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 Writ Of Certiorari To The Montana Supreme Court

BRIEF OF CHRISTIAN LEGAL SOCIETY, AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS, COUNCIL FOR CHRISTIAN COLLEGES AND UNIVERSITIES, EVANGELICAL COUNCIL FOR FINANCIAL ACCOUNTABILITY, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE, NATIONAL ASSOCIATION OF EVANGELICALS, AND QUEENS FEDERATION OF CHURCHES AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Does it violate the First Amendment's Free Exercise Clause to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools?

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INTEREST OF *AMICI CURIAE*[1]

Amici are (1) religious organizations and (2) associations with religious educational institutions as members. All *amici* are committed to religious freedom: not government promotion of religion, but freedom for religious individuals and institutions to practice their faith without unnecessary government interference. This freedom includes the ability of those receiving a government educational benefit to choose to use it at a religious school on the same terms as at other schools. That freedom is of interest to all *amici*, and particularly to those with religious educational institutions among their members.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, the Montana Supreme Court invalidated a religion-neutral tax credit for donations to private schools, solely because some donations under it would benefit needy students whose families choose religiously affiliated schools. The court invalidated the program under the state constitution and, in a single short paragraph, summarily rejected the argument

[1] Pursuant to Rule 37.2(a), *amici* gave all parties' counsel of record timely notice of their intent to file this brief. All parties gave written consent to its filing. In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

that acting on the basis of a provision singling out religious educational choices violated the First Amendment's Free Exercise Clause.[2] As the petition for certiorari explains, the Montana court's decision has "deepened the long-standing split [in lower courts] on whether barring religious options from student-aid programs violates," among other things, federal free exercise rights. Pet. 3.

Amici agree that this ongoing division and the uncertainty it causes warrant this Court's review. We write to make two further points supporting review.

I. This Court recently held—consistent with its longstanding, strict prohibitions on discrimination against religion—that government violates the Free Exercise Clause when it "den[ies] a generally available benefit solely on account of [the claimant's] religious identity" or status. *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2019 (2017) (holding that state could not declare organization ineligible for grant supporting playground resurfacing on basis that it was a church). While *Trinity Lutheran* forbade discrimination based on the claimant's religious status, it reserved the question whether the state might discriminate because the claimant would use the benefit for activities involving religious teaching. *Id.* at

[2] The court struck down the entire program, Pet. App. 32-34, but its decision was clearly based on Mont. Const. Art. X, §6, which prohibits aid to schools "controlled in whole or part by any church, sect, or denomination." The court thus gave effect, unconstitutionally, to a legal provision singling out religious choices for exclusion from a state benefit.

2024 n.3 ("We do not address religious uses of funding.").

Amici urge first that any asserted distinction between status- and use-based discrimination cannot serve to eliminate constitutional challenges to state provisions discriminating against religion. Cf. *id.* at 2025-26 (Gorsuch, J., concurring in part) (criticizing the distinction). We present this argument because the alleged status-use distinction has been claimed in some lower-court cases allowing bans on religious options in student-aid programs (see Pet. 26-27) and may appear in this case as well.[3]

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[3] The Montana Supreme Court actually approved discrimination based purely on religious *status*, thus flying in the face of *Trinity Lutheran*. Throughout its opinion the court applied the state constitutional provision to prohibit aid to educational institutions simply because they were religious or "sectarian." See, e.g., Pet. App. 19 (concluding that the provision prohibits the state "from aiding sectarian schools"); *id.* App. 26 (program violated provision because it allowed state "to indirectly pay tuition at private, religiously-affiliated schools"); *id.* App. 23 (provision was intended "to broadly and strictly prohibit aid to sectarian schools").

After reaching these conclusions, the court majority, remarkably, failed even to mention *Trinity Lutheran* in its single paragraph rejecting plaintiffs' free exercise challenge. The court merely stated that "this is not one of those cases" where singling out an indirect form of aid to religion violates free exercise. Pet. App. 32.

The court's disregard of *Trinity Lutheran* intensifies the need for this Court to grant review. But this case squarely poses the question of discrimination against religious uses as well as religious status, since lower courts that allow bans on religious options in student-aid programs, especially for tuition aid,

A "status-use" distinction cannot be the proper constitutional line for discrimination against religion in student-aid programs. The Court should not prohibit discrimination based on a beneficiary's religious affiliation and then turn around and immunize discrimination based on the beneficiary's religious use of the benefit. A status-use distinction conflicts with the Free Exercise Clause's text and this Court's decisions under it, both of which protect the right not just to have a religious identity but to act on it.

Moreover, the status-use distinction is illusory and unworkable, especially in the context of benefits for education. Schools that do not merely affiliate with a religion but integrate religion into their secular subjects—and parents who use those schools—do so because of their belief that religious values permeate education. That can be called "belief or status" as well as "use." "It is free exercise either way" (*Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring in part)), and the state presumptively cannot discriminate against it.

II. A. In addition, discrimination against religious uses is frequently offensive to the basic principles underlying the Free Exercise Clause and the First Amendment's Religion Clauses as a whole. Those basic principles are government neutrality toward religion and respect for the choices that individuals and private groups make in matters of religion. In the context of

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frequently rely on the asserted need to prevent religious uses of funds.

government benefits programs where individuals choose to use the benefits in religious settings, all the basic Religion Clause principles point in the same direction: that is, presumptively including religious options on the same terms as nonreligious options. Neutrality toward religion in the sense of equal treatment of religious persons and organizations also embodies neutrality in the "substantive" sense, that is, respect for individuals' religious choices.

If any situation is appropriate for reaffirming the fundamental principles of religious neutrality and religious choice in government benefits, it is the situation of tax benefits for contributions to student scholarship organizations (SSOs). As such, this case is especially appropriate for this Court's review. In such programs, the connection between government policy and the ultimate benefit to religion is highly attenuated. Among other things, a private SSO must form and must choose to fund religious schools, a taxpayer taking the credit must donate to that SSO, and a family must choose to apply for a scholarship for its child at the religious school. This attenuated connection to an ultimate religious use cannot justify applying a state provision that discriminates against religious schools, the families who choose to use them, and the donors who choose to support an organization that in turn supports those families.

ARGUMENT

I. Denial of Benefits May Violate the Free Exercise Clause Not Only When It Singles Out Individuals and Entities with a Religious "Status" or Identity, but Also When It Singles Out Religious Uses of the Benefit.

A "status-use" distinction cannot be the proper constitutional line concerning discrimination against religion in student-aid programs. That distinction conflicts with the text of the Free Exercise Clause and decisions of this Court, and it is unstable and unworkable, especially in the context of student-aid cases.

A. Ignoring Discrimination Against Religious Uses is Inconsistent with the Text of the Free Exercise Clause.

First, a distinction between a beneficiary's religious affiliation and its religious use of benefits has no support in the constitutional text. It is difficult to "see why the First Amendment's Free Exercise Clause should care" about a "status-use" distinction when "that Clause guarantees the free *exercise* of religion, not just the right to inward belief (or status)." *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring in part) (emphasis in original). The clause encompasses "two concepts,—freedom to believe and freedom to act." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). "[T]he 'exercise of religion' often involves not only belief and profession but the performance of (or

abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation." *Employment Division v. Smith*, 494 U.S. 872, 877 (1990).

The "exercise of religion" covers not just having a religious identity, but living out that religious identity explicitly, including by teaching or learning it in educational institutions. The constitutional text simply cannot support protecting equality for religious affiliation but ignoring it for religious teachings and activities.

B. Discrimination Against Religious Uses is Impermissible Under This Court's Free Exercise Clause Decisions.

A citizen's "use" of a government benefit to subsidize his or her child's education at a religious institution is a religious action. This Court's decisions under the Free Exercise Clause clearly forbid discrimination and non-neutrality not only against religious affiliation, but against those who live out their religious identity in actions. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Review Board*, 450 U.S. 707 (1981); *McDaniel v. Paty*, 435 U.S. 618 (1978).[4]

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[4] This Court in *Smith* reaffirmed *Sherbert* and *Thomas* on the ground that when a state's unemployment-benefits law recognizes certain reasons as "good cause" for declining available work, the state's refusal to accept a religiously-based reason is non-neutral toward religious exercise. *Smith*, 494 U.S. at 884.

In *Sherbert*, for example, a South Carolina employer discharged an employee for refusal to work on Saturday in violation of her religious beliefs as a Seventh-day Adventist, and the state denied her unemployment benefits because she had refused available work. The state did not penalize Adele Sherbert because she was a Seventh-day Adventist; it penalized her because she acted based on that identity/status. *Sherbert*, 374 U.S. at 404. This Court still found it unconstitutional. Likewise, in *Thomas*, the state unconstitutionally denied unemployment benefits to a Jehovah's Witness man who had resigned his job rather than begin to produce weapons in violation of his beliefs. The state did not penalize Eddie Thomas for being a Jehovah's Witness; it penalized him for acting on that identity. The government violates free exercise if, absent a compelling reason, it "conditions receipt of an important benefit upon *conduct* proscribed by a religious faith, or . . . denies such a benefit because of *conduct* mandated by religious belief, thereby putting substantial pressure on an adherent to modify his *behavior* and to violate his beliefs." *Thomas*, 450 U.S. at 718 (emphasis added).

Moreover, *McDaniel v. Paty*, *supra*, is sometimes cited as an example of this Court invalidating discrimination based on "status" (see *Trinity Lutheran*, 137 S. Ct. at 2020)—but *McDaniel* also reflects a broader rule. *McDaniel* struck down a state constitutional provision barring clergy from serving in the state legislature or a state constitutional convention. The Court held that the state had placed an unconstitutional

disability on McDaniel—ineligibility for office—because of his "status as a 'minister.'" 435 U.S. at 627. But as Justice Brennan noted in his influential concurring opinion, the state had actually asserted a distinction between mere religious affiliation and something more: the state court had defended the disqualification because it rested "'not [on] religious belief, but [on] the career or calling, by which one is identified as dedicated to the full time promotion of the religious objectives of a particular religious sect.'" *Id.* at 630 (Brennan, J., concurring in the judgment).

Justice Brennan rejected that distinction, for reasons that are highly relevant here as well:

> Clearly, freedom of belief protected by the Free Exercise Clause embraces freedom to profess or practice that belief, even including doing so to earn a livelihood. One's religious belief surely does not cease to enjoy the protection of the First Amendment when held with such depth of sincerity as to impel one to join the ministry.

Id. at 631. In other words, *McDaniel* illustrates that discrimination against a person may not be based on the seriousness or pervasiveness of his practice of religion. Justice Brennan continued (*id.* at 632):

> The provision imposes a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity. Such a classification as much imposes a test for office based on religious conviction

> as one based on denominational preference. A law which limits political participation to those who eschew prayer, public worship, or the ministry as much establishes a religious test as one which disqualifies Catholics, or Jews, or Protestants.

McDaniel likewise condemns a "unique disability" like the one placed upon religious uses of neutral, choice-based student aid. For a state to bar religious uses of such aid—and a court to immunize the bar from free exercise challenge—is to discriminate against those families, and schools, that practice their religion with an "intensity" that calls for integrating it into the educational process, rather than keeping it separate. Such action by the state imposes a bar as much "based on religious conviction as one based on denominational preference" or religious affiliation. *Id.* The Free Exercise Clause protects against discrimination not only for attending or operating a religiously affiliated school, but also for integrating religious principles into education to the degree indicated by personal or organizational choice.

C. A Distinction between Religious Status and Use is Unstable and Unworkable.

The reasons just given exemplify how, as Justice Gorsuch predicted, a rule of law distinguishing between status- and use-based discrimination is unstable and unworkable. *Trinity Lutheran*, 137 S. Ct. at 2025-26 (Gorsuch, J., concurring in part). As he argued, it makes little sense to prohibit discrimination against

religious people but allow it against people who practice their religion. "Often enough the same facts can be described both ways." *Id.* at 2026. Would the Constitution approve a school board's refusal to fund a charter school's provision of kosher foods in its elementary cafeteria but condemn the same board's refusal to enroll Jews?

Any distinction between exclusions based on religious status and use is particularly unstable in the context of teaching in religious schools. As already discussed (p. 10 *supra*), to exclude religious uses of scholarship funding is to exclude religious schools that integrate faith in their teaching: those that perceive most or all aspects of life from a religious lens. Banning aid when it is used for secular instruction that integrates religious teaching could be characterized as aiming at a religious "use." But it can equally be characterized as aiming at certain religious identities. It imposes a penalty on people of certain religious views: "those who take their religion seriously, who think that their religion should affect the whole of their lives." *Mitchell v. Helms*, 530 U.S. 793, 827-28 (2000) (Thomas, J., for four justices). As Justice Gorsuch predicted, "the same facts can be described both ways." *Trinity Lutheran*, 137 S. Ct. at 2026 (concurring in part).

"[M]any of those who choose religious schools believe that secular knowledge cannot be rigidly separated from the religious without gravely distorting the child's education. . . . From this perspective, it is not sufficient to introduce religious education on the side." Michael W. McConnell, *The Selective Funding Problem:*

Abortions and Religious Schools, 104 Harv. L. Rev. 989, 1017-18 (1991).[5] Discrimination against religious "uses" discriminates against that religious perspective or identity. Moreover, "[r]eligious schools . . . teach the full secular curriculum and satisfy the compulsory education laws. If we consider that [state aid] is funding the secular curriculum, then religious schools were excluded because of who and what they are—exactly what *Trinity Lutheran* says is unconstitutional." Douglas Laycock, *Comment: Churches, Playgrounds, Government Dollars—And Schools?*, 131 Harv. L. Rev. 133, 162 (2017).

Accordingly, a distinction between status and use cannot serve to define the limits on whatever "play in the joints" exists between the Religion Clauses (*Trinity Lutheran*, 137 S. Ct. at 2019)). Such a distinction would confine rights under the Free Exercise Clause to the straightjacket of idle convictions. In the context of student-aid programs, only the inclusion of both nominal adherents and devoted disciples gives proper application to the Free Exercise Clause.

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[5] See also Thomas C. Berg, *Vouchers and Religious Schools*, 72 U. Cin. L. Rev. 151, 177 (2003) (a religious/secular bifurcation "singles out those religions that cannot accept such 'bracketing' of religious teaching, and penalizes them by denying them the entire state educational benefit").

D. *Locke v. Davey* Provides No Basis for Broad Discrimination Against Religious Uses of Benefits.

Nor does this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), provide any basis for giving the government carte blanche to discriminate against religious uses of a benefit. *Locke* permitted the state of Washington to exclude a student from a generally available scholarship because he was majoring in "devotional theology," a degree aimed at preparing him for the ministry. But for several reasons, *Locke* is a narrow decision that does not broadly immunize laws that single out religious uses of benefits. See *Trinity Lutheran*, 137 S. Ct. at 2022-24 (reading *Locke* narrowly based on similar factors to those discussed here).

First, the exclusion permitted in *Locke* aimed to prevent government support of clergy training—a goal that the Court said reflects a "historic and substantial state interest" dating back to "the founding of our country." 540 U.S. at 725, 722. By contrast, for reasons described *infra* Part II, government benefits such as the tax credits here have only a highly attenuated connection to the ultimate religious uses; thus the state's anti-establishment interests are neither historic nor substantial.

Second, and related, a post-secondary theology degree—"training for a religious profession"—is a "distinct category of instruction," not "fungible" with "training for secular professions." *Id.* at 721. By contrast, religious primary and secondary schools and

colleges—the entities involved in most student-aid cases—"pursue not only religious instruction but also secular education. They train students for the same secular professions and careers that secular schools do." Thomas C. Berg and Douglas Laycock, *The Mistakes in* Locke v. Davey *and the Future of State Payments for Services Provided by Religious Institutions*, 40 U. Tulsa L. Rev. 227, 248 (2004). Thus "excluding them excludes instruction that falls within the same category as secular schools"—"a pure case of discrimination against an activity solely because of its religious motivation or viewpoint." *Id.*

Third, and importantly, the Court in *Locke* emphasized that even with the theology-degree exclusion, the Washington exclusion went "a long way toward including religion in its benefits." 540 U.S. at 724. Joshua Davey could attend a pervasively religious college (if it was accredited) and take courses that integrated religion, including "devotional theology courses"; he suffered only the relatively "minor burden" of not being able to major in theology and receive a scholarship. *Id.* at 724-25. As such, the disqualification arguably did not significantly affect Davey's choice to pursue a religious education and calling. As *amici* discuss in Part II *infra*, the degree of burden on religious choice is relevant to determining whether a state disqualification violates the Free Exercise Clause. Thus, as Judge Michael McConnell observed, *Locke* "implies that major burdens and categorical exclusions from public benefits might not be permitted in service of lesser or less long-established governmental ends." *Colorado*

Christian College v. Weaver, 534 F.3d 1245, 1256 (10th Cir. 2008). *Locke* in no way immunizes state provisions that single out religious uses of funds, rather than religious status, for exclusion.

II. Discrimination Against Religious Options in Generally Available Student-Aid Programs Violates the Fundamental Principles of the Religion Clauses: Neutrality and Choice in Matters of Religion.

For the reasons above, the distinction between "status" and "use" cannot serve to immunize discrimination against religious activity from invalidation. Discrimination against religious uses can be equally offensive to the basic principles underlying the Free Exercise Clause and the First Amendment's Religion Clauses as a whole. Those basic principles are government neutrality toward religion and respect for the choices that individuals and private groups make in matters of religion.

As *amici* now discuss, those principles can guide the Court in setting forth how far the Free Exercise Clause prohibits discrimination against religious activity (not just against mere religious status or affiliation). Review in this case is necessary to prevent the violations of neutrality and religious choice in the Montana Supreme Court's decision and other decisions by lower courts.

A. The Free Exercise Clause, and the Religion Clauses in General, Preserve Religious Choice and Government Neutrality toward Religious Activity.

"The ultimate goal of the Constitution's provisions on religion is religious liberty for all—for believer and nonbeliever, for Christian and Jew, for Protestant and Catholic, for Western traditions and Eastern, for large faiths and small, for atheist and agnostic, for secular humanist and the religiously indifferent, for every individual human being in the vast mosaic that makes up the American people." Berg and Laycock, *supra*, 40 Tulsa L. Rev. at 232. The ultimate goal is that every American should be free to hold his or her own views on religious questions, and to live the life that those views direct, with a minimum of government interference or influence. The fundamental principle to achieve that goal is for the government to maintain neutrality toward religion in the "substantive" sense.

> [S]ubstantive neutrality [means] this: the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance. . . . [R]eligion [should] be left as wholly to private choice as anything can be. It should proceed as unaffected by government as possible. . . .
>
> This elaboration highlights the connections among religious neutrality, religious autonomy, and religious voluntarism. Government must be neutral so that religious belief

> and practice can be free. The autonomy of religious belief and disbelief is maximized when government encouragement and discouragement is minimized.

Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1001-02 (1990).

Put differently, the goal of the Religion Clauses is that religion in America should flourish or decline, not according to whether government promotes or hinders it, but "according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). This formulation restates the principle of private choice, as Justice Brennan once summarized: "Fundamental to the conception of religious liberty protected by the Religion Clauses is the idea that religious beliefs are a matter of voluntary choice by individuals and their associations, and that each sect is entitled to 'flourish according to the zeal of its adherents and the appeal of its dogma.'" *McDaniel*, 435 U.S. at 640 (Brennan, J., concurring in the judgment) (quoting *Zorach*; footnote omitted). See also *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) ("The basic purpose of the religion clause of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.").

1. Neutrality, choice, and government aid benefiting religious education.

The principles of voluntarism and substantive neutrality are directly reflected in this Court's approval of private-choice programs of educational aid. See *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Dept. of Servs.*, 474 U.S. 481 (1986); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). In such programs, "government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Zelman*, 536 U.S. at 649; accord *Witters*, 474 U.S. at 487; *Mueller*, 463 U.S. at 399-400. Because such a program's terms are "neutral with respect to religion," it creates no "financial incentive for parents to choose a religious school" over a nonreligious one. *Zelman*, 536 U.S. at 652, 655; accord *Witters*, 474 U.S. at 487-88. Thus individuals decide to apply their benefits based on whether they have "zeal" for, or find "appeal" in, a particular school's education or ideology. See *Zorach*, 343 U.S. at 313.

Thus, in the context of a government benefits program involving true private choice, the basic Religion Clause principles point in the same direction: presumptively including religious options on the same terms as nonreligious options. Neutrality toward religion in the sense of equal treatment of religious persons and organizations also embodies neutrality in the "substantive" sense, that is, respect for individuals' religious choices. "Financial aid can be distributed in a way consistent with individual choice": "[e]ach family receiving a government voucher can choose the school

that it prefers among all the options available," and whatever that range of options may be, "there are more choices with the voucher than without it." Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 Harv. L. Rev. 155, 157 (2004).

Although the Court's "true private choice" decisions hold that exclusion of religious choices is not required by the Establishment Clause, the decisions also show why such exclusion is presumptively forbidden by the Free Exercise Clause: the exclusion contravenes fundamental principles of neutrality and religious choice. Accordingly, most cases where a law singles out private religious choices for exclusion from a general program of benefits should not be particularly difficult: the exclusion should be invalid. See *Morris County Bd. of Chosen Freeholders v. Freedom from Religion Found.*, 139 S. Ct. 909, 910-11 (2019) (statement of Kavanaugh, J., respecting denial of certiorari). "Barring religious organizations because they are religious from a general . . . program [of state benefits] is pure discrimination against religion" (*id.* at 911); it also generally interferes with religious choice.

2. Neutrality and choice in other categories of Religion Clause cases.

The principles of substantive neutrality and respecting religious choice also significantly explain this Court's decisions in two other major areas of Religion

Clause disputes: (1) protection of religious exercise against burdens from generally applicable laws and (2) religious speech by the government itself, such as government-sponsored prayer or religious display. "Under the Court's precedents, both of those categories of cases can pose difficult questions," *Morris County Bd. of Chosen Freeholders*, 139 S. Ct. at 911 (statement of Kavanaugh, J., respecting denial of certiorari); and there is uncertainty in both categories. But the principles of neutrality and religious choice explain the broad outlines of the Court's decisions.

Religious exercise and generally applicable laws. Principles of neutrality and religious choice also explain why government may—and sometimes must—accommodate religious exercise in the face of generally applicable laws and regulations. Government may accommodate private, voluntary religious practice by exempting it from burdensome regulation, even if the exemption does not "come packaged with benefits to secular entities." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 338 (1987). Such an exemption is constitutionally legitimate when it "does not have the effect of 'inducing' religious belief, but instead merely 'accommodates' or implements an independent religious choice." *Thomas v. Review Bd.*, 450 U.S. 707, 727 (1981) (Rehnquist, J., dissenting). See also, e.g., *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012) (requiring

exemption to protect religious organization's freedom to choose leaders).[6]

Government-sponsored religious speech. Although the Court has forbidden the exclusions of private religious actors from general government benefits, it has maintained restrictions on government's *own* religious speech—restrictions that do not apply to government's *nonreligious* speech. The Court has repeatedly reaffirmed the ban on government-sponsored religious exercises in public schools, *Lee v. Weisman*, 505 U.S. 577 (1992); *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), even though the schools promote, or expose students to, a variety of nonreligious ideas in classes. *Weisman*, 505 U.S. at 591 ("Speech is protected by ensuring its full expression even when the government participates," but the government "is not a prime participant" in presenting or debating religious ideas and activities.).

Government-sponsored religious speech is in some tension with individual choice, since "[a]ny religious observance at a public event necessarily requires a collective decision" about what speech to present. Laycock, *supra*, 118 Harv. L. Rev. at 158. However, there

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[6] Accommodation of religious choices may often be a matter of government discretion rather than constitutional mandate. See *Employment Division v. Smith*, 494 U.S. 872 (1990). But that constitutional interpretation stems largely from concerns about judicial competence to decide when exemptions are appropriate, not from a rejection of the importance of religious choice. See *id.* at 890. The issue in cases like this one—whether religious choices should receive nondiscriminatory treatment in student-aid programs—raises no such concerns.

remain difficult questions about what constitutes permissible acknowledgment of religion's role in American history and society, as opposed to impermissible promotion or imposition of one religion or religion in general. See, e.g., *Van Orden v. Perry*, 545 U.S. 677 (2005); *Maryland-National Capital Park and Planning Comm'n v. American Humanist Ass'n*, Nos. 18-18, 17-1717 (argued Feb. 27, 2019). But in any event, the principle of respecting religious choice remains bedrock. Whatever the scope of government's power to engage in religious speech, indisputably "the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Weisman*, 505 U.S. at 587.

This case, of course, raises no issues concerning religious accommodation or government religious speech. Whatever the proper approach for those categories of cases, the principle in this context is clear. In most cases, a provision that excludes religious beneficiaries, or religious uses, from a general program of student aid violates neutrality and distorts religious choice—thereby violating fundamental Religion Clause principles.

B. Tax Credits for Contributions Benefiting Students' Educational Choices Are a Particularly Clear Instance of Promoting Religious Neutrality and Choice.

If any situation is appropriate for reaffirming the fundamental principles of religious neutrality and

religious choice in government benefits, it is the situation of tax benefits for contributions to student scholarship organizations (SSOs). For that reason, this case is especially appropriate for this Court's review.

In tax-benefit programs for donations to SSOs or analogous organizations, the connection between government policy and the ultimate benefit to religion is highly attenuated. It therefore cannot justify application of a state provision that discriminates against religious schools, the families who choose to use them, and the donors who choose to support an organization that in turn supports those families.

This Court held that the supposed aid to religion in SSO-tax-credit programs is so attenuated that taxpayers did not even have standing to challenge such programs in federal court. *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011). For one thing, the Court said, when the government, by offering a credit, "declines to impose a tax"—rather than imposing a tax whose proceeds go (even in small part) to religious uses—the dissenting taxpayer "has not been made to contribute" to the religious uses, and "[a]ny financial injury [to him, in the form of increased tax assessments] remains speculative." *Id.* at 142. More broadly, the Court reasoned that under the program,

> contributions result from the decisions of private taxpayers regarding their own funds. Private citizens create private STOs; STOs choose beneficiary schools; and taxpayers then contribute to STOs. While the State, at

> the outset, affords the opportunity to create and contribute to an STO, the tax credit system is implemented by private action and with no state intervention.

563 U.S. at 143.[7] The dissent in *Winn* objected that the differences between tax credits and tax-financed expenditures did not justify denying standing to sue, but the dissent did not assert that the program should fail on the merits. *Id.* at 147-69 (Kagan, J., dissenting).

Lower courts have likewise recognized that in such programs, the state's action is separated from religious schools by "multiple layers of private, individual choice." *Winn v. Arizona Christian Sch. Tuition Org.*, 586 F.3d 649, 662 (9th Cir. 2009) (O'Scannlain, J., dissenting from denial of rehearing en banc), rev'd, 563 U.S. 125 (2011). A private SSO must form and must choose to fund religious schools, a taxpayer taking the credit must donate to that SSO, and a family must choose to apply for a scholarship for its child at the religious school. At each step, the program's terms are religion-neutral, with no evidence that the State has skewed them toward religious schools: taxpayers can choose any SSO, the SSOs can support religious or non-religious schools, and parents can seek scholarships at either category of school. "Only after passing through choice piled upon choice do government funds reach

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[7] The equivalent term in *Winn* to "SSO" was "STO," for "student tuition organization."

religious organizations." *Id.*[8] See also *Kotterman v. Killian*, 972 P.2d 606, 620 (Ariz. 1999) ("The way in which [a scholarship organization] is limited, the range of choices reserved to taxpayers, parents, and children, the neutrality built into the system—all lead us to conclude that benefits to religious schools are sufficiently attenuated [as not to constitute impermissible aid]."); *Griffith v. Bower*, 747 N.E.2d 423, 426 (Ill. App. 5th Dist. 2001) (under tax-credit program, "[f]unds become available to schools only as the result of private choices made by individual parents").[9]

Indeed, to read tax credits as impermissible aid to religious schools leads to absurd results. If a credit becomes impermissible aid to religion when a scholarship it encourages is used at a religious school, then

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[8] If a large percentage of private schools are religious, or a large percentage of SSOs direct donations to religious schools, that does not undercut choice: it reflects "the zeal of [the] adherents" of those faiths for providing and supporting education (*Zorach*, 343 U.S. at 313). Groups that approach education from secular perspectives (or other religious perspectives) can create their own schools and SSOs, and a neutral tax-credit program encourages them to do so.

[9] Although this case clearly passes benefits through to individuals, *amici* do not believe that a program must formally do so in order to be a program of private choice. As four justices recognized in *Mitchell v. Helms*, 530 U.S. 793 (2000), aid given directly to religious schools or social services can also follow private choice when its terms are neutral and the amount is "based on enrollment." *Id.* at 830 (opinion of Thomas, J.). The per-capita allocation formula "create[s] no improper incentive" for religious education and ensures that "[i]t is the students and their parents—not the government—who, through their choice of school, determine who receives . . . funds." *Id.*

any tax *deduction* for such contributions becomes invalid as well. See *Winn*, 563 U.S. at 144 (rejecting distinction between credits and deductions). Lower courts have recognized that treating credits as public funding "directly contradicts the decades-long acceptance of tax deductions for charitable contributions, including contributions made directly to churches, religiously-affiliated schools and institutions. If credits constitute public funds, then so must other established tax policy equivalents like deductions and exemptions." *Kotterman*, 972 P.2d at 618; accord *Toney v. Bower*, 744 N.E.2d 351, 357 (Ill. App. 4th Dist. 2001).

In fact, barring religious organizations from benefiting from SSO tax credits would *a fortiori* justify excluding them from tax exemptions and from deductions for charitable contributions, since those exemptions are not separated by the additional steps present here: donation to an SSO that funds a scholarship that assists a parent who chooses a school that may or may not be religious.

To apply a "no aid to religion" provision to the House-that-Jack-built sequence of actions here would validate discrimination against religion in multiple contexts. To ensure that the principles of neutrality and religious choice retain significant meaning for government-benefits programs, this Court should grant review in this case.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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