No. 18-1195

IN THE
Supreme Court of the United States

KENDRA ESPINOZA, ET AL.,
Petitioners,
v.

MONTANA DEPARTMENT OF REVENUE, ET AL.,
Respondents.

On Writ of Certiorari to the Montana Supreme Court

BRIEF OF AMICUS CURIAE FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitutions, Statutes, and Regulations

Other Authority

INTEREST OF AMICUS CURIAE[1]

The Foundation for Moral Law is Alabama-based legal organization dedicated to religious liberty and to the strict reading of the Constitution as intended by its Framers. The Foundation believes religious liberty is the God-given right of all people claimed in the Declaration of Independence and protected by the First Amendment. Accordingly, we see the decision of the Montana government to exclude religious organizations from generally available benefits as an affront to this common right to freely exercise religion. We believe that the Free Exercise Clause and the Establishment Clause of the First Amendment are not at odds with each other. They are two sides of the same coin.

SUMMARY OF THE ARGUMENT

Suppose you are a Montana parent who wants the best education for his or her children. You want your children to receive a good academic education, but you believe based on your religious convictions that your children should be educated in accordance with the tenets and the worldview of your Roman Catholic

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[1] Pursuant to Rule 37.3, *Amicus* has notified all parties of intent to submit this Brief and has requested consent from all parties. All parties have consented. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae,* its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

(or Protestant, or Jewish, or Muslim, or other) religion. However, because you have limited finances and because you are forced to pay heavy taxes to support the public schools, you are unable to afford a private school education for your children.

Then you are overjoyed to learn that Montana has established a scholarship program whereby children of limited financial means will be able to attend private schools. But when you apply for the scholarship program, you learn that the Department of Revenue has imposed a hitch: the scholarships can be used to attend only secular private schools; religious schools are excluded.

How would you react to this? You would consider this a "message of exclusion," and you would consider yourself marginalized as a second-class citizen, because the state had displayed animus toward you and your religion.

You are then faced with a difficult choice: You must either exceed your family budget in order to send your children to a religious school, or you must compromise your religious convictions and send your children to a public or secular private school.

This is exactly the dilemma the Montana Department of Revenue has imposed upon religious parents and students.

On May 8, 2015, the Montana Legislature enacted a scholarship program in order to help disadvantaged children attend private schools. This would be

accomplished through tax credits which were given to businesses which donate to scholarship organizations. These organizations would, in turn, provide scholarships to qualified students, who in turn were to use those scholarships to attend private schools. The stated purpose of the program "is to provide parental and student choice in education" Mont. Code Ann. § 15-30-3101.

However, shortly after the legislation went into effect, the Montana Department of Revenue enacted an administrative rule, known as "Rule 1," addressing where the scholarships may be used. They altered the definition of "qualified education provider" in the original legislation to specifically exclude any organization which is in any way related to religion. Mont. Admin. R. 42.4.802. This regulation effectively gutted the provision and purpose of the scholarship program by excluding a substantial majority of private schooling options, because roughly 69 percent of all private schools in Montana are Christian schools. The Montana Department of Revenue effected this drastic exclusion because they mistakenly believed they were required to do so by Article X Section 6 of the Montana Constitution, which prohibits any "direct or indirect appropriation or payment from any public fund or monies . . . 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." Mont. Const. Art. X § 6.

The Espinozas applied for the scholarship program in order to send their children to religious schools and were subsequently denied because of Rule 1. They sued and initially prevailed in the trial court, but the Montana Supreme Court reversed, not only upholding the restriction against vouchers for religious schools, but also invalidating the entire scholarship program because "there is no mechanism within the [program] to identify where the secular purpose ends and the sectarian begins" Pet. App. 29. Thus, they reasoned that since there was no efficient way, within the program, to effectively keep it from reaching religious schools, then the entire program should be struck down.

The Montana Supreme Court erred in several respects, not the least of which is their conclusion that Article X § 6 of the Montana Constitution, Montana's "Blaine Amendment," does not violate the Free Exercise Clause of the First Amendment to the U.S. Constitution.[2] Blaine Amendments were

[2] Each state supreme court is the final interpreter of its state constitution, but federal courts have authority to determine whether a state constitutional provision as interpreted by its state supreme court violates the federal Constitution. The Montana Supreme Court in ¶ 40 of its decision interpreted Art. X § 6 and upheld its constitutionality as consistent with the Free Exercise Clause, because Justices Gustafson and Sandefur addressed the Free Exercise issue in greater detail in their concurring opinions and also concluded that the program violates the Establishment Clause of the First Amendment, and because Justices Baker and Justice Rice disagreed with these conclusions in ¶ 104 of her dissent and ¶

developed shortly after the War Between the States by Congressman James G. Blaine. Blaine fashioned the Federal Blaine Amendment which would have altered the United States Constitution to prevent any aid to religion. His plan to amend the Federal Constitution did not pass, but many states amended their own constitutions in order to apply the no-aid provisions on a state level.

Montana's Article X § 6, like most Blaine Amendments, was motivated by strong anti-Catholic sentiment and was adopted to place a handicap on Catholic Schools which were beginning to become prominent in the wake of heavy Catholic immigration to the America after the end of the War Between the States. Laws which are made with the specific intention of placing a burden on a specific group of people simply for their status should always be held to be Constitutionally suspect.

Furthermore, Blaine Amendments like Montana's Article X § 6 are contrary to the rights which are guaranteed in the First and Fourteenth Amendments of the United States Constitution. These Mini-Blaine Amendments show animus toward the Roman Catholic faith, and Rule 1 perpetuates that animus by showing animus not only toward Roman Catholicism but toward Christian schools in general. By adopting Rule 1, the Department has discriminated against religious schools and those who

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116 of his dissent, this case is appropriate for federal court review.

want to send their children to religious schools by excluding them from this general benefit. This place a clear burden on religion. Section 6 violates the Establishment Clause because it does not treat religion in a neutral manner. On the contrary, the Rule shows an animosity which demonstrates the very thing which our founders sought to prevent with the Establishment Clause. It violates the Free Exercise clause by denying religious parents a substantial state benefit if they follow their religious convictions. Finally, it violates the Equal Protection Clause of the Fourteenth Amendment because it creates a class (in this case religion) which is treated worse than other comparable classes.

ARGUMENT

I. Rule 1 and Its Application of Article X § 6 of the Montana Constitution Are Contrary to the Founders' View of Religious Liberty.

The Montana Blaine Amendment and Rule 1 are contrary to the Founders' view of church-state relations.

To understand the meaning of the First Amendment, we need to understand the Framers' view of religious liberty. As the Senate Judiciary Committee said in its 1853 study of the Establishment Clause,

> The clause speaks of "an establishment of religion." What is meant by that expression? It referred, without doubt,

> to that establishment which existed in the mother country, its meaning is to be ascertained by ascertaining what that establishment was.[3]

In 1534, King Henry VIII separated the English church from the Roman Catholic Church and established it as the Church of England with himself as its head. The Framers of the First Amendment wanted to prevent an official state church such as they had seen in England. As the Senate Report continued,

> Our fathers were true lovers of liberty, and utterly opposed to any constraint upon the rights of conscience. They intended, by this amendment, to prohibit "an establishment of religion" such as the English church presented, or anything like it. But they had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to send our armies and navies forth to do battle for their country without any national recognition of that God on whom success or failure depends; they did not intend to spread over all the public authorities

[3] Senate Judiciary Committee, S. Rep. No. 32-376, at 1, 4 (1853).

> and the whole public action of the nation the dead and revolting spectacle of atheistical apathy. Not so had the battles of the revolution been fought, and the deliberations of the revolutionary Congress conducted. On the contrary, all had been done with a continual appeal to the Supreme Ruler of the world, and an habitual reliance upon His protection of the righteous cause which they commended to His care.[4]

In their desire to prohibit an official state church, the Framers did not intend to prohibit all cooperation between church and state, nor did they intend to prohibit the church from aiding the state nor the state from aiding the church. As Justice Story wrote in his 1833 *Commentaries,*

> Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration, the general, if not the universal sentiment was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private right of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created

[4] *Id.*

> universal disapprobation, if not universal indignation.
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> ....
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> The real object of the First Amendment was not to countenance, much less to advance, Mohammedanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.[5]

After introducing the Bill of Rights on the floor of Congress in 1789, James Madison was asked what the amendment that became the First Amendment meant:

> Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.[6]

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[5] 3 Joseph Story, *Commentaries on the Constitution of the United States* §§ 1868, 1871 (1833).

[6] 1 *Annals of Congress* 730 (August 15, 1789). There is no verbatim transcript of proceedings of the First Session of Congress.

The great fear of our Framers was that the government may use its power to penalize and disadvantage those who did not believe what the government thought that they should. But this is exactly what Montana is doing. Montana is discriminating against religious schools and their patrons by refusing to allow generally available vouchers to be used for religious schools.

This Court has held that "The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion". *McDaniel v. Paty*, 435 U.S. 618, 641 (1978). And in *Everson v. Board of Education* this Court upheld a state program that paid for busing children to parochial schools, holding that "That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary," and "State power is no more to be used so as to handicap religions than it is to favor them." *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). The Founders' vision of a benevolently neutral government toward religion is still relevant to our understanding of the Constitution today. Both of the Religion Clauses protect the right to believe in and practice a faith that our Founders fought and died to maintain.

II. Blaine Amendments Like Article X § 6 Were Created with an Animus Against Roman Catholicism.

When the First Amendment was adopted in 1789, Catholics constituted less than 1% of the American population, and in 1840 still only 3.3%. But immigration from Eastern and Southern Europe and the acquisition of new territory in the Southwest increased the Catholic population to 10% in 1866, 12.9% in 1891, and 16.5% in 1921.[7]

This increase in the Catholic population aroused concern among the Protestant majority and others, in part because across the nation the Catholic Church was establishing a system of parochial schools. Non-Catholics responded by pushing for compulsory schooling laws that would require all children to attend public schools.[8] Non-Catholics objected to state funding for Catholic schools, while Catholics resented having to pay taxes to support a public school system that (at least in their opinion) taught Protestant and secular values. Many Catholics thought it unfair that they had to pay taxes to support a school system they did not believe in and

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[7] Toby J. Heytens, *School Choice and State Constitutions*, 86 Virginia Law Review 117, 135 (2000). The author might actually mean virtually all parochial schools.

[8] *Id.* at 137; see also, Donald L. Kinzer, *An Episode in Anti-Catholicism: The American Protective Association* 11-12 (1964). Laws requiring all children including Catholic children to attend public schools were declared unconstitutional in *Pierce v. Society of Sisters,* 268 U.S. 510 (1925).

did not use while having to finance their own Catholic schools as well. Many therefore asked for government aid for their Catholic school system to redress the imbalance.

To combat this perceived threat, James G. Blaine, an influential Republican Congressman, Senator, and three-time Presidential candidate from Maine, led the Anti-Catholic Republican majority[9] in proposing a federal amendment to the Constitution–that would prevent the states from giving aid to sectarian organizations. His amendment failed in Congress, but similar amendments were subsequently adopted by a majority of states, including Montana.

The advent of these Blaine Amendments was an attempt to subjugate and suppress the rise of Catholicism in America. It was an open secret the use of "sectarian" in the amendments was a thinly-veiled code-word for "Catholic." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). "Virtually all private schools were affiliated with the Catholic church when the Blaine Amendments were proposed and enacted."[10] This clear attempt to burden the Catholic minority makes it clear that Blaine Amendments should be constitutionally suspect under the

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[9] During Blaine's 1884 Presidential campaign, his Republican supporters called the Democrat Party the party of "Rum, Romanism, and Rebellion," *United States Presidential Election of 1884*, Encyclopaedia Britannica, https://www.britannica.com/event/United-States-presidential-election-of-1884

[10] Heytens, *supra*, at 138. The author might actually mean virtually all parochial schools.

Establishment Clause because it has the primary effect of inhibiting religion, under the Free Exercise Clause because it forces Catholics to either compromise their religious convictions or give up a substantial state benefit, and the Equal Protection Clause because it applies the law differently to religious schools. As this Court recognized in *Helms,*

> ... hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. Cf. *Chicago* v. *Morales,* 527 U.S. 41, 53—54, n. 20 (1999) (plurality opinion). Although the dissent professes concern for "the implied exclusion of the less favored," *post*, at 1, the exclusion of pervasively sectarian schools from government-aid programs is just that, particularly given the history of such exclusion. Opposition to aid to "sectarian" schools acquired prominence in the 1870's with Congress's consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. 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." See generally Green, The Blaine Amendment

> Reconsidered, 36 Am. J. Legal Hist. 38 (1992). Notwithstanding its history, of course, "sectarian" could, on its face, describe the school of any religious sect, but the Court eliminated this possibility of confusion when, in *Hunt* v. *McNair,* 413 U.S., at 743, it coined the term "pervasively sectarian"– a term which, at that time, could be applied almost exclusively to Catholic parochial schools and which even today's dissent exemplifies chiefly by reference to such schools.
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> *Helms*, 530 U.S. at 828-29.

The Supreme Court has said repeatedly that a law made with animus toward a religious group will not survive constitutional scrutiny. *Larson v. Valente*, 456 U.S. 228, 246 (1982), (holding that a law was invalid when it was created in order to burden a particular religious sect); similar to *Hunter v. Underwood*, 471 U.S. 222 (1985) (holding a law invalid that was put in place to discriminate against African Americans). In *Abington School District v. Schempp,* 374 U.S. 203, 225 (1963), this Court stated, "the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'" But that is exactly what Montana has done: Those who want secular education may receive scholarships, while those who want religious education may not

receive scholarships. This favors irreligion over religion.

The creation of the Blaine Amendment in the State of Montana is also inescapably linked to the federal anti-Catholic animus. Montana entered the Union under the Enabling Act of 1889. This Enabling Act served to allow Washington, North Dakota, South Dakota and Montana to become states. However, the Act placed several qualifications upon admission. One of these qualifications had to deal with schools in the new states. This Enabling Act stated "That provision shall be made for establishment and maintenance of systems of public schools which shall be open to all the children of said States and *free from sectarian control."* 125 Act of Feb. 22, 1889, ch. 180, 25 Stat. 676 § 4 (1889) (Emphasis Added). As noted earlier, "sectarian" at that time was often a code-word for "Catholic."

Montana wasted no time in crafting its Constitution to meet and even surpass this requirement at their Constitutional Convention of 1889. They were ready to present their Constitution to Congress after only a month of drafting and discussion.[11] Scholars are of the opinion that drafting a good quality Constitution was not the top priority of the drafters. Rather, they wanted to quickly create a Constitution so that they would be

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[11] G. Alan Tarr, *The Montana Constitution: A National Perspective*, 64 Mont. L. Rev. 1, 3 (2003).

allowed to achieve statehood. The Montana Constitution was "enacted more as a tool to achieve statehood than to provide a well-thought-out structure of governance for the new state."[12] Because of their rush to statehood, they enacted provisions which they thought would be most likely to pass the pervasively anti-Catholic Congress. They therefore rushed to create one of the strictest amendments against aid to sectarian organizations in the nation, prohibiting not only direct aid but also indirect aid to sectarian schools.

The Montana Constitutional Convention of 1972 sought to revise the document and to create a more carefully drafted Constitution. However, this convention retained their Blaine Amendment almost word for word, despite the fact that many of the delegates voiced their concerns that the anti-Catholic animus of the original amendment would live on in their Constitution. Delegate Harbaugh attacked the 1889 provision as being born in anti-Catholic bigotry.[13] He went on to say that "80 years later, the State of Montana still retains in its constitution remnants of a long-past era of prejudice."[14] However, discussion over the inclusion of this anti-

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[12] Larry M. Elison & Fritz Snyder, *The Montana State Constitution: A Reference Guide,* n. 8 at 4 (G. Alan Tarr, ed., 2001).

[13] Michael P. Dougherty, *Montana's Constitutional Prohibition on Aid to Sectarian Schools: "Badge of Bigotry" or National Model for the Separation of Church and State?* 77 Mont. L. Rev. 41, 50 (2016).

[14] *Id.*

sectarian provision revealed that this prejudice was not left behind in the 1880s. Not only that, but this prejudice had evolved to include not only anti-Catholic sentiments, but also prejudice against the entire church. Delegate McNeil supported the amendment because he felt that it was fundamentally wrong to fund the church.[15] Delegate Harbaugh felt as though this provision was unnecessary to promote any separation of church and state since this would be the third time this fear had been addressed in their Constitution.[16] The drafters went far beyond what was necessary to establish a healthy and Constitutional relationship between the church and state and the advancement of this Blaine amendment only served to burden religious organizations who had only committed the offense of being religious.

III. Article X § 6 of the Montana Constitution Violates the Free Exercise Clause Because It Places a Substantial Burden on Religion.

The God-given right to religious liberty is first and foremost among the rights that we enjoy. It is a gift that the government cannot take away from us. This right is granted completely and entirely by God. Because people have a duty to obey the laws of Nature and of Nature's God first, human laws may not interfere with their sacred duty. The right to

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[15] *Id.* at 51.
[16] *Id.*

freely exercise our religion is a part of our unalienable rights which are claimed for us in the Declaration of Independence. Like all unalienable rights, it is irrevocable by human powers. In *Zorach v. Clauson* 343 U.S. 306, 313 (1952), Justice Douglas declared that "we are religious people whose institutions presuppose a Supreme Being," and in *McGowan v Maryland,* 366 U.S. 420, 562 (1961), he said in dissent that

> The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect.

Sherbert v. Verner, 374 U.S. 398 (1963) held that the Free Exercise Clause of the First Amendment is at issue whenever a substantial burden is placed upon religion. A major way that this substantial burden may be imposed is in the giving of a special disability based on a religious status. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) held that a law will be considered to be aimed at religion even if the religion is not specifically mentioned in the law, if the evidence establishes that the intent behind the law or the effect of the law was directed toward religion.

A law burdens free exercise if it imposes a disability upon religion, such as denying benefits to religious persons that are generally available to others, or placing a special handicap upon religious persons that is not common to everyone. *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1 (1947).

In the case at hand, both the purpose and the effect of Rule 1 is to exclude religious students, religious parents, and religious parents from a program that benefits all others. The Department placed a unique and particular disability on religious schools and their patrons. They were denied scholarship money from a generally available public program solely because they wanted to send their children to religious schools. If we look at the plain meaning of Article X § 6 we can see that there was an obvious disadvantage given to religion. The Section reads:

> "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.

Art. X § 6 Mont. Const. Section 6 specifically singles out religion for adverse treatment. Secular private schools and their patrons will receive scholarship aid, but no religious schools or patrons need apply.

Because Art. X § 6 and Rule 1 expressly discriminate against religion on their face, in their purpose, and in their effect, they must be accorded strict scrutiny. If government action is found to place a substantial burden upon religion, it will only be upheld when it is in the service of "a state interest of the highest order". *McDaniel*, 435 U.S. at 628. "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Church of Lukumi*, 508 U.S. at 546. "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation ... [the law] is invalid unless it is justified by a compelling interest that is narrowly tailored to advance that interest." *Id.* at 533. This Court has so stated, expressly in dicta and implicitly in holdings*: United States v. Armstrong*, 517 U.S. 456, 464 (1996) (noting that in criminal prosecutions, "the decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification') (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)); *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992) (stating that local venue rules would not be subject to strict scrutiny because they did not "classify along suspect lines like race or religion"). For additional examples, see *Wade v.*

United States, 504 U.S. 181, 186 (1992); *McCleskey v. Kemp*, 481 U.S. 279,291 n.8 (1987); *Friedman v. Rogers*, 440 U.S. 1, 17 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951); *United States v. Carolene Products Co.,* 304 U.S. 144,152 n.4 (1938).

Furthermore, the right of parents to determine the education of their children is fundamental. In *Meyer v. Nebraska,* 262 U.S. 390, 400 (1923), this Court stated. "Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the [Fourteenth] Amendment." And in *Pierce v. Society of Sisters of the Holy Names of Jesus,* 268 U.S. 510, 535 (1925) this Court stated:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

See also, *Farrington v. Tokushige,* 273 U.S. 284 (1927); *Wisconsin v. Yoder,* 406 U.S. 205 (1972). Montana has forced the Espinozas and others to either surrender their parental right to direct the

education of their children as they deem fit, or give up a substantial state benefit, the scholarship. Placing the Espinozas in this kind of dilemma violates their free exercise of religion, as this court has noted in *Sherbert v. Verner, supra.* at 404, , and *Thomas v. Review Board,* 450 U.S. 707 at 719 (1981).

IV. The Holding of *Trinity Lutheran Church v Comer* Forbids This Kind of Religious Discrimination.

The case of *Trinity Lutheran Church of Columbia v Comer* held that the Free Exercise rights of the Appellant were violated when they were denied a publicly available grant program for their playground solely because of the fact that they were a religious school. *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2024 (2017). This court held that the denial of the benefits in Trinity Lutheran violated the 1st Amendment because it forced the church to make a choice. They could stand by their principles and make do without the benefits or they could deny their religious identity and gain a benefit. The rule exacted by the action in this case is the same as in *Trinity Lutheran Church v Comer*: no churches need apply.

Trinity is especially relevant to the case at hand, because like Montana, Missouri has a Blaine Amendment in its Constitution, and the Missouri Department of Natural Resources used the State's Blaine Amendment as the reason for excluding

churches from the program. The Court said the Free Exercise Clause of the First Amendment prohibited the Department from discriminating against religious exercise, and "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." *Trinity*, 137 U.S. at 2022. The Court said Missouri's policy of effecting a greater separation of church and state than the First Amendment requires cannot justify a violation of the Free Exercise Clause.[17]

The *Trinity* decision appears to settle this issue and control this case, except for Footnote 3 of the Opinion 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." This footnote is consistent with the Court's cautious approach of making limited, narrow, fact-specific rulings rather than launching into sweeping generalizations. But there is no reason to distinguish the case at hand from *Trinity*. In fact, the Montana scholarship program preserves far greater separation of the State from parochial schools than does the Missouri playground program, because the Missouri program involved direct aid from the

[17] At least one state supreme court, that of Wisconsin, has upheld a Milwaukee voucher program that included religious schools even though the Wisconsin Constitution included a Blaine amendment.

State to schools whereas the Montana scholarship program involves scholarships to parents and students who in turn decide to use their scholarships to attend a private secular or religious school. In Missouri the aid goes to from the State to the school; in Montana the aid goes from the State to the parents and students. In Missouri decision to give aid to a school is made by the State; in Montana the decision is made by the parents and students. Furthermore, in Montana no money is actually taken from the State Treasury; rather, taxpayers are given tax credits for having contributed to scholarship companies that award scholarships to children.

This is a very important distinction, as this Court explained in *Helms:*

> As a way of assuring neutrality, we have repeatedly considered whether any governmental aid that goes to a religious institution does so "only as a result of the genuinely independent and private choices of individuals." *Agostini*, *supra,* at 226 (internal quotation marks omitted). We have viewed as significant whether the "private choices of individual parents," as opposed to the "unmediated" will of government, *Ball*, 473 U.S., at 395, n. 13 (internal quotation marks omitted), determine what schools ultimately benefit from the governmental aid, and how much. For if numerous private choices, rather than the single choice of

a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment. Private choice also helps guarantee neutrality by mitigating the preference for pre-existing recipients that is arguably inherent in any governmental aid program, see, *e.g.*, Gilder, The Revitalization of Everything: The Law of the Microcosm, Harv. Bus. Rev. 49 (Mar./Apr. 1988), and that could lead to a program inadvertently favoring one religion or favoring religious private schools in general over nonreligious ones.

The principles of neutrality and private choice, and their relationship to each other, were prominent not only in *Agostini*, *supra,* at 225—226, 228, 230—232, but also in *Zobrest*, *Witters*, and *Mueller*. The heart of our reasoning in *Zobrest*, upholding governmental provision of a sign-language interpreter to a deaf student at his Catholic high school, was as follows:

> "The service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as 'disabled'

> under the [statute], without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends. By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because the [statute] creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking." 509 U.S., at 10.

As this passage indicates, the private choices helped to ensure neutrality, and neutrality and private choices together eliminated any possible attribution to the government even when the interpreter translated classes on Catholic doctrine.

Witters and *Mueller* employed similar reasoning. In *Witters*, we held that the Establishment Clause did not bar a State from including within a neutral program providing tuition payments for vocational rehabilitation a blind person studying at a Christian college to

become a pastor, missionary, or youth director. We explained:

> "Any aid … that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients. Washington's program is made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited and … creates no financial incentive for students to undertake sectarian education… . [T]he fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State.
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> . . . . .
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> "[I]t does not seem appropriate to view any aid ultimately flowing to the Inland Empire School of the Bible as resulting from a *state* action sponsoring or subsidizing religion." 474 U.S., at 487—488 (footnote, citations, and internal quotation marks omitted).

Further, five Members of this Court, in separate opinions, emphasized both the importance of neutrality and of

> private choices, and the relationship between the two. See *id.*, at 490—491 (Powell, J., joined by Burger, C. J., and Rehnquist, J., concurring); *id.*, at 493 (O'Connor, J., concurring in part and concurring in judgment); see also *id.*, at 490 (White, J., concurring).
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> The tax deduction for educational expenses that we upheld in *Mueller* was, in these respects, the same as the tuition grant in *Witters*. We upheld it chiefly because it "neutrally provides state assistance to a broad spectrum of citizens," 463 U.S., at 398—399, and because "numerous, private choices of individual parents of school-age children," *id.*, at 399, determined which schools would benefit from the deductions. We explained that "[w]here, as here, aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally." *Ibid.* (citation omitted); see *id.*, at 397 (neutrality indicates lack of state *imprimatur*)."

Helms, 530 U.S. at 810-13.

Much earlier, in *Widmar v. Vincent,* 454 U.S. 263, 276 (1981), this Court stated a similar proposition. Holding that the University of Missouri at Kansas City would not violate the Establishment Clause by

allowing a student religious organization to use its meeting rooms, this Court held that "the state interest asserted here -- in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution --is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well."

The state may not incentivize the abandonment of religion. *McDaniel v Paty* states that "To condition the availability of benefits . . . upon [a recipient's] willingness to . . . surrender his religiously by compelling his status effectively penalizes the free exercise of his constitutional liberties." *McDaniel v. Paty*, 435 U.S. 618, 626 (1978). In our case, the same dilemma is being posed to religious organizations in the state of Montana. They may either surrender their principles which they hold to as a religious organization or they will be denied the benefit of having students attend through the use of the generally available government program, Furthermore, if parents and students choose to use their scholarships to attend religious schools, they do not all use them for religious schools of the same denomination. Although when the Blaine Amendment and its state counterparts were being adopted parochial schools were almost entirely Catholic, that is no longer true. According to *Private School Review,* the top 85 religiously-affiliated schools in Montana include 4 Amish schools, 1 Assembly of God school, 5 Baptist schools, 1 Brethren

school, 1 Calvinist school, 23 schools that simply call themselves Christian (presumably interdenominational) schools, 2 Church of Christ schools, 7 Lutheran Church - Missouri Synod schools, 5 Mennonite schools, 1 Methodist schools, 1 "Other," 19 Roman Catholic schools, 14 Seventh Day Adventist schools, and one Wisconsin Evangelical Lutheran Synod school.[18] Any thought that these scholarships have a primary effect of advancing religion fails to consider that the scholarships would go to schools of many different denominations.

V. Blaine Amendments Violate the Equal Protection Clause, Since They Disadvantage Religion.

Not only does this decision by the Montana Supreme Court raise issues under the Free Exercise Clause and the Establishment Clause, but it also is problematic under the Equal Protection Clause. Article X § 6 does not merely prevent the state from giving undue and unfair benefits to religion, it also prevents any and all aid from going to them. This decision would effectively separate them from the rest of society and would subject them to adverse treatment based solely on what class of people they belong to. The Supreme Court is clear that laws must apply to all people who are similarly situated

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[18] *Top Montana Religiously Affiliated Schools*, Private School Review, https://www.privateschoolreview.com/montana/religiously-affiliated-schools

the same. What is also clear is that religion will not be a valid reason to treat individuals or entities differently. It has been held that "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." *McDaniel*, 435 U.S. at 639 (1978) (Brennan, J., concurring). And the government may not impose a "special disability on the basis of…a religious status." *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U. S. 872 (1990). Additionally, "When a law discriminates against religion… it automatically will fail strict scrutiny". *Lukumi* at 107.

CONCLUSION

The rationale of *Trinity Lutheran Church v. Comer* applies *a fortiori* to the case at hand. If Missouri's Blaine Amendment cannot justify discrimination against religious institutions in a program by which the state directly finances playgrounds, certainly Montana's Blaine Amendment cannot justify discrimination against religious persons in a program by which private organizations award scholarships to needy recipients using funds that never enter or leave the State treasury and go to the students rather than to the schools.

This case gives the Court an opportunity to reaffirm once again the principle it has pronounced over and over during the last half century: Governments may not discriminate against religion.

The Foundation urges the Court to reverse the Montana Supreme Court decision and strike down Montana's Blaine Amendment, and Blaine amendments generally, because they violate the First and Fourteenth Amendments to the U.S. Constitution.

If the Court is not willing to take that step, the Foundation urges the Court to rule, as in *Trinity,* that Montana's Blaine Amendment cannot justify a Free Exercise violation.

Respectfully submitted,

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