FILED
01/18/2018
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 17-0492

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 17-0492

KENDRA ESPINOZA, JERI ELLEN ANDERSON,
and JAIME SCHEFER,

Plaintiffs and Appellees,

v.

MONTANA DEPARTMENT OF REVENUE and
MIKE KODAS in his official capacity as DIRECTOR
of the MONTANA DEPARTMENT OF REVENUE,

Defendants and Appellants.

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

On Appeal from the Montana Eleventh Judicial District Court, Flathead County,
The Honorable Heidi J. Ulbricht, Presiding

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INTEREST OF THE UNITED STATES

This case involves the right of individuals under the Free Exercise Clause of the First Amendment to be free from discrimination based on religion, and raises important questions about the scope of the United States Supreme Court's decisions in *Locke v. Davey*, 540 U.S. 712 (2004), and *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). The United States has an interest in the proper interpretation of the Free Exercise Clause, and more generally in enforcing the various protections for religious freedom under the Constitution and federal civil rights laws. The Attorney General recently issued comprehensive guidance on these protections. *See* Memorandum from the Attorney General, *Re: Federal Law Protections for Religious Liberty* 2-3 (Oct. 6, 2017), available at https://www.justice.gov/opa/press-release/file/1001891/download. The United States has filed amicus briefs in other cases to address conflicts between the United States Constitution and state law provisions barring students from using scholarships toward education at religious schools and colleges. *See Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), and *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008).

STATEMENT OF THE ISSUES

The United States addresses only the following question:

Whether Montana has violated the First Amendment's Free Exercise Clause by barring students who attend private religious schools from participating in the Montana Tax Credit Scholarship Program, but allowing such participation by students at private non-religious schools.

STATEMENT OF THE CASE

1. In May 2015, the Montana legislature enacted S.B. 410, 64th Leg., Reg. Sess. (Mont. 2015), the "Montana Tax Credit Scholarship Program" (the "Scholarship Program"), which became effective on January 1, 2016. S.B. 410 created a tax credit program allowing taxpayers to claim up to $150 in dollar-for-dollar tax credits for donating to a private Student Scholarship Organization ("SSO"). S.B. 410, § 14. Under the law, SSOs provide scholarships for students to attend non-public elementary and secondary schools. *Id.* §§ 8-9. To that end, the SSOs provide the donated money directly to the private school of a scholarship recipient's choosing, assuming the school qualifies under the Scholarship Program as a "Qualified Education Provider." *Id.* §§ 9-10.

To implement the Scholarship Program, the Montana Department of Revenue promulgated Rule 1, which prohibits the following entities from qualifying as a Qualified Education Provider: any "church, school, academy,

seminary, college, university, literary or scientific institution, or any other sectarian institution owned or controlled in whole or in part by any church, religious sect, or denomination." Mont. Admin. R. M. 42.4.802 (2015). The state agency issued Rule 1 to conform the SSO program to its understanding of the Montana Constitution's prohibition on public funding for sectarian or religious purposes. *See ibid.* (citing Mont. Const. Art. V, § 11(5) and Art. X, § 6(1)).

2. Plaintiffs seek to use scholarships under the Scholarship Program at their children's Christian school, whose educational program includes teaching of religious values. D.C. Doc. 1, ¶¶ 70, 86, 105.[1] But because the school is a religious private school, it is not a Qualified Education Provider under Rule 1, and therefore no scholarship organization participating in the Scholarship Program can grant a scholarship generated by the tax credit to students attending the school. *See* D.C. Doc. 29, at 5. Accordingly, Rule 1 bars plaintiffs from using any scholarships generated by the program simply because their children attend a religious school. *See* D.C. Doc. 29, at 5.

In December 2015, Plaintiffs filed suit against Defendants challenging Rule 1. D.C. Doc. 1. Plaintiffs alleged that they struggle to pay the tuition at their children's school and fear they may be unable to do so in the future. D.C. Doc. 1,

[1] Citations to "D.C. Doc. __" refer to documents, by number, on the district court docket sheet.

¶¶ 66-68, 72, 85, 92-94, 103, 107. The complaint raised several claims: (1) Defendants lacked authority to issue Rule 1 under the Montana Administrative Procedure Act, Mont. Code Ann. § 2-4-305(6)(a) (2015); (2) Rule 1 violates the Montana Constitution's Equal Protection Clause, Free Exercise Clause, and Establishment Clause, Mont. Const. Art. II, §§ 4 & 5; and (3) Rule 1 violates the United States Constitution's Free Exercise Clause, Establishment Clause, and Equal Protection Clause, U.S. Const. Amends. I & XIV. D.C. Doc. 1, ¶¶ 113-174. Plaintiffs sought declaratory and injunctive relief barring enforcement of the Rule.

3. In March 2016, the trial court entered a preliminary injunction against Rule 1. D.C. Doc. 29, at 1. Subsequently, the parties filed cross-motions for summary judgment. D.C. Docs. 36, 51. On May 23, 2017, the trial court granted Plaintiffs' motion, denied Defendants' motion, and permanently enjoined Defendants from applying or enforcing Rule 1. D.C. Doc. 81.

The trial court addressed whether Defendants correctly interpreted two provisions of the Montana Constitution to prohibit tax credits for donations to Student Scholarship Organizations that ultimately go to religious schools. D.C. Doc. 81, at 5. The court concluded that they did not. Article V, § 11, of the Montana Constitution prohibits "appropriations" to private individuals for a religious purpose. Article X, § 6, prohibits direct or indirect "appropriations" to a church, sect, or denomination. *See* D.C. Doc. 81, at 2. The court held that those

provisions "prohibit *appropriations* that aid religious schools but they are silent concerning tax credits." D.C. Doc. 81, at 5 (emphasis added). The court therefore concluded that "Rule 1 is based on a mistake of law." D.C. Doc. 81, at 6. The court "decline[d] to address the constitutionality of the Rule or whether Article V, Section 11(5) and Article X, Section 6(1) of the Montana Constitution violate the United States Constitution." D.C. Doc. 81, at 6. The court also did not address whether Rule 1 was *ultra vires* under Montana's Administrative Procedure Act or whether, absent Rule 1, S.B. 410 would have violated Montana's Establishment Clause.

On appeal, Defendants argue that Articles V and X of the Montana Constitution apply to privately run scholarships funded with tax credits like those under the Scholarship Program, Rule 1 is not *ultra vires*, and Rule 1 is necessary to avoid violating Montana's Establishment Clause. Defendants also argue that Rule 1 does not violate the Free Exercise or Equal Protection Clause of the Montana Constitution. Defendants further contend that Rule 1 does not violate the Free Exercise or Equal Protection Clause of the United States Constitution. Brief of Appellant, No. DA 17-0492 (Mont. Sup. Ct.) (filed Nov. 22, 2017).

SUMMARY OF THE ARGUMENT

Montana's Rule 1 prohibits students attending private religious schools—but not those at private non-religious schools—from participating in the Scholarship

Program. In this program, Montana taxpayers receive tax credits of up to $150 for donations to charities offering scholarships to students attending private schools. Defendants argue that Rule 1 is valid under state law and does not violate the United States Constitution's Free Exercise Clause. The United States files this amicus brief to lay out the proper legal standard for analyzing the federal Free Exercise Clause issue. In so doing, we recognize that this Court might not address this issue, as the trial court disposed of the case on a question of state law. Nevertheless, because Defendants have argued that applying Rule 1 to Plaintiffs would not violate the Free Exercise Clause, we address this issue in the event this Court reaches this question.

The First Amendment's Free Exercise and Establishment Clauses, along with the Free Speech Clause and the Fourteenth Amendment's Equal Protection Clause, overlap and reinforce one another by requiring the government to assume a position of "wholesome neutrality" with respect to religion. *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963). Rule 1 excludes from the definition of "Qualified Education Provider" any school "owned or controlled in part by any church, religious sect, or denomination." Mont. Admin. R. M. 42.4.802 (2015). Therefore, it denies those students who wish to choose such schools from participating in the Scholarship Program on the basis of religion. By targeting religious conduct for distinctive, and disadvantageous, treatment,

Defendants violate the Free Exercise Clause unless they can show that the discriminatory treatment is supported by interests "of the highest order" and narrowly tailored to achieve those interests. Defendants have made no such showing here.

ARGUMENT

The United States Constitution's Free Exercise Clause requires government neutrality toward individuals' religions. It prevents states from "imposing special disabilities on the basis of religious views or religious status." *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 876-877 (1990) (citing *McDaniel* v. *Paty*, 435 U.S. 618 (1978)). It also prevents states from "target[ing] religious conduct for distinctive treatment," or otherwise "infring[ing] upon or restrict[ing] practices because of their religious motivation." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 534 (1993). Rule 1 contravenes this basic requirement of neutrality toward religion.

1. As a preliminary matter, *permitting* Montana to allow students attending private religious schools to participate in the Scholarship Program would not run afoul of the federal Establishment Clause. In *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002), the United States Supreme Court upheld Cleveland's school voucher program that included state vouchers for students to attend religious schools. The Court explained that there was "no dispute that the program . . . was

enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system." *Id.* at 649. Therefore, the Court explained that the issue was whether the voucher program "nonetheless has the forbidden 'effect' of advancing or inhibiting religion." *Ibid.* The Court concluded that it did not.

The Court reasoned that the program was "neutral with respect to religion" and that any government aid that flowed to religious schools was a result of individuals' "own genuine and independent private choice." *Zelman*, 536 U.S. at 652. In addition, the Court rejected the argument that the program created a public perception that the State was endorsing religious practices and beliefs. *Id.* at 654. "Any objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general." *Id.* at 655.

Here, Defendants have not alleged anything to the contrary with respect to S.B. 410. Indeed, the Scholarship Program has a far more attenuated connection to government action than did the program the Supreme Court upheld in *Zelman.* The aid at issue in *Zelman* was government funding that reached religious schools indirectly through the private choices of parents. The Scholarship Program involves funds from private charitable organizations that accept donations from

individuals who receive tax credits. The private charitable organizations give scholarships to students' parents, who then direct the funds to the school of their choice. Because *Zelman* upheld the use of government funds that went to private schools through the private choices of parents, it is beyond question that a choice program where scholarships come from private scholarship organizations funded by Montana taxpayers receiving tax credits is permissible under the Establishment Clause.

2. The federal question in this case, therefore, is not whether scholarships under the Scholarship Program may go to students attending religious schools—they clearly may—but whether the Free Exercise Clause prevents Montana from enacting a rule barring such students from receiving scholarships under the Scholarship Program. The case law on this is equally clear: Rule 1 is valid only if Defendants can show that their discriminatory treatment of students attending religious schools is supported by compelling State interests and narrowly tailored to achieve those interests. Defendants fail to make this showing.

a. The United States Supreme Court has long held that "there is room for play in the joints" between the First Amendment's Religion Clauses: "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Locke v. Davey*, 540 U.S. 712, 718-719 (2004). At the

same time, some state action or forbearance from action is, absent compelling justification, required by the Free Exercise Clause.

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), the Court held that the Free Exercise Clause required the State to treat a religious preschool equally under a program for providing safe playground material made from recycled tires. The Court stated that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest of the highest order." *Id.* at 2019 (citation and internal quotation marks omitted); *see also Lukumi*, 508 U.S. at 546 ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny," *i.e.*, it "must advance interests of the highest order and must be narrowly tailored to pursuit of those interests.") (citation and internal quotation marks omitted).

In this regard, the Free Exercise Clause and Establishment Clause of the First Amendment, along with the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, overlap and reinforce one another by requiring the government to assume a position of "wholesome neutrality" with respect to religion. *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963); *see Board of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and concurring in the

judgment) ("[T]he Religion Clauses . . . and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits."). That principle—and the corollary that the State may not target religion for disfavored treatment—applies here.

Last term the Supreme Court in *Trinity Lutheran* reiterated that "[t]he Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" 137 S. Ct. 2012, 2019 (quoting *Lukumi*, 508 U.S. at 533, 542). The Court in *Trinity Lutheran* likewise noted the related principle that a law may not "regulate or outlaw conduct because it is religiously motivated." *Id.* at 2021; *see also Lukumi*, 508 U.S. at 533, 534 (A law fails the neutrality requirement if it "targets religious conduct for distinctive treatment," or otherwise "infringe[s] upon or restrict[s] practices because of their religious motivation.").

In *Trinity Lutheran*, the Court addressed whether Missouri violated the Free Exercise Clause by denying a grant to a church-affiliated preschool and daycare center to receive rubber playground surfaces made from recycled tires. The State denied the grant because the center was operated by a church. The Court held that the State's express discrimination against the church was unconstitutional. *Ibid.*

The Court concluded that Missouri's "policy preference for skating as far as possible from religious establishment concerns" was not a compelling state interest. *Ibid*.

The State in *Trinity Lutheran* claimed that its denial of funds to the church-operated day care center did not violate the Free Exercise Clause because the denial did not *prohibit* the church from engaging in any religious conduct. *Id.* at 2022. The Supreme Court rejected that argument, emphasizing that that the Free Exercise Clause protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Ibid.* (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)). The Court further explained that the church was not claiming any entitlement to a subsidy. Rather, it "asserts a right to participate in a government benefit program without having to disavow its religious character." *Ibid.* Accordingly, the "express discrimination against religious exercise is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant." *Ibid.*

b. Here, Rule 1 on its face excludes from the definition of "Qualified Education Provider" under the Scholarship Program any school "owned or controlled in part by any church, religious sect, or denomination." It thus bars students and parents who wish to choose such schools from participating in the

Scholarship Program solely on the basis of religion. As the Court emphasized in *Lukumi*, the "minimum requirement of neutrality is that a law not discriminate on its face." 508 U.S. at 533. Because the Scholarship Program discriminates on its face against religious schools, and students and parents choosing such schools, it violates the Free Exercise Clause unless Montana can show that the discriminatory treatment is supported by interests "of the highest order" and narrowly tailored to achieve those interests. *Id.* at 546.

Contrary to Defendants' argument, *Locke v. Davey* does not require a different standard. In *Locke*, the Court held that a State's refusal to permit scholarship funds, paid out of the State's general funds, to be used to pursue a devotional theology degree did not violate the Free Exercise Clause. 540 U.S. at 720-722. But the Court carefully cabined its holding to the ministerial training at issue; indeed, the Court made clear that broad scholarship programs for general education at religiously affiliated schools are of a different character entirely from the ministerial educational program at issue. The Court stressed that "the only interest at issue here is the State's interest in not funding the religious training of clergy. Nothing in our opinion suggests that the State may justify any interest that its 'philosophical preference' commands." *Id.* at 722 n.5.

Accordingly, as a federal appeals court has summarized, the decision in *Locke* makes clear that "[s]tates' latitude to discriminate against religion is

confined to certain 'historic and substantial state interest[s],' and does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008) (quoting *Locke*, 540 U.S. at 720-721). Indeed, in *Trinity Lutheran* the Court characterized the *Locke* holding in this way:

> The Court in *Locke* . . . stated that Washington's choice was in keeping with the State's antiestablishment interest in not using taxpayer funds to pay for the training of clergy; in fact, the Court could "think of few areas in which a State's antiestablishment interests come more into play." The claimant in *Locke* sought funding for an "essentially religious endeavor . . . akin to a religious calling as well as an academic pursuit," and opposition to such funding "to support church leaders" lay at the historic core of the Religion Clauses.

137 S. Ct. at 2023 (quoting *Locke*, 540 U. S. at 721-722) (citations omitted) (second ellipses in original). The Court in *Trinity Lutheran* further stated that "Washington's scholarship program went 'a long way toward including religion in its benefits.'" *Ibid.* (quoting *Locke*, 540 U.S. at 724). In this regard, the Court noted that "[s]tudents in the program were free to use their scholarships at 'pervasively religious schools,'" and that the plaintiff in *Locke* "could use his scholarship to pursue a secular degree at one institution while studying devotional theology at another . . . [or] to attend a religious college and take devotional theology courses there." *Ibid.* (quoting *Locke*, 540 U.S. at 724). "The only thing he could not do was use the scholarship to pursue a degree in that subject." *Ibid.*

The concern expressed in *Locke* of avoiding State funding of the training of the clergy is absent here for two reasons. First, the parents and children seek to use the scholarship for general education at elementary and secondary schools rather than pursuit of divinity degrees as in *Locke.* Second, the Scholarship Program does not involve funds from the State treasury—the historical concern at issue in *Locke*—but rather scholarships from a private organization that raises money through private donations, for which the donors receive limited tax credits.

In sum, because Rule 1 denies participation in the Scholarship Program on account of the religious identity of the recipient schools, and thereby imposes a disability on students and parents based on their choice of a religious school, Montana must justify this denial with "a state interest of the highest order." *Trinity Lutheran*, 137 S. Ct. at 2019 (internal quotation marks omitted). Defendants have made no such showing here, where they simply point to their view that the State constitution requires the denial. Defendants here offer essentially the same justification that the Supreme Court rejected in *Trinity Lutheran*—namely, a State's "preference for skating as far as possible from religious establishment concerns." 137 S. Ct. at 2024. "In the face of the clear infringement on free exercise" that Montana's Rule 1 imposes, "that interest cannot qualify as compelling." *Ibid.*; *see also, e.g.*, *Widmar v. Vincent* 454 U.S. 263, 276 (1981) (holding that State's interest in "achieving greater separation of church and State

than is already insured under the Establishment Clause" was not compelling reason permitting denial of equal access of student religious groups to university facilities). The denial of scholarships to these students and parents for use at their chosen school therefore violates the Free Exercise Clause.

CONCLUSION

If this Court reaches the question, the Court should conclude that Rule 1 violates Plaintiffs' rights under the Free Exercise Clause of the United States Constitution.

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CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE complies with Montana Rule of Appellate Procedure 11(4) because the amicus brief is proportionately spaced using Microsoft Word 2016 in 14-point Times New Roman font and contains 3,545 words, excluding the parts of the brief excluded by the Rule.

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