

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

KENDRA ESPINOZA, ET AL.,)
)
 Petitioners,)
)
 v.) No. 18-1195
)
 MONTANA DEPARTMENT OF REVENUE, ET AL.,)
)
 Respondents.)

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9 Washington, D.C.
 10 Wednesday, January 22, 2020

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The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

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 on behalf of the Petitioners.
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 supporting the Petitioners.
 ADAM G. UNIKOWSKY, ESQ., Washington, D.C.;
 on behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument this morning in Case 18-1195, Espinoza
5 versus the Montana Department of Revenue.

6 Mr. Komer.

7 ORAL ARGUMENT OF RICHARD D. KOMER

8 ON BEHALF OF THE PETITIONERS

9 MR. KOMER: Mr. Chief Justice, and may
10 it please the Court:

11 This case asks whether the Federal
12 Constitution allows the wholesale exclusion of
13 religious schools from scholarship programs. It
14 does not.

15 Yet, Montana's Blaine Amendment
16 requires that exclusion. As a result, the
17 Blaine Amendment discriminates against religious
18 conduct, beliefs, and status in violation of the
19 free-exercise clause under Trinity Lutheran.
20 The Montana Supreme Court disagreed. That court
21 held that barring religious schools from the
22 program did not violate the Federal
23 Constitution. This Court should reverse that
24 judgment.

25 Even Respondents now concede that

1 excluding religious schools from the program is
2 unconstitutional, but they argue that the court
3 avoided this discrimination by invalidating the
4 entire program. This is wrong. The only reason
5 the court invalidated the program was because it
6 included religious schools.

7 And the court's remedy did not cure
8 its discriminatory judgment, nor should the
9 remedy shield the judgment from review.

10 Petitioners brought this lawsuit
11 because they were denied scholarships based on
12 religion, and they are still being denied
13 scholarships based on religion. If the court
14 had shut down the program because it included
15 Muslim schools or African-American schools,
16 there's no question that would be
17 unconstitutional. We ask you to reverse.

18 Respondents argue in the alternative
19 that Locke allows them to exclude the religious
20 schools and that this case falls within the play
21 in the joints. But that would allow the
22 exception to swallow the rule. As Trinity
23 Lutheran made clear, the rule is religious
24 neutrality and Locke only a narrow exception.
25 We argue that Locke is the exception that proves

1 the rule.

2 In Trinity Lutheran --

3 JUSTICE GINSBURG: May -- may I ask
4 you some threshold questions about Article III
5 standing? Under the Montana judgment, these
6 parents are treated no differently than parents
7 of children who are going to secular private
8 schools, so where is the harm?

9 When a differential is challenged, the
10 court inspecting the state law can level up or
11 level down. And here it leveled down. So these
12 would be parents of children going to secular
13 private schools. How are you harmed?

14 MR. KOMER: Your Honor, the Montana
15 Supreme Court lacked the necessary predicate for
16 leveling up or for leveling down because they
17 got the federal Supreme Court question wrong.

18 But for getting that question wrong,
19 we would never have moved on to the issue of
20 remedying that problem because it isn't a
21 constitutional problem.

22 JUSTICE GINSBURG: But there's another
23 serious problem, and that's the parents are not
24 taxpayers. Taxpayers are the people who
25 contribute to these student scholarship

1 organizations.

2 And this Court has held that there is
3 no standing to challenge somebody else's tax
4 status. It seems to me that the Court's
5 decision in Eastern Kentucky is very close to
6 this one, and the Court said you say you're
7 injured because these hospitals are not
8 providing -- providing services to you, but you
9 are not the taxpayer and you can't complain
10 about the tax treatment of someone else.

11 So how do you distinguish Eastern
12 Kentucky?

13 MR. KOMER: Well, Your Honor, here
14 what's involved is a scholarship program, and
15 the scholarship program's intended beneficiaries
16 are the parents, like our clients, who are
17 enabled to exercise their constitutional right
18 to choose --

19 JUSTICE GINSBURG: They're challenging
20 the tax status of someone else, not themselves.

21 MR. KOMER: No -- no, Your Honor, it's
22 because the Montana Supreme Court has extended
23 their Blaine Amendment to include scholarships
24 that are generated by the giving of tax
25 credits --

1 JUSTICE SOTOMAYOR: I'm sorry. Is
2 there any case we've ever had where we've
3 recognized a tax -- a -- a party who wasn't
4 either the taxpayer or the direct recipient of
5 the taxes, benefits of the taxes? So here the
6 parents not just aren't the taxpayer; they're
7 not the schools that receive the money. Neither
8 are they guaranteed receipt of the money. We're
9 told that there's less money than applicants.
10 So they're like three levels removed.

11 In what other case can you cite for me
12 have we permitted such a removed party to have
13 standing?

14 MR. KOMER: I -- Your Honor, I don't
15 think that we've had a state constitutional
16 provision ever be applied in such a --

17 JUSTICE SOTOMAYOR: It doesn't matter
18 that --

19 MR. KOMER: -- extended fashion.

20 JUSTICE SOTOMAYOR: -- we've had --
21 we've had a case involving schools that
22 discriminate, and we've said that those schools
23 -- that taxpayers -- not taxpayers -- that
24 individuals who feel affected by that
25 discrimination don't have standing because

1 they're not the people -- they're not the
2 taxpayer and they're not the recipient of the
3 discrimination directly, so -- and I'm -- I'm
4 having a problem understanding how you have
5 standing either for the taxpayer or for the
6 school who receives the money.

7 MR. KOMER: Well --

8 JUSTICE SOTOMAYOR: And why -- you
9 have a lot of contingencies. Other -- that
10 taxpayers won't give the \$150 without the tax
11 credit, that the school will actually pick them,
12 and that even if picked in the past, that
13 they'll be picked in the future.

14 It seems a high level of
15 contingencies. So mention one case that comes
16 close to that.

17 MR. KOMER: Any case that involves
18 Article III standing where the intended
19 beneficiaries of the program are --

20 JUSTICE SOTOMAYOR: The school's the
21 intended beneficiary.

22 MR. KOMER: I -- I -- respectfully,
23 Your Honor, I disagree. The financial benefit
24 from a scholarship program is to the families.
25 The families receive the benefit of the

1 scholarship. The scholarship is used by the
2 families to buy the education --

3 JUSTICE SOTOMAYOR: Counsel --

4 MR. KOMER: -- at the school.

5 JUSTICE SOTOMAYOR: -- the financial
6 benefit is to the taxpayer who gets a tax
7 credit.

8 MR. KOMER: Actually --

9 JUSTICE SOTOMAYOR: That's the intent.
10 It's an incentive for the taxpayer to give
11 money, but there are many incentives that
12 incentivize people to give money.

13 MR. KOMER: Yes, Your Honor, it does
14 incentivize donations. That's its purpose. And
15 it actually succeeded, while the program was
16 going, in awarding scholarships to two of our
17 three client families. And --

18 JUSTICE GINSBURG: How do you know
19 that they wouldn't have been in the same
20 situation? After all this is a small credit.
21 It's \$150. And if they don't get the credit, if
22 the donors to the organizations don't get the
23 credit, they still get a tax deduction. And
24 that tax deduction is uncapped.

25 So how can we even assume that there's

1 going to be less money in the kitty if the
2 credit is removed but the tax deduction remains
3 untouched? And I'm looking at Wright against
4 Allen in Eastern Kentucky and I just don't
5 understand how this case passes the standing bar
6 when those didn't.

7 MR. KOMER: Well, Your Honor, the
8 simple fact of the matter is that our clients
9 received scholarships under this program, which
10 was a financial benefit to them. The -- the --
11 the tax deductions are not a financial benefit
12 to the taxpayer because they are out \$150,
13 whether they pay their tax to the state or they
14 donate \$150 to the scholarship organization.

15 There's no financial benefit to them.
16 It's kind of a psychic benefit. But it creates
17 scholarships. It really created scholarships.
18 And --

19 JUSTICE KAGAN: Mr. Komer, can I go
20 back to Justice Ginsburg's first question? And
21 I don't know whether to call it standing or
22 mootness or anything else, but I guess I am
23 having trouble seeing where the harm in this
24 case is at this point. It's a strange kind of
25 posture wherein, but if you would describe to me

1 what is the harm that the parents are suffering
2 right now currently?

3 MR. KOMER: Well, right now, their
4 students -- two of the families' students are on
5 scholarships and next year they won't be --

6 JUSTICE KAGAN: Right. But I guess --

7 MR. KOMER: -- generated by the
8 program.

9 JUSTICE KAGAN: I'm sorry to
10 interrupt. I guess what I'm -- I'm saying is
11 that because of the supreme court's ruling,
12 whether you go to a religious school or you go
13 to a secular private school, you're in the same
14 boat at this point.

15 So I've always understood in these
16 kinds of cases that the harm is the perceived or
17 alleged or actual -- whatever you want to call
18 it -- discrimination.

19 But there is no discrimination at this
20 point going on, is there?

21 MR. KOMER: Yes, there is. Because
22 the discrimination occurred in the judgment of
23 the Montana Supreme Court which considered a
24 federal question, which led to the invalidation
25 of the program. And they --

1 JUSTICE KAGAN: But it led to the
2 invalidation of the entire program as it related
3 both to private secular schools and private
4 religious schools.

5 So a -- a -- a -- a -- the parents of
6 both are affected in the exact same way.

7 MR. KOMER: That's because the remedy
8 -- you can't let the remedy shield the
9 discriminatory judgment. The discriminatory
10 judgment is in mistakenly believing that this
11 Blaine Amendment and the application of it did
12 not violate the Federal Constitution.

13 If they got that question right, we
14 wouldn't be here. Because the program would
15 still be going on and our parents would be --

16 JUSTICE SOTOMAYOR: I'm sorry, how
17 could that be? Meaning, do you -- are you
18 taking the position that as a matter of
19 constitutional law, the Montana Supreme Court
20 constitutional provision is unconstitutional?
21 That -- that states are forced to give money,
22 tax credits, to religious institutions and
23 secular institutions? Are they required always
24 to give money out, scholarships?

25 MR. KOMER: No. No, Your Honor.

1 JUSTICE SOTOMAYOR: All right. So
2 let's start there. Are you saying that the
3 constitutional -- the constitution is
4 unconstitutional? Meaning that the
5 constitutional -- Montana's constitutional
6 provision is unconstitutional.

7 MR. KOMER: Montana's constitutional
8 provision violates the free-exercise clause on
9 its face.

10 JUSTICE SOTOMAYOR: On its face.

11 MR. KOMER: And as applied to this
12 program.

13 JUSTICE SOTOMAYOR: So you are saying
14 that states are forced to give money both to
15 secular and religious schools?

16 MR. KOMER: It -- not to the schools.
17 This is a case about giving the money to the
18 families. It's not a case about --

19 JUSTICE SOTOMAYOR: I don't --

20 MR. KOMER: -- giving money to the
21 schools.

22 JUSTICE SOTOMAYOR: Secular and
23 religious families?

24 MR. KOMER: Yes, if they give to one,
25 they must give to the other.

1 JUSTICE SOTOMAYOR: But can the state
2 choose not to give at all?

3 MR. KOMER: Yes.

4 JUSTICE SOTOMAYOR: All right. So
5 let's -- if you start from that proposition, the
6 Montana court said we don't have a law now,
7 don't give to any.

8 So let's assume that the Montana court
9 did what you wanted it to do and said: This is
10 unconstitutional under the Federal Constitution,
11 and it's unconstitutional under the Montana
12 Constitution, which is what I think it did, by
13 the way. It said it's unconstitutional under
14 both, even if it didn't say it, but let's assume
15 it.

16 Let's assume it says it's
17 unconstitutional under the federal constitution.
18 You're saying they can't say separately it's
19 unconstitutional under the Montana Constitution?
20 They have to keep the program alive?

21 MR. KOMER: In the circumstances we're
22 dealing with, Your Honor, they terminated the
23 program.

24 JUSTICE SOTOMAYOR: I'm not talking
25 about the circumstances. Let's assume their

1 opinion was written exactly the way you want it
2 to be, and they had said, this violates the
3 Federal Constitution, but it also violates the
4 Montana Constitution.

5 So instead of leveling up the way
6 Justice Ginsburg said, we're going to level
7 down. That way it doesn't violate either of
8 them. It -- we stopped the federal violation
9 because we're not discriminating against the
10 school -- any school. And we've now -- not
11 violating the Colorado Constitution.

12 Can they do that?

13 MR. KOMER: Are we talking about the
14 court doing this or --

15 JUSTICE SOTOMAYOR: To the court doing
16 this.

17 MR. KOMER: Can the court do it, no?

18 JUSTICE SOTOMAYOR: Why?

19 MR. KOMER: Because when you have a
20 constitutional conflict between the two
21 constitutions, the Federal Constitution trumps
22 --

23 JUSTICE SOTOMAYOR: But you just told
24 me the Federal Constitution doesn't stop the
25 state from choosing not to give aid.

1 MR. KOMER: That's right. But here
2 the state chose to give aid and it has been
3 stopped from giving aid to our clients.

4 JUSTICE KAGAN: Well, it chose to give
5 aid consistent with the constitutional
6 amendment. And -- and -- and the constitutional
7 amendment sets restrictions on funds.

8 And, as a result of the restrictions
9 on funds that the constitutional amendment set,
10 in this case, which I have always understood to
11 be a challenge to the way that the
12 constitutional amendment operated on a
13 particular program, as a result of this
14 challenge, what has happened is that neither the
15 parents who want to send their children to
16 religious schools nor the parents who want to
17 send their children to secular schools get what
18 they would like to get.

19 So they're both being treated the same
20 way.

21 MR. KOMER: Only as a result of a
22 mistaken understanding of the free-exercise
23 clause, Your Honor.

24 JUSTICE ALITO: Under --

25 JUSTICE KAGAN: But we don't usually

1 --

2 JUSTICE ALITO: -- under -- go ahead.

3 JUSTICE KAGAN: I mean, we don't
4 usually sort of grade every line of an opinion.
5 Usually we look to an opinion, and -- and --
6 and -- and there's a decision below, and it's
7 had a consequence in the world.

8 And the consequence of this decision
9 is that there is no discrimination, that neither
10 -- that neither set of parents is getting what
11 it -- they want.

12 Now, you might say, well, both should
13 get what they want, and maybe that would be a
14 better world. Maybe. But the constitutional
15 harm that it seems that you have to allege here
16 is the discrimination. And there is no
17 discrimination.

18 MR. KOMER: Your Honor, there is no
19 discrimination because the Montana
20 constitutional provision requires discrimination
21 on its face and as applied to our clients. And,
22 if I can point out, this isn't a decision about
23 harmonizing the two constitutions because the
24 Montana Supreme Court did not recognize there
25 was any conflict between them that had to be

1 harmonized at all.

2 CHIEF JUSTICE ROBERTS: Justice Alito?

3 JUSTICE ALITO: Yeah, I just wanted to
4 ask this simple question: Under our decision in
5 Village of Arlington Heights, is it
6 constitutional for a unit of state government to
7 do something that it could do, but if it does it
8 for an unconstitutional discriminatory reason,
9 is it then unconstitutional?

10 MR. KOMER: Yes, it is, Your Honor. I
11 see the light is on.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Mr. Wall.

15 ORAL ARGUMENT OF JEFFREY B. WALL
16 FOR THE UNITED STATES, AS AMICUS CURIAE,
17 SUPPORTING THE PETITIONERS

18 MR. WALL: Mr. Chief Justice and may
19 it please the Court:

20 The Montana Supreme Court held that
21 the Montana constitution requires religious
22 discrimination that the federal constitution
23 forbids. Parents may not direct scholarships to
24 schools solely because those schools are
25 religiously affiliated.

1 Now, the state doesn't defend that
2 error of federal law, but says it was washed
3 away when the court invalidated the entire
4 program and left everyone empty-handed.

5 The Montana Supreme Court had no power
6 under federal law to invalidate anything. It
7 relied on a state constitutional provision that
8 is inconsistent with and preempted by the
9 federal free-exercise clause, and, crucially,
10 Petitioners continue to suffer from that federal
11 free exercise violation regardless of whether
12 any parents received scholarships or also suffer
13 as collateral damage.

14 If the Montana Supreme Court had
15 invalidated this program because it included
16 historically African-American schools or
17 all-girl schools, that would be a
18 straightforward equal-protection violation.
19 Nothing about it would be cured by the fact that
20 other parents had been denied funding as well.

21 CHIEF JUSTICE ROBERTS: So your --
22 your -- I'm sorry. Oh, you're good.

23 The injury flows through the schools,
24 right? I mean, the money would go to the
25 schools, not to the parents. And we don't have

1 a school in this case.

2 MR. WALL: Well, but I think that's
3 really getting at the standing issue, Mr. Chief
4 Justice. And they're losing their scholarships
5 at the end of the school year, as I understand
6 it. They've had them for years, and under the
7 court's decision, they lose them at the end of
8 this school year. So even I don't take the
9 state to be challenging Article III injury.

10 And so then it's just a question of
11 whether they're raising their own rights and
12 they are because the reason they're being
13 excluded from the program, everybody would say,
14 the answer to the question, why don't these
15 parents get their scholarships, because they
16 want to direct the scholarships to religious
17 schools.

18 Their free exercise is being
19 penalized. They're not raising a right on
20 behalf of the state. Everybody concedes that if
21 all the parents in this program had wanted to
22 choose secular schools, there'd be no basis for
23 the state's court ruling. The scholarship
24 program would still exist. It's only because
25 some parents said I want to send my kids to

1 schools like Stillwater, and at that point, at
2 page 30 of the Petition Appendix, the state
3 supreme court says we have a state
4 constitutional guarantee, no state funds to
5 religious schools. That's what it says.

6 And that's a straightforward violation
7 of --

8 JUSTICE SOTOMAYOR: Mr. Wall --

9 MR. WALL: -- federal law.

10 JUSTICE SOTOMAYOR: -- are you
11 claiming that -- what you're calling Blaine
12 amendments, but that the Montana provision and
13 all the other states that have one, that as a
14 matter of federal constitutional law, all of
15 those constitutional -- state constitutional
16 provisions must be struck?

17 MR. WALL: Well, not the entire
18 category because I actually think it's a little
19 more nuanced than that, but I am saying what the
20 Court said in Trinity Lutheran. Seven members
21 of the Court said the free-exercise clause there
22 compelled what two members of the Court said in
23 your dissent, Justice Sotomayor, the
24 Establishment Clause forbade.

25 Yes, we think the same is true here.

1 There are 37 --

2 JUSTICE SOTOMAYOR: That's a radical
3 decision.

4 MR. WALL: I --

5 JUSTICE SOTOMAYOR: We have -- we have
6 a founding father, Madison, lobbying heavily for
7 the free-exercise clause and equally to stop
8 states from both establishing religions or using
9 public funds to support them.

10 There's been over -- since the
11 founding fathers, a long history of people who
12 for non-discriminatory reasons, but for reasons
13 related to their belief in the separation of
14 church and state, that have taken the position
15 that the state should not give money to
16 religious institutions.

17 You are suggesting now that Montana in
18 1972 went through an empty exercise, they looked
19 at the history of this amendment or one like it,
20 said it was odious, admitted -- some of its
21 people who voted for this bill in '72 said it
22 was a despicable history, but they then looked
23 at the founding fathers' writings, they looked
24 at the State of Montana's religious tolerance,
25 which had changed dramatically from the Blaine

1 Amendment era, and decided that they were going
2 to side with James Madison, one of the fathers
3 of our Constitution, and continue to say we
4 don't want aid to churches.

5 MR. WALL: So -- so --

6 JUSTICE SOTOMAYOR: Now --

7 CHIEF JUSTICE ROBERTS: Perhaps you
8 could comment, counsel.

9 MR. WALL: So, Justice Sotomayor, that
10 was one of two points I was hoping to make on
11 the merits before I sat down. Every time that
12 the state points to that in its brief, and I
13 think most notably at pages 30 and 31, and what
14 Madison was talking about in the Remonstrance
15 were compelled support laws, preferential aid to
16 the church.

17 Even the state admits at page 30 of
18 their brief, and these are the state's words:
19 There is zero founding era evidence that there
20 -- that you could have a generally available
21 benefit and deny it to an institution based on
22 its religious character --

23 JUSTICE BREYER: What about -- what
24 about --

25 MR. WALL -- and Justice Thomas, I

1 think, walks through the history of the opposite
2 in his Rosenberger concurrence, that at the time
3 of the founding, when they gave out land in the
4 Northwest Territory and other statutes for -- to
5 schools, they included religiously affiliated
6 schools.

7 I think actually the tradition that
8 dates to the founding is -- is sort of the
9 opposite, that you can't disqualify them just
10 based on their religious character, but you can
11 have no compelled support, no preferential aid
12 to the church. And that's very different from
13 what -- what's going on here.

14 JUSTICE BREYER: But what -- what did
15 you think of this? I -- I'm having trouble, and
16 I want you to tell me what you really think
17 about this problem which has probably an answer
18 that you will have thought about. Okay.

19 Say in San Francisco or Boston or take
20 any city or state, and they give many, many,
21 many millions of dollars to the public school
22 system. And a lot of them give a lot of money
23 to charter schools.

24 Now, they don't give money to Catholic
25 schools. All right? Now, if -- if we decide

1 you're right, does that all change?

2 MR. WALL: Well, no, in certain
3 respects it doesn't change, Justice Breyer.
4 They don't -- if they want to open up the
5 funding, they can put limits, secular limits, on
6 the program. We're going to give math
7 scholarships or engineering scholarships --

8 JUSTICE BREYER: There's -- I'm not
9 talking about scholarships.

10 MR. WALL: But if --

11 JUSTICE BREYER: I'm talking about the
12 X billion dollars that the State of New York
13 spends on the public school system, and I don't
14 know how much, but I suspect they might spend
15 money on charter schools.

16 MR. WALL: Yes.

17 JUSTICE BREYER: Let's call it another
18 500 million. They do not -- I'm just repeating
19 myself --

20 MR. WALL: Yes.

21 JUSTICE BREYER: -- spend money on the
22 Catholic school system. Now, there's nothing
23 immoral about that. That's just the -- the --
24 what they do. And -- and that's -- comes from
25 the Constitution. All right.

1 If I decide -- it's the same question.
2 If I decide for you, am I saying that they have
3 to give money to the -- same amounts
4 proportionate to -- to the parochial school?

5 MR. WALL: I think if they structure
6 the benefit program the way they did here or the
7 way they did in Trinity Lutheran --

8 JUSTICE BREYER: No, no. I'm saying
9 the way --

10 MR. WALL: If --

11 JUSTICE BREYER: -- they do do it, not
12 the way that they did it here and so forth.

13 MR. WALL: If they are giving out
14 generally available public benefits for people
15 to go to private schools --

16 JUSTICE BREYER: Oh, oh, what's the
17 private? Why is it that they have to be equal
18 with private but they don't have to be equal
19 with public?

20 MR. WALL: No, when you said charter
21 schools, I took those to be private schools.

22 JUSTICE BREYER: Forget the charter
23 schools. Same -- same question.

24 MR. WALL: If -- if a city or state
25 gives out funds for private education, which

1 it's not required to do, it can limit its
2 funding to public schools, but if it gives it
3 out and it gives it out just for scholarships
4 for private schools --

5 JUSTICE BREYER: My hypothetical was
6 they give it out in -- it's called the Public
7 School System of the United States. I'm saying
8 that's what I'm talking about. Now, what's your
9 response? What's the difference between this
10 case, you win, and the same with the public
11 schools, they have to give it to parochial
12 schools too. What's the difference?

13 MR. WALL: Justice Breyer, what I'm
14 saying in the last paragraph of Trinity
15 Lutheran, when the Court said you can't deny a
16 generally available public benefit to an entity
17 that's otherwise qualified based solely on its
18 religious character or nature --

19 JUSTICE KAGAN: So Mr. Wall, don't you
20 --

21 MR. WALL: -- that rule applies
22 equally to schools as to playgrounds.

23 JUSTICE KAGAN: Mr. Wall, I mean,
24 there seems -- I was one of the seven in Trinity
25 Lutheran, but there seems to me a real

1 difference in this case. In Trinity Lutheran,
2 the -- a state was using the religious status of
3 various people or entities to limit access to a
4 unrelated public benefit, to a completely
5 secular public benefit.

6 Now, here, it seems to me, that what
7 the state is doing with respect to these
8 educational programs is to say: We don't want
9 to subsidize religious activity. We don't want
10 to subsidize religious education. And, further,
11 because of the way that the supreme court issued
12 its decision, that will mean that we don't want
13 to subsidize any private education.

14 So you have both the
15 non-discrimination as to that, but even put that
16 aside, what this is is essentially a state
17 saying, for many reasons that have been viewed
18 as legitimate, even though not shared by
19 everybody, but have been viewed as legitimate
20 for many years, we don't want to subsidize
21 religious activity, in particular religious
22 education. That's a far cry from Trinity
23 Lutheran.

24 MR. WALL: So your question gets at
25 the two things I was hoping to say before I sat

1 down.

2 The -- the first is all we're asking
3 and the Petitioners are asking is that you do
4 what you normally do when you review a state
5 supreme court decision. At page 32 of the Pet.
6 App., it said no problem with federal law. It
7 got federal law wrong. If it had come out
8 correctly on the federal law question, nothing
9 else in the decision would have flowed. The
10 trial court would have been affirmed and
11 everybody would have gotten the scholarships.

12 That -- with the application of the
13 state constitutional provision, which was
14 preempted under Trinity Lutheran, was the only
15 basis to impugn the state law. So you should
16 reverse the federal error and send it back.

17 On the merits of your question, look,
18 I get that you can say it's a harder case
19 because it's -- it's education and it's not a
20 playground. And in that sense, it may be a
21 harder question, but the Montana Supreme Court
22 didn't take it as a case about use, didn't try
23 to say this was covered by Davey or any of the
24 rest.

25 It said religiously-affiliated

1 schools. That's a status-based distinction.
2 And I don't think we can distinguish that from
3 Trinity Lutheran.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Mr. Unikowsky.

7 ORAL ARGUMENT OF ADAM G. UNIKOWSKY
8 ON BEHALF OF THE RESPONDENTS

9 MR. UNIKOWSKY: Mr. Chief Justice, and
10 may it please the Court:

11 The Constitution does not bar the
12 State of Montana from enacting and applying a
13 state constitutional provision that keeps its
14 own state legislature out of the business of
15 funding of religious schools.

16 The no-aid clause does not prohibit
17 anyone's free exercise of religion. To the
18 contrary, it protects religious freedom by
19 protecting religious schools from government
20 influence and ensuring that government cannot
21 use aid as leverage to influence the content of
22 religious education.

23 Petitioners attempt to analogize this
24 case to Trinity Lutheran but the analogy is
25 inapt for two reasons:

1 The first reason is that the coercion
2 aspect of Trinity Lutheran, which was crucial to
3 the Court's decision, was absent here. In
4 Trinity Lutheran, the church put to a stark
5 choice: Either abandon your religious faith and
6 become a nice secular stone building with a
7 daycare facility and you're going to get the
8 money or stick to your religious faith and you
9 won't get -- you won't get the money.

10 And that coercion was the premise of
11 the Court's decision that there is a penalty on
12 free exercise. That's not happening in this
13 case where the state court held that Montana
14 wasn't even capable of knowing whether a
15 particular parent would use money for a
16 religious and non-religious school, and it
17 therefore held that regardless of how the money
18 was spent, there wouldn't be a tax credit.

19 The second distinction from Trinity
20 Lutheran is that Trinity Lutheran involved the
21 refusal to give money to a church for a
22 completely non-religious purpose, merely because
23 it was a church. This case is different in that
24 the state is simply declining to fund religious
25 education.

1 The state court did not hold that
2 under the no-aid clause, religious schools would
3 be denied funding for non-religious purposes.

4 So let me start with the standing
5 point which came up during the first half hour.
6 So we didn't, as the Court knows, it's in an
7 amicus brief, but we didn't make the argument in
8 our brief because we concluded that the
9 arguments really went more to the merits rather
10 than standing.

11 We -- I -- I mean, we believe there's
12 an attenuated connection between the state
13 action here and Petitioners' free exercise of
14 religion but Petitioners are alleging in their
15 brief that they personally are the victims of
16 status discrimination because they are
17 Christians.

18 We think that's wrong based on what
19 the state court actually did, but historically
20 the courthouse doors have been open to make that
21 kind of argument. But we think on the merits,
22 there simply isn't a prohibition on the free
23 exercise.

24 CHIEF JUSTICE ROBERTS: I -- I'd like
25 to get back to Justice Breyer's question and get

1 your view you on it which I understand it to be
2 that why doesn't -- do you think the other
3 side's theory leads to a situation where the
4 funding that goes to public schools, a -- a --
5 if -- if they prevail, wouldn't have to go to
6 religious schools?

7 MR. UNIKOWSKY: Well, I mean, I'm not
8 sure of the breadth of their theory. I mean,
9 there's a number of amicus briefs that -- that
10 make that exact point. I mean --

11 CHIEF JUSTICE ROBERTS: Well, let's
12 take it to be just that, I mean, this is a case
13 about money and the question whether or not it
14 must go to religious schools. And I am
15 wondering if the public -- the funding of public
16 schools is the same as the situation involved
17 here in your -- in your view?

18 MR. UNIKOWSKY: I guess I don't
19 understand Petitioners to be making that
20 argument in this particular case.

21 JUSTICE BREYER: They're not, but
22 that's what's -- but it still can bother me.
23 I'd like to know if in deciding it for them, if
24 I do, that I have made a major change in the
25 public school system.

1 I understand one's private and the
2 other's public. And what I'm asking for, you or
3 them, why would that matter?

4 MR. UNIKOWSKY: Well --

5 JUSTICE BREYER: That is, why -- why
6 would it make a difference, if you have to give
7 -- I mean, now don't jump on to my argument and
8 say, great, it supports you. I'm not making an
9 argument to support you.

10 (Laughter.)

11 JUSTICE BREYER: I'm asking a question
12 to find out the answer.

13 MR. UNIKOWSKY: Well, I -- I -- I'm
14 not sure exactly how far Petitioners' argument
15 would lead, but I -- I do think that one
16 important point of this -- in this case is that
17 states generally have had power over education,
18 and to decide that they're only going to fund
19 the public school system, and that is the
20 ultimate effect of the state court's judgment in
21 this case.

22 CHIEF JUSTICE ROBERTS: But, I wonder
23 if -- if there's a difference in the sense
24 that -- that -- between general funding of the
25 public schools and the decision to provide aid

1 to private schools, except not religious
2 schools.

3 MR. UNIKOWSKY: Well, so I think that,
4 you know, the question in this case ultimately
5 boils down to, whether the striking down of the
6 program because of the no-aid clause just in and
7 of itself is a violation of the free exercise
8 right of Petitioners.

9 And, you know, the first half of the
10 argument involved a number of questions about
11 how Petitioners are really harmed if the program
12 as a whole is struck down.

13 And I think I heard two sets of
14 arguments from the other side, from Petitioners,
15 both of which I would like to address. One
16 argument is the sort of broader argument that
17 just, the no-aid clause is just constitutionally
18 defective, like, by its very nature, because it
19 is discriminatory, is not capable of being
20 applied, and, therefore, the court should just
21 remand and tell the court you just can't apply
22 this illegal rule.

23 And the second argument I heard is
24 this somewhat narrower argument that as applied,
25 the problem here is that the court excluded

1 religious schools from a general program as in
2 Trinity Lutheran.

3 So if I could just address those --
4 those two theories of the case by Petitioners.
5 So I think the first argument really is
6 tantamount to an argument that the no-aid clause
7 is facially unconstitutional, because like every
8 single time you applied the no-aid clause, the
9 rule it recites is that religious schools don't
10 get money because --

11 JUSTICE ALITO: Well, I thought they
12 were quite clear, that they were not arguing --
13 they were not making a facial challenge.

14 MR. UNIKOWSKY: Right.

15 JUSTICE ALITO: It was a challenge as
16 applied to the particular situation here.

17 MR. UNIKOWSKY: Right. So if -- if
18 that's the case, and I -- I agree that that's
19 the tenor of Petitioners' argument. I think the
20 government was making a broader argument but I
21 think Petitioners' argument is more limited.

22 So if -- if it is the case that in
23 general the Court -- the state court can apply
24 the no-aid clause, in other words, it's not just
25 facially discriminatory to say because something

1 is religious --

2 JUSTICE ALITO: Well, they're not --

3 MR. UNIKOWSKY: -- we're not --

4 JUSTICE ALITO: -- conceding that.

5 They're just saying you have to consider it as
6 applied here. Look, I -- I -- I like your
7 reaction to this way of looking at the case.
8 Maybe it's right; maybe it's wrong. A -- it is
9 a violation of the Federal Constitution if a
10 state Supreme Court bases a decision on a ground
11 that discriminates in violation of the
12 constitution.

13 Do you agree with that?

14 MR. UNIKOWSKY: I would agree with
15 that, but obviously the question is whether it
16 discriminates in violation of the Constitution
17 --

18 JUSTICE ALITO: Okay.

19 MR. UNIKOWSKY: -- the last part of
20 that. Look --

21 JUSTICE ALITO: All right.

22 MR. UNIKOWSKY: -- I'm not -- I'm not
23 objecting --

24 JUSTICE ALITO: The argument is if
25 they -- they don't have to fund private

1 education at all, but if they choose to provide
2 scholarships that are available to students who
3 attend private schools, they can't discriminate
4 against parents who want to send their children
5 to schools that are affiliated in some way with
6 a church.

7 MR. UNIKOWSKY: So I --

8 JUSTICE ALITO: That's the simple
9 argument. And it's hard to see that that's much
10 different from Trinity Lutheran.

11 MR. UNIKOWSKY: No, I think it is
12 completely different from Trinity Lutheran. So
13 look, I'm not going to object to the general
14 premise that Your Honor offered, that if there's
15 like a -- a -- a legal rule, just the very
16 application of the rule is constitutionally
17 defective, then you can reverse the state court
18 decision. I'm -- I'm not going to fight that
19 proposition as a general matter. But that's not
20 the question here.

21 I think the question here is whether
22 the state may apply a no-aid clause. And I
23 think that the answer is yes. Because if you
24 accept the premise that the --

25 JUSTICE GORSUCH: Counsel, wouldn't

1 you --

2 MR. UNIKOWSKY: Yes.

3 JUSTICE GORSUCH: In terms of what
4 you're agreeing with Justice Alito, I just want
5 to press you a little bit further. Let's say a
6 state court decision could be consistent with
7 the constitution or not consistent with the
8 constitution, right? The outcome may or may not
9 be.

10 If the -- if -- if the decision rests
11 on an erroneous interpretation of federal law
12 and remedying that error could provide relief,
13 we have a case, don't we?

14 MR. UNIKOWSKY: I mean, in principle,
15 if we assume there's an error of federal law in
16 --

17 JUSTICE GORSUCH: Yes.

18 MR. UNIKOWSKY: -- the court's
19 decision --

20 JUSTICE GORSUCH: Assuming there's an
21 error of federal -- in federal law and that
22 remedying it here might provide relief to
23 plaintiffs, we have a case.

24 MR. UNIKOWSKY: I -- I -- so, I think
25 that, yes, as a general matter, at a high level

1 of generality, if Petitioners identify an error
2 of federal law in a lower court decision, I
3 think the Court can adjudicate the error
4 federally.

5 JUSTICE GORSUCH: Okay. So the
6 question really becomes do we have an error of
7 federal law here?

8 MR. UNIKOWSKY: Right. But the
9 question is what becomes an error of federal
10 law.

11 JUSTICE KAVANAUGH: Suppose -- suppose
12 the state said we're going to allow the
13 scholarship funds to be used for secular schools
14 or Protestant schools but not for Jewish schools
15 or Catholic schools. Unconstitutional?

16 MR. UNIKOWSKY: Yes, so I think that
17 --

18 JUSTICE KAVANAUGH: Is that a yes?

19 MR. UNIKOWSKY: Yes.

20 JUSTICE KAVANAUGH: Okay. So what's
21 different when you say the scholarship funds can
22 be used for secular schools but not for
23 Protestant, Jewish, Catholic or other religious
24 schools because of the religious status?

25 MR. UNIKOWSKY: So, I think the right

1 lens to look at that hypothetical is the
2 Establishment Clause, which prohibits the state
3 -- regardless of whether there's an infringement
4 on any individual liberty, I think the
5 Establishment Clause prohibits the state from
6 distinguishing between one religion versus a
7 different religion. And I think that's an
8 example --

9 JUSTICE KAVANAUGH: But a lot of the
10 free-exercise equal-treatment cases, going back
11 to Everson, McDaniel, say you can't exclude
12 religious people, religious institutions,
13 religious speech because it's religious from a
14 generally applicable program --

15 MR. UNIKOWSKY: Right. So --

16 JUSTICE KAVANAUGH: -- the fact that
17 it's odious to the Constitution to quote the
18 words of Trinity Lutheran.

19 So why isn't this excluding religious
20 people, telling them that they're not entitled
21 to equal treatment under the Constitution, why
22 isn't that a violation of -- a straight
23 violation of the Trinity Lutheran principle
24 which goes back to Everson --

25 MR. UNIKOWSKY: Because I think --

1 JUSTICE KAVANAUGH: And why is it
2 different from other hypothetical?

3 MR. UNIKOWSKY: I think the state has
4 a choice, right? It's not allowed to tell
5 people we are going to penalize you for
6 exercising your religion. That's a prohibition.

7 I think that the core insight of a
8 case like Trinity Lutheran is that there's no
9 difference between the denial of a benefit and a
10 fine. That's a prohibition because you're
11 actually penalizing the decision to exercise
12 religion.

13 That doesn't mean that the state has
14 to fund religious schools and it also doesn't
15 mean the state can't just apply a principled
16 view that it doesn't want --

17 JUSTICE KAVANAUGH: But if you're a --

18 MR. UNIKOWSKY: -- to get involved in
19 religious education.

20 JUSTICE KAVANAUGH: If you're running
21 a scholarship fund and there's a group of people
22 lining up for the scholarships, are you secular?
23 Okay, you can get it? Are you Catholic? No,
24 you're out because you're Catholic.

25 MR. UNIKOWSKY: Yeah, that's exactly

1 what the state --

2 JUSTICE KAVANAUGH: How is that --

3 MR. UNIKOWSKY: -- court is not doing
4 in this case.

5 JUSTICE KAVANAUGH: How is that -- how
6 is that consistent with the principle set forth
7 in Trinity Lutheran or McDaniel, Justice
8 Brennan's concurrence in McDaniel?

9 MR. UNIKOWSKY: I think that's exactly
10 what the state court ensured wouldn't happen.
11 It's not just a matter of like --

12 JUSTICE KAVANAUGH: The predicate --
13 the predicate was that that kind of
14 discrimination is -- does not violate the
15 Federal Constitution.

16 MR. UNIKOWSKY: No, I -- I -- I think
17 that the state court can say, look, as a state,
18 we have a no-aid clause clause. We have a
19 principled objection to funding of religious
20 institutions, but we understand that this sort
21 of classification of coercing people on to being
22 secular is a penalty on religion. So to balance
23 those two interests, we're going to simply level
24 down.

25 And I just want to be clear, we're not

1 defending religious bigotry here, okay? I think
2 no-aid clauses have a principal justification,
3 especially in Montana.

4 JUSTICE KAVANAUGH: Well, they're --
5 they're certainly rooted in -- in grotesque
6 religious bigotry against Catholics. You agree
7 with that?

8 MR. UNIKOWSKY: I mean, I think that
9 in the 1880s, there was undoubtedly grotesque
10 religious bigotry against -- against Catholics.
11 I don't think that's --

12 JUSTICE KAVANAUGH: That was the --

13 MR. UNIKOWSKY: -- comes out in the --

14 JUSTICE KAVANAUGH: -- clear
15 motivation for this.

16 MR. UNIKOWSKY: No, not -- that's not
17 true. In the 1972 Constitution, which is where
18 this provision was enacted, I don't think
19 there's any evidence whatsoever of any
20 anti-religious bigotry. I think the -- yes,
21 Your Honor? I'm sorry.

22 JUSTICE ALITO: No, I -- I want to --
23 to see if there's any real difference between
24 this and Trinity Lutheran. So what the --
25 excuse me -- what Article X, Section 6 of the

1 Montana Constitution says that there can't be
2 any aid, indirect or direct, to any institution,
3 school, or other institution controlled in whole
4 or in part by any church, sect, or denomination.

5 So if you have a school that has a
6 board of trustees and one or more of the board
7 -- members of the board of trustees ex officio
8 are members of a religious body, that would seem
9 to provide control, in part. Would that be
10 sufficient under the Montana Constitution,
11 without looking at all at the nature of the
12 education provided by the school?

13 MR. UNIKOWSKY: No, I don't think so.
14 That's not how the state court has construed the
15 Constitution --

16 JUSTICE ALITO: Where has it said --
17 where has it said that that's not how it's
18 construed? That's control in -- in part.

19 MR. UNIKOWSKY: So if you read the
20 lower court opinion, there's all this language
21 about how the real problem here is that the
22 money is going to the school, which is going to
23 spend it on religious education. The language
24 --

25 JUSTICE ALITO: Well, they're talking

1 about schools in general. How do they know what
2 schools they're talking about?

3 MR. UNIKOWSKY: No, they're -- they're
4 saying -- they're not talking about schools in
5 general. There's all this language saying that
6 money is going to go to a school and, therefore,
7 the money -- the school is going to spend that
8 money on explicitly religious education.

9 If I could just step back, look, I'm
10 agreeing -- I agree that the -- the lower court
11 opinion is not completely clear on this. I
12 mean, part of the problem is I think that this
13 -- this challenge has really changed in this
14 Court. In the lower court, it wasn't the no-aid
15 clause that was really being challenged; it was
16 the rule.

17 And so I don't think -- I mean, I
18 think the state courts in general should be
19 entitled to adopt limiting constructions of
20 their own state constitutions. I just don't
21 think the state court had the chance to do that
22 here because the argument wasn't really raised.

23 And I think it would be a little
24 unfair in this Court to sort of assume the
25 broadest possible interpretation of the state

1 constitution just for purposes of -- of like
2 invalidating it. At minimum --

3 JUSTICE SOTOMAYOR: May I ask you a
4 question? Let's go back to the basic, okay?

5 Let's take the proposition here that
6 the law as written giving aid discriminated. I
7 know you're challenge that, okay? But that it
8 violates the U.S. Constitution --

9 MR. UNIKOWSKY: Yes.

10 JUSTICE SOTOMAYOR: -- because -- Rule
11 1 does because it permits secular schools but
12 not religious schools from receiving the
13 scholarship. I know you take as a defense
14 position that they can do that. Putting that
15 aside, you're wrong. Assume that. Okay?

16 MR. UNIKOWSKY: I accept I'm wrong,
17 yes.

18 JUSTICE SOTOMAYOR: All right. Now,
19 there was a suggestion in an earlier question
20 that if you were wrong, and the Montana Supreme
21 Court in turn uses the Montana Constitution to
22 level down, that it is unconstitutionally
23 acting, that it is using religion to level down.

24 How do you answer that argument?

25 MR. UNIKOWSKY: Because --

1 JUSTICE SOTOMAYOR: Because that's
2 exactly what we were told in a question, which
3 is they are basing the leveling down on the
4 basis of discriminating against religion.

5 MR. UNIKOWSKY: So I think that the
6 answering of that question requires a kind of
7 focused analysis of exactly what the
8 Constitution allows and doesn't allow, all
9 right?

10 So if you accept the premise that Rule
11 1 is unconstitutional because it discriminates,
12 it says secular schools in and religious schools
13 out, that doesn't answer the question of whether
14 the mere application of a no-aid clause that
15 does not lead to a judgment with that effect is
16 also unconstitutional.

17 So I think the crucial point in this
18 case is to look at what the state court did when
19 it applied the no-aid clause.

20 JUSTICE ALITO: No, isn't the crucial
21 question why the state court did what it did?
22 If it did what it did for an unconstitutionally
23 discriminatory reason, then there's a problem
24 under Village of Arlington Heights.

25 So I'll give you an example. The

1 state legislature sets up a scholarship fund,
2 and after a while, people look at the -- the
3 recipients of the scholarships, and some people
4 say: Wow, these are mostly going to blacks and
5 we don't like that and that's contrary to state
6 law. So the state supreme court says: Okay,
7 that discrimination is -- we're going to strike
8 down the whole thing.

9 Is that constitutional?

10 MR. UNIKOWSKY: No, so we don't think
11 the race analogy is apt. I don't think that's
12 constitutional, and we just don't think that
13 race and religion are identical for all
14 constitutional --

15 JUSTICE BREYER: What they're -- what
16 he's saying is that, look, the Court took the
17 case in the Prince -- Prince Edward County thing
18 --

19 MR. UNIKOWSKY: Yes.

20 JUSTICE BREYER: -- or the equivalent
21 and said they couldn't do that. They can't shut
22 down all the schools, even though the
23 Constitution they didn't say had a right and so
24 that's the similarity.

25 MR. UNIKOWSKY: So I -- I assume the

1 --

2 JUSTICE BREYER: I think, Justice --

3 MR. UNIKOWSKY: I have an answer --

4 JUSTICE BREYER: But I have -- I'd

5 like you to think about that --

6 MR. UNIKOWSKY: Look --

7 JUSTICE BREYER: -- but I have a more

8 direct question on the merits. Sorry.

9 Look, the state says Catholic schools

10 get some money; Jewish schools don't.

11 MR. UNIKOWSKY: Yeah.

12 JUSTICE BREYER: All right? No

13 problem, unconstitutional, free exercise, right?

14 MR. UNIKOWSKY: And establishment,

15 yes.

16 JUSTICE BREYER: Okay. The -- the

17 state says: We'll give police protection to all

18 schools, all people, but no religious

19 institution. That's --

20 MR. UNIKOWSKY: That -- that --

21 JUSTICE BREYER: -- unconstitutional.

22 MR. UNIKOWSKY: That's Trinity

23 Lutheran.

24 JUSTICE BREYER: Clearly. Okay.

25 Yeah. Correct.

1 MR. UNIKOWSKY: Yeah.

2 JUSTICE BREYER: Now, why is it
3 different? And I'm not saying it isn't. I want
4 to know your reason why is it different? Oh,
5 try it the opposite extreme.

6 The state says: We will pay for the
7 salaries of priests if they're Mohammedan but
8 not if they're Buddhist. Unconstitutional,
9 right?

10 MR. UNIKOWSKY: Yeah.

11 JUSTICE BREYER: Okay. So why doesn't
12 it also violate the Constitution were the state
13 to say we won't pay the salaries of any priests
14 but we will pay the head of every other
15 organization?

16 MR. UNIKOWSKY: Well, I think that --

17 JUSTICE BREYER: I mean, you see where
18 I'm -- you see --

19 MR. UNIKOWSKY: Yes.

20 JUSTICE BREYER: -- how I'm doing
21 that? You see the point?

22 MR. UNIKOWSKY: So let me -- let me
23 answer that question and then go back to the
24 race question I would like to address.

25 JUSTICE BREYER: Okay. You don't have

1 to answer if you don't want to.

2 (Laughter.)

3 MR. UNIKOWSKY: Well, I'll -- I'll
4 give a --

5 CHIEF JUSTICE ROBERTS: I recommend
6 it, though.

7 (Laughter.)

8 MR. UNIKOWSKY: I'll give a brief
9 answer.

10 JUSTICE BREYER: Yeah.

11 MR. UNIKOWSKY: So I think that
12 there's a constitutional difference between
13 distinguishing among religions and saying the
14 Court is -- the government is just going to stay
15 out of religion altogether.

16 JUSTICE BREYER: That's correct.

17 MR. UNIKOWSKY: There's many
18 Establishment Clause cases saying that
19 regardless of whether there's a civil liberties
20 violation, it's just contrary to -- to
21 disestablishment principles to say that we're
22 going to treat one religion --

23 JUSTICE BREYER: Okay, I got that.

24 MR. UNIKOWSKY: -- totally different
25 from another one.

1 JUSTICE BREYER: So what about the
2 other part, where we said, look, you can't
3 discriminate against all religions by not giving
4 them playgrounds or you can't discriminate
5 against all religions by refusing to give them
6 police protection or fire protection? What
7 about that part?

8 MR. UNIKOWSKY: All right. So there
9 -- there's two differences between that case and
10 this one. One is the striking down of the whole
11 program, which we've talked about throughout the
12 argument today, and then there's a second point
13 which hasn't really come up, which is sort of
14 the *Locke v. Davey* distinction between a
15 declination to fund religious education and
16 refusing funding merely because someone happens
17 to be religious for a completely non-religious
18 purpose.

19 JUSTICE KAVANAUGH: Does --

20 MR. UNIKOWSKY: And I think that --

21 JUSTICE KAVANAUGH: Does --

22 JUSTICE KAGAN: Can I take you back,
23 Mr. Unikowsky, to the striking down the whole
24 program?

25 MR. UNIKOWSKY: Yes.

1 JUSTICE KAGAN: Because a number of
2 people have suggested that that must be
3 motivated by animus towards religion.

4 MR. UNIKOWSKY: Right.

5 JUSTICE KAGAN: And I can think of
6 many reasons why you would strike down the whole
7 program that have nothing to do with animus
8 toward religion. You might actually think that
9 funding religion imposes costs and burdens on
10 religious institutions themselves. You might
11 think that taxpayers have conscientious
12 objections to funding religion. You might think
13 that funding religion creates divisiveness and
14 conflict within a society, and that for all
15 those reasons, funding religious activity is not
16 a good idea and that you would rather level down
17 and fund no comparable activity, whether
18 religious or otherwise, than fund both.

19 Now, none of those things have
20 anything to do with animus towards religion, and
21 I -- I -- I --

22 MR. UNIKOWSKY: So I think that's
23 right, and I think that's why we don't think the
24 race analogy is apt. And I think it's useful to
25 talk about why the no-aid clause was enacted

1 based on the convention's discussions in 1972
2 and why it makes sense that those justifications
3 would result in --

4 CHIEF JUSTICE ROBERTS: Why -- why
5 does that explain why the race analogy is inapt?
6 I mean, the legislature may say they built parks
7 and pools, and they say funding those, but if a
8 higher percentage of African Americans come and
9 use the pools, then we're going to shut down the
10 whole program.

11 And you wouldn't defend that on saying
12 they could have a judgment that it decreases
13 tensions among the different races to keep them
14 -- no, you would just look at the facial
15 discrimination, right, and conclude the fact
16 that -- that wouldn't be good under your view,
17 would it?

18 MR. UNIKOWSKY: Of course not --

19 CHIEF JUSTICE ROBERTS: Because
20 they're shutting down the whole --

21 MR. UNIKOWSKY: No.

22 CHIEF JUSTICE ROBERTS: -- program?

23 MR. UNIKOWSKY: No. Of course not.

24 CHIEF JUSTICE ROBERTS: How is that
25 different than religion, which is also protected

1 under -- under the First Amendment?

2 MR. UNIKOWSKY: Because I don't think
3 that race and religion are identical for all
4 constitutional purposes, right?

5 Look -- look, if a state constitution
6 had a provision saying that like historically
7 black colleges aren't entitled to any aid at
8 all, that would obviously be facially
9 unconstitutional. You wouldn't even need to get
10 to these as-applied challenges at all because I
11 think the equal-protection clause embodies a
12 judgment that race is never, ever a permissible
13 criterion in any government decision making at
14 all, regardless -- unless strict scrutiny is
15 satisfied, which is very, very difficult.

16 And -- and I don't think the rule is
17 the same in religion. But later this term, this
18 Court's about to hear a case involving
19 exemptions of religious schools from anti-
20 discrimination laws. That distinguishes between
21 -- that -- that creates a sort of religious
22 classification but that does -- that's not
23 intrinsically unconstitutional.

24 CHIEF JUSTICE ROBERTS: Was that --
25 was that your answer to Justice Kagan's

1 question?

2 MR. UNIKOWSKY: No, so -- well --

3 CHIEF JUSTICE ROBERTS: Well, I -- go
4 ahead. I'd like to give you the chance to do
5 that.

6 MR. UNIKOWSKY: The answer is, I think
7 if you accept that no-aid clauses are not
8 facially unconstitutional, and I think it's a
9 hard argument to make for all the historical
10 reasons, they've existed for such a long time,
11 then you have to accept that it's at least
12 permissible for a state to say, for principled
13 reasons deeply rooted in national tradition
14 dating back to Madison, we have a preference to
15 not fund religious activities, not prohibit it
16 but not fund it.

17 JUSTICE ALITO: But there's a
18 difference between saying we're not going to
19 fund religious activities and saying we're going
20 to discriminate based on religion. That's the
21 point. They -- the state -- nobody's claiming
22 the state has an obligation to make particular
23 grants to religious institutions or to provide
24 any funding for private education at all.

25 The question is, can they -- if -- if

1 -- if there is a program that is -- that's -- is
2 designed to serve certain purposes, can they
3 discriminate in the application of the -- in the
4 -- in the -- deciding who's going to get the
5 benefit of it on the basis of religious
6 affiliation?

7 MR. UNIKOWSKY: I think what -- so
8 that sounds more like the Trinity Lutheran
9 hypothetical. I think what state -- there are
10 certain things a state can't do and certain
11 things a state can do.

12 What I think a state can do is say,
13 look, we have a no-aid clause which has existed
14 for a very long time and that says on its face
15 that we prefer not to fund religious activities
16 for good reasons I'd like to explain in just a
17 second, okay?

18 Now, we're constrained by
19 anti-discrimination principles from coercing
20 people into abandoning their religion. So if we
21 have these two principles, these principled
22 non-bigoted and historically rooted views that
23 we don't want to fund religious activity on the
24 one hand, and the First Amendment, which clearly
25 guards against coercion and penalizing religious

1 faith on the other, the way we're going to
2 balance it is to do what the state court did.

3 And I just want to say one thing about
4 that.

5 JUSTICE KAGAN: To do what the state
6 court did, meaning?

7 MR. UNIKOWSKY: Yes, invalidate the
8 program. And I just -- I mean, if you look at
9 the reasons the no-aid clause was enacted which
10 I think are similar to the reasons James Madison
11 gave, it's just hard to say that James Madison
12 disabled future states from enacting no-aid
13 clauses based on essentially similar arguments
14 to the ones he made.

15 And in 1972, what the delegates
16 basically said was that they conceived of the
17 no-aid clause as a mechanism of protecting
18 religious schools from political influence. So,
19 to prevent government from using its leverage to
20 -- to influence the content of religious
21 education.

22 There's like a lot of leaders of
23 religious denominations who came forward and
24 testified in favor of the no-aid clause for that
25 exact reason. And I think it's very clear why

1 that justification applies with complete force
2 with respect to this program, right?

3 Because it's --

4 JUSTICE ALITO: Basically what you're
5 saying is, the difference between this and race
6 is, it's permissible to discriminate on the
7 basis of religion. It's not permissible, ever,
8 to discriminate on the basis of -- of race.
9 That's what you're saying.

10 MR. UNIKOWSKY: I mean, look, it -- it
11 seems to me that when you talk about
12 discrimination, we can mean two different
13 things, all right? One way of looking at
14 discrimination is to say that just -- you can't
15 have a rule that treats religion differently
16 from other subjects, which is I think is the
17 core of Petitioners' argument.

18 And they say, look at the no-aid
19 clause. It says religious schools are
20 ineligible and it imposes no comparable
21 restriction on anyone else, and therefore that's
22 just discrimination and it should be wiped out
23 of the state constitution.

24 So if -- if -- if you buy that
25 argument, then you're basically saying that like

1 every no-aid clause since 1835 is
2 unconstitutional, even at the founding. Look,
3 all the state constitutions said things like, a
4 tax won't be levied to build a church. That is
5 a form of discrimination, right? Like you can
6 levy a tax to build a bridge but not a church.

7 JUSTICE ALITO: Well, I -- I mean, I
8 don't know about every -- every no-aid clause in
9 the country. They'd all have to be examined
10 separately if in -- if, in fact, they are
11 challenged.

12 A lot of them -- look, you -- I'm not
13 going to get into an argument with you about
14 what happened in 1972, but do you really want to
15 argue that the reason why a lot of this popped
16 up beginning, coincidentally, in the 1840s, at
17 the time of the Irish potato famine, that had
18 nothing to do with discrimination based on
19 religion?

20 MR. UNIKOWSKY: I'm not saying that
21 they -- no, I'm not saying that at all. I think
22 that the history in the 19th century is very
23 complex, like there's a Professor Green, who is
24 a leading scholar on this, wrote a book that
25 both parties cite which basically says it's a

1 complex history and there's good reasons and
2 there's bad reasons and it depends on the state.

3 And, look, I -- I don't see how
4 Montana could --

5 JUSTICE BREYER: But aren't you saying
6 -- are you -- I don't know, can we -- can you or
7 could I say this: Yes, race is different from
8 religion. Why? There is no Establishment
9 Clause in regard to race.

10 What is the Establishment Clause?
11 Well, it has something to do with not supporting
12 religion. And there is nothing more religious
13 except perhaps for the service in the church
14 itself than religious education. That's how we
15 create a future for our religion.

16 Now, there's some line there, and that
17 line may be what I have just suggested,
18 impermissible under case law of this Court or it
19 may be permissible but unwise. You'd like to
20 draw the line. Explain it.

21 MR. UNIKOWSKY: Okay. So I think
22 that, you know, we haven't talked about the
23 analogies to Locke at all. I'd just like to say
24 a few words about that, with I -- which I think
25 are consistent to your question.

1 So it's true that there are factual
2 distinctions between this case and Locke, right?
3 Locke involved training for the ministry and
4 this case involves secondary education.

5 So I'm -- I'm not denying -- I'm not
6 saying they're on all fours with each other, but
7 the question is whether that distinction can be
8 located in the free-exercise clause.

9 Because, really, you know, it's true
10 that Locke involved funding of the ministry but
11 I think this case does too, right, the ministry
12 of teachers towards their students. And I think
13 Petitioners have a somewhat revealing statement
14 --

15 JUSTICE KAVANAUGH: But this is a --
16 this is a school, in education, there satisfies
17 the compulsory education laws of the state,
18 correct?

19 MR. UNIKOWSKY: That's true.

20 JUSTICE KAVANAUGH: And so that's
21 different from Locke, as Professor Laycock's
22 amicus brief points out in a very narrow
23 decision about training of the clergy.

24 And it seems to me there are two
25 different things going on here, it seems to me.

1 One is to Justice Breyer's question,
2 just funding religion, funding religious schools
3 generally or training of clergy is -- is an
4 establishment clause concern, but this -- it's a
5 separate issue when you set up a neutral benefit
6 program -- police, fire, or scholarships -- and
7 allow people to use those things, allow
8 religious institutions to obtain the benefits of
9 those things on a non-discriminatory basis.

10 And the question in this case, it
11 seems to me, is which side of that line this
12 comes on. Is that the -- a proper way to look
13 at it? And if so, why does it come on the
14 funding side?

15 MR. UNIKOWSKY: I -- I guess I'm not
16 really sure that's the right way to look at it.
17 I think that it's important to just look at the
18 interest the no-aid clause protects, understand
19 whether those are just unconstitutional and
20 whether they apply to this case.

21 So as I said, the no-aid clause was
22 concerned about using government leverage to
23 influence religious education. And it's very
24 easy how -- to see how that can happen in the
25 context of even a neutral program like this one.

1 The state can just have a condition --

2 JUSTICE KAVANAUGH: You think that was
3 the design of the no-aid clause, to -- to help
4 religious institutions?

5 MR. UNIKOWSKY: Yeah. If you look at
6 the transcripts of 1972, that's -- is -- what
7 it's all about. There -- there is numerous
8 religious leaders who came forward and testified
9 that that's the reason they wanted it. On the
10 floor of the convention in 1972, the strongest
11 proponent was Delegate Harper who was not an
12 anti-religious bigot. He was the pastor of a
13 church in Helena and he told his colleagues,
14 drawing on his own religious faith, that the
15 no-aid clause was necessary to ensure that
16 religious schools were independent from
17 government.

18 So I just don't -- and there's a
19 committee report --

20 JUSTICE KAVANAUGH: Well, no one's
21 compelling the religious schools to participate
22 in a program in order to accept funds from the
23 program, correct?

24 MR. UNIKOWSKY: That is certainly
25 true. But --

1 JUSTICE KAVANAUGH: So a religious
2 school that doesn't want to be part of a neutral
3 program doesn't have to be.

4 MR. UNIKOWSKY: Yeah, that's true.
5 But I mean, there's still a concern that
6 ultimately the inevitable effect of these
7 programs is that the government would exercise
8 its leverage over schools.

9 And, look, this is what people were
10 saying at the hearing, and I think that may be a
11 little paternalistic, but I think the state is
12 allowed to have a structural provision being
13 arguably paternalistic in its own state
14 constitution.

15 There's no bigotry whatsoever in
16 evidence from the actual convention at which
17 this is enacted. I just don't understand how
18 Montana could have done any better than it did,
19 to wipe out its entire state constitution, start
20 all over again, have committee hearings --

21 JUSTICE KAVANAUGH: I think the other
22 side's argument is the way you can do better is
23 to say: If we're going to give benefits to
24 private schools, which you don't have to do --
25 to Justice Breyer's question, you do not have to

1 give benefits to private schools or funds or tax
2 credits, but if you do, don't tell someone they
3 can't participate because they're Jewish or
4 Protestant or Catholic.

5 MR. UNIKOWSKY: I guess the -- the
6 concern of the delegates was that if you have
7 money going to religious schools, that's going
8 to lead to entanglement problems. And the way
9 to solve that problem is to have a structural
10 provision saying, we're not going to do it.

11 And that's not prohibiting anyone from
12 exercising their religion. It's simply
13 separating the church from the state without,
14 again, preventing anyone from going to any of
15 these schools if they don't want to.

16 And it's true that there's a
17 constraint in the Federal Constitution that says
18 that you can't coerce people, you can't tell
19 people we're going to penalize you for being
20 religious. But if a state has two principles it
21 wants to stick to at the same time then we think
22 that it should be able to balance those
23 principles by invalidating the program.

24 JUSTICE GINSBURG: Mr. Unikowsky, if
25 we can just go back to the standing question.

1 You are not at liberty to waive Article III, so
2 why do you think this case doesn't fit under
3 Eastern Kentucky?

4 MR. UNIKOWSKY: So I'll -- I'll just
5 answer briefly, Your Honor.

6 CHIEF JUSTICE ROBERTS: Sure.

7 MR. UNIKOWSKY: So Petitioners are
8 claiming they personally are the victims of
9 status discrimination, which is the argument
10 that wasn't made in that case. So we think that
11 they're allowed to make that argument, it is
12 just incorrect on its merits.

13 But, of course, this argument is made
14 in amicus brief. And, as you say, we're not
15 able to waive it.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Mr. Komer, two minutes remaining.

19 REBUTTAL ARGUMENT RICHARD D. KOMER

20 ON BEHALF OF THE PETITIONERS

21 MR. KOMER: Thank you.

22 What we're saying here is that -- what
23 Trinity Lutheran says, the state can't
24 discriminate on the basis of religion. The
25 decision is crystal clear when you read it that

1 that is what they are doing in this case.

2 They focus on the religious
3 affiliation or religious nature of the schools.
4 They are not talking about what the schools do.
5 They are talking about what the schools are.

6 Second, Zelman has already answered
7 the question about who this program is aiding.
8 It's not aiding the schools. It is aiding the
9 parents.

10 You have a choice to make about the
11 parents here. You can either view them as mere
12 inconsequential conduits through which public
13 funds flow to the religious schools they choose
14 or you can regard them, as you did in Zelman, as
15 free and independent decision-makers who are
16 being given the power to choose a religious
17 education or a secular education in private
18 schools.

19 We are not arguing that the state
20 couldn't just fund public schools. We are
21 saying that when the legislature, when the state
22 makes the decision to empower parents to
23 exercise their right to choose and direct their
24 children's education, that the state cannot
25 distinguish between parents who want a religious

1 education for their children and parents who
2 want a secular private education for their
3 parents.

4 We are only in that area because the
5 state legislature has made, like Montana did,
6 the decision to open it up beyond the public
7 schools. We don't question that the public
8 schools must be secular. This Court recognized
9 that in Schempp. And, as a result, the public
10 schools now must be secular.

11 But at the time these provisions were
12 passed, the public schools were not secular.

13 JUSTICE SOTOMAYOR: It's almost --

14 MR. KOMER: That is why --

15 JUSTICE SOTOMAYOR: It's almost sort
16 of a illusory state, isn't it? The legislatures
17 can choose to give money or not. If they
18 choose, they have to do it this way.

19 But the court system is out of it
20 because it can't force the legislatures to act
21 constitutionally under their own constitution.

22 CHIEF JUSTICE ROBERTS: You may --

23 JUSTICE SOTOMAYOR: That's basically
24 what you're saying, isn't it?

25 CHIEF JUSTICE ROBERTS: You may answer

1 briefly.

2 JUSTICE SOTOMAYOR: And not fund.

3 MR. KOMER: We're saying the
4 legislature ab initio might be able to do more
5 than what the court should have done here. They
6 should have answered the federal question. They
7 should have recognized that Trinity Lutheran is
8 applicable. They should have recognized they
9 were applying Locke exactly the way Missouri
10 tried to.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel. The case is submitted.

13 (Whereupon, at 11:08 a.m., the case
14 was submitted.)

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