Petitioner Brief - Maloney & Mini

To be in the Supreme Court of the United States

January Term, 2020

Kendra Espinoza, Jeri Ellen Anderson and Jamie Schaefer; Petitioners

v.

Montana Department of Revenue, Respondent

Petitioner's Opening Brief

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Oral Argument: https://youtu.be/OZPhFskNu5w

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?

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Statement of Argument

The First Amendment's Free Exercise of religion clause and its Establishment clause prohibiting favoritism of any religion were intended to make religion a non-factor in judging the decisions that an individual makes in order to create a religiously neutral and welcoming nation free from government interference.[1] The Montana Legislature made efforts to open access to education for financially disadvantaged children by creating a private based donation program, called the Tax Credit for Qualified Education Contributions Act, in order to fund scholarships for students in need of an alternate option from their Title I public school.[2] The Montana Legislature attempted to comply with the Blaine Amendment, a constitutionally suspect rule, which entirely prohibits the use of any public funds for a religious entity by adding Rule 1, which prohibits all scholarships towards religious institutions. This Court however, has time and again made clear that public funding that indirectly affects religious institutions is acceptable if it has a secular purpose. This precedent certainly applies to the children in Montana because the program's goal is to provide access to education in secular areas. On the contrary, Montana's Blaine Amendment and Rule 1 of the Tax Credit for Qualified Education Contributions Act are discriminatory because they target Catholics in the exact way that the decision from *Church of the Lukumi Babalu Aye v. City of Hialeah*[3] attempted to avoid it. The funds at issue accordingly must be equally distributed in a faith-blind manner to secular and non-secular schools alike.

[1] U.S. Const. Amend. I
[2] Tax Credit for Qualified Education Contributions Act, No. 1 Mont. Laws (Jan. 1, 2016). Accessed February 20, 2020. https://leg.mt.gov/bills/mca/15/30/15-30-3111.htm.
[3] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 US 520 (1993)

Argument

I. Rule 1 of Montana's Tax Credit for Qualified Education Contributions Act is Unconstitutional.

Thomas Jefferson envisioned a country in which all men were not only "created equal," but were treated equally.[4] While this sentiment has been challenged throughout America's repeated eras of discrimination, it is vital that our Constitution perserves equality among the various religious and non-religious citizens. This idea was enumerated to the States in the Constitution through the 14th Amendment's Equal Protection Clause.[5] While written at the time to address racial injustices, this clause has been interpreted in a variety of cases in order to protect the rights of a citizen from unfair infringement by the government. Denying students access to religious private schools denies them access to a full and enriching education in secular areas that students in secular schools are entitled to receive.

The creation of the Title 1 program was intended to expand a child's ability to learn if they lived in an area with a poor public school system. It does this by offering them the option of attending a private school with a full scholarship. While the text of Rule 1 of Montana's Tax Credit for Qualified Education Contributions Act[6] appears neutral, it is clear that it was written in direct response to the use of scholarships to fund students at Catholic schools. Not only does this discriminate against Catholic schools, it also unfairly discriminates against already disadvantaged children seeking a good education. By eliminating the possibility of attending a religious school, Rule 1 of Montana's Tax Credit for Qualified Education Contributions Act[7] infringes upon that child's right to access education at a place of their choosing. Should a child be denied access to a proper education at the public level, it is preposterous to also deny them from

[4] Thomas Jefferson, "Declaration of Independence," June 1776.
[5] U.S. Const. Amend. XIV § 1
[6] Tax Credit for Qualified Act, Mont. Laws (Jan. 1, 2016). https://leg.mt.gov/bills/mca/15/30/15-30-3111.htm.
[7] Tax Credit for Qualified Act, Mont. Laws (Jan. 1, 2016). https://leg.mt.gov/bills/mca/15/30/15-30-3111.htm.

seeking this education through a religious private school. This is a clear failure to comply with the Equal Protection Clause[8] as it inhibits Catholic students from exercising their fundamental right to an education only because it is affiliated with the Catholic Church.

This Rule fails to comply with the precedent set by *Church of the Lukumi Babalu Aye v. City of Hialeah*.[9] In *Church of the Lukumi*, this Court protected the religious liberty of followers of Santeria. In an attempt to stop these followers from taking part in sacrificial practices, Florida's state legislature passed several ordinances specifically targeted towards this practice. Because Florida's law was found to be both religiously motivated and directed towards the specific religious group, the unanimous holding in *Lukumi* deemed the discriminatory law invalid.[10] The precedent made clear that legislation must be nondiscriminatory when it came to religion. Since Montana's Rule 1 discriminates against Catholic students, this Court must invalidate Montana's Rule 1 due to its specific discriminatory application. .

In the landmark 1971 case of *Lemon v. Kurtzman,*[11] the Court established a three-prong test, many times referred to as the *Lemon Test*,[12] now commonly used to determine whether or not a law or act violates the Establishment Clause[13] of the Constitution. In order to be constitutional under this test, a law or act must pass each of the three prongs: serve a secular purpose, neither aide nor inhibit religion, and not foster excessive entanglement between church and state. In this particular case, Montana's rule failed the second prong of this test. It is quite evident that Montana's rule inhibits Catholic students' ability to obtain an education at a

[8] U.S. Const. Amend. XIV § 1
[9] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 US 520 (1993)
[10] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 US 520 (1993)
[11] Lemon v. Kurtzman, 403 US 602 (1971)
[12] Lemon v. Kurtzman, 403 US 602 (1971)
[13] U.S. Const. Amend. 1

Catholic school, whether they practice the Catholic faith or not, because they cannot use the much needed scholarship money for tuition at religiously affiliated schools.

This Court need look no further than its conclusion in *Zelman v. Simmons-Harris,*[14] which held that the use of monetary vouchers at religiously-affiliated schools was permissible and did not violate the Establishment Clause[15]. The vouchers in *Zelman* were directly funded by the Ohio state revenue. In *Espinoza v. Montana Department of Revenue,* the scholarships act similarly to the *Zelman* vouchers used to fund an education but even more strongly favors the Petitioners because the scholarships at issue have been funded by private organizations and individuals who chose to support the scholarship program, and not funded publicly. The state's only role lies in giving donors the tax credit for making the charitable donation, and thus indirectly depriving Montana of a small amount of tax revenue. But charitable donations, even directly to a Church, are typically tax deductible. If anything, *Zelman* represents a deeper entanglement than that of *Espinoza v.* Montana due to the *direct* use of public funds in *Zelman.* After *Zelman, Espinoza* should be far easier for this Court to reverse and find for the Petitioner. The Free Exercise Clause, when applied to both *Zelman* and *Espinoza*, clearly inhibits students from exercising their choice of school, and if they are there to practice their faith in addition to learning math, english, history and more, then the prohibition also infringes upon the student's and his or her parent's freedom of religion and is therefore wholly unconstitutional.

[14] Zelman v Simmons-Harris, 536 US 639 (2002)
[15] U.S. Const. Amend. 1

II. Article X Section 6 of the Montana State Constitution is a Constitutional Violation of the Free Exercise Clause of the First Amendment.

During the Reconstruction Era, Congressman James G. Blaine proposed a Constitutional Amendment which would have prohibited public finances from funding religiously affiliated organizations.[16] The bill fell a few votes short in the Senate and does not exist at the Federal level, yet thirty seven states have their own amendments that resemble Blaine's vision.[17] Many of these so called Blaine Amendments - like the State of Montana's - are inherently unconstitutional. Article X Section 6 of the Montana State Constitution calls for a blanket prohibition of any public funds from going to all organizations associated with a religious entity.[18] The goal of the original Blaine Amendment was designed by nativists to prevent the Catholic Church from receiving aid from the government that might be seen as favoring that Church over others. In reality, it was designed to target Irish Catholic immigrants to prevent Catholic schools from thriving in their community and empowering educated Catholics.[19] Nonetheless, since Montana's Act is meant for the primary beneficiaries to be students in need of scholarships for private education, with funds that can be equally distributed amongst all private schools, the program does not supply unfair aid if religious schools are included. On the contrary, it singles out the Catholic school and starves it and its students of funding.

In fact, the Free Exercise Clause prohibits states from withholding funds used for religious scholarships by using the Blaine Amendment because the Amendment, in practice,

[16] University of Virginia, "James G. Blaine (1881)," Miller Center, accessed February 20, 2020, https://millercenter.org/president/garfield/essays/blaine-1881-james-secretary-of-state.
[17] "Blaine Amendments," Institute for Justice, accessed February 20, 2020, https://ij.org/issues/school-choice/blaine-amendments/.
[18] MT Const. art. X, § 6.
[19] "Blaine Amendments," Institute for Justice.

seeks to discriminate against Catholic schools and not other private schools.[20] In the historical effort to suppress the immigrant-Catholic education and voting power, legislatures around the nation, with help from the rise of the nativist *Know-Nothing Party*, made a thinly veiled play for what seemed like a religiously neutral amendment. In reality, it targeted Catholic immigrants by disincentivizing their dreams of freely exercising their beliefs.[21] The reaction of the Montana Supreme Court to shutdown the program altogether reflects the true intention of the Amendment: it is better to cut off all students all together than to allow a single penny to support a Catholic.[22]

The Blaine Amendment in this case is equally misplaced here because the child - not the church - is the beneficiary in receiving the funds and receiving an education. Historically, the general trend of the Court has followed the child-benefit theory, from Cochran v. Louisiana State Board of Education,[23] order to promote the general education/wellbeing of the child. Since the right to education is neutral to everyone, and the right to freely exercise religion is universal, there is no reason that an individual cannot exercise both at the same time. The school teaches many traditional secular subjects and merely includes religion as one of its subjects – no one is forced to believe in the Church or convert if they are not Catholic. In *Locke v. Davey*, the Court allowed the Washington State Promise Scholarship to continue to fund religious education that is not considered to cause belief in said religion.[24] The Court correctly supported the child's right to an education and the right to freely exercise their religion and found that this heavily outweighed the state interest to withhold money to prevent him from learning about religion.

[20] U.S. Const. Amend. 1
[21] George Will, "Anti-Catholic 'Blaine Amendments' Harm Children Now, in the 21st Century," National Review, last modified May 19, 2019, accessed February 20, 2020, https://www.nationalreview.com/2019/05/supreme-court-should-strike-down-blaine-amendments-anti-catholic/.
[22] Espinoza v. Montana Department of Revenue
[23] Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930)
[24] Locke v. Davey, 540 U.S. 712 (2004)

The ruling in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, stated that the "generally available public benefit" cannot be denied from a school that, apart from religion, is identical to other schools.[25] Judging an institution simply because of their beliefs undermines the entire point of neutrality amongst religions from the First Amendment.[26] Schools that have a religious component and schools that do not must be treated equally. To discriminate against the one where religion is taught puts the state in the position of making a value judgment that secular is better than non-secular education, which is not too dissimilar from saying the Catholic school education is inferior to an education at a Jewish or Islamic school - a stark violation of the First Amendment and our Nation's core values. To be clear, the Supreme Court has never ruled that the Free Exercise Clause requires states to fund non-secular schools, but if they do fund secular schools, then their religious counterparts must be included as well.

The vision of the framers, specifically James Madison, was inspired by the Virginia Declaration of Rights, which claimed that religion ought to be "directed only by reason and conviction . . . according to the dictates of conscience." [27] The Blaine Amendment oversteps the the government's boundaries drawn by the First Amendment to leave free religious choice up to the people in an unfettered manner. Allowing children to go to non-secular schools using public funding does not add the "force or violence" that Madison feared.[28] To the contrary, failure to do so actually restricts the individual's right to Free Exercise of religion because it limits how and where they can learn religion. While color and gender conscious laws designed to be race and gender neutral help manage racial and gender inequalities, a faith blind eye that treates religious

[25] Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. (2017)
[26] U.S. Const. Amend. 1
[27] The Library of Virginia, Richmond, Va. 23219. George Mason. Declaration of Rights, 1776.
[28] 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--).

and non-religious people the same can create a neutral standard. Agnostics and Atheists deserve as much freedom of choice as do religiously observant students. Although in Montana, the law primarily impacts the Christian faith, it could easily hurt other faiths as well. The law taking an entirely anti-religion stance actually unfairly promotes atheist principles by ensuring that no financially disadvantaged child can learn about the religion of their choice.

Conclusion

Montana's Supreme Court had no constitutional grounds to invalidate the scholarship program. By doing so, the Montana Court actually violated the Free Exercise Clause of the First Amendment to the Constitution[29]. The Montana Supreme Court must be overruled and the ruling reversed. Denying students access to an enriching education simply based on the religious affiliation of some private schools is a direct violation of their right to an education established in the 1981 case *Plyler v. Doe*.[30] Not only this, but it strips the child of their right to free exercise while unfairly promoting atheist beliefs. In passing Rule 1 of Montana's Tax Credit for Qualified Education Contributions Act[31] and creating a no-aid clause towards religious schools, Montana's legislature is clearly inhibiting religion and failing to pass the second prong of the Lemon Test.[32] This decision has been reached by the Supreme Court in the landmark case *Zelman v. Simmons-Harris.*[33] Why look any further than the clear decision of the Supreme Court in years past? If acts and laws must make sure that "the principal or primary effect must be one that neither advances nor inhibits religion,"[34] then how can we allow an act that specifically and discriminatingly attacks religion and the religious freedom of children in Title 1 Districts to stand? It is evident that this attempt by the Montana legislature and protection of said attempt by the Montana Supreme Court is a poorly veiled attack upon the Catholic Church and an attack upon each child's right to free exercise. A student's choice to attend a parochial school through the scholarship program is their right to exercise freely. Any attempt by the government to infringe upon that right is in clear violation of the freedom of religion. It is abhorrent that the

[29] U.S. Const. Amend. 1
[30] Plyler v. Doe, 457 US 202 (1982)
[31] Tax Credit for Qualified Act, Mont. Laws (Jan. 1, 2016). https://leg.mt.gov/bills/mca/15/30/15-30-3111.htm.
[32] Lemon v. Kurtzman, 403 US 602 (1971)
[33] Zelman v Simmons-Harris, 536 US 639 (2002)
[34] Lemon v. Kurtzman, 403 US 602 (1971)

state Supreme Court has allowed such a violation of the principles of our Constitution to go without punishment and must be stopped at the Federal Supreme Court level.

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