No. 16-35422

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATHY ARMSTRONG, individual; JERRY ARMSTRONG, individual;
ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL,
a non-governmental organization,

Plaintiffs - Appellants,

v.

MIKE KADAS,
in his official capacity as Director of the Montana Department of Revenue,

Defendant - Appellee.

On Appeal from the United States District Court
for the District of Montana, Helena Division
Honorable Sam E. Haddon, District Judge

APPELLANTS' REPLY BRIEF

ETHAN W. BLEVINS
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565
E-mail: ewb@pacificlegal.org

JOSHUA P. THOMPSON
WENCONG FA
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: jthompson@pacificlegal.org

Counsel for Plaintiffs - Appellants

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Association of Christian Schools International hereby states that it has no parent corporation and that there is no publicly held corporation that owns 10% or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

State Statute

Page

Rule of Court

Miscellaneous

INTRODUCTION

Religious Montanans seek the same opportunity to use private scholarship money to educate their children as their secular neighbors. The Montana Department of Revenue, however, has adopted a rule—the religious school ban—that denies them that opportunity solely because they choose to educate their children at religious schools. *See* Mont. Admin. R. 42.4.802. The Armstrongs and the Association of Christian Schools International (ACSI) filed suit in a United States District Court to vindicate their First and Fourteenth Amendment rights.

The district court ultimately abstained from this case because of a state court case presenting similar issues. Federal courts, however, have an unwavering duty to exercise jurisdiction over First Amendment claims. Only in the rarest case can such a court abstain. This is not such a case.

Montana adopted a tax-credit scholarship program in 2015. The program allows individuals and businesses to claim a tax credit of up to $150 if they donate to a student scholarship organization. *See generally* MCA § 15-30-3101, *et seq*. Student scholarship organizations then award scholarships to help students afford a school of their choice. Most private schools eligible for scholarship dollars are religious.[1] The Montana Department of Revenue, however, promulgated the religious school ban,

[1] *See* Private School Review, *Montana Private Schools*, www.privateschool review.com/montana.

which forbids the use of tax-credit scholarships at religious schools. *See* Mont. Admin. R. 42.4.802. Thus, the Armstrongs cannot use the scholarship money because of their religious conviction, and ACSI's members cannot compete equally with secular private schools for students and scholarship dollars.

The Armstrongs and ACSI challenged the rule under the Free Exercise and Establishment Clauses of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment. They also challenged the rule's compliance with the Montana Administrative Procedure Act. Another group of plaintiffs—in *Espinoza v. Kadas*—challenged the rule in state court. They brought federal and state constitutional claims, as well as a state administrative procedure act claim. *See* No. DV 15-1152A (Mont. Dist. Ct. filed Dec. 16, 2015).

The Department asked the United States District Court for the District of Montana to abstain and dismiss the Armstrongs' case. After the parties completed briefing on a motion for preliminary injunction and a motion to dismiss, the federal district court granted the Department's motion to abstain and dismissed the case. The court did not allow the Armstrongs to respond to the Department's abstention motion and denied their request for rehearing.

This Court should reverse and remand. The Department hopes to make this the second case in the Ninth Circuit's long history to apply *Pullman* abstention to a First Amendment challenge. To counter this Circuit's long-standing rule that First

Amendment cases almost never merit abstention, the Department offers a novel theory that a state court preliminary injunction supports abstention. The Court should decline the Department's invitation to deviate from its precedent safeguarding First Amendment claims from abstention.

ARGUMENT

I

PULLMAN ABSTENTION DOES NOT APPLY TO THIS FIRST AMENDMENT CHALLENGE BROUGHT IN FEDERAL COURT

Pullman abstention is a guarded exception to the general rule that federal courts must exercise the jurisdiction granted by Congress and the Constitution. *Porter v. Jones*, 319 F.3d 483, 492 (9th Cir. 2003). *Pullman* applies when each of the following three factors are met:

1. The case involves sensitive social policy matters that federal courts should sidestep if possible;
2. Resolving a state issue would avoid a constitutional question; and
3. The right answer to the state law issue is uncertain. *Courthouse News Service v. Planet*, 750 F.3d 776, 783-84 (9th Cir. 2014).

Appellate courts review these factors de novo. *Id.* at 782. Here, the lower court erred by abstaining because First Amendment claims, by rule, do not involve social policy

matters that federal courts should sidestep. To the contrary, First Amendment claims are precisely the type of claims that should be heard in federal court.

This Court has explained why *Pullman* abstention is inappropriate for First Amendment claims. First, "the guarantee of free expression is always an area of particular federal concern." *Planet*, 750 F.3d at 784 (quoting *Ripplinger v. Collins*, 868 F.2d 1043, 1048 (9th Cir. 1989)). Second, the delay occasioned by abstention can inflame a First Amendment injury by further chilling protected conduct. *See Planet*, 750 F.3d at 787; *see also Baggett v. Bullitt*, 377 U.S. 360, 379 (1964) (*Pullman* should not apply when the abstention would inhibit First Amendment freedoms).

Only once in this Court's storied history has it applied *Pullman* abstention in a First Amendment case. *See Almodovar v. Reiner*, 832 F.2d 1138 (9th Cir. 1987). There, the federal court abstained under *Pullman* because a parallel state case had already reached the Supreme Court of California. *Id.* at 1140. This Court held that the district court could abstain because the risk of a chilling effect was low when a final resolution was imminent. *Id.*

The Department's attempt to analogize this case to *Almodovar* is wrong. *See* Response Brief at 14-15. *Espinoza*—the Montana state case challenging the religious school ban—has not even reached the merits in the Montana trial court. The Montana Supreme Court recently ruled on an *intervention* motion in this case. *Montana Quality Education Coalition v. Montana Eleventh Judicial District Court*, No. OP 16-

0494 (Mont. Sup. Ct. filed Oct. 27, 2016). The parties have yet to even complete summary judgment briefing. *See id.* at 5 (Shea, J., concurring). Unlike in *Almodovar*, a resolution in the *Espinoza* state case is far from imminent.

The Department argues that the trial court's entry of a preliminary injunction—temporarily enjoining the religious school ban—eliminates the chilling effect of the regulation *Id.* The Department cites no existing caselaw for this argument, a stark contrast to this Court's long tradition of opposing abstention in First Amendment cases. *See, e.g.*, *Planet*, 750 F.3d at 784; *Wolfson v. Brammer*, 616 F.3d 1045, 1066 (9th Cir. 2010); *Porter*, 319 F.3d at 492-93; *Ripplinger*, 868 F.2d at 1048.

Unlike the imminent final decision present in *Almodovar*, a preliminary injunction does not promise a clear and forthcoming resolution to the case. In the Ninth Circuit and most states, a court may issue a preliminary injunction if, among other things, it finds likelihood of success on the merits. *See, e.g.*, *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011); *Cole v. St. James Healthcare*, 199 P.3d 810, 813-14 (Mont. 2008). And where other factors—such as the balance of hardship to the parties—strongly favor the plaintiff, a court may grant a preliminary injunction even if there are only "serious questions going to the merits." *Alliance for the Wild Rockies*, 632 F.3d at 1134-35; *see also* Douglas Lichtman, *Uncertainty and the Standard for Preliminary Relief*, 70 U. Chi. L. Rev. 197, 204, 210 (2003) (describing how many courts tolerate more uncertainty regarding the merits

where irreparable harm is more certain). Indeed, given the early stage of litigation, courts often grant preliminary injunctions when the final decision is far from certain due to time constraints and the lack of discovery. *See* Lichtman, *supra*, at 205. Thus, the grant of a preliminary injunction does not speak to the case's outcome.

Here, even with the preliminary injunction in place, the chilling effect remains because the ultimate outcome of the case is uncertain. Uncertainty lies at the heart of the First Amendment chilling doctrine. For example, in *Dombrowski v. Pfister*, the Supreme Court refused to abstain because the "uncertainties and vagaries" created by anti-communist laws chilled speech. 380 U.S. 479, 492 (1965).

Likewise, here, uncertainty lingers despite the temporary injunction. That uncertainty chills protected conduct. The decision about where to enroll a child in school is a long-term one. Parents weighing how to use tax-credit scholarship funds will think beyond the length of a preliminary injunction to the full timeline of a child's education. For example, a religious family like the Armstrongs may hope to send their son to a private religious school with tax-credit scholarship help. Although the rule is now enjoined, their son's scholarship only applies to one academic year. If, after a year or two of scholarship assistance, the Supreme Court of Montana upholds the religious school ban, they may no longer be able to afford the religious school. Their son would be forced to switch schools—a challenging transition for many children. This concern could outweigh a family's preference for a religious school,

chilling religious choices about how to educate children. The chilling effect this law could have on countless Montana families is a proper consideration for this Court. *See Ripplinger*, 868 F.2d at 1047 (observing that courts can consider First Amendment chilling effects on non-parties). The temporary relief in this case fails to provide an adequate safeguard for these families. Unless a final resolution is already at the doorstep, as in *Almodovar*, abstention is improper in First Amendment cases.

II

COLORADO RIVER ABSTENTION DOES NOT APPLY BECAUSE THE ARMSTRONGS AND ACSI ARE NOT SUBSTANTIALLY THE SAME AS THE PARTIES IN THE PARALLEL STATE ACTION

The lower court did not rely on *Colorado River* abstention for good reason: it does not apply here. Courts can abstain under *Colorado River* only when parallel proceedings are "substantially similar." *Nakash v. Marciano*, 882 F.2d 1411, 1416 (9th Cir. 1989). This means parties to the different suits must have "nearly identical" interests. *Clark v. Lacy*, 376 F.3d 682, 686 (7th Cir. 2004).

The Department argues that the *Armstrong* and *Espinoza* cases are substantially similar because the plaintiffs are all parents with children attending religious schools. The Department is wrong. Educating children is an intensely personal and individual element of parenting—parents' interests in educating their children are never "nearly identical." The Department has failed to show otherwise. Nor has the Department

demonstrated that these families are substantially similar in their ability to afford private religious schooling. The Department's argument assumes that the lack of scholarship help will affect these families in the same way despite inevitable differences in financial circumstances and educational preferences.

The Department's argument also ignores ACSI—the other plaintiff in this action. ACSI and its member schools are not "nearly identical" to the parents in *Espinoza*. They have different interests and injuries. The religious school ban injures ACSI and its members by reducing the pool of student applicants and granting secular schools a competitive edge. That is not the injury alleged by the *Espinoza* parents.

The nature of the free exercise claim also differs. For parents, scholarship assistance is conditioned on abandonment of a religious preference. For schools, access to a pool of candidate students is conditioned on relinquishing a settled religious status. These parties are not substantially the same, as required under *Colorado River*.

III

EVEN IF ABSTENTION WAS WARRANTED, THE LOWER COURT SHOULD HAVE STAYED PROCEEDINGS RATHER THAN DISMISS

At minimum, the lower court should not have dismissed the Armstrongs' claims. This Court has "generally considered dismissal inappropriate following *Pullman* abstention." *Courtney v. Goltz*, 736 F.3d 1152, 1164 (9th Cir. 2013).

Abstaining courts must "retain jurisdiction so that the plaintiff may return to vindicate her constitutional rights if the state decision does not settle the issues." *Almodovar*, 832 F.2d at 1141. The Department does not argue otherwise. Therefore, even if abstention were appropriate here, the lower court should have issued a stay.

CONCLUSION

When James Madison fought to include a bill of rights, he wrote of the courts' duty to champion such rights: "If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights." James Madison, *Speech in Congress Proposing Constitutional Amendments, reprinted in* JAMES MADISON: WRITINGS 449 (Jack N. Rakove ed., 1999). That guardianship includes a commitment to wielding jurisdiction over core constitutional claims. This Court should reverse and remand under the traditional rule disfavoring abstention in First Amendment cases.

DATED: November 8, 2016.

Respectfully submitted,

JOSHUA P. THOMPSON
ETHAN W. BLEVINS
WENCONG FA
Pacific Legal Foundation

By s/ Ethan W. Blevins
ETHAN W. BLEVINS

Counsel for Plaintiffs - Appellants

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☑ this brief contains 1,996 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii), *or*

❑ this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because:

☑ this brief has been prepared in a proportionally spaced typeface using WordPerfectX7 in 14-point Times New Roman, *or*

❑ this brief has been prepared in a monospaced typeface using WordPerfect X7 with [*state number of characters per inch and name of type style*].

DATED: November 8, 2016.

s/ Ethan W. Blevins
ETHAN W. BLEVINS

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 8, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Ethan W. Blevins
ETHAN W. BLEVINS