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 Supreme Court Of Montana**

## BRIEF OF OKLAHOMA, GEORGIA, ARIZONA, ALABAMA, ALASKA, ARKANSAS, KANSAS, THE COMMONWEALTH OF KENTUCKY BY AND THROUGH GOVERNOR MATT BEVIN, LOUISIANA, GOVERNOR PHIL BRYANT OF THE STATE OF MISSISSIPPI, MISSOURI, NEBRASKA, OHIO, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS


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## INTERESTS OF *AMICI CURIAE*

This case implicates the vital interests of Oklahoma, Georgia, Arizona, Alabama, Alaska, Arkansas, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, Ohio, South Dakota, Tennessee, Texas, Utah, and West Virginia[1] in promoting the general welfare of our residents and protecting their constitutional rights.

Many of the *Amici* States have enacted scholarship programs similar to the one the Montana Supreme Court struck down in this case. These programs provide financial assistance that empowers parents to choose better educational opportunities for their children. The *Amici* States permit students in these programs to attend private schools of sufficient caliber, religious or not, as a matter of good policy. But opening these programs to religious and secular schools alike is also required by the First Amendment.

Many of the *Amici* States also have a constitution that includes a "Blaine Amendment" or "no-aid provision" similar to Article V, Section 11(5), and Article X, Section 6, of the Montana Constitution. The court below relied on Montana's Blaine Amendment in striking down the scholarship program, causing the constitutional violations at issue in this case. Although each Blaine Amendment is slightly different, these provisions must be read, if at all possible, to permit states to include religious schools in generally applicable tax-credit scholarship programs. By doing so, states

[1] *Amici* submit this brief pursuant to Sup. Ct. Rule 37.4.

can both protect all residents' First Amendment rights and maximize every child's opportunity to secure an excellent education.

## SUMMARY OF THE ARGUMENT

I. State law that mandates discrimination against religion violates the First Amendment unless "a state interest of the highest order" justifies it. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (cleaned up). A long line of precedent from this Court makes it abundantly clear that barring all religious participants in a facially neutral program on anti-establishment grounds is not a compelling interest. Yet that is precisely what the Montana Supreme Court did in the case below.

The Montana Supreme Court did not avoid this First Amendment violation by dismantling the state's school choice scholarship program *in toto*. State law, including in a state constitution, is void and unenforceable if it violates the U.S. Constitution. The Supremacy Clause requires courts to disregard an unconstitutional state law; a court cannot apply the discriminatory law first and then decide whether the results provide equal treatment. But the decision below held the opposite when it interpreted and applied the state constitution's Blaine Amendment as requiring every public benefit be withdrawn as soon as a disfavored religious group even incidentally benefits. This "evince[s] a hostility to religion" and creates a First Amendment

problem independent of any equal protection issues. *Van Orden v. Perry*, 545 U.S. 677, 684 (2005) (plurality opinion).

II. Reversal of the decision below would encourage other state courts to avoid similar First Amendment violations and give proper respect to neutral state laws that help the religious and nonreligious alike. The text of most state constitutions that contain Blaine Amendments or "no-aid" provisions does not require the broad interpretation Montana chose here. Prohibitions on uses of state funds do not prohibit individuals' use of tax credits, nor do prohibitions on aiding religious schools prohibit aid to religious students. Nine states have found no conflict between their state Blaine Amendments and tax-credit scholarships. Other state courts are more likely to follow that precedent and avoid First Amendment violations if the Montana Supreme Court is reversed here.

III. On the other hand, affirming the Montana Supreme Court's decision could have a sizeable negative effect nationwide. That judgment would encourage other state courts to curtail or entirely eliminate neutral state education programs designed to help the underprivileged just because religious adherents want to participate with everyone else. Religious schools disproportionately volunteer for these programs and parents disproportionately choose religious schools across the states. Over a quarter million students in school-choice programs like Montana's could be deprived of a better education if religious schools and parents cannot actively seek educational improvement. This Court should not countenance the "odious" position

that religious participants are unwelcome in neutral programs. *Trinity Lutheran*, 137 S. Ct. at 2025.

## ARGUMENT

### I. Montana's Blaine Amendment, as applied by the decision below, violates the First and Fourteenth Amendments to the U.S. Constitution.

At its core, this case is rather simple. The Montana Legislature created a neutral and generally applicable public benefit program. The Montana Supreme Court invalidated this program because some benefits would incidentally accrue to religious institutions. The court did so based on a Montana constitutional provision, checkered with a history of religious animus, that imposes special disabilities based on religious status. The First and Fourteenth Amendments forbid such treatment of religious persons and organizations.

#### A. This Court's precedent requires reversal.

1. The tax-credit program invalidated by the Montana Supreme Court is neutral toward religion and generally available to all Montana taxpayers. It provides a tax-credit to any person, regardless of religion, who donates to a qualified scholarship organization. The organization may then use those donations to provide tuition scholarships to any child to attend any qualified private school, regardless of religious affiliation.

The Montana Supreme Court invalidated this program because it would incidentally benefit religious schools if scholarship recipients chose to attend those schools. In its own words, the Montana Supreme Court held that Montana's Blaine Amendment required the state to discriminate "between an indirect payment to fund a secular education and an indirect payment to fund a sectarian education." Pet. App. 29.

This Court's precedent makes clear that state law cannot mandate such discrimination. The court below used Montana's Blaine Amendment to target "conduct motivated by religious beliefs." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993). But "a law targeting religious beliefs as such is never permissible." *Id.* at 533 (citing *McDaniel v. Paty*, 435 U.S. 618, 626 (1978); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940)). This Court's "Establishment Clause cases . . . forbid[] an official purpose to disapprove . . . of religion in general." *Lukumi*, 508 U.S. at 532. And "the protections of the Free Exercise Clause pertain if the law at issue," like Montana's Blaine Amendment, "discriminates against some or all religious beliefs. . . ." *Id.*

A law violates the First Amendment not only when it directly restricts a religious practice, but also when it denies a public benefit because of religious affiliation. Over 70 years ago, this Court stated that a state "cannot hamper its citizens in the free exercise of their own religion" by excluding "members of any [] faith, because of their faith, or lack of it, from receiving the

benefits of public welfare legislation." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 16 (1947). And just two years ago this Court reaffirmed that the First Amendment "subjects to the strictest scrutiny laws that target the religious for special disabilities based on their religious status," and "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest of the highest order." *Trinity Lutheran*, 137 S. Ct. at 2019 (citations and internal marks omitted); *see also id.* at 2022. The court below held that Montana law forbids any state program that indirectly benefits religious organizations, thereby imposing special disabilities based on religious status in contravention of the First Amendment.

2. The Montana Supreme Court offered little justification for imposing this discriminatory burden, much less a "state interest of the highest order" to survive "the strictest scrutiny." *Id.* At most, the justices in the majority intimated that this discriminatory treatment is required by the Establishment Clause. *See* Pet. App. 30-31, 35, 43-49, 57. A long line of this Court's cases, however, have recognized that the Establishment Clause imposes no barriers to state programs "in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) (citing *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Wash. Dep't of Servs. for Blind*, 474

U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)); *see also Mitchell v. Helms*, 530 U.S. 793 (2000).

And Montana's program layers even *more* private choice between the government benefit and religious institutions than the program in *Zelman*. The government benefit (the tax credit) is given to an individual who chooses to donate to a scholarship organization, although they may also receive a similar tax credit by donating to public schools. *See* Pet. App. 37-38 n.2. A family must then choose to send their child to a religious school (or not) and apply for a scholarship from the scholarship organization. Finally, the scholarship organization must choose to support that family by providing a tuition scholarship to a school operated by a religious entity. Only then would a religious institution see any benefit from Montana's tax statute.

If *Zelman*'s single layer of private choice sufficiently mediates any concerns about benefitting religious organizations, surely Montana's three degrees of separation can pose no Establishment Clause concerns. *Cf. Mitchell*, 530 U.S. at 816 (plurality op.) ("We viewed this arrangement, however, as no different from a government issuing a paycheck to one of its employees knowing that the employee would direct the funds to a religious institution."); *Locke*, 540 U.S. at 727-28, 734 (Scalia, J., dissenting) ("No one would seriously contend, for example, that the Framers would have barred ministers from using public roads on their way to church. . . . What next? Will we deny priests and

nuns their prescription-drug benefits on the ground that taxpayers' freedom of conscience forbids medicating the clergy at public expense?"). As in *Trinity Lutheran*, Montana's "policy preference for skating as far as possible from religious establishment concerns . . . cannot qualify as compelling" enough to justify "the clear infringement on free exercise" that the court below imposed. 137 S. Ct. at 2024.

3. Not even Respondents assert that the Establishment Clause requires the result below. Instead, they argue that Montana's Blaine Amendment is "within the 'play in the joints' of the Religion Clauses." Opp. 30 (quoting *Locke v. Davey*, 540 U.S. 712, 718-19 (2004)). This is incorrect. *See* Pet. Br. 23-28. Whereas *Locke* involved a concern "at the historic core of the Religion Clauses," *Trinity Lutheran*, 137 S. Ct. at 2023, at the historic core of Montana's Blaine Amendment lies religious hostility, *see* Pet. Br. 28-45. And while the state in *Locke* "went 'a long way toward including religion in its benefits,'" *Trinity Lutheran*, 137 S. Ct. at 2023 (quoting *Locke*, 540 U.S. at 724), Montana goes a long way toward *excluding* religion by prohibiting public programs that have three degrees of separation from religion. Even the dissent in *Trinity Lutheran* was primarily concerned with direct funding of houses of worship from the public treasury, *see id.* at 2027-30 (Sotomayor, J., dissenting)—a concern not presented by the tax-credit program in this case.

### B. The Montana Supreme Court's decision to invalidate the entire tax-credit program does not cure the constitutional violations.

Respondents contend that the Montana Supreme Court fixed any constitutional defect by eliminating Montana's scholarship program altogether. *See* Opp. 12, 22-24, 32-34, 36. In effect, the Court below held that under the state's Blaine Amendment, if religious institutions must be included in Montana's program, then no one can be allowed to benefit. *See* Pet. App. 28-29. Better to raze a program, Montana law now commands, than to allow any religious entity to obtain even the most incidental benefits. But enforcing a state law that requires hostility to religion does not cure constitutional problems; it perpetuates them.

1. Because the Montana Supreme Court interpreted Montana's Blaine Amendment to require unconstitutional discrimination, the Blaine Amendment should never have been applied in the first place. "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby County*, 118 U.S. 425, 442 (1886). Since Montana's Blaine Amendment violates the First Amendment, it is "void" and to be given no effect. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). The only permissible course is to recognize that Montana's Blaine Amendment is unconstitutional, *and then not enforce it*.

The Montana Supreme Court's opposite approach raises Supremacy Clause concerns. *See* U.S. CONST. art. VI, cl. 2. Because Montana's Blaine Amendment and the First Amendment "clash," the Supremacy Clause "creates a rule of decision": courts "must not give effect to state laws." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015); *see also Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("It is basic to this constitutional command that all conflicting state provisions be without effect."). That is, where there exists "a conflict between a law and the Constitution, judges . . . have a duty 'to adhere to the latter and disregard the former.'" *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1220 (2015) (quoting THE FEDERALIST No. 78, at 468 (A. Hamilton)). The Supremacy Clause does not countenance Respondents' approach, which is to apply a discriminatory state law first, and then later analyze whether the aftermath contains any federal constitutional problems.

2. Sidestepping the Supremacy Clause also creates a legal rule in Montana that raises a new constitutional violation. The current rule in Montana is: any public benefit is available to all, but as soon as the disfavored religious class may benefit, directly or indirectly, the benefit shall be available to no one. This rule has no logical stopping point. The State may support soup kitchens—unless the Catholic Church opens a soup kitchen. The State may assist businesses in maintaining their storefront sidewalks—unless any business regularly allows the Salvation Army to seek charity there. The State may provide police, fire, and

antiterrorism protection—unless that allows the Synagogue to spend less funds on security and safety measures. No member of this Court has ever countenanced that this is consistent with our federal Constitution.[2]

When state law so forbids even the most incidental benefit to religion, it violates the Establishment Clause by "affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'" *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963) (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)). The Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984); *see also Rosenberger v. Rector and Visitors of UVA*, 515 U.S. 819, 845-46 (1995). The Montana Supreme Court interpreted its constitution to "evince a hostility to religion by disabling the government" from enacting social welfare programs that even in the most incidental ways benefit religion. *Van Orden*, 545 U.S. at 684. Because it is "based primarily on the religious nature" of participating schools, the decision below

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[2] *See Trinity Lutheran*, 137 S. Ct. at 2027 (Breyer, J., concurring) ("'[C]utting off church schools from' such 'general government services as ordinary police and fire protection . . . is obviously not the purpose of the First Amendment.'" (quoting *Everson*, 330 U.S. at 17-18)); *id.* at 2040 (Sotomayor, J., dissenting) (agreeing that "[t]o fence out religious persons or entities from a truly generally available public benefit—one provided to all, no questions asked, such as police or fire protections—would violate the Free Exercise Clause"); *Zobrest*, 509 U.S. at 8 (citing *Widmar v. Vincent*, 454 U.S. 263, 274-75 (1981)).

"lead[s] the law to exhibit a hostility toward religion." *Id.* at 704 (Breyer, J., concurring). It is hard to imagine a more hostile legal regime than one wherein everything religion touches is tainted as anathema to the state.

"The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 248 (1990) (quoting *McDaniel*, 435 U.S. at 641 (Brennan, J., concurring in the judgment)). Abolishing every program that includes as incidental beneficiaries religious entities—a rule applied only to religious entities and only because they are religious—imposes such a unique disability. *See also Trinity Lutheran*, 137 S. Ct. at 2019 (First Amendment prohibits laws "target[ing] the religious for 'special disabilities' based on their 'religious status'" and "singl[ing] out the religious for disfavored treatment") (quoting *Lukumi*, 508 U.S. at 533, 542)); *id.* at 2027 (Breyer, J., concurring in the judgment) ("The sole reason advanced that explains the difference is faith. And it is that last-mentioned fact that calls the Free Exercise Clause into play. We need not go further.").

And the Montana rule will surely engender public hostility toward religious adherents, whose presence and request for equal treatment would be the but-for cause of the denial to all others the opportunity to receive public benefits. This "purg[ing] from the public

sphere all that in any way partakes of the religious" will therefore "tend to promote the kind of social conflict the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment).

3. The equal protection cases Respondents cite cannot justify the decision below. Opp. 32, 36. To start, those cases did not involve a decision to eliminate a disparity via application of a state constitutional provision that *itself* is unconstitutional, raising the concerns discussed above.

Respondents rely on *Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010), which emphasized that "[o]n finding unlawful discrimination . . . courts may attempt, within the bounds of their institutional competence, to implement what the legislature would have willed had it been apprised of the constitutional infirmity." *Id.* at 427; *see also Heckler v. Mathews*, 465 U.S. 728, 739 n.5 (1984). But here, legislative intent is quite clear: the Montana Legislature enacted a tax-credit program that would provide the credits irrespective of whether donations are used for scholarships at religious or nonreligious schools. The Montana Supreme Court held as much. *See* Pet. App. 33. This Court's decision in *Levin* cannot be used to justify striking down that program in its entirety.

The cases Respondents cite also involve equal treatment concerns distinct from the powerful First Amendment values at stake here. *Levin* presented a case of discriminatory taxation, where equal treatment

"even more than in other fields" is subject to wide legislative prerogative. 560 U.S. at 426 (quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)). Here, the First Amendment concerns subject the state law "to the strictest scrutiny." *Trinity Lutheran*, 137 S. Ct. at 2019. Unlike in *Levin*, the equal protection concerns in this case combine with First Amendment protections to forbid solving discriminatory treatment by categorically eliminating every benefit in which a disfavored religious group chooses to participate. *Cf. Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 881-82 (1990) (noting the presence of "hybrid" rights where the "Free Exercise Clause [works] in conjunction with other constitutional protections" to provide greater protection). Exclusion of people of faith from public benefits by systematic *de jure* elimination of all programs in which they participate still evinces hostility to and imposes special disabilities on religion. *See Trinity Lutheran*, 137 S. Ct. at 2022 (religious freedom cannot "come[] at the cost of automatic and absolute exclusion from the benefits of a public program for which the [religious person] is otherwise fully qualified").

## II. Reversal would encourage other state courts to interpret their states' Blaine Amendments in a way that does not pose the same First Amendment problems as Montana's provision.

The anti-religion legal framework that reigns in Montana today is not one of necessity. Thirty-six other states, including many of the *Amici* States, have Blaine Amendments—sometimes called or grouped with similar "no-aid" provisions—that limit the extent to which the State may provide aid to religious organizations. *See* Richard D. Komer & Olivia Grady, *School Choices and State Constitutions: A Guide to Designing School Choice Programs*, Institute for Justice and American Legislative Exchange Council (2nd ed. 2016). While some of those no-aid provisions could be read the way Montana has construed its own provision—to require the State to discriminate against religious organizations by excluding them from a generally applicable benefit program—they do not have to be. Indeed, a number of state appellate courts have already upheld tax-credit scholarship programs and similar programs against challenges brought under their states' respective no-aid provisions.[3] Concluding that Montana's application of its Blaine Amendment violates the First Amendment will encourage other state courts to follow those states' lead rather than Montana's—protecting

[3] Eighteen States have tax-credit scholarship programs similar to the one Montana's Supreme Court invalidated based on Montana's no-aid provision. *See infra* Part III.

rather than infringing their residents' First Amendment rights.

### A. The text of the vast majority of state Blaine Amendments permits states to include religious organizations in generally applicable tax-credit scholarship programs.

With a few exceptions, state no-aid provisions share common roots. In 1875, amidst simmering anti-Catholic sentiment, Rep. James Blaine of Maine proposed an amendment to the U.S. Constitution forbidding States from using tax dollars to fund sectarian schools, which notably excluded the then-pervasively-Protestant public schools. 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, 556–73 (Spring 2003). Although his efforts failed, by the 1890s, approximately thirty States had adopted such "Blaine-style amendments into their constitutions." *Id.* at 573.

Largely because of this common origin, most Blaine Amendments are quite similar. Although they vary in some details—for example, some apply only to religious schools, while others apply more broadly to religious institutions—they share common language and cover similar ground. As relevant here, almost all of these no-aid provisions prohibit the same basic thing: directing the State's money to aid religious schools or institutions. Georgia's, for instance, provides that "[n]o

money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution." GA. CONST. art. I, § II, ¶ VII. Kentucky's states that "[n]o portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school." KY. CONST. § 189. And Indiana's reads: "No money shall be drawn from the treasury, for the benefit of any religious or theological institution." IND. CONST. art. 1, § 6.

These prohibitions, however, need not implicate tax-credit scholarship programs. The programs (1) do not use or appropriate *the State's* money, because tax credits are not public funds; and (2) do not appropriate or use the State's money "in aid of" or "to support" religious institutions, because both the credits and the scholarships go to and are intended to benefit students.

### 1. No-aid provisions generally forbid the use of only the State's money, but tax-credit scholarship programs do not draw from the state treasury.

Almost every state Blaine Amendment limits only the use to which a state may put the state's own money. Many of these provisions prohibit the use of "public funds" or "public money," terms which, in the 19th century as today, limit the provisions' application to *the State's* money, "as distinguished from private [citizens']." William C. Cochran, *Students' Law Lexicon* –

*A Dictionary of Legal Words and Phrases* 222 (1888) (defining "public"); *see also* Henry Campbell Black, *Dictionary of Law* at 963 (1st ed. 1891) ("public money" means "all the funds of the general government derived from the public revenues"); *id.* at 962 ("public funds" means the "funded public debt of a state or nation" or "the funds (money) belonging to a state or nation as such, and *in the possession of its government*" (emphasis added)).[4] A number prohibit taking or drawing money from "the treasury," meaning "a place where the public revenues are deposited and kept, and where money is disbursed to defray the expenses of government." *Id.* at 1186.[5] Several prohibit using "revenue of the state," "tax[es]," or "[m]oney raised," meaning money collected by the State through "a tax, as a means of collecting revenue." *Id.* at 993 (defining "raise revenue"); *see also* Cochran, *Law Lexicon* at 254 ("tax" means "a sum assessed against and collected from a citizen for the support of the government").[6] And most prohibit any "appropriation" to religious organizations, a term well known as the "act by which the legislative department of government designates a particular fund, or sets apart a specified portion of the *public*

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[4] *See, e.g.*, ALASKA CONST. art. VII, § 1 ("public funds"); NEB. CONST. art. VII, § 11 (same); S.C. CONST. art. XI, § 4 (same); MASS. CONST. art. XVIII, § 2 ("public money"); MINN. CONST. art. XIII, § 2 (same); OKLA. CONST. art. II, § 5 (same).

[5] *See*, *e.g.*, GA. CONST. art. I, § II, ¶ VII; IND. CONST. art. 1, § 6; WIS. CONST. art. I, § 18.

[6] *See, e.g.*, FLA. CONST. art. I, § 3 ("revenue of the state"); ARIZ. CONST. art. IX, § 10 ("tax"); N.H. CONST. pt. 2, art. 83 ("money raised").

*revenue* or of the *money in the public treasury*, to be applied to some general object of governmental expenditure." Black, *Dictionary of Law* at 82 (emphasis added); *see also* Cochran, *Law Lexicon* at 21 ("Appropriation, . . . [is] provision for the support of the government, or the payment of its various debts and obligations.").[7] In short, the Blaine Amendments in these States—36 of the 37—limit only what a state can do with the State's own money.[8]

A state does not use state money when it provides tax credits in the typical tax-credit scholarship program. When a state provides a tax credit, it does not take money out of the treasury and give it to the taxpayer. Rather, it merely tells the taxpayer that he does not have to pay the amount of the credit into the treasury. In other words, tax credits allow citizens to "spend their own money, not money the State has collected." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 142 (2011). Indeed, equating tax credits with the appropriation of public funds wrongly "assumes that income should be treated as if it were government property even if it has not come into the tax collector's hands." *Id.* at 144; *see also Kotterman v. Killian*, 972 P.2d 606, 618 (Ariz. 1999) ("Indeed, under such reasoning

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[7] *See, e.g.*, ALA. CONST. art. IV, § 73; *id.* art. XIV, § 263; CAL. CONST. art. XVI, § 5; *id.* art. IX, § 8; N.M. CONST. art. XII, § 3; PA. CONST. art. III, § 15; UTAH CONST. art. I, § 4; *id.* art. X, § 9; VA. CONST. art. IV, § 16; WYO. CONST. art. I, § 19; *id.* art. 3, § 36.

[8] Michigan is the exception: Michigan's no-aid provision expressly prohibits the State from providing a "tax benefit, exemptions or deductions" to support attendance of students at any nonpublic school. *See* MICH. CONST. art. VIII, § 2.

all taxpayer income could be viewed as belonging to the state because it is subject to taxation by the legislature."). Although the economic consequences of tax credits and government expenditures may be similar, the former are beyond the reach of state Blaine Amendments that by their terms prohibit states only from paying money from their treasuries to aid religious organizations.

State courts around the country have acknowledged the difference between appropriating money from the state treasury and merely providing tax credits. For example, in upholding Arizona's tax-credit scholarship program, the Arizona Supreme Court reasoned that tax credits are not "public money" as that term is used in Arizona's no-aid provision because "no money *ever* enters the state's control as a result of this tax credit," and "[n]othing is deposited in the state treasury or other accounts under the management or possession of governmental agencies or public officials." *Kotterman*, 972 P.2d at 618 (emphasis in original). The Georgia Supreme Court relied on the same logic in rejecting a challenge to Georgia's scholarship program on standing grounds, explaining that Georgia's program "does not involve the distribution of public funds out of the State treasury because none of the money involved in the Program ever becomes the property of the State of Georgia." *Gaddy v. Ga. Dep't of Revenue*, 802 S.E.2d 225, 231 (Ga. 2017). In rejecting another such challenge, the Florida First District Court of Appeal agreed that "tax credits received by taxpayers who have contributed to [scholarship organizations] are not the

equivalent of revenues remitted to the state treasury." *McCall v. Scott*, 199 So. 3d 359, 366 (Fla. 1st Dist. App. 2016). And several state courts have rejected the argument that tax credits amount to forbidden "appropriations" to religious institutions. *See, e.g.*, *Gaddy*, 802 S.E.2d at 230 ("Plaintiffs do not allege, and cannot demonstrate, that the Program's tax credits represent money appropriated from the state treasury."); *Magee v. Boyd*, 175 So. 3d 79, 121 (Ala. 2015) ("Traditional definitions of 'appropriations' do not extend to include tax credits."); *In re N.C.B. Careers*, 298 N.W.2d 526, 528 (S.D. 1980) (a tax exemption is permissible because "[n]o monies have been appropriated, nor has anything else been given to aid religion"); *cf. Gilligan v. Attorney General*, 595 N.E.2d 288, 291 (Mass. 1992) (holding that the "proposed tax credits did not set aside monies in the treasury and, thus, could not be viewed as an appropriation").

The upshot is clear: providing tax credits is not the same thing as using the State's money, so Blaine Amendments that prohibit only the use of the State's money to aid religious institutions need not be interpreted to prohibit tax-credit scholarship programs.

### 2. Blaine Amendments forbid using the State's money for the purpose of supporting religious institutions, but typical tax-credit scholarship programs are intended to benefit the students who receive the scholarships and do not direct benefits to any particular schools.

State no-aid provisions use a handful of synonymous phrases to prevent the government from providing public funds to religious schools or institutions. Most if not all of them prohibit payments directed to or intended to benefit religious institutions, but not payments that benefit those institutions only incidentally. True to their nickname, many of the no-aid provisions prohibit appropriations made or money used "in aid of" religious institutions—connoting an intention or purpose to provide "active support or assistance" to those institutions. Black, *Dictionary of Law* at 56 (defining "aid").[9] Others prohibit appropriations or payments or money used "for the support of" or "to help support or sustain" or "in maintenance of" religious institutions, terms that connote directly "supply[ing] funds for" the institutions. Noah Webster, *An American Dictionary of the English Language* (1st ed. 1828) (defining "support"); Black, *Dictionary of Law* at 742 ("Maintenance" means "support" or the "furnishing by one person to

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[9] *See, e.g.*, COLO. CONST. art. IX, § 7; DEL. CONST. art. X, § 3; KY. CONST. § 189; N.Y. CONST. art. XI, § 3.

another, for his support").[10] Several prohibit appropriations made for the "benefit of" such institutions.[11] Some expressly prohibit appropriations or payments made "for any sectarian purpose."[12] And a few prohibit public funds being "applied to" or for religious institutions, which connotes a direct payment to such institutions. Black, *Dictionary of Law* at 80 (defining "apply" to mean "to appropriate and devote to a particular use").[13]

The tax-credit scholarship programs at issue are not set up to direct support or benefits to religious schools. Instead, they direct benefits to parents and students in the form of scholarships supported by the associated tax credits. These programs are not set up to "pay the costs of" religious organizations, *Webster's New Collegiate Dictionary* 1162 (1979) (defining "support"), furnish religious organizations with "[the state's] support" or "the means of living," Black, *Dictionary of Law* at 742 (defining "maintenance"), keep the religious organization "in an existing state," or "bear the expense of" its operation. *Webster's* at 687 (defining

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[10] *See, e.g.*, ALA. CONST. art. XIV, § 263 ("support"); WASH. CONST. art. I, § 11 (same); HAW. CONST. art. X, § 1 ("support or benefit"); IDAHO CONST. art. IX, § 5 ("to help support or sustain"); N.Y. CONST. art. XI, § 3 ("maintenance of"); *but see* MICH. CONST. art. VIII, § 12 ("support the attendance of any student").

[11] *See, e.g.*, MINN. CONST. art. I, § 16; OR. CONST. art. I, § 5; S.D. CONST. art. VI, § 3.

[12] *See, e.g.*, ILL. CONST. art. X, § 3; MO. CONST. art. IX, § 8; NEV. CONST. art. 11, § 10.

[13] *See, e.g.*, ARIZ. CONST. art. II, § 12; N.H. CONST. pt. 2, art. 83; UTAH CONST. art. I, § 4.

"maintain"). Much less do the credits provide "active support and assistance" to the religious organization. Black, *Dictionary of Law* at 56 (defining "aid"). Students and their families are the only direct or intended beneficiaries of the tax credits that underpin these scholarship programs.

This Court's jurisprudence reflects the understanding that programs that provide benefits to student and their families should not be viewed as directing benefits to religious organizations. In *Mueller*, this Court explained that a tax deduction's "assistance" went to parents, allowing them to "deduct their children's educational expenses," and that any benefit to "parochial schools" from a tax deduction "ultimately controlled by the private choices of individual parents" was "attenuated" at best. 463 U.S. at 400. In *Board of Education v. Allen*, this Court upheld a textbook loan program because the "financial benefit is to the parents and children, not . . . schools." 392 U.S. 236, 244-45 (1968). And in *Zelman*, when upholding Cleveland's tuition assistance program, this Court again recognized that the program "confers educational assistance directly to . . . any parent of a school-age child who resides in the Cleveland City School District," rather than to any religious or non-religious private school. 563 U.S. at 653. In each of these cases, this Court refused to consider aid actually supplied to students or their parents to be benefits directed towards religious schools.

State courts have regularly taken the same view. For example, the Arizona Supreme Court has explained that "[t]he primary beneficiaries of this [tax]

credit are taxpayers who contribute to the [school tuition organizations], parents who might otherwise be deprived of an opportunity to make meaningful decisions about their children's educations, and the students themselves." *Kotterman*, 983 P.2d at 283. The Indiana Supreme Court agrees, reasoning that "any benefits that may be derived by program-eligible schools [were] ancillary to the benefit conferred on families[.]" *Meredith v. Pence*, 984 N.E.2d 1213, 1229 (Ind. 2013). In upholding Missouri's tuition-assistance program, the Missouri Supreme Court cited favorably the argument that the program "is designed and implemented for the benefit of the students, not of the institutions, and that the awards are made to the students, not to the institutions." *Ams. United v. Rogers*, 538 S.W.2d 711, 720 (Mo. 1976). Other state courts are in accord. *See Jackson v. Benson*, 578 N.W.2d 602, 621 (Wis. 1998) ("incidental benefit" to schools not prohibited); *State ex rel. Gallwey v. Grimm*, 48 P.3d 274, 285 (Wash. 2002) (purpose of grant is to "assist" students).

Similar logic can and should be applied even to the Blaine Amendments in eight states that prohibit appropriations or payments made "directly *or indirectly*" in aid of religious institutions. *See* FLA. CONST. art. I, § 3; GA. CONST. art. I, § II, para. VII; MICH. CONST. art. VIII, § 2; MO. CONST. art. I, § 7; MONT. CONST. art. X, § 6; N.Y. CONST. art. XI, § 3; OKLA. CONST. art. II, § 5; VA. CONST. art. IV, § 16. These scholarship programs may provide *incidental* benefits to religious schools in the form of tuition dollars from students who choose to use their scholarships to attend religious schools. But such incidental benefits do not necessarily implicate a

prohibition on "indirect" state aid. As the New York Court of Appeals reasoned in upholding a generally applicable textbook program that included religious schools, "the words 'direct and indirect' " can be read to "relate solely to the means of attaining the prohibited end of aiding religion as such." *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 228 N.E.2d 791, 794 (N.Y. 1967), *aff'd* 392 U.S. 236 (1968) (finding no evidence that the textbook loan statute was a "verbal smoke screen designed . . . to circumvent the . . . State Constitution"). In other words, a prohibition on "indirect" aid need not proscribe "every form of legislation, the benefits of which, in some remote way, might inure to parochial schools." *Id.* Rather, such a prohibition can be construed merely as a bar against pretextual appropriations: attempts to use an indirect means to achieve a prohibited purpose of aiding religious institutions. Viewed in this way, a prohibition on "indirect aid" would bar a veiled attempt to benefit religious schools (*e.g.*, by appropriating funds to a secular shell company), but not "a program aimed at improving the quality of education in all schools" that happens to benefit religious schools too. *Id.*

### B. Judicial constructions of the Blaine Amendments of at least nine states already permit including religious organizations in a generally applicable tax-credit scholarship program.

Courts in nine states have already construed their states' Blaine Amendments in a way that permits

these programs, thus avoiding any potential violation of the First Amendment. The courts of Alabama, Georgia, Arizona, Florida, and Illinois have each permitted tax-credit scholarship programs to coexist with their no-aid provisions. *See Kotterman*, 972 P.2d at 606; *Magee*, 175 So. 3d at 135-37; *Toney v. Bower*, 744 N.E.2d 351, 358 (Ill. App. 4th Dist. 2001); *Griffith v. Bower*, 747 N.E.2d 423, 426 (Ill. App. 5th Dist. 2001); *Gaddy*, 802 S.E.2d at 225 (denied challenge on standing grounds); *McCall*, 199 So. 3d at 359 (similar).

At least four other states have read their no-aid provisions as either similar to or coextensive with the First Amendment. *See Jackson*, 578 N.W.2d at 620; *Ams. United for Separation of Church & State Fund, Inc. v. State*, 648 P.2d 1072, 1081-82 (Colo. 1982); *Springfield Sch. Dist., Del. Cnty. v. Dep't of Educ.*, 397 A.2d 1154, 1170 (Pa. 1979); *Eugene Sand & Gravel, Inc. v. City of Eugene*, 558 P.2d 338, 348 (Or. 1976). Since the federal Establishment Clause and Free Exercise Clause do not preclude states from enacting a generally applicable tax-credit scholarship program that includes religious institutions, neither would these states' no-aid provisions.

To be sure, each state's Blaine Amendment has its own legal and historical context that informs its meaning and application. But if this Court were to conclude, as it should, that prohibiting tax-credit scholarship programs because they incidentally benefit religious institutions violates the First Amendment, other states are likely to interpret their common language in line with existing precedent. If a particular Blaine Amendment

could be read either way—to prohibit such a program or to permit it—the constitutional avoidance doctrine will counsel in favor of an interpretation that permits the program.

## III. The decision below, if affirmed, will jeopardize numerous school choice programs across the country, harming children who are religious, impoverished, and disabled.

While reversal sends a message to state courts instructing them to respect religious protections, affirmance risks the opposite result. Because a significant majority of states have similar Blaine Amendments, *see supra* Part II, affirming the Montana Supreme Court's decision may have implications far beyond Montana. Upholding the decision below may well embolden other state supreme courts to interpret their own states' Blaine Amendments as strict prohibitions on even incidental benefits to religious schools. In states that follow the Montana Supreme Court's lead, the result would be to wholly eliminate those states' tax-credit scholarship programs. This would risk harming students in those states, many of whom are low income or have disabilities. It would also punish parents for exercising their religion in the use of a facially neutral program. Finally, it may also harm individuals in other school choice programs and in many other benefit programs with religious participants.

### A. Affirmance would jeopardize scholarship programs that help more than a quarter million students, especially low-income and disabled children.

Besides Montana, eighteen other states operate similar tax-credit scholarship programs: Alabama, Arizona, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Minnesota, Nevada, New Hampshire, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, and Virginia. U.S. GOV'T ACCOUNTABILITY OFFICE, *Private School Choice: Requirements for Students and Donors Participating in State Tax Credit Scholarship Programs* (Sept. 2018); *see also* MINN. STAT. ANN. § 290.0674. According to recent numbers, over 250,000 students participate in these tax-credit scholarship programs. *Id.* at 28-30 (over 250,000 scholarships distributed, not including Georgia and Louisiana); GA. CENTER FOR OPPORTUNITY, *Georgia School Choice Handbook, 2019 Parents Guide* 11 (13,247 Georgia students); LA. DEP'T OF EDUC., *2017-2018 Annual Report on the Tuition Donation Credit Program* (1,896 Louisiana students). Fifteen of these states have Blaine Amendments.[14]

Many of the children in these programs may be too poor to afford their current schools without a scholarship. In New Hampshire, 57.1% of its scholarship

[14] Iowa, Louisiana, and Rhode Island do not have Blaine Amendments, but do have other church-state separation provisions. *See, e.g.*, R.I. CONST. art. I, § 3 ("no person shall be compelled to frequent or to support any religious worship, place, or ministry"); *see also* IOWA CONST. art. I, § 3; LA. CONST. art. I, § 8.

students are at or below 185% of the federal poverty level. CHILDREN'S SCHOLARSHIP FUND, *Scholarship Organization Report* (July 16, 2019); GIVING AND GOING ALLIANCE, *Scholarship Organization Report* (July 26, 2019). Similarly, South Dakota has 59% of its scholarship students coming from low income households. S.D. PARTNERS IN EDUC., *Program Summary*. In Arizona, nearly 46% of scholarship dollars went to students from families that are similarly low income. ARIZ. DEP'T OF REVENUE, *School Tuition Organization Income Tax Credits in Arizona, Summary of Activity: FY 2016/2017*. The percentage of low-income scholarship students in Alabama is a staggering 93%. ALA. DEP'T OF REVENUE, *2017 Scholarship Granting Organization Public Report Information*. And in Kansas, ***all*** of the students come from households at or below 130% of the federal poverty level. KAN. STAT. ANN. § 72-4352(d)(1)(A) (applying § 72-5132(c)(1)); KAN. DEP'T OF EDUC., *Tax Credit for Low Income Students Scholarship Program, Legislative Report for 2019*. Some scholarships programs that are not exclusive to low income students still set aside a minimum amount of scholarships for low-income students. *See, e.g.*, OKLA. STAT. tit. 68, § 2357.206(G)(7)(d). Without a scholarship, many of these students may be forced to leave their current schools.

Other children may lose access to high quality services for their special needs without these programs. South Carolina provides scholarships exclusively to students with disabilities. *See* S.C. CODE ANN. § 12-6-3790. Arizona has one scholarship program exclusively

for students in foster care and students with disabilities. *See* ARIZ. REV. STAT. § 43-1505(E). Several other states also provide special scholarships for students with disabilities. *See, e.g.*, OKLA. STAT. tit. 68, § 2357.206(G)(2)-(3); VA. CODE ANN. § 58.1-439.28(C). All of these programs involve participation from religious students and schools that, under the reasoning of the court below, would require the programs to end.

The loss of these educational benefits matters because in many states students receive a better education when their parents are able to choose the best school for them. *See* Anna J. Egalite & Patrick J. Wolf, *A Review of the Empirical Research on Private School Choice*, 91 PEABODY J. EDUC. 441 (2016); Greg Forster, *A Win-Win Solution: The Empirical Evidence for School Choice*, FRIEDMAN FOUND. FOR EDUC. CHOICE (May 2016). These trends hold true with tax-credit scholarships. For example, in Nevada, over 2/3rds of students demonstrated maintenance or growth in standardized test scores, with results improving the longer students participate in the scholarship program. *See* NEV. DEP'T OF EDUC., *Nevada Opportunity Tax Credit Scholarship Program, Fact Sheet* (Nov. 2018). For the states with means-tested tax-credit scholarships, the program helps not only low-income students but also low-performing students who can find a better school once they receive a scholarship. *See* David Figlio *et al.*, *Who Uses a Means-Tested Scholarship, and What Do They Choose?*, 29 ECON. EDUC. REV. 301 (2010). One study even found that Florida's tax-credit scholarship increased education outcomes in

*public* schools because of the increased competitive pressure from nearby private schools. *See* David Figlio and Cassandra M. D. Hart, *Competitive Effects of Means-Tested School Vouchers*, 6 AM. ECON. J.: APPLIED ECON. 133 (2014). Thus, states have a legitimate and important interest in enacting these programs—interests that are undermined by the decision below.

### B. Affirmance will sanction state disapproval of religious choices.

The harm imposed by the decision below on the disadvantaged and disabled is, of course, collateral damage; the explicit target has always been families of faith. And the targeting is successful in both purpose and effect. The Montana Supreme Court's application of their Blaine Amendment explicitly singles out parents who choose religious schools for disfavored treatment. And because the beneficiaries of these programs are indeed primarily receiving an education from religiously affiliated schools, the effect of the decision below is to disproportionally suppress educational activities by and for people of faith.

1. Contrary to the Montana Supreme Court's suggestion, the disproportionate use of scholarships at religious schools is not because these state programs somehow prefer religious schools over secular ones. *See* Pet. App. 27-30. Neither Montana's program nor any other state tax-credit scholarship program limits participation to religious schools. Instead, many states have a higher participation for religious schools

because religious organizations are more proactive in providing educational choice, especially to those who cannot afford it, and because parents disproportionately choose religious schools for their children regardless of which schools participate in the state's program.

In sixteen of the eighteen states with tax-credit scholarships, the majority of private schools are religious schools. *See* U.S. DEP'T OF EDUC., NAT'L CENTER FOR EDUC. STATISTICS, *Private School Universe Survey, 2017-2018 Data Files*. For twelve of these states, over 2/3 of their private schools are religious. *Id.* (cited in *Zelman*, 536 U.S. at 657).[15] For those states with a high proportion of religious schools, high religious participation is inevitable.

Beyond that baseline statistic, religious schools are more likely than secular schools to participate in these programs. For example, approximately 54% of Florida's private schools are religious, but 67% of the schools that joined its tax-credit scholarship program are religious. FLA. DEP'T OF EDUC., OFFICE OF INDEP. EDUC. & PARENTAL CHOICE, *Florida Private School Directory*; FLA. DEP'T OF EDUC., *Florida Tax Credit Scholarship Program*, *June 2019 Quarterly Report*.

[15] This data is limited to schools with responses to the U.S. Department of Education's survey. The National Center for Education Statistics also separately estimates that there are 32,461 total private schools in the U.S., 66.4% of which are religious. U.S. DEP'T OF EDUC., NAT'L CENTER FOR EDUC. STATISTICS, *Private School Universe Survey, 2017-2018 Data Files*, Number and percentage distribution of private schools, students, and full-time equivalent (FTE) teachers, by religious or nonsectarian orientation of school: United States, 2017-18.

Similarly, in Oklahoma, approximately 85% of the private schools are religious, but 89% of the schools in the tax-credit scholarship program are religious. U.S. DEP'T OF EDUC., NAT'L CENTER FOR EDUC. STATISTICS, *Private School Universe Survey, 2016-17 Data Files and 2017-2018 Data Files*; OPPORTUNITY SCHOLARSHIP FUND, *Our Member Schools* (listing 70 members and acknowledging additional schools); OKLA. ISLAMIC SCH. FOUND., *FAQs*, (two Islamic schools). Even in New Hampshire, where private schools are primarily non-sectarian, religious schools comprise almost 60% of participating schools in its tax-credit scholarship. N.H. DEP'T OF EDUC., *School Information*; CHILDREN'S SCHOLARSHIP FUND, *Scholarship Organization Report* (July 16, 2019); GIVING AND GOING ALLIANCE, *Scholarship Organization Report* (July 26, 2019).

Religious schools show up in such strong numbers in part because parents overwhelmingly prefer them. Even accounting for the predominantly religious options in a scholarship program, parents still disproportionately choose religious schools. In Florida's program, where 67% of the options are religious schools, 83% of the scholarship students enroll in religious schools. FLA. DEP'T OF EDUC., *Florida Tax Credit Scholarship Program*, *June 2019 Quarterly Report*. In New Hampshire, where 60% of the options are religious schools, 66% of the scholarship students enroll in religious schools. CHILDREN'S SCHOLARSHIP FUND, *Scholarship Organization Report* (July 16, 2019); GIVING AND GOING ALLIANCE (July 26, 2019). In Nevada, where 78% of the options are religious schools, 97% of the scholarship

students enroll in religious schools. AAA SCHOLARSHIP FOUND., INC., *2018-2019 Mid-year Scholarship Organization Information*; CHILDREN'S TUITION FUND, *2018-2019 Mid-year Scholarship Organization Information*; DINOSAURS & ROSES, *2018-2019 Mid-year Scholarship Organization Information*; EDUC. FUND OF N. NEV., *2018-2019 Mid-year Scholarship Organization Information*.

Again, the reasoning of the court below is not limited to tax-credit scholarship programs; the harm extends to other school choice and social services programs. In Oklahoma, the Lindsey Nicole Henry (LNH) Scholarship Program provides scholarships for students with disabilities, and 91% of its participating schools are religious. OKLA. STATE DEP'T OF EDUC., *Lindsey Nicole Henry Approved Private Schools* (July 3, 2019). Ohio—which never passed a Blaine Amendment—runs a school-choice program that treats religious and nonreligious schools on equal terms. *See* OHIO REV. CODE § 3310.01, *et seq*. Equal treatment has served only to benefit Ohio students, as illustrated by the fact that parents often choose religious schools for their children. Patrick O'Donnell, *Almost all of Ohio's voucher cash goes to religious schools*, THE PLAIN DEALER (Mar. 12, 2017). These programs would likely fail Montana's expansive interpretation of Blaine Amendments.

Moving beyond school choice, in Oklahoma, the Office of Community and Faith Engagement partners with religious organizations to address the state's social service needs, including disaster relief and health initiatives for children. OKLA. DEP'T OF HUMAN SERVS.,

*Office of Community and Faith Engagement Office Information* (Feb. 26, 2018). In Georgia, most of the private agencies that contract with the state for the adoption of special needs children are religious. GA. DIV. OF FAMILY & CHILDREN SVCS., *AdoptUSKids* (April 2019). And because religious groups are especially active in healthcare, many state Medicaid programs also fund sectarian hospitals. For example, SSM Health operates multiple hospitals in Missouri, Oklahoma, Illinois, and Wisconsin with the express mission statement: "Through our exceptional health care services, we reveal the healing presence of God." SSM HEALTH, *About SSM Health, Our Mission & Values*, 2019. All of these programs may "effectively subsidize[]" religion, Pet. App. 28, and therefore be in jeopardy if the First Amendment does not protect against an expansive prohibition on religion.

2. The Montana Supreme Court found this disproportionate religious participation problematic, Pet. App. 30, but the religious status of those who seek the benefits of these school choice programs does not pose any First Amendment problems. In *Mueller*, for example, this Court "rejected an Establishment Clause challenge to a Minnesota program authorizing tax deductions for various educational expenses, including private school tuition costs, even though the great majority of the program's beneficiaries (96%) were parents of children in religious schools." *Zelman*, 536 U.S. at 649-50 (citation omitted). The Court stated it "would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting

the extent to which various classes of private citizens claimed benefits under the law." *Mueller*, 463 U.S. at 401. The same was true of the program upheld in *Zelman*, where the Court held that merely because "46 of the 56 private schools now participating in the program are religious schools does not condemn it as a violation of the Establishment Clause." *Zelman*, 536 U.S. at 656; *see also id.* at 658. Otherwise, the Constitution would impose higher burdens on communities that are especially religious. *Id.* at 657-58.

Rather, the opposite is true: if state law requires abolishing public benefits with high participation from people of faith, *that* would create serious Establishment and Free Exercise Clause concerns. Because the "preponderance of religiously affiliated private schools certainly did not arise as a result of the program," *Zelman*, 536 U.S. at 656-57, but instead from religiously-motivated private choice, striking down a program based on those faith-based choices profoundly impinges on free exercise rights, *see Lukumi*, 508 U.S. at 524 (striking down law that targeted "conduct motivated by religious beliefs").

Put differently, state constitutions that prohibit neutral programs incidentally benefitting religious schools ultimately punish parents for exercising their religion. *See Trinity Lutheran*, 137 S. Ct. at 2020. It punishes religious organizations for being particularly active in specific social welfare spaces—such as education or healthcare—choices that are themselves often faith-based. It tells religious organizations zealously promoting education that the more successful they are

in educating more students, the more likely they are to cause invalidation of a state program. The decision below takes a truly neutral education program and then tells the organizations, parents, and children that are most eager to participate they are creating constitutional issues solely because they are religious. It "reserve[s] special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children." *Mitchell*, 530 U.S. at 827-28. According to the Montana Supreme Court, faith makes one a pariah as a matter of state constitutional law, whereby participation by religious persons so infects a generally available program that it must be excised entirely. The First Amendment does not tolerate such hostility.

## CONCLUSION

The Court should reverse the decision below.

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