IN THE SUPREME COURT OF

THE UNITED STATES

Espinoza

Petitioner

Vs.

Montana Department of Revenue

Respondent

Aileen Mai and Daniel Sawyers

Brief for petitioner

Table of cited authorities:

Statement of the case

In 2015, the ¨ Tax credit for qualified education contributions¨ act was enacted by the Montana Legislature. Under this act, individuals can donate money and receive up to a $150 tax credit. The organizations that received this money can use these funds to provide scholarships to qualified families/children. Big Sky, one of these organizations planned to use this money for religious and non-religious schools. In order to comply with the Montana Constitution, the Department of Revenue issued rule one , and in accordance with this, the Big Sky program is unable to give these scholarships to the students, and the whole program was terminated.

Argument:

Today, the petitioner will be demonstrating that there is no legitimate interest shown by the government, and that section 1 as applied in the Montana Constitution discriminates against religious beliefs, conduct, and status, as well as imposes special disabilities on the basis of religious status in contravention to *Trinity Lutheran Church of Columbia v. Comer.*

1. There is no substantial state interest in enforcing article 10 section 6 of the Montana constitution which under *Church of Lukumi Babalu Aye Inc. v. City of Hialeah (1993)* would make the discrimination of religious schools in this case unsanctioned.

The certified question presented to this court concedes that the program itself is religiously neutral and the Montana Constitution directly targets religion in itself which according to *Church of Lukumi Babalu Aye Inc. v. City of Hialeah (1993)* would make it unconstitutional unless it took care of a legitimate interest that it was specifically tailored to

do, but since the official question admits that it is religiously neutral there can be no legitimate interest.

According to *Church of Lukumi Babalu Aye Inc. v. City of Hialeah (1993)* "(a) Under the Free Exercise Clause, a law that burdens religious practice need not be justified by a compelling governmental interest if it is neutral and of general applicability. *Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U. S. 872.* However, where such a law is not neutral or not of general application, it must undergo the most rigorous of scrutiny: It must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." Neutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied. There is no question that article 10 section 6 of the Montana Constitution forces a burden upon religion considering the amount of potential funding that has been lost among schools such as Stillwater Christian School in this case simply because they are partly associated with a religious sect. While it could be argued that there was no burden if the funding went only to public education, the scholarship itself was designed to generally be applicable to "qualified education providers;" however the later issuance of rule 1 directly placed a burden on Stillwater by specifically excluding it from a widely available government program. Considering that the burden was directly targeted at religion in itself, under *Church of Lukumi Babalu Aye Inc. v. City of Hialeah (1993)* it must undergo the most rigorous of scrutiny" and "It must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." because it is not applied generally and neutrally . The standard of compelling government interest is simply not met within this case and article 10 section 6 is not "narrowly tailored" in any sense as it uses general terms to discriminate

against any "sectarian purpose". There is no substantial government interest in directly targeting religion in this case as the grant program is religiously neutral. With the grant being religiously neutral and widely available, then there can be no plausible substantial government interest as the government interest in cases like these are motivated by the state´s desire to not put forth any religious cause through government action. Especially under the most "rigorous scrutiny" where a "compelling government interest" is required, this court should come to the conclusion that the government action in this case is in violation of *Church of Lukumi Babalu Aye Inc. v. City of Hialeah (1993).*

2. Section 1 as applied to the Montana Constitution violates the precedent set forth in *Trinity Lutheran* by discriminating against religious beliefs, conduct, and status as well as imposes special disabilities on the basis of religious status.

When looking at whether or not there was a violation of the free exercise clause, we can look to *Trinity Lutheran,* where this Court reiterated three "fundamentals of [its] free exercise jurisprudence.".

1. a law "may not discriminate against some or all religious beliefs.' "
2. "Nor may a law regulate or outlaw conduct because it is religiously motivated."
3. And finally, laws cannot impose "special disabilities on the basis of . . . religious status." *Church of Lukumi Babalu Aye*

Only one of these principles needs to be violated in order for there to be a violation of the free exercise clause.

The first principle is violated because rule 1 provided that the scholarship could not be provided to students at 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. This violates the 1st fundamental principle because it discriminates against all religious beliefs because they are not able to give and receive scholarships under rule 1 of the Montana Constitution. Article 1 of the Montana constitutions says that these scholarship/grants can only be given to secular institutions, which leaves religious institutions in the dark as they are unable to be given this money to help with a student's education, this means that all religions are discriminated because the institutions where the students who go there are worshippers are not getting any aide while secular institutions are given aid. This also goes against *Zelman v. Simmons-Harris* because amendment 1 is not neutral with respect to religion; in fact, it is favoring non-religious institutions over religious institutions, making it unnatural and unconstitutional.

The 2nd principle states that a law may not outlaw or regulate conduct because it is religiously motivated. There is a violation of this because this discourages private and/or religious organizations to give scholarships to low income students who otherwise would not have gone to those schools or organizations, meaning that it was religiously motivated because it did not want religious schools or institutions to receive aid which created an undue burden upon the appellants One of the founding fathers Thomas Jefferson wrote in his letter to Danbury Baptist Church ”I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties”. This quote shows a strong sentiment from Jefferson in opposition of any state interference with the practice of religion. Additionally, it also discriminates against religious families and discourages them from attending these schools. In the historical source of *Document 69 Joseph Story, Commentaries on the Constitution 3:§§*

1865--73 it states that the government should focus on ¨securing to all citizens the free exercise of religion.¨ which is violated because Espinoza´s religious status is compromised and she is discouraged to practice take part in her religion by not going to a religious school. Kendra Espinoza testified that a major reason why she chose Stillwater Christian School is that she is Christian and she loves the fact that the school teaches the same Christian values that she and her family believe in and teach at home. Citing the record, the other family said they sent their child to Stillwater for its academic rigor. Therefore, Article 1 prevented Stillwater from giving the scholarship to Espinoza´s kids because it allowed them to choose to go to schools that have secular/religious connections and ties.

The 3rd prong is that the laws/legislation cannot impose special disabilities on the basis of religion. However, Rule 1 does impose special disabilities on the basis of religion. Because in Section 1, these families can never receive any public aid as long as they go to a school that has connections to a religious group, organization, or sect which would compromise their status and create a special disability only towards people who chose to go to schools connected to a religious organization/sect. So by not giving Espinoza the scholarship money due to rule 1, rule 1 is creating a barrier and a burden on Espinoza to pick between her religion, and sending her kids to public school, which imposes a special disability on Espinoza on the basis of her religion, which violates the 3rd fundamental principle. This creates a special disability because if she had gone to a non-religious or non-denominational school, she would have gotten the financial aid, but because she did not and chose to go to a private school, her not getting the financial aid imposes a special disability on the basis of religion. And in *Joseph Story Commentaries on the Constitution* he states that "there is much more to be pleaded than for the former, (that is, revealing the ordinances of

the church,) being a matter of private conscience, to the scruples of which our present laws have shown a very just, and Christian indulgence. For undoubtedly all persecution and oppression of weak consciences, on the score of religious persuasions, are highly unjustifiable upon every principle of natural reason, civil liberty, or sound religion. But care must be taken not to carry this indulgence into such extremes, as may endanger the national church. There is always a difference to be made between toleration and

Establishment." meaning that extra care has to be taken in order to ensure that religion and religious school are not discriminated against, but in today´s case, there was no extra care taken to ensure this.

Another consideration that this court should consider is preference, statistically; Americans would want affordable private schools rather than public e or charter schools. Additionally, DiPerna & Shaw, supra, at 46-48, states that the fact that parents whose children go to private school report a higher satisfaction rate than parents whose children go to a public school. Additionally, in the record, some of the families decided to send their children to Stillwater due to the academic rigor or the athletic program, so these preference can play a role when Espinoza and the other families decided on sending their kids to Stillwater, and in the case of Kendra Espinoza, she applied for a scholarship, but when it was denied, not only is it devastating, it is also unconstitutional because The government may not "exclude members of any . . . faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 16 (1947). This shows a violation because it excludes and discriminates against Espinoza and her family from receiving benefits because not only does it regulate conduct by preventing religious families from going to religious school that may be better,

but as long as they decide to go to a Christian or religiously connected school, they will never be able to receive any aid. And under the Free Exercise Clause U.S. Constitution Amendment 1, a law that burdens religious practice need not be justified by a compelling governmental interest if it is neutral and of general applicability. *Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U. S. 872.* However, where such a law is not neutral or not of general application, it must undergo the most rigorous of scrutiny: It must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. Neutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied. And because rule 1 is not neutral and can't be generally applied, it must go through the highest scrutiny and be backed up by a compelling government interest, which as stated previously, there is not one.

Espinoza was mostly motivated to send her kids to Stillwater because of her religion and her beliefs, and many devoted families are encouraged or even mandated to send their kids to full time religious school throughout their life. *Vatican Council II, Gravissimum educationis (1965); see also Codex Iuris Canonici 1983 c.798* says that whenever possible, parents or couples are required to send their kids to a Catholic schooling program as well as how many orthodox Jews believe that it is necessary to send their kids to Jewish education/schooling. So by not allowing the kids to get the scholarship, this will violate their free exercise because sometimes, they aren't given a choice on where they should send their kids to school. By ruling in favor of the respondent, this will create a slippery slope where religiously devoted families may have to pick between going to a non-religious school with aide which may go against their religion in some cases, or follow their religion and go to a religious school, but they won't get any aide at all. This creates a precedent which goes

against the framers intent when they drafted the bill of rights which guaranteed the freedom of religion.

Conclusion:

In conclusion, Amendment 1 of the Montana Constitution is discriminatory because there is no substantial state interest in enforcing article 10 section 6 of the Montana constitution which under *Church of Lukumi Babalu Aye Inc. v. City of Hialeah (1993)* would make the discrimination of religious schools in this case unsanctioned as well as fails the three categories set forth in the precedent in *Trinity Lutheran*.

Prayer:

It is for these reasons that we pray this court rule in favor of the petitioner, Kendra Espinoza et al, and overturn the ruling of the lower court.