Respondent Brief - Murray and Yang

To be in the Supreme Court of the United States

April Term, 2020

ESPINOZA

V.

MONTANA DEPARTMENT OF REVENUE

RESPONDENT'S OPENING BRIEF

Michael Murray & Andrea Yang

Counsel of Record

Lake Oswego High School

Room 213

Lake Oswego, OR

(503) 534-2313

Counsel for Petitioner

Oral argument: https://youtu.be/vRl4ra37Z_4

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

QUESTION PRESENTED ……... 1

TABLE OF AUTHORITIES ……. 3

STATEMENT OF ARGUMENT …….. 4

ARGUMENT I …….. 5

ARGUMENT II ……. 6

REBUTTAL OF OBJECTIONS ……..…
10

CONCLUSION ……..... 13

ENDNOTES …… 14

BIBLIOGRAPHY ……..... 16

Table of Authorities

Cases

Committee for Public Education & Religious Liberty v. Nyquist
413 U.S. 756 (1973) ……..…… 4, 7, 8, 14

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah
508 U.S. 520 (1993) ……... 10, 11

Locke v. Davey
540 U.S. 712 (2004) ……... 4, 5, 6, 10, 12, 13, 14

Trinity Lutheran Church of Columbia, Inc. v. Comer
582 U.S. ___ (2017) ……..… 11, 12, 13

Constitutions

MT Const. Art. X, § 6. ……... 4

U.S. Const. Amend. I. ……..... 4, 5, 6, 7, 8

WA Const. Art. I, § 11. …….. 5

Other Authorities

Madison, James, *To the Honorable the General Assembly of the Commonwealth of Virginia A Memorial and Remonstrance*, 20 June 1785, The University of Chicago Press. http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html. ……... 7

Tucker, St. George. *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*. 5 vols. Philadelphia, 1803. Reprint. South Hackensack, N.J.: Rothman Reprints, 1969. …… 6, 7, 8

Statement of Argument

The First Amendment's Establishment Clause does not allow Congress to make any "law respecting an establishment of religion," by extension making it illegal for the government to promote a particular religion or to become unduly entangled.[1] Montana's "Tax Credit for Qualified Education Contributions" Act would violate the Establishment Clause if Rule 1 were to be dissolved. The Establishment Clause dictates that there must be a distinguishable separation between government and religion, and Article X, Section 6 of the Montana Constitution and subsequent Rule 1 ensure a healthy separation between the state government and innately religious institutions like Stillwater Christian School. The Court has already upheld Article 1, Section 11 of Washington's Constitution, which embodies the same language and intent of Article X, Section 6 of Montana's Constitution, in *Locke v. Davey*.[2] The Court found that, given the absence of "animus towards religion" within the Washington Constitution, that the state was able to decide not to "fund a distinct category of instruction."[3] Furthermore, in *Committee for Public Education & Religious Liberty v. Nyquist*, the Court invalidated a New York education funding program for parochial schools because the public funds would inevitably "subsidize and advance the religious mission of sectarian schools."[4] Without Rule 1 in place, Montana would be in violation of precedent set in *Committee for Public Education & Religious Liberty v. Nyquist*, because there would be no guarantee that public funding would go toward secular functions, creating the risk of public funds advancing religious missions.

Argument

I. The State has the right to not fund a distinct category of instruction.

In *Locke v. Davey*,[5] the Court examined whether the free exercise clause of the First Amendment [6] requires a state to fund religious instruction if college scholarships are offered for secular instruction. The case centered around the Washington State Promise Scholarship, which offered state-funded college scholarships to students. The State government declined to offer scholarship funds to students pursuing degrees in theology, citing the State's ban on public funding for religious activities; Article 1, Section 11 of the Washington State Constitution stipulates that "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."[7] The Court upheld the constitutionality of Article 1, Section 11 of the Washington State Constitution. In the 7-2 decision by Chief Justice Rehnquist, the Court found "neither in the history or text of Article I, §11 of the Washington Constitution, nor in the operation of the Promise Scholarship Program, anything that suggests animus towards religion."[8] Instead, the Court found, in the absence of any intentional hostility toward religion, that the State "merely [chose] not to fund a distinct category of instruction"[9] (religious instruction, that is). The Court subsequently ruled that the State was allowed to withhold Promise Scholarship funds from those pursuing a religious education.

Similar to Washington State in *Locke v. Davey*, the Montana Department of Revenue contends that the State's constitutional ban on public funding for religious activities allows the department to withhold financial benefits under the "Tax Credit for Qualified Education Contributions" Act from religious schools and institutions.[10] Article 10, Section 6 of the Montana Constitution clearly specifies 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 in part by any church, sect or denomination."[11] The $150 tax credit offered under the "Tax Credit for Qualified Education Contributions" Act would constitute an indirect appropriation or payment from public funds. Article 1, Section 11 of the Washington State Constitution and Article 10, Section 6 of the Montana Constitution are comparable in both language and intent, as both sections aim to separate public funds from indisputably religious activities or programs. Article 10, Section 6 of Montan's Constitution also shows no animus toward religion, similar to the Washington State Constitution. Consequently, just as the Court upheld the constitutionality of Article 1, Section 11 of Washington's Constitution[12], it follows that the Court should find Article 10, Section 6 of Montana's Constitution constitutionally fit.

II. The dissolution of Rule 1 would violate the Establishment Clause.

The First Amendment's Establishment Clause clearly states that "Congress shall make no law respecting an establishment of religion."[13] The Establishment Clause represents the United States' historical and principled view that there should be a distinct dividing line between religion and government. Notable legal scholars and practitioners, such as St. George Tucker, a respected lawyer and judge during the United States' early years, maintain the incredible need for religion-blind, secular government. In his annotated version of *Blackstone's Commentaries*, Tucker contends that "To separate [religion and government] by mounds which can never be overleaped, is the only means by which our duty to God, the peace of mankind, and the genuine

fruits of charity and fraternal love, can be preserved or properly discharged."[14] Tucker, referencing the Virginia Statute for Religious Freedom, continues by saying "'that no man shall be compelled to frequent or support any religious worship, place, or ministry, whatsoever.'"[15] James Madison, in his *Memorial and Remonstrance against Religious Assessments*, concurred, writing, "Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us."[16]

In *Committee for Public Education & Religious Liberty v. Nyquist*, the Court affirmed the sentiment of Tucker's contentions by ensuring that taxpayer funds were not used to advance the religious mission of sectarian schools.[17] The case centered around Chapter 414 of New York's Education and Tax Laws. Sections 1-5 of Chapter 414 provided parochial schools with grants for school maintenance, tuition reimbursements for low-income parents, and tax relief for parents who did not qualify for tuition reimbursements. The Court concluded that Chapter 414 violated the Establishment Clause[18] since Chapter 414 did not guarantee that public funds — either in the form of grants, tuition reimbursements, or tax relief measures — would be used by sectarian schools in objectively secular ways.[19] Consequently, the Court held that the "New York statute violates the Establishment Clause because their inevitable effect is to subsidize and advance the religious mission of sectarian schools."[20]

Stillwater Christian School, the school at issue in this case, has publicly demonstrated that it is driven by a sectarian mission. The school has stated that it is dedicated to "developing *Christian character* for life through instruction, in relationships, in work habits and decision making…. [and] honoring *family and church* as God ordained institutions and to teaching *values*

that reinforce families' efforts to raise their children biblically."[21] The school follows "a classical approach to teaching and learning *which* equips students to think, write and speak clearly and to be thoroughly grounded with a biblical worldview."[22]

Without Rule 1 in place, funds would be indirectly distributed to sectarian schools, with no guarantee that the funds would be used in a secular educational function, and, given that schools like Stillwater Christian School clearly operate according to religious doctrine, there is a near certainty that state funds could be used to fund indisputably sectarian activities or practices. This absence of assured secularity is exactly what drove the Court to strike down Chapter 414's tuition reimbursement provisions, as the Court could find no absolute proof that the funds would be used for secular purposes.[23] Ultimately, the dissolution of Rule 1 would violate the Establishment Clause,[24] because without Rule 1 in place, the state government would be subsidizing and advancing the religious mission of sectarian schools.

In the Court's *Committee for Public Education & Religious Liberty v. Nyquist* decision, Justice Lewis Powell, writing for the majority, also warned that programs like New York's Chapter 414 run the unhealthy risk of further entangling the government and religion in any subsequent cases,[25] a further violation of the Establishment Clause.[26] Justice Powell writes that "assistance of the sort involved here carries grave potential for entanglement in the broader sense of continuing and expanding political strife over aid to religion."[27] Justice Powell's observation aligns with Tucker's warning that "Civil establishments of formularies of faith and worship, are inconsistent with the rights of private judgement. They engender strife . . . they turn religion into a trade . . . they shore up error . . . they produce hypocrisy and prevarication . . . they lay an undue bias on the human mind in its inquiries, and obstruct the progress of truth . . . genuine

religion is a concern that lies entirely between God and our own souls. It is incapable of receiving any aid from human laws. It is contaminated as soon as worldly motives and sanctions mix their influence with it."[28]

Drawing upon Justice Hugo Black's dissent in *Board of Education v. Allen*, Justice Powell reiterates Justice Black's fears that future statutes, induced by such entanglement, "'could be upheld providing for state or federal government funds to buy property on which to erect religious school buildings or to erect the buildings themselves, to pay the salaries of the religious school teachers, and finally to have the sectarian religious groups cease to rely on voluntary contributions of members of their sects while waiting for the Government to pick up all the bills for the religious schools."[29]

The continuation of Rule 1 allows us to avoid the aforementioned concerns, as Rule 1 inhibits any unhealthy entanglement between government and religion.

Rebuttal of Objections

I. Montana does not target a specific religion as in *Church of Lukumi*.

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Church and its congregants practiced animal sacrifice as a form of devotion. Citing Florida animal cruelty laws, the city of Hialeah passed Resolution 87-66, which declared the city's "commitment" to prohibiting such practices.[30]

Yet the scholarship program did not target a specific denomination of religion, as was evident in *Church of Lukumi*. Rather, it advocated for a generalized application of the separation between church and state. Justice Kennedy, in the Court opinion, wrote that the diction and the various "prohibitions, definitions, and exemptions" in the language of the city's legislation in *Church of Lukumi* give away its "gerrymandered" nature; Resolution 87-66 of the *Church of Lukumi* case used the words "sacrifice" and "ritual" in reference to the Santeria church members' animal killings, and Justice Kennedy writes that the other Ordinances passed "suppress much more religious conduct than is necessary to achieve their stated ends."[31] Montana does not reference a particular religion or denomination in Rule 1, let alone actively "suppress" a particular sort of religious conduct through the scholarship program when it more accurately would be described as maintaining the status quo of religious education as a whole in the state.

Furthermore, Davey contended in the *Locke* decision that the actions of the city of Hialeah in *Church of Lukumi* were similar to those of Washington state and its student scholarships because Washington was not "facially neutral with respect to religion."[32] In the majority *Locke* opinion, however, Justice Rehnquist argues that Washington's "disfavor of religion (if it can be called that) is of a far milder kind" when compared to the actions of the city

of Hialeah, especially when recognizing that "[Washington] imposed neither criminal nor civil sanctions on any type of religious service or rite."[33] Neither did Montana in this case. Just as *Locke v. Davey* is distinct from *Church of Lukumi*, the tax-credit program of Montana is simply not comparable to Resolution 87-66. Because Rule 1's impact is not specific to a single denomination and the state acted reasonably with respect to religion, Rule 1 does not establish *Church of Lukumi*'s relevance.

II. Religious identity is undisputedly different from religious use.

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the heart of the matter centers on the denial of the Trinity Lutheran Church Child Learning Center from participating in Missouri's Scrap Tire Program. The state's Department of Natural Resources offered reimbursement grants to nonprofit organizations that installed playground surfaces made from recycled tires. But pursuant to the Department's policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity, the Department deemed the Center to be ineligible.[34]

Firstly, and most importantly, the Court states that *Trinity* "involves express discrimination based on religious identity with respect to playground resurfacing," and that they "do not address religious uses of funding"[35]. Reimbursing playground resurfacing is a distinctly different endeavor from subsidizing parents to provide their children with religious education. Because Rule 1 deals specifically with the public funding of religiously affiliated educational programs, quite clearly a "religious use of funding," *Trinity* does not apply.

Furthermore, this case continues to diverge from *Trinity* in that Trinity Lutheran was excluded from a generally available benefit in a manner that penalized the institution for being

religious. The "most rigorous" scrutiny was bestowed upon *Trinity* was because, as Chief Justice Roberts describes, "The State in this case expressly requires Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified."[36] But Rule 1 regulates action, not identity. Stillwater Christian School is a nondenominational school and is not affiliated with any particular church.[37] Because the school lacks an affiliation, the state has not chosen to deny the Petitioners scholarships due to the nature of the institution as religious or non-religious in character. Rather, Stillwater's emphasis on religious teachings and instilling Christian values and beliefs on its students is the justification for their students' ineligibility for government-subsidized aid. On the other hand, if the Petitioners chose to attend a religiously-affiliated school that did not actively promote religious education, they would still have the opportunity to apply to the tax-credit program.[38]

Justice Roberts distinguished Missouri's denial of a grant to Trinity Lutheran "simply because it is — a church" from Washington's actions in *Locke*, which denied a Davey a scholarship not "because of who he was; he was denied a scholarship because of what he proposed to do."[39] Thus, *Trinity* discusses an altogether different question from the one at hand; it focuses on the nature of the institution itself as secular or non-secular, rather than the question of what action an institution, and ultimately, its students, intend to take as a result of government-subsidized aid.

Conclusion

It does not violate the Free Exercise Clause to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools. *Locke v. Davey* plays a key role in laying the groundwork for this case. Because both Washington and Montana's constitutions show "no animus toward religion" and Washington retained the ability to "not fund a distinct category of instruction," *stare decisis* maintains that Montana, due to its similarity both in terms of the proposition to fund religious education and states' shared constitutional provisions, should have the same right in its scholarship program. Thus, Rule 1 does not violate the Free Exercise Clause. Furthermore, Rule 1 is absolutely essential to not infringing upon the U.S. Constitution's Establishment Clause, as exemplified through *Nyquist*. Not only does the United States have a long-standing tradition of sustaining a careful separation of church and state, but many scholars have deemed such a tradition to be crucial to preserving the validity and purity of religion itself, if citizens should so choose to devote themselves. For these reasons, this Court should affirm the ruling of the Montana Supreme Court.

Respectfully submitted,

Michael Murray & Andrea Yang

Endnotes

1. U.S. Const. Amend. I.
2. *Locke v. Davey*, 540 U.S. 712 (2004)
3. *Locke v. Davey*, 540 U.S. 712 (2004)
4. *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973)
5. *Locke v. Davey*, 540 U.S. 712 (2004)
6. U.S. Const. Amend. I.
7. WA Const. Art. I, § 11
8. *Locke v. Davey*, 540 U.S. 712 (2004)
9. *Locke v. Davey*, 540 U.S. 712 (2004)
10. MT Const. Art. X, § 6
11. MT Const. Art. X, § 6
12. *Locke v. Davey*, 540 U.S. 712 (2004)
13. U.S. Const. Amend. I.
14. Tucker, St. George. *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*. 5 vols. Philadelphia, 1803. Reprint. South Hackensack, N.J.: Rothman Reprints, 1969
15. Tucker, St. George. *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*. 5 vols. Philadelphia, 1803. Reprint. South Hackensack, N.J.: Rothman Reprints, 1969
16. Madison, James, *To the Honorable the General Assembly of the Commonwealth of Virginia A Memorial and Remonstrance*, 20 June 1785, The University of Chicago Press.
17. *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973)
18. U.S. Const. Amend. I.
19. *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973)
20. *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973)
21. "Mission: Vision: Core Values / Mission, Vision, and Core Values." *Mission | Vision | Core Values / Mission, Vision, and Core Values*, 2013, www.stillwaterchristianschool.org/domain/232.
22. "Mission: Vision: Core Values / Mission, Vision, and Core Values." *Mission | Vision | Core Values / Mission, Vision, and Core Values*, 2013, www.stillwaterchristianschool.org/domain/232.
23. *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973)
24. U.S. Const. Amend. I.
25. *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973)
26. U.S. Const. Amend. I.
27. *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973)

28. Tucker, St. George. *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*. 5 vols. Philadelphia, 1803. Reprint. South Hackensack, N.J.: Rothman Reprints, 1969
29. *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973)
30. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)
31. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)
32. *Locke v. Davey*, 540 U.S. 712 (2004)
33. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)
34. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. ___ (2017)
35. See footnote 3 of *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. ___ (2017)
36. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. ___ (2017)
37. "Mission: Vision: Core Values / Mission, Vision, and Core Values." *Mission | Vision | Core Values / Mission, Vision, and Core Values*, 2013, www.stillwaterchristianschool.org/domain/232.
38. "Montana Supreme Court strikes down tax credit program." *Tax and Benefits Challenges, Business Advocate,* Apr. 2019, https://mcdonaldhopkins.com/Insights/Blog/Tax-and-Benefits-Challenges/2019/04/18/Montana-State-Supreme-Court-strikes-down-tax-credit-program.
39. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. ___ (2017)

Bibliography

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)

Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973)

Locke v. Davey, 540 U.S. 712 (2004)

Madison, James, *To the Honorable the General Assembly of the Commonwealth of Virginia A Memorial and Remonstrance*, 20 June 1785, The University of Chicago Press. http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html.

"Mission: Vision: Core Values / Mission, Vision, and Core Values." *Mission | Vision | Core Values / Mission, Vision, and Core Values*, 2013, www.stillwaterchristianschool.org/domain/232.

"Montana Supreme Court strikes down tax credit program." *Tax and Benefits Challenges, Business Advocate,* Apr. 2019, https://mcdonaldhopkins.com/Insights/Blog/Tax-and-Benefits-Challenges/2019/04/18/Montana-State-Supreme-Court-strikes-down-tax-credit-program.

MT Const. Art. X, § 6.

Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. ___ (2017)

Tucker, St. George. *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*. 5 vols. Philadelphia, 1803. Reprint. South Hackensack, N.J.: Rothman Reprints, 1969.

U.S. Const. Amend. I.

WA Const. Art. I, § 11.