In the

Supreme Court of the United States

Kendra Espinoza, Jeri Ellen 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.

Respondent's Brief

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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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BACKGROUND

In 2015, the State of Montana passed a law titled "Tax Credit for Qualified Education Contributions".[1] This program gave taxpayers a dollar-for-dollar tax credit for their donation to a Student Scholarship Organization (SSO).[2] These SSOs would then provide money to a Qualified Education Provider (QEP) to subsidize the tuition of a student in need.[3] However, under the legislature's definition of a QEP, most QEPs were religiously affiliated. However, the Montana Department of Revenue, who were given executive authority over the program, felt that this violated Article X § 6 of the Montana 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."[4]

Therefore, shortly after the law's enactment The Montana Department of Revenue enacted an administrative rule, henceforth known as rule 1, which removed the QEP status of religiously affiliated schools.[5] Several affected mothers, led by Kendra Espinoza, filed a lawsuit in the district court, saying that rule 1 violated their rights under the Free Exercise clause of the First Amendment and that the program was constitutional without Rule 1. The district court granted summary

[1] Kendra Espinoza v. Montana Department of Revenue, No. 18-1195, slip op . at 4 (Mont. Dec. 12, 2018). Accessed February 18, 2020. https://www.scotusblog.com/wp-content/uploads/2019/04/18-1195-opinion-below.pdf.
[2]Kendra Espinoza v. Montana Department of Revenue, No. 18-1195, slip op. at 4 (Mont. Dec. 12, 2018). Accessed February 18, 2020. https://www.scotusblog.com/wp-content/uploads/2019/04/18-1195-opinion-below.pdf.
[3]Kendra Espinoza v. Montana Department of Revenue, No. 18-1195, slip op. at 4 (Mont. Dec. 12, 2018). Accessed February 18, 2020. https://www.scotusblog.com/wp-content/uploads/2019/04/18-1195-opinion-below.pdf.
[4]Mont. Const. art. X § 6, cl. 1.
[5]Kendra Espinoza v. Montana Department of Revenue, No. 18-1195, slip op. at 4 (Mont. Dec. 12, 2018). Accessed February 18, 2020. https://www.scotusblog.com/wp-content/uploads/2019/04/18-1195-opinion-below.pdf.

judgement to Espinoza.[6] Feeling that the program still violated Article X § 6, the Department of Revenue appealed the ruling. The case moved to the Montana Supreme court, where the court decided the entire program was unconstitutional, leading to its demise under the eyes of the law. Along with the program, Rule 1 was nullified as it was an administrative rule placed on an unconstitutional law. Dissatisfied with this conclusion, Espinoza took the case to the Supreme Court, hoping to prove the programs constitutionality and that Rule 1 is an unconstitutional addition to an otherwise just and constitutional law that benefited the common good.

STATEMENT OF ARGUMENT

When examining the First Amendment, it is important to keep in mind the "room for play in the joints" between the Free Exercise and Establishment Clauses.[7] It is within this room that the Espinoza case finds it home. Under the Federal Constitution, Montana could allow religious schools to be Qualified Education Providers. However, since Montana has a historic and substantial interest in securing a "wall of separation between church and state," precedent shows that Montana is not legally compelled to facilitate the public funding of activities that could promote religious activities at sectarian institutions.

ARGUMENT I: CONCURRENCE WITH CONSTITUTIONAL PRECEDENT

While discussing the protections and structure that the Constitution should contain, the founders kept their eyes on the republics of old. Indeed, the founder understood Santayana's quote that "those who cannot remember the past, are condemned to repeat it" long before he wrote those

[6]"Espinoza v. Montana Department of Revenue." Oyez. Accessed February 18, 2020. https://www.oyez.org/cases/2019/18-1195.
[7] Walz v. Tax Comm'n of the City of New York, No. 135. Accessed February 19, 2020.

famous words.[8] One of the inspirations the founders had was Jefferson's idea for a "wall of separation between church and state."[9] This separation was a cardinal belief of the early Americans, manifesting itself years before the ratification of the U.S. constitution. For example, in 1784, Patrick Henry proposed a bill to the General Assembly of the Commonwealth of Virginia that called for "the support of Christian teachers...payable by tax on the property within this Commonwealth".[10] This bill attempted to create tax-supported Christian education in Virginia and was almost unanimously struck down in an opposition led by James Madison.[11] Indeed, Madison recognized the importance of the separation of church and state long before it was enshrined by the First Amendment. Patrick Henry's bill would be succeeded by the "The Virginia Statute for Religious Freedom," drafted by Thomas Jefferson, which asserted that "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or gods, nor shall otherwise suffer on account of his religious opinions or belief." [12] This statute firstly further supports the notion of separation of church and state. However, it also states that no man shall be compelled to support a religious belief "whatsoever," a concept which applies directly to *Espinoza v Montana Department of Revenue.* Under the program established under Espinoza, citizens would be compelled to support a religious institution through the use of their taxpayer dollars. The petitioner will be quick to point out that the institutions are not funded by taxpayer dollars directly, but are rather funded through

[8] George Santayana, *The Life of Reason* (Amherst (N.Y.): Prometheus Books, 1998
[9] Jefferson, Thomas. Letter, "Letter to the Danbury Baptists," January 1, 1802. Accessed February 19, 2020. https://www.loc.gov/loc/lcib/9806/danpre.html.
[10] Monticello, "Transcript For: A Bill Establishing A Provision For Teachers Of The Christian Religion," Monticello Digital Classroom, accessed February 20, 2020, https://classroom.monticello.org/view/72279/.
[11] Monticello, "Transcript For," Monticello Digital Classroom.
[12] Virginia Museum of History and Culture, "Thomas Jefferson and the Virginia Statute for Religious Freedom," Virginia History, accessed February 20, 2020, https://www.virginiahistory.org/collections-and-resources/virginia-history-explorer/thomas-jefferson.

voluntary donations. However, the use of a tax credit in this scenario leads state governments to indirectly use taxpayer dollars for sectarian purposes. This is due to the fact that it is the parents of those receiving the scholarships who are most likely to donate to an SSO, as the organization is acting in their interest.[13] Therefore, say one of these parents donates $300 to an SSO and receives $300 in tax credits. Since they are now paying less in taxes, their loss in cash is offset. Therefore, they have not gained nor lost capital. However, the state government has lost $300, as they no longer have the $300 the parent would have paid in taxes. Next, if this parent's child then receives a scholarship, say for $300, from a SSO to attend a sectarian school for that parent owes $300 less towards their tuition. Looking at the transaction as a whole, the state has lost $300 and the parent has gained $300 towards their child's sectarian education, meaning that the state has indirectly paid for a religious endeavor. Therefore, in Espinoza, tax dollars from the state's budget are being repurposed for tuition towards a school that will provide religious instruction, overtly violating the idea of "a wall of separation" pioneered by Jefferson and Madison.

Madison further wrote in a letter to the Assembly that it is important that "the metes and bounds which separate each department of power be invariably maintained; but more especially that neither of them be suffered to overleap the great Barrier which defends the rights of the people."[14] This statement contains two important ideas. The first idea is the reinforcement of aforementioned statements on the importance of preserving secularity. The second, more nuanced idea is that such secularity benefits the freedom of expression in the nation as the Church itself is a "department of power" which, if subject to public funds, is then subject to public regulation and

[13] Kendra Espinoza v. Montana Department of Revenue, No. 18-1195, slip op. at 4 (Mont. Dec. 12, 2018). Accessed February 18, 2020. https://www.scotusblog.com/wp-content/uploads/2019/04/18-1195-opinion-below.pdf.
[14] James Madison to General Assembly of the Commonwealth of Virginia, "James Madison, Memorial and Remonstrance against Religious Assessments," June 20, 1785.

opinion. By preserving the "metes and bounds" articulated by Madison one allows for seamless coexistence between church and state to thrive. To facilitate this peaceful coexistence, the founders drafted the First Amendment, declaring "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[15] This clause ensured that religion would remain extraneous to the works of government. In this vein, the Supreme Court should hold true to the intent of the constitution in not publicly endorsing or funding sectarian institutions. This intent was upheld in the case *Committee for Public Education & Religious Liberty v. Nyquist (1973)*[16] where the court employed stare decisis in referencing *Lemon v. Kurtzman (1971)* which stated that "First, a law must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and third, must avoid excessive government entanglement with religion."[17] This precedent demonstrates how the federal government continues to understand the importance for the separation of "the meats and bounds."

However, the federal government is not the government to support anti establishment measures in the United States. Indeed, the Montana State Constitution, was driven by these concerns. This drive manifested itself in the debate on Article X § 6 of the State Constitution, which includes the no-aid clause or "Blaine Amendment". While speaking on this topic, Delegate Burkhard argued at the convention that "the issue of church and state is an emotional issue for the public." [18] This quote demonstrates that the Blaine Amendment stemmed from public interest and, therefore, striking it down would be nothing short of ignoring the will of several Montanans. Yet, it

[15] U.S. Const. amend. I § 1. Accessed February 18, 2020.
[16] Committee for Public Education & Religious Liberty v. Nyquist, No 72-694.
[17] Lemon v. Kurtzman, No. 89.
[18]Michael P. Dougherty, Montana's Constitutional Prohibition on Aid to Sectarian Schools: "Badge of Bigotry" or National Model for the Separation of Church and State?, 77 Mont. L. Rev. 41 (2016). Available at: https://scholarship.law.umt.edu/mlr/vol77/iss1/3=

is still important to note that the inital passage of the Blaine Amendment in 1889 was largely propelled by a strong anti-catholic mindset.[19] Indeed, opponents of the Blaine Amendment at the 1972 convention pointed to it as a "badge of bigotry."[20] However, the Blaine Amendment has come to take a different role in Montanan society. This amendment now serves to make sure that nobody is forced to pay for someone else's religion. In other words, it does not protect the freedom of religion as much as it enshrines the freedom *from* religion. Additionally, the amendment protects churches from the government using grants as leverage to affect their religious practices. Indeed, Delegate Conover, representing a church at the 1972 convention, argued that "if we cannot support our private schools, then it's our fault. We are the ones that's [sic] running it, and we don't want nobody [sic] to interfere with us. We teach our religion and want it this way." [21] Therefore, this amendment no longer serve as means of discrimination but instead highlights and protects the founder's vision of a "wall of seperation." Since the Montana law tears down that wall through using taxation as financial capital to promote religious schools, it is clear that the court should confirm is unconstitutionality.

ARGUMENT II: THE APPLICATION OF CONSTITUTIONAL VARIABILITY

The Constitution was developed to be flexible, meaning that it's language could be applied differently based on the details of a case. This flexibility, henceforth known as variability, is a cornerstone of judicial review and a precedent which has been tried and tested in the Supreme

[19] Institute for Justice, IJ, accessed February 20, 2020, https://ij.org/issues/school-choice/blaine-amendments/.
[20]Michael P. Dougherty, Montana's Constitutional Prohibition on Aid to Sectarian Schools: "Badge of Bigotry" or National Model for the Separation of Church and State?, 77 Mont. L. Rev. 41 (2016). Available at: https://scholarship.law.umt.edu/mlr/vol77/iss1/3=
[21]Michael P. Dougherty, Montana's Constitutional Prohibition on Aid to Sectarian Schools: "Badge of Bigotry" or National Model for the Separation of Church and State?, 77 Mont. L. Rev. 41 (2016). Available at: https://scholarship.law.umt.edu/mlr/vol77/iss1/3=

Court. For example, in *Schenck v. United States (1919)*[22], the court ruled that while the First Amendment indeed protected the freedom of speech for American citizens, it could not be applied to "speech that approaches creating a clear and present danger of a significant evil that Congress has power to prevent."[23] The case provided that in cases of libel, slander, or incitement of violence, protections under the first amendment are null and void. The argument in variability cases boils down to a single question: would protection of the statue promote the ideals of liberty, freedom, and safety or conversely encourage actions which go against those principles? This same question can be applied to a multitude of cases. For example, the cruel and unusual punishments clause does not exempt heinous felons from being put to death in the case that their life has or will endanger those around them.[24] This was tested in *Arave v Creech (1993)*[25] where the court held the Idaho Supreme Court decision that "a capital sentencing scheme must channel the sentencer's discretion by 'clear and objective standards' as mentioned in *Lewis v. Jeffers (1990).*"[26] It deemed the case at hand to meet those standards. Indubitably, the Constitution protects the rights of individuals, however each amendment must be observed on a case by case basis, leaving room for judicial determination as to where the case at hand falls in regard to constitutional protections. This fundamental question should also be asked in *Espinoza v Montana Department of Revenue* to gauge whether the funding in the case furthers or hinders liberty, freedom, and safety,

While reviewing the case presented, it is tempting to draw parallels to the case *Trinity Lutheran Church of Columbia, Inc. v. Comer (2017).* After all, both cases feature a free exercise

[22] Schenk v. United States, No. 437.
[23] Oyez, "Schenck v. United States," Oyez, accessed February 20, 2020, https://www.oyez.org/cases/1900-1940/249us47.
[24] U.S. Const. amend. VIII § 1, cl. 3.
[25] Arave v. Creech, No. 91-1160.
[26] Lewis v. Jeffers, No. 89-189.

dispute regarding religious schooling. However, upon closer examination of these cases, it is clear that they are intrinsically different. Firstly, in the *Trinity* Case, the aid was going towards the creation of a safer playground through replacement of the granite floor with rubber. Additionally, it was noted that "the benefits of a new surface would extend beyond its students to the local community, whose children often use the playground during non-school hours."[27] Indeed, the improvement of the playground served a secular purpose and was directly in line with the child-benefit theory pioneered *in Cochran v. Louisiana State Board of Education (1930).*[28] This type of aid, which is secular in nature, contrasts with the aid being given in the case at hand. In the *Espinoza* case, prior to the introduction of Rule 1, taxpayers received a credit for donating to organizations that could eventually fund the religious education of Montanans. This type of aid differs from that in *Trinity Lutheran*, as the aid is eventually used for a religious purpose: the funding of a child's sectarian education.

Therefore, *Trinity* should not serve as the governing case in this discussion. Rather, this case is far more similar to *Locke V. Davey (2004).* In *Locke*, Joshua Davey was given a Promise Scholarship under a Washington State law. [29] The law provided scholarships towards post-secondary education for academically outstanding students who could not afford it.[30] However, the state prohibits this money from being used towards "a degree in theology."[31] Much like in the case at hand, this was done in order to comply with the Washington State Constitution which prohibits public money going towards "religious worship, exercise, or instruction" in Article

[27] Justia, Justia US Supreme Court, accessed February 20, 2020, https://supreme.justia.com/cases/federal/us/582/15-577/#tab-opinion-3752809.
[28] Cochran v. Louisiana State Board of Education.
[29] Locke v. Davey, No. 02-1315.
[30] Locke v. Davey, No. 02-1315.
[31] Locke v. Davey, No. 02-1315.

1 § 11.[32] Davey hoped to use his scholarship towards a theology degree. When informed that he could not utilize scholarship money to pursue his devotional degree, he sued, claiming that his free exercise rights had been infringed.[33] The basis of his argument was found in the rule established by *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah (1993)*[34] that stated that laws should be "facially neutral with respect to religion."[35] However, the court rejected this line of reasoning as the program was not imposing any punishments to those who are religious. Indeed, in both *Espinoza* and *Locke*, the law does not prohibit the use of funding because the people are religious; rather, it prohibits their use because the people hope to use the funds for religious purposes. Therefore, in the *Locke* case, the Supreme Court ruled that "the State has merely chosen not to fund a distinct category of instruction" and should apply a similar standard here.[36]

In the case presented, the court is asked whether the State of Montana is allowed to prohibit funds that may go towards religious education. The issue is not whether the State of Montana could provide the funds towards religious schools. Indeed, the case *Zelman v. Simmons-Harris (2002)* makes it clear that a state is allowed to provide aid to religious schools in order to improve education: an item which is for the common good.[37] The question is whether or not Montana has a substantial interest in not providing funds towards a religious education. In *Locke*, the court ruled that "the State's interest in not funding the pursuit of devotional degrees is substantial." [38] By this logic, not funding religious education at primary and secondary schools is also a substantial interest and, therefore, allows Montana to cancel programs that may provide funds for sectarian education.

[32] Washington State Constitution Article 1 § 1
[33] Locke v. Davey, No. 02-1315.
[34] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, No. 91-948.
[35] Locke v. Davey, No. 02-1315.
[36] Trinity Lutheran Church of Columbia, Inc. v. Comer, No. 15-577
[37] Zelman V. Simmons-Harris, No. 00-1751.
[38] Locke v. Davey, No. 02-1315.

The petitioner may argue that if this holds true, is it not discrimination to allow secular schools to obtain funding but bar religious institutions? After all, even *Locke* allowed recipients to go to religious schools so long as they were not obtaining a religious degree.[39] To this the respondent has two rebuttals. Firstly, an education at a religious institution inherently advances religious values. One need not look further than the mission statement at Stillwater Christian Highschool (the school where the petitioners want to send their children) which declares that it's mission is "to equip students with the tools for learning through a Christ-centered education." [40] Stillwater and other religious schools provide a devotional education, which, just as a degree in theology, is "akin to a religious calling as well as an academic pursuit."[41] Therefore, it is not fair to claim that it is the religious character of the institution that is barring them from being a QEP. After all, *Trinity* outlawed that type of facial discrimination.[42] Rather, it is that the educators could use the tuition money for religious purposes. It is simply the funding of something inherently religious that allows the state to deny providing funds. This act is constitutional under *Locke* and should be deemed constitutional here.

FUTURE STANDARD

Seeing as much of the debate surrounding the case presented stems from whether *Trinity* or *Locke* is more applicable, it would be beneficial to set a clear standard for future free exercise cases. The standard should be as follows. In coordination with *Trinity*, if a state attempts to prohibit any sort of funding for public programs that benefits the common good due to the religious characteristic of a recipient, under the free exercise clause, it is unconstitutional. However, in

[39] Locke v. Davey, No. 02-1315.
[40] Stillwater Christian School, SCS, accessed February 20, 2020, https://www.stillwaterchristianschool.org/domain/232.
[41] Locke v. Davey, No. 02-1315
[42] Trinity Lutheran Church of Columbia, Inc. v.Comer, No. 15-577

coordination with *Locke*, a state is allowed to restrict the use of funding for programs that promote religious beliefs or values due to their own constitutional anti establishment concerns. However, this restriction can only be put in place if it does not compel one to drop their religious identity or impose civil or criminal punishments for practicing religion. This standard falls within the "room for play between the joints" that is discussed in *Walz v. Tax Comm'n of the City of New York*, allowing states to take establishment to a reasonable extent without violating the free-exercise clause.[43] In summary, the only circumstance under which a state can inhibit religion further is where it is preventing public money from being used to fund sectarian aspects of a religious operation. Case law continues to back this up. *In the case Everson v. Board of Education (1947),* the Supreme Court upheld state paid bussing to religious schools in New Jersey as it served a secular purpose for the common good.[44] However, in the case *Committee for Public Education and Religious Liberty (PEARL) v. Nyquist*, the court failed state granted tuition to students at religious schools as it violated the establishment clause.[45] In this case, the aid is not for the common good or a secular purpose and, therefore, is unconstitutional.

CONCLUSION

In 1819, Thomas Jefferson told the Virginia Board of Ministers that "the constitutional freedom of religion [is] the most inalienable and sacred of all human rights".[46] Therefore, it is important to ensure that both the freedom of religion and freedom *from* religion are being protected in all cases. In the case that has been presented, it is not the freedom of religion that is truly in

[43] Walz v. Tax Comm'n of the City of New York, No. 135.
[44] Everson v. Board of Education, No. 52
[45] Committee for Public Education & Religious Liberty v. Nyquist, No 72-694.
[46] John C. Domino, *Civil Rights and Liberties in the 21st Century*, 4th ed. (New York, NY: Routledge, 2018),

danger. After all, Espinoza is free to continue practicing her religion and is free to send her children to a Christian school. What is being questioned is the freedom *from* religion. Federal precedent on this topic demonstrates that if the State of Montana wanted to fund sectarian QEPs, they could (see Zelman v. Simons-Harris).[47] However, America was founded as a union of states in order to ensure that regional interests were properly represented. One such insert is the strong opposition to establishment within the State of Montana, as enumerated by Article X § 6 clause 1of the Montana State Constitution. Seeing that the anti establishment interest in the Montana State Constitution finds its basis in the ideas of the framers, and recognizing that precedent shows anti establishment concerns to be a substantial governmental interest, it stands to reason that this clause is constitutional. Therefore, it is clear that providing money (albeit indirectly) to sectarian institutions for purposes that are parochial through the 2015 tax credit program is unconstitutional under Montana's own constitution. Additionally, precedent shows that the striking down of the program is constitutional federally. *Locke* demonstrates that, if money is going towards sectarian purposes, it is allowed to be struck down. Since the program is unconstitutional under Montana's state constitution (which abides by the federal constitution), any bureaucratic rules regarding its implementation, such as rule 1, are moot. Therefore, due to the history and precedent surrounding a state's ability to regulate religion within the "room for play between the joints," the court should uphold the ruling delivered at the Montana Supreme Court and apply the aforementioned rule to future cases on this topic.[48]

[47] Zelman V. Simmons-Harris, No. 00-1751.
[48] Walz v. Tax Comm'n of the City of New York, No. 135.