IN THE SUPREME COURT OF MONTANA

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ESPINOZA

Petitioner

Vs.

MONTANA DEPARTMENT OF REVENUE

Respondent

_____

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Brief for Respondent

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?f

Makaylia Askew
Jacqueline Aliman

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Statement of the Case

Big Sky Scholarships was going to award scholarships to students at both religious and nonreligious schools. Because of the Montana Constitution, the Montana Department of Revenue issued Rule 1: a scholarship can not provide students at a “church, school, academy, seminary, college, etc. or any other sectarian institutions owned or controlled in whole or in part by any church, religious.” Because of this; Big Sky could not award scholarships to students at Stillwater Christian School, which is a religious academy in Kalispell, Montana. The parents

argued that Rule 1 violates the Free Exercise Clause of the First Amendment, and claimed that the Tax Credit Program was constitutional and that the addition of Rule 1 was unnecessary.

Statement of the Argument

The Free Exercise Clause does not prohibit states from withholding funding from student aid programs because the clause does not prohibit the free exercise of religion. The History of the Free Exercise Clause up holds that there is no violation of the Petitioners first amendment freedom of religion because several State constitutions have disqualified religious institutions from government aid. There was no violation of the Free Exercise clause because previous courts have upheld the constitutionality of not funding religious schools when non-religious schools are also declined.

Argument one: Past precedent support the constitutionality of not funding religious schools

In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. *Employment Div. Dept. of Human Resources of Ore v. Smith 484 U.S. 872 (1990).* Neutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. According to *Smith,* if prohibiting the exercise of religion results from enforcing a "neutral, generally applicable law, the Free Exercise clause has not been offended. *Id. at 878-880.* The Free exercise clause is offended when prohibiting religious exercise results from a law that is not neutral or generally applicable, all state constitutions have provisions that address the relationship between the institutions of religion and government. Cases such as *Strout v. Albanese, Chittenden Town School. Dist. v. Dept of Educ, Eullitt ex rel. Eulott v. Me. Dept of Educ.* and *Anderson v. The Town of Durham* all have addressed the question about tuition grant programs. THey all rejected the arguments that steam must include religious education in programs that provide aid to private schools. All 4 of the cases are over a decade old and no case since has conflicted with them.

Though the language and history of such provisions vary, the distinctive treatment of religion is a commonplace. The distinctiveness of religion (not animus toward any particular religion or religion in general) and importance of religious liberty explain its special treatment in our constitutional tradition. This constitutionally distinctive quality of religion is deeply rooted in history and precedent. James Madison, for one, observed that religion "is precedent both in order of time and degree of obligation, to the claims of Civil Society"3 *James Madison Memorial and Remonstrance Against Religious Establishments ¶1 (1785),* entirety, it also ensured that no one is penalized for exercising their faith. Jurists ranging from Justice Brennan to Judge Sutton have also recognized the vital importance of state constitutions in protecting individual liberties; and recognized the fundamental rights not explicit in the federal constitution; and allowing this Nation's citizenry to fine-tune the limits of governmental authority and the extent of governmental obligations, state by state. *Jeffery S. Sutton, 51 Imperfect Solutions; States and the making of American Constitutional Law (2018).* Additionally according to *Brown v. Bd of Educ., 347 U.S. 483, 493 (1954)* the federal constitution makes no reference to schools or education, leaving to the states the establishment of a public education system, its financing, and the contours of the right to a quality public education.

Therefore it does not undermine Montana's sovereign prerogative exercised by the 1972 constitution, to deploy public funds to guarantee equal quality public education, and to build a church0state wall for education in that acknowledged space between the free exercise and the establishment clauses. North Carolina's 1776 Constitution provided that "there shall be no denomination in this state , in preference to any other, that no person shall be obliged to pay, for the purchase of any globe, or the building of any house of worship, and all persons be at liberty to exercise their own mode of worship. *N.C. Const. In 1776, art. XXXIV.* Similarly, New Jersey's 1776 Constitution provided: there shall be no establishment of any religious sect in this province, in preference to another, no person would be obliged to pay tithes, taxes or any other rates, for purpose of building or repairing any… church or churches and that no person shall ever, with in this colony, be deprived of the inestimable privilege of worshipping Almighty God in a manner, agreeable to the dictates of his own conscience. *N.J. Const. of 1776, art. XVIII.* These early state constitutions confirm that a bar on government aid to religion does not violate the Free Exercise Clause. These constitutions simultaneously guaranteed free exercise of religion while simultaneously disqualifying religious institutions from state aid.

By Affording state and local governments the latitude to resolve close church-state questions, federal courts achieve some of the desirable effects of originalism- namely political accountability and judicial consistency-"when states are free to create their own policies and programs reflective of their increased need for both separation from and partnership with religious institutions. To refuse to give states this latitude on borderline church-state issues would collapse the lay in the joints"between the Religion Clauses this court has wisely and repeatedly recognized. *Locke, 540 U.S. at 718.* Additionally, Montana's constitution reflects the stateś interest in respecting the distinctive nature of religious education, avoiding interference in religious schools, and protecting its state funding resources for public education. It ensures pbic accountability for education and avoids entanglement with religion. The stateś treatment of religion reflects the kind of symmetry long associated with protections for religious liberty. It also protects against government involvement in religious institutions.

Argument two: The history of the Free Exercise Clause upholds that there is no violation

Founding-era evidence demonstrates that the No-Aid Clause does not violate the Free Exercise Clause. At that time, several State constitutions disqualified religious institutions from government aid. Moreover, James Madison, the principal drafter of the Free exercise Clause, argued against government funding of the church for reasons similar to those cited by Montana's Delegates. The Free Exercise Clause of the First Amendment states: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof" Under the Petitioners position, any constitutional provision that bars funding of religious schools violates the free exercise clause. Yet 38 states have such provisions, and they date back all the way to 1835.

Zorach v. Clauson, 343 US at 312 (1952) held that "there cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated." and that "as far as interference with the free exercise of religion and an establishment of religion are concerned, the separation must be complete and unequivocal." The first amendment within the scope of its coverage permits no exception. However, the first amendment does not say that in every and all respects there shall be a separation of Church and State. James Madison in his *Memorial and Remonstrance Against Religious Assessments*, warned that a "prudent jealousy" for religious freedoms required that they never become entangled in precedents. He strongly

believed that convictions are reflected in the first clauses of the first amendment of the Bill of Rights, which states: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

Cantwell v. Connecticut, 310 U.S. 296 (1940) held that the interrelationship of the Establishment Clause and the Free Exercise Clause as a `double aspect". On one hand, it forestalls compulsion by law of the acceptable of any creed or the practice of any form of worship. The freedom of conscience and the freedom to adhere to such religious organization as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion Founding-era of evidence that demonstrates that the No-Aid Clause does not violate the Free Exercise Clause. At that time, several State constitutions disqualified religious institutions from government aid. Both the religion and Equal allow a state to reject generally available subsidies that would benefit private education without running afoul of any constitutional antidiscrinimation rule.

Moreover, James Madison, the principal drafter of the Free Exercise Clause, argued against government funding of the church for reasons similar to those cited by Montana's Delegates. This evidence demonstrates that the original public meaning of a "prohibition" on "free exercise" would not have encompassed a state constitutional prohibition on government aid to religious institutions. These early state constitutions confirm the correctness of decisions like *Zelmanv. Simmons-Harris, 536 U.S. 639 (2002)*, which hold that the provision of government aid to religious schools does not, in and of itself, violate the Establishment Clause. There would have been no need to both disestablish the church and bar compelled support of the church if the provision of taxpayer funds to a church was an "establishment" of religion. At the same time, these early state constitutions also confirm that a bar on government aid to religion does not violate the Free Exercise Clause. These constitutions guaranteed free exercise of religion while simultaneously disqualifying religious institutions from state aid. ¨The real difficulty lies in ascertaining the limits, to which the government may rightfully go in fostering and encouraging religion. Three cases may easily be supposed. One, where a government affords aid to a particular religion, leaving all persons free to adopt any other; another, where it creates an ecclesiastical establishment for the propagation of the doctrines of a particular sect of that religion, leaving a like freedom to all others; and a third, where it creates such an establishment, and excludes all persons, not belonging to it, either wholly, or in part, from any participation in the public honours, trusts, emoluments, privileges, and immunities of the state.

For instance, a government may simply declare, that the Christian religion shall be the religion of the state, and shall be aided, and encouraged in all the varieties of sects belonging to it; or it may declare, that the Catholic or Protestant religion shall be the religion of the state, leaving every man to the free enjoyment of his own religious opinions; or it may establish the doctrines of a particular sect, as of Episcopalians, as the religion of the state, with a like freedom; or it may establish the doctrines of a particular sect, as exclusively the religion of the state, tolerating others to a limited extent, or excluding all, not belonging to it, from all public honours, trusts, emoluments, privileges, and immunities.¨ *Joseph Story, Commentaries on the Constitution (1833)*

James Madison was the "leading architect of the religion clauses of the first amendment" *Ariz. Christian Sch. Tuition Org. v. Winn 563 U.S. 125, 141 (2011)* in *Memorial and Remonstrance Against religious assessments* confirms that not only does Montana's statute not violate the Establishment clause, but striking down the statute under the No-Aid Clause does not violate the Free Exercise Clause either. The provisions regarding religion elsewhere in the 1972 Montana

Constitution confirm that the No-Aid Clause was motivated by concern for preserving public funds for public schools and avoiding government supervision of religion, not anti-religious bias. The Convention adopted a groundbreaking right to individual dignity that prohibited both public and private discrimination on multiple bases, including religious beliefs.

Argument three: The No-Aid Clause does not violate the Free Exercise of religion

Recognizing that most private schools in Montana are religious schools, the Legislature provided that "the tax credit…. Must be administered in compliance with… Article X, section 6, of the Montana Constitution" *Mont. Code Ann. § 15-30-3101.* That constitutional provision, the No-Aid Clause, prohibits aid to the sectarian schools. It provides that Montana will not financially aid religious schools. It protects public funding and accounting for public entities. *Mon. Const. Art X,§ 6.* It recognizes the distinctiveness of religious institutions and guards against state interference in religious practice. Overwhelming evidence from the adoption of this provision shows that it is rooted not in a biased view, but in the principled view that barring aid to religious schools would promote, not hinder, religious freedom. The free exercise clause bar laws "prohibiting the free exercise" of religion. This court has held that the term "prohibition covers not only direct bans on religious practice, but also indirect coercion or penalties on the free exercise of religion" *Trinity Lutheran Church of Colombia, Inc. v. Comer 137 S. Ct. 2012, 2022 (2017).*

Unlike in *Trinity*, where the court held that when a church was barred from receiving a generally available benefit, it was penalized for being a church, in violation of the Free Exercise Clause. Here, because the Montana Supreme Court invalidated the statute as to both religious schools and non-religious schools, it has ensured that there would be no "indirect coercion or penalties, and therefore there is no prohibition. It would be particularly incongruous to suggest that the free exercise clause invalidates a state constitutional No-Aid Clause when one original purpose of the simultaneously enacted Establishment Clause was to protect the variety of church-state arrangements that existed at the founding- including both state establishments and state disestablishments- from federal interference. *Town of Green v. Galloway, 572 U.S. 565, 605 (2014)(Thomas J. Concurring)*

There are two religious traditions that have coexisted since the early Republic. The first religious tradition that has existed since the early republic is **t**he tradition of protection of religious freedom. This includes a recognition that non-discrimination is crucial to religious freedom. Religious freedom requires that the State not exclude religious adherents from public benefits available to everyone else. It coerces people into abandoning their religion. And it exhibits a hostility to religion that is repugnant to fundamental principles of neutrality. The other religious tradition that has also existed since the early republic is the tradition of principled opposition to government aid to religious institutions. It instead promotes religious freedom. By doing so it prevents religious institutions from becoming dependent on government while simultaneously protecting the rights of people who have principled religious objections to supporting a religion in which they do not believe. Petitioners contend that the bare application of the No-Aid Clause, as an interlocutory step in a judicial decision, itself violates the Free Exercise Clause. Rather than restraining individual liberty, the No-Aid Clause restrains the government by barring state aid to religious schools.

The current No-Aid Clause was enacted in the Constitutional Convention of 1972. The Delegates' debates show that the Delegates enacted the No-Aid Clause in order to protect religious liberty. The Delegates believed that the No-Aid Clause would prevent the government

from gaining undue influence over religious schools, preserve funding for public schools, and protect the rights of taxpayers with religious objections to state aid. The Montana Supreme Court's decision protects religious freedom. The court enforced the No-Aid Clause as written, fulfilling the Delegates' goal of protecting religious liberty by creating a structural barrier between religious schools and government. By striking down the statute in its entirety, it also ensured that no one is penalized for exercising their faith.

Locke v. Davey held that even when a state decides not to fund religious organizations out of adherence to traditional american commitments to religious liberty, including prohibitions on aid to religious education, the free exercise clause does not condemn it as hostility toward religion. Additionally, just like in *Locke*, the scholarship program did not fail because of who the Petitioners are, but because of what the Petitioners proposed to do- use the funding provided by the scholarship program to provide their child a religious education and unlike in *Trinity Lutheran*, such funding for religious education lies at the core of constitutional No-Aid principles. All nine justices in *Locke v. Davey*, 540 U.S 712 (2004) also would have supported the Supreme Court of Montana's position. The majority opinion concluded that a State may support non-religious education while declining to support religious education, and the dissent would have also acknowledged that the State could constitutionally eliminate the scholarship program in its entirety.

Conclusion

The Free Exercise Clause of the First amendment does not prohibit states from withholding funding from student aid programs because based on past precedent, the refusal to fund religious sanctions is constitutional, *Employment Div. Dept. of Human Resources of Ore v. Smith 484 U.S. 872 (1990),* The constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. The History of the Free Exercise Clause also upholds that there is no violation because the original meaning of prohibition on free exercise would not have encompassed a state constitutional meaning of prohibition on government aid to religious institutions. *James Madison Memorial and Remonstrance Against Religious Establishment*. And lastly, the No-Aid Clause does not violate the Free exercise clause because it protects public funding and accounting for public entities.

Prayer

It is for these reasons we pray the court rule in favour of the Respondent, The Montana Department of Revenue, and uphold the lower court ruling.