No. 18-1195

In The
Supreme Court of the United States

KENDRA ESPINOZA, JERI ELLEN ANDERSON, and JAIME SCHAEFER, *Petitioners,*

v.

MONTANA DEPARTMENT OF REVENUE and GENE WALBORN, in his official capacity as Director of the Montana Department of Revenue, *Respondents.*

On Writ of Certiorari to the Montana Supreme Court

Brief of Amicus Curiae Montana Family Foundation Supporting Petitioners

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QUESTION PRESENTED

Does it violate the Religion Clauses or Equal Protection Clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools?

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STATEMENT OF INTEREST[1]

The Montana Family Foundation is "a non-profit, research and education organization dedicated to supporting, protecting and strengthening Montana families." It recognizes the family as "a fundamental institution in a civil society" and that the "government should promote and protect [the family's] formation and well being." It believes that "[a]n informed and politically active citizenry is the best means for shaping pro-family public policy."

The Montana Family Foundation was at the forefront of advancing the Montana student-aid program underlying this case, drafting and advocating for its adoption since 2009. It was adopted in 2015. App. 87.

The Montana Family Foundation is organized as a non-profit corporation under 26 U.S.C. 501(c)(4). It regularly participates as amicus in litigation involving issues of importance to Montana families. *See* http://www.montanafamily.org.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties received timely notice of and have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

The Montana Supreme Court in the decision below held that Montana can constitutionally prohibit all government aid to sectarian schools under Article X, Section 6 of the Montana Constitution ("Montana's Blaine Amendment") and *Locke v. Davey*, 540 U.S. 712 (2004). Specifically, the court held that Montana's Blaine Amendment "plays at the joints" between the Establishment Clause and the Free Exercise Clause of the First Amendment to the United States Constitution and so can constitutionally prohibit Montana's student-aid program for private schools, including religious schools.

The court below misapplied *Locke*. Insofar as there is "play at the joints" between the Religion Clauses, that interplay does not mean that the Religion Clauses' "wholesome neutrality" protections are inapplicable. In particular, this Court has long held that the Establishment Clause requires "wholesome neutrality" by prohibiting the government from compelling religious adherence or directly promulgating religious practices and traditions. And the Free Exercise Clause requires "wholesome neutrality" by prohibiting the government from prescribing religion through unequal treatment based on religious status or religiously-motivated conduct.

Under these "wholesome neutrality" requirements, Montana's Blaine Amendment is unconstitutional. The purpose of Blaine Amendments, including Montana's, was to advance Protestantism to the exclusion of Catholicism. So Montana's sweeping prohibition on *all aid* to religious schools, no matter how tangential, violates the Establishment Clause's

requisite neutrality. It also establishes unequal treatment based on religious status, violating the Free Exercise Clause.

In contrast, Montana's student-aid program falls comfortably into the wholesome neutrality preserved under the Religion Clauses, providing a $150 tax credit for both public and private school donations, with tax credits for scholarships awarded to any qualifying private school parents and their children choose, whether religious or not. It neither compels nor promulgates religious activity, nor imposes unequal treatment based on religious status or religiously-motivated conduct.

Montana's student-aid program plays an important role in Montana. It helps lift incomes and lower employment rates of its citizens through increased education. And it increases revenue to and decreases dependence on the state.

ARGUMENT

I. Montana's Student-Aid Program Is Constitutional under the Religion Clauses.

A. The Religion Clauses Impose "Wholesome Neutrality" Protections.

"The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Lee v. Weisman*, 505 U.S. 577, 589 (1992). As a result, the Establishment Clause and the Free Exercise Clause of the First Amendment—and by extension, the Equal Protection Clause—all "overlap and reinforce one another by requiring the government to assume a position of 'wholesome neutrality' with respect to religion." *School Dist. of Abington*

Twp. v. Schempp, 374 U.S. 203, 222 (1963); *see Board of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and concurring in the judgment) ("[T]he Religion Clauses ... and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits.").

This Court's Religion Clauses jurisprudence, while cast in varying tests and terminology, consistently adheres to these "wholesome neutrality" protections.

1. The Establishment Clause Requires Wholesome Neutrality.

The Establishment Clause states that "Congress shall make no law respecting an establishment of religion," U.S. Const., amend. I. Pervasive throughout this Court's interpretation and application of the Establishment Clause is a neutrality governed by at least two fundamental principles.

First, the government may not compel religious adherence:

> Neither a state nor the Federal Government can set up a church. … Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.

Everson v. Bd. Of Ed. Of Ewing, 330 U.S. 1, 15-16 (1947). This religious adherence principle is perhaps most clearly applied and developed in *Lee*, where the Court reviewed whether a public school could direct

and control the content of a clergyman's prayers. 505 U.S. at 589. The Court concluded that the school could not, observing that:

> [i]t is a cornerstone principle of our Establishment Clause jurisprudence that 'it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government,' and that is what the school officials attempted to do.

Weisman, 505 U.S. at 588 (quoting *Engel v. Vitale*, 370 U.S. 421, 425 (1962)). Monitoring prayer in such a fashion might induce a participation that students would otherwise reject. *Lee*, 505 U.S. at 590. Moreover, history has taught that:

> in the hands of government what might begin as a tolerant expression of religions views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.

Lee, 505 U.S. 591-92. *See also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 183-84, (2012) ("the Establishment Clause addressed the fear that 'one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform.'") (quoting 1 Annals of Cong. 730-731 (1789) (remarks of J. Madison)).

Second, the government may not directly promulgate religious practices or traditions. "[T]hree main evils against which the Establishment Clause was intended to afford protection [are] 'sponsorship, financial support, and active involvement of the

sovereign in religious activity.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (quoting *Walz v. Tax Comm'n,* 397 U.S. 664, 668 (1970)). And so the Court has made clear that, while "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause," *Van Orden v. Perry*, 545 U.S. 677, 690 (2005), fostering either hostility against or pervasive bias for or against religion threatens the Establishment Clause's neutrality, *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 845-46 (1995).

By preventing government-compelled religious adherence and government-directed promulgation of religious practices and traditions, the Establishment Clause ensures wholesome neutrality.

2. The Free Exercise Clause Requires Wholesome Neutrality.

The Free Exercise Clause states that "Congress shall make no law ... prohibiting the free exercise thereof [of religion]," U.S. Const., amend. I. Here too, this Court's jurisprudence underscores the need for "wholesome neutrality" protections.

First, the government may not afford unequal treatment because of religious status. That is, it may not impose "special disabilities on the basis of religious status." *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2021 (2017). As Justice Kavanaugh recently observed, "[u]nder the Constitution, the government may not discriminate against religion generally or against particular religious denominations. *See Larson* v. *Valente*, 456 U. S. 228, 244, 102 S. Ct. 1673, 72 L. Ed. 2d 33 (1982)." *Morris Cty. Bd. Of Chosen Freeholders v.*

Freedom from Religion Found., 139 S. Ct. 909, 909 (2019).

> [A] law may not discriminate against 'some or all religious beliefs,' and 'a law targeting religious beliefs as such is never permissible.' *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 532, 533, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). … the government may not 'impose special disabilities on the basis of . . . religious status.' *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 877, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990).

Id. at 910. "Discriminating against religious schools because the schools are religious "is odious to our Constitution."" *Id.* at 910 (quoting *Trinity Lutheran*, 137 S. Ct. at 2024).

Second, the government may not "regulate or outlaw conduct because it is religiously motivated." *Id.* at 2021; *Church of Lukumi Babalu Aye*, 508 U.S. at 532 ("The Free Exercise Clause's protections are implicated where a law "prohibits conduct because it is undertaken for religious reasons."). *See, e.g., Fowler v. Rhode Island*, 345 U.S. 67, 67 (1953) (finding "that a municipal ordinance was applied in an unconstitutional manner when interpreted to prohibit preaching in a public park by a Jehovah's Witness but to permit preaching during the course of a Catholic mass or Protestant church service.").

To determine whether a law is neutral under the Free Exercise Clause, several factors are considered:

> Factors relevant to the assessment of governmental neutrality include 'the historical background of the decision under challenge, the specific series of events leading to the enact-

> ment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.'

Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1731 (2018) (quoting *Church of Lukumi Babalu Aye*, 508 U.S. at 540).

When a law is neutral and generally applicable—that is, it does not impose unequal treatment because of religious status or religiously motivated conduct—it need only have a rational basis for its enforcement. *Smith,* 494 U.S. at 881. However, when a law is not neutral or generally applicable, it must be narrowly tailored to a compelling government interest and be narrowly tailored to ensure the Free Exercise Clause's neutrality protections are overcome in the least restrictive way possible. *Church of Lukumi Babalu Aye*, 508 U.S. at 531-32.[2]

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[2]Free Exercise Clause jurisprudence is similar to Free Speech Clause analysis, which has perhaps the most clearly developed jurisprudence ensuring neutrality. Much like free exercise regulation, speech regulation that is content-based—targeting speech based on "the topic addressed or idea or message expressed"—the government must satisfy strict scrutiny and demonstrate that its regulation is the least restrictive means to serve a compelling government interest. *Reed v. Town of Gilbert,* 135 S. Ct. 2218, 2227 (2015). But when speech regulation is content- or viewpoint-neutral—that is, speech regulation that facially neutral and is justified without reference the content of the speech its regulates—it must satisfy lesser scrutiny. *See Ward v. Rock Against Racism*, 491 U.S. 781, 792 (1989).

3. The Interplay Between The Religion Clauses Does Not Negate Their Neutrality Protections.

Notwithstanding the Religion Clauses' wholesome neutrality protections, this Court has found that a tension can exist between the Clauses. In *Walz,* the Court has acknowledged that it "has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." 397 U.S. at 668-669. This interplay between the Religion Clauses was recently confirmed in *Locke v. Davey*, where the Court observed that they "are frequently in tension," 540 U.S. 712, 718 (2004), and a year later in *Cutter v. Wilkinson*, where the Court again stated that "[w]hile the two Clauses express complementary values, they often exert conflicting pressures." 544 U.S. 709, 719 (2005).

The Court's recent solution to addressing this interplay has been to recognize a "play at the joints" between the Religion Clauses that can form the basis for upholding certain state laws implicating the Clauses. In doing so, the Court reasoned that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Locke*, 540 U.S. at 718. *See also Trinity Lutheran*, 137 S. Ct. at 2019 ("we have recognized that there is 'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels.").

The *Locke* case involved a Washington scholarship program that prohibited awarding government-sourced scholarship funds to students pursuing a degree in devotional theology to go into ministry.

Locke, 540 U.S. at 715. The Court reasoned that, on the one hand, the link between government spending and religious training was broken by independent choice, avoiding implicating the Establishment Clause. *Id.* at 719. On the other, it reasoned that the state's anti-establishment interests were compelling and the law narrowly tailored such that the Free Exercise Clause was not violated. *Id.* at 722-24. So the program fit between "the joints" of the Religion Clauses. *Id.* at 719.

This "play at the joints" has no clear, definitive parameters, however. As Justice Scalia, joined by Justice Thomas, observed in dissent in *Locke*, "play at the joints" is a principle that is "not so much a legal principle as a refusal to apply *any* principle when faced with competing constitutional directives," *Locke,* 540 U.S. at 728. It leaves the door open for states to "discriminate a little bit each way and then plead 'play in the joints' when haled into court." *Id.* at 728. Because it lacks definition, the "play at the joints" principle is not limited to apply only "when it was a close call whether complying with one of the Religion Clauses would violate the other." *Id.* at 728.

This lack of principle is evident in the decision below. There, the court, concluding "that Montana's Constitution more broadly prohibits 'any' state aid to sectarian schools"—drawing a "'more stringent line than that drawn' by its federal counterpart"—nonetheless "considers Article X, Section 6, within a narrower 'room for play' between the federal Religion Clauses," and so consequently declined to "address federal precedent." App. 16. It offered no rationale, no legal analysis for its conclusion, simply resting on the "play at the joints" window within which it

asserted Montana's "Blaine Amendment"[3] landed.

In so doing, Justice Scalia's concerns have been realized: Montana's Blaine Amendment imposes unequal treatment based on religion in violation of the Free Exercise Clause—it's not even a close call case. And yet, as predicted, *Locke*'s "play at the joint" "principle" was employed to allow Montana to discriminate against religion anyway.

Whatever role "play at the joints" may have in Religion Clause jurisprudence, it is undisputed that it was not intended to supplant the unified requirement of "wholesome neutrality" under the Religion Clauses. The *Locke* court expressly identifies this neutral zone when it states that "there are some

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[3] The court below construed Article X, Section 6 to prohibit not just the direct support of religious organizations or even "*the direct or indirect taking of money* from the public treasury,' but *all* sectarian aid, mirroring the federal Blaine Amendment, an 1875 federal constitutional amendment proposed in Congress that was designed with clear animus towards Catholicism and its parochial school system by forbidding direct government aid to educational institutions with a religious affiliation. 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, 556-59 (2003). Around forty states have similar, "sectarian" proscriptions in their state constitutions. Patrick Loughery, Note, *Inhibiting Educational Choice: State Constitutional Restrictions on School Choice*, 30 Notre Dame J. L. Ethics & Pub Pol'y 449, 456 (2016) *See* DeForrest, *supra* note 5, at 554 n.14 (providing examples of state Blaine Amendments). The scope of these Amendments is much broader than that considered in *Trinity Lutheran*. *See Trinity Lutheran*, 137 S. Ct. at 2023 ("Washington's scholarship program went 'a long way toward including religion in its benefits.' *Locke*, 540 U. S., at 724, 124 S. Ct. 1307, 158 L. Ed. 2d 1. Students in the program were free to use their scholarships at 'pervasively religious schools.' *Ibid*.").

state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Locke*, 540 U.S. at 718. And the *Locke* holding is wholly consistent with the Establishment Clause proscription on government directly promulgating religious practices and traditions—funding education that prepares students to lead a congregation, *Locke,* 540 U.S. at 719, is the epitome of this prescription. And while the alternative is unequal treatment based on religiously motivated conduct—a Free Exercise violation—that this tension can be reconciled through narrow tailoring under Free Exercise jurisprudence readily justifies upholding such a law. *See Locke*, 540 U.S. at 724 (finding Washington State's scholarship program's devotional theology exception to be narrow compared to the other religious inclusions it provided). Such analysis addresses a close call, to be sure, but yields an outcome that closely hews to and respects the Religion Clauses' wholesome neutrality protections.

B. Montana's Blaine Amendment Does Not Afford Wholesome Neutrality Protections.

The court below was not presented with a close call, however. Nor in interpreting Montana's Constitution as it did, did it address any of the neutrality concerns Montana's Blaine Amendment raises.

The Amendment, found at Article X, Section 6 of Montana's Constitution, states:

> (1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectari-

> an purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.
>
> (2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education.

App. 17. Interpreting the provision to proscribe *any* state aid to sectarian schools,[4] the Court pointed to *Locke*'s "play at the joint" principle as self-evident justification for such a sweeping religious proscription. App. 16.

Montana's Blaine Amendment does not satisfy the wholesome neutrality of the Religion Clauses. As described by amici Montana Catholic Parents, The Catholic Association Foundation, and the Invest In Education Foundation (collectively "Catholic Parents"), the Blaine Amendments were motivated by animus against Catholics in favor of Protestantism. Catholic Parents Am. Br. Supp. Pet. at 21-25. Montana's Blaine Amendment thus promulgates religious practices and traditions in violation of Establishment Clause by proscribing doctrinal preferences. This also establishes unequal treatment based on religious status and religiously motivated conduct, prescribing *any aid* to religious schools, in violation of the Free Exercise Clause. *See* Pet. Br. at 17-19. The Court should find it unconstitutional.

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[4] The court below goes to great lengths to show how Article X, Section 6 is considerably more sweeping than other state's religious funding exceptions. App. 21-22.

C. Montana's Student-Aid Program Affords Wholesome Neutrality Protections.

As Petitioners describe in their opening brief, Montana's student-aid program allows Montana taxpayers a tax credit of $150 for donations they make scholarship organizations, which award scholarships to families who wish to send their children to private schools. Pet. Br. at 4-5. Reasoning that Montana's student-aid program was contrary to Montana's Blaine Amendment, the court below struck down the program in its entirety. App. 31.

The program in its entirety, enacted in 2015 through Senate Bill 410 and codified at MCA § 15-30-3101 *et seq*., created tax credits for donations to public schools and student scholarship organizations. *See* S.B. 410, 64th Leg., Reg. Sess. at 8-11, §§ 13-14 (Mont. 2015), https://leg.mt.gov/bills/2015/billpdf/SB0410.pdf; MCA §§ 15-30-3110 and 15-30-3111. Section 14 of Senate Bill 410, codified at MCA § 15-30-3111, applies uniformly to all "qualified education providers," regardless of religious affiliation. *See* App. 10-11.

The student-aid program of Section 14—indeed, the program in its entirety—neither discriminates for or against religious beliefs nor outlaws religiously motivated conduct. App. 10-11. It establishes equal treatment both among the taxpayers who donate to the program and the students who benefit from the program. Montana's student-aid program is the epitome of Free Exercise Clause neutrality.

Likewise, Montana's student-aid program steers clear of Establishment Clause neutrality concerns. It does not even involve the government fisc, *see* Cato Inst. Am. Br. Supp. Pet. at 2 (citing *Ariz. Christian*

Sch. Tuition Org. v. Winn, 563 U.S. 125 (2011)),[5] and instead simply provides a tax credit, capped at $150, to donors who give to a participating private scholarship program. Donors who contribute to public schools enjoy a similar tax credit. *See* MCA § 15-30-3110. Montana's student-aid program poses no risk of compelled religious adherence or promulgating religious practices or traditions. So it poses no Establishment Clause neutrality concerns.

The Court should find Montana's student-aid program is constitutional under the Religion Clauses.

II. Montana's Blaine Amendment Harms Montanans Who Benefit From Montana's Student-Aid Program.

The decision of the court below to broadly interpret Article X, Section 6 of the Montana Constitution has considerable, harmful implications for Montana's students. Unlike in *Trinity Lutheran*, where "[s]tudents in the program were free to use their scholarships at 'pervasively religious schools,'" 137 S. Ct. at 2023, needy Montana students continue to struggle to find access to educational choice.

The Montana legislature adopted a neutral student-aid program to encourage student opportunity for scholarships from scholarship organizations providing financial help to attend private schools. *See* S.B. 410, 64th Leg., Reg. Sess. at 8-11, §§ 13-14 (Mont. 2015), https://leg.mt.gov/bills/2015/billpdf/

[5] In *Ariz. Christian Sch. Tuition Org.*, the Court held that Arizona's student-aid program—a program substantially similar to Montana's—did not implicate the Establishment Clause because its tax credits relate to how taxpayers spend their own money and not to money the State has collected from taxpayers. 563 U.S. at 142-44.

SB0410.pdf. This provides Montana families, especially the most needy, with educational options, and benefits all Montanans.

In 2016, an estimated 14,857 of the 99,861 18–24 year-olds residing in Montana did not have a high school diploma.[6] Montana's per capita income (2013-2017) was $28,706, with 12.5% of Montanans living in poverty.[7] Increased education opportunity increases both incomes and employment rates.[8] This in turn represents increased revenue to the state, which at present secures over half of its revenue from individual income tax.[9] Indeed, the financial cost of a Montana student that drops out of high school is an estimated $888,460 of income over 30 years to that student and nearly $300,000 in social service costs to the state.[10] Montana can ill-afford to be discriminating against and propounding historical animus towards needy Montana students who happen to be religious by using "religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." *McDaniel* v. *Paty*, 435 U. S.

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[6] *See* Didi Fahey, *Value of a High School Diploma: Quantitative Research Evaluation and Measurement*, Alliance for Choice Education, at 16 (June 16, 2017), https://act.acescholarships.org/wp-content/uploads/2018/09/ 2017-Value-of-a-Diploma.pdf.

[7] *QuickFacts Montana*, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/MT/PST045218 (last visit-ed Sept. 17, 2019).

[8] *Unemployment rates and earnings by educational attainment*, U.S. Bureau of Labor Statistics, https://www.bls.gov/emp/chart-unemployment-earnings-education.htm (last visited Sept. 17, 2019).

[9] *Governor's Budget Fiscal Year 2018-2019*, Governor's Office of Budget and Program Planning, at 2-1 Tab. 1, https://budget.mt.gov/Portals/29/execbudgets/2019_Budget/Volume_2.pdf (last visited Sept. 17, 2019).

[10] Didi Fahey, *supra* n. 6, at 3, 16.

618, 639 (1978) (Brennan, J., concurring). Yet that is precisely what the decision below requires.

All Montana parents participate in the burdens and obligations of our civil society but now, because of Montana's Blaine Amendment, are being excluded from participating in any corollary benefits that would otherwise inure to them simply because they choose to integrate their religious faith in their education and daily life. Parents are placed in the position of exercising their fundamental right to raise their children according to their religious tenets and beliefs, *Troxel v. Granville*, 530 U.S. 57, 66 (2000), with the very real financial reality that they must do so on their own. Such social injustice should not be allowed to stand.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Montana Supreme Court.

Respectfully submitted,

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