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 FOR SENATORS STEVE DAINES, TIM SCOTT, JOHN KENNEDY, AND MARSHA BLACKBURN AND REPRESENTATIVE GREG GIANFORTE AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICI CURIAE*[*]

Amici Steve Daines, Tim Scott, John Kennedy, and Marsha Blackburn are United States Senators representing the States of Montana, South Carolina, Louisiana, and Tennessee, respectively. *Amicus* Greg Gianforte is a Member of the United States House of Representatives for the State of Montana. Their role under Article I of the Constitution in enacting legislation gives these legislators a paramount interest in ensuring that the Court properly interprets federal statutes, including the 1889 Enabling Act that compelled Montana and other States to adopt so-called "mini-Blaine amendments" prohibiting aid to "sectarian" schools. As members of a coequal branch, *amici* also have a strong interest in promoting the proper interpretation of the Constitution's Free Exercise Clause.

SUMMARY OF ARGUMENT

On July 4, 1894, Montanans gathered in the city of Butte for patriotic festivities. There was much to celebrate that Independence Day: Montana had attained statehood just five years earlier, and Montanans finally enjoyed full self-government. Red, white, and blue bunting festooned many of Butte's public spaces.

The night before, local saloonkeepers Simon Housworth and J.J. Anderson joined in by tacking up bunting of their own, spelling out "A.P.A." in "mammoth letters." *Riot at Butte*, Dillon Trib., July 6, 1894, at 1. "APA" stood

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[*] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3, *amici* affirm that all parties have filed blanket letters of consent to the filing of amicus briefs with the Clerk's Office.

for the American Protective Association, a powerful, virulently anti-Catholic organization founded in 1887 that claimed 2.5 million members by the mid-1890s. Brian Leech, *"Hired Hands from Abroad": The Populist Producer's Ethic, Immigrant Workers, and Nativism in Montana's 1894 State Capital Election* 8, James A. Rawley Conference in the Humanities (2008); *Secret Work of the A.P.A.*, N.Y. Times, July 5, 1894. In Butte, a city of 30,000, the APA boasted some 2,000 members, and the group held immense sway in Montana politics. David M. Emmons, *The Butte Irish* 13, 115 (1989); Pet. Br. 40-41.

The group's initials could not have been more inflammatory in Butte, or indeed anywhere else in America. The message "A.P.A." conveyed, on Independence Day of all days, was unmistakable: Catholics had no place in America. To the APA and its members, Catholicism was a conspiratorial religion bent on infiltrating the government and delivering America to the Pope through violent uprisings. Humphrey J. Desmond, *The A.P.A. Movement: A Sketch* 52-60 (1912). APA members swore an oath to "use [their] utmost power to strike the shackles and chains of blind obedience to the Roman Catholic Church from . . . a priest-ridden and church-oppressed people," and to neither employ nor vote for any Catholic. *Id.* at 36-38. And the APA insisted that Catholics—especially noncitizens—should never gain a foothold in "non-sectarian free public schools," seen as the "bulwark of American institutions." Pam Epstein, *The American Protective Association*, Vassar 1896 Project, http://projects.vassar.edu/1896/apa.html (last visited Sept. 16, 2019) (quoting *American Protective Association Statement of Principles* (1894)). Indeed, just one year earlier, the APA's Butte members had acted on that conviction by trying to seize control of a faltering parochial school in town. Emmons, *supra*, at 115.

The saloonkeepers' display in the heart of Butte provoked a response that was literally incendiary. APA opponents blew up the sidewalk in front of Housworth's saloon "with giant powder, but without injury to any person." *Butte's Fatal Riot*, New Northwest, July 6, 1894, at 1. Butte's mayor and sheriff urged the saloonkeepers to "remove the objectionable emblems" "in the interest of peace." *Id.* Housworth complied, but Anderson refused.

Crowds gathered outside Anderson's saloon, eventually swelling to 8,000 men. *Id.*; *Riot at Butte*, *supra*. Stones broke the saloon's windows. A rioter drew a pistol and shot a special policeman through the heart. *An A.P.A. Riot in Montana*, N.Y. Times, July 5, 1894. More shooting broke out; chaos ensued. *Id.*; *Butte's Fatal Riot*, *supra*. The militia, called up from Helena, imposed martial law and shut all saloons, pawnshops, and purveyors of ammunition. *An A.P.A. Riot*, *supra*. When the dust settled, twenty rioters were in jail and a local newspaper grimly predicted the "early and repeated recurrence of trouble over the affair." *Butte's Fatal Riot*, *supra*.

Today, the prospect that thousands of Americans would come to blows over Catholics' participation in American life seems thankfully remote. But in the late nineteenth century, no less than President Grant warned that tensions over governmental support for Catholic schools could ignite another civil war. *See* John T. McGreevy, *Catholicism and American Freedom* 91 (2003). All understood that the Butte riot was "caused by a difference of religious opinion—a conflict between the Catholics and the A.P.A." *Riot at Butte*, *supra*. And the APA riot was no isolated incident: burnings and bombings of Catholic churches were distressingly common during the nineteenth century.

Above all, passions flared over the fate of American public schools, which were then universally Protestant in their outlook. Catholics were migrating to America in record numbers, adding their voices to many Catholics' longstanding objections that subjecting their children to classroom readings of the King James Bible and anti-Catholic textbooks violated their religious beliefs. Many Catholics thus sought to establish Catholic schools of their own, supported by public funds, if public schools would not accommodate their faith. Those efforts drew opposition from many corners, including nativists who wanted to keep America Protestant and secularists who hoped to rigidly separate religion and government. The APA's fears of Catholic subversion might have struck many Americans as extreme, but much of the American public sympathized with its anti-Catholic bigotry.

Hostility to Catholicism also ran rampant in the halls of the United States Congress. The official position of the Republican Party was to preserve generically Protestant values in public schools by ensuring that no funds, directly or indirectly, could go to "sectarian" schools—code for Catholic schools. Plenty of Democrats crossed party lines to endorse that position. Their combined efforts, spearheaded by Representative James G. Blaine, came within a hair's breadth of enshrining that position in an amendment to the United States Constitution in 1875.

Blaine's amendment failed, but its supporters in Congress persisted, turning their attention to state constitutions. Starting in 1889, Congress leveraged its power over statehood to require new entrants to the Union to adopt mini-Blaine amendments as the price of admission. The 1889 Enabling Act admitted Montana, North Dakota, South Dakota, and Washington—but forced them to repu-

diate any "sectarian" control over public education. Montana's mini-Blaine amendment, adopted in 1889 as art. XI, § 8 of its Constitution and readopted in 1972 as art. X, § 6, is typical of the many ensuing mini-Blaine amendments. That provision forbids "any direct or indirect appropriation or payment . . . for any sectarian purpose" or to support any educational institution "controlled in whole or in part by any church, sect, or denomination." Mont. Const. art. X, § 6(1).

No one questioned what those words meant. "Sectarian" was a derogatory synonym for "Catholic" in the late nineteenth century, just as "nonsectarian" signified majoritarian Protestant views. Bans on aiding "sectarian" schools were bans on giving any public funds to Catholic schools, plain and simple—even as funds continued flowing to public schools that inculcated Protestant beliefs. That Montana's prohibition on public funds further extended to institutions controlled in any way by "any church, sect, or denomination" did not, in practice, change anything. Catholic schools were overwhelmingly the institutions meeting that description. Pet. Br. 42.

Montana's mini-Blaine amendment, in short, was egregiously unconstitutional from its inception. If the Free Exercise Clause means anything, it is that the government "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2020 (2017) (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947)). But the plain meaning and effect of Montana's mini-Blaine amendment did just that, excluding Catholic schools from

eligibility for generally available public funds, solely because those schools aligned themselves with the Catholic faith.

Nor has Montana's mini-Blaine provision improved with age. Today, Catholic schools are just one of many types of educational institutions in Montana that are controlled in any way by a "church, sect, or denomination." But it is no defense to the Free Exercise Clause to say that Montana has lessened its anti-Catholic animus by treating other religiously affiliated schools just as poorly when it comes to eligibility for generally available public benefits. Montana's mini-Blaine provision impermissibly disqualifies all of these schools from public aid "solely because of their religious character," *Trinity Lutheran*, 137 S. Ct. at 2021, while opening the State's coffers to secular private schools and institutions. The State has no possible interest in sustaining such discrimination, and the Free Exercise Clause demands an end to this shameful history.

ARGUMENT

I. Montana's Blaine Provision Flowed Directly from the Failed Federal Blaine Amendment

From their inception, American public schools were "unmistakably Protestant." John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 297 (2001). That orientation flowed naturally into the "common school" movement of the mid-1800s, which championed the establishment of public schools infused with "explicitly religious moral instruction." Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493, 502-03 (2003). Hallmarks of such "common schools" included daily readings from the King James Version of the Bible, recitations of the Lord's Prayer, and singing hymns. *Id.* at 503; *see* Jay S. Bybee & David W.

Newton, *Of Orphans and Vouchers: Nevada's "Little Blaine Amendment" and the Future of Religious Participation in Public Programs*, 2 Nev. L.J. 551, 555 (2002). The founders of the "common school" movement, many of whom were Protestant ministers, considered this lowest-common-denominator Protestant instruction "nonsectarian" because it excluded the distinctive doctrines of specific denominations—especially Catholicism. *See* Duncan, *supra*, at 502-04; *see* Michael W. McConnell, *Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have to Say?*, 1991 U. Chi. Legal F. 123, 138; Lloyd P. Jorgenson, *The State and the Non-Public School* 26, 28 (1987).

As the country's Catholic population rose from 30,000 or so at the Founding to over 12 million by 1900, Jeffries & Ryan, *supra*, at 299-300, many Catholics balked at the common-school "nonsectarian" curriculum, which to them hardly seemed neutral. In particular, many Catholics objected to common schools' use of the King James Bible, which came from the schismatic Church of England; worse, requiring students to read it without accompaniment "violated Catholic conviction that scripture should be read only in the context of the Church's authoritative doctrinal tradition." Duncan, *supra*, at 505. Catholics increasingly founded their own parochial schools and sought public funds to support them. Jeffries & Ryan, *supra*, at 300-01. Bolstering this trend, in 1884, a national council of bishops ordered every parish nationwide to establish a parochial school within two years, and mandated that all Catholic parents send their children to the parish school. Anthony E. Conte & Eugene R. Mason, *Catholic Education in New Jersey and the Nation* I-4-5 (1970).

Thus, by the mid-nineteenth century, the overwhelming majority of American private schools were Catholic,

and the battle lines over religion in education were drawn across the nation. *See* Jorgenson, *supra*, at 69-70, 125; McGreevy, *supra*, at 115. Those battles often translated into violence. After New York City's bishop called for public support for Catholic schools in 1842, a mob destroyed his home; only the intervention of the state militia saved St. Patrick's Cathedral. Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 669 (1998). In Boston in 1859, the vicious caning of a Catholic common-school student who refused to recite the Protestant version of the Ten Commandments became a national *cause celebre*, with local ministers blaming "Catholic aggression." McGreevy, *supra*, at 7-9. By 1875, fourteen States had laws "to seal off public funds from sectarian control." Duncan, *supra*, at 507.

The West was no exception. Plans to provide public support for Catholic schools, or to establish special rules for Catholic students in the common schools, provoked strenuous public opposition. Jorgenson, *supra*, at 117. Montana's experience is illustrative: thousands of Catholic immigrants migrated to work in the burgeoning mining industry, *see* Emmons, *supra*, at 94-95, and schools followed. By the 1880s, Catholic schools had sprung up in Helena, Missoula, Bozeman, Deer Lodge, and Butte. Cornelia M. Flaherty, *Go With Haste Into the Mountains: A History of the Diocese of Helena* 18, 20, 24-25, 47-48 (1984). Meanwhile, Montana's territorial government in 1872 enacted a law requiring school boards to ban "sectarian" literature in schools and libraries, on pain of losing public funding—but retained religious instruction. Pet. Br. 36. And leaders of Montana's public schools increasingly derided any "sectarian" influence in public schools, while bitterly opposing the use of public funds to support "sectarian" private schools. Pet. Br. 38-39.

In 1875, President Ulysses S. Grant raised the stakes further, calling on Americans to keep public money from being "appropriated to the support of any sectarian school." McGreevy, *supra*, at 91 (quoting Ulysses S. Grant, Address to Veterans of the Union Army of Tennessee (Oct. 29, 1875)). President Grant's annual message to Congress in December 1875 then proposed a federal constitutional amendment to bar public funds from religious schools, warning that without adequate public education, "ignorant men" would be vulnerable to the wiles of "priestcraft." Duncan, *supra*, at 508 (quoting 4 Cong. Rec. 175 (1875)) (internal quotation marks omitted).

Speaker of the House James G. Blaine—a future Senator, presidential candidate, and Secretary of State—fleshed out the details the following week, introducing a constitutional amendment to ban public aid by any government to any religious "sect." *Id.* at 509. The Blaine amendment would have rewritten the Religion Clauses of the First Amendment to read:

> No state shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

Philip Hamburger, *Separation of Church and State* 297-98 (2002).

Blaine's proposal "conformed to the Protestant or nativist conception" of church-state separation—that is, it was "an anti-Catholic measure that still permitted a gen-

eralized Protestantism in public schools." *Id.* at 298. Indeed, the Senate added language to preserve "nonsectarian" Protestantism in state-funded schools by expressly exempting classroom Bible reading from the amendment's prohibition. Donald L. Drakeman, *Church, State, and Original Intent* 318 (2010).

The Blaine Amendment passed the House of Representatives but fell shy of a two-thirds majority in the Senate. *Id.* But all was not lost for its supporters in Congress. The United States' Western territories were beginning to press for admission to the Union. Congress had long used its authority over admitting new States to impose conditions of statehood. *See* Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 Am. J. Legal Hist. 119, 120 (2004). Blaine's supporters in Congress exploited this power to achieve at the state level what they had failed to do at the federal level: ensure that the new States could not devote one penny of public funds to Catholic schools.

A. The Enabling Act of 1889 Required Montana to Prohibit "Sectarian" Control of Public Schools

Like other Western territories, Montana aspired to statehood in the late nineteenth century. Montanans chafed at the fact that they were American citizens, yet lacked the authority to govern themselves fully. *See* William C. Rava, Comment, *Toward a Historical Understanding of Montana's Privacy Provision*, 61 Alb. L. Rev. 1681, 1686 & n.39 (1998). The territorial governor called Montana's first constitutional convention in 1866, which quickly failed, not least because the population was too small for statehood. *Id.* at 1686-87. But the drive for greater independence from federal control strengthened

as the territory's population, wealth, and infrastructure expanded. *See id.* at 1687.

Montanans called another constitutional convention in 1884 and produced a new draft constitution. *Id.* Inspired by the failed Blaine amendment, the draft prohibited spending any public funds "in aid of any church, or for any sectarian purpose," or to support any educational institution "controlled in whole or in part by any church, sect or denomination whatever." Mont. Const. art. IX, § 9 (1884). The delegates begged Congress to liberate Montana from the status of an internal colony: "[T]he policy which has so long prevailed, of sending strangers to rule over us and fill our offices, has become distasteful to us," they wrote. H.R. Rep. No. 50-1025, at 10 (1888). But their plea fell on deaf ears, in part because members of Congress feared disrupting the political balance of the Senate. Rava, *supra*, at 1690 & n.63. Congress held the keys to Montana statehood, and Montanans were at its mercy.

By 1888, Congress was ready to reconsider. That spring, the House Committee on the Territories had on its calendar statehood-enabling bills for Dakota (still a unified territory at the time), Montana, Washington, and New Mexico. H.R. Rep. No. 50-1025, at 1. The committee's chair, Representative William M. Springer, was an Illinois Democrat who had crossed party lines to support the federal Blaine Amendment. Robert F. Utter & Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington Constitution*, 15 Hastings Const. L.Q. 451, 464 n.57 (1988). Springer's committee decided to combine the various pending bills into a single "omnibus" statehood bill that would authorize all four territories to form constitutions. *See* H.R. Rep. No. 50-1025, at 30.

But Blaine amendment supporters in Congress sought to exact a heavy price for admission to the Union. Springer's bill declared that if Montana and its sister territories wanted statehood, they had to comply with an array of policy mandates, including:

> That provision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all the children of said States *and free from sectarian control*.

H.R. 8466, 50th Cong. § 4, Fourth (2d Sess. 1889) (emphasis added). The bill also provided for certain land grants to support schools in the new States, but declared:

> The schools, colleges, and universities provided for in this act shall forever remain under the exclusive control of the said States, respectively, and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes shall be used for the support of any sectarian or denominational school, college, or university.

Id. § 13 (emphasis added).

No previous enabling act had ever mandated nonsectarian public schools. *See* Utter & Larson, *supra*, at 460. Nonetheless, President Grover Cleveland signed the Enabling Act into law on February 22, 1889. *See* Ch. 180, 25 Stat. 676 (1889).[1] The Act included, verbatim, both of the

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[1] A conference committee agreed to drop New Mexico statehood from the bill. 20 Cong. Rec. 2,101 (1889). New Mexico's statehood campaign had faced greater opposition than others, in part because most of its citizens were Catholics of Mexican ancestry. *See id.* at 2,102. Some legislators even insinuated that the people of New Mexico Territory were not ready for statehood because priests had kept them uneducated, and the residents believed in outdated "superstition." *See* H.R. Rep. No. 50-1025, at 42-43.

Blaine provisions from the House bill as quoted above, and thus gave Montana, North and South Dakota, and Washington their marching orders. *Id.* §§ 4, Fourth, 13.[2]

B. Constitutional Framers in the 1889 States Understood that the Enabling Act Mandated Blaine Prohibitions on Aiding "Sectarian" Schools

1. The ratifiers of Montana's 1889 Constitution barely discussed the wisdom of adopting a constitutional provision to keep schools free from "sectarian" control. They had no choice. And the draft 1884 constitution already provided ready language that would satisfy Congress's mandate. The 1889 provision, ratified as Article XI, § 8, stated:

> Neither the Legislative Assembly, nor any county, city, town, or school district, or other public corporations, shall ever make directly or indirectly, any appropriation, or pay from any public fund or moneys whatever, or make any grant of lands or other property in aid of any church, or for any sectarian purpose, or to aid in the support of any school, academy, seminary, college, university, or other literary, scientific institution, controlled in whole or in part by any church, sect or denomination whatever.

Mont. Const. art. XI, § 8 (1889), *reratified in substance as* Mont. Const. art. X, § 6 (1972); *see also Proceedings and*

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[2] Congress did not stop there, inserting materially similar language into Enabling Acts for Utah, Oklahoma, New Mexico, Arizona, and Wyoming in the ensuing decades. Duncan, *supra*, at 514, 519. By one estimate, 30 States have adopted mini-Blaine amendments, of varying degrees of restrictiveness, some voluntarily and others at Congress's command. 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, 576 (2003).

Debates of the Constitutional Convention 529 (Mont. 1889).

Though the prohibition on any aid to "sectarian" schools or institutions exceeded what the Enabling Act required, the ratifiers nonetheless saw themselves as executing Congress's commands. The ratifiers' collective sentiment regarding § 4, Fourth of the Enabling Act was summed up by William W. Dixon, of Silver Bow: "I desire to state that it seems to be very important to adhere closely to what Congress says. We have in here just exactly what Congress requires, and I am decidedly in favor of this matter following the language and the exact words of the Act of Congress." *Proceedings and Debates of the Constitutional Convention* 888 (Mont. 1889). Another delegate reiterated that it was "necessary from the Enabling Act" that the provision barring aid to sectarian schools "shall be in the ordinance." *Id.* at 959; *see also Montana ex rel. Chambers v. Sch. Dist. No. 10*, 472 P.2d 1013, 1016-17 (Mont. 1970) (per curiam) (noting that article XI, section 8 of the 1889 Constitution was adopted "in compliance with the Enabling Act"). Thus the Montana Constitution came to contain a mini-Blaine provision.

2. The ratifiers of the state constitutions in North Dakota, South Dakota, and Washington were also under no illusions about what the 1889 Enabling Act required of them. Article IX, § 4 of the Washington Constitution—which provides, "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence"—exists to satisfy the Enabling Act's mandate. *See Locke v. Davey*, 540 U.S. 712, 723 n.7 (2004) (internal quotation marks omitted). The drafter of that provision explained that he adapted it from the Illinois Constitution, "modified only so far as it

seems necessary to bring it into conformity to the provision on this subject in the [Enabling Act]." Utter & Larson, *supra*, at 475 n.122 (quoting Morning Oregonian, July 4, 1889, at 11, col. 1). The only substantive change Washingtonians made was to prohibit sectarian *influence*, not just control. *See id.*[3]

At North Dakota's constitutional convention, copies of the Enabling Act rested on every delegate's desk. *Official Report of the Proceedings and Debates of the First Constitutional Convention of North Dakota* 67 (1889) (hereinafter *North Dakota Proceedings*). Delegates recognized that the Enabling Act's provisions "are matters in which we have no discretion. They are just and reasonable provisions that are laid down by the Enabling Act as absolutely essential to our admission into the Union." *Id.* Delegates understood that it was "absolutely necessary" that the draft mandate non-sectarian schools. *Id.* at 68. Thus, Article VIII, § 1 of the North Dakota Constitution provides that "the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota and free from sectarian control." The framers chose that language to "embod[y] the language" of the Enabling Act. *North Dakota Proceedings*, *supra*, at 152.

South Dakota was uniquely situated because its 1885 convention had produced a draft constitution, the "Sioux Falls Constitution," that already prohibited aid to "sectarian" schools. *See* S. Rep. No. 50-75, at 52, 56 (1888).

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[3] By contrast, the Court concluded that Article I, § 11, of the Washington Constitution, the prohibition on public support for "religious worship, exercise, or instruction" at issue in *Locke v. Davey*, is not a Blaine provision because its history was not tethered to the federal Blaine amendment or its state progeny. *See* 540 U.S. at 723 n.7.

The Enabling Act provided that South Dakotans would simultaneously vote on reapproving the Sioux Falls Constitution and on delegates to the constitutional convention. 25 Stat. 677-78, § 5. If the voters reapproved that constitution, then convention delegates could only make technical edits. *See id.* That provision reflected Congress's expectation that South Dakota would have complied with the same Blaine amendment mandate it imposed on the other States. *See* S. Rep. No. 50-75, at 52, 56; S.D. Const. art. VI, § 3; *id.* art. VIII, § 16. And South Dakota voters delivered, reapproving the Sioux Falls Constitution so that delegates avoided "any changes to the constitution that might conflict with the requirements of the [Enabling Act]." Patrick M. Garry & Candice Spurlin, *History of the 1889 South Dakota Constitution*, 59 S.D. L. Rev. 14, 29 (2014) (quoting Jon K. Lauck, *Prairie Republic* 127 (2010)). Just to be safe, South Dakota's ratifiers appended § 4 of the Enabling Act as Article XXII of the South Dakota Constitution, thereby including the requirement that public schools be "free from sectarian control" verbatim. S.D. Const. art. XXII.

II. The Enabling Act and States' 1889 Blaine Provisions Used the Term "Sectarian" To Discriminate Against Catholics

In the late nineteenth century, there was little ambiguity as to what various prohibitions on "sectarian" control over public schools and on aid to "sectarian" institutions meant. The term "sectarian" generally meant "Catholic." Keeping state-funded schools free from "sectarian" control meant that the public fisc could continue supporting Protestant teachings in public schools, as States had done for generations. But no school receiving public funds could teach "sectarian"—that is, Catholic—beliefs. Likewise, prohibitions on aiding "sectarian"

schools meant that not one dollar of public funds could make its way to Catholic schools for any purpose.

1. Members of the Court have long noted that in the nineteenth century, "it was an open secret that 'sectarian' was code for 'Catholic.'" *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion). Initiatives to ensure that "public money must not support 'sectarian' schools" thus "in practical terms meant Catholic." *Zelman v. Simmons-Harris*, 536 U.S. 639, 721 (2002) (Breyer, J., dissenting) (internal quotation marks omitted).

Nineteenth-century dictionaries confirm that the term "sectarian" was a pejorative directed at Catholics and other disfavored denominations, not a synonym for "religious." *See* Robert G. Natelson, *Why Nineteenth Century Bans on "Sectarian" Aid Are Facially Unconstitutional: New Evidence on Plain Meaning*, 19 Fed. Soc'y Rev. 98, 101-02 (2018). These dictionaries define a "sectarian" as a "dissenter . . . out of the mainstream" or otherwise "associate the word with a negative term, such as 'prejudice,' 'bigot,' or 'heretic.'" *Id.* at 102. Newspapers and writers of the period similarly distinguished sectarianism from religion; associated "sectarian" behavior with bigotry, or alternatively with religious minorities; and labeled Catholics and other groups outside the Protestant majority (such as Mormons and Jews) as "sectarian." *Id.* at 103-05. Likewise, the chief supporters of Massachusetts' 1854 constitutional amendment—the nativist and anti-Catholic Know-Nothing Party—explained that the prohibition on diverting public funds to schools operated by "religious sect[s]" was "intended to have special reference" to the Catholic Church. *Official Report of the Debates and Proceedings in the State Convention Assembled May 4, 1853 to Revise and Amend the Constitution of the Commonwealth of Massachusetts*, Vol. II, at 630.

Members of Congress were similarly unabashed in using the term "sectarian" to express disdain for Catholics. During Senate floor debates over the 1889 Enabling Act, Senator Henry W. Blair of New Hampshire announced his enthusiastic support for requiring new States to keep their schools "free from sectarian control." 20 Cong. Rec. 2,100 (1889). His remarks are particularly illuminating as to the original public meaning of the term "sectarian" because he quoted at length from a petition from leading citizens of Philadelphia that equated "sectarian" control with a perceived Catholic menace. Senator Blair started with the petition's framing of the problem:

> Two grave dangers threaten at this hour the American system of common schools, the atheistic tendency in education and the strenuous demand for a division of the school funds in the interest of sectarian or denominational schools. . . . We have, therefore, observed with pleasure the introduction of a joint resolution . . . which, while it recognizes the Christian character and purpose of our system of public education, forbids the appropriation of public money to any school or institution in which the peculiar doctrines or ceremonials of any religious sect or denomination are practiced or taught.

Id. The "joint resolution" in question was Senator Blair's renewed effort to shepherd a federal Blaine Amendment. *Id.* at 2,101. The petition further resolved:

> That this nation, in its origin and history, is Christian, [and that] the type of Christianity which has characterized our State and national life is that which secures to our people an open Bible, the right of private judgment, freedom of speech and of the press, and of the entire independence of our Government against all foreign domination, whether ecclesiastical or civil.

> The sovereign people and their government are not amenable to spiritual pontiffs or civil potentates, but to God and His law. . . . [O]ur common schools, as one of the most important institutions of our country, should correspond to the Christian origin, history, and character of the Republic itself."

Id. at 2,100-01. Quoting the petition further, Senator Blair contended that public support for the Catholic Church, and its doctrine of Papal infallibility, was "directly subversive of the principles of liberty on which the Republic has been founded." *Id.* at 2,101. In sum, Christianity in public schools was welcome—but "sectarian" Catholic influence purportedly threatened the Republic.[4]

True, "sectarian" was sometimes used as a synonym for "denominational" and so did not invariably mean "Catholic." *See, e.g.*, Daniel C. Gilman, *Present Aspects of College Training*, 136 N. Am. Rev. 526, 538 (1883) ("[M]any an argument has been framed to prove that sectarian colleges are better than those which seek to promote the union of several religious bodies."). But even

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[4] Some evidence suggests that supporters of Blaine amendments also understood the term "sectarian" to sweep in any schools and institutions affiliated with the Church of Latter-Day Saints. Some members of Congress expressed fears that Mormons would migrate from Utah to the new Western States and take control. *See* Biber, *supra*, at 157-58 n.158; *see also* Frank J. Conklin & James M. Vache, *The Establishment Clause and the Free Exercise Clause of the Washington Constitution—A Proposal to the Supreme Court*, 8 U. Puget Sound L. Rev. 411, 424-30 (1985). Common-school proponents also portrayed those schools as a way of "reforming" Mormons as well as Catholics, McGreevy, *supra*, at 112-13, and opposed sectarian education as a way for Mormons to sustain their religious traditions, *see* Utter & Larson, *supra*, at 466 n.72. That these prohibitions may have singled out Mormons as well as Catholics for discriminatory treatment hardly rehabilitates them.

when "sectarian" was used in this broader sense, it often had a negative connotation, and anti-Catholicism still typically underlay its use. *See, e.g.*, Edward McGlynn, *The New Know-Nothingism and the Old*, 145 N. Am. Rev. 192, 200 (1887) (criticizing "the appropriation of valuable public lands and of millions of dollars of public money, to the support of all manner of sectarian institutions under the control of churches, and especially of the Roman Catholic Church"); *Harrison Condemned: A Rebuke by Boston's Committee of One Hundred*, N.Y. Times, Jan. 28, 1890 (reporting that President Harrison's attendance at the opening of a Catholic seminary provoked a new petition for a constitutional amendment "prohibiting all sectarian appropriations"); Bybee & Newton, *supra*, at 569-70 (discussing 1882 Nevada Supreme Court decision that understood the word "sectarian" in its "popular sense" to mean a "distinct organization or party" such as the Catholic Church) (internal quotation marks omitted).

Conversely, in late nineteenth century usage, specific Protestant denominations were "nonsectarian" if they fell within the mainstream. *See* Jorgenson, *supra*, at 24-28. As members of this Court have observed, to nineteenth-century Americans, the term "nonsectarian," especially when used to describe schools, was thus ordinarily "understood to allow Bible reading and other Protestant observances." *Zelman*, 536 U.S. at 721 (Breyer, J., dissenting). This idea that some Christian (i.e., Protestant) principles were "nonsectarian" became the foundation of the common-school movement. Duncan, *supra*, at 503-04. Illustrating the pervasiveness of this usage, Harvard president Josiah Quincy believed "that Unitarians, Quakers, Methodists, Baptists, Episcopalians, and the Orthodox Church were all non-sectarian." Natelson, *supra*, at 104-05. Some news sources likewise expressly distinguished "denominational" schools (Protestant) from "sectarian"

schools (Catholic). *Id.* at 105. In the main, then, to late nineteenth century Americans, a ban on supporting "sectarian" institutions signified a ban on supporting religious minorities. And Catholics were then the country's most prominent religious minority. *See* Hamburger, *supra*, at 213-15.

2. The same understandings prevailed within the four States subject to the 1889 Enabling Act—Montana, North and South Dakota, and Washington.

Contemporaneous public discussion confirms that Montanans too understood that the word "sectarian" did not mean "religious," but was instead code for "Catholic." In 1876, when Montana was still a territory, local newspapers reported on the conflict between public schools (which were common schools) and "sectarian" schools. An article describing the tenets of the National Committee of the Order of the American Union explained that the group on the one hand "accept[ed] the Bible as the basis of all moral, religious, governmental, and educational undertakings." On the other hand, the group "claim[ed] that no part of the public funds shall be used for the support or maintenance of any sectarian school or institution whatever." *The National Committee of the Order of the American Union*, The Madisonian (Virginia City, Mont.), Jan. 15, 1876, at 3. That "sectarian" meant something besides "religious" was unmistakable. *Id.*

Similarly, Montana's *Dillon Tribune* in 1888 reported that "[o]ur public school system is the pride of the people, who are taxed according to their wealth, to keep it up independent of sectarian influences and free from the control of any party or religious denomination." *More Attention Given to the Election of School Officers than Usual*, Dillon Trib., Apr. 6, 1888, at 7. That same year, speakers at a Montana teachers' conference championed keeping

schools "Christian" while condemning the teaching of "sectarian doctrines." Pet. Br. 42-43. Opponents of "sectarian" education were afraid, not of religion in schools generally, but of the influence of specific, organized denominations—and Catholics were most identified with a structured and organized church. *See* McGreevy, *supra*, at 113; Hamburger, *supra*, at 211-13.

The Montana Constitution itself distinguishes between support for "religious" endeavors and hostility to "sectarian" activities. Indeed, its very first sentence begins, "We, the people of Montana, *grateful to Almighty God* for the blessings of liberty, in order to secure the advantages of a State government, do, in accordance with the provisions of the Enabling Act of Congress . . . ordain and establish this constitution." Mont. Const. pmbl. (1889) (emphasis added). Right off the bat, Montana's Constitution thus recognized the centrality of religion to the polity. That Constitution went on to guarantee the "free exercise and enjoyment of religious profession and worship" and to emphasize that "no person shall be denied any civil or political right or privilege on account of his opinions concerning religion." *Id.* art. III, § 4. The Constitution further required all members of the Montana legislature, as well as executive, ministerial, and judicial officers, to swear an oath that ended "So help me God." *Id.* art. XIX, § 1. But the Constitution at the same time flatly prohibited support for "sectarian" schools or teaching "sectarian" tenets in them. *See id.* art. XI, §§ 8-9.

Of course, while the text of Montana's mini-Blaine amendment focuses on prohibiting aid to "sectarian" schools and "sect[s]," it does not end there. Article XI, § 8 (and now, Article X, § 6) further prohibits directly or indirectly aiding any type of educational, scientific, or literary institution "controlled in whole or in part by any church,

sect, or denomination whatever." In practice, however, sweeping in institutions controlled in some way by churches or denominations, not just "sects," did not add much breadth. The overwhelming majority of institutions subject to this prohibition in 1889 were Catholic, since the dominant view was that no particular "church, sect, or denomination" controlled public schools teaching tenets of Protestantism. Hamburger, *supra*, at 220-24; Viteritti, *supra*, at 668-69; Jorgenson, *supra*, at 134-35. Montana was no exception: nearly all of its private schools in the 1880s were Catholic. Pet. Br. 42.

Likewise, to the people of North and South Dakota, "sectarian" education meant something different from religious education, and the primary danger of "sectarian education" was Catholic education. For instance, the Dakota Territory legislature passed an 1883 law "guaranteeing that Protestant activities such as Bible reading would not be considered a 'sectarian' activity and would not, therefore, be excluded from the common schools." Lauck, *supra*, at 77. The 1887 territorial code, adopted just two years before statehood, similarly excluded Bible reading from the definition of sectarian activity. *Id.* Dakotans also denounced federal aid to Catholic schools on Indian reservations, infuriated at the distribution of public funds to "sectarian bodies." *Id.* at 80. As a Catholic newspaper observed, "Too often 'freedom from sectarian control' in our public schools, practically is made to mean the careful exclusion of every thing Catholic." *Id.* at 78.

This attitude—generically in favor of religion but against Catholicism—also pervaded the Dakota constitutional drafting process. At the 1883 constitutional convention, ministers from practically every Protestant denomination gave invocations, but Catholic priests gave none. *Id.* At the 1885 convention, a minister called on "the great

republics of the world to lean upon their God." *Id.* at 92. Both Dakotas embraced religion in their 1889 Constitutions. North Dakota's preamble, like Montana's, thanked "Almighty God for the blessings of civil and religious liberty," N.D. Const. pmbl. South Dakota did the same, S.D. Const. pmbl., and chose "Under God the People Rule" as the state motto, *id.* art. XXI, § 1.

The delegates to the Washington constitutional convention, too, drew a bright line between "religious" and "sectarian" activity, and opposed only the latter. The framers used the word "sectarian" in Article IX, § 4 as a considered choice—delegates rejected an attempt to replace the word "sectarian" with "religious," and also voted down a proposal to bar "religious exercises or instructions" from public schools completely. *See* Br. for Becket Fund for Religious Liberty et al. as Amici Curiae Supporting Resp't, *Locke v. Davey*, 540 U.S. 712 (2004) (No. 02-1315), 2003 WL 22118852, at *19. That choice thereby kept funding from Catholics while preserving generic Protestantism in Washington's public schools. As with its sister States, the Washington Constitution also gave religious values pride of place, expressing gratitude in its preamble to "the Supreme Ruler of the Universe." Wash. Const. pmbl. As one delegate explained: "While I am opposed to sectarianism, I believe in recognizing the supremacy of God." Utter & Larson, *supra*, at 470.

III. The 1972 Re-Ratification of Montana's Blaine Provision Did Not Neutralize Its Discriminatory Meaning

When Montana revisited its Constitution in 1972, it had come a long way from the anti-Catholic bigotry that triggered the APA riot. By 1970, Catholicism was the dominant denomination in Montana, and Catholics comprised a little over 20% of the State's population. *The Statesman's Year-Book 1972-1973* at 651 (John Paxton

ed.). Catholic schools had expanded significantly, and in some counties "carrie[d] a sizable portion of the total educational load." *See Chambers*, 472 P.2d at 1017.

Montana's mini-Blaine provision, meanwhile, had barely received any attention from Montana's courts. The Montana Supreme Court interpreted the provision for the first time in 1970. *See id.* at 1020-21. And that decision merely held that Montana's Constitution unambiguously prohibited a school district from funding teachers at a Catholic high school, because Catholic schools unambiguously fall within the definition of "any school controlled in whole or in part by any church, sect, or denomination." *Id.*

Delegates to the 1972 constitutional convention debated scrapping Montana's mini-Blaine amendment. Some criticized the provision as a relic of anti-Catholic "hysteria" and the "remnants of a long-past era of prejudice." Mont. Constitutional Convention Tr. vol. 6, 2010, Mar. 11, 1972. Others urged jettisoning the "archaic" provision. *Id.* at 2012. And Delegate John Schiltz of Billings made a personal appeal, linking the anti-Catholic bigotry he had experienced during his childhood to Montana's Blaine Amendment:

> I've lived with the Blaine Amendment and the philosophy of the Blaine Amendment all the days of my life. I can remember during the Al Smith campaign[5] when they burned crosses on the rim-rocks in Billings. I can remember being let out of school in the fourth grade to erase three "Ks" on the front doors of the Catholic Church in Billings. I am a Roman Catholic . . . . To

[5] Al Smith, the Democratic nominee for President in 1928, was the first Catholic on a major party's national ticket. He won only 87 electoral votes to Herbert Hoover's 444.

> me, the Blaine Amendment is a badge of bigotry, and it should be repealed.

Id.

Still, opponents of Montana's mini-Blaine provision fell short, and Montana kept the provision in the 1972 constitution. The ratifiers made only one substantive change to Article XI, § 8, now renumbered as Article X, § 6, adding a sentence disclaiming any intent to affect the disposition of federal funds.[6]

Aside from the federal-funds amendment, the meaning of Montana's prohibition on aid to "sectarian schools" in 1972 remained exactly what it was in 1889. The official publication of the proposed Constitution explained that the mini-Blaine provision "[r]etained" from the 1889 Constitution the "[p]rohibition against legislature and other governmental units from spending money for sectarian purposes." *Proposed 1972 Constitution for the State of Montana: Official Text with Explanation* 4 (1972). The Montana Supreme Court's decision below confirms "the

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[6] The current version of the provision is titled "Aid prohibited to sectarian schools" and reads:

> (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 sectarian 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.

Mont. Const. art. X, § 6.

1972 Constitutional Convention Delegates intended Article X, Section 6, to retain the meaning of Article XI, Section 8, of the Montana Constitution of 1889." Pet. App. 22. Montana's mini-Blaine amendment, then, remains "extreme[ly] inflexib[le]," Mont. Constitutional Convention Tr. vol. 6, 2010-11, Mar. 11, 1972, and "among the most stringent [no-aid clauses] in the nation," Pet. App. 19 (alteration in original). And, while hostility to Catholicism had diminished, Montana's mini-Blaine amendment continued to operate against Montana's many Catholic schools in a significant number of instances.

IV. Article X, § 6 of the Montana Constitution Blatantly Violates the Free Exercise Clause in Excluding Religious Schools from a Generally Available Public Benefit

1. Perhaps the most fundamental premise of the Free Exercise Clause is that the government cannot "discriminate[] against some or all religious beliefs" just because the government of the day prefers some faiths to others. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993); *accord Mitchell*, 530 U.S. at 828 (plurality opinion) ("[O]ur decisions . . . have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity.").

Few laws violate that principle more plainly than Montana's mini-Blaine provision. At its inception, that constitutional amendment was a profoundly unconstitutional effort to exclude Catholic-affiliated schools from the public benefits that their generically Protestant public-school counterparts received. The historical evidence shows that the original meaning of the provision's references to prohibiting aid to sectarian schools, the use of public funds for "any sectarian purpose," and in particular for educational institutions controlled by "sect[s]," Mont. Const.

art. X, § 6, was to exclude Catholic schools—simply because they were Catholic—from eligibility for any public funds. *Supra* pp. 16-24.

Montana's further prohibition on allowing any public funds to flow to educational institutions controlled in any way by any "church" or "denomination" hardly dissipated the anti-Catholic animus. Rather, those phrases were the bells and whistles of an impermissible "religious gerrymander[]." *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring); *see Lukumi*, 508 U.S. at 535. The church or denomination-controlled educational institutions of the late nineteenth century were, again, overwhelmingly Catholic, both in Montana and in the nation as a whole. Jorgenson, *supra*, at 70; Pet. Br. 42. Meanwhile, because public schools were unaffiliated with any particular Protestant church or denomination and embraced tenets common across Protestant faiths, practices like the reading of the King James Version of the Bible in schools could persist. Montana's Blaine provision thus singled out particular religious beliefs—those not compatible with majoritarian Protestant views—for disfavor. But "[o]fficial action that targets religious conduct for distinctive treatment" is precisely the conduct that the Free Exercise Clause forbids. *Lukumi*, 508 U.S. at 534.

2. As time has passed and Montana's demographics have changed, Montana's prohibition on providing any public aid to educational institutions controlled in any way by "any church, denomination, or sect" now extends to a much wider range of religiously affiliated schools. As the Montana Supreme Court noted in the decision below, Article X, § 6 bars all of Montana's religious schools, not just Catholic ones, from partaking of any public benefits. *See* Pet. App. 17-19. Meanwhile, the public schools of the

twentieth and twenty-first centuries have long since repudiated the generic Protestantism of their nineteenth-century antecedents. Today, in short, Montana's mini-Blaine amendment no longer operates to privilege Protestant teachings in schools while excluding Catholic influence. Instead, Montana's provision favors secular institutions while systematically excluding all religiously affiliated schools from public aid.

Those developments, of course, do not alter the noxious anti-Catholic meaning of the term "sectarian," which Congress required Montana and so many other States to insert in their constitutions. Montana's Constitution still bans "sectarian" aid or support for "sectarian purposes," and Montanans pointedly retained the original meaning of their mini-Blaine amendment in 1972. *Supra* pp. 24-27. More fundamentally, the fact that Montana's Blaine provision has evolved in its applications from an anti-Catholic measure to an anti-religious measure is no saving grace. Montana's mini-Blaine amendment no longer compels Catholics alone "to choose between their religious beliefs and receiving a government benefit," but instead puts all other faiths to the same unconstitutional choice. *See Trinity Lutheran*, 137 S. Ct. at 2023 (internal quotation marks omitted). States cannot possibly salvage mini-Blaine amendments like Montana's by magnifying the discriminatory effects of their laws and blocking access to public benefits for all religiously affiliated institutions.

3. The history of Montana's mini-Blaine provision also destroys any argument that Montana could invoke "anti-establishment interests" to justify discriminating against religiously affiliated schools and institutions. *Locke*, 540 U.S. at 722. The Court in *Locke* validated a "historic and substantial state interest" in "not funding the religious training of clergy," *id.* at 723 n.5, 725, but "did not suggest

that discrimination against religion outside the limited context of support of ministerial training would be similarly exempt from exacting review," *Trinity Lutheran*, 137 S. Ct. at 2025 (Thomas, J., concurring); *accord id.* at 2026 (Gorsuch, J., concurring).

Further, *Locke* rejects the notion that the State can have such a valid interest if its motivation in enacting the law at issue was "animus toward religion." 540 U.S. at 724-25. Post hoc antiestablishment rationales cannot paper over a State's effort to sanction religious discrimination. *See id.* That proposition is fatal to any defense of Montana's mini-Blaine provision on "antiestablishment" grounds, given its unambiguous roots in animus toward Catholics in particular, and toward faiths outside the Protestant mainstream more generally.

* * *

As for many other States, Congress required Montana to accept a mini-Blaine amendment as the price of joining the Union. As enacted in 1889, Montana's provision openly discriminated against Catholics, barring any public funding for "sectarian" Catholic schools while leaving generically Protestant public schools unaffected. Today, because Catholic schools no longer comprise the overwhelming majority of schools controlled by a church, denomination, or sect, the provision unconstitutionally discriminates against all religiously affiliated schools. The Free Exercise Clause, however, equally prohibits discriminating against Catholics and discriminating against all religions. One hundred thirty years of discrimination on the basis of religion is more than long enough.

CONCLUSION

The judgment of the Montana Supreme Court should be reversed.

Respectfully submitted,

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