In the

Supreme Court of the United States

KENDRA ESPINOZA, JERI ANDERSON, and JAIME SCHAEFER,

Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE, and GENE WALBORN, in his official capacity as DIRECTOR of the MONTANA DEPARTMENT OF REVENUE,

Respondents.

BRIEF FOR PETITIONERS

QUESTION PRESENTED

Does it violate the Religion Clauses or Equal Protection Clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools?

INTRODUCTION

In 2015, Montana legislators created a scholarship program to help families send their children to the school of their choice. Families, many of whom live in poverty, immediately signed up to use the scholarships at schools that met their children's individual needs, whether those schools provided stronger academics, an escape from bullies and violence, or values that aligned with what the families taught at home. In 2018, however, the Montana Supreme Court declared the program unconstitutional under article X, section 6(1) of the Montana Constitution, solely because it gave families the choice of using their scholarships at religious schools.

Applying article X, section 6(1) to prohibit religious options from student-aid programs violates the federal Constitution. This Court has already held that the Establishment Clause allows religious options in student-aid programs that rely on private choice. The question now is whether a state may *bar* religious options from such programs. It cannot. The Free Exercise, Establishment, and Equal Protection Clauses all demand that the government show neutrality-not hostility-toward religion in student-aid programs. Prohibiting all

religious options in otherwise generally available student-aid programs rejects that neutrality and shows inherent hostility toward religion. This is evident from decades of case law.

In addition, article X, section 6(1) itself raises serious constitutional concerns. The historical record shows that this provision was originally adopted along with dozens of other so called "Blaine Amendments" in the Nineteenth Century-to preserve funding for the Protestant-oriented public schools and to suppress Catholicism and Catholic schooling. The Montana Supreme Court's application of article X, section 6(1) now extends the discrimination behind the provision to all religions.

This Court should reverse the Montana Supreme Court's judgment and hold that government cannot bar the choice of religious schools in student-aid programs, whether through a bigoted constitutional provision or otherwise. This holding would allow Montana's scholarship program to continue and also remove a major barrier to educational opportunity for children nationwide.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Religion Clauses of the First Amendment to the United States Constitution provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that a state shall not "deny to any person within its jurisdiction the equal protection of the laws."

Article X, section 6(1) of the Montana Constitution, under which the Montana Supreme Court enjoined the state's scholarship program, provides:

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 or in part by any church, sect, or denomination.

STATEMENT

A. Factual Background

In 2015, the Montana Legislature enacted a scholarship program for kindergarten through 12th-grade students. The purpose of the program "is to provide parental and student choice in education." It does so by providing a modest tax credit-up to $150 annually-to individuals and businesses who donate to private, nonprofit scholarship organizations. Scholarship organizations then use the donations to award scholarships to families who wish to send their children to private school. Families can use those scholarships to attend any "qualified education provider," which is broadly defined by statute to include virtually every private school in the state. Montana's program is one of the 57 educational choice programs that operate in 28 states, Washington, D.C., and Puerto Rico.

So far, one Montana scholarship organization, Big Sky Scholarships, has formed to participate in the scholarship program. Big Sky is a small nonprofit run by part-time and volunteer staff. Although the statute authorizing the program allows scholarship organizations to award scholarships to any Montana family, Big Sky awards scholarships to families who are financially struggling or have children with disabilities. The recipients have chosen to attend both religious and nonreligious schools.

Shortly after the program was enacted, however, Respondent Montana Department of Revenue promulgated an administrative rule ("Rule l") that prohibited families from using scholarships at religious schools. Specifically, Rule 1 changed the definition of "qualified education provider" to exclude any organization "owned or controlled in whole or in part by any church, religious sect, or denomination." According to the Department, Rule 1 was necessary to comply with article X, section 6(1) of the Montana Constitution.

Rule 1 significantly limited the choice of families participating in the program. About 69 percent of Montana private schools for K-12 students are religiously affiliated, and these schools are in demand for both religious and secular reasons. Petitioners are three families who chose religious schools for their children.

Petitioners are all low-income mothers who were counting on the scholarships to keep their children in Stillwater Christian School, a nondenominational religious school in Kalispell, Montana. Although all three receive some financial aid from the school, they still struggle to make their monthly tuition payments.

Petitioner Kendra Espinoza is a single mother who transferred her two daughters out of public school after her youngest struggled in

her classes and her oldest was teased and sometimes bullied by her classmates. Kendra and her daughters are Christian, and a "major reason" Kendra chose Stillwater Christian was because she wanted to send her daughters to a school that aligned with her Christian beliefs and because she "loves that the school teaches the same Christian values that she teaches at home." Her daughters, now 13 and 11**,** are flourishing at Stillwater.

Kendra, however, struggles to pay tuition. She works nights as a janitor (for two different employers), on top of her full-time job as an office assistant, just to afford her children's monthly tuition payments. Kendra has also raised tuition money from her community by raffling off donated quilts and holding yard sales, and her daughters have chipped in by taking odd jobs. Kendra was hoping to receive program scholarships to ease her family's burden. Without the scholarships, she may have to pull her children out of Stillwater.

Like Kendra, Petitioner Jeri Anderson is a single mom struggling to pay Stillwater's tuition for her 10- year-old daughter, Emma. Jeri adopted Emma from China, and Emma is academically gifted. Jeri chose to send her to Stillwater for its academics, and Emma thrives on the individualized attention she receives from her teachers, who guide her in advanced studies. Although Stillwater has been generous with its financial aid for Emma, "paying the remaining tuition every month is still a serious struggle" and Jeri "worries about it constantly." Fortunately, Jeri was able to rely on the program scholarships for the last two years to make ends meet. But without the scholarships, Jeri and her daughter would suffer even greater hardship.

Petitioner Jaime Schaefer also struggles to pay tuition for her son and daughter to attend Stillwater. Jaime and her husband transferred their daughter out of public school because the curriculum disappointed them. Jaime now sends both her children to Stillwater, where she has been impressed by the school's academic rigor and music program. Paying the tuition, however, "is like a second mortgage payment" and "it is a year-by-year decision" whether the Schaefers can keep their children there. Jaime was counting on the scholarships for "significant financial and psychological relief."

These mothers' stories are not unique. Dozens of other families are relying on program scholarships to make tuition payments, including families living below the poverty line and those caring for disabled children.

B. Proceedings Below

Petitioners filed this case on December 16, 2015, challenging Rule 1 as ultra vires, unnecessary, and unconstitutional. They made three arguments. First, they argued the rule was ultra vires because the Legislature intended the scholarship program to include both religious and nonreligious schools, which is clear from the plain text of the statute and its legislative history. Second, they argued that article X, section 6(1) of the Montana Constitution did not apply to the program because that section applies only to public funds-not private donations incentivized by tax credits. Third, Petitioners argued that to interpret and apply article X, section 6(1) to prohibit religious schools in the program would violate the Religion and Equal Protection Clauses of the U.S. Constitution. As Petitioners alleged, Rule 1 "discriminates against Plaintiffs and other families because of their religious views and/or the religious nature of the school that they have selected for their children." Petitioners similarly alleged that the rule unconstitutionally "disfavors and inhibits religion."

On March 31, 2016, the trial court preliminarily enjoined Rule 1, agreeing it was likely both ultra vires and unconstitutional under the U.S. Constitution. On May 26, 2017, the trial court made the injunction permanent and granted Petitioners summary judgment. At the core of both decisions was the court's determination that the tax credits implicated private, not public funds, and that Rule 1 was thus not required by article X, section 6(1) of the Montana Constitution, which reaches only public appropriations and payments.

The trial court held that to conclude otherwise and apply section 6(1) to prohibit religious options in the program might violate the U.S. Constitution. As the court determined, Rule 1 "precludes the Plaintiffs, each of whom is a parent who has chosen to enroll her student in a non-public, religiously-affiliated school, from competing on an equal footing with parents who have chosen to enroll their children in a non-public secular school for the end benefit of the tax credit program." The court further held that "Rule 1 draws a distinction based on religious affiliation" and that this distinction potentially violated the Religion and Equal Protection Clauses in the U.S. Constitution. The Department appealed the decision to the Montana Supreme Court.

In a 5-2 decision, the Montana Supreme Court reversed on December 12, 2018. Although the court agreed that Rule 1 exceeded

the Department's rulemaking authority, the court exercised its judicial power to do what the Department could not: It interpreted and applied article X, section 6(1) as an absolute bar to religious options in the scholarship program. The court further held that the inclusion of religious schools was not severable from the rest of the scholarship program, requiring invalidation of the program itself. Finally, the court held that applying section 6(1) to bar religious schools from participating in the scholarship program did not conflict with the federal Constitution.

As to its first holding, the court determined that the program "indirectly paid tuition at private, religiously affiliated schools" and thus impermissibly aided religious schools in violation of article X, section 6(1). The court emphasized that "religious education is a rock on which the whole church rests, and to render tax aid to a religious school is indistinguishable from rendering the same aid to the church itself."

Next, the court held that the inclusion of religious schools was not severable from the rest of the scholarship program. According to the court, "there is no mechanism within the program to identify where the secular purpose ends and the sectarian begins" or "when the tax credit is indirectly paying tuition at a secular school and when the tax credit is indirectly paying tuition at a sectarian school." The court thus invalidated the program in its entirety. For the same reasons, it also held that Rule 1 exceeded the scope of the Department's rulemaking authority. As the court found, "an agency cannot transform an unconstitutional statute into a constitutional statute with an administrative rule."

Finally, the court summarily rejected Petitioners' argument that interpreting and applying article X, section 6(1) to prohibit scholarships for children at religious schools would violate the Religion and Equal Protection Clauses of the U.S. Constitution. The court held that although "an overly-broad analysis of section 6(1) could implicate free exercise concerns, ... this is not one of those cases." Pet. App. 32. In reaching this conclusion, the court relied on this Court's statement that there is "room for play in the joints" of the Religion Clauses and held that Montana may impose a stricter barrier between government and religion than is required by the Establishment Clause.

Two justices dissented. They concluded that the program was constitutional under the state constitution. They also expressed concern that the majority's opinion violated the First Amendment.

Quoting this Court's recent opinion in *Trinity Lutheran,* Justice Baker stressed that "the exclusion of a group 'from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution.'"

On December 24, 2018, Petitioners moved the Montana Supreme Court to stay the effective date of its judgment pending final disposition of an appeal to this Court. As Petitioners argued, dozens of families were expecting to receive scholarships in summer 2019 and depriving them of these scholarships would impose irreparable harm. On January 24, the court granted a partial stay of the judgment, allowing Big Sky to award scholarships in the summer of 2019. But the court denied Petitioners' request that Big Sky be able to resume fundraising for tax-creditable donations. As a result, Big Sky had funds for around 40 students, and awarded scholarships in summer 2019.

SUMMARY OF THE ARGUMENT

The Montana Supreme Court interpreted article X, section 6(1) to bar any religious options in student aid programs. That interpretation led the court to invalidate Montana's scholarship program-solely because it gave parents the choice of using scholarships at religious schools. This interpretation and application of article X, section 6(1) discriminates against religion in violation of the Free Exercise, Equal Protection, and Establishment Clauses.

First, applying article X, section 6(1) to bar religious options in student-aid programs violates the Free Exercise principles set forth in *Trinity Lutheran* and prior case law. This application discriminates against the religious ''beliefs," "conduct," and "status" of religious families who choose to use scholarships at schools that align with their faith. It also discriminates against the religious "status" of the schools themselves, to the detriment of every family that has decided these schools best meet their children's needs. In addition, it discriminates against the religious "use" of student-aid money. No matter the label given to the discrimination in this case, it is pervasive and anathema to the Free Exercise Clause.

Second, relying on article X, section 6(1) to bar religious options from student-aid programs violates the Equal Protection Clause. Article X, section 6(1) is a "Blaine Amendment," originally motivated by anti-Catholic bigotry. This Court has not hesitated to invalidate, under the Equal Protection Clause, other state constitutional provisions "born of animosity.''

And while invalidating section 6(1) is not required here, this Court should not allow this provision to strike down the scholarship program just because it allows religious options. Indeed, applying Montana's Blaine Amendment in this way extends the provision's original prejudice against Catholics and Catholic schooling to *all* religions and religious schooling.

Finally, article X, section 6(1) as applied here violates the Establishment Clause, which prohibits government hostility toward religion. Whether this Court applies the *Lemon* test, or some other metric, categorically barring religious options in student-aid programs necessarily reflects such hostility. The Montana Supreme Court's judgment must be reversed.

CONCLUSION

This Court should reverse the judgment of the Montana Supreme Court and hold article X, section 6(1) unconstitutional as applied to bar religious options from student-aid programs.