No. 18-1195

IN THE
Supreme Court of the United States

KENDRA ESPINOZA, ET AL.,
Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE, ET AL.,
Respondents.

On Writ of Certiorari
To the Supreme Court of Montana

BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI CURIAE[1]

Amici curiae are associations dedicated to improving and supporting public education in the United States. *Amici* also have a longstanding interest in implementing effective state and local education policies in accordance with constitutional requirements, including the First Amendment's Establishment and Free Exercise Clauses. *Amici* are gravely concerned that an expansion of this Court's ruling in *Trinity Lutheran* would undermine longstanding state policies, based on decades of precedent, supporting public education.

The National School Boards Association ("NSBA") represents state associations of school boards across the country, and the board of education of the U.S. Virgin Islands. NSBA represents over 90,000 of the Nation's school board members who, in turn, govern over 13,600 local school districts that serve approximately 50 million public school students — 84 percent of the elementary and secondary students in the nation.

The Montana School Boards Association ("MTSBA") is a nonprofit, non-partisan corporation organized under section 501(c)(3) of Title 26 of the United States Code. MTSBA represents over 1,400 elected school board members in Montana. MTSBA member trustees are constitutionally empowered

[1] The parties have filed blanket consents to the filing of briefs *amici curiae*. No counsel for a party authored this brief in whole or in part. No such counsel, any party, or any other person or entity – other than *amici curiae*, their members, and their counsel – made a monetary contribution intended to fund the preparation or submission of this brief.

under Article X, Section 8 of the Montana Constitution with supervision and control of the public schools of Montana and are sworn to support, protect and defend the constitution of the United States, and the constitution of the state of Montana.

The Montana Quality Education Coalition ("MQEC") is a statewide advocacy organization focusing on adherence to Article X of the Montana constitution as it impacts K-12 public education. Members include Montana public school districts as well as statewide entities representing the interests of school business officials, educators, rural schools, locally elected trustees, and school administrators.

AASA, The School Superintendents Association ("AASA") represents over 13,000 school system leaders and advocates. For over 150 years, AASA has advocated for the highest quality public education for all students, and provided programming to develop and support school system leaders nationwide.

The Association of Educational Service Agencies ("AESA") is a professional organization serving regional educational service agencies in 45 states. There are 553 educational service agencies nationwide.

The Association of Latino Administrators and Superintendents ("ALAS") is a professional organization with the goal of effectively serving the educational needs of Latinx youth through the professional development of administrators.

Association of School Business Officials International ("ASBO") is a nonprofit organization that, through its members and affiliates, represents

approximately 30,000 school business professionals worldwide.

The Council of Administrators of Special Education ("CASE"), a division of the Council for Exceptional Children, is an international nonprofit professional organization providing leadership, advocacy, and professional development to more than 4,500 administrators who work on behalf of students with disabilities and their families in public and private school systems and institutions of higher education.

The Council of the Great City Schools ("Council") is a coalition of 76 of the nation's largest urban public school systems, and is the only national organization exclusively representing the needs of urban public schools.

The National Association of Elementary School Principals ("NAESP") is a professional organization serving elementary and middle school principals and other education leaders throughout the United States, Canada, and overseas.

The National Association of Secondary School Principals ("NASSP") is the leading organization of and voice for principals and other school leaders across the United States.

National PTA is a nationwide network of nearly 3.5 million families, students, teachers, administrators, and business and community leaders devoted to making a difference for the education, health, safety and well-being of every child and making every child's potential a reality.

The National Rural Education Advocacy Consortium ("NREAC") currently represents rural

public school districts in 17 states. The purpose of NREAC is to advocate for the highest quality of education for the children of rural America's public schools.

The National Rural Education Association ("NREA") is the voice of all rural schools and rural communities across the United States.

Amici believe public schools are the cornerstone of American democracy and oppose efforts to divert public funds away from the crucial mission of public education.

SUMMARY OF ARGUMENT

The state of Montana, in a ruling of its Supreme Court based on its state constitution, has invalidated a tax credit scholarship program that would enable the state to fund private sectarian institutions indirectly. It has decided to end the program altogether. Through that ruling, which is reasonable and constitutional under the principles espoused by this Court for decades, the state is choosing to remain neutral with respect to religion on this issue. There is nothing further to decide, and *Amici* urge this Court to end its analysis here. If this Court decides to address whether the Montana constitutional provision as applied by its Supreme Court passes muster under the U.S. Constitution, *Amici* urge it not to steer away from its recognition that states may choose not to fund religious instruction in favor of supporting their public schools, and to consider the harm that will result to public education from any dramatic shift in its existing precedents.

States historically have committed themselves to public education by restricting the use of public funds for private and/or religious schools; this Court never has held that this violates the U.S. Constitution. Nor has this Court ever ruled that a state's decision not to offer any, even indirect, public subsidy to private – religious or nonreligious – schools through a tax credit scholarship program violates the U.S. Constitution.

Although the Court has found certain types of public support of religious institutions to be *permissible* under the Establishment Clause,[2] it has not held such support to be *required* under the Free Exercise Clause. To hold as much now would be to open the door to redirection of scarce public dollars to private religious institutions, to invite entanglement with and regulation of religious instruction, and to steer the opposite direction from the efforts by states at our nation's founding to avoid establishment, as "[r]eligion then of every man must be left to the conviction and conscience of every man…." James Madison, *Memorial and Remonstrance Against Religious Assessments*, 1785, The Founders' Constitution, Vol. 5, Amend. I (Religion), Doc. 43, University of Chicago Press, http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html.

Most importantly, to hold as much now would be to open the door to programs that harm public education by drawing public funding and support

[2] *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms* 530 U.S. 793 (2000); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Locke v. Davey*, 540 U.S. 712 (2004); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017).

away from local public schools. This Court should not disregard its long and sustained recognition of the crucial role of public education in preparing students for participation in our democracy, and states' flexibility to manage that important mission with their own policy choices. *Amici* urge the Court not to create a new era of constitutional interpretation that upends historic understanding of the ability of states to support public education.

ARGUMENT

I. STATES' POLICY DECISIONS NOT TO FUND RELIGIOUS INSTRUCTION AS PART OF THEIR HISTORIC COMMITMENT TO PUBLIC EDUCATION ARE CONSTITUTIONAL.

This Court has long recognized the crucial importance of public education in preparing students for participation as responsible members of society and its unique role as "the very foundation of good citizenship."[3] It has affirmed "the importance of

[3] *Brown et al. v. Board of Education of Topeka, Shawnee County, Kan. et al.*, 347 U.S. 483, 493 (1954)("Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that

education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child," asserted that "education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all," and recognized education's "fundamental role in maintaining the fabric of our society." *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

At the same time, it is well-established that public education is a state and local responsibility. *U.S. v. Lopez*, 514 U.S. 549, 580-581 (1995) (Kennedy, J., concurring) ("... [E]ducation is a traditional concern of the States.")(citing *Milliken v. Bradley,* 418 U.S. 717, 741–742 (1974) and *Epperson v. Arkansas,* 393 U.S. 97, 104 (1968)); *see also* U.S. Dep't of Education, *The Federal Role in Education*, https://www2.ed.gov/about/overview/fed/role.html. From our nation's birth, states, not the federal government, have borne the responsibility of financing, managing, and supporting public education through locally chosen school boards that govern their community schools. Public education was omitted from those functions delegated to our central government in an effort to preserve a *federal* system of state sovereigns and to avoid a *national* government. *See* Kern Alexander & M. David Alexander, *American Public School Law* at 119 (Wadsworth Cengage Learning, 8th ed. 2012).

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any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."); *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)("education prepares individuals to be self-reliant and self-sufficient participants in society.").

States fulfill their public education mission in a variety of ways. Some operate county-based school districts of similar size, while others allow districts of widely varying size.[4] In some, like Pennsylvania, most school board members are elected. The Center For Public Justice, *What Is The Role Of School Boards?,* (last accessed Nov. 13, 2019), https://www.cpjustice.org/public/page/content/cie_faq_school_boards. In others, like Michigan, some school board members are elected and some are appointed. *Id.* And eighteen states operate a program by which state funds are directly or indirectly provided to private schools through "voucher" or tax-credit programs. EdChoice, *Fast Facts on School Choice*, (last modified May 28, 2019) http://www.edchoice.org/our-resources/fast-facts.

Significantly, all states in the U.S. provide for public education through their own constitutions.[5]

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[4] Maryland, for example, operates 24 county-based school districts. Maryland Department of Education, http://www.marylandpublicschools.org/about/Pages/directory.aspx. Florida operates 67. Florida Department of Education, http://www.fldoe.org/core/fileparse.php/7507/urlt/1718Profiles.pdf. Illinois operates over 850 school districts of varying sizes. Illinois State Board of Education, https://www.isbe.net/Documents/reorg_history.pdf. The largest Illinois district serves over 350,000 students, Chicago Public Schools, *CPS Stats and Facts*, https://cps.edu/About_CPS/At-a-glance/Pages/Stats_and_facts.aspx, and the smallest serves 33. Regional Office of Education #28, *Ohio Community High School District #505*, http://www. bhsroe.org/public-schools/ohio505/.

[5] Ala. Const. art. XIV, § 256; Alaska Const. art. VII, § 1; Ariz. Const. art. XI, § 1; Ark. Const. art. XIV, § 1; Cal. Const. art. IX, §§ 1, 5; Colo. Const. art. IX, § 2; Conn. Const. art. VIII, § 1; Del. Const. art. X, § 1; Fla. Const. art. IX, § 1; Ga. Const. art. VIII, § 1, ¶ I; Haw. Const. art. X, § 1; Idaho Const. art. IX, § 1; Ill. Const. art. X, § 1; Ind. Const. art. VIII, § 1; Iowa Const. art. IX, 2nd, §§

Seven have taken the commitment further, by enacting constitutional provisions guaranteeing a level of quality or "adequacy" in public education to all residents.[6] States impose numerous transparency and accountability requirements on their public schools to ensure state dollars are spent responsibly and fairly, in furtherance of the state's educational mission.[7]

1, 3; Kan. Const. art. VI, §§ 1, 6; Ky. Const. § 183; La. Const. art. VIII, §§ 1, 11 & 13; Maine Const. art. VIII, Pt. 1, § 1; Md. Const. art. VIII, §§ 1, 3; Mass. Const. Pt. 2, Ch. 5, § 2; Mich. Const. art. 8, §§ 1, 2; Minn. Const. art. XIII, § 1; Miss. Const. art. 8, §§ 201, 206 & 206A; Mo. Const. art. IX, §§ 1(a), 3(a) & 3(b); Mont. Const. art. X, § 1; Neb. Const. art. VII, § 1; Nev. Const. art. XI, §§ 1, 2 & 6; N.C. Const. art. IX, §§ 1, 2; N.D. Const. art. VIII, §§ 1–4; N.H. Const. Pt. 2, art. LXXXIII; N.J. Const. art. VIII, § 4, ¶¶ 1, 2; N.M. Const. art. XII, §§ 1, 4; N.Y. Const. art. XI, § 1; Ohio Const. art. XI, § 2; Okla. Const. art. XIII, §§ 1, 1a; Or. Const. art. VIII, §§ 3, 4 & 8; Pa. Const. art. III, § 14; R.I. Const. art. XII, §§ 1, 2; S.C. Const. art. XI, § 3; S.D. Const. art. VIII, §§ 1, 15; Tenn. Const. art. XI, § 12; Texas Const. art. XII, §§ 1, 3 & 5; Utah Const. art. 10, §§ 1, 2 & 5; Vt. Ch. II, § 68; Va. Const. art. VIII, § 1, 2; Wash. Const. art. IX, § 1, 2; W.Va. Const. art. 12, §§ 1, 5 & 12; Wis. Const. art. X, § 3; Wyo. Const. art. 7, §§ 1, 8 & 9.

[6] Ga. Const. art. VIII, § 1, ¶ I; Ill. Const. art. X, § 1; Maine Const. art. VIII, Pt. 1, § 1; Mich. Const. art. 8, §§ 1, 2; Mo. Const. art. IX, §§ 1(a), 3(a) & 3(b); N.H. Const. Pt. 2, art. LXXXIII; Wash. Const. art. IX, § 1, 2.

[7] *See, e.g.* California Public Schools Accountability Act, Cal.Educ.Code § 52050.5: "(i) The statewide accountability system must include rewards that recognize high achieving schools as well as interventions and, ultimately, sanctions for schools that are continuously low performing…"; Delaware Accountability for Schools, Districts and the State, Del. Code Ann. Tit. 14, § 103 (1.1): "All public schools, including charter schools, reorganized and career technical school districts and the state shall be subject to the calculation and reporting of Adequate Yearly Progress (AYP) as prescribed by the federal Elementary and Secondary Education Act (ESEA), 20 U.S. C.A.

The overwhelming majority (84%) of K-12 students in the nation, over 50 million of them, are educated in traditional public schools. Only six percent are enrolled in charter schools, and 10.2% are enrolled in private schools. Network for Public Education, *Grading the States* (June 2018), https://networkforpubliceducation.org/grading-the-states/. Seventy-five percent of private school students are enrolled in religious schools. *Id*.

In Montana, nearly 150,000 students attend public elementary and secondary schools. Office of Public Instruction, *Facts About Montana Education 2019*, https://opi.mt.gov/Portals/182/Page%20Files/Superintendent's%20Folder/FactsAboutMontanaEducation.pdf?ver=2019-04-02-121817-760. Roughly 14,000 students attend private schools, *id*., and nearly 70 percent of K-12 private schools in the state are religiously affiliated. Brief for Petitioner at 6. According to Petitioners, in 2019, 40 students were awarded scholarships through the State-funded, private-school scholarship program at issue in this case. Brief for Petitioner at 12.

Thirty-eight states have constitutional provisions barring aid to religious institutions. Respondents' Brief at 9. Twenty-one states have

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§6301 et seq. Additionally, public schools, including charter schools, reorganized and vocational technical school districts shall be subject to the applicable rewards, sanctions and other accountability activities as prescribed in this regulation"; Florida Educational Funding Accountability Act, FL ST § 1010.215 (5)(a): "5) The annual school public accountability report required by ss. 1001.42(18) and 1008.345 must include a school financial report …. to better inform parents and the public concerning how funds were spent to operate the school during the prior fiscal year...."

placed limits on public funding to private and religious schools specifically.[8]

Montana's constitutional prohibition on funding to religious schools is rooted in its dedication to funding public schools, and fully consistent with the U.S. Constitution. The delegates to Montana's 1972 constitutional convention passed the no-aid provision after considerable discussion about whether to prohibit "indirect" aid to religious schools, and whether to allow pass-through of federal funds. The delegates decided to do both, noting the importance of support for public education as a primary concern:

> DELEGATE BURKHARDT:…[W]e did very seriously consider the issue and here are some of the major points which came up. Number one, on line 3: "The primary and significant advantage secured by the present provision is the unequivocal support it provides for a strong public school system.….The growth of a strong, universal, and free educational system in the United States has been due in part to its exclusively public character. Under federal and state mandates to concentrate public

[8] Ala. Constitution art. XIV, § 263; Ark. Const. art. 14, § 2; Cal. Const. art. 9, § 8; Colo. Const. art. IX, § 7; Del. Const. art. X, § 3; Ga. Const. Art. 8, § 5, Par. VII; Haw. Const. art. X, § 1; Ky. Const. § 189; Mass. Const. art. XVIII; Mich. Const. art. 8, § 2; Minn. Const. art. XIII, § 2; Miss. Const. art. 8, § 208; Mo. Const. art. IX, § 8; Mont. Const. art. V, §11(5) & art. X, §6; Neb. Const. art. VII, § 11; N.C. Const. art. II, § § 6,7; N.M. Const. art. XII, § 3; S.C. Const. art. XI, § 4; Tex. Const. art. VII, § 5; Va. Const. art. VIII, §10; Wyo. Const. art. 7, § 8.

> funds in public schools, our educational system has grown strong in an atmosphere free from divisiveness and fragmentation. Any diversion of funds or effort from the public school system would tend to weaken that system in favor of schools established for private or religious purposes."

Montana Constitutional Convention 1971-1972 transcript Vol. VI, p. 2008-2009 (Mont. Legis. & Legis. Council 1981), https://courts.mt.gov/portals/189/library/mt_cons_convention/vol6.pdf.

Since our nation's founding, states have adopted constitutional provisions that embody principles in the federal constitution, but strike different balances based on state preference. No two clauses have inspired more balancing, perhaps, than the very first words of the Bill of Rights, the religion clauses of the First Amendment. This Court has wrangled with these clauses on numerous occasions, recognizing "that there is 'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels." *Trinity Lutheran*, 137 S.Ct. 2012, 2019 (2017), *citing Locke*, 540 U.S. at 718.

When addressing state funding of public education, some states have decided to enforce a stronger "establishment" prohibition, at times tipping the balance in its favor over the "free exercise" requirement; but that difference is tolerable under the federal Constitution and something the framers expected states to do. *See Locke*, 540 U.S. at 722-723 (noting that at the time of the founding, many states

included in their constitutions prohibitions on tax funds going to the ministry). In other words, when it comes to the tug of war between the Establishment and Free Exercise Clauses, states -- with some limits -- have a right to decide what weight gets put on either side of the rope. Under the principles of federalism, states should be allowed to decide that they do not wish to fund religious education through their own state constitutions and statutes enacted through political processes.

The Montana Supreme Court's decision to follow its constitutional mandate to refrain from funding religious institutions is not subject to strict scrutiny because it is not singling out religious institutions for disfavored treatment, but addressing the use of public funds for religious instruction. The clear purpose behind Montana's policy, reflected in the constitutional convention transcript, is to support public education by choosing not to fund "a distinct category of instruction," *Trinity Lutheran*, 137 S.Ct. at 2023, *citing Locke*, 540 U.S. at 721. Religious schools are denied direct or indirect state funding not because of what they are, but because of what they propose to do – use the funds to induce religious faith. *See id*. ("Davey was not denied a scholarship because of who he was; he was denied a scholarship because of what he proposed to do—use the funds to prepare for the ministry.") This policy choice is consistent with states' historic desire to steer away from state funding of religious endeavors, thereby promoting religious freedom and devoting scarce public funds to public education. And, while this Court need not reach the question of whether a secular education at religiously affiliated schools is constitutionally permissible,

(Respondents' Brief at 9), the distinction may be one without a difference, because exposing impressionable young children at various levels of emotional and psychological development to a religious school setting despite a secular curriculum may be enough to convey religious dogma in a manner that amounts to *de facto* establishment.

A. Even if Montana's decision not to fund religious uses of public funds is subject to strict scrutiny, it has numerous compelling interests for doing so.

The Montana "no-aid" provision was readopted by the delegates to the Montana Constitutional Convention of 1972, with an added subsection allowing pass-through of federal funds to private schools. *Espinoza v. Montana Dept. of Revenue*, 435 P.3d 603 (Mont. 2018). The delegates to that convention were clear that by re-adopting a prohibition on direct or indirect payment of public funds "for any sectarian purpose or to aid any church, school, academy… controlled in whole or in part by any church, sect, or denomination," *id.* at 609, citing Mont. Const. art. X, §6 (2019), they were acting on their "strong commitment to maintaining public education and ensuring that public education remained free from religious entanglement," and giving Montana's public schools "unequivocal support." *Espinoza*, 435 P.3d at 610.

Far from evidencing impermissible discrimination, this implementation of the state's constitutional requirement in the least restrictive manner possible is fully in accord with the mandate

of the federal Constitution. Unlike the "policy preference for skating as far as possible from religious establishment concerns" offered by Missouri in *Trinity Lutheran*, Montana has shown several compelling concerns leading to its adoption of the state constitution's "no-aid" provision, and its Supreme Court's decision to invalidate the tax credit scholarship program.

First, Montana's decision to re-adopt a strong anti-establishment position in its state constitution is consistent with 200 years of state "disestablishment" efforts designed to protect religion from state entanglement. James Madison's *Memorial and Remonstrance Against Religious Assessments*, itself is a petition urging the Virginia legislature not to pass a bill allowing the direction of public funds to Christian societies. Public financial backing of religious endeavors, Madison explained, is not necessary to support civil government; it is a means of supporting religion, and would destroy the "moderation and harmony" that had developed between religious sects. James Madison, *Memorial and Remonstrance Against Religious Assessments* at 4-5.

States' longstanding disestablishment efforts are rooted in the notion that public funding of religious endeavors inevitably leads to oversight and regulation. In the very early days of the American colonies, religion was heavily regulated. *See Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 183 (2012)("In Virginia, for example, the law vested the governor with the power to induct ministers presented to him by parish vestries.") (citation omitted). States made a

conscious effort to change this through disestablishment, to avoid state interference with religion and division among the body politic. Carl H. Esbeck, *When Accommodations for Religion Violate The Establishment Clause: Regularizing The Supreme Court's Analysis*, 110 W. Va. L. Rev. 359, 368-369 (2007).

Indeed, the deliberate tension and resulting balance between the Establishment and Free Exercise Clauses is intended to create a role for government in which it refrains from supporting *any* religion so that *all* religions may exist without government regulation and individuals may worship as their consciences dictate. In future rulings, this Court warned against the idea of excessive entanglement as a grave Establishment Clause concern, adding it to its analytical framework in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Based on its prior rulings, this Court added the consideration of "excessive entanglement" to the "secular purpose" requirement to acknowledge its concern with state infringement on practices of religion by becoming too intermingled with its tenets and operations.

In this case, the Court can reaffirm our nation's historic struggle to maintain government neutrality toward religion, and with it religious freedom. The balance between these concerns, reflected in the religion clauses, strives to have government power "reach actions only, & not opinions," and to erect "a wall of separation between Church & State." Thomas Jefferson, *Letter to the Danbury Baptists* (Jan. 1, 1802), http://www.loc.gov/loc/lcib /9806/danpre.html. Montana's no-aid provision reflects an important

historical commitment to keeping government out of the business of religious education and training.

The Montana constitution embraces the core principle that taxpayer support for religious education not only harms public schools but also undermines true religious liberty by diverting public funds to religious uses, inviting state interference with religious institutions,[9] and fostering religious organizations' dependence on government largesse. These are basic notions that date back to the founding of the nation, and Montana should have the constitutional authority to promote them.

States have wide latitude to draft their state constitutions to suit the policy concerns of their own populace. Indeed, "[t]he state constitutions are based on diverse understandings and philosophies of government, are substantially easier to amend than the U.S. Constitution," and "provide for direct citizen involvement in the process of amendment and change (unlike the federal constitution)." Advisory Commission on Intergovernmental Relations, *State Constitutions in the Federal System: Selected Issues*

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[9] With state financial support often comes state regulation; and state policy priorities do not always align with religious tenets. A state may require private schools to abide by certain rules as a condition of participation in a state funding program. For example, a Maine program makes public funding available for private school tuition when the local district does not offer a secondary school. To participate in the program, a private school must agree to refrain from discriminating on various bases. 5 Me. Rev. Code §4553(10)(G)(prohibiting discrimination in educational opportunity "on the basis of sexual orientation or gender identity, except that a religious corporation, association or organization *that does not receive public funds* is exempt from this provision….")(emphasis added).

and Opportunities for State Initiatives at 2 (Jul. 1989), https://library.unt.edu/gpo/acir/Reports/policy/a-113.pdf.[10] Our federal system leaves states in charge of policy matters of concern to their citizens and "left open to them by the very incompleteness of the U.S. Constitution." *Id.* at 8.

Second, Montana's constitution, like those of other states, seeks to avoid entanglement with, and accompanying regulation of, religious institutions by refraining from supporting religious instruction with public funds. Respondents' Brief at 17-23. This Court long has recognized that the Establishment Clause bars a state from enacting curriculum and related requirements in the public schools where the purpose "either is the advancement or inhibition of religion." *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 223 (1963). Accordingly, the Court has invalidated required exercises at the opening of the school day that include reading of the Bible and recitation of the Lord's prayer, *id.* at 225; the required teaching of creationism, *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987); and a legal bar on teaching evolution science because it conflicts with religious views, *Epperson*, 393 U.S. at 107. "While study of

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[10] The Advisory Commission on Intergovernmental Relations was a bipartisan agency created by Congress in 1959 to monitor and study the federal government's relationships with state and local government. Before it was discontinued in 1996, it convened government officials and issued reports on issues affecting federal-state-local government interactions, including a report required by the Unfunded Mandates Reform Act of 1995. Center for the Study of Federalism (updated Jun. 3, 2019), http://encyclopedia.federalism.org/index.php/U.S._Advisory_Commission_on_Intergovernmental_Relations.

religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program or education need not conflict with the First Amendment's prohibition, the State may not adopt programs or practices in its public schools … which 'aid or oppose' any religion" and "[t]his prohibition is absolute." *Id*. at 106 [citation omitted].

Consistent with these decisions, the Court has invalidated the use of public funds for religious instruction. In *Lemon* itself, this Court considered two such state statutes – Pennsylvania's, reimbursing private schools for expenses including teacher salaries, and Rhode Island's, paying a salary supplement directly to private school teachers. This Court ruled that both statutes enabled public aid to go to "church-related educational institutions," and ruled them unconstitutional in light of the "three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Lemon,* 403 U.S. at 607, 612 (citation omitted). An attempt to fund only the "secular" component of the religious schools' operations, this Court held, immersed the states unlawfully in those operations. *Id*. at 613.

This Court has rejected some attempts to invalidate state programs that limit funding to sectarian institutions when there is a plausible secular purpose, reflecting the Court's "reluctance to attribute unconstitutional motives to the states…" *Mueller v. Allen*, 463 U.S. 388, 394-395 (1983). The Court has, since *Mueller*, found certain types of neutral public support of religious institutions and schools permissible under the Establishment Clause,

but it has never held such support to be required under the Free Exercise Clause. The central tenet -- that state governments must avoid excessive entanglement with religion – abides. *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 774 (1973). And this Court has never held that a state must ignore its significant historic concerns about entanglement and abandon its sovereign policy choice to support public schools to direct public money to fund religious instruction. On the contrary, it has recognized that public support of religious instruction carries special apprehensions: "That early state constitutions saw no problem in explicitly excluding only the ministry from receiving state dollars reinforces our conclusion that religious instruction is of a different ilk." *Locke*, 540 U.S. at 723.

Finally, and importantly, Montana's choice to restrict public funding to private and/or religious schools is rooted in its dedication of public dollars to public schools. As the Montana constitutional delegates recognized, funneling public money to private schools does not propel improvement of public education, but rather, drains already limited resources and dilutes broad community support, undermining the very schools that most American children, including low-income children, attend.

Indeed, many state constitutions make clear their strong commitment to public education by restricting in various ways the flow of public money to private and/or religious schools. Nebraska's state constitution, for example, states "Notwithstanding any other provision in the Constitution, appropriation of public funds shall not be made to any school or institution of learning not owned or exclusively

controlled by the state or a political subdivision thereof"… "All public schools shall be free of sectarian instruction." "All such fines, penalties, and license money shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue." Neb. CONST. Art. VII, § 11. Michigan's constitution similarly prohibits "public monies or property" from being "appropriated or paid" to either "aid or maintain any private, denominational or other nonpublic . . . school," or "to support the . . . employment of any person at any such nonpublic school." Mich. Const. art. 8, §2. These provisions reflect concerns not motivated by a hostility to religion, but by the dual goals of supporting public schools and remaining neutral with respect to religion.[11]

The Montana constitutional provision at issue in this case, and its Supreme Court's application of it to invalidate the tax credit scholarship program, reflects its populace's choice to prohibit public funding of such religious education, a choice fully consistent with the values secured by the religion clauses of the First Amendment to the United States Constitution. When a state government chooses not to support religion with public funds, a court cannot presume its motive to be suppression of religious conduct, but should presume a constitutional goal to avoid "the divisiveness, strife, and violations of conscience that forcing taxpayers to fund the religions of others involves." Laura S. Underkuffler, *The Separation of*

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[11] *See, e.g. Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rights Commn.*, 138 S. Ct. 1719, 1732 (2018)(First Amendment requires that laws be applied in a manner neutral toward religion).

the Religious and the Secular: A Foundational Challenge to First Amendment Theory, 2 First Amend. L. Rev. 179, 185 (2004); *see also Mueller v. Allen*, 463 U.S. at 394-395 (noting Court's "reluctance to attribute unconstitutional motives to the states"). As *Locke* makes clear, Montana's decision – which reflects that state's choice about how best to protect the values of religious liberty and freedom of conscience embodied in its state constitution – is entitled to deference and respect. *See Locke*, 540 U.S. at 723-725 (given Washington's historic and substantial antiestablishment interest, the denial of public funding for vocational religious instruction was not inherently constitutionally suspect).

B. Montana's decision not to allow public funds to flow indirectly to religious schools is consistent with this Court's holdings that states need not fund religious education.

This nation and this Court have consistently supported the policy goals behind Montana's "no-aid" provision as crucial state interests overcoming any accompanying burden on religion.

In *Locke*, this Court recognized the historical reluctance to fund degrees that were "devotional in nature or designed to induce religious faith," 540 U.S., at 716, and recognized the "play in the joints" between the Constitution's religion clauses. It acknowledged the state of Washington's policy not to fund devotional theology degrees as part of its scholarship program to be "in keeping with the State's antiestablishment interest in not using taxpayer funds to pay for the

training of clergy; in fact, the Court could 'think of few areas in which a State's antiestablishment interests come more into play,' …. The claimant in *Locke* sought funding for an 'essentially religious endeavor ... akin to a religious calling as well as an academic pursuit,' and opposition to such funding 'to support church leaders' lay at the historic core of the Religion Clauses." *Trinity Lutheran*, 137 S.Ct. at 2023, *citing Locke* 540 U.S. at 721–722 (citations omitted). The question in *Locke* was whether the state of Washington could prohibit use of public scholarship money to pursue a degree in devotional theology. This Court said it could. *Locke*, 540 U.S. at 719. The Court did not disturb that finding in *Trinity Lutheran*.

Although this Court has held that the Establishment Clause permits states, under certain circumstances, to allow religious schools to benefit from public funding programs in an indirect manner, *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10-11 (1993), it has also said that states are not required to do so in all circumstances. *Locke*, 540 U.S. at 719 ("Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients.)(citations omitted). This Court has expressed skepticism at the constitutionality of a program ostensibly designed for "school choice," but acting as an "ingenious plan[] for channeling state aid to sectarian schools." *See Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 785 (1973), and warned that a government's secular purpose may not be "a sham, * * * merely secondary to [its] religious objective." *McCreary Cnty. v. Am. Civil Liberties Union of Kentucky*, 545 U.S. 844, 864

(2005). In *Bowen v. Kendrick*, this Court had made clear that a government program is unconstitutional if, in its application, public aid is directed to religious organizations that are "pervasively sectarian" or that use the public funds to "inculcate the views of a particular religious faith." 487 U.S. 589, 621 (1988).

The Court has found the Establishment Clause permits otherwise neutral public programs to benefit religious schools in some instances, *see*, *e.g.*, *Agostini v. Felton*, 521 U.S. 203, 225 (1997) ("… we have departed from the rule relied on in *Ball* that all government aid that directly assists the educational function of religious schools is invalid"). But it has never held that a state is required to fund religious schools despite its strong state policy of directing public funds to public schools.

The Free Exercise Clause prevents government from "plac[ing] a substantial burden on the observation of a central religious belief or practice," *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989), but government's mere refusal to pay the cost of a pervasively religious education – even if it pays for the secular counterpart – does not impose any such burden. It may not violate the Establishment Clause for a state to operate such programs when there is no purpose or effect of advancing religion, but it is not compelled by the Free Exercise clause. *Locke*, 540 U.S. at 718-719. The First Circuit has held so explicitly. *Eulitt ex rel. Eulitt v. Maine, Dep't of Educ.*, 386 F.3d 344 (1st Cir. 2004)("[t]he fact that the state cannot interfere with a parent's fundamental right to choose religious education for his or her child does not mean that the state must fund that choice.").

If the Court holds now that any state reluctance to fund religious instruction manifests a hostility toward religion that, *ipso facto*, violates the Free Exercise Clause, any "play in the joints" has disappeared, and the balance has tipped precipitously in Free Exercise's favor. There is no longer a set of policy choices that states can select with respect to public funding for religious instruction that are allowed by the Establishment Clause but not required by the Free Exercise Clause. Decades of state choices to act on historic entanglement concerns by drawing the line closer to the Establishment Clause than the federal constitution requires, but not to the point that the Free Exercise Clause forbids, will disappear.

A holding that the U.S. Constitution forbids states from balancing the religion clauses in that way would overturn decades of state jurisprudence finding state constitutional provisions with more pronounced separation requirements have independent vitality from the federal constitution. Alexander at 223-226, *citing*, *e.g.*, *University of the Cumberlands v. Pennypacker, et al.*, 308 S.W. 668 (Ky. 2010), *Matthews v. Quintin*, 362 P.2d 932 (Alaska 1961), *Spears v. Honda*, 449 P.2d 130 (Haw. 1968); *Bd. of Cnty. Commissioners v. Idaho Health Facilities Authority*, 531 P.2d 588 (Idaho 1974); *Knowlton v. Baumhover*, 166 N.W. 202 (Iowa 1918); *Attorney General v. Sch. Committee of Essex*, 439 N.E.2d 770 (Mass. 1982); *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539 (Vt. 1999). To hold as much would be to apply this Court's 2017 *Trinity Lutheran*'s narrow ruling unnecessarily widely, and to turn away from decades of precedent allowing flexibility to the states.

II. PROGRAMS LIKE MONTANA'S INVALIDATED TAX CREDIT SCHEME HARM PUBLIC EDUCATION.

School voucher schemes and tax credit scholarship arrangements, promoted as vehicles for "school choice" ostensibly allowing families that otherwise could not afford private schools to choose them, often benefit only wealthier families who can afford the significant portion of private school tuition that vouchers or scholarships do not cover. These wealthier families can use such programs to defray private school costs that they already have decided to incur. These programs shift public funds away from the local public school system, to the detriment of students who have no real choice but to remain.

The programs purposely skirt state and federal legal constrictions, such as Montana's no-aid provision, by funneling state dollars through parents, or scholarship nonprofit corporations that in turn pay some portion of tuition at private schools. While vouchers create a direct expense to the state in the form of funding some portion of a student's tuition at a private school, a scholarship funded through a tax credit program is a loss in potential state revenue through tax credits. National Conference of State Legislatures, *Fiscal Impact of Vouchers and Scholarship Tax Credits* (2013) http://www.ncsl.org/research/education/fiscal-impact-of-school-vouchers-and-scholarship-tax-credits.aspx.

Voucher and similar programs did not arise in states in any significant way until this Court invalidated segregation in public schools by race in *Brown v. Board of Education*. *See* Alexander at 219.

Shortly after that landmark decision, the state of Virginia allowed counties to close public schools, to open private academies for white students only, and to award parents tuition vouchers and tax credits. *Id.* This Court eventually found that program violative of the Fourteenth Amendment's Equal Protection Clause. *Griffin v. County Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218, 232 (1964). Since then, vouchers and similar schemes have become more sophisticated.

Tax credit scholarship programs have grown exponentially in recent years, and now operate in 18 states. In 2005, roughly 50,000 students received some form of tax credit scholarship; in 2017 that number was 256,000. Kevin Carey, *DeVos and Tax Credit Vouchers: Arizona Shows What Can Go Wrong*, New York Times (Mar. 2, 2017) https://www.nytimes.com/2017/03/02/upshot/arizona-shows-what-can-go-wrong-with-tax-credit-vouchers.html.

In practice, tax credit scholarship programs have effects similar to those of traditional voucher programs, drawing resources and support away from public schools, and failing to help the vast majority of students.

A. Tax credit scholarship programs like Montana's divert money otherwise headed for state coffers to private schools.

Programs like Montana's divert funds otherwise bound for public coffers through tax collection to private schools, thereby undermining public schools by shorting state treasuries, an important source of educational dollars. Indeed, tax

credit programs, like tax deductions, reduce state revenues. *See*, *e.g.*, *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 157-158 (2011)(Kagan, J., dissenting). The Montana statute itself describes the purpose of Student Scholarship Organizations in terms of parental choice via private contributions through a "tax *replacement* programs." *Espinoza*, 435 P.3d at 606. The fiscal note accompanying the Montana bill estimated that the program would reduce the state's general fund revenues by up to $9.6 million annually by fiscal year 2022. *Id*. at 616, n.3 (Gustafson, J., concurring).

Local public school districts in Montana, like those throughout the nation, are creatures of state law, and depend on states for a large percentage of their operating funds. In school year 2015-16, only eight percent of all public elementary and secondary schools' revenue came from federal sources, while forty-seven percent came from state sources, and forty-five percent came from local sources. National Center for Education Statistics, *Public School Revenue Sources*, https://nces.ed.gov/programs/coe/indicator_cma.asp (updated May 2019). The percentage from each source differed from state to state. In Illinois, for example, the federal-state-local percentages were 8-24-67, while in Vermont they were 7-89-4. *Id*. In Montana, forty-eight percent of public school revenues came from the state. *Id*.

Although proponents maintain that tax credit scholarship programs do not involve actual government expenditures, in reality the economic effect can be similar. *See Arizona*, 563 U.S. at 141-142. Instead of directly funding private school scholarships, the government reimburses

sophisticated taxpayers for providing funding to private schools on the state's behalf. The end result is the same as under a direct voucher program: a boost in resources for private schools and frequently a reduction in resources for public education and other services. Institute on Taxation and Education Policy, *How School Voucher Tax Shelters Undermine Public Education* (2017), https://itep.org/wp-content/uploads/AASA_Public_Loss_Private_Gain_F2.pdf.

Take Arizona, a state where tax credit scholarships have grown since enactment of the first program in 1998. Arizona describes its current programs as follows:

> Arizona provides four income tax credits for taxpayer donations to certified school tuition organizations (STOs) for the purpose of providing scholarships to students to attend Arizona private schools. Two credits are for donations made by individual taxpayers (original and switcher)1 A.R.S. §§ 43-1089 and 43-1089.03 and two credits are for corporate donations (low-income and disabled/displaced), A.R.S. §§ 20-224.06 and 20-224.07 or A.R.S. §§ 43-1089.04, 43-1183 and 43-1184. Corporate donations can be claimed as a tax credit against either the corporate income tax or the insurance premium tax. The tax credit programs have various start dates: the original individual tax credit program began in 1998, the low-income corporate program began in 2006, the

> disabled/displaced program began in 2009 and the switcher individual program began in 2012.

Arizona Dep't of Revenue, Office of Economic Research & Analysis, *School Tuition Organizations Income Tax Credits in Arizona: Summary of Activity: FY: 2016/2017* (Apr. 2019), https://azdor.gov/sites/default/files/REPORTS_CREDITS_2018_fy2017-private-school-tuition-org-credit-report.pdf.

Arizona's tax credit scholarship program allows state taxpayers to contribute $500-$1000 per year to School Tuition Organizations (STOs), which process tax credits for private school tuition scholarships, and to obtain a credit on their state tax bill. Ninety-three percent of money processed through STOs in Arizona goes to religious schools. Tax credits topped $160 million in 2016. The amount is allowed to grow by 20% every fiscal year. Save Our Schools Arizona (2019), https://sosarizona.org/ 2019/02/07/5-things-you-need-to-know-about-stos/.

While its tax credit scholarship scheme grew, Arizona's financial support for public education declined. Arizona has cut an estimated $4.5 billion from public school funding since 2009, and continues to cut K-12 spending. Arizona School Boards Association, *Arizona's Unrestored Budget Cuts Part 1* (2017), https://azsba.org/wp-content/uploads/2017/04/Unrestored-Budget-Cuts-Pt.1.jpg. According to the state's own tally, dollars otherwise headed to state coffers as tax revenue totaled $350 million from 1998 to 2008. *Arizona*, 563 U.S. at 161 (Kagan, J., dissenting)(citations omitted). As of 2017, Arizona had hit the $1 billion mark in scholarships granted.

Arizona Dep't of Revenue, Office of Economic Research & Analysis at 2.

As of 2017, seventeen states were diverting a total of over $1 billion per year toward private schools via tax credits and deductions. Nine of these states' tax credit programs enabled contributors to eliminate their state tax bill and to obtain a federal tax deduction.[12]

B. Tax credit scholarship programs support private schools that are not accountable to state taxpayers as public schools are.

At the heart of state efforts to support public education are missions to improve student well-being and achievement. States monitor progress on these crucial goals through accountability measures. Public schools must follow these requirements and publicly report their progress; private schools often do not.

Taxpayers in states with tax credit scholarship programs often cannot see how students who receive scholarships to attend private schools are performing or how the money is spent, and there are no clear standards to protect against misuse of public funds.

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[12] Carl Davis, *State Tax Subsidies for Private K-12 Education*, Rep. Institution for Taxation and Economic Policy (Oct. 12, 2016) (updated May 2017), http://itep.org/ itep_reports/2016/10/state-tax-subsidies-for-private-k-12-education.php#.WO0Lx4grJEY; *see also* Carl Davis, and Sasha Pudelski, *Public Loss Private Gain: How School Voucher Tax Shelters Undermine Public Education*, School Superintendents Association & Institute of Taxation and Economic Policy (May 2017), https://itep.org/public-loss-private-gain-how-school-voucher-tax-shelters-undermine-public-education/.

The GAO recently reported that of the 22 programs currently operating in seventeen states (not including Montana), only eight require that schools receiving tuition dollars from the scholarship organizations meet the minimal standard of state accreditation. U.S. Government Accountability Office, *Private School Choice: Accountability in State Tax Credit Scholarship Programs*, GAO-19-664 (September 2019) https://www.gao.gov/assets/710/701640.pdf. The GAO noted that most states with tax credit scholarship programs require participating schools to teach core subjects and to meet minimum attendance requirements, but few require financial audits or reviews. *Id.*

Research indicates that students who participate in voucher-type programs often lose ground academically. *See*, *e.g.*, Jonathan N. Mills & Patrick J. Wolf, *The Effects of the Louisiana Scholarship Program on Student Achievement After Four Years*, Louisiana Scholarship Program Evaluation Report #10 (Apr. 23, 2019), http://www.uaedreform.org/wp-content/uploads/Mills-Wolf-LSP-Achievement-After-4-Years-final.pdf; Megan Austin, R. Joseph Waddington, & Mark Berends, *Voucher Pathways and Student Achievement in Indiana's Choice Scholarship Program*, RSF: The Russell Sage Foundation Journal of the Social Sciences (2019), https://www.rsfjournal.org/content/rsfjss/5/3/20.full.pdf.

Students with disabilities who participate in state-supported voucher-type programs give up considerable federal protections designed to ensure their equal access to education under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C.

§1400 *et seq*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Whereas public schools must provide eligible students with a free appropriate public education through special education and related services, private schools do not. A public school district must only expend federal funds in an amount "proportionate" to the number of private school students attending schools in its borders. 20 U.S.C. §1412 (a)(10)(A). Many states further limit IDEA's already constricted reach in private schools by requiring that parents waive their rights under the law as a condition of accepting a voucher. (Wisconsin, Tennessee, Colorado, Ohio, and the District of Columbia allow for partial IDEA rights, while Oklahoma, Florida's McKay Scholarship, and Georgia require parents to revoke all IDEA rights.) National Council on Disability, *School Choice Series: Choice & Vouchers – Implications for Students with Disabilities* (Nov. 15, 2018), https://ncd.gov/sites/default/files/NCD_Choice-Vouchers_508_0.pdf; U.S. Government Accountability Office, *Private School Choice: Federal Actions Needed to Ensure Parents Are Notified About Changes in Rights for Students with Disabilities*, GAO-18-94 (November 2017), https://www.gao.gov/assets/690/688444.pdf.

Private schools do not have to hire licensed teachers and are not subject to the academic standards imposed on public schools. They are not required to serve free or reduced lunch, offer transportation, or, as discussed above, provide special education services. This makes it more unlikely for impoverished families in socio-economically segregated neighborhoods to take advantage of the scholarships offered through these programs.

These failures in voucher and tax credit scholarship programs' design and implementation belie any stated intention to promote school reform; rather, their primary purpose is to provide public resources to private, mostly religious schools. A program genuinely designed to expand high-quality educational options and to improve student outcomes also presumably would impose public accountability, oversight, and curricular control on any school—public or private—that received public funding. Where public tax dollars are involved, the public has an interest in ensuring quality education is delivered.

The Montana program creates an accountability structure for private schools that is far more relaxed and basic than the extensive accountability structure imposed on Montana's public schools. While accountability structures for Montana's public schools literally fill books within the Montana Code Annotated and Montana Administrative Rules, those for private schools participating in the program consist of one subsection, Mont. Code Ann. § 15-30-3102(7), which allows schools to receive scholarships if they are "seeking" accreditation. Indeed, Montana's public schools are required by state law to seek and maintain accreditation by the Montana Board of Public Education, but there is no such requirement for private providers generally, which "may" request accreditation. Mont. Code Ann. § 20-7-102.

The Montana program runs contrary to the policy concerns expressed by the state's constitutional delegates by draining public money and support for public education, thereby threatening the number and quality of public school options, the only viable

choices for the overwhelming majority of the state's students. Tax credit programs like this one hamper a state's ability to provide all of its students with free public education. *See Arizona*, 563 U.S. at 147 (2011) (Kagan, J., dissenting)("…the Arizona private-school-tuition tax credit has cost the State, by its own estimate, nearly $350 million in diverted tax revenue.")

Additionally, tax credit programs are not a viable solution in many rural areas of the country because these programs can strain funding resources in communities that already have lower densities of students and schools. Neil Campbell and Catherine Brown, *Vouchers Are Not a Viable Solution for Vast Swaths of America*, Center for American Progress (March 3, 2017), https://www.americanprogress.org/issues/education-k-12/news/2017/03/03/414853/vouchers-are-not-a-viable-solution-for-vast-swaths-of-america/. And tax credit/voucher programs provide public funding to schools that can legally remove or refuse to serve some students altogether. Kimberly Quick, *Second-Class Students: When Vouchers Exclude*, The Century Foundation (Jan. 11, 2017), https://tcf.org/content/commentary/second-class-students-vouchers-exclude/?session=1&agreed=1; Rebecca Klein, *These Schools Get Millions Of Tax Dollars To Discriminate Against LGBTQ Students*, HuffPost (Dec. 15, 2017), https://www.huffpost.com/entry/discrimination-lgbt-private-religious-schools_n_5a32a45de4b00dbbcb 5ba0be. Public schools are not able to reduce their fixed costs (such as facilities costs) in proportion to students leaving for private schools. When tax credit programs successfully encourage families to leave public schools, therefore,

they result in less money going to the classroom for students remaining in public schools.

CONCLUSION

If this Court overrules the Montana Supreme Court by dramatically expanding the narrow parameters of the 2017 *Trinity Lutheran* holding to encompass state support of religious instruction, the Court will undermine its own precedent recognizing a state's flexibility to balance the religion clauses according to the priorities of its populace. A holding that Montana *must*, under the Free Exercise Clause, include religious schools in its tax credit program, would strike at the heart of federalism, eliminating any "play in the joints" between state support permitted Establishment Clause and that required by Free Exercise. The tension purposely designed into these provisions would disappear, and Montana's decision to support public education would become irrelevant.

For the reasons explained above, *Amici* urge the Court to uphold the Montana Supreme Court's ruling.

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November 15, 2019