No. 18-1195

In The
Supreme Court of the United States

♦

KENDRA ESPINOZA, JERI ANDERSON,
and JAIME SCHAEFER,

Petitioners,

v.

MONTANA DEPARTMENT OF
REVENUE, and
GENE WALBORN, in his official capacity
as DIRECTOR of the MONTANA
DEPARTMENT OF REVENUE,

Respondents.

♦

On Writ Of Certiorari
To The Montana Supreme Court

♦

BRIEF FOR PETITIONERS

♦

Luke Spitzley
East Grand Rapids H.S.
East Grand Rapids,
Michigan 49506
spitluk@egrps.org

Questions Presented

Does it violate the Religion Clauses 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?

Parties To The Proceedings

Petitioners (Plaintiffs below) are mothers Kendra Espinoza, Jeri Anderson, and Jaime Schaefer. Respondents (Defendants below) are the Montana Department of Revenue and its Director, Gene Walborn, in his official capacity.

TABLE OF CONTENTS

Table of Authorities

Constitutional Provisions

U.S. Const. amend. I Mont.
Const. art. X, § 6(1)

Codes Rules And Statutes

Mont. Admin. R. 42.4.802.
Mont. Code Ann. §§ 15-30-3101–15-30-3114
Mont. Code Ann. § 15-30-3111

Other Authorities

Blackman, Josh, This Lemon Comes as a Lemon. The Lemon Test and the Pursuit of a Statute's Secular Purpose (January 17, 2009). George Mason University Civil Rights Law Journal (CRLJ), Vol. 20, 2010.

Brief for Agudath Israel of America as Amicus Curiae Supporting Appellees at 1, 8, Espinoza v. Dep't of Revenue, No. 17-0492 (Mont. Sup. Ct. Jan. 19, 2018).

D. Currie, The Constitution in Congress: The Federalist Period 1789–1801, pp. 12–13 (1997).

Duncan, Richard F., "Justice Thomas and Partial Incorporation of the Establishment Clause: Herein of Structural Limitations, Liberty Interests, and Taking Incorporation Seriously" (2007). College of Law, Faculty Publications. 130.

"From John Adams to Massachusetts Militia, 11 October 1798," Founders Online, National Archives, accessed September 29, 2019.

Joseph M. Snee, Religious Disestablishment and the Fourteenth Amendment, 1954 Wash. U.L.Q. 371

Joseph P. Viteritti, Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law, 21 Harv. J.L. & Pub. Pol'y 657 (1998).

Joseph Story, Commentaries on the Constitution of the United States § 1873 (1833).

Letter from Thomas Jefferson, President, United States of America, to Danbury Baptists (Jan. 1, 1802) (on file with Library of Congress).

Steven K. Green, The Blaine Amendment Reconsidered, 36 Am. J. Leg. Hist. 38, 47 (1992).

The Papers of James Madison, vol. 8, 10 March 1784–28 March 1786, ed. Robert A. Rutland and William M. E. Rachal. Chicago: The University of Chicago Press, 1973, pp. 295–306.

Thomas J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment 221 (1986).

William C. Porth & Robert P. George, Trimming the Ivy: A Bicentennial Re-examination of the Establishment Clause, 90 W. Va. L. Rev. 109, 136-39 (1987).

Opinions Below

The opinion of the Montana Supreme Court, available at Pet. App. 4, is reported at 393 Mont. 446. The order of the Montana Supreme Court granting a partial stay of its judgment pending review by this Court is available at Pet. App. 1. The opinion of the Montana Eleventh Judicial District Court granting Petitioners' 3 motion for a preliminary injunction is available at Pet. App. 96, and the opinion and order of that court granting summary judgment to Petitioners is available at Pet. App. 86.

SUMMARY OF ARGUMENT

As interpreted by the Montana Supreme Court, Article X Section 6(1) bars any religious option from an otherwise neutral student-aid benefit. This allows Montana to become an "adversary" of religion which is prohibited under the Establishment Clause. Everson v. Board of Education, 330 U.S. 1 (1947) (holding "that Amendment requires the state to be a 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."). This application violates *Lemon*s second prong requiring the government to partake in programs that "neither advances nor inhibits religion." Lemon v. Kurtzman, 403 U.S. 602 (1971). This application goes against the Court's holding in *Zelman* that governments cannot pass laws that have "the forbidden effect of advancing or inhibiting religion." Zelman v. Simmons-Harris, 536 U.S. (2002). This application places an unconstitutional burden on these families Free Exercise of religion by discriminating against their "religious use" of money in contradiction of *Rosenberger*. This application discriminates against their "religious beliefs," "religiously motivated conduct," and "religious status" in contradiction of *Trinity Lutheran*. Lastly this application places a substantial burden on the Free Exercise rights of these families and should be reviewed under Strict Scrutiny which it cannot pass. Sherbert v. Verner, 374 U.S. 398 (1963).

ARGUMENT

1. Applying Article X Section 6(1) To Bar Religious Options In Student-Aid Programs Violates the Establishment Clause

As applied, Montana's Blaine Amendment, Article X Section 6(1) makes Montana an "adversary" of religion which the Establishment clause forbids. Everson v. Bd. of Educ. of Ewing Township, 330 U.S. 1 (1947). This neutrality required by the Establishment clause has been a well-established principle throughout American history. See e.g. Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 306 (1963). In the past the court has held that with respect to religion states may not engage in activities "affirmatively opposing or showing hostility to religion." Id. (majority opinion); *see also Epperson v. Arkansas,* 393 U.S.

97, 104 (1968). (holding that the "First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion."); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993). (holding that the "First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (government is forbidden from engaging in behavior that leads to "fostering a pervasive bias or hostility to religion").

These cases to the contrary Montana's Blaine Amendment as applied shows hostility towards religion that the Establishment Clause expressly forbids. Article X Section 6(1) indeed traces its roots to Nineteenth Century Anti-Catholic bigotry. See e.g. Steven K. Green, The Blaine Amendment Reconsidered, 36 Am. J. Leg. Hist. 38, 47 (1992). This Blaine Amendment goes out of bounds to show hostility towards religion in disregard of the fact "that the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion." Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring). It obstructs parents' abilities to "direct the upbringing and education of [their] children" which is "deeply rooted in this Nation's history and tradition." Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534 (1925); Washington v. Glucksberg, 521 U.S. 702 (1997); see Zorach v. Clauson, 343 U.S. 306 (1952) ("We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions.") (J. Douglass)

In its general application the Establishment Clause clearly requires a prohibition of hostility towards religion. On the narrower questions the Court has ruled that tests that "focuses on the particular issue at hand" should be employed. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019). With the issue in this case being student aid the Court should apply its test requiring private choice and neutrality towards religion. See Zelman v. Simmons-

Harris, 536 U.S. 639 (2002). Without a doubt the Blaine Amendment's banning of religious options from otherwise neutral student-aid programs, shows hostility towards religion in violation of *Zelman.*

In addition to violating the Zelman's test the Court's "*Lemon* test" is violated by Article X Section 6(1). Instead of having "a secular legislative purpose" Article X Section 6(1) is based on religious bigotry. Lemon v. Kurtzman, 403 U.S. 602 (1971); See Joseph P. Viteritti, Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law, 21 Harv. J.L. & Pub. Pol'y 657 (1998). (providing clarity on Blaine Amendments history) Instead of having an effect that "neither advances nor inhibits religion" the Blaine Amendment facially discriminates against religion. It goes against Zelman, Lemon, and the broader Establishment Clause rulings by addressing religion with hostility. For these reasons the Court should strike down Article X Section 6(1) for violating the Establishment Clause.

a. Article X Section 6(1) as applied violates the *Lemon* test

If the Court decides that the "*Lemon* test" is controlling and reanimates the "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried" then the Blaine Amendment would fail to pass Constitutional muster. Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993) (J. Scalia concurring); See Blackman, Josh, This Lemon Comes as a Lemon. The Lemon Test and the Pursuit of a Statute's Secular Purpose (January 17, 2009). George Mason University Civil Rights Law Journal (CRLJ), Vol. 20, 2010. (for other colorful Lemon analogies, and an analysis of the flaws of divining legislative intent.) As applied by the Montana Supreme Court, Article X Section 6(1) bans religious options from an otherwise neutral student aid in violation of *Lemon.* In this case the first two prongs of *Lemon's* three-pronged test settle the matter. Prong one requires that the government actor must have a "secular purpose" for the program. In the instance of Montana'stax scholarship program, the tax credits clearly advance a secular goal of education. The program is not geared to religion in its benefits and is neutral on its face. Therefore, prong one of *Lemon* is satisfied in this case. However, prong two requires that a government actor engages in

programs that "neither advances nor inhibits religion." Lemon v. Kurtzman, 403 U.S. 602 (1971). This prong is what causes irreconcilable conflict between *Lemon* and the current application of Article X Section 6(1). Montana's prohibition on religion in general therefore results in the Establishment Clause being violated. See *Church of the Lukumi Babalu Aye*, 508 U.S. at 532. (supporting government's inability to ban religion from neutral benefits).

The first prong of *Lemon* imposes a requirement of a secular purpose. This requirement is designed to prevent any relevant "governmental decision maker . . . from abandoning neutrality." Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335 (1987). Instead of allowing for a neutral approach to religion Article X Section 6(1) works in practice to further establish a religion of secularism that violates the Establishment Clause. See Sch. Dist. of Abington Twp., s

The second prong of *Lemon* is violated by the current application of Article X Section 6(1). The Montana Supreme Court in its decision "ultimately concluded the Tax Credit Program aids sectarian schools in violation of Article X, Section 6, and that it is unconstitutional in all of its applications." Espinoza v. Dep't of Revenue, No. 17-0492 (Mont. Sup. Ct. Jan. 19, 2018). For this reason, the effect of Montana's application of Article X Section 6(1) is to ban religious options from otherwise neutral student-aid programs. This application of Article X Section 6(1) serves only to inhibit the ability of private individuals to send their children to religious schooling and therefore does not have a "principle or primary effect" that "neither advances nor inhibits religion." Lemon v. Kurtzman, 403 U.S. 602 (1971) Article X Section 6(1) expressly shows hostility towards religion and therefore violates the Establishment Clause.

Under the current application set forth by the Montana Supreme Court, Article X Section 6(1) shows hostility towards, and fails to meet the first and second prongs of the *Lemon* test, and therefore should be reversed.

b. As applied Article X Section 6(1) violates Zelman and the Establishment Clause.

In *Zelman* the Court looked at a case involving a challenge to a student voucher program on the grounds of

an Establishment Clause violation. In *Zelman* the Court consolidated previous cases and came to a test to be used for student-aid programs. See Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993) (government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit); Mueller v. Allen, 463 U.S. 388 (1983). The Court in *Zelman* stated that if a student-aid program that is "neutral with respect to religion" and is composed of individuals that "direct government aid to religious schools wholly as a result of their own genuine and independent private choice", then there is no Establishment Clause violations. Zelman v. Simmons-Harris, 536 U.S. (2002); see Mueller v. Allen, 463 U.S. 388 (1983), ("A program that provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause"). When the Court in the past has ruled that a tax exemption directly from a State to a Church is not an Establishment Clause violation, it would strain credulity to say that an indirect tax benefit presents entanglement that violates the Establishment Clause. See Walz v. Tax Commission of the City of New York, 397 U.S. 664 (1970) (court ruled that tax exemptions to Churches are permissible under the Establishment Clause). Even if you find the facts of *Walz* as too different, in Mueller v. Allen, 463 U.S. 388 (1983) the court found that a program giving taxpayers deductions on their state tax income tax to be permissible under the Establishment clause as "the historic purposes of the Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case."

On its face that Tax Credit Scholarship Program, §15-30-3111, MCA, does not violate *Zelman*'s requirement of neutrality towards religion and allows for families to make their own private decisions on schooling which means "the circuit between government and religion [is] broken, and the Establishment Clause [i]s not implicated." Zelman v. Simmons-Harris, 536 U.S. (2002). See Agostini Felton, 521 U.S. 203 (1997) (ruled no Establishment Clause concerns because "the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis"). The Court in *Zelman* goes out of its way to strain the importance of laws

not pursuing "the forbidden effect of advancing or inhibiting religion", because the contrapositive of its neutrality and private choice requirements would violate the core principles of the Establishment Clause.

Therefore, if a State chooses to remove private choice and neutrality towards religion, as Montana's application of Article X Section 6(1) does, it would fail to meet the test put forth in *Zelman,* and is unconstitutional under the Establishment Clause. See Everson v. Board of Education, 330 U.S. 1 (1947) ("That Amendment requires the state to be a 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").

2. Applying Article X Section 6(1) To Bar Religious Options In Student-Aid Programs Violates the Free Exercise Clause

Article X Section 6(1) takes a neutral student-aid program that the Montana Legislature passed and makes it openly hostile and discriminatory towards religious exercise. The Free Exercise Clause provides protection to the exercise of religion and the Court has ruled in the past that discrimination towards "a particular religion or religion in general." *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993); See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (holding that an exclusion of a religious institution from an otherwise neutral benefit solely due to their religion "odious to our Constitution… and cannot stand"). For its open hostility towards religion Article X Section 6(1) as applied violates this Court's traditional jurisprudence on Free Exercise and should be struck down.

Of additional concern is the application of Article X Section 6(1) to discriminate with regards to religious use of student-aid money. The Court has long standing precedent from several cases that forbids this form of discrimination towards religious use of student-aid money. See Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393 (1993); Widmar v. Vincent, 454 U.S. 263, 265 (1981).

a. Applying Article X Section 6(1) to bar religious options from Student-Aid programs contradicts *Locke*

While the Montana Supreme Court interpreted *Locke* to permit the wholesale exclusion of religion from a neutral student-aid program we hold that *Locke* does no such thing and in fact admonishes this form of religious discrimination. In *Locke* as in this case there was a student-aid program from the state of Washington geared around increasing educational access for needy students. Washington's program had no prohibitions on the use of its funds, allowing for students to go to a religious or secular school, with one exception of not allowing a student to use these funds to pursue a major in "devotional theology." Joshua Davey was a member of Washington's scholarship program and got into Northwest College which is a private Christian College. Well at Northwest Davey aimed to double major in pastoral ministries and business management. Davey's goal of majoring in pastoral ministries was drawn into conflict with the scholarship program's requirement that its funds can't go to a major in "devotional theology" and therefore his funds under the scholarship program were denied. In response to his scholarship funds being denied Davey went to Court and claimed injury under the Free Exercise Clause.

In *Locke* the decision of the Court did not strike down the devotional theology prohibition and took the unprecedented step of allowing for this religious exclusion in a student-aid program. However, its unprecedented nature is rightly earned as the Court strained to ensure that this ruling was construed narrowly to the facts of the case and was not signaling the ability of states to prohibit religious options from future student-aid programs. Although the Washington Scholarship made a religious exclusion the Court ruled that because the program was "otherwise inclusive", that the devotional theology exclusion could stand as not burdening Davey's Free Exercise of religion. Locke v. Davey, 540 U.S. 712 (2004). The program allowed individuals to use its funds at "pervasively religious schools", to take religious classes, and indeed even some religious majors. *I.d* at 724-5. Additionally, the state interest of "not funding the religious training of clergy" was a justification that factored into the Court's ruling, and this interest is not present in this case. It was these facts that allowed the Court in *Locke* to take the unprecedented step of allowing a religious exclusion in

a student-aid program as it showed no "hostility towards religion" and even went "a long way toward including religion in its benefits." *I.d.* at 724. The tolerance therefore of Washington's Scholarship Program is completely at odds with the facts of this case, where Montana's application of Article X Section 6(1) bars all religious options in its student aid programs, instead of providing a narrow religious exclusion.

Washington's student-aid program critically did not have a coercive element that would "require students to choose between their religious beliefs and receiving a religious benefit." *I.d.* at 720-721 However contrastingly after Montana's Supreme Court decision an individual would have to decide between attending a school that follows their beliefs or receiving a government financial benefit. This does represent coercion and conditioning an individual's ability to participate in a public benefit based on their cessation of religious conduct is precisely what *Trinity Lutheran* ruled unconstitutional. Cf. South Dakota v. Dole, 483 U.S. 203 (1987) (for a commentary on necessary elements for coercion); See McDaniel v. Paty, 435 U.S. 618, 626 (1978) ("To condition the availability of benefits upon a recipient's willingness to surrender his religiously impelled status effectively penalizes the free exercise of his constitutional liberties.") (internal punctuation omitted); See Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449 (1988). (held that the government can't "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens"); See also Lee v. Weisman, 505 U.S. 577 (1992) (discussing coercion under the first amendment). See Hobbie v. Unemplt. Appeals Comm'n, 480 U.S. 136 (1987); See also *Thomas* v. *Review Bd. of Indiana Employment Security Div.,* 450 U. S. 707(1981); See also Sherbert v. Verner, 374 U.S. 398 (1963).

It strains credulity to find the facts of *Locke* analogous to the facts of this case and therefore the Court should rule this exclusion a separate matter from *Locke*'s, and therefore should apply its principles of not allowing hostility towards religion in an otherwise neutral benefit. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).

b. As Applied Article X Section 6(1) discriminates against the "religious use" of student-aid money in violation of *Rosenberger*

In its current application Article X Section 6(1) discriminates against the religious use of money in violation of the Free Exercise Clause. In the past the Court has not ruled religious use a separate matter from religious status or belief. To the contrary the Court has ruled discrimination of religious use of public benifits to violate the Free Exercise Clause. See Widmar v. Vincent, 454 U.S. 263, 265 (1981). (Held that a prohibition of "use" of public facilities "for purposes of religious worship or religious teaching" was unconstitutional.); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828, 843, 845–46 (1995). (Held that a prohibition on students receiving student activity funds solely because the funds would be "used for sectarian purposes" violates the Free Exercise Clause). In *Trinity Lutheran* Justices Thomas and Gorsuch find arguments distinguishing religious belief or status from use unconvincing and hold them equally offensive to Free Exercise rights. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017). ("I don't see why it should matter whether we describe [a] benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use). It is free exercise either way.") (Gorsuch, J., concurring in part).

c. As Applied Article X Section 6(1) discriminates against "religious beliefs," "religiously motivated conduct," and "religious status" in violation of *Trinity Lutheran.*

In the Court's decision of *Trinity Lutheran,* the issues of discrimination against religious beliefs, motivated conduct, and status is addressed as violating the Free Exercise clause. *Trinity Lutheran* involved a daycare center and a Church preschool that applied to a Missouri grant program that would allow them to resurface their playgrounds with tire scraps. Trinity Lutheran then qualified for the program and was one of the 14 initial recipients. However, Missouri just like Montana has a Blaine Amendment preventing public funding of religion and therefore Missouri denied Trinity Lutheran's application. Trinity Lutheran sued the denial on the basis of the Free Exercise clause and won in a decision the covered fundamental principles of the Free Exercise clause.

The Court held that laws may not create "special

disabilities on the basis of religious *status*." Church of Lukumi Babalu Aye, 508 U.S. at 533. Next the Court held that any law "may not discriminate against some or all religious *beliefs*." Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017). Lastly the Court held that the government cannot make a law that would "regulate or outlaw conduct because it is religiously motivated." *Id.* In *Trinity Lutheran* the Court ruled on discrimination based on religious status as governing the case. It held that making Trinity Lutheran choose between "participat[ing] in an otherwise available benefit program or remain[ing] a religious institution," was an infringement of their Free Exercise rights. Id. at 2021–22.

The current application of Article X Section 6(1) discriminates against the religious "status" in violation of families Free Exercise rights to practice their religion. See Mitchell v. Helms, 530 U.S. 793, 828 (2000) (holding "our decisions have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity"); Church of the Lukumi Babalu Aye, 508 U.S. at 533. Montana's Blaine amendment discriminates against families sending their children to religious schools solely because of their religious "status." Indeed, for several religions including Kendra's, the dictates of their faith require them to put their children into religious schooling. See, e.g., Brief for Agudath Israel of America as Amicus Curiae Supporting Appellees at 1, 8, Espinoza v. Dep't of Revenue, No. 17-0492 (Mont. Sup. Ct. Jan. 19, 2018). (Discussing Orthodox Jews tradition of religious schooling).

In addition, the application of Article X Section 6(1) to bar religious options from an otherwise neutral student-aid program, discriminates against the religiously motivated conduct, and religious beliefs of families who want to send their children to religious schools. The programs application as it pertains to its rejection of religious use is inextricably linked to a purpose of prohibiting the Free Exercise of religious beliefs and conduct. And as the government is not permitted to "impose burdens only on conduct motivated by religious belief," the application of Article X Section 6(1) violates the Free Exercise rights of families wishing to participate in a neutral student-aid program. Church of the Lukumi Babalu Aye, 508 U.S. at 543.

d. Article X Section 6(1) as applied places substantial burden on Free Exercise of religion

and therefore should be reviewed with Strict Scrutiny which it cannot pass.

Montana's Blaine Amendment as applied facially discriminates against religion and imposes a substantial burden on the Free Exercise of families who wish to send their children to parochial schools. Due to these facts the *Sherbert* test requiring strict scrutiny should be applied. Sherbert v. Verner, 374 U.S. 398 (1963) *Sherbert* like the *Lemon* test has three prongs at play that involve substantial burdens, how narrowly tailored a law is to a state's end, and a compelling interest.

First in order for *Sherbert* to be triggered a substantial burden on the Free Exercise of your religion must be identified. In the application of Montana's Blaine Amendment that substantial burden is eminently clear as an unconstitutional "hostility" is exhibited towards family's religious exercise. See Everson v. Bd. of Educ. of Ewing Township, 330 U.S. 1 (1947). (Held with respect to the Establishment Clause "That Amendment requires the state to be a 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."). After establishing a substantial burden, the *Sherbert* test requires that a law is birthed out of a compelling state interest in prohibiting that Free Exercise of religion. The respondents argue that our nation's history divines a tradition of erecting a "wall of separation between church and state." Letter from Thomas Jefferson, President, United States of America, to Danbury Baptists (Jan 1. 1802) (on file with the Library of Congress); The Papers of James Madison, vol 8, 10 March 1784-28 March 1786, ed. Robert A. Rutland and William M. E. Rachal. Chicago: The University of Chicago Press, 1973, pp. 295-306. However, a more thorough and even keeled examination of our Country's founding reveals that a strict separationist view of the Establishment Clause is at best contested by numerous phenomena at our founding. Mere days after approving of the first amendment the first Congress appointed chaplains for legislative prayer. D. Currie, The Constitution in Congress: The Federalist Period 1789–1801, pp. 12–13 (1997). John Adams went as far as to say "our Constitution was made only for a moral and religious People. It is wholly inadequate to the government of any other." "From John Adams to Massachusetts Militia, 11 October 1798," *Founders Online,* National Archives, accessed September 29, 2019. Indeed, some scholars and

even a justice of this Court view the Establishment Clause as a Federal prohibition on establishment of a national religion, but also a prohibition on Federal disestablishment of established state religions. See Joseph M. Snee, Religious Disestablishment and the Fourteenth Amendment, 1954 Wash. U.L.Q. 371; William C. Porth & Robert P. George, Trimming the Ivy: A Bicentennial Re-examination of the Establishment Clause, 90 W. Va. L. Rev. 109, 136-39 (1987); Duncan, Richard F., "Justice Thomas and Partial Incorporation of the Establishment Clause: Herein of Structural Limitations, Liberty Interests, and Taking Incorporation Seriously" (2007). College of Law, Faculty Publications. 130. Therefore it bears asking what tradition of separation States practiced, because the facts of our founding dispute the respondent's historical interpretation. Of the original thirteen colonies "at least six states had government- supported churches" in 1789. *Id.* Fully eleven of the thirteen states had religious tests required for office holding. Thomas J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment 221 (1986). Even famed jurist Joseph Story commented on the issue ", the whole power over the subject of religion is left exclusively to the state governments." Joseph Story, Commentaries on the Constitution of the United States § 1873 (1833). Now while the incorporation of The Establishment Clause provides the practical effect of states no longer having the freedom to create establishments of religion, it would be a fatally flawed analysis of our founding to come to the conclusion that a uniform approach or tradition of "separation of church and state" was practiced by the several states.

With these facts in mind the next argument for a state interest from the respondents is that *Locke* is governing, and that the "play in the joints" between the Establishment Clause and Free Exercise Clause allows Montana to discriminate against families sending their children to parochial schools in an otherwise neutral student-aid program. Walz v. Tax Commission of the City of New York, 397 U.S. 664 (1970) (origination of play between the joints analogy to describe the tension between the two religion clauses of the first amendment.). However as discussed earlier the facts of *Locke* diverge from the facts of this case. In *Locke* Washington's Scholarship Program besides it exclusion of devotional theology was "otherwise inclusive" towards religion and allowed for students to take classes at "pervasively religious schools", and had a unique interest of not aiding a pastoral function. Even while ruling this interest compelling, the Court made

sure to note that Washington, if it so desired, "could consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology." Locke v. Davey, 540 U.S. 712 (2004). It held so because "under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients." *Id.* See also *Witters* v. *Washington Dept. of Servs. for Blind,* 474 U. S. 481, 487 (1986) (supporting proposition of private choice removing Establishment Clause concerns). For these reasons the Court held that Washington's program was narrowly tailored to the effect of promoting religious use of its program, and that the goal of prohibiting the funding of "devotional theology" was a compelling interest.

Article X Section 6(1) as applied lacks both requirements of strict scrutiny, with its application not being narrowly tailored and not possessing a compelling interest. First while the Court has recognized a "play in the joints" allowing for "some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." Locke v. Davey, 540 U.S. 712 (2004). However, this Court held that a state's interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution [] is limited by the Free Exercise clause." Widmar v. Vincent, 454 U.S. 263 (1981). Therefore, once Montana wanders out of the safe haven that exists due to the tension between the Establishment Clause and Free Exercise, it is in violation of the Free Exercise Clause and cannot find refuge through the "play in the joints." This is precisely what Montana's application of Article X Section 6(1) achieves as it facially discriminates against religion and is an "adversary" of religion in violation of the Free Exercise Clause. Everson v. Bd. of Educ. of Ewing Township, 330 U.S. 1 (1947). In terms of scope the application of Article X Section 6(1) is anything but narrow, and indeed seems allergic towards the idea. Montana Supreme Court's interprets the applicability of Montana's Blaine Amendment to covers parties so disconnected from its text, that the district court that initially ruled on the case disagreed, and held that the parties to the case did not amount to individuals that benefited from a "direct or indirect appropriation or payment from any public fund or monies." Mont. Const. art. X, § 6(1) Additionally respondents hold at the same time that the Blaine Amendment is broad enough in scope to cover the families of the case, while at the same time arguing that these families are so disconnected from the Tax Credit Program

that they do not possess an article three injury and therefore lack standing. See National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012) (another instance where two seemingly incompatible propositions were held at the same time, with the government holding that the Patient Protection and Affordable Care Act of 2010 was a tax for the purposes of the taxing power, but was not a tax under the Anti-Injunction Act).

CONCLUSION

Montana's application of Article X Section 6(1) violates the Free Exercise Clause and the Establishment Clause. This Court reverse the judgement of the Montana Supreme Court and should hold that the exclusion of religion from an otherwise neutral student-aid program is unconstitutional.

Respectfully submitted,

Luke Spitzley
East Grand Rapids H.S.

East Grand Rapids, Michigan 49506
spitluk@egrps.org