No. 18-1195

In The Supreme Court of the United States

Espinoza,

Petitioner,

V.

Montana Department of Revenue

Respondent,

On Writ Of Certiorari
To The Supreme Court Of The United States

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether invalidating a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools violates the Free Exercise Clause of the First Amendment?

Statement of the Argument

Article X, section 6 of the Montana Constitution states that counties, cities, towns, school districts, or businesses cannot give money or land for any religious purpose whether it be directly or indirectly.

Montana Article X, section 6(1) violates *Trinity Lutheran Church of Columbia v. Comer* which held that if the state gives the playgrounds to secular schools then they must also give them to religious schools. Because the schools are not using these playgrounds for religious purposes, the state has to give them the playground. If you give money to secular schools, you give it to religious schools as well. In not doing so they would be violating the First Amendment Free Exercise Clause of the U.S. Constitution. The article is violating by invalidating the Big Sky program because it offers the choice of attending religious schools.

Zelman v. Simmons-Harris says that the state can give vouchers if they decide. This applies to our case because the state could give the money to the religious schools if they decided to. As long as the money isn't used for religious purposes. The purpose for the money in this case is to get children a basic education. If Montana were to give money to the religious schools for secular purposes and end up supporting religion as a secondary result of the primary goal, it would not be unconstitutional. The application of Article X, section 6(1) that bars religious options in programs discriminates against the religious "use" of student-aid money.

Argument

I. Under *Trinity Lutheran v. Comer* the state has to give the schools the taxpayer money because they are not using the money for religious purposes, and the state is giving money to secular schools.

In *Trinity* the court says that if you give an item to the public schools you must also give it to secular schools as well. In *Trinity* the item was rubber for safer playgrounds. In this case there is money for scholarships so that kids can go to school. "Denying a generally available benefit solely on account of religious identity imposes a penalty on the Free Exercise Clause of religion." *Trinity Lutheran Church of Columbia v. Comer* This was the first out of two precedents set in this case. The second precedent set in this case is that if the school is not using the money for religious reasons then it is completely legal to give them this money. The money isn't being given to this school so that they can teach about God. The main purpose for this money is to give children a basic education. If the money was strictly for religious purposes then secular schools wouldn't be getting any of the money given to the state by the taxpayers. Montana Constitution article X, section 6(1) interpreted to bar religious options from student aid programs directly violates the precedent set by *Trinity* and in doing so violates the First Amendment Free Exercise Clause of religion. Montana's blatant requirement of all of its organizations to exclude religion from anything that gives resources completely disregards the first amendment and should be overruled. Montana forces the parents to choose between their religion and being able to participate in the student-aid program. "To condition the availability of benefits… upon [a recipient's] willingness to… surrender his religiously impelled [status] effectively penalizes the free exercise of his constitutional liberties." *McDaniel v. Paty, 435 U.S. 618 (1978)* Forcing a person to choose between what they believe and receiving help from their government is a violation of their unalienable rights. The government may not discriminate against religious "beliefs," "conduct" that is "religiously motivated," or religious "status." 137 S. Ct. at 2021. By completely disbanding Big Sky for affording parents the choice of sending their children to religious schools Montana

is prohibiting parents from exercising their own religion. Furthermore, religion is not directly supported at any point of the program therefore Montana has no reason to get rid of Big Sky. Montana violates both *Trinity* and the First Amendment.

The *James Madison, Memorial and Remonstrance against Religious Assessments* states, "The Religion then if every man must be left to the conviction and conscience of every man; it is the right of every man to exercise it as they may dictate." Meaning that the choice of exercising one's religion or not doing so should be left up to that one man alone. Article X, section 6(1) as interpreted to prohibit religious options in the Big Sky student aid program goes against the remonstrance. Montana is imposing an unconstitutional law that should not be applicable.

Article X, section 6(1) barring religious options discriminates against "religious uses" of student aid money in violation of multiple precedents. The court held it unconstitutional for the government to exclude groups from receiving student activity funds simply because the funds would be "used… for sectarian purposes" or " religious activities" *Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828, 843, 845-46* The Court has never upheld an individual aid program that excludes religious sects except for in *Locke* when the law was narrowly tailored. Some religions require religious schooling; the separation between religious use and religious status is virtually indistinguishable in most people's lives.

II. Under *Zelman v. Simmons-Harris,* Big Sky can give the money to religious schools if they decide to.

In *Zelman v. Simmons-Harris 536 U.S. 639 (2002)* the court decided that the Cleveland City School District could vouchers to students whether it be a religious school or secular schools if they wanted to but it was not required. This was possible because supporting religion was a secondary result of the primary goal which was promoting education. We are looking at this case because it is very similar to ours with both schools giving monetary aid. If in *Zelman* it is permissible to give vouchers to students then it is fine for the program Big Sky to give the scholarships to parents who plan to send their children to either religious or secular schools. As previously shown in *Trinity,* as long as these vouchers aren't being used

for religious purposes and are available to all schools, they should also be given to parents who choose religious schools. Another precedent made in this case is that the respondent cannot interfere with others' money. *Reed v. Rhodes* says that if the change makes a "crisis of magnitude" then it cannot be enforced. If we look at the damages that the shutting down Big Sky could cause we see that many students would have to go back into the public education system because their parents wouldn't be able to afford the private school tuition. Integrating these students back into conventional schools could be problematic for them depending on the neighborhood and school attended. Bullying and violence ultimately weigh in as a factor when all is considered in shutting down Big Sky.

III. *Locke* proves that Montana Constitution's article X, section 6(1) cannot hold up under constitutional pressure.

Although in *Locke v. Davey 540 U.S. 712 (2004)* the court ruled that religious exclusion was applicable because it was "narrowly tailored," the case also stressed that the exclusion reflect no "hostility" toward religion, "does not require students to choose between their religious beliefs and receiving a governmental benefit," and is justified by a "historic and substantial state interest." Article X, section 6(1) doesn't hold under two of the four requirements. The interpretation that bars religious options is not narrow and it makes students choose between religion and government assistance. The law is not narrow because it bars all religious options no matter what they entail or hope to achieve. A law cannot be narrowly tailored if it bars any form of religious sects to be excluded from receiving government aid. The ruling in the Montana Supreme court also forces students to choose between religion and help. Montana only allows secular programs and organizations to receive government assistance therefore discriminating against the practice of religious faith. *Jefferson's Letter to the Danbury Baptists (1998)* "religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of the government reach actions only," meaning that the government may not do anything to come

between a man and his faith because faith is not in the physical sense; therefore it cannot be regulated.

Article X, section 6(1) as applied to prohibit religious options does not pass strict scrutiny. The law is not narrowly tailored for Montana Article X, section 6(1) to enforce it to protect their interest. The interest that they have in not supporting or progressing religion in anyway is compelling, but to ban any form of government assistance from being given to religious sects. *Cantwell v. Connecticut, supra, at 303-304,* if the object of the law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, see *Employment Div., Dept. of Human Resources of Ore v. Smith, supra, at 878-879;* and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest. Since the law is not narrowly tailored, the violation of the Free Exercise Clause is unconstitutional. Big Sky should be reinstated and Montana Constitution article X, section 6(1) should be overruled.

IV. Under *Lukumi* Big Sky can give the scholarships as long as they are not being used in an extreme way.

The Supreme Court did rule in *Lukumi's* favor and said that as long as the request is not too extreme and is neutral to religion, then it is allowed. In this case the request is not extreme at all; the petitioner is asking that the Big Sky program be reinstated because article X, section 6(1) violates the Free Exercise Clause of the First Amendment of the U.S. Constitution. *Church of Lukumi Babalu Aye Inc. v. City of Hialeah* The Free Exercise Clause bars government action aimed at suppressing religious belief or practice. *Cf. McConnell & Posner, An Economic Approach to Issues of Religion Freedom, 56 U. Chi. L. Rev. 1, 35 (1989)* ([A] regulation is not neutral in an economic sense if, whatever its normal scope or its intentions, it arbitrarily imposes greater costs on religious than comparable non religious activities)" The student aid money that is being given to parents from Big Sky is not strictly for religious schools or to promote religious purposes. The primary goal is to promote education, so the secondary repercussion of reaching that goal is indirectly supporting religion if a parent chooses to send their child to a religious school. Since the support is not purposeful or primary, there is no reason for Big

Sky to be canceled. With these reasons alone Big Sky should be reinstated and article X, section 6(1) should be overruled.

V. According to *Nyquist,* not allowing religious options to be considered in student aid would damage the education system.

The right to select among alternative educational systems should be available in a pluralistic society, and that any sharp decline in nonpublic school pupils would massively increase public school enrollment and costs, seriously jeopardizing quality education for all children. *Committee for Public Education v. Nyquist 413 U.S. 756 (1973)* By not allowing parents to choose religious options, Montana is forcing them to go to public schools which will eventually become overcrowded and untamely. Also, the switch into public schools from private schools could be damaging to the children. Bullying, violence, and a decline in successful academic performance may stem from the environment change.

In conclusion we pray that this court reverse the Montana Supreme court's decision and allow families to continue using scholarships the way they see fit.