Brief:

Alexis Phan
Ishaan Panjwani
Lake Oswego HS

Table of Cited Authorities:
Zelman v. Simmons Harris
Locke

Statement of Argument:
Invalidating a generally available and religiously neutral student-aid program because it affords students the choice of attending religious schools does not violate the Free Exercise Clause of the First Amendment.

Argument:

I. The Constitution supports the States' diverse approaches to deciding whether and how to finance religious schools under their own constitutions. This Court has recognized that a State's choice of whether and how to finance religious education is of a "historic and substantial state interest" that "is of a different ilk" than other forms of education. Locke, 540 U.S. at 723, 725.

The funding of religious schools is an issue that the States have an interest in regulating. States have space to decide whether and how to fund religious schools between the competing religion clauses of the State and the federal government. The Framers recognized that no single solution would work for every single State, and allowed for them to make decisions about the issue of aid to religion. Given this, each State has interpreted and applied its noaid provision based on its unique history, local expertise, and state-specific experiences with religious and other private school funding. Any decision by this Court should continue to retain this flexibility, allowing the States to further experiment with different funding approaches for private schools, whether religious or secular. Adopting a rigid one size-fits-all approach, may jeopardize existing funding structures of States and prevent the States from tailoring their responses to the unique concerns of their residents.

The Court has never suggested that the Free Exercise Clause compels the States to fund religious schools in the same manner or to the same extent as public

schools. To the contrary, the States have room to fashion state-specific solutions within the "play in the joints" that exists between the Establishment Clause and the Free Exercise Clause. This Court's precedents leave room for the States to craft their own funding choices for religion within constitutional limits. Furthermore, they are consistent with the Framers' views. The Framers of the First Amendment did not intend to prevent the States from making decisions regarding aid to religion.

Allowing the States latitude in their approaches to religious school funding also defers to their local authority and expertise over school finance. School funding falls within state-spending an area where each State faces unique, local obstacles. While some States may adhere to James Madison's view and prohibit even "three pence" of public funds from going to religious institutions, Flast v. Cohen, 392 U.S. 83, 103 (1968) (internal quotations omitted), other States choose to support education programs that occur at religious schools. This recognition of the importance of each State deciding for itself how to address funding for religious schools—operating within the constitutional space recognized by this Court—permits their respective policies to reflect unique and even divergent attitudes.

In short, each State can advance its own funding policies within the constitutional bounds set by this Court's decisions. The States' diverse interpretations of their respective no-aid provisions demonstrates the differing attitudes towards government funding of religious schools.

Public education in particular is an area "where States historically have been sovereign." United States v. Lopez, 514 U.S. 549, 564 (1995). This sovereignty leads to a diversity of approaches under the States' respective constitutions. State constitutional guarantees leave the details of implementation to the States' respective legislatures, who balance local concerns to create state-specific solutions. Petitioners here, however, seek to upend this basic system of federalism and dual sovereignty with respect to school funding choices.

Petitioners acknowledge that a state legislature may decline to enact a school scholarship program without any constitutional infirmity. But if the state legislature does enact a program and then the state courts invalidate the program under the State's no-aid clause, Petitioners assert this outcome is unconstitutional and, as a matter of federal constitutional law, the State must carry on with the program. But state sovereignty interests are at their peak when a State enshrines a

principle in its constitution, and state courts are the final arbiters of those provisions. Michigan v. Long, 463 U.S. 1032, 1041 (1983) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions." (quotation omitted)). Petitioners' request that the federal courts require Montana to enforce a state education funding program that its state supreme court held disrespects state constitutional law and creates significant anti commandeering concerns. To the extent that Petitioners' proposed remedy would bar Montana from taking a stronger antiestablishment stance than federal law—within the constitutionally permissible "play in the joints"—it unnecessarily demands that the States lockstep their state constitutions with the federal Constitution. See Sutton, supra, at 174 (stating the practice of state courts "lockstepping" in "reflexive imitation of the federal courts' interpretation of the Federal Constitution" constitutes a "grave threat to independent state constitutions"). The Montana Supreme Court below rightly avoided this concern, choosing instead to address the state constitutional claims before the federal ones—as was its prerogative—while also assuring itself that its holding posed no problem under the federal Free Exercise Clause. Pet. App. 32; see Sutton, supra, at 179 ("A state-first approach to litigation over constitutional rights honors the original design of the state and federal constitutions."). This "[s]tate primacy" approach "flows from the U.S. Constitution and from one of its key structural guarantees of liberty: federalism." Id.

In contrast, Petitioners' proposed remedy would eliminate any play in the joints between the Free Exercise and Establishment Clauses, foreclosing the States from taking any action to further their "historic and substantial state interest at issue " in this area. Locke, 540 U.S. at 725. Because this Court's jurisprudence under the Religion Clauses accommodates differing state education funding policies and eschews a one-size-fits all approach, this Court should affirm the judgment below and not remove this authority currently exercised by the States.

II. This Court's precedents recognize the States' important role in deciding whether and how to fund religious schools.

The Free Exercise Clause 3 and the Establishment Clause do not prohibit States from funding religious schools, but likewise do not compel the funding of religious schools. Rather, the States have leeway to develop their own funding solutions for their residents' education.

Petitioners' reliance on Trinity Lutheran Church of Columbia Inc. v. Comer should be rejected. That case does not overrule the Court's earlier decision in Locke permitting the States to treat religious instruction differently than other forms of education.

This Court emphasized the deference afforded to the state in deciding how to treat religious schools in Zelman v. Simmons-Harris, 536 U.S. 639 (2002). There, Ohio's scholarship program, which permitted recipients to choose among religious and secular schools, was challenged for violating the Establishment Clause. In holding that the program did not violate the Establishment Clause, this Court explained that state funds may pay for religious schools on the same basis as secular schools so long as students—not the government—ultimately decide which school to attend. Zelman holds that the Establishment Clause does not categorically prohibit States from funding religious schools. The related question—whether States are required to fund religious schools—was answered in Locke.

In Locke, a Washington scholarship program excluded recipients from pursuing a degree in devotional theology; it was challenged for violating the Free Exercise Clause. In holding that the program did not violate the Free Exercise Clause, this Court explained that religious enterprise—specifically religious instruction—may be treated differently from secular equivalents without running afoul of the Free Exercise Clause. In determining whether different treatment of religious instruction violates the Free Exercise Clause, the Locke Court framed the issue as whether the differential treatment of religious activity and nonreligious activity burdened a fundamental right of religious exercise. Adhering to its prior precedent, the Locke Court acknowledged that there is play between the joints of the Religion Clauses—meaning that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." Locke expanded on the state legislative discretion established in Zelman.

Taken together, Zelman and Locke highlight the significant deference granted to state legislatures to fund or not fund religious schools. Zelman permits them to fund religious instruction under certain circumstances; Locke permits them not to. But Locke reminds us that a State's choice not to fund religious schools does not burden the fundamental right of religious exercise.

Petitioners rely heavily on Trinity Lutheran, as one example of an unlawful burden on religious exercise. Missouri disqualified Trinity Lutheran Church's

daycare from the playground surfacing program under Missouri's no-aid provision. This Court's opinion concluded that excluding the daycare from the program solely for being church-operated violated the Free Exercise Clause because it improperly required the church to choose between its religious affiliation and receiving the government benefit. The Court held that this ultimatum impermissibly burdened the fundamental right of religious exercise that was discussed in Locke. A plurality of the Court limited its opinion to "discrimination based on religious identity with respect to playground resurfacing," and expressly left for another day other "uses of funding or other forms of discrimination." Petitioners' argument extends Trinity Lutheran beyond its facts and reasoning. For one, it ignores Justice Breyer's related concurrence emphasizing the nature of the public benefit. Justice Breyer explained that Missouri sought to "cut Trinity Lutheran off" from a general program designed to "improve the health and safety of children." Trinity Lutheran, 137 S. Ct. at 2027 (Breyer, J., concurring in the judgment). In his view, cutting off church schools from general government services like "'ordinary police and fire protection . . . is obviously not the purpose of the First Amendment.'" Id. (quoting Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 17–18 (1947)).

Here, no one contends that Montana's scholarship program is a general government services program designed to improve the health and safety of children. But even if the nature of the benefit were not a controlling factor in Trinity Lutheran, Petitioners' heavy reliance on it does not address the question of this case. This case falls closer to Locke than Trinity Lutheran. The scholarship funds here, if directed towards religious schools, advance religious education, not secular resources.

Locke made clear that "religious instruction is of a different ilk" and that a State's decision to "deal differently" with religious education is "scarcely novel." If Locke stands for anything, it's that a State does not violate the Free Exercise Clause by declining to fund religious education with taxpayer dollars. Petitioners' more narrow reading of Locke should be rejected. Under Petitioners' view, Locke means only that the State cannot be compelled to subsidize a would-be minister's pursuit of a devotional theology degree. But that reading all but eliminates the "play in the joints" that the States enjoy between the Establishment Clause and the Free Exercise Clause. Never has this Court indicated that the room between the joints is so narrow as Petitioners suggest. This Court's precedent points in the opposite direction, permitting the States a wide range of legislative choices

between the competing Religion Clauses. Montana has acted within that permissible range in this case.

CONCLUSION

This Court should affirm the decision below as the tax credit program violates the First Amendment's Free Exercise Clause.

Respectfully submitted,
Alexis Phan
Ishaan Panjwani