No. 18-1195

IN THE

Supreme Court of the United States

KENDRA ESPINOZA, ET AL.,
Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE, ET AL.,
Respondents.

On Writ of Certiorari
to the Supreme Court of Montana

BRIEF OF RESPONDENTS

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QUESTION PRESENTED

The Montana Legislature enacted a statute under which taxpayers would receive dollar-for-dollar tax credits for donations to organizations that would in turn disburse those donations to private schools for purposes of paying student tuition. The Montana Supreme Court invalidated the statute under the Montana Constitution's bar on aid to religious schools. The question presented is whether the invalidation of Montana's statute violated the Free Exercise Clause, Equal Protection Clause, or Establishment Clause.

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INTRODUCTION

This case lies at the intersection of two traditions that have coexisted since the early Republic.

The first is a tradition of staunch protection of religious freedom, including a recognition that nondiscrimination is crucial to religious freedom. Religious freedom is not limited to the mere right to practice one's faith without facing prosecution. Religious freedom requires that the State not exclude religious adherents from public benefits available to everyone else. Such discrimination penalizes the exercise of religion. It coerces people into abandoning their religion. And it exhibits a hostility to religion that is repugnant to fundamental principles of neutrality.

The second is a tradition of principled opposition to government aid to religious institutions. This view dates back to James Madison, the principal drafter of the Free Exercise Clause. It is not rooted in hostility to religion, but instead reflects the view that barring aid to religious institutions promotes religious freedom. Barring aid to religious institutions prevents government from using its leverage to dictate religious policy. It prevents religious institutions from becoming dependent on government. And it protects the rights of people who have principled religious objections to supporting a religion in which they do not believe.

States seeking to balance these competing interests have two options. First, a State may neutrally offer a benefit to both religious and non-religious institutions. This Court has made clear that the Establishment Clause authorizes that practice. And a State's desire to

avoid funding religious institutions cannot justify excluding them from benefits available to everyone else.

That does not mean that a State with principled opposition to aiding religious institutions *must* aid them. If a State is opposed to aiding religious institutions, it can achieve that goal by taking a second path—by *also* not funding similarly situated non-religious institutions. So a State can decline to rebuild church playgrounds—but only if it declines to rebuild any playgrounds. And it can decline to support religious private schools—but only if it declines to support any private school.

This case is about whether Montana's decision to take that second path violates the Constitution. Like 37 other States, Montana has a "No-Aid Clause" in its Constitution, which prohibits aid to "sectarian schools." By its terms, the No-Aid Clause does not prohibit any religious practice. Nor does it authorize any discriminatory benefits program. It simply says that Montana will not financially aid religious schools. Overwhelming evidence from the adoption of this provision shows that it is rooted not in bigotry, but in the principled view that barring aid to religious schools would promote, not hinder, religious freedom.

In this case, the Montana Legislature enacted a statute providing for a school-choice program. By its terms, the program provided for aid to both religious and non-religious schools while also requiring adherence to the No-Aid Clause. After the Montana Department of Revenue issued a rule finding only non-religious schools eligible to participate in the program,

Petitioners sued, alleging that the rule was illegal. The Montana Supreme Court held that the program's provision of aid to religious schools violated the No-Aid Clause. But it did not uphold the rule. Instead, it took the only action that would both abide by the No-Aid Clause, while also not excluding religious schools from a generally available benefit: It struck down the statute as a whole.

Petitioners now contend that even *that* is unconstitutional. It matters not, in Petitioners' view, that the government also does not aid similarly situated non-religious schools. Nor does it matter that the state Constitution was adopted based on the same principled views held by James Madison. Petitioners claim that the Constitution prohibits the bare act of applying a state constitutional provision that keeps government out of the business of aiding religious schools.

The Court should reject that claim. It is irreconcilable with the constitutional text, the original public meaning of that text, this Court's precedents, and longstanding national tradition.

STATEMENT

A. The Tax Credit Program

In 2015, the Montana Legislature passed Senate Bill 410, which created a tax-credit program for donations made to certain educational scholarship organizations. *See* 2015 Mont. Laws 2165, ch. 457 (codified at Mont. Code Ann. §§ 15-30-3101 *et seq.*). Individuals who donated to a nonprofit "student scholarship organization" ("SSO") could receive a dollar-for-dollar tax credit of up to $150 per year. Mont. Code Ann. §

15-30-3111. SSOs used these donations to fund scholarships for use at any "[q]ualified education provider" ("QEP"), which was defined to include essentially all private schools in Montana. *Id.* § 15-30-3102(7). SSOs paid the scholarships directly to the private school. *Id.* § 15-30-3104(1). Neither the donor nor the SSO could restrict the scholarships to any particular school. *Id.* § 15-30-3103(1)(b). By its terms, the program will expire in 2023. 2015 Mont. Laws 2165, ch. 457 § 33.

Recognizing that most private schools in Montana are religious schools, the Legislature provided that "[t]he tax credit … must be administered in compliance with … Article X, section 6, of the Montana constitution." Mont. Code Ann. § 15-30-3101. That constitutional provision—the "No-Aid Clause"—prohibits aid to "sectarian schools." It provides that state and local governments cannot "make any direct or indirect appropriation or payment from any public fund or monies … for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination," subject to an exception for "funds from federal sources provided to the state for the express purpose of distribution to non-public education." Mont. Const. art. X, § 6.

In 2015, the Montana Department of Revenue ("Department") promulgated Rule 1, an implementing regulation for the tax-credit program. Rule 1 provided that a QEP may not be "a church, school, academy, seminary, college, university, literary or scientific

institution, or any other sectarian institution owned or controlled in whole or in part by any church, religious sect, or denomination." Admin. R. Mont. § 42.4.802(1)(a). Rule 1's purpose was to comply with the No-Aid Clause, as required by the statute. Pet. App. 12-15, 89.

Because of this litigation, Rule 1 has never come into effect. Thirteen schools participate in the program: twelve are religious schools, and one (Cottonwood Day School) is a school for children with disabilities. Pet. App. 50 & n.6, 125; Big Sky Scholarships, *Schools*, https://perma.cc/L8RB-AD69 (last visited Nov. 4, 2019). In fall 2018, 94% of the program scholarships (51 of 54) were disbursed to religious schools. Pet. App. 123, 125.

B. Proceedings Below

Petitioners are parents whose children received scholarships through an SSO to attend Stillwater Christian School. Pet. App. 102 & n.2. Stillwater is a nondenominational school that provides a Christian education. Pet. Br. 6.

In 2015, Petitioners sued the Department, seeking an injunction against Rule 1. Pet. App. 104. A Montana trial court enjoined the rule on the state-law ground that it was not required by the No-Aid Clause. Pet. App. 86-119.

The Montana Supreme Court reversed. It held that the tax-credit program "indirectly [paid] tuition at private, religious-affiliated schools" and thus violated the No-Aid Clause. Pet. App. 26. The court then held that the portion of Senate Bill 410 that included

religious schools in the definition of "qualified education provider" could not be severed from the remainder of the statute. Pet. App. 29. In light of that holding, the Montana Supreme Court declined to uphold Rule 1. Instead, it struck down the entire tax-credit program. Pet. App. 32a-34a.

Concurring separately, Justice Gustafson concluded that the tax-credit program violated not only the state constitution, but also the Establishment and Free Exercise Clauses of the U.S. Constitution—the latter because it compelled taxpayers to support religious schools in order to obtain the tax credit. Pet. App. 49-51.

Justice Sandefur concurred separately. Pet. App. 52-60. Justices Baker and Rice dissented. Pet. App. 61-85.

SUMMARY OF ARGUMENT

I. The Montana Supreme Court's application of the No-Aid Clause did not violate the Free Exercise Clause.

I.A The Free Exercise Clause bars laws "prohibiting the free exercise" of "religion." This Court has held that the term "prohibition" covers not only direct bans on religious practice, but also "indirect coercion or penalties on the free exercise of religion." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) (internal quotation marks omitted). Thus, in *Trinity Lutheran*, this Court held that when a church was barred from receiving a generally available benefit, it was penalized for being a church, in violation of the Free Exercise Clause.

But here, because the Montana Supreme Court invalidated the statute as to both religious schools and non-religious schools, it ensured that there would be no "indirect coercion or penalties"—and hence no prohibition.

Petitioners contend that the bare application of the No-Aid Clause, as an interlocutory step in a judicial decision, itself violates the Free Exercise Clause. It does not. The No-Aid Clause does not restrain individual liberty. Rather, it restrains the government by barring state aid to religious schools. Giving effect to that restraint on government does not violate the First Amendment.

I.B The No-Aid Clause is not the product of anti-religious animus. The current No-Aid Clause was enacted in the Constitutional Convention of 1972. The Delegates' debates show that the Delegates enacted the No-Aid Clause in order to *protect* religious liberty. The Delegates believed that the No-Aid Clause would prevent the government from gaining undue influence over religious schools, preserve funding for public schools, and protect the rights of taxpayers with religious objections to state aid.

The Montana Supreme Court's decision protects religious freedom. The court enforced the No-Aid Clause as written, fulfilling the Delegates' goal of protecting religious liberty by creating a structural barrier between religious schools and government. By striking down the statute in its entirety, it also ensured that no one is penalized for exercising their faith.

I.C Founding-era evidence shows that the No-Aid Clause is constitutional. Several early state constitutions barred taxpayer support to religious institutions—while also disestablishing the church and protecting free exercise. By contrast, the First Amendment includes Establishment and Free Exercise Clauses, while saying nothing about taxpayer support of religious institutions. The First Amendment therefore leaves that question to the People. James Madison's principled opposition to state funding of religious institutions further confirms that the No-Aid Clause—which was enacted based on those same rationales—is constitutional.

I.D All nine Justices in *Locke v. Davey*, 540 U.S. 712 (2004), would have supported Montana's position here. The majority opinion concluded that a State may support non-religious education while declining to support religious education—thus rejecting the premise of Petitioners' Free Exercise claim. The dissent would have found a Free Exercise violation because Davey was excluded from a generally available benefits program. But it acknowledged that the State could constitutionally eliminate the scholarship program in its entirety. That is what occurred here.

I.E This case does not present the question reserved in *Trinity Lutheran*—whether excluding religious *use*, rather than religious *people*, from a generally available benefit program is constitutional—because here, there is no generally available benefit program. But if that question is relevant, the best reading of Montana law is that the No-Aid Clause bars

aid to religious *education*. It does not bar aid to secular education at religiously affiliated schools.

I.F Under Petitioners' position, any constitutional provision that bars funding of religious schools violates the Free Exercise Clause. Yet 38 States have such provisions, and they date back to 1835. The Court should defer to that national tradition, just as it has frequently done in the Establishment Clause context.

I.G Petitioners' position would be a blow to federalism. This Court's Establishment Clause cases hold that States should have latitude to decide whether to enact school-choice programs that support religious schools. States should also have latitude to decide *not* to enact them—which includes the latitude to bar such programs at the state constitutional level.

Petitioners' position would also infringe on state sovereignty by forcing a state to enforce a statute that is void *ab initio* under its state constitution. Even more incongruously, Petitioners contend that a legislature may decline to enact a school-choice program based on church-state concerns. But if a State bars such programs in its constitution, then the state constitution must be invalidated and the void statute must be enforced. That position would interfere with States' right to structure their own governments as they choose.

II. The No-Aid Clause does not violate the Equal Protection Clause. Its application to this case results in no unequal treatment, and it is not grounded in religious animus.

This case is not comparable to *Romer v. Evans*, 517 U.S. 620 (1996). In *Romer*, this Court invalidated a state constitutional provision that barred gay people from invoking the protections of antidiscrimination laws. Montana's Constitution does not do that. To the contrary, it protects religious people from both private and public discrimination—thus providing even more protection against discrimination than the Free Exercise Clause.

III. The No-Aid Clause does not violate the Establishment Clause. It separates church from state to a greater extent than the Establishment Clause, but that does not mean it *is* an Establishment. Contrary to Petitioners' position, the No-Aid Clause exhibits no hostility toward religion.

ARGUMENT

I. THE APPLICATION OF THE NO-AID CLAUSE DID NOT VIOLATE THE FREE EXERCISE CLAUSE.

Petitioners' primary argument—and the government's sole argument—is that the application of the No-Aid Clause violated the Free Exercise Clause. This Court should reject that claim.

A. Petitioners Have Not Identified A Prohibition on Free Exercise.

Begin with the text. The Free Exercise Clause provides that "Congress shall make no law … prohibiting the free exercise" of "religion." U.S. Const. amend. I. Thus, proving a Free Exercise violation requires the showing of a "prohibition" on religious

exercise.

The most straightforward type of "prohibition" is a flat ban on religious exercise, but that is not the only type. The term "prohibition" also covers "indirect coercion or penalties on the free exercise of religion." *Trinity Lutheran*, 137 S. Ct. at 2022 (internal quotation marks omitted). For instance, in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the cake shop owners were subject to financial liability because of government officials' hostility to their beliefs. That was a "prohibition" on Free Exercise—it was a financial penalty levied because of religion.

This Court has applied the same principle in cases where the government has denied a generally available benefit on the basis of religion. In *Trinity Lutheran*, Missouri funded a playground-repair program but excluded churches from the program. 137 S. Ct. at 2017-18. The Court held that when the government "den[ies] a generally available benefit solely on account of religious identity," it "imposes a penalty on the free exercise of religion." *Id.* at 2019, 2021. The textual basis for that holding was straightforward. The church was denied funds that it would otherwise have received because it was a church. This was dollar-for-dollar identical to imposing a fine for being a church—a classic "prohibition." Moreover, the "Department's policy put[] Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution." *Id.* at 2021-22. Thus, the policy was coercive—another hallmark of a "prohibition."

By contrast, state action does not violate the Free

Exercise Clause if it is not a "prohibition." In *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), a Native American organization argued that the construction of a road would destroy an area of spiritual significance to its members, thereby prohibiting their free exercise of religion. This Court disagreed. It explained that "[t]he crucial word in the constitutional text is 'prohibit': For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Id.* at 451 (internal quotation marks omitted). Thus, laws that "may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs" do not violate the Clause. *Id.* at 450.

In the state courts, Petitioners challenged the Department's Rule 1, which authorized scholarship funds for non-religious but not religious private schools. Petitioners alleged that the differential treatment of religious and non-religious schools created a "prohibition" as in *Trinity Lutheran*. But the challenge to Rule 1 is moot because the Montana Supreme Court invalidated the entire program. Pet. App. 32-34.

Petitioners now reframe their argument as a challenge to the No-Aid Clause itself, irrespective of whether religious schools are barred from receiving a generally available benefit.[1] That argument fails

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[1] Montana adheres to its position in the Brief in Opposition that Petitioners' contention was neither preserved nor decided below. In the Montana Supreme Court, the opening brief of Montana (appellant below) argued (at 40-41) that if Rule 1 was

because the application of the No-Aid Clause does not prohibit Petitioners' free exercise of religion. Because the Montana Supreme Court ensured that no one would be penalized for exercising their religion, the Montana Supreme Court complied with the First Amendment.

Neither Petitioners nor any schools are being prohibited from exercising their religion. Rather, the effect of the Montana Supreme Court's decision was to make scholarship donations by other Montanans less tax-advantaged. (They are still tax-deductible, Pet. App. 37 n.1, but are no longer subject to a dollar-for-dollar tax credit.) This, in turn, will reduce those other Montanans' incentive to donate money to a scholarship fund which will in turn have less scholarship money to disburse. Petitioners contend that paying tuition without scholarships is financially burdensome, *see* Pet. Br. 7-8, but neither Petitioners nor the schools are prohibited from doing anything.

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unconstitutional, then the whole statute would have to be invalidated. The response brief of Petitioners (appellees below) focused exclusively on the constitutionality of Rule 1, except for one footnote (at 39 n.30) responding to Montana's argument as follows: "Not only does this incorrectly assume that Article X, § 6 requires Rule 1, but it fails to harmonize § 6 with the Religion Clauses of both Constitutions." The government asserts that Petitioners preserved their claim at page 34 of their brief below (U.S. Br. 16-17), but that portion of the brief argued that *Rule 1* was discriminatory. Not surprisingly, the Montana Supreme Court did not address Petitioners' one-sentence statement beyond its own one-sentence statement that the Free Exercise Clause was not implicated. Pet. App. 31-32. Neither the Montana Supreme Court nor any other court has ever grappled with the complex issues in this case.

The government's assertion that the No-Aid Clause "prohibit[s] private parties from independently directing funds to religious entities," U.S. Br. 15, misunderstands the decision below. The Montana Supreme Court made clear that "[a] taxpayer is free to donate to an SSO, a QEP, or any other charitable cause of her choice. There is no prohibition on a taxpayer giving her money away, nor would such prohibition be constitutional." Pet. App. 25. Rather, "the action under scrutiny is the [Montana] Legislature's provision of a tax credit to taxpayer donors." *Id.* The invalidation of that tax credit does not prohibit any religious exercise or expenditure of funds.

Nor does this case resemble *Trinity Lutheran*. In *Trinity Lutheran*, the church was excluded from a generally available benefit, thus penalizing its religious practice. Here, the whole program is void *ab initio* under state law. *See Brockie v. Omo Constr., Inc.*, 887 P.2d 167, 171 (Mont. 1994) ("When a statute is declared unconstitutional, it is void *ab initio*."). Thus, there is no generally available benefit—and hence no penalty. Indeed, the state of the law is identical to what it will be in 2023, when the statute expires, and Petitioners do not suggest that there will be any "prohibition" at that point.

Likewise, unlike in *Trinity Lutheran*, there is no coercion here. If Trinity Lutheran abandoned its faith, it would get the money. But if Petitioners abandoned their faith, they still would not get scholarships. Thus, the application of the No-Aid Clause has "no tendency to coerce individuals into acting contrary to their religious beliefs." *Lyng*, 485 U.S. at 450.

The government claims that this argument is merely a quibble about remedies. In its view, it is irrelevant that the court below struck down the entire statute; the fact that the No-Aid Clause was applied was enough to violate the Free Exercise Clause. U.S. Br. 13-16.

This argument cannot be squared with the plain text of the Free Exercise Clause. The Free Exercise Clause bars prohibitions on an *individual liberty*: the "free exercise" of "religion." But the No-Aid Clause does not restrain any individual liberty. Rather, it bars the *government* from taking a particular type of action—aiding religious schools.

To be sure, when 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. But standing alone, the No-Aid Clause does not do that. It merely restrains the government from aiding religious schools. A restraint on government is not a prohibition on religious exercise—and the fact that the restraint on government was given effect, as an interlocutory step in a judicial decision, does not prohibit Petitioners' free exercise of religion.

Trinity Lutheran's reasoning makes this clear. Over and over again, this Court explained that the doctrinal basis for its holding was that the church was denied a generally available benefit, thus penalizing religious exercise. Trinity Lutheran "assert[ed] a right to participate in a government benefit program without having to disavow its religious character." 137 S. Ct. at

2022 (internal quotation marks omitted). "The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant." *Id.* Trinity Lutheran was "put to the choice between being a church and receiving a government benefit," and "such a condition imposes a penalty on the free exercise of religion." *Id.* at 2024. All of this reasoning presupposes that the benefit program exists and excludes the church—a scenario that the Montana Supreme Court ensured would not arise.

Thus, this is not a quibble about remedies. It is about the scope of the right. In *Trinity Lutheran*, the source of the prohibition on free exercise was the church's exclusion from a generally available benefit. Without that exclusion, there is no prohibition on free exercise.

B. Neither the Montana Constitution, Nor the Montana Supreme Court's Decision, Is the Product of Religious Hostility.

Petitioners also contend that the No-Aid Clause is unconstitutional because it was motivated by animus toward religion. Even assuming a showing of illicit motives would be sufficient to establish a constitutional violation, the premise is incorrect. The No-Aid Clause is not the product of religious bigotry, but rather stems from the view that barring aid to religious organizations *protects* religious freedom. The Montana Supreme Court followed the state constitution while also adhering to the antidiscrimination norm embodied in the Free Exercise Clause.

1. The No-Aid Clause Was Enacted in Order to Protect Religious Freedom.

Petitioners' brief argues that the no-aid provision in Montana's 1889 constitution was the product of bigotry. Pet Br. 28-45. Montana disagrees with that account. Petitioners rely on contemporary statements by private citizens, which are an unreliable basis for discerning the government's intent. *E.g.*, Pet. Br. 39-43. Petitioners also identify certain laws and statements using the word "sectarian." *E.g.*, Pet. Br. 36-39. But Petitioners identify no statements from the 1884 or 1889 constitutional conventions, or from any official participating in those conventions, demonstrating any anti-Catholic or other anti-religious bigotry, and Montana is aware of none.

Moreover, a contemporary source takes a contrary view. The 1913 edition of the Catholic Encyclopedia, published "under the auspices of the Knights of Columbus Catholic Truth Committee," states that "[t]he spirit of religious intolerance has had scant encouragement in Montana, and many Catholics have occupied prominent positions in her industrial development and political history." 10 Charles George Herbermann, *The Catholic Encyclopedia*, at iii, 519 (1913), https://perma.cc/U3PL-XU6M. It further notes that Montana's elected delegates to Congress from 1867-72 (James Cavanaugh) and 1873-85 (Martin Maginnis) were Catholic; so was Thomas Carter, who was Montana's final territorial delegate and first Congressman when Montana entered the Union in 1889. *Id.* at 519. In the next paragraph, entitled

"Freedom of Worship," it cites both the state constitution's free exercise clause and its provision barring appropriations to sectarian institutions, with no indication that the latter is a product of anti-Catholic bigotry. *Id.* Notably, Martin Maginnis served on the Education Committee of the 1889 Montana Constitutional Convention that drafted the No-Aid Clause, which the Convention adopted unanimously. *Proceedings and Debates of the Montana Constitutional Convention, 1889* at 529, 532 (1921), http://archive.org/details/proceedingsdebat00montrich.

Of greater importance, Petitioners' discussion is irrelevant because the operative document is the Montana Constitution of 1972. In 1970, the people of Montana passed a referendum calling for a Constitutional Convention to create a new Montana Constitution. *See* Larry M. Elison & Fritz Snyder, *The Montana State Constitution: A Reference Guide* 8-10 (2001). Montana's Constitutional Convention brought together 100 delegates from all walks of life. Those delegates included legislators, lawyers, ranchers, farmers, and ministers. *See Montana Constitutional Convention Proceedings* 30-64 (Mont. Legis. & Legis. Council 1972), https://courts.mt.gov/Library/mr#69845105-constitutional—statehood ("*Convention Proceedings*"); Montana Centennial Commission, *100 Delegates—Montana Constitutional Convention of 1972* (1989) ("*100 Delegates*").

Crucially, the Constitutional Convention did not *amend* the 1889 Constitution; the 1889 Constitution was thrown out and the delegates began anew. Unlike in *Hunter v. Underwood*, 471 U.S. 222, 233 (1985), the

constitutional provision enacted for allegedly bigoted reasons no longer had any legal force. No provision could become part of the new Constitution unless it was passed by a majority of the Delegates. If a provision in the 1972 Constitution resembled a provision in the 1889 Constitution, it was only because the Delegates made the affirmative decision to enact it anew.

The no-aid provision was initially addressed by a committee of delegates. In a majority report, the committee recommended a total bar on government aid to religious schools, as provided in the 1889 Constitution. It stated that "[a]ny diversion of funds or effort from the public school system would tend to weaken that system in favor of schools established for private or religious purposes." *Convention Proceedings*, at 729. It further stated:

> [P]ublic aid to sectarian schools which might result from a relaxation of the prohibition poses a potential threat to religion. The control which comes with aid could excessively involve the state in religious matters and could inadvertently favor one religious group over another. Several witnesses testified that they opposed aid not only from the standpoint of the protection of the state from religious influence but also from the standpoint of the protection of religion from political influence.

Id. Three committee members, led by Delegate Harbaugh, proposed amending the majority proposal to allow federal funds to pass through the State to religious schools. *Id.* at 743.

The Delegates then debated the No-Aid Clause, including the proposed amendment. The Delegates who supported the No-Aid Clause made clear that their support was not premised on religious bigotry, but rather on their good-faith view that barring aid to religious schools would promote religious freedom.

One view was that taxpayer support of religion would infringe on the religious freedom of taxpayers. Delegates cited their own religious beliefs in supporting the No-Aid Clause on that basis. Delegate McNeil emphasized he was raising his own children as Catholics, and stated: "I don't know whether you think this federal money comes from the collection plate on Sunday. It comes out of my pocket as a taxpayer. It is fundamentally wrong to take any tax money, and this applies to all federal money, and apply it to any church purpose." *Id.* at 2016. Delegate Barnard similarly stated: "I don't want any of my tax money going into my church, and my church doesn't want it." *Id.* at 2017.

Another view was that taxpayer support of religious institutions would ultimately weaken those institutions. Delegate Harper, a clergyman educated at a theological seminary, stated that "when state and a dominant church, or any church, get mixed up, it always has seemed to work to the detriment of both the church—the religious institution, finally, and to the state itself." *Id.* at 47, 2012-13. He explained: "[I]t's very difficult for a church supported by a state to be critical of the state, as I think a church should." *Id.* at 2021-22.

Delegate Conover emphasized that "three different church denominations" had supported the No-Aid

Clause for that very reason. *Id.* at 2016-17. He elaborated:

> [T]he Seventh Day Advent schools—he talked to us and he pointed out very strongly that if any of this money is ever distributed to any private school, then the federal government or the state will take over part of their church work. And they specifically told us they wanted no aid from no taxes or any allocation of any kind. He pointed out that 'If we cannot support our private schools, then it's our fault. We are the ones that's running it, and we don't want nobody to interfere with us. We teach our religion and we want it this way.'

Id.

After extensive debate, the Delegates agreed, by a 53-40 vote, to permit federal taxpayer money to flow through the State to religious schools. *Id.* at 2025-26. This substantive change to the 1889 provision is further evidence that the delegates did not merely re-enact the 1889 provision, and that the intent of the 1972 Delegates is what counts. *See Abbott v. Perez*, 138 S. Ct. 2305, 2325 (2018).

The Delegates approved the No-Aid Clause by an 80-17 vote. *Convention Proceedings*, at 2672. Among the "Aye" voters was Delegate Arbanas, a Catholic priest who at the time was the director of education for the Roman Catholic Diocese of Great Falls. *Id.*; *see 100 Delegates*, at 35. Most "Nay" votes came from Delegates who opposed federal taxpayer money going to religious schools and had voted against the minority

proposal. *Compare Convention Proceedings*, at 2672, *with id.* at 2025-26.

Petitioners' sole reference to the 1972 Convention consists of statements by three delegates (Delegates Harbaugh, Driscoll, and Schiltz) expressing the view that no-aid clauses were historically rooted in anti-Catholicism. Pet. Br. 44-45. Other delegates disagreed. Delegate Harper stated: "I rather think that most of us do not believe that the separation of church and state is an evidence of bigotry. I think we rather believe it to be an evidence of an evolution in history that has proved to be very wise in this country." *Convention Proceedings*, at 2012. Similarly, Delegate Kelleher, a self-described "'diaper Catholic'" who "spent 9 years in a Carmelite Monastery," observed: "I dislike the word 'bigotry,' because what is bigotry for me may be a very logical reason to another man." *Id.* at 2023. Indeed, Delegate Harbaugh acknowledged that his views were not uniformly shared, even among religious leaders. He stated that "I hope that, if nothing else, this debate will prove that ministers are human and that they can disagree with one another." *Id.* at 2010.

Notably, following the debates, Delegates Harbaugh, Driscoll, and Schiltz were all "Aye" votes for the No-Aid Clause. *Id.* at 2672. None of them ever suggested that any of their fellow Delegates had any anti-religious motives.

On June 6, 1972, the People of Montana voted to approve the Constitution. *Convention Proceedings*, at vi. Far from mobilizing public anti-religious bigotry, the official voter information pamphlet described the No-Aid Clause as prohibiting "state aid to private

schools." *Mont. Const. Conv., Proposed 1972 Constitution for the State of Montana: Official Text with Explanation*, https://sosmt.gov/Portals/142/Elections/archives/1970s/1972_VIP.pdf.

The Court should not tar the Delegates and the Montanans who ratified the Constitution as mere rubber-stampers of bigotry that arose elsewhere a century earlier.

2. The Montana Supreme Court's Decision Protects Religious Freedom.

The Montana Supreme Court's application of the No-Aid Clause is also not rooted in hostility. To the contrary, the court balanced two principles, each of which protect religious freedom in different ways.

In finding the statute unconstitutional, the court followed the No-Aid Clause, which protects religious freedom by enacting a structural barrier designed to ensure that religious institutions are independent from government. In striking down the statute as to non-religious schools as well, the court protected religious freedom by ensuring that religious institutions are not penalized for exercising their faith. This Court should not hold that the Montana Supreme Court's adherence to both those principles constituted an unconstitutional infringement on religious freedom.

Moreover, as Justice Gustafson explained in her concurrence, the court's decision protects religious freedom in an additional way: by invalidating a statute that had the effect of conditioning a government benefit

on a person's willingness to violate his religious beliefs by donating money to support schools of a different religion. Pet. App. 49-51.

Under the program, a taxpayer receives a tax credit if he donates money to a scholarship program. The taxpayer may not, however, direct how those funds are disbursed. Pet. App. 49, 50.

But participation in the program can violate the religious beliefs of religious minorities. For example, Petitioners emphasize that Jews view religious education as central to their religious beliefs. Pet. Br. 19. But Jews may also have a religious objection to supporting Christian education. And that is the inevitable effect of participating in the tax-credit program. No Jewish schools participate in the scholarship program; even if there were Jewish schools, the law forbids the donator from controlling how the donated funds are disbursed. Thus, given that the overwhelming majority of scholarships are for Christian schools, it is virtually certain that a Jewish taxpayer's donation would be funneled to a Christian school, in violation of his own religious beliefs.

Thus, like the church in *Trinity Lutheran*, the Jewish taxpayer is forced to choose between his money and his faith. He can either violate his religion and get the tax credit, or give the same $150 directly to an organization consistent with his religious beliefs and not get the tax credit. The invalidation of the statute eliminated that condition—illustrating how the No-Aid Clause can protect religious liberty.

3. The Invalidation of a Generally Applicable Program Reflects No Religious Hostility.

Petitioners emphasize that Montana's program does not mandate that the scholarship funds be expended on religious schools, but instead allows parents to choose between religious and non-religious schools. They argue, therefore, that the invalidation of the program under the No-Aid Clause reflects hostility toward religion. *E.g.*, Pet. Br. 1.

That argument lacks merit. In 1972, the Delegates explained that aiding religious schools would give the State leverage to dictate the content of religious instruction, and foster dependence by religious schools on the State, while diluting the State's commitment to public schools. These concerns—which have nothing to do with religious bigotry—continue to have force even when funds also go to non-religious schools, especially where, as here, 94% of the funds go to religious schools.

Moreover, members of this Court have offered principled justifications for opposing neutral programs similar to Montana's. For instance, Justice Breyer has opined:

> Parental choice cannot help the taxpayer who does not want to finance the religious education of children. It will not always help the parent who may see little real choice between inadequate nonsectarian public education and adequate education at a school whose religious teachings are contrary to his own. It will not satisfy religious minorities unable to participate

> because they are too few in number to support the creation of their own private schools. It will not satisfy groups whose religious beliefs preclude them from participating in a government-sponsored program, and who may well feel ignored as government funds primarily support the education of children in the doctrines of the dominant religions. And it does little to ameliorate the entanglement problems or the related problems of social division[.]

Zelman v. Simmons-Harris, 536 U.S. 639, 728 (2002) (Breyer, J., dissenting). Justice Breyer did not persuade the majority that the Establishment Clause *required* invalidating programs like Montana's, but his views were not rooted in bigotry. Montana's adoption of that position as a matter of state constitutional law—in a State where religious education is the only private school choice for many students—likewise cannot be attributed to religious hostility.

More fundamentally, Petitioners' argument conflates the Establishment Clause and the Free Exercise Clause. It is true that this Court has repeatedly upheld neutral programs like Montana's under the Establishment Clause. *See* U.S. Br. 22. That reflects a straightforward interpretation of the Establishment Clause's text: A State does not "establish[]" religion when parents, not the State, select the religious school. But the fact that the State *may* enact a program under the Establishment Clause does not show that it *must* do so under the Free Exercise Clause—or that a state constitution constraining it from doing so is unconstitutional. The

Free Exercise Clause analysis turns not on whether the State's program complies with the Establishment Clause, but on whether Petitioners are being penalized for exercising their religion. Here, Petitioners are correct that the Montana Legislature authorized, and the Montana Supreme Court invalidated, tax credits for scholarships that could also go to non-religious schools. But that fact does not show that Petitioners, who never wanted scholarships to non-religious schools, were penalized for exercising their religion.

It also bears noting that the Montana Supreme Court did not question the tax-deductibility of donations to religious schools as charities, Mont. Code Ann. § 15-30-2131, or the broad property tax exemptions for religious schools (and other charitable and educational facilities), as authorized by the Montana Constitution. Mont. Const. Art. VIII, § 5; Mont. Code Ann. § 15-6-201. Rather, the Montana Supreme Court's decision was narrow. The court recognized that a "tax exemption in many cases is economically and functionally indistinguishable from a direct monetary subsidy." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 859-60 (1995) (Thomas, J., concurring). It therefore concluded that the tax credit was the economic equivalent of a direct subsidy of religious school tuition, and hence an "indirect payment" to religious schools under state law. Pet. App. 27-28. Prohibiting the State from paying such a subsidy neither prohibits the free exercise of, nor shows hostility to, Petitioners' religion.

C. The History of the Free Exercise Clause Confirms that There Is No Free Exercise Violation.

Founding-era evidence demonstrates that the No-Aid Clause does not violate the Free Exercise Clause. At that time, several State constitutions disqualified religious institutions from government aid. Moreover, James Madison, the principal drafter of the Free Exercise Clause, argued against government funding of the church for reasons similar to those cited by Montana's Delegates. This evidence demonstrates that the original public meaning of a "prohibition" on "free exercise" would not have encompassed a state constitutional prohibition on government aid to religious institutions.

1. Contemporary State Constitutions.

Petitioners claim that the No-Aid Clause is unconstitutional because it disqualifies religious institutions from eligibility for government aid. But at the Founding, numerous state constitutions also disqualified religious institutions from eligibility for government aid.

These disqualifications typically appeared as part of a tripartite structure in early state constitutions. Those constitutions: (1) disestablished the church; (2) prohibited compelled support of the church; and (3) protected the free exercise of religion.

For instance, North Carolina's 1776 Constitution provided, *inter alia*, that (1) "there [s]hall be no establishment of any one religious church or denomination in this state, in preference to any other";

(2) that no person shall "be obliged to pay, for the purchase of any glebe, or the building of any house of worship"; and (3) "all persons shall be at liberty to exercise their own mode of worship." N.C. Const. of 1776, art. XXXIV. Similarly, New Jersey's 1776 Constitution provided: (1) "there shall be no establishment of any one religious sect in this Province, in preference to another"; (2) "no person" would be "obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any … church or churches …."; and (3) "no person shall ever, within this Colony, be deprived of the inestimable privilege of worshipping Almighty God in a manner, agreeable to the dictates of his own conscience." N.J. Const. of 1776, art. XVIII. Similar provisions from other early state Constitutions are collected in Appendices A-C.

These early state constitutions confirm the correctness of decisions like *Zelman*, which hold that the provision of government aid to religious schools does not, in and of itself, violate the Establishment Clause. There would have been no need to *both* disestablish the church *and* bar compelled support of the church if the provision of taxpayer funds to a church *was* an "establishment" of religion.

At the same time, these early state constitutions also confirm that a bar on government aid to religion does not violate the Free Exercise Clause. These constitutions guaranteed free exercise of religion while simultaneously disqualifying religious institutions from state aid. Therefore, it is impossible that the original public meaning of a "prohibition" on "free exercise" encompasses a state constitutional provision

disqualifying religious institutions from state aid.

The First Amendment adopts two-thirds of the tripartite framework present in contemporary state constitutions. It bars the establishment of religion and prohibitions on free exercise, while including no language authorizing or barring taxpayer aid to religious institutions. The natural inference is that the decision on whether to authorize, or bar, state aid to religious institutions is left to the People—not that a bar on state aid to religious institutions violates both Religion Clauses simultaneously, as Petitioners contend.

It is worth reemphasizing the distinction from *Trinity Lutheran*. *Trinity Lutheran* involved a general program that funded all playgrounds *except* church playgrounds. *See* 137 S. Ct. at 2017. Not only is there a straightforward textual argument that this is a "prohibition," but there is zero Founding-era evidence that any State ever engaged in this practice. That is why New Jersey's 1776 Constitution, which barred the use of tax dollars for purposes of "building or repairing" churches, does not justify New Jersey's modern-day practice of excluding churches from a historic-preservation program open to other institutions. *See Morris Cty. Bd. of Chosen Freeholders v. Freedom from Religion Foundation*, 139 S. Ct. 909 (2019) (Kavanaugh, J., respecting denial of certiorari).

By contrast, here Petitioners are redefining the constitutional violation as the very fact that a state constitution disqualifies religious institutions from eligibility for government aid. And when formulated *that* way, Petitioners' contention conflicts with the

historical evidence that such disqualifications were common at the Founding.

It is particularly incongruous to suggest that the Free Exercise Clause invalidates a state constitutional no-aid clause when one original purpose of the simultaneously enacted Establishment Clause was to *protect* the "variety of church-state arrangements that existed at the Founding"—including both state establishments and state disestablishments—from federal interference. *Town of Greece v. Galloway*, 572 U.S. 565, 605 (2014) (Thomas, J., concurring). It would be ironic if the First Amendment were construed to disable States from maintaining the very types of provisions it was designed to protect.

2. The Remonstrance.

James Madison was "the leading architect of the religion clauses of the First Amendment." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 141 (2011) (internal quotation marks omitted). His famous Memorial and Remonstrance Against Religious Assessments confirms the above analysis: Montana's statute does not violate the Establishment Clause, but the striking-down of the statute under a No-Aid Clause does not violate the Free Exercise Clause, either.

In 1785, Virginia proposed a bill under which "taxpayers would direct their payments to Christian societies of their choosing." *Id.* at 140. "If a taxpayer made no such choice, the General Assembly was to divert his funds to seminaries of learning, at least some of which undoubtedly would have been religious in character." *Id.* (internal quotation marks omitted). In

his Remonstrance, Madison argued that the bill would restrict religious freedom, *id.*; Virginia subsequently enacted a law forbidding the compelled support of religion. *Id.*

As this Court has held, the arguments in Madison's Remonstrance do not imply that the Establishment Clause forbids neutral government programs that may benefit religious schools, particularly tax-credit programs like Montana's. *See, e.g.*, *id.* at 141; *Rosenberger*, 515 U.S. at 854 (Thomas, J., concurring). The Establishment Clause prohibits an established church—and mere *aid* to a church does not *establish* the church.

But the Remonstrance also shows that the No-Aid Clause does not violate Free Exercise. Madison would not have viewed a bar on state support of religion as hostile. To the contrary, he opposed state support of religion—and not only state support of a particular established church. He concluded that even Virginia's assessment, which allowed taxpayers to choose which church to support, would threaten religious freedom.

Madison explained that "every page" of the "Christian religion" "disavows a dependence on the powers of this world … for it is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them." James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 6 (1785) (reprinted as an appendix to *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 67 (1947) (Rutledge, J., dissenting)). Madison expressed concern that the proposed assessment would weaken the church by

"weaken[ing] in those who profess this Religion a pious confidence in its innate excellence and the patronage of its Author" and "foster[ing] in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust it to its own merits." *Id.* He explained that the church's dependence on government might make it too wary of criticizing the government. *Id.* ¶ 8 (330 U.S. at 68). And he understood that taxpayer support of religion—even "three pence"—could infringe religious minorities' liberty. *Id.* ¶ 3 (330 U.S. at 65-66).

In light of Madison's views, the Free Exercise Clause—which Madison himself drafted, and which bars prohibitions of *free exercise of* religion—cannot reasonably be understood to bar prohibitions of *government aid to* religion. Madison did not, via the Free Exercise Clause, disable States from declining to aid religious institutions based on the views that Madison himself held.

D. Petitioners' Position Conflicts with *Locke*.

Petitioners claim that *Locke v. Davey*, 540 U.S. 712 (2004), supports their position. They are incorrect: All nine members of the *Locke* Court would have rejected Petitioners' claim.

In *Locke*, scholarships for secular subjects were funded but theology scholarships were not. 540 U.S. at 727. The Court concluded that such discrimination did not violate the Free Exercise Clause. Washington's rule did "not require students to choose between their religious beliefs and receiving a government benefit";

rather, the State had "merely chosen not to fund a distinct category of instruction." *Id.* at 720-21.

Crucially, the Court rejected the premise of Petitioners' position: that the Constitution prohibits singling out religious education as the one thing the State would not fund. The majority opinion explained that "[t]he subject of religion is one in which both the United States and state constitutions embody distinct views—in favor of free exercise, but opposed to establishment—that find no counterpart with respect to other callings or professions. That a State would deal differently with religious education for the ministry than with education for other callings is a product of these views, not evidence of hostility toward religion." *Id.* at 721. "That early state constitutions saw no problem in explicitly excluding only the ministry from receiving state dollars reinforces our conclusion that religious instruction is of a different ilk." *Id.* at 723. Treating "religious instruction" as "of a different ilk" is precisely the defect that Petitioners identify in the No-Aid Clause.

Petitioners emphasize that *Locke* applied only to theology students, rather than religious school students more generally. Pet. Br. 23-28. But the statute in *Locke* codified Washington's prohibition on providing funds on degrees "designed to induce religious faith." 540 U.S. at 716 (quotation marks omitted). Religious primary and secondary schools also offer an education designed to induce religious faith. The Court should not construe the Free Exercise Clause to distinguish between the religious education of college theology majors and the religious education of primary and

secondary school students (like Petitioners' children). Such a distinction has no basis in the constitutional text and would require courts to draw impossible distinctions between different forms of religious education.

Moreover, Petitioners' argument overlooks that religious teaching—even to primary and secondary school students—is itself a form of religious ministry. *See Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012). Indeed, Joshua Davey—who was studying to become a minister—is more closely comparable to religious school *teachers* than religious school *students*. Thus, like Washington's constitution, the No-Aid Clause bars funding of religious *ministry*—the ministry of religious teachers towards their students. Nothing in the Free Exercise Clause distinguishes between the funding of "religious instruction that will prepare students for the ministry," *Locke*, 540 U.S. at 719, and the funding of ministry itself.

Justice Scalia, joined by Justice Thomas, dissented in *Locke*. The dissent was based on the argument that prevailed in *Trinity Lutheran*: "When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax." 540 U.S. at 726-27 (Scalia, J., dissenting). That reasoning shows that there is no Free Exercise violation here, where there is no generally available public benefit.

Underscoring the point, Justice Scalia also stated that "the State already has all the play in the joints it needs. There are any number of ways it could respect both its unusually sensitive concern for the conscience of its taxpayers and the Federal Free Exercise Clause. … The State could also simply abandon the scholarship program altogether." *Id.* Justice Scalia then noted that, "[i]f that seems a dear price to pay for freedom of conscience, it is only because the State has defined that freedom so broadly that it would be offended by a program with such an incidental, indirect religious effect." *Id.*

Justice Scalia was prescient: He described the *exact* holding of the Montana Supreme Court. Justice Scalia said that there would be no constitutional problem if the State abandoned the program, *even if the reason for that abandonment was "concern for the conscience of its taxpayers," id.—i.e., to prevent the funding of religion*. Justice Scalia deemed that a "dear price to pay for freedom of conscience," *id.*, but he made clear that paying that price would not violate the Free Exercise Clause—which is exactly what happened here.

E. If the Status/Use Distinction Is Relevant, the Montana Constitution Bars Aid Based on Use Rather than Status.

In *Trinity Lutheran*, the Court fractured on whether the distinction between religious status and religious use is pertinent to the Free Exercise Clause analysis. A four-Justice plurality stated: "This case involves express discrimination based on religious

identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination." 137 S. Ct. at 2024 n.3. Justice Gorsuch, joined by Justice Thomas, disagreed that this distinction is relevant to the Free Exercise analysis. *See id.* at 2026 (Gorsuch, J., concurring in part).

Regardless of who is correct on that issue, Montana should prevail in this case, because there is no prohibition at all. But if that issue is relevant, Montana's Constitution does not discriminate on the basis of status. Rather, it denies aid to schools on the basis of religious use.

As a threshold matter, Petitioners are not the victims of status discrimination. They are not the object of any government action at all. Rather, the No-Aid Clause denies tax credits to other donors—a rule that applies irrespective of the donors' religious beliefs. Although the absence of those tax credits reduces the incentive to donate money which in turn reduces the amount of scholarship money, Petitioners' status as Christians never factors into any government decision.

Nor is Stillwater Christian School—where Petitioners intend to send their children, Pet. Br. 6—a victim of status discrimination. Stillwater is a nondenominational school. *Id.* It is not affiliated with a particular church. Stillwater is deemed a sectarian school under the No-Aid Clause because of what it does—provide a Christian education—not because of what it is. *See* Pet. 8-9 (quoting Pet. App. 152) (Petitioner Kendra Espinoza "love[s] that the school teaches the same Christian values that [she teaches] at home").

The government contends that the No-Aid Clause is status-based because it would also encompass schools providing no religious instruction that are merely affiliated with a church. U.S. Br. 20-22. It is doubtful that Petitioners have standing to make this argument given that they intend to attend an unaffiliated school. Moreover, Montana is unaware of any school in the State that merely is affiliated with a church but does not provide a religious education.

Even if Petitioners had standing, the argument would be unpersuasive. The Montana Supreme Court has not squarely decided whether a school is deemed a "sectarian school" under the No-Aid Clause if it is merely affiliated with a church but does not offer a religious education. Nor has it squarely decided whether the No-Aid Clause bars aid to religious schools when the aid would flow only to non-religious education. But the fairest reading of the Montana Supreme Court's jurisprudence is that the term "sectarian school" refers to a school that provides a religious *education*, and does not encompass schools merely affiliated with a church that provide a non-religious education. The Montana Supreme Court's decisions also imply that under the No-Aid Clause, a religious school that could separate its religious education from its non-religious education would be eligible for government funding to support the latter.

In *State ex rel. Chambers v. School District No. 10*, 472 P.2d 1013 (Mont. 1970),[2] the Montana Supreme

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[2] *Chambers* construed Montana's 1889 Constitution, but the decision below holds that *Chambers*' reasoning is also applicable to

Court considered whether state funds could be spent on teachers to teach "the standard course of secular instruction" at a Catholic school. *Id.* at 1014-15. The court held the funds could not be spent—but *not* because of the school's mere Catholic affiliation. Rather, the court quoted the church's policy that "[i]t is necessary not only that religious instruction be given to the young at certain fixed times, *but also that every other subject taught, be permeated with Christian piety*." *Id.* at 1021 (emphasis in original; quotation marks omitted). It then stated: "If this is the aim of the Church then if teachers were to be furnished at public expense to a parochial school it would not be possible to determine where the secular purpose ended and the sectarian began." *Id.* In other words, if a church-affiliated school provided a non-religious *education*—or if, at a religious school, expenditures on religious education could be separated from expenditures on non-religious education—there would be no problem with funding the non-religious education. But because there *was* no "standard course of secular instruction" that could be disentangled from religious instruction, the state expenditures were impermissible.

In the decision below, the court cited *Chambers* and emphasized that there is "no mechanism within the Tax Credit Program itself that operates to ensure that an indirect payment of $150 is *not* used to fund religious education." Pet. App. 28-29. The court was correct: The statute provides no mechanism to distinguish between scholarships awarded to non-religious schools

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the 1972 Constitution. *See* Pet. App. 22-23, 29-30.

and religious schools. Nor does it provide a mechanism to distinguish between non-religious and religious education at a particular school. As the court below put it, "[g]eneral tuition payments fund the sectarian school as a whole and therefore may be used by the school to strengthen any aspect of religious education, including those areas heavily entrenched in religious doctrine." Pet. App. 30. This reasoning shows that the Montana Supreme Court found that allocation of public money for religious *use* violated the No-Aid Clause. Its decision did not turn on anyone's status; indeed, it would likely have reached the opposite conclusion if it could be assured that schools providing religious education would use the money only for secular subjects.

Thus, fairly read, the Montana Supreme Court's decisions have interpreted the No-Aid Clause to prohibit expenditures on religious *education—i.e.*, religious use, not religious status.

If the Court is uncertain as to the Montana Constitution's meaning, it should remand so the Montana Supreme Court—which did not squarely address this question in this case—can interpret it in the first instance. The Montana Supreme Court would also have the opportunity to apply constitutional avoidance principles to avoid any clash with this Court's Free Exercise jurisprudence.

F. Invalidating Montana's No-Aid Clause Would Conflict with National Tradition.

Petitioners contend that it is unconstitutional for a state constitution to disqualify religious schools from

eligibility for public funds. That position would not only invalidate Montana's No-Aid Clause, but would also threaten no-aid provisions in 37 other state constitutions. *See* Appendix D (cataloging no-aid clauses). These provisions were mostly enacted in the 1800s and date back to 1835. *Id.* Rarely has the Court overturned provisions that are so longstanding and so widespread.

Petitioners do not dispute the longstanding and widespread nature of no-aid clauses, but contend that they can be overturned because they are the product of anti-Catholic bigotry. Pet. Br. 31-45. This argument lacks merit.

First, Petitioners' account of history is incomplete. Petitioners refer to no-aid clauses as "Blaine Amendments," after a federal constitutional amendment proposed by James Blaine that failed in 1875. Petitioners contend that no-aid clauses are the product of anti-Catholic bigotry of the Blaine era.

But the historical record is more complex. State constitutions barring taxpayer support of churches were widespread at the Founding. And the earliest provisions specifically barring aid to religious schools were enacted long before Blaine ever held office: Michigan adopted its no-aid clause in 1835, and other States adopted no-aid clauses in the 1840s and 1850s. In a scholarly book that Petitioners cite repeatedly (Pet. Br. 33-34, 43), Professor Green explains that there is little evidence of anti-Catholicism surrounding these early provisions. *See* Steven K. Green, *The Bible, The School, and the Constitution: The Clash that Shaped Modern Church-State Doctrine* 87-89 (2012). He

further explains that, even in the late nineteenth century, the historical record discloses a complex debate over the relationship between the government and public education that makes it difficult to determine whether state no-aid clauses reflect anti-religious bias. *See id.* at 230-33.

Moreover, generations have passed since Blaine, and voters continue to support their States' no-aid clauses. Statewide referenda seeking to overturn no-aid clauses failed in Oklahoma in 2016 and Florida in 2012, with over 5 million voters across the two States voting "no."[3] In recent years, voters in numerous other States have rejected referenda to overturn or limit no-aid clauses. *See* James N.G. Cauthen, *Referenda, Initiatives, and State Constitutional No-Aid Clauses*, 76 Alb. L. Rev. 2141, 2161-63 (2013).

Montana neither minimizes nor condones the anti-Catholic bigotry that unquestionably has existed throughout this nation's history. But Montana's No-Aid Clause is *not* the product of that bigotry. Instead, it embodies the distinct intellectual tradition that regards barring aid to religious institutions as a means of protecting religious liberty.

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[3] State Question No. 790 (Okla. 2016), https://www.sos.ok.gov/documents/questions/790.pdf; Florida Constitutional Amendments, Religious Freedom (Nov. 6, 2012), https://perma.cc/6UXH-9AT9; Oklahoma Public Money for Religious Purposes, State Question 790 (2016), https://ballotpedia.org/Oklahoma_Public_Money_for_Religious_Purposes,_State_Question_790_(2016); Florida Religious Freedom, Amendment 8 (2012), https:// ballotpedia.org/Florida_Religious_Freedom,_Amendment_8_(2012).

More generally, the constitutionality of a law cannot be determined by the motives of its most bigoted supporters. The anti-Catholicism of the nineteenth century was driven by hostility to Catholic *immigrants*. Some private citizens oppose immigration for bigoted reasons today. But there are principled reasons for opposing immigration, and the existence of bigoted supporters does not make anti-immigration laws suspect. Similarly, one common argument against school-choice programs is that some such programs were enacted in the 1950s and 1960s to avoid school desegregation. *See, e.g.*, Chris Ford et al., *The Racist Origins of Private School Vouchers*, American Progress (July 12, 2017), https://perma.cc/F99Q-FYX7. This argument, too, is unpersuasive: *Montana*'s school-choice program was not the product of racism, and it would be unfair to judge it based on others' racist motives in the distant past. The same goes for Montana's No-Aid Clause.

Petitioners' argument also misunderstands the role of tradition in constitutional adjudication. There is an unquestionably longstanding tradition of no-aid clauses. Petitioners claim that this tradition may be ignored because it reflects religious hostility. But the tradition should, in and of itself, support the constitutionality of no-aid clauses, regardless of the Court's current view on whether they promote or hinder religious freedom. This Court regularly applies this methodology in Establishment Clause cases: In cases like *Town of Greece* and *American Legion*, the longstanding traditions of legislative prayer and religious monuments in and of themselves were powerful

evidence of the constitutionality of those practices. *See Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2088-89 (2019); *Town of Greece*, 572 U.S. at 576-77. No-aid clauses have existed for just as long—often in the same States where there were religious monuments and legislative prayer—and that tradition should be respected, too.

That is so for two reasons. First, the Constitution exists to preserve rather than upend national traditions. Thus, difficult legal questions are properly resolved based on those national traditions rather than judges' freestanding assessment of how much separation of church and state is too little or too much. As this Court has stated in the Establishment Clause context: "[A]n unbroken practice … is not something to be lightly cast aside." *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 678 (1970).

The second reason is epistemological. The Court should be skeptical that Petitioners' asserted constitutional claim has eluded so many people for so long. Millions of citizens have debated and voted on these provisions—in many cases, long after the Blaine era. Moreover, state courts regularly apply no-aid clauses; in Petitioners' telling, every time those state courts enforce those clauses, they violate the Constitution. The Court should reject Petitioners' contention that there has been a widespread constitutional violation hiding in plain sight since the early Republic.

G. Invalidating Montana's No-Aid Clause Would Pose Grave Federalism Concerns.

This Court has repeatedly held that there is "play in the joints" between the Free Exercise and Establishment Clauses. *See, e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005) (quoting *Locke*, 540 U.S. at 718)). As Justice Kavanaugh recently observed, "the Constitution sets a floor for the protection of individual rights." *Am. Legion*, 139 S. Ct. at 2094 (Kavanaugh, J., concurring). But a state constitution, as interpreted by the State's highest court, might be broader than the federal Establishment Clause. *Id.*

That "play in the joints" principle played an important role in *Zelman*. In that case, the Court held that a program authorizing taxpayer-funded vouchers for both religious and non-religious private schools did not violate the Establishment Clause. 536 U.S. at 662-63. Four dissenters would have held that Cleveland's program was impermissible because it results in state aid to religious schools. *Id.* at 696-707 (Souter, J., dissenting). But the majority disagreed. It emphasized the importance of deferring to Cleveland's voters and the divisiveness of striking the program down: It explained that the program had created "no 'divisiveness' or 'strife' other than this litigation" and could locate no "authority to deprive Cleveland residents of a program that they have chosen but that we subjectively find 'divisive.'" *Id.* at 662 n.7. Justice Thomas's concurrence similarly stated that "[t]he wisdom of allowing States greater latitude in dealing with matters of religion and education can be easily

appreciated in this context." *Id.* at 680 (Thomas, J., concurring).

On Petitioners' reading, this was all a bait-and-switch. In their view, if a State exercises that "greater latitude" by interpreting its own constitution consistent with the views of the *Zelman* dissenters—and invalidates a school-choice program that allows parents to use government aid to attend religious school—then the State would violate the Free Exercise Clause.

Petitioners' position would be a serious blow to federalism. As the debate between the *Zelman* majority and dissent demonstrate, there is room for good-faith disagreement on whether school-choice programs permitting aid to religious schools promote, or hinder, religious freedom. *Zelman*'s lesson is that the First Amendment does not prescribe a single nationwide answer to that question, but instead leaves that decision to the States. Montana chose to adopt, as a matter of state constitutional law, the views of the *Zelman* dissenters, and that decision should be respected too.

The federalism concerns arising from Petitioners' position stretch beyond the abandonment of "play in the joints." The Montana Supreme Court held that the law was void *ab initio* under the Montana Constitution. Petitioners seek a federal court order under which that void law springs back into existence. To Montana's knowledge, no federal court has ever issued such a remedy.

This remedy creates significant Tenth Amendment concerns. A basic attribute of reserved state

sovereignty is the power to decide whether to legislate or not. *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1482 (2018). Here, Petitioners seek a federal court order that would require Montana to enforce a law that Montana's Constitution does not authorize its legislature to enact.

The government theorizes that if the Court declares the Montana No-Aid Clause to be void under the Supremacy Clause, then Montana would merely be enforcing the statute its legislators enacted. U.S. Br. 17-19. It is doubtful that a statute that the state legislature lacked authority to pass under the state's organic document actually counts as "state law," even if this Court invalidates the provision that required the invalidation of the state law. *Cf.* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 334-35 (2012) (noting the "Repeal-of-Repealer Canon," under which the repeal of a repealing statute does not reinstate the statute). Moreover, the fact that the Legislature enacted an express proviso stating that the program must be implemented consistent with the No-Aid Clause, *supra* at 4, suggests that the Legislature may not have enacted the program at all if it knew the No-Aid Clause would be struck down.[4]

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[4] The government's position would also improperly enact a federal severability rule. The question is whether the invalidation of one state-law provision (the state constitution) triggers the invalidation of a different state-law provision (the state statute). That is a severability question, and "[s]everability is of course a matter of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (per curiam). If the Legislature's enactment of the statute was

Petitioners' position would also create a kind of inverse federalism. According to Petitioners, if a state legislature merely decided not to enact a tax-credit statute—based on the exact same separation-of-church-and-state principles at issue here—the statute need not be enacted. Indeed, if, in 2023, the Montana Legislature elects not to re-enact this very statute based on the very no-aid concerns it has already recognized in its proviso, there would be no constitutional concern. But if those principles are sufficiently important to the State that it enshrines them in its state constitution, then the state constitution must be invalidated and the void statute must be enforced. It should be the other way around: Principles of federalism are at their zenith when a State enacts a provision in its constitution.

In reality, Petitioners are invoking a kind of political-process claim, under which state action that is permissible at a lower level of government becomes unconstitutional when enacted at a higher level of government. In *Schuette v. Coalition to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN)*, 572 U.S. 291 (2014), the plurality concluded that such

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contingent on aid not going to religious schools—a question of legislative intent for the state court to decide—then the statute is inseverable from the state constitution. The statute does state that unconstitutional portions of the *statute* could be severed from constitutional portions of the *statute*, Pet. App. 31 n.7, but it does not say that the *statute* can be severed from the *state constitution*. The government does not explain any basis in *federal* law to hold that the state constitutional provision must be invalidated while the state statute stays on the books.

claims may be brought only in one narrow circumstance: when the higher-level law facilitates racial discrimination. *Id.* at 305-06. Justice Scalia would have abolished such claims, finding that they conflict with "the near-limitless sovereignty of each State to design its governing structure as it sees fit." *Id.* at 327 (Scalia, J. concurring). Petitioners' position does the same: It authorizes a Legislature to decline to enact a voucher program based on church-state concerns, but bans the State from putting that policy judgment in the state constitution. The Court should reject Petitioners' novel contention.

II. THE APPLICATION OF THE NO-AID CLAUSE DID NOT VIOLATE EQUAL PROTECTION.

Petitioners' Equal Protection argument also fails. In *Locke*, this Court held that because the "program is not a violation of the Free Exercise Clause," the Court must "apply rational-basis scrutiny to [the] equal protection claims." 540 U.S. at 720 n.3. Here, as explained above, the Delegates offered rational reasons for the No-Aid Clause.

Petitioners contend that the No-Aid Clause violates Equal Protection because it is rooted in bigotry, relying on *Hunter v. Underwood*, 471 U.S. 222 (1985). Pet. Br. 29-30. But, as explained above, there is no evidence of bigotry at the 1972 Convention.

Moreover, the original public meaning of the Equal Protection Clause would not have required the abolition of no-aid clauses, given that such provisions already existed at the time of the Equal Protection

Clause's enactment in Michigan (1835); Wisconsin (1848); Indiana (1851); Ohio (1851); Oregon (1857); and Minnesota (1858). Notably, there is no historical evidence that these pre-Blaine provisions were motivated by anti-Catholic bigotry. *See supra*, at 41.

Petitioners' Equal Protection claim also fails because there is no unequal treatment: No one is getting scholarships. This is another distinction from *Hunter*, where African-Americans were disenfranchised to a greater extent than whites. *See* 471 U.S. at 224. Although the No-Aid Clause is the *reason* for the striking-down of the program, Petitioners identify no case holding that the absence of a subsidy to all citizens violates Equal Protection because of the reason for that absence.

Petitioners rely on *Romer v. Evans*, 517 U.S. 620 (1996). Pet. Br. 13-14. In *Romer*, this Court invalidated a state constitutional amendment that itself invalidated municipal anti-discrimination ordinances that the municipalities lacked any constitutional obligation to enact in the first place, which is structurally similar to Petitioners' request here. 517 U.S. at 635. But *Romer* is readily distinguishable from this case.

In *Romer*, the Court explained that the amendment "bar[red] homosexuals from securing protection against the injuries that … public-accommodations laws address." 517 U.S. at 629. Moreover, "[n]ot confined to the private sphere, [the amendment] also operate[d] to repeal and forbid all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government." *Id.* at 629. For

instance, "repealed, and now forbidden, are various provisions prohibiting discrimination based on sexual orientation at state colleges." *Id.* at 629-30 (internal quotation marks omitted). The amendment therefore violated the Equal Protection Clause because it "deem[ed] a class of persons a stranger to [Colorado's] laws." *Id.* at 635.

By contrast, here, the effect of the No-Aid Clause was to require the denial of aid to all private schools, religious and non-religious. Moreover, the Montana Constitution explicitly bars both private and public discrimination on the basis of religion. In that sense, it is more protective of religious liberty than the federal Constitution. Like the federal Constitution, the Montana Constitution bars the State from prohibiting the free exercise of religion. Mont. Const. art. II, § 5. Unlike the federal Constitution, the Montana Constitution also protects against private discrimination: It provides that no "person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of … religious ideas." *Id.* art. II, § 4. In addition, adjacent to the No-Aid Clause is Article X, Section 7, which provides that "[n]o person shall be refused be refused admission to any public educational institution on account of … religion"—the very protection that Colorado's amendment abolished as to gay people.

The *Romer* Court also reasoned that the amendment was "inexplicable by anything but animus toward the class it affects." 517 U.S. at 632. By contrast, as explained above, the historical record

shows that Montana's delegates enacted the No-Aid Clause to protect religious freedom. *See supra* at 17-23.

III. THE APPLICATION OF THE NO-AID CLAUSE DID NOT VIOLATE THE ESTABLISHMENT CLAUSE.

The No-Aid Clause does not violate the Establishment Clause. It separates church from state to a greater extent than the Establishment Clause, but that does not mean it *is* an Establishment. Montana's No-Aid Clause shares none of "the characteristics of an establishment as understood at the founding," such as mandatory "[a]ttendance at the established church" or the use of "taxes" to "generate church revenue." *American Legion*, 139 S. Ct. at 2096 (Thomas, J., concurring) (internal quotation marks omitted).

Moreover, as previously observed, state constitutional provisions barring taxpayer support of churches were common at the Founding, and appeared alongside state constitutional provisions that disestablished the church—showing that no-aid clauses are not *themselves* establishments of religion. *See* Appendices A-C. And the Establishment Clause was designed to *safeguard* such provisions, making it incongruous to argue that the Establishment Clause *abolishes* them. *Supra*, at 31.

Petitioners suggest that the No-Aid Clause violates the Establishment Clause because it demonstrates "hostility" toward religion. Pet. Br. 45-47. But as already explained, there is no evidence of hostility. *Supra*, at 17-23.

Petitioners invoke two cases in support of their Establishment Clause claim: *Zelman* and *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See* Pet Br. 47-54. Neither case supports Petitioners' claim.

In *Zelman*, this Court held that a school-choice program that included religious schools did not violate the Establishment Clause. 536 U.S. at 653. Petitioners interpret *Zelman* to hold that if a State applies a no-aid provision to invalidate a program akin to Cleveland's, it *violates* the Establishment Clause. *See* Pet. Br. 49.

That reading is incorrect. *Zelman* does not suggest that a state constitution's declination to fund religious schools constitutes an "establishment" of religion. To the contrary, as explained above, *Zelman* emphasized that the Establishment Clause gives States leeway to decide whether to fund religious schools. *Supra*, at 45-46. Nothing in *Zelman* suggests that the Establishment Clause would *prohibit* States from construing their own constitution in the same way that the four dissenters believed the Establishment Clause *required*.

As for *Lemon*: Petitioners' argument illustrates *Lemon*'s infinite malleability. *Lemon* held that the Establishment Clause required invalidating a "statute under which the State pays directly to teachers in nonpublic elementary schools a supplement of 15% of their annual salary," as a result of which "state aid has been given to church-related educational institutions." 403 U.S. at 607. Thus, *Lemon* holds that the Establishment Clause *bars* aid to religious schools; yet Petitioners now argue that, under the *Lemon* test, the

Establishment Clause *forbids* barring aid to religious schools.

If the Court applies *Lemon*, it does not support Petitioners. The purpose of the No-Aid Clause, as explained by the Delegates, was to protect religious liberty and guard against entanglement, not to create a "religion of secularism" as Petitioners allege. Pet. Br. 52.

Likewise, the invalidation of the tax-credit program does not create any unconstitutional "effects." Petitioners state that the effect of invalidating the program is "to inhibit religious schooling." Pet. Br. 52. But by this logic, the Legislature's decision to have the tax-credit program expire on its own terms in 2023, or to limit the tax credit to $150, also has the effect of "inhibit[ing] religious schooling," yet Petitioners do not suggest that the program's expiration or dollar limit is unconstitutional. The "effect" of the state court's decision was to invalidate a statute that the legislature had no constitutional duty to enact. That is not unconstitutional under *Lemon*.

Finally, *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970), rebuts Petitioners' theory. In that case, this Court held that the Establishment Clause authorizes States to give property tax exemptions to churches. 397 U.S. at 679-80. In light of *Walz*, all States—including Montana—give property tax exemptions to religious institutions. *See* Mont. Const. art. VIII, § 5 (explicitly authorizing such exemptions). Notably, Montana's broad-based, constitutionally grounded property tax exemption *favors* religious schools: Religious schools receive

property tax exemptions even if they do not have mandatory attendance rules (as many Sunday schools do not), but a similar Sunday school teaching non-religious subjects would not. *Compare* Mont. Code Ann. § 15-6-201(1)(b), *with id.* § 15-6-201(1)(e)(ii). Yet, under *Walz*, the tax exemption complies with the Establishment Clause.

Walz's holding is that religious institutions' entitlement to one type of tax exemption is *not* an "establishment." 397 U.S. at 676-80. Thus, it makes little sense to argue that religious institutions' disentitlement to a different type of tax credit—which non-religious schools also do not receive—*is* an "establishment." Moreover, *Walz* reasoned that "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." *Id.* at 668. The No-Aid Clause provides for the opposite of those outcomes.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

Appendix A

List of Compelled Support Clauses
in Founding-Era State Constitutions

Delaware

Delaware Constitution of 1792 art. I, § 1: "[N]o man shall or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against his own free will and consent."

Georgia

Georgia Constitution of 1776 art. LVI: "All persons . . . shall not, unless by consent, support any teacher or teachers except those of their own profession."

Georgia Constitution of 1798 art. IV, § 10: "No person within this State shall . . . be compelled to attend any place of worship contrary to his own faith and judgment; nor shall he ever be obliged to pay tythes, taxes, or any other rate, for the building or repairing any place of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or hath voluntarily engaged to do."

Kentucky

Kentucky Constitution of 1792 art. XII, § 3: "[N]o man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry

against his consent."

New Hampshire

New Hampshire Constitution of 1784 part I, art. VI: "[N]o portion of any one particular religious sect or denomination, shall ever be compelled to pay towards the support of the teacher or teachers of another persuasion, sect or denomination."

New Jersey

New Jersey Constitution of 1776 art. XVIII: "[N]o person shall . . . , under any pretence whatsoever[, be] compelled to attend any place of worship, contrary to his own faith and judgment; nor shall any person, within this Colony[,] ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately or voluntarily engaged himself to perform."

North Carolina

North Carolina Constitution of 1776 art. XXXIV: "[N]either shall any person, on any pretence whatsoever, be compelled to attend any place of worship, contrary to his own faith or judgment; nor be obliged to pay, for the purchase of any glebe, or the building of any house of worship, or for the maintenance of any minister or ministry, contrary to

what he believes right, of has voluntarily and personally engaged to perform."

Pennsylvania

Pennsylvania Constitution of 1776, Declaration of the Rights of the Inhabitants of the Commonwealth or State of Pennsylvania art. II: "[N]o man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent."

Pennsylvania Constitution of 1790 art. IX, § 3: "[N]o man can, of right, be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent."

South Carolina

South Carolina Constitution of 1778 art. XXXVIII: "No person shall[,] by law, be obliged to pay towards the maintenance and support of a religious worship, that he does not freely join in, or has not voluntarily engaged to support."

Tennessee

Tennessee Constitution of 1796, art. XI, § 3: "[N]o man can, of right be compelled to attend, erect, or support any place of worship, or to maintain any ministr[y] against his consent."

Appendix B

List of Disestablishment Clauses
in Founding-Era State Constitutions

Delaware

Delaware Constitution of 1776 art. XXIX: "There shall be no establishment of any one religious sect in this State in preference to another."

Georgia

Georgia Constitution of 1798 art. IV, § 10: "No one religious society shall ever be established in this State, in preference to another."

Kentucky

Kentucky Constitution of 1792 art. XII, § 3: "[N]o preference shall ever be given by law to any religious societies or modes of worship."

Massachusetts

Massachusetts Constitution of 1780, Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts art. III: "[N]o subordination of any sect or denomination to another shall ever be established by law."

New Hampshire

New Hampshire Constitution of 1784 part I, art. VI: "[N]o subordination of any one sect or denomination to another, shall ever be established by law."

New Jersey

New Jersey Constitution of 1776 art. XIX: "[T]here shall be no establishment of any one religious sect in this Province[,] in preference to another."

North Carolina

North Carolina Constitution of 1776 art. XXXIV: "That there shall be no establishment of any one religious church [or denomination] in this State[,] in preference to any other."

Pennsylvania

Pennsylvania Constitution of 1790 art. IX, § 3: "[N]o preference shall ever be given, by law, to any religious establishments or modes of worship."

Tennessee

Tennessee Constitution of 1796, art. XI, § 3: "[N]o preference shall ever be given, by law, to any religious establishments or modes of worship."

Appendix C

List of Free Exercise Clauses
in Founding-Era State Constitutions

Delaware

Delaware Constitution of 1792 art. I, § 1: "[N]o power shall or ought to be vested in or assumed by any magistrate that shall in any case interfere with, or in any manner control, the rights of conscience, in the free exercise of religious worship."

Georgia

Georgia Constitution of 1776 art. LVI: "All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State."

Georgia Constitution of 1798 art. IV, § 10: "No person within this State shall, upon any pretence, be deprived of the inestimable privilege of worshipping God in a manner agreeable to his own conscience . . . nor shall any person be denied the enjoyment of any civil right merely on account of his religious principles."

Kentucky

Kentucky Constitution of 1792 art. XII, § 3: "[A]ll men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences."

Maryland

Maryland Constitution of 1776 art. XXXIII: "[N]o person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights."

Massachusetts

Massachusetts Constitution of 1780, Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts art. II: "It is the right as well as the duty of all men in society, publicly and at stated seasons, to worship the SUPREME BEING, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the publick peace, or obstruct others in their religious worship."

New Hampshire

New Hampshire Constitution of 1784 part I, art. V: "Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained in his person, liberty or estate

for worshipping God, in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession, sentiments or persuasion; provided he doth not disturb the public peace, or disturb others, in their religious worship."

New Jersey

New Jersey Constitution of 1776 art. XVIII: "[N]o person shall ever[,] within this Colony[,] be deprived of the inestimable privilege of worshipping Almighty God in a manner[,] agreeable to the dictates of his own conscience."

New York

New York Constitution of 1777 art. XXXVIII: "And whereas we are required[,] by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind: This convention doth further, in the name and by the authority of the good people of this State, ORDAIN, DETERMINE, AND DECLARE. That the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed[,] within this State[,] to all mankind. *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State."

North Carolina

North Carolina Constitution of 1776 art. XXXIV: "[A]ll persons shall be at liberty to exercise their own mode of worship, *Provided*, That nothing herein contained shall be construed to exempt preachers of treasonable or seditious discourses, from legal trial and punishment."

Pennsylvania

Pennsylvania Constitution of 1776, Declaration of the Rights of the Inhabitants of the Commonwealth or State of Pennsylvania art. II: "[A]ll men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding . . . [and] no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship."

Pennsylvania Constitution of 1790 art. IX, § 3: "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences . . . [N]o human authority can, in any case whatever, control or interfere with the rights of conscience."

South Carolina

South Carolina Constitution of 1790 art. VIII, § 1: "The free exercise and enjoyment of religious profession find

worship, without discrimination or preference, shall, forever hereafter, be allowed within this State to all mankind; [P]rovided, that the liberty of conscience thereby declared, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State."

Tennessee

Tennessee Constitution of 1796, art XI, § 3: "[A]ll men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences."

Virginia

Virginia Constitution of 1776 Bill of Rights § XVI: "That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other."

Appendix D

List of State No-Aid Clauses

(1) Alabama

No-Aid Clause enacted in 1875 and re-adopted without change in 1901

Alabama Constitution of 1875 art. XIII, § 8: "No money raised for the support of the public schools of the State shall be appropriated to[,] or used for[,] the support of any sectarian or denominational school."

Alabama Constitution of 1901 art. XIV, § 263: "No money raised for the support of the public schools shall be appropriated to or used for the support of any sectarian or denominational school."

(2) Alaska

No-Aid Clause enacted in 1959 (upon Statehood)

Alaska Constitution of 1959 art. VII, § 1: "The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution."

(3) Arizona

No-Aid Clauses enacted in 1912 (upon Statehood)

Arizona Constitution of 1912 art. IX, § 10: "No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation."

Arizona Constitution of 1912 art. II, § 12: "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment."

(4) California

No-Aid Clause enacted in 1879 (upon Statehood) and amended in 1966 and 1974

California Constitution of 1879 art. IX, § 8: "No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State."

California Constitution of 1879 art. IV, § 30: "Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or

in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the State, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever; *provided*, that nothing in this section shall prevent the Legislature granting aid pursuant to section twenty-two of this article."

California Constitution of 1879 art. XVI, § 5 (as amended in 1974): "Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever; provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 3 of Article XVI."

(5) Colorado

No-Aid Clauses enacted in 1876 (upon Statehood)

Colorado Constitution of 1876 art. V, § 34: "No appropriation shall be made for charitable, industrial, educational, or benevolent purposes to any person, corporation, or community not under the absolute control of the State, nor to any denominational or sectarian institution or association."

Colorado Constitution of 1876 art. IX, § 7: "Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever; nor shall any grant or donation of land, money or other personal property, ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose."

(6) Delaware

No-Aid Clause enacted in 1897

Delaware Constitution of 1897 art. X, § 3: "No portion of any fund now existing, or which may hereafter be appropriated, or raised by tax, for educational

purposes, shall be appropriated to, or used by, or in aid of any sectarian, church or denominational school; provided, that all real or personal property used for school purposes, where the tuition is free, shall be exempt from taxation and assessment for public purposes."

(7) Florida

No-Aid Clause adopted in 1885 and amended in 1968

Florida Constitution of 1885, Declaration of Rights § 6: "No preference shall be given by law to any church, sect or mode of worship, and no money shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination, or in aid of any sectarian institution."

Florida Constitution of 1885 art. XII, § 13: "No law shall be enacted authorizing the diversion or the lending of any County or District School Funds, or the appropriation of any part of the permanent or available school fund to any other than school purposes; nor shall the same, or any part thereof, be appropriated to or used for the support of any sectarian school."

Florida Constitution of 1968, art. I, Declaration of Rights, § 3: "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."

(8) Georgia

No-Aid Clause enacted in 1877 and re-adopted with minor amendments in 1945, 1976, and 1983

Georgia Constitution of 1877 art. I, ¶ XIV, § 5006: "No money shall ever be taken from the public [T]reasury, directly or indirectly, in aid of any church, sect, or denomination of religionists, or of any sectarian institution."

Georgia Constitution of 1945 art. I, ¶ XIV: "Appropriations to Churches, Sects, Etc., Forbidden. 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."

Georgia Constitution of 1976 art. I, § 2 ¶ X: "Appropriations to Churches, Sects, Etc., Forbidden. 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."

Georgia Constitution of 1983 art. I, § 2 ¶ VII: "Separation of church and state. No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution."

(9) Hawaii

No-Aid Clause enacted in 1959 (upon Statehood) and amended in 2002

Hawaii Constitution of 1959 art. IX, § 1: "[N]or shall public funds be appropriated for the support or benefit of any sectarian or private educational institution."

Hawaii Constitution of 1959 art. X, § 1 (as amended in 2002): "[N]or shall public funds be appropriated for the support or benefit of any sectarian or nonsectarian private educational institution, except that proceeds of special purpose revenue bonds authorized or issued under section 12 of Article VII may be appropriated to finance or assist: (1) Not-for-profit corporations that provide early childhood education and care facilities serving the general public; and (2) Not-for-profit private nonsectarian and sectarian elementary schools, secondary schools, colleges and universities."

(10) Idaho

No-Aid Clause enacted in 1890 (upon Statehood) and amended in 1980

Idaho Constitution of 1890 art. IX, § 5: "Neither the legislature nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian, or religious society, or for any sectarian or religious purpose, or to help support or sustain any

school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever; nor shall any grant or donation of land, money or other personal property ever be made by the state, or any such public corporation, to any church, or for any sectarian or religious purpose."

Idaho Constitution of 1890 art. IX, § 5 (as amended in 1980): "Neither the legislature nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever; nor shall any grant or donation of land, money or other personal property ever be made by the state, or any such public corporation, to any church or for any sectarian or religious purpose; provided, however, that a health facilities authority, as specifically authorized and empowered by law, may finance or refinance any private, not for profit, health facilities owned or operated by any church or sectarian religious society, through loans, leases, or other transactions."

(11) Illinois

No-Aid Clause enacted in 1870 and re-enacted without change in 1970

Illinois Constitution of 1870 art. VIII, § 3: "Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose."

Illinois Constitution of 1970 art. X, § 3: "Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose."

(12) Indiana

No-Aid Clause enacted in 1851

Indiana Constitution of 1851 art. I, § 6: "No money shall be drawn from the treasury, for the benefit of any religious or theological institution."

(13) Kansas

No-Aid Clause enacted in 1859 and amended in 1966

Kansas Constitution of 1859 art. VI, § 8: "No religious sect or sects shall ever control any part of the Common School or University funds of the State."

Kansas Constitution of 1859 art. VI, § 6(c) (as amended in 1966): "No religious sect or sects shall control any part of the public educational funds."

(14) Kentucky

No-Aid Clause enacted in 1891

Kentucky Constitution § 189: "No portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school."

(15) Massachusetts

No-Aid Clause enacted in 1855 and amended in 1917 and 1974

Massachusetts Constitution art. XVIII (as amended in 1855): "All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the State for the support of common schools, shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is to be expended; and such moneys shall never be appropriated to any religious sect for the maintenance exclusively of its own schools."

Massachusetts Constitution art. XVIII, § 2 (as amended in 1917): "All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the commonwealth for the support of common schools shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is expended; and no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aiding any other school or institution of learning, whether under public control or otherwise, wherein any denominational doctrine is inculcated, or any other

school, or any college, infirmary, hospital, institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both, except that appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town, and to carry out legal obligations, if any, already entered into; and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society."

Massachusetts Constitution art. XVIII, § 2 (as amended in 1974): "No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the [C]ommonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the [C]ommonwealth or federal authority or both, except that appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town and to carry out legal obligations, if any, already entered into; and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or

aiding any church, religious denomination or society. Nothing herein contained shall be construed to prevent the Commonwealth from making grants-in-aid to private higher educational institutions or to students or parents or guardians of students attending such institutions.

(16) Michigan

No-Aid Clause enacted in 1835 (upon Statehood), amended in 1850, and re-adopted in 1908 and 1963

Michigan Constitution of 1835 art. I, § 5: "No money shall be drawn from the treasury for the benefit of religious societies, or theological or religious seminaries."

Michigan Constitution of 1850 art. IV, § 40: "No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary, nor shall property belonging to the State be appropriated for any such purposes."

Michigan Constitution of 1908 art. II, § 3: "No money shall be appropriated or drawn from treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose."

Michigan Constitution of 1963 art. I, § 4: "No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to

the state be appropriated for any such purpose."

(17) Minnesota

No-Aid Clause enacted in 1858 (upon Statehood) and amended in 1877 and 1974

Minnesota Constitution of 1858 art. I, § 16: "The enumeration of rights in this constitution shall not be construed to deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed, nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry against his consent, nor shall any control of, or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship, but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state, nor shall any money be drawn from the treasury for the benefit of any religious societies, or religious or theological seminaries."

Minnesota Constitution art. VIII, § 3, cl. 2 (as amended in 1877): "But in no case shall the moneys derived as aforesaid, or any portion thereof, or any public moneys or property, be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught."

Minnesota Constitution of 1858 art. I, § 16 (as amended in 1974): "The enumeration of rights in this constitution shall not be construed to deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect, or support any place of worship, or to maintain any religious or ecclesiastical ministry against his consent, nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured, shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state, nor shall any money be drawn from the treasury for the benefit of any religious societies, or religious or theological seminaries."

(18) Mississippi

No-Aid Clause enacted in 1890

Mississippi Constitution art. 8, § 208: "No religious or other sect or sects shall ever control any part of the school or other educational funds of this state; nor shall any funds be appropriated toward the support of any sectarian school, or to any school that at the time of receiving such appropriation is not conducted as a free school."

(19) Missouri

No-Aid Clause enacted in 1875 and readopted without change in 1945

Missouri Constitution art. I, § 7: "[N]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship."

Missouri Constitution art. XI, § 8: "Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town or other municipal corporation, for any religious creed, church, or sectarian purpose whatever."

(20) Montana

No-Aid Clause enacted in 1889, narrower clause adopted in 1972

Montana Constitution of 1889 art. XI, § 8: "Neither the Legislative Assembly, nor any county, city, town, or school district, or other public corporations, shall ever make, directly or indirectly, any appropriation, or pay from any public fund or moneys whatever, or make any grant of lands or other property in aid of any church, or for any sectarian purpose, or to aid in the support of any school, academy, seminary, college, university, or other literary, scientific institution, controlled in whole or in part by any church, sect or denomination whatever."

Montana Constitution of 1972 art. X, § 6: "(1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination. (2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education."

(21) Nebraska

No-Aid Clause enacted in 1875 and amended in 1920 and 1976

Nebraska Constitution of 1875 art. VII, § 11: "No sectarian instruction shall be allowed in any school or any institution supported in whole or in part by the public funds set apart for education purposes; nor shall the state accept any grant, conveyance, or bequest of money, lands, or other property, to be used for sectarian purposes."

Nebraska Constitution of 1875 art. VII, § 11 (as amended 1920): "No sectarian instruction shall be allowed in any school or institution supported in whole or in part by the public funds set apart for educational purposes, nor shall the state accept any grant, conveyance, or bequest of money, lands or other property to be used for sectarian purposes. Neither the State Legislature nor any county, city or other public corporation shall ever make any appropriation from any public fund, or grant any public land in aid of any sectarian or denominational school or college, or any educational institution which is not exclusively owned and controlled by the state or a governmental subdivision thereof. No religious test or qualification shall be required of teacher or student, for admission to or continuance in any public school or educational institution supported in whole or in part by public taxation."

(22) Nevada

No-Aid Clause enacted in 1880

Nevada Constitution art. XI, § 10 (added 1880): "No public funds of any kind or character whatever, [S]tate, [C]ounty or [M]unicipal, shall be used for sectarian purpose."

(23) New Hampshire

No-Aid Clause enacted in 1877

New Hampshire Constitution part II, art. 83: "[N]o money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination."

(24) New Mexico

No-Aid Clause enacted in 1911 (upon Statehood)

New Mexico Constitution art. XII, § 3: "The schools, colleges, universities and other educational institutions provided for by this Constitution shall forever remain under the exclusive control of the State, and no part of the proceeds arising from the sale or disposal of any lands granted to the State by Congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university."

(25) New York

No-Aid Clause enacted in 1894 and amended in 1962

New York Constitution of 1894 art IX, § 4: "Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid of maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught."

New York Constitution of 1894 art. XI, § 3 (as amended in 1962): "Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid of maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning."

(26) North Dakota

No-Aid Clause enacted in 1889 (upon Statehood)

North Dakota Constitution art. VIII, § 152: "All colleges, universities, and other educational

institutions, for the support of which lands have been granted to this State, or which are supported by a public tax, shall remain under the absolute and exclusive control of the State. No money raised for the support of the public schools of the State shall be appropriated to or used for the support of any sectarian school."

(27) Ohio

No-Aid Clause enacted in 1851

Ohio Constitution art. VI, § 2: "The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State; but, no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this State."

(28) Oklahoma

No-Aid Clause enacted in 1907 (upon Statehood)

Oklahoma Constitution art. II, § 5: "No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such."

(29) Oregon

No-Aid Clause enacted in 1857 (upon Statehood)

Oregon Constitution art. I, § 5: "No money shall be drawn from the Treasury for the benefit of any religious[,] or theological institution, nor shall any money be appropriated for the payment of any religious services in either House of the Legislative Assembly."

(30) Pennsylvania

No-Aid Clause enacted in 1874, reenacted in 1967

Pennsylvania Constitution of 1874 art. X, § 2: "No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school."

Pennsylvania Constitution of 1967 art. III, § 15: "No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school."

(31) South Carolina

No-Aid Clause enacted in 1895, amended in 1973

South Carolina Constitution art. XI, § 9 (repealed 1973): "The property or credit of the State of South Carolina, or of any County, city, town, township, school district, or other subdivision of the said State, or any public money, from whatever source derived, shall not,

by gift, donation, loan, contract, appropriation, or otherwise, be used, directly or indirectly, in aid or maintenance of any college, school, hospital, orphan house, or other institution, society or organization, of whatever kind, which is wholly or in part under the direction or control of any church or of any religious or sectarian denomination, society or organization."

South Carolina Constitution art XI, § 4 (adopted 1973): "No money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution."

(32) South Dakota

No-Aid Clause enacted in 1889 (upon Statehood)

South Dakota Constitution art. VIII, § 16: "No appropriation of lands, money or other property or credits to aid any sectarian school shall ever be made by the State, or any county or municipality within the State, nor shall the State or any county or municipality within the State accept any grant, conveyance, gift or bequest of lands, money or other property to be used for sectarian purposes, and no sectarian instruction shall be allowed in any school or institution aided or supported by the State."

(33) Texas

No-Aid Clause enacted in 1876, with additions in 1891 and an amendment in 1983 and 2003

Texas Constitution of 1876 art. I, § 7: "No money shall be appropriated, or drawn from the [T]reasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes."

Texas Constitution art. VII, § 5 (adopted 1891): "And no law shall ever be enacted appropriating any part of the permanent or available school fund to any other purpose whatever; nor shall the same[,] or any part thereof ever be appropriated to or used for the support of any sectarian school."

Texas Constitution art. VII, § 5 (added 1983): "The available school fund shall be applied annually to the support of the public free schools. Except as provided by this section, the legislature may not enact a law appropriating any part of the permanent school fund or available school fund to any other purpose. The permanent school fund and the available school fund may not be appropriated to or used for the support of any sectarian school."

(34) Utah

No-Aid Clauses enacted in 1895 (upon Statehood), amended in 1986 and 2001

Utah Constitution of 1895 art. I, § 4: "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment."

Utah Constitution art. X, § 13: "Neither the Legislature nor any county, city, town, school district or other public corporation, shall make any appropriation to aid in the support of any school, seminary, academy, college, university or other institution, controlled in whole, or in part, by any church, sect or denomination whatever."

(35) Virginia

No-Aid Clause enacted in 1902, with additional additions in 1971

Virginia Constitution of 1902 art. IV, § 67: "The General Assembly shall not make any appropriation of public funds, of personal property, or of any real estate, to any church, or sectarian society, association, or institution of any kind whatever, which is entirely or partly, directly or indirectly, controlled by any church or sectarian society; nor shall the General Assembly make any like appropriation to any charitable institution, which is not owned or controlled by the State; except that it may, in its discretion, make

appropriations to non-sectarian institutions for the reform of youthful criminals; but nothing herein contained shall prohibit the General Assembly from authorizing counties, cities, or towns to make such appropriations to any charitable institution or association."

Virginia Constitution of 1971 art. VIII, § 10: "No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof; provided, first, that the General Assembly may, and the governing bodies of the several counties, cities and towns[,] may, subject to such limitations as may be imposed by the General Assembly, appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate or graduate education of Virginia students in public and nonsectarian private schools and institutions of learning, in addition to those owned or exclusively controlled by the State or any such county, city or town; second, that the General Assembly may appropriate funds to an agency, or to a school or institution of learning owned or controlled by an agency, created and established by two or more States under a joint agreement to which this State is a party for the purpose of providing educational facilities for the citizens of the several States joining in such agreement; third, that counties, cities, towns, and districts may make appropriations to nonsectarian schools of manual, industrial or technical training, and also to any school or institution of learning owned or exclusively controlled by such county, city, town, or

school district."

(36) Washington

No-Aid Clause enacted in 1889 (upon Statehood), amended in 1993

Washington Constitution art. I, § 11: "No public money or property shall be appropriated for, or applied to any religious worship, exercise or instruction, or the support of any religious establishment. PROVIDED, HOWEVER, That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional and mental institutions … as in the discretion of the legislature may seem justified."

Washington Constitution art. IX, § 4: "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."

(37) Wisconsin

No-Aid Clauses enacted in 1848 (upon Statehood)

Wisconsin Constitution art. X, § 3: "The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of four and twenty years; and no sectarian instruction shall be allowed therein."

Wisconsin Constitution art. I, § 18: "[N]or shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries."

(38) Wyoming

No-Aid Clause enacted in 1889 (upon Statehood)

Wyoming Constitution art. I, § 19: "No money of the State shall ever be given or appropriated to any sectarian or religious society or institution."

Wyoming Constitution art. VII, § 8: "[N]or shall any portion of any public school fund ever be used to support or assist any private school, or any school, academy, seminary, college or other institution of learning controlled by any church or sectarian organization or religious denomination whatsoever."