

No. 18-1195

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**In the Supreme Court of the United States**

KENDRA ESPINOZA, JERI ELLEN ANDERSON,  
AND JAMIE SCHAEFER,

*Petitioners,*

v.

MONTANA DEPARTMENT OF REVENUE AND GENE WAL-  
BORN, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE  
MONTANA DEPARTMENT OF REVENUE,

*Respondents.*

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

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**BRIEF FOR MONTANA ASSOCIATION OF RABBIS  
AS *AMICUS CURIAE*  
SUPPORTING RESPONDENTS**

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

*Amicus* the Montana Association of Rabbis (MAOR, also a Hebrew word meaning “enlighten”) is an association formed for the purpose of providing a rabbinical voice for Montana’s Jews. MAOR may issue position papers and statements, respond to government policy and initiatives, engage in collaborative work with other religious and advocacy organizations, and perform other activities that address issues affecting the Jewish community of Montana. Although MAOR’s primary focus is Montana, it also speaks and acts on national and international matters that impact Jewish values. MAOR’s founding members are Rabbi Ed Stafman of Bozeman; Mark Kula of Missoula and Bozeman; Francine Roston of Whitefish; Allen Secher of Whitefish; and senior rabbinic student (now Rabbi) Laurie Franklin of Missoula. Senior Rabbinic Student Eric Uriarte of Billings is also a member. MAOR’s members include all of the practicing non-Orthodox rabbis in Montana. Their training and ordinations come from the Reform, Conservative, and/or Renewal branches of Judaism, which collectively represent the overwhelming majority of Montana and U.S. Jews.

The issue presented in this case is one of tremendous importance to Montana’s Jewish community and to all adherents of minority faiths in the State. *All* religious schools in Montana are affiliated

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<sup>1</sup> Pursuant to this Court’s Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made a monetary contribution to its preparation or submission. The parties have submitted blanket consents to the filing of *amicus* briefs in this case.

with Christian denominations; these schools make Christian religious doctrine an element of their curricula, and some incorporate in their teaching materials that are antithetical to Jewish beliefs and values. Yet petitioners and their *amici* advocate an application of Montana's private-school tax credit program that, as a practical matter, makes participation in that program available only to people who provide financial support to these Christian schools. Because this approach disadvantages members of all minority religions, MAOR submits this brief to assist the Court in the resolution of this case.

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

Montana demonstrates in its brief that its rule restricting state aid to all private schools, secular and sectarian, is consistent with the First Amendment. MAOR fully supports that position. Rather than duplicate the State's arguments, however, MAOR focuses on a different aspect of the problem in this case: The award of Montana tax credits to sectarian schools in the manner proposed by petitioners and the United States would *itself* have an impermissible impact on members of minority faiths. If structured as petitioners and the United States propose, the *inevitable* effect of Montana's program would be either to exclude non-Christians from participation in that program, denying them a valuable state benefit; or to force those persons to subsidize an avowedly religious Christian education.

Petitioners and the United States offer theoretical arguments. But the undeniable reality is that the religious schools that would benefit from Montana's tax credit program *all* are Christian. In the real

world, moreover, it *always will be* the case that religious schools eligible to receive payments under the Montana program will be affiliated with Christian denominations because, in a low-population state like Montana, minority religions lack the critical mass of members necessary to support a private school. And because contributors to the Montana tax credit program may not select or limit the schools to which the funds are directed, non-Christians may participate in and receive tax benefits from the program *only* by supporting Christian schools.

This structure places non-Christian Montanans in an impossible position. The religious schools supported by the tax-credit program offer an explicitly Christian education that advances religious beliefs that not only are not shared by non-Christians, but also are affirmatively hostile or offensive to minority religious faiths.

Such a regime is inconsistent with the First Amendment. By conditioning access to a valuable tax benefit on the taxpayer's contribution to religious education—supporting the beliefs of a religion to which the taxpayer does not belong—the program would deny the free exercise rights of non-Christians in Montana. And by offering state support in a manner that has the seeming purpose and the necessary effect of benefitting members of only certain religious denominations, the program would contravene the requirements of the Establishment Clause.

## ARGUMENT

### **I. The demographics of Montana mean that the only religious schools eligible to benefit from the State's tax-credit program are Christian.**

#### **A. Operation of the Montana program.**

Montana describes the operation of its tax-credit program in its brief. Resp. Br. 6-9. The key elements are simply stated. Through the program, the State grants an annual tax credit of up to \$3 million in the aggregate to taxpayers who donate money to a participating student scholarship organization (SSO). Mont. Code Ann. §§ 15-30-3101, 15-30-3111. The SSOs, in turn, use the donations to fund scholarships for students at qualified education providers (QEPs). *Id.* § 15-30-3102(9)(b). Significantly, neither the donors nor the scholarship organizations may restrict the scholarships to a particular type of school or prevent the funds from being directed to a particular school. *Id.* § 15-30-3103(1)(b); 15-30-3111(1).

The Montana legislature explicitly aimed to increase private school enrollment through the program. The bill's budget assessment predicted that "[t]he credits allowed by this bill would reduce the net price of attending private school," and the bill's sponsors envisioned increasing private school enrollments by 87 in 2015, 95 in 2016, 105 in 2017, and 116 in 2018. Fiscal Note 2017 Biennium\_for SB 410, 2015 Montana S. Bill No. 410, 64th Mont. Leg. (April 7, 2015), at 2-3, <https://tinyurl.com/uv78beh>.

The schools that benefit from the program overwhelmingly are affiliated with Christian denominations and offer a Christian education. According to

the National Center for Education Statistics' Private School Universe Survey, ninety-eight private schools operated in the state of Montana in the 2017-2018 school year. Of these, 32 were nonsectarian. Only seven of the secular private schools offered teaching through twelfth grade. *PSS Private School Universe Survey School Search*, National Center for Education Statistics, <https://perma.cc/L7NX-HB7M> (last visited Nov. 14, 2019). Of the religiously affiliated schools, all are associated with a Christian denomination.

Unsurprisingly, almost all taxpayer funds generated through the tax-credit program have gone to Christian schools. Only one SSO, Big Sky Scholarships, has been established under the program. More than 94% of its scholarships for the 2018-2019 school year went to a Christian-affiliated school. Pet. App. 123-25. Only three of the 54 scholarships granted went to the sole completely non-religious private school in the program, Cottonwood Day School, which serves children with disabilities. *Id.*; see *Schools, Big Sky Scholarships*, <https://perma.cc/283M-452M> (last visited Nov. 9, 2019).

Montana legislators largely opposed the Montana Department of Revenue's attempt to restrict scholarship funding to secular schools through its "Rule 1." See Mont. Code Ann. § 15-30-3101. Legislators expressed opposition to Rule 1 at hearings held by the agency and in a poll conducted by the Revenue and Transportation Interim Committee. The "poll determine[d] that a majority of the members of both houses [found] that 'the proposed rule or adopted rule is contrary to the intent of the legislature, [and] the proposed rule or adopted rule must be conclusively

presumed to be contrary to the legislative intent in any court proceeding involving its validity.” Pet. App. 90. The results of the poll indicate that the Montana legislature in fact intended to provide funds to Christian private schools.

**B. The religious schools that receive funds from the Montana program incorporate Christian religious doctrine in their curricula.**

The structure of the tax-credit program means that benefits not only may, but inevitably will, go to Christian schools. And those schools offer a religious education that Jews and adherents of other non-Christian faiths will not wish to support—and may well find offensive or antithetical to their own beliefs.

*1. All private religious schools in Montana are Christian.*

Minority religious populations in Montana do not have their own private schooling options. There are no schools associated with Judaism or Islam in the state of Montana, nor any other non-Christian religious schools. *PSS Private School Universe Survey School Search, supra*.

Moreover, based on the State’s demographic make-up, it would be impractical—if not impossible—for minority religions to support their own private schools that could benefit from the Montana tax-credit program. Minority religious groups, including Jews, Muslims, and Hindus, each comprise less than 1% of Montana’s already relatively small population. *Religious Landscape Study*, Pew Research Center, <https://perma.cc/LY7C-UKCL> (last visited Nov. 9, 2019). And the geographic dispersion

of minority religious groups throughout the State makes it especially difficult for them to sustain local private schools. Jews, Muslims, Hindus, and Bahá'í do not live in a single part of the state. For example, in Gallatin County—which includes Bozeman—the most recent available data indicate that there are 284 Jews (most of whom are not of school age), compared with 12,099 Evangelical Protestants, 5,833 Mainline Protestants, and 6,400 Catholics. There are also 28 Bahá'í and 308 Muslims. *Gallatin County (Montana) Religious Traditions* (2010), Association of Religious Data Archives, <https://perma.cc/Z7RE-76B2> (last visited Nov. 14, 2019).<sup>2</sup> As a practical matter, a population of this size could not sustain a K-12 school.

The predominance of Christian private schooling options in Montana aligns with—and to a certain degree outpaces—national trends. Nationwide, 41.6% of the private schools operating in the 2017-2018 school year were religiously affiliated, but the vast majority of them were Christian-affiliated. *National Center for Education Statistics, Private School Universe Survey (PSS), 2017–18*, U.S. Department of Education, <https://perma.cc/7CHY-38QY> (last visited

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<sup>2</sup> In Yellowstone County, there are 135 Jews and 25 Muslims, compared with 20,845 Evangelical Protestants, 11,920 Mainline Protestants, and 17,155 Catholics. *Yellowstone County (Montana) Religious Traditions* (2010), Association of Religious Data Archives, <https://perma.cc/VEQ8-LNPE> (last visited Nov. 14, 2019). In Ravalli County, there are 22 Bahá'í compared to 4,318 Evangelical Protestants, 2,522 Mainline Protestants, and 2,225 Catholics; there are no Jews or Muslims in the county. *Ravalli County (Montana) Religious Traditions* (2010), Association of Religious Data Archives, <https://perma.cc/E2P2-LGWH> (last visited Nov. 14, 2019).

Nov. 14, 2019). Of all the religious private schools, 83.5% were affiliated with some form of Christianity. *Ibid.* But this disparity has a particularly acute impact in a low-population State like Montana, where lack of critical mass in any one location makes it impossible as a practical matter for minority religions to provide a non-Christian private religious schooling option.

2. *The Montana Christian schools that participate in the tax-credit program incorporate religious doctrine in their curricula.*

In addressing religious schooling in Montana, the Solicitor General declares that the State's religious schools are "required to teach standard, secular subjects such as reading, writing, mathematics, and science." U.S. Br. 21. But this anodyne statement obscures the actual nature of Montana's religious schools. In fact, the funds provided to Christian schools through Montana's tax-credit program directly support the teaching of religious doctrine. The schools receiving scholarships through the program incorporate Christian beliefs into their teaching to a significant degree, with some schools offering not only required classes on religion and biblical studies, but also religious services and the integration of Christian teachings into other academic subjects. The schools' educational philosophies indicate that their core purpose of religious teaching cannot be separated from their other educational activities.

For example, petitioner Kendra Espinoza seeks to use a scholarship from an SSO to send her children to Stillwater Christian School. This school em-

phasizes “Christ-centered education” and includes Chapel as part of “Student Life” on its website.<sup>3</sup>

The mission statements of the other Christian schools affiliated with Big Sky make clear that they also aim to integrate Christian values and teachings into their overall educational curricula. Butte Central Catholic Schools states that “[o]ur Faith is Central to everything we do.”<sup>4</sup> Foothills Community Christian School explains on its curriculum page that “[t]he educational process in a Christian School is dependent on a Biblical philosophy” and “a God-centered view that all truth is God’s truth, and that the Bible is the inspired and the only infallible authoritative Word of God which contains this truth.”<sup>5</sup> Similarly, Great Falls Central Catholic High School seeks to foster “a Christ-centered community” where students “live fully God’s will.”<sup>6</sup> Heritage Christian School’s “guiding vision is to raise up a generation ‘whose God is the Lord’ by instilling in the hearts and minds of our students a passionate and holy fear of the Lord.”<sup>7</sup> Mission Valley Christian Academy

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<sup>3</sup> *Core Values*, Stillwater Christian School, <https://perma.cc/YRZ8-GPL8> (last visited Nov. 14, 2019); *Chapel & Chapel Dress*, Stillwater Christian School, <https://perma.cc/Z3E9-WM5H> (last visited Nov. 14, 2019).

<sup>4</sup> *Welcome to Butte Central Catholic Schools*, Butte Central Catholic Schools, <https://perma.cc/TAB4-VEHK> (last visited Nov. 9, 2019).

<sup>5</sup> *Our Philosophy*, Foothills Community Christian School, <https://perma.cc/9S2A-VFQ7> (last visited Nov. 14, 2019).

<sup>6</sup> *Home Page*, Great Falls Central Catholic High School <https://perma.cc/9CPP-JGBE> (last visited Nov. 9, 2019).

<sup>7</sup> *About Us*, Heritage Christian School, <https://perma.cc/NW7W-B9B> (last visited Nov. 14, 2019).

aims to be “an extension of the Christian home, in providing an education that is thoroughly and distinctively Christ based.”<sup>8</sup>

Trinity Lutheran School (Billings) and Trinity Lutheran School (Kalispell) also have Christian missions: for students to be “reminded of God’s love and [to be] in God’s Word every day,” and “Knowing Jesus Through Education,” respectively.<sup>9</sup> Whitefish Christian Academy hopes to “send[] out Christian thinkers and doers of the Word to engage and transform our culture for Christ.”<sup>10</sup> St. Andrew School’s mission includes “the official espousal of the beliefs of the Roman Catholic Church and the teaching of these beliefs in our religion program.”<sup>11</sup> Fortis Leadership Academy “place[s] an emphasis on traditional values and honoring the foundational tenants [sic] of our country’s Judeo-Christian heritage in the classroom” and “strive[s] to partner with parents to provide students with a biblical classical education.”<sup>12</sup>

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<sup>8</sup> *Mission Vision Purpose*, Mission Valley Christian Academy, <https://perma.cc/W5DA-7L6P> (last visited Nov. 14, 2019).

<sup>9</sup> *About*, Trinity Lutheran School (Billings), <https://perma.cc/BC4B-C5KU> (last visited Nov. 9, 2019); *About*, Trinity Lutheran School (Kalispell), <https://perma.cc/72VP-EW92> (last visited Nov. 14, 2019).

<sup>10</sup> *About*, Whitefish Christian Academy, <https://perma.cc/YMW7-WN8C> (last visited Nov. 14, 2019).

<sup>11</sup> *Mission Statement*, St. Andrew School, <https://perma.cc/YVL4-E69C> (last visited Nov. 9, 2019).

<sup>12</sup> *Our Difference*, Fortis Leadership Academy, <https://perma.cc/7MEU-EK4P> (last visited Nov. 9, 2019).

In addition, most of the schools affiliated with Big Sky require Christian religious study as part of their curriculum. Butte Central Catholic Schools includes “Spiritual Life” education and “high school students experience prayer and reflection each day through a ‘Daily Devotional.’”<sup>13</sup> Foothills Community Christian School requires a daily Bible class in each grade and mandates that each student own a specific version of the Bible.<sup>14</sup> Great Falls Central Catholic High School requires at least one semester of theology coursework in each year of high school.<sup>15</sup> Bible is a “core subject” at Heritage Christian School.<sup>16</sup> Mission Valley Christian Academy also requires Bible courses in grades 3-12.<sup>17</sup> At Stillwater Christian School, Bible courses are a core part of the curriculum in elementary, middle, and high school.<sup>18</sup> Trinity Luther-

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<sup>13</sup> *High School Academics*, Butte Central Catholic Schools, <https://perma.cc/3EQG-LG6T> (last visited Nov. 14, 2019).

<sup>14</sup> *Academic Overview*, Foothills Community Christian School, <https://perma.cc/6NF3-Q3YE> (last visited Nov. 14, 2019).

<sup>15</sup> *Theology*, Great Falls Central Catholic High School, <https://perma.cc/FF4R-FLTP> (last visited Nov. 9, 2019).

<sup>16</sup> *Academics*, Heritage Christian School, <https://perma.cc/JS9R-MBCB> (last visited Nov. 9, 2019).

<sup>17</sup> *Elementary Curriculum*, Mission Valley Christian Academy, <https://perma.cc/5NJY-6TXD> (last visited Nov. 14, 2019); *Middle School Curriculum*, Mission Valley Christian Academy, <https://perma.cc/M6YN-N6> (last visited Nov. 14, 2019); *High School Curriculum*, Mission Valley Christian Academy, <https://perma.cc/22CV-6GUP> (last visited Nov. 14, 2019).

<sup>18</sup> *Academics Elementary*, Stillwater Christian School, <https://perma.cc/Q44V-A64F> (last visited Nov. 14, 2019); *Academics Middle School*, Stillwater Christian School, <https://perma.cc/F7SP-688D> (last visited Nov. 14, 2019); *Academics High School*, Stillwater Christian School, <https://perma.cc/K3TZ-TXEX> (last visited Nov. 14, 2019).

an School (Billings) also has Religion courses.<sup>19</sup> Trinity Lutheran School (Kalispell) has “Bible Time” in kindergarten and Religion/Bible courses in junior high.<sup>20</sup> St. Andrew School requires religious education in each grade.<sup>21</sup>

Some of the schools also incorporate religious services into the school schedule. Butte Central High School holds a weekly mass.<sup>22</sup> Students at Heritage Christian School attend one hour of chapel each week and participate in an annual mission trip.<sup>23</sup> Trinity Lutheran School (Kalispell) incorporates “daily prayers and devotions, [and] students begin each day with exploration and analysis of Scripture.”<sup>24</sup>

Moreover, Montana’s Christian schools emphasize that religious teaching is integrated into their other academic subjects. Butte Central Catholic

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<sup>19</sup> *Curriculum*, Trinity Lutheran School (Billings), <https://perma.cc/48JL-A4V8> (last visited Nov. 14, 2019).

<sup>20</sup> *Kindergarten*, Trinity Lutheran School (Kalispell), <https://perma.cc/Y5Q7-N8WX> (last visited Nov. 14, 2019); *Religion/Bible Junior High*, Trinity Lutheran School (Kalispell), <https://perma.cc/P6QW-79ZJ> (last visited Nov. 14, 2019).

<sup>21</sup> *Curriculum*, St. Andrew School, <https://perma.cc/R8HB-UPFF> (last visited Nov. 14, 2019).

<sup>22</sup> *About*, Butte Central Catholic Schools, <https://perma.cc/TS5U-HKY3> (last visited Nov. 14, 2019).

<sup>23</sup> *Chapel*, Heritage Christian School, <https://perma.cc/GC9F-NQG3> (last visited Nov. 9, 2019); *Mission Trip*, Heritage Christian School, <https://perma.cc/NSC2-XHZE> (last visited Nov. 9, 2019).

<sup>24</sup> *Religion/Bible Junior High*, Trinity Lutheran School (Kalispell), <https://perma.cc/P6QW-79ZJ> (last visited Nov. 14, 2019).

Schools says that its curriculum is “rooted in the Catholic faith and moral values.”<sup>25</sup> Foothills Community Christian School “teaches all subject matter by looking through the ‘lens’ of Scripture.”<sup>26</sup> Heritage Christian School believes that “[a]ny educational pursuit without Christ as its source of truth is less than true” and “the full truth of any subject—whether art, music, science, history, or economics—cannot be taught if God is ignored, denied, or marginalized as having only personal or private relevance.” The school notes that “[a]ll curriculum materials are selected for their Christian content” and that it emphasizes materials from Christian publishers.<sup>27</sup>

Similarly, Mission Valley Christian Academy uses Christian textbooks for subjects other than religion courses, such as, for science courses, *The World that God Made* and *Discovering God’s World*; and, for history, *United States History in Christian Perspective*.<sup>28</sup> Trinity Lutheran School (Billings) also follows this philosophy, stating that it “seeks to help student[s] to view and interpret the world in science,

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<sup>25</sup> *Elementary & Middle Schools*, Butte Central Catholic Schools, <https://perma.cc/9VQ5-X22H> (last visited Nov. 9, 2019).

<sup>26</sup> *Academics*, Foothills Community Christian School, <https://perma.cc/W7YP-EAET> (last visited Nov. 14, 2019).

<sup>27</sup> *Why Christian Education*, Heritage Christian School, <https://perma.cc/WER4-L42E> (last visited Nov. 9, 2019); *Christ Centered Academics*, Heritage Christian School <https://perma.cc/Y6Q4-AN8Z> (last visited Nov. 14, 2019).

<sup>28</sup> *Elementary Curriculum*, Mission Valley Christian Academy, <https://perma.cc/5NJY-6TXD> (last visited Nov. 9, 2019); *High School Curriculum*, Mission Valley Christian Academy, <https://perma.cc/22CV-6GUP> (last visited Nov. 14, 2019).

literature, economics, politics, history or mathematics through the grid of who God is and what He has spoken to us.”<sup>29</sup> Whitefish Christian Academy similarly states that “our understanding of God as Creator and of His saving purposes in Jesus Christ is the foundation of all of our teaching and conduct.”<sup>30</sup> St. Andrew School states that it “teach[es] from the perspective of Catholic Christianity” and that is “essential” to its mission and curriculum.<sup>31</sup>

To be clear, in offering this review MAOR does not question the right of these schools to provide an education centered on Christian values and beliefs, or the authority of parents to select these schools as the best choice for their children. But it is plain that funds directed to these schools through the Montana tax-credit program will be used to support a specifically Christian education that is tied to the religious beliefs of particular Christian denominations—and the issue in this case must be resolved with that reality in mind.

3. *Material taught in Montana’s Christian schools may be inconsistent with the beliefs of Judaism and other non-Christian religions.*

Religious schools in Montana do more than teach the basis of their faith and religious worldview; in some circumstances, the educational materials used

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<sup>29</sup> *Curriculum*, Trinity Lutheran School (Billings), <https://perma.cc/48JL-A4V8> (last visited Nov. 14, 2019).

<sup>30</sup> *Academics*, Whitefish Christian Academy, <https://perma.cc/3C2P-LTLS> (last visited Nov. 14, 2019).

<sup>31</sup> *Home page*, St. Andrew School, <https://perma.cc/X958-UFAH> (last visited Nov. 9, 2019).

by Montana’s Christian schools promote ideas that are offensive to other religions. Two of the major Christian school textbook suppliers are Bob Jones University (BJU) Press and Abeka Books. Stillwater Christian School, St. Andrew School, and Mission Valley Christian Academy teach from Abeka Books textbooks.<sup>32</sup> Heritage Christian School and Mission Valley Christian Academy both use BJU Press materials.<sup>33</sup> Additionally, four of the Big Sky Scholarship schools—Foothills Community Christian School, Heritage Christian School, Mission Valley Christian Academy, and Stillwater Christian School—are part of the Association of Christian Schools International (ACSI).<sup>34</sup> ACSI schools use books from Abeka Books and BJU Press. *Ass’n of Christian Sch. Int’l v. Stearns*, 678 F. Supp. 2d 980 (C.D. Cal. 2008).

Textbooks from Abeka Books and BJU Press denigrate non-Christian religious beliefs. For example, a geography textbook from Abeka Books teaches that Iran’s use of Islamic law “effectively stop[ed] Iran’s progress as a modern nation.” Laurel Hicks, *Old World History & Geography in Christian Perspective* 62 (4th ed. 2017). The book also criticizes Hinduism, teaching that a “major reason[] for India’s poverty

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<sup>32</sup> *Find a School*, Abeka, <https://perma.cc/E6QE-THB5> (last visited Nov. 9, 2019); *Elementary Curriculum*, Mission Valley Christian Academy, <https://perma.cc/5NJY-6TXD> (last visited Nov. 9, 2019).

<sup>33</sup> *High School Curriculum*, Mission Valley Christian Academy, <https://perma.cc/22CV-6GUP> (last visited Nov. 9, 2019); *Elementary Curriculum Overview*, Heritage Christian School, <https://perma.cc/N3GK-G2YV> (last visited Nov. 14, 2019).

<sup>34</sup> *Find a School*, Association of Christian Schools International, <https://perma.cc/L6RW-UKHJ> (last visited Nov. 14, 2019).

[is] belief in the false religion of Hinduism” and that “Hinduism has led to a superstitious regard for animal and plant life that hinder[s] progress.” *Id.* at 69. In addition, Abeka’s publication attributes problems with literacy and stability in Africa to the practice of different religions, stating, “Africa is a continent with many needs. It is still in need of the gospel.” *Id.* at 153.

American history books from BJU Press promote similar non-tolerant ideas. For example, one book advances an anti-Catholic version of the history of European settlement in the Americas: “[W]hile Roman Catholicism claimed much of the New World, the English preserved a part of North America for more religious freedom and the influence of the Bible.” Rachel C. Larson & Pamela B. Creason, *The American Republic for Christian Schools* 12 (1989). The book also derides Unitarians as “unbelieving preachers,” *id.* at 276, and describes Mormonism as a “cult[]” that teaches “false doctrines.” *Id.* at 282. Similarly, the book criticizes Christian Science, Seventh-Day Adventism, and Jehovah’s Witnesses as cults that “denied Biblical truths.” *Id.* at 446. BJU Press also derides “rationalists” and agnostics, as well as people who believe in evolution. *Id.* at 446-47.

In addition, BJU books teach versions of history that are offensive to other minority groups, including African Americans. One history book presents a favorable view of the Ku Klux Klan, stating: “[T]he Ku Klux] Klan in some areas of the country tried to be a means of reform, fighting the decline in morality and using the symbol of the cross. Klan targets were bootleggers, wife-beaters, and immoral movies.” Timothy Keese & Mark Sidwell, *United States His-*

tory 479 (3d ed. 2001). BJU history books also minimize the horrors of slavery, describing slaves' working hours as similar to those of white southerners: "Although this may seem very harsh to us today, most free workers in those days kept similar hours [to slaves]—even the masters. The maximum hours slaves could work were set by law in most colonies, but it was the common sense and compassion of the masters that really determined how well slaves were treated." Larson & Creason, *supra*, at 45.

The same history book associates the influx of non-Protestant immigrants with negative changes in Americans' religious attitudes. *Id.* at 446. Additionally, the book presents a demeaning view of immigrant communities, stating, for example: "Some immigrant groups were particularly heavy drinkers, and their actions were offensive to many others. Wherever alcoholism occurred, abuse of family members, increased poverty, and crime were often the result." *Id.* at 447.

The books also promote ideas that are associated with anti-Semitism. For example, an economics textbook from Abeka Books contains a chapter arguing that "[t]he stark reality of globalism is that it threatens to rob us of the liberty for which our forefathers fought and died to obtain. The transfer of economic control from sovereign nations representing the interests of their peoples to global organizations controlled by an elite few can result only in loss for the American people who, with their coveted free market economy and personal freedoms, have the most to lose." Russell Kirk, *Economics: Work and Prosperity in Christian Perspective* 217 (3d ed. 2017). The term "globalism" and its critiques are associated with the

history of anti-Semitism, particularly the idea that Jews are not loyal citizens. See, *e.g.*, Mark Strauss, *Antiglobalism's Jewish Problem*, 139 *Foreign Policy* 58 (2003).

Moreover, the schools teach directly from the Bible in their Bible and Religion courses. Throughout history, passages of the New Testament have been manipulated and misused to substantiate and promote anti-Semitism. The most infamous example of this may be Martin Luther's 1543 *On The Jews and Their Lies*, but distortion of the New Testament for anti-Semitic ends has been an unfortunately recurrent theme. Certain passages are of particular note. For example, in *John* 8:44, Jesus tells the Jews: "You are from your father, the devil, and you choose to do your father's desires. He was a murderer from the beginning and does not stand in the truth, because there is no truth in him. When he lies, he speaks according to his own nature, for he is a liar and the father of lies." New Revised Standard Version. Historically, this passage has been used by anti-Semites to promulgate hatred and violence towards Jewish communities. See, *e.g.*, Candida Moss, *How Bigots Easily Exploit the Bible for Anti-Semitism*, *The Daily Beast* (Oct. 30, 2018), <https://perma.cc/6BYL-QPUA>. This passage played a role in the most violent forms of modern white supremacy; accused Pittsburgh Tree of Life Synagogue shooter Robert Bowers paraphrased this passage on his Gab page as support for his virulent hatred of the Jewish community. *Id.* Another notable passage is *Matthew* 27:25, which quotes the Jews as saying: "His blood be on our hands and on the hands of our children!" with "his" referring to Jesus (New Revised Standard Version).

These are just two examples from a larger history of the New Testament being taught in ways that promote anti-Semitic messages. Rabbi Michael J. Cook has identified ten themes of the New Testament that are hostile to Jews, including teachings that “[t]he Jews are culpable for crucifying Jesus—as such they are guilty of deicide”; and “[t]he tribulations of the Jewish people throughout history constitute God’s punishment of them for killing Jesus.” Michael J. Cook, *Modern Jews Engage the New Testament: Enhancing Jewish Well-Being in a Christian Environment* 278 (2008).

Yet Montana does not, and constitutionally could not, monitor the religious content of the teachings at its private sectarian schools to determine whether their teachings are offensive to the beliefs of other denominations. Courts have consistently held that such efforts by the government to scrutinize religious practice would violate the Establishment Clause. For example, in *St. Augustine Sch. v. Evers*, 906 F.3d 591 (7th Cir. 2018), the Seventh Circuit stated that “the state may not even monitor a religious school to identify which aspects of its curriculum and courses contain religious content generally.” *Id.* at 598; see also *New York v. Cathedral Acad.*, 434 U.S. 125, 132–33 (1977) (disapproving of a scheme that required the State to identify “any religious content in various classroom materials” as part of a reimbursement process); *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971). In this light, members of minority religions, and Jews in particular, have reason to be deeply concerned about supporting schools that include Christian religious belief and New Testament passages in their curricula.

## **II. If used to benefit sectarian schools, the Montana tax-credit program violates the First Amendment.**

Against this background, the operation of Montana's tax-credit program means that the only schools that do now, and that can be expected in the future to, receive benefits are Christian. These schools make Christian doctrine a central aspect of their curricula, and in some cases that curriculum contains elements that are inconsistent with or offensive to the beliefs of other faiths. But because donors to the Montana tax-credit program may not limit the schools to which their contributions are directed or restrict the uses to which the funds are put, a member of the Jewish, Muslim, or Hindu faith may benefit from the program's tax credit *only* by supporting Christian education.

Consequently, would-be donors must choose either to forgo participating in the tax-credit scheme or to support Christian education regardless of their own religious beliefs. This forced choice violates the First Amendment's religion clauses in three ways.

*First*, it creates an unconstitutional condition because it premises access to a valuable state benefit—a tax credit—on providing financial support of religious education. Yet the State could not mandate that conduct directly without running afoul of First Amendment principles.

*Second*, the tax-credit program violates the Free Exercise Clause because, in forcing a choice between receiving a tax credit and disavowing one's religious identity, it discriminates against Montana's non-Christian residents on the basis of their religious

status. This discrimination subjects the program to strict scrutiny, which it is unable to survive.

*Third*, in the absence of restrictions on the allocation of funds to religious schools, the tax-credit program violates the Establishment Clause because it operates to produce what this Court has recognized as “a religious gerrymander.” The statute’s plain text and legislative history indicate that its creation was motivated by a discriminatory purpose. Since its creation, the program has already had a discriminatory effect. And the program, which has caused excessive entanglement between the State and religious institutions, can be expected to produce “continuing political strife over aid to religion.” *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 794 (1973).

**A. The tax-credit program imposes an unconstitutional condition on the receipt of a public benefit.**

It is fundamental that a State may not condition a public benefit on conduct that it could not otherwise constitutionally mandate. Here, the Montana Legislature has done precisely that by conditioning access to a valuable tax benefit on the requirement that—as a practical matter—taxpayers fund religious instruction that is inimical to their own faiths.

The unconstitutional conditions doctrine “reflect[s] an overarching principle \* \* \* that vindicates the Constitution’s enumerated rights by preventing the government from coercing people to give them up.” *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). A State engages in such coercion when it obligates individuals to forgo constitutionally protected rights so as to receive a benefit

from the State. The Court has held “in a variety of contexts that ‘the government may not deny a benefit to a person because he exercises a constitutional right.’” *Ibid.* (quoting *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983)). See, e.g., *United States v. Am. Library Ass’n*, 539 U.S. 194, 203 (2003).

The Court has “repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights.” *Koontz*, 570 U.S. at 608. It would be a “palpable incongruity” to strike down legislation that expressly denies a person’s constitutional rights, but to uphold legislation “by which the same result is accomplished under \* \* \* surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold.” *Frost v. R.R. Comm’n*, 271 U.S. 583, 593 (1926). The doctrine applies even when the benefit is gratuitous. Indeed, “virtually all of [the Court’s] unconstitutional conditions cases involve a gratuitous governmental benefit of some kind.” *Koontz*, 570 U.S. at 608. See, e.g., *Memorial Hospital v. Maricopa Cty.*, 415 U.S. 250 (1974) (healthcare); *Perry v. Sindermann*, 408 U.S. 593 (1972) (public employment); *United States v. Butler*, 297 U.S. 1 (1936) (crop payments). And these benefits need not be indispensable to the recipient; it is enough that the benefit “has value to those who seek it.” *Autor v. Pritzker*, 740 F.3d 176, 182 (D.C. Cir. 2014) (participation on government advisory committee; no court has “found a benefit too insignificant” to trigger the doctrine); *Cuffley v. Mickes*, 208 F.3d 702, 707 (8th Cir. 2000) (participation in state adopt-a-highway program).

If governments had the power to so condition the exercise of rights, the “guarantees embedded in the Constitution” could be “manipulated out of existence.” *Frost*, 271 U.S. at 594. The unconstitutional conditions doctrine thus gives effect to this fundamental insight, holding that what the Constitution “precludes the government from commanding directly, it also precludes the government from accomplishing indirectly.” *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 78 (1990).

This principle applies with full force here. The Court has held that, “[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.” *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 717-718 (1981); see also *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

If applied as petitioners and the United States demand, Montana’s tax-credit scheme runs afoul of this principle because the State could not directly mandate the conduct required of taxpayers to receive the tax credit—the financing of Christian religious education. Such a mandate plainly would violate the First Amendment, which “forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship.” *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940); see also *Sch. Dist. of Abingdon Tp. v. Schempp*, 374 U.S. 203, 222 (1963).

And although Montana's program does not require that taxpayers themselves embrace Christianity to benefit from the program, the unconstitutional conditions doctrine is triggered by the practical requirement that program beneficiaries support another faith's religious teachings. The State surely could not, for example, provide that individuals are eligible for state employment only if they provide funds to a Muslim congregation for its construction of a mosque, or to a Jewish congregation to support Torah studies, or to Jehovah's Witnesses to assist in proselytizing. But in its essence, that is just what petitioners and the United States would have the tax-credit program do.

Against this background, the United States' submission in this case offers an oddly distorted argument. The United States correctly explains "that a State 'cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation'" (U.S. Br. 9 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947))); and that "the government may not 'impose special disabilities on the basis of religious views or religious status.'" U.S. Br. 10 (quoting *Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990)). But that is precisely why the United States' proposed application of the tax-credit program is *unconstitutional*: so far as minority religions are concerned, it is the government's application of Montana's program that effectively excludes adherents of those religions from receiving benefits "because of their faith" and that fails to "protect[] religious observers against unequal treatment." U.S. Br. 10 (quoting *Church of the*

*Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993)).

**B. As applied by petitioners and the United States, the program discriminates on the basis of taxpayers’ religious status, violating the Free Exercise Clause.**

In addition, when considering Free Exercise challenges to public grant schemes, the Court has noted a distinction between discrimination on the basis of religious “status” and that on the basis of religious “use.” Insofar as that consideration is properly part of the analysis (see Resp. Br. 36-40; U.S. Br. 13-16), it requires invalidation of the Montana tax-credit program as it would be applied by petitioners and the United States.

In *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017), the Court struck down a program that discriminated based on the religious status of a church that sought a government grant for playground resurfacing. In coming to its conclusion, the Court stated that “there [was] no question that Trinity Lutheran was denied a grant simply because of what it is—a church.” *Id.* at 2023. The Court contrasted *Trinity* with *Locke v. Davey*, 540 U.S. 712 (2004), where the Court upheld a scholarship program’s restrictions on the use of funds for theological study. As the Court explained, the two cases can be differentiated because the State in *Locke* had “merely chosen not to fund a distinct category of instruction” (*id.* at 721) and the applicant “was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry.” *Trinity Lutheran Church*, 137 S. Ct. at 2023.

To determine whether a particular benefit scheme discriminates on the basis of religious status, the Court has asked whether the State has directly or indirectly forced the would-be beneficiaries of a public program to choose between their religion and enjoyment of the public benefit—effectively, an application of the unconstitutional conditions doctrine. See, e.g., *Trinity Lutheran Church*, 137 S. Ct. at 2021-22 (“[T]he Department’s policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution. \* \* \* [W]hen the State conditions a benefit in this way, \* \* \* the State has punished the free exercise of religion” and “must withstand the strictest scrutiny.”); see also *McDaniel v. Paty*, 435 U.S. 618, 626 (1978).

Benefit or grant schemes that discriminate based on religious status are subject to strict scrutiny. See *Trinity Lutheran Church*, 137 S. Ct. at 2019. And just as the program in *Trinity Lutheran Church* was held to discriminate against religious entities on the basis of their religious status, Montana’s tax credit scheme—if applied as petitioners and the United States propose—would discriminate against non-Christians based on their religious status because it conditions receipt of the tax credit on taking an action contrary to that religious identity: financing Christian education. Section 15-30-3101 is thus subject to exacting scrutiny, which it plainly fails to meet. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

The facial neutrality of Montana’s pre-Rule 1 tax credit scheme does not save it. “A regulation neutral on its face may, in its application, nonetheless offend

the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.” *Yoder*, 406 U.S. at 220 (citations omitted). Because the inevitable result for non-Christian individuals participating in Montana’s tax credit scheme as petitioners and the United States would apply it is that they must choose between receiving the tax benefit and forgoing their own religious beliefs in subsidizing Christian education, the scheme violates the Free Exercise Clause.

To be sure, there are circumstances when the state may provide funding to religious schools or may provide parents tax deductions to help pay for schooling at such schools. See, e.g., *Mueller v. Allen*, 463 U.S. 388 (1983). But the program at issue here differs in crucial respects from those that have been upheld by the Court. In those cases, the State offered “many” equivalent deductions that did not benefit religious institutions, and parents made their own “private choice[]” whether to seek a deduction to help pay for their own child’s schooling at the school they selected. *Id.* at 396, 400. Here, in contrast, members of minority faiths in Montana may obtain the tax credit only by supporting education in *someone else’s* religion. In assessing such a scheme, the Court “look[s] to the substance of the program.” *Sloan v. Lemon*, 413 U.S. 825, 832 (1973). And in this case, the program is one that, in substance, treats minority religions adversely.

Moreover, petitioners’ and the United States’ favored application of the Montana program is especially problematic because, as a practical matter, it favors (and disfavors) members of *particular* faiths. Government action having that effect, and that

therefore could foster sectarian strife, was of special concern to the Framers of the First Amendment.

The Nation's founding documents show a keen interest in avoiding sectarian religious language. This can be seen in the Declaration of Independence's immortal phrase "they are endowed by their Creator, with certain unalienable rights," which makes no reference to particular religious denominations. The Constitution goes even further by entirely failing to reference a deity. This was a deliberate choice made by the Framers, which was opposed at the Convention by Luther Martin and a handful of others.<sup>35</sup>

At the state level, the documents crafted by Jefferson and Madison—whose views are central to an understanding of the religion clauses—show a similar sensitivity to religious inclusion. Jefferson's original draft of the Virginia Statute for Establishing Religious Freedom, a state precursor to the federal Establishment Clause, declared in its Preamble that "Almighty God hath created the mind free" and that governmental penalties for religious beliefs "are a departure from the plan of the holy author of our religion."<sup>36</sup> A proposal to change the sentence to read "a departure from the plan of Jesus Christ, the Holy author of our religion," was rejected by the legisla-

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<sup>35</sup> See Luther Martin, *Genuine Information*, in 4 *The Founders' Constitution* (Philip K. Kurland & Ralph Lerner ed. 1987).

<sup>36</sup> *Thomas Jefferson and the Virginia Statute for Religious Freedom*, Va. Museum of Hist. & Culture, <https://perma.cc/LM9A-CXWU> (last visited Nov. 14, 2019).

ture.<sup>37</sup> Both Madison and Jefferson perceived a fundamental difference between the original language and the proposed amendment: the original language was universal, but the amendment was exclusionary, particularly of non-Christians. Madison believed that the phrase “Jesus Christ, the holy author of our religion” would “imply a restriction of the liberty defined in the Bill, to those professing his religion *only*.”<sup>38</sup> And Jefferson wrote that the legislature’s decision to omit that phrase from the final statute demonstrated an intent “to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and Infidel of every denomination.”<sup>39</sup> The approach advocated by petitioners and the United States cannot be squared with this goal.

**C. As applied by petitioners and the United States, the program violates the Establishment Clause.**

By the same token, petitioners’ and the United States’ proposed application of the tax-credit program would violate the Establishment Clause by producing what this Court has recognized as a “religious gerrymander[.]” *Gillette v. United States*, 401 U.S. 437, 452 (1971) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 696 (1970)); see *Larson v. Valente*, 456 U.S. 228, 252-255 (1982). Although the program may

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<sup>37</sup> Thomas Jefferson, *Autobiography* (1821), in 5 *The Founders’ Constitution*, amend. I, document 45.

<sup>38</sup> James Madison, *Detached Memoranda ca. 31 January 1820*, Nat’l Archives, <https://perma.cc/4NVQ-ALQ7> (last visited Nov. 14, 2019).

<sup>39</sup> Jefferson, *Autobiography*, *supra* n. 37.

be neutral on its face, it nonetheless is designed in a manner that impermissibly advances Christian teaching.

In the Court’s Establishment Clause jurisprudence, “[t]he question of governmental neutrality is not concluded by the observation that [the law] on its face makes no discrimination between religions, for the Establishment Clause forbids subtle departures from neutrality, ‘religious gerrymanders,’ as well as obvious abuses.” *Gillette*, 401 U.S. at 452 (quoting *Walz*, 397 U.S. at 696). Instead, courts “must survey meticulously” the context and circumstances that could permit religious gerrymanders intended to single out particular religions for a burden or benefit. *Walz*, 397 U.S. at 696. See, e.g., *Church of Lukumi Babalu Aye*, 508 U.S. at 534. And although the precise nature of the test now used by the Court to resolve Establishment Clause challenges has been a matter of dispute (see, e.g., *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2079-2082 (2019) (opinion of Alito, J); *id.* at 2090 (Breyer, J., concurring); *id.* at 2092 (Kavanaugh, J., concurring); *id.* at 2094 (Kagan, J., concurring in part)), here, all of the relevant considerations—and the practical reality, which the Court has regarded as important to the inquiry (see *id.* at 2091 (Breyer, J., concurring))—point to the conclusion that the tax-credit program, if applied as petitioners and the United States propose, would have an impermissible purpose and effect.

1. *The program has a discriminatory purpose.*

To begin with, the tax-credit program must be understood to have a discriminatory purpose. It has an undeniably discriminatory *effect* because almost

all of the taxpayer funds are allocated to Christian schooling—and the legislature designed the program so that such an impact would be unavoidable.

By enacting the program, the Montana legislature aimed to increase private school enrollment, with the knowledge that the vast majority of Montana’s private schools are Christian. The Legislature’s intent can be inferred from the statutory text and structure. Indeed, the statute was designed such that neither the donors nor SSOs could exclude Christian schools or restrict scholarships only to private secular schools.

The Legislature’s intent was evident again when the majority of legislators mobilized to oppose the promulgation of Rule 1. Standing alone, the Legislature’s evident intent to design a program that would single out Christian schools for a benefit is sufficient to find an Establishment Clause violation.

2. *The program has a discriminatory effect.*

In addition, the profoundly discriminatory effect of the tax-credit program itself establishes unconstitutionality. In the 2018-2019 school year, more than 94% of the taxpayer funded scholarships went to Christian-affiliated schools. Pet. App. 123-125. These stark statistics demonstrate precisely the kind of effect that this Court has found impermissible in the past.

For example, in *Sloan* the Court considered a case involving parental reimbursement for nonpublic education that posed a similar issue. The Court noted that “more than 90% of the children attending nonpublic schools in [the State] [were] enrolled in schools that are controlled by religious organizations

or that have the purpose of propagating and promoting religious faith.” 413 U.S. at 830 (citation omitted) (comparing with *Lemon v. Kurtzman*, “in which the Court noted that more than 96% of the children attending nonpublic schools in [the State] ‘attend[ed] church-related schools’”).<sup>40</sup>

And even setting aside the problematic statistics, the Court's Establishment Clause jurisprudence often simply asks whether a program has the impermissible effect of causing “a symbolic union between government and religion.” See, e.g., *Agostini v. Felton*, 521 U.S. 203, 208 (1997). In this case, the “symbolic union” is evident. Taxpayers were effectively told that to qualify for a valuable government benefit, they would have to support Christian schools, even if doing so is offensive to the free exercise of their own faith.

3. *The program can be expected to produce “continuing political strife.”*

Finally, the tax-credit program effected a symbolic union between the State of Montana and Christian schools, and in so doing created excessive entanglement between church and state. The Court has said that, “apart from any specific entanglement of the State in particular religious programs, assistance \* \* \* [violates the Establishment Clause if it] carries

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<sup>40</sup> The Court in *Mueller* was “loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.” 463 U.S. at 401. But as we have noted, the Montana program contains elements that are far more troubling than those at issue in *Mueller*; and the practical reality of the Montana program is that it *always* will wholly exclude members of minority religions.

grave potential for entanglement in the broader sense of continuing political strife over aid to religion.” *Comm. for Pub. Educ.*, 413 U.S. at 794. And if applied as petitioners and the United States propose, the program will create significant political and sectarian divisions over the funding of religious education. In such circumstances, as Justice Powell wrote for the Court, it should “decline to approach or overstep the ‘precipice’ against which the Establishment Clause protects.” *Sloan*, 413 U.S. at 832.

### CONCLUSION

The decision of the Montana Supreme Court should be affirmed.

Respectfully submitted.

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