THE WRONG CHOICE TO ADDRESS SCHOOL CHOICE: *ESPINOZA V. MONTANA DEPARTMENT OF REVENUE*

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INTRODUCTION

For many school-choice advocates, *Espinoza v. Montana Department of Revenue*[1] is the chance to extend the Supreme Court's decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*[2] in 2017.[3] In *Trinity Lutheran*, the Supreme Court held that a state's exclusion of a church from a public benefit program to resurface playgrounds discriminated against religion in violation of the Free Exercise Clause.[4] Many school-choice proponents hope to extend the *Trinity Lutheran* holding from playgrounds materials to school funding and thus strike down religion-based exclusions in school voucher programs.[5] However, *Espinoza* is the wrong vehicle to do so. In *Espinoza*, the Montana Supreme Court struck down a voucher-type tax credit program that provided scholarships, which could be used at any private school, as violating the Montana Constitution's prohibition on

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1. 435 P.3d 603, 608–09 (Mont. 2018).

2. 137 S. Ct. 2012, 2024 (2017).

3. Frank Ravitch, *Symposium:* Espinoza v. Montana Department of Revenue*: The Battle Between May and Must Fund*, SCOTUSBLOG (Sept. 18, 2019, 3:21 PM), https://www.scotusblog.com/2019/09/symposium-espinoza-v-montana-department-of-revenue-the-battle-between-may-fund-and-must-fund/ [hereinafter SCOTUSBLOG on *Espinoza*]. For the purposes of this commentary, school-choice advocates believe that public education funds should follow students to the educational institutional of their choice, whether it be public or private.

4. *Trinity Lutheran*, 137 S. Ct. at 2017, 2024.

5. Mark Rienzi, *Symposium: The Calm Before the Storm for Religious-Liberty Cases?*, SCOTUSBLOG (Jul. 26, 2019, 10:42 AM) https://www.SCOTUSblog.com/2019/07/symposium-the-calm-before-the-storm-for-religious-liberty-cases/ ("Applying *Trinity Lutheran* to funding for private education opens the door to forcing states to include religious schools in any program open to secular ones, including voucher programs.").

funding religious schools.[6] By striking down the program, the state court eliminated any alleged discrimination. Therefore, the Supreme Court should affirm and decline to extend the non-discrimination principles expressed in *Trinity Lutheran* to the use of funding for religious education. If the Court ignores the lack of discrimination, as it seems it might,[7] it should in the alternative still affirm the Montana Supreme Court's decision as consistent with the *Trinity Lutheran* line of cases and solidify the distinction between discrimination based on religious status and religious use.

I. FACTS

In 2015, the Montana Legislature enacted a scholarship program that gave dollar-for-dollar tax credits of up to $150 annually for donations to nonprofit "student scholarship organizations."[8] Under this scholarship Tax Credit Program, the scholarship organization used these funds to provide tuition scholarships to a "Qualified Education Provider" ("QEP"), defined under the statute to include essentially any private school in Montana, including religious schools.[9] Taxpayers cannot direct their funds to go to a specific QEP, and the funds are paid directly to the QEP by the student scholarship organization.[10] Since the program was enacted, only one student scholarship organization was formed. Thirteen private schools received funding through that organization, twelve of which were religiously affiliated.[11]

The Montana Department of Revenue is the agency "responsible for implementing and administering" the Tax Credit Program and was granted authority to adopt rules necessary to do so.[12] The Legislature also dictated that the Department of Revenue must comply with Article X, Section 6[13] of the Montana Constitution—commonly known

6. *Espinoza*, 435 P.3d at 614.
7. SCOTUSBLOG on *Espinoza*, *supra* note 3.
8. Brief of Respondents at 3, Espinoza v. Mont. Dep't of Revenue, 139 S. Ct. 2777 (mem.) (No. 18-1195) [hereinafter Brief of Respondents].
9. MONT. CODE ANN. § 15-30-3102(7) (2015). The relevant part reads:
"Qualified education provider" means an education provider that: (a) is not a public school; (b)(i) is accredited . . . (c) is not a home school . . . (d) administers a nationally recognized standardized assessment test or criterion-referenced test . . . (e) satisfies the health and safety requirements prescribed by law for private schools in this state; and (f) qualifies for an exemption from compulsory enrollment . . . .
10. *Espinoza*, 435 P.3d at 606.
11. Brief of Respondents, *supra* note 8, at 5.
12. *Espinoza*, 435 P.3d at 607.
13. MONT. CONST. art. X, § 6.

as the "No-Aid Clause"—in administering the program.[14] The No-Aid Clause was adopted in 1972 when Montana held a Constitutional Convention to create a new state constitution.[15] The provision prohibits the government from making "any direct or indirect appropriation or payment from any public fund or monies . . . for any sectarian purpose or to aid any church, school, academy, seminary, college, university . . . controlled in whole or in part by any church, sect, or denomination," with an exception for federal funds intended for private schools that can be channeled through the state government.[16] Thirty-seven other states have similar constitutional provisions restricting aid to religious schools in varying degrees.[17] Soon after the Tax Credit Program was enacted, the Department of Revenue implemented Rule 1, which provided that religious schools did not qualify as QEPs under the program.[18] The Department of Revenue justified Rule 1 as being necessary to bring the Tax Credit Program into compliance with the No-Aid Clause as the scholarship program statute required.[19]

Petitioners, parents of children granted scholarships through the Tax Credit Program, sued the Department of Revenue and its Director to challenge Rule 1 on free exercise grounds.[20] A Montana district court found for the Petitioners and granted an injunction against Rule 1, holding the No-Aid Clause was inapplicable because the tax credits were not "appropriation[s]" under the No-Aid Clause.[21] The Department of Revenue appealed.[22] The Tax Credit Program remained intact without any limitation on funds going to religious schools as the case was being litigated up to the highest court in the state.[23]

II. LEGAL BACKGROUND

The Establishment Clause and the Free Exercise Clause of the First Amendment,[24] incorporated to the states through the Fourteenth

14. *Espinoza*, 435 P.3d at 607.
15. Brief of Respondents, *supra* note 8, at 18.
16. MONT. CONST. art. X, § 6.
17. Brief of Respondents, *supra* note 8, at 2. *Cf. Espinoza*, 435 P.3d at 610–11 (observing that Montana's no-aid provision is distinct from those of other states because it contains a stronger prohibition against any kind of aid to religious schools).
18. Brief of Respondents, *supra* note 8, at 4–5.
19. *Id.* at 5.
20. *Id.*
21. *Espinoza*, 435 P.3d at 608.
22. *Id.*
23. *Id.*
24. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the

Amendment,[25] bar the federal and state governments from establishing a religion and interfering with the free exercise of religion.[26] The Establishment Clause constructs "a wall of separation between church and state," barring laws that aid religion or exhibit a preference for one religion over others.[27] The Free Exercise Clause forbids laws that prohibit the free exercise of religion or discriminate against religion, including broad bans, indirect coercion, and penalties on religious exercise and exclusions from generally available public benefits.[28]

The dual commands of the Religion Clauses of the First Amendment embody two longstanding traditions— a commitment to "staunch protection of religious freedom" and a "principled opposition to government aid to religious institutions"[29]—whose interests are "frequently in tension."[30] Still, between the fundamental prohibitions of the Religion Clauses, there is "room for play in the joints" where "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."[31]

For example, in *Locke v. Davey*, the Supreme Court upheld a Washington state scholarship program that prohibited recipients from using funds to receive a devotional theology degree against a free exercise challenge.[32] The Court found the exclusion for devotional theology degrees was justified by the state's longstanding anti-establishment interest in not funding the training of religious clergy.[33] The Court stated that there was "no doubt that the State could,

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press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

25. U.S. CONST. amend. XIV; *see* Everson v. Bd. of Educ., 330 U.S. 1, 13 (1947) ("Prior to the adoption of the Fourteenth Amendment, the First Amendment did not apply as a restraint against the states.").

26. *See* Walz v. Tax Comm'n of New York, 397 U.S. 664, 669 (1970) ("The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion.").

27. *See Everson*, 330 U.S. at 15–16, holding:

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.

28. Brief of Respondents, *supra* note 8, at 11.

29. *Id.* at 1.

30. Locke v. Davey, 540 U.S. 712, 718 (2004).

31. *Id.* at 719.

32. *Id.* at 724.

33. *Id.* at 723–24.

consistent with the Federal Constitution, permit [scholarship recipients] to pursue a degree in devotional theology."[34] However, even though the Establishment Clause would have permitted the state to administer the program without an exception for theology degrees, the Free Exercise Clause did not compel the state to do so.[35] Washington could draw "a more stringent line than that drawn by the United States Constitution" and prohibit funding the training of the clergy without stepping outside of the "room for play in the joints."[36]

The Supreme Court has held that a law violates the Free Exercise Clause when it creates a "prohibition" on religious exercise through an outright ban, indirect coercion, or penalties on free exercise.[37] For example, in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[38] the Colorado Civil Rights Commission fined cake shop owners for refusing to provide a cake for a same-sex couple in violation of the state's antidiscrimination laws.[39] The Supreme Court found for the cake shop owners, holding the financial penalty constituted a prohibition on their free exercise of their religion, thus violating the Free Exercise Clause.[40] However, laws that simply "make it more difficult to practice certain religions but which have no tendency to coerce individual into acting contrary to their religious beliefs" do not constitute an unconstitutional prohibition on religious exercise.[41]

Beginning with its decision in *Church of the Lukumi Babalu Aye v. City of Hialeah*[42] in 1993, the Supreme Court has increasingly acknowledged "that nondiscrimination is crucial to religious freedom" and has struck down laws that discriminate against religion.[43] In this line of cases, the Court applies strict scrutiny to laws that restrict free

34. *Id.* at 719.

35. *Id.*; *see* Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012, 2019 (2017) ("[W]e have recognized that there is 'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels." (quoting *Locke*, 540 U.S. at 718)); *see also* Espinoza v. Mont. Dep't of Revenue, 435 P.3d 603, 608–09 (Mont. 2018) (stating that when a state creates greater separation of church and state, it narrows the "room for play" between the Religion Clauses).

36. *Locke*, 540 U.S. at 718, 722.

37. Brief of Respondents, *supra* note 8, at 11 (citing *Trinity Lutheran*, 137 S. Ct. at 2022).

38. 138 S. Ct. 1719 (2018).

39. *Id.* at 1725–26.

40. Brief of Respondents, *supra* note 8, at 11.

41. *Id.* at 12 (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n., 485 U.S. 439, 450 (1988)).

42. 508 U.S. 520 (1993).

43. Brief of Respondents, *supra* note 8, at 1; SCOTUSBLOG on *Espinoza*, *supra* note 3.

exercise when laws are not neutral in their treatment of religion.[44] *Hialeah* involved city ordinances criminalizing specific forms of animal slaughter that were integral to the Santeria religion and loathed by other residents of the city.[45] The ordinances were challenged under the Free Exercise Clause as having a discriminatory purpose despite being facially neutral.[46] The Court struck down the ordinances, finding that laws "that target[] religious conduct for distinctive treatment or advance[] legitimate government interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases."[47]

Most recently, in *Trinity Lutheran*, the Supreme Court reiterated these principles and expanded the non-discrimination concept to public benefits that were denied to religious entities because of their religious status.[48] In that case, the Trinity Lutheran Church was denied a government funding grant to resurface its playground when it was otherwise qualified to receive it solely because it was a religious institution.[49] Thus, the Court applied strict scrutiny and found that the state's interest in maintaining a greater separation of church and state was not compelling.[50] In a footnote, a plurality of justices explicitly clarified that the majority's holding only applied to playground resurfacing and did not address "religious uses of funding."[51]

III. HOLDING

The Montana Supreme Court struck down the Tax Credit Program as indirectly aiding religious schools in violation of the No-Aid Clause of Article X, Section 6 of the Montana Constitution.[52] To interpret the No-Aid Clause, the Montana Supreme Court looked to the Delegates' intent discerned from the text's plain meaning and "in light of the historical and surrounding circumstances under which the [Delegates] drafted the Constitution, the nature of the subject matter they faced,

44. SCOTUSBLOG on *Espinoza*, *supra* note 3.
45. Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 526–27 (1993).
46. *Id.* at 528–29.
47. *Id.* at 546.
48. *See* SCOTUSBLOG on *Espinoza*, *supra* note 3 ("In *Trinity Lutheran* the court expanded the nondiscrimination concept from *Lukumi Babalu Aye* to situations in which a public benefit without religious content – in that case, rubber chips for resurfacing playgrounds – is denied to an entity specifically because the entity is religious.").
49. Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012, 2024 (2017).
50. *Id*. at 2024.
51. *Id*. at 2024 n.3.
52. Espinoza v. Mont. Dep't of Revenue, 435 P.3d 603, 614 (Mont. 2018).

and the objective they sought to achieve."[53] The court determined that the 1972 Delegates intended to "broadly and strictly prohibit[] aid to sectarian schools."[54] The transcripts from the 1972 Montana Constitutional Convention illustrate the Delegates' concerns that it would weaken the public school system if funds could be diverted away to religious and other private schools.[55] The transcripts show that the Delegates intended to craft a provision for their state constitution that more strictly prohibited aid to religious schools than its federal counterpart.[56]

Determining that the Legislature provided tuition indirectly to aid religious schools, the court found that the Tax Credit Program was facially unconstitutional and violated the No-Aid Clause's "constitutional guarantee to all Montanans that their government will not use state funds to aid religious schools."[57]After striking down the Tax Credit Program as unconstitutional, the court continued to address the constitutionality of Rule 1 even though "[a]s a result, [it was] superfluous."[58] The court found that Rule 1 exceeded the Department of Revenue's rulemaking grant under the statute.[59] Under the statute that enacted the Tax Credit Program, the Department of Revenue could only issue rules consistent with the statute.[60] The statute contained a broad definition of QEP clearly meant to encompass religious schools.[61] Therefore, limiting the definition of QEP under Rule 1 to exclude religious schools was inconsistent with the statute and exceeded the Department of Revenue's rulemaking powers.[62] The Department of Revenue could not "transform an unconstitutional statute into a constitutional statute with an administrative rule."[63]

IV. PETITIONER'S ARGUMENT

Petitioners—parents of children who received tuition scholarships through the Tax Credit Program to attend a nondenominational

53. *Id.* at 609.
54. *Id.*
55. *Id.* at 610.
56. *See id.* (discerning the delegates' intent from their understanding that the state clause prohibited forms of aid that were permissible at the federal level).
57. *Id.* at 612–14.
58. *Id.* at 614.
59. *Id.* at 615.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*

Christian school—argue that the Montana Supreme Court's application of the No-Aid Clause to exclude religious options in the Tax Credit Program is "inherently discriminatory" and violates the Free Exercise Clause principles restated in *Trinity Lutheran*.[64] The Petitioners argue the state court's interpretation of the No-Aid Clause to prohibit religious options in a neutral student-aid program discriminates against the "religious beliefs and religiously motivated conduct" of the Petitioners.[65] The court's interpretation also discriminates against the religious "status" of the families and the schools: families were motivated by their "status" to send their children to religious schools, and the schools are barred by their "status" from participating in the Tax Credit Program.[66] Therefore, because the application of the No-Aid Clause in this case discriminates against free exercise rights protected by the First Amendment, the Court should apply strict scrutiny.[67] Petitioners argue the Montana Supreme Court's application of the No-Aid Clause cannot survive strict scrutiny because its only justification for discriminating against religious beliefs and status—to "achiev[e] greater separation of church and state than is already ensured under the Establishment Clause"—is insufficient and has been rejected by the Court in *Trinity Lutheran* and *Widmar v. Vincent*[68] as not "compelling."[69] The Petitioners do not ask the Court to invalidate the No-Aid Clause, only its application here.[70]

Petitioners urge the Court to expand its holding in *Trinity Lutheran* beyond the situation of playground resurfacing materials denied because of religious *status*, and find that the application of the No-Aid Clause to strike down the Tax Credit Program also "discriminates

64. Brief for Petitioners at 15, Espinoza v. Mont. Dep't of Revenue, 139 S. Ct. 2777 (mem.) (No. 18-1195) (Sept. 11, 2019) [hereinafter Brief for Petitioners]. This commentary will focus only on the two parties' arguments relating to the Free Exercise Clause, as the case is considered to be primarily concern free exercise issues. *See* Erwin Chemerinsky, *Symposium: The New Court and Religion*, SCOTUSBLOG (Jul. 26, 2019, 1:33 PM), https://www.SCOTUSblog.com/2019/07/symposium-the-new-court-and-religion/ (stating that *Espinoza* will give an indication of how the newly composed Supreme Court will approach free exercise questions).

65. Brief for Petitioners, *supra* note 64, at 17.

66. *See id.* at 18–19 (adding that many religious families, namely Catholics, are required by Vatican II to send their children to religious schools whenever possible).

67. *Id.* at 20.

68. 454 U.S. 263 (1981).

69. *See* Brief for Petitioners, *supra* note 64, at 20–21 (stating states have attempted to rely on Blaine Amendments to justify religious exclusions but the Supreme Court rejected this argument).

70. *Id*. at 14 ("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.").

against the religious *use* of student-aid money" in violation of the Free Exercise Clause.[71] Petitioners would not bind the Court to the stipulation in the footnote in *Trinity Lutheran* that the holding in *Trinity Lutheran* does not address "religious uses of funds."[72] Instead, the Petitioners rely on the concurrence of Justices Gorsuch and Thomas, stating "discrimination based on religious '*use*' is just as constitutionally offensive" under the Free Exercise Clause "as discrimination based on religious '*status*.'"[73] Petitioners argue that there is not a meaningful distinction between religious *status* and religious *use* because many devout families send their children to religious schools because it is mandated by their religion.[74] Therefore, denying a benefit based on proposed religious *use* in effect denies the benefit based on religious *status*.[75]

Petitioners also devote specific attention to distinguishing *Espinoza* from *Locke*, arguing that *Locke* actually condemns prohibiting all religious options in student-aid programs.[76] In *Locke*, the Court upheld the devotional theology exclusion in a generally available scholarship program.[77] Petitioners argue the Court's holding in *Locke* was narrow, and the result was dependent on the program's inclusivity and lack of hostility towards religion.[78] In addition, Petitioners stress that the exclusion was justified by the state's substantial and longstanding "interest in not funding the training of clergy," in contrast with the "deeply troubling" purpose of the No-Aid Clause's prohibition on all aid.[79] Petitioners contend that the No-Aid Clause is a Blaine Amendment, adopted in order to discriminate against Catholics.[80] Blaine Amendments are state constitutional provisions enacted in the mid-to-late 1800s to prevent funding for Catholic schools at a time

71. *Id.* at 21.

72. *See id.* at 22 ("[D]enying that aid because of the religious use to which such families would put it is to deny that aid because of their religious status."); Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012, 2024 n.3 (2017).

73. Brief for Petitioners, *supra* note 64, at 21–22 (citing *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring in part) (emphasis added)).

74. *Id.* at 22.

75. *See id.* ("[D]enying [student] aid because of the religious use to which such families would put it is to deny that aid because of their religious status.").

76. *Id.* at 26.

77. *Id.* at 23–24.

78. *Id.* at 24.

79. *Id.* at 26–27 (quoting Locke v. Davey, 540 U.S. 712, 722 n.5 (2004)).

80. *Id.* at 27 (noting that the holding in *Locke* depended on saying there was no animus underlying the state's exclusion); *see generally id.* at 31–45 (presenting the history of no-aid clauses in Montana to argue that the No-Aid Clause is a Blaine Amendment and its application violates the Equal Protection Clause).

when the public schools often had strong Protestant influences and elements.[81] At a height of anti-Catholic animus, Representative James Blaine led a campaign to amend the Constitution to prohibit school funding for any religious sect that ultimately failed.[82] However, Blaine turned his attention to the states, and successfully helped pass similar 'Blaine Amendments' into numerous state constitutions.[83] Petitioners argue these Blaine Amendments, rooted in anti-Catholic animus and hostility towards religion, "exacerbate[] the Free Exercise" issues because the government "may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion."[84]

V. RESPONDENT'S ARGUMENT

Respondents, the Montana Department of Revenue and the Director of the Department of Revenue, urge the Court to reject Petitioners' claim that No-Aid Clause application violates the Free Exercise Clause and uphold the Montana Supreme Court's decision to strike down the Tax Credit Program.[85] To prove that the application of the No-Aid Clause violated the Free Exercise Clause, Respondents argue that Petitioners must show they were prohibited, coerced, or penalized from practicing their religion, or that they were denied a generally available benefit because of their religious status.[86] Respondents argue Petitioners cannot show a prohibition on their religious free exercise because the state court struck down the Tax Credit Program for religious and non-religious beneficiaries alike; thus, the Petitioners are neither treated differently nor being denied a benefit because the benefit does not exist.[87] Respondents distinguish this case from *Trinity Lutheran* because there is no benefit being denied after the Tax Credit Program was struck down; while in *Trinity Lutheran,* the church was being denied playground-resurfacing materials because of its religious status.[88] Similarly, without a benefit to be denied, there can be no coercion to abandon one's faith in order to receive a benefit.[89] By striking down the Tax Credit Program as

81. *Id.* at 31–32.
82. *Id.* at 34–35.
83. *Id.* at 35.
84. *Id.* at 27 (quoting Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 547 (1993)).
85. Brief of Respondents, *supra* note 8, at 10.
86. *Id.* at 11.
87. *Id.* at 12–13.
88. *Id.* at 14.
89. *Id.*

violating the No-Aid Clause, the Montana Supreme Court ensured that religious families would not be discriminated against or punished for exercising their religious freedom.[90]

Respondents also contest Petitioners' description of the No-Aid Clause as a Blaine Amendment motivated by religious animus.[91] Respondents stress that the "operative document" is not the 1889 no-aid provision that Petitioners spend considerable time discussing[92] but the No-Aid Clause debated and enacted by the Delegates of Montana's Constitutional Convention of 1972.[93] Respondents argue these 1972 Delegates were not motivated by religious bigotry, but instead believed the No-Aid Clause would protect religious freedom.[94] The Delegates believed allowing government aid to religious schools would weaken both the public school system and religious institutions, as well as infringe on the religious freedom of other taxpayers.[95] Respondents also emphasize that the Montana Supreme Court was not motivated by hostility towards religion when it applied the No-Aid Clause in this case, but was instead motivated by a desire to ensure religious schools would not be penalized based on their religious status.[96]

Respondents also argue that the Court's decision in *Locke*, both in its majority and dissenting opinions, supports the Montana Supreme Court's application of the No-Aid Clause to strike down the Tax Credit Program.[97] Respondents stress that *Locke* supports a state's decision to "singl[e] out religious education as the one thing [it] would not fund," including through a constitutional provision.[98] Further, the provision that was the basis for the exclusion in *Locke* was aimed at prohibiting funding degrees "designed to induce religious faith."[99] Respondents argue that drawing a line between higher education and primary and secondary education would be arbitrary, as the latter two are also

90. *Id.* at 13.
91. *Id.* at 41–42.
92. *Id.* at 18; *see generally* Brief for Petitioners, *supra* note 64, at 28–45 (discussing the 1889 Montana constitutional amendment).
93. Brief of Respondents, *supra* note 8, at 18.
94. *Id.* at 17–18.
95. *Id.* at 19–21.
96. *Id.* at 23; *see also id.* at 23–24 (discussing the argument of Justice Gustafson in her concurrence that the court's decision also protects religious freedom by not "conditioning a government benefit on a person's willingness to violate his religious beliefs by donating money to support schools of a different religion").
97. *Id.* at 33–35.
98. *Id.* at 34.
99. *Id.* (quoting Locke v. Davey, 540 U.S. 712, 716 (2004)).

inherently designed to "induce religious faith."[100] Respondents highlight that Justice Scalia's dissent in *Locke* prescribed the exact path taken by the Montana Supreme Court in ensuring that religious individuals and institutions are not being denied a generally available public benefit.[101] When faced with dual concerns over the "conscience of its taxpayers and the Federal Free Exercise Clause . . . the State could also simply abandon the program altogether."[102] Cutting further against Petitioners' argument, Respondents stress Scalia's statement that striking down the entire program would be permissible even if it were to prevent the funding of religion.[103]

Respondents present three other arguments supporting the constitutionality of the No-Aid Clause itself and its application to the Tax Credit Program.[104] First, Respondents argue that the issue of taxpayer support for religious institutions was left to the people in the First Amendment, and highlight that James Madison, the architect of the Free Exercise Clause, had a "principled opposition to state funding of religious institutions."[105] Second, Respondents urge the Court to defer to the strong national tradition of state constitutional provisions that prohibit funding religious schools.[106] Finally, Respondents argue that accepting Petitioners' position would be inconsistent with the Court's Establishment Clause jurisprudence, which has sustained the states' ability "to decide whether to enact school-choice programs that support religious schools."[107] Respondents contend this discretion should also include the ability to decide not to enact such programs through a prohibition at the constitutional level.[108]

VI. ANALYSIS

The Supreme Court should uphold the Montana Supreme Court's application of the No-Aid Clause to invalidate the Tax Credit Program.

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100. *Id.*

101. *See id.* at 35 (stating the dissent took the stance in *Locke* that a benefit was being denied).

102. *Id.* at 36 (quoting *Locke*, 540 U.S. at 726–27 (Scalia, J., dissenting)).

103. *Id.*

104. *See id.* at 8–9, 12 (noting that Petitioner's argument is framed as a challenge to the No-Aid Clause itself regardless of the fact that schools are not being excluded from a benefit program because no program exists that they could be excluded from).

105. *Id.* at 28–29.

106. *See id.* at 40–44 ("There is an unquestionably longstanding tradition of no-aid clauses . . . . [T]he tradition, should, in and of itself, support the constitutionality of no-aid clauses . . . . This Court regularly applies this methodology in Establishment Clause cases.").

107. *Id.* at 9.

108. *Id.* at 46–47.

The outcome of this case, as exhibited by both of the parties' briefs, hinges heavily on the Court's interpretation of two cases: *Trinity Lutheran* and *Locke*.[109] Both cases involved religion-based exclusions from a public benefit program.[110] However, the Court should conclude its analysis quickly and focus on the key feature distinguishing *Espinoza* from *Locke* and *Trinity Lutheran*: there is no public benefit from which Petitioners can be excluded.[111] Petitioners' free exercise challenge must fail because they cannot show any "prohibition" of their religious free exercise or any discrimination based on their religious beliefs, conduct, or status.[112] Petitioners are in the exact same position as if the Tax Credit Program had never been enacted or had come to its natural end.[113] Most importantly, by striking down the Tax Credit Program, Petitioners are in the exact same position as all other Montanans.[114]

The same "play in the joints" theory applies to Montana's No-Aid Clause as was the case when the *Locke* Court held that states are able to take action that the Establishment Clause permits but the Free Exercise Clause does not require.[115] Petitioners are careful throughout their brief to argue only the discriminatory application of the No-Aid Clause was unconstitutional, not the No-Aid Clause itself.[116] Potentially, Petitioners stop short of making this claim in recognition of the strong national tradition of state constitutional provisions that exclude religious institutions from receiving school funding.[117] However, Petitioners' argument would in effect invalidate the No-Aid Clause, stripping it of its ability to achieve its primary purpose. This interpretation is inconsistent with the Court's position that not only

109. *See generally* Brief for Petitioners, *supra* note 64 (dedicating considerable individual attention to both *Trinity Lutheran* and *Locke*); Brief of Respondents, *supra* note 8 (same).

110. *See* Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012, 2025 (2017) (finding the exclusion of Trinity Lutheran Church from a public benefit to be a violation of the Free Exercise Clause); Locke v. Davey, 540 U.S. 712, 725 (2004) (rejecting free exercise challenge to the exclusion of devotional degrees from a generally available scholarship program).

111. *See* Brief of Respondents, *supra* note 6, at 16 (stating the Court's holding in *Trinity Lutheran* presupposes a benefit program exists and is excluding religious institutions).

112. *Id.* at 14.

113. *Id.*

114. *Id.* at 13.

115. Espinoza v. Mont. Dep't of Revenue, 435 P.3d 603, 608 (Mont. 2018) (quoting Walz v. Tax Comm'n of New York, 397 U.S. 664, 669 (1970)).

116. *See* Brief for Petitioners, *supra* note 64, at 14 ("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.").

117. *See* Brief of Respondents, *supra* note 8, at 40–41 ("Petitioners do not dispute the longstanding and widespread nature of no-aid clauses.").

does "room for play in the joints" exist, but also that funding restrictions for religious education is a form of approved play.[118]

If the Court declines to resolve the case by focusing on the lack of discrimination, the Court should, in the alternative, affirm the Montana Supreme Court's decision below as consistent with *Locke* and *Trinity Lutheran*. In *Trinity Lutheran*, the Court distinguished its facts from those in *Locke*.[119] The Court stated that in *Trinity Lutheran* the church was denied a public benefit of playground resurfacing materials because of its *status* as a religious institution.[120] In contrast, the student in *Locke* was not denied scholarship funds because of his *status* as a religious individual, but instead because of what he was going to *use* those funds for: train for the ministry.[121] *Trinity Lutheran* and *Locke* both involve a religion-based exclusion from a public benefit program, but the different outcomes the Court reaches are internally consistent when viewed in light of the status/use paradigm. Some current Supreme Court Justices, and surely the Petitioners, do not view this distinction as meaningful.[122] However, the status/use distinction helps evaluate the free exercise issues at play by stressing the implications of the choices created by exclusions based on religious status versus religious use. In situations like *Trinity Lutheran*, the choice for the church is to forgo the benefit or deny its *status* as a church.[123] This is a prohibition on the church's free exercise rights; the church is coerced to not exercise its religious freedom if it wants to receive the benefit.[124] In contrast, in situations like *Locke*, even if the student said that he was not religious but wanted to *use* the scholarship funds to study devotional theology anyway, he would still be denied the benefit.[125] The student in *Locke* is not presented with the same coercive choice of being denied a benefit unless he abandons his religious beliefs.

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118. *See* Locke v. Davey, 540 U.S. 712, 718, 725 (2004) ("If any room exists between the two Religion Clauses," it is that States have a substantial interest "in not funding the pursuit of devotional degrees . . . .").

119. Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012, 2023–24 (2017).

120. *Id.*

121. *Id.*

122. *See* Brief for Petitioners, *supra* note 64, at 17 (arguing prohibiting the use of public funds at religious schools is discrimination based on religious status); Mark Rienzi, *supra* note 5 ("Kavanaugh [joined by Alito and Gorsuch] wrote the exclusion of religious organizations from equal participation in a government program 'simply because they are religious' is 'pure discrimination against religion.'").

123. *Trinity Lutheran*, 137 S. Ct. at 2023.

124. Brief for Petitioners, *supra* note 64, at 17.

125. *See* Locke v. Davey, 540 U.S. 712, 720–21 (2004) (noting that religion is irrelevant as "the State has merely chosen not to fund a distinct category of instruction," for all people).

Here, Petitioners were not denied a benefit because of their religious *status*. Instead, like the student in *Locke*, they were denied the benefit because of their proposed *use* for the scholarship funds: religious education. Laws that "make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs" do not run afoul of the Free Exercise Clause.[126] Even though Petitioners' religious beliefs helped motivate their choice to send their children to religious schools, they are not forced to act contrary to those beliefs.[127] Like Washington in *Locke*, Montana had "merely chosen not to fund a distinct category of instruction"[128] As the Court stated in *Locke*, "religious instruction is of a different ilk," and there is a long history of states treating the funding of religious education differently that dates back to the founding.[129] The *Trinity Lutheran* Court's discussion of *Locke*, as well as its stipulation in a footnote about the holding not reaching the situation of religious funding, support this understanding.[130] The Court should heed the footnote in *Trinity Lutheran* and decline to extend its non-discrimination concept in free exercise cases to situations of the religious use of funding like *Espinoza*.

Nevertheless, if the newly composed Supreme Court is seeking to extend its non-discrimination free exercise principles into the context of student-aid funding,[131] *Espinoza* is the wrong vehicle to do so for two reasons. First, as has already been discussed, Petitioners are not being discriminated against or treated any differently than any other Montana resident; no benefit program exists from which they are being excluded.[132] Second, contrary to Petitioners' straw man argument about the "deeply troubling" motives underlying the Court's application of the No-Aid Clause, the No-Aid Clause is not a Blaine Amendment

126. Brief of Respondents, *supra* note 8, at 12 (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n., 485 U.S. 439, 450 (1988)).

127. *Id.*

128. *Locke*, 540 U.S. at 721.

129. *Id.* at 721–23.

130. *See* Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012, 2023, 2024 n.3 (2017) ("This case involves express discrimination based on religious identify with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.").

131. *See* Erwin Chemerinsky, *Symposium: The New Court and Religion*, SCOTUSBLOG (Jul. 26, 2019, 1:33 PM), https://www.SCOTUSblog.com/2019/07/symposium-the-new-court-and-religion/ (anticipating major changes in free exercise clause jurisprudence in the coming years in the direction of robust protection for religion).

132. *See* Brief of Respondents, *supra* note 8, at 16.

rooted in religious animus.[133] The operative No-Aid Clause was passed in 1972, with an awareness of the previous constitution's problematic history, and was motivated instead by a desire to protect religious freedom.[134] *Espinoza* does not present the opportunity to address the constitutionality of Blaine Amendments, and any discussion of the No-Aid Clause in those terms is misplaced.[135]

CONCLUSION

The Supreme Court should uphold the Montana Supreme Court's application of its No-Aid Clause to strike down the Tax Credit Program. While the newly composed Court may be seeking an opportunity to expand its free exercise non-discrimination principles into the school-funding context,[136] the Court should refrain from doing so not only because *Espinoza* would be the wrong vehicle for such an argument, but also because this expansion is inconsistent with the Court's decisions in *Locke* and *Trinity Lutheran*.[137] The Court should focus on the lack of discrimination present in this case and affirm the decision of the Montana Supreme Court.

In the alternative, the Court should solidify the meaningful paradigm distinguishing between laws that discriminate based on religious *status* and laws that discriminate based on religious *use* that it used in *Locke* and *Trinity Lutheran*, and uphold Montana's decision to abide by its own constitution's mandate against funding religious education.

133. *Id.* at 17–18.

134. *Id.*

135. *But see* Mark Rienzi, *Symposium: The Calm Before the Storm for Religious-Liberty Cases?*, SCOTUSblog (Jul. 26, 2019, 10:42 AM) https://www.scotusblog.com/2019/07/ symposium-the-calm-before-the-storm-for-religious-liberty-cases/ (stating the Court should use *Espinoza* to "clarify that state constitutional Blaine Amendments that exclude religious groups from equal participation in government benefits are impermissible").

136. *See* SCOTUSBLOG on *Espinoza*, *supra* note 3 (stating even though Montana's holding is consistent with *Trinity Lutheran*, the Court will likely apply the nondiscrimination concept to the religious education situation).

137. *See generally* Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012, 2023 (2017) (contrasting with *Locke* by stressing that the student was denied a scholarship because of what he proposed *"to do*," not because of "who he *was*").