No. 18-1195

In The Supreme Court of the United States

KENDRA ESPINOZA, JERI 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

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INTRODUCTION

Respondents' entire framing of this case is wrong. They insist it "lies at the intersection of two traditions": "protection of religious freedom" and "opposition to government aid to religious institutions." Resp'ts' Br. 1. While this case certainly involves "religious freedom," it does *not* involve "aid to religious institutions." This Court has already held that scholarship programs like Montana's benefit students, not schools. *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002). The issue in this case, then, is whether the Montana Supreme Court's judgment—which bars religious options from these programs—discriminates against religion in violation of the federal constitution. As Petitioners have shown, it does.

Remarkably, Respondents now concede that applying Article X, section 6(1) to exclude families choosing religious schools from Montana's scholarship program would violate the federal constitution.[1] Yet Respondents argue that the Montana Supreme Court avoided this violation by invalidating the entire program and depriving *all* families of scholarships. This Court should

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[1] *See, e.g.*, Resp'ts' Br. 1 ("Religious freedom requires that the State not exclude religious adherents from public benefits available to everyone else."); *id.* at 1–2 ("[A] state's desire to avoid funding religious institutions cannot justify excluding them from benefits available to everyone else."); *id.* at 2 ("[The State] can decline to support religious private schools—but only if it declines to support any private school."); *id.* at 15 ("[W]hen a No-Aid Clause prohibits government aid to religion while the government is simultaneously aiding similarly situated non-religious institutions, the government may violate the Free Exercise Clause by effectively penalizing religious exercise.") (emphasis omitted).

reject this argument, just as it did in its desegregation cases, where local governments tried to avoid desegregation by closing their public schools. S*ee, e.g.*, *Griffin v. County Sch. Bd.*, 377 U.S. 218, 225 (1964). Indeed, eliminating the program solely to prevent families from using scholarships at religious schools still violates the federal constitution's protections for religious liberty. That other families also suffer from that violation does not wash it away.

Petitioners reply to Respondents' brief in five sections. In section I, Petitioners rebut that invalidating the scholarship program harmonized the Montana and federal constitutions. In sections II through IV, Petitioners confirm that applying section 6(1) to bar religious schools from the program violates the Free Exercise, Equal Protection and Establishment Clauses. And in section V, Petitioners refute that ruling for them would undermine national tradition and federalism.

ARGUMENT

I. The Montana Supreme Court's Invalidation of the Scholarship Program Did Not Harmonize the Montana and Federal Constitutions.

Respondents concede that applying section 6(1) to exclude religious schools from the scholarship program would violate the federal constitution. Yet Respondents claim the court's remedy reconciled the conflict between the Montana and federal constitutions and even protected "religious freedom" by "ensur[ing] that no

one is penalized for exercising their faith." *Id.* at 17. The Court should reject this argument for three reasons.[2]

A. The Montana Supreme Court invalidated the program for technical severability reasons, not to harmonize the two constitutions.

First, as a factual matter, the Montana Supreme Court did not invalidate the program to reconcile a conflict between the Montana and federal constitutions. To the contrary, the court held there was no conflict between them. Instead, the court invalidated the program based purely on severability grounds.

The Montana Supreme Court made two key holdings. First, it held that section 6(1) barred religious schools from the program. Pet. App. 30. Second, the court held that this bar did not conflict with the federal constitution. As the court found, "[a]lthough there may be a case" where section 6(1) bars "aid" to a religious organization, but "where prohibiting the aid would violate the Free Exercise Clause, this is not one of those cases." Pet. App. 32. The court thus did not find a constitutional conflict, much less invalidate the program to avoid one.

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[2] Respondents argue in a footnote that Petitioners cannot challenge the invalidation of the program because they did not preserve this challenge below. Resp'ts' Br. 12, n. 1. There is no merit to this argument. *See* Pet'rs' Reply Br. in Supp. of Cert. at 2–6.

Rather, the court invalidated the program because it concluded it could not, consistent with the program's statute, sever only religious schools from the program. The court found that the statute allowed all "qualified education providers" to participate, which the statute broadly defined to cover all private schools. Pet. App. 28–29. The statute also contained "no mechanism" to allow Respondents to "discern" when families used their scholarships at "a secular school" or "a sectarian school." *Id.* at 29; *see also id.* at 30 (holding that, under the statute, "there was no way to determine 'where the secular purpose ended and the sectarian began' "); Resp'ts' Br. 6 (conceding the court "struck down" the program "in light of this holding"). As a result, the court invalidated the entire program to ensure that religious schools could not participate.

B. As the court's underlying judgment was unconstitutional, so too is its remedy.

Second, even if the Montana Supreme Court viewed itself as reconciling the state and federal constitutions, invalidating the program was still not permissible. This Court has already held that eliminating a public program to prevent including a protected class in that program is just as discriminatory as excluding that class in the first place. *Griffin v. County Sch. Bd.*, 377 U.S. 218, 225 (1964).[3]

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[3] The only support Respondents cite to the contrary is a line from Justice Scalia's dissent in *Locke v. Davey* stating that the Washington Legislature could have "abandoned the scholarship

In *Griffin*, the Court held that a county could not close its public schools to prevent including African-American students in those schools. *Id*. As the Court stated, "[w]hatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional." *Id.* at 231; s*ee also Bush v. Orleans Parish Sch. Board*, 187 F. Supp. 42 (E.D. La. 1960), *aff'd*, 365 U.S. 569 (affirming injunction against Louisiana closing its public schools under the same circumstances); *Palmer v. Thompson*, 403 U.S. 217, 232 (1971) (Douglas, J., dissenting) (discussing *Bush*).[4]

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program" in *Locke* rather than exclude devotional theology majors from the program. 540 U.S. 712, 729 (2004). But Justice Scalia's dissent is inapplicable for two reasons. First, it is inconsistent with *Griffin* and *Bush*, as shown below. Second, there is a distinction between a legislature's repealing a program and a state supreme court's invalidating it. The legislature's judgment is purely political and allows its citizens to pursue political recourse. In contrast, a court issues a constitutional judgment, leaving its citizens no recourse absent certiorari.

[4] Although *Palmer* allowed a city to close its public pools after they were ordered to desegregate, that case does not apply here. 403 U.S. at 226. The Court declined to order reopening of the pools in *Palmer* because it was unclear whether the city was closing the pools for discriminatory or budgetary reasons, and this Court did not want to question the city's motives. *Id.* at 224–26. Here, there is no question that the Montana Supreme Court invalidated the scholarship program because it included religious options. In any event, this Court has since rejected *Palmer*'s reasoning and requires courts to examine government motives when discrimination is at play. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 & n.10 (1977).

The same is true here. Montana can only "abandon" the scholarship program for a "constitutional" reason. Respondents admit that excluding religious schools from the program would be unconstitutional. *Supra* note 1. Thus, under *Griffin* and *Bush*, eliminating the program to prevent including these schools in the program is just as unconstitutional. Indeed, invalidating the program on this basis violates Petitioners' free exercise rights.

C. Invalidating the program penalizes religious families and schools for exercising their beliefs.

Third, Respondents argue that invalidating the program cannot violate the Free Exercise Clause because it does not "prohibit" families from exercising their religion. Resp'ts' Br. 11–16, 27–34. There is no merit to this argument. "The Free Exercise Clause," after all, "protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.' " *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2015 (2017) (citation omitted).

Here, the only reason the Montana Supreme Court eliminated the program was because some families wanted to use the scholarships at religious schools. As choosing religious schooling is a free exercise right, *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972), depriving families of scholarships on that basis penalizes that right. This is no less a penalty on religious families just because other families must also suffer.

In fact, the penalty here is even more concrete—and more serious—than the one at issue in *Trinity Lutheran*. There, after all, the church was merely *applying* for a grant—and a one-time grant, at that. 137 S. Ct. at 2024. Here, by contrast, Petitioner Jeri Anderson and other families have already been receiving and relying on the scholarships for years. Pet'rs' Br. 7–8. And so long as the Montana Supreme Court's judgment remains in effect, Petitioners and other families choosing religious schools will be effectively barred from petitioning the legislature to pass a financial-aid program in which they can participate. Meanwhile, the legislature remains free to pass aid programs for families choosing secular schools. This is a harm in itself. As this Court said in *Romer v. Evans*, 517 U.S. 620, 633 (1996), "[c]entral . . . to the . . . Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."

Respondents claim that invalidating the program does not penalize Petitioners' free exercise, but merely "makes scholarship donations by other Montanans less tax-advantaged." Resp'ts' Br. 13. This ignores the basic purpose of the program "to provide parental and student choice in education." Mont. Code Ann. § 15-30-3101. And Respondents admit that without the tax credit, there will be less financial aid available for Petitioners and other families, which will impose serious financial burdens on them, Resp'ts' Br. 13, and may force them to pull their children out of religious school. Pet'rs' Br. 6–8.

Respondents further argue that section 6(1) cannot violate Petitioners' free exercise rights because the provision restrains only government, not individual action. Resp'ts' Br. 7, 15. Even if this distinction were relevant to section 6(1)'s facial constitutionality, a doubtful assertion, Petitioners' is an as-applied challenge. And this Court already sustained an as-applied challenge to a similar Blaine Amendment under the Free Exercise Clause in *Trinity Lutheran*, 137 S. Ct. at 2023–25.

Therefore, Respondents cannot show that applying section 6(1) to invalidate the scholarship program is constitutional.

II. Applying Article X, Section 6(1) to Bar Religious Options from the Scholarship Program Violates the Free Exercise Clause.

Although Respondents initially concede that applying section 6(1) to exclude religious schools from the program would violate the Free Exercise Clause, *supra* note 1, they later argue, presumably in the alternative, that barring religious schools from the program complies with that clause. Resp'ts' Br. 33–40. The Court should reject this argument. It ignores the key principles in both *Locke* and *Trinity Lutheran*, and it mischaracterizes the history behind the Free Exercise Clause.

A. *Locke* does not allow the complete bar of religious options in public-benefit programs.

According to Respondents, *Locke* allows the complete bar of religious schools from the program. Resp'ts' Br. 34–35. It does not, and holding otherwise would expand *Locke*'s narrow holding to allow sweeping religious exclusions that threaten the fundamental principles of neutrality.

Locke upheld the religious exclusion for devotional theology majors in Washington's scholarship program for four reasons: The exclusion (1) was narrow, (2) otherwise went "a long way toward including religion in its benefits," (3) did not "force students to choose between their religious beliefs and receiving a government benefit," and was (4) tied to states' unique historical interest in not funding the clergy. 540 U.S. at 720–24. As Petitioners have shown, Pet'rs' Br. 23–28, none of these criteria is met here.

Respondents nonetheless argue that children attending religious private schools are indistinguishable from college students majoring in devotional theology. Resp'ts' Br. 34–35. This is wrong. *Locke* stressed that excluding devotional theology majors was tied to the state's interest in not funding the clergy because these majors were studying to "lead a congregation." *Id*. at 721; *see also id.* at 723 (stating that "early state constitutions saw no problem in explicitly excluding *only* the ministry from receiving state dollars").

Here, in contrast, students attending religious primary and secondary schools are not studying to "lead a congregation," much less to enter a "religious profession." Instead, these students must satisfy the same academic requirements as students at nonreligious schools in everything from reading and writing to advanced science and mathematics. *See* Mont. Code Ann. § 20-5-109(4). Religious school students will also go on to attend the same colleges, gain the same skills, and enter the same careers as their secular counterparts. If any of these children wish to enter the clergy, they will need special training, as Joshua Davey sought, such as in a devotional theology or seminary program.

In addition, many families pick religious schools for secular reasons. Even nonreligious families choose religious schooling for their children, as these schools may offer secular benefits such as rigorous academics, safety, or discipline. For the same reason, many religious families choose to send their child to a school affiliated with a different faith. In contrast, those studying to enter the clergy are inevitably engaged in "an essentially religious endeavor." *Locke*, 540 U.S. at 721.[5]

To accept Respondents' argument would allow the narrow exception in *Locke* to swallow the general rule of religious neutrality. *See, e.g.*, *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and

[5] For the same reasons, this Court should reject that religious school teachers are the equivalent of the "ministry itself." Resp'ts' Br. 35. Moreover, the program aids students, not the schools they select. *Zelman*, 536 U.S. at 652.

religion, and between religion and nonreligion."). The exclusion in *Locke* did not threaten that general rule because the scholarship program there went "a long way toward including religion in its benefits." *Locke*, 540 U.S. at 724. In contrast, the Montana Supreme Court applied section 6(1) as a total bar on religious options, just because they are religious. This conflicts with not only *Locke*, but also *Trinity Lutheran*.

B. *Trinity Lutheran* also does not allow the complete bar of religious options from public-benefit programs.

As Petitioners showed, applying section 6(1) to bar all religious options in student-aid programs violates the three free exercise fundamentals identified in *Trinity Lutheran*: It discriminates against the religious "beliefs," "religiously motivated" conduct, and religious "status" of both religious families and the religious schools they wish to attend. Pet'rs' Br. 16–21; *Trinity Lutheran*, 137 S. Ct. at 2021. Respondents ignore these first two fundamentals, despite each of them providing independent grounds to rule for Petitioners. Rather, Respondents argue only that the bar does not discriminate against religious status, and instead discriminates based on the religious "use" of scholarship money. Respondents' reasoning is flawed for three reasons.

First, Respondents assume that discrimination against the "religious use" of money is permissible under *Trinity Lutheran*. But the plurality opinion in that

case merely declined to address this question. *Trinity Lutheran*, 137 S. Ct. at 2024, n.3. Respondents provide no rationale for why that discrimination should be treated differently than discrimination against religious status, nor do they address any of the cases showing that discrimination against religious use is just as constitutionally offensive. *See* Pet'rs' Br. 22–23.

Second, there *is* status discrimination here, as shown by both the text of section 6(1) and the Montana Supreme Court's application of that provision. Section 6(1) is titled "Aid Prohibited To Sectarian Schools" and states that the government shall not use government funds "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." Whether section 6(1) applies to a school, then, turns on the schools' religious status.

The Montana Supreme Court also interpreted the provision to turn on religious status. In fact, the court interpreted the provision to apply not just to schools controlled by a religious organization, but to any "sectarian school," a term the court used interchangeably with "religious schools," and "religiously-affiliated schools." Pet. App. 16–29. As a result, the court applied section 6(1) to bar all religious schools from the program. This discriminates against the schools' religious status in contravention of *Trinity Lutheran*.

Respondents offer an alternative textual analysis of section 6(1), but it does not help their position. Respondents argue that section 6(1) applies to religious

schools based on their status only when those schools are "affiliated with a particular church;" meanwhile, nondenominational religious schools, like Stillwater Christian, are excluded from the program because they provide a "religious education." Resp'ts' Br. 37–38. It is unclear why Respondents think their reading would make religious discrimination any more defensible. In any event, Respondents' reading is unsupported by the Montana Supreme Court's opinion, which never considered any of the participating schools' curriculum. Instead, the court simply applied section 6(1) to bar all "religious schools" from the program.

Third, Respondents' own arguments show that the status/use distinction is irrelevant. Respondents claim that religious schools often cannot be "disentangled" from the religious education they provide. *Id.* at 39 (citing *State ex rel. Chambers v. Sch. Dist. No. 10*, 472 P.2d 1013, 1021 (Mont. 1970)). But if that were so, then the status/use distinction is one without a difference—and so is Respondents' argument. The more Respondents try to argue that use, and not status, is implicated here, the more they credit Justice Gorsuch's concern that the status/use distinction is unworkable. *Trinity Lutheran*, 137 S. Ct. at 2025, 2026 (Gorsuch, J., concurring in part).

Thus, whether the application of section 6(1) here discriminates against religious beliefs, conduct, status, use—or some combination thereof—the result is the same: It discriminates against religion in violation of the Free Exercise Clause. The history surrounding the Free Exercise Clause does not change that conclusion.

C. The history of the Free Exercise Clause does not help Respondents.

Perhaps recognizing that this Court's Free Exercise Clause jurisprudence lends it no support, Respondents invoke history: specifically, the Founding-era constitutions of New Jersey and North Carolina, as well as James Madison's *Memorial and Remonstrance against Religious Assessments*. But like this Court's jurisprudence, these sources support the Petitioners' position—not Respondents'.

According to Respondents, the fact that the New Jersey and North Carolina Constitutions of 1776 "guaranteed free exercise of religion while simultaneously disqualifying religious institutions from state aid" makes it "impossible that the original public meaning of a 'prohibition' on 'free exercise' encompasses a state constitutional provision disqualifying religious institutions from state aid." Resp'ts' Br. 29–30. Impossible or not, that conclusion is irrelevant, because as already stated, this case does not involve aid to religious institutions. This Court has "drawn a consistent distinction" between programs that aid religious institutions and programs of private choice that aid individuals, and this case involves the latter. *Zelman*, 536 U.S. at 649 (collecting cases).

New Jersey's high court made the same point, holding that the very state Constitutional provisions[6]

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[6] The provisions at issue in *Everson* were substantively identical to those of New Jersey's 1776 Constitution. *Compare* N.J.

that, according to Respondents, "disqualify[] religious institutions from state aid" *allow* programs aiding individuals attending religious schools. *Everson v. Board of Educ.*, 44 A.2d 333 (N.J. 1945), *aff'd*, 330 U.S. 1 (1947). In affirming that decision, meanwhile, this Court held that "New Jersey . . . *cannot* exclude . . . the members of any . . . faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation," because doing so would "hamper its citizens in the free exercise of their own religion." *Everson*, 330 U.S. at 16 (emphasis added). If there is anything to learn from New Jersey's constitutional experience, it is that the Free Exercise Clause prohibits—not allows—a wholesale bar to religious options in individual aid programs. As for North Carolina, that state's supreme court has twice upheld the state's scholarship program for elementary and secondary students. *See Hart v. State*, 774 S.E.2d 281 (N.C. 2015); *Richardson v. State*, 774 S.E.2d 304 (N.C. 2015).

Respondents' invocation of Madison's *Memorial and Remonstrance against Religious Assessments* is equally unavailing. The *Remonstrance* protested a Virginia bill that would have forced all Virginians to pay a tax in support of a Christian church selected by the taxpayer, which the state would have then required the churches to use for paying the salaries of clergymen and for places of worship. That bill bears no similarity to the scholarship program here. Unlike the Virginia bill, the scholarship program aids families on a religiously

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Const. of 1776 art. XVIII & XIX, *with* N.J. Const. of 1844 art. I, §§ 3 & 4.

neutral basis for the secular purpose of enhancing educational opportunities. The Virginia bill, on the other hand, would have aided religious institutions—and only Christian ones—for a blatantly religious purpose. In short, Madison's opposition to the Virginia bill says nothing about what his thoughts would have been on the program here.[7]

What the Remonstrance *does* show is that Madison would have opposed excluding religious options from this program. Madison believed the government must remain neutral toward religion and "protect[] every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property." James Madison, *Memorial and Remonstrance against Religious Assessments* ¶ 8 (1785), *reprinted in Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 68 (1947). The proposed Virginia bill "violate[d] [that] equality by subjecting some to peculiar burdens" in matters of religion. *Id.* Applying section 6(1) to bar religious options in student-aid programs does the same thing. It subjects some Montanans—those who choose religious education—to a "peculiar burden": an absolute prohibition on state-financial assistance.

Thus, Respondents cannot refute that applying section 6(1) to the program discriminates against religion. Moreover, this discrimination is exacerbated by the history behind section 6(1) itself. That history creates

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[7] In fact, a leading Madisonian scholar has argued that Madison would not have opposed school-choice programs, as long as they are religiously neutral. Vincent Phillip Muñoz, *God and the Founders: Madison, Washington, and Jefferson* 141–43 (2009).

serious constitutional concerns, including under the Equal Protection Clause.

III. Applying Article X, Section 6(1) to Bar Religious Options from the Program Violates the Equal Protection Clause.

Petitioners have shown that section 6(1) was originally enacted to target Catholics and Catholic schooling. Under this Court's equal protection cases, if "discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985). Respondents have failed to carry that burden. They offer three arguments, none of which is persuasive.

First, Respondents argue that section 6(1) could not have been enacted to target Catholics in 1889, because Montanans elected three Catholic politicians that served between 1867 and 1891. Resp'ts' Br. 17 (citing 10 *The Catholic Encyclopedia*, at iii, 519 (1913)).[8]

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[8] The Amici brief for the Baptist Joint Committee for Religious Liberty, et al. also claims that "[a]t that time seventy-seven percent of all Montanans who considered themselves members of any church denomination identified as Catholic." *See* Amicus Br. 28 (citing census report). This is misleading because it only considers members of specific churches. A more telling statistic is that in 1890, Catholics were only 19 percent of the total population in Montana. *See* Department of the Interior, *Report on Statistics of Churches in the United States at the Eleventh Census: 1890* 231 (1894), https://tinyurl.com/ra7ly6e (stating there were 25,149 Catholics in Montana in 1890); Department of Commerce

But this means nothing. The virulent anti-Catholicism surrounding John F. Kennedy's presidential campaign is proof enough that Catholics can be elected despite substantial anti-Catholic sentiment.

Second, Respondents argue that even if the 1889 provision was enacted for bigotry, that bigotry was erased when the Delegates started "anew" with their 1972 Constitution. Resp'ts' Br. 18. This is incorrect. Not only is the language in the 1972 provision nearly verbatim to the original, but the Delegates consistently stated that the 1972 provision "retains" the 1889 provision. 1971–1972 Montana Constitutional Convention Tr. Vol. VI ("Transcript"), at 2010, 2012–14 (Statements of Delegates Loendorf, Schiltz, Harbaugh, and Driscoll); *see also* Pet. App. 22 (finding that the "Delegates intended Article X, Section 6, to retain the meaning" from 1889). In addition, the Delegates retained the original provision despite their widespread acknowledgment that it was "a badge of bigotry," and a "remnant[] of a long-past era of prejudice." *Id.* at 2009–13, 2030 (statements of Delegates Harbaugh, Toole, Driscoll, Schiltz, Graybill, and Champoux).

Third, Respondents argue that the Delegates had legitimate motives for the provision's readoption, such as preventing funds from being diverted from the public schools. Resp'ts' Br. 19. Yet the provision itself undermines that argument by prohibiting aid only to

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and Labor, *Statistical Abstract of the United States: 1906* 33 (1907), https://tinyurl.com/rqp5vw4 (stating there were 132,159 people in Montana in 1890).

religious schools, not all private schools. Indeed, the record shows that the primary reason for readopting the provision was instead to preserve the "status quo" and avoid "stir[ring] deeply held emotional feelings in various sectors of the public." Transcript at 2009. Delegate Burkhardt even stated that "if we were starting from no place, the exact wording of this statement might not be as it is in our Constitution." *Id*. Yet he, like several other Delegates, recommended retaining the provision because "[c]hange in the present provision, whether substantial or merely formal, might endanger passage of the entire Constitution." *Id*. Thus, between excising this badge of bigotry and passing the new constitution, the Delegates concluded it was more important to do the latter.

Section 6(1)'s application in this case continues its discriminatory legacy. But even if section 6(1) had not been enacted to discriminate against Catholics, it would still show hostility toward religion by singling out religious schools and the families who wish to attend them for disparate treatment. This violates not only the Equal Protection Clause, but also the Establishment Clause.

IV. Applying Article X, Section 6(1) to Bar Religious Options from the Program Violates the Establishment Clause.

As Petitioners showed in their brief, Pet'rs' Br. 45–52, barring religious options from a public program shows hostility toward religion in violation of the

Establishment Clause. *See Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963) (holding the Establishment Clause prohibits government from "affirmatively opposing or showing hostility to religion"). Respondents offer three arguments against this claim, none of which succeeds.

First, Respondents again argue that section 6(1) is valid on its face. Resp'ts' Br. 52–53. But this is no answer to Petitioners' challenge, which is to section 6(1) *as applied* by the Montana Supreme Court. Next, Respondents oversimplify *Zelman* by arguing that that case merely held that student-aid programs that include religious schools are permissible under the Establishment Clause. Resp'ts' Br. 53. Respondents ignore that *Zelman* also sets forth an Establishment Clause framework governing such programs, requiring that they be neutral toward religion and allow families, not the government, to choose where to use the aid. *Zelman*, 536 U.S. at 652–53; Pet'rs' Br. 47–51. The Montana Supreme Court, however, held that any such program must *bar* religious options, thereby denying the religious neutrality and private choice required by *Zelman*.

Last, Respondents incorrectly apply the *Lemon* test. First, they claim section 6(1) has the "secular purpose" of "protect[ing] religious liberty and guard[ing] against entanglement." Resp'ts' Br. 54. Even assuming that those rationales could support section 6(1) generally, they cannot justify section 6(1)'s application in this case. The Montana Supreme Court never suggested that the program in any way threatened religious liberty or

caused entanglement between the state and religious schools, nor is that ever suggested by the record.

Respondents similarly claim the application of section 6(1) does not have the primary effect of inhibiting religion any more than "the Legislature's decision to have the tax-credit program expire on its own terms in 2023." *Id*. Not so. If the program expired, the Legislature would be free to reenact the same or a similar program later. Here, in contrast, the lower court not only invalidated the scholarship program, but effectively forbade families from ever receiving state aid for religious schooling in the future.

Thus, the court's judgment inhibits religion in violation of the tests in both *Zelman* and *Lemon*, and it should therefore be reversed.

V. Ruling for Petitioners Would Not Create a Parade of Horribles.

Respondents next argue that ruling for Petitioners will "upend national traditions" and "pose grave federalism concerns." Resp'ts' Br. 44–45. It will do neither.

A. Petitioners' position would not "upend national traditions."

Respondents warn this Court against "[i]nvalidat[ing] Montana's No-Aid Clause" and the "no-aid provisions in 37 other state constitutions," because they are a "longstanding and widespread" part of our history. Resp'ts' Br. 41. Yet Petitioners have not asked the

Court to do any such thing. As Petitioners stressed in their opening brief, "it is unnecessary" to "invalidate[ ] the challenged provision on its face" (much less any other state provision) because "[t]he Court can simply declare that article X, section 6(1) is unconstitutional as applied." Pet'rs' Br. 31 n.5.[9]

In any event, as seven of this Court's justices have recognized, Blaine Amendments stand for bigotry, not for any venerable tradition. *Mitchell v. Helms*, 530 U.S. 793, 828–29 (2000) (plurality opinion by Justice Thomas, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy) (stating the national Blaine movement was "born of bigotry" and "pervasive hostility to the Catholic Church"); *see also Zelman*, 536 U.S. at 719–21 (dissent by Justice Breyer, joined by Justices Stevens and Souter) (noting anti-Catholicism "played a significant role" in the Blaine movement).

Respondents argue that some of these amendments predated James G. Blaine's proposed federal constitutional amendment and for this reason, must have been free of anti-Catholic animus. *See* Resp'ts' Br. 41–42. This is false. As Professor Green, on whose work Respondents rely, has emphasized: James Blaine was

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[9] Most state courts in interpreting their Blaine Amendments have declined to give effect to the "tradition" of discrimination that Respondents embrace. Twenty of the 37 states with Blaine Amendments freely allow religious options in publicly funded scholarship programs, and almost all allow religious options in tax-credit programs. Richard Komer & Olivia Grady, *School Choice and State Constitutions* (2d ed. 2016), https://tinyurl.com/t6z8ly3.

a political opportunist who rode the wave of anti-Catholicism that had been swelling in this country *for decades*. *See* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 54 (1992); *see also* Joseph P. Viteritti, *Choosing Equality: School Choice, the Constitution, and Civil Society* 152 (1999). Michigan's 1835 "proto-Blaine Amendment"—which Respondents stress the most—is a perfect example. *See* Resp'ts' Br. 41, 23a. Scholars have demonstrated that this provision was rooted in vehement anti-Catholicism. *E.g.*, Joseph P. Viteritti, *The Inadequacy of Adequacy Guarantees: A Historical Commentary on State Constitutional Provisions That Are the Basis for School Finance Litigation*, 7 U. Md. L.J. Race, Religion, Gender & Class 58, 78 (2007). The same is true of other proto-Blaines, as well. *See, e.g.*, Amicus Brief by Pioneer Institute (discussing extensive anti-Catholic bigotry behind Massachusetts' proto-Blaine, enacted in 1855).

Still, Respondents insist, "the constitutionality of a law cannot be determined by the motives of its most bigoted supporters." Resp'ts' Br. 43. But regardless of whether the motives of individual supporters can determine the constitutionality of a law, a law's object—as evinced by its text, effect, and history—certainly can. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533-40 (1993); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). Here, the object of Article X, section 6(1)—as applied in this case and evinced by its text, effect, and history—is discrimination against

Petitioners and other families who believe a religious school is the best option for their children. If that is a "national tradition," Resp'ts' Br. 44, it is one that must end.

B. Petitioners' position does not "pose grave federalism concerns."

Finally, Petitioners' position does not "pose grave federalism concerns," as Respondents claim, *see* Resp'ts Br. 45, but would protect federalism principles. Respondents' three arguments to the contrary fail.

First, reversing the judgment below would not deny States discretion to legislate within the play in the joints of the Free Exercise and Establishment Clauses. *See* Resp'ts' Br. 46. Indeed, Montana's Legislature *was* within the play in those joints when it enacted the scholarship program: while the Establishment Clause permits States to adopt a program like Montana's, *see Zelman*, 536 U.S. 639, the Free Exercise Clause does not require them to do so. By contrast, barring religious options from such programs falls outside the "play in the joints" between the Religion Clauses and, in fact, *violates* both clauses.

Respondents next contend that there is a grave federalism concern in Petitioners "seek[ing] a federal court order under which [a] void law"—the scholarship program—"springs back into existence" if the state constitutional provision it violates is itself invalidated under the federal constitution. Resp'ts' Br. 46. "To

Montana's knowledge," Respondents insist, "no federal court has ever issued such a remedy." *Id.*

Yet that was the result in *Romer v. Evans*. There, the cities of Aspen and Boulder and the city and county of Denver each had enacted ordinances which banned discrimination on the basis of sexual orientation. 517 U.S. 620, 623–24 (1996). The state of Colorado then adopted Amendment 2, which "repeal[ed] th[o]se ordinances." *Id.* at 624. When the Colorado courts and, ultimately, this Court held that Amendment 2 violated the federal constitution, the ordinances "spr[a]ng back into existence," in Respondents' words. They are still enforced in Aspen, Boulder, and Denver to this day.

Likewise, in *McDaniel v. Paty*, Reverend McDaniel's eligibility to serve as a state constitutional delegate "spr[a]ng back into existence" after this Court held that the state law provision that the Tennessee Supreme Court had relied upon in holding him ineligible for that office violated the federal constitution. *See* 435 U.S. 618 (1978). If this Court's reversal of a *state* court of last resort to require reinstatement of a *state* constitutional delegate barred from that office on *state* statutory and constitutional grounds does not raise federalism concerns, then surely this case does not.

Finally, Respondents claim that "Petitioners' position would . . . create a kind of inverse federalism" by which (1) a state legislature could, without federal constitutional consequence, "decide[] not to enact" a

scholarship program in the first instance, but (2) a state court would violate the federal constitution if it applied the state's Blaine Amendment to bar such a program. Resp'ts' Br. 48. But there is nothing problematic about that state of affairs. The first scenario does not involve state action; the second obviously does, and this Court has not hesitated to invalidate similar state action when it contravenes the federal constitution. *See, e.g.*, *McDaniel* 435 U.S. at 618.

Thus, ruling for Petitioners would neither upset tradition nor disturb federalism. Instead it would affirm this Court's long-standing principles of religious liberty and neutrality.

CONCLUSION

The Court should reverse the judgment of the Montana Supreme Court and hold Article X, section 6(1) unconstitutional as applied to the scholarship program.

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