NO. 18-1195

In the
Supreme Court of the United States

KENDRA ESPINOZA, JERI ELLEN ANDERSON, AND JAMIE SCHAEFER,
Petitioners,
v.
MONTANA DEPARTMENT OF REVENUE, AND GENE WALBORN, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE MONTANA DEPARTMENT OF REVENUE,
Respondents.

On Writ of Certiorari to the Supreme Court of Montana

BRIEF FOR COLORADO, CALIFORNIA, HAWAII, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEW YORK, OREGON, AND WASHINGTON AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici curiae are nine States that each have a strong government interest in financing their public schools, providing education to their residents, and taking diverse approaches to when and how religious schools participate in that process. Like Montana, all the *amici* States have constitutions that contain a no-aid provision. These no-aid provisions are informed by each State's legislature, judiciary, and unique state-specific history. The Montana Supreme Court, for example, consulted the delegates' statements at Montana's Constitutional Convention in 1972 when it concluded that the State's no-aid provision barred "religious entanglement" in public education. Pet. App. 19. Nowhere did the court rely on delegate statements evincing hostility towards Catholicism or any other religion.

The Montana court's interpretation is safely within the "play in the joints" that the States enjoy between the Free Exercise Clause and the Establishment Clause. *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 669 (1970). Each State may interpret its own no-aid provision to either include or exclude funding for religious schools so long as its choice stays within the perimeter required by the competing Religion Clauses of the federal Constitution. As this Court has noted, the States' respective constitutions "embody distinct views" on funding for religious schools and "deal differently with religious education" than with education on other topics. *Locke v. Davey*, 540 U.S. 712, 721 (2004). The States' diverse approaches are "a product of these

[distinct] views, not evidence of hostility toward religion." *Id.*

Here, the *amici* States strongly support Respondents because each State has a compelling interest in maintaining the "play in the joints" that currently governs its respective funding choices for religious schools. *Walz*, 397 U.S. at 669.

SUMMARY OF ARGUMENT

I. The funding of religious schools is an issue that the States have a unique interest in regulating. States have space to decide whether and how to fund religious schools within the "play in the joints" of the competing Religion Clauses. The Framers recognized that no single solution would work for all States, and left room for individual States to make decisions about the issue of aid to religion. Under the latitude granted to the States, each has interpreted and applied its no-aid provision based on its unique history, local expertise, and state-specific experiences with religious and other private school funding. Any decision by this Court should continue to retain this flexibility, allowing the States to further experiment with different funding approaches for private schools, whether religious or secular. Adopting a rigid one-size-fits-all approach, by contrast, may jeopardize existing funding structures in the States and prevent the States from responding to the unique concerns of their residents.

II. The decision below is consistent with this Court's jurisprudence under the Religion Clauses granting deference to the States' diverse approaches to funding religious schools. The Free Exercise Clause

and the Establishment Clause do not *prohibit* States from funding religious schools, but likewise do not *compel* the funding of religious schools. Rather, the States have leeway to develop their own funding solutions for their residents' education. Petitioners' contrary reliance on *Trinity Lutheran Church of Columbia Inc. v. Comer*, 137 S. Ct. 2012 (2017), should be rejected. That case does not overrule the Court's earlier decision in *Locke* permitting the States to treat religious instruction differently than other forms of education.

III. Thirty-eight state constitutions contain a no-aid provision. These provisions have been adopted throughout American history; many have even been re-ratified or amended in recent decades, far removed from the anti-Catholic sentiments that Petitioners assert pervaded the 1876 Blaine Amendment. The States' historical reasons for adopting no-aid provisions in their constitutions are diverse. Some States sought to solidify the Framers' original design separating church and State; others simply sought to guarantee the financial security of their public schools. What the States have in common, however, is that each has substantial and legitimate historical and current reasons—unrelated to anti-Catholicism or other religious bias—for enacting their no-aid provisions. This Court should thus reject Petitioners' argument that state no-aid provisions are facially unconstitutional.

ARGUMENT

I. The Constitution supports the States' diverse approaches to deciding whether and how to finance religious schools under their own constitutions.

This Court has recognized that a State's choice of whether and how to finance religious education is of a "historic and substantial state interest" that "is of a different ilk" than other forms of education. *Locke*, 540 U.S. at 723, 725. Recognizing the leeway that the States enjoy, the Court has upheld the States' decisions to *include* religious institutions in government subsidy programs, *see, e.g.*, *Walz*, 397 U.S. 664, but it has never suggested that the Free Exercise Clause compels the States to fund religious schools in the same manner or to the same extent as public schools. To the contrary, the States have room to fashion state-specific solutions within the "play in the joints" that exists between the Establishment Clause and the Free Exercise Clause. *Id.* at 669. This Court's precedents—leaving room for the States to craft their own funding choices for religion within constitutional limits—are consistent with the Framers' views. The Framers of the First Amendment did not intend to preclude the States from making decisions regarding aid to religion. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1482–85 & n.384 (1990).

The Framers' structure, leaving space for state decision making, is also consistent with the historical development of education in this country. Education in the United States has from the very beginning been

a "decentralized matter in which individual states and local governments have raised the taxes and provided the teachers and administrators who run schools." Kenneth L. Townsend, *Education and the Constitution: Three Threats to Public Schools and the Theories that Inspire Them*, 85 Miss. L.J. 327, 332 (2016). Naturally, the States have taken diverse approaches to funding; this "dispersal of authority" in itself provides an "independent institutional check" on any potential religious favoritism. Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 Harv. L. Rev. 1810, 1831 (2004).

Allowing the States latitude in their approaches to religious school funding also defers to their local authority and expertise over school finance. School funding falls within state-spending and taxation restrictions—areas where each State faces unique, local obstacles. While some States may adhere to James Madison's view and prohibit even "three pence" of public funds from going to religious institutions, *Flast v. Cohen*, 392 U.S. 83, 103 (1968) (internal quotations omitted), other States choose to support education programs that occur at religious schools. This recognition of the importance of each State deciding for itself how to address funding for religious schools—operating within the constitutional space recognized by this Court—permits their respective policies to reflect unique and even divergent attitudes. *See* Schragger, *supra*, at 1846 ("Local accommodations will better calibrate the balance between religious and secular interests."). In short, each State can advance its own funding policies within the constitutional bounds set by this Court's decisions.

The States' diverse interpretations of their respective no-aid provisions demonstrates the differing attitudes towards government funding of religious schools. Wisconsin in 1995, for example, amended its school scholarship program to include both religious and secular schools. *See Jackson v. Benson*, 218 Wis.2d 835, 848 (Wis. 1998). When plaintiffs challenged the inclusion of religious schools as violating Wisconsin's no-aid provision, the Wisconsin Supreme Court held that the amended program was permissible under its no-aid provision because the program's principal effect did not advance religion. *Id.* at 878. Thus, Wisconsin has at different times permissibly included and excluded religious schools from its scholarship program, allowing its legislature to adapt to the State's changing attitudes.

Colorado, too, has taken a state-specific approach to funding religious schools under its no-aid provision. In 1982, the Colorado Supreme Court found that a government scholarship program that benefitted religious as well as other colleges did not violate the State's no-aid provision. *See Americans United for the Separation of Church & State Fund, Inc. v. State*, 648 P.2d 1072, 1083–85 (Colo. 1982). Other scholarship programs, however, have not passed muster because of specific problematic features. *See Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461, 470 (Colo. 2015) (invalidating scholarship program that functioned as a recruitment tool for religious schools), *vacated and remanded*, 137 S. Ct. 2327

(2017).[1] While not all States may take such a highly individualized approach, the Constitution permits the States room to experiment in developing their own funding solutions. *See Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) (stating the Religion Clauses leave "some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause").

Still other States address public funds supporting religious schools without consulting their no-aid provisions. The Florida Supreme Court, for example, has held that a school scholarship program that included religious schools violated the Florida Constitution without even invoking its no-aid clause. *Bush v. Holmes*, 919 So.2d 392 (Fla. 2006). Similarly, the absence of a no-aid provision in Maine's constitution did not prevent it from amending its scholarship program to exclude religious schools. *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127 (Me. 1999). And the Kentucky Supreme Court invalidated a statute supplying textbooks to nonpublic schools because the state constitution prohibits public funding of nonpublic schools, religious or otherwise. *See Fannin v. Williams*, 655 S.W.2d 480 (Ky. 1983). The State's no-aid provision was not implicated. These cases suggest that no-aid provisions are simply one small part of a larger hierarchy of state policies and laws that guide the States' decisions on how public funds flow to religious schools.

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[1] The case was ultimately dismissed as moot following a remand from this Court due to a change in school district policy.

These varying approaches not only reflect the historical practice of deferring to state policymakers on whether and how to fund religious schools, they are consistent with basic principles of federalism and dual sovereignty. Public education in particular is an area "where States historically have been sovereign." *United States v. Lopez*, 514 U.S. 549, 564 (1995). This sovereignty leads to a diversity of approaches under the States' respective constitutions. "[T]he state courts of Utah and Rhode Island and Maryland [might] construe a free exercise clause differently than other state courts given their histories[.]" Jeffrey S. Sutton, *51 Imperfect Solutions* 17 (Oxford Press 2018). State constitutional law "respects and honors these differences between and among the States by allowing interpretations of the fifty state constitutions to account for these differences in culture, geography, and history." *Id.*

Consistent with these features of federalism and the decentralization of education funding, most States have crafted their own unique public education guarantees within their state constitutions. *See, e.g.*, COLO. CONST. art. IX, § 2. These state constitutional guarantees leave the details of implementation to the States' respective legislatures, who balance local concerns to create state-specific solutions.

Petitioners here, however, seek to upend this basic system of federalism and dual sovereignty with respect to school funding choices. Petitioners acknowledge that a state legislature may decline to enact a school scholarship program without any constitutional infirmity. But if the state legislature *does* enact a program and then the state courts

invalidate the program under the State's no-aid clause, Petitioners assert this outcome is unconstitutional and, as a matter of federal constitutional law, the State must carry on with the program. But state sovereignty interests are at their peak when a State enshrines a principle in its constitution, and state courts are the final arbiters of those provisions. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions." (quotation omitted)); *see, e.g., Curious Theatre Co. v. Colo. Dep't of Pub. Health and Env't*, 220 P.3d 544, 551 (Colo. 2009) ("This court is the final arbiter of the meaning of the Colorado Constitution.").

Petitioners' request that the federal courts *require* Montana to enforce a *state* education funding program that its state supreme court held is void *ab initio* disrespects state constitutional law and creates significant anticommandeering concerns, as Respondents have ably demonstrated. Resp. Br. 46–49. To the extent that Petitioners' proposed remedy would bar Montana from taking a stronger anti-establishment stance than federal law—within the constitutionally permissible "play in the joints"—it unnecessarily demands that the States lockstep their state constitutions with the federal Constitution. *See* Sutton, *supra*, at 174 (stating the practice of state courts "lockstepping" in "reflexive imitation of the federal courts' interpretation of the Federal Constitution" constitutes a "grave threat to independent state constitutions"). The Montana Supreme Court below rightly avoided this concern, choosing instead to address the state constitutional

claims before the federal ones—as was its prerogative—while also assuring itself that its holding posed no problem under the federal Free Exercise Clause. Pet. App. 32; *see* Sutton, *supra*, at 179 ("A state-first approach to litigation over constitutional rights honors the original design of the state and federal constitutions."). This "[s]tate primacy" approach "flows from the U.S. Constitution and from one of its key structural guarantees of liberty: federalism." *Id.* In contrast, Petitioners' proposed remedy would eliminate any play in the joints between the Free Exercise and Establishment Clauses, foreclosing the States from taking any action to further their "historic and substantial state interest at issue" in this area. *Locke,* 540 U.S. at 725.

Because this Court's jurisprudence under the Religion Clauses accommodates differing state education funding policies and eschews a one-size-fits-all approach, this Court should affirm the judgment below and not remove this authority currently exercised by the States.

II. This Court's precedents recognize the States' important role in deciding whether and how to fund religious schools.

This Court emphasized the deference afforded to state legislators in deciding how to treat religious schools in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). There, Ohio's scholarship program, which permitted recipients to choose among religious and secular schools, was challenged for violating the Establishment Clause. *Id.* at 645, 648. In holding that the program did not violate the Establishment Clause, this Court explained that state funds may pay for

religious schools on the same basis as secular schools so long as students—not the government—ultimately decide which school to attend. *Id.* at 662–63.

Zelman holds that the Establishment Clause does not categorically *prohibit* States from funding religious schools. The related question—whether States are *required* to fund religious schools—was answered in *Locke*.

In *Locke*, a Washington scholarship program excluded recipients from pursuing a degree in devotional theology; it was challenged for violating the Free Exercise Clause. 540 U.S. at 715, 718. In holding that the program did not violate the Free Exercise Clause, this Court explained that religious enterprise—specifically religious instruction—may be treated differently from secular equivalents without running afoul of the Free Exercise Clause. *Id.* at 721. In determining whether different treatment of religious instruction violates the Free Exercise Clause, the *Locke* Court framed the issue as whether the differential treatment of religious activity and nonreligious activity burdened a fundamental right of religious exercise. *See Locke,* 540 U.S. at 720–21.

Adhering to its prior precedent, the *Locke* Court acknowledged that there is play between the joints of the Religion Clauses—meaning that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." 540 U.S. at 719. *Locke* thus expanded on the state legislative discretion established in *Zelman*. Taken together, *Zelman* and *Locke* highlight the significant deference granted to state legislatures to fund or not fund religious schools. *Zelman* permits them to fund

religious instruction under certain circumstances; *Locke* permits them not to.

But *Locke* reminds us that a State's choice not to fund religious schools does not burden the fundamental right of religious exercise. Petitioners rely heavily on *Trinity Lutheran*, 137 S. Ct. 2012, as one example of an unlawful burden on religious exercise. Missouri disqualified Trinity Lutheran Church's daycare from the playground surfacing program under Missouri's no-aid provision. *Id.* This Court's opinion concluded that excluding the daycare from the program solely for being church-operated violated the Free Exercise Clause because it improperly required the church to choose between its religious affiliation and receiving the government benefit. *Id.* at 2022. The Court held that this ultimatum impermissibly burdened the fundamental right of religious exercise that was discussed in *Locke*. A plurality of the Court limited its opinion to "discrimination based on religious identity with respect to playground resurfacing," and expressly left for another day other "uses of funding or other forms of discrimination." *Id.* at 2024 n.3.

Petitioners' argument extends *Trinity Lutheran* beyond its facts and reasoning. For one, it ignores both the plurality's limiting language in footnote 3 and Justice Breyer's related concurrence emphasizing the nature of the public benefit. Justice Breyer explained that Missouri sought to "cut Trinity Lutheran off" from a general program designed to "improve the health and safety of children." *Trinity Lutheran*, 137 S. Ct. at 2027 (Breyer, J., concurring in the judgment). In his view, cutting off church schools from general

government services like "'ordinary police and fire protection . . . is obviously not the purpose of the First Amendment.'" *Id.* (quoting *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 17–18 (1947)). Here, no one contends that Montana's scholarship program is a general government services program designed to improve the health and safety of children.

But even if the nature of the benefit were not a controlling factor in *Trinity Lutheran*, Petitioners' heavy reliance on it does not address the question of this case. This case falls closer to *Locke* than *Trinity Lutheran*. The scholarship funds here, if directed towards religious schools, advance religious education, not secular resources. As Petitioners concede, a "'major reason'" motivating parents to use the scholarship funds at religious schools is because they want a school that "'teaches the same Christian values'" that they teach at home. Pet. Br. 6 (quoting Pet. App. 152, ¶ 12). Yet *Locke* made clear that "religious instruction is of a different ilk" and that a State's decision to "deal differently" with religious education is "scarcely novel." 540 U.S. at 721–23. If *Locke* stands for anything, it's that a State does not violate the Free Exercise Clause by declining to fund religious education with taxpayer dollars.

Petitioners' more narrow reading of *Locke* should be rejected. Under Petitioners' view, *Locke* means only that the State cannot be compelled to subsidize a would-be minister's pursuit of a devotional theology degree. But that reading all but eliminates the "play in the joints" that the States enjoy between the Establishment Clause and the Free Exercise Clause. Never has this Court indicated that the room between

the joints is so narrow as Petitioners suggest. This Court's precedent points in the opposite direction, permitting the States a wide range of legislative choices between the competing Religion Clauses. *See Locke*, 540 U.S. at 718–22; *Zelman*, 536 U.S. at 662–63; *Walz*, 397 U.S. at 669–71. Montana has acted within that permissible range in this case.

III. State no-aid provisions have been adopted throughout history, and for reasons unrelated to anti-Catholicism.

Petitioners argue that Montana's no-aid provision is unconstitutional as applied to this case. They provide an alternative argument, however, that no-aid provisions in general are facially unconstitutional because, Petitioners claim, they arise from the anti-Catholicism that allegedly motivated the failed Blaine Amendment to the federal Constitution in 1876. But States adopted, re-ratified, and amended their no-aid provisions over an expansive 200-year span, *see* Table 1, *infra*, and the States adopting them did so for legitimate reasons unrelated to anti-Catholicism.

For example, the States with no-aid provisions may wish to avoid the "anguish, hardship and bitter strife" that can accompany government entanglement with religion. *Engel v. Vitale*, 370 U.S. 421, 429 (1962); *see also Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 794 (1973) (striking down government aid program that carried "grave potential for . . . continuing political strife over aid to religion"). Other States may want to avoid rendering private schools, religious or otherwise, dependent on state money. *See Everson*, 330 U.S. at 53 (Rutledge, J., dissenting) (stating that government aid to religious

education brings "the struggle of sect against sect for the larger share [of public funds] or for any"). Still others may want to avoid putting parents to the untenable choice of providing their child an "inadequate nonsectarian public education [or an] adequate education at a school whose religious teachings are contrary to [their] own." *Zelman*, 536 U.S. at 727 (Breyer, J., dissenting). While not all States will coalesce around a single rationale supporting their no-aid provisions, the States' varied justifications are each reasonable and consistent with the Free Exercise Clause, not violative of it.

The notion that state governments should refrain from funding religious schools also long pre-dates the Blaine Amendment, dating back to the Founders in the 1770s. *See generally* Steven K. Green, *Blaming Blaine: Understanding the Blaine Amendment and the No-Funding Principle*, 2 First Amend. L. Rev. 107, 113–16 (2003). Thomas Jefferson wrote in 1779, for example, that "even forcing [a man] to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern." *Id.* at 114 (quoting Thomas Jefferson, *A Bill for Establishing Religious Freedom, June 12, 1779*, in 5 THE FOUNDERS' CONSTITUTION 77, 77 (Philip B. Kurland & Ralph Lerner eds., 1987)).

James Madison, the leading architect of the Religion Clauses, echoed this sentiment in his Memorial and Remonstrance Against Religious Assessments: "'the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force

him to conform to any other establishment in all cases whatsoever.'" *Flast*, 392 U.S. at 103 (quoting 2 Writings of James Madison 183, 186 (Hunt ed. 1901)). Petitioners' claims about anti-Catholicism ignores the basic principle underlying the Framers' original design: separation of church and State. That overriding principle "arose independently of and prior to the rise of the common school movement or the Catholic parochial school system." Green, *supra* at 114.

Moreover, few States' no-aid provisions, if any, are the progeny of the Blaine Amendment. The Blaine Amendment was proposed in 1876. Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 38 (1992). Of the 38 state constitutions that contain a no-aid provision, only twelve States enacted their provision in the decade immediately preceding or immediately following the Blaine Amendment (Montana is not one of them). *See* Table 1, *infra*. Seven of those States either re-ratified or amended their no-aid provision within the last 52 years. In total, 22 States have either amended, ratified, or readopted their no-aid provisions after 1960, demonstrating that no-aid provisions in general are far removed from any anti-Catholic fervor that surrounded the 1876 Blaine Amendment proposal.

Table 1. History of states with no-aid provisions. Dates are based on the best available information.

State	First Enacted	Amended, Ratified, and/or Readopted	Current Provision(s)
Hawaii	1959	2002	Art. X, § 1
Alaska	1959		Art. XII, § 1
Arizona	1912		Art. II, § 12
	1912		Art. IX, § 10
New Mexico	1911		Art. XII, § 3
Oklahoma	1907	1978	Art I, § 5
	1907		Art. XI, § 5
Virginia	1902	1971	Art. IV, § 16
Delaware	1897		Art. X, § 3
Utah	1895	2001	Art I, § 4
	1895	1986	Art. X, § 9
South Carolina	1895	1973	Art. XI, § 4
New York	1894	1962	Art. XI, § 3
Kentucky	1891		§ 189
Idaho	1890	1980	Art. IX, § 5
Mississippi	1890		Art. IV, § 66
	1890		Art. VIII, § 208
Wyoming	1889		Art. I, § 19
	1889		Art. III, § 36
	1889		Art. VII, § 8
Montana	1889	1972	Art. X, § 6

North Dakota	1889		Art. VIII, § 5
South Dakota	1889		Art. VI, § 3
Washington	1889	1993	Art. I, § 11
	1889		Art. IX, § 4
Florida	1885	1968	Art. I, § 3
Nevada	1880		Art. XI, § 10
California	1879		Art. IX, § 8
	1879	1974	Art. XVI, § 5
Georgia	1877	1983	Art. I, § 11
New Hampshire	1877		Pt. II, Art. 83
1876 Blaine Amendment Proposed			
Colorado	1876		Art. IX, § 7
Texas	1876	2003	Art. VII, § 5
	1876		Art. I, § 7
Alabama	1875	1901	Art. XIV, § 263
Missouri	1875	1945	Art. I, § 7
Nebraska	1875	1976	Art. VII, § 11
Pennsylvania	1874	1967	Art. III, § 29
Illinois	1870	1970	Art. X, § 3
Kansas	1859	1966	Art. VI, § 6
Minnesota	1858	1974	Art. XIII, § 2
Oregon	1857		Art. I, § 5
Massachusetts	1855	1974	Const. Amend.

			Art. XVIII, § 2
Ohio	1851		Art. XI, § 2
Indiana	1851		Art. I, § 6
Wisconsin	1848	1982	Art. I, § 18
		1972	Art. X § 3
Michigan	1835	1963	Art. I, § 4

Petitioners rely on Montana's social climate in the 1800s in arguing that its no-aid provision was enacted to discriminate against Catholics. Pet. Br. 31–45. But Montana's no-aid provision is far more contemporary: it was re-adopted, relocated, and modified in 1972 as part of a constitutional convention. MONT. CONST. art. X § 6; *see* Resp. Br. 18–23. Nowhere do Petitioners argue that anti-Catholicism permeated the delegates' debates at Montana's 1972 Constitutional Convention.

Even if the Blaine Amendment might have had some indeterminable influence on *some* States' no-aid provisions, the historical record does not support the conclusion that anti-Catholicism was its driving force. As one group of historians recently put it: the Amendment's no-funding principles "arose as a result of a complex dynamic of forces intersecting over the issue of American public schooling . . . motivated by concerns about universal free public education, protecting the integrity of public school funding, the obligation of states to provide universal education, the federal role in ensuring and funding education at the state level, and the funding of religious instruction and training." Brief of *Amici Curiae*, Legal and Religious Historians, in Support of Respondent at 16,

Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017) (No. 15-577).

Undoubtedly *some* supporters of the Blaine Amendment and state no-aid provisions were motivated by anti-Catholicism, but most focused on the financial security and survival of the nascent public schools. *Id.* (citing Steven K. Green, *The Insignificance of the Blaine Amendmen*t, 2008 BYU L. Rev. 295, 327 (1992)). Petitioners oversimplify this history underpinning no-aid provisions by attributing the Blaine Amendment solely to anti-Catholicism. These provisions instead reflect the longstanding, important prerogative of the States—operating in the space between the Free Exercise and Establishment Clauses—to make their own, locally-responsive funding decisions.

CONCLUSION

This Court should affirm the decision below.

Respectfully submitted,

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