IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 17-0492

KENDRA ESPINOZA, JERI ELLEN ANDERSON and JAIME SCHAEFER,

Plaintiffs and Appellees,

v .

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

Defendants and Appellants.

BRIEF OF *AMICUS CURIAE* AGUDATH ISRAEL OF AMERICA

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions

Legislative Bills

Articles

INTEREST OF *AMICUS CURIAE* AGUDATH ISRAEL OF AMERICA

Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization. Among its other functions and activities, Agudath Israel articulates and advances the position of the Orthodox Jewish community on a broad range of legal issues affecting religious rights and liberties in the United States. Agudath Israel regularly intervenes at all levels of government—federal, state, and local; legislative, administrative, and judicial (including through the submission or participation in *amicus curia* briefs)—to advocate and protect the interests of the Orthodox Jewish community in the United States in particular and religious liberty in general. One of Agudath Israel's roles in this connection is to serve as an advocate for Jewish schools and Jewish education, which Orthodox Jews see as both a personal religious obligation and a critical factor— perhaps the critical factor—in ensuring Jewish religious identity and continuity. The overwhelming majority of Agudath Israel's constituents choose to send their children to the approximately 750 Orthodox Jewish day schools across the country that collectively educate over 250,000 students. There may be students who would want to attend Jewish schools in states that have similar tax credit programs as the one created through legislation passed in Senate Bill 410.

Agudath Israel's interest in this case extends well beyond this particular tax-credit program. Similar to the tax-credit program at issue in this case, programs in

a number of other states in the country also exist that provide government funding to students choosing nonpublic (including religious) schools, and proposals for such programs have been advanced in other states as well. The constitutional principle that this case could establish thus has great significance for Agudath Israel's constituents not only in Montana but throughout the country.

If the program enacted in SB 410 is upheld, not only will some students who choose to attend religious schools in Montana be able to utilize the tax credit program, but the precedent could potentially enable proposals for similar programs in other states to move forward, even in the 38 states that have provisions barring state aid to religious institutions (often called "Blaine Amendments") in their state constitutions. Repeatedly, state "Blaine Amendments" have been cited in opposition to programs involving school choice that could benefit students who wish to attend religious schools. *See* Erica Smith, *Blaine Amendments and the Unconstitutionality of Excluding Religious Options From School Choice Programs*, 18 Fed. Soc'y Rev. 48 (2017) ("Just in the past ten years, Blaine Amendments have been used to challenge school choice programs eleven times. There are still more instances of opponents pointing to Blaine Amendments to try to convince state legislatures and governors to reject school choice bills."). If the Montana Supreme Court holds that the sections of the Montana State Constitution that bar state assistance to religious institutions (Article X, Section 6 and Article V, Section 11)

allow assistance to students attending religious schools, it could lead the way for other states with similar constitutional provisions to be able to provide needed assistance to students choosing to attend religious schools. To hold otherwise would violate the First Amendment's Free Exercise Clause of the United States Constitution,

A ruling upholding the tax credit program created by SB 410 could also serve as an important precedent in states where opponents of government-funded scholarships for nonpublic (including religious) school students are seeking or may seek to challenge existing programs that provide such funding.

On the other hand, should the Montana Supreme Court hold that the tax credit program in SB 410 is unconstitutional, religious school students in Montana would be barred from receiving government scholarship funding. A precedent would potentially be set for other states to also bar religious school students from receiving funding if their state constitutions contain provisions that bar government aid to religious institutions.

Under its interpretation of Article X, Section 6 and Article V, Section 11 of the Montana Constitution, the Montana Department of Revenue ("DOR") implemented Rule 1 which excluded any institution, or an individual employed by an institution, "owned or controlled in whole or in part by any church, religious sect, or denomination" from participating in the tax-credit program adopted in SB 410.

Agudath Israel respectfully submits this *amicus curiae* brief in support of the Appellees because the United States Supreme Court's decision in *Trinity Lutheran Church v. Comer*, 582 U.S. ___ (2017), compels a finding that the DOR's proposed interpretation of Article X, Section 6 and Article V, Section 11 of the Montana Constitution to prohibit aid to sectarian institutions and thus exclude aid under SB 410's tax credit program to students attending religious schools, violates the Free Exercise Clause of the United States Constitution.

ARGUMENT

I.

UNDER THE SUPREME COURT'S DECISION IN *TRINITY LUTHERAN CHURCH V. COMER*, THE TAX CREDIT PROGRAM UNDER SB 410 IS CONSTITUTIONAL.

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 US ____ (2017), the United States Supreme Court held that a Missouri grant program to help public and private schools and other nonprofit entities to install playground surfaces made from recycled tires could not constitutionally prohibit a church from benefitting from the program. To the contrary, the Court held that barring the church from receiving benefits the benefits of the program violated the church's rights under the Free Exercise Clause of the First Amendment.

The Court, citing *McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (plurality opinion), *quoting Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972), stated that "denying

a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'" Thus, the Court in *Everson v. Board of Education of Ewing*, 330 U.S. 1 (1947), upheld a New Jersey law enabling local school districts to reimburse parents for the costs of transportation to schools, including religious schools. As the Court explained, a state "cannot hamper its citizens in the free exercise of their own religion . . . [and] cannot exclude . . . members of any faith, because of their faith . . . from receiving the benefits of public welfare legislation." *Id.* at 16. Similarly, the Court cited other cases in which it held that the Free Exercise Clause protects against laws that "impose special disabilities on the basis of . . . religious status." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, *quoting Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990).

Turning specifically to the Missouri program in question, the Court ruled that it "expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." *Trinity Lutheran Church v. Comer,* Slip Opinion at 13-14. Such a policy, said the Court, "imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Id.* at 14, *citing Lukumi*, 508 U.S. at 546. The Court made clear that barring a benefit is itself an infringement of the Free Exercise Clause: "The express

discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church, solely because it is a church—to compete with secular organizations for a grant." *Trinity Lutheran Church v. Comer*, Slip Opinion at 15. When the State conditions benefits in this way, it punishes the free exercise of religion. "In this case, there is no dispute that Trinity Lutheran is put to the choice between being a church and receiving a public benefit. The rule is simple: No churches need apply." *Id.* at 17-18. The Court concluded that barring Trinity Lutheran from participating in the Missouri grant program was a violation of the Free Exercise Clause. "The exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution . . . and cannot stand." *Id.* at 19.

In footnote 3 the Court added, "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination." Justices Thomas and Gorsuch specifically disagreed with footnote 3. In his concurring opinion Justice Gorsuch explicitly discussed:

> I worry that some might mistakenly read it [footnote 3] to suggest that only 'playground resurfacing' cases, or only those with some association with children's safety or health, or perhaps some other social good we find sufficiently worthy, are governed by the legal rules recounted in and faithfully applied by the Court's opinion. Such a reading would be unreasonable for our cases are "governed by general principles, rather than ad hoc improvisations." *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 25 (2004) (Rehnquist, C.J.,

> concurring in judgment). *And the general principles here do not permit discrimination against religious exercise—whether on the playground or anywhere else."*

Trinity Lutheran Church v. Comer, Slip Opinion at 24 (Gorsuch, J. concurring) (emphasis added).

Justice Gorsuch correctly observed that footnote 3 did not expressly extend the decision to other issues of religious funding, yet the Court's logic in *Trinity Lutheran* and all of the cases it cited make clear that no distinction exists where a state denied funds for playground resurfacing from the case before this Court where a state seeks to deny scholarship funding for students to attend religious schools as part of a program that provides scholarship funding for all other students. Under the Free Exercise Clause, only a state interest "of the highest order" can justify a policy that discriminates against religious institutions and individuals in the provision of government benefits. The DOR cannot establish that level of state interest to justify its policy here.

Furthermore, as demonstrated above, *Trinity Lutheran* emphasized that the United States Supreme Court has found in numerous cases that the Free Exercise Clause "protect[s] religious observers against unequal treatment" and subjects to the strictest scrutiny laws that target the religious for "special disabilities" based on their "religious status." *Lukumi,* 508 U. S. at 533, 542. Applying this basic principle, the Court has repeatedly confirmed that denying a generally available benefit solely on

account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest "of the highest order." *McDaniel*, 435 U. S. at 628, *quoting Yoder*, 406 U. S. at 215. *See also Mitchell* v. *Helms*, 530 U. S. 793, 828 (2000) (plurality opinion) (noting that "our decisions . . . have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity").

As applied to students of the Orthodox Jewish faith, the denial of tax credits under SB 410 constitutes discrimination on the basis of "religious status." Orthodox Jews believe that there is a strong religious obligation to ensure that their children receive a Jewish education, which can only be fully accomplished by sending their children to full-time Orthodox Jewish schools. That obligation is a consequence of their religious status, or identity, as Orthodox Jews. To deny their children scholarships simply because they wish to attend a Jewish school is therefore not only discrimination based on the "use" to which they would put the scholarship, but also on their status, or identity, as Orthodox Jews. Under *Trinity Lutheran*, the Free Exercise Clause prohibits such discrimination.

Trinity Lutheran stands for the proposition that a state constitution cannot be applied to bar programs like the tax credit program in SB 410 from providing scholarships to students who choose to attend religious schools. Therefore, the judgment of the district court should be upheld.

II.

THE UNITED STATES SUPREME COURT'S DECISION IN *TRINITY LUTHERAN CHURCH v. COMER* GOVERNS THE MONTANA CONSTITUTION'S "BLAINE AMENDMENT" SO THAT AID TO STUDENTS ATTENDING RELIGIOUS SCHOOLS UNDER SB 410'S TAX CREDIT CANNOT BE BARRED.

In *Trinity Lutheran Church v. Comer*, the State based its exclusion of the church from its playground resurfacing program on Missouri's "Blaine Amendment" (Article I, Section 7 of the Missouri Constitution), which prohibits state funds from being used, directly or indirectly, in aid of any church. The Court of Appeals for the Eighth Circuit held that the Free Exercise Clause did not compel the State to disregard the State's "Blaine Amendment." *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F. 3d 779 at 785 (2015). The United States Supreme Court reversed the Eighth Circuit, finding instead that the Free Exercise Clause *did* compel the State to provide the public benefits in question to the church, The Court clearly held that in a conflict between a state's "Blaine Amendment" and the Free Exercise Clause, the Free Exercise Clause prevails.

Likewise, the Supreme Court's ruling in *Trinity Lutheran Church* stands for the proposition that a state "Blaine Amendment," such as that contained in both the Missouri and Montana Constitutions, that prohibit religious institutions from receiving public benefits, cannot under the Free Exercise Clause bar students

attending religious schools from receiving government-funded scholarship assistance such as SB 410 provides. Thus, this Court should affirm the district court's decision because it comports with the United States Supreme Court's numerous judgments that a state cannot exclude the grant of funds from a generally available program based upon a religious identity.

CONCLUSION

Senate Bill 410 created a program to allow taxpayers to claim a tax credit for donating to a private student scholarship organization which in turn would provide scholarships for students to attend non-public schools. The DOR promulgated Rule 1 to prohibit sectarian institutions "owned or controlled in whole or in part by any church, religious sect, or denomination" from qualifying to receive funds from the program created by SB 410. The Eleventh Judicial District Court correctly determined that the DOR misinterpreted two Montana constitutional provisions to prohibit tax credits for donations to the scholarship fund that ultimately go to religious schools.

For the reasons stated above, *amicus curiae* Agudath Israel of America respectfully urges the Montana Supreme Court to uphold the district court's decision and allow religious schools to be included in the tax credit program under SB 410.

DATED this 19th day of January, 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(b), M.R.App.P., I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points, is double spaced, and that the word count calculated by Microsoft Word 2016 is 3,092 words, including certificate of compliance and excluding certificate of service.

DATED this 13th day of January, 2009.

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