# In the
# Supreme Court of the United States

KENDRA ESPINOZA, JERI ELLEN ANDERSON,
AND JAMIE SCHAFFER,

*Petitioners*,

v.

MONTANA DEPARTMENT OF REVENUE AND GENE
WALBRON, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF
THE MONTANA DEPARTMENT OF REVENUE

*Respondents*.

*ON WRIT OF CERTIORARI*
*TO THE SUPREME COURT OF MONTANA*

## BRIEF FOR THE PETITIONERS

ALYSSA SEIBT
DORIS YANG

## 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

In 2015, the Montana legislature created a tax-credit program that would incentivize corporations and individuals to donate to nonprofit, private scholarships that would benefit high-school students within the state. A while after, the Montana Department of Revenue enacted "Rule 1" which established that students who attend "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" would not be awarded the scholarship. The Montana Department of Revenue created this law in order to comply with Montana's state constitution, which states that

> 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.

Article X, Section 6, Mont. Const. of 1972 (Mont. Const.).

The petitioner, Kendra Espinoza, a mother of a low-income household in Montana, applied to receive a scholarship so that her children could attend Stillwater Christian School, located in Kalispell, Montana. Without the scholarship, they would not be able to afford to continue their education at Stillwater. Seeing that Rule 1 violated the Free Exercise Clause, Espinoza sued the Montana Department of Revenue in state court, wanting to challenge Rule 1.

The lower court found that the scholarship program was constitutional without the addition of Rule 1 and found in favor of the petitioner. Once it was appealed, the Montana Supreme Court reversed the ruling, finding in favor of the Montana Department of Revenue, and argued that the scholarship program is unconstitutional without the addition of Rule 1.

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## SUMMARY OF ARGUMENT

The Montana Supreme Court's decision restricted Espinoza's First Amendment right to the free exercise of religion.

First, the discriminatory origins of section 6(1) violate the spirit of the Free Exercise Clause. Section 6(1) and similar Blaine Amendments targeted the Free

Exercise right of Catholics, as the Supreme Court has acknowledged in prior cases such as *Mitchell v. Helms*. Given the discriminatory history behind the Blaine Amendment and the modern-day application of it, the Court cannot allow section 6(1) to invalidate the scholarship program.

Second, the Montana Supreme Court's decision violates the Free Exercise Clause. The invalidation of the scholarship program displays an unconstitutional hostility to religion and relies on an overextension of the Establishment Clause. *Widmar*, *Wolman*, and *Trinity* provide compelling precedence to support this reasoning. Moreover, the scholarship program's elimination supports a secular monopoly on education. This creates a forced choice concerning education and religion, violating the Free Exercise rights of parents and children.

Finally, the scholarship program presents no challenge to the Establishment Clause. The motivations behind the scholarship program and the layers of indirect payment involved satisfy the neutrality requirement established by precedent cases such as *Mueller* and *Zelman*. The State's neutral role in education is not compromised.

Thus, a ruling for Espinoza would not affect the intended scope of the Establishment Clause; rather, it would restore the balance between the Free Exercise and Establishment Clauses. The Court should reverse the Montana Supreme Court's decision and hold Montana's application of Article X, section 6(1) as unconstitutional.

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## ARGUMENT

### I. ORIGINAL INTENT OF RELIGION IN THE FIRST AMENDMENT

"[H]e feared it might be thought to have a tendency to abolish religion altogether", stated Representative Peter Silvester during a debate over the passing of the First Amendment (Congressional Register). Ever since the founding of the United States of America, both the fear of religion's control over government and the fear of the government's control over religion have been a concern of many Americans. In cases such as *Espinoza v. Montana Department of Revenue*, however, the issue of greatest concern is the infringement of religious rights.

In his Thanksgiving Proclamation of 1789, George Washington calls for Americans "To promote the knowledge and practice of true religion and virtue…". However, the current laws and general sentiments in today's age do not reflect the

words spoken by Washington years ago. Instead, Americans who are religiously affiliated are discriminated against, even though their country was founded on the belief that religion and government could co-exist without affecting one another.

## II. HISTORICAL CONTEXT OF BLAINE AMENDMENTS

After losing his position as Speaker of the House of Representatives in 1875, Representative James G. Blaine proposed a joint resolution to prohibit states from providing governmental aid to religious educational institutions. Popularly known as the "Blaine Amendment," it failed in the Senate but inspired thirty-eight states to adopt similar provisions in their state constitutions. Montana was one such state, ratifying the Montana Blaine Amendment, Article X, § 6(1), titled "Aid prohibited to sectarian schools," in 1889 (Rassbach).

Though Blaine Amendments like Montana's ostensibly codified the separation of Church and State, their true intent was to ostracize the Catholic Church. The Blaine Amendments accompanied a wave of anti-immigrant sentiment, particularly against Irish Catholics. President Ulysses S. Grant stated in a speech that the government should not "support institutions of learning other than those sufficient to afford to every child growing up in the land the opportunity of a good common school education, unmixed with sectarian, pagan or atheistical dogmas." Given that a "good common school education" of the time included Protestant prayers and hymns, "sectarian" did not include "Protestant." Instead, "sectarian" was a euphemism for "Catholic." Rather than subjecting their children to education violating their religious beliefs, Catholic parents created their own private school system in Montana. In line with attacks on these schools by the Know Nothing party and the American Protective Association, Montana's Blaine Amendment sought to maintain Protestant influence over education.

### A. View of the Court on Blaine Amendments

In *Locke v. Davey*, the Court recognized the significance of the Blaine Amendments' association with "anti-Catholicism." 540 U.S. 712, 723 n.7 (2004). The Court chose not to consider the history of the Blaine Amendments, however, because the provision in question (Wash. Const. Article I, §11) did not have "a credible connection" with Washington's Blaine Amendment (Article IX, §4). *Id*. 724 n.7. Given this line of reasoning, the historical origins of Mont. Const. Article X, § 6(1) have significant weight when considering the Montana Tax Credit Scholarship Program. S.B. 410, 64th Leg., Reg. Sess. (Mont. 2015).

### B. Precedent for the consideration of original meaning

While direct challenges to state Blaine Amendments have been unsuccessful thus far, the Court struck the "pervasively sectarian" test established in *Hunt v. McNair*, 413 U.S. 734, 743 (1973), in *Mitchell v. Helms*, 530 U.S. 793 (2000). In the *Mitchell* decision, the Court cited the pejorative roots of the term "sectarian" as a reason for invalidating the "pervasively sectarian" test. The Court highlighted the usage of "sectarian" in the proposed federal Blaine Amendment and acknowledged that "it was an open secret that 'sectarian' was code for 'Catholic.'" *Mitchell*, *supra*, at 828. The Court further observed that at the time of the *Hunt* decision, "['sectarian'] could be applied almost exclusively to Catholic parochial schools." *Id*, at 829. The Court concluded this line of reasoning by stating that "[t]his doctrine, born of bigotry, should be buried now." *Ibid*.

### C. The Blaine Amendment unconstitutionally caused the invalidation of the Tax Credit Program

In *Hunter v. Underwood*, the Court struck a section of the Alabama Constitution of 1901, Article VIII, § 182, that disenfranchised people convicted of crimes of "moral turpitude." 471 U.S. 222 (1985). Like the ostensible neutrality of the modern meaning of "sectarian," the Court noted that "Section 182 on its face is racially neutral." *Id*. at 227. The unanimous decision stated, however,"[w]ithout deciding whether § 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race, and the section continues to this day to have that effect." *Id*. at 233. The effect noted by the Court was that "section 182 had disfranchised approximately ten times as many blacks as whites." *Id*. at 227. A similar, albeit less severe, effect occurred in Montana. Since seventy percent of the state's private schools are religious, the enactment of Rule 1 was a targeted attack at religiously affiliated institutions. Mont. Admin. R. M. 42.2.802 (2015). The subsequent invalidation of the Tax Credit program also resulted in a targeted reduction of access to the free exercise of religion in education for low-income parents. Moreover, the invalidation was specifically motivated by the Blaine Amendment: the Montana Supreme Court cited the "sole issue" of contention in the issue in its decision to invalidate the program was "whether the Tax Credit Program runs afoul" of the Blaine Amendment. 435 P.3d 603, 609 (2018). In its original intent to discriminate against Catholics on account of religion, Montana's Blaine Amendment continues to prevent the free exercise of religion today by causing the invalidation of the scholarship program. The rationale in *Hunter* thus implies that Montana's Blaine Amendment is also unconstitutional.

Given the prevalence of Blaine Amendments across the United States, a ruling in favor of Espinoza is important for low-income American parents and students seeking to exercise their religious freedom.

## III. INVALIDATION VIOLATES THE FREE EXERCISE CLAUSE

### A. Hostility to religion

*Engel v. Vitale* helps establish that the government has a responsibility to the people to ensure that it remains neutral during cases in which secular and non-secular matters conflict. The Court has stated that "The First Amendment leaves the Government in a position not of hostility to religion, but of neutrality." 370 U.S. 421, 370 (1962) and that "The First Amendment teaches that a government neutral in the field of religion better serves all religious interests." *Ibid.* When applying this concept established by the Court to the situation in Espinoza, it is in the best interest of the State to maintain a neutral stance on religious issues, meaning that the invalidation of the Tax Credit Program should be ruled as unconstitutional.

Moreover, invalidation of the Tax Credit Program targeted religiously affiliated education, which "is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). No such compelling interest existed in Montana, other than the desire to comply with a discriminatory relic of the nineteenth century.

### B. Overextension of the Establishment Clause

*Trinity Lutheran Church of Columbia Inc. v. Comer* demonstrates the Court's view on religion as the sole basis for discrimination when a religious school applied for a governmental program. Like *Trinity*, in *Espinoza*, the governmental program was invalidated solely because of the religious affiliations of the parochial schools involved in the scholarship program. In *Trinity*, the Court upheld the Free Exercise clause and ruled in favor of the petitioners. Trinity argued that not being considered for a scholarship program due to their religious affiliation was in violation of their first amendment protections, specifically freedom of religion and freedom of speech. The Court found that the exclusion of churches or religious schools from the program was unconstitutional and violated their First Amendment rights.

In his written opinion of the case, Justice Roberts argues that "the State's decision to exclude [a religious organization] for purposes of this public program must withstand the strictest scrutiny", which it clearly does not in the case of Espinoza. The Montana Department of Revenue's actions take the "separation of church and state" too far. The striking down of the scholarship program ultimately violates the First Amendment Rights of the students who apply for the scholarship program and attend religious schools and topples over when faced with "the strictest scrutiny". Nor does Montana meet the "state interest of sufficient magnitude" established in *Wisconsin v. Yoder* to "override the interest claiming protection under the Free Exercise Clause." 406 U.S. 205, 214 (1972).

*Widmar v. Vincent* demonstrates the danger of state actors who are excessively concerned with complying with the Establishment Clause. In categorically denying religious rights to student groups, the State "[achieved] greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution" 454 U.S. 263, 454 (1981). Concerning the invalidation of the Montana Tax Credit Program, the extended effect of excessive deference for the Establishment Clause beyond Free Exercise violations is depriving the public of a positive good.

**C. Secular monopoly creates forced choice**

By ending the Tax Credit Program, Montana entrenches a secular monopoly on education. The Court wrote in *Wolman v. Walters* that "[p]arochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans." Most importantly, *Wolman* established the obligation of the State to facilitate "education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them." 433 U.S. 229, 262 (1977). Invalidating the Tax Credit Program prevents Montana from fulfilling this obligation.

The invalidation of the scholarship program created a secular monopoly on education, which is exemplified through the moral education provided at schools. Parents who can no longer afford for their children to attend religiously affiliated schools are forced to subject their children to secular moral education. The Court wrote in *Good News Club v. Milford* that "there is no logical difference in kind between the invocation of Christianity… and the invocation of teamwork, loyalty, or patriotism." *Good News Club v. Milford Central School*, 533 U.S. 98, 99 (2001). The fact that religious and secular moral education are comparable is a clear example of

discrimination against religious beliefs. Parents are not able to choose between secular and religious moral education, violating the Free Exercise Clause.

The creation of a secular monopoly creates unconstitutional forced choices. Justice Roberts also discusses how Trinity Lutheran Church simply wanted to "participate in a government benefit program without having to disavow its religious character", and explains that having to deny one's religious character in order to be allowed to even be considered in a government benefit program is in violation with the First Amendment, specifically the Free Exercise Clause. When applying a similar ideology to the case of Espinoza, one can see that a student or parent in Montana who wanted to be considered for the scholarship would have to "disavow [their] religious character", violating the Free Exercise Clause.

In the case of *McDaniel v. Paty*, the Court upheld that it is unconstitutional to force McDaniel to choose between participating in an election for a state government position or being a minister, stating that "...it conditions his right to the free exercise of his religion on the surrender of his right to seek office" 435 U.S. 618, 618 (1978). Applying this concept to the case of Espinoza, a student's First Amendment rights would be dependent on their ability to apply for the scholarship and may force a student to surrender their First Amendment rights just to do so, making this action unconstitutional. Furthermore, the Court explains how the statute preventing McDaniel from running for office "...requires appellant to purchase his right to engage in the ministry by sacrificing his candidacy, [and] impairs the free exercise of his religion." *Id.* 634. Absent the Tax Credit Program and the scholarships afforded by it, parents and students would similarly have to purchase their right to an education that aligns with their religious values.

## IV. THE TAX CREDIT PROGRAM AND THE ESTABLISHMENT CLAUSE

The Court emphasized the importance of neutrality when considering governmental programs "in the face of Establishment Clause attack." *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 US 819, 839 (1995). By maintaining neutrality in intent and effect, Montana's Tax Credit Program does not violate the Establishment Clause.

### A. Motivations of the Tax Credit Program

Montana was motivated by religiously neutral concerns in creating the Tax Credit Program. In *Rosenberger*, the Court observed that the University of Virginia did not create its Student Activities Fund (SAP) "to advance religion" and did not adopt "some ingenious device with the purpose of aiding a religious cause." *Id.*, at

840. Similarly, Montana did not create the Tax Credit Program to promote religious education. As in *Rosenberger*, Montana extended "benefits to recipients whose ideologies and viewpoints, including religious ones, [were] broad and diverse," thus respecting neutrality. *Id.*, at 821. The Tax Credit Program, like the Minnesota program that allowed parents to claim tax deductions for their children's educational expenses, "has the secular purpose of ensuring that the State's citizenry is well educated, as well as of assuring the continued financial health of private schools, both sectarian and nonsectarian." *Mueller v. Allen*, 463 U.S. 388, 463 (1983).

The Court also considered the motivations of the recipients of the Univ. of Va.'s aid: Wide Awake Productions, an organization publishing a student newspaper, "did not seek a subsidy because of its Christian editorial viewpoint; it sought funding as a student journal." *Id.*, at 840. Likewise, recipients of Montana's Tax Credit Program sought primarily to promote general education scholarships.

**B. Indirect payment**

The Court further distanced the SAP from the Establishment Clause by addressing the immediate effect of the SAP: "[w]e do not confront a case where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity." Like the SAP, Montana's Tax Credit Program is a neutral program that does not provide direct monetary support to the religiously affiliated private schools that the scholarship recipients attend. As the Court reasoned in *Mueller*, "the historic purposes of the [Establishment] Clause simply do not encompass the sort of attenuated financial benefit" religiously affiliated schools ultimately received through the Tax Credit Program. *Mueller*, *supra*, at 463.

The Court also dismissed the argument in *Mitchell* that any aid needed to be "literally placed in schoolchildren's hands rather than given directly to their schools," labelling "such formalism" irrelevant. *Mitchell*, *supra*, at 795. Thus, the fact that the direct beneficiaries of the scholarship program were donors rather than children does not render it in violation of the Establishment Clause.

In *Zelman v. Simmons-Harris*, the Court noted that its "jurisprudence with respect to true private choice programs has remained consistent and unbroken." 536 U.S. 639, 649 (2002). The program in question in *Zelman* was Ohio's Pilot Project Scholarship Program, which provided tuition aid for students to attend a participating public or private school of their parent's choosing. Ohio Rev. Code

Ann. §§ 3313.974-3313.979 (Anderson 1999 and Supp. 2000) (program). When the Court ruled that extending vocational aid to a blind student seeking to become a pastor, missionary, or youth director did not violate the Establishment Clause, "central to [its] inquiry" was the fact that "aid… that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Witters v. Svcs. for the Blind*, 474 U.S. 481, 487 (1986). Montana's Tax Credit Program introduces two additional layers of private choice to its scholarship process: not only do parents choose whether their children attend religious or nonreligious schools, but individuals can also choose the nonprofit scholarship organization to which they donate and the scholarship organization also chooses which specific scholarships it funds. These additional layers only strengthen the conclusion in *Zelman* that a program is "a program of true private choice" when it permits "a wide spectrum of individuals" to "exercise genuine choice among options public and private, secular and religious." *Zelman*, *supra*, at 662. Another facet of private choice concerns the neutrality of private choice. In *Zelman*, the Court stated that the "Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools, and that question must be answered by evaluating *all* options Ohio provides… schoolchildren." *Zelman*, *supra*, at 640-641. The scholarship programs in Ohio and Montana were one of many options for parents, students, and donors in their respective states, thus maintaining neutrality.

### C. Role of the State in religious education

The principle of private choice largely eliminates concerns about public perception of the government's role in religious education in Montana. As reasoned in *Mitchell*, "when government aid supports a school's religious mission" due to the choices of private individuals, "endorsement of the religious message is reasonably attributed to the individuals who select the path of the aid." *Mitchell*, *supra*, at 843. *Zobrest v. Catalina* expanded upon this reasoning by observing that "the state created no incentive for parents to choose a sectarian school," thus removing the *imprimatur* of governmental approval. 509 U.S. 1, 10 (1993). Given that scholarship organizations like Big Sky Scholarships planned to offer scholarships to both religious and nonreligious schools, the State provided no incentive for parents to choose a religious school. Any incentive that may have existed was created by private donors and their recipient organizations, not the State.

The fact that approximately seventy percent of Montana's eligible private schools are religious does not imply a violation of the Establishment Clause. In *Zelman*, eighty-one percent of Cleveland's participating private schools were

religious and eighty-two percent of private schools in Ohio were religious. *Zelman*, *supra*, at 641. "To attribute constitutional significance to [these] figure[s]," the Court held, "would lead to the absurd result that a neutral school-choice program might be permissible in some parts of Ohio… where a lower percentage of private schools are religious schools." *Ibid*. Similarly, in *Muller*, the Court stated that it "would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Muller*, *supra*, at 463.

The claim that a portion of the Tax Credit Program may be diverted to religious use does not constitute a violation of the Establishment Clause. In *Mitchell*, the Court held that the divertibility argument "has only the most attenuated (if any) link to any realistic concern for preventing an 'establishment of religion'" and that it "has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it spend its other resources on religious ends." *Mitchell*, *supra*, at 824. This argument is only strengthened in *Espinoza* by the fact that religious private schools are only indirectly supported by Montana's Tax Credit Program.

### D. Distinguishing *Nyquist* and *Locke*

When distinguishing the *Committee for Public Education v. Nyquist* in *Mueller*, the Court noted that "a program… that neutrally provides state assistance to a broad spectrum of citizens is *not* readily subject to challenge under the Establishment Clause. *Mueller*, *supra*, at 398-399 (emphasis added). The issue of neutrality was resolved above, so the same reasoning exempts *Espinoza* from an Establishment Clause challenge. The additional levels of private choice in the Tax Credit Program further distinguish *Espinoza* from *Nyquist*. In *Nyquist*, tax benefits were extended directly to the parents of children attending religious schools. *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). On the other hand, Montana's state assistance was extended to a broad spectrum of donors who assisted a broad range of scholarship organizations, who then assisted a broad range of students. The other main issue of Establishment concern in *Nyquist* was that "the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them." *Nyquist*, *supra*, at 786. The earlier discussion of *Zobrest* established that the Tax Credit Program created no such incentive. Moreover, the parents were not the direct recipients of the Tax Credit Program and the tax credit was not unrestricted, but rather capped at $150. Thus, the reasoning in *Zobrest* does not apply to the facts of *Espinoza*. Finally, it is important to note that finding for Espinoza would not invalidate the

*Nyquist* decision. Striking Blaine Amendments in state constitutions does not affect the scope of the Establishment Clause.

*Locke v. Davey* establishes that a student cannot receive a publicly funded scholarship if they are pursuing a degree in devotional theology, explaining that "...training for religious professions and training for secular professions are not fungible." 540 U.S. 712, 721 (2004). The Court additionally stated that "Training someone to lead a congregation is an essentially religious endeavor." *Ibid.* However, in the case of Espinoza, the students are merely attending religious schools, not studying devotional theology to become ministers. The discrimination parents faced forced them to choose between their religion and receiving financial aid. In the majority opinion written for *Trinity Lutheran Church of Colombia, Inc. v. Comer*, the Court distinguishes when a person or organization can be excluded from a government program, and ties in *Locke v. Davey*, stating that in Davey's case, "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." 15-577. It is clear in the case of Espinoza that the students are being denied these scholarships because of who they are and what they believe in, not what they were going to do with the scholarships.

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## CONCLUSION

The intent and effect of the original Blaine Amendment and the modern application of it are the same: to deny parents, children, and other interested parties their First Amendment right to freely exercise religion. This Court should reverse the judgement of the Montana Supreme Court and strike Article X, Section 6(1) as applied by the Montana Supreme Court.