Respondent Brief - Lloyd & Pancoast

To be in the Supreme Court of the United States

Winter Term, 2020

ESPINOZA

V.

MONTANA DEPARTMENT OF REVENUE

RESPONDENT'S OPENING 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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SUMMARY OF ARGUMENT

The Free Exercise Clause permits government restraint on aid to religious schools through no-aid amendments to state constitutions. As a result, the Montana State Supreme Court acted in line with precedent when it invalidated the religiously neutral student aid program. Separation of church and state is a constitutionally mandated pursuit of the US government, and Montana's internalization of this standard within its own constitution is a strong reflection of this goal. No-aid amendments to state constitutions have been actively supported in states since the Founding Era[1], and have never been found to violate the Free Exercise clause of the First Amendment.

Locke v. Davey[2] and *Walz v. Tax*[3] established state interest in balancing the Establishment Clause and the Free Exercise Clause. Montana's current application of the no-aid clause to invalidate the tax-rebate program follows the precedent of these cases: that it is acceptable, but not required, for states to provide generally available religiously neutral aid. Furthermore, because Montana's restriction of aid is based on use, rather than inherent status, *Trinity Lutheran v. Comer*[4] does not apply, confirming that Montana may invalidate or limit the application of the program. Finally, *Committee for Public Education & Religious Liberty v. Nyquist*[5] establishes that when grants are unable to distinguish between secular and nonsecular purposes, they are unconstitutional.

Montana's invalidation of the tax program does not violate the Free Exercise Clause and was a constitutionally permitted option Montana could take to stay in line with the Federal and State constitution.

ARGUMENT

1. MONTANA'S NO-AID CLAUSE REPRESENTS HISTORICAL AND SUBSTANTIAL STATE INTERESTS IN THE SEPARATION OF CHURCH AND STATE

a. Separation of Church and State was an Integral Idea in the Nascent United States

Religious freedom in a pluralistic society has been a concern since the start of our nation, even before the First Amendment, which states that the federal Government "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"[6]. Indeed, "[b]y 1789, every State but Connecticut had incorporated some version of a free exercise clause into its constitution".[7] James Madison, the main impetus behind the Free Exercise Clause, spoke strongly about the urgent need to protect religious freedom through anti-establishment clauses, stating "ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation."[8] His "Memorial and Remonstrance against Religious Assessments," written in response to a proposed tax bill that would provide for direct payments to fund preachers, opposed the proposal on the basis that the tax would constrict religious freedom both for the participating church and for taxpayers.[9] Madison argued that government entanglement in the church would actually "destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion has produced among its several sects."[10] Madison's reasoning states that opposition to direct funding of churches is not motivated by religious hostility, but instead promotes religious freedom.

The importance of separating religion and government is reflected later when Thomas Jefferson, in his Letter to Danbury Baptists, writes that the First Amendment was written because "religion is a matter" for the individual and because "the legitimate powers of government [should] reach actions only, and not opinions".[11] Jefferson confirms that avoiding government entanglement with religious institutions is an integral part of individual free exercise of religion, an opinion in strong support of the text of the First Amendment. As evidenced by the thoughts of Madison and Jefferson, the Free Exercise Clause cannot have been intended as a justification to prohibit no-aid clauses.

b. Montana's No-Aid Clause is a Reflection of this Historical State Interests

Since the founding of America, no-aid clauses have been incorporated into state constitutions. Nine states had no-aid provisions and disestablishment clauses, while 13 states had free exercise clauses. One example of a founding-era no-aid clause is found in South Carolina's constitution. The amendment states that "No person shall[,] by law, be obliged to pay towards the maintenance and support of a religious worship, that he does not freely join in, or has not voluntarily engaged to support."[12] The intent and impact of this law is fundamentally the same as Montana's no-aid clause, showcasing that no-aid clauses have a long history of validity in terms of constitutionality. Furthermore, since South Carolina and the other eight states also have free exercise clauses, it is clear that no-aid clauses have always existed simultaneously with free exercise clauses, and that no-aid clauses do not inherently violate Free Exercise rights.

Montana's no-aid clause stipulates the following:

"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 in part by any church, sect or denomination."[13]

Similar to historical no-aid clauses and contemporary no-aid clauses in 37 other states, Montana's no-aid clause specifically prohibits direct or indirect aid to religious institutions. Indeed, this amendment addresses the exact government entanglement that Madison protested against: state funds paying for religious education. Even the intent behind Montana's no-aid clause is similar to Madison's arguments for promoting religious tolerance through governmental restrictions. Several of the supporters of Montana's 1972 no-aid clause were religious individuals, some of them clergy people, who supported the no-aid clause on the basis that it would protect the religious freedom of both the taxpayers and of the religious institutions by ensuring that the religious institutions would not be weakened through governmental support.[14] Petitioners may argue that the application and existence of the state no-aid clause itself is unconstitutional. However, it is clear that no-aid clauses are, and always have been, constitutional. Montana's no aid clause reinforces the original philosophy of the Founding Fathers: that there be a "wall of separation between Church and State."[15]

2. THE MONTANA STATE COURT'S INVALIDATION OF THE STUDENT AID PROGRAM DOES NOT VIOLATE THE FREE EXERCISE CLAUSE.

As succinctly stated in *Appellant v. Edwin D. Lee*, "Not all burdens on religion are unconstitutional."[16] The Free Exercise clause of the First Amendment prevents government interference with the free exercise of religion, but does allow for governmental restraints on certain aspects of religious practice. The tension between the Establishment Clause's requirement for neutrality and the potential need for certain accommodations due to the Free Exercise Clause has been recognized by the court in *Walz v. Tax Comm'n*,: "There is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without [governmental] sponsorship and without interference."[17] The Court recognizes the necessity of balancing governmental restrictions allowed by the Free Exercise clause with governmental actions allowed, but not required, by the Establishment Clause.

a. Locke v. Davey should be the controlling case

The invalidation of the student-aid program by Montana Department of Revenue is a clear example of the balancing required "in the joints" between the Establishment and Free Exercise Clauses.[18] *Locke v. Davey* emphasizes that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause," meaning that the exclusion of a certain category of instruction is permitted.[19] The reasoning from *Locke v. Davey* holds in *Espinoza v. Montana*, as like in Washington, although a state theoretically could provide generally available scholarship aid for both religious and non-religious students, it is not required to give that aid to students receiving a religious education. Just like Washington, Montana's

no-aid clause that prohibits giving monetary aid to religious institutions is not a violation of the Free Exercise Clause.

Indeed, *Locke v. Davey* validates the differential treatment towards religious education, proclaiming "That a State [dealing] differently with religious education for the ministry than with education for other callings is a product of these views [and] not evidence of hostility toward religion."[20] States have a vested interest in utilizing differential treatment towards religious education to enforce the "wall of separation" between church and state, as religious education in particular has a strong influence on the continued establishment of religion.[21] *Locke v. Davey* applies to *Espinoza v. Montana* as the exclusion of religious education from the student-aid program is not promoted because of religious hostility, but from the desire to stay in line with the Montana State Constitution. As the Montana State Constitution prohibits even indirect aid to religious institutions through the no-aid amendment, the only way the tax-credit program could exist in Montana is if religious schools were prohibited from receiving that aid. As *Locke v Davey* shows, restrictions on religious education based on no-aid amendments are not in violation of the Free Exercise or the Establishment Clause.

In writing the dissenting opinion, Justice Scalia acknowledges that there are other potential options for the state: "there are any number of ways [the government] could respect both its… concern for the conscience of its taxpayers and the Federal Free Exercise Clause. … The State could also simply abandon the scholarship program altogether."[22] This line directly parallels with the Montana Supreme Court's course of action, further emphasizing that the invalidation of the program, which is the key issue being argued here, is not a violation of the Free Exercise Clause.

b. Trinity Lutheran was denied funding because of religious status, whereas Davey was denied funding because of religious use

The question of whether Montana can apply the no-aid provision to generally available benefits is crucial. Plaintiffs may incorrectly argue that *Trinity Lutheran Church of Columbia, Inc. v. Comer*[23] should be a controlling case. However, the ruling lends itself to a very narrow application of government based funding. In the *Trinity v. Comer* decision, the Supreme Court ruled that it violated the Free Exercise Clause to not give a generally available grant for rubber surfacing of the playground on the grounds that Trinity Lutheran Church was a religious institution. Generally available aid can be given to religious educational institutions as long as the fundings are not used for religious activities or upkeep.[24] Trinity Lutheran Church could only use the money for the rubber resurfacing of the playground, which according to the record was a purely secular area.

Trinity Lutheran v Comer does not apply because *Trinity Lutheran* makes the distinction between status and use. Referencing *Locke v. Davey*, one can see that "Davey was not denied a scholarship because of who he was; he was denied a scholarship because of what he proposed to do -- use the funds to prepare for the ministry. Here there is no question that *Trinity Lutheran* was denied a grant simply because of what it is--a church."[25] There is a clear difference between denying aid based on action (*Locke v. Davey*) and denying aid based on beliefs (*Trinity Lutheran)*. In *Espinoza v Montana*, the tax program would provide a dollar for dollar tax credit for donations to Student Scholarship Organizations which could offer the scholarships to 14 different private schools, 13 of which were religious schools, with the 14th being a special education school. Students were prohibited from receiving scholarships not because of their

inherent religious beliefs, but because of the actions they chose to take in furthering a specific type of religious education. Thomas Jefferson said himself that "the legitimate powers of government [should] reach actions only, and not opinions."[26] Whereas *Trinity v. Comer* was an opinion-based case, *Locke v. Davey* was an action-based case.

Indeed, the Court showcases that it is acceptable to deny students aid as long as students are not required "to choose between their religious beliefs and receiving a government benefit."[25] And this is the situation in *Espinosa v. Montana* -- the students are not required to give up their beliefs or status in order to access aid. To theoretically access aid, they would have to choose another form of education, just like the college student from *Locke v Davey*[27]. Whether or not they choose to attend religious education or not, they are free to hold whatever religious beliefs they choose, and do not have to change their status as religious individuals. Unlike *Trinity*, where giving up the church's integral religious status would have allowed access to the benefit, the scholarships to Montana students are given without consideration for the individuals' religious beliefs. Furthermore, Montana is not required to give aid to any Student Scholarship Organizations, and as discussed earlier, can circumnavigate the issue by not giving scholarships to any students, secular or religious.

c. The *Nyquist* ruling serves as a counterpoint to *Trinity Lutheran* by highlighting the importance of purely secular use of government scholarship money

In *Committee for Public Education and Religious Liberty v. Nyquist,*[28] New York created Chapter 414 of Education and Tax Laws, which provided grants, tuition reimbursement, and tax

relief for low income schools. The monetary aid given by the government in this case was interpreted by the Supreme Court as indirect government support. In addition, the court noted that since the grants could not "guarantee the separation between secular and religious educational functions."[29] Containing no provision expressly forbidding the use of the grant to construct or repair religious buildings, the money could be put towards religious purposes. Additionally, New York's proposed tax relief system was ruled unconstitutional because it was not "sufficiently restricted to assure that it will not have the impermissible effect of advancing the sectarian activities of religious schools."[30] Due to the "grave potential for government entanglement," the tax relief system could not exist, even though the money was given to the parents instead of directly to the schools.

The *Nyquist* case serves as a counterpoint to the *Trinity Lutheran* decision, where lack of government funding is ruled unconstitutional because the funds could not be put towards a non-secular purpose. Nyquist shows that tax relief programs do constitute government advancing of religion through religious education, showing that even tax programs and indirect aid can be considered to advance religion, which is a violation of the Establishment Clause. Following the reasoning of *Nyquist*, the tax relief offered by the Montana Department of Revenue is unconstitutional for the same reasons: "enhancing opportunities."[31] The government subsidizes donations to scholarships that go towards religious schools, a function that violates the "indirect" aid for religious institutions.[32] Unlike *Trinity Lutheran*, in which there was no advancement of religion through the generally available benefit, tax relief programs for the purposes of religious education do have the effect of advancing religion. This is different from the tax voucher program in *Zelman v. Simmons-Harris*, as the tax voucher program allowed for tax relief to both

private and public schools, not only private, mostly religious schools like in Montana and *Nyquist.*[33] *Zelman v Simmons-Harris* showed that with the option to go to private schools, "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."[34] In Montana, there is not the same influence of individual choice that separates the government from the effect of advancing religion. Without explicit provision preventing scholarship money from going towards non-secular purposes, the money given by Big Sky Scholarships could be used for religious purposes -- indirect aid by the government in violation of the Establishment Clause. Indeed, without Rule 1, Montana's tax credit program would be unconstitutional both by the state no aid amendment and the federal constitution. The invalidation of the tax credit program was the only possible option for the Montana Supreme Court.

CONCLUSION

The Montana Supreme Court's use of the no-aid amendment to invalidate the tax program is not a violation of the Free Exercise clause. no-aid clauses have a clear constitutional basis, as no-aid clauses have been an integral part for many state constitutions since the founding era. Madison himself argues that premise of no-aid clauses-denying state funding for religious institutions-is vital for religious freedom. Not only are no-aid clauses constitutional, they actually help enforce Free Exercise and promote religious diversity. Separation of church and state is a long-standing pursuit of the US government, and Montana's pursuit of this idea beyond the First Amendment has a well established history not just in Montana, but in multiple other states.

Furthermore, the invalidation of the program does not violate Free Exercise because restraining funds based on use rather than status is an allowed example of government restraint. As established in *Locke v. Davey*[35], restrictions on a specific type of instruction-religious education- is accepted, which is the same situation as happening in *Montana.* There is room between what is allowed in the Establishment Clause and what is not required by the Free Exercise Clause, and Montana's application is a clear example of permissible actions under Free Exercise. *Montana* also does not restrict funds based on status, showing that the invalidation is not a prohibition application of the Free Exercise Clause as outlined in *Trinity*. And the invalidation of the trax program prevents any possible complications created from the inability to separate the secular purpose of grants from the religious purpose. *Committee for Public Education & Religious Liberty v. Nyquist* and *Zelman v Simmons Harris* showcases the distinction between tax relief programs that have individual choice as a barrier between the

government.[36] Tax relief programs that advance religion are not permitted under the Establishment Clause, and Montana's tax relief program is like *Nyquist* in that it advances religion. As Justice Scalia noted in his dissenting opinion in *Locke v Davey*, it also follows that invalidating a program for both religious and secular students is an acceptable solution to avoid providing funds to religious institutions.

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In accordance with previous precedent, the court should hold Montana Department of Revenue's disintegration of the scholarship program as constitutional.

Endnotes

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