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 *AMICUS CURIAE* OF BILLY GRAHAM EVANGELISTIC ASSOCIATION, SAMARITAN'S PURSE, NATIONAL LEGAL FOUNDATION, PACIFIC JUSTICE INSTITUTE, AND INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS

in support of the Petitioners

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STATEMENTS OF INTEREST[1]

The **Billy Graham Evangelistic Association** ("BGEA") was founded by Billy Graham in 1950 and, continuing the lifelong work of Billy Graham, exists to support and extend the evangelistic calling and ministry of Franklin Graham by proclaiming the Gospel of the Lord Jesus Christ to all we can by every effective means available to us and by equipping the church and others to do the same. BGEA ministers to people around the world through a variety of activities including Decision America Tour prayer rallies, evangelistic festivals and celebrations, television and internet evangelism, the Billy Graham Rapid Response Team, the Billy Graham Training Center at the Cove, and the Billy Graham Library. Through its various ministries and in partnership with others, BGEA intends to represent Jesus Christ in the public square, to cultivate prayer, and to proclaim the Gospel. It is a religious, non-profit organization supported by charitable donations.

Samaritan's Purse is a nondenominational evangelical Christian organization formed in 1970 to provide spiritual and physical aid to hurting people around the world. The organization seeks to follow the command of Jesus to "go and do likewise" in response to the story of the Samaritan who helped a hurting stranger. Samaritan's Purse operates in over 100 countries providing emergency relief, community development, vocational programs, and resources for

[1] The parties have consented to the filing of this brief in writing. No counsel for any party authored this brief in whole or in part. No person or entity other than *Amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

children, all in the name of Jesus Christ. It is a religious, non-profit organization supported by charitable donations.

The **National Legal Foundation** (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, including those in Montana, seek to ensure that an historically accurate understanding of the Religion Clauses is presented to our Country's judiciary.

The **Pacific Justice Institute** (PJI) is a non-profit legal organization established under Section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment rights. As such, PJI has a strong interest in the development of the law in this area.

The **International Conference of Evangelical Chaplain Endorsers** (ICECE) has as its main function to endorse chaplains to the military and other organizations requiring chaplains that do not have a denominational structure to do so, avoiding the entanglement with religion that the government would otherwise have if it determined chaplain endorsements. ICECE safeguards religious liberty for chaplains and all military personnel.

SUMMARY OF THE ARGUMENT

The majority of the Montana Supreme Court, despite the scholarship program going through not just one independent, private choice, but two, and despite the fact that the donated monies never were in the State's coffers, concluded that, by providing the individual donors a tax credit, the State was providing a benefit to religious schools, who were the ultimate recipient of some of the funds. The assumption that undergirds this decision is that the State owns all property, rather than the citizens of the State, and so the decision of the State to give a tax credit for the individual's donation makes the donation government funds, which character follows the funds to the recipient organization.

While this case can and should be reversed on other federal grounds, the *Amici* submit this brief to emphasize that, whatever the suitability of the above assumption under Montana law, it is inconsistent with the First Amendment, as this Court has repeatedly instructed, and also with the Guarantee Clause of the Constitution. The Montana Supreme Court's underlying assumption does not bind this Court, and it should not be embraced by this Court in any respect.

Ours is a government of the people, by the people; the people are not of the government, by the government.

ARGUMENT

I. The Montana Majority's Predicate That the State Owns All Is Contrary to Federal Law and the Republican System of Government Required of the States by the Guarantee Clause.

The majority of the Montana Supreme Court struck down the tax credit and scholarship program under the provision of its State constitution that prohibits "indirect appropriation or payment from any public fund or monies." *See* Montana Const. art. X, § 6(1). As dissenting Justice Rice pointed out, the unstated predicate for the majority decision undergirding that "public fund or monies" are being paid to religious schools is that all private income belongs to the State because the State can tax it. Under this interpretation of the Montana Constitution, when the State sets a tax rate on all income but then gives a deduction or credit, it is giving a benefit to the citizen out of its own largesse, and that benefit is indistinguishable from a payment of money by the government to whatever purpose the citizen puts that untaxed income.

Justice Rice put the point well:

> [T]he Department's troubling argument [is] that the Scholarship Program is a "diversion" of "public funds" by the Legislature. The argument is premised on the Department's theory that the base tax liability each taxpayer will owe to the State on income that the taxpayer will earn should be considered "public funds," and that all tax liability—even potential liability on potential

> income, before a taxpayer timely completes the tax return process and applies deductions and credits for the entire year—is the property of the State, until such time a proper tax return is filed and the state permits a credit for the year's donations to be made against the taxpayer's liability. The Department's view, that "'[t]ax expenditures' are monetary subsidies the government bestows on particular individuals or organizations by granting them preferential tax treatment . . . the various deductions, credits and loopholes [] are just spending by another name," might be correct for purposes of internal state government budgeting, § 5-4-104, [Montana Code Annotated], but it is an utter misstatement of the fundamental right of private property ownership. A citizen's income—all income of each year, every year—belongs to the citizen until such time the proper portion thereof becomes owed to the government; the government does not own all income until the citizen demonstrates otherwise.

Espinoza v. Mont. Dept. of Rev., 435 P.3d at 603, 633 (Mont. 2018) (Rice, J., dissenting).

While Justice Rice's understanding of Montana law may have been rejected by a majority of the Montana Supreme Court, he most certainly states federal law correctly. Thus, the majority's reading of Montana law on this point neither binds this Court nor resolves the federal question presented. Indeed, this unstated predicate of the majority decision undermines its acceptability under the Federal Constitution, as the foundational principles that the government is created by the people and that its powers are limited to what the people prescribe is

basic to the Federal Constitution and is required of the States as well through the Guaranty Clause.

A. Precedent of This Court Disposes of the Idea That the Government Owns All Because It Can Tax All.

"The power to tax involves the power to destroy" is a truism early established. *McCulloch v. Md.*, 17 U.S. (4 Wheat.) 316, 429 (1819). Moreover, this Court has acknowledged that, as a matter of economics, it may be acceptable, as Justice Rice acknowledged, to treat a tax deduction or credit as "lost income" to the State. *See Regan v. Taxation With Representation*, 461 U.S. 540, 544 (1983). But these statements do not lead to the conclusion that, for First Amendment purposes, when a State gives a tax deduction or credit for a charitable donation, it is the State itself that is the operative agent in making a donation to the charitable organization. To the contrary, this Court has uniformly rejected that position, recognizing that it is the individual who is the donor for Federal Constitutional purposes.

Arizona Christian School Tuition Organization v. Winn, 563 U.S. 125 (2011), involved a system similar to Montana's, in which Arizona provided tax credits for contributions to private school tuition organizations ["STOs"], which used those contributions for scholarships to students attending private schools, many of which were religious. *Id.* at 129. The case turned on whether the taxpayers who objected to the tax credit system had standing, and their chief argument was that a tax credit to an individual was the constitutional equivalent of an expenditure by the government to the schools. The

Court rejoined, "That is incorrect."[2] *Id.* at 141. It explained, "When Arizona taxpayers choose to contribute to STOs, they spend their own money, not money the State has collected from respondents or from other taxpayers." *Id.* at 142.

The Court elaborated in words directly applicable to the Montana tax credit system:

> Here, . . . contributions result from the decisions of private taxpayers regarding their own funds. Private citizens create private STOs; STOs choose beneficiary schools; and taxpayers then contribute to STOs. While the State, at the outset, affords the opportunity to create and contribute to an STO, the tax credit system is implemented by private action and with no state intervention. Objecting taxpayers know that their fellow citizens, not the State, decide to contribute and in fact make the contribution. . . . Like contributions that lead to charitable tax deductions, contributions yielding STO tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations. Respondents' contrary position assumes that income should be treated as if it were government property even if it has not come into the tax collector's hands. That premise finds no basis in standing jurisprudence. Private bank accounts cannot be equated with the Arizona State Treasury.

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[2] Indeed, as Justice Rice pointed out, Montana's position was based on the dissenting opinion in the case. 435 P.3d at 633 (Rice, J., dissenting), citing *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 151 n.1 (2011) (Kagan, J., dissenting).

Id. at 143-44.

Zelman v. Simmons-Harris, 536 U.S. 639 (2002), concerned a multifaceted plan by the Cleveland school system to provide scholarship assistance to students whom their parents sent to private schools, many of which were religious. This Court rebuffed an Establishment Clause challenge to the plan. By reviewing in particular three precedents that are also directly relevant here, this Court emphasized that, when it comes to the Federal Constitution, there is a critical difference between government expenditures and systems in which private choice determines where funds are spent:

> [O]ur decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools, *Mitchell* v. *Helms,* 530 U. S. 793, 810-814 (2000) (plurality opinion); *id.,* at 841-844 (O'Connor, J., concurring in judgment); *Agostini, supra,* at 225-227; *Rosenberger* v. *Rector and Visitors of Univ. of Va.,* 515 U. S. 819, 842 (1995) (collecting cases), and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals, *Mueller* v. *Allen,* 463 U. S. 388 (1983); *Witters* v. *Washington Dept. of Servs. for Blind,* 474 U. S. 481 (1986); *Zobrest* v. *Catalina Foothills School Dist.,* 509 U. S. 1 (1993). . . . Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges.

Id. at 649. The Court went on to explain that, in

> *Mueller,* we rejected an Establishment Clause challenge to a Minnesota program authorizing tax deductions for various educational expenses, including private school tuition costs, even though the great majority of the program's beneficiaries (96%) were parents of children in religious schools. . . . [V]iewing the program as a whole, we emphasized the principle of private choice, noting that public funds were made available to religious schools "only as a result of numerous, private choices of individual parents of school-age children." 463 U. S., at 399-400. This, we said, ensured that "no 'imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally." *Id.,* at 399 (quoting *Widmar, supra,* at 274)). We thus found it irrelevant to the constitutional inquiry that the vast majority of beneficiaries were parents of children in religious schools . . . . That the program was one of true private choice, with no evidence that the State deliberately skewed incentives toward religious schools, was sufficient for the program to survive scrutiny under the Establishment Clause.

Id. at 649-50.

The *Zelman* Court next discussed its prior decision in *Witters*, in which the Court

> used identical reasoning to reject an Establishment Clause challenge to a vocational scholarship program that provided tuition aid to a student studying at a religious institution to

> become a pastor. Looking at the program as a whole, we observed that "[a]ny aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." 474 U. S., at 487. We further remarked that, as in *Mueller,* "[the] program is made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." 474 U. S., at 487 (internal quotation marks omitted). In light of these factors, we held that the program was not inconsistent with the Establishment Clause. *Id.,* at 488-489.
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> Five Members of the Court, in separate opinions, emphasized the general rule from *Mueller* that the amount of government aid channeled to religious institutions by individual aid recipients was not relevant to the constitutional inquiry. 474 U. S., at 490-491 (Powell, J., joined by Burger, C. J., and Rehnquist, J., concurring) (citing *Mueller, supra,* at 398—399); 474 U. S., at 493 (O'Connor, J., concurring in part and concurring in judgment); *id.,* at 490 (White, J., concurring). Our holding thus rested not on whether few or many recipients chose to expend government aid at a religious school but, rather, on whether recipients generally were empowered to direct the aid to schools or institutions of their own choosing.

Id. at 650-51.

Third, the *Zelman* Court explicated its ruling in *Zobrest*, in which it rejected an Establishment Clause challenge to a federal program that permitted sign-language interpreters to assist deaf children enrolled

in religious schools:

> We further observed that "[b]y according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents." *Id.,* at 10. Our focus again was on neutrality and the principle of private choice, not on the number of program beneficiaries attending religious schools. *Id.,* at 10-11. . . . Because the program ensured that parents were the ones to select a religious school as the best learning environment for their handicapped child, the circuit between government and religion was broken, and the Establishment Clause was not implicated.

Id. at 651-52. The *Zelman* Court summed up the holdings of those cases as follows:

> *Mueller, Witters,* and *Zobrest* thus make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the

> government, whose role ends with the disbursement of benefits.

Id. at 652.

The precedent outlined above sufficiently establishes that the Federal Constitution does not equate indirect encouragement of charitable organizations via tax deductions and credits with direct government aid. But this Court's consistent rulings that uphold religious exemptions (vice religious preferences) on the basis that the government in such situations is not a direct actor in aiding religion demonstrate the same. These cases recognize that, when the government gives an exemption to a religious individual or organization, it does not violate the First Amendment because it is leaving religion alone; it is refusing to act or intervene.

For instance, in *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970), this Court rejected a challenge to New York's exemption of religious organizations from the city's property tax. The gravamen of the attack on the exemption was that, when the government decides not to tax something, it is granting a beneficence and forcing all other citizens to make an indirect contribution to the organization. *See id.* at 667. This assumes as a predicate that the government ultimately owns everything and only allows its citizens to keep what it deigns they should have. This Court rejected that assumption. It ruled that the grant of a tax exemption to churches is not the same as a cash grant because the government is not transferring part of its revenue to churches. *Id.* at 675.

Similarly, in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), this Court upheld a statutory religious exemption in Title VII that left religious organizations free "to define and carry out their religious missions" as they see fit. *Id.* at 335. The Court rejected the assertion that the government was the principal actor harming the employee via the exemption: "[I]t was the Church . . . , not the Government, who put [the employee] to the choice of changing his religious practices or losing his job."[3] *Id.* at 337 n.15. *See also Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (holding that RLUIPA's religious exemption for prisoners did not violate Establishment Clause); *Gillette v. United States*, 401 U.S. 437, 448-60 (1971) (holding that a religious exemption from the military draft for those opposed to all war did not violate the Establishment Clause); *Zorach v. Clauson*, 343 U.S. 306, 308-15 (1952) (holding that a public school policy of releasing pupils from the state's compulsory education law to attend voluntarily private religion classes off school grounds did not violate Establishment Clause); *The Selective Service Draft Law Cases*, 245 U.S. 366, 389-90 (1918) (rejecting an Establishment Clause challenge to a military draft exemption for clergy, seminarians, and pacifists).

Montana's argument that it is aiding religious schools through its tax credits implies that the State

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[3] For an example of a preference, which involves direct government aid or the government siding with a particular religious view, see *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (holding that statute creating an "unyielding" preference for religious observance, totally disregarding the competing interests of others, such as the claimant's employer and fellow workers, was unconstitutional).

owns the funds provided to the schools. That argument puts matters completely backwards: citizens at the foundational level own everything, not the government, and the government has only what the people give it. Federal law has got it straight: the government by deciding not to tax something or by giving a tax credit for an individual's charitable donation does not thereby become the owner of the property or the donor to the charity, either directly or indirectly. All the deduction or credit means is that individuals who contribute to charitable educational organizations are encouraged to do so by their government, but via the exercise of their own, private choices. It does not mean that it is the government who has donated the funds, directly or indirectly. Ownership of the individual's funds was never in the government's hands, and it does not pass to the government by it giving a tax deduction or a credit or an exemption.

B. The Constitution Establishes a Limited Federal Government and Requires Republican State Governments, Both of Which Eliminate Any Suggestion That the Government Owns All.

As the Preamble sets out and the Tenth Amendment reinforces, it is the people who established our form of federal government, and not the federal government that gave rise to itself or granted the people its rights and privileges. Ours is a government that has only the powers granted to it by the people in the Constitution. *See generally New York v. United States*, 505 U.S. 144 (1992). The federal government does not own all property in the country, which it allows individuals to hold at the

government's good pleasure when it decides not to take it away by tax or exaction. Indeed, if the public requires property owned by an individual for a general use, the government must pay a fair price to the individual owner for its taking. U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation").

These basic principles also apply to State governments. The Constitution in article IV, §4, "guarantee[s] to every State in this Union a Republican Form of Government . . . ." A republican form of government is one in which the government is responsible to the people, who are the ultimate owners of all. It is a government that is established by the people and for the people, and it is the people who select their representatives to operate that organization. The government itself is not the ultimate source of rights, authority, and powers. This Court explained in *In re Duncan*, 139 U.S. 449 (1891),

> By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of *the people* to choose *their own* officers for governmental administration, and pass *their own* laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those *of the people* themselves; but, while *the people are thus the source of political power*, their governments, National and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities.

Id. at 461 (emphasis added). This ruling is wholly consistent with Madison's explanation of what the Constitution meant by a republican form of government:

> If we resort for a criterion to the different principles on which different forms of government are established, we may define a republic to be, or at least may bestow that name on, a government which *derives all its powers directly or indirectly from the great body of the people*, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. . . . Could any further proof be required of the republican complexion of this system, the most decisive one might be found in its absolute prohibition of titles of nobility, both under the federal and the State governments; and in its express guaranty of the republican form to each of the latter.

The Federalist No. 39 (James Madison 1788) (emphasis added).

When the Montana Supreme Court predicated its decision on the assumption that the State owns all property it could tax and, thus, that the State is itself making a donation by giving a credit for an individual's donation, it assumed, albeit implicitly, that the State, like a communist or totalitarian form of government, was the owner and dispenser of all property and privileges. In doing so, it violated the guarantee in the Federal Constitution that its government be republican in form. *Cf. Plessy* v. *Ferguson,* 163 U. S. 537, 563-564 (1896) (Harlan, J., dissenting) (stating that racial segregation is

"inconsistent with the guarantee given by the Constitution to each State of a republican form of government").

For this reason as well, this Court must reverse the decision of the Montana Supreme Court. At a minimum, this Court is not bound by the implied predicate in the majority's decision that the State of Montana owns all property in that State that it could tax, but does not.

CONCLUSION

Under federal law, the government does not own all property, and a private choice as to where a donation is applied insulates a related deduction or credit or exemption from Establishment Clause challenge. This is required under our republican system of government, a form of government also required of the States. The Montana Supreme Court's decision is inconsistent with the Federal Constitution as interpreted by this Court and should be reversed.

Respectfully submitted
this 18th day of September 2019,

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