No. 18-364

In the Supreme Court of the United States

MORRIS COUNTY BOARD OF CHOSEN FREEHOLDERS, THE MORRIS COUNTY PRESERVATION TRUST FUND REVIEW BOARD, JOSEPH A. KOVALCIK, JR., IN HIS OFFICIAL CAPACITY AS MORRIS COUNTY TREASURER,

Petitioners,

v.

FREEDOM FROM RELIGION FOUNDATION AND DAVID STEKETEE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

SUPPLEMENTAL BRIEF OF PETITIONER

ERIC S. BAXTER
Counsel of Record
DIANA M. VERM
NICHOLAS R. REAVES
THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 New Hampshire Ave. NW, Suite 700
Washington, D.C. 20036
(202) 955-0095
ebaxter@becketlaw.org

Counsel for Petitioners

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INTRODUCTION

Two state supreme court decisions issued the week of December 10, 2018, deepen the split over the reach of *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012 (2017). In *Moses* v. *Ruszkowski*, the New Mexico Supreme Court relied on *Trinity Lutheran* to reinstate a textbook lending program *despite* some students' taking their textbooks to religious schools. Supp.App.1. And in *Espinoza* v. *Montana Department of Revenue*, the Montana Supreme Court expressly disregarded *Trinity Lutheran* to strike down an educational scholarship program *because* some students would take those scholarships to religious schools. Supp.App.49. The two courts' starkly conflicting treatments of *Trinity Lutheran* underscore that review should be granted to resolve the square split among the lower courts over whether and when the Free Exercise Clause prohibits exclusion from generally available government programs based on a participant's religious status.

This case presents an ideal vehicle for resolving this deepening split over the scope of *Trinity Lutheran*'s application in the specific context of historic preservation grants and with a clean factual record.

ARGUMENT

Moses v. *Ruszkowski* addressed a decades-old lending program that makes state-owned textbooks available to all students in New Mexico regardless of whether they attend a public or private school. Two parents sued, complaining that the program violates New Mexico's Blaine Amendment by extending benefits to students at private schools that are religious. In December 2015, the New Mexico Supreme Court

struck down the program 5-0. See *Moses* v. *Skandera*, 367 P.3d 838 (N.M. 2015), *vacated sub nom. New Mexico Ass'n of Non-public Schs.* v. *Moses*, 137 S. Ct. 2325 (2017) (mem.). It deemed New Mexico's Blaine amendment unique in that it prohibits aid to both "sectarian" and "private" schools. Reading the Blaine Amendment as simply favoring public education (and thus not furthering religious discrimination) the court invalidated the textbook lending program.

Intervenor New Mexico Association of Nonpublic Schools (NMANS) sought certiorari soon after this Court chose to review *Trinity Lutheran*. And after deciding *Trinity Lutheran*, this Court granted, vacated, and remanded NMANS's petition for reconsideration in light of the new ruling. See *New Mexico Ass'n of Non-public Schs.* v. *Moses*, 137 S. Ct. 2325 (2017) (mem.).

On remand, the New Mexico Supreme Court applied *Trinity Lutheran* to reach a different result. It acknowledged that New Mexico's Blaine Amendment "is facially neutral toward religion" and was likely "intended" by the people of New Mexico "to be a religiously neutral provision." Supp.App.22a, 30a. But the court also found, based on "the history of the federal Blaine amendment and the New Mexico Enabling Act," that New Mexico had been "caught up in the nationwide movement to eliminate Catholic influence from the school system" and was "forced" by Congress "to eliminate public funding for sectarian schools as a condition of statehood." *Id.* at *30a. That New Mexico tried to comply by enacting a religiously neutral Blaine Amendment that barred aid to *any* private school was irrelevant: the "anti-Catholic sentiment tainted its adoption." *Ibid.* The court thus construed

New Mexico's Blaine Amendment narrowly to "not implicate the Free Exercise Clause under *Trinity Lutheran*," finding that the textbook lending program "helps students" and "furthers New Mexico's legitimate public interest in promoting education and eliminating illiteracy." *Id.* at 32a, 33a. It concluded that "[a]ny benefit to private schools is purely incidental and does not constitute 'support' within the meaning of [the Blaine Amendment]." *Id.* at 33a.

Just a day before, the Montana Supreme Court—confronted with a similar set of circumstances—held 5-2 that *Trinity Lutheran* simply did not apply to Montana's Blaine Amendment. *Espinoza* addressed a newly enacted educational tax-credit program that provides a "dollar-for-dollar tax credit" for donations to organizations that "fund tuition scholarships for students who attend private schools." Supp.App.51a. The court struck down the program under the Montana Blaine Amendment, concluding that the tax credits constituted an "indirect payment" of public funds for a "sectarian purpose" because some students would take their scholarships to religiously affiliated schools. *Id.* at 69a-70a.

The court recognized that "an overly-broad analysis" of its Blaine Amendment "could implicate free exercise concerns." *Id.* at 74a. And it agreed that "there may be a case where an indirect payment constitutes 'aid'" under the Blaine "but where prohibiting [that] aid would violate the Free Exercise Clause." *Ibid.* Yet without even mentioning *Trinity Lutheran*, the court simply concluded with an *ipse dixit*: "this is not one of those cases." *Ibid.* Justices Baker and Rice dissented, finding it "[q]uite remarkabl[e]" that the court so casually dismissed "any Free Exercise Clause concerns."

Id. 115a; see also *id.* at 124a (Rice, J., dissenting). The *Espinoza* intervenors have announced that they intend to seek review in this Court.

Moses and *Espinoza* demonstrate the confusion among the lower courts about *Trinity Lutheran*'s application outside its specific facts. The New Mexico Supreme Court applied *Trinity Lutheran* to protect the right of even secular parties to participate in a government program where their exclusion had roots in anti-religious bigotry. The Montana Supreme Court did the exact opposite, invalidating a government program and excluding even secular participants, apparently hoping that the seeming neutrality of that drastic remedy would atone for the Montana Blaine Amendment's roots in anti-religious bigotry.

There is already a square split among the lower courts over the import of *Trinity Lutheran* in the context of historic preservation programs. *Moses* and *Espinoza*—coming just one day apart—demonstrate that the confusion extends to other contexts as well. Given these two recent decisions, the need for this Court to resolve the question of *Trinity Lutheran*'s scope has become even more pressing. *Trinity Lutheran* cannot mean one thing in New Jersey, Massachusetts, and Montana and another in Vermont, the Sixth Circuit, and New Mexico. This Court should step in to resolve the disagreement among the lower courts.

The important question thus becomes how (and in what factual context) the Court should do that. This case is an ideal vehicle for resolving the split over the scope of *Trinity Lutheran*. Morris County's historic preservation program has a clear secular purpose that only incidentally benefits religious organizations, so

the question of unequal treatment is uncluttered. And the New Jersey court addressed *Trinity Lutheran* at length and rejected its application. Moreover, granting review in this case will provide further guidance for courts in cases like *Espinoza*, which have a more complicated factual record concerning educational tax credits and where the Montana Supreme Court engaged in no analysis of *Trinity Lutheran* at all. Among the cases now before the Court or about to be, this case presents the best vehicle.

CONCLUSION

For these reasons, the petition should be granted or, in the alternative, the judgment below should be summarily reversed.

Respectfully submitted.

ERIC S. BAXTER
Counsel of Record
DIANA M. VERM
NICHOLAS R. REAVES
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1200 New Hampshire
Ave. NW, Suite 700
Washington, D.C. 20036
(202) 955-0095
ebaxter@becketlaw.org

Counsel for Petitioners

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SUPPLEMENTAL APPENDIX

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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: _____

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NO. S-1-SC-34974

CATHY MOSES AND
PAUL F. WEINBAUM,

Plaintiffs-Petitioners,

v.

CHRISTOPHER RUSZKOWSKI,

Secretary of Education, New Mexico
Public Education Department,

Defendant-Respondent,

and

ALBUQUERQUE ACADEMY, et al.,

Defendants/Intervenors-Respondents.

ORIGINAL PROCEEDING ON CERTIORARI
Sarah M. Singleton, District Judge

Graeser & McQueen, LLC
Christopher L. Graeser
Santa Fe, NM

Frank Susman
Santa Fe, NM
for Petitioners

New Mexico Public Education Department
Dawn E. Mastalir, General Counsel
Santa Fe, NM

Sutin, Thayer & Browne, P.C.
Susan M. Hapka
Albuquerque, NM

for Respondent

Modrall, Sperling, Roehl, Harr is & Sisk, P.A. Rufus E. Thompson
Jennifer G. Anderson
Sarah M. Stevenson
Albuquerque, NM

The Becket Fund for Religious Liberty
Eric S. Baxter
Washington, DC
for Intervenors-Respondents

OPINION
VIGIL, Justice.

{1} In this opinion we reconsider the constitutionality of New Mexico's textbook loan program. In *Moses* v. *Skandera (Moses II)*, this Court considered whether using public funds to lend textbooks to private school students violated Article XII, Section 3 support of any sectarian, denominational or private

school, college or university." 2015-NMSC-036, 367 P.3d 838, *vacated sub nom.*, *N.M. Ass'n of Non-public Sch.* v. *Moses*, 137 S. Ct. 2325 (2017) (mem.). This Court held "that the plain meaning and history of Article XII, Section 3 forbids the provision of books for use by students attending private schools, whether such schools are secular or sectarian." *Moses II*, 20 l5-NMSC-036, ¶2. The United States Supreme Court subsequently vacated this Court's judgment and remanded the case for further consideration in light of *Trinity Lutheran* Church of Columbia, Inc. v. Comer, 582 U.S. _, 137 S. Ct. 2012 (2017).N.M. Ass 'n of Non-public Sch. ,137 S. Ct. 2325.

{2} On remand, we conclude that this Court's previous interpretation of Article XII, Section 3 raises concerns under the Free Exercise Clause of the First Amendment to the United States Constitution. To avoid constitutional concerns, we hold that the textbook loan program, which provides a generally available public benefit to 19 students, does not result in the use of public funds in support of private schools as prohibited by Article XII, Section 3. We also hold that the textbook loan program is consistent with Article IV, Section 31 of the New Mexico Constitution, which addresses appropriations for educational purposes, and Article IX, Section of the New Mexico Constitution, which limits "any donation to or in aid of any person, association or public or private corporation."

I. BACKGROUND

{3} Cathy Moses and Paul F. Weinbaum (Petitioners) initiated this case by filing a complaint for declaratory judgment against Hanna Skandera, the Secretary of

the 9 New Mexico Public Education Department (Department).[1] Petitioners sought a declaration that the Instructional Material Law (IML), NMSA 1978, §§ 22-15-1 to -11(1967, as amended through 2011), violates several provisions of the New Mexico Constitution because the IML provides for the distribution of public funds to private schools.

{4} The IML establishes an instructional material fund that is administered by the Department. See § 22-15-5(A). The Department uses the fund to purchase textbooks that are loaned free of charge to public and private school students enrolled in first through twelfth grades and in early childhood education programs. See §§ 22-15-5(B), 22-15-7(A); *see also* § 22-15-2(C) (defining "instructional material," which is referred to collectively in this opinion as "textbooks"). Although schools play a role in the implementation of the IML, they do so as agents for the benefit of their students. See § § 22-15- 7(B), 22- l 5-8(B). The Department allocates the money in the instructional material fund to schools based on the number of students enrolled. See § 22-15-9(A). The schools select textbooks from a "multiple list" approved by the Department. See §§ 22-15-2(D), 22-15-8(B). The IML permits schools to use a portion of their allocated funds for the purchase of instructional materials, classroom materials, and "items that are not on the multiple list; provided that no funds shall be expended [by a private school] for religious, sectarian or non-secular materials." Section 22-15-9(C). The Department distributes the textbooks to the

[1] Christopher Ruszkowski, the current Secretary of Education, has been substituted for Hanna Skandera on remand.

schools, see § 22-15-7(B), and the schools disseminate the textbooks to their students, see § 22-15- 7(C). Schools are responsible for the safekeeping of the textbooks, *id.*, and may holda student or parent "responsible for the loss, damage or destruction of ' a textbook that is "in the possession of the student." Section 22-15-10(B).

{5} Petitioners moved for summary judgment in the district court. At a summary judgment hearing, the district court indicated that it intended to grant the motion based on *Zellers* v. *Huff*, 1951-NMSC-072, 55 N.M. 501, 236 P.2d 949 (addressing issues concerning public funding of parochial schools and Catholic influence in public schools). But before the district court entered summary judgment, Intervenors, the Albuquerque Academy, the New Mexico Association of Non-public Schools, Rehoboth Christian School, St. Francis School, Hope Christian School, Sunset Mesa School, and Anica and Maya Benia moved to intervene. The district court granted the motion to intervene and ordered the parties to submit additional briefing on whether *Zellers* precluded the use of IML funds to purchase textbooks for distribution to private schools. At a second summary judgment hearing, the district court concluded that *Zellers* did not constitute binding or persuasive authority, denied Petitioners' motion for summary judgment, and granted summary judgment in favor of the Department. The Court of Appeals affirmed. *Moses* v. *Skandera* (Moses I), 2015-NMCA-036, ¶2, 346 P.3d 396, rev 'd, 2015-NMSC-036, ¶¶12, 41.

{6} Petitioners sought review by this Court, raising five issues:

> (1) whether this Court's decision in Zellers constituted dicta; (2) whether the IML violates Article XII, Section 3 of the New Mexico Constitution; (3) whether the IML violates Article IV, Section 31 of the New Mexico Constitution; (4) whether the IML violates Article IX, Sectionof the New Mexico Constitution; and (5) whether the IML violates Article II, Section of the New Mexico Constitution.

Moses II, 2015-NMSC-036, ¶11. This Court held that loaning textbooks to private school students violated Article XII, Section 3 and declined to reach the remaining issues. *Moses II*, 2015-NMSC-036, ¶12.

{7} The New Mexico Association of Non-public Schools filed a petition for a writ of certiorari in the United States Supreme Court. The day after the Supreme Court issued its opinion in *Trinity Lutheran*, 137 S. Ct. 2012, the Supreme Court granted review of this Court's opinion in *Moses II*, vacated this Court's judgment, and remanded the case to this Court for further consideration in light of *Trinity Lutheran*. *See N.M. Ass'n of Non-public Sch.*, 137 S. Ct. 2325. In accordance with the Supreme Court's directive, in this opinion we take a fresh look at the constitutionality of the textbook loan program under the New Mexico Constitution.

II. DISCUSSION

{8} On remand, Petitioners argue that loaning textbooks to private school students under the IML violates three provisions of the New Mexico Constitution: (1) Article XII, Section 3, which prohibits the use of public funds "for the support of any

sectarian, denominational or private school, college or university"; (2) Article IV, Section 31, which precludes an appropriation for "educational . . . purposes to any person, corporation, association, institution or community, not under the absolute control of the state"; and (3) Article IX, Section 14, which limits "any donation to or in aid of any person, association or public or private corporation."

{9} The Department and Intervenors argue that Article XII, Section 3, as interpreted by the Court in *Moses II*, violates the Free Exercise Clause of the First Amendment to the United States Constitution and the equal protection guarantees of the federal and state constitutions. They ask this Court to interpret Article XII, Section 3 in a manner that permits the state to loan textbooks to private school students under the IML and assert that such an interpretation would be consistent with the United States Constitution.

A. Standard of Review

{10} This Court applies a de novo standard of review to a constitutional challenge to a statute. *Bounds* v. *State ex rel. D'Antonio*, 2013-NMSC-037, ¶ 11, 306 P.3d 457. In doing so, we presume that the statute is valid and will uphold it "unless we are satisfied beyond all reasonable doubt that the Legislature went outside the bounds fixed by the Constitution in enacting the challenged legislation." *Id.* (internal quotation marks and citation omitted). "We will not question the wisdom, policy, or justness of a statute, and the burden of establishing that the statute is invalid rests on the party challenging the constitutionality of the statute." *Id.* (internal quotation marks and citation omitted).

B. Loaning Textbooks to Private School Students Under the IML Does Not Constitute Support of Private Schools as Prohibited by Article XII, Section 3

1. This Court's previous interpretation of Article XII, Section 3 in *Moses II*

{11} This Court based its decision in *Moses II*, 2015-NMSC-036, on Article XII, Section 3 of the New Mexico Constitution, which provides that

> [t]he schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university.

To determine whether loaning textbooks to private school students constituted support of private schools in violation of Article XII, Section 3, this Court considered the historical circumstances that led to the provision's adoption, including the nationwide controversy over public education. See *Moses II*, 2015-NMSC-036, ¶¶ 19-23.

{12} "During the early nineteenth century, public education was provided in public schools known as common schools." *Moses II*, 2015-NMSC-036, ¶ 19 (internal quotation marks and citation omitted). These common schools were heavily influenced by non-denominational Protestantism. See Mark Edward

Deforrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551, 559-60 (2003) (describing the "overt fusion of Protestant faith with public education"); Joseph P. Viteritti, Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law, 21 Harv. J.L. & Pub. Pol'y 657, 666 (1998) (noting that the common schools promoted "the teachings of mainstream Protestantism"). The Protestant-run common schools were" 'designed to function as an instrument for the acculturation of immigrant populations, rendering them good productive citizens in the image of the ruling majority.'" *Moses II*, 20 l 5-NMSC-036, ¶ 19 (quoting Viteritti, *supra*, at 668). "State statutes at the time authorized Bible readings in public schools and state judges generally refused to recognize the Bible as a sectarian book." *Id.*

{13} "By the middle of the nineteenth century," an "influx of Catholic immigrants created a demand for Catholic education, and consequently Catholics and other minority religionists challenged the Protestant influence in the common schools." *Id.* 20. Protestants responded by "calling for legislation prohibiting sectarian control over public schools and the diversion of public funds to religious institutions." StevenK. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 43 (1992). President Ulysses S. Grant entered the debate by vowing to "'[e]ncourage free schools, and resolve that *not one dollar be appropriated to support any sectarian schools*.' "*Moses II*, 2015-NMSC-036, ¶ 21 (alteration in original) (emphasis added) (quoting Viteritti, supra, at 670). At that time, "[i]t was an open secret that 'sectarian' was

code for 'Catholic.'" *Id.* (internal quotation marks and citation omitted).

{14} In 1875, Congressman James G. Blaine proposed the following amendment to the federal constitution:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, [nor] any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

Green, *supra,* at 38 n.2 (quoting Cong. Rec. 5453 (1876)). This proposed amendment to the federal constitution failed to pass, but similar provisions were soon incorporated into state law. *Moses II*, 2015-NMSC-036, ¶ 23. "By 1876, fourteen [s]tates had enacted legislation prohibiting the use of public funds for religious schools; by 1890, twenty-nine [s]tates had incorporated such provisions into their constitutions." Viteritti, *supra*, at 673.

{15} Although many states voluntarily chose to adopt state constitutional provisions based on the failed Blaine amendment, Congress forced New Mexico and other territories seeking admission to the union to adopt Blaine provisions as a condition of statehood. *See* DeForrest, *supra*, at 573-74; Viteritti, *supra*, at 673. Congress passed the Enabling Act for New Mexico in 1910. See Enabling Act for New Mexico of June 20, 1910, ch. 310, 36 Stat. 557. The Enabling Act required New Mexico to establish and maintain "a system of

public schools . . . free from sectarian control," *id.* § 2, and granted New Mexico "over thirteen million acres of federal land . . . to be held in trust for the benefit of various public schools and other institutions." *State of N.M. ex rel. King* v. *Lyons*, 2011-NMSC-004, ¶ 5, 149 N.M. 330, 248 P.3d 878. The Enabling Act further mandated

> [t]hat the schools, colleges, and universities provided for in this Act shall forever remain under the exclusive control of the said State, and no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college, or university.

Enabling Act § 8. "The Enabling Act required that the people of New Mexico incorporate its mandates into the state constitution, and it specified that those mandates could not be modified without the consent of Congress and a ratifying vote 19 of our citizens." *Lyons*, 2011-NMSC-004, ¶ 4; *see also* N.M. Const. art. XXI, § 9 (consenting to Enabling Act provisions); N.M. Const. art. XXI, § (making Enabling Act provisions "irrevocable without the consent of the United States and the people of this state").

{16} The drafters of the New Mexico Constitution modeled Article XII, Section 3 on Section 8 of the Enabling Act but made two significant changes to the language drafted by Congress. First, Article XII, Section 3 restricts "the use of proceeds from any lands granted to New Mexico by Congress, not only those granted in the Enabling Act." *Moses II*, 2015-NMSC-036, ¶ 27. And second, Article XII, Section restricts

"the use of any funds appropriated, levied, or collected for educational 9 purposes for the support of not only sectarian schools, but also the much broader category of private schools." *Moses II*, 2015-NMSC-036, ¶ 27 (emphasis added). "Through these changes, the Constitutional Convention decided to provide for additional restrictions on public funding of education beyond the restrictions required by Section 8 of the Enabling Act." *Moses II*, 2015-NMSC-036, ¶ 27. "The members of the Constitutional Convention chose to play it safe-by broadening the provision to reach all private schools, they avoided drawing a line between secular and sectarian education." *Id.*

{17} In *Moses II* this Court considered two interpretations of Article XII, Section 3: a permissive interpretation that would allow the state to lend textbooks to private school students under the IML, and a restrictive interpretation that would preclude such lending. *Moses II*, 2015-NMSC-036, ¶ 30-38. Our Court of Appeals had taken the permissive approach, construing the limitations in Article XII, Section 3 as coextensive with the limitations set forth in the Establishment Clause of the First Amendment to the United States Constitution. *See Moses* I, 2015-NMCA-036, ¶ 34. The Court of Appeals explained that the Establishment Clause, which prohibits Congress from making any law "respecting an establishment of religion," U.S. Const. amend. I, does not bar a state from creating a textbook loan program that provides secular instructional material for the benefit of students and their parents, "regardless of the school of their attendance." *See Moses I*, 20 l5-NMCA-036, ¶¶ 34-38. The Court of Appeals concluded that although the IML may provide incidental or indirect

benefits to private schools, the IML does not violate Article XII, Section 3 because students and their parents "are the direct recipients of the program's financial support." *Moses I*, 2015-NMCA-036, ¶¶ 39-40.

{18} On certiorari, this Court observed that Article XII, Section 3 "stands as a constitutional protection separate from the Establishment Clause" because it prohibits the use of public funds for all private schools, not just religious schools. *Moses II* ,2015-NMSC-036, ¶¶17-18. This Court concluded that "Article XII, Section 3 must be interpreted consistent with cases analyzing similar Blaine amendments under state constitutions." *Moses II*, 2015-NMSC-036, ¶ 32. State courts considering the constitutionality of similar textbook loan programs have reached different results.

{19} Some jurisdictions have concluded that the Blaine provisions in their state constitutions permit a textbook loan program despite incidental or collateral benefits to religious schools. *See, e.g., Borden v. La. State Bd. of Educ.*, 123 So. 655, 660-61 (La. 1929); *Chance v. Miss. State Textbook Rating & Purchasing Bd.*, 200 So. 706, 713 (Miss. 1941) (in bane); *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 228 N.E.2d 9 791, 793-94 (N.Y. 1967), *aff 'd*, 392 U.S. 236 (1968). These jurisdictions have emphasized that textbook loan programs are intended to benefit the student, not the school, and that such programs advance the state's legitimate public welfare concern in promoting education. *See Borden*, 123 So. at 660-61 (concluding that schoolchildren and the state, but not the schools, were the beneficiaries of the program); *Chance*, 200 So. at 713 (concluding that lending secular textbooks to

"individual pupils" did not provide "a direct or indirect aid to the respective schools which they attend" and that any benefit to the school was only incidental); *Allen*, 228 N.E.2d at794 (explaining that the textbook program was intended to "bestow a public benefit upon all school children" and that "any benefit accruing to" religious schools was merely "a collateral effect" that "cannot be properly classified as the giving of aid directly or indirectly").

{20} Other states have chosen a more restrictive approach, interpreting the Blaine provisions in their state constitutions to preclude the provision of any aid or benefit to private religious schools. *See, e.g., Cal. Teachers Ass'n v. Riles,* 632 P.2d 953, 964 (Cal. 1981); *Spears v. Honda*, 449 P.2d 130, 135-36 (Haw. 1968); *Bloom v. Sch. Comm. of Springfield*, 379 N.E.2d 578, 581-82 (Mass. 1978); *Paster v. Tussey*, 512 S.W.2d 97, 104-05 (Mo. 1974) (en bane*); Gaffney v. State Dep 't of Educ.*, 220 9 N.W.2d 550, 554 (Neb. l 974); *Dickman v. Sch. Dist. No. 62C, Or. City, of Clackamas Cty*, 366 P.2d 533, 541-42 (Or. 1961) (en banc); *In re Certification of a Question of Law from the US. Dist. Court*, Dist. of S.D., S. Div., 372 N.W.2d 113, 116, 118 (S.D. 12 1985). These courts have reasoned that textbook loan programs help religious schools fulfill their religious mission. *See Cal. Teachers Ass 'n*, 632 P.2d at 962-63 ("[l]t is an undeniable fact that books are a critical element in enabling the school to carry out its essential mission to teach the students."); *Dickman*, 366 P.2d at 544 (noting that textbooks are an "integral part of the educational process" and that the teaching of religious precepts is an inseparable part of that process).

{21} Faced with two competing interpretations of Article XII, Section 3, this Court concluded that the more restrictive approach honored the intent behind the failed Blaine amendment and the mandate set forth in the Enabling Act to ensure that no public funds are used to support sectarian schools. *See Moses II*, 20 l 5-NMSC-036, ¶¶ 21, 27, 32. In reaching that conclusion, this Court did not attach any significance to the inclusion of private schools in Article XII, Section 3; the restrictive approach flowed from the intent underlying the Blaine amendment and the Enabling Act and applied equally to sectarian and private schools. This Court thus held "that the plain meaning and history of Article XII, Section 3 forbids the provision of books for use by students attending private schools, whether such schools are secular or sectarian." *Moses II*, 2015-NMSC-036, ¶2.

2. Evolving First Amendment Law and *Trinity Lutheran*

{22} The religion clauses of the First Amendment provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. On remand we must consider whether this Court's interpretation of Article XII, Section 3 in *Moses II* conflicts with the First Amendment principles enunciated by the United States Supreme Court in *Trinity Lutheran*, 137 S. Ct. 2012.

{23} The Supreme Court described the relationship between the religion clauses in *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947). *Everson* involved a New Jersey program that reimbursed parents for school bus fares incurred by

both public and private school students, including students who attended religious schools. *Id.* at 3. The Court opined that "New Jersey cannot consistently with the [Establishment Clause] contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church." *Id.* at 16. "On the other hand, [the Free Exercise Clause] commands that New Jersey cannot hamper its citizens in the free exercise of their own religion." *Id.* Given these competing concerns, the Court was "careful, in protecting the citizens of New Jersey against state-established churches, to be sure that [it did] not inadvertently prohibit New Jersey from extending its general [s]tate law benefits to all its citizens without regard to their religious belief." *Id.* The Court concluded that the Establishment Clause did not prohibit New Jersey from providing bus fares to religious school students "as a part of a general program." *Id.* at 17. The Court explained that the state must remain "neutral in its relations with groups of religious believers and non-believers" when providing" general government services," such as "police and fire protection, connections for sewage disposal, public highways and sidewalks." *Id.* at 17-18.

{24} Since *Everson*, the Supreme Court has issued multiple opinions analyzing whether the Establishment Clause permits the government to provide benefits or aid to religious schools or their students. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 644-45, 652, 663 (2002) (upholding a publicly financed school voucher program that was neutral with respect to religion and provided aid to families who exercised an independent choice regarding whether to enroll in public or private school); 6

Mitchell v. Helms, 530 U.S. 793, 801, 829, 835 (2000) (plurality opinion) (upholding a program that loaned secular educational materials to public and private schools on the basis of neutral, secular criteria); *Zobrest v. Catalina Foothills Sch. Dist*., 509 U.S. 1, 3,13-14 (1993) (permitting a local school district to provide a publicly employed interpreter for a deaf student who attended parochial school); *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 238, 243 (1968) (upholding a New York law under which secular textbooks were loaned to public and private school students).

{25} While there have been many opinions addressing whether the Establishment Clause *permits* a state to provide aid or benefits to a religious school or its students, the Supreme Court has only recently begun to consider the circumstances under which the Free Exercise Clause *requires* a state to do so. In *Locke v. Davey*, the Court analyzed a Washington scholarship program that prohibited recipients from using scholarship money to pursue "a degree in devotional theology." 540 U.S. 712, 715 (2004). The Court concluded that the Establishment Clause permitted Washington to give scholarship money to theology students because "the link between government funds and religious training [was] broken by the independent and private choice of recipients." *Id.* at 719. But the Court held that Washington could nonetheless exclude theology students from the scholarship program under the Washington Constitution without violating the Free Exercise Clause. *Id.* at 725. The Court explained Washington's restrictions on scholarship recipients fell into the "play in the joints" between what the Establishment Clause

permits and the Free Exercise Clause requires. *Id.* at 718-19 (internal quotation marks and citation omitted). In other words, although Washington could give scholarship money to recipients pursuing a degree in theology without violating the Establishment Clause, it did not have to do so. Washington's interest against "funding religious instruction" to "prepare students for the ministry" provided a valid basis for excluding theology students from the scholarship program and did not violate their rights under the Free Exercise Clause. *Id.* at 719; *see also Id.* at 725 ("If any room exists between the two Religion Clauses, it must be here.").

{26} In *Trinity Lutheran*, the Supreme Court considered whether the Free Exercise Clause required Missouri to include religious schools in a program that provided grants to schools and other entities to resurface playgrounds with recycled tire rubber. 137 S. Ct. at 2017. The preschool at *Trinity Lutheran* Church applied for a grant, but the state deemed the preschool categorically ineligible to receive a grant based on restrictions set forth in article I, section 7 of the Missouri Constitution. *Trinity Lutheran*, 137 S. Ct. at 2017-18. Article I, section 7 provides

> [t]hat no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any 1church, sect or creed of religion, or any form of religious faith or worship.

Trinity Lutheran Church sued, arguing that

Missouri's policy of denying grants based on the religious identity of the applicant violated the Free Exercise Clause. *Trinity Lutheran*, 137 S. Ct. at 2018. The federal district court ruled in favor of the state, reasoning that the case was controlled by *Locke* and that the Free Exercise Clause did "not prohibit withholding an affirmative benefit on account of religion." *Trinity Lutheran*, 137 S. Ct. at 2018. The Eighth Circuit Court of Appeals affirmed, concluding that the Free Exercise Clause did not compel Missouri "to disregard the antiestablishment principle" embodied in its state constitution. *Id.* at 2018-19.

{27} The Supreme Court reversed, holding that Missouri's policy of excluding religious entities from the grant program violated the Free Exercise Clause. *Id.* at 2024. The Court confirmed that a state's denial of "a generally available benefit solely on account of religious identity" violates the Free Exercise Clause unless "justified . . . by a state interest of the highest order." *Id.* at 2019 (internal quotation marks and citation omitted). The Court concluded that Missouri's policy implicated the Free Exercise Clause because it "expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." *Id.* at 2021. The Court also determined that Missouri's interest in "skating as far as possible from religious establishment concerns" was insufficient to justify its discriminatory policy. *Id.* at 2024. The Court did not analyze the constitutionality of the Missouri policy under the Establishment Clause because the parties stipulated that Missouri could provide playground resurfacing grants to religious preschools without violating the Establishment Clause. *Id.* at 2019. But

see *id.* at 2028 (Sotomayor, J. dissenting) (opining that the Establishment Clause precluded Missouri from giving a grant to the church for playground resurfacing because the church uses its facilities "to practice and spread its religious views"). We discuss the holding and implications of *Trinity Lutheran* later in this opinion.

3. Reconsideration of *Moses II* in light of *Trinity Lutheran*

{28} Petitioners argue that *Trinity Lutheran* does not require reversal of this Court's holding in *Moses II* because Article XII, Section 3 treats all private schools alike, whether religious or secular, and does not discriminate "solely on account of religious identity." *See Trinity Lutheran*, 137 S. Ct. at 2019. The Department and Intervenors argue that despite its facial neutrality, Article XII, Section 3, as interpreted by this Court in *Moses II*, violates the Free Exercise Clause because Article XII, Section 3was adopted as a result of animus toward Catholics. The Department and Intervenors also assert that the decisions from other states on which this Court relied in *Moses II*, 2015-NMSC-036, ¶¶ 32-38, are suspect following *Trinity Lutheran*.

{29} In *Trinity Lutheran*, the Supreme Court changed the landscape of First Amendment law. Under *Trinity Lutheran*, if a state permits private schools to participate in a generally available public benefit program, the state must provide the benefit to religious schools on equal terms. *See* 137 S. Ct. at 2022 ("The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church-solely because it is a church-to

compete with secular organizations for a grant."). *Trinity Lutheran* was the first Supreme Court opinion to hold that the Free Exercise Clause required a state to provide public funds directly to a religious institution. *See* 137 S. Ct. at 2027 (Sotomayor, J., dissenting) ("The Court today profoundly changes [the] relationship [between church and state] by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church."). The Supreme Court also emphasized that a state's interest in maintaining church-state separation does not justify the withholding of generally available public benefits based on the religious status of the recipient. *Id.* at 2024.

{30} Like the grant program at issue in *Trinity Lutheran*, the textbook loan program under the IML is a generally available public benefit program. See *Moses II*, 2015-NMSC-036, ¶ 28 (acknowledging "that the provision of school books for children attending both public and private schools constitutes 'a public service' "). And this Court in *Moses II*, like Missouri in *Trinity Lutheran*, limited the availability of the program based on restrictions in our state constitution on the expenditure of public funds.

{31} But there is a critical difference between Article XII, Section 3 of the New Mexico Constitution and article I, section 7 of the Missouri Constitution. Specifically, Article XII, Section 3 of the New Mexico Constitution does not make a distinction based solely on religious status, whereas article I, section of the Missouri Constitution does. Compare N.M. Const. art. XII, § 3 (providing that no "funds appropriated, levied

or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university"), *with* Mo. Const. art. I, § 7 (providing "[t]hat no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion").

{32} Article XII, Section 3, as interpreted in *Moses II*, 20 l 5-NMSC-036, enunciates a facially neutral policy of prohibiting the expenditure of public funds to support private schools, both religious and secular. Article XII, Section 3 does not disqualify religious individuals or entities from receiving public benefits based solely on their religious status. Instead, it creates a distinction between public schools and private schools. The First Amendment requires government neutrality toward religious viewpoints; it does not require the state to treat public schools and private schools alike.

{33} Although Article XII, Section 3 is facially neutral toward religion, the Free Exercise Clause may still be implicated if its adoption was motivated by religious animus. In *Trinity Lutheran*, the Supreme Court recognized a distinction between laws that "single out the religious for disfavored treatment" and laws that are "neutral and generally applicable without regard to religion." 137 S. Ct. at 2020. "[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 531 (1993). But "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not

neutral." *Id.* at 533. "Facial neutrality is not determinative." *Id.* at 534. The Free Exercise Clause forbids subtle departures from neutrality and covert suppression of particular religious beliefs." *Id.* (internal quotation marks and citations omitted).

{34} Evolving First Amendment jurisprudence suggests that courts should consider the historical and social context underlying a challenged government action to determine whether the action was neutral or motivated by hostility toward religion. "Factors relevant to the assessment of governmental neutrality include the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision making body." *Masterpiece Cakeshop, Ltd.* v. *Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (internal quotation marks and citation omitted); see *Id.* at 1729-31 (citing hostile comments from members of the Colorado Civil Rights Commission and the commission's inconsistent treatment of religious discrimination and sexual-orientation discrimination to conclude that the commission's treatment of a cake shop owner "violated the [s]tate's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint"); *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2417 (2018) (considering extrinsic evidence of anti-Muslim animus when determining the constitutionality of a presidential proclamation).

{35} In *Moses II*, this Court acknowledged that the federal Blaine amendment originated in anti-Catholic

prejudice and that Congress, through the Enabling Act, forced New Mexico to adopt a Blaine provision as a condition of statehood. *Moses II*, 2015-NMSC-036, ¶¶ 19-24. The United States Supreme Court likewise has recognized that the federal Blaine amendment was a product of anti-Catholic animus. *See Mitchell*, 530 U.S. at 828 ("Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.' "); *see also Zelman*, 536 U.S. at 720-21 (Breyer, J., dissenting) (explaining that "the Protestant position . . . was that public schools must be nonsectarian (which was usually understood to allow Bible reading and other Protestant observances) and public money must not support sectarian schools (which in practical terms meant Catholic") (internal quotation marks and citation omitted)). This history casts constitutional doubt on the motive underlying Article XII, Section 3. We therefore consider whether the history or circumstances in New Mexico that led to the adoption of Article XII, Section 3 cured the provision's anti-Catholic origins.

4. History of public and sectarian schools in New Mexico

{36} New Mexico has a unique history and culture, and the public school debate within New Mexico took a different course than the debate at the national level. Formal schooling commenced in New Mexico with the arrival of the first Franciscan missionaries over four hundred years ago. See Kathleen Holscher, *Religious Lessons: Catholic Sisters and the Captured Schools Crisis in New Mexico* 28 & 206 n.13(2012). "Under both

Spanish and Mexican rule, the Roman Catholic Church . . . handled all education with little interference from secular forces." Robert W. Larson, *New Mexico's Quest for Statehood: 1846-1912* 101 (1968). During that time period, "New Mexico's remote location, its rugged landscape, and its struggling economy made a centralized system of schools no more than a far-off hope." Holscher, *supra*, at 28.

{37} In 1848, Mexico ceded present-day New Mexico to the United States, and in 1850, New Mexico became a territory. *See* Treaty of Peace, Friendship, Limits, and Settlement With the Republic of Mexico (Treaty of Guadalupe Hidalgo), 9 Stat. 922 (1848); *Torrez* v. *Bd. of Cty. Comm'rs, Socorro Cty.,* 1901-NMSC-002, ¶ 3, N.M. 670, 65 P. 181. When New Mexico became a territory, the overwhelming majority of its population consisted of native-born New Mexicans. See Holscher, *supra*, at 31 ("In 1850, ninety-five percent of New Mexico's population was native born, either Hispano or Native American."). Catholic Church leaders established new parochial schools during the early territorial days, and the Church maintained control over education in New Mexico into the 1870s. See Dianna Everett, *The Public School Debate in New Mexico: 1850-1891*, 26 Arizona and the West 107, 108-09 (1984) (describing the work of "the first bishop of the Diocese of Santa Fe, John B. Lamy, "and "Father Donato Maria Gasparri, Superior of the Society of Jesus in New Mexico"). Both New Mexico's public schools and its parochial schools employed members of the Catholic clergy as teachers and used textbooks published by a Catholic printing press. See Howard R. Lamar, *The Far Southwest 1846-1912: A Territorial History* 144-45 (rev. ed. 2000); *see also* Holscher,

supra, at 38 (explaining that "schools taught by Catholic religious" were some of the first to receive public funding and that a Jesuit printing press "supplied textbooks to many of the territory's tax-supported schools"). New Mexico remained "overwhelmingly Spanish-American in culture . . . and Roman Catholic in religion" throughout the territorial period. See Lamar, *supra*, at 3.

{38} Although native New Mexicans remained a majority, the number of Anglo-American Protestants in New Mexico increased significantly between 1850 and 1910. *See* Holscher, *supra*, at 31. "Anglo-American transplants to New Mexico introduced a series of proposals for public education." Holscher, *supra*, at 26. These proposals met resistance because they "relied on the familiarly Protestant objection to sectarianism" and sought "to eliminate Catholic influence." *Id.* at 38, 40; *see also* Lamar, *supra*, at 144-45, 162-64 (describing opposition to public school proposals by Catholic Church leaders and Spanish-American members of the legislature); Charles E. Smith, *The New Mexico State Constitution* (2011) ("[T]he Catholic Church had enjoyed the position of primacy in education for three centuries, and Catholic leaders were suspicious of public schools."). "Between 1850 and 1891, New Mexico's government failed at multiple attempts to inaugurate a system of tax- supported schools." Holscher, *supra*, at 37. The ongoing debate over public education evidenced "mounting hostility between public education advocates and the Archdiocese of Santa Fe," Holscher, *supra*, at 38, and was one of the most pressing problems facing the territorial legislature, see Larson, *supra*, at 65.

{39} Perceived problems with New Mexico's educational system and widespread illiteracy also posed obstacles to New Mexico becoming a state. *See* David V. Holtby, *Forty-Seventh Star: New Mexico's Struggle for Statehood* 54-55 (2012); Holscher, *supra*, at 38-39; Lamar, *supra*, at 162; Larson, *supra*, at 65, 124-25. Concerns about New Mexico's educational system were exacerbated by "strong prejudice toward [its] Spanish-speaking, Roman Catholic people." See Larson, *supra*, at 303-04; *see also State ex rel. League of Women Voters of N.M.* v. *Advisory Comm. to the N.M. Compilation Comm'n*, 2017-NMSC-025, ¶¶ 29, 32, 401 P.3d 734 (concluding that "decades of hostility toward New Mexico's Spanish-speaking population" delayed New Mexico's admission to the union); Larson, *supra*, at 124-25 (explaining that the "Catholicism of native New Mexicans was used in a particularly insidious way" and that the Catholic Church was implicated "in the high percentage of illiteracy")."Anglo-Protestant apprehension about Catholic influence motivated official scrutiny of the Church's role in schooling as soon as New Mexico became part of the United States." Holscher, *supra*, at 37; *see also* Lamar, *supra*, at 144 (explaining that officials viewed New Mexico's schools with disfavor because classes were "Catholic in orientation" and taught in Spanish). "[B]y the last quarter of the century everyone understood that the territory's prospects for joining the Union depended upon the condition of its educational system. Above all, statehood would require schools free from Catholic influence." Holscher, *supra*, at 38.

{40} In 1891, the territorial legislature passed "an act establishing common schools in the territory of New

Mexico and creating the office of superintendent of public instruction." 1891 N.M. Laws, ch. 25. The 1891 act was "intended to establish a comprehensive and harmonious system of public schools throughout the territory." *Water Supply Co. of Albuquerque* v. *City of Albuquerque*, 1898-NMSC-023, ¶ 9, 9 N.M. 441, 54 P. 969. The 1891 act made school attendance compulsory and served as a precursor to the IML by authorizing free textbooks for a child whose "parent or guardian [was] not able by reason of poverty to buy books." 1891 N.M. Laws, ch. 25, 12 § 42. In 1903, the 1891 act was amended to clarify that the textbooks were only loaned to the children and that ownership remained with the school districts. See 1903N.M. Laws, ch. 39, § 2.

{41} When Congress passed the Enabling Act for New Mexico in 1910, New Mexico's centralized public school system had been in place for almost two decades. "New Mexico held a constitutional convention that same fall in Santa Fe, and nearly a third of the convention's one hundred elected delegates were native Spanish-speakers." *State ex rel. League of Women Voters of N.M*, 2017-NMSC-025, ¶ 32. The delegates drafted an array of constitutional provisions related to education. Consistent with the 1891 act, the New Mexico Constitution requires the state to establish and maintain a "uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state." N.M. Const. art. XII, § 1. The Constitution also includes explicit protections for the educational rights of New Mexico's Spanish-speaking citizens. *State ex rel. League of Women Voters of N.M.*, 2017-NMSC-025, 26; see N.M. Const. art. XII, § 8 ("The legislature shall provide for the training of teachers in the normal

schools or otherwise so that they may become proficient in both the English and Spanish languages, to qualify them to teach Spanish-speaking pupils and students in the public schools and educational institutions of the state, and shall provide proper means and methods to facilitate the teaching of the English language and other branches of learning to such pupils and students."); N.M. Const. art. XII, § ("Children of Spanish descent in the state of New Mexico shall never be denied the right and privilege of admission and attendance in the public schools or other public educational institutions of the state, and they shall never be classed in separate schools, but shall forever enjoy perfect equality with other children in all public schools and educational institutions of the state, and the legislature shall provide penalties for the violation of this section."). The provisions protecting the educational rights of Spanish speakers were safeguarded with a heightened amendment requirement and cannot be changed without at least three-fourths of the popular vote in a statewide election. *State ex rel. League of Women Voters of N.M.,* 2017-NMSC-025, ¶¶ 25-26.

{42} The constitutional delegation that incorporated explicit protections for Spanish-speaking students into the New Mexico Constitution also drafted Article XII, Section 3, which extended the Enabling Act's restrictions on public funding for "sectarian [and] nondenominational school[s]" to also include "private schools." We cannot ascertain what motivated the delegates to draft Article XII, Section 3. *See Hunter v. Underwood*, 471 U.S. 222, 228 (1985) (noting the difficulty of "determining the actual motivations of the various legislators" that make up a constitutional

delegation); *see also* Smith, *supra*, at 17 (noting that no verbatim record was made of the constitutional convention). But under the circumstances, it appears that the drafters of Article XII, Section 3 intended to create a provision that would be acceptable to New Mexico voters while fulfilling the mandate set forth in the New Mexico Enabling Act. See Dorothy I. Cline, *New Mexico 's 1910 Constitution: A 19th Century Product* 26-27, 45 n.31, 46 (1985) (explaining that despite a deep political divide between Republicans and Democrats, the constitutional delegates "agreed it was essential to guarantee the civil, religious and political rights" of native New Mexicans). In the absence of sufficient proof that New Mexico adopted Article XII, Section 3 for a discriminatory purpose, we decline to impute an impermissible motive to the constitutional delegation and New Mexico voters, who approved the Constitution "by an overall majority of three to one." *See* Cline, *supra*, at 52.

5. We adopt a construction of Article XII, Section 3 that avoids free exercise concerns

{43} Even though it appears that the people of New Mexico intended for Article XII, Section 3 to be a religiously neutral provision, the history of the federal Blaine amendment and the New Mexico Enabling Act lead us to conclude that anti-Catholic sentiment tainted its adoption. New Mexico was caught up in the nationwide movement to eliminate Catholic influence from the school system, and Congress forced New Mexico to eliminate public funding for sectarian schools as a condition of statehood. In *Moses II*, this Court looked to the history of the federal Blaine amendment and the Enabling Act to conclude that

Article XII, Section 3 was intended to preclude any whisper of support for *private schools*. *Moses II*, 2015-NMSC-036, ¶¶19-24, 32. After *Trinity Lutheran* and the cases interpreting the Free Exercise Clause that have followed, we must reconsider our conclusion through a different lens, one that focuses on discriminatory intent.

{44} Prior to *Trinity Lutheran*, this Court's interpretation of Article XII, Section 3 in *Moses II* fell into the "play in the joints" between what the Establishment Clause permits and what the Free Exercise Clause requires. *See Locke*, 540 U.S. at 719 (noting that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause"). In other words, in *Moses II* we concluded that New Mexico's interest in restricting public funding for *private* schools was a lawful basis for restricting funding for *religious* schools. Following *Moses II*, the Supreme Court emphasized that the Free Exercise Clause is implicated by a law that "single[s] out the religious for disfavored treatment." *Trinity Lutheran*, 137 S. Ct. at2020. The Supreme Court has since underscored the state's constitutional duty to avert religious discrimination. *See Masterpiece Cakeshop*, 138 S. Ct. at 1731 ("The Constitution commits government itself to religious tolerance, and upon even *slight suspicion* that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures."). Thus, we conclude that this Court's previous interpretation of Article XII, Section 3 in *Moses II* raises concerns under the Free Exercise Clause.

{45} When interpreting the New Mexico Constitution, we avoid a construction that raises concerns under the federal constitution. *See State v. Radosevich*, 2018-NMSC-028, ¶ 8, 419 P.3d 176 (recognizing "the well-established principle of statutory construction that statutes should be construed, if possible, to avoid constitutional questions" (internal quotation marks and citation omitted)); *State ex rel. State Highway Comm 'nv. City of Aztec*, 1967-NMSC-046, ¶ 9, 77 N.M. 524, 424P.2d 801 ("[P]rinciples governing the construction of statutes apply also to the interpretation of constitutions[.]"). When a state constitutional provision "is susceptible to two constructions, one supporting it and the other rendering it void," this Court "should adopt the construction which upholds its constitutionality." *See N.M. State Bd. of Educ. v. Bd. of Educ. of Alamogordo Pub. Sch. Dist. No. 1*, 1981-NMSC-031, ¶ 26, 95 N.M. 588, 624 P.2d 530.

{46} To avoid constitutional concerns, we adopt a construction of Article XII, Section 3 that does not implicate the Free Exercise Clause under *Trinity Lutheran*. We have previously held that Article XII, Section 3 serves the dual purposes of ensuring that the state maintains control over the public education system and that the public schools do not become religious schools. *Prince v. Bd. of Educ. of Cent. Consol. Indep. Sch. Dist. No. 22*, 1975-NMSC-068, ¶ 20, 88 N.M. 548, 543 P.2d 1176. The IML neither divests the state of control over the public schools nor affects the non-religious character of the public schools. Like the 1891 act establishing New Mexico's public school system, the IML grants students access to appropriate textbooks regardless of their parents'

financial resources, which helps students fulfill their duty to attend school. See N.M. Const. art. XII, § 5 (making school attendance compulsory); NMSA 1978, § 22-12-2(A) (2015) (same). The textbook loan program furthers New Mexico's legitimate public interest in promoting education and eliminating illiteracy. See NMSA 1978, § 22- l -1.2(E) (2015) (setting forth the Legislature's finding that "improving children's reading and writing abilities and literacy throughout their years in school must remain a priority of the state"). We conclude that the IML provides a public benefit to students and a resulting benefit tothe state. Any benefit to private schools is purely incidental and does not constitute "support" within the meaning of Article XII, Section 3. We hold that loaning secular textbooks to private school students under the IML does not violate Article XII, Section 3.

C. The IML Does Not Result in Any Appropriation to a Person or Entity Not Under the Absolute Control of the State as Prohibited by Article IV, Section 31

{47} Petitioners argue that lending textbooks to private school students under the IML violates Article IV, Section 31, which provides in relevant part, "No appropriation shall be made for charitable, educational or other benevolent purposes to any person, corporation, association, institution or community, not under the absolute control of the state." The Department and Intervenors argue that the IML does not implicate Article IV, Section 31. We agree with the Department and Intervenors.

{48} Article IV, Section 31 imposes limits on the Legislature's authority to appropriate money. Under

the IML, appropriations are made only to the Department. *See* § 22-15-5(A). The Department is an executive agency established by the New Mexico Constitution and is under the absolute control of the state. *See* N.M. Const. art. XII, § 6(A); *see also* NMSA 1978, § 22-2- 1 (B) (2004) (setting forth the general powers of the Department). The IML does not result in an appropriation to any person or entity not under the absolute control of the state. The fact that students derive a benefit from the IML does not implicate Article IV, Section 31. *Compare State ex rel. Interstate Stream Comm'n v. Reynolds,* 1963-NMSC-023, ¶¶ 16-17, 71 N.M. 389,378 P.2d 622 (holding that although certain communities and nonprofit organizations would benefit from appropriations to the State Engineer, the appropriations did not implicate Article IV, Section 31 because the State Engineer retained absolute control over their expenditure), with *Harrington v. Atteberry*, 1915-NMSC-058 ¶¶ 66-67, 21 3 N.M. 50, 153 P. 1041 (Hanna, J., concurring in result) (majority of three-justice panel concluding that appropriation of funds to the fair association violated Article IV, Section 31 because the funds did not remain under the control of the state). We hold that the IML does not result in any appropriation to a person or entity not under the absolute control of the state as prohibited by Article IV, Section 31.

D. Loaning Textbooks to Students Under the IML Does Not Constitute a Donation to Any Person or Entity as Prohibited by Article IX, Section 14

{49} Petitioners argue that lending textbooks to private school students under the IML violates the

anti-donation clause of Article IX, Section 14, which provides, "Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation." Petitioners do not contend that the IML results in the lending or pledging of government credit. Thus, the IML implicates the anti-donation clause only if a textbook loan constitutes a "donation" within the meaning of Article IX, Section 14. The Department and Intervenors argue that the IML does not violate Article IX, Section because a textbook loan is not a donation. We agree with the Department and Intervenors.

{50} This Court has defined donation, for purposes of Article IX, Section 14, as "a gift, an allocation or appropriation of something of value, without consideration." *Vill. of Deming v. Hosdreg Co*., 1956-NMSC- l 11, ¶ 36, 62 N.M. 18, 303 P.2d 920 (per curiam) (internal quotation marks omitted). Article IX, Section permits "incidental aid or resultant benefit to a private corporation or other named recipients "unless the aid or benefit "by reason of its nature and the circumstances surrounding it, take on character as a donation in substance and effect." *Vill. of Deming, 1956- NMSC-111*, ¶¶34, 37. This Court has found violations of the anti-donation clause in circumstances involving an outright gift of public money to a private individual or entity. *See*, e.g., *Chronis v. State ex rel.* Rodriguez, 1983-NMSC-081, 24, 30, 100 N.M. 342, 670 P.2d 953 (holding that a law granting liquor licensees a credit against gross receipts taxes owed to state constituted an unconstitutional subsidy to the liquor

industry); *State ex rel. Mechem v. Hannah*, 1957-NMSC-065, ¶¶18,40, 63 N.M. 110, 314 P.2d 714 (holding unconstitutional a law granting "an outright gift" of public funds to ranchers and farmers to purchase livestock feed in times of drought); *Hutcheson v. Atherton*, 1940-NMSC-001, ¶¶ 24, 35, 44 N.M. 144, 99 P.2d 462 (holding unconstitutional the appropriation of bond money to finance auditoriums for use by private corporations because the aid was "direct and substantial").

{51} In this case, the textbook loan program does not involve any donation or gift to students or private schools. The Department merely loans textbooks to students for use while attending school. *See* § § 22-15-7, 22-15- l O(B). The Department retains ownership and control over the textbooks and the fund used to purchase them. *See* §§ 22-15-4(B), 22-15-5(A), 22-15- l O(E). We hold that loaning textbooks to students under the IML does not involve a donation to any person or entity as prohibited by Article IX, Section 14.

E. Equal Protection Clauses of the State and Federal Constitutions

{52} The Department and Intervenors argue that excluding private school students from participation in the textbook loan program violates the equal protection guarantees of the state and federal constitutions. See U.S. Const. amend. XIV, § 1;N.M. Const. art. II, § 18. We decline to address these arguments because we conclude that private school students may participate in the textbook loan program. *See Trinity Lutheran*, 137 S. Ct. at 2024 n.5 (deciding the case on free exercise grounds and declining to reach the equal protection claim raised by

the church).

III. CONCLUSION

{53} We hold that the textbook loan program established by the IML does not violate Article IV, Section 31; Article IX, Section 14; or Article XII, Section 3 of the New Mexico Constitution. We reinstate the provisions of the IML that allow private school students to participate in the textbook loan program.

{54} **IT IS SO ORDERED.**

/s/_____
BARBARA J. VIGIL,
Justice

WE CONCUR:
/s/ PETRA JIMENEZ MAES, Justice
/s/ CHARLES W. DANIELS, Justice
/s/ JUDITH K. NAKAMURA, Chief Justice, dissenting
/s/ GARY L. CLINGMAN, Justice, joining in dissent

NAKAMURA, Chief Justice (dissenting).

{55} *Moses II* correctly concluded that the provision of school books under the IML to students who attend private schools-whether secular or religious-violates the plain language of Article XII, Section 3. *Moses II*, 2015-NMSC-036, ¶2. Understanding what *Trinity Lutheran* does and does not do makes clear that this Court should not abandon this conclusion.

{56} *Trinity Lutheran* holds that, "[i]f a state awards grants, on religiously neutral criteria, to create safer playground surfaces, it cannot exclude an otherwise eligible playground simply because it is owned by a church. Such discrimination against religion violates

the Free Exercise Clause, and awarding the grant would not violate the Establishment Clause." Douglas Laycock, *Churches, Playgrounds, Government Dollars-and Schools?,* 131 Harv. L. Rev. 133, 133 (20 l 7); see *Trinity Lutheran*, 137S. Ct. at 2024. At the heart of the *Trinity Lutheran* Court's holding is the following thought: "If the state neutrally supports playground surfaces for religious and secular daycares alike, and for religious daycares of different faiths, it is supporting daycares, or just playgrounds, but not religion. Equal funding gives the religious daycares no advantage; funding only secular daycares would put religious daycares at disadvantage." Laycock, *supra*, at 147. This thought is not a departure from settled First Amendment principles.

{57} The conclusion in *Trinity Lutheran* that Missouri cannot disqualify an applicant for a public benefit "solely because of its religious character," 137 S. Ct. at 2024, advances the "core principles of the Religion Clauses: that government should not penalize any person because of his religion, and that government should be neutral with respect to the people's religious choices and commitments." Laycock, *supra*, at 148. But see *Trinity Lutheran*, 137 S. Ct. at 2027 (Sotomayor, J., dissenting) ("The Court today profoundly changes th[e] relationship [between church and state] by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church. Its decision slights both our precedents and our history, and its reasoning weakens this country's longstanding commitment to a separation of church and state beneficial to both."). This is an adequate summary of what *Trinity Lutheran* does. We need to understand with equal

certainty what *Trinity Lutheran* does not do.

{58} Footnote three of Chief Justice Robert's opinion for the Court[2] points out that *Trinity Lutheran* "involves express discrimination based on religious identity" and clarifies that *Trinity Lutheran* does not "address religious uses of funding or other arms of discrimination." 137 S. Ct. at 2024 n.3 (emphasis added). In other words, "[f]ootnote three carefully limits the reach of the opinion" and "reserve[s]" the very issue before this Court on remand: whether a very different form of alleged discrimination than that considered in *Trinity Lutheran* is also an unconstitutional abridgment of religious liberty. Laycock, *supra*, at 134-35.

{59} The "discrimination" we are faced with here, on remand, is "public-private, not religious-secular." *Id.* at 167. This difference is critical. Because of this difference, "motive" becomes essential. *Id.* at 167-68. The question remand to this Court prompts is this: was Article XII, Section 3 "adopted because of a desire to prohibit funding for Catholic education?" Laycock, *supra*, at 167. "If [Article XII, Section3] was motivated by anti-Catholicism, it should be unconstitutional." Laycock, *supra*, at 168. This is because, "[w]here sufficient evidence of motive is available, Trinity Lutheran should extend to cases of antireligious discrimination shrouded in facially neutral provisions." Laycock, *supra*, at 169. Careful attention

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[2]Footnote three was joined by four justices (including the Chief Justice), buthas unquestionable significance for future cases (like this one) given how the other 19 Justices proposed to resolve Trinity Lutheran. Laycock, supra, at 135-36.

must be paid to the instances of the word "should" in the two preceding sentences.

{60} *Trinity Lutheran* does not resolve the question presented on remand. Laycock, *supra*, at 134. We can only make educated guesses about how the United States Supreme Court will resolve the issues reserved, and we will only know whether those guesses are correct when the Supreme Court takes up the "next round of cases." *Id.* at 169. While we eagerly await future guidance, we must nevertheless answer the question before us: whether there is sufficient evidence that the motivations for the enactment of Article XII, Section 3 were discriminatory. I cannot conclude sufficient evidence exists.

{61} "In determining if the object of a law is a neutral one under the Free Exercise Clause, we can . . . find guidance in . . . equal protection cases." *Lukumi*, 508 U.S. at 540. In the equal protection context, a litigant claiming that a facially neutral provision is unconstitutional because it emanates from discriminatory motives is required to establish that the provision did in fact arise from discriminatory motives. *See Hunter*, 471 U.S. at 227-28; see also *Abbott* v. *Perez*, 138 S. Ct. 2305, 2324 (2018) ("Whenever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State.").Only after making such a showing must the proponent of the provision's constitutionality attempt to rebut the claim. *Hunter*, 471 U.S. at 227-28.

{62} "Proving the motivation behind official action is often a problematic undertaking." *Id.* at 228. This is particularly true when the official action under review

is the drafting of a constitutional provision that occurred a century ago. See *Id.* The problem is only further compounded when the provision under scrutiny is neutral and constitutional on its face. *Id.*

{63} The history the majority recounts suggests that a straight line of anti-Catholic bigotry runs from the motivations underlying the Blaine Amendment to Article XII, Section 3. Maj. Op. ¶¶12-17, 43. This history, first explicated in *Moses II*, purports to establish that anti-Catholic animus prompted the Blaine Amendment, which was in tum incorporated into the Enabling Act (most directly) at Section 8, which was in turn the basis for Article XII, Section 3. Maj. Op. ¶¶12-17, 43. *Moses II* was too quick to conclude that the root of this series of events was, in fact, anti-Catholic bigotry.

{64} "Those who characterize the Blaine Amendment as a singular exercise in Catholic bigotry . . . give short shrift to the historical record and the dynamics of the times." Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 B.Y.U.L. Rev. 295, 296 (2008).

> The Blaine Amendment had as much to do with the partisan climate of the post-Reconstruction era and related concerns about federal power over education as it did with Catholic animus. Included in the mix was a sincere effort to make public education available for children of all faiths and races, while respecting Jeffersonian notions of church-state separation.

Id. (internal quotation marks and citation omitted). Any attempt at a summary of the many social forces at play in the lead-up to the creation of the Blaine

Amendment is beyond the scope of this dissent. See generally *Id.* It suffices to state that there is reason to doubt the first link in the chain of inferences that must be accepted to conclude that Article XII, Section 3 was motivated by anti-Catholic animus (i.e., that anti-Catholic animus was the sole force behind the Blaine Amendment). The next link-that between the Blaine Amendment and the Enabling Act-is equally susceptible to attack.

{65} The suggestion that the motives underlying the Blaine Amendment (whatever they were) were shared by the drafters of the Enabling Act is problematic. The enabling act which authorized the statehood of Arizona and New Mexico contained the proviso that both nascent states must have constitutional language forbidding public funding to sectarian schools. Opponents of the Blaine Amendment claim that the same anti-Catholic animus behind the federal Blaine Amendment motivated this mandate to new states in the enabling acts. However, a recent study by historians prepared in an amicus brief to Locke v. Davey found that no evidence of anti-Catholic bigotry lay behind a similar enabling act for Washington State that same year, and the Supreme Court noted in a footnote that the history of the federal Blaine Amendment was not relevant to consideration of Washington's similar provision. Jill Goldenziel, *Blaine's Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 Denv. U. L. Rev. 57, 79-80 (2005) (footnotes omitted). The "legal and religious historians and law scholars who" authored the amicus brief in Locke point out that "[m]any state constitutions . . . contain no-funding provisions [like Article XII, Section 3] that have nothing to do with

anti-Catholicism or nativist sentiment." Brief Amicus Curiae of Historians and Law Scholars on Behalf of Petitioners Gary Locke, et al., Locke v. Davey, 540 U.S. 712 (2004) (No. 02-1315), 2003 WL 21697729 at 1, 4. They further note that "[t]he no-funding principle, as applied to educational matters, arose independently of and prior to the rise of Catholic parochial schooling and the organized nativist movement of the mid-nineteenth century." *Id.* at 2.

{66} These authorities are offered not as indisputably correct and definitive; rather, they merely illuminate the complexity of the historical questions before us: What, precisely were the motives behind the Blaine Amendment? How, exactly, did those motives influence the drafters of the Enabling Act? And how, specifically, did these events influence the drafters of Article XII, Section 3? It is because the answers to these difficult questions are uncertain at best and because we must "eschew guesswork" that other interpretive tools must be prioritized. *Hunter*, 471 U.S. at 228, internal quotation marks and citation omitted).

{67} As *Moses II* observes, the drafters of our state constitution made a significant drafting decision when writing Article XII, Section 3. *Moses II*, 2015-NMSC-036, ¶27. Unlike Section 8 of the Enabling Act which "precludes the use of public funds for the support of sectarian or denominational schools[,]" Article XII, Section 3 restricts the use of public funds for "the much broader category of private schools." *Moses II*, 2015-NMSC-036, ¶27 (emphasis added). *Moses II* correctly notes that this drafting choice is self-evidently significant: "The members of the

Constitutional Convention chose to play it safe-by broadening [Article XII, Section 3] to reach all private schools, they avoided drawing a line between secular and sectarian education." *Id.* ¶27. In other words, the drafters of Article XII, Section 3 took affirmative measures to decouple the provision from the problematic language in the Enabling Act. Our understanding of the drafter's motives must incorporate these measures, which strongly suggest that their motives were not discriminatory but the opposite. The majority seems in agreement with this point.

{68} The majority ultimately concludes that they cannot "impute an impermissible motive to the constitutional delegation[,]" *Maj. Op.* ¶42, and doubt that it is possible to "ascertain what motivated the delegates to draft Article XII, Section 3." *Maj. Op.* ¶42. They do accept, however, that "the constitutional delegates agreed it was essential to guarantee the civil, religious, and political rights of the native New Mexicans[,]" who were largely Catholic. *See Maj. Op.* ¶¶37, 42. It is difficult to see how the majority's conclusions and concessions do not end the inquiry in this case and dictate the outcome.

{69} "Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not." *Pers. Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 277 (1979). It "implies more than intent as volition or intent as awareness of consequences." *Id.* "It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." *Id.*

(internal quotation marks omitted).

{70} Respondents have not established that Article XII, Section 3 was the product of impermissible, discriminatory motives, and the majority appears to recognize this. All that has been established is that Article XII, Section 3 is guilty by association. *See Maj. Op.* ¶43 ("Even though it appears that the people of New Mexico intended for Article XII, Section 3 to be a religiously neutral provision, the history of the federal Blaine amendment and the New Mexico Enabling Act lead us to conclude that anti-Catholic sentiment tainted its adoption." (emphasis added)). But this is insufficient and does not amount to discriminatory intent or purpose as the United States Supreme Court has defined this concept.

{71} Moreover, the claim of guilt by association here is doubtful as the history associated with the Blaine Amendment and Enabling Act are unclear at best. We are left wondering: With what, exactly, is Article XII, Section 3 guilty of associating? More critically, "[p]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." See *Abbott* v. *Perez*, 138 S. Ct. 2305, 2324 (2018) (internal quotation marks and citation omitted). The drafters of our constitution took affirmative measures to avoid becoming ensnared by the nativist discrimination-to whatever extent it existed-in the Blaine Amendment and Enabling Act. We should not ignore these efforts and condemn the drafters to be forever and inescapably associated with a viewpoint the majority acknowledges the drafters of Article XII, Section 3 did not embrace.

{72} *Moses II* s conclusion that the plain language of

Article XII, Section 3 prohibits the state from loaning textbooks to children enrolled in private schools does not run afoul of the principles articulated in *Trinity Lutheran*. There is insufficient evidence Article XII, Section 3 stems from discriminatory motives. Respondent an Intervenor's renewed free-exercise claims fail. The majority disagrees and embraces a construction of Article XII, Section 3 that is inconsistent with the provision's plain language and permits the state to loan secular textbooks to private school students, including religious students. *See* Maj. Op. ¶46. They do so to "avoid constitutional concerns," but these are concerns that do not exist. Id.

{73} Because the conclusions in *Moses II* survive *Trinity Lutheran* and because the IML violates Article XII, Section 3, there is no need to address whether the IML also 8 violates Article IV, Section 31 or Article IX, Section of our state constitution. See *Baca* v. *N.M.Dep't of Pub. Safety*, 2002-NMSC-017, ¶12, 132 N.M. 282, 47 P.3d 441 (noting that courts exercise judicial restraint by deciding cases on the narrowest possible grounds and avoid reaching unnecessary constitutional issues).

{74} The majority does not address Respondent and Intervenor's arguments that interpreting Article XII, Section 3 to preclude the provision of books to private schools gives rise to a violation of our state constitution's equal protection clause. The majority need not do so given their resolution of this matter. *See Maj. Op.* ¶52.Because I resolve this case differently, I address these claims.

{75} The argument presented is that providing books to public school students but not to private school

students treats two classes of similarly-situated students differently. Public school students will receive books, private school students will not. This disparate treatment is a violation of equal protection, or so it is argued.

{76} "The New Mexico Constitution provides that no person shall be denied equal protection of the laws." *Wagner* v. *AGW Consultants*, 2005-NMSC-016, 21, 137 N.M. 734, 114 P.3d 1050 (citing N.M. Const. art. II, § 18). "Like its federal equivalent, this is essentially a mandate that similarly situated individuals be treated alike, absent a sufficient reason to justify the disparate treatment." *Id.* "What level of scrutiny we use depends on the nature and importance of the individual interests asserted and the classifications created by the statute." *Id.* 12. "Rational basis review applies to general social and economic legislation that does not affect a fundamental or important constitutional right or a suspect or sensitive class." *Breen* v. *Carlsbad Mun. Sch.*, 2005-NMSC-028, 11, 138 N.M. 331, 120 P.3d 413. "Under rational basis review, the challenger must demonstrate that the legislation is not rationally related to a legitimate government purpose." *Rodriguez* v. *Brand W. Dairy*, 2016-NMSC-029, 23, 378 P.3d 13. Itis conceded that rational basis review applies to the equal-protection argument presented.

{77} The decision by the drafters of our state constitution that state largesse be directed to the public schools alone, and not to private schools, is rationally supported by the legitimate principle that doing so ensures that the public schools of our state are maximally financed, a circumstance necessary to

ensure that "[a] uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained." N.M. Const. art. XII, § 1. "It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause." *Norwood* v. *Harrison*, 413 U.S. 455, 462(1973).

{78} *Trinity Lutheran* does not require us to abandon the conclusion reached in *Moses II* that Article XII, Section 3 precludes the provision of school books to private schools under the IML. The state-constitution, equal-protection claims advanced by Respondent fails.

{79} Accordingly, I respectfully dissent.

/s/
JUDITH K. NAKAMURA,
Chief Justice

I CONCUR:
/s/
GARY L. CLINGMAN, Justice

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DA 17-0492

IN THE SUPREME COURT OF
THE STATE OF MONTANA

2018 MT 306

Kendra ESPINOZA, Jeri Ellen Anderson, and Jaime Schaefer,

Plaintiffs-Appellants,

v.

MONTANA DEPARTMENT OF REVENUE, and Mike Kadas, in His Official Capacity as Director of the Montana Department of Revenue,

Defendants and Appellants.

APPEAL FROM: District Court of the Eleventh Judicial District, In and For the County of Flathead, Cause No. DV-15-1152C, Honorable Heidi J. Ulbricht, Presiding Judge

COUNSEL OF RECORD:

For Appellants: Daniel J. Whyte (argued), Brendan Beatty, Nicholas J. Gochis, Special Assistant Attorneys General, Helena, Montana

For Appellees: William W. Mercer (argued), Holland & Hart LLP, Billings, Montana, Richard D. Komer (argued), Erica Smith, Institute for Justice, Arlington, Virginia

For Amicus American Civil Liberties Union, ACLU of Montana Foundation, Inc., Americans United for Separation of Church and State, and the Anti-Defamation League: Alex J. Luchenitser, American United for Separation of Church and State, Washington, District of Columbia, James Goetz, Goetz, Baldwin and Geddes, P.C., Bozeman, Montana, Heather L. Weaver, American Civil Liberties Union, Washington, District of Columbia, Alex Rate, ACLU of Montana Foundation, Missoula, Montana

For Amicus Montana Quality Education Coalition: Karl J. Englund, Karl J. Englund, P.C., Missoula, Montana, Jonathan McDonald (argued), McDonald Law Office, PLLC, Helena, Montana

For Amicus United States: John M. Gore, Acting Assistant Attorney General, Eric W. Treene, Thomas E. Chandler, Bethany Pickett, Department of Justice, Washington, District of Columbia, Kurt G. Alme, United States Attorney, Leif Johnson, First Assistant United States Attorney, Billings, Montana

For Amicus The Becket Fund for Religious Liberty: Charles A. Harball, Kalispell City Attorney, Kalispell, Montana, Eric C. Rassbach, Joseph C. Davis, The Becket Fund for Religious Liberty, Washington, District of Columbia

For Amicus Alliance for Choice in Education Scholarships: Anita Y. Milanovich, The Bopp Law Firm, PC, Bozeman, Montana

For Amicus Pride School Atlanta: Thomas Hydrick, Baker Botts L.L.P., Washington, District of Columbia, Chris J. Gallus, Gallus Law Firm, Helena, Montana

For Amicus EdChoice: Kristin Hansen, Kristin Hansen, PLLC, Helena, Montana, Russell Menyhart, Taft Stettinius & Hollister LLP, Indianapolis, Indiana, Leslie Davis Hiner, EdChoice, Indianapolis, Indiana

For Amicus Agudath Israel of America: Jennifer Wendt Bordy, Attorney at Law, Bozeman, Montana, Mordechai Biser, Agudath Israel of America, New York, New York

Argued: April 6, 2018

Submitted: April 10, 2018

Decided: December 12, 2018

Filed: /s/ Ed Smith
Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 The Montana Department of Revenue (the Department) appeals from an order of the Eleventh Judicial District Court, Flathead County, granting Kendra Espinoza, Jeri Ellen Anderson, and Jaime Schaefer (collectively, Plaintiffs) summary judgment. The Department is responsible for administering § 15-30-3111, MCA (the Tax Credit Program), which provides a taxpayer a dollar-for-dollar tax credit based on the taxpayer's donation to a Student Scholarship Organization (SSO). SSOs fund tuition scholarships for students who attend private schools meeting the definition of Qualified Education Provider (QEP). The Legislature instructed the Department to implement

the Tax Credit Program in compliance with Article V, Section 11(5), and Article X, Section 6, of the Montana Constitution. Pursuant to that grant of authority, the Department implemented Admin. R. M. 42.4.802 (Rule 1), which it believed was necessary to constitutionally administer the Tax Credit Program. Rule 1 adds to the Legislature's definition of QEP and excludes religiously-affiliated private schools from qualifying as QEPs.

¶2 Plaintiffs are parents whose children attend a religiously-affiliated private school. Because Rule 1 precludes religiously-affiliated private schools from the definition of QEP, SSOs cannot fund tuition scholarships at the school Plaintiffs' children attend. Plaintiffs filed this proceeding challenging Rule 1. The Department responded, arguing Rule 1 was necessary because the Tax Credit Program as enacted by the Legislature violates Montana's Constitution. The District Court determined the Tax Credit Program was constitutional without Rule 1 and accordingly granted Plaintiffs summary judgment. The Department now appeals, arguing that the Tax Credit Program is unconstitutional absent Rule 1. We address the following issue on appeal:

Does the Tax Credit Program violate Article X, Section 6, of the Montana Constitution?

¶3 We conclude the Tax Credit Program violates Article X, Section 6, of the Montana Constitution and accordingly reverse the District Court's order granting Plaintiffs summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

¶4 In 2015, the Legislature, through Senate Bill 410, enacted Title 15, chapter 30, part 31, MCA, entitled "Tax Credit for Qualified Education Contributions." Sections 15-30-3101 to -3114, MCA (Part 31); 2015 Mont. Laws 2165. Part 31 provides two types of dollar-for-dollar tax credits to taxpayers who donate to educational programs in Montana. Sections 15-30-3110 to -3111, MCA. A taxpayer may receive a tax credit for providing supplemental funding to public schools, § 15-30-3110, MCA, or for donating to the Tax Credit Program, § 15-30-3111, MCA. The only tax credit at issue in these proceedings is the credit a taxpayer receives based on her donation to the Tax Credit Program, § 15-30-3111, MCA.[1] The Tax Credit Program provides a taxpayer a dollar-for-dollar tax credit of up to $150 based on her donation to an SSO. Section 15-30-3111(1), MCA.

¶5 An SSO is a charitable organization in Montana that is (1) "exempt from federal income taxation under [I.R.C. § 501(c)(3)]"; (2) "allocates not less than 90% of its annual revenue for scholarships to allow students to enroll with any [QEP]"; and (3) "provides educational scholarships to eligible students without limiting student access to only one education provider."

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[1] The Legislature capped the Tax Credit Program's aggregate total of tax credits to $3 million in tax year 2016. Section 15-30-3111(5)(a)(i), MCA; *see also* § 15-30-3110(5)(a)(i) (setting forth an identical aggregate $3 million cap for tax credits based on taxpayer contributions to public schools). If the aggregate limit is met in any given tax year, the subsequent year's limit increases. Section 15-30-3111(5)(a)(ii)-(iii), MCA; *see also* § 15-30-3110(5)(a)(ii)-(iii) (creating the same increase for contributions to public schools).

Section 15-30-3102(9)(a)-(c), MCA; *see also* § 15-30-3103, MCA (listing additional SSO requirements); §§ 15-30-3105 to -3106, MCA (setting forth SSO reporting requirements). The purpose of SSOs "is to provide parental and student choice in education with private contributions through tax replacement programs." Section 15-30-3101, MCA.

¶6 Taxpayer donors donate to SSOs generally; they "may not direct or designate contributions to a parent, legal guardian, or specific [QEP]." Section 15-30-3111(1), MCA. SSOs then use those donations to fund student tuition scholarships at private schools meeting the definition of QEP in § 15-30-3102(7), MCA. Section 15-30-3104(1), MCA. SSOs are responsible for maintaining "an application process under which scholarship applications are accepted, reviewed, approved, and denied." Section 15-30-3103(1)(h), MCA. After an SSO decides to grant a student a tuition scholarship, the SSO pays the scholarship directly to the scholarship recipient's QEP. Section 15-30-3104(1), MCA. The Legislature defined QEP as "an education provider that":

> (a) is not a public school;
>
> (b)(i) is accredited, has applied for accreditation, or is provisionally accredited by a state, regional, or national accreditation organization; or
>
> (ii) is a nonaccredited provider or tutor and has informed the child's parents or legal guardian in writing at the time of enrollment that the provider is not accredited and is not seeking accreditation;

> (c) is not a home school as referred to in 20-5-102(2)(e);
>
> (d) administers a nationally recognized standardized assessment test or criterion-referenced test and:
>
> (i) makes the results available to the child's parents or legal guardian; and
>
> (ii) administers the test for all 8th grade and 11th grade students and provides the overall scores on a publicly accessible private website or provides the composite results of the test to the office of public instruction for posting on its website;
>
> (e) satisfies the health and safety requirements prescribed by law for private schools in this state; and
>
> (f) qualifies for an exemption from compulsory enrollment under 20-5-102(2)(e) and 20-5-109.

Section 15-30-3102(7), MCA. Essentially, the Legislature's definition of QEP means "a private school."

¶7 The Department is responsible for implementing and administering Part 31. Sections 15-30-3102(1), -3114, MCA. The Department must perform extensive administrative tasks to ensure Part 31 functions appropriately. Sections 15-30-3103, -3105, -3111 to -3113, MCA. The Legislature explicitly granted the Department rulemaking authority to "adopt rules, prepare forms, and maintain records that are necessary to implement and administer [Part 31]."

Section 15-30-3114, MCA. The Legislature also instructed the Department to administer Part 31 in compliance with Article V, Section 11(5), and Article X, Section 6, of the Montana Constitution. Section 15-30-3101, MCA.

¶8 Beginning in fiscal year 2016, to accomplish these statutorily-mandated responsibilities, the Department required additional resources and personnel. Senate Bill 410's Fiscal Note estimated one-time costs to the Department of $420,325 to develop new forms and add data processing systems. S. 410 Fiscal Note, 64th Reg. Sess., at 3 (April 21, 2015), https://perma.cc/6X7Z-GEEZ (hereinafter Fiscal Note). Further, the Department required two additional full-time employees: one to process and verify credit applications and annual reports from SSOs and another to verify and audit the new tax credits. Fiscal Note, at 3-4.

¶9 Tasked with constitutionally implementing Part 31, the Department identified what it saw as a constitutional deficiency: the Tax Credit Program aided sectarian schools in violation of Article X, Section 6, of Montana's Constitution. Under the Legislature's definition of QEP, most QEPs were religiously-affiliated private schools. The Department examined how the Tax Credit Program operated and determined it unconstitutionally aided those religiously-affiliated QEPs. To combat the issue, and pursuant to the rulemaking authority granted by the Legislature, §§ 15-30-3101, -3114, MCA, the Department adopted Rule 1.

¶10 Rule 1 added to the Legislature's definition of QEP, § 15-30-3102(7), MCA, providing:

> (1) A "qualified education provider" has the meaning given in 15-30-3102, MCA, and pursuant to 15-30-3101, MCA, may not be:
>
> (a) a church, school, academy, seminary, college, university, literary or scientific institution, or any other sectarian institution owned or controlled in whole or in part by any church, religious sect, or denomination; or
>
> (b) an individual who is employed by a church, school, academy, seminary, college, university, literary or scientific institution, or any other sectarian institution owned or controlled in whole or in part by any church, religious sect, or denomination when providing those services.
>
> (2) For the purposes of (1), "controlled in whole or in part by a church, religious sect, or denomination" includes accreditation by a faith-based organization.

Admin. R. M. 42.4.802. Simply put, Rule 1 excluded religiously-affiliated private schools from the Legislature's definition of QEP, § 15-30-3102(7), MCA.

¶11 Plaintiffs are parents whose children attend a religiously-affiliated private school in Montana. The school qualifies as a QEP under the Legislature's definition, § 15-30-3102(7), MCA, but does not qualify as a QEP under the Department's definition, Rule 1. Plaintiffs challenged Rule 1 in District Court, arguing it violated the free exercise clauses of the Montana and U.S. Constitution.[2] Plaintiffs further reasoned that

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[2] On December 24, 2015, Plaintiffs filed a "Notice of Constitutional Challenge to a Statute" in District Court which notified the

Rule 1 was unnecessary because the Tax Credit Program and the Legislature's definition of QEP were constitutional. The Department responded, arguing that the Tax Credit Program is unconstitutional and reasoning that Rule 1 necessarily restricted the Tax Credit Program which, absent Rule 1, aided sectarian schools. Both sides filed cross-motions for summary judgment.

¶12 The District Court narrowly focused its analysis on the tax credits themselves, noting the credits did not "involve the expenditure of money that the state has in its treasury." Instead, it determined the tax credits "concern[ed] money that is not in the treasury and not subject to expenditure." For that reason alone, the District Court concluded the Department incorrectly interpreted Article V, Section 11(5), and Article X, Section 6(1), of the Montana Constitution. Because it decided the Tax Credit Program was constitutional as enacted by the 2015 Legislature, the District Court did not further address Rule 1's constitutionality. The District Court granted Plaintiffs' motion for summary judgment, denied the Department's motion for summary judgment, and permanently enjoined the Department from applying or enforcing Rule 1. The Tax Credit Program remained as enacted by the 2015 Legislature. The Department now appeals the District Court's decision.

Attorney General that they filed a complaint alleging that the Tax Credit Program "as interpreted and applied by the Department of Revenue in its 'Rule 1' ... violates" Article II, Sections 4 and 5, of the Montana Constitution. Thereafter, and throughout this litigation, counsel for the Department has appeared and represented themselves as "Special Assistant Attorneys General."

STANDARD OF REVIEW

¶13 This Court exercises plenary review over constitutional law questions. *Nelson v. City of Billings*, 2018 MT 36, ¶ 8, 390 Mont. 290, 412 P.3d 1058. A statute is presumed constitutional unless it "conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt." *Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶ 6, 392 Mont. 1, 420 P.3d 528 (quoting *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877). The party challenging the constitutionality of the statute bears the burden of proof. *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 12, 382 Mont. 256, 368 P.3d 1131. If any doubt exists, it must be resolved in favor of the statute. *Mont. Cannabis Indus. Ass'n*, ¶ 12.

¶14 Whether an administrative rule impermissibly conflicts with a statute is a question of law to be decided by the court. *Clark Fork Coal. v. Tubbs*, 2016 MT 229, ¶ 18, 384 Mont. 503, 380 P.3d 771; *Gold Creek Cellular of Mont. L.P. v. State*, 2013 MT 273, ¶ 9, 372 Mont. 71, 310 P.3d 533. We review a district court's conclusions of law to determine if they are correct. *Clark Fork*, ¶ 18.

DISCUSSION

¶15 The First Amendment's Religion Clauses—the Establishment Clause and the Free Exercise Clause—are "frequently in tension." *Locke v. Davey*, 540 U.S. 712, 718, 124 S.Ct. 1307, 1311, 158 L.Ed.2d 1 (2004). Yet, "there is room for play in the joints" between them. *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 669, 90 S.Ct. 1409, 1412, 25 L.Ed.2d 697 (1970). A state's constitutional prohibition against aid to sectarian schools may be broader and stronger than the First

Amendment's prohibition against the establishment of religion. *See Locke*, 540 U.S. at 722, 124 S.Ct. at 1313. Where a state's constitution "draws a more stringent line than that drawn by the United States Constitution," the "room for play" between the Establishment and Free Exercise Clauses narrows. *See Locke*, 540 U.S. at 718, 722, 124 S.Ct. at 1311, 1313. The Montana Constitution broadly and strongly prohibits state aid to sectarian schools, leaving a very limited amount of "room for play." See Mont. Const. art. X, § 6 (hereinafter, Article X, Section 6).

¶16 Our analysis, therefore, considers Article X, Section 6, within a narrower "room for play" between the federal Religion Clauses and, consequently, we do not address federal precedent. We conclude that Montana's Constitution more broadly prohibits "any" state aid to sectarian schools and draws a "more stringent line than that drawn" by its federal counterpart. *See Locke*, 540 U.S. at 722, 124 S.Ct. at 1313. Therefore, the sole issue in this case is whether the Tax Credit Program runs afoul of Montana's specific sectarian education no-aid provision, Article X, Section 6. For the following reasons, we conclude the Tax Credit Program aids sectarian schools in violation of Article X, Section 6.

I. Article X, Section 6, broadly and strictly prohibits aid to sectarian schools.

¶ 17 Article X, Section 6, of the Montana Constitution, entitled "Aid prohibited to sectarian schools," provides:

> (1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment

> from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.
>
> (2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education.

¶18 The Constitutional Convention Delegates' (Delegates) intent controls our interpretation of a constitutional provision. *Nelson*, ¶ 14. We primarily discern the Delegates' intent "from the plain meaning of the language used." *Nelson*, ¶ 14 (explaining that we apply our rules of statutory construction to our analysis of constitutional provisions). However, we define the Delegates' intent "not only from the plain meaning of the language used, but also in light of the historical and surrounding circumstances under which the [Delegates] drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve." *Nelson*, ¶ 14. Accordingly, we "determine the meaning and intent of constitutional provisions from the plain meaning of the language used without resort to extrinsic aids except when the language is vague or ambiguous or extrinsic aids clearly manifest an intent not apparent from the express language." *Nelson*, ¶ 16 (emphasis added).

¶19 In determining what the Delegates intended Article X, Section 6, to mean, we first observe that the plain language of the provision's title is expansive and forceful: "Aid prohibited to sectarian schools." The title clearly manifests the Delegates' intent to broadly

prohibit aid to sectarian schools. The provision's text is equally expansive, prohibiting numerous types of state actors, including the "legislature, counties, cities, towns, school districts, and public corporations" from making "any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any ... school ... controlled in whole or in part by any church, sect, or denomination." Mont. Const. art. X, § 6(1).

¶20 The provision's plain language begs three main inquiries, each of which cast a broad net clearly intended to prohibit "any" type of state aid being used to benefit sectarian education. First, the provision's plain language identifies the entity that is prohibited from providing the aid: Article X, Section 6, prohibits the "legislature, counties, cities, towns, school districts, and public corporations" from aiding sectarian schools. Second, the provision's plain language identifies the type of aid it prohibits: Article X, Section 6, broadly prohibits any type of direct or indirect aid to sectarian schools—"any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property." Third, the provision's plain language specifies that the aid is prohibited "for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination."

¶21 The Delegates adapted Article X, Section 6, of the Montana Constitution from the 1889 Constitution's broad and general no-aid provision, recognizing that it was already "among the most stringent [no-aid

clauses] in the nation." Montana Constitutional Convention, Verbatim Transcript, March 11, 1972, pp. 2008, 2011 (hereinafter Convention Transcript); see Mont. Const. of 1889, art. XI, § 8 ("[T]he Legislative Assembly ... shall [n]ever make directly or indirectly, any appropriation, or pay from any public fund or moneys ... in aid of any church, or for any sectarian purpose, or to aid in the support of any school ... controlled in whole or in part by any church....").

¶22 The Delegates' strong commitment to maintaining public education and ensuring that public education remained free from religious entanglement is evident from the Constitutional Convention Transcripts; the Delegates wanted the public school system to receive "unequivocal support." Convention Transcript, p. 2008. Delegate Burkhardt noted, "Under federal and state mandates to concentrate public funds in public schools, our educational system has grown strong in an atmosphere free from divisiveness and fragmentation." Convention Transcript, p. 2009. He further emphasized, "*Any 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." Convention Transcript, p. 2009 (emphasis added).

¶23 A minority of Delegates sought to delete the language prohibiting indirect aid from Article X, Section 6. Those Delegates wanted to ensure private school students could receive federal aid under the United States Supreme Court's child-benefit theory, which allows federal aid as long as it directly supports the child and not the religious school. Convention Transcript, pp. 2010-11. Delegate Blaylock, however,

expressed concern that deleting the indirect language would make it "fairly easy to appropriate a number of funds ... to some other group and then say this will be done indirectly." Convention Transcript, p. 2015. The Delegates ultimately maintained the indirect language and instead added a separate subsection specifically addressing federal aid: "[Article X, Section 6] shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education." Mont. Const. art. X, § 6(2). Notably, the Delegates understood that Montana could prohibit forms of state aid that were otherwise permissible as federal aid. Convention Transcript, pp. 2008, 2011, 2024-25. Our conclusion that Article X, Section 6, more broadly prohibits aid to sectarian schools than the federal Establishment Clause is consistent with the Delegates' intent of the provision.

¶24 It is also worth observing that Montana's no-aid provision is unique from other states' no-aid provisions. Article X, Section 6's prohibition of "any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any ... school ... controlled in whole or in part by any church" make it a broader and stronger prohibition against aid to sectarian schools than other states.[3] Even other

[3] See, e.g., Utah Const. art. X, § 9 ("Neither the state of Utah nor its political subdivisions may make any appropriation for the direct support of any school or educational institution controlled by any religious organization."); Del. Const. art. X, § 3 ("No portion of any fund now existing, or which may hereafter be appropriated, or raised by tax, for educational purposes, shall be appropriated to, or used by, or in aid of any sectarian, church or denominational

states whose no-aid provisions also contain "indirect" language only prohibit aid in the form of the direct or indirect taking of money from the public treasury. See Ga. Const. art. I, § II, ¶ VII ("No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church...."); [4] Fla. Const. art. I, § 3 ("No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church...."). [5] Such language is distinct from and less stringent than Montana's prohibition on any type of aid, whether it be a "direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property." Mont. Const. art. X, § 6(1).

¶25 As a Court, we have not yet interpreted Article X, Section 6. However, the 1972 Constitutional Convention Delegates intended Article X, Section 6, to retain the meaning of Article XI, Section 8, of the Montana Constitution of 1889. See Convention Transcript, p. 2014. Accordingly, this Court's pre-1972

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school[.]"); Ala. Const. art. XIV, § 263 ("No money raised for the support of the public schools shall be appropriated to or used for the support of any sectarian or denominational school.").

[4] In *Gaddy v. Ga. Dep't of Revenue*, 301 Ga. 552, 802 S.E.2d 225, 230 (2017), the Georgia Supreme Court upheld a similar tax-credit program.

[5] In *McCall v. Scott*, 199 So.3d 359, 370 (Fla. Dist. Ct. App. 2016), *cert denied*, No. SC16-1668, 2017 WL 192043, at *1, 2017 Fla. LEXIS 83, at *1 (Fla. 2017), a Florida Court of Appeals concluded that the "express language of Florida's no-aid provision contains no limit on the Legislature's taxing authority, including the Legislature's power to enact laws creating tax credits or exceptions; rather, th[e] provision focuses on the use of state funds to aid sectarian institutions, not other kinds of support." (Internal citation and quotations omitted.)

precedent analyzing Article XI, Section 8, of the Montana Constitution of 1889 remains helpful to our analysis of Article X, Section 6. In *State ex rel. Chambers v. School Dist. No. 10*, 155 Mont. 422, 436-41, 472 P.2d 1013, 1020-22 (1970), the Court considered whether a tax levy intended to fund general teaching positions at a religiously-affiliated private school violated Article XI, Section 8, of the Montana Constitution of 1889. The Court observed that the tax levy permitted a religiously-affiliated school to unconstitutionally obtain teachers at public expense. *Chambers*, 155 Mont. at 437-38, 472 P.2d at 1020-21. Even though the teachers would have taught general, secular subjects, the Court noted that the funding nonetheless aided sectarian schools, as there was no way to determine "where the secular purpose ended and the sectarian began." *Chambers*, 155 Mont. at 438, 472 P.2d at 1021. Accordingly, the Court determined Article XI, Section 8, of the Montana Constitution of 1889 prohibited "a public school board from making a levy for, or expending funds for the employment of teachers to teach in a parochial school." Chambers, 155 Mont. at 440, 472 P.2d at 1022.

¶26 The plain language of Article X, Section 6, and the Constitutional Convention Transcripts demonstrating the Delegates' clear objective to firmly prohibit aid to sectarian schools lead us to the conclusion that the Delegates intended Article X, Section 6, to broadly and strictly prohibit aid to sectarian schools.

II. The Tax Credit Program aids sectarian schools in violation of Article X, Section 6, of the Montana Constitution.

¶27 Plaintiffs initially filed this action challenging Rule 1. The District Court focused its analysis on the underlying Tax Credit Program, determining the program itself was constitutional. Therefore, the District Court easily dispelled of Rule 1 after concluding it was based on a mistake of law. On appeal, the Department argues that the Tax Credit Program is unconstitutional and, accordingly, Rule 1 is necessary for the Department to constitutionally administer the program.[6] To properly evaluate the propriety of Rule 1, we must first address the Department's contention that the Tax Credit Program is unconstitutional. It is clear the Department's contention is a facial challenge to the Tax Credit Program, as it asserts the Tax Credit Program unconstitutionally aids sectarian schools and promulgated Rule 1 to cure the constitutional defect. Under *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987), a party bringing a facial challenge must "establish that no set of circumstances exists under which the [statute] would be valid"—that is, that the law is unconstitutional in all of its applications. *See also Mont. Cannabis Indus. Ass'n*, ¶ 14.

¶28 To analyze the Tax Credit Program under Article X, Section 6, first, we identify the entity

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[6] As it did before the District Court, the Department's own attorneys have acted as Special Assistant Attorneys General on appeal. M. R. App. P. 27 provides that a party challenging the constitutionality of any act of the Montana Legislature in this Court must provide the attorney general with notice of the constitutional issue, but only if neither the state nor any state agency is a party to the proceeding. The Department of Revenue, a state agency, is the defendant in this case and, accordingly, a notice of the constitutional challenge was not mandated.

providing the aid; second, we identify the type of aid; and third, we consider whether the entity provided the aid "for any sectarian purpose or to aid any ... school ... controlled in whole or in part by any church...." We ultimately conclude the Tax Credit Program aids sectarian schools in violation of Article X, Section 6, and that it is unconstitutional in all of its applications.

a. The Legislature aided sectarian schools when it enacted the Tax Credit Program.

¶29 Article X, Section 6, directly prohibits various entities, including the Legislature, from aiding sectarian schools. Preliminarily, we recognize that an individual taxpayer may give money to any cause she wishes. A taxpayer is free to donate to an SSO, a QEP, or any other charitable cause of her choice. There is no prohibition on a taxpayer giving her money away, nor would such prohibition be constitutional.

¶30 In this case, the action under scrutiny is the Legislature's provision of a tax credit to taxpayer donors. The Legislature, by enacting the Tax Credit Program, involved itself in donations to religiously-affiliated private schools. The Tax Credit Program provides a dollar-for-dollar incentive of up to $150 for taxpayer donations to SSOs. The tax credit encourages the transfer of money from a taxpayer donor to a sectarian school because the taxpayer donor knows she will be reimbursed, dollar-for-dollar, for her donation to an SSO. SSOs, in turn, directly fund tuition scholarships at religiously-affiliated QEPs. The Legislature, by enacting a statute that provides a dollar-for-dollar credit against taxes owed to the state, is the entity providing aid to sectarian schools via tax credits in violation of Article X, Section 6.

b. The Tax Credit Program permits the Legislature to indirectly pay tuition at private, religiously-affiliated schools.

¶31 Article X, Section 6, broadly prohibits any type of direct or indirect aid: the Legislature may not make "any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property."

¶32 The Tax Credit Program permits the Legislature to indirectly pay tuition at private, religiously-affiliated schools. Parents owe a certain amount of tuition to the QEP their child attends. If a child receives a tuition scholarship from an SSO, the scholarship decreases the amount of tuition that child's parents owe to the QEP. Many of the taxpayer donors who would donate to SSOs would be parents of children who attend QEPs. When parents donate to an SSO, they receive a dollar-for-dollar tax credit of up to $150. If the parents' child also receives a tuition scholarship from an SSO in the amount of, for example, $150, the parents' tuition obligation to the QEP decreases by $150—the exact amount the parents received as a tax credit for their donation to an SSO. The parents donated $150 to an SSO, received a dollar-for-dollar reimbursement for that donation in the form of a tax credit, and subsequently owed $150 less in tuition to their child's QEP. The Legislature indirectly payed $150 of that student's tuition by permitting his or her parents to claim a tax credit instead of paying that amount of tuition to the QEP.

¶33 The Legislature attempted to sever the indirect payment by requiring taxpayer donors to donate to an SSO generally and prohibiting them from directing or

designating contributions to specific parents, legal guardians, or QEPs. See § 15-30-3111(1), MCA. Therefore, parents cannot donate to an SSO, claim a tax credit for their donation, and then directly designate the funds they donated to their own child's scholarship. However, an indirect payment still exists, as described above, when a student whose parents claimed the tax credit receives a scholarship from an SSO. The simple fact that parents who donate to SSOs cannot directly designate the scholarship funds to their own child or to their child's school does not defeat the fact that the Legislature indirectly pays tuition to the QEP. Senate Bill 410's Fiscal Note recognized as much, stating that the donations to SSOs, the bases for the tax credits, "would primarily represent funds that *would have been used to pay tuition directly*...." Fiscal Note, at 2. The Tax Credit Program permits the Legislature to indirectly pay tuition at QEPs by reimbursing parents for donating to SSOs, donations funded with money the parents would have otherwise used to pay their child's tuition.

¶34 The Tax Credit Program permits the Legislature to subsidize tuition payments at religiously-affiliated private schools. A subsidy is a "*grant*, usu[ally] made by the government, to any enterprise whose promotion is considered to be in the public interest." *Subsidy, Black's Law Dictionary* (10th ed. 2014). "Although governments sometimes make direct payments (such as cash grants), subsidies are usu[ally] indirect. They may take the form of ... tax breaks...." Subsidy, Black's Law Dictionary (10th ed. 2014). When the Legislature indirectly pays general tuition payments at sectarian schools, the Legislature effectively subsidizes the sectarian school's

educational program. That type of government subsidy in aid of sectarian schools is precisely what the Delegates intended Article X, Section 6, to prohibit.

¶35 While $150 may seem like a small sum of money when compared to the State's overall operating budget, the amount of aid is wholly insignificant to an Article X, Section 6, analysis. The Legislature violates Article X, Section 6's prohibition on aid to sectarian schools when it provides any aid, no matter how small. Further, the $150 indirect payments certainly add up over time, especially as the aggregate limits on the tax credits increase from $3 million each year the limit is met. *See* § 15-30-3111(5)(a)(i)-(iii), MCA. The Tax Credit Program creates an indirect payment: the program reduces "the net price of attending private school ... for students who receive scholarships and whose families claim the credit." Fiscal Note, at 2. Article X, Section 6, expressly prohibits that type of indirect payment to sectarian schools.

¶36 Importantly, for purposes of examining the facial constitutionality of the Tax Credit Program, the schools meeting the Legislature's definition of QEP may be—and, in fact, the overwhelming majority are—religiously affiliated. There is simply no mechanism within the Tax Credit Program itself that operates to ensure that an indirect payment of $150 is *not* used to fund religious education in contravention of Article X, Section 6. The Department, in administering the Tax Credit Program pursuant to the Legislature's definition of QEP, § 15-30-3102(7), MCA, has no ability to ensure that indirect payments are not made to religious schools. Or, as this Court has previously cautioned, there is no mechanism within the Tax

Credit Program to identify "where the secular purpose end[s] and the sectarian beg[ins]." *Chambers*, 155 Mont. at 438, 472 P.2d at 1021. The Department cannot discern when the tax credit is indirectly paying tuition at a secular school and when the tax credit is indirectly paying tuition at a sectarian school. Because the Tax Credit Program does not distinguish between an indirect payment to fund a secular education and an indirect payment to fund a sectarian education, it cannot, under *any* circumstance, be construed as consistent with Article X, Section 6.

c. The Legislature provided the tax credits to aid schools controlled in whole or in part by churches.

¶37 Article X, Section 6, prohibits aid used "for any sectarian purpose or to aid any ... school ... controlled in whole or in part by any church, sect, or denomination." In *Chambers*, we explained that public funds could not be used to pay teachers' salaries at a religiously-affiliated private school, even if those teachers provided standard, non-religious instruction. *Chambers*, 155 Mont. at 438, 472 P.2d at 1021. In support of that conclusion, we reasoned that the school was sectarian as a whole, and therefore there was no way to determine "where the secular purpose ended and the sectarian began." *Chambers*, 155 Mont. at 438, 472 P.2d at 1021.

¶38 Under the Legislature's definition of QEP, the majority of QEPs are private schools controlled by churches. SSOs pay scholarship funds directly to QEPs and the funds offset scholarship recipients' general tuition obligations. General 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. Religious education is a "rock on which the whole [church] rests, and to render tax aid to [a religious school] is indistinguishable ... from rendering the same aid to the [c]hurch itself." *Chambers*, 155 Mont. at 438, 472 P.2d at 1021 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 24, 67 S.Ct. 504, 515, 91 L.Ed. 711 (1947) (Jackson, J., dissenting)). The Tax Credit Program aids schools controlled by churches, in violation of Article X, Section 6.

¶39 "The most effective way to establish any institution is to finance it." Chambers, 155 Mont. at 438, 472 P.2d at 1021 (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 229, 83 S.Ct. 1560, 1575, 10 L.Ed.2d 844 (1963) (Douglas, J., concurring)). The Legislature's enactment of the Tax Credit Program is facially unconstitutional and violates Montana's constitutional guarantee to all Montanans that their government will not use state funds to aid religious schools. This basic notion of separation of church and state is a foundation of our Nation's federal Constitution, but is more fiercely protected by Montanans through the broader prohibitions contained in Article X, Section 6. Although the Tax Credit Program provides a mechanism of attenuating the tax credit from the SSO's tuition payment to a religiously-affiliated QEP, it does not comport with the constitutional prohibition on indirectly aiding sectarian schools. We conclude, following consideration of both the plain language of the provision and the Delegates' intent as discerned from their discussion when drafting Montana's 1972 Constitution, that such attenuation remains inconsistent with Article X,

Section 6's strict and broad prohibition on aid to sectarian schools. The Tax Credit Program constitutes the precise type of indirect payment the Delegates sought to prohibit in their formulation of Article X, Section 6. Based on the Legislature's definition of QEP, the Department cannot constitutionally implement or administer the Tax Credit Program. Because Senate Bill 410 contained a severability clause,[7] we conclude the Tax Credit Program, § 15-30-3111, MCA, must be severed from the remainder of Part 31, §§ 15-30-3101 to -3114, MCA.

¶40 Having concluded the Tax Credit Program violates Article X, Section 6, it is not necessary to consider federal precedent interpreting the First Amendment's less-restrictive Establishment Clause. Conversely, however, an overly-broad analysis of Article X, Section 6, could implicate free exercise concerns. Although there may be a case where an indirect payment constitutes "aid" under Article X, Section 6, but where prohibiting the aid would violate the Free Exercise Clause, this is not one of those cases. We recognize we can only close the "room for play" between the joints of the Establishment and Free Exercise Clauses to a certain extent before our interpretation of one violates the other.

III. Rule 1 is unnecessary because the underlying Tax Credit Program is unconstitutional and, further, the Department exceeded its rulemaking authority

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[7] 2015 Mont. Laws 2186 ("If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.").

when it enacted Rule 1.

¶41 The Department enacted Rule 1 in its efforts to constitutionally implement the Tax Credit Program, which we have now determined is unconstitutional. We severed the Tax Credit Program from the remainder of Part 31. *See supra*, ¶39. As a result, Rule 1 is superfluous. However, we further note that, in enacting Rule 1, the Department exceeded the Legislature's grant of rulemaking authority. *See* § 15-30-3114, MCA (granting the Department rulemaking authority to adopt rules that are necessary to implement and administer Part 31).

¶42 An agency's authority to adopt rules is limited:

> Whenever by the express or implied terms of any statute a state agency has authority to adopt rules to implement, interpret, make specific, or otherwise carry out the provisions of the statute, an adoption, amendment, or repeal of a rule is not valid or effective unless it is:
>
> (a) consistent and not in conflict with the statute; and
>
> (b) reasonably necessary to effectuate the purpose of the statute.

Section 2-4-305(6), MCA; see also *Bd. of Barbers of Dep't of Prof'l & Occupational Licensing v. Big Sky College of Barber–Styling*, 192 Mont. 159, 161, 626 P.2d 1269, 1271 (1981). Accordingly, the Department's rules implementing Part 31 needed to be (1) consistent and not in conflict with Part 31 and (2) reasonably necessary to effectuate the purpose of Part 31. *See* § 2-4-305(6), MCA.

¶43 Rule 1 is inconsistent with the Legislature's definition of QEP. The Legislature broadly defined QEP to include all private schools in Montana, including religiously-affiliated schools. Section 15-30-3102(7), MCA. The Department's Rule 1 significantly narrowed the scope of the schools qualifying as QEPs, excluding all schools controlled in whole or in party by any church. Admin. R. M. 42.4.802. The Department's limitation on the definition of QEP conflicts with the Legislature's broad definition.

¶44 Although we recognize that the Legislature, by enacting § 15-30-3101, MCA, granted the Department broad authority to implement Part 31 consistent with Article X, Section 6, an agency may only adopt rules to "implement, interpret, make specific, or otherwise carry out the provisions of [a] statute." Section 2-4-305(6), MCA. An agency cannot transform an unconstitutional statute into a constitutional statute with an administrative rule. It is the Legislature's responsibility to craft statutes in compliance with Montana's Constitution, which it failed to do here. Rule 1 is superfluous because the underlying Tax Credit Program is unconstitutional and, additionally, the Department exceeded the Legislature's grant of rulemaking authority in enacting Rule 1.

CONCLUSION

¶45 We conclude the Tax Credit Program violates Article X, Section 6's stringent prohibition on aid to sectarian schools. Because the Tax Credit Program is unconstitutional, Rule 1 is superfluous and, further, the Department exceeded the scope of its rulemaking authority when it enacted Rule 1. We accordingly reverse the District Court's order granting Plaintiffs

summary judgment and determine the Tax Credit Program, § 15-30-3111, MCA, must be severed from the remainder of Part 31, §§ 15-30-3101 to -3114, MCA.

/S/ LAURIE McKINNON

We concur:

/S/ MIKE McGRATH

/S/ JAMES JEREMIAH SHEA

/S/ DIRK M. SANDEFUR

/S/ INGRID GUSTAFSON

Justice Ingrid Gustafson, concurring.

¶46 I concur in the Majority's Opinion and agree the Tax Credit Program violates our Constitution's prohibition against providing aid to religious schools, and this constitutional deficiency cannot be cured via administrative rule. I write separately to discuss additional grounds upon which the Tax Credit Program creates an indirect payment under Article X, Section 6(1), of the Montana Constitution. Although this Court has decided this matter purely on State constitutional grounds, I also discuss how the Tax Credit Program violates the federal Establishment and Free Exercise Clauses.

The Tax Credit for Qualified Education Contributions is an indirect payment under Article X, Section 6(1), of the Montana Constitution.

¶47 Montana's definition of "appropriation" is "well-established and quite limited," referring only to the authority given to the Legislature to expend money from the state treasury. *Nicholson v. Cooney*, 265 Mont. 406, 415, 877 P.2d 486, 491 (1994) (citations

omitted). However, the plain language of Article X, Section 6(1), prohibits more than appropriations; as Justice Baker notes in her Dissent, it prohibits four actions, including indirect payments. In this case, the District Court ended its analysis prematurely by not considering whether the Tax Credit Program constitutes an "indirect payment."

¶48 As to whether the money comes from a public fund, when determining whether the Tax Credit for Qualified Education Contributions (TCQEC) of Title 15, chapter 30, part 31, creates a "direct or indirect appropriation or payment," it is necessary to understand that while the TCQEC deems the money provided to the SSO by a taxpayer to be a "donation," it is not in fact a donation. To donate is to give property or money without receiving consideration for the transfer. *Donate, Black's Law Dictionary* (10th ed. 2014). Here, 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. The taxpayer simply chooses, with the State's blessing, to pay the money he or she otherwise owes to the State to an SSO. Since religious schools would be eligible to receive tuition payments from these funds, this runs afoul of the purpose of Article X, Section 6 "to guard against the diversion of public resources to sectarian school purposes." *Kaptein ex rel. Kaptein v. Conrad Sch. Dist.*, 281 Mont. 152, 163-64, 931 P.2d 1311, 1318 (1997) (Nelson, J., specially concurring).

¶49 For the "donor," the difference between a dollar-for-dollar tax credit and a typical charitable tax deduction is remarkable. The former costs them

absolutely nothing out of pocket. See *Hibbs v. Winn*, 542 U.S. 88, 95, 124 S.Ct. 2276, 2282, 159 L.Ed.2d 172 (2004) (deeming contributions to a similar Arizona program "costless" to the "donor"). The dollar-for-dollar diversion distinguishes this program from other tax credit programs, such as the contributions to university or college foundations and endowment funds codified in § 15-30-2326, MCA, which offers taxpayers a tax credit equal to 10% of the amount of qualifying charitable contributions made. In such instances, the State incentivizes charitable giving; for example, under § 15-30-2326, MCA, for every $10 a taxpayer contributes, that taxpayer's tax liability is decreased by $1. The taxpayer, however, still donates $9 out of his or her own pocket. Here, the taxpayer donates none of his or her own funds, but instead dictates where and how a portion of their tax liability is spent. 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...."[1]

¶50 Justice Baker observes that under the TCQEC, "[n]o money originates, is deposited into, or is expended from the state treasury or any public fund."

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[1] Big Sky Scholarships, *About this Charity*, https://perma.cc/5TMP-M4XD. As Big Sky Scholarships also points out, "The entire amount of any donation is eligible for the federal charitable deduction." Thus, a taxpayer "donor" would not only reduce his or her Montana tax liability by up to $150, but he or she could also take a charitable deduction for that amount on his or her federal income tax return. Therefore, a taxpayer in the 33% tax bracket would receive a $49.50 reduction in his or her federal income tax liability on top of the dollar-for-dollar tax credit on the taxpayer's State taxes.

Dissent, ¶ 94. And since the money is never deposited into and then expended from a public fund, it is not an appropriation. *Board of Regents v. Judge*, 168 Mont. 433, 446-47, 543 P.2d 1323, 1330 (1995).[2] However, the only reason the money is not deposited into and then expended from a public fund is because the TCQEC diverts it before it reaches the public treasury. The Legislature recognized this diversion within SB410, the bill that created the TCQEC, when it set aside $3 million from the State's budget to cover the revenue shortfall the Tax Credit Program created.[3] Justice Baker likewise acknowledges the TCQEC diverts funds, although she would deem this "an indirect *transfer of benefit* to the student-selected school" but not find this to be an indirect payment. Dissent, ¶ 93 (emphasis in original). A "transfer of benefit" is simply an oblique way of saying "assignment."[4] Allowing a taxpayer to assign a portion of his or her tax liability by paying the money owed to the State to a third party

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[2] We note, however, that the Legislature created a similar tax credit for public schools that explicitly creates an appropriation. Such "donations for the purpose of funding innovative educational programs" entitles contributors to tax credits consistent with § 15-30-3110, MCA. These funds are deposited into a "state special revenue fund" and are then appropriated to public schools. Section 20-9-905, MCA.

[3] SB410's fiscal note indicates the Tax Credit Program will reduce general fund revenues by up to $9.6 million per year by 2022 because § 15-30-3111(5), MCA, provides for the available tax credits to increase by ten percent following each year that the previous tax year's credit limit is met.

[4] An assignment is the transfer of rights or property. *Assignment, Black's Law Dictionary* (10th ed. 2014). See also Assignee, Black's Law Dictionary (10th ed. 2014) ("One to whom property rights or powers are transferred by another.").

is not a "donation" by the taxpayer.

¶51 The TCQEC was explicitly designed as a tax expenditure.[5] Section 5-4-104(2), MCA, defines "tax expenditures" as "those revenue losses attributable to provisions of Montana tax laws that allow a special exclusion, exception, or deduction from gross income or that provide a special credit ... including: ... (d) credits allowed against Montana personal income tax or Montana corporate income tax." Indisputably, the Tax Credit Program creates a "tax expenditure" under § 5-4-104(2), MCA. See also *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 343-44, 126 S.Ct. 1854, 1862, 164 L.Ed.2d 589 (2006) (" '[T]ax expenditures' ... reduce amounts available to the treasury by granting tax credits or exemptions."). Moreover, many of the items enumerated under § 5-4-104(2), MCA, while not appropriations, are nonetheless expenditures.

¶52 Every tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become "indirect and vicarious 'donors.' " Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 14, 109 S.Ct. 890, 899, 103 L.Ed.2d 1 (1989) (quoting *Bob Jones Univ. v. United States*, 461 U.S. 574, 591, 103 S.Ct. 2017, 2028, 76 L.Ed.2d 157 (1983)). "Both tax exemptions and tax deductibility are a form of subsidy.... Deductible contributions are similar to cash grants of the amount

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[5] Section 15-30-3101, MCA, provides in part: "Pursuant to 5-4-104, the legislature finds that the purpose of student scholarship organizations is to provide parental and student choice in education with private contributions through tax replacement programs." Section 5-4-104(1), MCA, provides in part that "the legislature encourages a policy of providing an explicit purpose of a tax expenditure...." Therefore, the Legislature clearly recognized that the TCQEC creates a tax expenditure.

of a portion of the individual's contributions." *Regan v. Taxation with Representation*, 461 U.S. 540, 544, 103 S.Ct. 1997, 2000, 76 L.Ed.2d 129 (1983). *Regan* further held that, by denying a political lobbying organization tax-exempt status under § 501(c)(3), the U.S. Code was not denying the organization any independent benefit, but "Congress has merely refused to pay for the lobbying out of public moneys." *Regan*, 461 U.S. at 545, 103 S.Ct. at 2001. *Texas Monthly, Bob Jones University*, and *Regan* all recognize that deductions and exemptions function the same as an appropriation by allowing some taxpayers to pay lower taxes than they otherwise would. Although Justice Rice in his Dissent characterizes DOR's argument on this point as "an utter misstatement of the fundamental right of private property ownership," Dissent, ¶ 115, it is, in fact, consistent with the U.S. Supreme Court's holdings. Likewise, Article X, Section 6(1), of the Montana Constitution recognizes that a tax expenditure may not be an appropriation per se but nonetheless may function in the same manner. Thus, Article X, Section 6(1), prohibits not only appropriations, but also payments.

¶53 By creating a diversionary scheme whereby money otherwise bound for the public treasury is diverted, the Legislature has created an indirect payment. Moreover, as noted above, the TCQEC does require "funding," with the State setting aside $3 million to cover the anticipated revenue shortfall this statutory scheme is expected to cause in its first year—in addition to the substantial administrative costs described in the Majority Opinion.

The funds generated by the Tax Credit for Qualified Education Contributions aid schools controlled in whole or in part by a church, sect, or denomination.

¶54 Under the Tax Credit Program, no funds are delivered to students, but are paid directly to the schools. Section 15-30-3104(1), MCA, provides that the SSO delivers the scholarship funds "directly to the qualified education provider...." Thus, while the scholarships aid the students in assisting them in covering the cost of tuition, they aid the schools in the form of direct monetary payments. The economic effect of these funds is that of aid given directly to the school. See *Mueller v. Allen*, 463 U.S. 388, 399, 103 S.Ct. 3062, 3069, 77 L.Ed.2d 721 (1983).

¶55 In addition to the Montana cases cited by the Majority, federal precedent compels the conclusion that these funds aid religious schools. In *Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973), the U.S. Supreme Court found unconstitutional a statutory scheme which provided a grant to low-income parents who paid private school tuition. The Supreme Court rejected the argument that these grants did not constitute aid to a religious school since they went to the parents, holding, "By reimbursing parents for a portion of their tuition bill, ... the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Nyquist*, 413 U.S. at 783, 93 S.Ct. at 2971. The *Nyquist* majority rejected the dissenters' position that "government aid to individuals generally stands on an entirely different footing from direct aid to religious institutions." *Nyquist*, 413 U.S. at 801, 93 S.Ct. at 2978 (Burger, C.J.,

dissenting). Here, by relieving parents of a portion of their tuition bill by directly paying part of the students' tuition, the effect of the aid is to provide financial support to QEPs, including religious schools.

¶56 Later, in *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993), the U.S. Supreme Court upheld a deaf student's right to the services of a sign-language interpreter funded by the local school district, and pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq., even though he attended a Catholic high school. The Supreme Court reasoned that the funding of an individual's interpreter "creates no financial incentive for students to undertake sectarian education." *Zobrest*, 509 U.S. at 9-10, 113 S.Ct. at 2467 (quoting *Witters v. Wash. Dep't of Servs. for Blind*, 474 U.S. 481, 488, 106 S.Ct. 748, 752, 88 L.Ed.2d 846 (1986)). In other words, the student would have received the services of a district-funded sign-language interpreter regardless of which school he attended, and providing the interpreter gave no aid to the religious school because it did not relieve it of any costs it otherwise would have borne to educate its students. The interpreter benefited the student and not the school. *Zobrest*, 509 U.S. at 12, 113 S.Ct. at 2469. Here, however, the tuition payments aid the recipient schools because these funds directly cover the costs of educating the school's students. They do not, as in *Zobrest*, provide a benefit only to the student and to which the student would have been entitled regardless of school attended.

¶57 Therefore, I agree with the majority that the Tax Credit Program unconstitutionally creates an

indirect payment of public funds that aids religious schools.

The Tax Credit Program violates the U.S. Constitution's Establishment and Free Exercise Clauses by compelling taxpayers to support religious schools in order to avail themselves of the tax credit.

¶58 Section 15-30-3111(1), MCA, provides in part that "[t]he donor may not direct or designate contributions to a parent, legal guardian, or specific qualified education provider." Thus, a taxpayer who reduces his or her tax liability by up to $150 by sending those funds to the SSO has no control over which QEP receives the benefit of those funds. Those funds may go to pay the tuition of a student at a secular school or a religious school, but the taxpayer cannot choose which school—or which type of school—to support.

¶59 As explained above, I do not consider this diversion of funds to be a genuine "donation." Nonetheless, taxpayers may wish to take advantage of the proffered tax credit, whether to support a school or schools providing instruction consistent with a particular religion, to support the secular school that is designated as a QEP, or because they believe their tax money is better spent supporting private schools in general. Nonetheless, a taxpayer who desires to donate to an SSO in exchange for a tax credit may find donating under the constraints of the TCQEC untenable as the SSO is free to use this money to aid a religious school which the taxpayer may prefer not to support financially.

¶60 As the Majority explains, "The Legislature attempted to sever the indirect payment by requiring

taxpayer donors to donate to an SSO generally and prohibiting them from directing or designating contributions to specific parents, legal guardians, or QEPs." Opinion, ¶ 33. However, in their attempt, the Legislature ran afoul of the Establishment and Free Exercise Clauses by compelling taxpayers who seek the tax credit to relinquish the choice as to whether to support a religious school, and whether to support, or decline to support, a particular religion.

A. The Tax Credit Program violates the Establishment Clause because it prohibits the donating taxpayer from choosing whether the funds aid a religious school.

¶61 The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the "purpose" or "effect" of advancing or inhibiting religion. *Zelman v. Simmons-Harris,* 536 U.S. 639, 648-49, 122 S. Ct. 2460, 2465, 153 L.Ed.2d 604 (2002) (citation omitted). In *Agostini v. Felton*, 521 U.S. 203, 222, 117 S. Ct. 1997, 2010, 138 L.Ed.2d 391 (1997), the U.S. Supreme Court acknowledged its recent cases had undermined the assumptions upon which some of its earlier Establishment Clause cases had rested. It then took the opportunity to reiterate the principles it uses to evaluate Establishment Clause challenges: "[W]e continue to ask whether the government acted with the purpose of advancing or inhibiting religion," and "we continue to explore whether the aid has the 'effect' of advancing or inhibiting religion." *Agostini*, 521 U.S. at 222-23, 117 S. Ct. at 2010. We apply those principles here.

¶62 In *Nyquist*, the U.S. Supreme Court concluded that a state-funded tuition reimbursement for nonpublic schools violated the Establishment Clause. The Supreme Court explained, "[I]f the grants are offered as an incentive ... the Establishment Clause is violated.... Whether the grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same." *Nyquist*, 413 U.S. at 786-87, 93 S. Ct. at 2972. The Supreme Court further held that, whether a parent received a cash reimbursement for tuition or was allowed to reduce his or her tax bill, "in both instances the money involved represents a charge made upon the state for the purpose of religious education." *Nyquist*, 413 U.S. at 791, 93 S. Ct. at 2974-75 (citation and quotation omitted).

¶63 In *Mueller*, 463 U.S. at 390, 103 S. Ct. at 3064, the U.S. Supreme Court upheld a Minnesota tax scheme which allowed parents to deduct certain educational expenses from their state income tax. Some Minnesota taxpayers had challenged the law, arguing that it violated the Establishment Clause by providing financial assistance to religious schools. *Mueller*, 463 U.S. at 392, 103 S. Ct. at 3065. The Supreme Court, noting that in some instances it had struck down "arrangements resembling … forms of assistance," while in other instances it upheld roughly similar arrangements, analyzed the constitutionality of *Mueller* by comparing its facts to *Nyquist* and the cases *Nyquist* relied upon to determine if the Minnesota statute violated the Establishment Clause. *Mueller*, 463 U.S. at 393, 103 S. Ct. at 3066. First, the Supreme Court concluded that a State's decision to defray the educational expenses parents bear is a secular and understandable purpose, regardless of the

nature of the school attended. *Mueller*, 463 U.S. at 395, 103 S. Ct. at 3067. The *Mueller* court found the universality of the tax deduction to be of considerable importance in upholding the Minnesota tax scheme. It held: In this respect, as well as others, this case is vitally different from the scheme struck down in *Nyquist*. There, public assistance amounting to tuition grants was provided only to parents of children in nonpublic schools. *Mueller*, 463 U.S. at 397-98, 103 S. Ct. at 3068 (emphasis in original). Because the Minnesota tax scheme was available to the parents of all students in any school, public or private, the Supreme Court found it distinguishable from *Nyquist*, and thus constitutional. *Mueller*, 463 U.S. at 398-99, 103 S. Ct. at 3069 (concluding that the applicability of *Nyquist's* tax deduction only to the students of nonpublic schools "had considerable bearing" on court's decision to strike it down). Here, the scholarships regulated by the TCQEC bear the purpose of defraying the cost of tuition. However, this aid is available only for the parents of students attending certain non-public schools—unlike in *Mueller*, where parents could claim the tax deduction regardless of whether their children attended public or private schools. *Mueller*, 463 U.S. at 397, 103 S. Ct. at 3068. The present case is more akin to *Nyquist* than *Mueller* in this regard.

¶64 In *Zelman*, the U.S. Supreme Court considered whether an Ohio program that provided tuition aid to families violated the Establishment Clause. In so doing, the Supreme Court found that its Establishment Clause jurisprudence drew "a consistent distinction between government programs that provide aid directly to religious schools and programs of true private choice, in which government aid reaches

religious schools only as a result of the genuine and independent choices of private individuals." *Zelman*, 536 U.S. at 649, 122 S. Ct. at 2465 (citations omitted). Most pertinent to the present case, the Supreme Court explained that the amount of government aid channeled to religious institutions by aid recipients is irrelevant to the constitutionality of the scheme. The salient point is "whether recipients generally were empowered to direct the aid to schools or institutions of their own choosing." *Zelman*, 536 U.S. at 651, 122 S. Ct. at 2466-67. Relying on *Mueller*, *Witters*, and *Zobrest*, *Zelman* held: "[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause." *Zelman*, 536 U.S. at 652, 122 S. Ct. at 2467.

¶65 Here, the recipients of the "government aid" are not the parents and students; they are the taxpayers who donate to the SSO and in exchange obtain tax credits. Under §§ 15-30-3104(1), and -3111(1), MCA, these taxpayers get no choice; they are at the mercy of the SSO as to where their donations are spent. Thus, it cannot be said the donations are given "to religious schools wholly as a result of their own genuine and individual private choice."

¶66 In *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 142-43, 131 S. Ct. 1436, 1447, 179 L.Ed.2d 523 (2011), the U.S. Supreme Court concluded that Arizona taxpayers, as mere taxpayers, lacked standing to challenge a tax credit/tuition scheme

roughly similar to the TCQEC. In that instance, the scholarship organization, similar to our SSO, was called a "school tuition organization," or STO. *Winn,* 563 U.S. at 129, 131 S. Ct. at 1440. There, the Supreme Court held that taxpayers had no standing to challenge the scheme because they were free to choose not to donate to an STO, and because they had no right to dictate how other citizens spent, or chose not to spend, their own pre-tax money. *Winn*, 563 U.S. at 142, 131 S. Ct. at 1447. The Supreme Court explained that all Arizona taxpayers "remain free to pay their own tax bills, without contributing to an STO," or may "contribute to an STO of their choice, either religious or secular." *Winn*, 563 U.S. at 142, 131 S. Ct. at 1447. Here, Montana taxpayers who wish to take advantage of the Tax Credit Program have no such choice, as § 15-30-3111(1), MCA, mandates that the donor cannot choose which school receives their contribution. Thus, since only one SSO exists in Montana, and its QEPs consist of both religious and secular schools, the contributor cannot choose whether or not to support a religious school and still avail himself or herself of the tax credit.

¶67 Plaintiffs have litigated this matter in their role as parents of children attending Stillwater Christian School and not as taxpayers seeking a tax credit. The Tax Credit Program does not inhibit Plaintiffs' choice as to whether their children attend a religious school, but it does inhibit the taxpayers' right to exercise their own "genuine and individual private choice[s]" as to whether their donations fund a secular or religious education. On these grounds, I would hold the Tax Credit Program violates the Establishment Clause.

B. The Tax Credit Program violates the Free Exercise Clause because it compels taxpayers to acquiesce in the use of their donations to support religious schools in order to claim a tax credit.

¶68 In *Mitchell v. Helms,* 530 U.S. 793, 828, 120 S. Ct. 2530, 2551, 147 L.Ed.2d 660 (2000), the U.S. Supreme Court commented that it had, in numerous decisions, "prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." (Citations omitted.) Here, however, the TCQEC discriminates in its distribution of a tax credit for donations to SSOs because donors have no choice but to permit the SSO to designate a donation to a student attending a religious school.

¶69 In *Trinity Lutheran,* the U.S. Supreme Court found that a policy of the Department of Natural Resources of the State of Missouri, which barred religious institutions from participating in a playground resurfacing program, "expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, —— U.S. ——, 137 S. Ct. 2012, 2021, 198 L.Ed.2d 551 (2017). Here, contributors who wish to claim an otherwise available tax credit for donating to an SSO cannot do so without being compelled to support a religious school. In *Trinity Lutheran*, the Supreme Court stated, "[T]he Department's policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution." Here, § 15-

30-3111(1), MCA, puts the taxpayer to a choice: He or she may participate in the Tax Credit Program, but only if he or she agrees to relinquish control of where that donation is spent, with the likely result that the SSO will give those funds to a religious school.[6]

¶70 The Free Exercise Clause protects religious observers from unequal treatment. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 542, 113 S. Ct. 2217, 2232, 124 L.Ed.2d 472 (1993) (citation omitted). Denying a generally available benefit solely due to religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest "of the highest order." *Trinity Lutheran*, —— U.S. ——, 137 S. Ct. at 2019 (citations omitted). Here, the Tax Credit Program would deny this benefit to taxpayers who wish to avail themselves of a tax credit for private-school scholarships but prefer not to support religious schools, or may prefer to support only a specific religion's schools.

¶71 The U.S. Supreme Court has held that the exclusion of degrees in devotional theology from eligibility in a state scholarship program did not violate the Free Exercise Clause because the exclusion "does not require students to choose between their religious beliefs and receiving a government benefit." *Locke*, 540 U.S. at 720-21, 124 S. Ct. at 1312. Here, however, taxpayers wishing to donate to a QEP and claim a tax credit for that donation are forced to choose between their religious beliefs and a government

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[6] Big Sky Scholarships presently lists 13 QEPs, only one of which, an elementary school for children with learning disabilities, is secular. Big Sky Scholarships, Schools, https://perma.cc/L8RB-AD69.

benefit because they cannot control whether the donation is used to fund a religious education.

¶72 Notwithstanding the additional analysis I offer here, I concur with and join in this Court's Opinion.

/S/ INGRID GUSTAFSON

Chief Justice Mike McGrath and Justice Dirk Sandefur join in the concurring Opinion of Justice Gustafson.

/S/ MIKE McGRATH
/S/ DIRK M. SANDEFUR

Justice Dirk Sandefur, concurring.

¶73 I concur in the ultimate result reached by the Court and much of its reasoning. However, I write separately to clearly state the reasons for my concurrence.

¶74 As a preliminary aside not at issue, I reject and condemn this Court's continuing use of a reasonable doubt standard for reviewing the constitutionality of statutes. As it has many times before, the Court again begins an analysis of the constitutionality of a statue by stating as the standard of review that:

> [a] statute is presumed constitutional unless it "conflicts with the constitution, in the judgment of this court, beyond a reasonable doubt." The party challenging the constitutionality of the statute bears the burden of proof. If any doubt exists, it must be resolved in favor of the statute.

Opinion, ¶13 (citations omitted). Certainly, legislative enactments are and should be presumed constitutional until clearly demonstrated otherwise

upon legal analysis. However, reasonable doubt is inherently and exclusively a standard of *factual proof*. Nothing more. The question of whether a statute conflicts with a federal or state constitutional provision, whether facially or as applied to a certain factual scenario, is a pure question of law. Whether facially or as applied, a statute either conflicts with a constitutional provision as a matter of law or it does not. Without reference to "reasonable doubt" or "proof," the proper standard for reviewing the constitutionality of statutes should be that statutes are presumed constitutional until clearly demonstrated to conflict with a constitutional provision, whether facially or as applied to a particular set of facts. The party challenging the constitutionality of a statute has the burden of demonstrating the asserted unconstitutionality by appropriate legal analysis.

¶75 Turning to the matters at issue, I concur that the dollar-for-dollar private school tax credit program embodied in §§ 15-30-3101 to -3114, MCA, is not a direct or indirect "*appropriation*" as referenced in Article V, Section 11(5), or Article X, Section 6, of the Montana Constitution.[1] *See State ex rel. Bonner v. Dixon*, 59 Mont. 58, 78-79, 195 P. 841, 845 (1921),

[1] In pertinent part, Article V, Section 11(5), prohibits the Legislature from making any appropriation for "religious ... purposes to any private individual, private association, or private corporation not under control of the state." Article X, Section 6, prohibits state and local governments from "mak[ing] any direct or indirect appropriation or payment from any public fund or monies ... for any sectarian purpose or to aid any church [or] school ... controlled in whole or in part by any church, sect, or denomination."

overruled in part by Bd. of Regents v. Judge, 168 Mont. 433, 447, 543 P.2d 1323, 1331 (1975), and *Bd. of Regents*, 168 Mont. at 446-47, 543 P.2d at 1331-32. In context, the constitutional phrase "appropriation" from "any public fund or monies" narrowly connotes an expenditure or commitment of public money in hand. I further concur that the program does not effect a *direct payment* from "any public fund or monies" as referenced in Article X, Section 6.

¶76 I concur, however, that as applied to religiously-affiliated private schools, the private school tax credit program effects an *indirect payment of public monies* for a sectarian purpose or to aid schools controlled in whole or in part by a church, religious sect, or religious denomination. Though it does not effect a direct or indirect "appropriation" or a direct payment, the program nonetheless diverts, on a dollar-for-dollar basis, funds otherwise earmarked and accrued to the public purse in the form of tax liability independently imposed by law. As applied to religiously-affiliated private schools, the undeniable purpose of the diversion is to further a sectarian purpose—the proliferation of the chosen religious beliefs and values of the participating parents—thereby further aiding private schools controlled in whole or in part by the affiliated church, religious sect, or religious denomination. As noted by the majority and previously by this Court, "[t]he most effective way to establish any institution is to finance it." The private school tax program is a clever, even somewhat ingenious, attempt by the Legislature to have the State provide affirmative financial aid to help parents enroll their children in private schools, not coincidentally including religiously-affiliated private schools. The

Legislature attempted to accomplish this manifest objective through the guise of a facially neutral statutory scheme that does not reference religion or religiously-affiliated schools and which directs an administrative agency to administer the scheme in a constitutional manner.

¶77 Plaintiffs assert, *inter alia*, that the program does not violate Article X, Section 6, of the Montana Constitution because the purpose and effect of the program is not to further a sectarian purpose or aid religiously-affiliated schools but, rather, merely to facilitate parental educational choice without regard for the choice made. They assert that any secondary benefit to religiously-affiliated schools is only incidental or *de minimis*. Despite the superficial appeal of this argument, closer examination quickly unveils the false distinction on which it is premised. Religiously-affiliated schools exist for the purpose of providing a quality general education, but with a specific emphasis on religious beliefs and values not taught in public schools. It is certainly conceivable that some parents, even though they do not subscribe to the affiliated religion, may nonetheless choose a religiously-affiliated school in pursuit of a quality general education perceived to be unavailable in public schools. However, the obvious and indisputable fact is that most, if not all, parents choose to send their children to a religiously-affiliated school for the specific purpose of educating their children with an emphasis on particular religious beliefs and values not taught in public schools. Providing children with particular religious instruction or emphasis incident to general education unquestionably aids and benefits the exercise and proliferation of those religious beliefs and

values—the very *raison d'être* for religiously-affiliated schools. Tuition aids also help maintain enrollment in religiously-affiliated schools, thereby helping facilitate their continued existence and administration. However neutrally characterized, a law diverting money otherwise earmarked and accrued to the public purse to allow parents to choose religiously-affiliated schools is clearly tantamount to an indirect payment of government monies for a sectarian purpose and aids schools controlled in whole or in part by a particular church, religious sect, or religious denomination.

¶78 As an ancillary matter not necessary to the Court's decision in light of its primary holding, I further concur with the majority that the Department of Revenue exceeded the scope of its administrative rulemaking authority in adopting Rule 1. Regardless of its general charge to the Department to administer the private school tax credit program in a constitutional manner, the Legislature has long provided that administrative agencies have no authority to promulgate rules conflicting with or otherwise limiting a clear and unequivocal statutory provision. *See* § 2-4-305(6), MCA (limiting exercise of delegated administrative rulemaking authority to rules necessary to effect an express or manifest statutory purpose but in a manner consistent and not in conflict with the statutory language and effect). *See* also Mont. Const. art. III, § 1 (separation of powers between co-equal branches of government). The Legislature put the Department in a hopelessly untenable position—it enacted a facially neutral statutory scheme with obvious application, inter alia, to an unconstitutional purpose and effect, and then inconsistently charged the Department with the task

of administering the scheme in a constitutional manner. The only way for the Department to carry out the Legislature's mandate was to administer the program in a manner inconsistent with the manifest intent and express provision of the statute—by declaring the tax credit unavailable to help fund the cost of sending children to religiously-affiliated schools.

¶79 I further concur with the Court's implicit holding, and Justice Gustafson's express concurrence, that as applied to religiously-affiliated schools, the private school tax credit program not only violates Article X, Section 6, of the Montana Constitution, but also violates the Establishment Clause of the First Amendment to the United States Constitution. As applied to the states through the Fourteenth Amendment, the Establishment Clause clearly, broadly, and unequivocally prohibits state governments from "mak[ing]" any "law respecting an establishment of religion...." U.S. Const. amend. I. As applied to religiously-affiliated schools, and for the same reasons that it violates Article X, Section 6, of the Montana Constitution, the private school tax credit program constitutes a state law "respecting an establishment of religion." Whether viewed objectively or through the subjective view of the churches or religious denominations that provide and control religiously-affiliated schools, the provision of government tuition subsidies, aids, or incentives to facilitate enrollment in those schools is a substantial, if not essential, aid to the proliferation of the affiliated religions and the continued existence and administration of the schools.

¶80 Finally, I concur with the majority and Justice Gustafson's concurrence, that as applied to the private school tax credit program as it applies to religiously-affiliated schools, Montana's constitutional prohibition on the indirect payment of public monies for sectarian purposes or to aid schools controlled in whole or in part by a church, religious sect, or denomination does not violate the Free Exercise Clause of the First Amendment to the United States Constitution. As applied to state governments through the Fourteenth Amendment, the Free Exercise Clause does nothing more than clearly, broadly, and unequivocally prohibit state governments from "mak[ing]" any "law ... *prohibiting* the free exercise" of religion. U.S. Const. amend. I (emphasis added). Regardless of the increasingly value-driven hairsplitting and overstretching that unnecessarily complicates its modern jurisprudence, the Free Exercise Clause is nothing more than a protective shield against government *interference* in the free *exercise* of a citizen's chosen religion or religious views. The Free Exercise Clause is not, nor did the Framers intend it to be, a sword or affirmative right to *receive* government aid—precisely the manifestly intended purpose and effect of the private school tax credit program as applied to religiously-affiliated schools. Though there may indeed be some room for "play" in reconciling the Establishment and Free Exercise Clauses, the bottom line is that the Free Exercise Clause only prohibits the government from interfering with the exercise of religious beliefs, practices, and, by extension, related activities and operations of religious and affiliated entities. As applied to the private school tax credit program, Montana's constitutional ban on sectarian

aid does not in any way interfere with or otherwise substantially burden the preexisting First Amendment right of parents to send their children to religiously-affiliated schools without government-imposed interference or impediment. Parents who wish to send their children to religiously-affiliated schools can and will continue to do so without government inference or impediment, just as they always have. As applied here, Article X, Section 6, of the Montana Constitution merely prohibits state and local governments from *affirmatively promoting or facilitating* the exercise of religious beliefs by diverting or foregoing government tax revenue for that purpose. The right to freely exercise religious beliefs without government interference or impediment cannot be reasonably stretched to require the state and its taxpayers to help pay for the exercise of that right through the diversion of otherwise earmarked and accrued government tax revenue.

¶81Nor does Montana's broad constitutional ban on sectarian aid *unconstitutionally* discriminate on the basis of religion. Article X, Section 6 may well have broader application that might be problematic in some other context. But, as specifically applied to the particular private school tax credit at issue and its application to religiously-affiliated schools, Article X, Section 6 does not discriminate against the exercise of religion any more than the First Amendment Establishment Clause already lawfully does, just as intended and expressly provided by the Framers of the United States Constitution.

¶82 Having greatly benefitted from eight years of attendance in a religiously-affiliated elementary and

middle school, I certainly understand the value and import to parents of educating their children with an emphasis on their chosen religious beliefs and values, parents' desire to further the proliferation of those beliefs and values, parents' fundamental right to make that choice for their children without governmental interference or impediment, and the concerted, well-intentioned efforts of powerful social and political forces to advance the proliferation of their respective religious beliefs in our state and country. However, the federal and state constitutional prohibitions on government aid for sectarian purposes respectively embodied in the First Amendment Establishment Clause and Article X, Section 6, of the Montana Constitution do not conflict, and are perfectly consistent, with the fundamental right to freely exercise one's chosen religion. In balanced tandem, the Establishment and Free Exercise Clauses form one of the cornerstones upon which our country and federal and state constitutions were founded and framed to the benefit and protection of all—the clear separation of church and state regardless of the will of the majority at any given time. The Court today fulfills its constitutional oath and duty to neutrally recognize, enforce, and maintain that critical constitutional balance under our state and federal constitutions.

¶83 I concur.

/S/ DIRK M. SANDEFUR

Justice Beth Baker, dissenting.

¶84 I agree that the Department overstepped its executive authority when it adopted Rule 1 because the enabling legislation did not trump existing statutory limitations on an agency's rulemaking authority.

Section 2-4-305(6), MCA. Rule 1 conflicts with § 15-30-3111, MCA, and was an *ultra vires* act by the Department. I do not join the Court's Opinion, however, because, in my view, the Court oversteps its own authority in invalidating § 15-30-3111, MCA (the Tax Credit Program), as unconstitutional.

¶85 Cases that test the limits of the government's involvement in matters of religion are difficult, in no small part because of the constitutional tension between prohibited government establishment of religion and the restraint against government action interfering with its free exercise. The Montana Constitutional Convention Delegates, seeking to avoid "jeopardiz[ing] the precarious historical balance which has been struck between opposing doctrines and countervailing principles," Montana Constitutional Convention, Committee Proposals, Feb. 22, 1972, p. 728, preserved the 1889 State Constitution's protection against direct or indirect public funding for sectarian purposes. As the Court accurately observes, other than stylistic changes, the Delegates maintained the language, and thus the meaning, of the 1889 Constitution when they adopted Article X, Section 6. Opinion, ¶¶ 21, 25.[1] The Court today seeks to outline a

[1] Article XI, Section 8, of the 1889 Constitution, provided:

Neither the Legislative Assembly, nor any county, city, town, or school district, or other public corporations, shall ever make directly or indirectly, any appropriation, or pay from any public fund or moneys whatever, or make any grant of lands or other property in aid of any church, or for any sectarian purpose, or to aid in support of any school, academy, seminary, college, university, or other literary, scientific institution, controlled in whole or in part by any church, sect or denomination whatever.

logical framework for examining claimed violations of Article X, Section 6, of the Montana Constitution. But it does not adhere to controlling principles of law in analyzing § 15-30-3111, MCA, and Rule 1 within that framework.

¶86 The Court begins with a fundamental mistake that permeates the remainder of the Opinion and flaws its conclusions. Relying in part on the title of Section 6, the Court makes a sweeping statement that the provision broadly prohibits "aid" to sectarian schools. Opinion, ¶ 19. Recognizing the first principle of statutory construction—to examine the plain meaning of the words used, Opinion, ¶ 18—it nonetheless skips over the words used in Section 6 to divine the Delegates' intent. Throughout the Opinion, the Court then applies its broad construct of "aid" to draw conclusions on each element within its outlined framework.

¶87 Let's back up a step. Article X, Section 6, says that the government "shall not make any direct or indirect *appropriation or payment from any public fund or monies*, or any grant of lands or other property *for any sectarian purpose or to aid* any church, ... or other ... institution, controlled in whole or in part by any church, sect, or denomination." (Emphasis added). In purporting to identify the "three main inquiries" required in its analysis, the Court applies the sweeping term "aid" instead of the textual "appropriation or payment from any public fund or monies." Opinion, ¶ 20. As an established principle of statutory construction, we do not rely on a provision's title over the language contained within its text. *Bates v. Neva*, 2014 MT 336, ¶ 21, 377 Mont. 350, 339 P.3d 1265

(recognizing that titles "are subordinate to statutory text and cannot be used to create ambiguity"). The operative language in the text is "direct or indirect appropriation or payment from any public fund or monies." Without examining what that language plainly means, the Court employs a broad meaning of "aid" for its analysis.[2] I begin with the plain language.

¶88 Article X, Section 6(1) prohibits four actions:

(1) direct appropriations;

(2) indirect appropriations;

(3) direct payments; or

(4) indirect payments

from public funds or monies. The first step is to examine what is an "appropriation" and what is a "payment." "A long line of Montana cases has established that 'appropriation' refers only to the authority given to the legislature to expend money from the state treasury." *Nicholson*, 265 Mont. at 415, 877 P.2d at 491. We discussed the nature of state appropriations in *Dixon*, explaining:

> "Appropriation" means an authority from the law-making body in legal form to apply sums of money out of that which may be in the treasury in a given year, to specified objects or demands against the state. It means the setting apart of a portion of the

[2] Standing alone, the title of Section 6 is not free from interpretation. It could be read, as the Court does, to proclaim that all aid to sectarian institutions is prohibited; or it could be read to preface an explanation of what aid to sectarian institutions is prohibited.

> public funds for a public purpose, and there must be money in the fund applicable to the designated purpose to constitute an appropriation.[3]

Dixon, 59 Mont. at 78, 195 P. at 845.

¶89 A "payment" is the "[p]erformance of an obligation by the delivery of money or some other valuable thing...." *Payment, Black's Law Dictionary* (10th ed. 2014). The Constitution likewise extends this prohibition to "any grant of lands or other property"—other items of value that the government must own, or be entitled to, before it can effectuate a delivery to another. Article X, Section 6, using the disjunctive "or," distinguishes an "appropriation" from a "payment." As discussed above, an appropriation comes "from the law-making body" or the "legislature" to "expend" or "apply" money "from the state treasury." *Nicholson*, 265 Mont. at 415, 877 P.2d at 491; *Dixon*, 59 Mont. at 78, 195 P. at 845. A "payment," in contrast, is

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[3] We also held in *Dixon* that the term "appropriation" as used in the Constitution "has reference exclusively to the general fund[.]" Dixon, 59 Mont. at 76, 195 P. at 844. This part of the *Dixon* holding was overruled in *Board of Regents*, in which this Court interpreted the 1972 Constitution as broadening the scope of legislative appropriation power, such that it "now extends beyond the general fund and encompasses all those public operating funds of state government." *Bd. of Regents*, 168 Mont. at 446, 543 P.2d at 1331. Therefore, *Board of Regents* broadened the scope of those public funds from which an appropriation may be expended. *See also* Treasury Fund Structure Act of 1963, 1963 Mont. Laws ch. 147, § 2. *Board of Regents* did not, however, alter or expand the meaning of "appropriation" provided by *Dixon* as "the setting apart of a portion of the public funds for a public purpose, and there must be money in the fund applicable to the designated purpose." *Dixon*, 59 Mont. at 78, 195 P. at 845.

attenuated from the law-making body. The Legislature cannot "appropriate" funds "to any private individual, private association, or private corporation not under control of the state." Mont. Const. art. V, § 11(5). "Payments" are made by the Executive Branch carrying out its appropriated spending authority, for example, by spending on contracts or by awarding grants.

¶90 For illustrative purposes, using the SSO Program as an example, the plain language of Article X, Section 6, would apply to the following:

1. Direct Appropriation: the Legislature appropriates $3 million to QEPs as defined in the statute, including religious schools;

2. Indirect Appropriation: the Legislature appropriates $3 million to SSOs, which then award the funds to QEPs, including religious schools;

3. Direct Payment: (a) the Office of Public Instruction (OPI) implements a grant program to award grants from its general fund budget to QEPs, including religious schools, or contracts with religious schools to hire teachers, or (b) the State Land Board donates a section of state trust land to a QEP on which to build a religious school;

4. Indirect Payment: (a) OPI grants funds to SSOs to provide teachers to religious schools, or (b) the State Land Board donates a section of state trust land to an SSO, which then auctions the land to support QEPs, including religious schools, or

> conveys the land for a sectarian school building site.

¶91 There is little dispute that the Tax Credit Program's tax credit does not constitute a *direct* appropriation or payment. The Department argues instead that the District Court erred by failing to consider the indirect impact that targeted tax breaks have on the public fisc. It emphasizes that the tax breaks indirectly aid sectarian schools. This argument becomes the lynchpin for the Court's holding. The argument may be correct, as far as it goes. But a theory based upon "indirect impacts" or "indirect effects" of the Tax Credit Program diverges from the constitutional text. Unambiguous constitutional language must be given its plain, natural, and ordinary meaning. *See Nelson*, ¶ 16; *Judicial Standards Comm'n v. Not Afraid*, 2010 MT 285, ¶ 16, 358 Mont. 532, 245 P.3d 1116.

¶92 In this regard, "we have long adhered to ordinary rules of grammar" in construing statutes. *Bates*, ¶ 15 (internal quotations omitted); *see also Jay v. Sch. Dist. No. 1 of Cascade Cty.*, 24 Mont. 219, 224-25, 61 P. 250, 252 (1900) (stating that "we must elicit the purpose and intent of [a statute] from the terms and expressions employed, if this is possible; calling to our aid the ordinary rules of grammar. This is the elementary rule applicable to all statutes. Other rules may be invoked only when this fails."). As the Court observes, the same principles of statutory construction apply when we interpret constitutional provisions. Opinion, ¶ 18. To invalidate the statute on the basis that it indirectly impacts sectarian schools to the detriment of the public fisc violates ordinary rules of

grammar, as it requires reading "indirect" to modify "aid" rather than "appropriation or payment." The clause, "any direct or indirect appropriation or payment from any public funds or monies ... for any sectarian purpose or to aid any" sectarian institutions, contains at least two modifiers of "appropriation or payment." The first, "direct or indirect," modifies the parallel terms "appropriation or payment." It thus prohibits any appropriations or payments, whether direct or indirect. What follows are non-parallel prepositional phrases, which describe from where these appropriations or payments may not be taken—"any public fund or monies"—and for what these appropriations or payments may not be used—"any sectarian purpose" or "to aid" sectarian institutions. The sentence structure means that "direct or indirect" modifies "appropriation or payment," and does not modify the non-parallel phrases "from public funds or monies" or "to aid any" sectarian school.[4]

¶93 The funds at issue pass from donor to SSO to student-selected school; they are accounted for in the public fisc by virtue of the dollar-for-dollar offset. *Tax Credit, Black's Law Dictionary* (10th ed. 2014) (defining tax credit as "[a]n amount subtracted directly

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[4] "Direct" and "indirect" are "prepositive" (pre-positioned) modifiers, and the subsequent prepositional phrases are "postpositive" modifiers (positioned after what they modify). *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147-48 (2012). The nearest-reasonable-referent canon of grammatical interpretation advises that a modifier normally applies only to the nearest reasonable referent (the term to which it refers) when parts of a sentence are not grammatically parallel. Scalia & Garner, *supra,* at 152.

from one's total tax liability, dollar for dollar ..."). Although this may be an indirect *transfer of benefit* to the student-selected school, the word "indirect," by itself, does not impose a prohibition upon all tax policies merely because they have that indirect effect. Rather, "indirect" modifies the subject of the clause, which is the "payment." Thus, the provision prohibits government agencies from making payments from a public fund or monies to religious schools indirectly. In this case, the funds eligible for tax credits are not "payment from any public fund or monies." The creation of the credit is a government's determination *not to collect* tax revenues. The statute diverts the funds before they ever become public monies. This well may result in an indirect impact on the "public fund or monies," but it is not an indirect payment.

¶94 Under the Tax Credit Program, the funds originate with private donors and are donated to the SSOs, which in turn direct the funds to the student's chosen school as a credit toward the student's obligation. No money originates, is deposited into, or is expended from the state treasury or any public fund. The State never takes "title" to the donated money or otherwise possesses it.

¶95 When this Court struck the property tax levy for private schools in *Chambers*, it was careful to distinguish its holding from property tax *exemptions* for religious institutions that had been upheld by the U.S. Supreme Court in *Walz*. *See Chambers*, 155 Mont. at 431-32, 472 P.2d at 1018. This was so even though the 1889 Constitution, under which Chambers was decided, contained the same prohibition on payments "from any public fund or moneys whatever" in aid of

religious schools, whether directly or indirectly, as in the 1972 Constitution. 1889 Mont. Const. art. XI, § 8.

¶96 The concern about "indirect payments" that undergirded the Delegates' decision to re-adopt the subject provisions in the 1972 Constitution was the possibility that government would appropriate funding for religious schools through intermediaries, necessitating retention of the language prohibiting "indirect" payments. "[I]t would be fairly easy to appropriate a number of funds and then-to [sic] some other group and then say this will be done indirectly." Montana Constitutional Convention, Verbatim Transcript, March 11, 1972, p. 2015 (Delegate Blaylock); *see also Direct payment, Black's Law Dictionary* (10th ed. 2014) (defining "direct payment" as a "payment made directly to the payee, without using an intermediary ..."). The Constitutional Convention was held one year after this Court had decided *Montana State Welfare Board v. Lutheran Social Services*, 156 Mont. 381, 480 P.2d 181 (1971)—in which we rejected the State Welfare Board's argument that payment of medical benefits to a woman using a religiously affiliated adoption agency would violate the Constitution—and two years after this Court's decision in Chambers, in which we distinguished property tax exemptions from impermissible property tax levies in support of religious schools. Delegate Loendorf, sponsor of the proposal to retain the "indirect" language that the Convention ultimately adopted, stated that, under his proposal, the provision "will continue to mean and do whatever it does now," expressing an apparent desire to preserve the status quo so recently stated by this Court. Montana Constitutional Convention, Verbatim

Transcript, March 11, 1972, p. 2014. Beyond indirect payments, the delegates did not discuss tax credits or deductions for private donations to religious schools.

¶97 The Convention debates on Article X, Section 6, thus reflect an intention that is consistent with the plain language the Delegates ultimately adopted. For this reason, the Court's reliance on *Nelson* to divine a broader meaning is misplaced. The Constitutional Convention record we examined in *Nelson* directly discussed the issue before the Court—the retention of common-law privileges—and contained thorough consideration explaining the Delegates' intention that such privileges would survive the broad language of the public's right to know in Article II, Section 9. *Nelson*, ¶¶ 20-21. Here, in contrast, the Convention transcript contains zero discussion of the use of, or prohibition against, tax incentives to encourage donations to private schools. The transcripts thus do not "clearly manifest an intent not apparent from the express language." *Nelson*, ¶ 16. Rather, as the Court acknowledges, the transcripts demonstrate the Delegates' desire to maintain the 1889 status quo.

¶98 Turning its focus to the specific provisions of § 15-30-3111, MCA, the Court strikes the statute in its entirety as unconstitutional. Opinion, ¶¶ 39-40. The Court concludes that the statute is facially invalid. But it does not properly address the difference between a facial and an as-applied challenge, important here because the Court's analysis—and its rationale for striking the statute—employs a strictly as-applied theory.

¶99 A party bringing a facial challenge "must show that no set of circumstances exists under which the

statute would be valid or that the statute lacks any plainly legitimate sweep." *In re S.M.*, 2017 MT 244, ¶ 10, 389 Mont. 28, 403 P.3d 324 (internal quotations omitted). We presume that a statute is constitutional, unless the Court is convinced beyond a reasonable doubt that the statute conflicts with the constitution. *Mont. Cannabis Indus. Ass'n*, ¶ 12. Any doubt must be resolved in favor of upholding the statute. *Mont. Cannabis Indus. Ass'n*, ¶ 12. Importantly, the party challenging the constitutionality of a statute bears the burden of proof. Mont. Cannabis Indus. Ass'n, ¶ 12. The Court mentions the heightened standard that a facial challenge brings, but falls short of actually analyzing the statute under this standard. Conceivably, the statute would not be applied unconstitutionally if a student chose to apply her scholarship to a non-sectarian private school. In such a case, the tax credits offered under the statute would not offend Article X, Section 6. The Court dismisses any such constitutional applications because the statute contains "no mechanism" for the Department to determine whether the money will be used to indirectly pay tuition at sectarian schools. Opinion, ¶ 36. This conclusion is problematic for at least two reasons. First, no one—not even the Department—argued that every application of the statute was unconstitutional under Article X, Section 6. Rather, the Department instituted Rule 1 to prohibit what it saw as unconstitutional applications of the statute, while still allowing what it saw as constitutional applications to continue to utilize the Tax Credit Program. Second, the Court's holding transforms almost any as-applied challenge into a facial challenge; challenged statutes rarely have a built-in mechanism

to sift out unconstitutional applications. The Court notably ignores the statute's severability clause until after it already has thrown out the entire Tax Credit Program.

¶100 The Court's heavy reliance on *Chambers, e.g.*, Opinion, ¶ 36, fails because that case involved payment from public monies to hire teachers at a parochial high school—a plain violation of the prohibition against "direct appropriations." Even though the teachers were to give "a standard course of instruction" at the sectarian school, the public school district had no control over the parochial school, and "it of necessity must supplement these courses of instruction by those required by the doctrines of the Church." *Chambers*, 155 Mont. at 437, 472 P.2d at 1020-21. Citing a Roman Catholic Encyclical, the Court pointed out that every subject taught must "be permeated with Christian piety." *Chambers*, 155 Mont. at 437-38, 472 P.2d at 1021. It was in this context—public payment of teacher salaries—that the Court concluded the lines between secular and sectarian purposes were impermissibly blurred. The case sheds no light on whether Tax Credit Program at issue is facially invalid simply because the Department does not examine how a taxpayer's contributions are used.

¶101 In rejecting any valid application of the statute, the Court's singular focus is on the Fiscal Note to Senate Bill 410. The Court relies on the Fiscal Note to conclude that many donors claiming the tax credit also would be parents who send their children to QEPs. Opinion, ¶ 32. It cites the Fiscal Note to demonstrate "the *fact* that the *Legislature* indirectly pays tuition to the QEP." Opinion, ¶ 33 (emphasis added). And it cites

the Fiscal Note in holding that the Tax Credit Program "creates an indirect payment" by reducing "the net price of attending private school." Opinion, ¶ 35. The Opinion contains no other support for its key holding that the Tax Credit Program is an indirect payment of tuition at private, religiously affiliated schools.

¶102 This is a problem. First, fiscal notes are prepared by the Governor's Office of Budget and Program Planning, an agency of the Executive Branch, not by the Legislature. Second, a fiscal note is simply the Executive's estimate of revenue and spending impacts based on a series of assumptions made by presumably affected agencies. The Court relies on the Department's fiscal note assumptions to support its conclusion that the statute is facially unconstitutional because of how the agency surmised the tax credit would be used. Those assumptions reflect the Department's advocacy here—that Rule 1 was necessary to save the statute from "aiding" sectarian schools.[5] [6] Whether the Department's assumptions

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[5] Though citing extensively from the Executive Branch Fiscal Note, the Court does not mention the 1992 Opinion from the Montana Legislature's Director of Legal Services that a proposed tax credit would not impermissibly provide an "appropriation or payment" to secular schools. He concluded that, unlike an appropriation or payment, the state would forego collecting a certain amount of tax that it otherwise would be entitled to collect, dependent upon the choices of individual parents. "The proposed tax credit would apply to a class defined without reference to religion, and any aid to religion would be the result of the private choices of individual beneficiaries." Gregory J. Petesch, Director, Legal Services, *Legal Analysis of Tuition Tax Credit* (Mont. 1992). The opinion is included in the record.

[6] The Court also does not mention the Fiscal Note's assumption

were well-researched or its predictions accurate is not the point of an inquiry into the constitutionality of the statute. They do not represent the Legislature's rationale for the statute and do not control a facial analysis of the statute's constitutionality. Third, relying on the assumption that many donors who claim the tax credit also will be parents who otherwise would be paying tuition reduces the issue to a purely as-applied challenge. It overlooks the instances in which the Tax Credit Program could constitutionally be applied.

¶103 Its failure to recognize constitutional applications of the statute under Article X, Section 6, undermines the Court's severability analysis, because—focusing only on Article X, Section 6, as the Court does—parts of the law would have valid application. Tax credits could be afforded for donations to private secular schools without running afoul of that section. That said, given its conclusion that the Tax Credit Program violates the prohibition against aid to religious schools, First Amendment considerations may require the Court's ultimate solution here—striking § 15-30-3111, MCA, in its entirety.

¶104 Quite remarkably, the Court dismisses any Free Exercise Clause concerns by proclaiming simply that "this is not one of those cases." Opinion, ¶ 40. I do not believe this issue so easily may be discarded. The Department acknowledges this as well, explaining that if the Court holds the Tax Credit Program

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about enrollment at private schools resulting from the Tax Credit Program. The Fiscal Note assumes that 87 additional students would enroll in private schools in 2015, increasing to 116 new students in 2018. Fiscal Note, at 3.

unconstitutional, "the only way of respecting both constitutional limits on the State is to invalidate the private school tax-credit program and sever it from the remaining curricular innovation program." A State's interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution [ ] is limited by the Free Exercise Clause." *Trinity Lutheran*, — U.S. —, 137 S.Ct. at 2024 (quoting *Widmar v. Vincent*, 454 U.S. 263, 276, 102 S.Ct. 269, 277, 70 L.Ed.2d 440 (1981)). The exclusion of a group "from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution." *Trinity Lutheran*, —— U.S. ——, 137 S.Ct. at 2025. Only an analysis of both Article X, Section 6, and the Free Exercise Clause would eliminate all applications of the tax credits, and the Opinion offers no such analysis.

¶105 The Court today holds that a tax credit—granted to a private individual for a donation that may or may not be directed to a religious entity—violates the State Constitution, even though it is clear under the law that a direct tax exemption by the State to a church does not. *Walz*, 397 U.S. at 675, 90 S.Ct. at 1415; Mont. Const. art. VIII, § 5(1)(b). As discussed above, the Delegates did not "clearly manifest" this intent in their discussions of Article X, Section 6. *Nelson*, ¶ 16. Although the Court does not mention them, its ruling calls into question numerous other state laws granting tax credits that may benefit religious entities, among them Montana's College Contribution Credit, § 15-30-2326, MCA, and Qualified Endowment Credit, § 15-30-2328, MCA.

¶106 At the end of the day, this case—like others involving the religion clauses—may be made more difficult by the circuitous path a legislative body designs in attempting to advance policy within its constitutional limits. It is in those instances that the Court's examination must be particularly precise. Tax policy is within the Legislature's wheelhouse. Tax laws "that seek to influence conduct are nothing new." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 567, 132 S.Ct. 2566, 2596, 183 L.Ed.2d 450 (2012) [hereinafter *NFIB*]. Quoting Justice Joseph Story's early treatise on the United States Constitution, the *NFIB* Court pointed out that "the taxing power is often, very often, applied for other purposes, than revenue." *NFIB*, 567 U.S. at 567, 132 S.Ct. at 2596 (quoting 2 Joseph Story, *Commentaries on the Constitution of the United States* § 962, 434 (1833)). The Montana Constitution does not bar the Legislature from setting tax policy to encourage any manner of private action, including incentivizing individuals to support certain philanthropic undertakings, religious or otherwise. Precisely because there is "play in the joints" between prohibited establishment and interference with free exercise, *Walz*, 397 U.S. at 669, 90 S.Ct. at 1412, the Court should hew closely to the constitutional text and uphold statutes unless their invalidity is established beyond a reasonable doubt. Even if "it differs from our idea of wise legislation, ... with the wisdom and policy of legislation, the courts have nothing to do." *Godbe v. McCormick*, 1 Mont. 105, 108 (1868); see also Chambers, 155 Mont. at 436-37, 472 P.2d at 1020.

¶107 I dissent and would affirm the District Court on the grounds discussed above.

/S/ BETH BAKER

Justice Jim Rice joins in the dissenting Opinion of Justice Baker.

/S/ JIM RICE

Justice Jim Rice, dissenting.

¶108 I concur in Justice Baker's dissenting opinion, and offer the following further thoughts.

¶109 First, this case was pled and litigated as a challenge brought by the Plaintiffs against the Department's enactment of Rule 1. The Plaintiffs gave notice of their challenge, stating "the Department of Revenue's Rule 1 implementing the [Scholarship] program violates Named Plaintiffs' rights under the Montana and U.S. Constitutions" and that "the Department of Revenue's rule is inconsistent with the statutory language and intent." In response, the Attorney General elected not to defend the Rule. No challenge to the constitutionality of § 15-30-3111, MCA, was ever made or noticed and, therefore, the Attorney General was not provided an opportunity to appear and defend its constitutionality. While the State is a party, and therefore, had notice of the proceeding itself, no challenge to the statute was made within the proceeding, and, consequently, the issue was not noticed, briefed, or argued. The Court has raised the constitutionality of the statute *sua sponte*. Striking a statute under such circumstances, including without notice, briefing or argument, and an opportunity for the parties and Attorney General to argue the issue, is a violation of due process and an inappropriate exercise of the Court's powers.

¶110 On the merits of its analysis, the Court's conclusions are largely devoid of supporting authority, and I concur with Justice Baker that the Court is not interpreting the Montana Constitution in accordance with established legal principles. Indeed, the Court's interpretation ignores, for the most part, the plain language of the Constitution and our Constitutional history.

¶111 The Court summarily declares that the subject Scholarship Program "aids sectarian schools" in violation of Article X, Section 6, of the Montana Constitution, a conclusion that is factually and legally incorrect. Opinion, ¶¶ 16, 28. First, as the Department acknowledges, the Program is facially neutral, and does not require any benefit to accrue to a particular school, religious or otherwise. The Program is voluntary, funded by charitable donations, and, consistent with its stated legislative purpose to promote school choice, is entirely directed by private action, without government direction, as follows: (1) the charitable donor has a choice, first, whether to donate, and, second, whether to donate to the private or to the public school scholarship program, but may not direct contributions to specific schools; (2) the student and parents/guardians choose the qualifying private institution, whether religious or non-religious, which the student will attend and to which a scholarship is directed; and (3) the SSO must direct the scholarship to the institution, religious or non-religious, chosen by the student's family, and may not otherwise reserve or restrict scholarships for use at a particular school. Thus, a religiously-affiliated school cannot be designated by the donor, the SSO, or the government—only by students and their families.

¶112 Further, the beneficiary of the Program is not the school, but the student/family receiving the scholarship, because they are relieved of a portion of their financial obligation for the student's attendance at a private school. This is separate from the private school itself, which must be paid the same tuition regardless of any assistance from the Program. Other courts have widely recognized this principle. See *Simmons-Harris v. Goff*, 86 Ohio St.3d 1, 711 N.E.2d 203, 211 (1999) ("The primary beneficiaries of the School Voucher Program are children, not sectarian schools."); *Meredith v. Pence*, 984 N.E.2d 1213, 1228-29 (Ind. 2013) (scholarship program not violative of no-aid provision because "[t]he direct beneficiaries under the voucher program are the families of eligible students and not the schools selected by the parents for their children to attend"); *Kotterman v. Killian*, 193 Ariz. 273, 972 P.2d 606, 616 (1999) ("The primary beneficiaries of this credit are taxpayers who contribute to the [SSOs], parents who might otherwise be deprived of an opportunity to make meaningful decisions about their children's educations, and the students themselves.... Private and sectarian schools are at best only incidental beneficiaries of [the] tax credit...."); see also *Zelman v. Simmons-Harris*, 536 U.S. 639, 649, 122 S.Ct. 2460, 2465, 153 L.Ed.2d 604 (2002) (distinguishing between "government programs that provide aid directly to religious schools" and scholarship programs based upon "genuine and independent choices of private individuals").

¶113 Similar to our acknowledgment in *Mont. State Welfare Bd. v. Lutheran Soc. Servs.*, 156 Mont. 381, 390, 480 P.2d 181, 186 (1971), of the "purely incidental" benefit that inured to the private adoption

agency under the indigent mother's assistance program, *Kotterman* recognized that programs such as the Scholarship Program can have "ripple effects" that "radiate to infinity," but that these are not constitutionally significant. *Kotterman*, 972 P.2d at 616. Any benefit of the Scholarship Program flowing from the private donor's voluntary contribution to the SSO, and then, if the student and family so chose, to a qualified religiously-affiliated school, is incidental and attenuated. Indeed, it is even more attenuated than the benefit provided by the government program in *Lutheran Soc. Servs*., because the Scholarship Program does not involve money that issues from a government fund. As the U.S. Supreme Court has stated for establishment clause purposes, "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion" are not invalid merely "because sectarian institutions may also receive an attenuated financial benefit." *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8, 113 S. Ct. 2462, 125 L.Ed.2d 1 (1993). The Program stands in stark contrast, factually and legally, to the levy imposed upon taxpayers in *State ex rel. Chambers v. Sch. Dist*., 155 Mont. 422, 472 P.2d 1013 (1970), as Montana taxpayers have not been implicated in, or made to support, a sectarian or religious activity by way of government extraction and expenditure of tax dollars, or by other coercive means.

¶114 Because the scholarships are directed by students and families, and there is no government action endorsing or directing funds for sectarian or religious purposes, there is no significance to the fact that more Program options are currently available for students choosing to attend private religious schools

than private non-religious schools. The same was true for the private religious adoption agencies at issue in *Lutheran Soc. Servs*. Other courts have widely recognized this principle. See *Oliver v. Hofmeister*, 368 P.3d 1270, 1274 (Okla. 2016) (finding no "constitutional significance" in the fact that there are "more students attending sectarian private schools than non-sectarian" private schools); *Simmons-Harris*, 711 N.E.2d at 210 (finding the fact that "[m]ost of the beneficiaries" of a neutral school scholarship program "attend sectarian schools" not relevant or persuasive). As stated by the U.S. Supreme Court, the "constitutionality of a neutral education aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school." *Zelman*, 536 U.S. at 658, 122 S. Ct. at 2470 (discussing a neutral program where 96 percent of voucher recipients were in religious schools ultimately found constitutionally permissible); see also *Mueller v. Allen*, 463 U.S. 388, 103 S. Ct. 3062, 77 L.Ed.2d 721 (1983) (same). The Program simply creates a neutral opportunity for genuine independent choices of donors and scholarship recipients, and provides that the beneficiaries of the program are the scholarship recipients. See *Oliver*, 368 P.3d at 1277 (upholding a student scholarship program because it was "completely neutral with regard to religion and that any funds deposited to a sectarian school occur as the sole result of the parent's independent decision completely free from state influence.... The parent, *not the State*, determines where the scholarship funds will be applied.") (emphasis in original).

¶115 Thus, in my view, the Court's conclusion that the Program "permits the Legislature to indirectly pay" sectarian schools, Opinion, ¶ 32, is not supported by the facts here, and, as Justice Baker's dissenting opinion also illustrates, is not supported by the plain language of the Constitution or the history of the Constitutional Convention. This conclusion follows the Department's troubling argument that the Scholarship Program is a "diversion" of "public funds" by the Legislature. The argument is premised on the Department's theory that the base tax liability each taxpayer will owe to the State on income that the taxpayer will earn should be considered "public funds," and that all tax liability—even potential liability on potential income, before a taxpayer timely completes the tax return process and applies deductions and credits for the entire year—is the property of the State, until such time a proper tax return is filed and the state permits a credit for the year's donations to be made against the taxpayer's liability. The Department's view, that " '[t]ax expenditures' are monetary subsidies the government bestows on particular individuals or organizations by granting them preferential tax treatment ... the various deductions, credits and loopholes [] are just spending by another name,"[1] might be correct for purposes of internal state government budgeting, § 5-4-104, MCA, but it is an utter misstatement of the fundamental right of private property ownership. A citizen's income—all income of each year, every year—belongs

[1] The Department's position is taken from the dissenting opinion in *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 151 n.1, 131 S. Ct. 1436, 1452, 179 L.Ed.2d 523 (2011) (Kagan, J., dissenting).

to the citizen until such time the proper portion thereof becomes owed to the government; the government does not own all income until the citizen demonstrates otherwise. At the time a citizen donates to the Scholarship Program, the tax year has not ended, the donor's total income may not have been earned, the tax return process has not been timely initiated, and the donor's potential tax liability is unknown. The government cannot at that time "own" the unknown tax liability as a public fund, or even an asset, regardless of whether the tax credit is "dollar-for-dollar" or otherwise, and regardless of the previous year's tax law. "[U]nder such reasoning all taxpayer income could be viewed as belonging to the state because it is subject to taxation by the legislature." *Kotterman*, 972 P.2d at 618; accord *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144, 131 S. Ct. 1436, 1448, 179 L.Ed.2d 523 (2011) ("Private bank accounts cannot be equated with the [] state treasury.").

¶116 A study of history reminds us that governments have oppressed or discriminated against citizens based upon their religious faith over millennia. Today, courts are to ensure that the citizen's free exercise of religion is not violated by the government. As the U.S. Supreme Court has stated in a recent religious rights case, "all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, —— U.S. ——, 138 S.Ct. 1719, 1731, 201 L.Ed.2d 35 (2018). I thus disagree with the Court's determination that it need not entertain the Plaintiffs' pled free exercise claims because "this is not one of those cases." Opinion, ¶ 40.

/S/ JIM RICE