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 Petition for Writ of Certiorari to the Supreme Court of Montana

BRIEF AMICUS CURIAE OF JERRY AND KATHY ARMSTRONG, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does it violate the Religion Clauses or Equal Protection Clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools?

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IDENTITY AND INTEREST OF AMICI[1]

Jerry and Kathy Armstrong, Association of Christian Schools International, and Pacific Legal Foundation respectfully submit this brief amicus curiae in support of Petitioners Kendra Espinoza, Jeri Ellen Anderson, and Jaime Schaefer. Jerry and Kathy are parents of a son who had attended Valley Christian School in Missoula, Montana. Represented by Pacific Legal Foundation, Jerry and Kathy had challenged the Montana Department of Revenue rule at issue in this case in federal court. Although their federal court claim was dismissed on jurisdictional grounds, the Armstrongs still believe strongly in Montana's tax-credit scholarship program and wish to support it however they can. *See Armstrong v. Walborn*, 743 Fed. Appx. 83 (9th Cir. July 19, 2018) (dismissing the Armstrongs' claims under the Tax Injunction Act). As both parents who would seek scholarship assistance for their son and as taxpayers who would utilize the tax credit, they have an interest in the outcome of this petition.

The Association of Christian Schools International (ACSI) is a nonprofit, nondenominational religious association that provides support services to 24,000

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[1] Pursuant to this Court's Rule 37.2(a), counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief, and granted consent for the filing of this brief.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any 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 Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Christian schools in more than 100 countries, including 10 Christian schools in Montana. ACSI and its members seek to advance the common good by providing quality education and spiritual formation for students. ACSI's religious calling is to promote a vibrant Christian faith that embraces every aspect of life. As such, ACSI has an interest in protecting religious liberty and religious practice for all who seek protection under the laws of the United States regardless of their faith or creed.

Founded in 1973, Pacific Legal Foundation is the oldest and most experienced public interest law foundation of its kind. Pacific Legal Foundation is headquartered in Sacramento, California, and provides a voice for thousands of individuals across the country who believe in limited government, private property rights, individual freedom, and free enterprise.

Pacific Legal Foundation has participated as amicus curiae in many cases before this Court involving K-12 education reform, including *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011) (tuition tax credit); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Ohio voucher program); and *Mitchell v. Helms*, 530 U.S. 793 (2000) (state and federal school aid programs). Additionally, Pacific Legal Foundation has filed amicus briefs in numerous state courts, including *Magee v. Boyd*, 175 So. 3d 79 (Ala. 2015) (scholarship program); *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013) (school voucher program); *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009) (school voucher program); and *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006) (opportunity scholarship program).

This case raises a vital issue of constitutional law that has simmered in state and federal courts for decades. State constitutions across the country erect a higher wall of church-state separation than the federal Establishment Clause. In many states, prohibitions on direct or indirect aid to religious institutions have raised severe tension between state constitutions and the First and Fourteenth Amendments to the United States Constitution. Pacific Legal Foundation's public policy perspective and litigation experience lends an additional viewpoint that can assist the Court in considering this weighty matter.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

When states empower parents to decide how and where to educate their children, academic outcomes improve. This is the story of the Armstrong family and the story of more and more families across the country. As parents have come to recognize the need for a menu of educational options, support for school-choice programs has catapulted. Americans want choices, and state legislatures across the country are responding. Unfortunately, many of these legislative responses face an uncertain future. Partisan opponents of school choice have wielded state Blaine Amendments to override the hopes of American families who seek a better future for their children. Not only do Blaine Amendments foil popular and successful choice programs, but they also have ignominious roots that are not in harmony with this nation's values of religious tolerance and equal protection. This Court should seize the opportunity to

address these holdovers from a discriminatory past that have now been retrofitted as partisan weapons to hamper parental efforts to offer the best for their children.

REASONS FOR GRANTING THE PETITION

I

Expanded Educational Opportunities Made Possible By State-Sponsored Scholarship Programs Are a Boon to Montana Families and Families Across the Country

Kathy and Jerry Armstrong, who live in Missoula, Montana, enrolled their son in Valley Christian School as he entered the sixth grade. Although Jerry served on the local school board, both parents had come to feel that the district did not adequately nurture the values and character traits that they believed integral to their son's education.

Valley Christian is an interdenominational Christian school of about 300 students that range from pre-K through grade 12. For Kathy and Jerry, the difference between the local public school and Valley Christian was "night and day." Kathy and Jerry ceased worrying about exposure to drugs, language, and other behavior that had concerned them at public school. They believe that increased academic rigor and higher standards of behavior combined to make their son who he is today—a polite, respectful young man with a strong religious foundation and an uncompromising work ethic.

As their son recently approached the 11th grade, he asked Kathy and Jerry if he could go to public high school because he preferred their athletics program. Kathy and Jerry asked him to write a persuasive

essay to convince them that this change would be in his best interest. Persuaded by their son, they allowed him to transfer to public school. Kathy and Jerry believe their son's experience at Valley Christian has prepared him to be a good influence on his peers in public school.

Above all, the Armstrongs' story is one of choice and opportunity. They had the regrettably rare opportunity to place their son in private school when they felt public school was not serving his best interests. And when he later persuaded them regarding a return to public school, they had the choice and opportunity to again make a schooling change that suited their son's interests. This ability to pick and choose educational opportunities as based on a family's needs and interests should belong to all American families.

Valley Christian was such a positive influence in their son's life that Kathy and Jerry do not want affordability to stand in the way of any parent who hopes to give their children a private school education. Thus, when the Montana Department of Revenue promulgated a rule denying scholarship assistance to families who needed help to keep their children at Valley Christian, the Armstrongs took action. Joined by the Association for Christian Schools International, Kathy and Jerry filed suit in federal court, challenging the Department's rule in December 2015. Unfortunately, the Armstrongs never saw a resolution on the merits.[2]

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[2] The Armstrongs and Association for Christian Schools International filed their complaint shortly after the Espinoza plaintiffs filed a complaint in state court. *See Armstrong v.*

Families across the country have had experiences similar to the Armstrongs'. In 2018, parents of students attending private schools reported much higher levels of satisfaction than parents with students at public school; in a nationwide survey, 37 percent of parents with children at private school gave an A rating to their school, while only 21 percent of parents with kids at public school offered an A rating. Paul DiPerna & Michael Shaw, *2018 Schooling in America* 22, Edchoice (Dec. 2018). Overall, parents with kids at a private or charter school were twice as likely to express satisfaction with their school than parents with kids at district schools. *Id.* at 19.

The existing literature on the impact of school choice programs demonstrates why such programs enjoy wide support. A review of 19 voucher studies around the world found that private schools improve math scores by 15 percent of a standard deviation and reading scores by 27 percent. Corey A. DeAngelis, *Is Public Schooling a Public Good?*, 842 Cato Institute Policy Analysis 4 (May 9, 2018). In the United States, 18 gold-standard studies ranging from 1998 to 2016 and spanning a range of jurisdictions have assessed the impact of school-choice programs on academic outcomes for participants. *See* Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Choice* 14 (4th Ed. May 2016). Fourteen found a positive effect on academic outcomes, two found no

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Kadas, No. 6:15-cv-00114-SEH, Complaint (D. Mont., Dec. 28, 2015). The federal district court abstained, pending resolution of the state case, *id.* at Docket Entry #30, and the Ninth Circuit dismissed the Armstrongs' claims for lack of jurisdiction under the Tax Injunction Act and the Association's claims under the comity doctrine. *See Armstrong v. Walborn*, 743 Fed. Appx. 83 (9th Cir. July 19, 2018), 745 Fed. Appx. 12 (9th Cir. Dec. 7, 2018).

visible effect, and two found a negative effect. *Id.* Of the two negative studies, both analyzed Louisiana's voucher program in 2016, which had suffered from poor design and faced hostile regulators. *See id.* at 12.

Given parents' overwhelmingly positive experiences with choice and the empirical data on these programs, it is unsurprising that most Americans favor a wide menu of educational options. Of the various methods of expanding schooling opportunities, Americans tend to prefer programs that facilitate affordability for private school options rather than public charter schools. DiPerna & Shaw, *supra,* at 46-48. Almost three-fourths of Americans are in favor of education savings accounts (ESAs), while 64 percent favor vouchers, and 66 percent favor tax-credit scholarships. *Id.* at 46, 50, 51.

Unfortunately, without such financial assistance, parents can rarely bring their educational wishes to fruition. Only 36 percent of parents prefer public school over other options, yet 82 percent of American children attend public school. *Id.* at 22. Affordability is the key driver behind this disjunction, a problem that vouchers, tax-credit scholarships, and education savings accounts seek to alleviate.

Where these programs are available, parents have flocked to them. Almost 190,000 K-12 students are enrolled across the country's 26 voucher programs. Edchoice, Research Hub: Fast Facts, https://www.edchoice.org/resource-hub/fast-facts/. Meanwhile, the five active ESA programs in the country service 18,706 students, and 23 tax-credit programs have issued scholarships to 274,983 students. *Id.*

These programs, unfortunately, have often fallen under the blade of state Blaine Amendments. *See*, *e.g.*, *Bush v. Holmes*, 886 So. 2d 340 (Fla. Dist. Ct. App. 2004) (striking down Florida voucher program on Blaine Amendment grounds); *Taxpayers for Public Education v. Douglas Cty. Sch. Dist.*, 351 P.3d 461 (Colo. 2015) (striking down Douglas County's Choice Scholarship Pilot Program that awarded publicly funded scholarships to help pay tuition at private schools). Parents thus lose the opportunities that the Armstrongs enjoyed, even if they would have educated their children at a secular private school.

A sad irony behind aggressive state religious aid provisions is that parents who wish to educate their children at private schools typically do not do so for religious reasons. Access to religious schooling is the least important reason, for instance, among parents who support ESAs. DiPerna & Shaw, *supra,* at 48. The reasons parents list as most important for supporting such programs are access to schools with better academics and educational flexibility. *Id.* Likewise, parents also listed individualized attention and safer learning environments as more important reasons for supporting ESAs than access to religious schooling. *Id.* Moreover, these programs also service children who attend nonreligious private schools, such that students who have no affiliation with a religious school suffer when they are invalidated. Hence, broad interpretation of state Blaine Amendments is more likely to foil parents' hopes to improve their childrens' education than prohibit state funding of religious institutions. This Court should grant the Petition to determine whether state constitutional provisions that imperil these important programs accord with federal constitutional guarantees.

II

States Have Recently Introduced Legislation That Expands Educational Opportunities For Children But May Face Peril under State Blaine Amendments

State legislatures across the country are responding to families' escalating demand for educational opportunity. In the first months of 2019, 25 states introduced 31 bills—not including identical companion bills—that would either expand existing school choice programs or inaugurate new programs. *Compare* Edchoice, BRIEF: School Choice in the States, February 2019 (Mar. 6, 2019) *with* Edchoice, BRIEF: School Choice in the States, March 2019 (Apr. 4, 2019). At least nine of these states have Blaine Amendments with either mixed or broad interpretations that would cast a shadow over the future of these programs. *Compare* H. 253, 2019 Leg., 65th Reg. Sess. (Idaho 2019) (proposing an education savings account for children beginning kindergarten and children with special needs); S. 1410, S. 7070, 2019 Leg., 121st Reg. Sess. (Fla. 2019) (proposing legislation that would expand Hope Scholarships for bullied students and create the Family Empowerment Scholarship Program for low-income and foster children); S. 118, 2019 Reg. Sess. (Ky. 2019) (proposing a tax-credit scholarship program for low-income students, students with special needs, and foster children); S. 160, 2019 Leg., 100th Reg. Sess. (Mo. 2019) (proposing the Missouri Empowerment Scholarship Accounts Program, a tax-credit-funded education savings account open to most K-12 students); A.B. 218, 2019 Leg., 80th Reg. Sess. (Nev. 2019) (proposing funding for the nation's first

universal education savings account program); H. 1464, 2019 Leg., 66th Reg. Sess. (N.D. 2019) (bill passed providing for legislative management study regarding the feasibility of developing a choice program); S. 177, 2019 Leg., 63rd Gen. Sess. (Utah 2019) (proposing the Scholarships for Special Needs Students Program); SB. 1015, SB. 1365, 2019 Leg., 400th Reg. Sess. (Va. 2019) (proposing to expand eligibility and funding for the Education Improvement Scholarships Tax Credits Program) *with* Institute for Justice, Blaine Amendments, https://ij.org/issues/school-choice/blaine-amendments/ (last visited April 11, 2019) (displaying map of Blaine Amendments with broad, narrow, and mixed interpretations).

Specifically, the bills in Florida, Missouri, and South Carolina demonstrate the urgency and importance of this national issue. Several choice bills have been working their way through the Florida legislature in early 2019. Senate Bill 1410, passed and signed by the governor, amended Florida's Hope Scholarship Program. *See* Fla. Stat. Ann. § 1002.40 (West 2019); S. 1410, 2019 Leg., 121st Reg. Sess. (Fla. 2019). The program is the first school-choice program to specifically address victims of bullying; it grants parents the right to transfer bullied students to a different public school with the help of a transportation scholarship, or parents can request scholarship assistance to enroll their child in a private school. Fla. Stat. Ann. § 1002.40(1). Donations to the nonprofits that provide this scholarship are eligible for a tax credit. The amendments essentially liberalize the program to make it accessible to more families. *See generally* S. 1410.

Senate Bill 7070, an omnibus education bill introduced in March,[3] contains the Family Empowerment Scholarship Program. The program would institute a voucher system designed to alleviate long waiting lists for families eager for help from Florida's popular Tax Credit Scholarship Program. *See* S. 7070, 2019 Leg., 121st Reg. Sess. (Fla. 2019). Tim Benson, *Research & Commentary: Family Empowerment Scholarships Would Be Another Welcome Florida School Choice Program*, Heartland Inst. (Mar. 8, 2019).[4] Children will be eligible for vouchers if they come from low-income families or live in foster care. *See* S. 7070.

Sadly, Florida's Blaine Amendment has a penchant for crippling choice. In 2004, a Florida appellate court struck down Florida's Opportunity Scholarship Program—a voucher program that helped parents of kids in schools deemed "failing" by the state. *See generally Bush v. Holmes*, 886 So. 2d at 347. The appellate court held that the vouchers defied "the express prohibition of direct and indirect aid to churches, religions, sects, and sectarian institutions . . . ." *Id.* at 353. The state supreme court affirmed on alternate grounds. *Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006). Thus, the high court has yet to address the constitutionality of voucher programs

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[3] The Senate Education Committee has passed the bill, and it has received approval from the Appropriations Subcommittee on Education. *See* Edchoice, BRIEF: School Choice in the States, March 2019 (Apr. 4, 2019), https://www.edchoice.org/blog/brief-school-choice-in-the-states-march-20.

[4] https://www.heartland.org/publications-resources/publications/research--commentary-family-empowerment-scholarships-would-be-another-welcome-florida-school-choice-program.

under Florida's Blaine Amendment, though *Bush v. Holmes* still casts a long shadow. So long as this Court remains quiet regarding Blaine Amendments like Florida's, legislation like the Family Empowerment Scholarship Program faces an uncertain future.

In Missouri, a tax-credit scholarship program is now working its way through the legislative process. The Missouri Empowerment Scholarship Accounts Program allows contributors to "educational assistance organizations" to claim a tax credit equal to 85 percent of the contribution, the total of which may not exceed 50 percent of the contributor's state tax liability. *See* S. 160, 2019 Leg., 100th Reg. Sess. (Mo. 2019). The educational assistance organizations then allot those funds as scholarships to K-12 students who will either be entering kindergarten or transitioning out of public school. *See id.* The parents can only use the money for qualified education expenses, which may include private religious school tuition. *See id.* Since the bill was introduced on January 9, 2019, it has progressed through the legislative process and is poised for a state senate vote in the coming weeks.

If passed, the Missouri program may face peril from the state's robust Blaine Amendment. Missouri's Constitution contains two provisions relevant to school-choice funding programs. The first provides in part that "no 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." Mo. Const. art. I, § 7. The second provision states in part that "[n]either the general assembly, nor any county, city, town [etc.] 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 . . . or other institution of learning controlled by any religious creed, church or sectarian denomination whatever." Mo. Const. art. IX, § 8.

As one might expect from this unequivocal language, "Missouri has a long history of maintaining a very high wall between church and state." *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376, 383-84 (W.D. Mo. 1973); *see also Paster v. Tussey*, 512 S.W.2d 97, 101-02 (Mo. En Banc 1974) (holding that the Missouri Constitution is "not only more explicit but more restrictive than the Establishment Clause of the United States Constitution."). State entities have wielded an aggressive interpretation of Missouri's Blaine Amendment, as this Court learned in *Trinity Lutheran v. Comer*, 137 S. Ct. 2012 (2017), where the Department of Natural Resources interpreted the Blaine Amendment to prevent the department from awarding grants to religious organizations for installing rubber playground surfaces. *Id.* at 2017-18.

If Missouri interprets the Blaine Amendment to extend to the funding of nonsectarian projects like playground surfacing, see *id.* at 2023, then the state will likely interpret the Amendment to extend to funding that indirectly goes to religious private school tuition—an option some have argued is left open to the state after *Trinity Lutheran*. Thus, the Missouri Empowerment Scholarship Accounts Program must survive more than floor votes and the governor's desk—it will have to survive legal challenge under the state Blaine Amendment.

Missouri's and Florida's bills face a steeper climb than South Carolina's recent pair of companion bills creating the Equal Opportunity Education Scholarship Account, an ESA for low-income households and children with special needs. S. 556, H. 3681, 2019 Leg., 123rd Reg. Sess. (S.C. 2019). The act's purpose is "to promote student achievement by making South Carolina the most choice-driven state in the nation by increasing students' participation in, and students' access to, educational opportunities, both within and outside of their resident school districts, regardless of where they live or their socioeconomic status." S. 556, § 59-8-120. The act expressly allows parents to use ESA funds for tuition at religious schools. *See id.* § 59-8-130 ("'Participating school' means an independent school, including those religious in nature, other than a public school . . . .").

South Carolina's boon to low-income and special-needs families has a brighter future. While South Carolina has a Blaine Amendment, past interpretation has narrowed it. Article XI, Section 4, of the South Carolina Constitution states, "No money shall be paid from public funds nor shall the credit of the State or any of its political subdivision be sued for the direct benefit of any religious or other private educational institution." S.C. Const. art XI, § 4. The Supreme Court of South Carolina has interpreted the Blaine Amendment narrowly. In *Durham v. McLeod*, the state high court upheld a law authorizing the state to make or guarantee loans to assist students with post-secondary education. *Durham v. McLeod*, 192 S.E.2d 202, 203-04 (S.C. 1972). In response to a Blaine Amendment challenge, the court held that the act was "scrupulously neutral" and "neither advantaged nor disadvantaged" religious schools vis-a-vis

nonreligious schools. *Id.* at 204. The court further noted that religious schools "would have been materially disadvantaged" if excluded from the program. *Id.* This precedent offers safe passage to South Carolina's fledgling program that neither Florida's nor Missouri's now enjoy.

So long as the specter of religious discrimination lingers, such legislation stands in peril. The time has arrived for this Court to confront that specter.

III

Montana's Blaine Amendment and Similar Constitutional Restraints Around the Country Grow from an Ugly History of Prejudice and Animus That Does Not Reflect Our Highest Constitutional Values

A. Montana's Ban on Religious Aid Is Facially Discriminatory

In *Trinity Lutheran*, this Court recently emphasized that the Free Exercise Clause "protects religious observers against unequal treatment and subjects to the strictest scrutiny laws that target the religious for special disabilities based on their religious status." 137 S. Ct. at 2019 (quoting *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993)). This includes laws that deny a "generally available benefit" on the basis of religion. *Id.* Laws that discriminate against religion either on their face or due to "a discriminatory purpose" are constitutionally suspect and "trigger [] the most exacting scrutiny." *Id.*; *see also Lukumi*, 508 U.S. at 546 ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.").

The program that this Court invalidated in *Trinity Lutheran* was one that discriminated against religion on its face. Pursuant to a provision of its state constitution, Missouri denied a church-affiliated preschool access to a generally available grant for playground resurfacing. *See* Mo. Const. art. 1, § 7 ("That no 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[.]"). The Court explained that a religious school has "a right to participate in a government benefit program without having to disavow its religious character." *Trinity Lutheran*, 137 S. Ct. at 2022. Missouri's law unconstitutionally "refus[ed] to allow the Church—solely because it is a church—to compete with secular organizations for a grant." *Id.*

Montana's prohibition on the use of tax credits for religious private schools is akin to the prohibition that this Court invalidated in *Trinity Lutheran*. Like the Missouri Constitution, the provision of the Montana Constitution at issue in this case facially and directly discriminates against religious schools solely because those schools are controlled by a church. Mont. Const. art. 10, § 6 ("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."). Under a straightforward application of *Trinity Lutheran*, the Montana Supreme Court should therefore have subjected its policy to strict

scrutiny, and its decision should be reversed solely on those grounds.

B. Montana's Ban Was Born of Bigotry and Is Therefore Constitutionally Suspect

However, there is another even more fundamental reason that Montana's policy should be subject to strict scrutiny and invalidated. The Montana Supreme Court wholly ignored the discriminatory history of provisions like the one in its Constitution. By contrast, nine members of this Court have recognized that these Blaine Amendments were "born in bigotry" and anti-Catholic hostility. *See Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000) (Thomas, J., joined by Rehnquist, C.J., and Kennedy and Scalia, JJ.); *Zelman v. Simmons-Harris,* 536 U.S. 639, 720-21 (2002) (Breyer, J., dissenting, joined by Stevens and Souter, JJ.); *Locke v. Davey*, 540 U.S. 712, 723 n.7 (2004) (Rehnquist, C.J., joined by six Justices, including O'Connor and Ginsburg, JJ.). In *Mitchell*, Justice Thomas explained that such amendments "arose at a time of pervasive hostility to the Catholic Church and to Catholics in general," and that the use of the term "sectarian" was a barely concealed code for the practices of Catholicism. 530 U.S. at 828-29.[5] And in *Zelman*, Justice Breyer noted that these laws were an effort by Protestants to "preserve their domination"

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[5] New research on the use of the term "sectarian" in the 19th century strongly confirms Justice Thomas's conclusion regarding the original and discriminatory meaning of Blaine Amendments. *See* Robert G. Natelson, *Why Nineteenth Century Bans on 'Sectarian' Aid Are Facially Unconstitutional: New Evidence on Plain Meaning*, 19 Fed. Soc. Rev. (2018), https://fedsoc.org/commentary/publications/why-nineteenth-century-bans-on-sectarian-aid-are-facially-unconstitutional-new-evidence-on-plain-meaning.

over education as the Catholic population increased in the late 19th century. 536 U.S. at 720-21. But despite the numerous pronouncements in concurring or dissenting opinions, this Court has never before tackled a Blaine Amendment head on in a majority opinion. This case provides the Court with a prime opportunity to do so.

In the early American republic, there were no public schools, and, as Alexis De Toqueville observed in his travels across America, "[a]lmost all education [was] entrusted to the clergy." Alexis de Tocqueville, 1 Democracy in America 320 n.4 (Phillips ed., Random House 1945) (1839). And throughout the first half of the 19th century, it was not uncommon for public funding to go to religious schools. Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 664 (1998). Because of the composition of the American people at the time, such schools were overwhelmingly Protestant in nature. As common or public schools were created, they retained many of the traditions of the protestant schools that they largely replaced. For instance, in Massachusetts's first public schools, students read daily from the King James Version of the Bible (A Protestant translation) and recited Protestant prayers and hymns. Viteritti, *supra* at 666-667.[6]

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[6] For Catholics at the time "reading the King James Bible was like eating meat on Friday in those days, or like eating pork today would be for an observant Jew or Muslim. It was something you couldn't do, something you were going to force kids to do to violate their consciences." *See* Seamus Hasson, Transcript of Remarks on the History of Blaine Amendments (March 28, 2003), https://www.pewforum.org/2003/03/28/separation-of-church-

In the middle of the 19th century, increasing immigration from Roman Catholic nations such as Ireland and Italy led to a rise in nativism and anti-Catholic sentiment. For instance, in 1855 the Know-Nothing Party, a stridently anti-Catholic party, took control of the Massachusetts statehouse. John R. Milkern, *The Know-Nothing Party in Massachusetts: The Rise and Fall of a People's Movement* 102 (1990). The public schools were seen as a tool for "teach[ing] these deluded aliens, that their poverty and ignorance in their own country arose mainly from their ignorance of the Bible." Viteritti, *supra,* at 667 n.42. Accordingly, while in charge, the Know-Nothing Party enacted a slate of anti-Catholic and anti-immigrant school reforms, including mandatory reading of the Protestant bible in public schools, compulsory attendance, and a prohibition on foreign language education. The Massachusetts Constitution was also at this time amended to prohibit aid to religious schools.

After the Civil War, the same anti-Catholic zeal that had taken over Massachusetts spread throughout the nation. Religious schools became a particular target for nativist zeal. For instance, Missouri enacted a state constitutional amendment in the 1870s prohibiting aid to religious schools. At the same time, the official publication of the State's Board of Education attacked the Catholic Church and claimed that it did not "allow any liberty of thought." Michael Hoey, *Missouri Education at the Crossroads: The Phelan Miscalculation and the Education Amendment of 1870*, 95 Mo. Hist. Rev. 372, 389 (July 2001).

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and-states-an-examination-of-state-constitutional-limits-on-government-funding-for-religious-institutions/#session1.

President Ulysses S. Grant gave anti-Catholic bigotry a national platform when he called for the establishment of public schools and emphasized that "not one dollar be appropriated to support any sectarian school." Viteritti, *supra,* at 670. President Grant partnered with Republican Congressman James G. Blaine of Maine to propose a constitutional amendment that would bar any state funds from going to the "control of any religious sect." *Id.* These amendments were clearly directed at Catholics and other despised religious minorities, and not at achieving government neutrality towards religion. For instance, one version of the federal Blaine Amendment put forward by Republicans in the Senate would have banned sectarian aid while at the same time mandating Bible reading in the Public Schools. *See* Ward McAffe, Transcript of Remarks on the History of Blaine Amendments (Mar. 28, 2003), https://www.pewforum.org/2003/03/28/separation-of-church-and-states-an-examination-of-state-constitutional-limits-on-government-funding-for-religious-institutions/#session1.

Even though Blaine's constitutional amendment failed, the Republican-controlled Congress sought to impose his preferred policy on new states as they entered the union. Viteritti, *supra,* at 670. Montana, North Dakota, South Dakota, Washington, and New Mexico were all required to enact such provisions into law as a condition of statehood. *Id.* Not coincidentally, the most restrictive of these amendments are concentrated in these and other western states. *Id.* at 675. By the 1890s, 29 states had enacted their own versions of the Blaine Amendment, either voluntarily or by Congressional fiat. *Id.* at 673.

While some supporters of local Blaine Amendments were not motivated by religious bigotry, the overall tenor of the movement was clearly anti-Catholic and anti-religious in nature. As the New Mexico Supreme Court recently concluded while reviewing the history of its own state's Blaine Amendment, "anti-Catholic sentiment tainted its adoption" as a result of "the nationwide movement to eliminate Catholic influence from the school system" and the fact that "Congress forced New Mexico to eliminate public funding for sectarian schools as a condition of statehood." *Moses v. Ruszkowski*, 2019-NMSC-003, ¶ 43. The same is true with Montana's Blaine Amendment. As this Court recently held, government actions rooted in hostility to religion do not comport with our Constitution. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) ("[T]he Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint."). This Court should accordingly grant the Petition to address the constitutionality of these laws that arose out of anti-Catholic and anti-religious bigotry.

CONCLUSION

Programs like Montana's have offered a lifeline to thousands of families hoping to provide the best for their children. States, recognizing the growing demand for educational options, are responding. Too many of these legislative efforts, however, face an uncertain future in states with broadly interpreted Blaine Amendments. This Court should grant the Petition to address this pressing issue.

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Respectfully submitted,

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