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**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the Free Exercise Clause or Equal Protection Clause requires a state to aid private religious education, even when the state does not similarly aid private nonreligious education, and notwithstanding a state constitutional provision prohibiting such aid.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

## JURISDICTION

This Court lacks jurisdiction under 28 U.S.C. § 1257(a) because the decision below did not draw in question "the validity of a statute of any State" under the Constitution of the United States, nor was any right under the Constitution of the United States "specially set up or claimed" in the court below.

## INTRODUCTION

In state court, Petitioners challenged the Montana Department of Revenue's administrative rule barring the use of tax credits to subsidize religious education. On summary judgment, the district court invalidated the rule as inconsistent with the underlying state statute. On appeal, the Montana Supreme Court reversed, holding that the statute itself was invalid under the state constitution. Both courts expressly declined to reach federal constitutional issues.

The question presented is the first time in this case Petitioners have raised the issue of whether the federal constitution requires a state to aid religious education even when a state law providing such aid to all private education, religious and nonreligious, is invalid under the state's constitution. Petitioners' failure to raise this question below, and the adequate and independent state law grounds on which the court below decided this case, are jurisdictional defects that should preclude this Court's review.

Even if jurisdiction were present, however, the decision below does not warrant this Court's review. No case requires a state to aid religious private education when it does not similarly aid nonreligious private education. There is, therefore, no conflict in the lower courts on this question. The split Petitioners claim, around a question this case does not present, based largely on cases decided decades ago, does not exist. The premature end of Montana's unusual and temporary scholarship program does not present any important federal question. In any event, although the decision below did not reach the issue, a state may subsidize both religious and nonreligious education, or neither, without violating the Free Exercise or Equal Protection Clauses.

## STATEMENT OF THE CASE

Montana's constitution, drafted and ratified in 1972, prohibits public financial aid to religious education. In 2015, the Montana Legislature enacted an unprecedented state tax expenditure of credits to repay donations made to school scholarship organizations supporting private education. It also cautioned the Department of Revenue to implement the credits in compliance with the 1972 Constitution's no-aid provision. The Department, based on this caution and hearing testimony that nine out of ten eligible beneficiaries of the tax credit would use those funds to support religious education, promulgated a rule disqualifying religious schools from tax-credit supported funding.

Petitioners, who seek to use such funding to provide a religious education to their children, sued in state court to overturn the rule as inconsistent with the authorizing statute and in violation of the state and federal constitutions. The Montana Supreme Court held the scholarship program unconstitutional, solely on state constitutional grounds. The court invalidated the program as to all private school beneficiaries, religious and nonreligious, and severed it from a separate program supporting public school beneficiaries.

### A. The 1972 Montana Constitution Prohibits Indirect State Aid to Religious Education.

In 1972, Montanans rewrote their 1889 statehood constitution, among other reasons, to strengthen their shared commitment to individual liberty, including religious liberty. The delegates who drafted the new constitution replaced a dated guarantee of "free exercise and enjoyment of religious profession and worship" limited by "the good order, peace or safety of the state," 1889 Mont. Const. Art. III, § 4, with language paralleling the First Amendment's Free Exercise and Establishment Clauses. *See* Mont. Const. Art. II, § 5 (Freedom of Religion). Most of the discussion around this proposal concerned "public aid to church-related schools," which the delegates took up separately as a matter of the state's goals and duties respecting education. Mont. Const. Conv., Bill of Rights Cmmte. Prop. (Feb. 22, 1972), Verb. Tr. at 629.

After extensive debate, the convention adopted a revised version of the 1889 restriction against state aid to religious education. The new provision prohibits "any direct or indirect appropriation or payment from any public fund or monies . . . for any sectarian purpose or to aid any . . . school . . . controlled in whole or part by any church, sect, or denomination." Mont. Const. Art. X, § 6(1). The prohibition on direct or indirect payments is the most stringent of state no-aid provisions. Pet. App. 21-22. However, recognizing the reliance of private schools on federal funding sources, the delegates also adopted a minority proposal for a pass-through for federal funds to private education. Mont. Const. Conv., Education & Public Lands Cmmte. Prop. (Feb. 22, 1972), Verb. Tr. at 744; Mont. Const. Art. X, § 6(2).

Delegates of various faiths, speaking on behalf of diverse religious communities, including two ministers and other delegates who had experienced religious discrimination, supported either the original committee proposal or a compromise that allowed a pass-through of federal aid to religious education. Both contained the no-aid text at issue. *See* Michael P. Dougherty, *Montana's Constitutional Prohibition on Aid to Sectarian Schools: "Badge of Bigotry" or National Model for the Separation of Church and State?*, 77 Mont. L. Rev. 41, 49-50 (2016). The compromise ultimately passed on final consideration by a vote of 80-17. *See* VII MONT. CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 2672 (1981).

As reframed in the 1972 Constitution, the primary purpose of the no-aid provision "is the unequivocal support it provides for a strong public school system." Mont. Const. Conv., Education & Public Lands Cmmte. Prop. (Feb. 22, 1972), Verb. Tr. at 729. It addressed the delegates' concern that "[a]ny diversion of funds or effort from the public school system would tend to weaken that system in favor of schools established for private or religious purposes." *Id*. The proposal noted "[e]ducation is primarily a function of the state" and "[a] state may prohibit forms of state aid which might be permissible under federal Supreme Court rulings." *Id*.; *see also* Pet. App. 19-21. Consistent with this purpose, the delegates rejected an amendment to strike the "indirect" aid prohibition, which would have allowed state aid to students for religious education under the "child-benefit" theory that such aid directly benefits the student not the school. Mont. Const. Conv., Del. Harbaugh (Mar. 11, 1972), Verb. Tr. at 2011.

Reflecting Montana's distinct constitutional tradition, including a fundamental concern with the state's responsibility and limited fiscal capacity to "provide a basic system of free quality public elementary and secondary schools," Mont. Const. Art. X, § 1(3), the delegates also guaranteed "[t]he public school fund shall forever remain inviolate, guaranteed by the state against loss or diversion." Mont. Const. Art. X, § 3. A primary source of revenue for this fund would be the state's public lands, held in trust for the sole benefit of public education, and augmented by general tax revenues to fulfill the state's fiduciary duties toward public

schools and their students. *See* Mont. Const. Art. X, §§ 2, 5. Thus the apparently incongruous title of the article containing the no-aid provision: "Education and Public Lands." *See* Mont. Const. Art. X.

The people of Montana ratified the new Constitution in June 1972. The no-aid provision was summarized to the voters as "Revis[ing] 1889 constitution by specifying that federal funds may be distributed to private schools. Proposed section still prohibits state aid to private schools." Mont. Const. Conv., *Proposed 1972 Constitution for the State of Montana: Official Text with Explanation*, available at https://sosmt.gov/Portals/142/Elections/archives/1970s/1972_VIP.pdf. For the Montanans who ratified Article X, Section 6, therefore, its original public meaning was associated with a prohibition on the diversion of "state aid to *private* schools." *Id.* (emphasis added).

### B. The Montana Legislature Enacted an Unprecedented, Temporary Scholarship Program for Private Education.

For more than four decades, the no-aid provision remained untested because the Montana Legislature made no attempt to aid private schools directly or indirectly, religious or nonreligious. The provision does not prevent private schools, including religious schools, from receiving the benefit of traditional tax benefits like general charitable deductions. As it did at the framing of the 1972 Constitution, the state allows federal charitable deductions. *See* Mont. Code Ann.

§ 15-30-2131(1)(a). The Montana Constitution itself expressly recognizes tax exemptions for "[i]nstitutions of purely public charity," including "places for actual religious worship, and property used exclusively for educational purposes." Mont. Const. Art. VIII, § 5(1)(b); *see also* Mont. Code Ann. § 15-6-201.

In 2015, the legislature enacted for the first time what it called a "tax replacement program" (hereinafter the "scholarship program") supporting private education that was unprecedented in Montana. Mont. Code Ann. § 15-30-3101. Under the "Tax Credit for Qualified Education Contributions," the state repays a taxpayer or corporation a tax credit for a contribution of up to $150 to a "student scholarship organization" ("SSO"). Mont. Code Ann. § 15-30-3111. The SSO pays those funds directly to a "qualified education provider" ("QEP") defined as a private school. Mont. Code Ann. §§ 15-30-3104(1), 3102(7). Under the program, "[a] student scholarship organization shall deliver the scholarship funds directly to the qualified education provider. . . ." Mont. Code Ann. § 15-30-3104. By its own terms, the program terminates December 31, 2023. *See* 2015 Mont. Laws ch. 457, § 33.

Two extraordinary provisions distinguished the scholarship program from other state tax expenditures. First, the legislature diverted exactly $3 million from the general fund to pay the supporting tax credits in 2016, an amount that escalates in subsequent years if that funding is fully committed. *See* Mont. Code Ann. § 15-30-3110(5)(a)(i). As the bill sponsor explained, this one-to-one match distinguished this scholarship

program from the tax-deductibility of contributions to support schools. *See* Hearing on SB 410, Before the House Committee on Education, 64th Mont. Leg. (April 10, 2015) at 23:45 (Sen. Jones) (the deductibility of contributions "does not offer a one-to-one tax credit as the 501(c)(3), it is different from this"). No other tax provision in the Montana Code Annotated provided a one-to-one tax credit.

Second, in response to constitutional concerns under the no-aid provision raised in committee, the legislature instructed that "[t]he tax credit for taxpayer donations under this part must be administered in compliance with Article V, section 11(5), and Article X, section 6, of the Montana constitution." Mont. Code Ann. § 15-30-3101 ("the constitutional proviso"). There was no similar provision anywhere else in the Montana Code Annotated outside of this bill.

Consistent with the legislature's constitutional proviso, the Department of Revenue promulgated a rule ("Rule 1") excluding religious schools from the qualified education providers eligible to receive scholarships funded by the tax credit. Pet. App. 12-13. Although the Department's rule never went into effect, only one SSO formed under the law. That organization, Big Sky Scholarships, supports 13 schools, all but one of which provide religious education. The sole exception is a specialized elementary school for children with learning disabilities. Pet. App. 50. According to an affidavit filed after the decision below, more than 94% of program scholarships support religious education. Pet. App. 123-24 (of 54 scholarships awarded last year,

only 3 of them supported the one nonreligious school in the program).

Like any other SSO that may form, and like nearly all private schools eligible as qualified education providers, Big Sky Scholarships already is exempt from federal and state income tax, and eligible for tax-deductible donations under federal and state law as a 501(c)(3) organization. *See* Mont. Code Ann. §§ 15-30-3102(9)(a), 15-31-102(d), 15-30-2131(1)(a). These benefits are available to SSOs and private schools in Montana regardless of the scholarship program.

### C. The Montana Supreme Court Invalidated the Scholarship Program on Its Face.

Petitioners challenged the Department's rule in state district court, claiming "that Rule 1 was unnecessary because the Tax Credit Program and the Legislature's definition of QEP were constitutional." Pet. App. 14. The Department argued the rule was authorized by the legislature's extraordinary constitutional proviso, and required in order to implement the scholarship program in compliance with Article X, Section 6. Pet. App. 7.

The district court preliminarily enjoined the rule before granting Petitioners a permanent injunction on cross-motions for summary judgment. Pet. App. 119, 91. That court agreed with Petitioners that Article X, Section 6 and a related provision under Article V, Section 11 did not apply to the scholarship program, and therefore the Department's rule excluding religious

schools from the program was "based on a mistake of law." Pet. App. 94. The district court expressly "declined to address the constitutionality of the Rule" under either state or federal constitutional law. *Id.*

The Montana Supreme Court reversed the district court in a 5-2 decision. Instead of upholding or striking down the Department's rule, the court invalidated the law establishing the scholarship program. "Having concluded the Tax Credit Program violates Article X, Section 6," of the state constitution, the court began by explaining "it is not necessary to consider federal precedent" on either the law's permissibility under the Establishment Clause or the rule's permissibility under the Free Exercise Clause. Pet. App. 16.

On the state constitutional question, the court approached the interpretation of the no-aid provision as an issue of first impression. Pet. App. 22. In an exhaustive analysis of the text and history of Article X, Section 6, the court held "[t]he provision's plain language . . . cast[s] a broad net clearly intended to prohibit 'any' type of state aid being used to benefit sectarian education." Pet. App. 18. Underlying this intent, the court noted, was "[t]he Delegates' strong commitment to maintaining public education and ensuring that public education remained free from religious entanglement . . . ; the Delegates wanted the public school system to receive 'unequivocal support.'" Pet. App. 19.

Because the Department claimed its rule was required by Article X, Section 6 and the statutory instruction to comply with it, the court proceeded to

analyze the scholarship program itself. First, the court held that the scholarship program was subject to the no-aid provision because the legislature, not the SSOs, provided the funding at issue. Pet. App. 25. As Justice Gustafson noted in her concurrence, "the taxpayer 'donates' nothing, because for every dollar the taxpayer diverts to the SSO, the taxpayer receives one dollar in consideration from the State in the form of a lower tax bill." Pet. App. 36 (Gustafson, J., concurring) ("Our first—and currently only—SSO acknowledges as much, urging taxpayers to make a donation 'to direct a portion of your taxes to help a student thrive . . . '").

Second, the court held that the legislature's unprecedented dollar-for-dollar tax credit reimbursing donations to an SSO for religious education is a prohibited "indirect payment" within the meaning of Article X, Section 6. As the court explained, "[w]hen the Legislature indirectly pays general tuition payments at sectarian schools, the Legislature effectively subsidizes the sectarian school's educational program." Pet. App. 28.

Third, the court held that the scholarship program as a whole aids religious education. As the record below revealed, "the schools meeting the Legislature's definition of QEP may be—and, in fact, the overwhelming majority are—religiously affiliated." Pet. App. 28. The court emphasized that "[g]eneral tuition payments fund the sectarian school as a whole and therefore may be used by the school to strengthen any aspect of religious education, including those areas heavily entrenched in religious doctrine." Pet. App. 30.

Thus, the court held, "[t]he Tax Credit Program constitutes the precise type of indirect payment the Delegates sought to prohibit in their formulation of Article X, Section 6." Pet. App. 31. Having reached this conclusion on independent and adequate state grounds, the court did not reach Establishment Clause concerns. Nor did it reach the Free Exercise Clause, because by invalidating the law on its face it resolved the Petitioners' claim that the Department's rule unconstitutionally excluded them from the program. Pet. App. 32; *see also* App. 16 ("we do not address federal precedent"). There being no scholarship program, Petitioners' constitutional challenge to the rule was "superfluous." Pet. App. 32.

Two justices wrote concurrences. Justice Gustafson, joined by Chief Justice McGrath and Justice Sandefur, agreed that the scholarship program "unconstitutionally creates an indirect payment of public funds" supporting religious education. Pet. App. 43. Justice Sandefur separately concurred, noting he "greatly benefitted from eight years of attendance in a religiously-affiliated elementary and middle school." Pet. App. 60. He agreed "the private school tax credit program effects an *indirect payment* of *public monies*" to support "the proliferation of the chosen religious beliefs and values of the participating parents." Pet. App. 54 (emphasis in original).

Two justices dissented on state constitutional grounds. Justice Baker, joined by Justice Rice, would have held the text of Article X, Section 6 and cases decided under its predecessor provision in the 1889

Montana Constitution would not treat the scholarship program as a prohibited "indirect payment." Pet. App. 69-70. Justice Rice separately dissented, arguing the court improperly reached the state constitutional issue because "this case was pled and litigated as a challenge brought by the Plaintiffs against the Department's enactment of Rule 1." Pet. App. 78.

The court issued its opinion on December 12, 2018. Pet. App. 7. Because the Department had already completed its tax returns, forms, and instructions for tax year 2018 under the district court's injunction against the rule, the court stayed its decision to "allow the Department to administer the Tax Credit Program in tax year 2018." Pet. App. 2. Justices Baker and Rice would have stayed the decision until completion of review by this Court. Pet. App. 3. Petitioners did not seek a petition for rehearing. *Cf.* Mont. R. App. P. 20(1)(a).

## REASONS FOR DENYING THE PETITION

Petitioners claim the United States Constitution requires the state to administer a scholarship program that would aid private education, religious and nonreligious alike, in a manner the court below has held to be beyond the state's delegated powers. This is the first time Petitioners have presented this question, and then only in a challenge to a decision resting on adequate and independent state constitutional grounds. For either reason, this Court lacks jurisdiction over the decision below. That decision does not exclude religious

education from a generally available scholarship program because such a program no longer exists. It makes this case a particularly unsuitable vehicle for the question Petitioners newly present.

Even if a federal question were presented by this case, there is no need for this Court to review it now. No case decided by this Court or any other court—including the court below—has addressed this question, let alone reached Petitioners' preferred outcome. Most of the few cases relied upon by Petitioners were decided decades ago, long before this Court's additional guidance in *Locke v. Davey*, 540 U.S. 712 (2004). Two more recent state cases were resolved on alternative grounds after remand in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). No case has held that the Free Exercise or Equal Protection Clause requires inclusion of religious education in programs that provide tax-subsidized payments to private schools. Only a single case cited by petitioners, other than this one, has considered any kind of state school aid program since *Trinity Lutheran* was decided. There is no vital or persistent split to resolve, and no compelling national interest in the fate of Montana's unusual, temporary, and now invalid state aid program.

In any event, the decision below does not present any of the Free Exercise or Equal Protection violations that Petitioners now claim. Regardless of whether a state may exclude private schools providing religious education from a general aid program for private schools, a state is free to offer such general aid or no aid at all. The choice of the latter option by the court

below, as a matter of state constitutional interpretation, presents no important federal question.

## I. This Court lacks jurisdiction because the decision below does not present the Petitioners' or any other federal question.

The question presented is the first time in this case Petitioners have raised the issue of whether it is unconstitutional "to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools." Pet. i. Until now, Petitioners only pressed a challenge to the Department's Rule 1. The court below did not pass on the Petitioners' question because it resolved their state constitutional claims against Rule 1 on adequate and independent state law grounds. These defects are fatal to this Court's jurisdiction with respect to the question presented in this case. *See* 28 U.S.C. § 1257(a) (granting jurisdiction over "[f]inal judgments . . . rendered by the highest court of a State . . . where any . . . right . . . is specially set up or claimed under the Constitution . . . of . . . the United States.").

### A. Petitioners did not press their question in the courts below, and the decision below did not pass on it.

This Court "will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision

[the Court has] been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997). It is a long-established rule that "due regard for the appropriate relationship of this Court to state courts requires [it] to decline to consider and decide questions affecting the validity of state statutes not urged or considered there." *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940).

Rather than setting out "when the federal questions sought to be reviewed were raised," Sup. Ct. R. 14(1)(g)(i), Petitioners' statement confirms they "Challenged *the Rule* as Unconstitutional," alongside other state law claims, from the start. Pet. 11 ("Petitioners argued that even if Article X, Section 6 requires exclusion of religious schools from the program, this would violate the Religion and Equal Protection Clauses of the U.S. Constitution"). This was the claim Petitioners prevailed upon in the trial court. Pet. 11. And this was the issue Petitioners presented to the state supreme court. *See* Appellee's Br., MT Supreme Court Cause No. DA 17-0492, at 2 ("Does the Montana Constitution require the State to exclude families who choose religious schools from participating in a scholarship program that is funded by tax-credit-eligible private donations?").

Both the majority and dissenting opinions below confirm that Petitioners failed to present below the new argument they now make. Pet. App. 13-14 ("Plaintiffs challenged Rule 1 in District Court, arguing it violated the free exercise clauses of the Montana and U.S. Constitution."); *see also* Pet. App. 78 ("this case

was pled and litigated as a challenge brought by the Plaintiffs against the Department's enactment of Rule 1") (Rice, J., dissenting). Despite their claims of errors and omissions in the decision below, Petitioners failed to petition the state supreme court for rehearing, which is available when that court's decision "overlooked some question presented by counsel that would have proven decisive to the case" or "conflicts with a . . . controlling decision not addressed by the supreme court." Mont. R. App. P. 20(1)(a)(ii), (iii).

Nor did any of the courts below pass on the question presented. The only issue addressed by the state supreme court was "Does the Tax Credit Program violate Article X, Section 6, of the Montana Constitution?" Pet. App. 8. This should have come as no surprise to Petitioners. In defending Rule 1, the Department argued in the alternative that if Rule 1 were invalid, the scholarship program should fail in its entirety: "If that part of the law cannot be harmonized with the requirements of the Montana Constitution, it can and should be severed from the remainder of the enacted bill consistent with legislative intent as expressed in the severability provision." Appellant's MSC Br., MT Supreme Court Cause No. DA 17-0492, at 41. But Petitioners brushed aside this argument in a footnote. Appellee's MSC Br., MT Supreme Court Cause No. DA 17-0492, at 39 n. 30.

From the complaint through the state supreme court, Petitioners' primary argument was that the invalidation of Rule 1 is required by state law. At no time did they argue that the invalidation of the scholarship

program would be prohibited by the Free Exercise and Equal Protection Clauses, let alone by the Establishment Clause. The distinction between the two claims is critical: the constitutional issue Petitioners raised below involves exclusion of some from a generally available benefit; the issue they raise now involves denial of any benefit to all. Whatever the basis for the latter claim in the question presented, it was not argued below. "When the highest state court fails or refuses to pass expressly upon a federal question, the party invoking the Supreme Court's jurisdiction has the high burden of showing that the federal question was in fact properly raised, so that the state court's failure to deal with it was not for want of proper presentation." Shapiro, *et al.*, SUPREME COURT PRACTICE, § 3.18 (p. 188) (10th Edition 2013); *see Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n. 3 (1983) ("Under these circumstances we have no jurisdiction to consider [an alternate federal question], for it does not affirmatively appear that that issue was decided below."). Petitioners have fallen far short of meeting that high burden here.

Because the question presented was not raised below, neither the Department nor other interested parties were able to litigate other potentially dispositive factual issues. *See, e.g.*, Pet. App. 91-92 (denying motion to intervene by Montana Quality Education Coalition in the case's posture at the time). Basic facts about the scholarship program's purpose and scope remain unclear, notwithstanding Petitioners' out-of-time attempt to introduce seven new affidavits into the factual

record *after* the decision below. Pet. App. 120-54; *cf.* Mont. R. Civ. P. 56(c)(1)(B). For example, Montana's rural geography may mean the vast majority of students would enjoy no genuine choice in schools under the scholarship program. *Compare Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002) *with Committee for Public Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 794 (1973). The lack of a record on the question presented is an additional reason to deny review. *See Morris County Bd. of Freeholders v. Freedom from Religion Foundation*, 139 S. Ct. 909, 911 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) ("factual uncertainty about the scope of the program could hamper our analysis of petitioners' religious discrimination claim."); *see also Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 635 (2019) (Alito, J., statement respecting the denial of certiorari) ("important unresolved factual questions would make it very difficult if not impossible at this stage to decide" the question presented).

Moreover, notwithstanding Petitioners' repeated invocation of "Blaine Amendments," there is no such amendment at issue here.[1] *Cf.* Pet. 7 n. 3. Montana's

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[1] Not even Petitioners suggest the constitutionality of Article X, Section 6 is properly presented. This Court should decline the invitations of several *amici* to transform "a case entirely to vacate a state court's judgment based on an alternative constitutional ground advanced only by an *amicus* and outside the question on which the petitioner sought . . . review." *Turner v. Rogers*, 564 U.S. 431, 457 (2011) (Thomas, J., dissenting); *see also Decker v. Northwest Envt'l Def. Ctr.*, 568 U.S. 597, 615-616 (2013) (Roberts, C.J., concurring).

1972 Constitution presents a uniquely unfit provision on which to test a challenge to provisions in other states' constitutions from a century earlier. Whatever the merits of the "Blaine Amendment" epithet as a historical matter, the framers of the 1972 Constitution, including leaders of diverse faiths, adopted the provision out of broader concerns to protect public education funds from diversion to private schools, and it was ratified by the people of Montana on that basis. *See* Michael P. Dougherty, *Montana's Constitutional Prohibition on Aid to Sectarian Schools: "Badge of Bigotry" or National Model for the Separation of Church and State?*, 77 Mont. L. Rev. 41, 48-53 (2016); *Proposed 1972 Constitution for the State of Montana: Official Text with Explanation* 15, available at https://sosmt.gov/Portals/142/Elections/archives/1970s/1972_VIP.pdf ("Proposed section still prohibits state aid to *private* schools.") (emphasis added).

Finally, and contrary to Petitioners' assertion of a long and deep split of authorities on the question, "this Court decided *Trinity Lutheran* only recently, and there is not yet a robust post-*Trinity Lutheran* body of case law in the lower courts" on state exclusions of public aid for religious uses. *See Morris County Bd. of Freeholders v. Freedom from Religion Foundation*, 139 S. Ct. 909 (Kavanaugh, J., statement respecting the denial of certiorari). If this issue were as important and widespread as Petitioners' assert, there will be cleaner vehicles in which to present it. Legislation around the issue arises dozens of times every biennium. Pet. App. 35. Petitioners' counsel already are litigating several

cases in the pipeline that involve a state's legislative or administrative exclusion of religious education from state aid programs. *See, e.g.*, *Carson v. Hasson*, No. 1:18-cv-00327-DBH (D. Me. filed Aug. 18, 2018); *Summit Christian Academy v. Meotti*, No. 3:18-cv-05656-TLF (W.D. Wash. filed Sept. 11, 2018).

### B. The decision below rests on adequate and independent state law grounds.

The question presented was not argued or decided below because Petitioners framed their claims, and the state supreme court resolved them, on adequate and independent state law grounds. This Court's "jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). This rule rests on two cornerstones, "[r]espect for the independence of state courts, as well as avoidance of rendering advisory opinions." *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). It usually arises where there is ambiguity about whether a state court decision rests primarily on federal law, and requires only "a plain statement" from the court below that its decision is alternatively "based on bona fide separate, adequate, and independent grounds." *Id.* at 1041.

The court below repeatedly, and plainly, stated its sole reliance on the state constitution. Its decision framed just one issue under state law for review, "Does the Tax Credit Program violate Article X, Section 6, of the Montana Constitution?" Pet. App. 8. If, as

Petitioners concede, "the only federal precedent that the Montana Supreme Court relied on was . . . *Locke v. Davey*," that bare mention in two opening paragraphs still would argue against this Court's jurisdiction. Pet. 29. Yet even these few citations served to distinguish rather than apply *Locke*, by contrasting the state law at issue (Article X, Section 6 of the Montana Constitution) from the federal law not at issue (the Religion Clauses). Pet. App. 16. The court's point was that the former, which Petitioners did not challenge below and do not challenge here, imposes different demands than the latter.

The state constitution, as applied by the court below, is both adequate to support the judgment below and independent of federal law. So as to leave no doubt as to its independent grounds for decision, the court below explained multiple times "we do not address federal precedent," Pet. App. 16, "it is not necessary to consider federal precedent," Pet. App. 31, and "this is not one of those cases" to implicate federal law. Pet. App. 32. It is difficult to imagine more of a plain statement of independent state grounds than the decision below. The state constitution also is adequate to support the judgment invalidating the scholarship program. This is "[a] classic instance" of the adequate and independent state ground bar. Shapiro, *et al.*, SUPREME COURT PRACTICE, § 3.25 (p. 222) (10th Edition 2013).

With its decision on state constitutional grounds, the court below effectively mooted any federal constitutional issues the Petitioners actually raised and

litigated in the state courts. Pet. App. 32 (holding "Rule 1 is superfluous"). As Petitioners acknowledge, when a Colorado school board stopped funding scholarships to private schools, religious and nonreligious alike, "the case became moot." Pet. App. 29, *citing Taxpayers for Pub. Educ. v. Douglas Cty.*, No. 2013SC233, 2018 WL 1023945 (Colo. Jan. 25, 2018).[2] Hearing concerns about diversion of educational funding, the Montana legislature itself terminated the scholarship program with a sunset provision in four years. *See* 2015 Mont. Laws Ch. 457, § 33. Petitioners offer no reason why a state's policy not to aid private education, either religious or nonreligious, whether through the legislature's termination of the statute under a sunset clause, or an administrative body's termination of a program as in *Douglas County*, should be distinguished from a judicial invalidation of a statute. Indeed, under Petitioners' reasoning, a state could never limit or end a general funding program that includes religious education, a perverse rule that may chill such funding in the first place.

Petitioners cite no precedent for what they ask this Court to do: mandate the state's enforcement of a generally applicable state law the state legislature had no power to enact. *See State v. Aronson*, 314 P.2d 849, 852 (Mont. 1957) ("the State Constitution is a

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[2] This Court granted, vacated, and remanded *Douglas County* for further reconsideration in light of *Trinity Lutheran*, 137 S. Ct. at 2327, but unlike the court below here, the Colorado Supreme Court reached a Free Exercise holding. *See Taxpayers for Pub. Educ. v. Douglas Cty.*, 351 P.3d 461, 473-75 (Colo. 2015).

limitation upon the power of the legislature and not a grant of power to that body"); *see also Brockie v. Omo Const., Inc.*, 887 P.2d 167, 171 (Mont. 1994) ("When a statute is declared unconstitutional, it is void *ab initio*"). Under Montana law, when a law is invalidated "the statute is left in the same position that it was in before the amendment was introduced." *Clark Fork Coalition v. Tubbs*, 380 P.3d 771, 782 (Mont. 2016). Such a mandate would raise difficult issues of comity and the remedial scope of the judicial power this Court can and should avoid by respecting the adequate and independent state law grounds of the decision below.

## II. The decision below presents no important federal question.

Petitioners claim a 24-year-long split on "[w]hether the government may bar religious options from otherwise neutral and generally available student aid programs." Pet. 15. They plead for this Court's intervention because "[t]he only way for this Court to resolve the split is to grant certiorari in another student-aid case." Pet. 29. Respectfully, the fact that the court below decided "another student-aid case" is no reason—and certainly not a compelling reason—for this Court to grant certiorari in *this* case. *See* Sup. Ct. R. 10. Whatever the merits of Petitioners' assertions, this case is not part of the split they describe. The decision below does not bar religious options from a generally available scholarship program; it bars the scholarship program itself. Under the reasoning on either side of the alleged split, this is a choice a state may make.

### A. The decision below does not create or perpetuate a conflict among other courts.

Petitioners characterize the split as involving twelve cases dating back to 1995. Closer examination reveals, however, that this "schism" is contrived. Pet. 16. The cases do not reflect a disagreement about the question presented, but instead address a wide range of laws, constitutional claims, and facts distinguishable from each other and this case. Nearly all of the cases are more than a decade old, and many of them have been on the books for two decades. Most of them precede *Locke v. Davey*, 540 U.S. 712 (2004), the purported source of the split, by several years.

For example, the earliest case Petitioners cite, *Hartmann v. Stone*, did not involve public funding for religious education at all. Instead, the Sixth Circuit invalidated under the Free Exercise Clause the Army's prohibition on religious practices in on-base day-care program placements of children made "at their parent's choice and expense." *Id.*, 68 F.3d 973, 975 (6th Cir. 1995). Such a prohibition on religious practices—free exercise of religion—in day-care programs provided at the parents' own expense is several steps removed from the question presented in this case.

Two other cases did not turn on the Free Exercise or Equal Protection Clause questions Petitioners present here. In *Colorado Christian University v. Weaver*, the Tenth Circuit invalidated under the Establishment Clause a Colorado law that discriminated among "sectarian" and "pervasively sectarian" religious institutions

in providing state-funded scholarships for private colleges in the state. *See id.*, 534 F.3d 1245, 1258 (10th Cir. 2008). The case turned on discrimination among religions, not an exclusion of religious options from a generally available program, and not the distinct question presented here. In *Badger Catholic, Inc. v. Walsh*, the Seventh Circuit invalided under the public forum doctrine Wisconsin's exclusion of a religious student organization from a generally available student activity fund. *See id.*, 620 F.3d 775, 776-78 (7th Cir. 2010). The case applied a line of cases under the Free Speech Clause, not the Free Exercise Clause. Petitioners do not bring claims under the Free Speech Clause, and such claims do not apply to scholarship programs regardless. *See Locke*, 540 U.S. at 720 n. 3 ("cases dealing with speech forums are simply inapplicable" to a scholarship program).

Another pair of cases do not involve state subsidies of religious education, but denial of access to state-provided special education services for students enrolled in religious schools. In *Peter v. Wedl*, the Eighth Circuit found "religious animus" under the Free Exercise, Free Speech, and Equal Protection Clauses in a Minnesota rule that provided special education services at nonreligious private schools but denied those same services at religious private schools. *See id.*, 155 F.3d 992, 996-98 (8th Cir. 1998). In *KDM ex rel. WJM v. Reedsport Sch. Dist.*, the Ninth Circuit upheld as-applied an Oregon regulation that required special education services to be provided in a religiously neutral setting, and allowed a student enrolled in a religious

school to receive those services nearby. *See id.*, 196 F.3d 1046, 1050-51 (9th Cir. 1999). It is at best a stretch to portray these denials of nonreligious state-provided special education services, neither of which involved state financial subsidies of religious education, an "exclusion" of "religious options." Still, there is no such exclusion here.

Other cases Petitioners catalog involve the same tuition payment law in Maine and Vermont. In *Strout v. Albanese*, the First Circuit upheld a Maine law excluding religious schools from a direct grant program only available to students who live in areas without public schools, because the grants otherwise would violate the Establishment Clause. 178 F.3d 57, 64 (1st Cir. 1999); *see also Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 147 (Me. 1999) (same). In *Chittenden Town Sch. Dist. v. Dep't of Educ.*, the Vermont Supreme Court invalidated a similar program's inclusion of religious schools on state constitutional grounds, and rejected a claim under the Free Exercise Clause. 738 A.2d 539, 562-64 (Vt. 1999). In *Eulitt ex rel. Eulitt v. Me. Dep't of Educ.*, the First Circuit addressed claims under the Equal Protection Clause similar to those brought in *Strout* against the same tuition grant program, and reaffirmed *Strout* on equal protection grounds in light of *Zelman* and *Locke*. *See Eulitt*, 386 F.3d 344, 356 (1st Cir. 2004). In *Anderson v. Town of Durham*, which raised claims under both the Equal Protection and Free Exercise Clauses, the Maine Supreme Judicial Court reached the same conclusion. 895 A.2d 944, 961 (Me. 2006). These later Maine (and Vermont) cases

wrestle with technical questions of intra-circuit *stare decisis* as much as with the Free Exercise Clause. Together, all five cases are over a decade old, and most of them are two decades old. There is no case that conflicts with them. Each of these cases rejected arguments that states must include religious education in programs that provide aid to private schools, and no case has held to the contrary. Again, none raises the question presented here.

That leaves *Taxpayers for Pub. Educ. v. Douglas Cty.* and *Moses v. Ruszkowski*. Petitioners concede the school board mooted the case on remand in *Douglas Cty.* by terminating the scholarship program, just as the court below did here. Pet. App. 29. In *Moses*, the aid consisted of nonreligious textbooks that had to be approved by the state and therefore could not support religious indoctrination. 2019-NMSC-003, ¶ 4, 2018 N.M. Lexis 70. The case raises interesting questions about New Mexico's unique cultural history, but it hardly demonstrates either a broad or deep split in the cases. Decided the day after the decision below, and just eighteen months after *Trinity Lutheran*, it certainly does not suggest an enduring split on the question presented by Petitioners, let alone on the distinct issue actually addressed by the decision below.

### B. Petitioners exaggerate the case's national importance and urgency.

As demonstrated above, on Petitioners' own count issues of state aid to religious education recurred only

a handful of times, many of those in one state. Of 17 other states that operate a tax-credit scholarship program, Petitioners do not cite a single one that presents the issue decided below, let alone the distinct question presented here. Pet. 6, *citing* EdChoice, *Tax-Credit Scholarship Programs*, http://www.edchoice.org/school-choice/school-choice-in-america. Maine and Vermont, Petitioners' only examples of states that exclude religious uses of generally available educational aid, operate "town tuitioning programs" of direct public funding for private education, discussed above. Pet. 34. These programs raise different issues of state and federal constitutional law, and also remain "generally available" to nonreligious private schools in those states unlike Montana's now invalid program. *See Eulitt*, 386 F.3d at 356-57 (upholding tuition program that excluded religious schools); *Chittenden Town Sch. Dist.*, 738 A.2d at 563-64 (upholding tuition program except to the extent it reimbursed religious schools).[3]

The fact that other states have debated various educational aid programs, and whether to include

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[3] Petitioners cite without discussion additional state constitutional cases, none of which involve direct or indirect public payments for religious education. *See Mitchell v. Consol. Sch. Dist. No. 201*, 135 P.2d 79 (Wash. 1943) (transportation to schools); *Cal. Teachers Ass'n v. Riles*, 632 P.2d 953 (Cal. 1981) (textbook loans); *see also Fannin v. Williams*, 655 S.W.2d 480, 484 (Ky. 1983) (textbook program for all private schools was "constitutionally impermissible because of the manner in which it directs the expenditure of public funds for educational purposes, through nonpublic schools."). Moreover, these states settled these questions decades ago, and decades before *Locke v. Davey*, the purported basis for the current split.

religious education within those programs, is a feature of federalism, not a bug for free exercise. Pet. 33-34. It is a choice this Court has recognized the states enjoy within the "play in the joints" of the Religion Clauses. *See Locke*, 540 U.S. at 718-19; *see also Zelman*, 536 U.S. at 662. Different states, with different legislatures and different constitutions, will arrive at different policies respecting scholarship programs specifically, and support for private education more generally. That debate, including popular discussions about the distinct meanings of state constitutions within our diverse state constitutional tradition, is something to celebrate not quash. *Cf.* Pet. 36 n. 18.

Even within the small universe of states that have considered scholarship programs like the one at issue here, Montana's laws would make a poor test case. As Petitioners admitted below, only one other state prohibits tax credits for religious education, and few states reject the "child-benefit theory" as Montana has. *See* Appellants Br., MT Supreme Court Cause No. DA 17-0492, at 27 (Michigan is the only other state that prohibits tax credits for religious education); *id.* at 24 ("The overwhelming majority" of states accept the child-benefit theory). According to a late affidavit filed by the administrator of the only student scholarship organization to form since 2015, perhaps forty students a year received a $500 scholarship from funds that may or may not have been subsidized by the $150 tax credit under the program. Pet. App. 124. According to Petitioners' source, Montana's tax credit scholarship program had the lowest participation, the

lowest participation rate, the smallest average student funding, and the smallest percentage of public funding (just one out of twenty dollars) of any such program in the nation. *See* "School Choice in America," EdChoice, last modified January 15, 2019, available at http://www.edchoice.org/school-choice/school-choice-in-america. It was a temporary program from the start, due to end in 2023 on its own accord. *See* 2015 Mont. Laws Ch. 457, § 33. With the decision below, a few years earlier than already planned, Montana has rejoined the two-thirds of states that do not provide aid for any private education through a tax-credit scholarship program. This is not an event of national importance.

## III. The decision below is consistent with the Free Exercise and Equal Protection Clauses.

The Montana Supreme Court decided the validity of the scholarship program on independent and adequate state constitutional grounds. This decision does not raise federal constitutional concerns. States, including state courts interpreting state constitutions, may make this choice. *See, e.g.*, *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009) (invalidating aid program for private schools on state constitutional grounds); *Fannin v. Williams*, 655 S.W.2d 480, 484 (Ky. 1983) (same). Both the Religion and Equal Protection Clauses allow a state to reject generally available subsidies that would benefit private education without running afoul of any constitutional antidiscrimination rule.

The reason the "Montana Supreme Court did not even cite to *Trinity Lutheran* [*Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017)] in its opinion," is not, as the Petition suggests, because its decision would "bar religious options from otherwise neutral and generally available student-aid programs." Pet. 29. The decision below did no such thing. The state legislature did not expressly exclude religious education from its scholarship program, *cf. Locke v. Davey*, 540 U.S. 712 (2004), nor was the Department's rule excluding aid to religious education upheld, *cf. Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017), nor did the court below require an exclusion of religious education from a generally available scholarship program, *cf. Morris Co. v. Freedom from Religion Foundation*, 181 A.3d 992 (N.J. 2018), *cert. denied*, 232 N.J. 543 (2019). Instead, the court below invalidated a scholarship program that subsidized both religious and nonreligious education. No case has held such a result under a state constitution to violate the federal constitution.

Had Montana's scholarship program discriminated against religion in violation of the Religion or Equal Protection Clauses, the remedy would have been to aid religious and nonreligious private schools on the same terms, or to aid neither. Unconstitutional discrimination, particularly in the provision of tax benefits, may be cured either "by extension or invalidation of the unequally distributed benefit or burden . . . leaving the remedial choice in the hands of state authorities." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 426-27 (2010). The decision below reaches the latter

outcome, harmonizing the demands of the Montana Constitution with any potential demands of the Religion and Equal Protection Clauses.

### A. Under the Religion Clauses, Montana may offer generally available subsidies to religious education, or no subsidies at all.

As the decision below recognized at its beginning, "there is room for play in the joints" between the Free Exercise and anti-establishment principles. Pet. App. 16, *citing Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 669 (1970). Thus, "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Locke v. Davey*, 540 U.S. 712, 719 (2004). Even when a state decides not to fund religious organizations out of adherence to traditional American commitments to religious liberty, including prohibitions on aid to religious education, the Free Exercise Clause does not condemn it as hostility toward religion. *Id.* at 721 ("[T]he subject of religion is one in which both the United States and state constitutions embody distinct views").

In *Locke*, this Court upheld Washington's denial of indirect aid to religious education notwithstanding the same program's availability to students pursuing nonreligious training. *Id.*, 540 U.S. at 721. Perforce, a state may decide not to aid either religious or nonreligious private education if its distinct constitutional commitments, as interpreted by its courts, prohibit such an indirect diversion of funds away from public education.

Indeed, Justice Scalia, dissenting in *Locke*, recognized "any number of ways [the state] could respect both its unusually sensitive concern for the conscience of its taxpayers and the Federal Free Exercise Clause," including by "simply abandon[ing] the scholarship program altogether." *Id.* at 729 (Scalia, J., dissenting). Through the decision below, Montana has done exactly that.[4]

This Court recently addressed a separate Free Exercise issue in *Trinity Lutheran*. That case involved Missouri's denial of a church's participation in a generally available scrap tire recycling program to improve the surface of its playground, which served both its preschool and the local community. *Id.*, 137 S. Ct. at 2017-18. The Court distinguished Missouri's denial of a church's participation in the recycling program "simply because it is—a church" from Washington's denial of funding for a student's participation in religious education. *Id.* at 2023. In *Locke*, the Court noted, the student in Washington's scholarship program "was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*." *Id.*

Given that the Montana Supreme Court invalidated the scholarship program altogether, the decision below does not present the same issue as *Trinity*

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[4] Although Petitioners and *amici* suggest questions about the holding in *Locke*, the consistency of the decision below with both the majority and dissent in *Locke* makes this an inappropriate case in which to revisit it. Petitioners have not asked the court to reconsider *Locke*.

*Lutheran*. (Petitioners concede that case does not control this one. Pet. 4.) As this Court observed, "Trinity Lutheran is not claiming any entitlement to a subsidy . . . [t]he express discrimination against religious exercise is not the denial of a grant." *Id.* at 2022. In this case, in contrast, after the decision below terminated the grant of the tax credit for all potential recipients, "a subsidy" is all Petitioners can claim they are entitled to. Montana is not "denying a generally available benefit solely on account of religious identity," *id.* at 2019, because it is no longer making such a benefit available to anyone at all.

Yet even in terms of *Trinity Lutheran*, the scholarship program did not fail because of who the Petitioners *are*; it failed because of what Petitioners proposed *to do*—use the funding provided by the scholarship program to provide their children a religious education. Pet. App. 157 (Espinoza Aff. ¶ 10, " . . . the school teaches the same Christian values that I teach at home."); Pet. App. 162 (Anderson Aff. ¶ 7, " . . . Stillwater teaches religious values. That was one of the main reasons that I chose Stillwater . . . "); Pet. App. 167 (Schaefer Aff. ¶ 6, "A very important reason that I chose Stillwater for my children is that the school teaches the same Christian values that I teach at home."). Unlike playground resurfacing, such funding for religious education lies at the core of constitutional no-aid principles. Thus, *Trinity Lutheran* confirms the holding of *Locke*, and does not address "religious uses of funding," such as the scholarship program at issue here. *Trinity Lutheran*, 137 S. Ct. at 2024 n. 3.

### B. The decision below cures rather than creates any violation of Equal Protection.

Although they present the question, Petitioners make no argument as to why the decision below is inconsistent with the Equal Protection Clause (or, for that matter, the Establishment Clause). In any event, equal protection doctrine adds little to the free exercise analysis. *See Locke*, 540 U.S. at 720 n. 3 (applying rational-basis scrutiny to equal protection claims where program satisfies the Free Exercise Clause); *cf. Trinity Lutheran*, 137 S. Ct. at 2024 n. 5 (not reaching claim under the Equal Protection Clause). Indeed, the decision below would have remedied any inequality Petitioners could claim. *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 426-27 (2010) ("How equality is accomplished—by extension or invalidation of the unequally distributed benefit or burden, or some other measure—is a matter on which the Constitution is silent"); *see also Heckler v. Mathews*, 465 U.S. 728, 740 n. 8 (1984) (this Court has "often recognized that the victims of a discriminatory government program may be remedied by an end to preferential treatment for others").

Petitioners, like thousands of Montanans who enroll their children in otherwise qualified religious schools, can avail themselves of every general tax benefit Montana's legislature has the power to provide. They can benefit from the full deductibility of otherwise eligible private charitable donations in general, including religious schools. *See* Mont. Code Ann. § 15-30-2131. They can benefit from the property tax

exemption for charitable uses in general, including religious schools. *See* Mont. Code Ann. § 15-6-201; *cf.* Mont. Const. Art. VIII, § 5 (the legislature may exempt "property used exclusively for educational purposes"). They can benefit from the income tax exemption for charitable organizations in general, including religious schools. *See* Mont. Code Ann. § 15-31-102. It is reasonable to assume, in fact, that they have benefitted from all of these general charitable tax benefits available to their schools and scholarship donors.

Within difficult constraints of rurality and low state income, and through an array of generally available charitable tax benefits, Montana has supported a vibrant community of private schools, nearly all of which provide religious education. The only tax benefit that is not available to Petitioners is not generally available at all, because that unprecedented indirect payment of public funds through the scholarship program violated the Montana Constitution. That decision does not warrant this Court's review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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