The Supreme Court of the United States

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ESPINOZA
Petitioner

V.

MONTANA DEPARTMENT OF REVENUE
Respondent

_____

_____

Brief of the Petitioner

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?

Abby Park
Samantha Watkins

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Board of Education v. Allen, supra, at 392 U. S. 243.

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Columbia Union Coll. v. Clarke, 527 U.S. 1013, 1013 (1999)
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School District of Abington Township v. Schempp, 374 U. S. 203, 374 U. S. 222 (1963)
Trinity Lutheran Church v. Comer (2017)

Zelman

Other Authorities

James Madison, Memorial and Remonstrance against Religious Assessments
Montana Constitution art. X, § X.
Virginia Declaration of Rights, art. 1
U.S. Constitution

Statement of the Case

In 2015, the "Tax Credit for Qualified Education Contribution" Act, or Montana Senate Bill 410, was enacted by the Montana legislature for the purpose of allowing individuals to donate money to nonprofit or private scholarship organizations, and for eligible recipients to

receive up to $150 in tax credit (Montana Supreme Court). Big Sky Scholarships, a scholarship organization, created a program intended to award scholarships to all students at both religious and nonreligious schools. The petitioner, Kendra Espinoza and other families, applied for the scholarship to keep their children enrolled in Stillwater Christian Academy, as the school was private and required the costs of tuition. Not long after the program was created, however, the Montana Department of Revenue enacted Rule 1; this regulation 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."

At trial, Plaintiff argues that the tax program as it was originally intended is constitutional, and the addition of Rule 1 to the Montana Constitution violates the Free Exercise Clause of the First Amendment of the Constitution. The motion for summary judgement was granted, on appeal. The Department of Revenue argued that the tax credit program is unconstitutional and Rule 1 does not violate the Free Exercise Clause. The Montana Supreme Court agreed with the Department and reversed the lower court. This court granted certiorari.

Statement of the Argument

Absent Rule 1, the tax credit program in contention does not violate the Free Exercise Clause of the First Amendment. When applying the standards and rationale set by Trinity Lutheran, financial aid should have been granted and would not violate the principle of separation of church and state. Additionally, the Blaine Amendment under the Missouri Constitution violates the First Amendment when excluding aid to eligible students based on the mere fact that they chose a private religious school. Therefore, Montana Supreme Court's decision to level down was unconstitutional.

Argument

I. **The tax credit program enacted in Montana Senate Bill 410 complies with First Amendment jurisprudence;** it satisfies the Establishment Clause as no money passes directly between the government and any religious organizations, and satisfies the Free Exercise Clause under *Trinity Lutheran v. Comer.*

a. When analyzed under the standard set in *Trinity Lutheran v. Comer (2017)*, the Tax Credit Program is religiously neutral and therefore constitutional.

In *Trinity Lutheran* Id., this court ruled that it was sufficient that the law denied a religious organization the same opportunity to compete for a benefit that is otherwise available to all secular organizations in order to be deemed unconstitutional. To invert this court's reasoning, therefore, the Free Exercise Clause is fulfilled as long as there is equal opportunity for competition between both secular and religious organizations for a benefit. Thus, the tax credit program in contention is constitutional, absent Rule 1. The aforementioned competition clearly exists, as both secular and religious organizations are allowed to participate in the program.

b. The student-aid scholarship program under the tax credit program affords parents true private choice, therefore complying with the standard set in *Zelman.*

The case at hand can be analyzed similarly to *Zelman*, wherein this court ruled that if a program afforded parents free private choice in choosing schools for their students, then the program would be deemed religiously neutral and constitutional: "...[that] the program was one of true private choice, with no evidence that the State deliberately skewed incentives toward religious schools, was sufficient for the program to survive scrutiny…" Just like the program in *Zelman*, the tuition aid that the student-aid program in contention planned to distribute to parents is according to financial need, and where the aid was to be spent depends solely upon where

parents chose to enroll their children. The student-aid program did not strip parents of true private choice in any way; there were both nonreligious and religious schools that could have been chosen by the parents at any time. It is just a commonly understood fact that most private schools are religious; this does not change the fact that there were both secular and religious schools available for choice by the parents. Additionally, this program further *expands* the privilege of private choice for parents; before the student-aid program at hand, parents who could not afford private schools were left to send their children to public schools. With the student-aid program, however, parents are enabled to send their children to an array of schools, including private schools.

In the plurality decision in *Mitchell v. Helms*, this court stated that "[i]f the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government." See, e.g., *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). All students, regardless of religion, were eligible for the student-aid program in contention. As stated before, the program neither stripped the parents of true private choice nor advocated for a certain religion. In fact, the program never mentions or includes religion in either its description or requirements. According to the description found in the scholarship program's website, Senate Bill 410 was "Montana's first education legislation specifically designed to give parents more options for their children's education", not legislation designed to benefit religious schools in particular. Stillwater Christian School was just one of the schools that the program was designed to benefit; there were numerous nonreligious schools that could also benefit from the program.

c. Disqualifying this program simply because of religious character can set a dangerous precedent that bars future programs from helping students who might genuinely need financial or educational aid.

The Court should not indulge the misconception that the intention behind Montana Senate Bill 410, and thus Big Sky Scholarships, is to persuade recipients to attend religious schools or to promote a certain religion. The sad irony is that parents who wish to educate their children at private schools typically do not do so for religious reasons. Access to religious schooling is the least important reason, for instance, among parents who support these kinds of scholarships. According to a 2018 study by Paul DiPerna and Michael Shaw, the reasons parents list as most important for supporting or applying for such programs are "access to schools with better academics and educational flexibility." *2018 Schooling in America* 22, Edchoice (Dec. 2018). DiPerna and Shaw also found that a plurality of current and former school parents said they would send their child to a private school if it was their decision because they were likely to prioritize "individual attention/one-on-one/class size/student-teacher ratio". *Id.*

There will be far-reaching consequences in invalidating this program. Rule 1 threatens the success of a plethora of future programs that provide aid to students who genuinely need it. About 69 percent of Montana private schools for K to 12 students are religiously affiliated, and excluding them severely limits the choices of families in terms of education. See *Aff. of Erica Smith in Supp. of Pls.' Mot. for Summ. J.* ¶ *2, Espinoza v. Dep't of Rev.*, No. 15-1152A (Mont. Eleventh Judicial Dist. Ct. May 13, 2016). Three of these families are Petitioners and their children. Additionally, in just the first months of 2019, 31 bills have been introduced by 25 states similar to Montana Senate Bill 410; at least nine of these states have Blaine Amendments with either mixed or broad interpretations that would potentially invalidate those programs

completely. Compare H. 253, 2019 Leg., 65th Reg. Sess. (Idaho 2019) (proposing an education savings account for children beginning kindergarten and children with special needs); S. 1410, S. 7070, 2019 Leg., 121st Reg. Sess. (Fla. 2019) (proposing legislation that would expand Hope Scholarships for bullied students and create the Family Empowerment Scholarship Program for low-income and foster children); S. 118, 2019 Reg. Sess. (Ky. 2019) (proposing a tax-credit scholarship program for low-income students, students with special needs, and foster children); S. 160, 2019 Leg., 100th Reg. Sess. (Mo. 2019) (proposing the Missouri Empowerment Scholarship Accounts Program, a tax-credit-funded education savings account open to most K-12 students); A.B. 218, 2019 Leg., 80th Reg. Sess. (Nev. 2019) (proposing funding for the nation's first universal education savings account program); H. 1464, 2019 Leg., 66th Reg. Sess. (N.D. 2019) (bill passed providing for legislative management study regarding the feasibility of developing a choice program); S. 177, 2019 Leg., 63rd Gen. Sess. (Utah 2019) (proposing the Scholarships for Special Needs Students Program); SB. 1015, SB. 1365, 2019 Leg., 400th Reg. Sess. (Va. 2019) (proposing to expand eligibility and funding for the Education Improvement Scholarships Tax Credits Program) with the Institute for Justice, Blaine Amendments, https://ij.org/issues/school-choice/blaine-amendments/(last visited April 11, 2019) (displaying map of Blaine Amendments with broad, narrow, and mixed interpretations).

So long as this Court ignores the potentially disastrous effects of barring aid to students simply due to religious character, legislation that is even more significant to young students, such as the Hope Scholarship Program in Florida (which is the first program to specifically address victims of bullying) or the Family Empowerment Scholarship Program (which is intended to alleviate struggles for low-income and foster-care families), will have no future.

II. The Montana Constitution's "Blaine Amendment" violates the Free Exercise Clause of the First Amendment as it bars aid to students simply because of the outward religious character of the schools.

a. The weight of case law points to the clear unconstitutionality of the Blaine Amendment.

As *Everson v. Board of Ed. of Ewing*, 330 U. S. 1, 16 (1947) dictated, the State "cannot exclude [individuals] because of their faith from receiving the benefits of public welfare legislation". The tax credit program in this case should be considered public welfare legislation in regards to educational aid. Thus, by invalidating an otherwise generally available and religiously neutral student-aid program, the Blaine Amendment violates the Free Exercise Clause of the First Amendment; it expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character.

Precedent does suggest that a state may "disfavor" religion by placing minor burdens on religion in order to maintain separation of church and state, but just as this precedent must be construed narrowly and did not apply in *Trinity Lutheran,* it does not apply to this case as well. The Court must "reaffirm that the Constitution requires, at a minimum, neutrality not hostility toward religion." See *Columbia Union Coll. v. Clarke*, 527 U.S. 1013, 1013 (1999) (Thomas, J., dissenting from denial of certiorari).

We can analyze the constitutionality of the Blaine Amendment under *Trinity Lutheran* as well, wherein this court found that "funds [used] for secular purposes rather than for sectarian purposes" were constitutional. *Id.*

The funds from the State itself goes directly to the taxpayers, and the parents receive the savings of those funds. Thus no direct aid is channeled to the schools themselves as they are removed by the aforementioned levels. Following this line of reasoning, Big Sky Scholarship

funds were never channeled directly to a certain religion; for all intents and purposes, the funds were meant to provide families an expanded ability of choice for quality education by removing the concern of money. We can also look to Chief Justice Rehnquist's concurring opinion in *Zelman* where he found that programs such as the tax credit program in contention are "entirely neutral with respect to religion. [They] provid[e] benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district." The Court also ruled in Zelman that the program afforded true private choice and was therefore constitutional. True private choice was defined to be the permittance of "such individuals to exercise genuine choice among options public and private, secular and religious." This is clearly what is happening here, as the parents were never forced to choose religious schools among all of the options, and the tax credit program included all schools who wished to participate. Thus, the Blaine Amendment, as applied, violates the Free Exercise clause as it voids a completely constitutional program simply due to the religious character. "It has remained a fundamental principle of this Court's free exercise jurisprudence that laws imposing 'special disabilities on the basis of ... religious status' trigger the strictest scrutiny." *Id.,Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472. at 533, 113 S.Ct. 2217. Pp. 2019-2021. Also we can look to mcdaniel in their opinion where it was found that "A plurality recognized that such a law discriminated against McDaniel by denying him a benefit solely because of his status as a `minister.'" *Id.,* at 627, 98 S.Ct. 1322. In McDaniels case it was a minister trying to serve on the legilatore the discrimination was still the same. The fact of the matter is if McDanle had not been a minister then he would have gotten on the legislature just fine but due to the fact that he chose to have a profession as a minister the state was punishing him. This is found in many different cases and as found in *Lyng v. Northwest Indian Cemetery*

Protective Assn., 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534; *Employment Div., Dept. of Human Resources of Ore. v. Smith,* " In recent years, when rejecting free exercise challenges to neutral laws of general applicability, the Court has been careful to distinguish such laws from those that single out the religious for disfavored treatment." In almost all of these cases the common factor is that because people choose to excessive their right to religion they are being punished from state programs that would generally be accessible to them if they choose not freely exercise their right to religion.

> The reason that church and state were separated was not to punish those who have a religion it is to protect those who have a religion from the government. "The state courts, in the main, have remained faithful to the language of their own constitutional provisions designed to protect religious freedom and to separate religious and governments."

b. The Framers make it clear that the intent and purpose of the principle of separation of church and state is not to punish those with a certain religion, but protect the balance between both. The Blaine Amendment violates this balance by forcing parents to choose between practicing their religion and making a financial choice for their children regarding education.

The Framers found a certain significance in maintaining a balance between church and state so that one did not overpower the other; this was most likely due to their past encounters with a "tyrannical" government that had too closely entangled with religion. This purpose did not include punishing the people for merely practicing a certain religion.

As James Madison wrote in Memorial and Remonstrance against Religious Assessments, "As the Bill violates equality by subjecting some to peculiar burdens, so it violates the same principle, by granting to others peculiar exemptions. If "all men are by nature equally free and

independent," [Virginia Declaration of Rights, art. 1] all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights." A burden is constantly being placed on people who wish to be religious in some way of their lifestyle, but by putting these people in a separate category solely based on the fact that they go to a private school with religion in the name or choose to get a degree in ministry is unconstitutional in and of itself. But by also creating laws that single out religions, like the blaine amendment does is subjected to strict scrutiny and violating the free exercise clause although we must keep church and state separate we should not set the bar to completely exile those who with to seize the first amendment right to free exercise of religion. "Because then establishment in question is not necessary for the support of Civil Government. If it be urged as necessary for the support of Civil Government only as it is a means of supporting Religion, and it be not necessary for the latter purpose, it cannot be necessary for the former .If Religion be not within the cognizance of Civil Government how can its legal establishment be necessary to Civil Government? What influence in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of the Civil authority; in many instances they have been seen upholding the thrones of political tyranny: in no instance have they been seen the guardians of the liberties of the people." James Madison, Memorial and Remonstrance against Religious Assessments

c. If the Blaine Amendment is found to be constitutional, the lines between constitutionality of federal aid will forever be blurred.

When looking at the balin amendment on its own it states "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 or in part by any church, sect, or denomination.” Montana Constitution art. X, § X. On its face this looks like the state of Montana promoting the separation of church and state but in the way that it is being applied in today's case with the “Tax Credit for Qualified Education Contributions” Act it is violating the free exercise clause of the first amendment. By only putting a different set standard on people who choose to send their kids to a private school it is unconstitutional. "a secular legislative purpose and a primary effect that neither advances nor inhibits religion . . ."; given a secular purpose, what is "the primary effect of the enactment?" *School District of Abington Township v. Schempp,* 374 U. S. 203, 374 U. S. 222 (1963); *Board of Education v. Allen, supra,* at 392 U. S. 243. Although the state does have the right to deny direct funding from the state to a church this aid is not going directly to a church, it's not going to a church at all it's going to a school. And if this court were to rule in favor of the state they would be setting a standard to where every time financial aid is given out whether it be in the form of a scholarship or aid in general then the people receiving this aid would be in fear that the state might just take back the money at any given time when they feel like it. BU tif we are to use the standard as set in *trinity lutheran v. comer* where all we need to prove is that the aid is not going toward furthering the religion it is just helping the children then it is constitutional. All the Blaine amendment does is confuse the people of Montana. The people at big sky only want to help parents give their kids the education they want them to have and not let money be an issue, and with the tax credit program that was possible. But by adding the blaine amendment and now saying you can't give any money to anybody who even goes to a religious school, is creating a blurred line for what the tax credit program was created for.

III. The rationale behind Montana Supreme Court's decision to level down is unconstitutional.

Montana Supreme Court, instead of allowing the tax credit program to stand absent Rule 1, decided to void it altogether. This decision was inherently flawed and unconstitutional. Although the State claims that this upheld the separation of church and state as it treated both religious and secular schools equally, this court should not let the remedy shield the discriminatory judgment.

Conclusion

In accordance with the standard set in *Trinity Lutheran* and *Zelman*, Montana Senate Bill 410 is religiously neutral and therefore constitutional absent Rule 1 of the Montana Constitution. Consequently, by invalidating the program in contention, Rule 1 of the Montana Constitution violates the Free Exercise Clause of the First Amendment, and Montana Supreme Court's decision to level down was also unconstitutional.

Prayer

For these reasons, we pray that this court reverses the decision of the Montana Supreme Court and rules in favor of the Petitioner.