

No. 18-1195

In The
Supreme Court of the United States

KENDRA ESPINOZA, JERI ELLEN ANDERSON
and JAIME SCHAEFER,

Petitioners,

v.

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

Respondents.

**On Petition For A Writ Of Certiorari
To The Montana Supreme Court**

**MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS*
CURIAE AND *AMICUS CURIAE* BRIEF FOR
GEORGIA GOAL SCHOLARSHIP PROGRAM, INC.
IN SUPPORT OF PETITIONERS**

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April 12, 2019

**MOTION FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

Pursuant to Supreme Court Rule 37(a), Georgia GOAL Scholarship, Inc. (“GOAL”) moves for leave of court to file a brief as *amicus curiae* in support of the Petition for a Writ of Certiorari.

Notice of intent to file this brief was provided to Petitioners and Respondents on April 8, 2019, which was seven days before the deadline for filing, and therefore untimely under Supreme Court Rule 37(a)(2), which requires at least 10 days’ advance notice.

Petitioners have consented to the filing. Respondents object on the grounds that the notice was untimely.

GOAL is a student scholarship organization operating under a statute similar to the Montana statute at issue in this case, and thus has an interest in seeing the constitutionality of such statutes upheld. GOAL believes this brief will be informative with respect to an ongoing trend in the educational policies of the Respondents and many other jurisdictions around the country to educate the “whole child” in government-approved thoughts, beliefs, attitudes, and practices pertaining to mental and behavioral health, and social and emotional learning. GOAL also hopes the brief will be helpful in considering how these policies and the explicit religious discrimination of the Respondents combine to implicate a broad constellation of fundamental rights, including personal dignity and autonomy, parental rights to direct the upbringing of children, free

exercise of religion, free speech, freedom from compelled thought, due process, and equal protection.

Respondents would suffer no prejudice if the Court permitted this brief to be filed, particularly since they were granted a 30-day extension to file their responsive brief.

Wherefore, GOAL respectfully requests the Court permit this brief to be filed.

Respectfully submitted,

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QUESTION PRESENTED

Does it violate the Religion and Speech Clauses or Equal Protection and Due Process Clauses of the United States Constitution to invalidate a generally available and religiously neutral student-aid program for the social, emotional, and academic development of students simply because the program affords students the choice of attending religious schools?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
IDENTITY AND INTEREST OF THE <i>AMICUS CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	4
I. Certiorari Should Be Granted to Clarify Whether Montana May Discriminate Against Parents Seeking Equal Access to Generally Available K-12 Student Aid to Secure the Social, Emotional, and Academic Education of Their Children at the Non-Public Religious Schools of Their Choice	4
A. Montana Has Transformed Its Generally Available K-12 Student Aid Program from an Exclusively Academic Education to a Social, Emotional and Academic Education Inculcating Children in Thoughts, Beliefs, Attitudes, and Practices Pertaining to Mental and Behavioral Health and Well-Being	5
B. The Schools Attended by Petitioners' Children Engage in Social, Emotional and Academic Learning from a Christian Perspective	14

TABLE OF CONTENTS – Continued

	Page
II. In Light of the Transformed Nature of Montana’s Generally Available K-12 Student Aid and Montana’s Religious Discrimination Against Parents Seeking Such Aid, This Court Should Grant Certiorari to Consider Refining Its Precedents in the Area of Parental Rights in Education	16
A. Conditions on Generally Available K-12 Student Aid Must Not Violate the Right to Free Exercise of Religion	17
B. Conditions on Generally Available K-12 Student Aid Must Not Violate the Right to Freedom of Speech	21
C. Conditions on Generally Available K-12 Student Aid Must Not Violate the Right to Freedom from Compelled Thought.....	22
D. Conditions on Generally Available K-12 Student Aid Must Not Violate the Rights to Due Process and Equal Protection	25
CONCLUSION	29

APPENDIX

MONTANA HEALTH ENHANCEMENT STANDARDS MODEL CURRICULUM GUIDE FOR K-12 HEALTH AND PHYSICAL EDUCATION.....	App. 1
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TABLE OF AUTHORITIES

	Page
CASES	
<i>Burwell v. Hobby Lobby Stores, Inc.</i> , 573 U.S. 682 (2014).....	26
<i>Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah</i> , 508 U.S. 520 (1993)	17
<i>Duncan v. Louisiana</i> , 391 U.S. 145 (1968)	25
<i>Eisenstadt v. Baird</i> , 405 U.S. 438 (1972).....	25
<i>Espinoza v. Mont. Dep’t of Rev.</i> , 393 Mont. 446 (2018).....	2
<i>Good News Club v. Milford Cent. Sch.</i> , 533 U.S. 98 (2001)	21, 22
<i>Griswold v. Connecticut</i> , 381 U.S. 479 (1965)	25
<i>Lee v. Weisman</i> , 505 U.S. 577 (1992)	14
<i>Locke v. Davey</i> , 540 U.S. 712 (2004)	19
<i>McDaniel v. Paty</i> , 435 U.S. 618 (1978).....	16, 18
<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923)	25, 28
<i>Mitchell v. Helms</i> , 530 U.S. 793 (2000).....	20, 21
<i>Morris Cnty. Bd. of Chosen Freeholders v. Free- dom From Religion Found.</i> , 586 U.S. ___ (March 4, 2019)	16
<i>Obergefell v. Hodges</i> , 135 S. Ct. 2584 (2015)	25, 27, 28
<i>Pierce v. Society of Sisters</i> , 268 U.S. 510 (1925)	26, 28
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963).....	24
<i>Trinity Lutheran Church of Columbia, Inc. v. Comer</i> , 137 S. Ct. 2012 (2017).....	18, 19, 21

TABLE OF AUTHORITIES – Continued

	Page
<i>W. Va. State Bd. of Educ. v. Barnette</i> , 319 U.S. 624 (1943).....	23, 24
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972)	18
CONSTITUTIONAL PROVISIONS	
Mo. Const. art. I, § 7.....	18
Mont. Const. art. X, § 6.....	2, 19
U.S. Const. amend. I	<i>passim</i>
U.S. Const. amend. XIV, § 1	16, 25, 26, 28
CODES, RULES AND STATUTES	
Mont. Admin. R. 10.55.1301	6
OTHER AUTHORITIES	
Atlanta Public Schools, <i>Social Emotional Learning</i> , https://www.atlantapublicschools.us/Page/53072 (last visited Apr. 10, 2019)	20
Collaborative for Academic, Social, and Emotional Learning (CASEL), <i>Core SEL Competencies</i> , http://www.casel.org/core-competencies (last visited Apr. 10, 2019).....	11
C.S. Porter Middle School, Montana Behavior Initiative (MBI), <i>What is MBI?</i> , https://www.mcpsmt.org/Page/9173 (last visited Apr. 10, 2019).....	5

TABLE OF AUTHORITIES – Continued

	Page
Emory University, <i>Emory-Tibet Partnership: His Holiness the Dalai Lama, Emory Presidential Distinguished Professor</i> , https://www.tibet.emory.edu/about/his-holiness-the-dalai-lama/index.html (last visited Apr. 10, 2019)	13, 14
Emory University, <i>Emory University launches global Social, Emotional and Ethical Learning program</i> (Apr. 2, 2019), https://news.emory.edu/stories/2019/04/upress_see_learning/campus.html	12
Harvey Rude et al., <i>The Montana Behavioral Initiative: Student Results and System Outcomes</i> (Mar. 2003), available at https://eric.ed.gov/?id=ED476200	5
Hilary Matheson, <i>Schools Focusing on Mental Wellness</i> , Daily Inter Lake (Feb. 13, 2017), https://www.dailyinterlake.com/article/20170213/ARTICLE/170219954	9
Hilary Matheson, <i>SOARS Raises Bar on Mental-Health Issues, Educators Say</i> , Daily Inter Lake (Feb. 23, 2019), https://www.dailyinterlake.com/local_news/20190223/soars_raises_bar_on_mental-health_issues_educators_say	8, 9, 10
Jane Cook, “ <i>SEEL</i> ” tackling the emotional crisis: <i>A gift to humanity by His Holiness the Dalai Lama of Tibet</i> , Tibet Post International (Apr. 6, 2019), http://www.thetibetpost.com/en/news/international/6448-seel-tackling-the-emotional-crisis-a-gift-to-humanity-by-his-holiness-the-dalai-lama-of-tibet	13

TABLE OF AUTHORITIES – Continued

	Page
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Marilee Bresciani Ludvik & Tonya Lea Eberhart, <i>How Mindful Compassion Practices Can Cultivate Social and Emotional Learning</i> , UNESCO-MGIEP (Sept. 2018), https://d27gr4uvgxfbqz.cloudfront.net/files%2Ff1d151fa-e993-4e81-a6e6-221a47e4bbb6_Mindfulness%20Compassion26112018.pdf	11, 12
Montana Office of Public Instruction, <i>Montana Health Enhancement Standards Model Curriculum Guide for K-12 Health and Physical Education</i> (July 2016), http://montanateach.org/wp-content/uploads/2016/11/HE_ModelCurriculumGuide-accessible-18.pdf	7, 8
Noxon Public Schools, <i>Montana Behavioral Initiative</i> , https://www.noxonschools.com/domain/124 (last visited Apr. 10, 2019)	6
Patricia A. Jennings, <i>Mindfulness-Based Programs and the American Public School System: Recommendations for Best Practices to Ensure Secularity</i> , <i>Mindfulness</i> (Feb. 2016), available at https://link.springer.com/article/10.1007/s12671-015-0477-5	12

TABLE OF AUTHORITIES – Continued

	Page
Stillwater Christian School, <i>Core Values, Mission Statement, Vision Statement</i> , http://www.stillwaterchristianschool.org/domain/232 (last visited Apr. 10, 2019).....	14
UNESCO-MGIEP, <i>Building Socio-Emotional Learning for Education 2030</i> , http://mgiep.unesco.org/ (last visited Apr. 10, 2019)	11
University of Montana, Phyllis J. Washington College of Education and Human Sciences, <i>Trauma-Informed Positive Behavioral Intervention and Supports</i> , https://coehs.umt.edu/specunits/montana_safe_schools_center/ti-pbis/default.php (last visited Apr. 10, 2019)	6
Urban Institute, <i>Best and Promising Practices: Trauma Informed Community Building – A Model for Strengthening Communities in Trauma Affected Neighborhoods</i> , https://societyhealth.vcu.edu/media/society-health/pdf/Best-Practices-Trauma-TICB-12.3.14.pdf (last visited Apr. 10, 2019)	8
U.S. Department of Education, <i>U.S. Department of Education Invests More Than \$70 Million to Improve School Climate and Keep Students Safe</i> (Sept. 23, 2014), http://www.ed.gov/news/press-releases/us-department-education-invests-more-70-million-improve-school-climate-and-keep-students-safe	7

**IDENTITY AND INTEREST
OF THE *AMICUS CURIAE*¹**

Georgia GOAL Scholarship Program, Inc. (“GOAL”) is the largest student scholarship organization (“SSO”) operating under the Georgia Education Expense Credit Program (the “Georgia Scholarship Program”). Similar to the Montana K-12 tax credit scholarship program, Georgia awards state income tax credits to taxpayers who contribute to SSOs to fund pre-K-12 scholarships to families desiring to send their children to the non-public schools of their choice. Most of the 138 non-public schools participating in GOAL are religious schools. In 2018, the Supreme Court of Georgia decided that taxpayers lacked standing to challenge the constitutionality of the Program. Like Montana, the Georgia Constitution contains a so-called “Blaine Amendment,” prohibiting use of public funds, directly or indirectly, in aid of any sectarian institution. The enforceability of Blaine Amendments against tax credit student scholarship programs is thus of vital interest to GOAL. A decision that Montana may not discriminate against parents seeking equal access to generally available K-12 student aid to secure the social, emotional, and academic education of their children at the non-public religious schools of their choice would provide

¹ Rule 37 statement: As noted in the motion for leave to file this brief, timely notice of intent to file was not provided to the parties, and Respondents object on that basis, while Petitioners consent. Counsel for the *amicus curiae* authored the brief in its entirety. No person or entity other than the *amicus curiae*, its members or its counsel made a monetary contribution to the preparation or submission of the brief.

much-needed clarity for similar K-12 tax credit scholarship programs to those who both support and oppose passage of similar programs in other states.

◆

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises the question of whether the government may exclude religious schools from otherwise neutral and generally available student aid programs. The Montana Supreme Court declared unconstitutional a state scholarship program that helped needy children attend the private school of their families' choice. *Espinoza v. Mont. Dep't of Rev.*, 393 Mont. 446 (2018). The court held that allowing families to use the scholarships at religious schools aided religious institutions in violation of Montana's Blaine Amendment, Mont. Const. art. X, § 6. In this case the Court can review whether state governments that offer K-12 student aid to families for the social, emotional, and academic development of their children may discriminate against those who would use the aid at a non-public religious school.

Over the past 25 years, Montana has transformed its free generally available public education system from an exclusive focus on academics to include the social, emotional, and academic development of the "whole" child. This has been implemented through the Montana Behavior Initiative, Montana's response to increased insubordination, alienation, aggressive

behavior, truancy, drug use, drop outs, and vandalism among Montana youth. The Montana Behavior Initiative, and the model standards, goals, and curriculum that support it, require local public schools to inculcate students in the thoughts, beliefs, attitudes, and practices that state officials have determined are essential to students' social, emotional, and academic development. This transformation is mirrored in many other states, and has taken root on a global scale as well.

While Montana has implemented this new approach over the last 25 years, private religious schools in Montana, including the school attended by Petitioners' children, have for decades been focused on the holistic social, emotional, and academic development of students from a religious perspective.

Montana offers generally available K-12 student aid, in the form of a free public education, to parents seeking to secure the social, emotional and academic development of their children in local public schools. Through the Montana Scholarship Program, it also offers such aid to parents with the same objective in non-public, non-religious schools. However, the State prohibits K-12 tax-credit scholarships from being used at religious schools. Therefore, parents and guardians who want the social, emotional, and academic development of their children to occur in a private religious school in accordance with their religious viewpoints—as Petitioners do—are financially penalized by costly and often unaffordable tuition.

K-12 education in Montana and elsewhere has changed to address complex and highly intimate social and emotional issues and learning that previously were the primary responsibility of parents and guardians. While the intentions of Respondents are undoubtedly good, their open discrimination on the basis of religion in their generally available K-12 student aid implicates an array of fundamental rights such as the free exercise of religion, free speech, freedom from compelled thought, due process and equal protection. The Court should grant certiorari to consider how its precedents in these areas apply to these new developments.

◆

ARGUMENT

I. Certiorari Should Be Granted to Clarify Whether Montana May Discriminate Against Parents Seeking Equal Access to Generally Available K-12 Student Aid to Secure the Social, Emotional, and Academic Education of Their Children at the Non-Public Religious Schools of Their Choice.

As shown below, the transformed nature of public education in Montana and elsewhere implicates an array of fundamental parental and family liberties. This, combined with Montana's overt religious discrimination, warrants granting certiorari.

A. Montana Has Transformed Its Generally Available K-12 Student Aid Program from an Exclusively Academic Education to a Social, Emotional and Academic Education Inculcating Children in Thoughts, Beliefs, Attitudes, and Practices Pertaining to Mental and Behavioral Health and Well-Being.

During the past 25 years, the focus of the generally available K-12 student aid Montana provides to families has expanded from academic learning to include the social, emotional, and academic development of the “whole” child.

In 1995, Montana developed the Montana Behavioral Initiative (the “MBI”). “The MBI is a proactive approach in creating behavioral supports and a social culture that establishes social, emotional, and academic success for all students.” C.S. Porter Middle School, Montana Behavior Initiative (MBI), *What is MBI?*² The MBI was created to respond to increased insubordination, alienation, aggressive behavior, truancy, drug use, drop outs, and vandalism among Montana youth. Harvey Rude et al., *The Montana Behavioral Initiative: Student Results and System Outcomes* (Mar. 2003).³ The MBI components are designed “to assist educators, parents, and other community members in developing the attitudes, skills, and systems necessary to ensure that each student, regardless of ability or disability,

² <https://www.mcpsmt.org/Page/9173> (last visited Apr. 10, 2019).

³ <https://eric.ed.gov/?id=ED476200>.

leaves public education and enters the community with social and academic competence.”⁴ Throughout Montana, there are now 250 public schools participating in the MBI, including Kalispell Public Schools (“KPS”).⁵

In 2001, the Montana State Board of Public Education (the “State Board”) adopted Administrative Rule 10.55.1301, which requires Montana public schools to teach children the importance of personal and community health through the promotion of a responsible lifestyle. “A healthy state transcends the physical and also includes the emotional, social and intellectual dimensions of health.” Mont. Admin. R. 10.55.1301. According to §(1)(b)(iii) of this rule, a basic health enhancement program “shall address the physical, emotional, social, and intellectual dimensions of a healthy lifestyle.” *Id.*

Montana schools promulgate a set of “MBI Belief Statements,” which explain, *inter alia*, that all students should be taught “academic, social, emotional, and behavioral” skills and that “a caring school climate and positive relationships between students, staff and families are critical to student success.” Noxon Public Schools, *Montana Behavior Institute*.⁶

⁴ University of Montana, Phyllis J. Washington College of Education and Human Sciences, *Trauma-Informed Positive Behavioral Intervention and Supports*, https://coehs.umt.edu/specunits/montana_safe_schools_center/ti-pbis/default.php (last visited Apr. 10, 2019).

⁵ Noxon Public Schools, *Montana Behavioral Initiative*, <https://www.noxonschools.com/domain/124> (last visited Apr. 10, 2019).

⁶ See n. 5.

In 2014, the Montana OPI received a \$3.75 million School Climate Transformation grant from the U.S. Department of Education to develop systems of support for implementing evidence-based, multi-tiered behavioral frameworks for improving behavioral outcomes and learning conditions. The goals of the program are to connect children and families to appropriate services and supports, improve conditions for learning and behavioral outcomes for school-aged youths, and increase awareness of and the ability to respond to mental-health issues among school-aged youths. U.S. Department of Education, *U.S. Department of Education Invests More Than \$70 Million to Improve School Climate and Keep Students Safe* (Sept. 23, 2014).⁷

In July 2016, the Montana OPI published the *Montana Health Enhancement Standards Model Curriculum Guide for K-12 Health and Physical Education* (the “Montana Guide”).⁸ For grades 9-12, the Montana Guide provides for the thorough inculcation of children in thoughts, beliefs, attitudes, and practices pertaining to their mental and behavioral health, including social and emotional well-being. *Id.*, pp. 75-90. The Performance Indicators and Health Goals applicable to students in grades 9-12 include many private and sensitive subjects about which parents have the primary right to teach to their children as they raise

⁷ <http://www.ed.gov/news/press-releases/us-department-education-invests-more-70-million-improve-school-climate-and-keep-students-safe>.

⁸ http://montanateach.org/wp-content/uploads/2016/11/HE_ModelCurriculumGuide-accessible-18.pdf.

them in accordance with the dictates of their consciences. *See* Montana Guide excerpts in the Appendix to this brief. These include, but are not limited to, life skills, good character traits and behaviors, self-esteem, self-respect, social-emotional environment, societal norms and health, personal values and beliefs, responsible decision-making, building resistance skills, conflict avoidance, conflict resolution, mind-body connection, depression, loss and grief, co-dependence, marriage, parenting, sexual attitudes and conduct, friendship, mental health and disorders, suicide, adjusting to family changes, coping with stressful life changes, and dating skills.

KPS complies with these policies. In 2014, as part of a \$3.5 million federal grant from the Substance Abuse and Mental Health Services Administration, Montana OPI awarded KPS a \$450,000 Montana Support, Outreach and Access for the Resiliency of Students (“Montana SOARS”) grant. Hilary Matheson, *SOARS Raises Bar on Mental-Health Issues, Educators Say*, Daily Inter Lake (Feb. 23, 2019).⁹ The Montana SOARS grant transformed KPS into a “trauma-informed community,”¹⁰ with schools that have raised

⁹ https://www.dailyinterlake.com/local_news/20190223/soars_raises_bar_on_mental-health_issues_educators_say.

¹⁰ A “trauma-informed community” is one organized on the premise that most emotional and behavioral problems are caused by traumatic experiences, rather than bad habits or decisions, and accordingly seeks to accommodate those problems and prevent “re-traumatizing triggers.” *See, e.g.*, Urban Institute, *Best and Promising Practices: Trauma Informed Community Building – A Model for Strengthening Communities in Trauma Affected*

the bar on mental-health awareness and its impact on students.¹¹

Mark Flatau, KPS Superintendent, confirmed in a 2015 article that what may have once been considered a private family matter was now part of public education:

Forty years ago when I started, there was the belief that's not the job of the schools, that's the job of the family. I wouldn't argue that. It should be the job of the family—but it's not happening in all families. We could throw our hands up and say, 'not my fault,' but that's an inappropriate response. It's our responsibility to teach the kids we have. Many of them come with issues stemmed around mental health and social emotional learning. We can't turn our backs on it because if we do we're also going to fail them in academic learning.

Hilary Matheson, *Schools Focusing on Mental Wellness*, Daily Inter Lake (Feb. 13, 2017).¹²

As a result of the Montana SOARS grant, KPS implemented the MBI to foster positive school cultures and attitudes by developing students' social and emotional skills. In the sometimes awkward locutions of educational bureaucrats, KPS has “worked toward

Neighborhoods, <https://societyhealth.vcu.edu/media/society-health/pdf/Best-Practices-Trauma-TICB-12.3.14.pdf> (last visited Apr. 10, 2019).

¹¹ See n. 9

¹² <https://www.dailyinterlake.com/article/20170213/ARTICLE/170219954>.

improving school climate by developing a ‘universal language’ for students to identify feelings and problem solve conflicts. Students also learn how their brains work and self-regulating techniques.”¹³ KPS also links students and families with social services and private therapists through an electronic referral system called Connect.¹⁴

This transformation is a national phenomenon, in which most states are engaged. A group of researchers and civil society organizations have championed social and emotional learning (“SEL”) in school systems around the country as a way to “advance a new vision of what constitutes success in schools: the full integration of social, emotional, and academic development to ensure every student is prepared to thrive in school and in life.” Learning Policy Institute, *Aspen Institute Launches National Commission to Make Social and Emotional Development Part of the Fabric of Every School* (Sept. 20, 2016).¹⁵

The Collaborative for Academic, Social, and Emotional Learning, a leading proponent of SEL across the country, has recognized five “core competencies” that schools should include in their SEL programs:

¹³ See n. 9.

¹⁴ *Id.*

¹⁵ <https://learningpolicyinstitute.org/press-release/aspen-institute-launches-national-commission-make-social-and-emotional-development>.

self-awareness, self-management, social awareness, relationship skills, and responsible decision-making.¹⁶

The transformation is also a global trend, which the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) and its affiliated Mahatma Gandhi Institute of Education for Peace and Sustainable Development (“MGIEP”) (“UNESCO-MGIEP”) are leading.¹⁷ To “Transforming Education for Humanity,” the UNESCO-MGIEP programs “are designed to mainstream SEL in education systems, innovate digital pedagogies, and put youth as global citizens at the center of the 2030 agenda for Sustainable Development.”¹⁸

A recent UNESCO-MGIEP paper explained how cognitive neuroscientists could rigorously evaluate the five SEL core competencies to identify the ways in which they can consistently be cultivated, including through mindfulness practices. Marilee Bresciani Ludvik & Tonya Lea Eberhart, *How Mindful Compassion Practices Can Cultivate Social and Emotional Learning*, UNESCO-MGIEP (Sept. 2018), pp. 13-14.¹⁹ “Mindfulness compassion is the awareness that arises from paying attention in a particular way to the present inner experience as it relates to what is being

¹⁶ Collaborative for Academic, Social, and Emotional Learning (CASEL), *Core SEL Competencies*, <http://www.casel.org/core-competencies> (last visited Apr. 10, 2019).

¹⁷ UNESCO-MGIEP, *Building Socio-Emotional Learning for Education 2030*, <http://mgiep.unesco.org/> (last visited Apr. 10, 2019).

¹⁸ *Id.*

¹⁹ https://d27gr4uvgrfbqz.cloudfront.net/files%2Ff1d151fa-e993-4e81-a6e6-221a47e4bbb6_Mindfulness%20Compassion26112018.pdf.

observed by all of the human senses.”²⁰ To promote SEL, the authors recommend that schools furnish mindful compassion practices, such as yoga, Tai Chi, or QiGong.²¹

Proponents of mindful awareness practices in public schools argue they do “not involve and/or require any belief,” because they are “based on evidence from cognitive and affective neuroscience and the social and behavioral sciences.” Patricia A. Jennings, *Mindfulness-based Programs and the American Public School System: Recommendations for Best Practices to Ensure Secularity*, *Mindfulness* (Feb. 2016), pp. 176-78.²² However, the religious underpinnings of SEL are manifest in the recent launch of a New Delhi-based Social, Emotional and Ethical Learning (“SEEL”) program by Emory University’s newly-established Center for Contemplative Science and Compassion-Based Ethics (the “Center”). The Center was established with a gift of \$11 million from Yeshe Khorlo Foundation and the Gaden Phodrang Foundation of His Holiness the XIV Dalai Lama, who heads the program. *See* Emory University, *Emory University launches global Social, Emotional and Ethical Learning program* (Apr. 2, 2019).²³ The Dalai Lama, an Emory University Presidential

²⁰ *Id.* at 15.

²¹ *Id.* at 17.

²² <https://link.springer.com/article/10.1007/s12671-015-0477-5>.

²³ https://news.emory.edu/stories/2019/04/upress_see_learning/campus.html.

Distinguished Professor,²⁴ invited Emory to create a program of ethics and basic human values “that would be grounded in common sense, common experience, and scientific evidence, and that would be equally acceptable to those of any religious faith and those without.”²⁵

News coverage of the Center’s launch stated without irony that His Holiness the Dalai Lama had given humanity a universal secular ethical system: “A large part of the world believes that the spiritual leader of Tibet minted the idea of universal secular ethics, enshrining the values of compassion, human dignity, empathy, warm-heartedness, genuine sense of concern for others in our vision of prosperity and progress.” Jane Cook, “*SEEL*” tackling the emotional crisis: A gift to humanity by His Holiness the Dalai Lama of Tibet, Tibet Post International (Apr. 6, 2019).²⁶

At the Center’s launch, its Executive Director made clear that the Center’s goal is to implement the Dalai Lama’s SEEL in public schools: “There is a growing awareness of the effects of stress on young people and the need to incorporate social, emotional and ethical learning into standard K-12 academic curricula to

²⁴ Emory University, *Emory-Tibet Partnership: His Holiness the Dalai Lama, Emory Presidential Distinguished Professor*, <https://www.tibet.emory.edu/about/his-holiness-the-dalai-lama/index.html> (last visited Apr. 10, 2019).

²⁵ See n. 23.

²⁶ <http://www.thetibetpost.com/en/news/international/6448-seel-tackling-the-emotional-crisis-a-gift-to-humanity-by-his-holiness-the-dalai-lama-of-tibet>.

address the needs of the whole child.”²⁷ The Center’s goal clearly conflicts with this Court’s precedents relating to the use of public schools to indoctrinate students in a universal secular ethics. “The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.” *Lee v. Weisman*, 505 U.S. 577, 590 (1992).

B. The Schools Attended by Petitioners’ Children Engage in Social, Emotional and Academic Learning from a Christian Perspective.

Like the public schools funded by the State of Montana and KPS, the schools attended by Petitioners’ children are engaged in the social, emotional, and academic education of children, but from a Christian perspective.

Stillwater Christian School, one of the Montana non-public religious schools Petitioners’ children attend, is committed “to developing Christian character for life through instruction, in relationships, in work habits and decision making.” Stillwater Christian School, *Core Values, Mission Statement, Vision Statement*.²⁸ In the Complaint, Petitioner Espinoza explained that she chose Stillwater Christian School for

²⁷ See n. 23.

²⁸ <http://www.stillwaterchristianschool.org/domain/232> (last visited Apr. 10, 2019).

her children “because she is a Christian and she loves that the school teaches the same Christian values that she teaches at home.” Pet. App. 152, ¶ 12. Petitioner Anderson “is a Christian and appreciates that Stillwater teaches Christian values.” Pet. App. 138, ¶ 8. Petitioner Schaefer “is a Christian and loves that the school teaches the same Christian values as she teaches at home.” Pet. App. 167, ¶ 6.

The character education and social and emotional learning at the Stillwater Christian School is taught from a Christian viewpoint and includes, but is not limited to, teaching students about honesty, personal responsibility, integrity, fairness, caring, respect, and citizenship.

In short, Montana offers parents generally available K-12 student aid, in the form of a free public education, which includes the social, emotional, and academic development of their children in local public schools. Through the Montana Scholarship Program, Montana also offers generally available K-12 student aid to families that want the same thing from non-public, non-religious schools. But Montana bars such aid to families seeking the social, emotional, and academic development of their children in accredited non-public, religious schools from a “purely” Christian or other religious viewpoint. This unequal treatment highlights the importance of granting certiorari to review the Court’s precedents in the areas of free exercise of religion, freedom of speech, freedom from compelled thought, due process, and equal protection

rights as they relate to the right of parents to direct the upbringing of their children.

II. In Light of the Transformed Nature of Montana’s Generally Available K-12 Student Aid and Montana’s Religious Discrimination Against Parents Seeking Such Aid, This Court Should Grant Certiorari to Consider Refining Its Precedents in the Area of Parental Rights in Education.

By granting certiorari, this Court could clarify whether, under the First and Fourteenth Amendments to the U.S. Constitution, Montana and KPS may deny Petitioners equal access to generally available K-12 student aid for securing the social, emotional, and academic development of their children in religious schools. As Justice Kavanaugh recently stated:

As this Court has repeatedly held, governmental discrimination against religion—in particular, discrimination against religious persons, religious organizations, and religious speech—violates the Free Exercise Clause and the Equal Protection Clause. In the words of Justice Brennan, the “government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits.” *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (opinion concurring in judgment).

Morris Cty. Bd. of Chosen Freeholders v. Freedom From Religion Found., 586 U.S. ___ (March 4, 2019) (Kavanaugh, J., statement regarding denial of certiorari at 2).

As it stands, Petitioners must pay the full cost of private school tuition to obtain the social, emotional, and academic development of their children in accordance with their beliefs. If Petitioners cannot afford private school tuition, they will be compelled to accept the inculcation of their children by Montana and KPS in government-approved thoughts, beliefs, attitudes, and practices relating to their mental and behavioral health and social and emotional development. Yet, the “principle of religious equality applies to governmental benefits or grants programs in which religious organizations or people seek benefits or grants on the same terms as secular organizations or people. . . .” *Id.* at 3.

A. Conditions on Generally Available K-12 Student Aid Must Not Violate the Right to Free Exercise of Religion.

The First Amendment states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .” U.S. Const. amend. I.

“A law that is not religiously neutral is subject to strict scrutiny and must be narrowly tailored to advance a compelling governmental interest.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993). By prohibiting Petitioners from receiving scholarships under the Montana Scholarship Program for use at non-public religious schools, Montana is unconstitutionally denying Petitioners equal access to the generally available K-12 student aid that

Montana provides to parents and guardians for the social, emotional, and academic education of their children.

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), this Court cited a long line of cases that “repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest ‘of the highest order.’” *Id.* at 2019 (citing *McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (plurality opinion) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972))).

In *Trinity Lutheran*, the Missouri Department of Natural Resources offered grants on a competitive basis to applicant schools for replacing pea gravel on playgrounds with a pour-in-place rubber surface made from scrap tires to protect children’s safety and to reduce the number of tires destined for landfills. *Id.* at 2017. However, in accordance with the Department’s interpretation of a section of the Missouri Constitution prohibiting funding “in aid of any church, sect or denomination of religion,” Mo. Const. art. I, § 7, the Department maintained a “strict and express policy of denying grants to any applicant owned or controlled” by a religious entity. *Id.* The Trinity Lutheran Church Child Learning Center, which is such an entity, applied for a grant, stating its mission was “to provide a safe, clean, and attractive school facility in conjunction with an educational program structured to allow a child to grow spiritually, physically, socially, and cognitively.” *Id.* at 2017-18 (quoting App. to Pet. for Cert. 131a).

The Department denied the grant based on the policy against funding schools operated by churches. *Id.* at 2018. This Court held that this decision violated the Free Exercise Clause. *Id.* at 2024.

In the present case, relying on art. X, § 6 of the Montana Constitution (the “Montana Blaine Amendment”), Montana denied Petitioners equal access to generally available K-12 student aid for the social, emotional, and academic development of their children at the accredited non-public religious schools of their choice. This decision was based solely and explicitly on the religious status of the Christian schools chosen by Petitioners.

In *Trinity Lutheran*, the Court distinguished *Locke v. Davey*, 540 U.S. 712 (2004), which upheld a State of Washington law excluding a devotional theology degree from a postsecondary education scholarship program. *Locke*, 540 U.S. at 716, 721. The *Locke* Court reasoned that pursuing such a degree is an “essentially religious endeavor . . . akin to a religious calling as well as an academic pursuit.” *Id.* at 721-22. In *Trinity Lutheran*, this Court decided that the “use [of] recycled tires to resurface playgrounds” provides no support to such “essentially religious” purposes; rather, it aims merely to protect the safety of children on the playground. *Trinity Lutheran*, 137 S. Ct. at 2016.

In the present case, Montana’s religious discrimination in providing generally available K-12 student aid is unlike that of the Washington scholarship program at issue in *Locke*. Whether performed by teachers,

social workers, and therapists at a public, non-public, or non-public religious school, the purpose of mental health and social and emotional learning is the same—namely, to engage in “the process through which children and adults acquire and effectively apply the knowledge, attitudes, and skills necessary to understand and manage emotions, set and achieve positive goals, feel and show empathy for others, establish and maintain positive relationships, and make responsible decisions.” Atlanta Public Schools, *Social Emotional Learning*.²⁹

Surely, if the First Amendment bars Missouri from religious discrimination in a generally available K-12 school aid program designed to keep students from hurting themselves on pea gravel when they fall on the playground, then it also bars Montana from religious discrimination in generally available K-12 student aid designed to equip students with social, emotional, and academic thoughts, beliefs, attitudes, and practices for success in life.

Montana has no compelling reason for denying Petitioners equal access to generally available, religiously neutral K-12 student aid for the social, emotional, and academic development of their children at the accredited non-public religious schools of their choice. In *Mitchell v. Helms*, 530 U.S. 793 (2000), a plurality of this Court asserted that “[i]n distinguishing between indoctrination that is attributable to the

²⁹ <https://www.atlantapublicschools.us/Page/53072> (last visited Apr. 10, 2019).

State and indoctrination that is not, [the Court has] consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion.” *Id.* at 809.

The mere fact that some parents and guardians prefer to use generally available K-12 student aid to secure the social, emotional, and academic development of their children at non-public religious schools over public schools illustrates the stakes for parental rights, free exercise, freedom from compelled thought, and personal autonomy. As this Court stated in *Trinity Lutheran*, “skating as far as possible from religious establishment concerns” is not a compelling interest that satisfies strict scrutiny. *Trinity Lutheran*, 137 S. Ct. at 2024.

B. Conditions on Generally Available K-12 Student Aid Must Not Violate the Right to Freedom of Speech.

The First Amendment to the U.S. Constitution states, “Congress shall make no law . . . abridging the freedom of speech. . . .” U.S. Const. amend. I.

In *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001), this Court held that denying the Good News Club, a Christian youth development organization, after-school access to a public school classroom cafeteria constituted impermissible viewpoint discrimination against the “purely” religious approach the Club took toward the moral and character education of children. As the Court explained, “what matters for purposes of

the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty or patriotism by other associations to provide a foundation for their lessons.” *Id.* at 111.

Montana and KPS have determined that, instead of providing after-school classroom access to external youth development organizations to teach children for a couple of hours each week, they will teach mental and behavioral health and social and emotional thoughts, beliefs, attitudes, and practices to students in their classrooms all day every day.

By granting certiorari, this Court could consider whether, in light of its decision in *Good News Club*, Montana can discriminate against Petitioners by denying them equal access to generally available K-12 student aid to communicate their preferred viewpoints about mental and behavioral health and social and emotional thoughts, beliefs, attitudes and practices at the accredited non-public Christian schools of their choice.

C. Conditions on Generally Available K-12 Student Aid Must Not Violate the Right to Freedom from Compelled Thought.

The First Amendment prohibition against government abridging freedom of speech also constrains government attempts to compel the thoughts, beliefs, attitudes, and practices of school children.

Throughout the school day, KPS educators, counselors, and outside therapists and invited individuals and community groups inculcate students in government-approved thoughts, beliefs, attitudes and practices relating to their mental and behavioral health and social and emotional development. The indisputably good intentions of the Respondents are insufficient to redeem the impositions on freedom of thought: “Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943). Yet, Montana is compelling Petitioners’ children to conform to the government’s preferred practices and attitudes relating to their mental and behavioral health and social and emotional well-being.

In *Barnette*, this Court upheld the First Amendment right of Jehovah’s Witnesses to refuse to participate in the Pledge of Allegiance during a public school day, finding that forcing such students to perform the pledge “invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.” *Id.* at 642. The Pledge of Allegiance to a flag representing such democratic values as tolerance, respect, civility, diversity, and sacrifice takes less than one minute to recite, but forced recital was unconstitutional. In KPS classrooms, the entire school day is devoted to inculcating students in Montana’s official doctrine relating

to these and many other personal values and social and emotional development goals. “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.” *Id.*

By adopting and implementing a mental and behavioral health and social and emotional development curriculum, Montana and KPS seek to remedy many of the unprecedented challenges children face in their lives. Yet, if Petitioners desire to secure the social and emotional development of their children at the non-public religious schools of their choice, they must pay often unaffordable tuition to do so. The government may not force a person to choose between following the precepts of his or her religion and forfeiting generally available benefits, on the one hand, and abandoning one of the precepts of his or her religion in order to accept the benefits on the other. *Sherbert v. Verner*, 374 U.S. 398 (1963). “Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.” *Id.* at 404.

The Court should grant the petition and consider how its holdings in *Barnette* and *Sherbert* apply to Montana’s denial of Petitioners’ equal access to generally available K-12 student aid for the mental and behavioral health and social and emotional development of their children, a matter of national importance

considering the rapid nationwide adoption of SEL curricula.

D. Conditions on Generally Available K-12 Student Aid Must Not Violate the Rights to Due Process and Equal Protection.

Under the Due Process Clause of the Fourteenth Amendment, no State shall “deprive any person of life, liberty, or property, without due process of law.” The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. *See Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968). In addition, these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) and *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965)).

Personal choices concerning contraception, family relationships, procreation, childrearing and marriage, all of which are protected by the U.S. Constitution, are among the most intimate that an individual can make. *Obergefell*, 135 S. Ct. at 2599. The term “liberty” includes the right to establish a home, bring up children, and give them an education suitable for their station in life. *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923).

Parents and guardians have the constitutionally guaranteed right to direct the upbringing and education of children under their control, and the State does

not have the power to standardize its children. “The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

“That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected.” *Meyer*, 262 U.S. at 401. As the State attempts to improve the physical, mental, and moral quality of children, it may not use coercive methods that conflict with the Constitution. *Id.*

The ability of parents to raise their children in accordance with the dictates of their consciences “is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014) (Kennedy, J., concurring, discussing Free Exercise rights).

The right of parents to secure the social, emotional, and academic development of their children as they see fit that is a protected liberty interest under the Due Process Clause enjoys like protection from the Equal Protection Clause:

The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights

secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. . . . This interrelation of the two principles furthers our understanding of what freedom is and must become.

Obergefell, 135 S. Ct. at 2602-03.

Montana’s interference with Petitioners’ liberty to control the social, emotional, and academic development of their children is exacerbated by Montana’s unequal treatment of Petitioners. “Each concept—liberty and equal protection—leads to a stronger understanding of the other.” *Id.* at 2603. In Montana, parents who choose to secure the social, emotional, and academic development of their children in public schools are able to do so without cost (beyond their share of any applicable state and local school taxes). Also, under the Montana Scholarship Program, Montana parents who choose to secure the social, emotional, and academic development of their children in non-public non-religious schools are eligible for K-12 scholarships. However, Montana denies parents equal access to generally available K-12 student aid for the social, emotional, and academic development of their children in non-public religious schools.

In so doing, Montana imposes a financial penalty on families who would prefer to not permit Montana to inculcate their children in government-approved thoughts, beliefs, attitudes, and practices relating to

mental and behavioral health and social and emotional development.

By granting certiorari, this Court can determine whether Montana is depriving Petitioners of their right to due process and equal protection under the Fourteenth Amendment as elaborated in *Meyer*, *Pierce*, and *Obergefell*; whether Montana has a compelling interest that is served by prohibiting Petitioners from participating in the Montana Scholarship Program; and, whether, if such a compelling state interest exists, Montana must more narrowly tailor the Montana Scholarship Program to serve that compelling state interest.

Montana's explicit religious discrimination against the Petitioners cannot survive such scrutiny. The unconstitutionality of the result in this case flows from a combination of an ill-considered obeisance to Montana's Blaine Amendment and a disregard of this Court's Free Exercise, Free Speech, Due Process and Equal Protection decisions.



CONCLUSION

For the foregoing reasons, and those stated by Petitioners, the petition should be granted and the decision of the Montana Supreme Court ultimately reversed.

Respectfully submitted,

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