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 Petition for a Writ of Certiorari to the Supreme Court of Montana

BRIEF OF AGUDATH ISRAEL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization. Among its many functions and activities, Agudath Israel articulates and advances the position of the Orthodox Jewish community on a broad range of legal issues affecting religious rights and liberties in the United States. Agudath Israel regularly intervenes at all levels of government—federal, state, and local; legislative, administrative, and judicial (including through the submission or participation in amicus curiae briefs)—to advocate and protect the interests of the Orthodox Jewish community in the United States in particular and religious liberty in general. One of Agudath Israel's roles in this connection is to serve as an advocate for Jewish schools and Jewish education, which Orthodox Jews see as both a personal religious obligation and a critical factor—perhaps the critical factor—in ensuring Jewish religious identity and continuity. The overwhelming majority of Agudath Israel's constituents choose to send their children to the approximately 750 Orthodox Jewish day schools

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[1] We thank Scott Whitman, a student at Georgetown University Law Center, for his assistance with the research and writing of this brief.

No counsel for any party authored this brief in whole or in part, and no person other than Agudath Israel, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received notice ten days prior to the due date of the Agudath Israel's intention to file this brief. All parties have consented to the filing of the brief.

across the country that collectively educate over 250,000 students. There may be students who would want to attend Jewish schools in states that have similar tax credit programs as the one created through the legislation passed in Senate Bill 410 (henceforth "SB 410").

But our interest in this case extends well beyond this particular tax-credit program. In addition to the tax-credit program at issue in this case, there are programs in numerous other states in the country which also provide government-encouraged funding and other forms of assistance to students who elect to attend nonpublic (including religious) schools. From time to time proposals for such programs have been advanced in other states as well. The constitutional principle that this case could establish thus has great significance for our constituents not only in Montana but throughout the country.

If the program enacted in SB 410 is upheld, not only will some students who choose to attend religious schools in Montana be able to utilize the benefits of the tax credit program, but the precedent could potentially enable proposals for similar programs in other states to move forward even in the 38 states that have provisions barring state aid to religious institutions (often called "Blaine Amendments") in their state constitutions. Repeatedly, state "Blaine Amendments" have been cited in opposition to programs involving school choice that could benefit students who wish to attend religious schools. *See* Erica Smith, *Blaine Amendments and the Unconstitutionality of Excluding Religious Options From School Choice*

Programs, 18 FED. SOC'Y REV. 48 (2017) ("Just in the past ten years, Blaine Amendments have been used to challenge school choice programs eleven times. There are still more instances of opponents pointing to Blaine Amendments to try to convince state legislatures and governors to reject school choice bills."). If the sections of the Montana State Constitution that bar state assistance to religious institutions (Mont. Const. art. V, § 11 and Mont. Const. art. X, § 6) are held to not bar assistance to students attending religious schools because to do so would violate the Free Exercise Clause of the United States Constitution, as our brief argues, it could lead the way for other states with similar constitutional provisions to be able to provide needed assistance to students choosing to attend religious schools. A ruling upholding the tax credit program in SB 410 could also serve as an important precedent in states where opponents of government-encouraged scholarships and other forms of assistance for nonpublic (including religious) school students are seeking or may seek to challenge existing programs that provide such funding.

On the other hand, should this Court uphold the decision of the Montana Supreme Court that the tax credit program in SB 410 is unconstitutional, not only would religious school students in Montana be barred from receiving government-encouraged scholarship funding, but other states that contain provisions in their state constitutions that bar religious school students from receiving government aid would be able to continue to bar such students from receiving government-

encouraged aid and other forms of assistance, and legislative attempts to provide for such assistance would be hampered given the precedent established by this case.

Agudath Israel of America respectfully submits this amicus curiae brief in support of Petitioners Writ for Certiorari because we believe that this Court's decision in *Trinity Lutheran Church v. Comer*, 137 S. Ct 2012 (2017) should compel a finding that the exclusion of aid under tax credit programs to students attending religious schools would violate the Free Exercise Clause of the United States Constitution.

ARGUMENT

I. UNDER THIS COURT'S DECISION IN *TRINITY LUTHERAN CHURCH V. COMER*, THE TAX CREDIT PROGRAM ENACTED IN MONTANA SENATE BILL 410 IS CONSTITUTIONAL

In *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 137 S. Ct 2012 (2017), this Court held that a Missouri grant program to help public and private schools and other nonprofit entities could not constitutionally prohibit a church from benefitting from the program. To the contrary, the Court held that barring the church from receiving benefits from the program was a violation of the church's rights under the Free Exercise Clause of the First Amendment.

The Court, citing *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)(plurality opinion)(quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)), stated that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'" Thus, for example, the Court in *Everson v. Board of Education of Ewing*, 330 U.S. 1 (1947), upheld a New Jersey law enabling local school districts to reimburse parents for the costs of transportation to schools, including religious schools. As the Court explained in that case, a state "cannot hamper its citizens in the free exercise of their own religion . . . [and] cannot exclude . . . members of any faith, because of their faith . . . from receiving the

benefits of public welfare legislation." *Id.* at 16. The Court in *Trinity Lutheran*, 137 S. Ct at 2016, then cited other cases in which it held that the Free Exercise Clause protects against laws that "impose special disabilities on the basis of . . . religious status." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (quoting *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990).

This holding was not a new one, rather – as was stated in *McDaniel* – the "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." 435 U.S. at 639 (Brennan, J. concurring). To put it simply, as Justice Kavanaugh stated, "under the Constitution, the government may not discriminate against religion generally or against particular religious denominations." *Morris County Board of Chosen Freeholders v. Freedom From Religion Foundation*, 139 S. Ct. 909 at 909 (citing *Larson v. Valente*, 456 U.S. 228, 244 (1982)).

Turning specifically to the Missouri program in question, the Court ruled that the Missouri program "expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." *Trinity Lutheran*, 137 S. Ct. at 2021. Such a policy, said the Court, "imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Id.* (quoting *Lukumi*, 508 U.S., at 546). The Court made clear that barring a benefit is itself an infringement of the Free Exercise Clause: "The express discrimination against religious exercise here is not the denial of a

grant, but rather the refusal to allow the Church, solely because it is a church—to compete with secular organizations for a grant." When the State conditions benefits in this way, stated the Court, it has "punished the free exercise of religion." The Court concluded that barring Trinity Lutheran from participating in the Missouri grant program was a violation of the Free Exercise Clause because "[t]he exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution . . . and cannot stand." *Id.* at 2025.

In footnote 3, a plurality of the Court added that, "[t]his case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination." *Trinity Lutheran*, 137 S. Ct. at 2024 n.3.

We noted that Justices Thomas and Gorsuch expressly did not agree to footnote 3. Moreover, in his concurring opinion, Justice Gorsuch explained why the ruling and logic of *Trinity Lutheran* extended beyond the program involved in that case alone, stating that:

> [I] worry that some might mistakenly read it [footnote 3] to suggest that only 'playground resurfacing' cases, or only those with some association with children's safety or health, or perhaps some other social good we find sufficiently worthy, are governed by the legal rules recounted in and faithfully applied by the Court's opinion. Such a reading would be unreasonable for our

> cases are 'governed by general principles, rather than ad hoc improvisations.' *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 25 (2004)(Rehnquist, C.J., concurring in judgment). And the general principles here do not permit discrimination against religious exercise—whether on the playground or anywhere else." (emphasis added).

Trinity Lutheran, 137 S. Ct. at 2026 (Gorsuch, J. concurring).

Using Justice Gorsuch's rationale, we urge the Court to grant certiorari and to consider, that although footnote 3 did not expressly extend the decision of the Court to other issues of religious funding, it would only be logical to do so. There should be no distinction as to whether a state is denying funds for playground resurfacing or, as in the instant case, denying scholarship funding for students who choose to attend religious schools as part of a program that provides for scholarship funding for students. Under the Free Exercise Clause, only a state interest "of the highest order" can justify a policy that discriminates against religious institutions and individuals in the provision of government benefits. Here there is no such interest, because to the contrary, it is well settled that students attending religious schools must be treated equitably. See, for example, *Mitchell v. Helms*, 530 U. S. 793, 828 (2000) (plurality opinion) (noting that "our decisions have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity").

II. UNDER THIS COURT'S DECISION IN *TRINITY LUTHERAN CHURCH V. COMER*, THE MONTANA CONSTITUTION'S "BLAINE AMENDMENT" SHOULD NOT BAR AID TO STUDENTS ATTENDING RELIGIOUS SCHOOLS

In *Trinity Lutheran*, the State based its exclusion of the church from its playground resurfacing program on Missouri's "Blaine Amendment" (Article I, Section 7 of the Missouri Constitution), which prohibits state funds from being used, directly or indirectly, in aid of any church. Mo. Const. art. I, § 7. The Court of Appeals for the Eighth Circuit held that the Free Exercise Clause did not compel the State to disregard its "Blaine Amendment". *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F. 3d 779 at 785 (2015). But this Court reversed the Eighth Circuit's ruling and held that the Free Exercise Clause did compel the State to provide the public benefits in question to the church. As such, this Court clearly held that in the conflict between a state's "Blaine Amendment" and the Free Exercise Clause, the Free Exercise Clause must prevail.

The ruling in *Trinity Lutheran* should stand for the general proposition that a state "Blaine Amendment", such as that contained in the Missouri State Constitution, and such as that contained in the Montana State Constitution, which prohibit religious institutions from receiving public benefits, cannot under the Free Exercise Clause bar students attending religious schools from receiving government-encouraged scholarship assistance and other forms of aid.

CONCLUSION

For the reasons stated, Agudath Israel of America as amicus curiae urges that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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