
In The
Supreme Court of the United States

KENDRA ESPINOZA, JERI ANDERSON, and JAIME SCHAEFER

v

MONTANA DEPARTMENT OF REVENUE, and GENE WALBORN,

in his official capacity as DIRECTOR of the MONTANA

DEPARTMENT OF REVENUE

On Writ Of Certiorari To The Montana Supreme Court

Brief for the Respondent

Brooke Sanchez and Avery Rose

Judge Barefoot Sanders Law Magnet

Dallas, Texas

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The 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?

Statement of Argument

In 2015 the Montana legislature enacted the "Tax Credit for Qualified Education Contributions" Act. This allowed individuals to donate money to any private, nonprofit scholarship organization, in return receiving up to one hundred and fifty dollars in tax credit. Big Sky, a temporary, non-profit scholarship program, planned on awarding the students the money attending both religious and nonreligious schools. The petitioners, several parents, were planning to use the program to reduce the tuition fees for their child's attendance to Stillwater Christian School, a religious school. The Montana Supreme Court ordered that the Big Sky program be immediately disbanded based on Article X, Section 6(1). The petitioners have sued the Montana Department of Revenue alleging that striking down Big Sky was a violation of the Free Exercise Clause of the U.S. Constitution. After a tumultuous battle in the lower courts, the Montana Supreme Court ruled that the scholarship program violated the Montana Constitution. Soon thereafter a

writ of certiorari was issued and granted by this honorable court. We contend that the termination of the Big Sky scholarship program is not a violation of the Free Exercise Clause of the First Amendment to the U.S. Constitution. Our first argument is centered around the allegation that the Montana Supreme Court discriminated against religious schools when voiding the program. Second, we will argue that Article X, Section 6(1) is constitutional. Lastly, we will prove that the petitioners would require us to give money to religious schools.

A. The Montana Supreme Court did not discriminate when ordering the termination of the Big Sky scholarship program.

Under *Trinity Lutheran*, religious discrimination is created when an entity is forced to choose between maintaining its religious status and receiving a government benefit. While Trinity Lutheran sees a state-run organization deny religious schools government aid, today's case sees the entire program abolished removing religious and non-religious students from accessing the Big Sky scholarship funds. The petitioners were not forced to choose between their status as Christians and receiving a reduction to their tuition fees because the Montana Supreme Court eliminated the choice for *all* families regardless of whether the money was intended to go to secular or sectarian schools. In *Rosenberger*, a religious organization was denied the ability to print a newsletter advocating its cause *Rosenberger v. Rector and*

Visitors of University of Virginia, 515 U.S. 819 (1995). This too, was deemed discriminatory. Furthermore, in *Widmar* the court held that university policies were discriminatory because since they opened the meeting room to all they couldn't deny Cornerstone. *Widmar v. Vincent*, 454 U.S. 263 (1981). As stated earlier everyone's option is being eliminated whether going to a secular or sectarian school. There is no discrimination when all parties are equally viewed in the eyes of the law and denied the same aid.

B. Article X, Section 6(1) of the Montana Constitution is not unconstitutional under the Free Exercise Clause of the First Amendment.

The state of Montana has chosen to create a constitutional provision that respects the US Constitution while protecting its own interests. Article X, Section 6(1) of the Montana Constitution prohibits the state from giving direct or indirect aid to any religious institution. As cited in *Joseph Story, Commentaries on the Constitution (1833)*, "the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions''. This is still justifiable in today's sense through the Incorporation Theory, which makes the First Amendment applicable to states through the Due Process Clause of the Fourteenth Amendment. The Fourteenth Amendment explicitly prohibits any states from depriving any person of life, liberty, and

property. In determining the broad generalization of liberty, it is related back to the elements of the First Amendment, one of which being the freedom of religion. States have the rights to control religion but does not in fact allow States to take authority over one's religion, seeing as though they must abide by the limitations of the First Amendment. The First Amendment establishes a distinct wall between church and state. The wall is porous, allowing for certain, specific measures to pass through. No state is permitted to break down this wall; however, states are able to raise and strengthen the wall if they believe it to be in their best interest. Article X, Section 6(1) is a clear example of this reasoning, protecting public education being their compelling state interest. The Washington Constitution contains a similarly strict clause to Montana's because the Washington Constitution explicitly prohibits the state from funding religious instruction. This court held in *Locke v. Davey* that Washinighton's strict no-aid clause did not violate the Free Exercise Clause of the First Amendment. *Locke v. Davey*, 530 U.S. 712 (2004) The court ruled that because the state was not forcing people to choose between their religion and governmental beliefs the no-aid clause did not violate the Free Exercise clause. The court also ruled that the state had a compelling state interest, stating "Given the historic and substantial state interest at issue, we therefore cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect".

Applying this to the issue in today's case, Article X, section 6(1), which is similar to the Washington Constitution in *Locke*, prohibits the states from directly and indirectly funding religious schools. Montana's Constitution is not forcing students to choose their religion over government benefits. The state of Montana has a compelling state interest to protect public education and as held in *Locke* the state has the right to do so making Article X, Section 6(1) constitutional provision constitutional.

C. Petitioners want to reinstate the Big Sky Program, which would Montana to fund religious schools.

Regardless of whether a state may exclude private schools providing religious education from a general aid program for private schools, a state is free to offer such general aid or no aid at all. *Trinity Lutheran* only requires the state to hand out aid if the program were to continue. Trinity Lutheran Church of Columbia v. Comer, 582 U.S. (2017). A primary reason for the Missouri Scrap Tire Program in *Trinity* to be accessed to all available schools was for the mere fact that its main purpose was for the safety and well being of the kids. This distinguishes this from our case due to the rationale that Big Sky funding religious schools would indirectly promote religion. In this case the Montana Supreme Court has held that the Free Exercise clause requires no inclusion of religious education. The option is left in the hands of the state. Cited in *James Madison, Memorial and Remonstrance against*

Religious Assessments (1785), "A just Government instituted to secure & perpetuate it needs them not. Such a Government will be best supported by protecting every Citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another." The Montana Supreme Court cannot be required to validate the Big Sky program in agreement with James Madison because it would force Montana to discriminate against religious schools to be able to stay content with Montana's own constitution. That would then cause the state to invade the rights of religion to the people.

Conclusion

The Montana Supreme Court constructively formulated the ruling of debanding the Big Sky program, citing that it violated Art. X Sec. 6 of the Montana Constitution. The petitioners argued to say this provision violated their First Amendment rights. This however does not violate the Free exercise clause of the United States Constitution because the Montana Supreme Court decided to dissolve the Big Sky tax credit and scholarship program in its entirety, rather than strictly discriminating against religious schools and the students wishing to attend said school. Furthermore, nowhere in the United States Constitution is any state, Montana included, required to give aid to religious schools; it is permitted but not obligatory,

meaning dissolving the Big Sky program was not unconstitutional. Lastly, the petitioner’s argument provides a slippery slope that the U.S. Constitution simply wouldn’t stand for. Reinstating the Big Sky program would establish a dangerous precedent, excessively entangling religion in state matters

Prayer

With that we pray that this honorable court affirm the lower court’s decision and find in favor the Montana Supreme Court in the case of Espinoza v Montana Department of Revenue.