No. _____

In The

Supreme Court of the United States

KENDRA ESPINOZA, JERI ELLEN ANDERSON,
and JAMIE SCHAEFER,

Petitioners,

v.

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

Respondent.

On Writ of Certiorari to
The Montana Supreme Court

Brief for Petitioner

Penelope Spurr
Senior, Lake Oswego H.S.
Lake Oswego, OR 97034
spurr02585@loswego.k12.or.us

Selena Zhang
Senior, Lake Oswego H.S.
Lake Oswego, OR 97034
zhang35736@loswego.k12.or.us

Counsels for 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?

Table of Contents

Table of Authorities

Cases

Constitutions

Other

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Madison, J., & Virginia. (1819). *Religious freedom: A memorial and remonstrance, drawn by His Excellency James Madison, late President of the United States, against the general assessment, in "A bill establishing provision for the teachers of the Christian religion" : presented to the General Assembly of Virginia, at the session of 1785*. Boston: Printed and sold by Lincoln and Edmands

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Introduction

In 2015, the Montana state government introduced a scholarship aid program to allow students the option of a non-public education.[1] (Montana's non-public schools are "overwhelmingly" religious.) Under the program, an individual could receive a "modest tax credit" for donating to private, nonprofit scholarship organizations[2]. Those organizations would then award scholarships to eligible students (those who are disabled or come from low-income families), allowing them the opportunity to attend any "qualified education provider," or nonpublic school[3]. But the Montana Department of Revenue implemented Rule 1, an addition to the legislation which excluded religious institutions from involvement in the scholarship program, citing its 19th century Blaine Amendment which prohibited tax credits from going to schools owned or operated by a "church, sect, or denomination." Kendra Espinoza, among other mothers, challenged the restriction in Rule 1 as a violation of the U.S. Constitution -- more specifically, the Free Exercise and Establishment Clauses of the First Amendment.

Summary of Argument

Stare decisis presents a vital framework for assessment of the constitutionality of Montana's scholarship aid program. This case is in no way a radical shift from preceding cases that have come under the eye of the Supreme Court.

The first matter at hand is private choice of education. When deciding precedent cases *Zelman*, *Everson*, and *Lukumi*, the Court concluded that their respective "objects" —vouchers, transportation, and playground material— were neutral. *Espinoza*, likewise, involves a wholly neutral objective: independent choice of education. The Court also established in *Lukumi* and *Trinity* that laws which impede religious exercise stand in violation of the Free Exercise Clause. *Espinoza* is similar because Montana's Rule 1, which excluded religious institutions from participation in the scholarship aid program, would have compelled parents to choose a secular education over nonsecular for their children. In depriving parents of a choice between the two, the rule practices religious coercion under the semblance of "neutrality." It ultimately starves Montanans of resources that have the potential to help students succeed academically.

The second matter at hand is hostility to religion. These particular scholarships are a generally available benefit in that all students with disabilities or low-income backgrounds are eligible. To pointedly exclude religious institutions, then, is

[1]Mont. Code Ann. § 15-30-3101
[2] *Id*. at § 15-30-3111
[3] *Id*. at § 15-30-3102(7)

blatantly and facially unconstitutional under Free Exercise. Montana's Rule 1 fails to stand up to strict scrutiny; it ultimately produces a *de facto* form of segregation. The harm of religious exclusion is substantial, long-lasting, and in clear violation of the First Amendment.

Argument

I. The student-aid program does not violate the Establishment Clause.

James Madison's proposal for a religion-related provision in the Bill of Rights read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretence, infringed."[4] Inherent freedom to religiously exercise has remained a pillar of the American construct of liberty and has developed into the Establishment and Free Exercise Clauses of the First Amendment of the United States Constitution.

In his 1785 "Remonstrance" speech to the Virginian General Assembly, James Madison articulated concerns not just about the stifling of religious exercise, but also the promotion of it. "As the Bill violates equality by subjecting some to peculiar burdens," he said, "so it violates the same principle, by granting to others peculiar exemptions. Are the Quakers and Menonists the only sects who think a compulsive support of their Religions unnecessary and unwarrantable? Can their piety alone be entrusted with the care of public worship? Ought their Religions to be endowed above all others with extraordinary privileges by which proselytes may be enticed from all others?" Madison's concern for the ambiguity behind hindrance and promotion of religion exists today in the form of the "Lemon test," a three-pronged standard used to assess church and state relations.

The test traces back to *Lemon v. Kurtzman*[5], in which the Court established the secular purpose doctrine[6], the principal or primary effects doctrine[7], and the excessive entanglement test[8].

Now, the *Lemon* test is satisfied by a policy of tax credits to scholarship programs discussed in *Espinoza*. Firstly, the tax credits to scholarship programs are secular

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[4]The Papers of James Madison. Edited by William T. Hutchinson et al. Chicago and London: University of Chicago Press, 1962--77
[5]*Lemon v. Kurtzman*, 411 US 192 (1973)
[6]*Abington School District v. Schempp,* 374 U.S. 203 (1963)
[7]*Board of Education v. Allen,* 392 U.S. 236 (1968)
[8]*Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970)

in purpose. Like the student-aid program considered in *Everson v. Board of Education of the Township of Ewing*[9], benefits to religious institutions are not the primary purpose of the tax credits, which are intended "for the purpose of funding scholarships benefiting students attending qualified education organizations."[10] Scholarships are offered to both secular and religious institutions, with no intention of aiding either of them on the basis of their religious affiliation. The scholarship money provides benefits directly to individuals across the state.[10] Although the scholarship money is transferred to a religious institution, it is awarded and spent on a purely individual basis.

Secondly, the student aid does not "directly fund or support religious institutions." For one, the scholarships may only offset the costs of a student's tuition and cannot, in their primary effect, be spent by the school for its own interests. For two, the primary beneficiary of the aid is the student, not the institution. The money is given in the name of the student, who can then choose which institution to spend their money at. At that point, the school is a secondary recipient of an ulterior transaction. As noted in the *Zelman* majority opinion, which ruled that the disbursement of federally funded tuition aid to religious schools was not in violation of the Establishment Clause, "The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual aid recipients not the government, whose role ends with the disbursement of benefits."[11] For the same reason, the student-aid program in *Espinoza*, whose beneficiaries depend on individual and private choice, does not violate the Establishment Clause. For three, the scholarships do not change the amount of money a school receives, so the funds do not substantially support the institution. If another student without financial need had paid out-of-pocket, the institution would receive the same amount of money and thus does not receive additional support from the provision of the scholarship. For four, even if these choices resulted in consistent scholarships to religious institutions, the scholarship is ultimately within each private party's free exercise rights. In *Everson*, where 96% of institutional reimbursement participants were parochial schools,[12] the court maintained that the program was constitutional on the basis of providing private choice. In *Zelman*, 96% of individual beneficiaries attended private religious schools, but the court noted "To attribute constitutional significance to [this] figure would lead to the absurd result that a neutral school-choice program might be permissible in parts of Ohio where the percentage is lower, but not in Cleveland, where Ohio has deemed such programs most sorely needed."

[9]330 US 1 (1947)
[10] "FAQ for Student Scholarship Organizations." *Education Donations Panel*, Montana Government, 2016, svc.mt.gov/dor/educationdonations/SSOHelp.aspx.
[11] 536 U.S. 639 6-11.
[12]"Everson v. Board." Oyez. https://www.oyez.org/cases/1940-1955/330us1

Thirdly, the program does not create undue entanglement between the state and a religious institution. The state only grants a tax credit to a private donor, so they have no contact with religious institutions. The private donor alone chooses which SSO to give money to. That SSO, in turn, chooses which students should receive scholarships, and those students finally choose which school they would like to attend. The government and its intentions are three degrees removed from any religious institution and have no obligation to monitor the usage of the money. The responsible dispensation of the funds is the responsibility of a private actor. No excessive administrative interaction between the state and a religious institution is required.

II. Rule 1 Violates the Free Exercise Clause

A. Private Choice

The student aid in *Espinoza* reaches religious institutions as a result of private choice, much like the cases of *Zelman v. Simmons-Harris*[13] and *Everson v. Board of Education of the Township of Ewing.*[14]

Chief Justice Rehnquist's majority opinion on *Zelman* notes that a program that "permits such individuals to exercise genuine choice among options public and private, secular and religious" is "a program of true private choice." The site describing Montana's tax credit states that "the SSO [Student Scholarship Organization] receiving your donation may not restrict or reserve scholarships for use at a particular education provider and must allow parents or legal guardian to enroll an eligible student with any qualified education provider *of their choice*" (*emp. added*). Thus, the policy is one of student private choice.

Rule 1 restricts this private choice by excluding religious institutions ("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") from scholarship eligibility. Under the Free Exercise Clause of the First Amendment of the United States Constitution, states may not abridge private religious choice, so Rule 1 is unconstitutional.

Locke v. Davey also notes that that the Court would not "[require] students to choose between their religious beliefs and receiving a government benefit, see, e.g., *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U. S. 136." (3). Yet, Espinoza's family and others like hers were unable to afford tuition without the scholarship money, forcing her to choose between her financial stability (and ability

[13]536 U.S. 639 (2002)
[14]330 U.S. 1 (1947)

to receive a neutral benefit) and an education for her child in accordance with her religious reviews,[15] effectively eliminating her right to religious choice.

Finally, students have the right to choose an education in values that align with their religious affiliation. A study by Bendrick and Burke identifying the most influential factors in choosing a school for over fourteen thousand tax-credit scholarship beneficiaries was "religious environment/instruction" for 66% and "morals/character/values instruction" at 52%.[16] According to EdChoice, "These two factors far outranked other considerations." Schools are sites which inculcate moral values. Parochial schools provide instruction along religious guidelines, while secular institutions prescribe government-approved paradigms. Rule 1 creates a significant burden on religious exercise by inhibiting access to an educational institution aligned with religious values and mandating education through a government-approved lens.

B. Hostility Toward Religion

Under the Free Exercise Clause, states may not legislate an animosity or hostility toward religion, as outlined in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* and furthered in *Trinity Lutheran Church of Columbia, Inc. v. Comer* and *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.

The language of Rule 1 explicitly prohibits donations to "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*"[17] (*emp. added*). The text of Rule 1 -- which uses an institution's religious affiliation as the criterion of eligibility -- shows that its operation is discrimination, on-face, on the basis of religion. As stated in *Trinity*'s majority opinion, "This Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion."

As Kennedy noted in the opinion of *Masterpiece*, "The Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion." He emphasizes that "The government, consistent with the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens."[18]

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[15] "Espinoza v. Montana Department of Revenue." Oyez, www.oyez.org/cases/2019/18-1195.
[16] Bedrick, Jason, and Lindsay Burke. "SURVEYING FLORIDA SCHOLARSHIP FAMILIES." *EdChoice*, EdChoice, Oct. 2018, www.edchoice.org/wp-content/uploads/2018/10/2018-10-Surveying-Florida-Scholarship-Families-byJason-Bedrick-and-Lindsey-Burke.pdf.
[17] Edchoice.org
[18] 584 US _ (2018)

Rule 1 creates hostility because parents would be compelled to choose between their religion and their financial stability. Espinoza would not be able to send her children to Stillwater without the Big Sky scholarship; families in similar situations would be forced to sacrifice sending their children to parochial schools.

Since Rule 1 is not neutral and does not violate the Establishment Clause, it is subject to strict scrutiny. According to precedent established by Justice Kennedy's majority opinion in *Lukumi* and Justice Roberts's majority opinion in *Trinity*, a law that cannot withstand strict scrutiny is hostile to religion and thus unconstitutional under the Free Exercise Clause.

As Justice Kennedy articulated in his decision on *Lukumi*, "Under the Free Exercise Clause, a law that burdens religious practice need not be justified by a compelling governmental interest if it is neutral and of general applicability. *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872. However, where such a law is not neutral or not of general application, it must undergo the most rigorous of scrutiny: it must be justified by a compelling governmental interest, and must be narrowly tailored to advance that interest." Rule 1 cannot withstand strict scrutiny, and thus violates the Free Exercise Clause.

Firstly, the alleged state interest vested in Rule 1 was to prophylactically avoid establishment concerns by adhering to the Montana Constitution. As Justice Roberts notes in his majority decision on *Trinity,* however, such a concern is insufficient when weighed against the limits on free exercise: "the Department offers nothing more than Missouri's preference for skating as far as possible from religious establishment concerns. In the face of the clear infringement on free exercise before the Court, that interest cannot qualify as compelling. Pp. 14–15." The aforementioned restriction of free exercise rights in parent and student choice likewise outweighs concerns of preemptively avoiding establishment concerns.

In addition, Justice Powell's decision in *Widmar v. Vincent* noted that Cornerstone, a religious club, had First Amendment free exercise rights that overruled state interest in upholding the Missouri Constitution due to the Supremacy Clause.[19] Even if Montana can prove a compelling state interest in adhering to the Montana Constitution, Espinoza's First Amendment rights, due to their federal nature, should outweigh.

Secondly, Rule 1 over-suppresses access to funding for religious institutions. The scholarship money parochial schools would receive does not come directly from the government, so the exclusion of religious schools does little to prevent undue entanglement. If anything, the prevention of a substantial portion of the population

[19] "Widmar v. Vincent." Oyez, www.oyez.org/cases/1981/80-689.

from accessing education by a religious institution violates the Lemon test by inhibiting religion in its primary effect.

In sum, the exclusion of religious organizations from scholarship receipt creates a *de facto* "no parochial-school student need apply" for scholarships when "Missouri's "No religious schools need apply" for school playground grants and New York's "No religious clubs need apply" for use of school facilities and Tennessee's "No ministers need apply" for state office" have been struck down (Kavanaugh).

Distinguishing Locke

Although the Locke decision -- which details "playing in the joints" between the Free Exercise Clause and the Establishment Clause -- does not subject the law to strict scrutiny, it should not determine the standard for this case, as it "also did not suggest that discrimination against religion outside the limited context of support for ministerial training would be similarly exempt from exacting review," which Justice Thomas notes in his concurring opinion on *Trinity* is rightfully narrowly tailored. Even if the Locke decision is considered, it allows states to impose only a "relatively minor burden" to further the state interest in preventing established religion or religious entanglement, whereas the wholesale restriction of low-income families attending religious schools creates a significant burden as articulated above.

Additionally, *Locke*'s subject of ministerial training cannot be drawn in similarity to secondary school education that is the subject of *Espinoza*. The latter is not a commitment or devotion to further religion; rather, families' desires to educate their children at religious schools is moreso a desire for their children to learn in a supportive environment where they can gain exposure to the studies of religion.

Conclusion

The separation of church and state is a foundational element of not only the American legal system, but holistic American culture. Unlike the nation's strongest allies, the United States does not have a national religion, just as it does not have a national language. As overused as the "melting pot" analogy might be, it holds true: the many religions of the States are one of its defining features.

The nation's founders harbored two concerns: that religion could be suppressed or promoted by the government. As conversation surrounding this concern continued over centuries, the nation witnessed the aforementioned precedent: *Zelman*, *Trinity*, *Locke*, and *Lukumi*, among others.

When applying the facts of these cases to the facts of *Espinoza*, parallels clarify. Espinoza's scholarship aid is not neutral in that it merely allows families the choice to educate their children in conjunction with their religious values. The aid itself does not directly or indirectly flow to religious institutions; it only allows needy families the ability to apply without financial burden. Because the inclusion of religious institutions in the program is wholly unproblematic, exclusion of such participants is an unconstitutional act which deprives parents choice. Although certain minute facts are unique to *Espinoza*, its most critical have already appeared before the Court. Just as it has before, the Court should uphold Free Exercise and Establishment by rejecting such exclusionary policies.