No. 18-1195

IN THE

Supreme Court of the United States

KENDRA ESPINOZA, ET AL.,
PETITIONERS,

V.

MONTANA DEPARTMENT OF REVENUE, ET AL.,
RESPONDENTS.

On Writ of Certiorari to the Supreme Court of Montana

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

Ilya Shapiro
Counsel of Record
Trevor Burrus
CATO INSTITUTE
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

September 17, 2019

QUESTION PRESENTED

Whether Art. X, § 6 of the Montana Constitution, as applied by the Supreme Court of Montana to Montana's Tax Credit Program for donations to scholarship funds for private education, is consistent with the First Amendment religion clauses and the Equal Protection Clause.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan think tank dedicated to individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of constitutionalism that are the foundation of liberty. To those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

This case concerns Cato because the First Amendment's religion clauses together protect the freedom of conscience, an essential aspect of a free society.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Free Exercise Clause protects religious observers from unequal treatment where that inequality is based solely on a person or organization's religious status. *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017). Such protections extend to exclusions from public programs on the basis of religious faith or practice. *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1 (1947). Likewise, the Establishment Clause requires that the government not "handicap religions." *Id.* at 18. While a government may prefer to "skat[e] as far as possible from religious establishment concerns," it cannot do so by discriminating against religion. *Trinity Lutheran*, 137 S. Ct. at 2024.

Montana created a program (the Tax Credit Program) to promote freedom in education by giving tax

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[1] Rule 37 statement: Both parties issued blanket consents to the filing of *amicus* briefs. No party's counsel authored any of this brief; *amicus* alone funded its preparation and submission.

credits to people who donated to school scholarship organizations. The scholarship organizations then use those donations to fund both religious and secular private schools. Article X, § 6 of Montana's constitution—the state's Blaine Amendment, a provision that many states passed in the late 19th century during a rash of anti-Catholic sentiment—forbids the appropriation or expenditure of any public funds, directly or indirectly, for "sectarian" (that is, religious) purposes. But a tax-credit program is not a public expenditure. It merely allows taxpayers to keep more of their own money and gives them incentive to spend it in certain ways. *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011). Moreover, tax credits do not go to schools or scholarship organizations, but to the donors themselves. Ignoring these facts, the state Department of Revenue relied on § 6 to exclude from the program donors to organizations that fund religious schools.

The Montana Supreme Court struck down the Tax Credit Program on the grounds that the private donations amounted to public expenditures aiding religious schools, in violation of § 6. That decision is troubling in two ways. First, the court dismissed summarily any First Amendment implications by invoking the "interplay between the joints" between the Free Exercise and Establishment Clauses. Second, it eliminated the entire program instead of evaluating the constitutionality of § 6's discriminatory burdens on religion.

The First Amendment's Free Exercise Clause is implicated whenever the government imposes an undue burden on the free exercise of religion. *Sherbert v. Vernor*, 374 U.S. 398 (1963). Denying neutral, publicly available benefits based on religious status imposes just such a burden. *Trinity Lutheran*, 137 S. Ct. at

2025. To deny religious schools, students, and parents the freedom to benefit from a facially neutral, voluntary donation is a violation of this neutrality principle.

Montana's Blaine Amendment also violates the Establishment Clause when it disfavors religious individuals and organizations. Such distinctions fly in the face of the constitutional principle that government must legislate in a way that does not impair religion. States surely violate that principle when they exclude people from government programs on the basis of their faith. This Court has repeatedly held that states must not be hostile to faith in that way, but the Montana Supreme Court's decision ignores that directive.

The Court should also recognize that school choice programs allow parents to select schools that share their values, reducing the need to impose those values on others. In doing so, they improve our nation's social and political cohesion and reduce conflict. Blaine Amendments stoke the flames of ideological conflict that currently threaten to engulf public education. On the other hand, initiatives like the Tax Credit Program work to rectify a deep structural unfairness in which devout parents pay twice, once for the secular public education made available through their tax dollars, and again for the parochial education their consciences demand. School choice programs are highly beneficial for parents, students, and our society as a whole.

This case presents a clear opportunity for this Court to guide states in the proper application of the First Amendment's religion clauses. The oft-invoked "interplay between the joints" does not extend so far as to allow states to gut the Free Exercise Clause in the guise of strengthening the Establishment Clause.

ARGUMENT

I. AS APPLIED BY THE MONTANA SUPREME COURT, ART. X, § 6 OF THE MONTANA CONSTITUTION VIOLATES THE U.S. CONSTITUTION

The First Amendment's Religion Clauses represent a unifying principle of religious neutrality that exerts competing pressures on courts as they evaluate the legislative balance-beam routine that states must perform to avoid both excessive entanglement with and disapprobation of religion. While this Court has never found the government's footing to be so narrow as to constitutionalize the entire field of relations between church and state, it has never been hesitant to offer correction when states fall on the side of either establishment or burdens on free exercise.

Since *Walz v. Tax Comm. of N.Y.*, 397 U.S. 664 (1970), the space for permissible state action between the Establishment and Free Exercise Clauses has been referred to as the "play in the joints," and discrete lines of precedent chart its borders with either prohibited domain. At the establishment frontier a watchword has been "endorsement," the overriding imperative being that government must avoid even the appearance of unequal citizenship between those who do and do not adhere to a favored religion. *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 578 (1989). At the free-exercise frontier, as described in *Trinity Lutheran*, 137 S. Ct. at 2023, the boundary sits between what an organization *does* and what an organization *is*. States may not deny religious organizations generally available benefits just because those groups are religious, but only when it is necessary to avoid direct aid to a pastoral function.

Montana's Blaine Amendment can generate three results. *First*, when it serves to forestall any expenditure constituting an establishment—something equally disallowed under the First Amendment—it is perfectly benign and serves as a valuable restatement of federal constitutional principles. The Tax Credit Program is not such an expenditure.

Second, if § 6 simply mandates a maximalist position within the "play in the joints," it represents a legitimate and permissible balancing of concerns in pursuit of state neutrality. Were this case to involve the training of the clergy, as in *Locke v. Davey*, 540 U.S. 712 (2004), or other forms of state subsidization of doctrinal religious education and devotional practices, § 6 could block such a program even if that result is not required by the U.S. Constitution. Whatever interest the state might have in ministers, their purpose, unambiguously, is to evangelize. Just as Montana would be free to fund these endeavors for the secular purposes of aiding her citizens' educational aspirations, the state is equally free to decide that the risked inference of establishment would be too great.

Third, it is only when § 6 creates invidious distinctions between secular and religious actors that it runs afoul of the Free Exercise Clause. Hard-on-their-luck preachers may not be excluded from public soup kitchens, nor their children barred from public schools. *See McDaniel v. Paty*, 435 U.S. 618 (1978) (pastors could not be barred from service in the state legislature). The question here is whether such discrimination exists when a tax-credit program is struck down merely because it leads to private funds being directed by taxpayers to facilitate attendance at religiously affiliated

schools. Such a neutral-funding program neither resembles *Locke*'s direct support of devotional education, nor violates the Establishment Clause.

A. The Tax Credit Program Is Not Prohibited by the Establishment Clause

The Montana legislature was free under the Establishment Clause to offer generally available subsidies to religious education. "[O]ur constitutional scheme leaves room for . . . cautiously delineated secular governmental assistance to religious schools" so long as indirect benefits do not entangle government with a religious mission. *Norwood v. Harrison*, 413 U.S. 455, 470 (1973); Br. in Opp'n at 33.

In evaluating a potential "entanglement," the Court has found that "[t]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990). In this regard, the Court's "jurisprudence with respect to true private choice programs has remained consistent and unbroken." *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002). A religiously neutral school-choice program based on private choice does not run afoul of the Establishment Clause. *Id.* at 652–53.

This Court's analysis should not be colored by an economic understanding of tax credits that characterizes incentives as government expenditures. The primary concern is a "message that religion or a particular religious belief is favored or preferred." *Mergens*, 496 U.S at 250. Unlike cases where states were prohibited from directly compensating the cost of non-public education, the Tax Credit Program requires no

payment out of the public treasury to any party—Montana's tax credits are non-refundable—nor any form of aid which might give the appearance of a government imprimatur. When assessing private-choice programs the Court has "found it irrelevant to the constitutional inquiry that the vast majority of beneficiaries were parents of children in religious schools." *Zelman*, 536 U.S at 650. Instead, taxpayers have been allowed to keep their own money, which they have freely directed to support educational choice, a distinction which is equally important when considering the "play in the joints" in relation to free exercise.

That the Establishment Clause requires a stance of government neutrality toward religious schools rather than strict separation was made clear in *Everson*, where the court highlighted the gross financial inequities such a system would bring down upon observant parents. "There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State." *Everson*, 330 U.S. at 17. While Justice Black stopped far short of mandating that parents be able to receive the same return on their tax dollar whether their children attend public or sectarian schools, his opinion is sensitive to the concerns of those who, while required to fund public education, feel compelled by their consciences to look elsewhere for their own children. For Montana to legislate to correct this disparity does not approach the borders of the Establishment Clause. *Mueller v. Allen*, 463 U.S. 388, 402 (1983).

B. Montana's Denial of Tax Credit Benefits Falls Outside the "Play in the Joints" Between the Free Exercise and Equal Protection Clauses

In *Walz*, the Court admitted that the religion clauses on their face "are not the most precisely drawn portions of the Constitution" and that "expanded to a logical extreme, [one] would tend to clash with the other." 397 U.S. at 668–69. Too rigid an application of either clause could defeat "the basic purpose of these provisions, which is to ensure that no religion be sponsored or favored, none commanded, and none inhibited." *Id.* at 669. And while the Court "will not tolerate either governmentally established religion or governmental interference with religion," that leaves substantial "room for play in the joints productive of a benevolent *neutrality* which will permit religious exercise to exist without sponsorship and without interference." *Id.* (emphasis added). That "play in the joints" is an area for good-faith balancing of establishment and free-exercise concerns, not an invitation to interfere with small and neutral education tax credits.

In *Locke*, the Court examined how far a state can go in distancing itself from religion when not obligated by the Establishment Clause. 540 U.S. at 719. Students of devotional theology—presumed to be training to proselytize their religion—were justifiably excluded from state scholarship programs in accordance with the Washington constitution. Such education constituted an "essentially religious endeavor" and was therefore not "fungible" with secular education for free-exercise purposes. *Id.* at 721–22.

The history that informed the court in *Locke* is a singular and fractious one. The compulsory maintenance of town ministers was a common feature of life in the Thirteen Colonies in the 17th and 18th century and a core component of the kind of "establishment" against which the Framers reacted. Gradually, by the time of the American Revolution, attempts by the Crown to replace majority-elected ministers with Anglican uniformity had given way in many colonies to systems in which colonists could direct their mandatory tithe to a minister of their choice. This was true so long as the minister was of a recognized Protestant denomination, possessed clerical training, and had a non-negligible number of adherents within the community. R. Freeman Butts, *The American Tradition in Religious Education* 30–37 (1950). The form of establishment with which the drafters of the First Amendment were most familiar, therefore, involved a relatively high degree of individual choice where the funding of ministers by the community was concerned. The Establishment Clause, and its parallels in many early state constitutions, demonstrate that compulsion in this regard was regarded as anathema to the values of the fledgling republic. While the "play in the joints" would still be strong enough to allow for the funding of theology students out of neutral scholarship programs, the Court in *Locke* clearly had special historical reasons to conclude that their exclusion did not violate the Free Exercise Clause.

Respondents argue that *Locke* "upheld Washington's denial of indirect aid to religious education notwithstanding the same program's availability to students pursuing non-religious training." Br. in Opp'n at 43. But this characterization overlooks the fact that

the provision in *Locke* was interpreted far more narrowly than § 6 here. *Locke* dealt with targeted clerical training as opposed to any education provided by religious institutions. 540 U.S. at 716. Whatever comfort devout parents may take in the religious setting of their children's schooling, the goal of a general parochial education remains to prepare students for a life in the world. While religious teachers might value their pedagogical mission, a church without a school remains a church. Scholarships for parochial school students, in other words, do not serve an "essentially religious purpose." Moreover, Montana's tax credits left the beneficiary free to donate to religious or secular organizations. Unlike in *Locke*, and unlike the colonial establishments, the Tax Credit Program established at best a passive and indirect aid to religion.

For all the same reasons that such indirect benefits have passed muster under the Establishment Clause, the withholding of funds from religious schools falls outside the "play in the joints" and within the prohibited sphere of the Free Exercise Clause. Allowing taxpayers, who are already forced to support secular public schools, to avoid taxation on small amounts of money which they have used to support private scholarship funds raises no specter of religious establishment. Like "passive and symbolic" religious symbols on public land, which are "unlikely to present a realistic risk of establishment," *Cty. of Allegheny*, 492 U.S. at 662 (Kennedy, J., concurring in judgment), striking down a wholly passive and indirect benefit goes beyond what the Establishment Clause requires and the Free Exercise Clause allows.

In *Trinity Lutheran*, Missouri's Blaine Amendment did not prevent a church from benefiting from a generally available playground-resurfacing program. In distinguishing *Locke*, the Court described the facts of the earlier case: "Davey was not denied a scholarship because of who he was; he was denied a scholarship because of what he proposed to do—use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church." 137 S. Ct. at 2022. Stating this principle in terms of intent, the Court reiterated that "[w]e have been careful to distinguish such [neutral] laws from those that single out the religious for disfavored treatment." *Id.* at 2015.

Respondents attempt to distinguish this case from *Trinity Lutheran* by highlighting the religious intent of many credit recipients in guiding their children's education. Br. in Opp'n at 45. Section 6, however, could have been narrowly written to target the action of religious instruction or other essentially religious functions but instead targeted recipients based on religious status, keeping this case within the ambit of *Trinity Lutheran*. Nor were tax credit recipients exercising delegated state authority as in *Bd. of Educ. v. Grumet*, 512 U.S. 687 (1994), but directing their own money that they were allowed to keep.

As for parental intent, "[t]he fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need." *Everson*, 330 U.S. at 6.

Accordingly, the permissible "play in the joints" as it applies to monetary aid to religious education is as

follows: A state may allow tax-collected funds to be spent as compensation for privately chosen aid to an essentially religious institution. Remove the element of religious purpose, as in *Trinity Lutheran*, and religious exclusion becomes religious discrimination. The Montana Supreme Court went too far.

II. CHOICE PROGRAMS ALLEVIATE, NOT EXACERBATE, RELIGIOUS CONFLICTS

A common concern about school choice programs that they it will split society into isolated—and potentially warring—factions along religious lines. This thinking is predicated on the assumption that education can be religiously neutral, treating Americans across the spectrum of religious belief—from none to nuns—equally and without entanglement in religious matters. But this is impossible.

As Cato education-policy expert Neal McCluskey has shown, religion is inextricably entangled with education on numerous levels, from the very broad to the very specific. Neal McCluskey, "Toward Conceptual and Concrete Understanding of the Impossibility of Religiously Neutral Public Schooling," 12 J. Sch. Choice 477 (2018). For instance, for some people nothing in life is separable from God. For others, while not everything is of intrinsic religious import, education is—as it involves the shaping of minds and, inevitably, souls. As one scholar wrote, "If education is in any sense a preparation for life, then its concern is religious. If education is at all concerned with truth, it is again religious. If education is vocational, then it deals with calling, a basically religious concept," Rousas John Rushdoony, *The Messianic Character of American Education* 315 (1963). Given the prevalence of

such beliefs, for much of American history public schooling was overtly religious. John W. Meyer, David Tyack, Joane Nagel & Audri Gordon, "Public Education as Nation-Building in America: Enrollments and Bureaucratization in the American States: 1870-1930," 85 Am. J. Soc. 591 (1979). Education divorced from religious directives about behavior, or without religious interpretations of history, is incomplete, and for some constitutes the imposition of a humanist—a human, rather than God-centered—world view.

Many courses and policies cannot be divorced from religious considerations, especially if morality stems from religion, as many Americans believe. As of July 2017, 42 percent of Americans agreed that "it is necessary to believe in God in order to be moral and have good values." Gregory A. Smith, "A Growing Share of Americans Say It's Not Necessary to Believe in God to Be Moral," Pew Research Center, Oct. 16, 2017, https://pewrsr.ch/2TXILQ0. Religious beliefs are heavily implicated in topics including the teaching of the origins of life, sex education, policies concerning student choices of bathroom and locker rooms,[2] and specific readings, including those touching on morals.[3] *See*

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[2] A recent *amicus* brief from Catholic, Jewish, Lutheran, and other religious groups supporting a challenge to an interpretation of "sex" to include gender identity noted that nine religious traditions hold "that personal identity as male or female is a divinely created and immutable characteristic." Br. of Major Relig. Org.'s as *Amici Curiae* Supp. Pet'r., *Gloucester County School Board v. G.G.*, 137 S. Ct. 1239 (2017) (No. 16-273) (vacated).

[3] Many books repeatedly challenged in public libraries, including school libraries, are challenged over content some consider to be immoral. Of the Top 11 books on the most recent annual American Library Association list of most frequently challenged books, nine were challenged at least in part for sexual material some felt

Edwards v. Aguillard, 482 U.S. 578 (1987); *Kitzmiller v. Dover Area School Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005); *see also* Austin Ruse, "Horrific Sex Ed Curriculum Is Taking Over in This Virginia County, and Objectors Are Getting Steamrolled," *Daily Signal*, Feb. 15, 2018, https://dailysign.al/2IrSVpQ; Joan Frawley Desmond, "Sex Education in California Sparks Culture Clash," *Nat'l Catholic Register*, Apr. 28, 2017, https://bit.ly/2X2MehW.

The effect of this dynamic within public schooling is to force people into political conflict over which values will be imposed on all students. By making diverse people pay for a single system of schools, public schooling appears to do what Justice Stevens feared from school choice: create conflict, as one observes historically "in the Balkans, Northern Ireland, and the Middle East," *Zelman*, 536 U.S. at 686 (Stevens, J., dissenting). History is littered with public schooling battles both political and, occasionally, physical. Horace Mann, the "Father of the Common school," faced significant religious opposition to his efforts to create common schools as people of various Protestant sects feared their beliefs would be slighted. *See* Charles L. Glenn Jr., *The Myth of the Common School* 146–235 (1987). In his last report as Massachusetts education secretary, Mann defended against accusations he would have the Bible, of which there were many interpretations, removed from schools. Mann stated, "The Bible is the acknowledged expositor of Christianity. In strictness, Christianity has no other authoritative expounder. The Bible is in our common schools by common consent." Report for 1848, in *Life and Works of*

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immoral or age-inappropriate. *State of America's Libraries 2019*, Am. Library Ass'n, Mar. 24, 2019, https://bit.ly/2GcYcA3.

Horace Mann 734 (Mary Mann, ed.,1868). In 1844, neighborhoods around Philadelphia saw massive property destruction and multiple deaths in "Bible Riots" touched off by disputes over whose version of the Bible—Protestant or Roman Catholic—would be used in the public schools. Vincent P. Lannie & Bernard C. Diethorn, *For the Honor and the Glory of God: The Philadelphia Bible Riots of 1840*, 8 Hist. of Educ. Q. 44 (1968).[4] In Kanawha County, West Virginia, one person was shot and district property bombed in the 1974 "Textbook War," fought over books adopted by the school board to which many parents objected on religious and other grounds. David Skinner, "A Battle Over Books," *Humanities*, Sept./Oct. 2010, https://bit.ly/2G7UgPN.

Today, overtly religious conflicts are commonplace, as well as many conflicts about moral values that may well be religion-based but not expressly so. Cato's Public Schooling Battle Map, an online database of values- and identity-based conflicts in public schools, contained 2,189 entries as of Sept. 13, 2019. Cato Inst., Public Schooling Battle Map, https://www.cato.org/education-fight-map. The map contains conflicts that appeared in media stories since 2005, with regular collection starting around 2011. Because it contains only battles that received media attention, it almost certainly understates the number of conflicts. Of the 2,189 entries, 336 explicitly involve religion, such as Bible study, prayer, posting "In God We Trust," and "mindfulness" yoga. Barry Amundson, "ACLU: Bill Requiring North Dakota Schools to Offer Bible Course 'Blatantly Unconstitutional,'" *Grand Forks Herald*, Jan. 9, 2019, https://bit.ly/2UsVBuC; Brittani Howell,

[4] The title date was corrected to "1844" in the subsequent issue.

"R-BB Superintendent's Prayer Letter Raises Concerns," *Hoosier Times Online*, Feb. 6, 2019, https://bit.ly/2IeyNs2; Dave Perozek, "'In God We Trust' Signs Going Up in Schools," *Arkansas Democrat and Gazette*, Mar. 4, 2018, https://bit.ly/2IsqGaH; Susan Parker, "Yoga and 'Unholy Spirit'? School Program Draws Christians' Ire," *Delmarva Now*, Apr. 27, 2018, https://bit.ly/2UbhA4b. Of those conflicts, 200 center on moral, but not explicitly religious, concerns, and 62 deal with "human origins," which can include religious explanations for the origins of life, but also ones not explicitly religious, such as intelligent-design theory.

The Battle Map contains 19 entries for Montana, including over bathroom access, a school trip to a creationist museum, and school choirs singing at a Latter-Day Saints event. Thom Bridge, "ACLU Sues to Block Ballot Initiative on Transgender Bathroom, Locker Room Use," *Missoulian*, Oct. 17, 2017, https://bit.ly/2G7po21; Associated Press, "Montana Third-Grader's Field Trip to Creationist Museum Canceled over Legal Concerns," *Casper Star-Tribune*, May 27, 2015, https://bit.ly/2D76tDS; Associated Press, "ACLU Protests High School Choirs Singing In Church Concert," Dec. 5, 2013, https://cbsloc.al/2uXRx6f.

Allowing families—and funders—to choose schools that share their values would abrogate the need to impose one's values on everyone else, improving the prospects for social and political peace. There is historical evidence of this occurring in other countries, including the Netherlands and Belgium, both of which in the 19th century moved away from education systems intended to impose one worldview to those based in families' ability to choose schools that shared their religious and philosophical values. Charles L. Glenn, Jr.,

Contrasting Models of State and School: A Comparative Historical Study of Parental Choice and State Control (2011); Robert Maranto & Dirk C. van Raemdonck, "Letting Religion and Education Overlap," *Wall St. J.*, Jan. 8, 2015. In both cases, the intent—and result—was an increase in social harmony.

CONCLUSION

Because the Montana Department of Revenue discriminated against religious believers and failed to allow "play in the joints" between the First Amendment's Religion Clauses, this Court should reverse the Montana Supreme Court.

Respectfully submitted,

Ilya Shapiro
Counsel of Record
Trevor Burrus
CATO INSTITUTE
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

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