't have to.

To further illustrate, this court may also look at the Debates over the 1st amendment for clarity. The original draft of the establishment clause and free exercise clause was that "no religion shall be established by law, nor shall the equal rights of conscience be infringed." Mr. Silvester then expressed concern that the provision might be interpreted as having no religion at all. To which Mr. Madison and Mr. Huntington responded that the text should be written in such a way as to "secure the right of conscience" (Huntington). Mr. Huntington additionally expressed concern that the text could be purposefully misinterpreted as completely banning the aid of any religiously involved activities.

"The ministers of their congregations to the eastward, were maintained by the contributions of those who belonged to their society; the expense of building meeting-houses was contributed in the same manner, these things were regulated by bye laws: If an action was brought before a federal court on any of these cases, the person who had neglected to perform his engagements could not be compelled to do it; for a support of ministers, or building of places of worship might be construed into a religious establishment."

Mr. Huntington accurately predicts what this case is about. Similarly to how the building of religious meeting-houses, could be misinterpreted as the government support of a religion; so to can the indirect financial aid to religious schools be misconstrued as a free establishment clause violation.

In *Widmar v. Vincent*, the state of Missouri, similarly like the state of Montana in this case, argued that the denial of a religious entity was valid, under the state interest of separation of church and state. In that case, Cornerstone tried hosting a religious meeting in a state university, but was denied, despite the fact that other secular meetings were allowed. The Supreme Court's ruling was that Cornerstone's 1st amendment rights outweighed the states interest of separation of church and state. "In achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution -- is limited by the Free Exercise Clause". The underlying purpose of separation between church and state is to chain the government from religious discrimination; both in

Widmar and in this case, the state discriminates on the basis of religion under the mantle of state purity and complete disentanglement with religion.

The second reason for why the Montana 10 is unconstitutional is because it discriminates based on religion.

In *Trinity Lutheran Church v. Comer*, the Supreme Court held that “Denying a generally available benefit solely on account of religious identity imposes a penalty of the free exercise of religion”. In this case, the Montana Department of Revenue is discriminating against Stillwater and the petitioners, by not allowing them to receive funds based solely because of their religious affiliation. *Lyng* states that, “government action can not penalize religious activity, benefits, and privileges enjoyed by other citizens”.

The opinion of the court also expressed that individuals and institutions may not be put in a position that requires them to choose between their religion and receiving a government benefit (*McDaniel*). (“Trinity Lutheran is not claiming any entitlement to a subsidy. It instead asserts a right to participate in a government benefit program without having to disavow its religious character.”)

The Montana constitution is favoring non-religion over religion. The institutions that qualify for the government program under rule 1 may only be secular. When as stated in *Rosenberger v. Rector*, governments can’t discriminate in the distribution of public benefits based upon religious status or sincerity

This is different from the position in *Locke v. Davey*. “Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*”, which was to use the money to pursue a Theology degree (*Trinity Lutheran discussing Locke v. Davey*). In this case however, the petitioner was denied a scholarship not because of its pursuance to education, but because of their religious affiliation. The first amendment states that the government cannot coerce you into practicing a religion but they also can’t force you into not practicing. The government shouldn’t be allowed to tell the petitioner that he/she can’t pursue his/her religion schooling if he/she wishes to receive tuition for private school.

In *Zelman v. Simmons-Harris* the Supreme court already addressed the issue that providing school vouchers, and to that extent offering scholarships, to religious institutions does not violate the Establishment clause; and to that extent, a person denied of that same government aid, merely on the grounds that they have an affiliation with religion, does violate the Free exercise clause.

Offering opportunities to education, such as the Big Sky program, is not the same as the government endorsing a religion. The individual makes the choice to endorse that religion, the government is merely allowing the individual to exercise their freedom of choice as citizens. Both *Zelman v. Simmons-Harris* and *Everson v. Board of education of Ewing*, find that government aid to religion incidental to the main purpose of greater opportunity is constitutional.

Conclusion

The state of Montana may not recognize that its constitution is harmonious with the U.S constitution, as it pertains to the Free Exercise Clause. Therefore the Montana Supreme Court may not use it to eradicate Big Sky. The Montana court overstepped its bounds when

it used Montana Constitution, Article X to strike a program that the Montana legislature passed. The eradication of the Tax Credit Program falls into the hands of the Montana legislature, not the Montana Supreme Court

Prayer

Based on the reasons set forth,
we pray that this Honorable Court
reverse the lower court's ruling

Respectfully Submitted,

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