No. 18-1195

IN THE
Supreme Court of the United States

KENDRA ESPINOZA, JERI ELLEN ANDERSON, and JAIME SCHAEFER

Petitioners,

v.

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

Respondents.

On Writ of Certiorari to the Montana Supreme Court

BRIEF FOR ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION AND IMMACULATE HEART OF MARY CATHOLIC SCHOOL AS *AMICI CURIAE* IN SUPPORT OF REVERSAL

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BRIEF FOR *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[*]

The **Arizona Christian School Tuition Organization** (ACSTO) gives Arizona students the opportunity to receive a private Christian education. ACSTO and its mission are made possible by Arizona's Tax Credit Scholarship program, which allows Arizona taxpayers to obtain dollar-for-dollar tax credits for contributions to school tuition organizations. School tuition organizations then, in turn, direct those taxpayer contributions to pay tuition for students at private schools in Arizona.

ACSTO began in 1998 as Arizona's first school tuition organization, and since then it has awarded over $200 million in scholarships to 34,000 students attending 150 Arizona Christian schools.

ACSTO has tirelessly championed and defended Arizona's Tax Credit Scholarship program. In 1999, the Arizona Supreme Court upheld the constitutionality of the individual scholarship credit in *Kotterman* v. *Killian*, 972 P.2d 606 (Ariz. 1999). ACSTO also defended the program against an Establishment Clause

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[*] Pursuant to Supreme Court Rule 37.6, *amici* represent that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consents to the filing of *amicus curiae* briefs in accord with Supreme Court Rule 37.3.

challenge, prevailing in *Arizona Christian School Tuition Organization* v. *Winn*, in which this Court ruled for ACSTO on the ground that plaintiffs lacked standing to challenge the program. 563 U.S. 125 (2011).

ACSTO wishes to preserve Arizona's program while expanding school choice across the country. Montana's Tax Credit Scholarship program operates similarly to Arizona's, and ACSTO has a keen interest in ensuring that such programs survive unjustified legal challenges so that families can send their children to schools of their choosing—including religious schools.

Immaculate Heart of Mary Catholic School (IHM) is a preschool-to-eighth-grade Catholic school immersed in the teaching of the Catholic Church. IHM strives to develop life-long learners who are courageous, compassionate disciples of Christ. Christ is the reason IHM exists, and a stronger relationship with Christ is the goal for every student who walks through IHM's doors.

IHM has a particular interest in the outcome of this case. Michigan's Legislature has attempted to appropriate limited funds to help Michigan's private religious schools pay for unfunded health and safety mandates, but opponents of that support have argued that Michigan's Blaine Amendment prohibits IHM and similarly situated schools from receiving that funding.

INTRODUCTION

The Free Exercise and Equal Protection Clauses forbid governmental discrimination against religion. *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2021 (2017). As this Court reaffirmed just two years ago, States cannot impose "special disabilities on the basis of religious views or religious status." *Ibid.* Yet that is precisely what happened here.

The Montana Supreme Court held invalid the State's Tax Credit Program, which facilitates taxpayer aid to students attending all types of private schools, *solely* because the Program *did not exclude* students who attended religiously affiliated schools. And it did so based on the "stringent prohibition on aid to sectarian schools" required by Montana's Blaine Amendment. Pet. App. 34 (citing Mont. Const. art. X, § 6).

Because Montana's Blaine Amendment "expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character," it violates the First Amendment unless it can survive strict scrutiny. *Trinity Lutheran*, 137 S. Ct. at 2021. But naked religious bigotry is not a compelling government interest, and Montana's Blaine Amendment—like every other State's Blaine Amendment—"has a shameful pedigree" that this Court should "not hesitate to disavow." *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality).

The Court should reverse the Montana Supreme Court's contrary holding and decisively reaffirm that government may not discriminate against religion *qua* religion by distributing benefits or imposing burdens based on nothing more than naked animus

against a particular faith and the people who practice it. The Court should throw off the dead hand of nineteenth-century bigotry by declaring all Blaine Amendments facially invalid, thereby expanding the availability of educational resources desperately needed by twenty-first-century parents and their children.

STATEMENT

1. In 2015, Montana enacted a student-aid Tax Credit Program, which provides "a dollar-for-dollar tax credit of up to $150" to taxpayers who donate to Student Scholarship Organizations—501(c)(3) organizations that allocate at least 90 percent of their revenue toward private-school scholarships "without limiting student access to only one education provider." Pet. App. 9 (citing Mont. Code §§ 15-30-3111, -3102(9), -3103). The same statute provides an identical credit for taxpayers who donate to public schools. Pet. App. 9 & n.1 (citing Mont. Code § 15-30-3110).

The Department of Revenue was charged with implementing and administering the program. In doing so, it "identified what it saw as a constitutional deficiency: the Tax Credit Program aided sectarian schools in violation of Article X, Section 6." Pet. App. 12. To remedy the purported deficiency, the Department adopted a rule that "excluded religiously-affiliated private schools from the Legislature's definition of [education provider]." Pet. App. 13.

2. Petitioners send their children to Stillwater Christian School, a non-denominational school in Kalispell, Montana that qualifies as an education provider under the statute but not under the Department's rule. They challenged the rule under the Free

Exercise Clauses and the Equal Protection Clauses of both the Montana and U.S. Constitutions.

The trial court ruled for petitioners and struck down the Department's rule. The court held that the Tax Credit Program did not run afoul of Montana's Blaine Amendment because the tax credits did not "involve the expenditure of money that the state has in its treasury." Pet. App. 94; see also *Ariz. Christian Sch. Tuition Org.*, 563 U.S. at 141–43 ("In [respondents'] view the tax credit is * * * best understood as a governmental expenditure. That is incorrect. * * * [T]he tax credit system is implemented by private action and with no state intervention.").

3. A divided Montana Supreme Court reversed. Even though the Tax Credit Program treated secular and religious private schools equally—and put private and public schools on the same footing—the court held that "the Tax Credit Program violates Article X, Section 6's [Montana's Blaine Amendment's] stringent prohibition on aid to sectarian schools." Pet. App. 34. Because the Tax Credit Program "permits the Legislature to indirectly pay tuition at private, religiously-affiliated schools," the court concluded that it "violates Montana's constitutional guarantee to all Montanans that their government will not use state funds to aid religious schools." Pet. App. 26, 30. The court thus left no doubt that Montana's Blaine Amendment *requires* the State to discriminate against religious schools. Like other Blaine Amendments, Montana's Blaine Amendment does not tolerate parity between religious and secular schools.

The Montana Supreme Court ignored this Court's recent decision in *Trinity Lutheran*, instead relying on

Locke v. *Davey* for the proposition that "[w]here 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." Pet. App. 16 (quoting 540 U.S. 712, 718, 722 (2004)). The court appeared to be under the impression that *Locke* explicitly immunized States' Blaine Amendments from Free Exercise challenges. See Pet. App. 16 ("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.") (citing *Locke*, 540 U.S. at 722). Although the court conceded that "an overly-broad analysis of [Montana's Blaine Amendment] could implicate free exercise concerns," it summarily concluded that "this is not one of those cases." Pet. App. 32.

Instead of upholding the Department's rule, the court severed the Tax Credit Program from the remainder of the statute, leaving in place only the tax credit for donations to public schools. Pet. App. 34.

SUMMARY OF ARGUMENT

Parents across the Nation struggle to find the resources to send their children to schools that best serve their children's needs. State legislatures have responded by developing innovative programs that allow taxpayers to receive credits for contributing to private funds that provide parents with sorely needed educational resources. Parents and students should not be walled off from these resources simply because they choose faith-based schools. Indeed, the Constitution prohibits such unequal treatment.

Trinity Lutheran demonstrates that States may not preclude otherwise-eligible recipients from receiving government funding based on their religious character. State laws that discriminate against religious organizations in that way are unconstitutional unless they can survive strict scrutiny. In *Trinity Lutheran*, the Court struck down a State's policy that excluded religious schools from competing for government funding for playground resurfacing. The Court held that the policy violated the First Amendment because it imposed "special disabilities on the basis of religious views or religious status." *Trinity Lutheran*, 137 S. Ct. at 2021.

Because Montana's Blaine Amendment, as interpreted by the Montana Supreme Court, *requires* the State to discriminate against religious schools purely because of their religious character, this should have been an easy case. But a number of courts have wrongly limited *Trinity Lutheran* to its facts—relying on a footnote that only a plurality of Justices joined—and permitted States to blatantly discriminate against religious entities solely for being religious. E.g., *Caplan* v. *Town of Acton*, 92 N.E.3d 691, 703 n.17 (Mass. 2018) (denying historic preservation grants to church); *ACLU of N.J.* v. *Hendricks*, 183 A.3d 931, 942 (N.J. 2018) (denying capital improvement grant to seminaries); *Freedom from Religion Found.* v. *Morris Cty. Bd. of Chosen Freeholders*, 181 A.3d 992, 1009–10 (N.J. 2018) (denying historic preservation grants to churches); *Real Alts., Inc.* v. *Sec'y Dep't of Health & Human Servs.*, 867 F.3d 338, 361 n.29 (3d Cir. 2017) (discussing limited applicability of *Trinity Lutheran* beyond its facts); *Carson* v. *Makin*, --- F. Supp. 3d ---,

2019 WL 2619521, at *3 (D. Me. June 26, 2019) (denying eligibility to church school for tuition grant program). The Court should correct that misapprehension and make clear that *Trinity Lutheran* was not a ticket good for one day—and one playground—only.

Moreover, contrary to the Montana Supreme Court's decision, nothing in *Locke* authorizes States to exclude religious institutions from neutral government programs. See *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1254–68 (10th Cir. 2008) (McConnell, J.) (*Locke* "does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support"); *Badger Catholic, Inc.* v. *Walsh*, 620 F.3d 775, 779–80 (7th Cir. 2010) ("The scholarships [in *Locke*] could be used at pervasively sectarian colleges, where prayer and devotion were part of the instructional program; only training to become a minister was off limits."). The Court should make clear that what *Trinity Lutheran* gives, *Locke* does not somehow take away.

Because Montana's Blaine Amendment—like every other State's Blaine Amendment—facially discriminates against religion, it is subject to strict scrutiny. See *Church of the Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 524 (1993). But it cannot satisfy that rigorous standard because, like other Blaine Amendments, it is based on rank religious bigotry, which is not a compelling government interest. As this Court explained just last year, States have a "duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint." *Masterpiece Cakeshop, Ltd.* v. *Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). Yet for

over a century, Blaine Amendments have enshrined hostility to religion into law, as numerous members of this Court have recognized.

Further, Article X, Section 6 is not narrowly tailored because it prohibits even-handed treatment of secular and religious schools and instead requires the very discrimination that the Free Exercise Clause prohibits.

ARGUMENT

I. MONTANA'S BLAINE AMENDMENT FACIALLY DISCRIMINATES AGAINST RELIGION IN VIOLATION OF THIS COURT'S TEACHING IN *TRINITY LUTHERAN*.

This should have been an easy case. The Montana Legislature designed the Tax Credit Program to ensure that the State gives equal treatment to religious and nonreligious schools. The Tax Credit Program allowed parents to claim a tax deduction for donations to scholarship programs benefiting secular as well as religious private schools. The Department's rule excluding only religious schools from the Tax Credit Program was thus a clear violation of the Free Exercise Clause, as most recently interpreted by this Court in *Trinity Lutheran*.

1. In *Trinity Lutheran*, this Court held that a policy that "expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character" contravenes the Free Exercise Clause unless it can survive strict scrutiny. 137 S. Ct. at 2021. Although *Trinity Lutheran* addressed a fairly unique grant program for refurbishing school playgrounds, the Court's holding was "unremarkable in light of [this Court's]

prior decisions"—none of which had anything to do with playgrounds. *Ibid.* (citing *Mitchell*, 530 U.S. 793, *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995), *Lukumi*, 508 U.S. 520, *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), and *Widmar* v. *Vincent*, 454 U.S. 263 (1981)).

Trinity Lutheran made clear that any state policy requiring an institution "to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified * * * must be subjected to the 'most rigorous' scrutiny." *Id.* at 2024 (quoting *Lukumi*, 508 U.S. at 546). "Under that stringent standard, only a state interest 'of the highest order'" will survive review. *Ibid.* (quoting *McDaniel* v. *Paty*, 435 U.S. 618, 628 (1978)). And any such law "must be narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 531–32.[1]

2. Some courts have wrongly limited *Trinity Lutheran* to its facts because, in a footnote, a plurality of Justices opined that the decision did "not address religious uses of funding or other forms of discrimination." 137 S. Ct. at 2024 n.3 (Roberts, C.J., joined by

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[1] The Department's rule must survive strict scrutiny whether or not the rule was motivated by religious hostility. Courts have applied the Free Exercise Clause "numerous times when government officials [have] interfered with religious exercise not out of hostility or prejudice, but for secular reasons." *Shrum* v. *City of Coweta*, 449 F.3d 1132, 1144–45 & nn.7–11 (10th Cir. 2006) (collecting cases). Accordingly, "close scrutiny of laws singling out a religious practice for special burdens is not limited to the context where such laws stem from animus." *Cent. Rabbinical Cong. of U.S. & Can.* v. *N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 197 (2d Cir. 2014).

Kennedy, Alito, and Kagan, JJ.).[2] But that footnote did not garner a majority, and as Justice Gorsuch explained, "[s]uch a reading would be unreasonable" because this Court's "cases are 'governed by general principles, rather than ad hoc improvisations.'" *Id*. at 2026 (Gorsuch, J., joined by Thomas, J., concurring in part) (quoting *Elk Grove Unified Sch. Dist*. v. *Newdow*, 542 U.S. 1, 25 (2004) (Rehnquist, C.J., concurring in judgment)).

Other courts have correctly recognized that *Trinity Lutheran*'s holding—that States cannot impose "special disabilities on the basis of religious views or religious status," *id.* at 2021 (majority)—is not confined to playground equipment. E.g., *Taylor* v. *Town of Cabot*, 178 A.3d 313, 322–25 (Vt. 2017) (applying *Trinity Lutheran* to uphold a historic preservation grant to a church); *Moses* v. *Ruszkowski*, --- P.3d ---, 2018 WL 6566646, at *1–2 (N.M. Dec. 13, 2018) (upholding textbook-loan program for students attending religious schools in light of *Trinity Lutheran*). These courts have accurately read *Trinity Lutheran* to prohibit withholding "access to secular benefits generally

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[2] See, e.g., *Caplan*, 92 N.E.3d at 703 n.17 (*Trinity Lutheran* does not apply to historic preservation grants); *Hendricks*, 183 A.3d at 942 (*Trinity Lutheran* footnote 3 "appeared to" limit the Court's broader holding); *Morris Cty.*, 181 A.3d at 1009–10 ("scope" of *Trinity Lutheran* did not "extend * * * beyond playground resurfacing"); see also *Real Alts.*, 867 F.3d at 361 n.29 (through footnote 3, *Trinity Lutheran* "confine[d] its holding to the particular facts and issue before it"); *Carson*, 2019 WL 2619521, at *3 (under *Trinity Lutheran* footnote 3, Maine can still exclude religious schools from its funding program).

available to like institutions" merely because of an institution's "religious affiliations." *Taylor*, 178 A.3d at 321.

3. The Department's rule cannot be squared with *Trinity Lutheran* because the rule singles out religious schools for disfavored treatment precisely *because* they are religious. The Montana Supreme Court should have had little difficulty in striking down the rule. Instead, it held that the Tax Credit Program violated Article X, Section 6 of the Montana Constitution because that section categorically prohibits aid to sectarian schools. The Montana Supreme Court thus made clear that Montana's Blaine Amendment *requires* discrimination against religion.

Instead of applying *Trinity Lutheran*, the Montana Supreme Court believed its holding was compelled by *Locke*. But *Locke* does not endorse the type of blanket discrimination against religion required by Montana's Blaine Amendment. In *Locke*, the Court upheld a Washington scholarship program that prohibited students from using state funds to pursue a degree in devotional theology. In upholding the program, the Court cited the "historic and substantial state interest" in "not funding the religious training of clergy." *Locke*, 540 U.S. at 722 n.5, 725. The Court also recognized that funding for "*religious instruction* is of a different ilk" than funding provided for general studies at *religious institutions*. *Id.* at 723 (emphasis added) ("early state constitutions saw no problem in explicitly excluding *only* the ministry from receiving state dollars").

As this Court has recognized, *Locke* does not broadly immunize discriminatory state laws from

Free Exercise challenges. *Trinity Lutheran*, 137 S. Ct. at 2023–24. The funding restriction at issue in *Locke* survived strict scrutiny because it was consistent "with the State's antiestablishment interest in not using taxpayer funds to pay for the training of clergy." *Id.* at 2023. The Court emphasized the limited nature of the funding exception, "[taking] account of Washington's antiestablishment interest only after determining * * * that the scholarship program did not 'require students to choose between their religious beliefs and receiving a government benefit.'" *Ibid.* (quoting *Locke*, 540 U.S. at 720–21). Rather than excluding all religious individuals or entities from state funding, the program challenged in *Locke* "permit[ted] students to attend pervasively religious schools" and "to take devotional theology courses." 540 U.S. at 724–25. In sum, it was the historically rooted constitutional interest and the program's narrow tailoring that led to its being upheld.

The key distinction between *Locke* and *Trinity Lutheran* is that in *Locke* the State prohibited funds from being used for particular *activities*, whereas in *Trinity Lutheran* the State sought to prevent funds from flowing to particular *institutions*. *Locke* does not immunize Montana's Blaine Amendment from strict scrutiny because here—as in *Trinity Lutheran*—the State is not concerned with *what* the scholarship funds are being used for but with *who* is using them. The Montana Supreme Court thus erred in failing to ask whether Article X, Section 6 furthers a compelling government interest or is narrowly tailored. And unlike the program upheld in *Locke*, Montana's Blaine Amendment cannot survive strict scrutiny because it was designed

not to prevent the State from funding the preparation of clergy, but to codify a policy of religious bigotry.

II. MONTANA'S BLAINE AMENDMENT CANNOT SURVIVE STRICT SCRUTINY.

Because Montana's Blaine Amendment facially discriminates against religious institutions—by requiring the State to disadvantage them—it must be narrowly tailored to further a compelling state interest to survive petitioners' constitutional challenge. It is not. As a historical matter, the primary interest furthered by Blaine Amendments was religious bigotry. More recently, delegates at state constitutional conventions, legislators, and courts have suggested that discrimination *against* religion is necessary to ensure that the government does not *advance* religion in violation of the Establishment Clause. But neither of those interests is compelling. And as this case confirms, Montana's Blaine Amendment is not narrowly tailored.

A. Blaine Amendments Have A "Shameful Pedigree" Of Anti-Catholic Bigotry.

The primary "state interests" advanced by Blaine Amendments were marginalizing Catholic minorities and suppressing faith-based education. But as this Court recently reiterated, States have a "duty under the First Amendment *not* to base laws or regulations on hostility to a religion or religious viewpoint." *Masterpiece Cakeshop*, 138 S. Ct. at 1731 (emphasis added). Because many States continue to abdicate that duty, the Court should make clear that the Free Exercise Clause bars any religious discrimination—even if it is enshrined in a State constitution.

1. The story of the Blaine Amendment begins in 1875, when President Ulysses S. Grant—riding a tide of nativism and anti-Catholic bigotry—publicly vowed to "[e]ncourage free schools, and resolve that not one dollar * * * shall be appropriated to the support of any sectarian schools." Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Leg. Hist. 38, 47 (1992).

Maine Congressman James G. Blaine took up the mantle and introduced the so-called "Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions." *Mitchell*, 530 U.S. at 828 (plurality). "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.'" *Ibid*.

Senator Blaine's federal constitutional amendment failed, but by 1890, some 29 States had incorporated similar prohibitions—so-called Blaine Amendments—into their constitutions. Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 673 (1998). It is now widely acknowledged that these Amendments are "a remnant of nineteenth-century religious bigotry promulgated by nativist political leaders who were alarmed by the growth of immigrant populations and who had particular disdain for Catholics." *Id.* at 659; see also *Am. Legion* v. *Am. Humanist Ass'n*, 139 S. Ct. 2067, 2097 n.3 (2019) (Thomas, J., concurring in judgment) (collecting materials).

2. Scholars and historians are not the only ones who have highlighted the Blaine Amendments' "shameful pedigree." *Mitchell*, 530 U.S. at 828 (plurality) (Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.) (Blaine Amendments have a "shameful pedigree that we do not hesitate to disavow").

Members of this Court have done so as well and called for the equal treatment of faith-based and secular schools:

- Missouri's Blaine Amendment "punished the free exercise of religion" and permitted "express discrimination against religious exercise." *Trinity Lutheran*, 137 S. Ct. at 2022 (majority) (Roberts, C.J., joined by Thomas, Kennedy, Alito, Kagan, and Gorsuch, JJ.).
- Blaine Amendments violate the Free Exercise Clause—"the general principles here do not permit discrimination against religious exercise—whether on the playground or anywhere else." *Id.* at 2026 (Gorsuch, J., joined by Thomas, J., concurring in part).
- There is no "administrative or other reason to treat church schools differently" from secular schools—the "sole reason advanced that explains the difference is faith * * * [which] calls the Free Exercise Clause into play." *Id.* at 2027 (Breyer, J., concurring in judgment).
- The "'sectarian' test 'has a shameful pedigree' that originated during the 1870s when Congress considered the Blaine Amendment," which "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.'" *Am. Legion*, 139 S. Ct. at 2097 n.3 (Thomas, J., concurring in judgment).

- "[S]o long as the money is granted based on neutral criteria that are faithfully applied, I don't know how you can draw a distinction between a program that's open to everybody and a selective program." Transcript of Oral Argument at 46–47, *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012 (2017) (No. 15-577) (Alito, J.).
- Blaine Amendments "depriv[e] one set of actors from being able to compete in the same way everybody else can compete because of their religious identification." *Id*. at 48–49 (Kagan, J.).

3. Anti-Catholic bigotry unfortunately remained alive and well in late-twentieth-century America. As late as 1968, Justice Black "accuse[d] Catholics who advocated for textbook loans to religious schools of being 'powerful sectarian religious propagandists * * * looking toward complete domination and supremacy of their particular brand of religion.'" *Am. Legion*, 139 S. Ct. at 2097 n.3 (Thomas, J., concurring in judgment) (quoting *Bd. of Educ.* v. *Allen*, 392 U.S. 236, 251 (1968) (Black, J., dissenting)).

And in 1971—the year before Montana's Constitutional Convention, and the year the Court decided *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971)—"some Justices were still 'influenced by residual anti-Catholicism and by a deep suspicion of Catholic schools.'" *Am. Legion*, 139 S. Ct. at 2097 n.3 (quoting Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory L. J. 43, 58 (1997) ("[The *Lemon*

Court] relied on what it considered to be inherent risks in religious schools despite the absence of a record in *Lemon* itself and despite contrary fact-finding by the district court in the companion case.")).

Tellingly, "in his concurring opinion [in *Lemon*], Justice Douglas (joined by Justice Black) repeatedly quoted an anti-Catholic book, including for the proposition that, in Catholic parochial schools, '[t]he whole education of the child is filled with propaganda.'" *Ibid*. (quoting *Lemon*, 403 U.S. at 635 n.20 (quoting, in turn, Loraine Boettner, *Roman Catholicism* 360 (1962))). As Justice Thomas later explained, Dr. Boettner's book, which Justice Douglas cited, said

> that Hitler, Mussolini, and Stalin learned the "secret[s] of [their] success" in indoctrination from the Catholic Church, and that "an undue proportion of the gangsters, racketeers, thieves, and juvenile delinquents who roam our big city streets come * * * from the [Catholic] parochial schools," where children are taught by "brain-washed," "ignorant European peasants."

Ibid. (quoting Boettner, *Roman Catholicism* at 363, 370–72).

The historical record confirms what several members of this Court have observed: Blaine Amendments, wherever they may be found, are based on rank religious bigotry in violation of the Free Exercise Clause.

B. Montana's Blaine Amendment—First Adopted In 1889—Was Readopted In 1972 With Full Knowledge Of Its Shameful, Discriminatory History.

1. Some States adopted their Blaine Amendments voluntarily. Others had no choice—"Congress forced * * * territories seeking admission to the union to adopt Blaine provisions as a condition of statehood." *Moses*, --- P.3d ---, 2018 WL 6566646, at *4.

Montana initially fell into the latter category. When Congress passed Montana's Enabling Act in 1889, it required the State to enact a constitution that provided for a system of public schools "free from sectarian control." Act of Feb. 22, 1889, ch. 180, §§ 4, 14, 25 Stat. 676, 676–77, 680 (prohibiting state aid to "any sectarian or denominational school, college, or university"). Montana did so.

2. In 1972, Montana voluntarily retained its Blaine Amendment when it adopted a new constitution that carried forward the 1889 constitution's "broad and general no-aid provision." Pet. App. 19 (Montana's Blaine Amendment was "among the most stringent [no-aid clauses] in the nation") (alteration in original); Pet. App. 22 ("the 1972 Constitutional Convention Delegates intended Article X, Section 6, to retain the meaning of * * * the Montana Constitution of 1889").

Montana's Blaine Amendment—entitled "Aid prohibited to sectarian schools" and found in Article X, Section 6 of its constitution—now presently provides:

> 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.

The retention of the Blaine Amendment by Montana's 1972 Constitutional Convention was neither an accident of history nor a procedural oversight. Delegates at the 1972 Convention explicitly noted that the provision restricting aid was "stated just as it is in the old Constitution," 6 *Montana Constitutional Convention 1971–1972* 2015 (1981) (Delegate Blaylock), and that a number of "other states have a Blaine-type Amendment." *Id.* at 2030 (Delegate Champoux). The main proponent of the language the Convention ultimately adopted stated that, under his proposal, the provision "will continue to mean and do whatever it does now." *Id.* at 2014 (Delegate Loendorf). The final version contained only minor stylistic changes and a short new subsection allowing non-public schools to continue receiving federal funds—thus "maintain[ing] the status quo." *Id.* at 2025 (Delegate Loendorf).

The delegates to the Convention were not ignorant of the Blaine Amendment's sordid past. One delegate urged the Convention to abandon the Blaine Amendment, arguing that "it is time to bury some of our old prejudices and our fears, particularly our fears." *Id.* at 2023 (Delegate Kelleher). Another explained that "the Blaine Amendment is a badge of bigotry, and it should be repealed." *Id.* at 2012 (Delegate Schiltz). But deep-seated prejudices can be difficult to

overcome. Regrettably, the same anti-Catholic animus that inspired the original wave of Blaine Amendments was alive and well at the time of Montana's 1972 Convention. See *Am. Legion*, 139 S. Ct. at 2097 n.3 (Thomas, J., concurring in judgment).

The delegates even rebuffed a modest proposal to remove the prohibition on mere "indirect" aid to religious schools. 6 *Montana Constitutional Convention* at 2011–15. When one delegate proposed an amendment to address concerns raised by the Montana Catholic Conference that the "rigid" no-aid requirement would prevent even "nonstate money from being distributed for the benefit of all students," *id.* at 2027 (Delegate Campbell), other delegates quickly shot down the proposal. *Id.* at 2027–29. As the sponsoring delegate tried to explain, the amendment was intended to ensure that Catholic and Protestant children and families would have equal access to federal funds made available to the State. *Id.* at 2030 (Delegate Campbell). But after a brief debate, the amendment failed overwhelmingly by a vote of 13 to 79. *Id.* at 2030–31.

To be sure, many delegates to the Convention claimed to support the Blaine Amendment because it supposedly ensured the "separation of church and state." *Id.* at 2018 (Delegate Woodmansey).[3] But the

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[3] See also *id.* at 2021–22 (Delegate Harper) ("this is no little thing, this matter of keeping separation of church and state"); *id.* at 2018 (Delegate Skari) ("I think we have built a substantial, solid wall in our old Constitution. I think that this wall is good and proper. I don't think we could remove it if we wanted to."); *id.* at 2009–10 (Delegate Burkhardt) ("Montana is in process of transition, as is our nation, * * * and there must be some holding firm on certain principles as we move out in others. And I've

"principles" on which delegates sought to "hold[] firm" were none other than the exclusion of Catholics from full participation in Montana life—the same hostility that underpinned the Blaine Amendment in the first place. *Id.* at 2009–10 (Delegate Burkhardt). Indeed, some Delegates hastened to specify that they were "Protestant"—i.e., not Catholic—and had "no intention" of sending their children to "private" institutions—like "parochial schools." *Id.* at 2012 (Delegate Brown).

In short, when the opportunity came to eradicate this vestige of anti-Catholic bigotry, Montana unfortunately stayed its hand.

3. Even if Montana had retained its Blaine Amendment solely to avoid entanglements between church and state, a State's interest in avoiding an Establishment Clause violation *cannot* be compelling when its "fears" are "unfounded." *Lamb's Chapel*, 508 U.S. at 395; accord, e.g., *Widmar*, 454 U.S. at 280–81 (Stevens, J., concurring in judgment) ("groundless" "fear of violating the Establishment Clause" cannot satisfy strict scrutiny). Montana cannot justify its Blaine Amendment on this ground because it prohibits even indirect funds from reaching religious schools, and as the Court has explained, "no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of

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sometimes thought we're midway between the cow pony and solid fuel rocketry here in Montana. * * * [T]he majority of us would advocate keeping the section as it now stands.").

government endorsement." *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 655 (2002).[4]

Montana's Tax Credit Program does not endorse religion because taxpayers may reap the same credit by donating to *public schools*—a credit the Montana Supreme Court did not strike down—as well as secular private schools. Pet. App. 34. As the Court reiterated in *Trinity Lutheran*, a State's "policy preference for skating as far as possible from religious establishment concerns" is not a compelling government interest that can justify blatant discrimination against religion. 137 S. Ct. at 2024. Any state interest in avoiding Establishment Clause violations "is limited by the Free Exercise Clause," *Widmar*, 454 U.S. at 276—it is not grounds for *overriding* the Free Exercise Clause.

4. The State also has contended that Montana's Blaine Amendment was "re-adopted" in 1972 solely to ensure adequate funding for the State's public schools. Br. in Opp. at 2–6. But that theory is undermined by uncontroverted testimony from the Convention itself, which explained that *eliminating* the Blaine Amendment would *reduce* the financial burden on public schools by making private education more affordable. See 6 *Montana Constitutional Convention*

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[4] In this litigation, Montana has affirmatively argued that its Blaine Amendment is "unique from other states' no-aid provisions" because it prohibits even *indirectly* funding religious schools—regardless of whether that money comes from the treasury or other more remote sources such as tax credits. See Pet. App. 16, 21–23 (Montana's Blaine Amendment prohibits religious schools from receiving state funding even if it is earmarked for secular instruction). Far from saving the Blaine Amendment, this concession dooms it.

at 2017 (Delegate Artz) ("We are saving the taxpayers of Cascade County $1,364,081. * * * Holy Family [alone] is saving Cascade County approximately $12,000 on [each of its] 18 students.").

Accordingly, Montana's Blaine Amendment, which facially discriminates against religious institutions, is not supported by any compelling state interest.

C. Montana's Blaine Amendment Is Not Narrowly Tailored.

Far from going "a long way toward including religion in its benefits," *Locke*, 540 U.S. at 724, Montana's Blaine Amendment *categorically* excludes parents from seeking financial aid for their children if they choose to send their children to a religious school, even though those schools provide general education, not ministerial training. That is a far cry from the "otherwise inclusive aid program" that this Court approved in *Locke*. *Id.* at 715.

Any interest in avoiding an Establishment Clause violation "could be achieved by narrower [policies] that burdened religion to a far lesser degree" than does Article X, Section 6. *Lukumi*, 508 U.S. at 546. Montana's Blaine Amendment paints with the broadest possible brush—prohibiting *all* financial assistance, no matter how minimal or indirect—to otherwise eligible parents and children based *solely* on their schools' religious affiliation. This puts religious institutions to an unconstitutional choice—"participate in an otherwise available benefit program or remain a religious institution." *Trinity Lutheran*, 137 S. Ct. at 2021–22. Sweeping status-based discrimination like this cannot pass constitutional muster.

* * *

For over a century, Blaine Amendments have blocked some children from accessing the educational opportunities otherwise available to all children. They continue to do serious harm today. The Court should make clear once and for all that religious bigotry is not constitutionally protected, but is fundamentally at odds with the Free Exercise Clause.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Montana Supreme Court.

Respectfully submitted.

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