No. 18-1195

In The

Supreme Court of the United States

KENDRA ESPINOZA, JERI ELLEN ANDERSON, and JAIME SCHAEFER

Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE, and GENE WALBORN, in his official capacity as DIRECTOR of the MONTANA DEPARTMENT OF REVENUE,

Respondents.

On Writ of Certiorari
To The Montana Supreme Court

BRIEF OF 131 CURRENT AND FORMER STATE LEGISLATORS

in support of the Petitioners

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are 122 current and 9 former state legislators from 34 states, 27 of which have Blaine Amendments and 33[2] of which have experienced litigation over school choice, student aid, and similar educational issues.[3] In this capacity, your *Amici* have a unique vantage point from which to understand how historic Blaine Amendments—born of anti-Catholic bigotry—continue to haunt modern day legislative efforts to enact beneficial educational programs.

A list of all 131 *Amici* legislators is contained in Appendix A.

SUMMARY OF THE ARGUMENT

The history of the failed Federal Blaine Amendment and of the passage of Blaine Amendments in 37 states is well-know to this Court, and seven current or former justices have acknowledged their "shameful pedigree." However, the problem with state Blaine Amendments is not merely their pedigree. Rather, they continue to serve

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[1] The parties have consented to the filing of this Brief in writing, via blanket letters of consent. No counsel for any party authored this Brief in whole or in part. No person or entity other than *Amici* and their Counsel made a monetary contribution intended to fund the preparation or submission of this Brief.

[2] The one state that has not experienced such litigation, Wyoming, has two separate Blaine Amendments.

[3] *See*, *generally*, *School Choice and State Constitutions: A Guide to Designing School Choice Programs*, 2d ed., https://ij.org/report/school-choice-and-state-constitutions/ (last visited Sept. 18, 2019) (click on links for individual states).

as thumbs on the scales of political debate when legislators like your *Amici* attempt to enact beneficial educational programs. Legislators who might otherwise desire to enact various school choice programs[4] will sometimes—understandably—be hesitant to do so, when litigation is threatened during debate. And that threat is viable given that some school choice programs have in fact been declared unconstitutional under state Blaine Amendments.

Recognizing that the "shameful pedigree" of state Blaine Amendments renders them unconstitutional is not merely an academic exercise; it will have a salutary effect in statehouses around the country by removing those thumbs from the scales of political debate and allowing school choice bills to pass or fail on a level playing field.

ARGUMENT

I. THE "SHAMEFULL PEDIGREE" OF THE STATE BLAINE AMENDMENTS.

At issue in this case is the Montana Constitution's Blaine Amendment. It is well known that seven justices or former justices of this Court have addressed the pernicious history of the failed federal Blaine Amendment and the successful enactment of

[4] "School choice" will hereinafter be used—as it generally is—to cover a wide variety of programs, including the scholarship program at issue here and many other programs that your *Amici* have considered or may in the future consider as beneficial to their constituents.

Blaine Amendments in numerous states. *See*, *e.g.*, Cert. Pet. 7 n.3; Pet.'s Br. 31-45 (addressing the history of Blaine Amendments and citing to the relevant opinions of this Court). Nonetheless, a few quotations will be helpful before moving on to demonstrate that the Montana provision at issue is indeed a Blaine Amendment.

First, the four justices in the plurality in *Mitchell v. Helms*—Justice Thomas, joined by Chief Justice Rehnquist, and Justices Scalia and Kennedy—wrote that:

> hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow . . . . Opposition to aid to "sectarian" schools acquired prominence in the 1870's with Congress's consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that "sectarian" was code for "Catholic." Notwithstanding its history, of course, "sectarian" could, on its face, describe the school of any religious sect, but the Court eliminated this possibility of confusion when, in *Hunt v. McNair*, 413 U.S., at 743, it coined the term "pervasively sectarian"-a term which, at that time, could be applied almost exclusively to Catholic parochial schools . . . .
>
> In short, nothing in the Establishment Clause

> requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now.

530 U.S. 793, 828 (2000) (citations omitted).

Similarly, in *Zelman v. Simmons-Harris*, three justices—Justice Breyer, joined by Justices Stevens and Souter—expanded upon the anti-Catholic origins of the Blaine Amendments. After surveying the relevant history of Catholic immigration and of religious battles over control of public schools, including the anti-Catholic bigotry involved, Justice Breyer summarized that survey this way:

> the "Protestant position" on this matter, scholars report, "was 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)." And this sentiment played a significant role in creating a movement that sought to amend several state constitutions (often successfully), and to amend the United States Constitution (unsuccessfully) to make certain that government would not help pay for "sectarian" (i.e., Catholic) schooling for children.

536 U.S. 639, 721 (2002) (Breyer, J. dissenting).

Finally, in *American Legion v. American Humanist Association*, Justice Thomas again raised the anti-

Catholic bias that was inherent in the term "sectarian." In doing so, he quoted from the same passage of the *Mitchell* plurality, that is quoted above, emphasizing the "shameful pedigree" of the Amendment. 139 S. Ct. 2067, 2097 n.3 (2019).

Having shown the "shameful pedigree" of state Blaine Amendments, it is important, of course, to demonstrate that Montana's constitutional provision is, in fact, a Blaine Amendment. The starting point is this Court's opinion in *Locke v. Davey*. In *Locke*, this Court opined that the Washington state Blaine Amendment was not at issue in that case:

> The *amici* contend that Washington's Constitution was born of religious bigotry because it contains a so-called "Blaine Amendment," which has been linked with anti-Catholicism. As the State notes and Davey does not dispute, however, the provision in question is not a Blaine Amendment. The enabling Act of 1889, which authorized the drafting of the Washington Constitution, required the state constitution to include a provision "for the establishment and maintenance of systems of public schools, which shall be . . . free from sectarian control." Act of Feb. 22, 1889, ch. 180, § 4, ¶ Fourth, 25 Stat. 676. This provision was included in Article IX, § 4, of the Washington Constitution ("All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence"), and is not at issue in this case. Neither Davey nor *amici* have established a credible connection

> between the Blaine Amendment and Article I, § 11, the relevant constitutional provision [actually at issue in the case]. Accordingly, the Blaine Amendment's history is simply not before us.

540 U.S. 712, 723 n.7 (2004) (citations omitted).

Thus, this Court has already opined that merely requiring public schools to be free of "sectarian control" is sufficient to qualify a state constitutional provision as a Blaine Amendment. And importantly, the enabling act that this Court mentioned in *Locke* was also the enabling act for Montana, North Dakota, and South Dakota.

However, while Washington merely imported the language from the enabling act into its constitution, North Dakota, South Dakota, and—as relevant here—Montana, all went further in following the "shameful pedigree" of the failed federal Blaine Amendment.[5]

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[5] The North Dakota Blaine Amendment reads as follows:

> All colleges, universities, and other educational institutions, for the support of which lands have been granted to this state, or which are supported by a public tax, shall remain under the absolute and exclusive control of the state. No money raised for the support of the public schools of the state shall be appropriated to or used for the support of any sectarian school.

North Dakota Const. Art VIII, § 5.

> The South Dakota Blaine Amendment reads as follows:
>
> No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious

Montana's Blaine Amendment reads as follows:

> The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.

Montana Const. Art. X, § 6 (1).

This language is significant in light of the debates over the federal Blaine Amendment in the Senate. Various Senators did not believe that the House version of the Blaine Amendment would accomplish its purpose. Of those senators, Senator Frederick T. Frelinghuysen addressed the issue in the most systematic manner. He noted that, while the House version *attempted* to prohibit funding for "sectarian

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> society or institution." South Dakota Const. Art. VI, § 3. "No appropriation of lands, money or other property or credits to aid any sectarian school shall ever be made by the state, or any county or municipality within the state, nor shall the state or any county or municipality within the state accept any grant, conveyance, gift or bequest of lands, money or other property to be used for sectarian purposes, and no sectarian instruction shall be allowed in any school or institution aided or supported by the state.

South Dakota Const. Art. VIII, § 16.

purposes," it failed to do so.[6] Senator Frelinghuysen noted a

> serious objection to the amendment than that [he had] noticed. The amendment only applies to a school fund and prohibits its being appropriated to schools under denominational control. There is not a word in the amendment that prohibits public money from being appropriated to theological seminaries, to reformatories, to monasteries, to nunneries, to houses of the Good Shepherd, and many kindred purposes . . . .
>
> Besides, sir, even in reference to schools this amendment only prohibits appropriating the school fund to denominational schools. It does not by any means forbid appropriations from the Treasury generally even to denominational schools.

Senator Frelinghuysen then explicitly enumerated

> six different modes by which the people can be taxed for sectarian purposes.

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[6] The House version read as follows:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no 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 or denomination; nor shall any money so raised or lands so devoted be divided between religious sects or denominations. This article shall not vest, enlarge, or diminish legislative power in the Congress.

4 Cong. Rec. 5580 (1876).

1. By appropriating money raised for school purposes to sectarian schools.
2. By appropriating money from the general Treasury to sectarian schools.
3. By appropriating public money to sectarian institutions other than schools, as theological institutions established by public funds, when so established, to sectarian purposes.
4. By devoting schools or other institutions established by public funds, when so established, to sectarian purposes.
5. By making appropriations of public money to religious denominations, or to promote their interests.
6. By appropriating public money to an institution to promote infidelity or for the benefit of an anti-religious sect.

4 Cong. Rec. 5561 (1876).

Comparing Montana's Blaine amendment to Senator Frelinghuysen's six deficiencies in the House version, one can see that, other than not addressing the "infidelity" deficiency, Montana's amendment aggressively incorporated all of Frelinghuysen's anti-Catholic provisions. Montana prohibits both direct and indirect assistance. It covers money from "*any* public fund or monies." It covers numerous institutions beyond schools, including churches, i.e., "denominations." Additionally, it covers land and other property.

Thus, Montana's Blaine Amendment is vastly

more hostile to "sectarian" institutions than that of Washington, which was at addressed in *Locke*. However, *all* Blaine amendments are problematic at a practical level for state legislators such as your *Amici*. This Brief turns to that problem now.

II. STATE BLAINE AMENDMENTS IMPEDE THE EFFORTS OF STATE LEGISLATORS WHO SEEK TO PASS BENEFICIAL LEGISLATION FOR THEIR CITIZENS.

In addition to courts construing state Blaine Amendments as prohibiting various educational aid programs,[7] it is an all too common occurrence for opponents of such programs to invoke Blaine Amendments (without mentioning their "shameful pedigree") in their efforts to intimidate legislators. As your *Amici* know firsthand, some legislators are reluctant to push for legislation that opponents are claiming will be subject to a lawsuit and will be found unconstitutional. Even though many legislators would otherwise be willing to introduce bills that they know will benefit their citizens, they must be realistic about the effect that claims of unconstitutionality will have

[7] *See*, *e.g.*, Cert. Pet. 30-33 (summarizing the following programs that have been declared violative of Blaine Amendments: In Maine, Vermont, and Montana, parents may not use a state scholarship program to send their children to a religious school; children in Washington may not receive publicly funded transportation to religious schools; children in California and Kentucky may not receive a public loan of textbooks at religious schools; and in Colorado, New Mexico, and Montana, entire student aid programs were struck down under Blaine Amendments).

on colleagues.

Examples abound. First, Petitioners in this case have documented the adverse impact of opposition claims of unconstitutionality on recent legislative efforts in Idaho, Kentucky, Missouri, and New Hampshire, dealing with scholarship programs, vouchers, and tax credit programs. *See* Cert. Pet. 36 & n.18. Examples from other states can easily be added. Your *Amici* will mention just two more—from an Americans United for Separation of Church and State (AU) "Wall of Separation Blog" posted just four days before the filing of the Petition in the instant case. AU noted that it had opposed vouchers in both Florida and Iowa.[8]

The extent to which Blaine rhetoric can be elevated is well illustrated by AU's blog. As explained there, AU sent letters to legislators in both states. Each is interesting for a separate illustrative reason.

First, in Florida, the AU letter explained to legislators that a state court had declared a prior program unconstitutional because it violated the state's Blaine Amendment.[9] AU then informed the Florida legislators that the state Supreme Court, in the same case, also found that the prior program

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[8] Americans United for Separation of Church and State, *The Fight Over States' Private School Voucher Proposals Is Heating Up*, https://www.au.org/blogs/wall-of-separation/the-fight-over-states-private-school-voucher-proposals-is-heating-up (last visited Sept. 18, 2019).

[9] March 5, 2019, letter to Committee on Education, Florida Senate at 3 & nn.11-12, *available at* https://www.au.org/sites/default/files/2019-03/FL%20SB%207070%20%28ESA%29%203.5.19.pdf.

violated the uniform public schools provision of the state constitution, but never mentioned that the Blaine Amendment was *no part* of the Supreme Court's analysis.[10] Indeed the state Supreme Court explicitly stated that it was deviating from the lower court by not even conducting a Blaine Amendment analysis.[11] But that is exactly the point—invoking the Blaine Amendment, whether legitimately or not—is used as a thumb on the scale in debate and lobbying.

Second, in Iowa, the state constitution does not even contain a Blaine Amendment, but the state Supreme Court has interpreted another provision *as if it were* a Blaine Amendment. And that is all that it took for AU to make the Blaine Amendment argument in its Iowa letter, again placing that thumb on the scale.[12]

But even such stretching of the Blaine argument to specific state contexts in which it is inapplicable, is just the tip of the iceberg. Opposition comes not just from individual legislators or lobbyists in response to individual bills in their states. Rather, many national organizations invoke Blaine amendments in their opposition to educational choice. For example, the nation's largest teachers union, the National Education Association, baldly asserts that "[v]ouchers tend to be a means of circumventing [state] Constitutional prohibitions [i.e., Blaine Amendments] . . . ." *The Case Against Vouchers*,

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[10] *Id.* at 3 and n3.

[11] *Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006).

[12] March 1, 2019, letter to Committee on Education, Iowa Senate at 3 & nn.11-13, available at https://www.au.org/sites/default/files/2019-03/IA%20SF%20372%20%28ESA%29%203.1.19.pdf

http://www.nea.org/home/19133.htm (last visited Sept. 6, 2019).

In fact, invocations of Blaine Amendments are so prevalent that the bipartisan National Conference of State Legislatures warns legislators of this problem in its *Comprehensive School Choice Policy: A Guide for Legislators* ("*Comprehensive Policy*")[13]. The *Comprehensive Policy* warns that "[a] common argument by opponents of school vouchers is that they violate state constitutional provisions that ban state support for religious schools (also known as Blaine amendments)." *Id.* at 11.

Thus, a decision by this Court that Montana's Blaine Amendment is unconstitutional will produce a salutary effect in all thirty-seven states that are suffering under such amendments, and likely in other states that face school choice litigation. It will free legislators to engage in the typical give and take over what educational legislation ought to be passed without the thumb of Blaine amendments being placed on the scales of legislative debate.

CONCLUSION

For the foregoing reasons and for others advanced by the Petitioners, this Court should reverse the decision of the Supreme Court of Montana.

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[13] This document is available at http://www.ncsl.org/documents/educ/ComprehensiveSchoolChoicePolicy.pdf.

Respectfully submitted,
this 18th day of September,

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APPENDIX A

NAME OF INDIVIDUAL AMICI LEGISLATORS

Representative David Faulkner, Alabama
Senator Lora Reinbold, Alaska
Representative Mark Finchem, Arizona
Senator Linda Gray, Arizona
Representative Anthony Kern, Arizona
Representative Ben Toma, Arizona
Representative Mary Bentley, Arkansas
Representative Harlan Breaux, Arkansas
Representative Joe Cloud, MD, Arkansas
Senator Jason Rapert, Arkansas
Representative Dan Sullivan, Arkansas
Representative Rod Beckenfeld, Colorado
Representative Susan Beckman, Colorado
Representative Perry Buck, Colorado
Former Senator Kent Lambert, Colorado
Representative Kimmi Lewis, Colorado
Former Senator Kevin Lundberg, Colorado
Senator Vicki Marble, Colorado
Senator Bob Rankin, Colorado
Representative Rod Pelton, Colorado
Representative Kim Ransom, Colorado
Representative Janice Rich, Colorado
Representative Lori Saine, Colorado
Representative Shane Sandridge, Colorado
Senator Jerry Sonnenberg, Colorado
Representative Kevin Van Winkle, Colorado
Representative Dave Williams, Colorado
Senator Rob Woodward, Colorado
Representative Timothy D Dukes, Delaware
Senator Dennis Baxley, Florida
Representative Walter “Mike” Hill, Florida
Representative Timothy Barr, Georgia

Representative Wes Cantrell, Georgia
Senator Bill Heath, Georgia
Senator William Ligon, Georgia
Representative Sage G. Dixon, Idaho
Former Representative Ronald M. Nate, Ph.D., Idaho
Representative Heather Scott, Idaho
Representative Woody Burton, Indiana
Senator Dennis Kruse, Indiana
Former Representative Cindy Noe, Indiana
Representative Jeff Thompson, Indiana
Representative Terry Baxter, Iowa
Representative Dean Fisher, Iowa
Senator Dennis Guth, Iowa
Representative Sandy Salmon, Iowa
Representative Renee Erickson, Kansas
Representative Susan Humphries, Kansas
Representative Trevor Jacobs, Kansas
Senator Mary Pilcher-Cook, Kansas
Representative Eric L. Smith, Kansas
Representative Barb Wasinger, Kansas
Representative Kevin Bratcher, Kentucky
Representative Joseph Fischer, Kentucky
Senator Robert Foley, Maine
Senator Stacey Guerin, Maine
Senator Lisa Keim, Maine
Representative Brian Daniels, Minnesota
Senator Mary Kiffmeyer, Minnesota
Representative Reo Tim Miller, Minnesota
Representative Peggy Scott, Minnesota
Representative Ben Baker, Missouri
Representative Mike Moon, Missouri
Senator Jennifer Fielder, Montana
Senator Cary Smith, Montana
Senator Robert Clements, Nebraska
Former Senator Don Gustavson, Nevada
Former Representative JR Hoell, New Hampshire

Former Representative Daniel C. Itse, New Hampshire
Representative Cathrynn Novich Brown, New Mexico
Representative Rebecca Dow, New Mexico
Representative David Gallegos, New Mexico
Representative Rod Montoya, New Mexico
Representative Gregg W Schmedes, MD, New Mexico
Senator William Sharer, New Mexico
Representative James Strickler, New Mexico
Representative Pat McElraft, North Carolina
Senator Dick Dever, North Dakota
Senator Robert Erbele, North Dakota
Representative Kim Koppelman, North Dakota
Representative Bob Paulson, North Dakota
Representative Dan Ruby, North Dakota
Representative Austen Schauer, North Dakota
Former Representative Diana Fessler, Ohio
Representative Candice Keller, Ohio
Senator Micheal Bergstrom, Oklahoma
Senator Larry Boggs, Oklahoma
State Senator Nathan Dahm, Oklahoma
Representative Mark Lepak, Oklahoma
Representative Jim Cox, Pennsylvania
Representative Rob Kauffman, Pennsylvania
Senator Scott Martin, Pennsylvania
Representative Brett Miller, Pennsylvania
Representative Dave Zimmermann, Pennsylvania
Representative Bruce Bryant, South Carolina
Representative Alan Clemmons, South Carolina
Senator Wes Climer, South Carolina
Senator Tom Davis, South Carolina
Senator Lawrence Grooms, South Carolina
Senator Terra Kelly, South Carolina
Representative John McCravy, South Carolina
Representative Garry Smith, South Carolina

Senator Danny Verdin, South Carolina
Representative Fred Deutsch, South Dakota
Representative Randy Gross, South Dakota
Senator Phil Jensen, South Dakota
Senator Jack Kolbeck, South Dakota
Representative Tina Mulally, South Dakota
Senator Stace Nelson, South Dakota
Representative Sue Peterson, South Dakota
Representative Doug Post, South Dakota
Senator Jim Stalzer, South Dakota
Representative Manny Steele, South Dakota
Representative Bruce Griffey, Tennessee
Representative Bud Hulsey, Tennessee
Representative Dennis Powers, Tennessee
Representative Terri Lynn Weaver, Tennessee
Representative David Erinakes, Texas
Representative Dan Flynn, Texas
Representative Phil King, Texas
Representative Rick Miller, Texas
Former Representative Molly White, Texas
Delegate R. Steven (Steve) Landes, Virginia
Delegate Dave LaRock, Virginia
Delegate Brenda Pogge, Virginia
Representative Matt Shea, Washington
Representative Jim Walsh, Washington
Senator Michael Azinger, West Virginia
Delegate Eric Porterfield, West Virginia
Delegate Terry Waxman, West Virginia
Senator Cheri Steinmetz, Wyoming