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

**Brief of Amicus Curiae Montana Family Foundation Supporting Petitioners**

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## QUESTION PRESENTED

Does it violate the Religion Clauses or Equal Protection Clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools?

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Constitutions and Statutes**



**Other Authorities**

## STATEMENT OF INTEREST[1]

The Montana Family Foundation is "a non-profit, research and education organization dedicated to supporting, protecting and strengthening Montana families." It recognizes the family as "a fundamental institution in a civil society" and that the "government should promote and protect [the family's] formation and well being." It believes that "[a]n informed and politically active citizenry is the best means for shaping pro-family public policy."

The Montana Family Foundation was at the forefront of advancing the Montana student-aid program underlying this case, drafting and advocating for its adoption since 2009. It was adopted in 2015. App. 87.

The Montana Family Foundation is organized as a non-profit corporation under 26 U.S.C. 501(c)(4). It regularly participates as amicus in litigation involving issues of importance to Montana families. *See* http://www.montanafamily.org.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties received timely notice of and have consented to the filing of this brief.

## SUMMARY OF ARGUMENT

The Montana Supreme Court in the decision below held that Montana can constitutionally prohibit all government aid to sectarian schools under Article X, Section 6 of the Montana Constitution. So it struck down Montana's Tax Credit Program, a generally available and religiously neutral student-aid program that does not violate the Religion Clauses, simply because the program provides a tax credit for donors to a scholarship program that affords students the choice of attending religious schools.

The court below summarily concluded that Article X, Section 6 fits within *Locke v. Davey*'s "play between the joints," an undefined principle that has resulted in inconsistent outcomes and conflicts among the circuits in its application. The Tenth and Seventh Circuit have cautiously applied *Locke*, reasoning that it still proscribes discrimination against religion. But the First Circuit, the Maine Supreme Court, and now the Montana Supreme Court, have interpreted it broadly to permit government to expressly and directly prohibit aid to religious schools.

This is a circuit split this Court should resolve because if left to stand, the government will be permitted to discriminate against religion and religious conduct in school funding, with the effect of marginalizing religion in the public square and excluding those who would integrate their faith with education from participating in the benefits of civil society.

## ARGUMENT

### I. The Interplay Between the Religion Clauses as Articulated in *Locke* Has Created a Conflict in the Courts Below.

This Court has long recognized that an interplay exists between the First Amendment's Establishment Clause and Free Exercise Clause (collectively "the Religion Clauses"). In *Walz v. Tax Comm'n,* the Court acknowledged that it "has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." 397 U.S. 664, 668-669 (1970). This struggle was recently confirmed in *Locke v. Davey*, where the Court observed that the Religion Clauses "are frequently in tension," 540 U.S. 712, 718 (2004), and a year later in *Cutter v. Wilkinson*, where the Court again stated that "[w]hile the two Clauses express complementary values, they often exert conflicting pressures." 544 U.S. 709, 719 (2005).

The Court's modern solution to addressing this struggle has been to recognize a "play at the joints" between the Religion Clauses that can form the basis for upholding certain state laws implicating the Clauses. In doing so, the Court reasoned that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Locke*, 540 U.S. at 718. *See also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) ("we have recognized that there is 'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels.").

The *Locke* case involved a Washington's scholarship program that prohibited awarding government-

sourced scholarship funds to students pursuing a degree in devotional theology. *Locke*, 540 U.S. at 715. The Court reasoned that, on the one hand, the link between government spending and religious training was broken by independent choice, avoiding implicating the Establishment Clause. *Id.* at 719. On the other, it reasoned that the state's anti-establishment interests were compelling and the law narrowly tailored such that the Free Exercise Clause was not violated. *Id.* at 722-24. So the program fit between "the joints" of the Religion Clauses. *Id.* at 719.

This "play at the joints" has no clear, definitive parameters, however. As Justice Scalia, joined by Justice Thomas, observed in dissent in *Locke*, this "principle" of "play at the joints" is a principle that is "not so much a legal principle as a refusal to apply *any* principle when faced with competing constitutional directives," *Locke,* 540 U.S. at 728. It leaves the door open for states to "discriminate a little bit each way and then plead 'play in the joints' when haled into court." *Id.* at 728. Because it lacks definition, the "play at the joints" principle is not applied only "when it was a close call whether complying with one of the Religion Clauses would violate the other." *Id.* at 728. Instead, it has been applied inconsistently among the circuits, including the court below. The resulting split is one this Court should resolve.

### A. The Establishment Clause Requires Secular Purpose and Neutrality and Proscribes Coercion and Excessive Entanglement, Which Montana's Student Aid Program Satisfies.

On one side of the Religion Clause "joint" is the Establishment Clause. This Clause states that "Congress shall make no law respecting an estab-

lishment of religion," U.S. Const., Amend. I, and its application is governed by several tests.[2]

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court identified a three-part test to assess whether a law violated the Establishment Clause. First, the law in question must serve a secular purpose. *Id.* at 612. Second, the primary effect of the law must neither advance nor inhibit religion. *Id.* at 612. And last, the law must not foster excessive entanglement of religion. *Id.* at 613. In *Allegheny v. ALCU*, 492 U.S. 573 (1989), Justice O'Connor, casting the deciding vote, adopted the "reasonable observer" test, finding government actions unconstitutional where a reasonable observer would believe that they endorse or disapprove religion. *Id.* at 631. And in *Lee v. Weisman*, 505 U.S. 577 (1992), the Court used the "coercion" test, which reviews as a preliminary

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[2] *See* Anita Y. Woudenberg, *Propagating a Lemon: How the Supreme Court Establishes Religion in the Name of Neutrality*, 7 First Amend. L. Rev. 307, 315-24 (2009) (discussing modern Supreme Court jurisprudence surrounding the Establishment Clause and arguing for a more clear, consistent test). As the Court stated in *Van Orden v. Perry*:

> Over the last 25 years, we have sometimes pointed to *Lemon v. Kurtzman* as providing the governing test in Establishment Cause challenges. Compare *Wallace v Jaffree*, 472 U.S. 38 [ ] (1985) (applying *Lemon*), with *Marsh v. Chambers,* 463 U.S. 783 [ ] (1983) (not applying *Lemon*). Yet, just two years after *Lemon* was decided, we noted that the factors identified in *Lemon* serve as "no more than helpful signposts." *Hunt v. McNair,* 413 U.S. 734 [ ] (1973). Many of our recent cases simply have not applied the *Lemon* test. See, *e.g.*, *Zelman v. Simmons-Harris,* 536 U.S. 639 [ ] (2002); *Good News Club v. Milford Central School*, 533 U.S. 98 [ ] (2001). Others have applied it only after concluding that the challenged practice was invalid under a different Establishment Clause test.

545 U.S. 677, 686 (2005).

question whether the government is coercing the support or participation in religion or its exercise. *Id.* at 587, 592.

Montana's student-aid program steers clear of all of these concerns. As the *Locke* court made clear, a law permitting the award of scholarship funds to devotional theology students would not violate the Establishment Clause because "the link between government funds and religious training is broken by the independent and private choice of recipients." *Locke*, 540 U.S. at 719. Montana's student-aid program does not even directly involve the government fisc[3] and instead simply provides a tax credit, capped at $150, to donors who give to a participating private scholarship program. It poses no Establishment Clause concerns.

### B. The Free Exercise Clause Requires General Applicability and Neutrality, Which Montana's Student Aid Program Satisfies.

On the other side of the Religion Clause "joint" is the Free Exercise Clause. The Clause states that "Congress shall make no law ... prohibiting the free exercise thereof [of religion]," U.S. Const., Amend. I. As laid out in Petitioner's brief, this Court's most recent Free Exercise Clause jurisprudence identifies three fundamental criteria in *Trinity Lutheran*. Pet. at 26. The government "may not discriminate against 'some or all religious beliefs.' Nor may a law regulate or outlaw conduct because it is religiously motivat-

[3] Indeed in *Ariz. Christian Sch. Tuition Org. v Winn*, the Court held that Arizona's student-aid program—a program substantially similar to Montana's—did not implicate the Establishment Clause because its tax credits relate to how taxpayers spend their own money and not to money the State has collected from taxpayers. 563 U.S. 125, 142-44 (2011).

ed." *Id.* at 2021 (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 532 (1993)). Pet. at 26. And it may not impose "special disabilities on the basis of religious status." *Trinity Lutheran*, 137 S. Ct. at 2021.

The Court expressly stated that *Trinity Lutheran* was not addressing student aid programs like Montana's. Pet. at 26 (citing *Trinity Lutheran*, 137 S. Ct. at 2024 n. 3, which states: "This 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."). However, Montana's student-aid program satisfies the criteria identified in *Trinity Lutheran*. The program applies uniformly to all "qualified education providers," regardless of religious affiliation. *See* App. 10-11. And it neither discriminates against religious beliefs nor outlaws religious conduct. App. 10-11. *See Trinity Lutheran,* 137 S. Ct. at 2020 ("[W]hen this Court has rejected free exercise challenges, the laws in question have been neutral and generally applicable without regard to religion."). Montana's student-aid program does not implicate Free Exercise concerns.

### C. Lower Courts Have Used *Locke* to Resolve the Interplay Between the Religion Clauses, With Conflicting Results.

Nevertheless, the court below concluded that Montana's student-aid program was unconstitutional. It arrived at this conclusion by summarily upholding Article X, Section 6 of Montana's Constitution under *Locke*, App. at 16, and then finding the student-aid program violated that state constitutional provision, App. 16-17.

Article X, Section 6 of the Montana Constitution states:

> (1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.
>
> (2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education.

App. 17. Interpreting the provision to proscribe *any* state aid to sectarian schools,[4] the Court pointed to *Locke*'s "play at the joint" principle as self-evident justification for such a sweeping religious proscription. App. 16. Then, reasoning that Montana's student-aid program was contrary to Article X, Section 6, the court below struck down the program in its entirety. App. 31.

As Petitioners show in their opening brief, the decision below is just the latest in an ever-growing conflict among lower courts that *Locke* has exacerbated. Pet. at 30-32. In following the Court's lead in acknowledging the "play at the joints" between the Religion Clauses, lower courts have been left to their own devises to address that tension under *Locke*, with conflicting results.

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[4] The court below goes to great lengths to show how Article X, Section 6 is considerably more sweeping than other state's religious funding exceptions. *See infra* Part II.

The Tenth Circuit, acknowledging that "[t]he precise bounds of the *Locke* holding … are far from clear," reasoned that while it was "disinclined to think that *Locke* is confined to its facts," it could not conclude that "that *Locke* subjects all 'state decisions about funding religious education' to no more than 'rational basis review.'" *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1254-1255 (10th Cir. 2008). Under this framework, it struck down a Colorado student-aid program that excluded "pervasively sectarian" schools. *Id.* at 1250, 1269.

Likewise, the Seventh Circuit struck down a University of Wisconsin student activity fund exclusion for religious activities because *Locke* still requires "that the state's program not evince hostility to religion" when determining "how to use funds over which it had retained plenary control." *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 780 (7th Cir. 2010).

But the First Circuit read *Locke* "more broadly: the decision there recognized that state entities, in choosing how to provide education, may act upon their legitimate concerns about excessive entanglement with religion, even though the Establishment Clause may not require them to do so." *Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344, 355 (1st Cir. 2004). So "[i]t follows inexorably that we must apply rational basis scrutiny to the lines that the Maine statute actually draws." *Id.* at 356 (citing *Locke*, 124 S. Ct. at 1312 n.3). The First Circuit found Maine's exclusion of "sectarian" schools from a scholarship program for students constitutional under the Religion Clauses. *Eulitt*, 386 F.3d at 356.

The Maine Supreme Court followed suit, concluding that Maine's exclusion of "sectarian" schools from

its school voucher program was constitutional because, while "the State may be permitted to pass a statute authorizing some form of tuition payments to religious schools … *Locke* and *Eulitt* hold that it is not compelled to do so," and so the program "falls within the 'play in the joints' between the two religion clauses." *Anderson v. Town of Durham*, 895 A.2d 944, 961 (Me. 2006).

The court below joined the First Circuit and Maine Supreme Court, further cementing this circuit split.

A robust and conflicting body of case law exists in the lower courts on the question of whether governments may proscribe student-aid programs that afford students the choice of attending religious schools. *See Morris Cty. Bd. of Chosen Freeholders v. Freedom from Religion Found.,* 139 S. Ct. 909, 911 (2019) (Kavanaugh, J., concurring). This Court should grant certiorari to resolve this conflict among the circuits.

## II. This Case Raises the Important Question of Whether Religion can be Marginalized in Civil Society, in Violation of the Equal Protection Clause.

The court below explains in detail how Article X, Section 6 of the Montana Constitution is considerably more broad than other state's religious funding exceptions. Article X, Section 6, it held, prohibits not just the direct support of religious organizations or even "*the direct or indirect taking of money* from the public treasury," but *all* sectarian aid. App. 21-22 (emphasis in original). *Compare with Trinity Lutheran*, 137 S. Ct. at 2023 ("Washington's scholarship program went 'a long way toward including religion in its benefits.' *Locke*, 540 U. S., at 724, 124 S. Ct. 1307, 158 L. Ed. 2d 1. Students in the program were free to use their scholarships at 'pervasively

religious schools.' *Ibid*."). The court below's interpretation construes Article X, Section 6 to mirror in scope the Blaine Amendment, an 1875 federal constitutional amendment proposed in Congress that was designed with clear animus towards Catholicism and its parochial school system by forbidding direct government aid to educational institutions with a religious affiliation.[5] Around forty states have similar, "sectarian" proscriptions in their state constitutions.[6]

Expansions of these provisions, like that undertaken in the court below, allows state governments to extend this religious discrimination and animus to not only all forms of Christianity but all religious conduct. This violates not only the Free Exercise Clause, but principles of equal protection: "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." *McDaniel* v. *Paty*, 435 U. S. 618, 639 (1978) (Brennan, J., concurring). As Justice Kavanaugh recently observed, "[u]nder the Constitution, the government may not discriminate against religion generally or against particular religious denominations. *See Larson* v. *Valente*, 456 U. S. 228, 244, 102 S. Ct. 1673, 72 L. Ed. 2d 33 (1982)." *Morris Cty.,* 139 S. Ct. at 909.

> [A] law may not discriminate against 'some or all religious beliefs,' and 'a law targeting reli-

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[5] Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551, 556-59 (2003).

[6] Patrick Loughery, Note, *Inhibiting Educational Choice: State Constitutional Restrictions on School Choice*, 30 Notre Dame J. L. Ethics & Pub Pol'y 449, 456 (2016) *See* DeForrest, *supra* note 5, at 554 n.14 (providing examples of state Blaine Amendments).

> gious beliefs as such is never permissible.' *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 532, 533, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). … the government may not 'impose special disabilities on the basis of . . . religious status.' *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 877, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990).

*Id.* at 910. "Discriminating against religious schools because the schools are religious "is odious to our Constitution."" *Id.* at 910 (quoting *Trinity Lutheran*, 137 S. Ct. at 2024).

The effect of this discrimination is to marginalize religion, and those religious individuals who actively seek to integrate their faith into their daily life, in civil society. As the Court in *Locke* recognized, "[t]he indignity of being singled out for special burdens on the basis of one's religious calling is so profound that the concrete harm produced can never be dismissed as insubstantial." *Locke*, 540 U.S. at 731 (emphasis in original). The same is true for students and parents who choose religious private education. Religious individuals who, like every other citizen, participate in the burdens and obligations of our civil society are now being excluded from participating in any corollary benefits of that social contract that would otherwise inure to them simply because they choose to integrate their religious faith in their education and daily life. Parents are placed in the position of exercising their fundamental right to raise their children according to their religious tenets and beliefs, *Troxel v. Granville*, 530 U.S. 57, 66 (2000), with the financial reality that they will be on their own in doing so where others lacking those convictions are not. Pet. at 34.

The Court should grant certiorari to address this important federal question.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari and reverse the decision of the Montana Supreme Court.

Respectfully submitted,

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