No. 18-1195

IN THE

Supreme Court of the United States

KENDRA ESPINOZA, JERI ELLEN ANDERSON, AND JAIME SCHAEFER,

Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE, AND GENE WALBORN, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE MONTANA DEPARTMENT OF REVENUE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF FOR PIONEER INSTITUTE, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Dated: April 12, 2019

BATEMAN & SLADE, INC. STONEHAM, MASSACHUSETTS

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.2(b), Pioneer Institute, Inc., respectfully moves for leave to file the accompanying brief as *amicus curiae*. The consent of Petitioners has been obtained, but the consent of Respondents was withheld by e-mail dated April 8, 2019 which stated, "The State of Montana does not normally object to the filing of an amicus brief, but in this case, it appears that you have not provided sufficient notice of your intent to file. See SUP.CT.R. 37.2(a)."

Inadvertently, counsel for Pioneer Institute mistakenly gave eight days' notice of intent to file, rather than the requisite ten days. Counsel for petitioners, in an e-mail exchange on April 8 with counsel of record for Pioneer Institute, stated that she "would be fine" with giving a two-day extension of time for *amicus* briefs in support of respondents. If granted a reciprocal extension, there is no real prejudice to respondents from the two-day delay. Further, as Montana's counsel stated, "The State of Montana does not normally object to the filing of an amicus brief . . . ."

More significantly, counsel for respondents withheld consent to the filing of this amicus brief even after he was granted a one-month extension, until May 15, 2019, to file a response to the cert petition. Considering this one-month extension, there would be no prejudice from amicus' two-day delayed notice to respondents in the Court's granting this motion for leave to file.

The interest of Pioneer Institute in this case is that, as an independent, non-partisan, privately

funded research organization that seeks to improve the quality of life in Massachusetts through civic discourse and intellectually rigorous public policy solutions, it is concerned with policies that restrict religious freedom and educational opportunity for children. The history of the proto-Blaine Amendment in Massachusetts is instructive on the 19th century religious bigotry in Montana and elsewhere that stands between petitioner Ms. Espinoza's children and a good education. Such history, included in the accompanying *amicus* brief, provides important perspective on why this Court should grant certiorari and hear this case.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONSTITUTIONAL PROVISIONS:

RULES:

OTHER AUTHORITIES:

INTEREST OF *AMICUS CURIAE* [1]

Pioneer Institute, Inc., ("Pioneer") is an independent, non-partisan, privately funded research organization that seeks to improve the quality of life in Massachusetts through civic discourse and intellectually rigorous, data-driven public policy solutions. Pioneer seeks to change policies that negatively affect freedom of association, freedom of speech, economic freedom, and government accountability.

Pioneer believes in both religious freedom and educational opportunity for the children throughout our nation. In that context, Pioneer respectfully takes this opportunity to stand against the relic of 19th century religious bigotry which has stood between Ms. Espinoza's children and a good education.

SUMMARY OF ARGUMENT

State action based on religious animus violates the First and Fourteenth Amendments. The legislative histories of the Anti-Aid Amendment of Massachusetts, the failed national Blaine Amendment, and the state-level progeny of the Blaine Amendment suggest that these legislative acts were motivated by religious animus, and should

[1] Pioneer Institute gave counsel of record for the parties e-mail notice of its intent to file this *amicus curiae* brief eight days prior to its due date. Consent was obtained from petitioners, but was withheld by respondents on grounds of insufficient notice of intent to file, thus necessitating the accompanying motion to file this brief. Further, pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, nor did such counsel or party make a monetary contribution to the preparation or submission of this brief.

therefore be held to be in violation of the First and Fourteenth Amendments. The Court should take the opportunity to address this animosity and grant certiorari.

ARGUMENT

When the Court is "[c]oncerned that [the] fundamental nonpersecution principle of the First Amendment [is] implicated" by state action, the Court should review that action to ensure compliance with constitutional principles. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 523 (1978) (noting that the Court granted certiorari because it was concerned about a potential violation of the First Amendment). This Court has consistently held that any state action based on religious animus violates the First and Fourteenth Amendments. *See, e.g.*, *McDaniel v. Paty*, 435 U.S. 618 (1978); *Lukumi*, 508 U.S. at 547; *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). While such state action is thankfully a rare occurrence, when hostility toward a particular religious group is the motivation behind the government's actions, the Court should take the opportunity to address the animosity rather than permitting unconstitutional harms to accrue. This is particularly true in the present case, where the lower courts have been inconsistent in their treatment of the kind of religious discrimination involved in Blaine Amendment cases. *See* Petition for Writ of Certiorari at 15–33, *Espinoza v. Mont. Dep't Rev.* (2019) (No. 18-1195) (collecting cases and explaining the divergent approaches in the lower courts). Because the hostility toward religious groups that motivated the adoption of Blaine-like Amendments across the country has never been completely rectified, animus-based harms have

continued for too long without ever being addressed by this Court. *See, e.g.*, *Mitchell v. Helms*, 530 U.S. 793, 829 (2000) (plurality opinion of Thomas, J.) ("Nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now."). We therefore ask the Court to grant certiorari in order to prevent state governments from inflicting further harm.

I. State Action Based on Religious Animus Violates the First Amendment.

The Court has long affirmed the nonpersecution principle of the First Amendment. In *Fowler v. Rhode Island*, 345 U.S. 67 (1953), this Court examined a Rhode Island statute prohibiting the address of a religious message in a public park. The Court found the statute fatally flawed because it treated the religious services of Jehovah's Witnesses differently than the religious services of other religions, which "amount[ed] to the state preferring some religious groups over this one." *Id.* at 69. Rhode Island's application of the statute had clearly violated the principle of neutrality by improperly burdening "a minister of this unpopular religion," *id.* at 70, simply because the religion *was* unpopular. The effects of the statute in *Fowler* are remarkably similar to the effects of provisions like those in the Massachusetts and Montana Constitutions. *See infra*, at Section III. Each of those constitutional provisions "prefer[s] some religious groups over" Catholics, *id.* at 69, to the detriment of the Catholic individuals and communities who are not given equal access to state funding and support. But "the exclusion of [a group] from a public benefit for which

it is otherwise qualified solely because it is a church is odious to our Constitution." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017).

Outright discrimination is just one form of impermissible animus. As the Court stated in *Church of Lukumi Babalu Aye v. City of Hialeah*, the animus need not be explicitly codified or stated to be impermissible: "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt." *Lukumi*, 508 U.S. at 534. In other words, "legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Id.* at 547. In that case a city ordinance banned the killing of animals cruelly or unnecessarily. *Id.* at 526. The ordinance was facially neutral in that it would apply to anyone wanting to perform the prohibited act. However, the Court noted that the ordinance blatantly targeted the practices of the Church of the Lukumi Babalu Aye — a Santeria church that had settled in the City of Hialeah shortly before the ordinance was enacted and whose practices required the sacrificial killing of certain animals. *Id.* at 524–28. The legislature's clear hostility toward the Church was deemed impermissible under the Constitution. *Id.* at 547.

A nearly identical form of animosity emerges when one looks at the history of the Massachusetts and Montana Blaine Amendments. *See infra*, at Sections II and III. And this Court should consider the history and development of these amendments. In similar cases, the Court assessed the presence of

animosity by looking to "both direct and indirect circumstantial evidence," such as "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body." *Lukumi*, 508 U.S. at 540. This approach was recently reaffirmed in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, where the Court overturned a decision by the Colorado Civil Rights Commission because the Commission had displayed significant hostility toward the religion of Jack Phillips, the owner of Masterpiece Cakeshop. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). There, the Court looked at vitriolic statements made by various commissioners during the proceedings against Phillips, as well as their improper treatment of parallel enforcement actions involving religious individuals. *Id.* at 1729–30. It was clear from the Commission's behavior throughout the process that its "hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion." *Id.* at 1732. Had the Court not considered the statements of commissioners during the proceedings, it would likely not have uncovered the animosity that motivated the Commission's decision. Because our Constitution does not lightly allow the government to infringe on First Amendment freedoms, the Court should employ every available tool in assessing legislative action.

Without this Court's intervention in each of the aforementioned cases, religious animus would have continued to oppress individual liberty. Blaine

Amendments across the country have inflicted significant harms on religious individuals and immigrants for well over a century. *See infra,* at Section II. Following its protective pattern, this Court should intervene in the present case to protect these historically unpopular groups from receiving further harms. We urge this Court to clarify, as it has done so many times in the past, that religious antagonism is antithetical to the constitutional scheme of the United States.

II. The Legislative History of the Proto-Blaine Amendments Is Full of Anti-Catholic Animus.

The recorded history of Massachusetts' own Anti-Aid Amendment is a perfect glimpse into the sordid history of the anti-Catholic, anti-immigrant Blaine Amendments. These amendments were passed because of the period's heightened xenophobia and anti-Catholic bias, and they largely served to funnel aid to Protestant institutions while discriminating against Catholic institutions.

Prior to the passage of Massachusetts' Blaine Amendment, anti-Catholic groups passed and advocated for a number of proto-Blaine legislative measures. Cornelius Chapman, *The Know-Nothing Amendments: Barriers to School Choice in Massachusetts* 3 (The Pioneer Institute, 2009). Their chief goal was to prevent the growth and prosperity of the largely Catholic immigrant population in the nineteenth century. Previously, education had not been conceived as a state function and was usually conducted by clergy, combined with religious instruction: Tocqueville observed that in America, "[a]lmost all education is entrusted to the clergy." Alexis de Tocqueville, 1 *Democracy in America* 320

n.4 (Phillips Bradley, ed., 1945) (1839); *see also* Joseph P. Vitteriti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 663 (1998). Although there was a movement to separate church and state, most famously supported by Thomas Jefferson, "even [he] did not draw the line of separation through the schoolhouse." Chapman, at 3.

The Catholic population of the United States ballooned over the nineteenth century, largely through immigration, and stiff nativist/Protestant opposition quickly rose to meet this new demographic. From 1789 to 1891, the American Catholic population rose from less than 1% to nearly 13% of the nation, from just 35,000 to over 8 million. Toby J. Heytens, Note, *Schools Choice and State Constitutions*, 86 Va. L. Rev. 117, 135 (2000) (citing other works). The Protestant majority in the United States grew wary of the wave of Catholics—largely Irish, typically poor and low-skilled—entering the country. *See* Chapman at 3–4. Numerous anti-Catholic groups swelled during this period, especially in Protestant-dominated Boston where citizens burned effigies of the pope on November 5 of each year. *See id.* at 4.

The Know-Nothing Party, an explicitly anti-Catholic and xenophobic political party, gained control of both the Massachusetts legislature and governorship in 1854. *Id.* at 5. The Know-Nothings proceeded to pass an Anti-Aid Amendment, prohibiting the use of public funds for religious schools other than those "conducted according to law." Mass. Const. amend. XVIII, *amended by* Mass. Const. amend. XLVI, *subsequently amended by* Mass. Const. amend. CIII. This was one of the first

proto-Blaine measures, motivated by an explicit anti-Catholic bias.

The Anti-Aid Amendment, despite its facially neutral language, favored Protestant schools. Schools "conducted according to law" in Massachusetts meant locally-owned Protestant schools. *Id. See also,* Chapman at 5. During the debate over the amendment, its supporters' goal was clear and explicit: they wanted to promote a Protestant education and not a Catholic one. *See* Chapman at 6 (quoting the 1853 debates).

Protestant schools continued to receive funding into the twentieth century, even as immigrants from Catholic-majority countries continued to settle in Massachusetts. *See id.* Although the Know-Nothings passed away as a political party, nativist, anti-Catholic groups continued to form and assert authority in the Commonwealth. The Supreme Court of Massachusetts in 1913 found that public funds could not be appropriated to primary and secondary religious schools, although private universities remained eligible for those funds. *In re Opinion of the Justices,* 102 N.E. 464, 464–65 (Mass. 1913). Although the legislature purported to strip funding from Protestant schools in 1917, non-Catholic religious institutions still received funding in violation of the Anti-Aid Amendment as recently as 2009. *See* Chapman at 7–8.

III. The Failed National Blaine Amendment and Its State-Level Progeny Were Motivated by Animus.

"[H]ostility to aid to pervasively sectarian schools has a shameful history that we do not

hesitate to disavow." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion). The Anti-Aid Amendment in Massachusetts was only the prototype of a series of amendments across the United States that were aimed at constitutionally preventing Catholic institutions from gaining access to public funds. These later amendments would come to be known as "Blaine" amendments after James G. Blaine, the leading advocate for the proposed federal amendment. *See* Chapman at 9. Where these amendments passed, education funding was restricted to "common schools," officially held up as neutral, non-sectarian institutions eligible for public support. These were, however, Protestant schools imparting a Protestant education. They were considered "neutral" only because of a myopic majoritarian bias in favor of its own prejudices.

> The American common school was founded on the pretense that religion has no legitimate place in public education. But in reality it was a particular kind of religion that its proponents sought to isolate from public support. The common-school curriculum promoted a religious orthodoxy of its own that was centered on the teachings of mainstream Protestantism and was intolerant of those who were non-believers.

Vitteriti, at 666. Having founded publicly funded schools according to their own religion, nativist and anti-Catholic forces in American politics then set about depriving Catholic institutions of similar support.

A. *The Blaine Amendment Attempted to Enshrine Anti-Catholic Prejudice in the United States Constitution Under the Guise of Promoting "Non-Sectarian" Education.*

The movement to deprive "sectarian" schools of public funds came at a period of high tension—and considerable violence—between the nation's growing Catholic minority and established Protestant majority:

> Dreading Catholic domination, native Protestants terrorized Catholics. In some States Catholic students suffered beatings or expulsions for refusing to read from the Bible, and crowds . . . rioted over whether Catholic children could be released from the classroom during Bible reading. . . . Catholics sought equal government support for the education of their children in the form of aid for private Catholic schools. But the "Protestant position" on this matter . . . was that public schools must be "nonsectarian" (which was usually understood to allow Bible reading and other Protestant observances) and public money must not support "sectarian" schools (which in practical terms meant Catholic). And this sentiment played a significant role in creating a movement that sought to amend several state constitutions (often successfully), and to amend the United States Constitution (unsuccessfully) to make certain that government would

> not help pay for "sectarian" (i.e., Catholic) schooling for children.

Zelman v. Simmons-Harris, 536 U.S. 639, 720–21 (2002) (Stevens, J., dissenting) (internal citations and quotation marks omitted); *see also Mitchell*, 530 U.S. at 828 (plurality opinion) ("Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'"); Philip Hamburger, *Separation of Church and State* 219, 287 (2002); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 299–301 (2001). Against this backdrop, the Blaine Amendment brought anti-Catholic, nativist prejudice to the stage of national politics.

The federal Blaine Amendment, debated in Congress in 1876, thinly disguised its anti-Catholic agenda. The text of the amendment lent it a veneer of even-handedness:

> No . . . public revenue of . . . the United States, or any State, Territory, District, or municipal corporation, shall be appropriated to or . . . used for the support of any school, educational or other institution under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization, or denomination shall be taught. 4 Cong. Rec. 5453 (1876).

Nevertheless, the amendment targeted Catholic schools directly. In a single day of debate, Senators used the word "Catholic" fifty-nine times, referenced the Pope twenty-three times, and discussed at length an 1864 papal encyclical's words on religious education. *Id.* at 138–39; *see* 4 Cong. Rec. 5562, 5582–94 (1876). One simple fact makes the amendment's intent clear: *virtually all private schools at the time were Catholic*. "The fact was that by 1870 the Protestants, except on their missions, had almost universally abandoned parochial schools, whereas the Catholics were multiplying theirs in considerable number." F. William O'Brien, *The Blaine Amendment 1875–1876*, 41 U. Det. L.J. 137, 149 (1963); *see also* Heytens, *supra* at 138 ("The conclusion is inescapable: When politicians spoke of private or sectarian schools during the debate over the Blaine Amendments, they meant *Catholic* schools." (emphasis in original)).

The Amendment's advocates on the Senate floor did not hide behind the pretense of neutrality: they targeted the specter of Catholicism directly. Senator Morton considered the amendment necessary in light of "circumstances . . . in the last fifteen or twenty years," and when pressed on the point, added that he foresaw danger in "a large and growing class of people in this country who are utterly opposed to our present system of common schools, and who are opposed to any school that does not teach their religion"—a guarded but unmistakable reference to burgeoning Catholic immigrant populations. 4 Cong. Rec. 5585 (1876); *see* Mark Edward DeForrest, *An Overview of Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551, 571 (2003).

Senator Edmunds was less discreet: first stating that "[t]he liberty of conscience . . . is universal in every church but one," he then had the Secretary read out excerpts of an 1864 papal encyclical to illustrate the threat of "sectarian control" of public schools. 4 Cong. Rec. 5587–88. Discussion of that encyclical continued throughout the debate: later, Senator Morton declared that "the whole doctrine of the opposition to this amendment" was that States must be free to establish a church, the doctrine of which he thought would be "in striking harmony with the Pope's encyclical." *Id.* at 5591. As he first introduced it, though, Senator Edmunds continued to inveigh against the Catholic Church in support of the amendment:

> [T]hese dogmas and commands put forth in 1864 are at this moment the earnest, effective, active dogmas of the most powerful religious sect that the world has ever known, or probably ever will know—a church that is universal, ubiquitous, aggressive, restless, and untiring. I do not speak of it as impugning the right of any man to believe all this; it is just as much his right to believe it as it is mine to believe in the duty of preserving public schools from that sort of domination; but . . . it is . . . my duty and yours to resist it by every constitutional amendment and by every law in our power. 4 Cong. Rec. 5588 (1876).

Before concluding, though, Senator Edmunds made clear that some religion could pass through the amendment's prohibition: at publicly funded

institutions, orphans, inmates, and presumably students "can be taught religion without being taught the particular tenets or creed of some denomination." *Id.* For his illustration of such religion, Senator Edmunds chose the "great and golden rule . . . that you shall do unto others as . . . you would wish them to do unto you, and that charity covers a multitude of sins." *Id.* He also quoted from a popular hymn, "O Brother Man," by John Greenleaf Whittier: "The noblest worship is to love each other; / Each smile a hymn, each kindly deed a prayer." *Id.* In other words, a kind of generic Protestantism would be safe from the amendment, but "sectarianism"—that is, Catholicism—would not be. *See also* DeForrest, 570.

Opponents of the amendment also attacked its anti-Catholic animus on the Senate floor. *See id.* at 570, 572. According to Senator Stevenson, a Protestant Democrat, the unmistakable object of the debate, for the amendment's sponsors, was "attempting to go to the Pope of Rome to scare the people of the free thirty-seven states of this confederacy that they cannot manage their schools and their religion and their various instrumentalities within their States." 4 Cong. Rec. 5589 (1876). Senator Bogy said to general laughter, "I have fancied that I have been carried, myself and all of us, by some mysterious power back to the old city of Rome . . . and that we were all members of an ecumenical council and also all cardinals." *Id.* He considered the whole discussion "to be deplored" and saw its "motive and animus" in creating an electoral wedge issue out of Catholicism, now that waving "the bloody shirt" was "played out" for the Republicans. *Id.* Senator Eaton, responding to Senator Edmund, said, "It will not do for the Senator

from Vermont to tell me or to tell anybody else that the Catholic religion is to be stamped under foot by the people of the United States." *Id.* at 5593. He urged the amendment be voted down, precisely out of respect for Catholic citizens and their faith. *Id.*

Senator Morton then attempted to disclaim any hostility toward Catholicism, *id.* at 5593–94, but he could not answer the fundamental charge that "sectarian schools," for purposes of this debate, was only a euphemism for Catholic schools. Senator Bogy had earlier charged that the "free schools" supported by tax revenue were themselves sectarian, that even the King James Bible used in those schools was sectarian. *Id.* at 5590. Senator Morton said nothing to rebut this point, and especially in light of his earlier speeches, his insistence that the amendment was no attack on the Catholic Church was mere dissembling.

Outside the halls of Congress, it was publicly understood that electoral advantage built on anti-Catholic sentiment was the whole point of introducing the amendment. Republicans, seeing that their best political strategy was tying Democrats to Catholic designs in America, had seized on the issue. *See* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Leg. Hist. 38, 47–49 (1992). After President Grant exploited these political winds in a speech calling for "not one dollar . . . appropriated to the support of any sectarian schools," Congressman James G. Blaine followed suit, introducing the amendment to build support for his bid for the Republican presidential nomination. *Id.* at 48, 53.

The amendment's intent was clear to the public: *The Nation* wrote, "Mr. Blaine did indeed bring forward . . . *a Constitutional amendment directed against the Catholics* . . . and all that Mr. Blaine means to do or can do with his amendment is, not to pass it *but to use it in the campaign to catch anti-Catholic votes*." *The Nation*, Mar. 16, 1876, at 173, *quoted by* Green, *supra* at 54 (emphasis added). *Catholic World* called the amendment's advocates "politicians who hope to ride into power by awakening the spirit of fanaticism and religious bigotry among us." "The President's Message," *The Catholic World*, Feb. 1876, at 707, *quoted in* Green, *supra* at 53–54. The *St. Louis Republican* likewise observed, "The signs of the times all indicate an intention on the part of the managers of the Republican party to institute a general war against the Catholic church. . . Some new crusading cry thus becomes a necessity of existence, and it seems to be decided that the cry of 'No popery' is likely to prove most available." *Quoted in New York Tribune*, July 8, 1875, at 4; *see* Green, *supra* at 44. The question of sectarian schools had captured the public's attention, and with the amendment certain politicians were scheming to capture popular animus for their political advantage.

After his bid for the nomination failed, Blaine did nothing to advance the measure through Congress. Green, *supra* at 54. In fact, though he had been appointed to the Senate a month before the vote, he failed even to show up and cast his vote. *Id.* at 67–68. Without a campaign in the offing—without the need for a political wedge issue—it no longer served a purpose. The life of the Blaine Amendment was entirely one of mobilizing anti-Catholic animus into political action.

B. *Montana's Constitutional Provision Is a Progeny of the Blaine Amendment Animated by the Same Impermissible Purpose.*

After the national effort failed, many states amended their own constitutions to include provisions similar to the national amendment, collectively known as the Blaine Amendments. *See, e.g., Locke v. Davey*, 540 U.S. 712, 723 n.7 (2004). These constitutional provisions enshrined at the state-level the same anti-Catholic sentiment that failed to pass into a federal amendment in 1876. "Nativist Protestants . . . failed to obtain a constitutional amendment but, because of the strength of anti-Catholic feeling, managed to secure local versions of the Blaine amendment in the vast majority of the states." Hamburger, *supra* at 335. Altogether, twenty-nine states had incorporated them into their constitutions by 1890, including Montana among them. Vitteriti, *supra* at 673; *see also* Mont. Const. of 1889, art. XI, § 8. Montana has retained its iteration of the Blaine provision since its original 1889 constitution, then reincorporating it (with only some re-phrasing) into the 1972 constitution. *Espinoza v. Mont. Dep't of Revenue*, 393 Mont. 446, 463 (2018); *see also id.* at 485 (Baker, J., dissenting). The state constitutional provision, preserved from the post-Civil War and challenged in this case, is the product of the same animus that inspired the national Blaine Amendment and its other state-level progeny. *See* Vitteriti, *supra* at 672–75.

Montana's provision, however, has a particular connection to animus at the national level, more so than those of most states, due to the 1889

Enabling Act of February 22, 1889, ch. 180, 25 Stat. 676 (1889). The Act of Congress authorizing Montana to form a state constitution thus *required* that the constitution include a Blaine provision.[2] Little more than a decade after the national Blaine amendment failed, the same animus—anti-sectarian in name but anti-Catholic in fact— still commanded a majority in Congress, which gave Montana no choice but to include such a provision in its own state constitution. *See* Frank J. Conklin & James M. Vache, *The Establishment Clause and the Free Exercise Clause of the Washington Constitution—A Proposal to the Supreme Court*, 8 U. Puget Sound L. Rev. 411, 442 (1985) (For the drafters of Washington's Constitution, authorized by the same Act as Montana's, "realistically, there was no choice" but to include a Blaine provision.). The clause a nativist, anti-Catholic Congress forced upon the Montana Constitution in 1889 persists to this day in substantially unaltered form.

In short, the principle of non-support "for any sectarian purpose," Mont. Const. art. X, § 6, is a direct descendant of an episode of deep animus against a minority religion. "This doctrine, born of bigotry, should be buried now." *Mitchell*, 530 U.S. at 829 (plurality opinion).

[2] On the floor of the Senate, Senator Blair praised the provision as "the substance of a constitutional amendment now pending before this body," referring to a later iteration of the Blaine Amendment. 20 Cong. Rec. 2100–01 (1889).

CONCLUSION

For the foregoing reasons, and those presented by Petitioners, this Court should grant certiorari.

Respectfully submitted,

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