No. 18-1195

In the

Supreme Court of the United States

KAREN 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* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the principle that Religion Clause forbids official hostility toward religion. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *American Legion v. American Humanist Association*, 139 S.Ct. 2067 (2019); *Klein v. Oregon Bureau of Labor and Industries*, 139 S.Ct. 2713 (2019); and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719 (2018).

SUMMARY OF ARGUMENT

Nearly four decades ago, this Court noted but did not decide the question of whether a state constitutional provision mandating hostility toward religion would constitute a "compelling" state interest. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). That issue is now squarely before the Court in this case. The Establishment Clause neither authorizes nor permits states to discriminate against religion in the administration of a generally available state benefit. The Establishment Clause was meant as a federalism protection for states against the possibility that the new federal government would create an Establishment overriding state preferences.

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[1] All parties consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

The Free Exercise Clause, by contrast, was meant to protect against government hostility and discrimination against the exercise of the individual right of religion. Once incorporated against the states, the Free Exercise Clause prohibited official state policies of hostility toward religion, such as the anti-Catholic hostility of the so-called "little Blaine Amendments." The provisions of the Montana Constitution on which the Montana Supreme Court relied in this case is just the sort of official state hostility toward religion prohibited by the Free Exercise Clause.

ARGUMENT

I. The Establishment Clause neither compels nor permits discrimination against religion in the administration of generally available state benefit programs.

A. The Establishment Clause was intended as a federalism protection for the states.

"[I]t is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history." *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting). Much of this Court's Establishment Clause jurisprudence, however, was constructed on an edifice of mistaken understanding of the history of that Clause. A close look at the history demonstrates that the Establishment Clause was meant as a federalism protection for the states rather than as an individual right. *Zelman v. Simmons-Harris*, 536 U.S. 639, 678 (2002) (Thomas, J., concurring). If it does protect an individual right, it is a right against coercion, not a protection against a "personal sense of affront." *See Town of Greece v.*

Galloway, 572 U.S. 565 , 589 (plurality opinion), 608 (Thomas, J. concurring) (2014).

In colonial America, state establishments of religion were ubiquitous. While the Puritans ruled New England to advance their vision of a Christian commonwealth, the Church of England held the allegiances of colonies like Virginia and Georgia. Michael McConnell, *The Origins and Historical Understanding Of Free Exercise Of Religion*, 103 Harv. L. Rev. 1409, 1422-23 (1990) [hereinafter McConnell, Origins of Free Exercise]. New York and New Jersey welcomed those that did not fit into the Puritan or Anglican tradition. *Id*. Pennsylvania and Delaware were founded as safe havens for Quakers, while Maryland was founded as a refuge for English Catholics who suffered persecution in Britain. *Id*. Most notably, Roger Williams founded Rhode Island as a colony for Protestant dissenters after the General Court banished him from Massachusetts. *Id*.

This variety of religious establishments allowed colonists to settle in a place that most accommodated their own religious preferences. Even as disestablishment took hold after the Revolution, states viewed religious belief and practice as essential to a civil society. See Mass. Const. of 1780, pt. 1, art. III ("[T]he happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality..."); Petition for General Assessment (Nov. 4, 1784), reprinted in C. James, Documentary History of the Struggle for Religious Liberty in Virginia 125, 125 (1900 and photo. reprint 1971) ("[B]eing thoroughly convinced that the prosperity and happiness of this country essentially de-

pends upon the progress of religion..."); G. Washington, Farewell Address (Sept. 17, 1796), reprinted in 1 Documents of American History 169, 173 (H. Commager 9th ed. 1973) ("[O]f all the dispositions and habits that lead to political prosperity, religion and morality are indispensible supports...").

This history of varied establishments and trend of disestablishment provided the impetus for the Religion Clauses. Antifederalists were alarmed at the Constitution's failure to secure the individual rights of Americans and were concerned that the federal government would have the power to declare a national religion, thus squelching the practices of religious minorities. *See* Letters from the Federal Farmer (IV) (Oct. 12, 1787), reprinted in 2 The Complete Anti-Federalist 245, 249 (Herbert J. Storing ed., 1981); *see also* Essay by Samuel, Indep. Chron. & Universal Advertiser (Boston), Jan. 10, 1788, reprinted in 4 The Complete Anti-Federalist, *supra*, at 191, 195. Though not hostile to state establishments, the antifederalists were concerned that a federal government might "[M]ake every body worship God in a certain way, whether the people thought it right or no, and punish them severely, if they would not." Letters from a Countryman (V), N.Y, J., (Jan. 17, 1788), reprinted in 6 The Complete Anti-Federalist, supra, 86, 87. As one antifederalist noted regarding the differences between different states, "It is plain, therefore, that we [Massachusetts citizens] require for our regulation laws, which will not suit the circumstances of our southern brethren, and the laws made for them would not apply to us." Letters of Agrippa (XII), Mass. Gazette, (Jan. 11, 1788), reprinted in 4 The Complete Anti-Federalist, *supra*, 93, 94.

Acting upon these concerns, at least four states submitted amendments concerning religious liberty along with their official notice of ratification of the Constitution. *See* Declaration of Rights and Other Amendments, North Carolina Ratifying Convention (Aug. 1, 1788), reprinted in 5 The Founders' Constitution at 18 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter The Founders Constitution] ("[A]ll men have an equal, natural, and unalienable right to the free exercise of religion, according the dictates of his conscience"); New Hampshire Ratification of the Constitution (June 21, 1788), reprinted in 1 The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787, at 325, 326 (Jonathan Elliot ed., 2d ed., William S. Hein & Co., Inc. 1996) ("Congress shall make no laws touching religion, or to infringe the rights of conscience"); New York Ratification of Constitution (July 26, 1788), reprinted in The Founders' Constitution, supra 11-12 ("That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience; and that no religious sect or society ought to be favored or established by law in preference to others."); Proposed Amendments to the Constitution, Virginia Ratifying Convention (June 27, 1788), reprinted in The Founders' Constitution, supra 15-16 ("[A]ll men have an equal, natural, and unalienable right to the free exercise of religion").

With these demands from various states in mind, the First Congress set to work to fashion an amendment that would appease these concerns. McConnell, *Origins of Free Exercise*, *supra*, at 1476-77. After debate over the exact wording of the Religion Clause in

the House and the Senate, both houses agreed to the final conference committee report. 1 Annals of Cong. 88 (Joseph Gales ed., 1789). From this committee emerged the Religion Clauses as they are known today: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. Const. amend. I.

States that had establishments feared federal interference. Letters of Agrippa (XII), Mass. Gazette, (Jan. 11, 1788), reprinted in 4 The Complete Anti-Federalist, supra, 93, 94. That fear was also shared by states that had no establishment. Because of the Supremacy Clause, states were concerned that Congress might impose a federal establishment that would overrule individual state rules. Thus, the First Amendment's "no law respecting an establishment of religion" provision had a clear federalism purpose. Therefore, incorporation of this provision against the states must be understood as protecting state authority to the maximum extent possible consistent with individual liberty lest it be interpreted to require the very thing that it forbids, federal interference with state support of religion. *Zelman v. Simmons-Harris*, 536 U.S. at 678, 679 (Thomas, J., concurring); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. at 50 (Thomas, J., concurring). The individual liberty protected by the clause is freedom from government coercion of individual religious observance or interference with the form of religious worship.

The prohibition on any law "respecting an establishment of religion" was never meant to be a prohibition on public acknowledgement of religion. It was instead a ban on federal government coercion and federal intrusion on state authority. This distinction is

clear from the rich history of religious acknowledgments and exercises by all three branches of government after adoption of the First Amendment.

B. If it includes an individual right, the Establishment Clause protects against coercion of individuals and religious institutions.

As noted above, the Congress that proposed the First Amendment and the states that ratified it had significant experience with the concept of religious establishments. Some establishments involved governmental coercion that compelled a form of religious observance. Thus, some states sought to control the doctrines and structure of the church. South Carolina did this through its 1778 Constitution requiring a church to ascribe to five articles of faith before being incorporated as a state church. S.C. Const. of 1778 art. XXXVIII, reprinted in 2 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States 1626 (Ben Perley Poore ed., The Lawbook Exch. Ltd. 2d ed. 2001) (1878). Other states, like Virginia, sought to control the personnel of the church and vested the power of appointing ministers of the Anglican Church in local governing bodies known as vestries. Rhys Isaac, *Religion and Authority: Problems of the Anglican Establishment in Virginia in the Era of the Great Awakening and the Parsons' Cause*, 30 Wm. & Mary Q. 3 (1973).

The other type of government coercion at play in religious establishments involved coercion of the individual in his or her religious practice. Massachusetts, for instance, prosecuted Baptists who refused to baptize their children or attend Congregationalist ser-

vices. Michael McConnell, *Establishment & Dis-establishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev 2105, 2145 (2003) [hereinafter McConnell, Establishment & Dis-establishment]. Georgia supported the state church through a liquor tax. *Id*. at 2154. Other states limited political participation to members of the state church. *Id*. at 2178.

The state law struck down by the Montana Supreme Court contained no such coercion. The tax credit was voluntary, and it provided a scholarship fund available to students and their parents to choose the school best suited to their educational needs. As was the case in *Zelman*, any decision to spend money on a religious school was the product of the free choice of students and parents. There was no state compulsion. Montana cannot base any defense of its hostility toward religion on the Establishment Clause.

II. As Interpreted by the Montana Supreme Court, the Prohibition on Aid to "Sectarian Schools" Violates the Free Exercise Clause.

A. The Religion Clauses prohibit an official policy of state hostility toward religion.

Time and again this Court has noted that government neutrality toward religion is required by the Constitution. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017); *Everson v. Board of Education of Ewing*, 330 U.S. 1, 16 (1947). The state is prohibited from subjecting religious observers to unequal treatment. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993). This rule also prohibits discriminating in the provi-

sion of generally available benefits on account of religion. *McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (plurality opinion). As this Court noted in *Trinity Lutheran*, the Court's decisions in this area make clear that a state policy imposing "a penalty on the free exercise of religion triggers the most exacting scrutiny." *Trinity Lutheran*, 137 S.Ct. at 2021. Justice Gorsuch explained, "the government may not force people to choose between participation in a public program and their right to free exercise of religion." *Id.* at 2026 (Gorsuch, J., concurring in part).

The Constitution requires accommodation of religious belief and it prohibits hostility. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). The *Lynch* Court noted that hostility toward religion "would bring us into 'war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.'" *Id.* (*quoting McCollum v. Board of Education*, 333 U.S. 203, 211-12 (1952)); *Zorach v. Clauson*, 343 U.S. 306, 315 (1952).

Hostility toward religion is established when equal access to government facilities is denied. *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 395-96 (1993); *see Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 846 (1995) (O'Connor, J., concurring ("Withholding access would leave an impermissible perception that religious activities are disfavored.")).

The Montana Constitution, as interpreted by the Montana Supreme Court, establishes an official state policy of hostility toward religion. In order to ensure that students attending religious schools would not have equal access to scholarship funds (for which state taxpayers could receive a tax credit), the state

court ruled that the entire program was unconstitutional. *Espinoza v. Montana Dept. of Revenue*, Montana Supreme Court, Petitioners' Appendix at 8. There is no argument that the tax credit offered to taxpayers who donated to the scholarship funds violated the Establishment Clause. Instead, the issue is the one avoided by this Court in *Widmar* – does a state constitutional mandate of hostility toward religion constitute a compelling state interest that overrides the Free Exercise Clause. *Widmar*, 454 U.S. at 276.

B. The prohibition on aid to "Sectarian Schools" constitutes an official policy of state hostility toward religion in violation of the Free Exercise Clause.

The "historical background" of a challenged state decision is relevant to the question of whether that state action violates the Free Exercise Clause. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). The "historical background" here is the provision of the Montana Constitution that prohibits aid to "sectarian schools." Petitioners Appendix at 17. This is the same type of provision considered by the Court in *Widmar*. *Compare Espinoza v. Montana Dept. of Revenue*, Montana Supreme Court, Petitioners' Appendix at 17 *with Widmar*, 454 U.S. at 275 *and Harfst v. Hoegen*, 349 Mo. 808, 815 (1941).

These provisions are known as "Blaine Amendments" based on a proposed amendment to the United States Constitution by Congressman James G. Blaine. The purpose behind the Blaine Amendment was to prohibit federal monies from being spent on Catholic Schools. Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under*

Constitutional Federalism, 15 Yale L. & Pol'y Rev. 113, 147 (1996). One national publication at the time noted that Blaine's purpose in proposing the amendment was to "catch anti-Catholic votes." *Kotterman v. Killian*, 193 Ariz. 273, 291 (1999) (quoting Stephen K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 54 (1992)).

While Blaine was unsuccessful in his attempt to amend the federal constitution, several state constitutions were amended to include similar provisions. Indeed, the provision of the Montana Constitution at issue here was mandated by Congress in the legislation enabling statehood. Jill Goldenziel, *Blaine's Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 Denv. U. L. Rev. 57, 66-67 (2005).

While the provisions of the state constitutions apply to "sectarian schools," the term was meant to apply almost exclusively to Catholic schools. *Mitchell v. Helms*, 530 U.S. 793, 829 (2000) (plurality op.). As members of this Court have noted, it is a doctrine born of bigotry. *Id.*; *see Am. Legion v. Am. Humanist Ass'n,* 139 S. Ct. 2067, 2097 (2019) (Thomas, J. concurring); *Zelman v. Simmons-Harris*, 536 U.S. at 721 (2002) (Bryer, J., dissenting).

Hostility toward religion is contrary to the Free Exercise Clause. *Masterpiece Cakeshop*, 138 S.Ct. at 1732. The Constitution requires neutrality toward religion. *Id.* A state constitutional provision born of anti-Catholic bigotry violates the promise of the Free Exercise Clause. A state can have no interest sufficient to overcome the commitment to religious accommodation in the federal constitution. The First Amendment must be read to preclude a policy of hostility toward. *Zorach*, 343 U.S. at 315 (1952).

The provision of the Montana Constitution at issue in this case is the product of religious bigotry. That religious bigotry cannot rise to the level of a compelling state interest. This official policy of hostility towards religion violates the Free Exercise Clause.

CONCLUSION

In *Mitchell v. Helms*, the plurality opinion of this Court noted that "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow." This case presents the Court with the opportunity to bring that "shameful" chapter of the nation's history to a close. The Court should reverse the judgment of the Montana Supreme Court and rule that the "no aid to sectarian schools" provision of the state constitution, as interpreted by the Montana court, is unconstitutional.

September 2019

Respectfully submitted,

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