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 BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY; THE EVANGELICAL LUTHERAN CHURCH IN AMERICA; GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST; REVEREND DR. J. HERBERT NELSON, II, AS STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.) AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Amici are Christian denominational organizations and representatives who serve religious institutions and individuals.[1] Amici support religious liberty for all and recognize that its protection is rooted in the distinctive nature of religion, which is given special status in federal and state constitutions. Amici have defended the distinctiveness of religion in numerous cases before this Court in support of no establishment and free exercise principles, including recently in a case about a government-sponsored cross, *see Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019) (rejecting the claim that the cross has a predominantly secular meaning), and in a case involving an employment discrimination claim brought by a parochial school teacher, *see Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (supporting the application of the ministerial exception).

Baptist Joint Committee for Religious Liberty (BJC) has vigorously supported religious liberty in the historic Baptist tradition for more than eighty years. BJC serves fourteen supporting organizations, including state and national Baptist conventions and conferences, and churches throughout the country. It addresses only religious liberty and church-state separation issues, and believes that strong enforcement of both Religion Clauses is essential to religious liberty for all Americans.

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[1] This brief was prepared and funded entirely by amici and their counsel. Blanket consents are on file with the Clerk.

The Evangelical Lutheran Church in America (ELCA) is the largest Lutheran denomination in North America and is the fourth largest Protestant body in the United States. Formed in 1988 by the merger of the Lutheran Church in America, The American Lutheran Church, and the Association of Evangelical Lutheran Churches, the ELCA has over nine thousand member congregations, which, in turn, have approximately 3.7 million individual members. In 2017, the Church Council of the ELCA adopted a social message on Human Rights, in which it states that the ELCA will "advocate for the U.S. government to protect and promote the equal rights of all people, as enshrined in the U.S. Constitution and Bill of Rights," which include the First Amendment rights of freedom of religion and to be free from government establishment of religion.

General Synod of the United Church of Christ is the representative body of the National Setting of the United Church of Christ (UCC). The UCC was formed in 1957, by the union of the Evangelical and Reformed Church and The General Council of the Congregational Christian Churches of the United States in order to express more fully the oneness in Christ of the churches composing it, to make more effective their common witness in Christ, and to serve God's people in the world. The UCC has over 4,800 churches in the United States, with a membership of approximately 825,000. The General Synod of the UCC, various settings of the UCC, and its predecessor denominations, have a rich heritage of promoting religious freedom and tolerance. Believing that churches

are strengthened, not weakened, by the principle of the separation of church and state, the UCC has long acknowledged its responsibility to protect the right of all to believe and worship voluntarily as conscience dictates, and to oppose efforts to have government at any level support or promote the views of one faith community more than another.

Reverend Dr. J. Herbert Nelson, II, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.) (PCUSA) joins this brief as the senior ecclesiastical officer of the PCUSA. The PCUSA is a national Christian denomination with nearly 1.6 million members in over 9,500 congregations, organized into 170 presbyteries under the jurisdiction of sixteen synods. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706. The General Assembly does not claim to speak for all Presbyterians, nor are its policies binding on the membership of the Presbyterian Church. However, the General Assembly is the highest legislative and interpretive body for the denomination, and it is the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members.

INTRODUCTION AND SUMMARY OF ARGUMENT

State constitutional provisions prohibiting the public funding of religious institutions, including those responsible for religious education, protect the distinctiveness of religion and promote values that advance religious freedom. The no-funding principle is historically and practically related to limits on government interference in religion and public accountability for public resources. States have expressed this principle in three ways, commonly referred to as "compelled support clauses," "public purpose clauses," and as at issue in this case, "no-aid to religion clauses."

There is no evidence that Montana Constitution Article X, Section 6 was enacted out of religious animus. This Court should respect the ability of States to guarantee greater protection of religious freedom through express provisions prohibiting the public funding of religious institutions.

ARGUMENT

I. THE RELIGION CLAUSES IN THE FEDERAL AND STATE CONSTITUTIONS FIRMLY ESTABLISH THE DISTINCTIVENESS OF RELIGION.

Read together, the Constitution's Religion Clauses – the Establishment Clause, the Free Exercise Clause, and Article VI's No Religious Test Clause – declare the unique status of religion in our political polity. Government is prohibited from establishing any religious

regime (or creating a condition akin to one). Government is prohibited from infringing upon the free exercise of religion (including interfering with the organization and internal operations of houses of worship). And, government cannot use one's religious faith or affiliation as a disqualifier from civic participation. Taken together, these three clauses have guaranteed religious freedom unmatched in the world.

Likewise, all state constitutions have provisions that address the relationship between the institutions of religion and government.[2] Though the language and history of such provisions vary, the distinctive treatment of religion is commonplace. The distinctiveness of religion (not animus toward any particular religion or religion in general) and importance of religious liberty explain its special treatment in our constitutional tradition.

This constitutionally distinctive quality of religion is deeply rooted in history and precedent. James Madison, for one, observed that religion "is precedent both in order of time and degree of obligation, to the claims of Civil Society"[3] As scholars and courts frequently attest, religion and religious entities are treated in distinct ways as a fundamental aspect of our nation's

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[2] Montana has such provisions that are more stringent than the First Amendment both with regard to protecting free exercise and no establishment principles. *See* Mont. Const. art. II, § 5, art. V, § 11(5), art. X, § 6.

[3] James Madison, *Memorial and Remonstrance Against Religious Establishments* ¶1 (1785), reprinted in *Everson v. Bd. of Educ.*, 330 U.S. 1, 64 (1947).

commitment to religious liberty.[4] Religion is the only category of expression which the Constitution prohibits the government from promoting.[5] A principle of governmental non-interference in religion, particularly non-interference with internal decisions that affect the faith and mission of a church, is a central theme in the protection of religious liberty.

A. The distinctive treatment of religion is central to ensuring the proper balance among federal and state constitutional provisions.

The constitutional distinctiveness of religion means two important things when it comes to adjudication. First, courts must strive to interpret the clauses in ways that complement and reinforce their distinct values, rather than place them in conflict. *See Engel v. Vitale*, 370 U.S. 421, 430 (1962) (noting that although "the[] two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom"). Specifically, courts should resist elevating one clause to the expense of the others but should instead respect the balance the drafters so wisely imbedded in the Constitution. As Chief Justice Rehnquist reminded us about the proper relationship between the clauses, "'there is room for play in the joints.'" *Locke v. Davey*, 540 U.S. 712, 718

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[4] Ira C. Lupu and Robert Tuttle, *The Distinctive Place of Religious Entities in our Constitutional Order*, 47 Vill. L. Rev. 37 (2002).

[5] Mark Yudof, *When Government Speaks* (1983), 159, 165.

(2004) (quoting *Walz v. Tax Com. of N.Y.*, 397 U.S. 664, 669 (1970)).

Second, courts should resist efforts to minimize the distinctiveness of religion, to treat it as simply equivalent to related interests. As the Court explained in *Hosanna-Tabor Evangelical Lutheran Church*, 565 U.S. at 189, "the text of the First Amendment itself . . . gives special solicitude to the rights of religious organizations." The Court rejected the claim that a church school should be treated the same as a labor union or social club, recognizing the special status of churches as grounded in the First Amendment. The Court affirmed the existence of the ministerial exception that limits government's involvement in religious organizations with regard to the employment of ministers. It recognized that both the Establishment and Free Exercise Clauses worked in tandem to protect this interest in distinctiveness.

The attack on Montana's no-aid provision as a remnant of "naked religious bigotry," *see* Brief of Arizona Christian School Tuition Organization, et al., at 3, misrepresents a long tradition of non-interference with religion, undermines the complementary nature of religious liberty provisions in our national and state polity, and disregards the distinctiveness of religion. Likewise, expanding this Court's narrow ruling in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2023 (2017), to require state funding of religious education threatens constitutional

provisions in 38 states that protect against state funding of and interference with religion.[6]

In *Trinity Lutheran*, 137 S. Ct. at 2023, this Court held that a church could not be excluded from participation in a grant program for playground resurfacing. Identifying the grant program as primarily concerned with playground safety (analogous to fire and police protection discussed in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947)), the Court treated participation as part of the baseline public benefit that is not implicated by the no-funding principle. Importantly, the Court did not hold that states are required to fund the building of churches or to fund explicitly religious activity conducted through churches, religious schools, or other religious institutions. *Trinity Lutheran*, 137 S. Ct. at 2023. Indeed, such a rule would fundamentally rewrite the constitutional arrangement that has long protected religious liberty and limited the influence of the state over religion.

Montana's no-aid rule protects public funding and accountability for public entities. It recognizes the distinctiveness of religious institutions and guards against state interference in religious practice. The limited scope of the grant program at issue in *Trinity*

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[6] What the government funds, it typically regulates. Moreover, it has long been recognized that the Religion Clauses represent a certain symmetry in the treatment of religion in order to protect religious liberty. When such symmetry is threatened, so is religious liberty. *See generally* Dallin Oaks, "*Separation, Accommodation, and the Future of Church and State*," 35 DePaul L. Rev. 1 (1985).

Lutheran is unlike a state's funding of education. While public and private schools, including religious schools, must meet certain state education requirements, they are not similarly situated with regard to sources of funding and regulatory accountability. Petitioners' demand for a state program for equal funding ignores the distinctiveness of religion and the various ways religious education operates to promote faith formation. It ignores the relationship between support and accountability in public programs and the limits on government interference in religion.

B. Since the earliest days of the Republic, the no-aid rule has reinforced the distinctive nature of religion.

Public support for churches and control of religious doctrine were central elements of religious establishments. At the cusp of the American Revolution, nine of thirteen British-American colonies maintained some form of a religious establishment.[7] Establishments provided government involvement in religion through financial support, influence over doctrine and personnel, and prohibitions based on religious beliefs. They united funding and control of religion: "First and foremost, [a religious establishment] signified the financial support of recognized ministers and their churches by the government. . . . But more than anything, a religious establishment meant an interdependency of

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[7] Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (1986), 105-133.

sacred and profane institutions, whereby both the church and the state reinforced and legitimized each other."[8]

Professor Douglas Laycock has described the revolutionary drive toward disestablishment as such: "Defenders of the established churches proposed as a compromise that dissenters be allowed to pay their church tax to their own church, so that tax money would be equally available to all denominations. But in the end, every state rejected this compromise. The high-profile debate over tax support for churches has played a large role in the development of American understandings of religious liberty."[9] Professor Thomas Curry concurs that by the time of constitutional formation, "[t]he belief that government assistance to religion, especially in the form of taxes, violated religious liberty had a long history."[10]

Religious dissenters, Baptists in particular, were at the forefront of the movement urging disestablishment. As Professor Laycock continues, "evangelical dissenters insisted that these new constitutions address issues of religious liberty. Immediately in most states, eventually in all states, the established churches were disestablished – deprived of government sponsorship and deprived of tax support. The details varied from state to state, but disestablishment was not the work

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[8] Ronald B. Flowers, Melissa Rogers, and Steven K. Green, *Religious Freedom and the Supreme Court* (2008), 15.

[9] Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 Ind. J. Global Legal Stud. 503, 508 (2006).

[10] Curry, *The First Freedoms*, 217.

of secular revolutionaries. It was mostly the work of evangelical religious dissenters."[11] Far from being a form of invidious discrimination against religion, disestablishment marked an essential step toward the protection of religious liberty, of individuals *and* religious institutions. Disestablishment ensured that churches would not be funded through the coercive power of the state but through the voluntary offerings of adherents, thus providing a constraint on government and a measure of religious liberty for individuals – to fund or refuse to fund religious institutions – that had long been denied.[12]

Consequently, the majority of initial state constitutions included clauses prohibiting the "compelled support of religion." Pennsylvania's constitution, which served as a model for many states, provided that no person could "be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent." Pa. Const. art. I, § 3. Twenty-nine state constitutions contain "no-compelled support" clauses.[13] Montana's no-aid provision is part of this

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[11] Laycock, *Church and State*, 13 Ind. J. Global Legal Stud. at 508.

[12] Curry, *The First Freedoms*, 217, 222.

[13] Ala. Const. art. I, § 3; Ark. Const. art. II, § 24; Colo. Const. art. II, § 4; Conn. Const. art. VII; Del. Const. art. I, § 1; Idaho Const. art. I, § 4; Ill. Const. art. I, § 3; Ind. Const. art. I, § 4; Iowa Const. art. I, § 3; Kan. Const. § 7; Ky. Const. § 5; Md. Const. art. 36; Mich. Const. art. I, § 4; Minn. Const. art. I, § 16; Mo. Const. art. I, § 6; Neb. Const. art. I, § 4; N.H. Const. art. 6; N.J. Const., art. I, para. 3; N.M. Const. art. II, § 11; Ohio Const. art. I, § 7; Pa. Const. art. I, § 3; R.I. Const. art. I, § 3; S.D. Const. art. VI, § 3; Tenn. Const. art. I, § 3; Tex. Const. art. I, § 6; Vt. Const. ch. I, art.

historic religious liberty tradition that separates the institutions of religion and government.

C. The constitutional rule prohibiting public funding of religion has long applied to religious activities such as religious education.

This Court's first modern Establishment Clause decision concerned indirect financial assistance to religious schools. *Everson*, 330 U.S. 1. Even though the justices split over the constitutionality of the aid program at issue, no one questioned whether the Establishment Clause, and the no-funding principle, applied to religious education. The Court has continued to recognize that religious schools frequently serve as arms of religious ministries and seek to transmit religious values and tenets through their educational programs. *See Hosanna-Tabor Evangelical Lutheran Church*, 565 U.S. at 204 (recognizing ministerial exception where teachers perform religious functions and serve as instruments of the religious message) (Alito, J., concurring); *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 503 (1979) ("parochial schools involve substantial religious activity and purpose"); *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971) (noting church-related schools "have a significant religious mission and that a substantial portion of their activities is religiously oriented").

3; Va. Const. art. I, § 16; W. Va. Const. art. III, § 15; Wis. Const. art. I, § 18.

This understanding of the scope of the no-funding principle extends back more than 235 years. In 1785, James Madison wrote his Memorial and Remonstrance in opposition to Patrick Henry's proposed bill in the Virginia Assembly to impose a tax assessment for the support of clergy or, alternatively, for "seminaries of learning." Madison opposed the assessment in toto, regardless of its application, in part because he knew that most seminaries or schools at the time were either affiliated with a church or had a religious orientation.[14]

With the development of common schools in the early nineteenth century and the creation of state "school fund" accounts for their maintenance, officials applied the no-funding principle to prohibit using state monies to support religious education.[15] In two early episodes (1824 and 1831), the Common Council of New York City (which distributed state school funds locally) rejected applications from Baptist and Methodist private schools for public financial support. In the reports accompanying the denials, the Council asserted that "the proposition that such a fund should never go into the hands of an ecclesiastical body or religious society, is presumed to be incontrovertible upon any political principle approved or established in this country. . . .

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[14] *See* Lloyd P. Jorgenson, *The State and the Non-Public School* (1987), 4-7.

[15] Scholars agree about the Protestant character of early public education, though recent scholarship emphasizes that that content declined over time. *See* Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & Pol. 65, 69-92 (2002); Steven K. Green, *The Bible, the School, and the Constitution* (2012), 11-44.

that church and state shall not be united." As the Council observed in a later report, it could not "perceive any marked difference in principle, whether a fund be raised for the support of a particular church, or whether it be raised for the support of a school in which the doctrines of that church are taught as a part of the system of education."[16]

Shortly, this principle prohibiting the funding of religious education became memorialized in state constitutions. Michigan was the first state to enact an express no-aid provision in its constitution of 1835. Other states followed suit, with no-funding clauses appearing in the constitutions of Wisconsin (1848), Indiana (1851), Ohio (1851), Massachusetts (1855), Minnesota (1857), Oregon (1857), and Kansas (1858), all before the Civil War.[17] In addition, the New York and California legislatures enacted laws prohibiting the public funding of religious schools in 1843 and 1852, respectively.[18] As one delegate to the Oregon constitutional convention stated his understanding of the principle: "Nor did he believe that [government] had any right to

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[16] William Oland Bourne, *History of the Public School Society of the City of New York* (1870), 88, 139-140.

[17] Mich. Const. art. I, § 5 (1835); Wis. Const. art. I, § 18; Ind. Const. art. I, § 6; Ohio Const. art. VI, § 2; Mass. Const. amend. art. XVIII; Minn. Const. art. I, § 16; Or. Const. art. I, § 5; Kan. Const. art. VI, § 8 (1859). The Florida Constitution of 1838 (art. X, § 1) and the Kentucky Constitution of 1850 (art. XI, § 1) provided that the school funds shall be appropriated in aid of common schools, "but for no other purpose."

[18] New York Laws, 1843, ch. 216, § 15; Calif. Stat., 1852, ch. 53, art. VI, § 1.

take the public money, contributed by the people, of all creeds and faith [sic], to pay for religious teachings. It was a violent stretch of power, and an unauthorized one. A man in this country had a right to be a Methodist, Baptist, Roman Catholic, or what else he chose, but no government had the moral right to tax all of these creeds and classes to inculcate directly or indirectly the tenets of any one of them."[19] Even though some of these constitutional provisions and statutes were enacted during a time of growing nativist reaction to Catholic immigration, there is a lack of evidence that religious animus or dissention was a leading factor in the enactment of these provisions.[20]

Today, 38 state constitutions contain provisions that prohibit public monies being spent in aid of religious institutions or religious education.[21] The language of

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[19] Charles Henry Carey, ed., *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857* (1926), 305.

[20] Green, *The Bible, the School, and the Constitution*, 87-89. Article XVIII of the Massachusetts Constitution was enacted during a time that the Know-Nothing Party held political dominance in the commonwealth. *See* John R. Mulkern, *The Know-Nothing Party in Massachusetts* (1990), 42, 61-113. However, the basis for a prohibition on public funding of sectarian schooling dates to the Massachusetts Public School Law of 1827, St. 1826, ch. 143, § 7 (March 10, 1827).

[21] Ala. Const. art. XIV, § 263; Alaska Const. art. VII, § 1; Ariz. Const. art. II, § 12, art. IX, § 10; Cal. Const. art. IX, § 8, art. XVI, § 5; Colo. Const. art. IX, § 7; Del. Const. art. X, § 3; Fla. Const. art. I, § 3; Ga. Const. art. I, § 2, para. VII; Haw. Const. art. X, § 1; Idaho Const. art. IX, § 5; Ill. Const. art. X, § 3; Ind. Const. art. I, § 6; Kan. Const. art. VI, § 6c; Ky. Const. § 189; Mass. Const. amend. art. XVIII; Mich. Const. art. I, § 4; Minn. Const. art. I,

these provisions varies widely. Some provisions, as with the Indiana Constitution's article I, section 6, are general in their prohibitions: "No money shall be drawn from the treasury, for the benefit of any religious or theological institution." Other state provisions contain more express language prohibiting monies for "religious or theological seminaries" or schools. Minn. Const. art. I, § 16. The Montana provision at issue here is still more specific in prohibiting the "payment from any public fund or monies, or grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination." Mont. Const. art. X, § 6. The fact that several state constitutions place free exercise and/or no-compelled support clauses within the same provision as their no-funding clauses indicates the mutually reinforcing nature of principles.[22] Complementing these no-funding provisions are clauses in twenty-seven state constitutions

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§ 16; Miss. Const. art. 8, § 208; Mo. Const. art. I, § 7, art. IX, § 8; Mont. Const. art. X, § 6; Neb. Const. art. VII, § 11; Nev. Const. art. XI, § 10; N.H. Const. art. 83; N.M. Const. art. XII, §§ 3, 4; N.Y. Const. art. XI, § 3; N.D. Const. art. VIII, § 5; Ohio Const. art. VI, § 2; Okla. Const. art. I, § 5, art. XI, § 5; Or. Const. art. I, § 5; Pa. Const. art. III, § 15, art. X, § 2; S.C. Const. art. XI, § 4; S.D. Const. art. VI, § 3, art. VIII, § 16; Tex. Const. art. I, § 7, art. VII, § 5; Utah Const. art. I, § 4, art. X, § 9; Va. Const. art. IV, § 16; Wash. Const. art. I, § 11; Wis. Const. art. I, § 18; Wyo. Const. art. I, § 19, art. III, § 36.

[22] *See* Fla. Const. art. I, § 3; Mich. Const. art. I, § 4; Minn. Const. art. I, § 16; N.M. Const. art. II, § 11; S.D. Const. art. VI, § 3; Utah Const. art. I, § 4; Va. Const. art. I, § 16; Wash. Const. art. I, § 11; W. Va. Const. art. III, § 15; Wis. Const. art. I, § 18.

limiting public appropriations or draws from state treasuries to "public purposes," for "public uses," or to remain under "public control."[23] Considered together, these "no-compelled support," "no-funding," and "public purpose" clauses represent a strong state commitment to the financial security of public education. In fact, only two state constitutions – Louisiana and Maine – do not contain at least one of these provisions; the majority of state constitutions contain two or more of these clauses.[24]

Importantly, out of the 38 no-funding provisions today, nineteen find their origins *before* the vote on the 1876 Blaine Amendment (discussed below).[25] As a result, it is inaccurate to designate state no-funding provisions

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[23] Ala. Const. art. IV, § 73; Alaska Const. art. IX, § 6; Ark. Const. art. XIV, § 2; Cal. Const. art. XVI, § 3; Colo. Const. art. IX, § 3; Conn. Const. art. VIII, § 4; Del. Const. art. X, § 4; Fla. Const. art. IX, § 6; Ga. Const. art. VII, § 6, para. 1(b); Haw. Const. art. VII, § 4; Idaho Const. art. IX, § 3; Ill. Const. art. VIII, § 1; Ky. Const. § 171; Md. Const. art. VIII, § 3; Mo. Const. art. IX, § 5; Mont. Const. art. V, § 11(5); Neb. Const. art. VII, § 11; N.J. Const. art. VIII, § IV, para. 2; N.M. Const. art. IV, § 31; N.C. Const. art. IX, § 6; Pa. Const. art. III, § 30; R.I. Const. art. XII, § 2; S.D. Const. art. VIII, § 3; Tex. Const. art. VII, § 5; Va. Const. art. VIII, § 10; Wash. Const. art. IX, § 2; Wyo. Const. art. III, § 36.

[24] David Tyack, et al., *Law and the Shaping of Public Education, 1785-1954* (1987), 56-57.

[25] Cal. Const. art. IX, § 8; Colo. Const. art. V, § 34, art. IX, § 7; Fla. Const. art. I, § 3; Ill. Const. art. X, § 3; Ind. Const. art. I, § 6; Kan. Const. art. VI § 8 (C) (1859); Ky. Const. art. XI, § 1 (1850); Mass. Const. amend. art. XVIII; Mich. Const. art. I, § 4; Minn. Const. art. I, § 16, art. XIII, § 2; Mo. Const. art. I, § 7, art. IX, § 8; Neb. Const. art. VII, § 11; Nev. Const. art. XI, § 10; N.Y. Const. art. IX, § 4 (1894); Ohio Const. art. VI, § 2; Or. Const. art. I, § 5; Pa. Const. art. III, § 15, art. X, § 2; Tex. Const. art. I, § 7; Wis. Const. art. I, § 18.

as "Blaine Amendments." The origins of the no-funding principle predate not only the Blaine Amendment but also the advent of significant Catholic immigration in the 1840s. Even restricting consideration to those no-funding provisions enacted after 1876, the no-funding provisions in the pre-1876 state constitutions more than likely served as models for the post-1876 provisions.[26] This was the common practice. For example, the Washington Constitutional Convention of 1889 modeled many of its provisions on the Oregon Constitution.[27] A cursory review of many of these state provisions reveals a variety of terminology and coverage, with the language often parroting that found in other state constitutions. Thus, no-funding provisions predate Blaine and serve religious liberty interests that cannot properly be dismissed as related to any anti-religious bias.

II. ARTICLE X, SECTION 6 OF THE MONTANA CONSTITUTION WAS ADOPTED OUT OF VALID CONCERN FOR RELIGION AND HAS BEEN MAINTAINED FOR THAT PURPOSE.

A. There is no scholarly consensus that the Blaine Amendment was motivated chiefly by anti-Catholic animus.

Petitioners and their amici assert that the Blaine Amendment of 1876 and the state no-funding provisions

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[26] Jill Goldenziel, *Blaine's Name in Vain: State Constitutions, School Choice, and Charitable Choice*, 83 Den. U. L. Rev. 57, 66-71 (2005).

[27] Robert F. Utter and Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide* (2002), 9.

were motivated by anti-Catholic animus. Based on this "sordid history" and its "discriminatory baggage" (Pet. Brf. 28-29), they urge this Court to rule that state no-funding provisions are *per se* discriminatory. *See also* Brief of Becket Fund, 4-20 ("The Court should mark all Blaine Amendments as presumptively unconstitutional."); Brief of 131 Current and Former State Legislators, 2-10.

History is complex; it does not provide simple answers to current legal disputes. History informs and enlightens; it does not supply legal conclusions. As Alfred H. Kelly wrote over five decades ago, when courts rely on history to achieve legal results, "[t]oo often they reach conclusions that are plainly erroneous. More often they state as categorical absolutes propositions that the historian would find to be tentative, speculative, interesting, and worthy of further investigation and inquiry, but not at all pedigreed historical truth."[28]

Contrary to the claims of Petitioners and their amici, there is no scholarly consensus about the

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[28] Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 Sup. Ct. Rev. 119, 155 (1965). History does not "set out to answer the kinds of questions that constitutional interpreters must resolve." Rebecca L. Brown, *History for the Non-Originalist*, 26 Harv. J.L. & Pub. Pol'y 69, 71 (2003). *See also Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 237 (1963) (Brennan, J., concurring) ("[T]he historical record is at best ambiguous, and statements can readily be found to support either side of the proposition.").

ultimate motivations behind those who supported the Blaine Amendment. All scholars acknowledge that the Blaine Amendment was proposed at a time of heightened controversy over the "School Question" – involving nonsectarian Bible reading in public schools and the public funding of religious schools – and during a period of increased tensions between Protestants and Catholics. Scholars also agree that some supporters of the Blaine Amendment used anti-Catholic rhetoric in the public debates that accompanied the proposal. But, as several scholars maintain, it distorts the historical record to insist that anti-Catholicism was the only or primary motivation for the Amendment and the actions of its supporters.[29] According to one scholar of the Blaine Amendment:

> [T]he Blaine Amendment was a fulcrum in the century-long struggle over the propriety, role

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[29] Feldman, *Non-Sectarianism Reconsidered*, at 111-112; Frederick Mark Gedicks, *Reconstructing the Blaine Amendment*, 2 First Amend. L. Rev. 85, 91, 94 (2003); Goldenziel, *Blaine's Name in Vain*, at 62-64; Steven K. Green, *"Blaming Blaine": Understanding the Blaine Amendment and the "No-Funding" Principle*, 2 First Amend. L. Rev. 107, 130 (2003); Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 B.Y.U. L. Rev. 295-333 (2008); Green, *The Bible, the School, and the Constitution*, 179-223; Stephen Macedo, *Diversity and Distrust* (2000), 54-63; Marc D. Stern, *Blaine Amendments, Anti-Catholicism, and Catholic Dogma*, 2 First Amend. L. Rev. 153, 168-176 (2003); Mark Tushnet, *Vouchers After Zelman*, 2000 Sup. Ct. Rev. 1, 16; Laura S. Underkuffler, *The "Blaine" Debate: Must States Fund Religious Schools?* 2 First Amend. L. Rev. 179, 194-195 (2003); Timothy Verhoeven, *Secularists, Religion and Government in Nineteenth-Century America* (2019), 151-159; Laurence H. Winer and Nina J. Crimm, *God, Schools, and Government Funding* (2015), 40-48.

> and character of universal public education in America while, at the same time, it served as the capstone of an eight-year controversy over the legitimacy of Protestant oriented public schooling, a controversy that raged alongside the parochial school funding question. The Blaine Amendment had as much to do with the partisan climate of the post-Reconstruction era and related concerns about federal power over education as it did with anti-Catholic animus. Included in the mix was a sincere effort to make public education available for children of all faiths and races, while respecting Jeffersonian notions of church-state separation. Those who characterize the Blaine Amendment as a singular exercise in Catholic bigotry thus give short shrift to the historical record and the dynamics of the times.[30]

Contemporaries understood that the proposed amendment sought to address a variety of issues. The Republican *New York Times*, the Democratic *New York Tribune*, *The Atlantic Monthly*, and even *The Catholic World* viewed the proposal as a step toward resolving the larger School Question and diffusing religious conflict.[31] "Thinking men of all parties see much more to deplore than to rejoice over, in the virulent outbreak of discussions concerning the churches and the schools,"

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[30] Green, *"Blaming Blaine*," at 113-114.

[31] *See New York Times*, Dec. 8, 1875, at 6, and Dec. 15, 1875, at 6; *New York Tribune*, Dec. 8, 1875, at 6, and Dec. 15, 1875, at 4; William T. Harris, "The Division of School Funds," 20 *Atlantic Monthly* 171 (Aug. 1876); *The Catholic World*, Jan, 1876, at 437.

wrote the *Tribune*, "and welcome any means of removing the dangerous question from politics as speedily as possible."[32] Contemporaries also viewed the Blaine Amendment as a way to ensure the financial security of state school funds at a crucial time in the development of common schooling. A division of the school funds "is totally inconsistent with the public school system as at present organized, and in the end would prove its destruction," wrote columnist Samuel T. Spear. "Moreover, it would be exceedingly difficult, if not wholly impracticable, to make the distribution according to equity."[33] As Professor Feldman has written, people also supported the Blaine Amendment because it affirmed a positive understanding of nonsectarian and secured the stability of public education: "the nonsectarianism envisioned by the Amendment solved the quandary of how to maintain common institutions

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[32] *New York Tribune*, Dec. 15, 1875, at 4. *See also* the statement by Senator Francis Kernan, a Catholic, about the amendment as proposed by James G. Blaine: "Insomuch as there was danger that sectarian dissensions would arise in regard to the common-school moneys, inasmuch as it was asserted that efforts were being made to divide these moneys between the religious denominations, and there was great danger that the subject of the common schools would be made a political question and sectarian prejudices aroused as an element in political contests, I was willing to adopt the Blaine amendment, in the hope and belief that is would quiet these groundless fears as to the common schools and avert the evils which spring from religious prejudice." 4 Cong. Rec. 5581 (Aug. 14, 1876).

[33] Samuel T. Spear, "The School Problem," *The Independent*, Feb. 3, 1876 at 5.

without running headlong into the difficult realties of religious heterogeneity."[34]

Finally, contemporaries supported the Blaine Amendment out of a sincere commitment to the principle of church-state separation. Numerous writers praised church-state separation and its accompanying prohibition on state funding of religion as a singular American achievement in the advance of religious freedom. Future U.S. Commissioner of Education William T. Harris wrote at the time that Americans concurred on "the inherent necessity of the separation of church and state in order that the former may become perfect spiritually, and that the latter may make political and civil freedom possible."[35] The *North American Review* expressed a similar sentiment, writing in 1876 that "[t]he separation of Church and State, an American discovery in political science, works well and receives the approval of Catholics and Protestants."[36]

Debate in the Senate over the proposed amendment centered on issues of partisanship, of federalism and states' rights, of the need to secure public education, and of the threats presented to that security by

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[34] Feldman, *Non-Sectarianism Reconsidered*, at 103.

[35] Harris, "The Division of School Funds," at 173. While serving as Superintendent of Public Education in St. Louis, Harris ended the practice of nonsectarian religious exercises in that city's schools. Green, *The Bible, the School, and the Constitution*, 203-205.

[36] D.C. Gilman, *Education in America, 1776-1876*, North American Review (Jan. 1876), 191, 209.

funding private, religious education.[37] Republicans and Democrats alike agreed that the proposed amendment would reinforce a longstanding constitutional principle against government funding of religious institutions. Senator Frederick Frelinghuysen, the floor manager of the amendment, declared that the measure affirmed the longstanding principle that "people should not be taxed for sectarian purposes." "The whole history of our country, from its origin to the present day, establishes and fortifies these positions."[38] Democratic Senator Thomas Randolph concurred, noting the proposal "founds no new principle, expresses no

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[37] Steven K. Green, *The Blaine Amendment Reconsidered*, 36 J. Legal Hist. 38, 47-57 (1992).

[38] 4 Cong. Rec. 5561 (Aug. 14, 1876). Although the word "sectarian" was at times used as a code word for Catholicism, contemporaries also used the term in its generic sense to refer to any religious sect or denomination. Professor Feldman has demonstrated that Horace Mann used the term sectarian to refer to doctrines of particular Protestant denominations, *see* Feldman, *Non-Sectarianism Reconsidered*, at 73-75, and in the 1831 New York controversy over funding denominational charity schools, opponents warned that "Methodist, Episcopalian, Baptist, and every other sectarian school" would seek a share of the school fund. Bourne, *History of the Public School Society*, at 140. In 1869, the Massachusetts Supreme Judicial Court applied Mass. Const. amend. art. XVIII's prohibition on appropriating public funds to any school controlled by a "religious sect" to bar funding for a school controlled by a Congregational Church. *See Jenkins v. Andover*, 103 Mass. 94 (1869). And in 1895, a Pennsylvania trial court enjoined religious exercises in a public school that tracked the doctrines of the Methodist Episcopal Church, declaring that "denominational religious exercises and instruction in sectarian doctrine have no place in our system of common school education." *Stevenson v. Hanyon*, 4 Pa. Dist. Rep. 395, 396 (Pa. Com. Pl. 1895).

opinion as the wisdom or policy of an existing practice. It recognizes the fact that a system known as the common-school system has obtained in almost every State, has the sanction directly or indirectly of most State governments [and] has the generous support of most taxpayers."[39] Republican Senator Oliver Morton agreed that the amendment merely reaffirmed existing principles:

> The idea of free schools not denominational but general, the idea of a free church not supported by the government or maintained by the government is an original one in American liberty. It has always prevailed in this country. Now it is proposed to give it form and put it in the Constitution. [But] [i]t has always been in the mind of our people for one hundred years.[40]

As Senator Morton continued in a statement that put the no-funding principle in constitutional terms:

> I believe that the example of one State establishing a religion, or doing what amounts to the same thing in principle, establishing denominational schools to be supported at public expense, endangers the perpetuity of the nation. The support of a school by public taxation is the same thing in principle as an established church.[41]

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[39] 4 Cong. Rec. 5454 (Aug. 11, 1876).

[40] *Id.* at 5585 (Aug. 14, 1876).

[41] *Id.*

And significantly, New York Democratic Senator Francis Kernan, a Catholic, voiced his support for Blaine's original proposal.[42] Overall, the Senate debate was devoid of statements that may be considered anti-Catholic. In that contemporaries understood that multiple issues informed the no-funding principle and the Blaine Amendment, this Court should resist invitations to characterize the amendment as a singular episode in anti-Catholicism.[43]

B. Evidence of anti-religious animus is lacking in the enactment of the 1889 Montana Constitution.

Like thirty-seven other states, the Montana Constitution contains an express provision that prohibits any government entity from appropriating public monies in support of a religious institution, including religious schools. Far from being an outlier, Montana's Constitution represents the prevailing practice in state constitutional drafting that began in the 1830s. Adhering to other constitutional mandates to create and support systems of public schools, constitution

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[42] *Id.* at 5580. Kernan stated that Blaine's original proposal "met with no considerable opposition in any quarter. It declares that money raised in a State by taxation for the support of public schools or derived from any public land therefor or any public lands devoted thereto shall not be under the control of any religious sect or denomination, nor shall any money so raised be divided among the sects or religious denominations. Were this before the Senate I would support it." *Id.*

[43] Green, *"Blaming Blaine,"* at 146-151.

drafters sought to preserve the school fund and avoid denominational competition over public monies and the religious dissention that it would create.

Petitioners provide no evidence that anti-Catholic animus motivated the later state no-funding provisions, including article XI, section 8 of the Montana Constitution, the precursor of article X, section 6. As Chief Justice Rehnquist observed in *Locke v. Davey* when discussing Washington's no-funding provision, Wash. Const. article IX, section 4, enacted pursuant to the same Enabling Act as applied to Montana, "Neither [the plaintiff] nor amici have established a credible connection between the Blaine Amendment and . . . the relevant constitutional provision . . . the provision in question is not a Blaine Amendment." *Locke*, 540 U.S. at 723, n.7. Petitioners thus bear the burden of demonstrating a credible connection between Montana Constitution Article XI, Section 8, and anti-Catholic animus, and they have failed to do so.

Petitioners and their amici attempt to paint a portrait of rampant anti-Catholicism in late-nineteenth century Montana. That image is not supported by the historical record. Catholic missionaries were among the first Christian settlers in Montana, establishing missions among several Native tribes.[44] The discovery of gold, silver, and then copper in Montana after

[44] S.H.C.J., *The Montana Missions*, Records of the Catholic Historical Society of Philadelphia 34 (1923), 32-49. With the influx of Catholics to work in the mines and smelters, Catholic officials sent additional priests to Montana, establishing many of the earlier churches in the territory. *Id.* at 45-49.

mid-century drew thousands of people to work in the mines, a significant proportion of whom were Irish or Irish Americans, although large numbers of Catholics also arrived from Italy, Germany, and the Austro-Hungarian Empire. Historians have documented that by the early twentieth century, Montana possessed one of the more diverse ethnic populations found anywhere in the American West.[45] At that time seventy-seven percent of all Montanans who considered themselves members of any church denomination identified as Catholic.[46]

During this period, Catholics held positions of economic and political influence. The Anaconda Copper Mining Company, the most powerful corporation in the history of Montana, was founded by Irish immigrant Marcus Daly and then run by another Catholic of Irish descent, John D. Ryan, into the early twentieth century.[47] Between 1867 and 1885, both of Montana's popularly elected delegates to Congress were Catholic – James Cavanaugh and Martin Maginnis – to be followed by another Catholic, Thomas Carter, who also served as Montana's first elected member of Congress.

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[45] Robert R. Swartout, Jr., ed., *Montana: A Cultural Medley* (2015), 2-4; Michael P. Malone and Richard B. Roeder, *Montana: A History of Two Centuries* (1976), 265.

[46] Department of Commerce and Labor, Bureau of the Census, Religious Bodies: 1906, 44-45 (reporting figures for 1890); Malone and Roeder, *Montana: A History of Two Centuries*, at 266 ("Roman Catholicism has always been Montana's dominant religion.")

[47] Malone and Roeder, *Montana: A History of Two Centuries*, 152-155.

The suggestion that Catholics were a persecuted minority within the state is refuted by the fact that Montanans, regardless of religious affiliation, continuously elected known Catholics to high political office, including Senators Thomas J. Walsh, James E. Murray, and Mike Mansfield. This situation substantiates the conclusion of *The Catholic Encyclopedia* that "[t]he spirit of religious intolerance has had scant encouragement in Montana, and many Catholics have occupied prominent positions in her industrial development and political history."[48]

The legislative record surrounding the drafting of the 1889 Montana Constitution is sparse and likewise does not support Petitioners' claims. According to analyses on the drafting of that constitution, the delegates drew extensively from a proposed constitution written five years earlier in a failed quest for statehood. As was a common practice during the nineteenth century, delegates of one state convention would borrow heavily from constitutions from other states. Apparently, delegates to the 1884 Montana convention did that very thing by excerpting from the California and Colorado constitutions, the latter likely being the source for Montana's eventual no-funding provision. The insinuation of animus raised in Petitioners' brief, at 35-45, lacks any basis in the evidence. *See* II 1884 Montana Constitutional Convention (1884), 159, 409-412, 435.

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[48] Charles George Herbermann, *The Catholic Encyclopedia* 10 (1913), 519.

In 1889, facing an invitation from Congress to organize a state government, delegates quickly wrote a new constitution with the 1884 version providing approximately ninety percent of its content.[49] Numerous Catholics of prominence, including Martin Maginnis, served as delegates to that convention, and Maginnis served on the Education Committee that drafted article XI, section 8. The convention adopted that provision unanimously, and Montana voters, a significant percentage of whom were Catholic, approved the Constitution by an overwhelming vote of 24,676 in favor to 2,274 opposed.[50]

C. There is no evidence that the reenactment of article X, section 6 in the 1972 Montana Constitution was motivated by anti-religious animus.

The determinative provision is the 1972 Constitution and its reenactment of article X, section 6 following a distinct debate about whether to retain, omit, or change this provision. As one commentator on article X, section 6 has observed, "drafters rewrote this section in 1972 to be devoid of any hostility towards religion." As a result, "the present version stands as a strong

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[49] Michael P. Doughterty, *Montana's Constitutional Prohibition on Aid to Sectarian Schools*, 77 Mont. L. Rev. 41, 45-46 (2016). One change between the 1884 proposed constitution and the 1889 Constitution is that the delegates added the word "indirectly" to Article XI, section 8's prohibition on funding. *Id.* at 46.

[50] Ellis Waldron and Paul B. Wilson, *Atlas of Montana Elections, 1889-1976* (1978), 11-12.

national model of the separation of church and state due to its express prohibition on indirect aid to private religious schools."[51]

This conclusion is supported by the transcript to the Montana Constitutional Convention in 1972. The sponsor of article X, section 6, Delegate Burkhart, described the purpose of the provision as such:

> The primary and significant advantage secured by the present provision is the unequivocal support it provides for a strong public school system. The traditional separation between church and state, an important part of the American social framework, has become a fundamental principle of American education.[52]

Several delegates seconded Delegate Burkhart's sentiments with Delegate Harper adding that "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 . . . I believe Americans – thoughtful Americans are dedicated to the idea of church and state separation."[53] The only true controversy over section 6 was whether to add an exemption from the provision's language to permit *federal* funds to go to

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[51] Doughterty, *Montana's Constitutional Prohibition on Aid to Sectarian Schools*, 77 Mont. L. Rev. at 42.

[52] Verbatim Transcript, Montana Constitutional Convention, 1971-72, vol. VI, at 2008.

[53] *Id.* at 2012-13. *See also* remarks by Delegate Conover, *id.* at 2016-17, Delegate Barnard, *id.* at 2017, Delegate Woodmansey, *id.* at 2018.

private and religious schools, an amendment the Convention adopted.[54]

As Petitioners' amici point out, three delegates expressed dissatisfaction with the 1889 provision, article XI, section 8, describing that provision as a "Blaine Amendment." *See* Brief of Becket Fund, at 19.[55] Other delegates, however, contested that characterization, with Delegate Harper responding that "I rather think that most of us do not believe that the separation of church and state is an evidence of bigotry."[56] Of greatest significance, in the end, those delegates who asserted a connection between article XI, section 8 and the Blaine Amendment voted *for* the compromise proposal that became article X, section 6.[57]

This Court has been loath to attribute improper discriminatory motives to legislators acting pursuant to their constitutional authority, particularly when it would involve divining the motivations of individual legislators. *See United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter. . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact

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[54] *Id.* at 2026; Doughterty, *Montana's Constitutional Prohibition on Aid to Sectarian Schools*, 77 Mont. L. Rev. at 46-52.

[55] Delegates Harbaugh, Driscoll, and Schultz, Verbatim Transcript, at 2010, 2012, 2012.

[56] Delegate Harper, *id.* at 2012. *See also* Delegate Kelleher, *id.* at 2023.

[57] *Id.* at 2025-26; Doughterty, *Montana's Constitutional Prohibition on Aid to Sectarian Schools*, 77 Mont. L. Rev. at 53.

it."). As the Court recently reaffirmed in *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018), "Whenever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State." In addition, the "allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination. '[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.'" *Id.* (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1981) (plurality opinion)). There is no reason for the Court to deviate from this norm.

III. FEDERALISM ALLOWS STATES TO MAINTAIN AN INDEPENDENCE OF RELIGION AND GOVERNMENT BEYOND WHAT THE ESTABLISHMENT CLAUSE REQUIRES.

The decision of the Montana Supreme Court below deserves deference. In our federalist system, federal and state laws sometimes provide overlapping protections. While states do not have to provide protection equivalent to that provided by the federal government, they can, and often do, offer greater protection. *See*, *e.g.*, *State v. Schmid*, 423 A.2d 615, 626 (N.J. 1980) (noting that the New Jersey state constitutional free speech and assembly protections are "more sweeping in scope than the language of the First Amendment"); *People v. Scott*, 593 N.E.2d 1328, 1334 (N.Y. 1992) ("We believe that under the law of this State the citizens are entitled to more protection [than the Fourth Amendment provides]."); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948-49 (Mass. 2003) ("The Massachusetts

Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution; it may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life.").

As Chief Justice Rehnquist's majority opinion in *Locke* demonstrates, that understanding of constitutional protections – as a floor beneath and not a ceiling above constitutional concerns – applies with full force to the Establishment Clause context. *See Locke*, 540 U.S. at 722 ("the differently worded Washington Constitution draws a more stringent line than that drawn by the United States Constitution."). The desire to avoid establishment, the Court reasoned, is a "historic and substantial state interest." *Id.* at 725. Because the Establishment Clause is restrained by the Free Exercise Clause, and vice versa, potential expansion of each above the floor of federal rights is inherently and uniquely limited. The "pairing presents a constitutional strategy that appears nowhere else in the Bill of Rights. . . . [They] create both a floor under and a ceiling over the formulation of religion policy by the states."[58]

By affording state and local governments the latitude to resolve close church-state questions, "federal courts achieve some of the desirable effects of originalism – namely political accountability and judicial consistency –" when states are free to create their own

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[58] Ira C. Lupu and Robert Tuttle, *Federalism and Faith*, 56 Emory L.J. 19, 21-22 (2006).

policies and programs reflective of their increased need for both separation from and partnership with religious institutions.[59] Refusing states this latitude on borderline church-state issues would collapse the "play in the joints" between the Religion Clauses this Court has wisely and repeatedly recognized. *Locke*, 540 U.S. at 718 (quoting *Walz*, 397 U.S. at 669).

Montana's constitution reflects the state's interests in respecting the distinctive nature of religious education, avoiding interference in religious schools, and protecting its state funding resources for public education. It ensures public accountability for education and avoids entanglement with religion. The state's treatment of religion reflects the kind of symmetry long associated with protections for religious liberty. It protects against government involvement in religious institutions. While this Court has recognized a distinction between government programs involving direct funding to religious institutions and those that involve indirect funding, various programs of indirect funding may still pose constitutional risks and bring unintended regulatory consequences. Religious education and public education are fundamentally different enterprises. Montana's prohibition on indirect aid to religious entities should be respected in order to maintain adequate distance between the state and religious institutions. This Court should reject Petitioners' effort to dismiss fundamental religious liberty protections as

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[59] Jesse R. Merriam, *Finding a Ceiling in a Circular Room:* Locke v. Davey, *Religious Neutrality, and Federalism*, 16 Temp. Pol. & C.R. L. Rev. 103, 129 (2007)

"bigotry" and respect Montana's "authority to safeguard individual rights above and beyond the rights secured by the U.S. Constitution" *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring). It would cause untold and longstanding injury to principles of federalism and state sovereignty to strike down a state constitutional provision based on speculation.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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