

No. 18-1195

In the Supreme Court of the United States

KENDRA ESPINOZA, ET AL.,
Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE MONTANA
SUPREME COURT

**BRIEF OF *AMICUS CURIAE*
JEWISH COALITION
FOR RELIGIOUS LIBERTY
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*

The Jewish Coalition for Religious Liberty is a non-profit organization—a group of lawyers, rabbis, and professionals who practice Judaism and defend religious liberty. *Amicus’s* members have written on the role of religion in public life. Representing members of the legal profession, and adherents of a minority religion, *Amicus* has a unique interest in ensuring the flourishing of diverse religious viewpoints and practices. The Jewish Coalition for Religious Liberty advocates for people of faith who practice their faith in religious services and in the public square.

Amicus urges this Court to declare the Montana’s Blaine Amendment unconstitutional. This Court has repeatedly held that government must be impartial toward religion. However, Montana’s Blaine Amendment expressly denies citizens public benefits based solely on their religious faith. Montana’s law inflicts collateral damage on the Jewish community in the context of primary education. Specifically, the Blaine Amendment forces Jewish parents to confront a Hobson’s choice between their financial security and their community’s religious continuity. *Amicus* submits this brief to demonstrate the harm that Blaine Amendments inflict on the Jewish community.¹

¹ Consistent with this Court’s Rule 37.6, *Amicus Curiae* states that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *Amicus* and their counsel made a monetary contribution to the preparation or submission of this brief. In accordance with this Court’s Rule 37.2, all parties were timely notified of the *Amicus’s* intent to file this brief, and correspondence consenting to the filing of this brief by all parties has been submitted to the Clerk.

SUMMARY OF ARGUMENT

The History of Blaine Amendments demonstrate that they are premised on religious animus. Their effect is to promote inequality and disadvantage persons based on viewpoint discrimination, and they consequently violate the First and Fourteenth Amendments to the Constitution. The collateral effects of Blaine Amendments are severe on faith communities, particularly on the Jewish Community. Members of the Orthodox Jewish community view sending their children to religious schools as nearly essential. Such schools facilitate their children's practice of Judaism while preparing them to eventually take leadership roles in the community. Unfortunately, the costs of paying for such schools is often exorbitant. Many Orthodox parents consider the high cost of tuition a crisis that forces them to choose between what they consider the best future of their children, and their current financial well-being. Lawmakers should be free to pass school policies that aid such parents and foster community stability and growth without being hampered by unconstitutionally biased legal relics like Montana's Blaine Amendment.

ARGUMENT

I. Blaine Amendments, Which Were Premised on Animus toward Non-Protestants, Are Plainly Unconstitutional.

Blaine Amendments have an ignoble past. They emerged because some Protestant Americans sought to foster religious hegemony and weaken non-Protestant—particularly Catholic—faiths. The Amendments are named after former United States Representative (later Senator and Presidential

Candidate) James G. Blaine of Maine. In 1875, he proposed an amendment to the United States Constitution that would have barred government aid to sectarian schools and institutions. Toby Heytens, *Note: School Choice and State Constitutions*, 86 Va. L. Rev. 117, 131 (2000) [hereinafter *School Choice*].

At the time, public schools—then often described as common schools—were largely Protestant. One scholar observed that the “common-school curriculum promoted religious orthodoxy of its own that was centered on the teaching of mainstream Protestantism.” Joseph P. Viretti, *Blaine’s Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol’y 657, 666 (1998) [hereinafter *Blaine’s Wake*]. This orthodoxy had a long pedigree in America. For example, in 1777 John Jay led an effort to amend the New York Constitution to exclude Catholics from the state. See Charles Lincoln, *The Constitutional History of New York* 581 (1906). Catholic immigrants, who began to arrive in America in waves in the 1800s, “perceived Protestant-controlled schools as hostile to their faith and values.” Heytens, *School Choice*, *supra* at 136. Soon these immigrants requested government financial support for Catholic schools, further exacerbating tensions. *Id.*

The Blaine Amendments were not premised on a preference for *nonsectarian* schools. During the late nineteenth century, the term “nonsectarian” was understood to mean Protestant. Michael W. McConnell, John H. Garvey & Thomas Berg, *Religion and the Constitution* 451-56 (2002); accord *Zelman v. Simmons-Harris*, 536 U.S. 639, 721 (2002) (Breyer, J. dissenting) (“Catholics sought equal government support for the

education of their children in the form of aid for private Catholic Schools,” but 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).”); *Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000) (same).

This history reveals the federal Blaine Amendment was a direct response to Catholic immigrants’ request for financial aid. It was not intended to foster secularism. Rather, it was intended to curtail the growing Catholic school system. *See e.g. School Choice*, *supra* at 138; *Blaine’s Wake* at 659 (“[T]he Blaine Amendment is a remnant of nineteenth-century religious bigotry promulgated by nativist political leaders who were alarmed by the growth of immigrant populations and who had particular disdain for Catholics.”).

The House of Representatives supported the Blaine Amendment, with the backing of President Grant. Thankfully, however, the amendment narrowly failed to achieve the two-third majority for an amendment in the Senate. *Id.* Our republic consequently avoided enshrining religious bigotry in the Constitution.

Blaine’s federal defeat “did not, however, end the matter.” *School Choice* at 134. In the late 19th and early 20th Century, “approximately thirty states wrote or amended their constitutions to include language substantially similar to that of” the federal Blaine Amendment. *Id.* In fact, Congress made the inclusion of Blaine Amendments a condition “of admission to the Union” for several states, including Montana. *Id.*

The Montana Constitution forbids the appropriation or expenditure of public funds, directly or indirectly, for “sectarian” (*i.e.* religious) purposes. Montana Const., Art. X, § 6 (“Montana’s Blaine Amendment”). When this provision was added, opponents noted its anti-Catholic bigotry. Michael P. Dougherty, *Montana’s Constitutional Prohibition on Aid to Sectarian Schools: “Badge of Bigotry” or National Model for the Separation of Church and State?* 77 Mont. L. Rev. 41, 50 (2016).

Amicus concurs with the Petitioner’s comprehensive discussion of how the Montana’s Blaine Amendment violates the Free Exercise, Establishment and Equal Protection clauses. *E.g.* Pet. Br. At 16-21, 28-31, 45-54. Additionally, the provision also violates the Free Speech Clause. Montana’s Blaine Amendment discriminates on the basis of viewpoint: funding is denied for educational speech for people of faith, but not those of atheists. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–835 (1995).

II. Many Orthodox Jewish Parents Send Their Children to Jewish Day School in Order to Ensure Their Religious Instruction, and to Prepare Them for Future Roles in the Community.

Montana’s Blaine Amendment inflicts collateral harm on the Jewish community. Specifically, this provision impedes ability of children in Jewish communities to participate in scholarship programs, such as the one at issue in this case, without suffering unconstitutional anti-religious discrimination.

A. The Critical Importance of Jewish Day Schools.

As of 2008, there were more “than eight hundred [Jewish day] schools and more than two hundred and twenty-five thousand youth” attending these institutions. Rona Sheramy, *The Day School Tuition Crisis: A Short History*, *Jewish Review of Books* (Fall: 2013).² Sending children to such schools is “the sine qua non of ‘serious Jewish child-rearing.’” *Id.*

Many Orthodox parents send their children to Jewish day schools. Such schools provide half a day of Judaic instruction, which includes classes in Hebrew language, Jewish History, and biblical studies. These classes are vital in preparing Jewish students to take roles in the Jewish community. The other half of the day covers secular instruction.

Jewish day schools facilitate Jewish children’s ability to flourish, both as students and as observant Jews. For example, these schools are closed on Jewish holidays. An Orthodox Jewish student in a public school would have to skip approximately a dozen days of school each year to observe the holidays. During these times, students cannot write, use electricity, or travel by car or bus. It would be effectively impossible for an Orthodox student to attend class on such days. Jewish students who attend public schools will necessarily miss class time and accrue a number of absences that may create disciplinary issues. *Anti-Defamation League, School & Workplace*

² Available at:

<https://jewishreviewofbooks.com/articles/511/the-day-school-tuition-crisis-a-short-history/> (last visited September 12, 2019).

*Accommodations for the Jewish High Holidays: Know Your Rights and Obligations.*³

Other days on the Jewish calendar pose a different set of difficulties: on certain dates, an observant Jewish student could go to school, but he would nevertheless face difficulties due to specific religious practices. For example, on the intermediate days of the Holiday of Sukkot, Orthodox Jews eat all of their meals in an outdoor booth known as Sukkah.⁴ If a Jewish day school is open on those days, it will provide a Sukkah in which to eat. A student attending a secular school would be unable to observe this practice while at school.

On all other days of the calendar, Jewish day schools provide an accommodating educational environment that allow youths to learn and practice their faith. For instance, Jewish students pray three times a day. After Jewish men reach age thirteen, they read from the Torah on Monday and Thursday mornings. Jewish day schools provide instruction in such prayer and incorporate prayers and Torah reading into the school day. Religious students, especially males over the age of thirteen, who attended a public school would have to attend morning prayers at a synagogue before school. This additional ritual would impose a significant burden on both parents and their children. These are many more ways in which

³ Available at: <https://www.adl.org/education/resources/tools-and-strategies/school-workplace-accommodations-for-jewish-high-holidays> (last visited September 12, 2019).

⁴ See “How to Celebrate Sukkot”, available at: https://www.chabad.org/library/article_cdo/aid/4457/jewish/How-To-Celebrate-Sukkot.htm (last visited September 12, 2019).

Jewish day schools enrich the lives of Jewish students and their families.

B. Jewish Day School is Very Expensive and Paying For it Has Been Described as a Community Crisis.

Jewish day school is prohibitively expensive for many families. Elementary tuition in New York can cost \$24,000 a year.⁵ In Washington, D.C., elementary school can cost \$28,000 a year. *Id.* In North Miami Beach, Florida, middle school can cost \$27,000 per year.⁶ High School in North Miami Beach can cost \$30,000 a year. *Id.* And even a third-grader in the same system would have tuition costs at \$25,000. *Id.* These significant expenses are compounded by the lack of scholarships due to Blaine Amendments. As a result, many parents face a painful choice between their own financial security and the personal and communal benefits catalogued above.

Members of the Jewish community describe the choice parents have to make—public or private schools—as a “crisis”. *E.g.* Shira Hirschman Weiss, *Jewish School Tuition Crisis: Parents Feeling “Priced Out” of Their Religion*, Huffington Post (May 25, 2011).⁷

⁵ See SAR Academy High School, available at: <https://www.saracademy.org/the-sar-experience/fast-facts> (last visited September 12, 2019).

⁶ See CESJDS, available at: <https://www.cesjds.org/admission/affording-cesjds> (last visited September 12, 2019).

⁷ Available at: https://www.huffpost.com/entry/feeling-priced-out-of-the_b_837043 (last visited September 12, 2019).

As tuition prices for Jewish day schools rise, parents are often forced to choose between providing their children with a Jewish education or keeping their families financially stable. This financial crush has many names within the Jewish community: ‘tuition crisis,’ ‘tuition crunch,’ and ‘pricing out parents’ are just a few.

Mary Litwack, *School Choice Policy Impact on the Jewish Community*, Jewish Policy Center (Winter, 2015).⁸

Nearly 90% of Orthodox Jews consider the cost of schooling a serious problem; and this number is particularly striking because less than half of the same group are concerned about antisemitism! Nishma Research, *The Nishma Research Profile of American Modern Orthodox Jews* (September 28, 2017) at 75.⁹ Indeed, the same study suggests: “Overall, finances are seen as the biggest problem. By a wide margin, the cost of Jewish schooling ranks as the #1 problem. . . .” *Id.* at 17. “Week after week, the tuition crisis comes to our attention, front and center. Rabbis, couples and concerned members of the community call us, email us, and approach us after [praying] regarding the financial

⁸ Available at:

<https://www.jewishpolicycenter.org/2014/12/31/school-choice-policy-jewish-community/> (last visited September 12, 2019).

⁹ Available at:

<http://nishmaresearch.com/assets/pdf/Report%20-%20Nishma%20Research%20Profile%20of%20American%20Modern%20Orthodox%20Jews%2009-27-17.pdf> (last visited September 12, 2019).

pressures threatening our schools and squeezing our middle-class families.” Shmuel Marcus and Jonathan Morgenstern, *How to Solve the Jewish Day School “Tuition Crisis”*, *The Algemeiner* (May 26, 2015).¹⁰ Government aid in paying school tuition would change the lives of Jewish families, as “[d]ay school tuition becomes a significant portion of families’ expenses.” Susan Jacobs Jablow, *Why Jewish Day School Education is Worth the Cost*, *The Times of Israel* (November 9, 2017).¹¹

This situation is not likely to improve. Population in Jewish communities continues to rise, and tuition continues to increase. The future of the crisis may soon become untenable. These social and financial pressures have sparked a desperate search for solutions. Yet, the Blaine Amendment stands in the way of any progress to remedy the crisis. This Court should declare Montana’s law unconstitutional. Such a decision would remove a vestige of bigotry from the state constitution, remedy an historic injustice, and alleviate pain that is unnecessarily imposed on Jewish parents.

C. Declaring Montana’s Blaine Amendment Unconstitutional Would Allow Funding to Alleviate the Communal Crisis.

Setting aside the Blaine Amendment would allow the state to aid in paying day school tuition. This

¹⁰ Available at: <http://www.algemeiner.com/2015/05/26/how-to-solve-the-jewish-day-school-tuition-crisis/>

(last visited September 12, 2019).

¹¹ Available at: <https://blogs.timesofisrael.com/why-jewish-day-school-education-is-worth-the-cost/> (last visited September 12, 2019).

transformational change would benefit the lives of Jewish families and strengthen their communities. Under the current status quo, such scholarships would be illegal. Moreover, many Jewish parents pay taxes for public schools their children cannot attend, as they do not meet family needs.

Indeed, a recent policy paper by the Union of Orthodox Congregations of America observed that:

Parents utilizing Jewish non-public schools are, at the same time, funding their local public schools through the payment of property and other taxes while choosing not to utilize those very schools which they are helping to fund. Thus, Jewish day school parents save local school districts an average of \$12,450 per student educated in a non-public school, even before accounting for the tax income these parents provide to the school system. Thus, as a matter of economic fairness, Jewish day school parents should be able to receive some amount of benefit from the state/locality alongside their fellow citizens.

Orthodox Union Position Paper on Government Aid to Jewish Day Schools (May 2, 2012).¹² The state could ameliorate the social and economic pressures associated with providing Judaic education by providing vouchers or other government support programs.

¹² Available at: <https://advocacy.ou.org/orthodox-union-position-paper-on-government-aid-to-jewish-day-schools/> (last visited September 12, 2019).

Jewish community analysts and commentators agree.

- “We can’t fix this without help from our government leaders. We must lobby those in state and local office.” Marcus & Morgenstern, *supra*.
- “Vouchers and tax credits have the potential to *completely* change the dynamics of Jewish school financing and solve the affordability crisis.” Rafi Eis, “Will Day School Be Affordable Again?”, LehrHaus (June 4, 2018).¹³
- “A full voucher that will pay for all General Studies salaries and costs, including classroom usage, could reduce tuition by over 60%!” *Id.*
- “I would argue that any government funding program that helps subsidize Jewish schools and/or support Jewish education — such as funding for services, direct funding to a school, tax credits or scholarship assistance — should fall under the definition of school choice for Jewish education.” *Id.*
- “For more than forty years, securing government support for day schools and *yeshivot* has been at the top of the Orthodox Jewish community’s public policy agenda.” Nathan J. Diamant, “Public Funding for Non-Public Schools,” *Jewish Action* (Fall 2005).¹⁴

¹³ Available at:

<https://www.thelehrhaus.com/commentary/will-day-school-be-affordable-again/> (last visited September 12, 2019).

¹⁴ Available at:

Provisions like Montana's Blaine Amendment impose roadblocks to solutions that could address the needs of heterodox education systems. Indeed, at the time of the Founding, Jewish schools received public funding:

The first official school under Jewish auspices was established at Shearith Israel (the Spanish and Portuguese Synagogue) in 1731 in New York City. Focusing on Hebrew studies, the school . . . operated as a separate entity with its own fees. In 1755, Shearith Israel expanded to include secular subjects, such as English composition. After closing during the Revolutionary War, the school reopened and functioned as a day school until 1821, receiving state funds as part of New York's newly created common school system that enabled poor Jewish children to receive an education.¹⁵

But the adoption of Blaine Amendments like Montana's effected a step backward. Catholic school children, much like Jewish school children and their parents, are harmed by Montana's Blaine Amendment. This law prohibits them from receiving monies for education that would include faith learning

<https://jewishaction.com/religion/education/public-funding-non-public-schools/> (last visited September 12, 2019).

¹⁵ MJL, *History of Jewish Schooling in America: Jewish Education in America, From Colonial Time to Today*. Available at <https://www.myjewishlearning.com/article/jewish-schooling/> (last visited September 12, 2019)

components. Sectarian education can and should foster the flourishing for all communities in our heterodox Union. The clear animus evident in the origins of the provision under review only cheapens our nation and the rule of law. The Court should declare Montana's Blaine Amendment unconstitutional because it violates the Free Exercise, Establishment, Equal Protection and Speech clauses. Policy-makers of invention and foresight can then foster educational diversity and strengthen our various communities and our nation as a whole.

CONCLUSION

This Court should reverse the decision of the Montana Supreme Court.

Respectfully submitted,

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