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 *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether state constitutional provisions commonly known as "Blaine Amendments" are presumptively unconstitutional due to their history of anti-Catholic bias.

2. Whether the Montana Blaine Amendment, which the Montana Supreme Court has interpreted to disqualify religious persons from equal access to government benefits, violates the First Amendment.

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INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a nonprofit, public-interest law firm dedicated to protecting the free expression of all religious faiths. It is founded on a simple but crucial principle: that religious freedom is a fundamental human right rooted in the dignity of every human person. To vindicate this principle, the Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, Zoroastrians, and many others in lawsuits across the country and around the world.

This case goes to the heart of Becket's mission because it involves a state constitutional provision whose aim and function is to single out religious groups for special disfavor solely because of their religious status. Becket has been involved in litigation to protect religious organizations barred from public benefits because of their religious status, including historical houses of worship excluded from a historic preservation program in New Jersey, *Morris County Board of Chosen Freeholders* v. *Freedom From Religion Foundation*, 139 S. Ct. 909. 909 (2019) (Kavanaugh, J., respecting denial of certiorari), and churches denied disaster recovery grants because of their religious status, *Harvest Family Church* v. *FEMA*, No. 17A649. Becket's practice has also included challenging 19th Century Blaine Amendments that arose during a shameful period of anti-Catholic sentiment in our national history and that continue to single out the religious for disfavor, as in this case. See, *e.g.*, *New Mexico*

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[1] No counsel for a party authored any portion of this brief or made any monetary contribution toward its preparation or submission. All parties have filed a notice of blanket consent with the Clerk.

Ass'n of Non-public Sch. v. *Moses*, No. 15-1409, 137 S. Ct. 2325 (2017) (mem.) (granting certiorari, vacating, and remanding); *Center for Inquiry, Inc.* v. *Jones*, No. 2007-CA-1358, slip op. at 18 n.61 (Fla. Cir. Ct. Jan. 20, 2016) (unpublished judgment), https://perma.cc/4MJT-FZRD; *Oliver* v. *Hofmeister*, 368 P.3d 1270 (Okla. 2016); *Independent Sch. Dist. No. 5 of Tulsa Cty.* v. *Spry*, 292 P.3d 19 (mem.) (Okla. 2012).

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INTRODUCTION AND SUMMARY OF ARGUMENT

In the decision below, the Montana Supreme Court applied the Montana Blaine Amendment to a neutral scholarship program, striking it down entirely because it provided "indirect" aid to religious schools. This decision contained many of the elements of this Court's recent Free Exercise case, *Trinity Lutheran* v. *Comer*: a state Blaine Amendment that prohibits aid to "sectarian" groups; a government program that benefits children; alleged state anti-establishment interests; and a decision to exclude religious groups because of their religious status. Curiously, the Montana Supreme Court failed even to address *Trinity Lutheran*, holding simply that while "there may be a case where an indirect payment constitutes 'aid' under Article X, Section 6, but where prohibiting the aid would violate the Free Exercise Clause, this is not one of those cases." App. 32. The Montana Supreme Court's woefully inadequate analysis amounts to so much whistling past the graveyard.

Enforcing the Blaine Amendment to strike down the scholarship program runs afoul of this Court's Free Exercise precedents on at least two fronts. First, it applies a Blaine Amendment to remove a public benefit, despite the well-documented anti-Catholic animus that motivated the Blaine Amendments in the latter half of the 19th Century. This animus renders all Blaine Amendments presumptively unconstitutional. The Montana Blaine Amendment is no exception.

Second, both on its face and as applied by the Montana Supreme Court, the Montana Blaine Amendment

imposes a status-based prohibition that begets a structural disadvantage for religious individuals and organizations operating alongside secular peers, from schools to soup kitchens. This discrimination violates the clear command of the Free Exercise clause that "denying a generally available benefit solely on account of religious identity" requires "a state interest 'of the highest order.'" *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2019 (2017).

One of the obvious factual differences between this case and *Trinity Lutheran* is that the Montana Supreme Court did not just deny the application of one church on the basis of religion—it struck down a whole program rather than allow funding to go indirectly to religious students and schools. That sort of "leveling down" makes the violation even worse than that in *Trinity Lutheran*. It compounds the already great harm imposed by anti-religious animus and status discrimination by extending it to even more innocent Montanans.

Because the Montana Supreme Court failed to heed this Court's guidance, the decision below must be reversed.

ARGUMENT

I. The Court should mark all Blaine Amendments as presumptively unconstitutional.

As this Court has recently explained, "[t]he Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously." *American Legion* v. *American Humanist Ass'n*, 139 S. Ct. 2067, 2074 (2019). Because Blaine Amendments were intended to exclude Catholics from

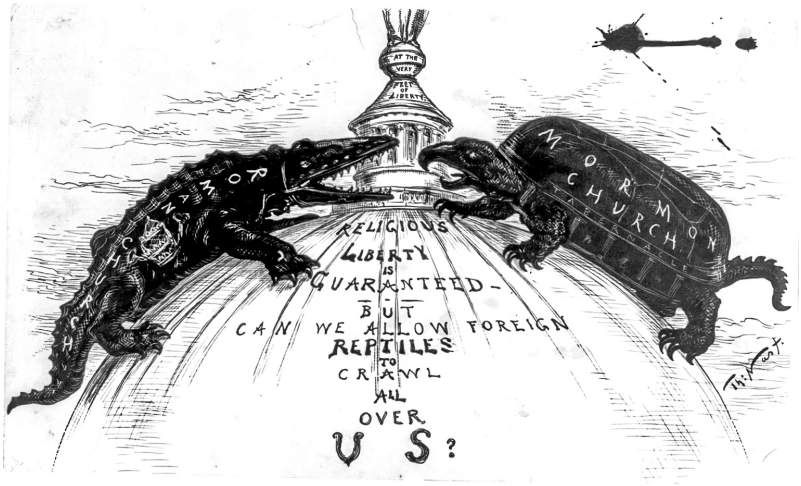
public benefits out of anti-religious animosity, they are not "consistent with that aim," and are thus presumptively unconstitutional. *Ibid.*

A. Blaine Amendments, including the Montana Blaine Amendment, were adopted as part of a national campaign against Catholics.

Blaine Amendments were "born of bigotry." *Mitchell* v. *Helms*, 530 U.S. 793, 828-829 (2000) (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.). They are the lasting legacy of a period of rabid anti-Catholic political activity coupled with an effort to coerce cultural and religious uniformity through the schools.

Although just a tiny minority at the founding, the Catholic population—fueled by large-scale immigration throughout the 19th Century—boomed, such that there were millions of Catholics in the United States by the latter half of the century. See John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 299-300 (2001). Many saw Catholic loyalty to the Pope as a threat to the American way of life. "Protestants feared that Catholics would attempt to subvert representative government or would even gain enough adherents to impose religious tyranny by democratic means." Philip Hamburger, *Separation of Church & State* 206 (2002). Exaggerated fears of what Catholics would do if they were allowed to gain power led to the view that "Catholics had to be denied equal civil and political

rights unless they first renounced their allegiance to the pope." *Ibid.*[2]



The increase in the number of Catholics—and the resulting tensions—coincided with the efforts by education reformers such as Horace Mann to promote a system of common schools with a backbone of moral and religious instruction that incorporated "least-common-denominator Protestantism" using the Bible by itself without any disputed commentaries. Jeffries & Ryan, 100 Mich. L. Rev. at 298.

Mann's proposal, of course, did not address the fact that, especially by the mid-nineteenth-century, not everyone agreed that religious instruction should include children reading from the King James Version of the Bible without guidance. In addition to the obvious problems this posed for Jewish and nonbelieving

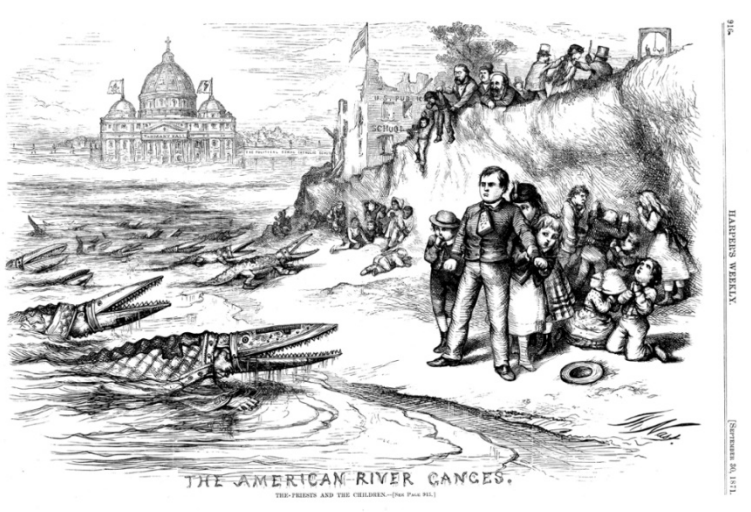
[2] The cartoons included in this brief were drawn by Thomas Nast in the 1870s, and are an example of both the level of invective that was employed against Catholics and the intricate iconography of the anti-Catholicism of the day.

Americans, it also alienated the growing minority of Catholic students and parents.

For one thing, the King James translation was not authorized by the Catholic Church and diverged from the Catholic Douay-Rheims translation on key points of theological significance. Jeffries & Ryan, 100 Mich. L. Rev. at 300. Reading from the King James Bible, then, constituted for Catholics not a secular exercise in literature or character formation but a denial of key aspects of their faith. Furthermore, regardless of the translation, Catholics objected to the very practice of reading the Bible unguided by the Catholic clergy or official commentaries because they were worried that children might misunderstand the text without official guidance. See *ibid.* But in public schools at this time, Catholic students unwilling to participate in Bible reading faced punishment. *Ibid.*

While there were some efforts to simply end the controversial practice of school Bible reading, many Catholics favored a system of parochial schools that allowed Catholic children to receive an education without participating in another religion's instruction or practices. Early efforts to achieve state support for Catholic schools were controversial. See Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 43 (1992). Resistance to support for Catholic schools, fueled by anti-Catholic bigotry, turned violent. Most famously, when the Bishop of New York advocated state support for New York Catholic schools, a mob destroyed his residence, leading to the posting of a militia to prevent the destruction of St. Patrick's Cathedral. See Joseph B. Viteritti, *Blaine's Wake: School Choice, the First Amendment*,

and State Constitutional Law, 21 Harv. J. L. & Pub. Pol'y 657, 669 (1998).

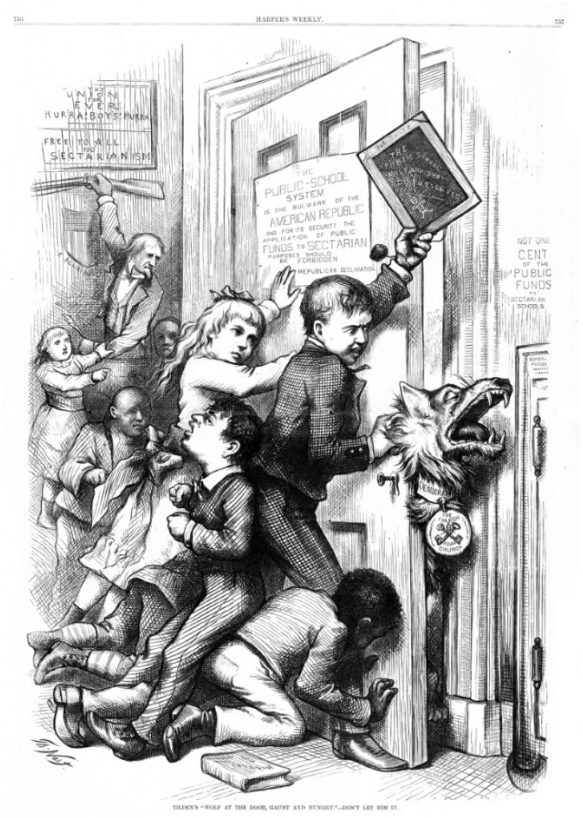


Eventually, however, Catholics were able to achieve public funding for parochial schools in some places. In New York, for example, parochial schools received hundreds of thousands of dollars in direct aid in 1871, and even after a ban on state support for parochial schools passed that same year, Catholics were still receiving significant public support in 1875. Green, 36 Am. J. Legal Hist. at 43 (citing *Harper's Weekly*, January 1, 1876, as reprinted in *The Index*, January 13, 1876, at 16; *The Nation*, Dec. 16, 1875 at 383). The Protestant reaction to this trend in the 1870s formed the immediate background for the Blaine Amendments.

The Blaine Amendment movement kicked off with an 1875 speech by Ulysses S. Grant, who sought to use the "School Question" to galvanize support for the upcoming election. See Hamburger, *Separation*, at 322. Using thinly-veiled anti-Catholic rhetoric, Grant

prophesied a coming conflict between "patriotism and intelligence on one side, and superstition, ambition and ignorance on the other." *Ibid.* (quoting Grant's speech to the Society of the Army of the Tennessee, as set forth in *American State Papers Bearing on Sunday Legislation*, 203-204 (New York: National Religious Liberty Association, 1891)). He argued that to meet this challenge, it was necessary to "afford every child in the land the opportunity of a good common school education, unmixed with atheistic, pagan, or sectarian tenets." *Ibid.* "Sectarian" was a pejorative word referring to groups that did not conform to the Protestant norm, and clearly included Catholics.

After a groundswell of support for Grant's speech, Congressman James Blaine—who had just lost his position as Speaker of the House and was positioning himself to be Grant's successor in the White House—proposed a constitutional amendment implementing Grant's vision. The amendment was met with widespread acclaim by anti-Catholic voices. See Mark Edward DeForrest, *An Overview & Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J. L. & Pub. Pol'y 551, 565-566 (2003).



The provision passed overwhelmingly in the House, where Democrats who feared being "too closely connected with the Catholic Church" essentially "neutered" the amendment's proposed language so they could support it with less offense to their Catholic constituents. DeForrest, 26 Harv. J. L. & Pub. Pol'y at 567-568 (citing Green, 36 Am. J. Legal Hist. at 55). By contrast, the Senate version pulled no punches, unambiguously barring aid to religious schools but allowing Bible reading in the public common schools. *Id.* at 568 (quoting 4 Cong. Reg. 5453). The debate on the Senate floor reflected the provision's blatant anti-religious

bigotry with "a tirade against Pope Pius IX," open attacks on Catholics' patriotism, and appeals that certain states were "vulnerable to takeover by local Catholic majorities." *Id.* at 570-572. The proposed amendment ultimately failed just shy of the two-thirds majority needed to approve it under Article V. See *id.* at 573.

But by then, "the spirit of Blaine had possessed the nation." Viteritti, 21 Harv. J.L. & Pub. Pol'y at 673. Several state legislatures enacted constitutional amendments in their state constitutions, *ibid.*, and Congress began requiring such provisions as a condition for any new state entering the Union, *id.* at 675; see also Kyle Duncan, *Secularism's Laws: State Blaine Amendments & Religious Persecution*, 72 Fordham L. Rev. 493, 512 (2003).

Eventually over 30 states adopted Blaine Amendments in one form or another. See Meir Katz, *The State of Blaine: A Closer Look at the Blaine Amendments and Their Modern Application*, 12 Engage: J. Federalist Soc'y Practice Groups 111, 111 n.1 (2011) (listing 40 state Blaine provisions as well as Blaine Amendments in American Samoa, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands); see also *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2037 n.10 (2017) (Sotomayor, J., dissenting) (listing 38 state Blaine Amendments).

B. This Court has repeatedly recognized the anti-Catholic origins of the Blaine Amendments.

The dark origins of the Blaine Amendments are not news to this Court. See, *e.g.*, *Locke* v. *Davey*, 540 U.S. 712, 723 n.7 (2004); *Zelman* v. *Simmons-Harris*, 536

U.S. 639, 720 (2002) (Breyer, J., dissenting); *Mitchell*, 530 U.S at 829 (plurality)

In *Mitchell*, the plurality opinion of Justice Thomas, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, rejected a line of cases that used the "pervasively sectarian" test to determine whether public funding indirectly aiding private schools was permissible. 530 U.S. at 829. The plurality recounted the "shameful pedigree" behind the "pervasively sectarian" test, and recognized that the word "sectarian" was defined to apply "almost exclusively to Catholic parochial schools." *Ibid.* Justice O'Connor and Justice Breyer concurred in the judgment, upholding a program of indirect funding to private schools. *Id.* at 837 (O'Connor, J., concurring in the judgment). Two years later, Justice Breyer, in a dissent, outlined the conflict that animated the Blaines, recognizing the discriminatory "sentiment" that "played a significant role in creating a movement that sought * * * to make certain that government would not help pay for 'sectarian' (*i.e.*, Catholic) schooling for children." *Zelman*, 536 U.S. at 721.

Two years after *Zelman*, the Court recognized again in *Locke* that Blaine Amendments are "linked with anti-Catholicism," but declined to consider the historical intent of the Blaine Amendments because the provision at issue was not necessarily a Blaine Amendment. *Locke*, 540 U.S. at 723 n.7. The Court distinguished that provision from Washington's actual Blaine Amendment, which was included in its Enabling Act—the same Enabling Act that authorized Montana's constitution—and which provided that "schools maintained or supported wholly or in part by

the public funds shall be forever free from sectarian control or influence." *Ibid.*

The Court has thus recognized the Blaine Amendments' two primary identifying features: they refer explicitly to the "sectarian" for exclusion from public benefits, and they arose in the context of the movement that swept the nation, intended to remove Catholic influence from public schools.

C. Because of their recognized anti-Catholic origins, Blaine Amendments are presumptively unconstitutional under the Free Exercise Clause.

The First Amendment "subjects to the strictest scrutiny laws that target the religious for special disabilities." *Trinity Lutheran*, 137 S. Ct. at 2019 (quoting *Church of the Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 533 (1993)). A law enacted with "hostility" that is "inconsistent with the First Amendment's guarantee" of neutrality toward religion "must be invalidated." *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1732 (2018).

Blaine Amendments have "a discriminatory purpose" that targets "some or all religious beliefs." *Trinity Lutheran*, 137 S. Ct. at 2021 (quoting *Lukumi*, 508 U.S. at 532). Initially enacted with the intent to exclude Catholics from government benefits and programs, Blaine Amendments today perpetuate that "odious" discrimination. *Id.* at 2025.

Discriminatory intent is a sufficient but not a necessary condition for determining that a law is not in fact neutral. In *Lukumi*, the Court considered local or-

dinances prohibiting animal slaughter that were enacted in response to a new Santeria church in the community that practiced animal sacrifice. 508 U.S. at 527-528. The city's discriminatory purpose was apparent in the text and effect of the ordinances, but also in their timing and context. Upon the licensing of a Santeria church building, the city adopted along with the ordinances a resolution of "'concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety'". *Lukumi*, 508 U.S. at 535. On the record, it "[could not] be maintained, that city officials had in mind a religion other than Santeria." *Ibid.* See also *Masterpiece Cakeshop*, 138 S. Ct. at 1731 ("Factors relevant to the assessment of governmental neutrality include 'the historical background of the decision under challenge [and] the specific series of events leading to the enactment or official policy in question * * * .'" (citation omitted)); *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) ("The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes.").

The Court has also used this approach in applying the Equal Protection Clause. In *Hunter* v. *Underwood*, the Court considered an Alabama state constitutional provision that applied to all persons convicted of certain petty criminal offenses, regardless of race. 471 U.S. 222, 227 (1985). But despite its facial neutrality, there was overwhelming historical evidence that the constitutional provision was intended to disenfranchise African-Americans. *Id.* at 227-229. As a result,

the Court held that this provision of the Alabama Constitution violated the Fourteenth Amendment and could not be enforced. *Id.* at 233.

The *Hunter* Court rejected the district court's reasoning that though the Constitutional Convention adopting the challenged provision was motivated by racial animus, "there had not been a showing that 'the provisions disenfranchising those convicted of crimes [were] based upon the racism present at the Constitutional Convention.'" *Hunter*, 471 U.S. at 224. Rather, because the Constitutional Convention "was part of a movement that swept the post-Reconstruction South to disenfranchise blacks," the Court held that this provision of the Alabama Constitution violated the Fourteenth Amendment and could not be enforced. *Id.* at 229, 233.

In applying *Trinity Lutheran*, at least one state supreme court has exercised caution in interpreting its Blaine Amendment to prevent it from punishing religious groups. New Mexico's Blaine Amendment provides that state funds may not be given to either "sectarian" or private schools. N.M. Const. art. XII, § 3. Under this provision, the New Mexico Supreme Court initially struck down a program that loans textbooks to students at public and private schools. *Moses* v. *Skandera*, 367 P.3d 838 (N.M. 2015), vacated *sub nom. New Mexico Ass'n of Non-public Sch.* v. *Moses*, 137 S. Ct. 2325 (2017) (mem.). This Court granted certiorari, vacated, and remanded for reconsideration in light of *Trinity Lutheran*.

On remand in *Moses* v. *Ruszkowski*, the New Mexico Supreme Court reversed its ruling, recognizing that even though the New Mexico Blaine is facially

neutral in restricting funds to both religious and non-religious schools, "the Free Exercise Clause may still be implicated if its adoption was motivated by religious animus." -- P.3d. --, No. S-1-SC-34974, 2018 WL 6566646, at *9 (N.M. Dec. 13, 2018). The court considered the "historical and social context" of the Blaine Amendment, and found that "anti-Catholic sentiment tainted" the Blaine. *Id.* at *9, *12. It held that "New Mexico was caught up in the nationwide movement to eliminate Catholic influence from the school system, and Congress forced New Mexico to eliminate public funding for sectarian schools as a condition of statehood." *Id.* at *12. Because the Blaine Amendment was inseparable from this religious animus, the New Mexico Supreme Court interpreted the Amendment narrowly to avoid constitutional concerns and reversed its earlier holding to conclude that the textbook lending program did not violate the Blaine. *Ibid.*

It follows from this Court's precedents that laws with the characteristics of Blaine Amendments—*i.e.*, excluding the "sectarian" from public benefits and "linked to anti-Catholicism"—are presumptively unconstitutional because of the animus motivating their adoption. Laws that were intended to exclude minority religious participation in publicly supported schools, but to maintain support for majority religious belief, had an "official purpose to disapprove of a particular religion." *Lukumi*, 508 U.S. at 532. The nationwide campaign to adopt Blaine Amendments means that it is impossible to distance the Blaine Amendments from the anti-Catholic sentiment that spawned them. Enforcing Blaine Amendments reanimates the dead hand of historical discrimination to punish religious people today. By contrast, recognizing that Blaine

Amendments are presumptively unconstitutional would allow local governments to determine how they want to shape their public programs without being weighed down by the bigotry of the past.

D. Montana's Blaine is easily recognizable as a presumptively unconstitutional Blaine Amendment.

1. The text, substance, and context of the Montana Blaine Amendment each attest to its status as a Blaine Amendment. By excluding "direct or indirect appropriation" of money or property from "any sectarian purpose," the Blaine Amendment reveals its historical bias against Catholics and in favor of Protestant "non-sectarian" religious instruction. Mont. Const. art. X, § 6(1).

Even more damning, Montana's Blaine Amendment was adopted as part of the nationwide campaign to exclude Catholics from public benefits. Montana was admitted to the Union in 1889 by the Enabling Act of that same year, which also brought in Washington State, North Dakota, and South Dakota. G. Alan Tarr, *The Montana Constitution: A National Perspective*, 64 Mont. L. Rev. 1, 2 (2003). This Enabling Act required, among other provisions, that "provision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all the children of said States, and *free from sectarian control*." 25 Stat. 676 (1889) (emphasis added). This Enabling Act, in the words of contemporary New Hampshire Senator Henry Blair, was "completing the unfinished work of the failed Blaine Amendment" by requiring states to include anti-Catholic provisions in their constitutions. Patrick M. Garry & Candice Spurlin,

History of the 1889 South Dakota Constitution, 59 S.D. L. Rev. 14, 31 (2014) (citing Jon K. Lauck, *"You Can't Mix Wheat and Potatoes in the Same Bin": Anti-Catholicism in Early Dakota*, 38 S.D. Hist. 1, 32 (2008)). Montana thus adopted its Blaine Amendment as a direct result of anti-Catholic animus.

The anti-Catholic animus at the federal level was matched by anti-Catholic animus in Montana itself. Petitioners explain how Catholics, as they moved west to Montana, were subjected to the same animosity as in other territories. Pet. Br. 35-44. Local politicians, newspapers, and clergy spoke out against Catholic influence in public schools. *Ibid.* And Montana was not free from anti-Catholic violence, including a riot in 1894. *Id.* at 41. It was in the midst of this stew of anti-Catholic sentiment that the delegates of the 1889 Montana Constitutional Convention enacted their Blaine Amendment, uniting national and local animosity to achieve the common goal of banishing Catholics from public schools.

The Montana Supreme Court glossed over all of this history, rejecting any possible Free Exercise violation without considering the discriminatory origin or effect of the Montana Blaine Amendment. App. 32. Such a lapse in analysis is inconsistent with this Court's strong command that laws must avoid even "subtle departures from neutrality." *Lukumi*, 508 U.S. at 534; see also *Masterpiece Cakeshop*, 138 S. Ct. at 1731.

2. Just as in the New Mexico case *Moses* v. *Ruszkowski*, nothing in Montana's context has intervened to cure the animus at the root of the Blaine Amend-

ment. In *Lukumi*, this Court warned that the Free Exercise Clause "commits government itself to religious tolerance," a "high duty" to be followed "upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices." 508 U.S. at 547. Once unlawful discrimination is identified as a reason for a law's enactment, that law "has no legitimacy at all under our Constitution." *City of Richmond* v. *United States*, 422 U.S. 358, 378 (1975).

The 1972 Constitutional Convention, which voted to maintain Montana's Blaine Amendment without substantive changes, did not cure the discriminatory purpose behind the Blaine. The convention delegates considered amending the provision that would become Article X Section 6 of the Montana Constitution, which forbids direct or indirect appropriation of funds for any educational institution "controlled in whole or in part by any church, sect, or denomination." Some delegates advocated revising the language or limiting its impact because of its origin. For example, Delegate Harbaugh detailed the history of the Blaine Amendment and argued that to keep it unmodified in the 1972 Constitution would mean retaining "remnants of a long-past era of prejudice" and that therefore the Blaine Amendment did not belong in the Constitution. 1971-1972 Montana Constitutional Convention Tr. Vol. VI, 2010. Likewise, Delegate Schiltz acknowledged that the Blaine Amendment "is a badge of bigotry, and it should be repealed." *Id.* at 2012. Ultimately, the delegates voted to retain the Blaine Amendment with only a minor addition that ensured the status quo regarding the provision of federal funds to Montana private institutions.

Once discrimination is shown to have been a "substantial" or "motivating" factor behind enactment of a law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor. *Hunter*, 471 U.S. at 228. Under this analysis, as long as the discriminatory language and effect of the Blaine continues, there is no way to show that it would have been adopted independently. The Montana Blaine Amendment still carries the signature language of a Blaine, it still carries with it the anti-Catholic history, and it continues to exclude the same targeted group from access to public benefits. The intent of the 1972 delegates is thus unimportant, because the 1972 Convention voted to maintain a discriminatory provision, not to remove or replace it. The 1972 Convention therefore did not whitewash the Blaine Amendment.

II. Enforcing the Blaine Amendment to exclude religious actors from state programs is separately unconstitutional under *Trinity Lutheran*.

Aside from the animus motivating Montana's Blaine Amendment, there is a separate reason it violates the Free Exercise Clause. It singles out religious actors for disfavored treatment on the basis of their religious status.

A. Montana's broad exclusion of religious actors constitutes status discrimination in violation of *Trinity Lutheran*.

"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*, 137 S. Ct. at 2019 (quoting *Lukumi*, 508 U.S. at 533, 542).

On its face, the Montana Blaine Amendment bars "direct and indirect appropriation" of money or property not only "for any sectarian purpose," but for "aid [to] any church" or any "school * * * controlled in whole or in part by any church, sect, or denomination." Mont. Const. art. X, § 6(1). This in itself disqualifies religious institutions from government benefits and invokes *Trinity Lutheran*'s command that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'" 137 S. Ct. at 2019 (quoting *McDaniel* v. *Paty*, 435 U.S. 618, 628 (1978)).

The Montana Supreme Court only made things worse. Applying the Blaine Amendment, the court held that the student-aid program "violates Montana's constitutional guarantee to all Montanans that their government will not use state funds to aid religious schools." App. 30. Given an opportunity to interpret a facially discriminatory provision in a limited way, the Montana Supreme Court could not have been clearer that it was interpreting its Constitution to "expressly deny[]" religious organizations any otherwise-available support "solely because of [their] religious character." *Trinity Lutheran*, 137 S. Ct. at 2024.

But despite its obvious relevance, the Montana Supreme Court declined to cite *Trinity Lutheran* even once. It "recogniz[ed]" that it "can only close the 'room for play' between the joints of the Establishment and Free Exercise Clauses to a certain extent before [the]

interpretation of one violates the other." App. 32. But it assumed without analysis that "this is not one of those cases" "where prohibiting the aid would violate the Free Exercise Clause." App. 32. Whether on its face or as applied, under the Montana Supreme Court's interpretation of the Blaine Amendment, religious groups are effectively disqualified solely on account of their religious status, contrary to *Trinity Lutheran*.

The effects of that disqualification are magnified by the Montana Supreme Court's expansive view of what constitutes "aid." On its reading, the Blaine Amendment not only bars "aid in the form of the *direct or indirect taking of money* from the public treasury" but rather "*any* type of aid." App. 21-22 (emphases in original). Further, the majority disclaimed any limiting principle regarding small or incidental benefits, declaring that the prohibition applies "when [the state] provides any aid, no matter how small" to a church school. App. 28.

As the dissent noted, the Montana Supreme Court read an already-stringent prohibition of payments as a mandate to purge any "indirect impact" or "indirect effects" working to a religious institution's benefit. App. 66 (Baker, J., dissenting). The majority admitted that "there *may* be a case" where indirect aid cannot be constitutionally denied. App. 32 (emphasis added). But it could not even concede a right to "participation in a general program designed to secure or to improve the health and safety of children"—the exact exclusion rejected in *Trinity Lutheran*. 137 S. Ct. 2027 (Breyer, J., concurring in the judgment) ("cutting off church schools from" access to "ordinary police and fire protection" due to their church affiliation alone violates

the Free Exercise Clause) (quoting *Everson* v. *Board of Educ.*, 330 U.S. 1, 17-18 (1947)).

The Department of Revenue contends that "the scholarship program did not fail because of who the Petitioners *are*; it failed because of what Petitioners proposed *to do*—use the funding provided by the scholarship program to provide their children a religious education." Resp. Br. in Opp. 35. This is obfuscation. The Montana Supreme Court did not hold that Montana's Blaine Amendment barred only the use of aid to fund the inculcation of religious tenets. It held it "broadly and strictly prohibit[ed] aid to sectarian schools." App. 23.

Trinity Lutheran also precludes any argument that a school's religious mission alone means that scholarships for students are necessarily a religious use. It was undisputed that Trinity Lutheran Church "operate[d] . . . for the express purpose of carrying out the commission of . . . Jesus Christ as directed to His church on earth." 137 S. Ct. at 2027 (Sotomayor, J., dissenting). Yet that did not cause the church to forfeit its right to participate in a generally available government benefit, nor did it bless a blanket ban on spending "money * * * in aid of any church." Mo. Const. art. 1 § 7.

The Montana Supreme Court suggested that, at least in aspects of parochial education, it is hard to tell "where the secular purpose end[s] and the sectarian beg[ins]." App. 23 (quoting *State ex rel. Chambers* v. *School Dist. No. 10*, 472 P.2d 1013, 1021 (Mont. 1970)). But religious schools are "member[s] of the community too," and a state cannot facially discriminate against

them out of a distaste for incidental support of religion. *Trinity Lutheran*, 137 S. Ct. at 2022. A *per se* rule that groups with a religious purpose can be barred from aid asks them "to renounce [their] religious character in order to participate" in the benefits available to other citizens. *Id.* at 2024. Cf. *Agency for Int'l Dev.* v. *Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 219 (2013) ("evident hypocrisy").

The state provision that struck down Montana's tax credit program is nearly identical in substance to the exclusionary policy that struck Trinity Lutheran's grant eligibility for playground resurfacing: "No churches [or their schools] need apply." *Id.* at 2024. This Court should clarify that "[a] judicial holding by its very nature is not 'a restricted railroad ticket, good for' one 'day and train only'"—or one playground only. *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 537-538 (2010) (Breyer, J., dissenting) (quoting *Smith* v. *Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting)).

The Free Exercise Clause has always meant that government "cannot exclude" people of faith "*because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." *Trinity Lutheran*, 137 S. Ct. at 2020 (quoting *Everson*, 330 U.S. at 16) (emphasis in original). *Trinity Lutheran* is the latest in a long line of Supreme Court cases to uphold that principle. The decision below blatantly ignores it and must be reversed.

B. Montana's application of its Blaine Amendment is not justified by *Locke*.

Applying the Blaine Amendment, the Montana Supreme Court held that the student-aid program "violates Montana's constitutional guarantee to all Montanans that their government will not use state funds to aid religious schools." App. 30. The aid violates the Blaine Amendment not because of some specific religious use, but because some funds would indirectly go to schools "controlled by churches." App. 30.

While the Montana Supreme Court relied on *Locke* v. *Davey*, 540 U.S. 712 (2004), this Court has already distinguished *Locke* from cases of express status-based discrimination, including status-based discrimination against religious schools.

"*Locke* took account of Washington's antiestablishment interest *only after determining*, as noted, that the scholarship program did not 'require students to choose between their religious beliefs and receiving a public benefit.'" *Trinity Lutheran*, 137 S. Ct. at 2023 (emphasis added) (quoting *Locke*, 540 U.S. at 720-21). *Locke* permitted Washington to bar a specific "essentially religious" use of funds—the pursuit of ministerial study that qualified as "devotional in nature or designed to induce religious faith." *Locke*, 540 U.S. at 716, 721. Before doing so, the Court had determined that the plaintiff "was not denied a scholarship because of who he *was*" or because of his college's religious affiliation. *Trinity Lutheran*, 137 S. Ct. at 2023. As this Court noted, a status/use distinction was built into the scholarship program, which funded attendance at "pervasively religious schools." *Ibid.* (quoting

Locke, 540 U.S. at 724). *Locke* is therefore not relevant to cases of discrimination based on religious status.

Nor can the Montana Blaine Amendment's status distinction be justified by some narrow historical anti-establishment interest. According to the Montana Supreme Court, the Montana Blaine Amendment is justified by a general desire to "more fiercely protect[]" the "separation of church and state" recognized in the federal Constitution. App. 30-31. But an absolute disqualification of religious institutions from general assistance "is obviously not the purpose of the First Amendment," interpreted "fiercely" or otherwise. *Trinity Lutheran*, 137 S. Ct. at 2027 (Breyer, J., concurring in the judgment) (citation omitted).

For these reasons, *Locke* cannot come to the defense of the decision below.

III. Razing the entire scholarship program as a "remedy" for violating the Blaine Amendment only makes the Free Exercise violation worse.

1. The Montana Supreme Court also erred in the "remedy" it imposed for violating the unconstitutional Blaine Amendment: ending the scholarship program altogether. In the name of eliminating any hint of funding to religious people, the Court eliminated funding to a number of non-religious people as well. This is a bit like saying "we had to burn down the village to save it." Far from eliminating discrimination, this "remedy" achieves only the "unanimity of the graveyard," exacerbating the Free Exercise violation. *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624,

641 (1943). Religious discrimination cannot avoid constitutional censure just because some additional victims are nonreligious.

Consider, for example, the constitutional provision at issue in *McDaniel* v. *Paty*, which—like the Montana Blaine Amendment—explicitly discriminated based on religious status: "no minister of the gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the legislature." 435 U.S. 618, 621 n.1 (1978). The Tennessee Supreme Court could not have remedied this discrimination by barring some broader group of individuals (say, all counselors) in order to capture all ministers and priests and prevent them from taking office. The restriction itself was unconstitutional, regardless of how it might have been enforced. Thus, the Court concluded that "[t]he Free Exercise Clause *categorically* prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." *Id.* at 626 (emphasis added); see also *Trinity Lutheran*, 137 S. Ct. at 2019 (denying "benefit solely on account of religious identity * * * can be justified only by a state interest 'of the highest order'").

Hunter v. *Underwood* is also instructive. There, the Court addressed a state constitutional provision on disenfranchisement, which "on its face [was] racially neutral, applying equally to anyone convicted of one of [certain] crimes," 471 U.S. at 227. But nobody "seriously dispute[d]" the "zeal for white supremacy" that had run "rampant" at the Alabama Constitutional Convention of 1901, where the provision was drafted, or that the Convention "was part of a movement that swept the post-Reconstruction South to disenfranchise blacks." *Id.* at 229. Because the provision "was motivated by a desire to discriminate against blacks" and

"continue[d] to this day to have that effect," the Court held that it violated equal protection. *Id.* at 233.

Notably, the Court disregarded expert testimony that the provision's "real purpose" was "to disenfranchise poor whites as well as blacks" to "stem the resurgence of Populism which threatened [the] power" of the Southern Democrats. *Hunter*, 471 U.S. at 230. Even if true, pleading collateral damage to others was ultimately irrelevant. Even if, alone, it were a "permissible motive," "discriminat[ing] against poor whites would not render nugatory the purpose to discriminate against all blacks * * * ." *Id.* at 232.

In fact just the opposite was true: even though the law was neutral on its face and there was some evidence that it was intended to apply to "poor whites" and not just African-Americans, 471 U.S. at 231, the Court concluded that—typically—the only way to invalidate the provision was to show "by a preponderance of the evidence that the same decision would have resulted had the impermissible purpose not been considered." *Id.* at 225 (quoting *Underwood* v. *Hunter,* 730 F.2d 614, 617 (11th Cir. 1984)). But the Court did not seriously entertain that possibility, presumably because the evidence of racial animus at the Constitutional Convention was so overwhelming there was no way to know what the constitutional delegates would have enacted without it. See *id.* at 223.

Here the case is far stronger than in *Hunter*. Beyond the pervasive anti-Catholic bigotry underlying the Blaine movement, the Montana Blaine Amendment expressly discriminates on its face. There is no need to consider anyone's intent or animus, because the discrimination is explicit in Article X Section 6(1).

Any enforcement of that provision (absent, perhaps, a legitimate *Locke*-based anti-establishment concern) inherently violates the Constitution.

The Montana Supreme Court's remedy is thus worlds away from the "leveling down" controversially upheld in *Palmer* v. *Thompson*, 403 U.S. 217 (1971). There, a court had held that segregated public facilities in Jackson, Mississippi, violated the Equal Protection Clause. *Id.* at 219. The city responded by desegregating its "parks, auditoriums, golf courses, and the city zoo," but shutting down entirely the public swimming pools. *Ibid.* City residents sued "to force the city to reopen the pools and operate them on a desegregated basis." *Ibid.* This Court acknowledged "[s]ome evidence" that the pools were closed because of opposition to racial integration in swimming pools. *Id.* at 224-225. But the city also had evidence that the pools had long operated at a loss and that integrating them would make them further unprofitable. *Id.* at 229-230. The Court concluded there was no equal protection violation, because it was "impossible" to "determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators," and there was "an element of futility" in invalidating a law for bad motive as "it would presumably be valid as soon as the legislature * * * repassed it for different reasons." *Id.* at 225.

But certainly the result would not have been the same if the city had closed the pools in reliance on a state constitutional provision stating that "no Black person" could use a public facility. In that circumstance, there would be no need to consider intent, because the law being applied would be facially discriminatory. Nor would the problem be remedied if the state courts then responded to legal challenges not by

invalidating the "no Blacks" law, but by applying the discriminatory law to shut down all of the facilities. It would not be necessary in that instance to search for illicit motive as it would be clear from the face of the law.

2. Nor is this a situation where the Montana Supreme Court construed the Blaine Amendment as having a broader, religiously neutral meaning, despite its plain language. Rather, the Montana Supreme Court repeatedly held that the "Delegates' intent," as reflected by the provision's "plain language," was "expansive and forceful": "to broadly prohibit aid to *sectarian* schools." App. 18 (emphasis added). The overwhelming evidence that the Blaine Amendments are "linked with anti-Catholicism" generally, *Locke*, 540 U.S. at 723 n.7, and in Montana specifically, only further reinforces what is plain from the face of the provision itself, see Pet. Br. 41.

The Montana Supreme Court did note that at least some of the 1972 delegates to the convention that adopted Montana's current version of its constitution exhibited a "strong commitment to maintaining public education." App. 19. But the court made no suggestion that this "commitment" changed the Blaine Amendment's meaning or purpose to exclude aid to all private schools. Indeed, the majority opinion clearly indicates otherwise in at least three ways.

First, the majority emphasized that it "determine[s] the meaning and intent of constitutional provisions from the plain meaning of the language," with only limited exceptions: "when the language is vague or ambiguous or extrinsic aids clearly manifest an intent not apparent from the express language." App. 18

(citation omitted). The court then immediately interpreted the Blaine Amendment, holding that its "title clearly manifests the Delegates' intent to broadly prohibit aid to sectarian schools" and that the provision's "text is equally expansive, prohibiting * * * any direct or indirect appropriation or payment * * * for any sectarian purpose or any . . . school . . . controlled in whole or in part by any church, sect, or denomination." App. 18. And the court's further analysis of the provision refers repeatedly to "sectarian education," "sectarian schools," and "sectarian purpose[s]." App. 18-19.

Second, even the Montana Supreme Court's passing reference to "the Delegates' strong commitment to maintaining public education" is equated in the opinion with a commitment to "ensur[e] that public education remained free from *religious* entanglement." App. 19 (emphasis added). The court further notes one delegate's statement that "federal and state mandates to concentrate funds in public schools" had made the state's "educational system * * * strong" and that any diversion would "weaken that system in favor of schools established for private or religious purposes." App. 20. But nowhere does the court conclude, or even suggest, that such statements reflected a different purpose behind, or new meaning in, the plain text of the Blaine Amendment. Rather, the court relies on these statements to reinforce its conclusion that the delegates intended to prohibit even "indirect" aid such that Article X, Section 6 "more broadly prohibits aid *to sectarian schools* than the Federal Establishment Clause." App. 20-21 (emphasis added).

Third, the Montana Supreme Court emphasized that the 1972 delegates "intended Article X, Section 6,

to retain the meaning of Article XI, Section 8, Montana Constitution of 1889," which contained the original (and identical) Blaine language. App. 22. The court then noted that its pre-1972 precedent thus "remains helpful," citing a 1970 case that focused on "secular" versus "sectarian," not public versus private. App. 22-23. In short, the court made clear that it relies on the plain language of a provision except in rare circumstances and made no effort to even suggest that such circumstances exist here, consistently describing the Blaine Amendment as targeting "sectarian" aid and "sectarian" schools.

Moreover, even if the 1972 delegates had preserving public schools as an underlying motive, it does not excuse using religious discrimination to accomplish it. *Hunter*, 471 U.S. at 232 (alleged permissible motive did "not render nugatory" evident racial discrimination). The New Mexico Supreme Court reached the same conclusion regarding its Blaine Amendment. Delegates to the New Mexico Constitutional Convention "chose to play it safe" in enacting the Blaine Amendment required by New Mexico's Enabling Act: they explicitly "broaden[ed] the provision to reach all private schools," thus "avoid[ing] drawing a line between secular and sectarian education." *Ruszkowski*, 2018 WL 6566646, at *4. Still, applying the Free Exercise Clause and this Court's ruling in *Trinity Lutheran*, the New Mexico Supreme Court construed the state's Blaine Amendment narrowly to avoid "concerns under the federal constitution." *Id.* at *12. It held that "[e]ven though it appears that the people of New Mexico intended for [the Blaine Amendment] to be a religiously neutral provision," the history of the

federal and state Blaine Amendments led to the conclusion that "anti-Catholic sentiment tainted its adoption." *Ibid.*

3. This is not to suggest that Montana could never distinguish the state's public and private schools, or that it is required to keep the scholarship program in place forever. Those choices presumably would be within the prerogative of the legislature. "The First Amendment requires government neutrality toward religious viewpoints; it does not require the state to treat public schools and private schools alike." *Ruszkowski*, 2018 WL 6566646, at *8. But such a law would have to be enacted on constitutional terms, at minimum, via text that does not explicitly "single out the religious for disfavored treatment," *Trinity Lutheran*, 137 S. Ct. at 2020, and via motives free from religious hostility, *Masterpiece Cakeshop*, 138 S. Ct. at 1731 ("The Constitution commits government itself to religious tolerance, and upon even *slight suspicion* that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." (internal quotation marks and citation omitted) (emphasis added)).

This Court's decision in *R.A.V.* v. *City of St. Paul, Minnesota*, 505 U.S. 377 (1992), is instructive. There the Court struck down an ordinance that—as construed by the Minnesota Supreme Court—criminalized the use of "fighting words" that invoked "race, color, creed, religion or gender." *Id.* at 380. The Court acknowledged that "fighting words" were "constitutionally proscribable," *id.* at 383, but nonetheless struck down the ordinance. Because it prohibited only

fighting words that invoked certain topics, the "practical operation" of the ordinance created both "content" and "viewpoint discrimination." *Id.* at 391. Such a statute could not survive strict scrutiny because "[a]n ordinance not limited to the favored topics" would have been just as effective, and there was no legitimate government interest—let alone a compelling government interest—in enacting the ordinance in a way that "impos[ed] unique limitations" on protected rights. *Id.* at 396.

So too here. If Montana wants to fund only public schools, and not private schools, it may do so by passing such legislation. Just as it would have been possible to prosecute R.A.V. under a valid law that was not viewpoint discriminatory, here there would be no problem if Montana were to choose to discontinue the program without relying on a religiously discriminatory law. What Montana cannot do is impose such a restriction via a law like the Blaine Amendment that was enacted out of religious animus and targets the religious for disfavored treatment.

The Montana Supreme Court's "leveling down" is particularly egregious. Not only did it breathe new life into the Blaine Amendment's religious bigotry, but it extended the religious discrimination even more broadly by striking the tax credit program as applied to donations to religious *and* secular schools. An injury is not remedied by distributing its pain more broadly.

Moreover, the Montana Supreme Court construed the Blaine Amendment so broadly as to potentially limit a large range of legislative actions that would otherwise be within the realm of possibility. And be-

cause the Blaine Amendment is in the state constitution, the limitations "impose[] a special disability" against religious actors, who now are "forbidden the [opportunities] that others enjoy or may seek without constraint" through the regular legislative process. *Romer* v. *Evans*, 517 U.S. 620, 631 (1996). They, instead, can access those same opportunities "only by enlisting the citizenry of [Montana] to amend the state constitution." *Ibid.*

* * *

Enforcing the Montana Blaine Amendment against Petitioners violates the Free Exercise Clause because, like all other Blaine Amendments, it was enacted out of religious animosity, and because it disqualifies religious people from access to government funding based solely on their religious status. The remedy imposed by the Montana Supreme Court for violating this unconstitutional law only made things worse by harming non-religious people in addition to religious people.

CONCLUSION

This Court should reverse the judgment of the Montana Supreme Court and hold that all Blaine Amendments are presumptively unconstitutional.

Respectfully submitted.

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