

No. 18-1195

IN THE
Supreme Court of the United States

KENDRA ESPINOZA, JERI ELLEN
ANDERSON, and JAIME SCHAEFER,
Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE,
and GENE WALBORN, in his official
capacity as DIRECTOR of the
MONTANA DEPARTMENT OF REVENUE,
Respondents.

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

**BRIEF OF AMICUS CURIAE MONTANA-
NORTHERN WYOMING CONFERENCE,
UNITED CHURCH OF CHRIST
SUPPORTING RESPONDENT**

PATRICIA E. ROBERTS
WILLIAM & MARY LAW
SCHOOL APPELLATE AND
SUPREME COURT CLINIC
P.O. Box 8795
Williamsburg, VA 23187
Telephone: 202-759-6925
tjbreckenridge@wm.edu

TILLMAN J. BRECKENRIDGE*
PIERCE BAINBRIDGE BECK
PRICE & HECHT LLP
601 Pennsylvania Ave., NW
Suite 700S
Washington, DC 20004
Telephone: 202-843-8342
tjb@piercebainbridge.com

*Counsel of Record

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

BRIEF OF AMICUS CURIAE 1

INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. PETITIONERS ASK THIS COURT TO
DEVIATE FROM PRECEDENT TO
INVALIDATE MONTANA LAW BASED
ON NONEXISTENT MOTIVATION 3

 A. Broad legislative motivation is only
 considered in facial challenges..... 3

 B. Legislative or administrative motivation
 must be directed at a challenger’s
 religious beliefs in as-applied, religion
 cases, and it was not here. 6

II. ARTICLE X, SECTION 6 OF THE 1972
MONTANA CONSTITUTION DOES NOT
EMBODY ANTI-CATHOLIC ANIMUS..... 9

 A. The 1889 Montana predecessor
 amendment was not enacted with
 improper purpose..... 9

 B. Any purported improper purpose was
 cleansed with the 1972 re-enactment of
 the Montana constitution. 12

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

<i>Arizona v. California</i> , 283 U.S. 423 (1931).....	3
<i>Bd. of Educ. of Cincinnati v. Minor</i> , 23 Ohio St. 211 (1872)	10
<i>Church of Lukumi Babalu Aye, Inc. v. City of Hialeah</i> , 508 U.S. 520 (1993)	5
<i>Daniel v. Family Sec. Life Ins. Co.</i> , 336 U.S. 220 (1949).....	3, 6
<i>Edwards v. Aguillard</i> , 482 U.S. 578 (1987).....	5
<i>Emp't Div. v. Smith</i> , 494 U.S. 872 (1990)	7
<i>Epperson v. Arkansas</i> , 393 U.S. 97 (1968).....	3
<i>Fletcher v. Peck</i> , 10 U.S. (6 Cranch) 87 (1810).....	3
<i>Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n</i> , 138 S. Ct. 1719 (2018)	6
<i>Romer v. Evans</i> , 517 U.S. 620 (1996)	5
<i>State, ex rel. Chambers v. Sch. Dist.</i> , 472 P.2d 1013 (Mont. 1970).....	15
<i>Thomas v. Review Bd. of Ind. Emp't Sec. Div.</i> , 450 U.S. 707 (1981)	7
<i>Trinity Lutheran Church of Columbia, Inc. v. Comer</i> , 137 S. Ct. 2012 (2017).....	7
<i>U.S. Dep't of Agric. v. Moreno</i> , 413 U.S. 528 (1973).....	5

**TABLE OF AUTHORITIES
(CONTINUED)**

<i>United States v. Lee</i> , 455 U.S. 252 (1982).....	7
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968).....	5
<i>United States v. Windsor</i> , 570 U.S. 744 (2013).....	4

Statutes

The Enabling Act of 1889, 25 Stat. 676 (1889).....	11
---	----

Other Authorities

1971-72 Montana Constitutional Convention Verbatim Tr., vol. II.....	12, 13
1971-72 Montana Constitutional Convention Verbatim Tr., vol. VI.....	13, 14, 15
Brandon L. Garrett, <i>Unconstitutionally Illegitimate Discrimination</i> , 104 Va. L. Rev. 1471 (2018)	4
Caleb Nelson, <i>Judicial Review of Legislative Purpose</i> , 83 N.Y.U. L. Rev. 1784 (2008).....	4
Douglas F. Johnson, <i>Freedom of Religion: Locke v. Davey and State Blaine Amendments</i> (2010).....	10, 11
Elijah L. Milne, <i>Blaine Amendments and Polygamy Laws: The Constitutionality of Anti-Polygamy Laws Targeting Religion</i> , 28 W. New Eng. L. Rev. 257 (2006).....	10

**TABLE OF AUTHORITIES
(CONTINUED)**

G. Alan Tar, <i>The Montana Constitution: A National Perspective</i> , 64 Mont. L. Rev. 1 (2003)	12
John Hart Ely, <i>Legislative and Administrative Motivation in Constitutional Law</i> , 79 Yale L.J. 1205 (1970).....	4
Mark Edward DeForrest, <i>An Overview and Evaluation of State Blaine Amendments: Original, Scope, and First Amendment Concerns</i> , 26 Harv. J.L. & Pub. Pol’y 551 (2003).....	11
Michael P. Dougherty, <i>Montana’s Constitutional Prohibition on Aid to Sectarian Schools: “Badge of Bigotry” or National Model for the Separation of Church and State</i> , 77 Mont. L. Rev. 41 (2016).....	11, 12, 14, 15
Stillwater Christian School, https://www.stillwaterchristianschool.org	7, 8

BRIEF OF AMICUS CURIAE

Amicus curiae respectfully submits this brief in support of the Respondents, the Montana Department of Revenue and Gene Walborn, urging that the Court affirm the Montana Supreme Court.

INTEREST OF AMICUS

The Montana-Northern Wyoming Conference, United Church of Christ is an alliance of Christian churches.¹ The Conference represents unity among several churches in Montana and Northern Wyoming. Together and in partnership with other organizations, the Conference advocates for human rights, children and families, and economic justice. We recognize and fulfill our mission and duty to spread the Gospel and to develop Christ's following.

As part of our justice advocacy, we believe in expanding equity in public education. Public education represents a universally available and publicly accountable means of educating our society's children. By contrast, private school alternatives—particularly those supported by public funding—do not serve the goal of increasing access to quality education for the poorest and most vulnerable children. Publicly funding private schools siphons money from public education, while providing inadequate access for poor children. And, unlike public educational institutions, private educational institutions lack public account-

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

ability. Moreover, public funding for private religious schools inappropriately entangles government with religion, forcing citizens to invest in religious indoctrination against their beliefs.

As a largely Montanan Conference, we are particularly interested in this litigation. We strongly believe that our state's educational system is best served by preserving resources for public schools and leaving religious education to churches and other religious organizations that are funded by voluntary investments from their followers. This Court should uphold the Montana Supreme Court's ruling to maintain the stability of Montana's public school system and limit government involvement with religious education. These motivations are not "hostil[e] toward religion" as Petitioners claim. We, the members of the Conference, devote our lives to promoting religion. We write to highlight for the Court how Petitioners' focus on the purported "anti-Catholic" motivation behind the initial enactment of the Montana constitutional provision is not relevant based on this Court's previous consideration of legislative motivation, and the historical backdrop of the 1972 re-enactment of Montana's constitution.

SUMMARY OF ARGUMENT

This Court should not consider Petitioner's straw man argument that the motivation underlying the enactment of Article X, Section 6's 1889 predecessor matters to the outcome of this case. The Court has carefully cabined uses of pronounced legislative motivation in cases involving the Religion Clauses for good reason—to avoid invalidating lawfully enacted legislation that is constitutionally appropriate on its face based on often incorrect or inapplicable assert-

ions of malicious intent. Here, Petitioners allege that Section 6 was born of anti-Catholic animus to advance the interest of Protestants. Yet they use it to assert a broader “hostil[e] toward religion”—and apparently anti-Protestant—animus as the Petitioners seek public funds to attend “non-denominational” schools. Petitioners’ assertion of anti-religious bias and their attempted conflation of it with anti-Catholic bias is both inapplicable to the law and facts here and historically inaccurate. The Court should disregard this line of argument, which dominates Petitioners’ opening brief.

ARGUMENT

I. PETITIONERS ASK THIS COURT TO DEVIATE FROM PRECEDENT TO INVALIDATE MONTANA LAW BASED ON NONEXISTENT MOTIVATION

A. Broad legislative motivation is only considered in facial challenges

For much of its history, this Court has rejected efforts to “search for motive in testing constitutionality.” *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220, 224 (1949) (citations omitted). As early as 1810, this Court disregarded a challenger’s argument that legislators were improperly motivated by impure financial considerations when passing legislation. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 131 (1810). The Court continued to abstain from inquiries into legislative motive throughout the early part of the Twentieth Century. *See, e.g., Arizona v. California*, 283 U.S. 423, 455 n.7 (1931). Not until the 1960s—in cases such as *Epperson v. Arkansas*—did this Court delve into legislative motive. 393 U.S. 97, 109 (1968) (“[T]here is no doubt that the motivation for the law

was . . . to suppress the teaching of a theory which, . . . ‘denied’ the divine creation of man.”); *see also* John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205 (1970) (tracing the Court’s changing use of motivation).

The Court now considers motivation, to various extents, in First Amendment, Due Process, and Equal Protection cases, among others. Brandon L. Garrett, *Unconstitutionally Illegitimate Discrimination*, 104 Va. L. Rev. 1471, 1486-1503 (2018). While this Court evolved its use of legislative or administrative purpose, it limits its inquiries into broad motivation to facial challenges. Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. Rev. 1784, 1853 (2008).

In *United States v. Windsor*, this Court engaged in a comprehensive consideration of the legislative purpose underlying § 3 of the Defense of Marriage Act. 570 U.S. 744, 775 (2013). In the course of invalidating the Act, the Court considered the Act’s deviation from normal principles of federalism, as well as the law’s stated purpose, “to promote an interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.” *Id.* at 771 (citation and internal quotation marks omitted). It ultimately decided that the Act’s purpose was to ensure that any same-sex marriages recognized at the state level would be treated as “second-class marriages for the purpose of federal law.” *Id.* This inappropriate purpose proved the improperly discriminatory effect, so the Court invalidated the statute on its face.

Similarly, this Court has considered legislative motivation in Free Exercise challenges. In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, this Court

facially invalidated a group of ordinances, that targeted a particular religious group—the local Santeria church. 508 U.S. 520, 524 (1993). Lawmakers there, reacting to anti-Santeria sentiments in the community, imposed criminal penalties for animal sacrifice, an important tenant of the Santeria faith. *Id.* at 526. The Court stated, “[t]he record in this case compels the conclusion” that lawmakers sought to suppress a “central element of the Santeria worship service.” *Id.* at 534. This improper legislative purpose proved the invidious discriminatory effect and mandated invalidation of the statute on its face. *Id.* at 533.

This Court also cited a broad, and invalid, legislative motivation when it found Louisiana’s Creationism Act facially invalid. *Edwards v. Aguillard*, 482 U.S. 578, 596-97 (1987). There, Louisiana’s attempt to “restructure the science curriculum to conform with a particular religious viewpoint” violated the Establishment Clause. *Id.* at 593. Other laws that this Court invalidated based on impermissible purpose resulted from facial challenges by the targets of the discriminatory legislative intent. *See Romer v. Evans*, 517 U.S. 620, 623, 631 (1996) (invalidating state constitutional amendment which imposed a “special disability” on homosexual people); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 532-33 (1973) (invalidating the “unrelated person” provision of the Food Stamp Act).

In contrast, this Court has avoided legislative motive considerations during as-applied challenges. In *United States v. O’Brien*, for instance, this Court rejected O’Brien’s legislative motive argument in part because the statute was constitutional on its face. 391 U.S. 367, 383 (1968) (“[T]his Court will not strike

down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.”); *see also Daniel*, 336 U.S. at 224 (declining to consider legislative purpose in an as-applied challenge). There are good reasons to avoid delving into legislative intent in as-applied challenges. In addition to the conceptual incongruence, an improperly discriminatory law should be wholly invalid. As-applied challenges based on purportedly improper legislative motive invite cases like this: where plaintiffs assert a discriminatory intent against a group to which they do not belong in a case where they suffer no ill effects of that purported discriminatory intent.

B. Legislative or administrative motivation must be directed at a challenger’s religious beliefs in as-applied, religion cases, and it was not here.

Petitioners contend that they were denied the opportunity to send their children to non-denominational, Protestant schools, and were thus victims of anti-Catholic animus from the Nineteenth Century. Yet they do not purport to be Catholic, nor do they intend to use the funds at issue here to attend Catholic schools. When this Court has considered motivation in Religion Clauses cases, it has only invalidated laws directly targeted at the challenger’s religious beliefs. That makes sense in light of the fact that motivation is used to prove discriminatory effect, and if the motivation does not match the purported effect, it is not good evidence. For instance, last year, this Court invalidated an action by the Colorado Civil Rights Commission. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1724 (2018). The Commission, in evaluating petitioner’s religious objections, denigrated the petitioner’s faith

specifically. Id. at 1729-30. One Commissioner labeled the petitioner’s sincerely held religious objection a “despicable piece[] of rhetoric.” *Id.* at 1729. The Commission’s animus was only legally relevant to the petitioner’s challenge because it targeted the petitioner’s exact beliefs.

Generally, this Court has evaluated alleged Free Exercise and Establishment Clause violations, as-applied. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017) (holding that Trinity Lutheran’s exclusion from a generally applicable public benefit violated the Constitution); *Emp’t Div. v. Smith*, 494 U.S. 872, 890 (1990) (denying inquiry into motivation for a generally applicable law); *United States v. Lee*, 455 U.S. 252, 260-61 (1982) (upholding a social security tax without examining underlying legislative motivation); *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 709, 720 (1981) (finding the law denying petitioner’s unemployment benefits unconstitutional as-applied without considering the underlying motivation).

The Court is correct to restrict the application of animus to litigants who actually identify with the purportedly afflicted group. If the purported animus is inconsistent with the application in the particular case, it is irrelevant. This case provides a perfect example. Petitioners enroll their children in Stillwater Christian School. Pet’rs Br. 6. Stillwater is a “non-denominational” Christian school educating children from kindergarten through high school. *Core Values*, Stillwater Christian School.² Having maintained its

² Available at: <https://www.stillwaterchristianschool.org/domain/232>.

“non-denominational” status since its founding in 1980, Stillwater does not now, has not ever, and does not purport to intend in the future, to affiliate itself with the Catholic Church. *History and Expansion*, Stillwater Christian School.³

In their brief, Petitioners describe the history behind Section 6 as favorable to such non-denominational educational institutions. The bias was “anti-Catholic,” and non-sectarian was code for the non-denominational Protestant education that existed in public schools at the time. Pet’rs. Br. 33 (“Protestantism [was] widely taught in the common schools.”). Since then, public schools no longer legally provide non-denominational Protestant education, and schools like Stillwater exist to spread the Gospel at an educational institution through a non-denominational viewpoint. In an attempt to exploit the inconsistency, Petitioners admonish this Court to “not allow a vestige of Nineteenth Century anti-Catholicism to be twisted into an engine of animus against all religion.” Pet’rs. Br. 29.

But, according to Petitioners’ story, Section 6 was not just a “vestige of Nineteenth Century anti-Catholicism”—it was a vestige of a Nineteenth Century interest in using public funds to advance Protestantism at the expense of Catholics. Pet’rs. Br. at 33. In other words, the Montana government was using taxpayer dollars of non-believers to advance Protestant religious education. Petitioners suggest that this Court apply alleged animus against private Catholic schooling and alleged bias *in favor of non-*

³ Available at: <https://www.stillwaterchristianschool.org/domain/15>.

denominational religious education to hold that it is unconstitutional, as-applied, to refuse to fund non-denominational religious education. Pet’rs Br. 13-14. That holding would represent a substantial departure from this Court’s considerations of legislative and administrative motivation.

The Petitioners call it “hostility toward religion” to object to government doing the same thing now that it did in the Nineteenth Century—using public funds to advance “non-denominational” Christian education. To the contrary, amicus does not wish public funds to go to a school that advances atheism, agnosticism, or any other pro- or anti-religious view. Amicus simply wants the government to stay out of religious education. Instead, amicus desires taxpayer dollars to flow to the public schools, which do not advance *any* viewpoint on religion. Petitioners’ attempt to use purported pro-Protestant, anti-Catholic bigotry from the Nineteenth Century to obtain funding for “non-denominational” Protestant schools and to paint current objectors as “hostile toward religion” is plainly false, insulting, and *legally irrelevant* under this Court’s precedents.

II. ARTICLE X, SECTION 6 OF THE 1972 MONTANA CONSTITUTION DOES NOT EMBODY ANTI-CATHOLIC ANIMUS

A. The 1889 Montana predecessor amendment was not enacted with improper purpose

Montana legislators did not choose to enact Article XI, Section 8 in the 1889 constitution of their own volition, even though it would later form the basis for Article X, Section 6 of the 1972 constitution. Prior to Montana’s statehood, public funding of religious

schools was prevalent and widely debated in public discourse, with an appeal to prohibit funding “sectarian” schools. Douglas F. Johnson, *Freedom of Religion: Locke v. Davey and State Blaine Amendments* 23-24 (2010). Many scholars impute anti-Catholic sentiments in the failed federal “Blaine Amendment,” and the “baby Blaine Amendments” later adopted by many states. Elijah L. Milne, *Blaine Amendments and Polygamy Laws: The Constitutionality of Anti-Polygamy Laws Targeting Religion*, 28 W. New Eng. L. Rev. 257, 260-62 (2006). Even so, this “anti-Catholic bias” was often not the only impetus for these amendments as “there were numerous legitimate motives for adoption of these state constitutional amendments including responding to growing religious turmoil over religious practices in schools.” Johnson, *supra*, at 18.

Numerous changes in religious culture in the Nineteenth Century—such as the Great Awakening and the rise of Methodist and Baptist denominations—altered Americans’ views on not only the role of religion in public schools, but also the separation of church and state. *Id.* at 22. One such example is the Cincinnati “Bible Wars,” a dispute between Catholics and Protestants over teaching the King James Bible in public schools. *Id.* at 18, 23-24. The Ohio Supreme Court resolved the conflict by affirming the school board’s decision to remove religious instruction, stating that “all history shows us that the more widely and completely they are separated, the better it is for both” religion and government. *Bd. of Educ. of Cincinnati v. Minor*, 23 Ohio St. 211, 248 (1872); Johnson, *supra* at 23-24. The court emphasized that government cannot express religious opinions as, if it did, it would lead to

controversy as to whose religious beliefs the government would accept. *Minor*, 23 Ohio St. at 249. The realization that “Protestant denominations were also Christian sects[,] and therefore th[e] constitutional provisions barring the flow of state funds into ‘sectarian’ institutions would affect Protestant practices in public schools[,] and not just Catholic practices,” led to many appreciating a stricter separation between church and state. Johnson, *supra*, at 26. Prohibitions on publicly funded religious schools were one such way to accomplish this goal. *See id.*

Amid these controversies, the federal government required some incoming states, such as Montana, to include a provision in their constitutions that eliminated public funding of sectarian schools. Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Original, Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol’y 551, 573 (2003). The 1889 Enabling Act required Montana, Washington, North Dakota, and South Dakota to adopt a provision requiring that “public schools . . . shall be . . . free from sectarian control.” The Enabling Act of 1889, 25 Stat. 676, 677 (1889). The Act further provided that this was “irrevocable” without congressional consent. *Id.*

Following an earlier failed attempt at statehood, Montana was particularly eager to become a state. Michael P. Dougherty, *Montana’s Constitutional Prohibition on Aid to Sectarian Schools: “Badge of Bigotry” or National Model for the Separation of Church and State*, 77 Mont. L. Rev. 41, 45-46 (2016). This desire for statehood resulted in “little debate surrounding Montana’s 1889 Constitution, including the adoption of Montana’s so-called Blaine Amendment.” *Id.* at 46. With this unique history and

motivation, Montana's 1889 "Blaine Amendment" was not solely enacted with the anti-Catholic bias Petitioners allege.

B. Any purported improper purpose was cleansed with the 1972 re-enactment of the Montana constitution.

In any event, the motivation behind the 1889 provision is irrelevant because that constitutional provision is not at issue here. Montana re-enacted its constitution in 1972 with significant substantive changes to remedy the 1889 constitution's inherent problems. G. Alan Tar, *The Montana Constitution: A National Perspective*, 64 Mont. L. Rev. 1, 12-14 (2003). This re-enactment cleansed any bias from the provision. *Id.* What ultimately became Section 6 was heavily debated during the re-enactment process. Dougherty, *supra*, at 48.

The Education and Public Lands Committee first debated the provision that evolved into Section 6. 1971-72 Montana Constitutional Convention Verbatim Tr., vol. II, at 728-30. In its final report, the committee recommended re-adopting Article XI, Section 8 of the 1889 constitution. *Id.* at 728. The committee emphasized the traditional separation of church and state as "a fundamental Principle of American education." *Id.* at 729. This argument was buttressed by the fear 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." *Id.* Moreover, the committee believed it was the prerogative of the state to enforce a stricter separation of church and state than that present in the federal constitution. *Id.* Additionally, there was a fear that Montanans would not vote

for the constitution if the provision were removed due to the deep emotional import of the separation of church and state. Convention Tr., vol. II at 729 (citing, as evidence, New York's failure to pass a new constitution after altering the state's religion clauses). Lastly, the committee was concerned that relaxing the prohibition would increase involvement of religious institutions in state matters and lead to favoring one religious group over others. *Id.*

As indicated in the committee report, anti-Catholic bias was not a consideration in reasserting a prohibition on public funding of religious institutions. *See id.* at 728-29. The delegates wanted to ensure that they protected the stricter separation between public monies and religious institutions that Montanans valued. *See id.*

The committee also reviewed a minority proposal to explicitly exclude federal funds from the prohibition. *Id.* at 730. While the committee did not agree that this addition was warranted as the prior constitution was never interpreted to include federal funding, *id.*, the convention later adopted the provision as part of Section 6. 1971-72 Montana Constitutional Convention Verbatim Tr., vol. VI, at 2031.

The committee's reasoning and rationales were reiterated during the floor discussion of Article X, Section 6. Delegate Harper emphasized that "Americans are dedicated to the idea of church and state separation." *Id.* at 2013. Others were troubled by any siphoning of public monies from public schools to fund religious and private schools. *Id.* at 2015.

The main concern for many delegates, however, was federal funding of religious institutions. Delegate

Toole, supporting the additional language allowing federal funding of private and religious schools, stated that “[w]e have given great attention to the matter of pluralism in our society and the necessity to maintain it. I think these few harmless words could be of significant benefit and cannot possibly harm anyone in the state of Montana.” *Id.* at 2011. Delegate Driscoll also noted that while this is “an archaic provision It doesn’t provide any religious emphasis [nor] for any conflict between church and state.” *Id.* at 2012. The amendment’s proponent, Delegate Loendorf, summarized the addition as “maintain[ing] the status quo.” *Id.* at 2025. The amendment passed 53 to 40 in the roll call vote. *Id.* at 2026.

Some delegates raised concerns about anti-Catholic bias present in “Blaine Amendments.” While still supporting the decision to amend Section 6’s predecessor, Delegate Harbaugh reiterated the Blaine Amendments’ troubling history. *Id.* at 2010. Delegate Brown apprised the convention of the alleged anti-Catholic bias present in the original provision, calling it “a badge of bigotry.” *Id.* at 2012. Both Delegates Brown and Harbaugh later voted to amend Section 6 to include an exemption for federal funds. *Id.* at 2025-26. While both delegates were aware of potential biases in the original amendment, they—as well as others who voted for the amendment after expressing such concerns—did not see the new constitution retaining any anti-Catholic bias. Dougherty, *supra*, at 53. There is simply no evidence that anti-Catholic bias motivated the delegates, and the Petitioners do not purport to have provided any.

Even with the debate concerning the original intent of the prohibition in the 1889 constitution, most

delegates were concerned with the separation of church and state and whether federal funding of sectarian schools could be exempted from the Section. *See* Convention Tr., vol. VI, *supra*, at 2008-31. In the end, the provision, amended to include the federal funding exemption, passed by voice vote. *Id.* at 2031.

Montanans still support this strict separation of church and state because “[t]he most effective way to establish any institution is to finance it; and this truth is reflected in the appeals by church groups for public funds to finance their religious schools.” *State, ex rel. Chambers v. Sch. Dist.*, 472 P.2d 1013, 1021 (Mont. 1970) (citation and internal quotations omitted). Many see that using public funds for a religious school makes it “[im]possible to determine where the secular purpose ended and the sectarian began.” *Id.* The serious debate of the prohibition on funding sectarian schools during the constitutional convention demonstrates that the ultimate concern of the delegates was the separation of church and state, not any animus or anti-Catholic bias. *See* Convention Tr., vol. VI, *supra*, at 2008-31; *see also* Dougherty, *supra*, at 54–55. Through this re-enactment process, Montana cleansed the amendment of any potential bias that may have lingered in the provision.

CONCLUSION

For the foregoing reasons, the Court should disregard Petitioners' argument that the Montana Supreme Court's decision is grounded in anti-Catholic bias and affirm for the reasons stated in the Montana Supreme Court's decision.

Respectfully submitted,

PATRICIA E. ROBERTS
WILLIAM & MARY LAW
SCHOOL APPELLATE
AND SUPREME COURT
CLINIC
P.O. Box 8795
Williamsburg, VA 23187
Telephone: 202-759-6925
tjbreckenridge@wm.edu

TILLMAN J. BRECKENRIDGE*
PIERCE BAINBRIDGE
BECK PRICE &
HECHT LLP
601 Pennsylvania Ave., NW
Suite 700S
Washington, DC 20004
Telephone: 202-843-8342
tjb@piercebainbridge.com

*Counsel of Record

Counsel for Amicus Curiae