Petitioner Brief— Liu & Lew

To be in the Supreme Court of the United States

February Term, 2020

KENDRA ESPINOZA, PETITIONER

V.

MONTANA DEPARTMENT OF STATE REVENUE, RESPONDENT

PETITIONER'S OPENING BRIEF

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Oral Argument: https://www.youtube.com/watch?v=uRXcPFmy_cs&feature=youtu.be

QUESTION PRESENTED

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

Table of Authorities

Cases

Constitutions

Other Authorities

Statement of Argument

The Establishment and Free Exercise Clauses of the First Amendment function to separate an individual's religious freedom from government involvement. As the understanding of the First Amendment has evolved, a separationist view of church and state is no longer applicable. Under *Lynch v Donnelly,*[1] the government can support generally religious values as long as it is not excessively entangled. In *Espinoza v Montana Department of Revenue,* non-profit organization Big Sky Scholarships should be allowed to provide tax credits for parents whose children attend religious schools.

The Department of Revenue's application of Article 10, § 6 of the Montana constitution[2] violates the Free Exercise Clause. When discriminating against "suspect classifications," the government has to withstand the standard of strict scrutiny. Here, there is no state interest advanced by excluding religious schools from generally available, public benefits. Under strict scrutiny, Montana unconstitutionally discriminates against religious institutions.

In addition, *Trinity Lutheran Church v Sarah Parker Pauley*[3] ruled that forcing institutions to choose between religious status and government benefit is unconstitutional under the Free Exercise Clause. The government cannot single out an institution for its religious character; doing so constitutes an act of animosity and is not permissible under the First Amendment. Furthermore, providing generally available funds to religious institutions does not violate the Establishment Clause. When applying the three-pronged test outlined in *Lemon v Kurtzman*[4] to this case, it is clear that the provision of funds to religious schools by a secular program is constitutional under the Establishment Clause. For these reasons, the respondent, Montana Department of Revenue, is in violation of the First Amendment's Free Exercise Clause[5] by invalidating a religiously neutral student-aid program.

Argument

I. The Montana Department of Revenue's application of Article 10, Section 6 of the Montana state constitution fails to adhere to the strict scrutiny standard.

The freedom to exercise religious beliefs is fundamentally rooted in the United States constitution. In creating the First Amendment, Framer James Madison advocated for the inclusion of the Establishment Clause in order to separate government involvement from religion, fearing that state support would infringe on the "conscience and conviction" of an individual.[6] This sentiment led the Framers to develop the Establishment Clause to prohibit laws "respecting an establishment of religion" and the Free Exercise Clause to disallow laws "prohibiting the free exercise thereof."[7]

The Founders' inclusion of the Establishment Clause was never meant to demonstrate animosity towards religion in general. Although Thomas Jefferson advocated for "building a wall of separation between Church & State" in his Letter to Danbury Baptists,[8] The Court need not operate under this "wall of separation," as stated in the majority opinion in *Lynch v Donnelly*: "The concept of a 'wall' of separation between church and state is a useful metaphor but is not an accurate description of the practical aspects of the relationship that in fact exists."[9] In other words, the government can operate under the notion of nonpreferentialism to support generally religious values as long as it does not favor one denomination over another.

Protections against religious discrimination have been expanded under the Fourteenth Amendment.[10] Under the Amendment's guarantee of fundamental rights, the standard of strict scrutiny must be met for the government to discriminate against race, national origin, or religion. To meet this standard, the law must be narrowly tailored: the government must prove that the law advances its interest, that it is not overly restrictive, and that there are no alternative less-restrictive means to serve the same interest.[11]

The Montana Department of Revenue's application of its state constitution specifically targets institutions for its religious character and in doing so fails to meet the strict scrutiny standard. In this case, denying scholarship funds from religious institutions does not advance any state interest. Providing scholarship funds does not serve the interest of separating church and state because the program is already secular in purpose and neither supports nor inhibits religious values. It is not in the interest of the state to deny from religious institutions a generally available public benefit; rather, this denial portrays animosity against religion and is not permissible by the First Amendment.[12]

II. Forcing institutions to choose between its religious character and receiving a government benefit violates the Free Exercise Clause of the First Amendment.

In *Trinity Lutheran Church v Sarah Parker Pauley*,[13] a church was denied a generally available public benefit solely because of its religious character. The state of Missouri argued that providing Trinity Lutheran with benefits supported by public money would violate the Establishment Clause, but the Court found that excluding Trinity from these benefits was unconstitutional under the Free Exercise Clause.[14] As Chief Justice Roberts writes in the majority opinion, the government cannot exclude individuals *"because of their faith, or lack of it*, from receiving the benefits of public welfare legislation."[15] In other words, it is unconstitutional to force an institution to choose between keeping its religious affiliation and receiving a public benefit. If the institution qualifies in all other criteria to receive the generally available benefit, religion cannot be the only reason that it is excluded from the program.

This distinction sets the opinion in *Trinity Lutheran* apart from that of *Locke v Davey*.[16] In *Locke v Davey*, the Court considered whether it is constitutional for Washington's Promise Scholarship Program to exclude the pursuit of a theology degree from an otherwise inclusive program.[17] The Court ruled that based on the idea of "play in the joints," which concerns actions permitted by the Establishment Clause but not required by the Free Exercise Clause, the state of Washington was not required to provide scholarship money to students pursuing a degree in devotional theology.[18]

Unlike *Locke v Davey, Trinity* involves the constitutionality of forcing an institution to remain religious or forsake its affiliation in order to receive a government benefit. Chief Justice Roberts distinguished these two cases by describing the extent of the government's ability to exclude on the basis of religion: "Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church."[19] Under this same distinction, the Montana Department of Revenue should not be able to discriminate against religious institutions solely for its religious character. Article 10, Section 6 of the Montana Constitution allows prohibition of public funds towards "a church, school, academy, seminary, college, university, literary or scientific institutions, or any other sectarian institutions owned or controlled in whole or in part by any church, religious sect, or denomination,"[20] which imposes the dilemma in of remaining religious or receiving a government benefit as seen in *Trinity v Pauley*.[21] The scholarship program in question provides a neutral, generally available benefit to parents and is not an intermediary step towards supporting religious endeavors. Allowing tax credits to parents will not violate the Establishment Clause by favoring the Christian religion; it will only extend an equal benefit publicly provided to other donors, which is both permissible under the Establishment Clause and necessary under the Free Exercise Clause to create neutral conditions allowing free religious practice.[22]

Furthermore, *Locke v Davey* was decided upon the assumption that Davey's intent could be separated from his religious identity,[23] a consideration that is not applicable to this case. The Court decided that Davey's ability to receive pursue his religious endeavors without the scholarship money allowed the Promise Scholarship Program exclude funds towards the pursuit of theology, but in this case, Montana religious schools have no alternative to receiving the same benefits that the Big Sky Scholarship program provides. As Justice Scalia states in his dissent of *Locke v Davey*, "When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax."[24] Montana religious schools are not asking for a special benefit that other non-religious institutions cannot receive. By denying these institutions a publically available benefit, the Montana Department of Revenue unconstitutionally disadvantages religious institutions simply for being religious.

This case should follow the precedent set by *Trinity* and not *Locke v Davey* because religious schools in Montana, like Trinity Lutheran Church, are excluded solely because of its religious character. Big Sky Scholarships was created to neutrally support private schools as well as public schools. The purpose of the program is not to support religion, and by preventing parents of children attending private religious schools from receiving tax credits, the Department of Revenue poses the same dilemma deemed unconstitutional in *Trinity*.

By treating religious schools differently because of its religious association, the government departs from the standard of neutrality as established in *Employment Division, Department of Human Resources of Oregon v Smith.*[25] The Court held that the Free Exercise Clause "did not entitle the church members to a special dispensation from the general criminal laws on account of their religion."[26] In this case, that same holding applies. Parents of children attending religious schools are not receiving a "special" benefit by being allowed tax credits. The Court made clear in *Employment Div.* that "laws imposing 'special disabilities on the basis of . . . religious status' trigger the strictest scrutiny,"[27] being careful to distinguish between laws singling out religion and laws maintaining neutral treatment. "The Free Exercise Clause *did* guard against the government's imposition of 'special disabilities on the basis of religious views or religious status,'" While the government can make a law prohibiting disfavorable behavior, it cannot specifically single out institutions for its religious affiliation. If a benefit is "neutral and generally available,"[28] as it is in this case, the government cannot exclude religious institutions.

When a law is not "neutral and generally available," it is unconstitutional to impose unnecessary burdens upon religious institutions. The Court held in *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*[29] that a facially neutral law is unconstitutional if its purpose penalizes the free exercise of religion without meeting the "most exacting scrutiny." Here, the Department of Revenue imposes unnecessary burden by denying a government benefit on the sole basis of religious character. Religious institutions must choose between their affiliation and their ability

to receive a public benefit, an imposition that is both unconstitutional under *Trinity*[30] and a violation of the Free Exercise Clause as established in *Employment Div.*[31] and *Lukumi*.[32]

III. The provision of funds withstands the scrutiny standard outlined by *Lemon v Kurtzman* and does not violate the Establishment Clause of the First Amendment.

The First Amendment jurisprudence has evolved from the Warren Court's "wall of separation" standard to the idea that a law can accommodate people with religious affiliations without becoming excessively entangled in religious affairs.[33] In 1971, *Lemon v Kurtzman*[34] outlined a three-prong test to determine whether or not a law withstands the scrutiny standard. A case only meets this standard when 1) it has a secular legislative purpose, 2) its principal or primary effect neither promotes nor inhibits religion, and 3) it does not foster "excessive government entanglement with religion."[35] Justice O'Connor suggested in her separate opinion in *Lemon* that a "strict separationist" view of church and state cannot be realistically applied, and that an "endorsement" perspective of the Lemon test should be used instead.[36] This "endorsement" perspective would allow for equal participation of religious communities in the "political community" without the government becoming "overly involved" with religion.[37] When held to the prongs of the Lemon Test and the endorsement perspective, the provision of funds by Big Sky Scholarships to religious institutions is permissible by the Establishment Clause.

The first prong of the Lemon test requires that the government must have a secular motive, a requirement that is met by Big Sky Scholarships. The program was founded to provide benefits to private schools, private religious schools, and public schools, thus making it secular in nature. It does not disproportionately favor religious institutions, nor does it specifically seek to serve them.

When the requirement of secularity is not met, we concede that allocating funds to religious institutions specifically is unconstitutional. In *Committee for Public Education v. Nyquist*,[38] a public school was not granted access to three financial aid programs created by New York tax law amendments solely intended to benefit nonpublic schools. In order for schools to receive such funds, the schools were required to be private. This program disproportionately benefited religiously affiliated schools, as 85 percent of nonpublic schools in this program Roman Catholic. Although the Committee for Public Education argued that §1 and 2 of the New York amendment of Chapter 414[39] maintains a secular purpose of providing "maintenance and repair" and ensuring students' "health, welfare and safety,"[40] the Supreme Court deemed all sections unconstitutional because "all or practically all" schools benefiting from the program were religious.

Unlike *Committee for Public Education v. Nyquist,*[41] the Montana tax credit program is purely secular in purpose and is not intended to only benefit non-public institutions. Big Sky Scholarships' funds were available to all types of schools and not specifically tailored to supporting private schools. The public availability of the Montana tax credit program, unlike the program in *Nyquist*, upholds the first prong of the Lemon Test and does not violate the Establishment Clause.[42]

Secondarily, the Lemon Test requires that a policy neither promotes nor inhibits religion in its principal or primary effect. In the context of the Big Sky Scholarships program, providing aid for both religious schools and non religious schools does not function to promote a specific denomination. The program was merely implemented to provide equal access to aid for all schools, regardless of religious background.

This act of providing funds to support all schools maintains an individual's freedom of choice and neither inhibits or promotes religion. In *Zelman v Simmons-Harris,*[43] the Court held that supplying vouchers to low-income parents did not violate the Establishment Clause.[44] The voucher program allowed parents to send their children to private, private religious, and public schools, which did not constitute support for religious education. Rather, the program was upholding a parent's ability to exercise individual and voluntary choice. Chief Justice Rehnquist described the role of individual choice in the majority opinion: "[the] Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice."[45] Under this precedent, the provision of scholarship funds by Big Sky Scholarships is constitutional because religious character is neither a requirement nor a consideration in providing funds. Providing funds to religious institutions simply preserves a "private choice" in education.

Similarly, in *Everson v Board of Education*,[46] authorizing state reimbursements to parents who send their children to either religious schools or public schools through a secular bus system was ruled as constitutional. As Chief Justice Black states in his majority opinion, "[The First] Amendment requires the state to be neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." [47] The neutral intent of the bus program did not propel a religious cause; it simply served the purpose of providing transportation to *all* students regardless of their religious background. Similarly, the Montana Department of Revenue provides aid to all individuals in the community without considering religious status. The secular nature of the program ensures that the second prong of the Lemon test is not violated when funds are provided for religious schools.

Lastly, the provision of funds does not foster excessive government entanglement with religion. The Lemon test's third prong was first conceptually introduced in 1970 as a way to avoid unnecessary interaction between the government and religious institutions.[48] The Court explained that "although some interaction between church and state will occur, it is necessary to avoid situations where the government is overly involved with religion, such as when 'official and continuing surveillance' is required."[49] As we mentioned above, the program has a secular purpose and does not specifically further a religious mission. By this explanation, the Montana Department of Revenue would not become "overly involved" with religion because it is creating an equal opportunity for parents to choose which institution their children attend. This allowance

of choice would not require "official and continuing surveillance," as the state is not favoring religious values since the use of scholarship funds towards private religious institutions is also afforded to non-religious private institutions as well as public schools.

When held to the three prongs of the Lemon test, the provision of funds by Big Sky Scholarships is constitutional under the Establishment Clause of the First Amendment.[50] The secular nature of the program would not promote religious values any more than it promotes the secular mission of a non-religious school. Withholding funds, however, inhibits religion and causes a disadvantage for parents whose children attend religious schools. *Zelman*[51] and *Everson*[52] have established that creating equal opportunities by providing funds for religious schools is not unconstitutional; the Department of Revenue should adhere to these rulings and provide the same publicly available benefit for non-secular institutions in Montana.

Conclusion

The question central to this case is whether the Montana Department of Revenue can invalidate a generally available and religiously neutral student-aid program solely because the program affords students the choice of attending religious schools. As established in *Trinity v Pauley*,[53] the state cannot deny a religious institution funding just because of its religious character. The Department of Revenue is acting in the same unconstitutional manner here. By treating religious schools differently for no other reason than their religious character, the Department of Revenue unconstitutionally inhibits religion and violates the Free Exercise Clause of the First Amendment.[54]

Not only does the Department of Revenue stray from precedent by denying funds to religious schools, it also fails to withstand the strict scrutiny standard.[55] In laws concerning "suspect classifications," which includes religion, the government must adhere to this standard to guarantee due process of law outlined by the Fourteenth Amendment.[56] There is no state interest here: the government is not advancing the interest of separating church and state because the student-aid program is already religiously neutral and does not disproportionately favor religious institutions.

In addition, providing funds to religious institutions through Big Sky Scholarships would not violate the Establishment Clause.[57] The Lemon test outlines three prongs used when litigating issues of Establishment, and none of the three prongs are violated when providing funds to religious schools. As the student-aid program is religiously neutral, there is no legal backing the Department of Revenue has to claim an Establishment violation.

The invalidation of a secular, publicly available student-aid program is unconstitutional under the Free Exercise Clause.[58] The Montana Department of Revenue cannot act unanimously against religion; there are no legal grounds to deny religious schools a generally available government benefit. Such an act would undermine the preservation of choice and free religious exercise fundamental to the First Amendment.

Endnotes

1. *Lynch v. Donnelly*, 465 U.S. 668 (1984)
2. MT Const. art. X, § 6
3. *Trinity Lutheran Church v Sarah Parker Pauley*, *582 US _ (2017)*
4. *Lemon v. Kurtzman*, 403 U.S. 602 (1971)
5. U.S. Const. amend. I.
6. *The Papers of James Madison*. Edited by William T. Hutchinson et al. Chicago and London: University of Chicago Press, 1962--77 (vols. 1--10); Charlottesville: University Press of Virginia, 1977--(vols. 11--).
7. U.S. Const. amend. I.
8. "Jefferson's Letter to the Danbury Baptists The Final Letter, as Sent." Library of Congress. Accessed February 13, 2020. www.loc.gov/loc/lcib/9806/danpre.html.
9. *Lynch v. Donnelly*, 465 U.S. 668 (1984)
10. U.S. Const. amend. XIV, § 1.
11. "Strict Scrutiny." Law Library - American Law and Legal Information. Accessed February 13, 2020. https://law.jrank.org/pages/10552/Strict-Scrutiny.html.
12. U.S. Const. amend. I.
13. *Trinity Lutheran Church v Sarah Parker Pauley*, 582 US _ (2017)
14. *Trinity Lutheran Church v Sarah Parker Pauley*, 582 US _ (2017)
15. *Trinity Lutheran Church v Sarah Parker Pauley*, 582 US _ (2017)
16. *Locke v. Davey,* 540 US 712 (2004)
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25. *Employment Division, Department of Human Resources of Oregon v Smith,* 494 US 872 (1990)
26. *Employment Division, Department of Human Resources of Oregon v Smith,* 494 US 872 (1990)
27. *Employment Division, Department of Human Resources of Oregon v Smith,* 494 US 872 (1990)
28. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993)
29. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993)
30. *Trinity Lutheran Church v Sarah Parker Pauley*, 582 US _ (2017)
31. *Employment Division, Department of Human Resources of Oregon v Smith, 494 US 872 (1990)*
32. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993)
33. James M. Lewis & Michael L. Vild, *Controversial Twist of Lemon: the Endorsement Test as the New Establishment Clause Standard*, 65 Notre Dame L. Rev. 671 (1990).
34. *Lemon v. Kurtzman*, 403 U.S. 602 (1971)
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36. James M. Lewis & Michael L. Vild, *Controversial Twist of Lemon: the Endorsement Test as the New Establishment Clause Standard*, 65 Notre Dame L. Rev. 671 (1990).
37. James M. Lewis & Michael L. Vild, *Controversial Twist of Lemon: the Endorsement Test as the New Establishment Clause Standard*, 65 Notre Dame L. Rev. 671 (1990).
38. *Committee for Public Education v. Nyquist,* 413 U.S. 756 (1973)
39. NY Const. ch. 414, § 1, 2
40. *Committee for Public Education v. Nyquist,* 413 U.S. 756 (1973)
41. *Committee for Public Education v. Nyquist,* 413 U.S. 756 (1973)
42. U.S. Const. amend. I.
43. *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002)
44. U.S. Const. amend. I.
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46. *Everson v. Board of Education,* 330 U.S. 1 (1947)
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51. *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002)
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53. *Trinity Lutheran Church v Sarah Parker Pauley*, 582 US _ (2017)
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