No. 18-1195

In The Supreme Court of the United States

KENDRA ESPINOZA, JERI 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 Writ Of Certiorari To The Montana Supreme Court

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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?

PARTIES TO THE PROCEEDINGS

Petitioners (Plaintiffs below) are mothers Kendra Espinoza, Jeri Anderson, and Jaime Schaefer. Respondents (Defendants below) are the Montana Department of Revenue and its Director, Gene Walborn, in his official capacity.

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INTRODUCTION

In 2015, Montana legislators created a scholarship program to help families send their children to the school of their choice. Families, many of whom live in poverty, immediately signed up to use the scholarships at schools that met their children's individual needs, whether those schools provided stronger academics, an escape from bullies and violence, or values that aligned with what the families taught at home. In 2018, however, the Montana Supreme Court declared the program unconstitutional under article X, section 6(1) of the Montana Constitution, solely because it gave families the choice of using their scholarships at religious schools.

Applying article X, section 6(1) to prohibit religious options from student-aid programs violates the federal Constitution. This Court has already held that the Establishment Clause allows religious options in student-aid programs that rely on private choice. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). The question now is whether a state may *bar* religious options from such programs. It cannot. The Free Exercise, Establishment, and Equal Protection Clauses all demand that the government show neutrality—not hostility—toward religion in student-aid programs. Prohibiting all religious options in otherwise generally available student-aid programs rejects that neutrality and shows inherent hostility toward religion. This is evident from decades of case law, from *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947), and *Church of the Lukumi Babalu Aye, Inc. v.*

City of Hialeah, 508 U.S. 520 (1993), to *Locke v. Davey*, 540 U.S. 712 (2004), and *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

In addition, article X, section 6(1) itself raises serious constitutional concerns. The historical record shows that this provision was originally adopted—along with dozens of other so called "Blaine Amendments" in the Nineteenth Century—to preserve funding for the Protestant-oriented public schools and to suppress Catholicism and Catholic schooling. The Montana Supreme Court's application of article X, section 6(1) now extends the discrimination behind the provision to all religions.

This Court should reverse the Montana Supreme Court's judgment and hold that government cannot bar the choice of religious schools in student-aid programs, whether through a bigoted constitutional provision or otherwise. This holding would allow Montana's scholarship program to continue and also remove a major barrier to educational opportunity for children nationwide.

OPINIONS BELOW

The opinion of the Montana Supreme Court, available at Pet. App. 4, is reported at 393 Mont. 446. The order of the Montana Supreme Court granting a partial stay of its judgment pending review by this Court is available at Pet. App. 1. The opinion of the Montana Eleventh Judicial District Court granting Petitioners'

motion for a preliminary injunction is available at Pet. App. 96, and the opinion and order of that court granting summary judgment to Petitioners is available at Pet. App. 86.

JURISDICTION

The Montana Supreme Court entered its judgment on December 12, 2018, and Petitioners timely filed their petition for certiorari on March 12, 2019. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Religion Clauses of the First Amendment to the United States Constitution provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that a state shall not "deny to any person within its jurisdiction the equal protection of the laws."

Article X, section 6(1) of the Montana Constitution, under which the Montana Supreme Court enjoined the state's scholarship program, provides:

> 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.

Sections 15-30-3101–15-30-3114 of the Montana Code Annotated, which created the scholarship program, are attached as Addendum A. Montana Administrative Rule 42.4.802 ("Rule 1"), which barred religious options from the scholarship program, is attached as Addendum B.

STATEMENT

A. Factual Background

In 2015, the Montana Legislature enacted a scholarship program for kindergarten through 12th-grade students. The purpose of the program "is to provide parental and student choice in education." Mont. Code Ann. § 15-30-3101. It does so by providing a modest tax credit—up to $150 annually—to individuals and businesses who donate to private, nonprofit scholarship organizations. *Id*. at § 15-30-3111.[1] Scholarship organizations then use the donations to award scholarships to families who wish to send their children to

[1] In the same bill, the Montana Legislature also established a similar tax credit for donations to public schools. Mont. Code Ann. § 15-30-3110, Pet. App. 9. The Montana Supreme Court left that tax credit intact. Pet. App. 31, 34.

private school. Families can use those scholarships to attend any "qualified education provider," which is broadly defined by statute to include virtually every private school in the state. *Id*. at § 15-30-3102(7). Montana's program is one of the 57 educational choice programs that operate in 28 states, Washington, D.C., and Puerto Rico.[2]

So far, one Montana scholarship organization, Big Sky Scholarships, has formed to participate in the scholarship program. Big Sky is a small nonprofit run by part-time and volunteer staff. Pet. App. 121–22, ¶¶ 4–5. Although the statute authorizing the program allows scholarship organizations to award scholarships to any Montana family, Big Sky awards scholarships to families who are financially struggling or have children with disabilities. Pet. App. 122, ¶¶ 6–8. The recipients have chosen to attend both religious and nonreligious schools. *Id*. at ¶ 9.

Shortly after the program was enacted, however, Respondent Montana Department of Revenue promulgated an administrative rule ("Rule 1") that prohibited families from using scholarships at religious schools. Mont. Admin. R. 42.4.802. Specifically, Rule 1 changed the definition of "qualified education provider" to exclude any organization "owned or controlled in whole or in part by any church, religious sect, or denomination." *Id*. According to the Department, Rule 1 was

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[2] *See*, *e.g*., EdChoice, *School Choice in America Dashboard*, https://www.edchoice.org/school-choice/school-choice-in-america/ (listing all voucher, tax-credit scholarship, and educational savings account programs).

necessary to comply with article X, section 6(1) of the Montana Constitution. *See*, *e.g.*, Opening Brief of Dep't of Revenue at 13, *Espinoza v. Dep't of Revenue*, No. 17-0492 (Mont. Sup. Ct. Nov. 22, 2017).

Rule 1 significantly limited the choice of families participating in the program. About 69 percent of Montana private schools for K–12 students are religiously affiliated, J.A. 5, and these schools are in demand for both religious and secular reasons. Petitioners are three families who chose religious schools for their children.

Petitioners are all low-income mothers who were counting on the scholarships to keep their children in Stillwater Christian School, a nondenominational religious school in Kalispell, Montana. Although all three receive some financial aid from the school, they still struggle to make their monthly tuition payments.

Petitioner Kendra Espinoza is a single mother who transferred her two daughters out of public school after her youngest struggled in her classes and her oldest was teased and sometimes bullied by her classmates. Pet. App. 150–51, ¶ 4. Kendra and her daughters are Christian, and a "major reason" Kendra chose Stillwater Christian was because she wanted to send her daughters to a school that aligned with her Christian beliefs and because she "love[s] that the school teaches the same Christian values that [she] teach[es] at home." Pet. App. 152, ¶ 12. Her daughters, now 13 and 11, are flourishing at Stillwater.

Kendra, however, struggles to pay tuition. She works nights as a janitor (for two different employers), on top of her full-time job as an office assistant, just to afford her children's monthly tuition payments. Kendra has also raised tuition money from her community by raffling off donated quilts and holding yard sales, and her daughters have chipped in by taking odd jobs. Kendra was hoping to receive program scholarships to ease her family's burden. Without the scholarships, she may have to pull her children out of Stillwater. Pet. App. 151–53, ¶¶ 7–18.

Like Kendra, Petitioner Jeri Anderson is a single mom struggling to pay Stillwater's tuition for her 10-year-old daughter, Emma. Jeri adopted Emma from China, and Emma is academically gifted. Jeri chose to send her to Stillwater for its academics, and Emma thrives on the individualized attention she receives from her teachers, who guide her in advanced studies. Pet. App. 137–38, ¶¶ 2–10. Although Stillwater has been generous with its financial aid for Emma, "paying the remaining tuition every month is still a serious struggle" and Jeri "worr[ies] about it constantly." Pet. App. 139, ¶ 15. Fortunately, Jeri was able to rely on the program scholarships for the last two years to make ends meet. But without the scholarships, Jeri and her daughter would suffer even greater hardship.

Petitioner Jaime Schaefer also struggles to pay tuition for her son and daughter to attend Stillwater. Jaime and her husband transferred their daughter out of public school because the curriculum disappointed them. Pet. App. 166, ¶ 2. Jaime now sends both her

children to Stillwater, where she has been impressed by the school's academic rigor and music program. Paying the tuition, however, "is like a second mortgage payment" and "[i]t is a year–by–year decision" whether the Schaefers can keep their children there. Pet. App. 167, ¶ 8. Jaime was counting on the scholarships for "significant financial and psychological relief." *Id*. at ¶ 9.

These mothers' stories are not unique. Dozens of other families are relying on program scholarships to make tuition payments, including families living below the poverty line and those caring for disabled children. *E.g*., Pet. App. 129–30, ¶¶ 4–6; *id*. at 122, ¶¶ 7–8.

B. Proceedings Below

Petitioners filed this case on December 16, 2015, challenging Rule 1 as ultra vires, unnecessary, and unconstitutional. They made three arguments. First, they argued the rule was ultra vires because the Legislature intended the scholarship program to include both religious and nonreligious schools, which is clear from the plain text of the statute and its legislative history. Second, they argued that article X, section 6(1) of the Montana Constitution did not apply to the program because that section applies only to public funds—not private donations incentivized by tax credits. Third, Petitioners argued that to interpret and apply article X, section 6(1) to prohibit religious schools in the program would violate the Religion and Equal Protection Clauses of the U.S. Constitution. As Petitioners

alleged, Rule 1 "discriminate[s] against Plaintiffs and other families because of their religious views and/or the religious nature of the school that they have selected for their children." *See*, *e.g.*, Pls.' Compl. 22, ¶ 141, *Espinoza v. Dep't of Revenue*, No. DV-15-1152A (Flathead Cty. Dist. Ct. Dec. 16, 2015). Petitioners similarly alleged that the rule unconstitutionally "disfavors and inhibits religion." *Id*. at 24, ¶ 152.

On March 31, 2016, the trial court preliminarily enjoined Rule 1, agreeing it was likely both ultra vires and unconstitutional under the U.S. Constitution. On May 26, 2017, the trial court made the injunction permanent and granted Petitioners summary judgment. At the core of both decisions was the court's determination that the tax credits implicated private, not public funds, and that Rule 1 was thus not required by article X, section 6(1) of the Montana Constitution, which reaches only public appropriations and payments. Pet. App. 94, 115–19.

The trial court held that to conclude otherwise and apply section 6(1) to prohibit religious options in the program might violate the U.S. Constitution. Pet. App. 117–18. As the court determined, Rule 1 "preclude[s] the Plaintiffs, each of whom is a parent who has chosen to enroll her student in a non-public, religiously-affiliated school, from competing on an equal footing with parents who have chosen to enroll their children in a non-public secular school for the end benefit of the tax credit program." Pet. App. 117 (internal quotation marks omitted). The court further held that "Rule 1 draws a distinction based on religious affiliation" and

that this distinction potentially violated the Religion and Equal Protection Clauses in the U.S. Constitution. Pet. App. 117–18 (citing *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245 (10th Cir. 2008)). The Department appealed the decision to the Montana Supreme Court.

In a 5–2 decision, the Montana Supreme Court reversed on December 12, 2018. Although the court agreed that Rule 1 exceeded the Department's rulemaking authority, the court exercised its judicial power to do what the Department could not: It interpreted and applied article X, section 6(1) as an absolute bar to religious options in the scholarship program. Pet. App. 24–25. The court further held that the inclusion of religious schools was not severable from the rest of the scholarship program, requiring invalidation of the program itself. Pet. App. 34. Finally, the court held that applying section 6(1) to bar religious schools from participating in the scholarship program did not conflict with the federal Constitution. Pet. App. 31–32.

As to its first holding, the court determined that the program "indirectly pa[id] tuition at private, religiously-affiliated schools" and thus impermissibly aided religious schools in violation of article X, section 6(1). Pet. App. 26. The court emphasized that "[r]eligious education is a rock on which the whole church rests, and to render tax aid to a religious school is indistinguishable from rendering the same aid to the church itself." Pet. App. 30 (internal punctuation omitted).

Next, the court held that the inclusion of religious schools was not severable from the rest of the scholarship program. According to the court, "there is no mechanism within the [program] to identify where the secular purpose ends and the sectarian begins" or "when the tax credit is indirectly paying tuition at a secular school and when the tax credit is indirectly paying tuition at a sectarian school." Pet. App. 29 (internal punctuation and citation omitted). The court thus invalidated the program in its entirety. For the same reasons, it also held that Rule 1 exceeded the scope of the Department's rulemaking authority. As the court found, "[a]n agency cannot transform an unconstitutional statute into a constitutional statute with an administrative rule." Pet. App. 34.

Finally, the court summarily rejected Petitioners' argument that interpreting and applying article X, section 6(1) to prohibit scholarships for children at religious schools would violate the Religion and Equal Protection Clauses of the U.S. Constitution. The court held that although "an overly-broad analysis of [section 6(1)] could implicate free exercise concerns[, . . .] this is not one of those cases." Pet. App. 32. In reaching this conclusion, the court relied on this Court's statement in *Locke* that there is "room for play in the joints" of the Religion Clauses and held that Montana may impose a stricter barrier between government and religion than is required by the Establishment Clause. Pet. App. 16 (citing *Locke*, 540 U.S. at 722).

Two justices dissented. They concluded that the program was constitutional under the state constitution.

They also expressed concern that the majority's opinion violated the First Amendment. Pet. App. 61–85. Quoting this Court's recent opinion in *Trinity Lutheran*, Justice Baker stressed that "[t]he 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.'" Pet. App. 76 (quoting *Trinity Lutheran*, 137 S. Ct. at 2025).

On December 24, 2018, Petitioners moved the Montana Supreme Court to stay the effective date of its judgment pending final disposition of an appeal to this Court. As Petitioners argued, dozens of families were expecting to receive scholarships in summer 2019 and depriving them of these scholarships would impose irreparable harm. Appellees' Mot. Stay Judgment at 1, 4–8, *Espinoza v. Dep't of Revenue*, No. 17-0492 (Mont. Sup. Ct. Dec. 24, 2018). On January 24, the court granted a partial stay of the judgment, allowing Big Sky to award scholarships in the summer of 2019. But the court denied Petitioners' request that Big Sky be able to resume fundraising for tax-creditable donations. Pet. App. 1. As a result, Big Sky had funds for around 40 students, Pet. App. 124, ¶ 16, and awarded scholarships in summer 2019.

SUMMARY OF THE ARGUMENT

The Montana Supreme Court interpreted article X, section 6(1) to bar any religious options in student-aid programs. That interpretation led the court to

invalidate Montana's scholarship program—solely because it gave parents the choice of using scholarships at religious schools. This interpretation and application of article X, section 6(1) discriminates against religion in violation of the Free Exercise, Equal Protection, and Establishment Clauses.

First, applying article X, section 6(1) to bar religious options in student-aid programs violates the Free Exercise principles set forth in *Trinity Lutheran* and prior case law. This application discriminates against the religious "beliefs," "conduct," and "status" of religious families who choose to use scholarships at schools that align with their faith. *See*, *e.g.*, *Trinity Lutheran*, 137 S. Ct. at 2021; *Church of Lukumi Babalu Aye*, 508 U.S. at 532–33. It also discriminates against the religious "status" of the schools themselves, to the detriment of every family that has decided these schools best meet their children's needs. *Trinity Lutheran*, 137 S. Ct. at 2021. In addition, it discriminates against the religious "use" of student-aid money. *See*, *e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828, 843, 845–46 (1995). No matter the label given to the discrimination in this case, it is pervasive and anathema to the Free Exercise Clause.

Second, relying on article X, section 6(1) to bar religious options from student-aid programs violates the Equal Protection Clause. Article X, section 6(1) is a "Blaine Amendment," originally motivated by anti-Catholic bigotry. This Court has not hesitated to invalidate, under the Equal Protection Clause, other state constitutional provisions "born of animosity." *Romer v.*

Evans, 517 U.S. 620, 634 (1996); *see also Hunter v. Underwood*, 471 U.S. 222 (1985). And while invalidating section 6(1) is not required here, this Court should not allow this provision to strike down the scholarship program just because it allows religious options. Indeed, applying Montana's Blaine Amendment in this way extends the provision's original prejudice against Catholics and Catholic schooling to *all* religions and religious schooling.

Finally, article X, section 6(1) as applied here violates the Establishment Clause, which prohibits government hostility toward religion. Whether this Court applies the test set forth in *Zelman v. Simmons-Harris*, the *Lemon* test, or some other metric, categorically barring religious options in student-aid programs necessarily reflects such hostility. The Montana Supreme Court's judgment must be reversed.

ARGUMENT

I. APPLYING ARTICLE X, SECTION 6(1) TO BAR RELIGIOUS OPTIONS IN STUDENT-AID PROGRAMS VIOLATES THE FREE EXERCISE CLAUSE.

This Court has long guarded against government attempts to single out religion and religious people for differential treatment. As this Court has held, government cannot discriminate against "a particular religion or . . . religion in general," and "the protections of the Free Exercise Clause pertain if the law at issue

discriminates against some or all religious beliefs." *Church of the Lukumi Babalu Aye*, 508 U.S. at 532. Yet here, article X, section 6(1) was applied to bar all religious options in student-aid programs. This application is inherently discriminatory and violates this Court's longstanding jurisprudence.

As this Court recently reiterated in *Trinity Lutheran*, the government cannot discriminate against religious "beliefs," "conduct" that is "religiously motivated," or religious "status." 137 S. Ct. at 2021. Here, the Montana Supreme Court's application of article X, section 6(1) clashes with all three of these principles. It discriminates against the religious beliefs, conduct, and status of religious families who choose a school because it shares their faith. It also discriminates against the religious status of the schools themselves, which directly harms every family that has decided these schools are the best fit for their child—whether for religious or secular reasons.

In addition, this application of article X, section 6(1) discriminates against the religious "use" of student-aid money. While *Trinity Lutheran* did not address the constitutionality of discrimination against religious "use" of public money, the Court's earlier precedent has invalidated such discrimination for decades. *Rosenberger*, 515 U.S. at 828, 843, 845–46 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993); *Widmar v. Vincent*, 454 U.S. 263, 265 (1981).

In fact, the only time this Court has upheld a religious exclusion in an individual-aid program was in *Locke v. Davey*, and the Court emphasized that the exclusion there was constitutional only because it was narrow and the challenged program otherwise went "a long way toward including religion in its benefits." *Locke*, 540 U.S. at 724. Here, by contrast, applying article X, section 6(1) to completely bar religious options in student-aid programs reflects the very religious "hostility" that the Constitution forbids. *Id*.

A. Article X, section 6(1) as applied discriminates against "religious beliefs," "religiously motivated conduct," and religious "status" in contravention of *Trinity Lutheran*.

Under this Court's recent decision in *Trinity Lutheran*, applying article X, section 6(1) to exclude religious options in student-aid programs discriminates against the free exercise rights of both Petitioners and the religious schools they wish their children to attend.

Trinity Lutheran concerned Missouri's grant program for institutions to resurface their playgrounds with soft tire scraps. 137 S. Ct. at 2017. A church-run preschool and daycare center applied for the grant, and the state at first selected it to be one of 14 recipients. *Id*. But the state ultimately denied the preschool's application under one of Missouri's Blaine Amendments, which prohibits public funding "in aid of any church, sect or denomination of religion." *Id*.; Mo. Const. art. I,

§ 7. The preschool brought a Free Exercise challenge to the grant denial, and the Court ruled for it in a 7–2 decision.

In analyzing the preschool's claim, the Court reiterated three "fundamentals of [its] free exercise jurisprudence." *Id*. at 2021. First, a law "may not discriminate against 'some or all religious beliefs.' " *Id.* "Nor may a law regulate or outlaw conduct because it is religiously motivated." *Id*. And finally, laws cannot impose "special disabilities on the basis of . . . religious status." *Id.* (quoting *Church of Lukumi Babalu Aye*, 508 U.S. at 533). The Court then held that Missouri's grant denial violated this third fundamental, as it discriminated against the preschool based solely on its religious status. *Id.* This discrimination forced the preschool to choose between "participat[ing] in an otherwise available benefit program or remain[ing] a religious institution," a choice which penalized the preschool's free exercise rights. *Id.* at 2021–22.

Here, applying article X, section 6(1) to bar religious options in student-aid programs and invalidate the scholarship program conflicts with all three of these fundamental principles. It violates the first and second by discriminating against the religious beliefs and religiously motivated conduct of devout families who wish to send their children to a school that aligns with their beliefs. For example, Petitioner Kendra Espinoza testified that a "major reason" she chose Stillwater Christian School for her two daughters is because her family is Christian and Kendra "love[s] that the school teaches the same Christian values" and

beliefs that "[she] teach[es] at home." Pet. App. 150–52, ¶¶ 2, 12. Yet the very reason the Montana Supreme Court invalidated the scholarship program is because it allowed parents like Kendra to choose schools that accord with their religious beliefs. For Kendra, a single mother who works three jobs just to pay for that school, *id*. at ¶ 15, this result is gut wrenching. It is also unconstitutional. The government may not "exclude[] members of any . . . faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 16 (1947). Nor may the government "impose burdens only on conduct motivated by religious belief." *Church of the Lukumi Babalu Aye*, 508 U.S. at 543.

This application of article X, section 6(1) also violates the third fundamental principle by discriminating against the religious "status" of families. *See Trinity Lutheran*, 137 S. Ct. at 2019; *Church of the Lukumi Babalu Aye*, 508 U.S. at 533 (citing *McDaniel v. Paty*, 435 U.S. 618, 627 (1978) (plurality opinion)); *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) (noting "our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity"). Kendra was motivated to send her children to Stillwater *because* of her religious "status" and "identity" as a Christian. In addition, many devout families are *required* by their religious status to place their children in full-time religious schooling. Catholics, for example, have a "duty"—set forth in canon law and stressed by the Second Vatican Council—"of entrusting

their children to Catholic schools wherever and whenever it is possible." Vatican Council II, *Gravissimum educationis* (1965); *see also Codex Iuris Canonici* 1983 c.798 (stating that "[p]arents are to entrust their children to those schools which provide a Catholic education" so long as they are able). Likewise, many Orthodox Jews believe there is an obligation (mitzvah) to ensure their children receive a Jewish education, rooted in study of the Torah, which can only be fully accomplished by sending their children to full-time Orthodox Jewish schools. *See*, *e.g.*, Brief for Agudath Israel of America as Amicus Curiae Supporting Appellees at 1, 8, *Espinoza v. Dep't of Revenue*, No. 17-0492 (Mont. Sup. Ct. Jan. 19, 2018). Applying article X, section 6(1) to exclude religious options in student-aid programs prohibits benefits to these faithful families simply because they adhere to the tenets of their religion.

Article X, section 6(1) as applied also discriminates against the religious status of schools themselves, to the direct detriment of families who have found such schools to be the best fit for their children. It bars religious schools—solely because of their "status," "character," and "identity," *Trinity Lutheran*, 137 S. Ct. at 2019, 2021—from ever participating in student-aid programs. This harms not only families, like the Espinozas, who have chosen these schools mainly for religious reasons, but also families who choose these schools for secular reasons.

Petitioner and scholarship recipient Jeri Anderson, for example, is a Christian, but chooses to send her

academically gifted daughter to Stillwater primarily for its rigorous academics. Pet. App. 162, ¶ 8. Similarly, Petitioner Jaime Schaefer chose Stillwater for its challenging curriculum and music program. Pet. App. 166–67, ¶¶ 3, 5. Meanwhile, a single mother of another scholarship recipient has chosen Great Falls Central Catholic High School for safety reasons after her son was severely bullied in public school. Pet. App. 130, ¶ 5. Yet because the scholarship program allowed these families and others to use scholarships at religious schools, the entire program was struck down. In fact, under the Montana Supreme Court's interpretation of article X, section 6(1), these families can *never* receive state student aid to attend a school with a religious "status." As it stands now, the Montana Legislature may only create student-aid programs that benefit children attending secular schools.

Because the application of article X, section 6(1) in this case discriminates against religious beliefs, conduct, and status, it is subject to strict scrutiny, *Trinity Lutheran*, 137 S. Ct. at 2019, which it cannot survive. The only justification for applying article X, section 6(1) to bar religious options in student-aid programs is that section 6(1) "more broadly prohibits aid to sectarian schools than the federal Establishment Clause."[3] *E.g.*, Pet. App. 21. But this justification is insufficient. This Court already held in *Trinity Lutheran* and previous cases that a "state['s] interest . . . in

[3] This Court has already held that the Establishment Clause allows religious options in student-aid programs. *Zelman*, 536 U.S. at 653.

achieving *greater* separation of church and state than is already ensured under the Establishment Clause" is not "compelling." *Trinity Lutheran*, 137 S. Ct. at 2024 (emphasis added) (citing *Widmar v. Vincent*, 454 U.S. 263 (1981)). In fact, in both *Widmar* and *Trinity Lutheran*, the government tried to rely on Blaine Amendments to justify excluding religious individuals and organizations from participating in public programs. In both cases, the Court rejected this interest. It should do the same here.

Thus, applying article X, section 6(1) to bar religious options in student-aid programs and invalidate the scholarship program violates the Free Exercise Clause.

B. Article X, section 6(1) as applied also discriminates against the "religious use" of student-aid money in violation of decades of precedent.

Applying article X, section 6(1) to bar religious options in student-aid programs should be subject to strict scrutiny and declared unconstitutional for an additional reason: It discriminates against the religious *use* of student-aid money. Although a majority of the Court in *Trinity Lutheran* "d[id] not address religious uses of funding or other forms of discrimination," *Trinity Lutheran*, 137 S. Ct. at 2024 n.3 (plurality), two justices in the majority—Justices Gorsuch and Thomas —did, and they noted that discrimination based on religious "use" is just as constitutionally offensive as

discrimination based on religious "status." *Id*. at 2026 (Gorsuch, J., concurring in part). After all, the text of the First Amendment protects the free *exercise* of religion, not just religious belief. *Id*.

And for many families seeking student aid, religious status and use are indistinguishable. As discussed above, some religions *require* religious schooling. *Supra* pp. 18–19. For families adhering to such a religion, "using" student aid at a religious school is required by the very "status" of being a member of that religion. *Id*. Likewise, denying that aid because of the religious use to which such families would put it is to deny that aid because of their religious status. This only confirms the point Justice Gorsuch made in *Trinity Lutheran* when he observed, "I don't see why it should matter whether we describe [a] benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use). It is free exercise either way." *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring in part).

Moreover, when this Court has considered religious exclusions in the context of the Free Speech Clause, it has agreed that they are unconstitutional. For example, the Court invalidated a regulation prohibiting the "use" of university facilities "for purposes of religious worship or religious teaching." *Widmar v. Vincent*, 454 U.S. 263, 265 (1981). Similarly, the Court held it unconstitutional for government to exclude groups from receiving student activity funds simply because the funds would be "used . . . for sectarian purposes" or "religious activities." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828, 843, 845–46

(1995). The Court also held that government unconstitutionally "discriminate[d] on the basis of viewpoint" when it "permit[ted] school property to be used for the presentation of all views about family issues and child-rearing except those dealing with the subject matter from a religious standpoint." *Lamb's Chapel*, 508 U.S. at 393.

In fact, this Court has never upheld an individual-aid program excluding all religious uses. The only time the Court upheld such a program excluding a religious use was in *Locke*, and that exclusion was narrow and showed no "hostility" toward religion. 540 U.S. at 724. Here, in contrast, applying article X, section 6(1) to bar all religious options in student-aid programs shows *complete* hostility toward religion. Indeed, *Locke* confirms the free exercise violation here.

C. *Locke* reinforces that applying article X, section 6(1) to bar religious options from student-aid programs cannot pass constitutional muster.

Notwithstanding the Montana Supreme Court's conclusion, Pet. App. 16, *Locke* does not authorize the banishment of religious options from student-aid programs; to the contrary, *Locke* condemns it. *Locke* concerned a Washington merit- and need-based scholarship program for college students. The program allowed students to attend religious colleges, but it excluded students who were majoring in "devotional theology"—that is, "religious instruction that will

prepare students for the ministry." 540 U.S. at 715, 719. Joshua Davey received a scholarship under the program, only to lose it when he chose devotional theology as his major. *Id.* at 717. Davey then challenged the exclusion under the Religion and Equal Protection Clauses. *Id.* at 718.

Although this Court upheld the devotional theology exclusion, it took pains to limit its opinion so that it would not be mistakenly construed as giving government *carte blanche*. *Locke* made clear that a religious exclusion in a student-aid program is permissible only if the exclusion: (1) is narrow, (2) reflects no "hostility" toward religion, (3) "does not require students to choose between their religious beliefs and receiving a government benefit," and (4) is justified by a "historic and substantial state interest." 540 U.S. at 720–22, 724. Here, none of these requirements is met.

First, the Court in *Locke* stressed that the religious exclusion in that case was narrow and that the scholarship program was "otherwise inclusive." *Id*. at 715, 724. Although the program prohibited scholarships for students majoring in devotional theology, students were still free to use the scholarships to attend "pervasively religious schools," take religious classes (including devotional theology classes), and pursue other religious majors. *Id.* at 724–25. Here, by contrast, the application of article X, section 6(1) effects a wholesale bar to religious options in student-aid programs; it is anything but narrow.

Second, and relatedly, the Court found that the program in *Locke* exhibited no "hostility toward religion" because it went "a long way toward including religion in its benefits." *Id.* at 724. But here, it is hard to conceive how excluding *all* religious schools from a student-aid program could exhibit any greater "hostility toward religion."

Third, the program in *Locke* did not "require students to choose between their religious beliefs and receiving a government benefit." *Id*. at 720–21. Students could use their scholarship money to attend a religious school that shared their faith and take as many religious classes as they desired. They just could not major in one "distinct category of instruction." *Id*. at 721. But in the aftermath of the Montana Supreme Court's holding, if a Montana student chooses to attend a religious school, she must forfeit all opportunity to participate in a Montana student-aid program. Practically, this means that the student may be forced to choose between attending a school that accords with her beliefs or receiving thousands of dollars in government benefits. But the government cannot condition an individual's receipt of public benefits on her ceasing religiously motivated conduct. *Cf. Trinity Lutheran*, 137 S. Ct. at 2022 ("To condition the availability of benefits upon a recipient's willingness to surrender his religiously impelled status effectively penalizes the free exercise of his constitutional liberties." (quoting *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (plurality opinion) (internal punctuation omitted)). Nor may the government "coerce[ ]" individuals "into violating their

religious beliefs" or "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988).

Next, *Locke* stressed that the religious exclusion in that case was justified by the state's unique interest "in not funding the religious training of clergy"—an interest that the Court noted had a long pedigree in our country's history and dated to the Founding itself. 540 U.S. at 722 n.5, 725. The Court was careful to frame that interest precisely, to address Justice Scalia's concern that the opinion might be viewed as "ha[ving] no logical limit" and as "justify[ing] the singling out of religion for exclusion from public programs in virtually any context." *Id*. at 730 (Scalia, J., dissenting). As the majority emphasized, "[n]othing in our opinion suggests" that reading. *Id*. at 722 n.5.

This case, in contrast, has nothing to do with training the clergy or any other unique interest. Instead, the government invokes only a generic desire to create a higher barrier between church and state, as it claims is required by article X, section 6(1). This Court has already rejected this same interest as a permissible justification for religious exclusions, as discussed above. *Supra* pp. 20–21. To conclude otherwise would do exactly what the Court sought to prevent in *Locke*: allow the government to single out religion for exclusion from individual-aid programs without limit.

In fact, the actual purpose behind article X, section 6(1) is not generic at all, but deeply troubling. As shown in the next section, *infra* Part II, the historical record demonstrates that this provision is a "Blaine Amendment," originally adopted in 1884 to suppress Catholicism and Catholic schooling. Although the Washington Constitution also contains a "Blaine Amendment"—Wash. Const. art. IX, § 4—that may be "linked with anti-Catholicism," *Locke*, 540 U.S. at 723 n.7, that provision was not at issue in *Locke*. *Id*. Instead, the Court determined that the provision that *was* at issue in *Locke*, article I, section 11 of the Washington Constitution, had nothing in its "history or text . . . that suggest[ed] animus toward religion." *Locke*, 540 U.S. at 725.[4] But here, a Blaine Amendment—along with its discriminatory history—is squarely at play and exacerbates the Free Exercise problems in this case. *See*, *e.g.*, *Church of the Lukumi Babalu Aye*, 508 U.S. at 547 (stating the government "may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion").

In short, the Montana Supreme Court's application of article X, section 6(1) is not saved by *Locke* but rather crashes right into it—as well as into *Trinity Lutheran* and this Court's longstanding Free Exercise principles. And, as shown below, the discriminatory history behind Montana's Blaine Amendment also

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[4] The plaintiff in *Locke* conceded that this provision was not a Blaine Amendment. *Id*. at n.7.

creates a serious conflict with the Equal Protection Clause.

II. APPLYING ARTICLE X, SECTION 6(1) TO BAR RELIGIOUS OPTIONS IN STUDENT-AID PROGRAMS VIOLATES THE EQUAL PROTECTION CLAUSE.

Applying article X, section 6(1) to bar religious options in student-aid programs and invalidate the scholarship program also violates the Equal Protection Clause. The Equal Protection Clause prohibits classifications drawn along religious lines, as religion is an "inherently suspect" classification. *E.g.*, *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam). While the extent to which the Equal Protection Clause should be applied alongside the Free Exercise Clause in religious discrimination cases is not always clear, the Court has applied equal protection analysis to laws that were enacted to discriminate against certain groups. In fact, the Court has twice invalidated state constitutional provisions under the Equal Protection Clause when the evidence showed the provisions were "born of animosity." *Romer*, 517 U.S. at 634; *see also Hunter*, 471 U.S. at 233.

Here, article X, section 6(1) shares this discriminatory baggage. The historical record shows that this provision is one of the dozens of "Blaine Amendments" that were originally enacted throughout the mid-to-late 1800s to suppress Catholicism and Catholic schooling. Several Justices have already recognized

the sordid history behind the Blaine movement. *Mitchell*, 530 U.S. at 828–29 (plurality opinion by Justice Thomas, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy) (stating the national Blaine movement was "born of bigotry" and "pervasive hostility to the Catholic Church"); *see also Zelman*, 536 U.S. at 719–21 (dissent by Justice Breyer, joined by Justices Stevens and Souter) (noting anti-Catholicism "played a significant role" in the Blaine movement).

The Court should not allow a vestige of Nineteenth Century anti-Catholicism to be twisted into an engine of animus against all religion. Nor should the Court allow it to be used as a weapon to deprive children of educational opportunity.

A. Laws violate the Equal Protection Clause when they are enacted to discriminate against certain groups.

Laws violate the Equal Protection Clause when discrimination is "a substantial or motivating factor" for their enactment. *Hunter*, 471 U.S. at 225. In determining whether discrimination is at play, the Court looks at "both circumstantial and direct evidence." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). Relevant evidence includes the "historical background" of the law, "particularly if it reveals a series of official actions taken for invidious purposes," as well as "the legislative or administrative history." *Id*. at 267–68; *see also Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719

(2017) (quoting *Church of the Lukumi Babalu Aye*, 508 U.S. at 540 (plurality)).

Hunter is directly on point. There, the Court held 8–0 that a provision of Alabama's Constitution, which had been adopted in 1901, was unconstitutional because a "motivating factor" for the law was to discriminate against African Americans. 471 U.S. at 231, 233. The challenged provision disenfranchised persons convicted of felonies and certain misdemeanors "involving moral turpitude," and the legislative history showed the drafters designed the provision to single out crimes that the delegates believed were more frequently committed by African Americans. *Id*. at 226–29. The evidence also showed this effort was "part of a movement that swept the post-Reconstruction South to disenfranchise blacks." *Id*. at 229. Because the provision's "original enactment was motivated by a desire to discriminate against blacks on account of race and the [provision] continue[d] to this day to have that effect," the Court held the provision violated the Equal Protection Clause. *See also Nichol v. ARIN Intermediate Unit 28*, 268 F. Supp. 2d 536, 552 (W.D. Pa. 2003) (holding that a law barring school teachers from wearing religious clothes and jewelry had a "discriminatory purpose" because it had been "motivated by anti-Catholic animus" when it was initially enacted in 1895).

As the following section will show, article X, section 6(1) arose from similar discriminatory motives,

and its application here should similarly be held unconstitutional.[5]

B. Article X, section 6(1) is a Blaine Amendment that was enacted to discriminate against Catholics and Catholic schooling.

Montana's article X, section 6(1) is also known as Montana's "Blaine Amendment." This provision, along with multiple other Blaine Amendments across the country, was originally adopted by a Protestant majority to prevent funding for Catholic schools while preserving funding for—and effectively coercing all students to attend—the Protestant-oriented public schools. This is evident in the historical record regarding Blaine Amendments generally and article X, section 6(1) specifically.

In the 1800s, Americans were predominantly Protestant and the public schools, then known as "common schools," reflected this religious composition. Teachers led students in daily prayer, sang religious hymns, extolled Protestant ideals, read from the King James Bible, and taught from anti-Catholic textbooks.[6]

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[5] In *Hunter*, the Court invalidated the challenged provision on its face. 471 U.S. at 233. The Court could do the same here, but it is unnecessary. The Court can simply declare that article X, section 6(1) is unconstitutional as applied.

[6] Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 41–42 (1992); *see generally* Lloyd P. Jorgenson, *The State and the Non-Public School, 1825–1925* (1987).

By midcentury, however, this status quo was challenged by an increase in Catholic immigration, leading to decades of religious conflict. In the 1840s and 50s, there were protests, vandalism, and even violent riots against Catholics. *See*, *e.g.*, *Zelman*, 536 U.S. at 720–21 (Breyer, J., dissenting) ("'Dreading Catholic domination,' native Protestants 'terrorized Catholics.' In some states, 'Catholic students suffered beatings or expulsions for refusing to read from the Protestant Bible, and crowds . . . rioted over whether Catholic children could be released from the classroom during Bible reading.'" (internal citations omitted)).

Catholics urged the government to remove Protestantism from the public schools, leading to more deadly riots.[7] When these efforts failed, Catholics created their own parochial school system and sought proportional funding for these schools from the government.[8] Their efforts, however, only stoked the flames of the conflict.[9]

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[7] *See*, *e.g.*, Tyler Anbinder, *Nativism & Slavery: The Northern Know Nothings & the Politics of the 1850s* 11–12 (1992) (describing the Philadelphia Bible riots in the 1840s); *see also* Philip Hamburger, *Separation of Church and State* 217, 219 (2002) (same).

[8] Anbinder, *supra* note 7, at 85.

[9] *See*, *e.g.*, 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, 561 (2003) ("In one often-noted 1842 incident, the Catholic bishop of New York advocated public funding of the parochial school system in that state. In response a mob burned down his house and state

Several anti-Catholic organizations rose to prominence during this period. One was the Know-Nothing Party, which made opposition to funding Catholic schools a main part of its party platform.[10] In the 1850s, the Know Nothings won hundreds of congressional seats, state legislative seats, and governorships.[11] As President John F. Kennedy later wrote, "[t]he Irish are perhaps the only people in our history with the distinction of having a political party, the Know-Nothings, formed against them."[12]

Although the Catholic school issue died down during the Civil War, it resurfaced and then peaked at the end of the Nineteenth Century. In 1875, President Ulysses S. Grant, a former Know Nothing who became a Republican,[13] delivered a widely publicized speech calling for banning all public support for "sectarian schools."[14] As Justices of this Court have recognized, "it was an open secret that 'sectarian' was code for 'Catholic,'" in contrast to the so-called "nonsectarian" Protestantism widely taught in the common schools. *Mitchell*, 530 U.S. at 828 (plurality); *see also Zelman*,

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troops had to be called out to defend the bishop's cathedral from attack." (footnote omitted)).

[10] *See*, *e.g.*, Joseph P. Viteritti, *Choosing Equality: School Choice, the Constitution, and Civil Society* 71 (1999).

[11] Anbinder, *supra* note 7, at 127–28, 197.

[12] John F. Kennedy, *A Nation of Immigrants* 18 (Harper & Row 1964).

[13] Anbinder, *supra* note 7, at 274.

[14] Stephen K. Green, *The Bible, the School and the Constitution: The Clash that Shaped Modern Church-State Doctrine* 187 (Oxford Univ. Press 2012).

536 U.S. at 721 (Breyer, J., dissenting) (stating that Protestants insisted "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)."). Three months later, President Grant delivered a congressional address calling for a constitutional amendment prohibiting such sectarian support.[15] The Republican Party also added the position to its official party platform.[16]

Representative James Blaine, who hoped to succeed Grant as president, took up the cause. Within days of Grant's speech, Blaine introduced a constitutional amendment to prohibit public school funding from being used for any "religious sect or denomination." *See* 4 Cong. Rec. 5454 (1876). At the time, the anti-Catholic sentiments behind the proposed amendment were well understood. *The Nation*, which supported the proposal, called it a "[c]onstitutional amendment directed against the Catholics" and declared it was designed to "catch anti-Catholic votes." The *New York Tribune* labeled the amendment as part of a plan to "institute a general war against the Catholic Church." And the *New York Times* referred to the proposal as addressing "the Catholic question."[17] The bill's anti-Catholic motives were also evident during

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[15] Green, *supra* note 14, at 192–93.

[16] Green, *supra* note 6, at 56.

[17] *Id.* at 54, 44, 58 (quoting newspapers).

the legislative debates on the bill, during which the supposed danger posed by the Catholic Church and its schools was discussed at length. One senator even insisted that Congress had a "duty . . . to resist" the teachings of the "aggressive" Catholic Church "by every constitutional amendment and by every law in our power." 4 Cong. Rec. 5588 (1876).

Although the federal constitutional amendment passed overwhelmingly in the House, it narrowly failed in the Senate—falling only four votes short of the supermajority needed to proceed to the states for ratification.[18] But the anti-Catholic effort continued. By 1890, 29 states had added Blaine Amendments to their own constitutions.[19] Montana was one such state.

As in the rest of the nation, anti-Catholic sentiments were coming to a head in Montana at the end of the Nineteenth Century. Irish immigration to Montana rose by over 400 percent between 1870 and 1890,[20] rapidly increasing the number of Catholic families in the Protestant territory. Religious strife soon found its way into educational law and policy, leading to a Blaine Amendment being included in the

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[18] *See* Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 672 (1998).

[19] Frank R. Kemerer, *State Constitutions and School Vouchers*, 120 Educ. L. Rep. 1, 6 n.21 (1997).

[20] *See* David M. Emmons, *Beyond the American Pale: The Irish in the West, 1845–1910* 214 (2012) (Table 3, showing Montana Irish immigrant population growing from 1,635 in 1870 to 6,648 in 1890).

territorial constitution of 1884, and readopted into the state constitution when Montana was admitted into the Union in 1889.

One local advocate against Catholic schooling was the Governor of the Montana territory, James Mitchell Ashley, who was appointed by President Grant in 1869. Like Grant, Ashley was a former Know Nothing who had become a Republican,[21] and he has been acknowledged as "anti-Catholic."[22] During his first address to the territorial legislature, he attacked the "denominational" schools and decried "sectarianism" as a threat to the "strength of our school system."[23]

Not long after Ashley's speech, the Montana legislature in 1872 passed a law pressuring school boards to ban from the public schools and school libraries "all books, tracts, papers, or catechisms" of a "sectarian" character. School boards that refused would lose state funding.[24] Tellingly, an earlier effort to ban any "*religious* tract or any publication of a *religious* character likely to elicit discord on religious subjects . . . in the common schools of the territory" had failed.[25] In other

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[21] Leonard L. Richards, *Who Freed the Slaves? The Fight over the Thirteenth Amendment* 13–14 (2015).

[22] *Id*. at 14.

[23] *Council Journal of the Sixth Session of the Legislative Assembly of the Territory of Montana*, 1869 Leg., 6th Sess. 34 (Mont. Terr. 1869) (statement of Gov. James M. Ashley).

[24] Emmet J. Riley, *Development of the Montana State Educational Organization, 1864–1930* 34 (1931).

[25] Dale Raymond Tash, *The Development of the Montana Common School System*: *1864–1884* 47–48 (1968) (Ph.D. dissertation)

words, "religious" materials were acceptable in the public schools, no matter how controversial, as long as they were not "sectarian."

Indeed, readings of the King James Bible in some Montana public schools continued[26] in direct conflict with Catholic doctrine.[27] Singing of gospel hymns in the schools also persisted, leading residents in Butte, Montana—a city with the highest percentage of Irish

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(citing Department of State Territorial Papers, Montana, 1864–1872) (emphasis added).

[26] *See*, *e.g.*, Reports from Commissioners, Inspectors, and Others to Parliament, *Special Report on Educational Subjects Vol. XI. Education in the United States of America Part 2*, 1902, Cd. 1156, at 592, 594 (UK), https://books.google.com/books?id=NCciAQAAMAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false (survey responses from the Montana Superintendent of Public Instruction in 1896); Editor, *Schools and Creed*, The Daily Independent (Helena), May 29, 1890, at 4, https://chroniclingamerica.loc.gov/data/batches/mthi_nuthatch_ver01/data/sn83025308/00212477357/1890052901/0449.pdf.

[27] Not only did the Catholic Church not recognize the King James version of the Bible, but it also opposed "unmediated" Bible reading. Catholics at the time read from the Douay-Rheims Bible, which provided the officially approved English translation of the Scriptures, as well as authoritative annotation and comment. Catholics believed that relying solely on the unadorned text, as Protestants did, invited the error of private interpretation, which in turn could lead to relativism, at one extreme, or fundamentalism, at the other. *See*, *e.g.*, John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 300 (2001).

in the territory and perhaps the country[28]—to successfully campaign to pull a gospel hymnbook from their local public schools.[29] Catholics in other parts of the state, however, were in the minority and had to either resign themselves to sending their children to the Protestant public schools or pay to send their children to the increasingly common Catholic schools in the territory.

Meanwhile, attacks on "sectarian" schooling were prevalent. In 1881, Robert Howey, the Montana Superintendent of the public schools and a Presbyterian pastor, advocated for Christian public schools free of "sectarianism," while opposing funding for "sectarian" private schools.[30] Howey's position was shared by

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[28] *See*, *e.g.*, David M. Emmons, *Immigrant Works and Industrial Hazards: The Irish Miners of Butte*, *1880–1919*, 5 J. Am. Ethnic Hist. 41, 41–42 (1985) ("[N]o American city was so overwhelmingly Irish.").

[29] *See*, *e.g.*, *The School Controversy* (Editorial), Semi-Wkly. Miner, Mar. 6, 1886, at 4, https://chroniclingamerica.loc.gov/data/batches/mthi_jewelwing_ver01/data/sn84036033/00295860601/1886030601/0561.pdf.

[30] Robert Howey, *The Public Schools* (op-ed), Helena Wkly. Herald, Jan. 1, 1880, at 13, https://chroniclingamerica.loc.gov/data/batches/mthi_harrier_ver01/data/sn84036143/00295861216/1880010101/0019.pdf; *see also* R.H. Howey, *Moral Teaching in Public Schools*, 16 J. Educ. 147, 147–48 (1882) ("The moral atmosphere of the [common] school should be pure, elevating, holy" and the moral teachings should be "not the morals of paganism, nor of philosophy, nor of Mohammedanism, nor of Mormonism, nor of atheism; but the morals of Christianity.").

ministers throughout the western territories. As one scholar described, "[a]s the frontier moved from the Alleghenies to the Pacific, . . . evangelical clergymen spread the gospel of the common schools in their united battle against Romanism, barbarism, and skepticism."[31] Opposition to sectarian schooling was also common in the local media. The GOP-aligned Helena Weekly Herald, for example, reprinted the Republican National Convention's opposition to funding "sectarian schools"—a measure necessary to fight the "domination" and "influence of sectarianism"—alongside an oped praising James Blaine as a man who "never met an equal" and one for whom there is "no political honor too great."[32]

Religious tensions continued into the next decade, and the anti-Catholic American Protective Association set down roots in Montana.[33] The A.P.A. was a national

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[31] David Tyack, *The Kingdom of God and the Common School: Protestant Ministers and the Educational Awakening of the West*, 36 Harv. Educ. Rev. 447, 450 (1966).

[32] *Resolutions Of The National Republican Convention* alongside *Blaine and his Friends*, Helena Wkly. Herald, June 17, 1880, at 2, https://chroniclingamerica.loc.gov/data/batches/mthi_harrier_ver01/data/sn84036143/00295861216/1880061701/0213.pdf.

[33] Brian Leech, "*Hired Hands from Abroad": The Populist Producer's Ethic, Immigrant Workers, and Nativism in Montana's 1894 State Capital Election* 8, James A. Rawley Graduate Conference in the Humanities (2008).

political organization whose primary objective was to oust "the dupes of Rome."[34] Like the Know Nothings, one of the A.P.A.'s main tenets was to promote non-sectarian public schools.[35] The organization gained prominence in the late 1880s and 1890s, when its membership reached 2.5 million nationwide,[36] and by 1895, its Montana membership was estimated between 8,000 and 18,000—when there were only 185,000 total residents in Montana.[37] Scholars have extensively documented the significant role the A.P.A. played in Montana state and local politics, with the A.P.A. even

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[34] Christine K. Erickson, *'Kluxer Blues': The Klan Confronts Catholics in Butte, Montana, 1923–1929*, Mont. Magazine of History, Spring 2003, at 46–47.

[35] The A.P.A. also opposed hiring Catholics in the public schools. As stated in its statement of principles, "We consider the non-sectarian free public schools, the bulwark of American institutions, the best place for the education of American children. To keep them as such we protest against the employment of subjects of any un-American ecclesiastical power as officers or teachers of our public schools." Donald L. Kinzer, *An Episode in Anti-Catholicism: The American Protective Association* 45–46 (1964).

[36] Leech, *supra* note 33, at 8.

[37] *Id.* at 18 n.45 (membership estimated at 10,000); *see also Politics and Religion*, Great Falls Wkly. Trib., Jan. 18, 1895, at 4, https://chroniclingamerica.loc.gov/lccn/sn86075243/1895-01-18/ed-1/seq-4/ (membership estimated at 8,000); *Kinzer*, *supra* note 35, at 178 (membership estimated at 18,000, out of a population of 185,000).

pushing the selection of Helena as the state capital because it had relatively few Catholics.[38]

The A.P.A. reflected the religious strife in Montana, as well as exacerbated it. In 1894, for example, a riot broke out between the A.P.A. and Catholics in Butte, Montana, after two saloon owners brazenly hung banners stating "A.P.A." in the front of their establishments and refused the mayor's order to remove them. The resulting riot injured hundreds of people with seven people shot and one police officer killed.[39]

The same anti-Catholic sentiments that would allow the A.P.A. to flourish in Montana also gave rise to the state's Blaine Amendment. In 1884, multiple Presbyterian church leaders petitioned the territorial legislature for a Blaine Amendment to be included in the territorial constitution.[40] The letters included proposed text for a Blaine provision almost identical to the text ultimately adopted in the 1884 constitution. The final provision stated that the government shall not "ever make, directly, any appropriation, or pay from any public fund or moneys whatsoever, or make any grant of lands or other property, in aid of any church, or for any

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[38] *See*, *e.g.*, Leech, *supra* note 33, at 8–9; David M. Emmons, *The Butte Irish: Class and Ethnicity in an American Mining Town 1875–1925* 97–99 (1989).

[39] Erickson, *supra* note 34, at 47; *see also* Jim Harmon, *Harmon's Histories: Can Montana Overcome Its History of Hatred, Bigotry, and Racism?*, Missoula Current (Aug. 19, 2017), https://www.missoulacurrent.com/opinion/2017/08/montana-bigotry-racism/.

[40] Record of Montana Constitutional Convention of 1884, Montana Historical Society, Research Center Archives, at Box 3, Fol. 7 (1884).

sectarian purpose, or to aid in the support of any school, academy, seminary, college, or university, or other literary or scientific institution, *controlled in whole or in part by any church, sect, or denomination* whatever." Mont. Territorial Const. art. IX, § 9 (1884) (emphasis added).

Of course, the overwhelming majority of schools controlled by a "church, sect, or denomination" in Montana at that time were Catholic.[41] Meanwhile, the public schools were overtly religious, as shown above, but were *not* controlled by any church, sect, or denomination. Thus, Montana's Blaine provision achieved the twin goals of (1) prohibiting any public funding of Catholic schools, while (2) allowing the public schools to retain their Protestantism.

After the initial adoption of the Blaine Amendment, anti-Catholicism continued to be a major theme in Montana's educational politics. In 1888, for example, at the annual conference of the Territorial Teachers Association (the Montana teachers union for the

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[41] *See*, *e.g.*, Tash, *supra* note 25, at 180 (citing 1884 Report of the Commissioner of Education) (stating there were 14 private schools in Montana for the 1883–84 school year); Rev. Henry Van Resselaer, *Sketch of the Catholic Church in Montana*, The Amer. Catholic Rev., Vol. XII, at 506 (1887), https://books.google.com/books?id=SJQNAQAAIAAJ&pg=PR7&lpg=PR7&dq=Sketch+of+the+Catholic+Church+in+Montana,+The+Amer.+Catholic+Rev.,&source=bl&ots=575e0yN67N&sig=ACfU3U0qHnGmZ78j7LnNqtf3islwhT8Diw&hl=en&sa=X&ved=2ahUKEwi6n9e0trXkAhVrU98KHVn-DN8Q6AEwAnoECAkQAQ#v=onepage&q&f=false (estimating 13 Catholic schools operating in 1887 Montana).

public schools), speakers discussed the supposed "opposition of Catholics toward public schools." Two of these speakers were Protestant ministers who opposed teaching "sectarian doctrines" in the public schools but strongly supported the schools remaining "Christian." The principal of Helena High School even gave a presentation attacking "the Catholic church," which he characterized as "the greatest foe of the public schools and the most formidable barrier to their success in this county."[42]

The next year, the Blaine Amendment was readopted when Montana became a state in 1889. The federal Enabling Act of 1889, which facilitated Montana's admission into the Union, required that Montana prohibit proceeds from federal land grants from being used "for the support of any sectarian or denominational school, college, or university."[43] Yet Montana's delegates went even further by readopting the 1884 Blaine Amendment, which prohibited appropriations and payments of "*any public fund or moneys whatever* . . . to aid in the support of any school . . . controlled in whole or in part by any church, sect or denomination."

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[42] *Officers Elected for the Ensuing Year–Concluding Proceedings*, Helena Wkly. Herald, Jan. 5, 1888, at 4, https://chroniclingamerica.loc.gov/data/batches/mthi_leopardfrog_ver01/data/sn84036143/00295861368/1888010501/0010.pdf.

[43] The Enabling Act of 1889, 25 Stat. 676, 680 (1889). This requirement in the Enabling Act was likely itself motivated by anti-Catholicism. *See*, *e.g.*, Green, *supra* note 14, at 232.

Mont. Const. art. XI, § 8 (1889) (emphasis added). In fact, the only substantive change the delegates made to the 1884 version was to prevent not only "direct[]" funding of sectarian schools but also "indirect[]" funding. *Id*.

Decades later, during the 1972 Montana Constitutional Convention, several Montana delegates recognized that this provision was indeed a "Blaine Amendment," as well as "archaic," "a badge of bigotry," and a "remnant[] of a long-past era of prejudice." 1971–1972 Montana Constitutional Convention Tr. Vol. VI, 2010–12 (statements of Delegates Harbaugh, Driscoll, and Schiltz). The Montana delegates and the public nevertheless readopted the provision into their 1972 Constitution as article X, section 6(1). The 1972 provision is nearly identical to the original (article XI, section 8 of the 1889 constitution).[44]

Thus, as in *Hunter*, the evidence shows that bigotry was a "motivating factor" behind article X, section 6(1), which was originally enacted "as part of a [broader] movement" to discriminate against Catholics and Catholic schooling. *See Hunter*, 471 U.S. at 229, 231, 233. Also as in *Hunter*, the provision today continues to have a discriminatory effect; the application of article X, section 6(1) to bar religious options in student-aid programs not only perpetuates this discrimination against Catholic schooling but also extends the

[44] The only substantive difference is the addition of subsection 2, which states that Section 6(1) "shall not apply to funds from federal sources."

original animus behind the provision to *all* religious education.

Families should not be denied educational opportunity based on an archaic and bigoted state constitutional provision. In *Mitchell*, a four-Justice plurality of this Court called for Blaine's legacy to be "buried now." 530 U.S. at 829. Now is the time. This Court should reverse the Montana Supreme Court's decision under the Equal Protection Clause.

III. APPLYING ARTICLE X, SECTION 6(1) TO BAR RELIGIOUS OPTIONS IN STUDENT-AID PROGRAMS VIOLATES THE ESTABLISHMENT CLAUSE.

Article X, section 6(1), as applied to bar religious options in student-aid programs and invalidate the scholarship program, is also at loggerheads with the Establishment Clause, which prohibits the state from being an "adversary" of religion. *Everson*, 330 U.S. at 18. As Justice Goldberg famously put it, "hostility to the religious"—whether "active" or "passive"—is "not only *not* compelled by the Constitution but prohibited by it." *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring) (emphasis added). The Establishment Clause thus prohibits government from "affirmatively opposing or showing hostility to religion." *Id*. at 225 (majority opinion); *see also Rosenberger*, 515 U.S. at 846 (holding that the Establishment Clause prohibits government from "fostering a pervasive bias or hostility to religion"); *Church of*

the Lukumi Babalu Aye, 508 U.S. at 532 ("The First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.").

Yet opposing and showing hostility to religion is precisely what article X, section 6(1) does in this case. And it is a hostility that, in Justice Goldberg's words, is both "passive" and "active": passive in its leaving undisturbed the Nineteenth Century animus against Catholicism that underlies article X, section 6(1) and active in its transmuting that original animus against Catholics into an engine of discrimination against *all* religion. The Establishment Clause neither requires nor abides such "brooding and pervasive devotion to the secular." *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring); *id.* at 225 (majority opinion) ("We agree of course that the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion.").

While the Establishment Clause's proscription of hostility toward religion is clear, the test for assessing an Establishment Clause violation is not. As the Court noted in last term's *American Legion v. American Humanist Association*, sometimes the Court applies the "*Lemon* test" in Establishment Clause cases, while other times it applies a specialized test that "focuses on the particular issue at hand." 139 S. Ct. 2067, 2087 (2019). When the "particular issue at hand" has been

religious options in student-aid programs, the Court has applied a test that demands two things: religious neutrality and private choice. *See Zelman*, 536 U.S. at 652–53.

Here, the Montana Supreme Court's application of article X, section 6(1) fails both tests. Under the test set forth in *Zelman*, barring religious options in student-aid programs shows hostility, not neutrality, toward religion, and it deprives parents of genuine choice in their children's education. Barring religious options in student aid also fails both *Lemon* prongs by lacking a secular purpose and inhibiting religious schooling. And, at a more fundamental level, the Montana Supreme Court's ruling conflicts with long-standing Establishment Clause principles. It reflects an unbending commitment to "secularism" that tramples upon religious rights, *see Schempp*, 374 U.S. at 225, and it shows an intolerance for parents who wish to exercise their fundamental liberty "to direct the upbringing and education of [their] children." *See Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534 (1925). This Court should not allow the ruling to stand.

A. The Court should apply the test used in *Zelman* to hold that article X, section 6(1) as applied violates the Establishment Clause.

Zelman concerned an Establishment Clause challenge to a publicly funded voucher program for inner-city Cleveland students. In resolving the claim, the

Court noted that its jurisprudence on student-aid programs "has remained consistent and unbroken." *Zelman*, 536 U.S. at 649. After surveying that jurisprudence, including *Mueller v. Allen*, 463 U.S. 388 (1983), *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), and *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), the Court explained that so long as a student-aid program is (1) "neutral with respect to religion, . . . permit[ting] the participation of all schools," whether "religious or nonreligious"; and (2) a program of "true private choice," providing a benefit "to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice," the program is perfectly permissible under the Establishment Clause. *Zelman*, 536 U.S. at 652–53 (emphasis omitted).

Along with explaining that neutrality and private choice in student-aid programs are dispositive for Establishment Clause purposes, the Court explained *why* they are dispositive. When "[a] program . . . shares these features," the Court noted, any "incidental advancement of a religious mission, or . . . perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government." *Id.* at 652. Simply put, when "parents [a]re the ones to select a religious school as the best learning environment for their . . . child, the circuit between government and religion [is] broken, and the Establishment Clause [i]s not implicated." *Id.*

The logic of the test in *Zelman* necessitates its application not only in cases that concern the constitutionality of *including* religious options in student-aid programs but also in those that, like this one, concern the constitutionality of *barring* them. If "the link between government funds and religio[n] . . . is broken" by individual choice, *Locke*, 540 U.S. at 719, then it is broken not only with respect to any Establishment Clause concerns in including religious options but also with respect to any state anti-establishment interest in excluding them. And while the government insists that Montana has an interest in achieving greater separation than the Establishment Clause requires, the break in the link achieved by "genuine and independent private choice" is the ultimate separation. *Zelman*, 536 U.S. at 652. There is no greater separation in a chain than a break in its links.

Moreover, if, as *Zelman* held, religious neutrality and private choice are the necessary criteria under the Establishment Clause in the student-aid context, then the *absence* of those criteria—that is, a lack of neutrality, or a denial of private choice—is necessarily fatal under the Establishment Clause. The neutrality and private choice requirements, after all, are relevant because of the Establishment Clause's mandate that a law not have "the forbidden 'effect' of advancing or inhibiting religion." *Id.* at 649. If government's neutrality toward religion and allowance for private, individual choice are necessary to protect against governmental advancement of religion, then government's banishment of religion, or its denial of private,

individual choice, will necessarily "inhibit[] religion." *Id.*

Moreover, these neutrality and private choice requirements are consistent with this Court's analysis in *Locke*. While the Court rejected an Establishment Clause challenge to the devotional theology exclusion at issue in that case, the scholarship program there operated on "the independent and private choice of [scholarship] recipients," *Locke*, 540 U.S. at 719, and was neutral in its inclusion of all "[p]rivate institutions, including those religiously affiliated." *Id.* at 716. Thus, the program satisfied the neutrality and private choice requirements of *Zelman* and its predecessors.

Here, in contrast, the application of article X, section 6(1) fails both prongs of the test. First, it is the antithesis of religious neutrality: It flatly bars not only this student-aid program because it includes religious options but also religious options in any other student-aid program that the Montana Legislature might wish to pass—for preschool, elementary, secondary, or even post-secondary students.[45] Meanwhile, student-aid programs that provide only secular options are completely permissible.

Second, this application severely limits private choice. Forcing the Montana Legislature to jettison

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[45] *See* App. 76 (Baker, J., dissenting) ("[The] ruling calls into question numerous other state laws granting tax credits that may benefit religious entities, among them Montana's College Contribution Credit and Qualified Endowment Credit." (citations omitted)).

religious options from student-aid programs ensures that parents and students who require that aid will have a much smaller number of schools from which to choose. And rather than parents being allowed to choose between religious and secular options, the government will have already made that choice for them by favoring secular schools to the total exclusion of religious ones. The Establishment Clause does not tolerate such "brooding and pervasive devotion to the secular." *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring).

B. Article X, section 6(1) as applied also fails the *Lemon* test.

If the Court determines that it is the *Lemon* test, rather than the test in *Zelman*, that governs in this case, applying article X, section 6(1) to bar religious options in student-aid programs still cannot pass muster. Under the *Lemon* test, government action must (1) have a secular purpose and (2) have a "principal or primary effect" that "neither advances nor inhibits religion."[46] This is true whether the inhibition is of "a particular religion or of religion in general." *Church of the Lukumi Babalu Aye*, 508 U.S. at 532. Failing either requirement results in a violation of the

[46] Although the *Lemon* test previously had three prongs, this Court has folded the "excessive entanglement" inquiry into the primary effect prong. *See Agostini v. Felton*, 521 U.S. 203, 222–23 (1997). Excessive entanglement is not at issue in this case.

Establishment Clause. Here, the application of article X, section 6(1) fails both requirements.

First, this application fails *Lemon*'s secular purpose requirement. As the Court has made clear, that requirement "aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality." *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987). It is not license for government to "show a callous indifference to religious groups." *Id.* (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)). Thus, government "may not," consistent with *Lemon*'s first prong, "establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion." *Schempp*, 374 U.S. at 225. Yet that is precisely what the application of article X, section 6(1) does in this case. It lacks a neutral, secular purpose under *Lemon* and must be reversed.

The application of article X, section 6(1) also fails the second *Lemon* prong. The principal effect of invalidating the scholarship program and banning religious options from student-aid programs is to inhibit religious schooling. Without scholarships, families may be forced to pull their children out of their religious schools, simply because they can no longer afford them. Petitioner and single-mom Kendra Espinoza, for example, currently works three jobs to keep up with her tuition payments, and said "it is still a real financial struggle for me to pay the remaining tuition every month." Pet. App. 152, ¶¶ 14–15. Similarly, Petitioner Jeri Anderson, also a single mom, testified that losing

the scholarship for her daughter will severely strain her already tenuous finances. Pet. App. 140, ¶ 21. And Petitioner Jaime Schaefer testified that paying school tuition "is like a second mortgage payment," and "[i]t is a year by year decision" whether the Schaefers can keep their children in their Christian school. Pet. App. 167, ¶ 8. These stories are similar to those of families across the state—many of whom live near or below the poverty line—who will similarly have to make the difficult decision of whether they can continue to afford to keep their children in religious schools after the Montana Supreme Court's judgment. *E.g.*, Pet. App. 129–30, ¶¶ 4–6; *id*. at 122, ¶ 7. Still more families will inevitably decline to send their children to a religious school in the first place.

Experience from other states confirms that barring religious options in school choice programs inhibits religion. For example, religious options had been permitted in Maine's school choice program for more than a century, but in 1980, they were barred by the state. John Bapst High School—a Catholic school that had "enrolled the largest number of [participating] students attending a religious-affiliated high school"—was forced to close and reopen as a secular school, stripped of its Catholic identity, rather than see students who could not afford tuition denied the opportunity of an outstanding education.[47] Thus, the state's

[47] John Maddaus & Denise A. Mirochnik, *Town Tuitioning in Maine: Parental Choice of Secondary Schools in Rural Communities*, 8 J. Res. Rural Educ. 27, 32 (1992).

banishment of religious options in a student-aid program had "the forbidden 'effect' of . . . inhibiting religion." *Zelman*, 536 U.S. at 649. The same will undoubtedly be true here.

Applying article X, section 6(1) to bar religious options in student-aid programs thus fails both prongs of the *Lemon* test. But whether the judgment is analyzed under *Lemon*, *Zelman*, or some other metric, one thing is clear: It reflects hostility toward religion and must be reversed.

C. Article X, section 6(1) as applied conflicts with the traditions, values, and historical understanding of the Establishment Clause.

Finally, the Montana Supreme Court's application of article X, section 6(1) to bar scholarships to religious schools stands in direct conflict with the values and historical understanding underlying the Establishment Clause.

When the state accommodates "religious instruction," this Court has held, "it follows the best of our traditions." *Zorach*, 343 U.S. at 314. "To hold that it may not" is to impose "a requirement that the government show a callous indifference to religious groups." *Id.* As applied by the Montana Supreme Court, article X, section 6(1) is just that: a requirement that the Montana Legislature show callous indifference—indeed, hostility—to religious parents and students.

That contravenes the very ideals and values the Establishment Clause is meant to serve: "respect," "tolerance," "inclusion," and "pluralism." *Am. Legion*, 139 S. Ct. at 2088–89 (plurality opinion); *id.* at 2094 (Kagan, J., concurring in part); *id.* at 2090–91 (Breyer, J., concurring). It reflects a disrespect and intolerance for those parents who, in the exercise of their "liberty . . . to direct the upbringing and education of [their] children," *Pierce*, 268 U.S. at 534, determine that a religious education is the best option for their family. And rather than promote inclusion and pluralism in matters religious, it reflects "[a]n insistence on [the] nonsectarian . . . as a single, fixed standard." *Town of Greece v. Galloway*, 572 U.S. 565, 578 (2014).

The Montana Supreme Court's ruling fares no better when judged against our nation's historical practices and understandings, which this Court has repeatedly stressed must be considered when interpreting the Establishment Clause. *See*, *e.g.*, *Am. Legion*, 139 S. Ct. at 2087 (plurality opinion) (quoting *Town of Greece*, 572 U.S. at 576); *see also id.* at 2093 (Kavanaugh, J., concurring) (urging consideration of "history and tradition" in Establishment Clause analysis); *id.* at 2094 (Kagan, J., concurring in part) (agreeing it is appropriate to "look[ ] to history for guidance" (alteration in original) (quoting plurality opinion)); *id.* at 2102 (Gorsuch, J., concurring in judgment) (opining that "historical practices and understandings . . . must be used *whenever* we interpret the Establishment Clause" (internal quotation marks omitted)). As Justice Thomas noted in *American Legion*, " 'insistence on

nonsectarian[ism]' . . . is inconsistent with our Nation's history and traditions." *Id.* at 2096 (Thomas, J., concurring in judgment) (quoting *Town of Greece*, 572 U.S. at 578). It is instead a post-Founding development with a "shameful pedigree" rooted in "pervasive hostility to the Catholic Church and to Catholics in general." *Id.* at 2097 n.3 (quoting *Mitchell*, 530 U.S. at 828 (plurality opinion)). And as shown in this case, it is also a development that has the practical effect of denying families religious freedom and educational opportunity.

This Court should reverse the Montana Supreme Court's judgment and allow Montana families to continue using scholarships at schools that best fit their children's individual needs, regardless of whether those schools are religious or not.

CONCLUSION

This Court should reverse the judgment of the Montana Supreme Court and hold article X, section 6(1) unconstitutional as applied to bar religious options from student-aid programs.

Respectfully submitted,

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