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 Supreme Court of Montana

BRIEF OF MONTANA CONSTITUTIONAL CONVENTION DELEGATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

More than 45 years ago, 100 delegates, elected from across the State and representing a diverse cross section of Montana society, gathered in Helena at a Constitutional Convention. The youngest delegate was age 24, born half a century after the eldest, age 74. After two months of extensive debate, the Convention unanimously adopted a proposed Constitution that was ratified by the voters of Montana on June 6, 1972. With then-sitting legislators excluded from serving as delegates, delegates brought fresh eyes and grassroots perspectives to the Convention floor. Elected by and truly representative of their peers, the delegates' views reflected their extensive community experience in local government, school boards, and civic organizations. Among their number were ranchers, homemakers, farmers, teachers, ministers, and every other profession one might imagine (beekeeper, accountant, veterinarian, insurance agent, business manager, and so on)—along with a good number of lawyers and a handful of prior legislators. *Amici* are a majority of the surviving framers of Montana's foundational law. *Amici* include the following delegates:

Bob Campbell was an attorney in private practice in Missoula when elected as a delegate. He served on the Bill of Rights Committee.

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[1] Counsel of record for all parties consented to the filing of the brief. S. Ct. R. 37.3(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

Gene Harbaugh, ordained as a Presbyterian minister, was serving as a pastor in Poplar at the time of the Convention. A member of the Education and Public Lands Committee, he authored the minority report on the no-aid clause that was adopted in large part by the Convention.

Jerome Loendorf was the chief prosecutor for Lewis and Clark County, after serving as the county's public defender, when he was elected to the Convention. He was Vice Chairman of the Legislative Committee and a member of the Style, Drafting, and Transition Committee. He proposed the floor amendment that was adopted, after style revisions, as the no-aid clause in force today.

Michael McKeon graduated from law school the year before the Convention and practiced law in Anaconda. He served on the Administration and Revenue and Finance Committees.

Lyle Monroe was two years out of college at the time of the Convention, working in health and social services in Great Falls. He was a member of the Bill of Rights Committee.

Marshall Murray served as a member of the Montana Legislature from 1960 to 1964. An attorney in Kalispell at the time of the Convention, he was Chairman of the Rules and Resolution Committee and a member of the Bill of Rights Committee.

Arlyne Reichert was a widowed mother of five children and a research assistant at the McLaughlin Institute in Great Falls, as well as a trustee for the local public library, when she was elected to the Convention. She served on the Legislative Committee.

Mae Nan Robinson Ellingson was a widow, a graduate student in political science, and the youngest delegate, elected at age 24, the minimum age for running. She was a member of the Legislative Committee.

Lynn Sparks Keeley returned home to Butte, Montana a few years before the Convention after working at the U.S. Embassy in the Dominican Republic. She served on the Local Government and Public Information Committees.

Roger Wagner was a farmer and rancher in Nashua, a small rural community in Northeastern Montana, when he was elected to the Convention. He was Vice Chairman of the Public Health, Welfare, and Labor Committee.

Amici write to share their considerable knowledge of the history and substance of the 1972 Montana Constitution. Having participated in debating and drafting the Constitution and having witnessed firsthand the public discussions surrounding ratification, *amici* have deep personal knowledge of the animating intent and objectives underlying the Montana Constitution and the no-aid clause, MONT. CONST. art. X, § 6. *Amici* can attest that far from being driven by anti-religious bigotry, the no-aid clause was essential to the Convention's efforts to promote educational opportunity for all through a robust state-funded public school system, and—as adopted to assure the pass-through of federal funding to religious schools—reflected the judgment of the Convention, and the people of Montana, about how to best serve the interests of both religious institutions and public schools.

INTRODUCTION AND SUMMARY OF ARGUMENT

Reflecting back on his time as the delegate chosen to be President of the Constitutional Convention, Leo Graybill, Jr. wondered, "How does it happen … that 100 men and women drawn together in a political process called a Constitutional Convention, were largely able to … fashion a new constitution which greatly improved on the old and in many respects set a high standard for Montana and for other states who have adopted parts of it as well?" MONT. CENTENNIAL COMM'N, 100 DELEGATES: MONTANA CONSTITUTIONAL CONVENTION OF 1972 13 (1989) ("100 DELEGATES"). The answer, he thought, was that the delegates were an "unusual group" of ordinary Montanans, drawn from all walks of life, for whom the political system was an interest, but generally not a career. *Id.* Montana would be fortunate if future convention delegates were "as far-seeing, hardworking, and tolerant of the viewpoint of others" as those who served at the 1972 Convention. *Id.*

The delegates' hard work and tolerance were on full display in their consideration and adoption of the no-aid clause at issue here. That provision, which was exhaustively debated and modified on the floor to enable religious schools to benefit from federal funds provided to the State, sits at the intersection of several overarching concerns of the Convention. Delegates erected a strong wall around public funds generally, barring their use for any private programs (religious or non-religious) and limiting taxation to public purposes. And they built that wall even higher

and stronger in the realm of education because their breathtakingly ambitious goals for Montana's educational system—guaranteeing equal educational opportunity—required strict protection of the State's funds for its public schools.

In adopting a no-aid clause to serve the lofty goals they set for education in Montana, the delegates were not blind to the concerns voiced by some delegates that some of the support for late nineteenth century no-aid provisions in the United States was based on anti-Catholic animus. But they repudiated any such history—consistent with their rejection of provisions from the 1889 Constitution that were biased against religious groups viewed as outside the mainstream in the nineteenth century, such as Mormons.

Rather than being motivated by anti-religious animus, many delegates urged adoption of the no-aid clause to protect religious institutions from government interference. Some of those delegates, echoing testimony from religious groups within Montana, would have favored prohibiting even the pass-through of federal funds. For the majority of delegates, however, the no-aid clause that emerged from extensive debate struck the right balance by protecting state funds for public education while ensuring religious schools could avail themselves of federal resources.

This sovereign choice regarding how to fund and structure education, endorsed by the people of Montana in a ratification vote, is precisely the sort of choice that the federal constitution leaves to the authority of the States. Nothing in the federal

constitution requires dismantling Montana's commitment to use state public funds for state public programs. On the contrary, our federalist structure dictates deference to the choices made by Montana citizens through a deliberative and democratic process.

ARGUMENT

I. The 1972 Montana Constitution Was Approved By Montana Voters After A Highly Public, Open, And Deliberative Process That Overhauled The State's Constitution.

A. State constitutions reflecting local conditions and understanding are fundamental to the federal system. This dual constitutional structure reflects the intent of the federal constitution's Framers that individual rights would often be subject to two layers of protection, federal and state. And it allows evolution of local solutions to local problems within the vast realm of powers that are not assigned to the national government and are reserved to the States. Our federalist design of complementary constitutional frameworks thus embodies the Framers' recognition that there should be no one-size-fits-all solution to defining the contours of a government's role in pursuing the objectives of its citizens.

State constitutions are perhaps the most important manifestations of the "autonomy and independence of the states" that the Constitution of the United States "recognizes and preserves." *Erie R.*

Co. v. Tompkins, 304 U.S. 64, 78 (1938) (citation omitted). Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution … are reserved to the States respectively, or to the people." U.S. CONST. amend. X. "This amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 752 (1833). The most foundational exercise of each State's "residuary and inviolable sovereignty," The Federalist No. 39, p. 285 (B. Wright ed. 1961) (J. Madison), is embodied in its state constitution.

Jurists ranging from Justice Brennan to Judge Sutton, along with constitutional scholars throughout the decades, have recognized the vital importance of state constitutions in protecting individual liberties; recognizing fundamental rights not explicit in the federal constitution; and allowing this Nation's citizenry to fine-tune the limits of governmental authority and the extent of governmental obligations, State by State.[2] State constitutionalism, in short,

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[2] *See, e.g.*, JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304 (2019); Randy J. Holland, *State Constitutions: Purpose and Function*, 69 TEMP. L. REV. 989 (1996); Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law*

serves as a structural mechanism for American constitutional law to develop in a manner that accounts for "differences in culture, geography, and history," SUTTON, *supra*, at 17.

One of the most vital areas of sovereignty vested in the States is education. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973) ("[E]ducation is perhaps the most important function of state and local governments.") (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)). The federal constitution makes no reference to schools or education, leaving to the States the establishment of a public education system, its financing, and the contours of the right to a quality public education. *See id.* at 58 ("The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States."); *see also United States v. Lopez*, 514 U.S. 549, 580-81 (1995) (Kennedy, J., concurring) ("[I]t is well established that education is a traditional concern of the States.").

Through the lively democratic process underpinning the drafting and ratification of its 1972 Constitution, Montana adopted new, lofty goals for excellence and equity in its public education system, requiring it to preserve public funds to achieve those objectives. *See infra* pp. 16-23. At the same time, Montana adopted safeguards to ensure that religious education could proceed free from governmental interference. *See infra* pp. 23-29. Given the absence

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Courts Reading Statutes and Constitutions, 70 N.Y.U. L. REV. 1 (1995).

of any federal constitutional provision dictating the manner in which States may raise and expend funds on education, and the long-recognized "play in the joints" of the federal Constitution's two religion clauses, *Locke v. Davey*, 540 U.S. 712, 718 (2004) (quoting *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970)), there is ample space to defer to Montana's education funding choices here, and no unavoidable conflict between the Montana and federal constitutions that would require otherwise. *See* Resps. Br. 45-48.

In short, nothing in the federal constitution undermines Montana's sovereign prerogative, exercised by the 1972 Constitution, to deploy public funds to guarantee equal quality public education, and to build a church-state wall for education in that acknowledged space between the Free Exercise and Establishment Clauses. Our federalist system was designed to allow precisely such choices.[3]

B. The sovereign choices of the people of Montana are embodied in a thoroughly debated foundational law designed "to improve the quality of life, equality of opportunity and to secure the

[3] All the more so here, where the Montana Supreme Court's remedy to achieve what Montana's constitution demands—striking down the entire tax credit scheme and thereby treating religious schools in the same way as all other private schools—preserves Montana's constitutional promise of channeling public funds to public schools while avoiding any hint of discrimination between religious and other private schools. Such state choices are entitled to respect and deference under our federalism's dual constitutional structure. *Accord* Resps. Br. 35-36.

blessings of liberty for this and future generations." MONT. CONST., preamble.

The 1960s was an era of tectonic shifts in Montana politics. Reapportionment of legislative districts based on population redistributed power from rural to urban areas, while the power of the Anaconda Copper Company—which once dominated Montana politics—began to wane. LARRY M. ELISON & FRITZ SNYDER, THE MONTANA STATE CONSTITUTION 8 (2011). These and other changes spurred what historians described as a "new activism" that manifested in calls for a new Constitution. *Id.*

The first step toward a new Constitution was a study commissioned by the Montana Legislature in 1967 to determine if the existing constitution was working. *Id.* The resulting report concluded that about half of the 1889 Constitution should be revised or repealed. Harry W. Fritz, *The 1972 Montana Constitution in a Contemporary Context*, 51 MONT. L. REV. 270, 272 (1990). One of the chief complaints was that "the specificity of the 1889 Constitution bred a need for adjusting details" through constitutional amendment. Richard Roeder, *The 1972 Montana Constitution in Historical Context*, 51 MONT. L. REV. 260, 266 (1990). In addition, the structural provisions regarding the executive and legislative branches were considered unwieldy and inadequate to modern needs. *Id.* at 263-66.

Following the initial study, the Legislature created a Constitutional Revision Commission that issued recommendations for specific constitutional changes and unanimously endorsed a convention as the best way to accomplish change. ELISON &

SNYDER, *supra*, at 9. The people of Montana approved a convention by a nearly two-to-one margin in a 1970 referendum. *Id.* at 8-9.

The people voted again in 1971 to select the 100 delegates from across the State to form the Convention. *Id.* at 9. The delegates were, by and large, a group of ordinary Montanans who answered the call to complete an extraordinary undertaking. With sitting legislators precluded from serving, the vast majority of delegates were newcomers to state politics, although some had served as legislators and several had served in local government. *Id.* at 10. That proved to be fortuitous because, as Leo Graybill, Jr., remarked, the "delegates brought none of the acrimony and bitterness to the convention that often develops between seasoned politicians with preconceived positions on major state issues." 100 DELEGATES at 13. To emphasize the non-partisan nature of their task, the delegates chose to seat themselves alphabetically, rather than by party. ELISON & SNYDER, *supra*, at 11.

Charged by the people of Montana to completely overhaul the State's Constitution, the Convention was structured to avoid simply importing or rubberstamping any part of the 1889 Constitution into the new Constitution. As a starting point for its work, the Convention was provided myriad reports from multiple sources. The first set, from the Revision Commission, included recommendations for the legislative, executive, judicial, taxation, and local government articles. *Id.* at 9. A second set consisted of studies prepared by a variety of issue-specific citizen groups. *Id.* In addition, the Convention

received more than 1,500 suggestions directly from individual Montanans. *Id.* at 11. Finally, the most important reference materials were 2,300 pages of reports on every topic that might be considered by the Convention. *Id.* These reports were prepared by a second commission that the Legislature funded to research and prepare reference materials, while prohibiting it from offering recommendations. *Id.* at 11-12.

Armed with thousands of pages of background information, the delegates organized themselves into committees to study the reports, conduct public hearings, and propose recommended articles for the Convention as a whole. *Id*. at 11. There were ten substantive committees and four procedural ones, including a style committee that prepared the final version of each proposed article for passage. *Id.* at 11-12. The delegates decided that all Convention proceedings should be open to the public, including committee hearings, and required at least three days notice of all hearings to maximize public participation. *Id.* at 12. Each report to the Convention from the substantive committees included a proposed article related to its work, the rationale for the proposal, and—more often than not—a minority proposal suggesting variations on the committee proposal. *Id.* at 11.

Because most committee reports included both majority and minority proposals, debate on the floor "was a true contest between principal contenders on any given point." *Id.* Debate sometimes continued until one or two in the morning. *For This And Future Generations: Montana's 1972 Constitutional*

Convention, MONTANA PBS (Aug. 9, 2004), https://tinyurl.com/y4ca4qpk. "There was no issue on which debate was limited; the delegates discussed fully all motions, amendments, and viewpoints." ELISON & SNYDER, *supra*, at 12. After two months of this exhaustive give-and-take, with all views fully aired, the 100 delegates unanimously signed the proposed Constitution. 7 MONT. CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 3041-3046 (1979) ("Tr.").[4]

Debate extended beyond the Convention hall, as well, and it did not end when the Constitutional Convention concluded. Both during the Convention, and over the next few months after its close, the people of Montana engaged in wide-ranging discussion and campaigning, with multiple pamphlets in circulation and more than 12,000 column-inches of newspaper coverage of the Convention and the resulting ratification debate. *See* Tyler M. Stockton, *Originalism and the Montana Constitution*, 77 MONT. L. REV. 117, 121-24 (2016). On June 6, 1972, the Constitution that had been unanimously signed by the 100 representative delegates was ratified by popular vote.

[4] The Verbatim Transcript of the Montana Constitutional Convention is available at https://tinyurl.com/uc6o4nj.

II. The No-Aid Clause Was A Critical Part Of The Delegates' Efforts To Make High Quality Public Education The State's Highest Public Purpose.

The no-aid clause was proposed as part of a Constitution that contained a firm commitment to protecting public funds for public uses along with bold promises of educational equality. The driving force behind the Convention's adoption of some form of a no-aid clause was thus not religious animus, but strong support for the State's guarantee of public education. Convention delegates recognized that a high-quality education system was essential to Montana's future. They were also acutely aware that providing a public education system that was both excellent and equitable would require substantial resources at a time when education spending already accounted for 70 cents of every tax dollar. *See* 6 Tr. 1968 (Martin). Consistent with an overarching concern of the Convention that public funds be preserved for public programs, the Convention deemed it essential to limit public aid to private religious schools in order to guarantee sufficient funding for public education.

A. A Central Objective of the New Constitution Was to Ensure that Public Funds Were Spent Only for Public Purposes.

Multiple provisions within the 1972 Constitution reflect the overarching principle that public funds should be spent only on public programs within the control of the State. For example, the

Constitution's Legislative Article prohibits any appropriation "for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not under control of the state." MONT. CONST. art. V, § 11(5). As one delegate explained, the issue was not whether private programs were beneficial—they "may be very commendable, for example, it may be a very worthwhile person, a very worthwhile private corporation with a good deal that might even make something for the state." 4 Tr. 665 (Harper). But the question was "should the state, should the Legislature, ever be in the business of making appropriations to anything other than public agencies?" *Id.* The Convention concluded it should not, ruling out appropriations to support even worthy private programs, of both a religious and non-religious nature. Similarly, the Constitution requires taxes to "be levied … for public purposes," MONT. CONST. art. VIII, § 1, a provision that generated virtually no floor debate, *see* 5 Tr. 1377-78.

Just as the Constitution restricted state support to private organizations (including religious ones), it also permitted the legislature to exempt many private organizations (including churches), from paying property taxes. MONT. CONST. art. VIII, § 5(1)(b) ("The legislature may exempt from taxation . . . [i]nstitutions of purely public charity . . . places for actual religious worship, and property used exclusively for educational purposes."). This no-ask/no-give approach to religious and charitable organizations demonstrates that there was no animating drive within the Convention to deplete the coffers of religious organizations or to reduce their

activities or influence, or to impede the free exercise of religion. The goal was rather to separate public and private programs into distinct spheres with respect to funding (and control).

B. The Convention Viewed Quality Public Education as Montana's Highest Public Purpose.

A paramount use for public funds contemplated by the Convention was education. As was the case under the 1889 Constitution, the 1972 Constitution provided for a "public school fund" consisting of income from certain public lands, among other sources, that would "forever remain inviolate, guaranteed by the state against loss or diversion." MONT CONST. art X, §§ 2-3. But the 1972 Constitution went further. Its promise of educational equality, MONT. CONST. art. X, § 1(1), meant that public funds had to be protected for an increasingly important and difficult (and therefore likely more costly) state endeavor: to provide an equitably-funded, quality education to every Montanan. Preservation of public funds for public education, rather than anti-religious bias, was thus the driving concern behind the no-aid clause.

The education provisions adopted by the Convention raised the bar for Montana's public education system, reflecting the delegates' judgment that quality public education was essential to the State's future well-being. The 1972 Constitution set a lofty goal for the State's education system—to "develop the full educational potential of each person"—and guaranteed "[e]quality of educational

opportunity … to each person of the state." MONT. CONST. art. X, § 1(1). Delegates recognized that it would take significant funding to realize this goal, and that the state's resources were limited. 6 Tr. 1949-50 (Harbaugh) ("[T]he committee realizes that economic resources of the state limit this goal, and yet it's our belief that it's very important to set forth a goal for education and that the development of our human resources to the fullest possible extent ought to be a primary goal of the state's educational enterprise.").

In addition, the Constitution imposed a new mandate of equitable funding. At the time, courts had held that four States' localized educational funding mechanisms were unconstitutional classifications based on wealth. 2 Tr. 722. Studies presented to the Education Committee indicated that the wealth of Montana school districts varied by as much as a ratio of 10,000 to 1. *Id.* at 723. Some "poor districts must tax their residents three or four times as much as rich districts to provide less than half as much money per student." *Id.* To begin to remedy these vast disparities, the 1972 Constitution required the legislature to "provide a basic system of free quality public elementary and secondary schools" and to "fund and distribute in an equitable manner … the state's share of the cost of the basic elementary and secondary school system." MONT. CONST. art. X, § 1(3). The resulting equitable funding mandate filled precisely the sort of federal constitutional gap that state constitutions are needed to fill, given the

importance of a uniform, high caliber system of education to democratic self-governance. [5]

These elevated goals of excellence and equity demanded diligence in protecting the public school system. In the words of Education Committee Chairman Richard Champoux: "Because of this overriding importance of education, the committee recognizes the awesome task of providing the appropriate constitutional provisions necessary to protect and nurture the public educational system." 6 Tr. 1948.

C. The No-Aid Clause Was Deemed Essential to Ensuring Continued Support for Quality Public Schools.

One of the provisions the Convention judged necessary to protect and nurture public education was the no-aid clause. The top two reasons for the no-aid clause identified by the Education Committee were maintaining "unequivocal support … for a

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[5] See generally SUTTON, *supra*, at 22-41, for a discussion of the role of federal and state constitutions and their interplay in shaping education equality and access to school funding, including a detailed discussion of *San Antonio Independent School District v Rodriguez,* 411 U.S. 1 (1973). That case held that education was not a fundamental right protected by the United States Constitution subject to strict scrutiny and declined to strike down a local funding system that exacerbated inequalities in wealth and access to education. This Court had not yet ruled when the Montana Constitutional Convention was held. Its 1973 ruling reversed a three-judge panel that had held, before the Convention, that a local funding system in Texas was unconstitutional. *Rodriguez v. San Antonio Indep. Sch. Dist.,* 337 F. Supp. 280 (W.D. Tex. 1971), rev'd, 411 U.S. 1 (1973).

strong public school system" and the fact that "[e]ducation is primarily a function of the state and is properly regulated by the state." Education and Public Lands Committee Proposal, 2 Tr. 713, 729 ("Education Committee Proposal").

Debate regarding the no-aid clause was animated and comprehensive, both within the Education Committee and on the Convention floor. As recalled by Chairman Champoux, the Education Committee "decided right off to defuse the church-state matter by having a major hearing in the early weeks of the convention on a Saturday in the House Chamber, that lasted all day. We invited everyone that wanted to come and state their views and they came from everywhere." 100 DELEGATES, *supra*, at 30.

After "long and serious consideration," the Education Committee proposed to include a provision "which strongly prohibits direct or indirect aid from any public fund of the state to any sectarian educational institution or for any sectarian purpose." Education Committee Proposal, 2 Tr. 728. Specifically, the Education Committee proposed a no-aid clause specifying:

> Neither the legislative assembly, nor any county, city, town, or school district … shall ever make directly or indirectly, any appropriation, or pay from any public fund or monies whatever, … in aid of any church, or for any sectarian purpose, or to aid in the support of any school … controlled in whole or in part by any church, sect or denomination whatever.

Id.

Delegate William Burkhardt carried the committee's no-aid proposal on the Convention floor. 6 Tr. 2008. A graduate of Yale Divinity School, Delegate Burkhardt accepted the call of the First Congregational Church in Hardin, Montana in his mid-20s, before moving to be pastor of Plymouth Congregational Church in Helena, where he was serving when he was elected to the Convention. 100 DELEGATES, *supra*, at 45. As he explained, the "primary and significant advantage secured by the provision is the unequivocal support it provides for a strong public school system." 6 Tr. 2008. In the Education Committee's view, the "growth of a strong, universal, and free educational system in the United States has been due in part to its exclusively public character," and "[a]ny diversion of funds or effort from the public school system would tend to weaken that system in favor of schools established for private or religious purposes." *Id.* at 2008-09.

Delegate Burkhardt was sensitive to the fact that the "church-state issue, which is interwoven with the question of public aid to nonpublic schools, stirs deeply held emotional feelings in various sectors of the public." *Id.* at 2009. But, on balance, he shared the view of the majority of the Education Committee—ultimately shared by a majority of the Convention—that a no-aid clause was essential to support for a world-class public education system. *Id.*; *see also, e.g.* 6 Tr. 2016 (McNeil) ("I am speaking to you today … as one who is dedicated to preserving our public school system. And that's what this issue

is all about. I don't think we ought to dilute that in any way.").

The committee report also transmitted a minority proposal that was originally submitted by Gene Harbaugh. Delegate Proposal No. 164, 1 Tr. 311. The minority proposed to delete the words "or indirectly" from the no-aid clause and to add the sentence "This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to nonpublic education." Education Committee Proposal, 2 Tr. 744. The minority explained that it agreed with the goal of "[e]quality of educational opportunity for all," but that this was a "hollow promise" unless some provision was made to protect nonpublic education, especially given the increasing federal role in financing education. *Id.* at 744, 746. Advocates of the minority proposal did not dispute the need to preserve the State's public funds, although some of them thought the no-aid clause was overkill in this regard, given the other provisions restricting the expenditure of public funds to public programs. *See* 6 Tr. 2015 (Harbaugh) ("I think we ought to realize that we have [a limit on public funds] at least two other places in the proposed Constitution we've already adopted …. I guess if you put it in there three times, you've really got the message across.").

On the Convention floor, the primary debate was regarding whether to add the sentence expressly permitting federal funds to flow to nonpublic schools. *See generally* 6 Tr. 2008-2031. No delegate offered an amendment to omit any no-aid clause, although some stated that this was their preference. *See, e.g.*, *id.* at

2012 (Brown). Delegate Jerome Loendorf offered a revised version of the Minority Proposal that restored the word "indirectly"—thus maintaining a strict restriction on state aid—while adopting the minority proposal's new sentence expressly permitting a pass-through of federal funds. *Id.* at 2013. The Loendorf Amendment was adopted. *Id.* at 2025-26. After revisions by the Committee on Style, the Convention adopted a no-aid clause that read:

> (1) The legislature … shall not make any direct or indirect appropriation or payment from any public fund or monies, … 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.
>
> (2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education.

MONT. CONST. art. X, § 6.

The clause was adopted with 80 delegates voting in favor and 17 against, with the vast majority of "no" votes reflecting opposition to the federal pass-through rather than opposition to restricting state aid. *Compare* 6 Tr. 2025-26, *with* 7 Tr. 2672. Among those voting in favor was Delegate Harold Arbanas, a Catholic priest who was then the director of education for the Diocese of Great Falls. *See* 7 Tr. 2672; 100 DELEGATES, *supra*, at 35. As adopted, the no-aid clause struck a balance between conserving state funds for public schools and ensuring that federal support for nonpublic education would pass

through without restriction to religious schools. The official voter information pamphlet reinforces that the driving force behind the no-aid clause was preserving state funds for public schools. It describes Article X, Section 6 as "prohibit[ing] state aid to private schools." Mont. Constitutional Convention, *Proposed 1972 Constitution for the State of Montana: Official Text with Explanation*, at 15 (1972), https://tinyurl.com/rodsybe.

III. Far From Reflecting Anti-Religious Bias, The No-Aid Clause Ensured Federal Funds Could Flow To Religious Schools And Reflected Concern About Government Interference In Religious Affairs.

Along with the need to preserve public funds for the new core guarantee of equal educational opportunity, many delegates saw the no-aid clause as essential to protecting religious institutions from a "potential threat" of government interference: "The control which comes with aid could excessively involve the state in religious matters and could inadvertently favor one religious group ever another." Education Committee Proposal, 2 Tr. 729. As one of the committee members reported during the floor debate, "[i]n all our testimony, … we had three different church denominations that spoke before us who are very, very opposed to any public money—or any federal money—to be allocated to any of their church or schools." 6 Tr. 2016 (Conover). A member of the Seventh Day Adventists appeared before the committee and "pointed out very strongly that if any of this money is ever distributed to any private

school, then the federal government or the state will take over part of their church work." *Id.* at 2016-2017.

Delegate George Harper's comments to the Convention were emblematic of this perspective. Having served as the pastor of St. Paul's United Methodist Church in Helena for more than a decade by the time of the Convention, 100 DELEGATES, *supra*, at 64, Delegate Harper explained that his denomination and two others "believe in this idea of separation of church and state" and preferred "not to receive aid for our church school," which they no longer controlled. 6 Tr. 2013. In his view, "when state and a dominant church, or any church, get mixed up, it always has seemed to work to the detriment of both the church—the religious institution, finally, and to the state itself." *Id.* at 2012-13.

The concern voiced for protecting religion from government interference does not mean that the delegates put their heads in the sand about private school students' need for resources or ignored the concerns of those who believed anti-Catholic sentiment had propelled the no-aid movement nearly a century earlier. To the contrary, the Convention's vigorous debate included a full airing of those concerns, as well as responses about how the no-aid clause served different and valuable purposes in the modern era.

Delegate Gene Harbaugh put these issues front and center when he propounded the Education Committee's minority proposal, a variation of which was ultimately adopted through the Loendorf Amendment, 6 Tr. 2026. Delegate Harbaugh was

raised on a ranch in eastern Montana and attended rural public schools, including a one-room elementary school and a high school that was miles from his home, with a dormitory for housing pupils when weather made it impossible for them to return home. 100 DELEGATES, *supra*, at 63. Ordained as a Presbyterian minister, Delegate Harbaugh served as a pastor when he was elected as a delegate, *id.*, and, consistent with the support for ecumenical cooperation at the time, arranged for the local Catholic priest to deliver the Lenten service at the First Presbyterian Church in Poplar during his absence for the Convention.

Delegate Harbaugh spoke passionately about both educational opportunity and the need to repudiate the "remnants of a long-past era of prejudice" within the no-aid clause, describing the Blaine Amendment's history as involving "a great deal of concern across the country about foreigners and about Catholics in particular." 6 Tr. 2010. To address this history, his proposal permitted "federal aid to nonpublic education," not state aid. *Id.*; *see also id.* at 2011 (reiterating that "[w]e're talking about federal aid in this amendment, not about state aid"). Although initially opposing any form of no-aid clause, the Montana Catholic Conference ultimately supported this approach. *See* 6 Tr. 2027 (Campbell) (describing the Montana Catholic Conference's testimony before the Bill of Rights Committee, in which they "assured us that they did not intend to have the State of Montana funds diverted to nonpublic schools, to their schools," only federal funds).

By ensuring that federal aid could pass through to religious schools, even if it were provided first to the State (as with block grants), Delegate Harbaugh emphasized that the State could "give all students within our state an equal educational opportunity without regard to their religious preference, … without any additional cost to the State of Montana." *Id.* at 2011. This ultimately-adopted compromise position thus served the needs of students attending religious schools while still securing the no-aid clause's central goal of securing public funding for high-quality public education.

Other delegates who spoke eloquently regarding the anti-Catholic history of the Blaine Amendment supported this proposal. Delegate Maurice Driscoll, "the parent of 10 children attending both public and private schools," described it as a replacement for the "archaic provision" embodied in the original proposal. 6 Tr. 2012. Delegate John Schiltz served in the 1951 and 1953 sessions of the Montana Legislature and was the "first Roman Catholic ever elected to anything in Yellowstone County." 100 DELEGATES, *supra*, at 88. He spoke movingly of living "with the Blaine Amendment and the philosophy of the Blaine Amendment all the days of my life," recalling "when they burned crosses on the rimrocks in Billings." 6 Tr. 2012. Although he would have preferred to omit any no-aid clause due to his perception of it "as a badge of bigotry," Delegate Schiltz was content to accept Delegate Harbaugh's "well-reasoned statements" in support of combining a restriction on state aid with a provision guaranteeing pass-through of federal funds. *Id.*

For those concerned about excessive government supervision of religious schooling, however, restraining public aid to religious schools was not a "badge of bigotry" but a "very wise" "evolution in history." *Id.* at 2012, 2013 (Harper). And some delegates opposed even the pass-through of federal funds on the ground that it could weaken the public school system. For example, Delegate McNeil, who reported that he was a Protestant "happily married to a charming Catholic woman" and raising his children in the Catholic faith, concluded that "it absolutely escapes me, the distinction between state and federal moneys," because any public funds "could open the door to a violation of our public school system." *Id.* at 2016.

But regardless of viewpoint on the no-aid clause and the minority proposal, every delegate who discussed the anti-Catholic bias associated with some supporters of the late nineteenth-century Blaine Amendment repudiated that bias. And the majority of the delegates accepted the compromise proposal as the best way to serve the needs of students in religious schools while still preserving state funds for public schools. Delegate Carman Skari, a historian-farmer from Liberty County who delivered the daily invocation just a few days after the no-aid debate, put it well when he explained, "I don't think we should, intentionally, build the same [church-state] wall, however, in regard to the federal moneys. … I don't think this will undermine our public school system; I think it may even strengthen it." 6 Tr. 2018-19; *see also, e.g.*, *id.* at 2015 (Blaylock) ("I am a public school teacher. I worked in public schools all my life. … [I]f those federal funds come in and are for those

purposes, for all the children of the State of Montana, I can't see harm in that.").

The provisions regarding religion elsewhere in the 1972 Montana Constitution confirm that the no-aid clause was motivated by concern for preserving public funds for public schools and avoiding government supervision of religion, not anti-religious bias. The Convention adopted a groundbreaking right to individual dignity that prohibited both public and private discrimination on multiple bases, including religious beliefs. See MONT. CONST. art. II, § 4 ("The dignity of the human being is inviolable. … Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of … religious ideas."). And in section 5, the Convention adopted wording echoing the First Amendment to guarantee the free exercise of religion and prohibit the establishment of religion. MONT. CONST. art. II, § 5. The committee responsible for the Bill of Rights proposal determined that the question of public aid to religious schools was best addressed by the education article, *see* 5 Tr. 1646 (Monroe), but no delegate voiced any conflict between the free exercise guarantee and the provisions governing education. Moreover, the 1972 Constitution expressly jettisoned provisions from the 1889 Constitution that reflected anti-religious bias (particularly against the Church of Jesus Christ of Latter-Day Saints). *See* 5 Tr. 1647 (Monroe) (stating that the "committee felt especially strong about removing the anti-Mormon biases reflected in the previous wording").

Petitioners' argument (Br. 44-45) that "bigotry was a 'motivating factor' behind article X, section 6(1)" because the 1972 Convention "readopted" the no-aid clause is therefore mistaken on multiple grounds. The Convention engaged in a thorough and reasoned debate on the provision and materially altered it to better serve students in religious schools by permitting pass-through of federal funds. Delegates repudiated the Blaine Amendment history while adopting a strict limit on state aid to avoid state encroachment on religious affairs and to conserve limited state funds for public schools. This sovereign judgment of a convention of 100 democratically-elected Montana citizens about the use of their collective resources, ratified by the people of Montana as a whole, should be respected in our federal system.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Montana should be affirmed.

Respectfully submitted.

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