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

Amici Curiae Brief of Justice and Freedom Fund, Institute for Faith and Family, and North Carolina School Choice Supporting Petitioners

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INTEREST OF *AMICUS CURIAE*[1]

Amici curiae, respectfully submit that the decision of the Montana Supreme Court should be reversed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education, legal advocacy, and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010). JFF has made numerous appearances in this Court as *amicus curiae*, including two cases relevant to the issues presented here: *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011) and *Trinity Lutheran Church v. Comer,* 137 S. Ct. 2012 (2017).

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[1] The parties have consented to the filing of this brief. *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to its preparation or submission.

Institute for Faith and Family ("IFF") is a North Carolina nonprofit corporation established to preserve and promote faith, family, and freedom by working in various arenas of public policy to protect constitutional liberties, including freedom of educational choices and opportunities. See https://iffnc.com.

North Carolina School Choice is an unincorporated grassroots organization of parents and individuals who engage in advocacy on educational issues and seek greater empowerment of North Carolina families and taxpayers regarding education. Its membership includes parents with children in district, charter, private, online, hybrid, and home schools. It supports educational freedoms that afford parents a full range of options, including enrollment in religious schools with financial assistance via opportunity scholarship programs and other taxpayer-saving incentives.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Montana is not only permitted to include religious schools in its Scholarship Program—it *must* include them. First, it is questionable whether financial aid reaches religious schools as the result of state action, a basic requirement for any constitutional transgression. The entire program rests on private action. It is funded by the voluntary donations of private citizens to a "Student Scholarship Organization" created by private citizens. The family receiving the scholarship selects the specific private institution that will receive the funds. Even under Montana's stringent state constitution, the program—established for educational and not sectarian purposes—is permissible. Second,

inclusion of religious schools in the program is constitutionally mandatory because excluding them conflicts with this Court's growing trend to apply nondiscrimination principles in the allocation of generally available public benefits. Indeed, that trend renders Mont. Const. art. X, § 6—and similar provisions in other state constitutions—constitutionally dubious.

ARGUMENT

I. THE MONTANA SCHOLARSHIP PROGRAM IS PERMISSIBLE UNDER WELL ESTABLISHED CONSTITUTIONAL PRINCIPLES.

Education is compulsory for school-age Montana children. Mont. Code Ann. § 20-5-102. But parents may fulfill that obligation through private school placement. *Pierce v. Society of the Sisters,* 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."). Many are dissatisfied with public schools. Religion has been systematically expelled. *See, e.g., Engel v. Vitale*, 370 U.S. 421 (1962) (prayer); *Abington Township School District v. Schempp,* 374 U.S. 203 (1963) (Bible reading); *Stone v. Graham*, 449 U.S. 39 (1980) (Ten Commandments); *Lee v. Weisman*, 505 U.S. 577 (1992) (graduation prayers); *Santa Fe. Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (student-led prayer at athletic events). When mandatory school curriculum clashes with faith, parents must either subject their children to objectionable content or get out of the public schools.

Evangelical parents face the same dilemma as their Catholic counterparts years ago, "paying taxes for public schools they [cannot] use in good conscience, and also paying tuition to fund religiously acceptable private schools." Laycock, Douglas, *Why the Supreme Court Changed Its Mind About Government Aid to Religious Institutions: It's a Lot More than Just Republican Appointments*, 2008 BYU L. Rev. 275, 289 (2008).

Families dissatisfied with public education may not be able to afford the tuition for an education compatible with their beliefs. Montana's program is a permissible accommodation that facilitates affordable choice for such families. The tax credit is no more than a "rough return for the benefits . . . provided to the State" when parents bear the financial burden of private education on top of their taxes. *Mueller v. Allen,* 463 U.S. 388, 402 (1983). It provides "partial relief to parents who support the public schools they do not use." *Comm. for Public Educ. and Religious Liberty v. Nyquist,* 413 U.S. 756, 803 (1973) (Burger, J., dissenting). "At no point in the financial operation of [the Montana Scholarship Program] does the government disburse public funds, so alleged benefits accruing to a religious school rest merely on an abstract notion of indirectness that has no real boundary." Boyer, Jonathan D., *Education Tax Credits: School Choice Initiatives Capable of Surmounting Blaine Amendments*, 43 Colum. J.L. & Soc. Probs. 117, 146-147 (2009). The connection is far too attenuated to be characterized as direct or even indirect aid.

A. The Montana Scholarship Program is implemented by a series of *private* choices—not the *state* action required for a constitutional violation.

Absent state action, Montana's Scholarship Program violates neither the federal nor the state constitution. Constitutional rights are protected only against *state* interference—not *private* conduct. In religion cases, the state action doctrine helps courts draw "the crucial dividing line" between *protected* private conduct and *prohibited* government action—"the public/private distinction that is enshrined in the Constitution's two Religion Clauses." *Developments in the Law: State Action and the Public/Private Distinction: The State Action Doctrine and the Establishment Clause*, 123 Harv. L. Rev. 1278, 1284, 1290 (2010). Montana's program involves a series of "numerous private choices, rather than the choice of a government," to direct the specific distribution of benefits. *Mitchell v. Helms*, 530 U.S. 793, 810 (2000).

Montana steers clear of Establishment Clause traps through a multi-tiered layering of private choices that takes the constitutionally mandated "hands off" approach necessary to ensure the absence of state action—a prerequisite for any constitutional violation. There is no state action at any critical juncture in the funding route. First, private citizens form a School Scholarship Organization ("SSO"). Next, taxpayers (private citizens) voluntarily donate to SSO's. Finally, scholarship recipients select the specific schools for their children. *None of these decision makers are state actors, and their actions cannot be attributed to the*

state. Funds are wholly directed by *private* actors—not *state* actors. Citizen participation at every stage protects against coerced financial support of religion.

The process is analogous to proximate causation (tort law). Montana has not given aid to religion by enacting legislation that sets in motion a series of disconnected private choices. The state is the "actual cause" of benefits, which would not exist apart from the statute, but there are too many broken links in the chain for Montana to be the "proximate cause" of the aid. Private parties—taxpayers, SSOs, parents—are the "superseding intervening independent causes" that rupture the chain. "[T]he *government itself* is at least four times removed from any aid to religious organizations." *Winn v. Ariz. Christian Sch. Tuition Org.*, 586 F.3d 649, 662 (9th Cir. 2009) (O'Scannlain, J., dissenting). The program "could just as easily have resulted in a total dearth of funding for religious organizations...." *Id*.

School aid has sparked legal challenges for decades. *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948) appears to have "launch[ed] a nationwide campaign to purge the religious schools of every penny of public money and the public schools of every vestige of religious sentiment." William W. Bassett, *Changing Perceptions of Private Religious Schools: Public Money and Public Trust in the Education of Children*, 2008 BYU L. Rev. 243, 258 (2008). Some cases implicate the services of *public* employees, but the aid is nevertheless permissible where it results from private choices: *Zobrest v. Catalina Foothills Sch. Dist.,* 509 U.S. 1, 10 (1993) (sign language interpreter in Catholic school);

Agostini v. Felton, 521 U.S. 203 (1997) (remedial education for low-income students). *Agostini* abandoned the *Meek-Ball* presumption that placing public employees on private school premises will inevitably create state-sponsored indoctrination or a symbolic union between the state and religion. *Id.* at 223; see *Meek v. Pittinger,* 421 U.S. 349 (1975) (auxiliary services); *Sch. Dist. v. Ball,* 473 U.S. 373 (1985) (teachers in private school classrooms "leased" to the state). *Mueller*, *Witters*, *Zobrest*, and *Zelman* all rejected Establishment Clause challenges because aid reached religious entities solely by the direction of private individuals—not the state. *Zelman* implicitly acknowledged the state action doctrine: "While our jurisprudence with respect to the constitutionality of direct aid programs has 'changed significantly' over the past two decades . . . our jurisprudence with respect to true private choice programs has remained consistent and unbroken." *Zelman v. Simmons-Harris,* 536 U.S. 639, 649 (2002).

B. Economic equivalence is not a subsidy.

Although "tax credits and governmental expenditures can have similar economic consequences," they "do not both implicate individual taxpayers in sectarian activities." *Winn*, 563 U.S. at 141-142. The tax credit's economic effect may be comparable to indirect aid (or even direct aid), but the constitutional analysis is radically different. Direct aid is *state* action, while private choice programs are not. In *Nyquist*, this Court acknowledged the relevance of the funding route but only as one of many factors. *Nyquist,* 413 U.S. at 781. *Mueller* elevated the importance of this factor.

Education Tax Credits, 43 Colum. J.L. & Soc. Probs. at 126; *Mueller,* 463 U.S. at 399. Here, Montana's role ended with the enactment of the tax credit. Having crossed that crucial dividing line, state action vanishes.

Allowing *taxpayers* to initiate the flow of funds ensures that no citizen's "tax dollars" are forcibly diverted to support religion. All taxpayers are compelled to support education. Montana's multi-tiered scheme allows them to channel some of their own educational "tax dollars." The program insulates the state against charges of financing religion and facilitates compliance with the constitutional purpose that "[n]o tax in any amount, large or small, can be levied to support any religions activities or institutions." *Everson v. Board of Education*, 330 U.S. 1, 16 (1947). Taxpayers direct *their own tax dollars*, either for public or private education. The credit involves no "direct transfer of public monies . . . us[ing] resources exacted from taxpayers as a whole." *Nyquist,* 413 U.S. at 807 (Rehnquist, J., dissenting).

Montana's tax credit is analytically similar to a tax exemption. An exemption "is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." *Walz v. Tax Comm'n*, 397 U.S. 664, 675 (1970). Unlike an exemption, where government passively refrains from assessing a tax, a subsidy "forcibly diverts the income of both believers and nonbelievers. . . ." *Walz,* 397 U.S. at 690-691 (Brennan, J., concurring), quoting Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, pt. II, 81 Harv. L. Rev. 513, 553 (1968). Montana's

credit functions much the same way. The *state* has neither diverted a penny nor "somehow imposed a tax by declining to collect potential revenue from its citizens." *Kotterman v. Killian,* 972 P.2d 606, 621 (1999). Otherwise, courts "would also be forced to rule that deductions for charitable contributions to private schools [are] unconstitutional because they too, would amount to the laying of a tax." *Id*.

Nevertheless, federal and state tax codes direct a broad array of benefits to religious institutions. The $8.2 million implicated in *Zelman*'s school voucher program "pale[d] in comparison to the amount of funds that federal, state, and local governments already provide[d] religious institutions" through income and property tax exemptions, charitable deductions, and programs like the "Hope Tax Credit." *Zelman*, 536 U.S. at 665 (O'Connor, J., concurring). The same is true of Montana's tax credit.

C. The purpose of the Scholarship Program is educational, not sectarian.

The purpose of the Montana SSO's is "to provide parental and student choice in education with private contributions through tax replacement programs." Mont. Code Ann. § 15-30-3101; *Espinoza v. Mont. Dep't of Revenue*, 435 P.3d 603, 606 (Mont. 2018). This is not a "sectarian purpose" under Mont. Const. art. X, § 6(1). Its focus is educational, like the many other cases where this Court has upheld school aid: *Bd. of Educ. v. Allen,* 392 U.S. 236, 247 (1968) ("raising national levels of knowledge, competence, and experience"); *Hunt v. McNair*, 413 U.S. 734, 741 (1973) (facilities and structures to give youth the "fullest opportunity to

learn and to develop their intellectual and mental capacities"); *Mueller,* 463 U.S. at 395 ("[a]n educated populace is essential to the political and economic health of any community"); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 485 (1986) (vocational rehabilitation); *Zobrest*, 509 U.S. at 5 (sign language interpreter for deaf students); *Agostini,* 521 U.S. 203 (remedial services to low-income students); *Zelman*, 536 U.S. at 649 ("providing educational assistance to poor children in a demonstrably failing public school system").

Even cases striking down school aid (some now overruled) have jumped the secular purpose hurdle derived from *Lemon v. Kurzman*, 403 U.S. 602 (1973): *Wolman v. Walter*, 433 U.S. 229, 236 (1977) (protecting student health and "providing a fertile educational environment"); *id.* at 262 (Powell, J., concurring in part) (relieving tax burdens, stimulating public schools through healthy competition, facilitating high quality education); *Nyquist*, 413 U.S. at 773 (safe, healthy educational environment; pluralism and diversity); *id.* at 796 (educational choices for low-income families); *Meek*, 421 U.S. 349 (supplemental auxiliary services); *Sch. Dist. v. Ball*, 473 U.S. at 382 (providing for the education of children is a "praiseworthy goal"); *Aguilar v. Felton*, 473 U.S. 402 (1985) (programs for educationally deprived children from low-income families).

II. INCLUSION OF RELIGIOUS SCHOOLS IN THE MONTANA SCHOLARSHIP PROGRAM IS CONSTITUTIONALLY MANDATORY.

Both Religion Clauses stand guard over religious liberty. The First Amendment's Establishment and Free Exercise Clauses work together to help protect religious freedom, not to prohibit school choice programs that help both religious schools and non-religious ones as well. The Establishment Clause limits government but simultaneously complements the Free Exercise Clause. Taken to extremes and wrenched from its context, the clause morphs into a sword attacking religious freedom instead of a shield protecting it. The Montana Supreme Court admitted that "an overly-broad analysis of Article X, Section 6, could implicate free exercise concerns." *Espinoza*, 435 P.3d at 606. States may grant more *protection* than the federal Constitution but excluding religious school options does nothing to *protect* religion. The Montana Supreme Court wields its state constitution as a weapon that strikes down religious liberty.

Montana wisely designed a multi-layered private choice program where only a thin thread connects the state with private school funding. The Scholarship Program reflects the "benevolent neutrality" that "permit[s] religious exercise to exist without sponsorship [or] interference." *Walz*, 397 U.S. at 669. The program facilitates voluntary religious instruction without coercing financial support, thus "follow[ing] the best of our traditions . . . respect[ing] the religious nature of our people and accommodat[ing] the public service to their spiritual needs." *Zorach v. Clauson,* 43

U.S. 306, 313 (1952). It would be "most bizarre" for this Court to "reserve special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children." *Mitchell,* 530 U.S. at 827-828.

Petitioners challenged the rigid exclusion of religious schools from the Scholarship Program (Mont. Admin. R. 42.4.802 (Rule 1)). The Montana Supreme Court decision, striking the entire program as unconstitutional, conflicts with this Court's trend to apply nondiscrimination principles in cases that involve the allocation of generally available public benefits. Nondiscrimination promotes the "benevolent neutrality" that must characterize all levels of American government. Rule 1's exclusion of religious schools is neither benevolent nor neutral.

A. This Court's Establishment Clause jurisprudence has shifted from a strict "no aid" position to a flexible standard grounded in nondiscrimination principles.

Government aid to religion has generated heated debate over the course of American history. Financial aid in particular has been viewed with suspicion. The Constitution affirmatively protects religion yet this Court once hesitated to approve anything but remote, incidental, indirect, inconsequential benefits. *See, e.g., Lynch v. Donnelly,* 465 U.S. 668, 683 (1984); *Widmar v. Vincent,* 454 U.S. 263, 273-274 (1981); *Nyquist,* 413 U.S. at 771. There is seemingly a pervasive paranoia that somehow, somewhere, someone might inadvertently confer a slight benefit on religion. But

under this Court's current approach, that anxiety is no longer warranted.

This nation's robust protection for religious liberty guards against both government compulsion and interference. Since absolute separation is neither wise nor feasible, courts have tried to flesh out the appropriate church-state relationship over decades of litigation. A strict "no-aid" position prevailed after this Court inaugurated *Lemon*'s tripart test in 1974. That approach was slowly replaced by a growing trend to resurrect and strengthen the weak nondiscrimination principle evident in earlier cases, particularly *Everson*, 330 U.S. 1. Since its holding in *Witters*, this Court's Establishment Clause jurisprudence has gradually progressed from a strict "no aid" stance to a point where "federal constitutional restrictions on funding religious institutions have collapsed." Douglas Laycock, Comment, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty,* 118 Harv. L. Rev. 155, 156 (2004). This trend has key implications for resolving this case.

Nondiscrimination principles developed mostly in the context of taxpayer challenges. A strong consensus emerged that the Constitution permitted state funds to reach religious organizations under limited conditions—most notably, as the result of private choices. Cases typically addressed what the government was *permitted* to do rather than what it was *required* to do. The result has been less than satisfactory. This Court's "new middle ground [was] to *permit* most funding but to *require* hardly any."

Laycock, *Theology Scholarships,* 118 Harv. L. Rev. at 161 (emphasis added). While this "maximizes government discretion and judicial deference," it also "threatens religious liberty" and tends to expand government power over religious institutions. *Id*. This line of authority failed to articulate exactly if or when the state *must* include religious organizations among other eligible recipients. *Locke v. Davey*, 540 U.S. 712 (2004) may appear to say "no," but its narrow parameters discourage extending its conclusion to other circumstances.

In light of this Court's developing jurisprudence, states have crafted programs accordingly. The scholarship program at issue in *Colorado Christian University* reflects such efforts. The state established a "safe harbor" to make funds available "as broadly as was thought permissible under [this] Court's then-existing Establishment Clause doctrine." *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1251 (10th Cir. 2008). Although this Court had scrupulously avoided "direct funding of pervasively sectarian institutions" in past decisions (*id.* at 1245), that approach was subsequently modified to discard the absolute prohibition evident in earlier cases. Instead, this Court recognized that the "pervasively sectarian" framework "collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." *Id*. at 1258, quoting *Mitchell,* 530 U.S. at 828 (plurality).

Early history (pre-*Lemon*). Decades ago, this Court warned against government hostility to religion. There is "no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." *Zorach,* 343 U.S. at 313-314. At that time, this Court began to consider state programs funding religious and secular education. Both "no aid" and nondiscrimination principles were evident in *Everson*, when this Court upheld state-funded bus rides that included a Catholic high school. 330 U.S. 1. New Jersey could not exclude individuals of a particular faith from receiving the benefits of public welfare legislation (*id.* at 16), essentially applying a "weak form of the nondiscrimination principle" that "permitted equal funding, but did not require it." Laycock, *Theology Scholarships,* 118 Harv. L. Rev. at 164. At this point, "[f]ew judges took seriously the possibility that equal funding might be constitutionally required." *Id*. But the decision was far from unanimous. Four dissenting justices advocated the rigid no aid position that later prevailed for a long stretch, insisting the Establishment Clause "broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes." *Everson*, 330 U.S. at 33 (Rutledge, Frankfurter, Jackson, Burton, J.J., dissenting).

Everson involved bus transportation, a religiously neutral benefit that hardly raised establishment concerns. A few years later, this Court approved a state program to loan textbooks to children in both public and parochial schools. Building on *Everson*, the Court

found this program did not advance religion, but furthered educational opportunities. *Bd. of Educ. v. Allen*, 392 U.S. at 243. Again, a strong dissent objected to using tax funds "even to the extent of one penny" to support religious schools. *Id*. at 253-254 (Black, J., dissenting). Following these early decisions, this Court "struggled to reconcile two competing intuitions"—the rigid no aid position that prevailed from *Lemon* through the mid-1980's and the nondiscrimination approach that later won the day. Laycock, Douglas, *Why the Supreme Court Changed Its Mind*, 2008 BYU L. Rev. at 276.

"No Aid" Era (1971-1985). *Lemon* ushered in a series of taxpayer challenges. This era was dominated by a strict "no aid" policy that struck down many forms of state aid for private religious schools and their students: *Lemon*, 403 U.S. 602 (private school teacher salaries); *Hunt v. McNair*, 413 U.S. 734 (state revenue bonds for Baptist college upheld because school was not "pervasively sectarian"); *Meek*, 421 U.S. 349 (materials and services); *Wolman*, 433 U.S. 229 (materials and services); *Sch. Dist. v. Ball*, 473 U.S. 373 (enrichment courses); *Aguilar*, 473 U.S. 402 (remedial instruction and guidance services).[2] "The no-aid principle derived from eighteenth-century debates over earmarked taxes levied exclusively for the funding of churches." Laycock, *Why the Supreme Court Changed Its Mind*, 2008 BYU L. Rev. at 276. The policy continued to dominate for many reasons, including lingering anti-Catholic sentiment that declined and ultimately faded in the

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[2] *Meek*, *Wolman*, *Ball*, and *Aguilar* have been subsequently overruled in whole or in part by *Mitchell* and/or *Agostini*.

1950's and 1960's, plus concerns about "white flight" to private schools in the face of desegregation mandates. *Id*. at 285-288. Eventually, a broad Protestant-Catholic coalition reframed the issue in terms of private choice and neutrality (*id*. at 292), but meanwhile, "the no-aid principle predominated from then [*Lemon*] until its high-water mark in *Aguilar v. Felton* in 1985." *Id*. at 277.

Aguilar and *Ball*, filed the same day, were both "ideological, strict constructionist attacks on programs that brought public-school teachers onto the premises of parochial schools." *Changing Perceptions,* 2008 BYU L. Rev. at 259. After these rulings created excessive costs and chaos, the New York state legislature created a special school district to accommodate the needs of disabled children who were denied Title I services on their religious school premises. The new school district, carved out along religious lines, raised its own Establishment Clause concerns. *Id*. at 264, discussing *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994). But in *Kiryas Joel*, Justice O'Connor urged the Court "to reconsider *Aguilar*, in order to bring our Establishment Clause jurisprudence back to . . . government impartiality, not animosity, toward religion." *Kiryas Joel*, 512 U.S. at 717-718 (O'Connor, J., concurring).

Even during the *Lemon* era, this Court occasionally approved financial aid: *Meek*, 421 U.S. at 359-62 (transportation); *Wolman*, 433 U.S. at 241-244, 244-248 (testing and remedial instruction); *Mueller*, 463 U.S. at 394-403 (state tax deductions). In fact, this Court "never squarely repudiated the nondiscrimination

principle," resulting in an incoherent body of law and leaving the no-aid position "vulnerable to new Justices measuring neutrality from a different baseline." Laycock, *Theology Scholarships,* 118 Harv. L. Rev. at 166.

Transition. Beginning with its 1986 unanimous decision in *Witters*, "[this] Court progressively elevated the nondiscrimination principle while subordinating the no-aid principle." Laycock, *Why the Supreme Court Changed Its Mind*, 2008 BYU L. Rev. 275 at 278. Since that time, this Court has upheld five additional programs allowing funds to reach religious institutions (*Bowen v. Kendrick*, 487 U.S. 589 (1988)*, Zobrest, Agostini, Mitchell, Zelman*), partially or wholly overruling several *Lemon* era rulings (*Meek*, *Wolman*, *Aguilar*, *Ball*). *Id.*

Witters has several parallels to *Locke v. Davey*. Petitioner was a blind student studying to become a pastor who applied for assistance under a vocational rehabilitation program. The State of Washington—where *Locke* also originated—denied the application based on the state constitution. The Washington Supreme Court upheld the denial based on the federal Establishment Clause and this Court reversed. *Witters* is an interesting case in this Court's transition to nondiscrimination. As in *Locke*, it involved an individual denied funding because he sought religious training. This Court expressed "no opinion" on whether the Free Exercise Clause mandated the vocational aid the petitioner sought (*Witter*s, 474 U.S. at 489-490) but cited nondiscrimination principles to support its ruling: "Washington's program is made available generally

without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited . . . and is in no way skewed towards religion." *Witters*, 474 U.S. at 487-488.

In *Witters*, nondiscrimination won the day in spite of the Court's simultaneous confirmation of both "no aid" and nondiscrimination principles. "[T]he Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution" but "the State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is that of a direct subsidy to the religious school from the State"—even if the aid "takes the form of aid to students or parents." *Id*. at 486 (internal quotation marks and citations omitted). Amazingly, though, this Court applied nondiscrimination principles to Witters' claims even *before* cases like *Ball*, *Aguilar*, and *Wolman* were overruled (in part or whole). This Court noted in dicta that "[o]n remand, the state court is of course free to consider the applicability of the 'far stricter' dictates of the Washington State Constitution." *Id*. at 489. Nevertheless, *Witters* is an intriguing step toward nondiscrimination. This Montana case is an opportunity for this Court to further sharpen the doctrine and consider whether "far stricter" state constitutions should ever override principles of equality and nondiscrimination in the distribution of generally available benefits.

Nondiscrimination (1986 forward). The tide eventually turned. This Court began to apply nondiscrimination principles to funding cases,

facilitating greater equality between religious organizations and comparable secular entities. Several landmark cases inaugurated an era where religious and secular private schools began to enjoy equal access to funding opportunities, particularly where the services funded were unrelated to religion or private choices directed the funds. In *Zobrest*, this Court reversed a ruling that denied sign-language interpreter services to a deaf student at a Catholic high school—services required by the Individuals With Disabilities Educational Act. In 1997, this Court overruled *Aguilar* and *Ball*, and implicitly overruled *Meek*, rejecting a taxpayer challenge to a program allowing public school teachers to provide remedial education to low-income students in public and private schools. The program did not define recipients with reference to religion. *Agostini*, 521 U.S. at 234. Three years later, this Court expressly endorsed nondiscrimination principles and condemned hostility to religion when it upheld a federally funded program distributing equipment to public and private schools on a per-student basis without reference to religion. *Mitchell*, 530 U.S. at 827-828.

Finally, *Zelman* upheld a program providing tuition and tutorial aid based on financial need and residence in a particular school district, explaining that "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge." 536 U.S. at 651 (internal citations and quotation marks omitted). *Zelman* and other cases "should be understood as evidence of [this] Court's shift from a focus on effects and perceptions" to "the

principle that government decisions which do not utilize religion as a standard for action or inaction do not violate the Establishment Clause." Ryan A. Doringo, *Comment: Revival: Toward a Formal Neutrality Approach to Economic Development Transfers to Religious Institutions*, 46 Akron L. Rev. 763, 794 (2013).

This case is an opportunity to extend the nondiscrimination principles highlighted in *Zobrest*, *Agostini, Mitchell*, and *Zelman*. Those cases implicated the U.S. Constitution, but in *Trinity Lutheran* this Court considered a state provision similar to the one in Montana and struck down a policy that "expressly discriminate[d]" against an "otherwise eligible recipient[]"—Trinity Lutheran Church—by excluding it from participation in a competitive program to improve playground safety "solely because of [its] religious character." *Trinity Lutheran*, 137 S. Ct. at 2021. The church was "not claiming any entitlement to a subsidy" (*id.* at 2022) but merely the "right to participate in a government benefit program without having to disavow its religious character." *Id.* This Court did not venture beyond the context of playground resurfacing and declined to "address religious uses of funding or other forms of discrimination." *Id.* at 2024 n. 3. But as Justice Gorsuch observed, the "general principles" that controlled *Trinity Lutheran* "do not permit discrimination against religious exercise—whether on the playground or anywhere else." *Id.* at 2026 (Gorsuch, J., concurring).

B. Many states have adopted constitutionally questionable "Blaine amendment" provisions in their state constitutions.

Many state constitutions rigidly deny financial aid to religion. These provisions are typically rooted in nineteenth century anti-Catholic bias, a position antithetical to the federal Constitution in general and nondiscrimination principles in particular. It is not possible to maintain a total wall of separation without discriminating against religion as Blaine amendments do. Such an effect is not what the Framers intended—rather, the state must offer neutrality toward religion. It should not therefore conduct affairs so as to disfavor religious people or organizations.

Public schools were saturated with Protestantism in the 1800's. The unsuccessful federal "Blaine Amendment" was an effort to prevent public funding of "sectarian" schools. Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J. L. & Pub. Pol'y 551, 551-573 (2003). In the late nineteenth century, comparable state amendments surfaced "during a period of mass anti-Catholic sentiment in response to Irish-Catholic immigration." Jonathan D. Boyer, *Article: Education Tax Credits: School Choice Initiatives Capable of Surmounting Blaine Amendments*, 43 Colum. J.L. & Soc. Probs. 117, 118 (2009). The 1889 Enabling Act *required* new states to include Blaine provisions in their constitutions in order to preclude funding for "sectarian" schools. DeForrest, *An Overview,* 26 Harv. J. L. & Pub. Pol'y 551 at 573-574. And it was an "open secret" that

"sectarian" was "code for Catholic." *Id*. at 559 (citing *Mitchell*, 530 U.S. at 828-829). By the close of the nineteenth century, the constitutions of "roughly thirty states" included Blaine-style amendments. *Id*. at 573. These provisions increased the likelihood that religious entities would be denied even the most indirect public funding. This is particularly true for schools, where strict "no aid" principles reflect "a misinterpretation of the Establishment Clause, deeply rooted in historic anti-Catholicism." Laycock, *Theology Scholarships,* 118 Harv. L. Rev. at 185.

State constitutions and analogous state statutes have generated lawsuits over the years. The Arizona Supreme Court, in dicta, "blasted the federal Blaine Amendment bill for its anti-Catholicism" and noted the challenge in applying comparable state provisions because of the difficulty in "'divorcing the amendment's language from the insidious discriminatory intent that prompted it.'" DeForrest, *An Overview,* 26 Harv. J. L. & Pub. Pol'y 551 at 583-584, quoting *Kotterman*, 972 P.2d at 624.

C. This Court should apply nondiscrimination principles to the Montana Scholarship Program.

In applying Mont. Const. art. X, § 6 to shut down parental choice in education, Montana uses its state constitution as a sword to discriminate against religion rather than a shield to protect it. Although the state has an interest in maintaining an appropriate church-state distinction, its categorical exclusion of religious schools from a neutral public benefit cannot withstand a nondiscrimination analysis.

State Blaine amendments threaten religious liberty by unlawfully discriminating against religion. DeForrest, *An Overview,* 26 Harv. J. L. & Pub. Pol'y 551 at 556. Decades ago, the Montana Supreme Court did just that by reading its state constitution to prohibit both direct and indirect aid to religious schools. *State ex rel. Chambers v. School District 10 of Deer Lodge County*, 472 P.2d 1013 (Mont. 1970); DeForrest, *An Overview,* 26 Harv. J. L. & Pub. Pol'y 551 at 586. The court repeated its error in this case by using state Blaine language to invalidate the Scholarship Program. But "[this] Court could presumably reverse that judgment on the ground that the [Montana] Blaine Amendment, *as applied in th[is] case*, violated the federal Constitution." Laycock, Comment, *Theology Scholarships,* 118 Harv. L. Rev. at 190 (2004) (emphasis added).

Nondiscrimination principles promote government neutrality by eliminating the threat that religious entities could be denied generally available government services and benefits dispensed according to neutral criteria. The Constitution "requires the state to be a neutral in its relations with groups of religious believers and non-believers; *it does not require the state to be their adversary*. State power is no more to be used so as to handicap religions than it is to favor them." *Everson*, 330 U.S. at 18 (emphasis added). Montana has become an adversary by excluding religious schools from the choices available to families under its Scholarship Program.

In *Trinity Lutheran*, this Court considered "whether the U.S. Constitution *compel[s]* Missouri to provide public grant money directly to a church, contravening a long-standing state constitutional provision that is not unique to Missouri." *Trinity Lutheran Church v. Pauley*, 788 F.3d 779, 784 (8th Cir. 2015). The shift to nondiscrimination had occurred almost exclusively in challenges where the question of mandatory inclusion was not in front of this Court. "*Zelman* held that a state is *entitled* to offer school vouchers that can be cashed at sectarian schools but not that it is *required* to do so." *Badger Catholic, Inc. v. Washington*, 620 F.3d 775, 779 (7th Cir. 2010). The Tenth Circuit took the next logical step. It was "undisputed that federal law [did] not *require* Colorado to discriminate" against a religious university, but neither could the state "choose to exclude pervasively sectarian institutions" from the program. *Colorado Christian University*, 534 F.3d at 1253.

Facilitating parental choice in education is far removed from "[t]he coercion that was a hallmark of historical establishments . . . coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Van Orden v. Perry,* 545 U.S. 677, 693 (2005) (Thomas, J., concurring), citing *Lee v. Weisman,* 505 U.S. at 640 (Scalia, J., dissenting). That historical threat is what drove the outcome in *Locke*. In that case, this Court allowed a state to discriminate under extraordinarily narrow circumstances not present in this case, citing "play in the joints," i.e., "state action that is permitted by the [Establishment Clause] but not required by the [Free Exercise Clause]." *Locke*, 540 U.S. at 718. But if read in its

original context, that phrase does not warrant Montana's categorical exclusion. The Constitution "will not tolerate either governmentally established religion or governmental interference with religion." *Walz,* 397 U.S. at 669. But there is "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). Nondiscrimination promotes "benevolent neutrality." Montana's rigid exclusion of religious schools is neither benevolent nor neutral. Exclusion is the antithesis of religious liberty and equal protection. As the Sixth Circuit observed in upholding Detroit's downtown refurbishing program: "That the program includes, rather than excludes, several churches among its many other recipients helps ensure neutrality, not threaten it." *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 290 (6th Cir. 2009) (internal citations and quotation marks omitted).

Locke's relatively minor burdens and mild disfavor, even if "tolerable in service of 'historical and substantial state interest[s],'" do not justify Montana's wholesale exclusion of religious schools from a neutral, generally available scholarship program. *Colorado Christian University*, 534 F.3d at 1255-56. Unlike laws that singled out religion for benefits not available to others, Montana withholds a generally available public benefit on the sole basis of religion—violating the Constitution as surely as if it had imposed a special tax.

Equality is a principle deeply embedded in the nation's history and constitution. "[A] state cannot shield a Religion Clause violation from judicial scrutiny by hiding the violation behind its own state charter." DeForrest, *An Overview,* 26 Harv. J. L. & Pub. Pol'y 551 at 607. Discrimination *against* religion violates the First Amendment. If a state enacts a funding program to assist private educational institutions, "it would seem that the *principle of nondiscrimination* requires [it] to extend that aid to organizations [that] identify themselves as religious." *Id*. at 608 (emphasis added). Exclusion of religious organizations merely because of their religious character "is not only offensive to fundamental principles of equality of citizenship, liberalism, and distributive justice, but also deeply offensive to the Constitution's guarantee of religious liberty." *Id*. at 613.

CONCLUSION

This Court should reverse the decision of the Montana Supreme Court and establish that religious persons and entities—including families and schools—are entitled to equal treatment in the distribution of generally available public benefits.

Respectfully submitted,

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