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 AMERICAN FEDERATION OF TEACHERS, NATIONAL EDUCATION ASSOCIATION, MONTANA FEDERATION OF PUBLIC EMPLOYEES, AND MONTANA QUALITY EDUCATION COALITION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

John M. West
Ramya Ravindran
BREDHOFF & KAISER, PLLC
805 Fifteenth St. NW
Suite 1000
Washington, DC 20005
(202) 842-2600

Kevin K. Russell
Counsel of Record
Erica Oleszczuk Evans
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
kr@goldsteinrussell.com

(Additional Counsel on Inside Cover)

Alice O'Brien
Kristen Hollar
NATIONAL EDUCATION
ASSOCIATION
1201 16th St. NW
Washington, DC 20036
(202) 822-7035

Rhonda Weingarten
David J. Strom
AMERICAN FEDERATION
OF TEACHERS
555 New Jersey Ave. NW
Washington, DC 20001
(202) 393-7472

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INTEREST OF AMICI CURIAE[1]

The American Federation of Teachers (AFT), an affiliate of the AFL-CIO, was founded in 1916 and today represents 1.7 million members in more than 3,500 local affiliates nationwide. Many AFT affiliates represent members in States where there is language in the state constitution that bars the use of state funds to support sectarian education. In cases that directly impact K-12 education, AFT frequently submits amicus briefs in this Court.

The National Education Association (NEA) is the oldest and largest organization of educators, with over three million members who serve our Nation's students in public school districts, colleges, and universities. Since its founding over a century and a half ago, NEA has worked to create, expand, and strengthen the quality of public education available to all children.

The Montana Federation of Public Employees (MFPE) is Montana's largest union, with 24,000 members living and working in virtually all Montana communities. MFPE is the merged affiliate of NEA and AFT. MFPE members include school teachers, probation and parole officers, higher education faculty, health care and social workers, school classifieds, police and sheriff officers, office personnel, and revenue collectors. MFPE under one name or another has been in continuous operation since 1882.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae, their members, or their counsel contributed money to fund the brief's preparation or submission. All parties have lodged letters of blanket consent to the filing of amicus briefs.

MFPE is seven years older than the State of Montana. MFPE represents and advocates for its members and what they do at the bargaining table; in the governor's office; at the state legislature; and before local, state, and university system governing boards and commissions as well as the courts.

The Montana Quality Education Coalition is a statewide advocacy organization focusing on adherence to Article X of the Montana Constitution as it impacts K-12 public education. Members include Montana public school districts as well as statewide entities representing the interests of school business officials, educators, rural schools, locally elected trustees, and school administrators.

SUMMARY OF ARGUMENT

I. This Court lacks jurisdiction to review the Montana Supreme Court's decision unless petitioners can establish Article III standing to invoke it. *See, e.g.*, *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617-18 (1989). They cannot.

Petitioners bring an as-applied challenge to the Montana Constitution's no-aid provision. As applied here, the provision's only effect was to eliminate a $150 (or less) tax credit provided to third parties who contribute to private student scholarship organizations (SSOs) that may be funded in a variety of ways and that may, or may not, use that money to provide petitioners scholarships. The effect of that change in the tax law on petitioners is too attenuated and speculative to satisfy Article III.

The elimination of the tax credit will not injure families whose scholarship awards are unaffected by the change (*e.g.*, because an SSO prioritizes returning scholarship recipients). Nor will the elimination of the tax credit affect families that would not have received a scholarship even with the tax credit in place (*e.g.*, because the SSO they applied to received more applications than it could grant). Petitioners can only speculate that they would be among those who, because of the Montana Supreme Court's decision, will be denied a scholarship they otherwise would have gotten. Such predictions are all the more speculative because they depend on guesses about how the elimination of a very limited tax credit will affect donations to SSOs.

This Court has repeatedly held that similarly situated third-party beneficiaries lack standing to

challenge the government's tax treatment of someone else. *See Allen v. Wright*, 468 U.S. 737 (1984), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26 (1976). Indeed, the Court has left open "the question of whether a third party *ever* may challenge [Internal Revenue Service (IRS)] treatment of another." *Simon*, 426 U.S. at 37 (emphasis added). That is a serious question because allowing standing to those indirectly affected by the tax treatment of others would open the doors to pervasive litigation over a multitude of government tax decisions that have downstream effects on third parties.

In the trial court, petitioners successfully argued that they had standing because the no-aid provision injured their ability to compete for SSO scholarships, in the same way the racial preference in *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), injured contract bidders' ability to compete for highway contracts, or the way the restriction in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), prevented the church from competing for a state grant to resurface its playground. But this case is different because the no-aid provision does not regulate the competition for scholarships; it simply eliminated a tax credit that may have increased the size of the pool of scholarships available. The effect of the no-aid provision on petitioners, then, is distinctly indirect and derivative, in a way the effect of the provisions challenged in *General Contractors* and *Trinity Lutheran* on the plaintiffs in those cases was not. Petitioners are more

analogous to a company that would have bid to obtain the resurfacing contract in *Trinity Lutheran*. Nothing in that case or cases like it suggest that such an indirectly affected party would have Article III standing to challenge the government's tax treatment of someone else.

II. Even if the Court were to reach the merits of this case, petitioners' constitutional challenge to the no-aid provision must fail, because nothing in the Free Exercise Clause prohibits the State of Montana from declining to fund religious education—and that is particularly the case where, as here, the State is not funding any nonpublic education, whether secular or sectarian. What petitioners seek is a broad constitutional ruling that the Free Exercise Clause prohibits States from refusing to fund religious education. That proposition cannot be squared with the intent of the framers of the Free Exercise Clause, nor of those who adopted and ratified the Fourteenth Amendment.

"Constitutional rights are enshrined with the scope they were understood to have when the people adopted them," *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008), and thus in interpreting the Free Exercise Clause, the Court should look to "the history of the times in the midst of which the provision was adopted," *Reynolds v. United States*, 98 U.S. 145, 162 (1879). That historical record makes clear that the framers of the First Amendment could not have intended the Free Exercise Clause to prohibit States from declining to fund religious education because those framers—including in particular James Madison and Thomas Jefferson—had just led the opposition to a religious education funding bill in

Virginia immediately prior to the drafting of the First Amendment. Madison and Jefferson's efforts resulted in not only the defeat of a Virginia assessment bill providing for the public funding of religious teachers but also passage of the Virginia Bill for Religious Liberty, which prohibited any compulsory taxpayer support of religion. Similar "compelled support" clauses were found in the constitutions of many of the States that ratified the Bill of Rights, and it is inconceivable that these framers and ratifiers would have intended the Free Exercise Clause to negate those constitutional provisions and the prohibition on compelled taxpayer funding of religious education that they embodied.

Equally implausible is the notion that those who adopted and ratified the Fourteenth Amendment could have intended to incorporate the Free Exercise Clause if they had understood the Free Exercise Clause to prohibit a State from declining to fund religious education. It is undisputed that during the very same period in which the Fourteenth Amendment was adopted and ratified, numerous States were enacting constitutional provisions prohibiting the use of public funds for religious education. Congress was also enacting legislation advancing the principle of "no public funding for religious schools." It is implausible that Congress and the States believed by adopting and ratifying Fourteenth Amendment, they would be nullifying the very no-aid provisions they were simultaneously enacting.

ARGUMENT

I. This Court Lacks Jurisdiction Because Petitioners Lack Article III Standing.

To invoke the jurisdiction of a federal court a party must establish standing under Article III. *See, e.g.*, *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617-18 (1989).[2] This is true even for cases coming to this Court from the state court system, where Article III does not apply. *See id.* at 623; *see also* Stephen M. Shapiro et al., *Supreme Court Practice* 19-7 (11th ed. 2019) ("Although a state supreme court may be willing to adjudicate the constitutionality of a state law without the presence of a plaintiff with a personal stake in the outcome of the controversy, the Supreme Court will not review such a decision."). For more than a century, this Court has faithfully applied that requirement and denied review of state court decisions in cases brought by plaintiffs who lack Article III standing, even when it has meant that a state supreme court's rejection of a federal constitutional claim was not subject to this Court's review. *See, e.g.*, *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001); *Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952); *Tileston v. Ullman*, 318 U.S. 44 (1943) (per curiam); *Tyler v. Judges of the Court of Registration*, 179 U.S. 405 (1900).[3]

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[2] Montana has not challenged petitioners' standing in this Court, but the Court is "required, of course, to raise these matters on [its] own initiative if necessary." *ASARCO*, 490 U.S. at 611.

[3] A state court *defendant* may sometimes seek this Court's review of an adverse state court judgment even though the *plaintiff* lacked Article III standing to bring the suit. That is

This is one of those cases. While Montana was entitled to entertain petitioners' claims in its state courts, petitioners cannot establish Article III standing to seek this Court's review of the resulting judgment.

A. Petitioners' Claimed Injury From The Denial Of Tax Credits To Third-Party Donors Is Too Attenuated And Speculative To Support Article III Standing.

The "irreducible constitutional minimum of standing contains three elements." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). "First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'" *Ibid*. (citations omitted). Second, there must "be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.'" *Ibid.* (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)) (alterations in

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because an adverse state court judgment (*e.g.*, requiring the defendant to pay damages) may itself constitute an Article III injury to the defendant sufficient to allow this Court to review the judgment at the defendant's request. *See ASARCO*, 490 U.S. at 618-19. But that exception has no application here, where it is the state court *plaintiff* seeking review of the state court's denial of the plaintiff's federal claims. In such cases, the judgment's only effect is to deny the plaintiff relief she lacked Article III standing to request in the first place. A plaintiff cannot bootstrap the denial of such a claim into Article III standing to appeal.

original). Third, it must be "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561 (citation omitted).

When, as in this case, "the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." 504 U.S. at 562. In "that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well." *Ibid*. And courts "cannot presume either to control or to predict" those third parties' "exercise of broad and legitimate discretion" in response to the challenged government action. *Ibid*. (citation omitted). Few plaintiffs in such cases can demonstrate causation and redressability, and petitioners have not done so here.

1. Petitioners originally filed suit to challenge a Montana Department of Revenue rule (Rule 1, Mont. Admin. R. 42.4.802) that, they said, unconstitutionally discriminated against them by forbidding petitioners from using scholarships funded with tax-supported donations to attend private religious schools. *See* Pet. Br. 8. In that posture, the standing question was whether petitioners could show a sufficient injury fairly traceable to the discrimination inherent in Rule 1.

That is not the standing question before this Court. The Montana Supreme Court struck down Rule 1, including on the adequate and independent state ground that it violated the Montana Administrative Procedure Act. *See* Pet. App. 32-34. Accordingly, Rule 1 no longer restricts petitioners' use of the scholarships they seek.

Petitioners instead challenge the Montana Constitution's no-aid provision. *See* Pet. Br. 1. But that provision does not restrict petitioners' use of SSO scholarships. Under the state constitution, private SSOs are free to give scholarships to whomever they like, to attend any school they wish. Nor does the no-aid provision prohibit private donations to fund scholarships to private religious schools. It simply forbids the state government from subsidizing such donations with tax credits.

The standing question, then, is whether the elimination of that tax credit has injured petitioners in a way that supports Article III standing.

2. The loss of a scholarship is undoubtedly a cognizable injury. But the question remains whether that injury is "fairly traceable" to the government action petitioners challenge. *Allen v. Wright*, 468 U.S. 737, 751 (1984), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). It is not.

First, even assuming that eliminating the tax credit will result in some reduction in contributions to scholarship organizations (a speculative assumption, as discussed below), petitioners still must "show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong." *Warth v. Seldin*, 422 U.S. 490, 502 (1975). An overall reduction in funding for any given scholarship organization will not inevitably injure particular families. The scholarship organization could react to the lower funding in various ways, such as cutting administrative costs without reducing scholarships. It might also maintain the amount of its current scholarships but simply offer

fewer of them. The families that received the scholarships would not be injured, and it would be completely speculative for petitioners to claim that they would be the ones left out (something they do not, in fact, assert).

It is equally speculative whether a favorable decision in this Court would have any effect on petitioners. While petitioners allege that they "qualify" for scholarships, that does not mean that they would get one if the tax credit were restored. Even with the benefit of the tax credits, an organization may have more applications than it can grant. And it is speculative whether petitioners would be among the recipients.

The limited information in the record confirms these points. Two of the three petitioners filed affidavits below stating that they planned to apply for scholarships from Big Sky Scholarships. *See* Pet. App. 139 (affidavit of Jeri Ellen Anderson); *id.* at 153 (affidavit of Kendra Espinoza).[4] As of December 2018, the Anderson family had already received a scholarship and intended to apply for its renewal. *See id.* at 139. The Espinoza family was going to apply for the first time. *Id.* at 153. Big Sky, in turn, filed an affidavit stating that the organization receives more applications than it grants (in 2017, 59 applications for 44 scholarships; in 2018, 90 applications for 54 scholarships). *Id.* at 123. It further represented that it prioritizes returning students who previously received scholarships. *Id.* at 124.

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[4] Petitioner Jamie Schaefer filed an affidavit stating she would like to apply for a scholarship for her child, without identifying any particular SSO. *See* Pet. App. 168.

On those facts, it seems likely that even if Big Sky's overall funding fell, that would not affect petitioner Anderson, whose child is already receiving funding from Big Sky and would therefore have priority for future aid. *See* Pet. App. 124, 139. At the very least, the prospect of any injury is highly speculative. At the same time, there is a real chance that petitioner Espinoza's family would not receive a scholarship even if the petitioners prevailed in this Court. Overall, Big Sky has been turning away up to 40% of its applicants. *Id.* at 123. Taking account of the preference for returning students reduces the likelihood of a new applicant receiving a grant even further. Big Sky reported that it anticipated supporting 15 returning students for the 2019 school year (*id.* at 124). Assuming similar numbers for next year, that would leave about 40 scholarships for approximately 75 applicants, giving new applicants around a 50/50 chance of obtaining a grant.[5]

Second, there is also no way to determine how donors would react to the loss (or restoration) of the tax credit without engaging in forbidden conjecture.

Petitioners and their amici argue at length as to the importance and value of the SSOs' programs. The Court should not presume that those who answer the call for donations to such groups would turn their backs unless the Government rewards them with a tax credit.

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[5] Perhaps petitioners think that if this Court reversed the Montana Supreme Court's decision donations would increase so much faster than applications that they would be sure to get a scholarship. But they haven't said so, and it would be pure speculation if they did.

The limited extent of the credit makes the causal chain all the more speculative. The maximum credit is $150. Mont. Code Ann. § 15-30-3110(1). And it only applies to donations made before the State has allocated an aggregate $3 million in tax credits. *Id*. § 15-30-3110(5). Without knowing the total amount of contributions to SSOs (*e.g.*, $100,000 or $10 million), it is impossible to know whether the credit affects a small or large proportion of expected donations. Consequently, the Court can only guess what the overall effect on scholarship contribution—and, therefore, the impact on petitioners' scholarship prospects—would be. For example, if the overall effect is relatively small, SSOs might adjust by streamlining administrative costs or reducing staff salaries, leaving scholarship opportunities unaffected.

The effect of the tax credit's elimination on petitioners is muted further by the fact that donors can continue to claim a tax *deduction* for the full amount of their contribution (*i.e.*, without any $150 cap), just as they can deduct a donation to any charitable organization. *See* Mont. Code Ann. § 15-30-3110(6)(a) (allowing donor to choose between tax credit and ordinary tax deduction allowed for charitable contributions). And it may well be that a very large share of the funding would come from those who benefit more from the tax deduction than from the tax credit—at a certain point, depending on the donor's marginal tax rate and the size of the donation, the $150 maximum tax credit will be less than the benefit of deducting the full amount of the contribution from the person's income.

B. This Court Has Held That Similar Indirect Beneficiaries Lack Standing To Challenge The Government's Tax Treatment Of Third Parties.

This Court has previously held that plaintiffs in petitioners' position lack standing to challenge the government's tax treatment of third parties.

For example, in *Simon v. Eastern Kentucky Welfare Rights Organization*, *supra*, the plaintiffs challenged an IRS decision to allow tax deductions for donations to certain health care providers under a provision of the tax code applicable to charitable hospitals. The plaintiffs included indigent individuals who depended on access to free medical services at charitable hospitals. They sued the IRS for classifying certain hospitals as "charitable" when those hospitals, in fact, only provided free emergency room care for indigent patients, but otherwise turned away those unable to pay. This Court held that the plaintiffs lacked Article III standing.

The Court recognized that being denied access to medical services undoubtedly causes injury. 426 U.S. at 40-41. But Article III "still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Id*. at 41-42. The plaintiffs alleged that their injury (denial of medical services) was linked to the allegedly unlawful conduct by the IRS (wrongfully allowing tax deductions for donations to the hospitals in question) because the tax treatment "had 'encouraged' hospitals to deny services to indigents." *Id*. at 42. In other

words, the favorable tax treatment for donations to charitable hospitals was intended to incentivize donations to hospitals that provide free medical care to the poor; failing to enforce the requirements for the charitable status undermined that incentive and, thereby, injured the intended beneficiaries of the tax incentive by making it less likely they would receive the free medical services the tax deduction was intended to secure for them.

This Court held that this chain of causation was too attenuated and speculative to support Article III standing. As a general matter, the Court observed, the "indirectness of injury, while not necessarily fatal to standing, 'may make it substantially more difficult to meet the minimum requirement of Art. III.'" 426 U.S. at 44-45 (citation omitted). In the case before it, the Court acknowledged the plaintiffs' allegation that the hospitals "receive substantial donations deductible by the donors." *Id*. at 43. And it recognized that this "allegation could support an inference that these hospitals, or some of them, are so financially dependent upon the favorable tax treatment afforded charitable organizations that they would admit [plaintiffs] if a court required such admission as a condition to receipt of that treatment." *Ibid*. But it held that "this inference is speculative at best." *Ibid*.

The Court considered a similar situation in *Allen v. Wright*, *supra*. There, the plaintiffs challenged the IRS's failure to deny tax-exempt status to racially discriminatory private schools. The plaintiffs claimed that the tax-exempt status increased the number of segregated private schools, thereby decreasing the diversity in the public schools and diminishing the plaintiffs' children's "ability to receive an education in

a racially integrated school." 468 U.S. at 756. The Court acknowledged that the claimed injury was "one of the most serious injuries recognized in our legal system." *Ibid*. "Despite the constitutional importance of curing the injury alleged by [the plaintiffs], however, the federal judiciary may not redress it unless standing requirements are met." *Id*. at 756-57. The Court concluded that the plaintiffs' injury was "not fairly traceable to the Government conduct [plaintiffs] challenge as unlawful" because the "line of causation between that conduct" and the injury was "attenuated at best." *Id*. at 757. As in *Simon*, the injury arose "from the independent action of some third party not before the Court." *Ibid.* (quoting *Simon*, 462 U.S. at 42). That is, the causal connection depended on speculation about how the beneficiary of special tax treatment (the private schools) would respond to the loss of the tax benefit. *Id*. at 758. Those independent decisions "were sufficiently uncertain to break the chain of causation between the plaintiffs' injury and the challenged Government action." *Id*. at 759.

Petitioners' standing is not logically distinguishable from the plaintiffs' in *Simon* and *Allen*. In each case, plaintiffs challenged the tax treatment of third parties. In each instance, the effect of that allegedly illegal tax treatment upon the plaintiffs depended on third parties' reactions to the conferral or denial of a tax break. In *Simon*, for example, the plaintiffs' injuries depended on how donors would respond to the IRS's elimination of the tax deduction for donations to the putatively charitable hospitals, and how the hospitals would react to any reduction in donations. In this case, petitioners' alleged injury

likewise depends on how donors will react to the elimination of the tax credit and how SSOs would respond to any reduction in funding. The conclusion in all three cases is the same—the plaintiffs lack Article III standing.

C. Allowing Standing In This Case Would Expose The States And The Federal Government To Suit By Third-Party Beneficiaries Of Innumerable Tax Programs.

In *Simon*, this Court left open "the question of whether a third party *ever* may challenge IRS treatment of another." 426 U.S. at 37 (emphasis added). While the Court need not resolve that question in this case, there is reason for the Court to proceed with caution in recognizing such standing, lest the Court open the floodgates of federal litigation against state and federal taxing authorities.

Tax codes are replete with tax credits, deductions, and other incentives designed to indirectly benefit third parties. One report from the U.S. Department of Treasury lists 172 different tax provisions contributing to lost tax revenue.[6] The tax deduction for charitable contributions alone applies to over 1.8 million organizations serving countless people.[7] Those beneficiaries, in turn, can be indirectly

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[6] *See* U.S. Dep't of the Treasury, *Tax Expenditures* (Oct. 19, 2018), https://home.treasury.gov/system/files/131/Tax-Expenditures-FY2020.pdf.

[7] *See* IRS, *Tax-Exempt Activities* (May 17, 2019), https://www.irs.gov/statistics/tax-exempt-activities.

affected by any number of legislative, regulatory, and administrative decisions controlling eligibility for those tax breaks. For example, in fiscal year 2018, the IRS ruled on more than 90,000 applications for tax-exempt status.[8]

While not every such decision or tax incentive provision will give rise to suits by third-party beneficiaries, the potential for litigation is nonetheless enormous. The initial decisions regarding the scope of the incentive, as well as various determinations by taxing authorities about who qualifies, will inevitably leave some people believing that they were wrongfully excluded from the indirect benefits of the tax law. And as this case, *Simon*, *Allen*, and others illustrate, disappointed beneficiaries have available to them all manner of claims they could raise against the creation, elimination, or administration of tax incentives.

Given the extreme attenuation between Montana's tax decision and petitioners' alleged injuries, the Court cannot declare Article III satisfied in this case without exposing tax authorities to many other claims regarding all manner of tax decisions.

D. Petitioners' Reliance On An Analogy To Standing In Affirmative Action Cases Is Inapt.

Petitioners argued below that it was enough to establish standing that state law discriminatorily diminished their prospects for obtaining a scholarship. *See* Pet. App. 109-10. Whatever the merits of that

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[8] *See ibid*.

argument under Montana standing law, it cannot be squared with this Court's precedents under Article III.

As Justice Scalia once observed, the "proposition that standing is established by the mere reduction in one's chances of receiving a financial benefit is contradicted by *Simon*." *Clinton v. City of New York*, 524 U.S. 417, 457 (1998) (Scalia, J., concurring in part and dissenting in part). Petitioners nonetheless asserted below that this case is different, citing decisions like *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993). *See* Pet. App. 109-10. There, the Court held that an applicant for a government contract had standing to challenge affirmative action rules governing contract awards even if the contractor could not show for certain that it would have obtained the contract but for the discrimination. The Court referred to the same principle in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), when it explained that the church in that case was not claiming an entitlement to a grant, but rather challenging "the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant." *Id*. at 2022 (citing *General Contractors*, 508 U.S. at 666).

General Contractors, *Trinity Lutheran*, and similar cases do not address the standing problem here. In those cases, the plaintiff challenged a rule governing the government's distribution of a benefit *directly* to the plaintiff. Here, however, petitioners plan to apply to scholarship programs neither administered nor regulated by the State. As applied, the no-aid provision governs only the State's

interaction with donors, which has only an indirect effect on the competition for scholarships (*i.e.*, by possibly reducing the pool of scholarship funds for which petitioners are competing). *General Contractors* and similar cases simply do not address standing based on such downstream effects.

If there is an analogy to be had, it would be between petitioners and a company that would have bid for the contract to resurface Trinity Lutheran's playground. The discriminatory rules of the grant program did not apply to the bidding for the church playground project. Instead, the contractor would be injured (if at all) only indirectly, by virtue of the State's decision not to contribute money to the church's resurfacing project. And that injury would be speculative—the church might proceed with the project and hire the contractor even without the state grant, or the contractor might not get the contract even if the grant were provided. Nothing in *Trinity Lutheran* or *General Contractors* suggests that such an indirectly affected party would have Article III standing.

Instead, such claims are governed by cases like *Allen* and *Simon*. In fact, the plaintiffs in *Allen* made the parallel claim that the IRS's tax treatment of third parties discriminatorily diminished "their children's *opportunity* to receive a desegregated education." 468 U.S. at 746 (emphasis added). The Court did not respond by holding that such a diminishment in *opportunity* alone sufficed to establish standing in a case alleging racial discrimination. Instead, it examined the causal link between the alleged

discriminatory taxing decision and the purported injury, and found it wanting. *Id*. at 756-61.[9]

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This Court has made clear that Article III's requirements will not be relaxed to facilitate challenges under the First Amendment's religion clauses. *See, e.g.*, *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 145 (2011). Nor is any such expansion necessary in order to prevent Montana's no-aid clause from escaping federal constitutional challenge by parties more directly affected by its implementation, such as donors, SSOs, or perhaps private religious schools.[10]

Perhaps petitioners have other arguments about why they have Article III standing in this case. But even if petitioners raise them for the first time in their reply brief, or at oral argument, the Court will be deprived of a thorough ventilation of this critical jurisdictional question. Rather than create new

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[9] Petitioners might claim that they are directly subject to discrimination in the competition for *tax-funded* scholarships. But that is just semantics. The contractors in *Trinity Lutheran* could just as fairly say that they were excluded from the competition for *tax-funded* playground resurfacing projects. The plaintiffs in *Simon*, as well as every other beneficiary of an organization denied tax-exempt status by the IRS, could likewise claim that a tax decision affected their eligibility to obtain *tax-funded* medical, social, or legal services, etc.

[10] Because the no-aid provision prohibits financial assistance to religious institutions, religious schools could be seen as directly subject to the allegedly unconstitutional classification by the no-aid provision. To the extent such classification, in itself, could create standing, that would not help petitioners because the schools' classification has only an indirect and speculative effect on petitioners.

standing law with potentially broad implications on the basis of inadequate briefing by the parties, the Court may wish instead to dismiss the case as improvidently granted. If not, it should dismiss the petition for lack of jurisdiction.

II. Petitioners' Reading Of The Free Exercise Clause As Requiring The Public Funding Of Religious Education Is Contrary To Its Original Meaning.

Even if the Court were to reach the merits of the constitutional issue raised by petitioners, the judgment of the court below should be affirmed for all of the reasons set forth in respondents' brief. We elaborate here on one aspect of that argument—that the historical record of the period in which both the Bill of Rights and the Fourteenth Amendment were adopted makes clear beyond doubt that the interpretation of the Free Exercise Clause advocated by petitioners and many of their amici cannot have been what those documents were originally understood to mean.

Petitioners and their amici seek a broad constitutional ruling that the Free Exercise Clause prohibits a State from establishing a policy that it will not use taxpayer dollars to pay for religious education.[11] That is, apparently, petitioners' position even in circumstances like those presented here in which (as a result of the Montana Supreme Court's

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[11] It appears to be irrelevant to petitioners' legal theory whether the State's policy against public funding of religious education applies only to direct governmental expenditures or also, as in this case, to "tax expenditures" like the 100% tax credit under the invalidated Montana statute.

ruling) no public funds are being provided to any private school, secular or religious.

That contention cannot, by any stretch of the imagination, be reconciled with the meaning ascribed to the Free Exercise Clause by those who adopted and ratified it in 1791, nor with the understanding of the Free Exercise Clause by those who, in 1868, incorporated that clause and applied it to the States by adopting and ratifying the Fourteenth Amendment. To the contrary, as the historical record makes clear, it is inconceivable that the Constitution's framers could have meant to prohibit the adoption of constitutional provisions, like Montana's Article X, Section 6, that are entirely in accord with prevailing sentiment with respect to public funding of religious education at the time the Free Exercise Clause was adopted—and, subsequently, applied to the States.

Contrary to arguments advanced in some of the opposing briefs, this case does not present a situation where individuals are prohibited from practicing the religious faith of their choosing. Petitioners and parents like them are free to practice their religion, including choosing to educate their children in religious schools that impart a religious course of study in accord with their personal religious beliefs. Similarly, private schools in Montana are free to shape their curricula around the tenets of the sponsoring religious organization and to provide a religion-focused education to their students as they see fit. Nothing in Article X, Section 6 or the Montana Supreme Court's decision prohibits either parents or private schools from engaging in such practices. Rather, the issue presented here is whether Montana is constitutionally required to *fund* such private

inculcation of religious belief. Article X, Section 6, as interpreted and applied by the Montana Supreme Court, reflects a choice by the State of Montana—initially in 1889 and again following a constitutional convention in 1972—that the State's taxpayers should not be required to provide public funds to pay for religious education.

As this Court has emphasized, "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them," even if "future legislatures or (yes) even future judges" prefer a different interpretation. *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008). A brief review of the historical record makes clear that the people who adopted and ratified the Free Exercise Clause, and those who incorporated it against the States through the Fourteenth Amendment, could not have understood that in so doing they were prohibiting the States from refusing to fund religious education.

A. The Framers Of The First Amendment Could Not Have Intended To Prohibit States From Declining To Fund Religious Education.

In determining "what is the religious freedom which has been guaranteed" by the First Amendment, this Court has found "nowhere more appropriate[]" to look than "the history of the times in the midst of which the provision was adopted." *Reynolds v. United States*, 98 U.S. 145, 162 (1879); *see also Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947) (to understand religion clauses, it is appropriate to "review the background and environment of the period in which that constitutional language was fashioned and adopted");

330 U.S. at 33 (Rutledge, J., dissenting) ("No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment."). Although early colonial settlers had come from Europe "to escape the bondage of laws which compelled them to support and attend government favored churches," many of these "practices of the old world were transplanted to and began to thrive in the soil of the new America." *Everson*, 330 U.S. at 8-9. Among them was that "people were taxed, against their will, for the support of religion," *Reynolds*, 98 U.S. at 162, as several colonies "exacted some kind of tax for church support." *Everson*, 330 U.S. at 10 n.8. "These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence," and the "imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation." *Id.* at 11. "It was these feelings which found expression in the First Amendment." *Ibid.*

Particularly relevant to the issue of public funding of religion was the intense debate in Virginia in the mid-1780s regarding a general assessment bill that provided funding for "Teachers of the Christian Religion," where each taxpayer was given the choice to designate the church that would receive his portion of the tax with any undesignated funds to be expended on "seminaries of learning" within the taxpayer's county. 330 U.S. at 72-74 (appendix setting forth full text of Virginia assessment bill). This bill was "nothing more nor less than a taxing measure for the support of religion." *Id.* at 36 (Rutledge, J., dissenting). James Madison—who would go on to become the primary

drafter and sponsor of the First Amendment—led the opposition to the Virginia assessment bill, preparing his famous "Memorial and Remonstrance" arguing against passage of the bill. *Id.* at 63-72 (appendix setting forth full text of Memorial and Remonstrance). In this document, Madison "eloquently argued that a true religion did not need support of law" and that "no person, either believer or non-believer, should be taxed to support a religious institution of any kind." *Id.* at 12 (majority opinion). Indeed, he pointed as well to the deleterious effect of public funding on religion itself. *Id.* at 67-68 (appendix). Under Madison's view, it was irrelevant that taxpayers could choose the recipient of their funds, just as it was irrelevant if the bill sought nothing more than "three pence only of his property." *Id.* at 65-66. It was the nature of the assessment itself that was deemed "a dangerous abuse of power." *Id.* at 64.

Madison's efforts led not only to defeat of the assessment bill, but also passage of the Virginia Bill for Religious Liberty. *See* A Bill for Establishing Religious Freedom, 18 June 1779, *available at* Nat'l Archives, *Founders Online*, https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082 (last visited Nov. 14, 2019) (Va. Religious Liberty Bill). Originally drafted by Thomas Jefferson and enacted by the same Virginia legislature that rejected the assessment bill, the Virginia Religious Liberty Bill enshrined into law the principle advanced by Madison in his opposition to the assessment bill: prohibiting compulsory public funding of religious education. The statute provided that "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever," and the preamble to the bill set

forth in strong terms the policy reasons behind this provision:

> That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness.

Ibid. As this Court has explained, the Virginia debate over religious funding showed that the "people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group." *Everson*, 330 U.S. at 11.

Without mentioning either the assessment bill or the Memorial and Remonstrance that led to its adoption, amicus curiae the United States invokes the Virginia Religious Liberty Bill as purported support for petitioners' position, citing the following language in the preamble of the statute: "laying upon [a person] an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which, in common with his fellow citizens, he has a natural right." *See* U.S. Br. 9, 14 ("In Jefferson's words, by disqualifying religious schools, and religious schools alone, from receiving public funds from the State, the no-aid provision

deprives such school of the 'privileges and advantages' that they have a 'natural right' to enjoy 'in common' with the rest of the community.") (citation omitted). But as the historical evidence discussed above makes clear, not only was Jefferson not speaking of any "natural right" to receive taxpayer funding for one's religious expression, such an interpretation is directly contrary to the views of both Jefferson and Madison as well as the provisions in the bill that are specifically directed to the issue of public funding of religion, namely that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical" and thus "no man shall be compelled to frequent or support any religious worship, place, or ministry *whatsoever*." Va. Religious Liberty Bill (emphasis added).

Nor was Virginia the only State during this critical time period to adopt prohibitions on public funding of religion. For example, the Vermont Constitution of 1777 contained a compelled support clause similar to the provision later adopted in Virginia. *See* Vt. Const. ch. I, art. 3 (1777) ("[N]o person ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience."). This provision "from its first adoption … cover[s] all forms of religious worship even as part of religious education," *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 169 Vt. 310, 335 (1999), and includes within its prohibition "support" in the form of "financial support through the payment of taxes," *id.* at 324. Citing this nonsupport provision, the Vermont Council of Censors—an elected body authorized by the state constitution at that time to evaluate the

constitutionality of legislative acts—recommended in 1799 the repeal of a state statute that permitted a tax levy to raise money to support "Ministers of the Gospel." *Id.* at 328-30. The Council continued to find the statute inconsistent with the nonsupport clause in the Vermont Constitution even after the law was amended to provide an exemption to any taxpayer who objected to supporting religion, thereby confirming that the issue "was not a state establishment of religion, but *any public financial support of religious activity*, even when raised solely from religious adherents." *Id.* at 331 (emphasis added).

The Vermont nonsupport provision is nearly identical to the compelled support clause in the Pennsylvania Constitution of 1776, *see* Pa. Const. art. I, § 3 (1776), which served as the model for the Vermont Constitution. *Chittenden*, 169 Vt. at 334. Pennsylvania's "constitutional nonsupport language" dated back to 1682, and that colony had embraced from the start "a refusal to provide public tax support for churches and clergy." *Ibid.* (citing T. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 75 (1986)). Indeed, most of the state constitutions from the founding era contained similar nonsupport provisions. *See* Resp. Br. App. A.[12]

This principle that taxpayers should not be required to support religion and religious education, embodied at the time the First Amendment was adopted and ratified in most state constitutions, in

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[12] Vermont, although not among the original 13 colonies, was admitted to the Union in March 1791 and in November of that year became the tenth State to ratify the Bill of Rights.

language virtually identical to the nonsupport language in the Virginia Religious Liberty Bill drafted by Jefferson and advocated for by Madison, cannot be squared with petitioners' interpretation of the Free Exercise Clause. Given this historical record, and particularly the pivotal role Madison and Jefferson played in both the Virginia debate and the framing of the First Amendment, it is inconceivable that the framers of the Free Exercise Clause believed that they were proscribing a State's choice to decline to expend public funds on religious education. *See Everson*, 330 U.S. at 13 ("This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute."). There is simply nothing in the historical record that would support the proposition that the Framers intended to compel States to fund religious education—and certainly nothing to suggest that the First Amendment places an affirmative obligation on States to fund tuition at private religious schools even when they are not otherwise funding tuition at any private schools, religious or secular.

B. The Congress That Adopted And The States That Ratified The Fourteenth Amendment Could Not Have Understood The Free Exercise Clause To Prohibit States From Declining To Fund Religious Education.

The Free Exercise Clause was made applicable to the States by incorporation through the Fourteenth Amendment, *Cantwell v. Connecticut*, 310 U.S. 296,

303 (1940), which was adopted by Congress in 1866 and ratified in 1868. Historical evidence regarding attitudes toward the public funding of religious education at the time the Fourteenth Amendment was adopted and ratified is highly relevant to the original meaning of the Free Exercise Clause. As this Court has pointed out, the "examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification" is a "critical tool of constitutional interpretation." *Heller*, 554 U.S. at 605 (examining post-Civil War historical evidence to understand meaning of Second Amendment). This historical record makes clear that those who adopted and ratified the Fourteenth Amendment could not have understood that the Free Exercise Clause they were incorporating as to the States would render unconstitutional restrictions on state financial support for religious education that were widely adopted during the same period of time.

There is no dispute about the facts upon which this conclusion is based. Indeed, it is a central tenet of petitioners' brief, and that of numerous amici, that most of the States, in the period before and after the adoption of the Fourteenth Amendment, enacted constitutional provisions intended to *prohibit* the use of public funds for religious education. *See* Pet. Br. 31-45; *see also* Rutherford Inst. Br. 7-11 ("By 1876, fourteen States had enacted legislation prohibiting the use of public funds for religious schools; by 1890, twenty-nine States incorporated such provisions into their constitutions."); Justice & Freedom Fund et al. Br. 22-23; Becket Fund for Religious Liberty Br. 8-11; Daines et al. Br. 6-13. In particular, ten States had

adopted "no-aid" provisions in their constitutions *prior* to ratification of the Fourteenth Amendment,[13] while another nine States adopted such provisions within the nine years immediately following ratification of the Fourteenth Amendment.[14] By 1890 no fewer than 29 States had adopted such "no aid" clauses in their constitutions, and in 1875 a similar federal constitutional amendment—which would have made such a restriction applicable to the States—narrowly failed to obtain the required supermajority in Congress. *See generally* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 57-68 (1992). Congress also enacted legislation requiring Montana and other newly admitted States to adopt such no-aid provisions in their state constitutions, *see* Teller Act (Omnibus Statehood Act),

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[13] *See* Mich. Const. art. I, § 5 (1835); Wis. Const. art. I, § 18 (1848); Ind. Const. art. I, § 6 (1851); Ohio Const. art. VI, § 2 (1851); Mass. Const. amend. art. XVIII (1855); Minn. Const. art. I, § 16 (1857); Or. Const. art. I, § 5 (1857); Kan. Const. art. VI, § 8 (1859); S.C. Const. art. X, § 5 (1868); Miss. Const. art. VIII, § 9 (1868). In addition, the Florida and Kentucky constitutions required school funds to be used for public schools only. *See* Fla. Const. art. X, § 1 (1838); Ky. Const. art. XI, § 1 (1850).

[14] *See* Ill. Const. art. VIII, § 3 (1870); Pa. Const. art. X, § 2 (1874); Ala. Const. art. XIII, § 8 (1875); Mo. Const. art. II, § 7, art. XI, § 11 (1875); Neb. Const. art. VIII, § 11 (1875); Colo. Const. art. V, § 34, art. IX, § 7 (1876); Tex. Const. art. I, § 7, art. VII, § 5 (1876); Ga. Const. art. I, § 1 ¶ XIV (1877); N.H. Const. pt. 2, art. 83 (1877). Minnesota also enacted a second constitutional provision prohibiting the use of public funds for religious schools. *See* Minn. Const. art. VIII, § 3 (1877).

ch. 180, 25 Stat. 676 (1889),[15] and a few years later it included a proviso in the Indian Appropriations Act limiting "the use of public moneys in sectarian schools" and declaring it "to be the settled policy of the government to hereafter make no appropriation whatever for education in any sectarian school." *Quick Bear v. Leupp*, 210 U.S. 50, 78-80 (1908).

Petitioners attempt to avoid the import of this historical evidence by dismissing these no-aid provisions as simply offspring of the federal Blaine Amendment (regardless of when they were enacted), and by dismissing the entire nineteenth century movement for secular education as tainted by "bigotry." That objection, of course, has no weight with respect to Montana's Article X, Section 6, which is the product of a 1972 constitutional convention. In any event, as is developed more fully by others, the oft-repeated argument seeking to discredit the nineteenth century no-aid clauses as simply the product of anti-Catholic bigotry rests on historical analysis that is at best shoddy and at worst tendentious. In fact, the nineteenth century debate over the "school question" involved multiple and complex historical threads going back well beyond the rise of nativism, which cannot simplistically be ascribed to "bigotry." *See*, *e.g.*, Resp. Br. 40-44; Baptist Joint Comm. for Religious

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[15] Congress passed similar legislation relating to the admission of Idaho, Utah, Oklahoma, Arizona, and New Mexico into the Union. *See* Idaho Statehood Act, ch. 656, § 8, 26 Stat. 215, 216 (1890); Act of July 16, 1894, ch. 138, § 3, pt. 4, 28 Stat. 107, 108; Oklahoma Enabling Act of June 16, 1906, ch. 3335, § 3, 34 Stat. 267, 270; Statehood Act (Arizona and New Mexico), ch. 310, § 8, 36 Stat. 557, 563 (1910).

Liberty Br.; Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & Pol. 65, 92-117 (2002).

What cannot be denied with respect to this historical record, however, is that at the time of the adoption and ratification of the Fourteenth Amendment, Congress and the States were both strongly advancing the principle of "no public funding for religious schools"—and indeed enacting such funding prohibitions into their constitutions. This historical fact renders implausible the suggestion that the Free Exercise Clause could have been understood to prohibit the States from declining to fund religious education. *Cf. Heller*, 554 U.S. at 616 ("It was plainly the understanding in the post-Civil War Congress that the Second Amendment protected an individual right to use arms for self-defense.").

Thus, in arguing that the enactment of no-aid clauses after the Civil War was allegedly affected to some extent by motivations that would be condemned today, petitioners and their amici miss the larger point. If the Court's interpretation of the Free Exercise Clause is to be guided by the understanding of those who adopted it—and those who incorporated it into the Fourteenth Amendment—then it is that meaning that is controlling, rather than contemporary views that question the values and attitudes of those framers and ratifiers. As one scholar has put it:

> If originalism is accepted as the foundation of constitutional law and constitutional legitimacy with regard to this part of the First Amendment, we have to live with the results. Judges cannot make choices based on contemporary values about whether certain practices should be excluded from

> contributing to the original understanding. Practices and understandings that were "born of bigotry" are just as relevant and binding as those that reflect more noble sentiments.[16]

In short—in light of the emphasis on "nonsectarian" education in the period around 1868—it is inconceivable that, in adopting and ratifying the Fourteenth Amendment, Congress and the States would have intended that amendment to incorporate the rights protected by the Free Exercise Clause if the framers and ratifiers had believed that doing so would nullify the very kind of provisions that both Congress and the States were enacting at that same time. This history, together with that of the original adoption of the Free Exercise Clause as part of the Bill of Rights, leaves no room for the argument that the Free Exercise Clause was originally intended to prohibit the States from declining to fund religious education.

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[16] Alan Brownstein, *The Reasons Why Originalism Provides a Weak Foundation for Interpreting Constitutional Provisions Relating to Religion*, 2009 Cardozo L. Rev. de novo 196, 204 (quoting *Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000) (plurality opinion)).

CONCLUSION

For the foregoing reasons, the writ of certiorari should be dismissed or, if not, the judgment should be affirmed.

Respectfully submitted,

John M. West
Ramya Ravindran
BREDHOFF & KAISER, PLLC
805 Fifteenth St. NW
Suite 1000
Washington, DC 20005
(202) 842-2600

Alice O'Brien
Kristen Hollar
NATIONAL EDUCATION ASSOCIATION
1201 16th St. NW
Washington, DC 20036
(202) 822-7035

Kevin K. Russell
Counsel of Record
Erica Oleszczuk Evans
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
kr@goldsteinrussell.com

Rhonda Weingarten
David J. Strom
AMERICAN FEDERATION OF TEACHERS
555 New Jersey Ave. NW
Washington, DC 20001
(202) 393-7472

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