NO. 18-1195

In the
Supreme Court of the United States

KENDRA ESPINOZA, JERI ELLEN ANDERSON, and JAMIE 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

BRIEF FOR *AMICI CURIAE* CENTER FOR EDUCATION REFORM, *ET AL.*, IN SUPPORT OF PETITIONERS (ADDITIONAL *AMICI* LISTED ON INSIDE COVER)

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ADDITIONAL *AMICI CURIAE*

Learn4Life

Power2Parents

Cristo Rey Network

Families Empowered

Foundation for Excellence in Education

Project 21

Jack Kemp Foundation

Parents for Educational Freedom in North Carolina

Catholic Education Partners

Catholic Charities DC

American Legislative Exchange Council

Excellence Schools PA

Chris Stewart

Sharif El-Mekki

Dr. Howard Fuller

CORPORATE DISCLOSURE STATEMENT

Amici are not-for-profit organizations and three individuals. No *amicus* has a parent or subsidiary organization, none is an issuer of stock, and no publicly held corporation owns 10% or more of the stock of any *amicus*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Regulation

Other Authorities

STATEMENT OF INTEREST[1]

The Center for Education Reform ("CER"), founded in 1993, is the nation's leading authority on advancing education opportunity and innovation in American education. Its mission is to expand educational opportunities that lead to improved economic outcomes for all Americans, particularly our youth, ensuring that the conditions are ripe for innovation, freedom, and flexibility throughout U.S. education. A non-profit research and support organization, CER creates opportunities for, and challenges obstacles to, better education for America's communities by providing support and guidance to parents and teachers, community and civic groups, policymakers, grassroots leaders, and all other interested citizens who are working to bring fundamental reforms to their schools. CER's work enables broad and lasting quality educational opportunities that produce high standards, enhance accountability, and protect parents' rights to direct educational opportunities for their children, securing the future prosperity of all citizens, regardless of the circumstances into which they are born.

In CER's experience, the factor most closely related to positive educational outcomes is parents' ability to select the school that their children attend.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing in letters on file with the Clerk's office.

Giving parents that opportunity not only frees parents and their children from the tyranny of the zip code; it creates better educational opportunities for all students by leveraging the dynamics of consumer opportunity and provider competition to infuse accountability and quality into the educational system. Allowing parents to educate their children as they see fit fosters parental involvement and high expectations, provides educational opportunity where none existed before, and promotes the rights of parents and the best interests of children over bureaucratic inertia.

CER is joined here by other *amici* who are similarly committed to protecting the constitutional rights of families to direct the education of their children. Foundation for Excellence in Education focuses on educational opportunity, innovation, and quality by increasing student learning, advancing equity, and readying graduates for college and career. Learn4Life is a charter school organization serving over 50,000 at-risk high school students. Families Empowered is a parent service organization, annually connecting over 60,000 families with school options that work for their particular children.

Project 21 is a black leadership network created in 1992 to highlight the diversity of black opinion on public policy, including education. Participants in Project 21 activities are black professionals who share the common goal of making the nation a better place for all Americans. The Jack Kemp Foundation is a nonprofit organization devoted to developing, engaging, and recognizing exceptional leaders who champion the American Idea. The American

Legislative Exchange Council is the nation's largest non-partisan individual membership association of state legislators.

Excellence Schools PA, Parents for Educational Freedom in North Carolina, and Power2Parent are statewide educational advocacy organizations. Excellence Schools PA advocates for educational options in Pennsylvania and was founded on the belief that all students, regardless of race or socioeconomic status, have the right to a high-quality education. Parents for Educational Freedom in North Carolina advocates for quality educational options and educates North Carolinians about those options. Power2Parent is a Nevada parents' organization that informs, organizes, and mobilizes community members to protect parental rights.

Catholic Education Partners serves the Catholic community by advancing public policy that empowers families and children to enjoy the benefits of a Catholic education. Catholic Charities DC is a private, non-profit agency operating 59 programs throughout the Archdiocese of Washington, serving over 140,000 people a year. The Cristo Rey Network partners with educators, businesses, and communities to deliver a college- and career-preparatory education in the Catholic tradition for students with limited economic resources, integrating rigorous academic curricula with four years of professional work experience and support to and through college.

Three individual *amici* are leaders in the educational policy space. Chris Stewart is an educational leader writer, essayist, and speaker based in Minnesota. Stewart founded the 8 Black Hands

podcast, and his Citizen Ed Blog is followed by thousands nationally. Sharif El-Mekki is a career educator who founded the Philly's 7th Ward blog, which works to find educational solutions for all students, particularly African-American children. El-Mekki is a member of the 8 Black Hands podcast and served on the Mayor's Commission on African American Males across two administrations. Dr. Howard Fuller is a long-time community activist, former Superintendent of Milwaukee Public Schools, author, and founder of the Institute for Transformation of Learning at Marquette University.

Amici believe that the Montana scholarship program at issue in this case is precisely the sort of program that enhances educational outcomes—not just for the low-income parents and children who utilize it, but for all students who benefit from increased competition and accountability in Montana's educational system. Affirming the Montana Supreme Court's decision striking down this neutral program would do incalculable damage to the rights of parents and children, all for the negligible benefit of avoiding the indirect funding of religiously affiliated institutions—an interest this Court has repeatedly regarded as minimal. Accordingly, *amici* urge this Court to reverse the decision below.

SUMMARY OF ARGUMENT

This Court has long held that the liberty protected by the Due Process Clause includes the constitutional right of parents to direct the education and upbringing of their children. Research demonstrates that empowering parents to exercise that constitutional right by selecting the school they consider most appropriate for their children improves educational outcomes for all students. The reason is straightforward: The science of how students learn establishes what most parents know intuitively—namely, that learning is a highly individual process. Because parents have the most knowledge about their children and their particular learning styles, which may vary substantially even among children raised in the same household, they can best determine the optimal pedagogical fit for their children when their right to direct their children's education is protected and facilitated. Because of financial constraints or longstanding housing patterns, however, many parents can only realistically exercise that right with government assistance. Denying parents the ability to exercise that right because of the religious affiliation of the schools they deem best-suited for their children results in numerous direct and significant injuries to core constitutional interests. It infringes upon parents' liberty interest in directing their children's upbringing, and it infringes upon the fundamental First Amendment protection of free exercise.

In stark contrast to these substantial injuries to individual rights, the government has only a minimal interest in avoiding indirect funding of religiously

affiliated entities. This Court has long distinguished between the greater state interest in avoiding direct funding of religious entities—although even that is permitted in some contexts—and the far weaker state interest in avoiding indirect funding of religious entities. So miniscule is the state interest in ensuring that government funds do not indirectly end up with religiously affiliated organizations that this Court has never found unconstitutional a government program where religiously affiliated entities obtain state funds only as a result of choices by private individuals. This negligible state interest mirrors the reduced state interest in other circumstances involving indirect government aid, such as where the government provides a neutral means for third parties to engage in speech or other expression.

Weighing these competing interests, the balance plainly favors respecting parents' rights, particularly in this case, where two distinct layers of private choice dictate the destination of government funds. That balance, furthermore, is consistent with Framing-era principles. Minimizing the state's ability to restrict parental decisionmaking when it comes to education reestablishes the traditional pluralism and limited governmental involvement in education that prevailed in the early Republic. The Blaine Amendment era marked a deviation from those principles by seeking to cement a Protestant educational homogeneity that the Framers would not recognize and that modern-day principles reject. To restore the Framers' vision, reassert parents' constitutional liberty interest in directing their children's upbringing, and reaffirm the core First Amendment interest in free exercise, this Court should reverse the decision below.

ARGUMENT

I. Prohibiting Parents From Using Generally Available Funds To Direct Their Children's Education Because A School Is Religiously Affiliated Inflicts Direct And Significant Injuries.

The Montana Supreme Court's decision denies parents the opportunity to participate in a neutral, generally available program intended to benefit the state's most at-risk children and to improve educational outcomes. That result inflicts significant and direct injuries on parents and their children. When a state prevents parents from choosing the best educational opportunity for their children, parents are unable to fully exercise their well-established constitutional right to direct the education of their children. Their children are also directly injured by the lack of educational opportunity. That these injuries derive from the mere fact that a family's desired school has a religious affiliation only underscores the gravity and caprice of the harm.

A. Parents Have a Constitutionally Protected Liberty Interest to Pursue the Best Educational Opportunity for Their Children, Which Is Promoted By Programs Expanding Educational Options.

The constitutional liberty interest of parents to direct the education of their children is "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Nearly a century ago, in *Meyer v. Nebraska*, this Court held that the "liberty" protected by the Due

Process Clause includes the right of parents "to control the education" of their children. 262 U.S. 390, 399-401 (1923). The Court expounded upon that principle in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, a case which upheld the right of parents to send their children to private, religiously affiliated schools. 268 U.S. 510, 534-35 (1925). *Pierce* held that the "liberty of parents" includes the right "to direct the upbringing and education of children under their control." *Id.* As the Court explained, "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535. Thus, "[i]n a long line of cases," this Court has held that "the 'liberty' specially protected by the Due Process Clause includes the right[] … to direct the education and upbringing of one's children." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

For many low-income families, however, parents' ability to "direct the education and upbringing of [their] children" is constrained by financial restraints and the unfortunate but real connection between the price tag of a house and the quality of education a child receives. Accordingly, the critical liberty interest of pursuing the most desirable education for one's child is promoted by programs that expand the options for parents to send their children to schools beyond their zip code—whether they take the form of vouchers, educational savings accounts, or tax credit scholarship programs.

This Court recognized as much in *Zelman v. Simmons-Harris*, a case that involved 75,000 children

enrolled in the Cleveland City School District—a district that failed to meet any of the 18 state standards for minimal acceptable performance. 536 U.S. 639 (2002). Only 1 in 10 ninth graders passed a basic proficiency exam and more than two-thirds of high school students either failed or dropped out. *Id.* at 644. The state auditor found the school system to be suffering a "crisis that is perhaps unprecedented in the history of American education." *Id.* Hardest hit were children from low-income and minority families, who were unable to move to wealthier communities with better schools. *Id.*

To address Cleveland's failing schools, Ohio enacted a scholarship program that provided tuition assistance for students to "attend a participating public or private school of their parent's choosing." *Id.* at 645. This Court upheld against an Establishment Clause challenge Ohio's program in part because it allowed parents to make a better educational choice for their child. *See id.* Facilitating parents' opportunities to select a school that is best-suited for their children thus enables parents to exercise their constitutionally protected liberty interest to "control the education" of their children. *Meyer*, 262 U.S. at 401; *see Zelman*, 268 U.S. at 534-35.

B. Empowering Parents to Exercise Their Constitutional Right to Direct Their Children's Education Results in Better Schools and Better Educational Outcomes, As Numerous Studies Concerning Brain Science And Individual Learning Reinforce.

Not only do parents possess a constitutional right to direct the education of their children; facilitating this right leads to better schools and better educational outcomes for parents and children, as recent studies underscore.

The unfortunate truth is that, for an increasing number of working families in the United States, traditional school districts are not working. The data from a 2017 National Assessment of Educational Progress (NAEP) study are disturbing. Only 36% of public school 8th grade students tested at or above proficient in reading. Center for Education Reform, *The Disappointing Reality of American Education*, at 4, available at: https://bit.ly/2kM9nrz. In math, the 8th grade proficiency level was even lower at 34%. *Id*. The study also found a six-year gap in reading achievement between the nation's poorest and wealthiest students. *Id.*

The implications are serious. According to the Department of Justice, "the link between academic failure and delinquency, violence, and crime is welded to reading failure." *Id.* at 6. An astounding 85 percent of juveniles who "interface with the juvenile court system are functionally illiterate, and over 70 percent of inmates in America's prisons cannot read above a fourth-grade level." *Id.*

Further, according to the Programme for International Student Assessment ("PISA"), the United States has one of the largest achievement gaps and one of the most "deeply inequitable" education systems in the industrialized world. *Id.* at 8-9. The United States is one of only five OECD countries that does not provide government funding for privately managed secular and sectarian schools. *Id.*

In 2018, an estimated 43% of American children were growing up in low-income families. *Id.* at 3. Thus, nearly half of American families do not have the resources needed to cover basic expenses, much less send their children to their school of choice. *Id.* Providing options outside of a family's zip code breaks the unfortunate link between the home a family can afford and the quality of education they can give their children. Providing choices also helps parents tailor their child's school to the particular child's learning needs and styles. After all, parents who are empowered to make educational choices—whether by government programs or their own resources—do not necessarily make uniform decisions about their children's education. They may leave one child in public school, while a second child attends private school, or select different non-public options based on each child's learning styles and needs.

Research has shown that educational choice programs "improve academic outcomes … positively impact graduation rates, college enrollment, civic engagement, crime rates, and improve parental and student satisfaction." Tim Keller, *As School Choice Programs Grow, We Must Debunk Myths About How Choice Works*, HomeRoom (Jan. 23, 2019) available at

https://bit.ly/2kmWZ12. It has likewise confirmed that private schools "often narrow [the] academic achievement gaps, create social capital, and foster democratic behavior." Ashley Berner, *Education for the Common Good*, EducationNext (Nov. 30, 2017) available at https://bit.ly/2lOYDc5. And it has demonstrated that religiously affiliated schools in particular have a positive impact on student achievement, attendance, and civic engagement. Alliance for Catholic Education, *Research on the Case for Catholic Schools*, University of Notre Dame, available at https://bit.ly/2m0eDYE.

Providing options among schools also helps students attend safer schools and avoid bullying and gang activity. A University of Arkansas study found that private school attendees were half as likely to commit felonies and misdemeanors as their local public school colleagues. Corey DeAngelis and Patrick J. Wolf, *The School Choice Voucher: A "Get Out of Jail" Card?*, University of Arkansas (Mar. 8, 2016) available at https://bit.ly/2kLZR7G.

Similarly, studies from the University of Arkansas show that charter schools regularly outperform their public counterparts, even with less funding. In 2015-2016, for example, Florida's charter schools had smaller racial achievement gaps and students made greater learning gains and performed better on state exams than their traditional public school peers in 65 out of 77 comparisons. Jessica Bakeman, *According to a New Department of Education Study, Charter Schools Outperform Traditional Public Shows,* Center for Education

Reform (Apr. 17, 2017) available at https://bit.ly/2kPjM5R.

Decades of brain science reinforce and help explain the reality that educational outcomes are improved when parents have the opportunity to fully exercise their constitutional right to direct their children's education. Research into the science of learning establishes what all parents know intuitively: every child learns differently. There is simply no one-size-fits-all model when it comes to learning. In fact, research shows that "[e]ach child has different learning needs at different times." Michael B. Horn, *Why Personalized Learning is Imperative,* Education Elements (Jun. 22, 2016) available at https://bit.ly/28UgdB3. As Todd Rose, director of the Mind, Brain and Education program at the Harvard Graduate School of Education, explains, there is no such thing as an "average" brain; every person's brain operates differently. Mary Jo Madda, *There's No Such Thing as Average': Todd Rose on Brain Science and the Limitations of Standards,* EdSurge (Oct. 26, 2016) available at https://bit.ly/2ePLt7y. A child's individual learning style stems from the "unique way[]" that his or her brain "retrieve[s] information and create[s] memory." *Id.*

The scientific research into how children learn underscores the critical importance of parent-directed educational opportunity. Universal education in the United States was originally modeled after factories. *See* Horn, *Why Personalized Learning is Imperative*. In that still-extant industrialized model, students are batched into classrooms based upon age and taught

the same material at the same pace. *Id.* Despite the best efforts of teachers, the standardization of the way students are taught makes tailoring lessons to each child in a 20 to 35 student classroom impossible. *See id.* It also creates learning gaps that later return to haunt students. *Id.* A school system that confines students to one progression of learning will not optimize learning for any student, let alone for students with learning styles and needs that differ from the mean.

Protecting and facilitating the right of parents to direct the educational outcomes of children allows for critically needed individualization of educational options to meet the needs of individual students. It is no surprise that parents with multiple children who are fully empowered to choose—whether by their own resources or government programs—do not always choose the same educational path for each child. They may send one to private school, one to the local public school, and one to a specialized academy. Single-sex education may be the right path for one child, and a science focus the better path for a sibling. It is also no surprise that empowering parents to make such choices produces better educational outcomes, because parents best understand their children's individual learning styles. The science behind how students learn thus validates that when parents exercise their constitutional right to direct their children's education by choosing among a range of schools, better educational outcomes are the result.

In short, the data on the improved outcomes that come with parent-directed education as well as decades of brain science confirm what common sense

suggests. When parents are given options for schooling that upend the tyranny of the zip code and facilitate the exercise of their constitutional right to direct and control the education of their children, educational diversity is enhanced and better educational outcomes are achieved.

C. Denying Parents Their School of Choice Because of its Religious Nature Injures Parents and Children by Violating Bedrock Constitutional Principles.

Given this Court's repeated recognition of parents' constitutional right to control their children's education, denying parents their preferred educational option simply because their desired school has a religious affiliation inflicts direct and significant injury on parents and children. As this Court has long held, a State may not impinge on "the traditional interest of parents with respect to the religious upbringing of their children" so long as the parents prepare them for additional obligations. *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (quoting *Pierce*, 268 U.S. at 535). The state's interest in educating its citizens must yield to the parent's fundamental liberty interest in reasonably controlling that education. *See id.*

It is no answer to say that parents may choose to send their children to other private schools, so long as they are not religiously affiliated. The state may not limit a parent's choice of educational options to secular ones. As this Court has recognized, "the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society." *Id.* at 213-14.

Denying parents their preferred option among a wide variety of otherwise neutrally available options merely because it is religiously affiliated is tantamount to denying them the ability to direct their children's education and send them to their school of choice. But parents—not the government—have both the fundamental right and the high calling to direct the education and upbringing of their children. *See Glucksberg*, 521 U.S. at 720.

Denying parents the ability to send their children to a desired school simply because that school is religiously affiliated directly implicates First Amendment concerns as well. The Free Exercise Clause "'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (quoting C*hurch of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 542 (1993)). Religious discrimination is particularly pernicious when it intersects with a fundamental liberty interest like directing children's education, as this Court recognized in *Employment Division v. Smith*, 494 U.S. 872 (1990). There, as examples of "the First Amendment bar[ring] application of a neutral, generally applicable law to religiously motivated action," the Court highlighted cases that involved "the Free Exercise Clause in conjunction with other constitutional protections," including "the right of parents … to direct the education of their children." *Id.* at 872, 881 (*citing Yoder* and *Pierce*). The Court explicitly affirmed that "when the interests of parenthood are combined with a free exercise claim …

more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment." *Id.* at 881 n.1 (quoting *Yoder*, 406 U.S. at 233).

This case likewise implicates "the interests of parenthood … combined with a free exercise claim." Both interests trigger constitutional protections, and both interests are directly and significantly infringed when parents are denied the ability to direct their child's education simply because the school of their choosing is religiously affiliated.

II. The State's Interest In Avoiding Indirect Funding Of Religiously Affiliated Institutions Is Miniscule.

In stark contrast to the core liberty and First Amendment interests of parents to direct their children's education free from religious discrimination, the state's interest in preventing the indirect funding of religiously affiliated entities is minimal. This Court has long recognized a difference between direct and indirect uses of government funds and underscored the government's attenuated interest in the latter. For example, the Court's decisions "have drawn a consistent distinction between government programs that provide aid directly to religious schools" and programs where "government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Zelman*, 536 U.S. at 649. The former require an evaluation of criteria that include whether the government "acted with the purpose of advancing or inhibiting religion" and whether the direct aid "has the 'effect' of

advancing or inhibiting religion." *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997); *see also Mitchell v. Helms*, 530 U.S. 793, 807-08 (2000) (plurality); *id.* at 836-37 (O'Connor, J., concurring in the judgment).[2] The latter, however, simply "do[] not offend the Establishment Clause," *Zelman*, 536 U.S. at 663, because there is no danger that a reasonable observer would attribute any endorsement of religion to the State. In such cases, any "incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government." *Id.* at 652.

Accordingly, this Court has repeatedly held that where funds flow indirectly, the government has a substantially reduced interest in how recipients of government aid use those funds. In *Mueller v. Allen*, 463 U.S. 388 (1983), for instance, the Court rejected an Establishment Clause challenge to a Minnesota program authorizing tax deductions for private school tuition even though over 90% of the program's beneficiaries were parents of children in religious schools. This Court held that where "public funds become available only as a result of numerous … choices of individual parents of school-age children," no "imprimatur of State approval" can be deemed conferred on religion. *Id.* at 399; *see also Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch.*

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[2] Even then, the Court has upheld against Establishment Clause challenge programs providing "government aid that directly assists the educational function of religious schools." *Agostini*, 521 U.S. at 225.

Dist., 509 U.S. 1 (1993). Indeed, because indirect expenditures are by definition the result of the intervening decisions of third parties, this Court has "*never* found a program of true private choice to offend the Establishment Clause." *Zelman*, 536 U.S. at 653 (emphasis added).

This Court's Establishment Clause cases speak directly to the lack of a strong government interest in the indirect destination of government funds. Where a state program, "[b]y according parents freedom to select a school of their choice … ensures that [government aid] will be present in a sectarian school only as a result of the private decision of individual parents," the State has a minimal interest in that flow of funds. *Zobrest*, 509 U.S. at 10. "The historic purposes of the [Establishment] [C]lause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case." *Mueller*, 463 U.S. at 400.

The Court has recognized the distinction between direct and indirect uses of government funds—and the state's greater interest in the former and attenuated interest in the latter—in other contexts. For example, "a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary." *Witters*, 474 U.S. at 486-87. The indirect use of government funds toward religious organizations does not implicate the government's core interests, and

thus the government has a minimal interest in policing the spending decisions of its employees. *See* 5 C.F.R. § 950.110 (guaranteeing the eligibility of religious organizations to participate in the Combined Federal Campaign).

Along similar lines, the government has a distinct interest in regulating the content of its employees' speech and conduct especially when they address matters within their job description. *See, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 418-19 (2006). The government "has a substantial interest in ensuring that all of its operations are efficient and effective," which "may require broad authority to supervise the conduct of public employees" that outweighs ordinary First Amendment protections. *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 386 (2011). But where the government merely provides a neutral means for third parties to speak—by providing a public forum or funding for the expression of views—the government's interest in regulating speech is substantially diminished. *See, e.g.*, *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819, 829-30 (1995). Speech by the government itself or government employees implicates important government interests that are simply not present when the government provides a forum for speech by others. There is no such thing as an indirect-government speech doctrine because the intervening choices of individual speakers eliminates any plausible inference that the speech is attributable to the government. Once speech and aid is no longer directly attributable to the government, its interest is truly minimal.

Any such governmental interest is particularly miniscule in this case, moreover, because the aid provided under Montana's program is doubly indirect. First, individuals make a donation to a nonprofit scholarship organization, receiving a tax credit in return. Second, the scholarship organization gives scholarships to parents who wish to send their children to a qualified school. The indirect aid to religiously affiliated organizations thus occurs "only as a result of numerous … choices" by private individuals at two different stages. *Mueller*, 463 U.S. at 399. Under such circumstances, so long as the funds are used for the neutral end served by Montana's program—expanding educational opportunity and enhancing educational outcomes—the government's interest in preventing those funds from reaching their destination because of their religious nature is not just minimal but invidious.

III. The Balance Of Interests Strongly Favors The Constitutional Right Of Parents To Direct Their Children's Education, Consistent With Framing-Era Principles And Contrary to the Principles Of The Blaine Amendment Era.

In a competition between, on the one hand, parents' constitutional rights to direct their children's education free from religious constraints and, on the other hand, the government's interest in regulating the indirect use of state funds, the balance plainly favors respecting parents' rights. *See Locke v. Davey*, 540 U.S. 712, 725 (2004) (comparing the "State's interest in not funding the pursuit of devotional degrees" with the "relatively minor burden" on

individuals from "the exclusion of such funding"). As explained, parents have a long-established and repeatedly recognized constitutional liberty interest in directing the education of their children, and an equally compelling interest in freely exercising their religious beliefs. This Court has specifically recognized the potency of those two interests when "combined." *Smith*, 494 U.S. at 881-82 & n.1. Denying parents the opportunity to direct their children's education simply because of religion directly and substantially infringes upon those interests. On the other side of the ledger, the state has a minimal interest in regulating the destination of indirect funding, and even less so here, where two distinct stages of private choice intervene between government aid and the recipients of that aid.

This balance not only is borne out by case law and common sense; it is consistent with Framing-era principles. Minimizing the state's ability to restrict parental decisionmaking when it comes to education restores the traditional pluralism and limited governmental involvement in education that prevailed in the early Republic. The Blaine Amendment era marked a deviation from those principles and should not guide sound constitutional decisionmaking.

Traditionally, parents had broad latitude to pursue the best educational option for their children without undue state interference. At the country's inception, education was generally considered a private, family matter. As Virginia's governor, Sir William Berkeley, wrote in 1671, Virginians were taking "the same course that is taken in England out of towns; every man according to his own ability in

instructing his children." Wayne J. Urban & Jennings L. Wagoner Jr., *American Education: A History* 22-23 (2nd ed. New York: McGraw-Hill 2000). And while many of the Founders recognized the critical importance of education—another Virginia Governor, Thomas Jefferson, proposed free public education in 1779—the new nation emerged from the eighteenth century with a "patchwork pattern of schools," most established by private schoolmasters or religious groups. *Common School Movement*, available at https://bit.ly/2kOEiDv.

It was not until the 1830s that the common school movement—*i.e.*, public schooling—began in earnest. At first, public schools were "educationally plural, reflecting the local populations beliefs and values." Ashley Berner, *The Case for Educational Pluralism in the U.S.*, Manhattan Institute (July 11, 2019), available at https://bit.ly/33wVMWq. Gradually, however, public schools began to reflect the then-prevailing Protestant hegemony in public life. A general Protestant morality was widely seen as a necessary prerequisite to the maintenance of the American constitutional republic. *See* Frederick Mark Gedicks, *Reconstructing the Blaine Amendments*, 2 First Amend. L. Rev. 85, 91-92 (2004). "Many people viewed Protestantism as inseparable from the American republican idea," Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy* 57 (2000), even as synonymous with "Americanism," John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 297 (2001) (quotation marks omitted).

The common schools soon served as important tools for inculcating civic Protestant values in their students. Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & Pol. 65, 72-73 (2002). The common schools' curricula "evidenced a 'pan-Protestant compromise,'" Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493, 503 (2003) (quoting Jeffries & Ryan, *supra*, at 299), the centerpiece of which was reading from a Protestant version of the Bible, *see* Joseph P. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 666 (1998), and reciting Protestant prayers and hymns, Christopher C. Lund, *The New Victims of the Old Anti-Catholicism*, 44 Conn. L. Rev. 1001, 1006 (2012).

The wave of Catholic immigration beginning in the mid-nineteenth century challenged this homogenized Protestant public education and sought to reintroduce plurality to the system. *See* Philip C. Hamburger, *Separation of Church and State* 201-02 (2002). Unsurprisingly, Catholics frequently declined to simply accept the openly Protestant instruction dominating the common schools. Protestants saw the Catholic refusal to participate in public school practices like Bible reading, hymn singing, and prayer as a failure to assimilate and a rejection of core values of American civic culture. *See id.* at 211; Charles L. Glenn, *The American Model of State and School* 154-60 (2012). Catholics established their own schools and lobbied for a share of common school funds. *See* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 42 (1992).

Although initially rebuffed, Catholics were gradually able to gain access to funding or excise Protestant practices from public schools in cities with large Catholic populations. *Id.* at 44-47.

These efforts were met frequently with a prejudice and nativism endemic of the broader anti-Catholic brand of politics that had emerged in response to swelling Catholic numbers. *See generally* Hamburger, *supra*, at 201-40; *see also* Jeffries & Ryan, *supra*, at 301. These politics reached a fevered pitch after the Civil War. In 1875, President Grant delivered an address denouncing the forces of "superstition" and calling for citizens to "resolve that not one dollar … be applied to the support of any sectarian school[s]." Duncan, *supra*, at 507 (quotation marks and emphasis omitted). The reference to "sectarian school[s]" had an unmistakable public meaning to Grant's audience. It meant Catholic—the antithesis of the "nonsectarian" Protestant public schools of the era. *See* Jeffries & Ryan, *supra*, at 301; Hamburger, *supra*, at 298-99, 307; *cf. Mitchell*, 530 U.S. at 828 (plurality opinion); *Zelman*, 536 U.S. at 721 (Breyer, J., dissenting); Richard A. Baer, Jr., *The Supreme Court's Discriminatory Use of the Term "Sectarian,"* 6 J.L. & Pol. 449 (1990).

Grant also called for a constitutional amendment forbidding funding for "sectarian" schools. Steven K. Green, *The Bible, the School, and the Constitution* 192-93 (2012). Shortly thereafter, Representative James Blaine of Maine obliged and introduced an amendment, which read in relevant part:

> [N]o money raised by taxation in any State for the support of public schools, or derived from

> any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

4 Cong. Rec. 205 (1875). The House approved the amendment, but it died in the Senate as Senators opposing it assailed its patently anti-Catholic purpose and effect. Green, *Blaine Reconsidered*, *supra*, at 39.

Although Blaine's Amendment failed in Congress, advocates of such measures turned to the states. Within a year of its defeat, fourteen states had adopted measures forbidding public funding for "sectarian" schools, and by the end of the nineteenth century, thirty states had adopted such provisions. 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, 573 (2003).

The Blaine Amendments thus marked an attempt to crystallize a particularly odious brand of homogeneity that the Framers would never have recognized: a Protestant educational hegemony. They did so through the particularly odious means of divvying up society according to religion, barring aid for any "sectarian" establishment (understood to mean Catholic). And by prohibiting funding—even indirect funding—for "sectarian" entities, they had the particularly odious effect of constraining parents' ability to exercise their constitutional rights to direct the upbringing and education of their children.

The Blaine Amendment era was a deviation from Founding-era principles, and it is a deviation from present-day principles. State prohibitions on indirect funding of religiously affiliated organizations should not be permitted to trump the fundamental promise of neutrality enshrined in the First Amendment or to constrain parents' fundamental liberty interest in directing the education of their children. Vindicating the rights of parents and children to be free of state-inflicted religious discrimination creates a constitutional and educational environment that the Framers would recognize and applaud. Accordingly, the Court should reverse the Montana Supreme Court's decision.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

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