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 RELIGION LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

Amici are scholars who have studied the Religion Clauses extensively.[1] This Court has long recognized that substantial anti-establishment interests can support drawing lines based on the religious use of public funds, particularly where education is involved. Amici's scholarship has explained why these

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for party, or person other than amicus curiae or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have filed a notice of blanket consent with the Clerk. A full list of amici is provided in the Addendum.

precedents are consistent with the anti-establishment and free exercise traditions embodied in the Religion Clauses. Petitioners have asked the Court to upend these precedents. Amici urge the Court to instead adhere to them, and the deeper constitutional tradition on which they rest, according to which a State may permissibly decline to fund the teaching of, and practice of, religion or irreligion.

SUMMARY OF ARGUMENT

Petitioners ask this Court to adopt a rule it has rejected before: When the government creates a funding program, the Free Exercise Clause prohibits it from drawing any lines based on religion not specifically required by the Establishment Clause. *See* Petrs' Br. at 14. This strict formalism—which would prohibit a government from considering the concerns that motivated the Religion Clauses—would discard precedent, would depart from the Court's general approach to constitutional challenges to funding programs, and would deprive States and the Federal Government of the ability to avoid the serious anti-establishment concerns that funding programs can raise.[2]

Petitioners' rule would do all of this and offer nothing in return. The Court's precedents *already* pro-

[2] As Respondents explain, this case does not offer the Court a vehicle to adopt that rule because Montana's no-aid constitutional provision is not before the Court, and Montana's no-aid provision does not, in any event, prohibit state funding based solely on an entity's status as a religious school. *See* Resp. Br. at 12–13 & n.1, 36–40. This brief discusses why Petitioners' argument is not just procedurally improper, but is also wrong on its own terms.

hibit discrimination for or against religion, or among religions. The Court should again reject the rule Petitioners seek, one that would insert the government into the everyday affairs of religious institutions and organizations.

ARGUMENT

I. A Government's Decision To Fund Only Secular Services Need Not Survive Strict Scrutiny.

A. The Free Exercise Clause permits the benevolent accommodation of anti-establishment concerns.

The Religion Clauses bind a government's decision to fund the exercise, practice, or teaching of religion. On the one side, the Establishment Clause does "not tolerate * * * governmentally established religion." *Walz* v. *Tax Comm'n of New York*, 397 U.S. 664, 669 (1970). On the other, the Free Exercise Clause forbids "governmental interference with religion." Between these Clauses lies room for "a benevolent neutrality" that allows a government to be more protective of religion or irreligion than the Clauses require. *Id.*

The Court has long said that there is space for a government to act between these two clauses. *See Locke* v. *Davey*, 540 U.S. 712, 718–719 (2004). "[T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.* So, for example, the Free Exercise Clause allows a State to decline to extend a state scholarship program to cover a degree in devotional theology, even though the Establishment Clause would permit the State to do so. *See id.* at

719, 725. By the same token, "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz*, 397 U.S. at 673. Thus, for example, the Establishment Clause allows a State to relieve burdens on religious exercise that institutionalized persons face, even though the Free Exercise Clause does not require it to do so. *See Cutter* v. *Wilkinson*, 544 U.S. 709, 713 (2005) (citing *Locke*); *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 18 n.8 (1989) (plurality op.).

The Court has also held that whether a government program has successfully navigated the Religion Clauses does not turn on whether the program is absolutely blind to religion. The First Amendment's dual commands with respect to religion—"in favor of free exercise, but opposed to establishment"—mean that a government's decision to "deal differently" with religion may be "a product of these views, not evidence of hostility to religion." *Locke*, 540 U.S. at 721. And so, when asked to adopt strict formalism, the Court has "reject[ed]" the view that a law or program that "is not facially neutral with respect to religion" is "presumptively unconstitutional." *Id.* at 720. So long as a law is neutral "*among* religions," there is "no justification for applying strict scrutiny." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 339 (1987); *accord Locke*, 540 U.S. at 725; *Bronx Household of Faith* v. *Bd. of Educ. of New York*, 750 F.3d 184, 195 (2d Cir. 2014) ("[R]ules that focus on religious practices in the interest of observing the concerns of the Establishment Clause * * * must be assessed neutrally on all the facts and not under strict scrutiny.").

Finally, the Court has already made plain that the space between the Religion Clauses is not infinite. While a government may accommodate free exercise concerns, "[a]t some point, accommodation may devolve into an unlawful fostering of religion." *Cutter*, 544 U.S. at 714 (internal quotation marks omitted); *Amos*, 483 U.S. at 33 (asking if a law made "a rational classification" to alleviate "significant governmental interference" with the ability of religious organizations to define and carry out their religious missions"); *see also Texas Monthly*, 489 U.S. at 18 & n.8 (finding an Establishment Clause violation where "[n]o concrete need to accommodate religious activity ha[d] been shown" and the tax exemption at issue did "not remove a demonstrated and possibly grave imposition on religious activity"). Just so, while a government may accommodate anti-establishment concerns, at some point, accommodation may devolve into an unlawful burdening of religion. *Trinity Lutheran* is best understood as an example. The program at issue funded the use of "recycled tires to resurface playgrounds," an activity that the Court viewed as not resembling the kind of "essentially religious endeavor" that a government may permissibly decline to fund. *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2023 (2017) (internal quotation marks omitted). The Court held that these funds had no connection to the exercise, practice, or teaching of religion, even if used by a church's playground, and so the exclusion of religious entities amounted to discrimination, not accommodation of anti-establishment interests. This program thus fell outside the permissible space between the Religion Clauses, and within the scope

of laws that are subject to strict scrutiny under the Free Exercise Clause. *See id.* at 2021.

B. The Court's approach mirrors its general approach to constitutional challenges to funding programs.

The Court's application of these principles in the context of funding programs aligns with its approach under the unconstitutional-conditions doctrine to other constitutional challenges to funding programs. This doctrine prohibits the government from placing "a condition on the receipt of a benefit or subsidy that infringes upon the recipient's constitutionally protected rights, even if the government has no obligation to offer the benefit in the first instance." *Agency for Int'l Dev.* v. *All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 212 (2013) (internal quotation marks omitted). The doctrine thus forbids "conditions that seek to leverage funding to regulate" a right "outside the contours of the program itself." *Id.* at 214–215.

Under the doctrine, a government need not fund a right's exercise, but it cannot condition funding on how a recipient exercises that right outside the context of the program. For example, a government may choose to not subsidize abortions, but it may not deny food stamps to women who have had abortions, or require food-stamp recipients to promise not to get abortions. *See Webster* v. *Reprod. Health Servs.*, 492 U.S. 490, 510 n.8 (1989); *Harris* v. *McRae*, 448 U.S. 297, 317 n.19 (1980); *Maher* v. *Roe*, 432 U.S. 464, 474 n.8 (1977). Similarly, a government may choose not to fund public broadcasters' editorials, but it may not deny funding to public broadcasters that have run editorials paid for by nongovernment funds. *See FCC* v. *League of Women Voters of Cal.,* 468 U.S. 364,

399–401 (1984). And a government may choose to grant tax-exempt status only to groups that do not engage in lobbying or electioneering, but it may not deny tax-exempt status to groups solely because they are affiliated with an entity that engages in lobbying or electioneering. *See id.*; *Regan* v. *Taxation with Representation of Wash.*, 461 U.S. 540, 544 (1983).

The Court's Religion Clauses precedents are of a piece with that larger constitutional jurisprudence. A government can limit a funding program to secular services, but it cannot *condition* funding on the recipient restricting its religious activities outside the program's scope. Adopting a different rule when the Religion Clauses are at issue—under which the government *cannot choose not to* fund the exercise of a religious right—would privilege religion over other constitutional rights, an Establishment Clause problem by itself. *See, e.g.*, *Regan*, 461 U.S. at 549 (The government's "decision not to subsidize the exercise of a fundamental right does not infringe the right."); *Lyng* v. *Int'l Union, United Automobile Workers*, 485 U.S. 360, 368 (1988) (The "strikers' right of association does not require the Government to furnish funds to maximize the exercise of that right.").

C. The Court's approach preserves flexibility to address the serious anti-establishment concerns that funding programs can raise.

A government's differential treatment of religious institutions can simply represent its "historic and substantial" interest in promoting anti-establishment values, not hostility toward or discrimination against religion. *Locke*, 540 U.S. at

725. Requiring a government's accommodation of anti-establishment principles to survive strict scrutiny would impermissibly undermine these important interests. Indeed, the historical context reveals four anti-establishment interests—all of which play an important role in our society, and none of which could be accommodated under Petitioners' formalist approach.

First, the Establishment Clause promotes dissenting citizens' freedom of conscience. Taxpayers can reasonably view a government's funding of a religious institution as infringing the religious freedom of taxpayers who object as a matter of conscience to supporting institutions with which they disagree. *See* Nelson Tebbe, *Excluding Religion*, 156 U. Pa. L. Rev. 1263, 1273–74 (2008). And "[t]axpayers who oppose state aid of religion have equal reason to protest whether that aid flows" directly or in the form of a tax subsidy. *Arizona Christian Sch. Tuition Org.* v. *Winn*, 563 U.S. 125, 148 (2011) (Kagan, J., dissenting).

Avoiding taxpayer support for religious institutions was a central concern of the Founding era. At that time, the "dominant issue" was not neutrality towards religion and non-religion but "government financial support for churches" of any kind. Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes,* 13 Ind. J. Global Legal Stud. 503, 508 (2006). Although "[d]efenders of the established churches proposed as a compromise that dissenters be allowed to pay their church tax to their own church," in the end, "every state rejected this compromise." *Id.* at 508–509. The Virginia Bill for Religious Liberty reflected these

contemporary sentiments, ensuring that taxpayers would not be coerced into subsidizing others' religious beliefs. Va. Code Ann. § 57-1 ("[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical * * * ."). Anything short of a blanket prohibition "would coerce a form of religious devotion in violation of conscience." *Winn*, 563 U.S. at 141 (discussing James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *in* 2 Writings of James Madison 183, 186 (Gaillard Hunt ed. 1901) (hereinafter *Memorial and Remonstrance*)); *see also* Noah Feldman, Divided By God: America's Church-State Problem—And What We Should Do About It 48 (2005) ("The advocates of a constitutional ban on establishment were concerned about paying taxes to support religious purposes that their consciences told them not to support.").

Montana reasonably concluded that requiring its scholarship program to pay for attendance at religious schools would transgress the Founding-era prohibition on paying for religious education out of taxpayer coffers. Montana's program offers a dollar-for-dollar tax credit of up to $150 dollars for donations to Student Scholarship Organizations, which in turn fund scholarships for students who attend private schools by transferring the funds directly to the schools. Pet. App. 9; Mont. Code Ann. § 15-30-3104(1). To start, taxpayer funds pay for the scholarship program. Those receiving the credit "'donate[ ]' nothing"; it is the State that provides the aid. Pet. App. 36. The Legislature included a $3 million appropriation for the tax credits in the program's first year, to be increased in later years as needed. Mont. Code Ann. § 15-30-3110(5)(a). That is the

practical equivalent of direct taxpayer support for religious education.

The threats to religious conscience can be exacerbated where, as is the case here, funds flow to one religious faith rather than many. *See, e.g.*, *Bronx Household of Faith*, 750 F.3d at 199 (explaining that even "unintended bias" that occurs when a government program benefits certain religions in practice "supports a reasonable concern" that the program will "creat[e] a public perception of endorsement of religion"). Under Montana's scholarship program, 11 of the 12 schools that received scholarships from Big Sky—the only Student Scholarship Organization to distribute funds under the program—are affiliated with Christian faiths. *Schools*, Big Sky Scholarships, https://bigskyscholarships.org/schools/ (last visited Nov. 15, 2019).[3] This creates a real risk that Montana taxpayers will view the state as having forced them to violate their conscience by supporting not just religious schools, but *Christian* schools—when the taxpayer may adhere to a different religion or no religion at all.

Second, States have a substantial interest in reducing the civil strife associated with state subsidies of religious activities. A "basic purpose[ ] of [the Religion] Clauses" is to avoid "that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike." *Van Orden* v. *Perry*, 545 U.S. 677, 698 (2005) (Breyer, J.,

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[3] The remaining school is a secular school focused on special education. *See Schools*, Big Sky Scholarships, https://bigskyscholarships.org/schools/ (last visited Nov. 15, 2019).

concurring in the judgment). Indeed, "[s]ince the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an 'established' religion." *Locke*, 540 U.S. at 722. Even if a government program will reach sufficient numbers of people of different faiths, competition among religious entities for scarce public resources would "destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion has produced amongst its several sects." Madison, *Memorial and Remonstrance* ¶ 11; *see also* Richard W. Garnett, *Religion, Division, and the First Amendment,* 94 Geo. L.J. 1667, 1681 (2006) (acknowledging history of concerns about the "balkanizing effects of religion and its tendency to unsettle political life by spilling over into it"); Tebbe, *supra*, at 1273 (noting that lawmakers may reasonably conclude that "staying out of the business of supporting religion will foster community harmony and avoid harmful unrest or division").

Third, government aid will, in practice, tend to flow to the dominant religion, which exacerbates rather than ameliorates the disparate treatment of religious institutions. This problem plagued the Founding era. Massachusetts, for example, passed laws concerning religion that were "nonpreferential as a matter of constitutional law." Leonard W. Levy, The Establishment Clause: Religion and the First Amendment 30 (1986). But these laws turned out to be preferential in practice. In towns where Congregationalists were the religious majority, they were able, through "a variety of complicated legal technicalities, as well as outright illegal action," to force

Quakers and Baptists to pay support to Congregationalist Churches. *Id.* It was this reality that led Madison to oppose any aid to religious institutions, no matter how neutral: "The dominating group will achieve the dominant benefit; or all will embroil the state in their dissensions." *Everson* v. *Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 54 (1947) (Rutledge, J., dissenting) (citing Madison, *Memorial and Remonstrance* ¶ 11).

If anything, the risks of disparate resource allocation are even greater today. The proliferation of funding programs means there are more resources to be distributed. Our nation has grown much more religiously diverse, meaning there are many religions and sects that compete for government resources. Stephen M. Feldman, *Divided We Fall: Religion, Politics, and the Lemon Entanglements Prong*, 7 First Amend. L. Rev. 253, 295 (2009); *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 723 (2002) (Breyer, J., dissenting). But these people of faith "are not similarly situated, either with regard to their religious beliefs and practices or with regard to the number of their adherents and their institutional infrastructure in various communities." Alan E. Brownstein, *Constitutional Questions About Vouchers*, 57 N.Y.U. Ann. Surv. Am. L. 119, 126 (2000). As a result, "large, institutionally established faiths" are better positioned to secure government funding. *See id.* at 127.[4] And the potential for disparities only

[4] This disparate funding of religions is itself constitutionally problematic, not least because it indicates animus towards particular religions. *See Larson* v. *Valente*, 456 U.S. 228 (1982) (observing that laws that distinguish among religions are

increases as a program is defined at a more granular level, because the potential for any given requirement to align or conflict with a religious tenet or practice will increase. *See id.* (discussing a requirement that schools have a five-year track record to receive funding that would disadvantage religious groups with fewer followers that might need government funds to start a school).

Montana's experience demonstrates that this risk of uneven resource allocation is real. Big Sky was the only Student Scholarship Organization to distribute scholarships under the program. According to Big Sky's website, it is affiliated with twelve private schools, eleven of which are Christian and none of which is affiliated with another faith. *See supra* p. 10. This was Madison's fear precisely: a dominant religion capturing a disproportionate amount of governmental aid to the detriment of religious minorities. Montana has a substantial interest in preventing such disparate treatment and should be afforded the ability to do so.

Fourth and finally, government entanglement in religious matters—even when it does not run afoul of the Establishment Clause—has been disfavored since the Founding era because it makes religious institutions dependent on government support. *See* Letter from James Madison to Edward Livingston

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inimical to the Religion Clauses); *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953) (invalidating conviction under ordinance that would penalize Jehovah's Witness sermon in a park but not other religious services); *cf. Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993) (invalidating a law intentionally designed to target one religion).

(July 10, 1822), *in* 9 Writings of James Madison 98, 102 (Gaillard Hunt ed. 1910) ("[R]eligion & Govt. will both exist in greater purity, the less they are mixed together."). Government support, in turn, "tends also to corrupt the principles of that *very* religion it is meant to encourage, by bribing, with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it." A Bill for Establishing Religious Freedom (June 18, 1779), *reprinted in* 2 Papers of Thomas Jefferson 546 (Julian P. Boyd ed. 1950); *see also* Roger Williams, *The Bloudy Tenent of Persecution, for Cause of Conscience* 28 (Edward Bean Underhill ed. 1848) (1644) ("[T]he church of Christ doth not use the arm of secular power to compel men to the faith or profession of the truth, for this is to be done by spiritual weapons * * * .").

Montana provides an example. Its state constitution expresses the State's clear preference for funding secular education. Montana could validly have concluded that its rule of declining to fund religious schools better serves the anti-establishment and free exercise interests embodied in the Religion Clauses than an alternative rule would. Montana could have attempted to achieve its preference by limiting state funding of religious schools to secular uses only, but doing so would come with a clear downside of constitutional import. The curriculum at religious schools is not easily separable into secular and sacred components in practice. *See Comm. for Pub. Educ. & Religious Liberty* v. *Nyquist,* 413 U.S. 756, 774 (1973). Indeed, many religious groups establish parochial schools precisely because they do not believe that classroom instruction should be secular. *See* Pet. App. 152 (stating that one Petitioner chose a

school because it "teaches the same Christian values that [she] teach[es] at home"); *Everson*, 330 U.S. at 47 (Rutledge, J., dissenting) ("[T]here is undeniably an admixture of religious with secular teaching in all such institutions."). To ensure that a religious school did not use state funds for religious purposes, Montana would thus have to monitor nearly every aspect of religious schooling, entangling itself in the religious school's affairs.[5] Montana could reasonably have concluded that such involvement would itself raise establishment and free exercise concerns. *See Amos*, 483 U.S. at 335 ("[I]t is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organiza-

[5] Stillwater Christian School's catalogue—the school Petitioners' children attend—emphasizes Christianity's inextricable role in the curriculum. *See* Stillwater Christian School, 2018-2019 Course Catalog at 13, 14, 21, 22, https://tinyurl.com/2019stillwater (explaining that Ancient/Medieval History "studies the beginning of civilizations with a special emphasis on Biblical/Jewish History," 12th Grade Economics includes "Biblical Economics," Conceptual Physics (Modeling) emphasizes "the creative powers of God," and Biology examines "the Word of God" and "the contradictions between what is popular science today and the truth of God's word"). Other schools partnering with Big Sky similarly seek to imbue each aspect of the students' lives with Christian values. *See, e.g.*, *Why Central*, Great Falls Central Catholic High School, https://tinyurl.com/whycentral (last visited Nov. 15. 2019) ("Faith plays a critical role in the daily educational life for students and staff at Great Falls Central Catholic High School."); Trinity Lutheran School, Parent-Student Handbook 2018-2019, at 41, https://tinyurl.com/tls2019handbook (assigning, as one of its disciplinary measures, "a Christian Based Reflection Sheet").

tions to define and carry out their religious missions.").[6]

There are, in the end, good reasons why thirty-seven States have state constitutional provisions comparable to Article X, Section 6(1) of the Montana Constitution. *See* Resp. Br. App. D. These four "weighty interests" counsel against Petitioners' new rule of strict formalism. *Trinity Lutheran*, 137 S. Ct. at 2036 (Sotomayor, J., dissenting); *see also Witters* v. *Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 489 (1986) (finding no Establishment Clause violation but noting that "[o]n remand, the state court is of course free to consider the applicability of the 'far stricter' dictates of the Washington State Constitution"). To "sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent." *Town of Greece* v. *Galloway*, 572 U.S. 565, 577 (2014).

D. Petitioners' strict-neutrality approach would prohibit the accommodation of free exercise interests.

These four anti-establishment interests are the flip side of the same religious liberty coin that the Court has invoked to uphold government line-drawing designed to accommodate free exercise concerns. *See* Laura S. Underkuffler, *The "Blaine" Debate:* Must *States Fund Religious Schools?*, 2 First Amendment

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[6] Under Petitioner's formalist rule, a state like Montana that wished to fund only secular education would be forced to fund only public schools and would lose the option to experiment with alternative programs that allow for greater school choice.

L. Rev. 179, 182 (2003) ("We protect religious conscience *and* we worry about the funding of religion by government for the same reason: because of the particular value, power, and consequent dangers that religious beliefs present."). A government must necessarily speak in terms of religion when it accommodates free exercise concerns because these accommodations *exempt* religious institutions or persons from generally-applicable laws. Under Petitioners' rule, however, a government could not accommodate free exercise interests beyond what the Free Exercise Clause itself requires because doing so would require impermissible line-drawing on the basis of religion that triggers strict scrutiny.

That would upend how this Nation operates. Absolute blindness toward the religious and the secular has never been the baseline rule. Instead, "religious-practice exemption is permitted," *Emp't Div., Dep't of Human Res.* v. *Smith*, 494 U.S. 872, 890 (1990), and there is no requirement "that the exemption come[ ] packaged with benefits to secular entities," *Amos*, 483 U.S. at 338.[7] Hundreds of State and Federal laws extend special privileges and grant exemptions to religious entities and people.

On the federal front, laws commonly exempt religious entities to accommodate free exercise concerns. Religious entities are excluded from a diverse range of laws including the Employee Retirement Income Security Act, the Lobbying Disclosure Act, the Inter-

[7] Accommodations that place substantial burdens on third parties, however, will raise anti-establishment concerns. *See* Micah Schwartzman et al., *The Costs of Conscience*, 106 Ky. L.J. 781, 784–785 (2018).

nal Revenue Code, and Title VII. *See* 29 U.S.C. § 1003(b)(2) (excluding religious entities from legal requirements governing retirement plans); 2 U.S.C. § 1602(8)(B)(xviii) (excluding religious entities from registration requirements); 26 U.S.C. §§ 501(c)(3), 6033(a)(3)(A)(i) & (iii) (exempting religious entities from obligations to register with the Internal Revenue Service and submit annual informational tax filings applicable to all other nonprofit organizations); 42 U.S.C. § 2000e-1(a) (exempting religious entities from Title VII's prohibitions against religious discrimination in hiring insofar as they favor coreligionists). Other federal laws, meanwhile, extend special protections and allowances to religious believers. *See* Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc, et seq. (granting special protections to prisoners seeking to exercise their religion); 42 U.S.C. § 1996a(b) (allowing Native Americans to use peyote despite the generally-applicable drug laws).

The state-law landscape is no different. Twenty-one States have enacted religious freedom restoration acts.[8] These laws prohibit the States from

[8] *See* Ala. Const. amend. 622; Ariz. Rev. Stat. Ann. §§ 41-1493 to 41-1493.04; Ark. Code Ann. §§ 16-123-401 to 16-123-407; Conn. Gen. Stat. § 52-571b; Fla. Stat. §§ 761.01-761.061; Idaho Code §§ 73.401-73.404; 775 Ill. Comp. Stat. 35/1-99; Ind. Code §§ 34-13-9-0.7 to 34-13-9-11; Kan. Stat. Ann. §§ 60-5301 to 60-5305; Ky. Rev. Stat. Ann. § 446.350; La. Rev. Stat. Ann. §§ 13:5231 to 13:5242; Miss. Code Ann. § 11-61-1; Mo. Rev. Stat. §§ 1.302-1.307; N.M. Stat. Ann. §§ 28-22-1 to 28-22-5; Okla. Stat. tit. 51, §§ 251-258; 71 Pa. Cons. Stat. §§ 2401-2407; R.I. Gen. Laws §§ 42-80.1-1 to 42.80.1-4; S.C. Code Ann. §§ 1-32-10 to 1-32-60; Tenn. Code Ann. § 4-1-407; Tex. Civ. Prac. & Rem. Code Ann. §§ 110.001-110.012; Va. Code Ann. § 57-2.02.

substantially burdening an individual's exercise of religion even if the burden results from a rule of general applicability unless governments can demonstrate that imposing such a burden is the least restrictive means of furthering a compelling governmental interest. These laws thus privilege religious believers by freeing them from laws that apply to those whose objections are equally strong but are non-religious. Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DePaul L. Rev. 1, 4–5 (2000). And many State statutes provide statute-specific exemptions for religious concerns. Religious exemptions appear in at least 2,000 such statutes.[9] These statutes range from tax obligations, *see, e.g.*, Minn. Stat. § 317A.909; to military service, *see, e.g.*, Cal. Mil. & Vet. Code § 125; to school curriculum requirements, *see, e.g.*, Ala. Code § 16-41-6; to solicitation regulations and reporting requirements, *see, e.g.*, Conn. Gen. Stat. § 21a-190d; and even to insurance regulations, *see, e.g.*, Cal. Ins. Code § 10494.2.

Petitioners do not grapple with the reality that their preferred approach would radically reshape this legal landscape. *See* Underkuffler, *supra*, at 184 (explaining how far this approach departs from current doctrine). But "[t]hose who would renegotiate the boundaries between church and state must

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[9] A LEXIS search run in 1992 that did not distinguish between state and federal statutes revealed 2,523 code sections and was discounted to 2,000 based on selective review. *See* James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407, 1445 & nn.214–215 (1992) ("religio! w/20 exempt! or object!"). Running this search today, using the same search terms and limiting the jurisdiction to States only, yields 3,695 code sections.

* * * answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?" *McCreary County* v. *Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 882 (2005) (O'Connor, J., concurring). And, as discussed next, Petitioners' proposed formalistic approach offers no benefits that would offset these costs.

II. The Court's Precedents Already Enforce The Requirement That Government Not Discriminate Against Religion.

Nor, in the end, is Petitioners' formalistic approach necessary to prevent discrimination against religion. The Religion Clauses erect firm proscriptions against religious discrimination that a government may not transgress when it acts on the basis of religion. And the Court's precedents recognize, and enforce, these lines.

To start, a government may not draw lines among religious groups. The Establishment Clause prohibits the government from *favoring* the practice of religion over irreligion, or favoring certain religions over others. *See, e.g.*, *Lukumi*, 508 U.S. at 532 ("[T]he First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."). And the Free Exercise Clause prohibits the government from acting to *disfavor* religion in favor of irreligion, or to disfavor some religious sects over others. *See, e.g.*, *id.* at 535 (explaining that a "religious gerrymander" violates the Free Exercise Clause"); *Fowler*, 345 U.S. at 69 (stating that it was "fatal" to the state's case that "a religious service of Jehovah's Witnesses is treated differently than a religious service of other sects"). A government may therefore remain secular, but cannot promote or

prohibit religion or promote or prohibit a certain religious sect.

Relatedly, a government may not act out of animus towards religious beliefs without triggering strict scrutiny. A government instead has a presumptive "duty under the First Amendment not to base laws or regulations on *hostility* to a religion." *Masterpiece Cakeshop, Ltd.* v. *Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (emphasis added). Whether a government acted with hostility, or instead with "neutrality" toward religion, can be determined by looking to the history of the law at issue and the pattern of its implementation. *See id.* at 1731–32.

So too, a government may not treat persons differently on the basis of their religious beliefs. A State may not "impose special disabilities on the basis of religious views or religious status." *Smith*, 494 U.S. at 876–877. Under this principle, a government may not, for example, bar a minister from holding elected office. *See McDaniel* v. *Paty*, 435 U.S. 618, 628–629 (1978). Nor may a government bar an employee from holding public office unless she affirms her belief in the existence of God. *See Torcaso* v. *Watkins*, 367 U.S. 488, 496 (1961).

Finally, as explained above, the principle that a government can have a valid interest in accommodating free exercise or anti-establishment concerns beyond what the Religion Clauses require is not limitless. The concern itself must be substantial, and the law must serve that interest. The Court has already made clear that a government cannot simply invoke free exercise or anti-establishment as a talisman to evade judicial scrutiny.

All of these safeguards guarantee that the government cannot act to favor or disfavor religion. Petitioners have not identified any *actual* discrimination that is occurring that these rules do not address. Instead, Petitioners seem to redefine discrimination to mean *any* government action that addresses religion in a manner not required by the Religion Clauses themselves. This approach is not just unfounded, it is unhelpful and unnecessary. It would call into question settled constitutional doctrine in service of solving a problem that does not exist. This Court should not accept it.

CONCLUSION

For these reasons and the reasons in the Respondents' brief, the judgment of the Supreme Court of Montana should be affirmed.

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