

No. 18-1195

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IN THE  
**Supreme Court of the United States**

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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.*

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**On Writ of Certiorari to the  
Montana Supreme Court**

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**BRIEF FOR GEORGIA GOAL SCHOLARSHIP  
PROGRAM, INC. AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONERS**

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## **QUESTION PRESENTED**

Does it violate the Religion and Speech Clauses or Equal Protection and Due Process Clauses of the United States Constitution to invalidate a generally available and religiously neutral student-aid program for the social, emotional, and academic development of students simply because the program affords students the choice of attending religious schools?

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## **IDENTITY AND INTEREST OF THE *AMICUS CURIAE*<sup>1</sup>**

Georgia GOAL Scholarship Program, Inc. (“GOAL”) is the largest student scholarship organization (“SSO”) operating under the Georgia Education Expense Credit Program (the “Georgia Scholarship Program”). Similar to the Montana K-12 tax credit scholarship program, the State of Georgia awards state income tax credits to taxpayers who contribute to SSOs to fund pre-K-12 scholarships to parents and guardians desiring to send their children to the non-public schools of their choice. The majority of the 144 non-public schools participating in GOAL are religious schools. As is the case with respect to the Montana Constitution, the Georgia Constitution contains a so-called “Blaine” amendment, prohibiting use of public funds, directly or indirectly, in aid of any sectarian institution. Thus the enforceability of “No-Aid” Blaine amendments against tax credit student scholarship programs is of vital interest to GOAL.

### **SUMMARY OF ARGUMENT**

This case arises from a decision of the Montana Supreme Court that a student scholarship program funded by private donations for which a state tax credit is given violates the Montana version of the Blaine Amendment on the grounds that public money is directly or indirectly aiding sectarian schools.

The historical underpinnings of the Blaine Amendment are rooted in prejudice. The late 19th century movement

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<sup>1</sup> Rule 37 statement: All parties have consented to the filing of this brief. Counsel for the *amicus curiae* authored the brief in its entirety. No person or entity other than the *amicus curiae*, its members or its counsel made a monetary contribution to the preparation or submission of the brief.

to adopt the Blaine Amendment at the state and federal levels was animated by invidious anti-Catholic bigotry. While this history is well-known and bad enough, the Blaine Amendment was also driven by a less familiar, but equally opprobrious, racial discrimination.

The Blaine Amendment was pushed in former slave states from racist motives to cripple education of newly freed slaves by banning any state aid to independent sectarian schools organized by black churches. Instead, black children were shunted to grossly inadequate public schools and provided only a rudimentary industrial education to prepare them for lives of menial service rather than lives of learning, critical thinking, development and citizenship.

This brief will outline how racist and anti-Catholic interests used the Blaine Amendment to further their agendas of disenfranchising and oppressing disfavored and powerless racial, ethnic and religious minorities by banning even indirect aid to sectarian schools they established to educate their children.

The unconstitutional and shameful origins of the Blaine Amendment cannot be concealed by clothing them in a belatedly and poorly conceived state interest in avoiding a violation of the Establishment Clause. Nor can such "state interests" redeem the clear violations of the Free Speech, Free Exercise, Due Process and Equal Protection rights of the Petitioners caused by Montana's policy of explicit religious discrimination through the per se exclusion of religious schools from otherwise neutral and generally available student aid programs.

Throughout the second half of the nineteenth century, American political and business leaders promoted

federal and state Blaine or “No-Aid” constitutional amendments designed to cut off public funding for educational and social welfare programs in which denominational or sectarian institutions participated. At the same time, they assured the public that prohibitions on the use of public funds for education by sectarian institutions would not preclude K-12 common schools (as public schools were known at that time) from teaching the Protestant Christian values they viewed as foundational to the American Republic and essential to the moral education of responsible citizens.

The true intentions of the “No-Aid” proponents are revealed most clearly in examining the education of blacks in the South from 1865 until 1920. During that period, a contest over the direction of black education was waged between two competing philosophies: the “accommodation” industrial education model advanced by Samuel C. Armstrong, Booker T. Washington, and supportive northern industrial philanthropists; and, the “empowerment” classical liberal education model advanced by black religious leaders like Bishop Henry Turner of the African Methodist Episcopal Church, the Niagara Movement (comprised of black intellectuals like W. E. B. Du Bois), and a nascent black social gospel movement. The No-Aid movement aligned with the accommodation model.

In 1877, as Georgia re-entered the Union, lawmakers approved both the creation of a tax-supported system of segregated elementary and secondary common schools and a “No-Aid” provision. The No-Aid provision effectively eliminated any hope that African American churches might receive public support to build and operate schools outside of a government-run—and miserably inadequate—segregated system. Starved

for funds and competing with free but inadequate public schools built on the industrial education model, black denominational schools offering a classical liberal education could not compete. Many black intellectuals and leaders at the time recognized the combination of these policies as an educational blueprint for black subordination. This prediction was borne out by subsequent events, as public education for black children languished for generations.

In more recent times, education policymakers have struggled with rising social disorder in public schools. In the last 25 years, a movement to address these problems has swept through American K-12 education, under the rubric of “social and emotional learning.” This movement posits that behavioral and learning problems flow from traumatic adverse childhood experiences. To address problems arising from “trauma,” public school officials, using public funds, promote a holistic in-school social and emotional learning agenda to inculcate a set of thoughts, beliefs, attitudes, and practices that state officials have determined are essential to students’ social, emotional, and academic development. While these social and emotional learning programs are nominally secular, the pervasive inculcation of these all-encompassing attitudes and beliefs toward social, academic and personal development and the evangelistic fervor of their proponents clearly resemble what students of religion refer to as “religious naturalism.”<sup>2</sup>

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<sup>2</sup> Religious naturalism combines a naturalist worldview with perceptions and values commonly associated with religions. “Religious Naturalism,” Wikipedia, [https://en.wikipedia.org/wiki/Religious\\_naturalism](https://en.wikipedia.org/wiki/Religious_naturalism) (last visited Sept. 11, 2019). Those practicing religious naturalism view all humans as “value-laden organisms,” whose meaning in life is realized through a “values

In the exercise of their fundamental constitutional rights, the Petitioners in this case prefer the social, emotional, and academic education of their children be conducted in accordance with the dictates of their consciences at the religious schools of their choice, in contrast to the value system chosen for them by the government. Respondents provide a free public education for those who accept the government's program of what equates to religious naturalism but, under the flag of Montana's No-Aid provision, deny this generally available public benefit—funding for education—to Petitioners and like-minded parents expressly on the basis of their religious beliefs. This violates their rights to Freedom of Religion, Freedom of Speech, freedom from compelled thought, Due Process and Equal Protection.

The bigoted origins of the No-Aid provisions in the Constitution of Montana and the constitutions or law of 39 other states<sup>3</sup> have yielded a bitter harvest of oppression of racial, ethnic and religious minorities for approximately 150 years, which continues in the case now before the Court. It is time to repudiate this legacy, and vindicate the fundamental rights of conscience, liberty and equal protection.

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discourse” engaged in “by individuals and communities in their myriad struggles to humanize their existence.” CAROL WAYNE WHITE, *BLACK LIVES AND SACRED HUMANITY: TOWARD AN AFRICAN AMERICAN RELIGIOUS NATURALISM* 18 (2016).

<sup>3</sup> See “Blaine Amendment,” Wikipedia, [https://en.wikipedia.org/wiki/Blaine\\_Amendment](https://en.wikipedia.org/wiki/Blaine_Amendment), describing extent of adoption of Blaine Amendments at the state level. (Last visited September 11, 2019).

**ARGUMENT****I. STATE “NO-AID” PROVISIONS RESULTED IN THE COERCIVE INDUSTRIAL EDUCATION OF BLACK STUDENTS.****A. In the Antebellum Period, at Risk of Severe Punishment, African Americans Placed a High Value on Educating Their Children.**

Before the Civil War, many Southern states criminalized teaching slaves to read and write. Nevertheless, African-Americans, both before and after their liberation, exhibited a courageous passion for educating their children. “Slavery’s great failure lay in its inability to crush the black longing to read and write.” RONALD E. BUTCHART, *SCHOOLING THE FREED PEOPLE: TEACHING, LEARNING, AND THE STRUGGLE FOR BLACK FREEDOM, 1861-1876* 2 (2010).

For example, during the 1830s in Savannah, Georgia, Jane Deveaux, the daughter of a former slave from Savannah and a free woman of African descent from Antigua, started a secret school affiliated with the Second African Baptist Church, which itself was founded in 1802 by a former slave and Georgia’s first native African American religious leader, Andrew Bryan. The school offered instruction in reading, writing, and mathematics to its slave students, some of whom carried their school work in buckets, giving the impression they were running errands for their owners. Undeterred by the public whipping of James Simms, another black teacher in Savannah, for operating a school during the antebellum period, Deveaux operated her school throughout the Civil War. After the War’s end, African American educators proudly organized the Savannah

Educational Association. Deveaux continued to operate her school, teaching an average of thirty-five pupils per day. Janice L. Sumter-Edmond, *Free Black Life in Savannah*, in *SLAVERY AND FREEDOM IN SAVANNAH* 134 (Leslie M. Harris and Daina Ramey Berry eds., 2014).

The hunger for learning among the slaves exemplified by the pioneering work of courageous black educators like Deveaux prompted this observation from John W. Alvord, Superintendent of Freedmen's Bureau: "[A] people long imbruted by slavery, and the most despised of any on earth, whose chains are no sooner broken than they spring to their feet and start up an exceeding great army, clothing themselves with intelligence." John W. Alvord, *First Semi-Annual Report on Schools for Freedmen* (Jan. 1, 1868).<sup>4</sup>

Superintendent Alvord further observed that "the great impulse to teach among these freed people themselves, with readiness to pay expenses, gives us the solution" to the problem of the projected shortfall of 15,000 in the number of available teachers. Foreseeing that freed slaves would create black schools throughout the South, it was Alvord's early impression that, once trained, these black teachers could be taught "to organize, classify, and govern a school." *Id.* at 12. He opined that freedmen deserved the chance to build their own schools, explaining that, "[a] [school] development system, bringing out what they can do themselves, is far better than a perpetual pauperizing, which only shows what others can do for them." *Id.* at 13.

Black religious and civil rights leaders in Georgia concurred with Alvord's assessment. During his keynote speech at the October 29, 1866 Convention of the

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<sup>4</sup> Available at <https://babel.hathitrust.org/cgi/pt?id=uva.x000176932&view=1up&seq=14>.

Equal Rights and Educational Association of Georgia in Macon, Captain J. E. Bryant, the white leader chosen by the black members of the Association to serve as President, challenged his audience to spend the coming year working “to arouse the colored people to the importance of gaining an education,” and to “establish as many schools in the State as possible.” J. E. Bryant, Annual Address of the President at Convention of the Equal Rights and Educational Association of Georgia (Oct. 29, 1866).<sup>5</sup> Bryant reported that northern missionary associations would be unable to establish many schools in rural Georgia, and that the State would not establish schools for them either. Bryant stated that “the freed people will therefore be obliged to establish and support schools for their children themselves, or have none,” suggesting that, for the coming year, the Association should work to establish self-financed schools in every county in the State. *Id.* at 12. He concluded that, if, during the year, schools for black youth and adults could be established in every county in Georgia, “it will be regarded by your friends, everywhere, as one of the most remarkable undertakings ever accomplished by a people just emancipated from slavery.” *Id.*

For several decades after the end of the Civil War, the efforts of black religious and civil rights leaders to start and operate denominational schools dedicated to classical liberal education for freedom, justice, and opportunity would run into resistance from the organizers and funders of competing schools offering only a limited industrial education.

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<sup>5</sup> Transcript *available at* <https://cdn.loc.gov/service/rbc/rba/apc/08400/08400.pdf>, p. 11.

**B. From 1865 to 1900, Black Religious Leaders Emphasized the Importance of Promoting Classical Liberal Education That Would Empower Blacks to Pursue Political, Economic, and Social Equality.**

The schools reporting to the Freedmen's Bureau represented every educational level, from elementary classes through college. Intent on demonstrating the intellectual capacity of freed black slaves, northern missionary educators developed a program to progress qualified students to the "higher branches," including mathematics, literature, and occasionally even Latin and Greek.

Following their liberation, freedmen fled from the churches of their former masters and rapidly established their own churches. For example, in Savannah, between 1865 and 1880, blacks organized ten new churches and began to join new denominations. These black churches became centers for political action and education, with pastors and deacons becoming major public leaders. Reconstruction forged a strong unification of church, class, and education. GARY WRAY MCDONOGH, *BLACK AND CATHOLIC IN SAVANNAH, GEORGIA* 37 (1993).

Ultimately, the proliferation of new churches and denominations led to schisms that, for the next few decades, would manifest in the related debate over how best to educate black youth. According to Gary Dorrien, a historian and professor of social ethics and religion, the black social gospel movement of the last quarter of the nineteenth century split into four distinct camps: those encouraging political accommodation and economic uplift (i.e., Booker T. Washington); those urging African American nationalism and separation (i.e., African Methodist Episcopal ("AME") Bishop

Henry McNeal Turner); those calling for protest activism for racial justice (AME minister Reverdy C. Ransom); and those who navigated between the other three positions, imploring against factional divisions (i.e., Baptist pastor Adam Clayton Powell, Sr.). Gary Dorrien, *Recovering the Black Social Gospel*, 43 *Harvard Divinity Bulletin* Nos. 3 & 14 (Summer/Autumn 2015).<sup>6</sup>

For Dorrien, Bishop Turner was a giant figure in the black church struggle against white racism, whose thought distinctly prefigured liberation theology. In 1868, two months after Turner and 26 other black Republicans were elected to the Georgia legislature, Georgia Democrats expelled them all. On September 3, 1868, Turner stood before the assembled representatives and denounced the legislators who had refused to seat the African American senators and representatives. In a fiery speech known as “I Claim the Rights of a Man,” Turner proclaimed that by working in white plantation owners’ fields and garnering their harvests for 250 years, African Americans had “pioneered civilization” in the South. As compensation, Turner explained that African Americans did not ask for retaliation for the blood, sweat, and tears expended by their fathers, but for “our rights.” Henry McNeal Turner, *I Claim the Rights of a Man* (Sept. 3, 1868).<sup>7</sup>

For their outspoken views and subsequent promotion of African American colonization of West Africa, Turner and other black nationalists were marginalized by the white social gospel movement, American

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<sup>6</sup> Available at <https://bulletin.hds.harvard.edu/articles/summerautumn2015/recovering-black-social-gospel>.

<sup>7</sup> Transcript available at <https://www.blackpast.org/african-american-history/1868-reverend-henry-mcneal-turner-i-claim-rights-man/>.

Protestants, and other, more moderate black leaders. Criticizing this marginalization, in their 1905 Declaration of Principles, the members of the Niagara Movement, which included W. E. B. Du Bois and other proponents of the early black social gospel movement, noted their disagreement: “[W]e are surprised and astonished at the recent attitude of the church of Christ—an increase of a desire to bow to racial prejudice, to narrow the bounds of human brotherhood, and to segregate black men to some outer sanctuary. This is wrong, unchristian and disgraceful to the twentieth century civilization.”<sup>8</sup> In spite of this defense, ultimately Turner and his movement were also marginalized by wealthy northern industrial philanthropists, who, along with Southern leaders, “all came to view Hampton Institute’s [industrial] educational philosophy as the key to resolving the race question nationally, and even worldwide.” Gregory Mixon, *Henry McNeal Turner Versus the Tuskegee Machine: Black Leadership in the Nineteenth Century*, 79 THE JOURNAL OF NEGRO HISTORY 363, 367 (Autumn 1994).

**C. From 1868 to 1900, Samuel C. Armstrong and Booker T. Washington Promoted an Industrial Education Model as Suitable for Adjusting Blacks to a Subordinate Economic, Social, and Political Role in the New South.**

The philosophy of “industrial education” for blacks, conceived and promoted by former Union Army General, Samuel Chapman Armstrong, and a former slave, Booker T. Washington, emerged as a competitor to the idea of a classical liberal education in denominational schools for black children. In 1868, Armstrong estab-

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<sup>8</sup> Available at <https://glc.yale.edu/niagaras-declaration-principles-1905>.

lished the Hampton Normal and Agricultural Institute.<sup>9</sup> In 1881, one of Armstrong's former students, Booker T. Washington, founded the Tuskegee Normal School for Colored Teachers, resulting in the "Hampton-Tuskegee Idea."<sup>10</sup>

The "Hampton Idea" was designed partly to teach students steady work habits, practical knowledge, and Christian morals. *See* JAMES D. ANDERSON, *THE EDUCATION OF BLACKS IN THE SOUTH, 1860-1935* 36 (1988). But it was also intended as an ideological force that would provide instruction suitable for adjusting blacks to a subordinate role in the emergent New South:

The ex-slaves struggled to develop a social and educational ideology singularly appropriate to their defense of emancipation and one that challenged the social power of the planter regime. Armstrong developed a pedagogy and ideology designed to avoid such confrontations and to maintain within the South a social consensus that did not challenge traditional inequalities of wealth and power. In time these two ideologies and programs of Black education collided, and Armstrong's prized pupil, Booker T. Washington, was at the center of the confrontation. Washington founded Tuskegee Normal and Industrial Institute in 1881, and by the turn of the century, the "Hampton-Tuskegee Idea" represented the ideological antithesis of the

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<sup>9</sup> "Normal schools" are schools for training teachers. "Normal schools," Wikipedia, [https://en.wikipedia.org/wiki/Normal\\_school](https://en.wikipedia.org/wiki/Normal_school) (last visited Sept. 11, 2019).

<sup>10</sup> Walter H. Page, *Introduction to* BOOKER T. WASHINGTON, *UP FROM SLAVERY: AN AUTOBIOGRAPHY*, p. 8 (1901).

educational and social movement begun by ex-slaves.

*Id.* at 33.

Significant for this brief, Armstrong intended the Hampton Idea to support the conservative wing of southern re-constructionists, who promoted new forms of external control over blacks, including disenfranchisement, segregation, and civil inequality:

Armstrong's philosophy of "Black Reconstruction," widely publicized as the "Hampton Idea," essentially called for the effective removal of black voters and politicians from southern political life, the relegation of black workers to the lowest forms of labor in the southern economy, and the establishment of a general southern racial hierarchy.

*Id.* at 36.

Armstrong's plan was for Hampton-trained black educators to adjust future generations of young people to this social arrangement, aided by Hampton-styled industrial teacher-training normal schools, state departments of education, local school boards, and northern white philanthropists. Armstrong excluded classical studies because he believed that such training stimulated "vanity" in black students, which focused them on unrealistic aspirations of political and professional success. *Id.* at 49.

For years, leading black educators heavily criticized the Hampton-Tuskegee ideology, pedagogy, and model, as well as the woefully limited and inadequate industrial instruction offered at Hampton. Regardless of these criticisms, many leading American politicians, businessmen, and philanthropists came to view the

Hampton-Tuskegee industrial education model as pointing the way toward a national solution of the “Negro problem.” The Hampton Idea was actively supported by Ulysses S. Grant (a primary proponent of the 1875 attempt to adopt the No-Aid Blaine Amendment), Rutherford B. Hayes, James A. Garfield, Theodore Roosevelt, William Howard Taft, Woodrow Wilson, Andrew Carnegie, John D. Rockefeller, Jr., Julius Rosenwald, George Eastman, Charles W. Eliot, Jabez L. M. Curry, and Clark Howell.

The determination among leading lawmakers and philanthropists to spread the Hampton-Tuskegee industrial education model throughout the South set the stage for the early twentieth-century struggle over the proper education of black people. The debate, one element of what came to be known as the Washington-Du Bois controversy, “represented one of the last great battles in the long war to determine whether black people would be educated to challenge or accommodate the oppressive southern political economy.” *Id.* at 77.

By the end of the nineteenth century, Booker T. Washington, who preached a philosophy of self-help, racial solidarity, and accommodation, was viewed as one of America’s leading education reformers and influential black leaders. He urged blacks to accept discrimination for the time being and concentrate on elevating themselves through hard work and material prosperity. He believed in education in the crafts, industrial and farming skills, and the virtues of patience, enterprise and thrift. He believed this approach would win the respect of whites and lead to African Americans being fully accepted as citizens and integrated into all strata of society.

On September 18, 1895, speaking before a predominantly white audience at the Cotton States and

International Exposition in Atlanta, in what came to be known as his “Atlanta Compromise” address, Washington defended the logic of the Hampton-Tuskegee industrial education model. He explained to his white audience that, “No race can prosper till it learns that there is as much dignity in tilling a field as in writing a poem. It is at the bottom of life we must begin, and not at the top. Nor should we permit our grievances to overshadow our opportunities.” Booker T. Washington, Atlanta Compromise Speech (Sept. 18, 1895).<sup>11</sup>

W. E. B. Du Bois, a towering black intellectual, scholar, and political thinker, disagreed with Washington, believing that accommodating segregation and promoting a second-class education model would only serve to perpetuate white oppression—just as Armstrong intended. Du Bois advocated political action and a civil rights agenda, which he and other members of the Niagara Movement set out in Niagara’s Declaration of Principles at their 1905 annual meeting. The Declaration expressed a preference for both “well-equipped trade and technical schools for the training of artisans, and the need of adequate and liberal endowment for a few institutions of higher education.” Niagara’s Declaration of Principles (1905).<sup>12</sup>

In 1903, Du Bois had argued that social change could be accomplished by developing a smaller group of college-educated blacks, which he referred to as “the Talented Tenth.” These Talented Tenth would lead the rest of the black race away from the “contamination and death” of materialism and exclusively industrial education. Du Bois explained, “If we make money the

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<sup>11</sup> Transcript *available at* <http://historymatters.gmu.edu/d/39/>.

<sup>12</sup> See n. 6, *supra*.

object of man-training, we shall develop money-makers but not necessarily men; if we make technical skill the object of education, we may possess artisans but not, in nature, men.” W. E. B. Du Bois, *The Talented Tenth*, in *THE NEGRO PROBLEM* (1903).<sup>13</sup>

By the end of the nineteenth century, the public debate over the proper purpose of educating black youth was still raging, but the die had been cast in favor of the Hampton-Tuskegee industrial education model. Political and public sentiment had shifted in support of a segregated common school system in states throughout the South, with public funding exclusively reserved for non-sectarian institutions.

**D. The Blaine Amendments Cemented the Primacy of the Hampton-Tuskegee Idea of Industrial Education and Barred Public Aid for the Classical Liberal Education of Blacks in Denominational Schools.**

By the mid-1870s, black leaders from various Christian denominational churches and some of Hampton’s students and alumni were publicly criticizing Armstrong’s Hampton industrial education model. In 1888, Armstrong himself stated, “During the first ten years of our school life [1868-1878] our work was looked upon with disfavor by the Negro leaders as providing only a low grade of instruction.” ANDERSON, *supra*, at 62-63. Thus, from the outset, Armstrong realized he would be in an ideological (and funding) battle with the diametrically opposed leaders of the majority of the South’s black denominational normal schools, secondary schools, and colleges. *Id.* at 83. If

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<sup>13</sup> Available at <https://teachingamericanhistory.org/library/document/the-talented-tenth/>.

Armstrong could convince his influential political friends and early supporters to embrace universal public education and the introduction of common schools in the South (to the exclusion of funding for Christian denominational schools), his normal school model for training public school teachers would prevail. During the 1870s, Armstrong went to work laying the foundation for such a result. *Id.* at 80. He found success, as ultimately, northern industrialists would emphasize the Hampton-Tuskegee model as a politically expedient device to reconcile hostile southern whites to the idea of universal common schooling for black children.

During an 1872 fundraising tour to major northern cities, Armstrong used public performances of “cabin and plantation songs” by a group of Hampton Institute African American singers to stimulate donations. At a stop in Washington, D.C., the Hampton Singers performed at the Capitol Rotunda and before President Ulysses S. Grant on the White House steps. Armstrong was received by his fellow Union Army General, President Grant, to whom he presented a needle and thread. “The two Union veterans sat on the steps, mending socks and trading war stories!” ROBERT FRANCIS ENGS, *EDUCATING THE DISFRANCHISED AND DISINHERITED: SAMUEL CHAPMAN ARMSTRONG AND THE HAMPTON INSTITUTE, 1839-1893* 111 n. 36 (1999).

Three years later, in an 1875 speech before the Society of the Army of the Tennessee, a Civil War veterans’ group, President Grant endorsed in ringing terms both free public education and a complete ban on any public aid to sectarian schools. Everyone, he said, should, “[e]ncourage free schools and resolve that not one dollar of money appropriated to their support, no matter how raised, shall be appropriated to the

support of any sectarian school.” Ulysses S. Grant, Address to the Society of the Army of the Tennessee (1875).<sup>14</sup>

Following Grant’s initiative, on December 14, 1875, U.S. Representative James G. Blaine of Maine, who was seeking the Republican presidential nomination in the next election, submitted a proposal to the House that read:

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

H.R.J. Res. 1, 44th Cong. (1875).

The Blaine Amendment failed to pass at the federal level, but it created a strong movement that resulted in the passage of state constitutional amendments or statutes restricting denominational school funding in a total of 40 states, with twelve states adopting such provisions in the 1870s.<sup>15</sup>

Beginning in 1792 and leading up to the Civil War, a significant portion of what little state aid Georgia had provided for the K-12 education of white children had been distributed to county-based, private acade-

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<sup>14</sup> Transcript *available at* <https://americancivicforum.org/project/a-great-and-happy-people/the-civil-war-and-union-victory/society-army-tennessee/>.

<sup>15</sup> See note 3, *supra*.

mies or “seminaries,” in which Christian religious education occurred. E. Merton Coulter, *The Ante-Bellum Academy Movement in Georgia*, 5 *GEORGIA HISTORICAL QUARTERLY* 11, 17-19 (Dec. 1921).<sup>16</sup> Once re-admitted to the Union, in 1877, the Georgia legislature, now controlled by conservative Democrats, amended the Georgia Constitution to provide not for a “system of general education,” but for “a thorough system of common schools for the education of children in the elementary branches of an English education only.” Ga. Const. art. VII, § 1, ¶ I (1877). The schools were to be free to all children of the State, “but separate schools shall be provided for the white and colored races.” Additionally, a No-Aid section was added to the Constitution providing that, “No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religionists, or of any sectarian institution.” Ga. Const. art. I, § 1, ¶ XIV (1877). Thus, once Georgia lawmakers decided it was necessary to provide a limited K-12 education to black, as well as white, children, they developed a newfound concern over the “separation of church and state” and decided to end their 85-year practice of financially supporting private Christian education. In this way, they avoided any need to fund private K-12 schools created by African American religious leaders.

As Professor Anderson explains, these developments significantly strengthened the chances for the Hampton-Tuskegee model to prevail over the Christian missionary and black denominational schools and colleges with which it was competing, including those operated by the AMA, the Freedmen’s Aid Society of

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<sup>16</sup> Available at [https://www.jstor.org/stable/40575695?seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/40575695?seq=1#metadata_info_tab_contents).

the Methodist Episcopal Church, the American Baptist Home Mission Society, the Board of Missions for the Freedmen of the Presbyterian Church in the U.S.A., the African Methodist Episcopal Church, the Colored Methodist Episcopal Church, and the African Methodist Episcopal Zion Church. ANDERSON, *supra*, at 67.

First, it was politically untenable to reverse the momentum for universal public education in the South, so Southern Democrats acquiesced. *Id.* at 80.

Second, public education would only be offered through a system of common schools, controlled by white local school system officials, who would decide which education model would be taught in their schools and which teachers would be hired, preserving white hegemony. *Id.* at 148-149.

Third, no public aid would flow to denominational schools of any sort, including those that would be educating black youth in classical liberal ideas, critical thinking skills, and economic empowerment that southerners would perceive as a threat to their dominant political, economic, and social positions.

Fourth, the Hampton-Tuskegee industrial education normal schools would produce black teachers who in turn would teach rudimentary “habits of living and labor” to students in segregated black schools.

Fifth, in light of the increased need for teachers in black common schools, northern industrial philanthropists made a concerted effort to convert financially struggling private liberal arts secondary and normal schools for the training of black teachers to the Hampton-Tuskegee industrial education model. *Id.* at 117.

Finally, as the proponents of the “No-Aid” constitutional amendment movement made clear, No-Aid

provisions would not interfere with publicly-funded common schools in the South teaching the “common” elements of “non-sectarian” Christianity and lessons in Christian morality that, in the nineteenth century, were viewed as an indispensable part of a basic education for democratic participation. WARD M. MCAFEE, *RELIGION, RACE AND RECONSTRUCTION: THE PUBLIC SCHOOL IN THE POLITICS OF THE 1870S* 4-5 (1998).

**E. Because Denominational Schools Serving Black Students Could Not Receive Public Aid, from 1900 to 1930, Rural Black Parents Resorted to Paying an Additional “Voluntary” Tax to Educate Their Children in the Segregated Common Schools.**

Even though by the end of the nineteenth century many southern state constitutions called for taxpayer funding of a “thorough system of common schools,” it was only in the first third of the twentieth century that public elementary schools became generally available to black students. ANDERSON, *supra*, at 148. The slow growth in the number of public common schools for black children was exacerbated by the decision in *Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899). *Cumming* rejected the black petitioners’ argument that because they were paying local taxes to support the white high school they could not attend, having to pay an additional tax in the form of tuition to attend other high schools violated their rights to Equal Protection under the Fourteenth Amendment, essentially validating separate but unequal public education for the races. *Cumming*, 175 U.S. at 543. See also J. Morgan Kousser, *Separate but not Equal: The Supreme Court’s First Decision on Racial*

*Discrimination in Schools*, 46 *Journal of Southern History* 17 (Feb. 1980).<sup>17</sup>

To improve languishing rural black education, Julius Rosenwald, philanthropist and President of Sears, Roebuck, and Company, launched a dramatic rural school construction program. By 1932, the Rosenwald Fund had contributed to the building of 4,977 rural black schools with pupil seating capacity of 663,615. The schoolhouses were located in 883 counties across fifteen southern states and, together with teachers' homes and industrial shops cost (in cash) \$28,408,520. Amazingly, black parents provided 16.64% of this total cash outlay, more than the Rosenwald Fund's 15.36%, while whites gave 4.27%, and public tax funds covered 63.73%. In effect, black parents were paying for their children's education twice – in taxes for schools their children could not attend or that the local authorities would not build for them, and a second time in contributions, materials and labor to build the Rosenwald schools. ANDERSON, *supra*, at 153.

This alternative to state-financed public education was necessary because, in the early twentieth century, “whites all over the South seized the school funds belonging to the disenfranchised black citizens, gerrymandered school districts so as to exclude blacks from certain local tax benefits, and expounded a racist ideology to provide a moral justification of unequal treatment.” *Id.* at 154. In short, black parents had no choice but to pay both direct and indirect “voluntary” taxes for the public education of their children.

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<sup>17</sup> Available at [https://www.jstor.org/stable/2207756?seq=1#page\\_scan\\_tab\\_contents](https://www.jstor.org/stable/2207756?seq=1#page_scan_tab_contents).

In vital respects, the system of double taxation that fueled what Professor Anderson calls the second crusade for black common schooling enabled black southerners to have at least the semblance of universal elementary education. This made the de jure exclusion of black children from the benefits of tax-supported public education more bearable for both whites and blacks. “It said much about blacks’ desire for education and their willingness to sacrifice for it, but it also said much about their powerlessness, their taxation without representation, and their oppression.” *Id.* at 185.

**F. The Ban on Public Funds for the Education of Children in the Religious Schools of Their Parents’ Choice Has Had a Devastating Impact on the Social and Emotional Attitudes, Skills, and Behaviors and Learning Outcomes of Black Children.**

Since the end of the Civil War, millions of black children have suffered from the inability of their parents to secure for them an adequate public social, emotional, and academic education at religious schools of their choice. For reasons emanating from religious bigotry, state No-Aid Blaine amendments precluded parents from receiving taxpayer funds (a significant portion of which they paid) for the education of their children in private denominational schools in which their children could secure a classical liberal education and the religious moral upbringing their parents deemed best. For decades, this religious bigotry was conjoined with racial bigotry in public school funding to trap black children in intentionally separate and grossly inadequate public schools.

By the mid-twentieth century, at least three generations of rural blacks had been educated in under-

funded, segregated public schools, the curriculum of which, in many instances, focused on rudimentary Hampton-Tuskegee industrial education. This naturally had a lasting and deleterious impact on the education of future generations of black children. In the same period, urban white Catholic European immigrants, one of the other original targets of state No-Aid constitutional amendments, but not also suffering racial discrimination or the same degree of poverty, were able to send their children to a nationwide system of parish-based parochial schools, either run by their local dioceses or a Catholic religious order.

Although the earliest state No-Aid constitutional amendments may have been directed toward African-American children in the South and Catholic immigrant children in the Northeast and Midwest, their cruelest impact was on rural black families. Since the end of the Civil War and the adoption of state No-Aid Blaine amendments, relative to white students in America during the same period of time, the lack of equal access to an adequate public education has been devastating to the economic sustainability, safety, and health of African Americans and their communities.

## **II. SOCIAL AND EMOTIONAL LEARNING AS PRACTICED IN MONTANA AND ELSEWHERE IS CONSISTENT WITH RELIGIOUS NATURALISM.**

Teachers and school administrators find themselves confronted with poor academic performance and difficult behavioral problems in their K-12 student population. In grappling with these problems, educators in Montana and elsewhere have begun relying on an emerging consensus in psychology and behavioral health that holds that traumatic adverse childhood experiences, or ACEs, can significantly interfere with childhood learn-

ing and socialization. Experiencing extreme injustice, extreme poverty, dysfunctional families, or absent or abusive parents are among many diverse circumstances qualifying as ACEs. Examining the link between toxic stress caused by ACEs and children's outcomes, a recent study shows that African American children growing up poor are at greater risk of disrupted physiological functioning and depressed academic achievement. Leila Morsy and Richard Rothstein, *Toxic Stress and Children's Outcomes*, Economic Policy Institute (May 1, 2019).<sup>18</sup> To help children overcome these problems, educators over the last 25 years have begun implementing a "trauma informed" social and emotional learning ("SEL") curriculum in America's K-12 public schools.

Upon examination, the nature of the social and emotional learning curricula bears striking similarities to a category of religious belief referred to by scholars as "religious naturalism," as distinguished from revealed religion. In her 2016 book, Bucknell University Professor of Philosophy of Religion Carol Wayne White contends that the historical evolution of religious belief in the black community corresponds to religious naturalism. She writes, "[T]he complexity of beliefs, choices, and actions of African Americans are not reducible to traditional expressions of black religion, or to the black church tradition." CAROL WAYNE WHITE, *BLACK LIVES AND SACRED HUMANITY: TOWARD AN AFRICAN AMERICAN RELIGIOUS NATURALISM* 4 (2016). White proposes "a view of humans as interconnected, social, value-laden organisms in constant search of

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<sup>18</sup> Available at <https://www.epi.org/publication/toxic-stress-and-childrens-outcomes-african-american-children-growing-up-poor-are-at-greater-risk-of-disrupted-physiological-functioning-and-depressed-academic-achievement/>.

meaning (cognition), enamored of value (goodness, love, justice), and instilled with a sense of purpose (teos).” *Id.* at 28.

White explains that humans are naturally conditioned to ask fundamental questions about the value, meaning, and purpose of our existence, which can only be answered in the context of our relations with others. White and other religious naturalists “share the sentiment that reveling in a sense of our connectedness with other living beings can only be described as sacred.” This sacredness is a natural orientation toward an ultimate pursuit with communal and discursive underpinnings:

This orientation toward joining with others in establishing our common humanity is what I imagine when using the phrase *sacred humanity*. Humans are, by our very constitution, relational, and our wholeness occurs within a matrix of complex interconnectedness; in this context, our sacrality has fundamentally to do with ways of conjoining with others that transform us.

*Id.* at 33.

Highlighting the naturalness of what she calls “sacred humanity,” White explains how the brain’s limbic system, which supports a variety of functions including emotion, behavior, motivation, and memory, “is the center of emotions that mobilize action and makes possible rich forms of relationship that involve empathy and caring for the young,” which, in turn, “lead us to recognize emotion, social relationships, and

values often associated with traditional religious symbols as part of human reality.”<sup>19</sup> *Id.* at 37.

White’s description of religious naturalism, and particularly the emphasis on social relations and connectedness to others, closely tracks the core philosophical premises of social and emotional learning curricula now sweeping through public K-12 education, which are described below.

Montana public schools are teaching mental and behavioral health and instilling in students all day, every day a particular set of social and emotional beliefs, attitudes, and practices. In 1995, Montana developed the Montana Behavioral Initiative (the “MBI”). “The MBI is a proactive approach in creating behavioral supports and a social culture that establishes social, emotional, and academic success for all students.” C. S. Porter Middle School, Montana Behavior Initiative (MBI), *What is MBI?*<sup>20</sup> The MBI components are designed “to assist educators, parents, and other community members in developing the attitudes, skills, and systems necessary to ensure that each student, regardless of ability or disability, leaves public education and enters the community with social and academic competence.” *Id.*

In July 2016, the Montana Office of Public Instruction (“Montana OPI”) published the *Montana Health Enhancement Standards Model Curriculum Guide for K-12 Health and Physical Education* (the

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<sup>19</sup> The Religious Naturalist Association “encourages awareness of the religious naturalist orientation.” <http://religious-naturalist-association.org/> (last visited September 16, 2019).

<sup>20</sup> <https://www.mcpsmt.org/Page/9173> (last visited Sept. 16, 2019).

“Montana Guide”).<sup>21</sup> For grades 9-12, the Montana Guide provides for the thorough inculcation of children in thoughts, beliefs, and attitudes for mental and behavioral health, including social and emotional well-being. The Performance Indicators and Health Goals applicable to students in grades 9-12 include many private and sensitive subjects about which parents have the primary right to teach their children as they raise them to realize their “sacred humanity.” These include, but are not limited to, life skills, good character traits and behaviors, self-esteem, self-respect, social-emotional environment, societal norms and health, personal values and beliefs, responsible decision-making, building resistance skills, conflict avoidance, conflict resolution, mind-body connection, depression, loss and grief, co-dependence, marriage, parenting, sexual attitudes and conduct, friendship, mental health and disorders, suicide, adjusting to family changes, coping with stressful life changes, and dating skills.

The recent transformation of K-12 public education from a purely academic undertaking into a holistic model for the social, emotional, and academic training of students is a national phenomenon, in which most states are engaged. The resemblance to religious naturalism lies in the reliance on man’s own understanding to develop as a person, and in the emphasis on social and relational aspects of development and being as an ultimate source of meaning and value. While writings in SEL eschew philosophical moral discussion and avoid the use of overtly moral language, reference to values like respect, empathy, honesty, fairness, and

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<sup>21</sup> Available at [https://opi.mt.gov/Portals/182/Page%20Files/Health%20%26%20Physical%20Education/HE\\_ModelCurriculumGuide.pdf](https://opi.mt.gov/Portals/182/Page%20Files/Health%20%26%20Physical%20Education/HE_ModelCurriculumGuide.pdf).

compassion are used throughout to express student behavior expectations. DEBRA MAYCONICH BARON, SOCIAL AND EMOTIONAL LEARNING: AN ARGUMENT FOR RELIGIOUS PLURALISM 153-54 (2013).<sup>22</sup> “[P]olicymakers, researchers, and educators often fail to recognize that SEL cannot be separated from the moral assumptions embedded by the state in the learning standards, or from the moral assumptions made by teachers, students, and their families based on their own belief systems.” *Id.* at 141. According to Baron,

[t]he reality that individuals look to different sources of authority for meaning making and guidance on moral issues cannot be ignored. While the resources that individuals rely upon can include, but are not limited to, one’s own experiences, friends, family traditions, society, popular culture, and the media, religion has been and continues to be a dominant force in shaping the moral and ethical identity and behavior of many people.

*Id.* at 250.

As with the promotion of the Hampton-Tuskegee industrial education model in the rural South by educators and wealthy industrial philanthropists, education and social psychology researchers and supportive foundations are championing SEL in school systems around the country as a way to “advance a new vision of what constitutes success in schools: the full integration of social, emotional, and academic development to ensure every student is prepared to thrive in school and in life.” Learning Policy Institute,

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<sup>22</sup> Available at [https://ecommons.luc.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1498&context=luc\\_diss](https://ecommons.luc.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1498&context=luc_diss).

*Aspen Institute Launches National Commission to Make Social and Emotional Development Part of the Fabric of Every School* (Sept. 20, 2016).<sup>23</sup>

The Collaborative for Academic, Social, and Emotional Learning, a leading proponent of SEL across the country, has recognized five “core competencies” that schools should include in their SEL programs: self-awareness, self-management, social awareness, relationship skills, and responsible decision-making. Collaborative for Academic, Social, and Emotional Learning (CASEL), *Core SEL Competencies*.<sup>24</sup>

The transformation is also a global trend, which the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) and its affiliated Mahatma Gandhi Institute of Education for Peace and Sustainable Development (“MGIEP”) (“UNESCO-MGIEP”) are leading. UNESCO-MGIEP, *Building Socio-Emotional Learning for Education 2030*.<sup>25</sup> In order to “transform education for humanity,” the UNESCO-MGIEP programs “are designed to mainstream SEL in education systems, innovate digital pedagogies, and put youth as global citizens at the center of the 2030 agenda for Sustainable Development.” *Id.*

In another parallel to religious naturalism’s attempt to validate its tenets by reference to analyses of the brain’s limbic system, a recent UNESCO-MGIEP paper

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<sup>23</sup> Available at <https://learningpolicyinstitute.org/press-release/aspen-institute-launches-national-commission-make-social-and-emotional-development>.

<sup>24</sup> <https://www.casel.org/core-competencies/> (last visited Sept. 9, 2019).

<sup>25</sup> UNESCO-MGIEP, *Building Socio-Emotional Learning for Education 2030*, <http://mgiep.unesco.org/> (last visited Sept. 16, 2019).

explained how cognitive neuroscientists could rigorously evaluate the five SEL core competencies to identify the ways in which they can consistently be cultivated, including through mindfulness practices. Marilee Bresciani Ludvik and Tonya Lea Eberhart, *How Mindful Compassion Practices Can Cultivate Social and Emotional Learning*, UNESCO-MGIEP (Sept. 2018), pp. 13-14.<sup>26</sup> To promote SEL, the authors recommend that schools furnish mindful compassion practices, such as yoga, Tai Chi, or QiGong. *Id.*

It can thus be seen that social and emotional learning (“SEL”) has substantial overlap and commonality with religious naturalism.

In the second half of the nineteenth century, educators, state lawmakers, and their wealthy industrial philanthropist supporters introduced prohibitions on the use of public funds for educating children in schools controlled by sectarian institutions. This consolidated the hegemony of their preferred accommodationist industrial education policies in secular public common schools over the liberal classical education model taught in denominational schools for black children. Today, an analogous effort relies on those same funding prohibitions to establish a comparable hegemony for religiously-natural SEL in public schools. The constitutional significance of this development is discussed in the next section.

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<sup>26</sup> Available at [https://d27gr4uvngxfbqz.cloudfront.net/files%2Ff1d151fa-e993-4e81-a6e6-221a47e4bbb6\\_Mindfulness%20Compassion26112018.pdf](https://d27gr4uvngxfbqz.cloudfront.net/files%2Ff1d151fa-e993-4e81-a6e6-221a47e4bbb6_Mindfulness%20Compassion26112018.pdf).

**III. THE ENFORCEMENT OF MONTANA'S  
NO-AID PROVISION AGAINST PETI-  
TIONERS VIOLATES THEIR FREEDOM  
OF SPEECH, THOUGHT, DUE PROCESS,  
AND EQUAL PROTECTION RIGHTS.**

**A. Conditions on Generally Available K-12  
Student Aid Must Not Violate the Right  
to Freedom of Speech.**

The First Amendment to the U.S. Constitution states, “Congress shall make no law . . . abridging the freedom of speech . . . .” U.S. Const. amend. I.

In *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001), this Court held that denying the Good News Club, a Christian youth development organization, after-school access to a public school classroom cafeteria constituted impermissible viewpoint discrimination against the “purely” religious approach the Club took toward the moral and character education of children. As the Court explained, “what matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty or patriotism by other associations to provide a foundation for their lessons.” *Id.* at 111.

Throughout the day, Montana public school officials are teaching students mental and behavioral health and social and emotional thoughts, beliefs, attitudes, and practices that are consistent with religious naturalism. Yet, Montana is denying Petitioners equal access to a scholarship program funded by contributions for which taxpayers receive a state income tax credit solely because they would use it at religious schools. In light of the decision in *Good News Club*, Montana cannot discriminate against Petitioners by denying

them equal access to generally available K-12 student aid to communicate their preferred viewpoints about mental and behavioral health and social and emotional thoughts, beliefs, attitudes and practices to their children at the accredited non-public Christian schools of their choice.

**B. Conditions on Generally Available K-12 Student Aid Must Not Violate the Right to Freedom from Compelled Thought.**

The First Amendment prohibition against government abridging freedom of speech also constrains government attempts to compel the thoughts, beliefs, attitudes, and practices of school children.

Throughout the school day, Montana educators, counselors, and outside therapists and invited individuals and community groups inculcate students in government-approved thoughts, beliefs, attitudes and practices relating to their mental and behavioral health and social and emotional development. The indisputably good intentions of the Respondents are insufficient to redeem the impositions on freedom of thought: “Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943). Yet, Montana is compelling Petitioners’ children to conform to the government’s preferred practices and attitudes relating to their mental and behavioral health and social and emotional well-being as a condition of receiving a free public education.

In *Barnette*, this Court upheld the First Amendment right of Jehovah’s Witnesses to refuse to participate in

the Pledge of Allegiance during a public school day, holding that forcing such students to perform the pledge “invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.” *Id.* at 642. The Pledge of Allegiance to a flag representing such democratic values as tolerance, respect, civility, diversity, and sacrifice takes less than one minute to recite; nevertheless, this Court held that forced recital of the Pledge was unconstitutional. In Montana public school classrooms, the entire school day is devoted to instilling Montana’s official doctrine relating to these and many other personal values and social and emotional development goals that certainly some parents prefer be taught from a religious perspective. “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.” *Id.*

By adopting and implementing a mental and behavioral health and social and emotional development curriculum, Montana seeks to remedy many of the unprecedented challenges today’s children face in their lives. Yet, if Petitioners desire to secure the social and emotional development of their children at the non-public religious schools of their choice, they must pay often unaffordable tuition to do so. The government may not force a person to choose between following the precepts of his or her religion and forfeiting generally available benefits, on the one hand, and abandoning one of the precepts of his or her religion in order to accept the benefits on the other. *Sherbert v. Verner*, 374 U.S. 398 (1963). “Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine

imposed against appellant for her Saturday worship.”  
*Id.* at 404.

**C. Conditions on Generally Available K-12  
Student Aid Must Not Violate the Rights  
to Due Process and Equal Protection.**

Under the Due Process Clause of the Fourteenth Amendment, no State shall “deprive any person of life, liberty, or property, without due process of law.” Via incorporation, the fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. *See Duncan v. Louisiana*, 391 U.S. 145, 148-149 (1968). In addition, these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. *Obergefell v. Hodges*, 576 U.S. \_\_\_, 135 S.Ct. 2584, 2597 (2015) (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) and *Griswold v. Connecticut*, 381 U.S. 479, 485-486 (1965)).

Personal choices concerning contraception, family relationships, procreation, childrearing and marriage, all of which are protected by the U.S. Constitution, are among the most intimate that an individual can make. *Obergefell*, 135 S.Ct. at 2599. Constitutional liberty includes the right to establish a home, bring up children, and give them an education suitable for their station in life. *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923).

Parents and guardians have the constitutionally guaranteed right to direct the upbringing and education of children under their control, and the State does not have the power to standardize its children. “The child is not the mere creature of the State; those who nurture him and direct his destiny have the right,

coupled with the high duty, to recognize and prepare him for additional obligations.” *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925).

“That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected.” *Meyer*, 262 U.S. at 401. As the State attempts to improve the physical, mental, and moral quality of children, it may not use coercive methods that conflict with the Constitution. *Id.*

The ability of parents to raise their children in accordance with the dictates of their consciences “is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014) (Kennedy, J., concurring, discussing Free Exercise rights).

The right of parents to secure the social, emotional, and academic development of their children as they see fit, which is a protected liberty interest under the Due Process Clause, enjoys like protection from the Equal Protection Clause. *Obergefell*, 135 S. Ct. at 2602-03 (discussing overlap of Due Process and Equal Protection rights).

Montana’s interference with Petitioners’ liberty to control the social, emotional, and academic development of their children is exacerbated by Montana’s unequal treatment of Petitioners. “Each concept—liberty and equal protection—leads to a stronger understanding of the other.” *Id.* at 2603. In Montana, parents who choose to secure the social, emotional, and academic development of their children in public schools are able to do so without cost (beyond their share of any

applicable state and local school taxes). Also, under the Montana Scholarship Program, Montana parents who choose to secure the social, emotional, and academic development of their children in private non-religious schools are eligible for K-12 scholarships. However, Montana denies parents equal access to generally available K-12 student aid for the social, emotional, and academic development of their children in non-public religious schools. In so doing, Montana imposes a frequently prohibitive financial penalty on families who would prefer their children not be inculcated in government-approved thoughts, beliefs, attitudes, and practices relating to mental and behavioral health and social and emotional development.

Montana is depriving Petitioners of their right to due process and equal protection under the Fourteenth Amendment as elaborated in *Meyer*, *Pierce*, and *Obergefell*. Montana has no compelling interest that is served by prohibiting Petitioners from participating in the Montana Scholarship Program. If, in the opinion of this Court, such a compelling state interest exists, Montana must more narrowly tailor the Montana Scholarship Program to serve that compelling state interest.

Respondents' explicit religious discrimination against the Petitioners cannot survive strict scrutiny. The unconstitutionality of the result in this case flows from a combination of an ill-considered obedience to Montana's No-Aid Blaine Amendment and a disregard of this Court's Free Speech, Freedom of Thought, Due Process, and Equal Protection decisions.

**CONCLUSION**

For the foregoing reasons, and those stated by Petitioners, the decision of the Montana Supreme Court should be reversed.

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