Espinoza et al. v. Montana Department of Revenue

Case Summary; Synopsis of Montana Department of Revenue and Amicus Curiae Briefs before the United State Supreme Court

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Montana Quality Education Coalition

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Executive Summary – Background Information on Espinoza et al. v. Montana Department of Revenue

Espinoza et al. v. Montana Department of Revenue was filed in December 2015 in response to the process of enacting Senate Bill 410 (*Provide for tax credits for contributions to public and private schools*) from the 2015 Montana legislative session. The Montana Constitution prohibits the appropriation or payment of state funds to church-affiliated schools (Article X, §6), and Senate Bill 410 explicitly called for adherence to this restriction. When the Montana Department of Revenue published administrative rule excluding church-affiliated schools from receiving taxpayer contributions under Senate Bill 410 (42.4.802 ARM), *Espinoza* was filed in Flathead County District Court as a challenge to this rule.

In May 2017 Judge Heidi Ulbricht ruled in favor of the plaintiffs, thus permitting church-affiliated schools to receive taxpayer contributions. In December 2018, upon appeal to the Montana Supreme Court, this ruling was reversed and as a result, the tax credit program for contributions to private schools was discontinued.

In March 2019 the case was appealed to the United States Supreme Court, and oral arguments were scheduled for January, 2020.

Legal Questions

The appeal to the Montana Supreme Court centered on the following issue:

> *Does the Tax Credit Program violate Article X, Section 6, of the Montana Constitution?*

The Justices, in a 5-2 decision, found the private school component of the tax credit program unconstitutional and determined it must be severed from the remainder of the program. The public side of the tax credit program remains in force.

With the private side of the program no longer in effect, the appeal to the United States Supreme Court shifted to a federal perspective focused on the action of the Montana Supreme Court:

> *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?*

Establishment, Free Exercise, and Equal Protection Clauses of the United States Constitution

The Religion Clauses (the Establishment and Free Exercise Clauses, ratified in 1791), and Equal Protection Clause (ratified in 1868 following the American Civil War) of the U.S. Constitution are central to the *Espinoza* argument. The Religion Clauses refer to the beginning text of the First Amendment of the U.S. Constitution, reading as follows:

Congress shall make no law respecting an establishment of religion, — **Establishment Clause**

or prohibiting the free exercise thereof;… — **Free Exercise Clause**

In general terms, the **Establishment Clause** prevents the federal government from declaring or creating a national religion, limits government in providing benefits to religious institutions, and prevents passage of any law that favors or forces belief in any particular religion. This clause has been central in several U.S. Supreme Court cases such as *Everson v. Board of Education* (1947, upholding New Jersey state funding for student transport to public and private schools as it applies to all students regardless of religious belief) and *Lemon v. Kurtzman* (1971, finding "excessive government

entanglement" with religion in two Pennsylvania statutes that permitted the state to partially reimburse private schools for teacher salaries when teaching public school courses using public school materials).

The **Free Exercise Clause** generally permits individuals to exercise their religious beliefs. (The U.S. Supreme Court has declared the freedom to believe is unfettered but the ability to act on religious beliefs may be restricted, such as the practice of bigamy). Interpretation of this clause was pivotal in *Trinity Lutheran Church v. Comer* (2017), where the Court ruled in favor of Trinity Lutheran, permitting the Trinity Lutheran Church Child Learning Center to participate in a grant program run by the State of Missouri's Department of Natural Resources and thus receive funds to install playground surfaces made from recycled tires.

Together, these Clauses create the "separation of church and state", a phrase used by Thomas Jefferson as an explanation of the Religion Clauses.

The **Equal Protection Clause** refers to the following section of the Fourteenth Amendment to the U.S. Constitution:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;*
>
> *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

In essence, the Equal Protection Clause requires states to practice equal protection – treating an individual or group in the same manner as others with similar conditions and situations. Initial interpretation of this clause was limited – in *Plessy v. Ferguson* (1896) the U.S. Supreme Court upheld the segregation of blacks and whites on railroads – but by the time of *Brown v. Board of Education* (1954) the Court found school segregation unconstitutional. Over the subsequent years, the Equal Protection Clause has been applied to voting rights (*Bush v. Gore*, 2000), sex discrimination (*Reed v. Reed*, 1971), same-sex marriage (*Obergefell v. Hodges*, 2015), and affirmative action (*Regents of the University of California v. Bakke*, 1978).

Espinoza **Argument**

Espinoza argues that the decision of the Montana Supreme Court to invalidate the private school component of the tax credit program was incorrect and the decision conflicts with the Free Exercise, Equal Protection, and Establishment Clauses. To wit:

- The Free Exercise, Establishment, and Equal Protection Clauses all demand that the government show neutrality—not hostility—toward religion in student-aid programs. Prohibiting all religious options in otherwise generally available student-aid programs rejects that neutrality and shows inherent hostility toward religion. (p. 1)

***Montana Department of Revenue* Argument**

The Montana Department of Revenue counters *Espinoza*'s claim of hostility as follows:

- This case lies at the intersection of two traditions that have coexisted since the early Republic….The first is a tradition of staunch protection of religious freedom, including a recognition that nondiscrimination is crucial to religious freedom…The second is a tradition of principled opposition to government aid to religious institutions. (p. 1)

- States seeking to balance these competing interests have two options. First, a State may neutrally offer a benefit to both religious and non-religious institutions. This Court has made clear that the Establishment Clause authorizes that practice…That does not mean that a State with principled opposition to aiding religious institutions *must* aid them. (p. 2)

- If a State is opposed to aiding religious institutions, it can achieve that goal by taking a second path—by *also* not funding similarly situated nonreligious institutions…This case is about whether Montana's decision to take that second path violates the Constitution. Like 37 other States, Montana has a "No-Aid Clause" in its Constitution, which prohibits aid to "sectarian schools." By its terms, the No-Aid Clause does not prohibit any religious practice. Nor does it authorize any discriminatory benefits program. It simply says that Montana will not financially aid religious schools. Overwhelming evidence from the adoption of this provision shows that it is rooted not in bigotry, but in the principled view that barring aid to religious schools would promote, not hinder, religious freedom. (p. 2)

- After the Montana Department of Revenue issued a rule finding only nonreligious schools eligible to participate in the program, Petitioners sued, alleging that the rule was illegal. The Montana Supreme Court held that the program's provision of aid to religious schools violated the No-Aid Clause. But it did not uphold the rule. Instead, it took the only action that would both abide by the No-Aid Clause, while also not excluding religious schools from a generally available benefit: It struck down the statute as a whole. (pp. 2-3)

- Petitioners now contend that even *that* is unconstitutional. It matters not, in Petitioners' view, that the government also does not aid similarly situated non-religious schools. Nor does it matter that the state Constitution was adopted based on the same principled views held by James Madison. Petitioners claim that the Constitution prohibits the bare act of applying a state constitutional provision that keeps government out of the business of aiding religious schools. (p. 3)

Summary of Briefs Supporting the Montana Department of Revenue

A total of fifteen briefs were filed in support of the Montana Department of Revenue – the Respondent's Brief itself and fourteen amicus briefs. This support reflects 441 pages of legal narrative representing the views of 107 entities (see Appendix A for a complete listing). Amici represent a wide range of interests including religious and interfaith groups; professional education organizations and associations, 10 states' Attorneys General; civil and disability rights organizations; religious law scholars; advocates for public education; and advocates for separation of church and state. Each brief brings a unique perspective on the issue at hand with compelling arguments endorsing the decision of the Montana Supreme Court.

In addition, we are extremely fortunate to have a first-hand view of the 1972 Montana Constitutional Convention provided by ten surviving framers, including Delegate Reverend Gene Harbaugh who served on the Education and Public Lands Committee which drafted Article X §6. The Convention transcripts and recollections provide irrefutable evidence that rather than "showing inherent hostility toward religion" (Petitioners' Brief, p. 1), Article X §6 (introduced by Delegate Reverend William Burkhardt) was thoroughly and deliberately discussed and included direct discourse about public aid to sectarian schools from the "standpoint of the protection of religion from political influence". (Montana Constitutional Convention Verbatim Transcript, p. 730)

The following information is a synopsis of briefs filed by the Montana Department of Revenue and in support of the Montana Department of Revenue's position. The target audience for this document is nonlawyers, and as such the excerpts are intended to be easily understood and not overly technical. There is one exception – the brief of AFT/NEA et al. contains an argument regarding standing that is not easily distilled into excerpts. In this instance MQEC has crafted a summary of the argument which has been reviewed by counsel for accuracy.

Hyperlinks are provided for each brief if further information is desired. The entire docket for *Espinoza et al. v. Montana Department of Revenue* is available at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-1195.html.

Brief of Respondents

Submitted 11.8.19
Narrative Length 56 pages

Entities Represented

- **Montana Department of Revenue**
- **Governor Steve Bullock**

Argument

I. The Application of the No-Aid Clause Did Not Violate the Free Exercise Clause.

A. Petitioners Have Not Identified A Prohibition on Free Exercise.
B. Neither the Montana Constitution, Nor the Montana Supreme Court's Decision, Is the Product of Religious Hostility
C. The History of the Free Exercise Clause Confirms that There Is No Free Exercise Violation.
D. Petitioners' Position Conflicts with Locke.
E. If the Status/Use Distinction Is Relevant, the Montana Constitution Bars Aid Based on Use Rather than Status.
F. Invalidating Montana's No-Aid Clause Would Conflict with National Tradition.
G. Invalidating Montana's No-Aid Clause Would Pose Grave Federalism Concerns.

I. The Application of the No-Aid Clause Did Not Violate Equal Protection

II. The Application of the No-Aid Clause Did Not Violate the Establishment Clause.

Excerpts

- Barring aid to religious institutions prevents government from using its leverage to dictate religious policy. It prevents religious institutions from becoming dependent on government. And it protects the rights of people who have principled religious objections to supporting a religion in which they do not believe. (p. 1)

- The 1913 edition of the Catholic Encyclopedia, published "under the auspices of the Knights of Columbus Catholic Truth Committee," states that "[t]he spirit of religious intolerance has had scant encouragement in Montana, and many Catholics have occupied prominent positions in her industrial development and political history." [10] Charles George Herbermann, *The Catholic Encyclopedia*, at iii, 519 (1913), https://perma.cc/U3PL-XU6M. It further notes that Montana's elected delegates to Congress from 1867-72 (James Cavanaugh) and 1873-85 (Martin Maginnis) were Catholic; so was Thomas Carter, who was Montana's final territorial delegate and first Congressman when Montana entered the Union in 1889. *Id*. at 519. In the next paragraph, entitled "Freedom of Worship," it cites both the state constitution's free exercise clause and its provision barring appropriations to sectarian institutions, with no indication that the latter is a product of anti-Catholic bigotry. *Id*. Notably, Martin Maginnis served on the Education Committee of the 1889 Montana Constitutional Convention that drafted the No-Aid Clause, which the Convention adopted unanimously. *Proceedings and Debates of the Montana Constitutional Convention, 1889* at 529, 532 (1921), http://archive.org/details/proceedingsdebat00montrich. (pp. 17-18)

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

  > [P]ublic aid to sectarian schools which might result from a relaxation of the prohibition poses a potential threat to religion. The control which comes with aid could excessively involve the state in religious matters and could inadvertently favor one religious group over another. Several witnesses testified that they opposed aid not only from the standpoint of the protection of the state from religious influence but also from the standpoint of the protection of religion from political influence. (p. 19)

- The Delegates who supported the No-Aid Clause made clear that their support was not premised on religious bigotry, but rather on their good-faith view that barring aid to religious schools would promote religious freedom. (p. 20)

- One view was that taxpayer support of religion would infringe on the religious freedom of taxpayers. Delegates cited their own religious beliefs in supporting the No-Aid Clause on that basis. Delegate McNeil emphasized he was raising his own children as Catholics, and stated: "I don't know whether you think this federal money comes from the collection plate on Sunday. It comes out of my pocket as a taxpayer. It is fundamentally wrong to take any tax money, and this applies to all federal money, and apply it to any church purpose." *Id*. at 2016. Delegate Barnard similarly stated: "I don't want any of my tax money going into my church, and my church doesn't want it." *Id*. at 2017. (p. 20)

- Another view was that taxpayer support of religious institutions would ultimately weaken those institutions. Delegate Harper, a clergyman educated at a theological seminary, stated that "when state and a dominant church, or any church, get mixed up, it always has seemed to work to the detriment of both the church—the religious institution, finally, and to the state itself." *Id*. at 47, 2012-13. He explained: "[I]t's very difficult for a church supported by a state to be critical of the state, as I think a church should." *Id*. at 2021-22. (p. 20)

- In finding the statute unconstitutional, the court followed the No-Aid Clause, which protects religious freedom by enacting a structural barrier designed to ensure that religious institutions are independent from government. In striking down the statute as to nonreligious schools as well, the court protected religious freedom by ensuring that religious institutions are not penalized for exercising their faith. This Court should not hold that the Montana Supreme Court's adherence to both those principles constituted an unconstitutional infringement on religious freedom. (p. 23)

- [T]he Montana Supreme Court's decision was narrow. The court recognized that a "tax exemption in many cases is economically and functionally indistinguishable from a direct monetary subsidy." *Rosenberger v. Rector & Visitors of Univ. of Va*., 515 U.S. 819, 859-60 (1995) (Thomas, J., concurring). It therefore concluded that the tax credit was the economic equivalent of a direct subsidy of religious school tuition, and hence an "indirect payment" to religious schools under state law. Pet. App. 27-28. Prohibiting the State from paying such a subsidy neither prohibits the free exercise of, nor shows hostility to, Petitioners' religion. (p. 27)

- Petitioners claim that the No-Aid Clause is unconstitutional because it disqualifies religious institutions from eligibility for government aid. But at the Founding, numerous state constitutions also disqualified religious institutions from eligibility for government aid. These disqualifications typically appeared as part of a tripartite structure in early state constitutions. Those constitutions: (1) disestablished the church; (2) prohibited compelled support of the church; and (3) protected the free exercise of religion. (p. 28)

- The First Amendment adopts two-thirds of the tripartite framework present in contemporary state constitutions. It bars the establishment of religion and prohibitions on free exercise, while including no language authorizing or barring taxpayer aid to religious institutions. The natural inference is that the decision on whether to authorize, or bar, state aid to religious institutions is left to the People—not that a bar on state aid to religious institutions violates both Religion Clauses simultaneously, as Petitioners contend. (p. 30)

- In light of [James] Madison's views, the Free Exercise Clause—which Madison himself drafted, and which bars prohibitions of free exercise of religion—cannot reasonably be understood to bar prohibitions of government aid to religion. (p. 33)

- The Court should be skeptical that Petitioners' asserted constitutional claim has eluded so many people for so long. Millions of citizens have debated and voted on these provisions—in many cases, long after the Blaine era. Moreover, state courts regularly apply no-aid clauses; in Petitioners' telling, every time those state courts enforce those clauses, they violate the Constitution. The Court should reject Petitioners' contention that there has been a widespread constitutional violation hiding in plain sight since the early Republic. (p. 44)

- The federalism concerns arising from Petitioners' position stretch beyond the abandonment of "play in the joints." The Montana Supreme Court held that the law was void *ab initio* [from the beginning] under the Montana Constitution. Petitioners seek a federal court order under which that void law springs back into existence. To Montana's knowledge, no federal court has ever issued such a remedy. (p. 46)

- Here, Petitioners seek a federal court order that would require Montana to enforce a law that Montana's Constitution does not authorize its legislature to enact. (p. 47)

- Petitioners' Equal Protection claim also fails because there is no unequal treatment: No one is getting scholarships. (p. 50)

- Petitioners state that the effect of invalidating the program is "to inhibit religious schooling." Pet. Br. 52. But by this logic, the Legislature's decision to have the tax-credit program expire on its own terms in 2023, or to limit the tax credit to $150, also has the effect of "inhibit[ing] religious schooling," yet Petitioners do not suggest that the program's expiration or dollar limit is unconstitutional. The "effect" of the state court's decision was to invalidate a statute that the legislature had no constitutional duty to enact. (p. 54)

Brief Amicus Curiae of Freedom from Religion Foundation et al.

Submitted 11.13.19
Narrative length: 22 pages

Entities Represented

- Freedom from Religion Foundation
- Center for Inquiry
- American Atheists
- American Humanist Association

Argument

I. The structure and purpose of Montana's neo-voucher program fall under the broad text of the Montana No Aid Clause.

II. No Aid Clauses, including Article X, Section 6 of the Montana Constitution, foster and protect the religious freedom of all citizens.

III. The principle underlying No Aid Clauses dates to America's founding and was uniformly accepted after years of experience.

IV. Undermining No Aid Clauses and offering direct or indirect aid to religious education will require government regulation of religious schools.

Excerpts

- The Montana Supreme Court's determination is consistent with how the program operates. Taxpayers owe taxes to Montana. They are relieved of that obligation if they divert the payment to an entity that funds religious education. Montana appropriated $3 million to cover the anticipated shortfall from forgiving those obligations. This program would not exist but for the taxes owed to the state—the taxes that are to be forgiven and which exist only because of how Montana was manipulating its taxing power. App. 40 ¶53 (Gustafson, J., concurring). (p. 7)

- The principle embodied in every No Aid Clause, including Montana's, is that the government should not tax citizens to benefit a religion. (p. 9)

- It is not just direct taxes that violate religious liberty but employing the taxing power in any manner to fund sectarian education. (p. 11)

- Granting religious schools a right to access the public purse will eventually lead the government to regulate religious schools. It must. Where public money goes, public accountability must follow. State governments have generally had a hands off approach to religious institutions, including private religious schools, which are largely unregulated by state education agencies. That will change if private schools receive public funds. (p. 16)

- Churches and religious schools want to have their cake—which they think American taxpayers must buy—and eat it too. (pp. 17-18)

- When public money flows to private schools, however indirect the route, regulation is foreordained because the unregulated flow of funds to unaccountable organizations guarantees abuse. (p. 18)

Brief Amicus Curiae of Montana-Northern Wyoming Conference, United Church of Christ

Submitted 11.14.19
Narrative length: 16 pages

Entities Represented

- United Church of Christ, Montana-Northern Wyoming Conference

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.

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

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.

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

Excerpts

- 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 accountability. Moreover, public funding for private religious schools inappropriately entangles government with religion, forcing citizens to invest in religious indoctrination against their beliefs. (pp. 1-2)

- 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. (p. 2)

- 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. (p. 12)

- 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. (p. 6)

Amicus brief of State of Maine

Submitted 11.14.19
Narrative length: 19 pages

Entity Represented

- State of Maine

Argument

I. Unlike a typical "voucher" or "school choice" program, the benefit made available by Maine's tuition program is a free public education for students who reside in a school administrative unit that neither operates a public school nor contracts for schooling privileges.

II. Unlike a sweeping "Blaine Amendment" or "no-aid" clause, Maine's tuition program is the result of carefully considered legislative judgment as to what constitutes a public education.

III. The Court of Appeals for the First Circuit has previously rejected claims that Maine's tuition program violates the Free Exercise Clause and nothing in this Court's *Trinity Lutheran* decision casts doubt on the First Circuit's decision.

Excerpts

- Because it is a lightly populated, predominantly rural state, many school administrative units ("SAUs") in Maine do not operate public secondary schools. In those cases, Maine law provides two options: an SAU may contract with another public or approved private school for schooling privileges for some or all of its resident students in those grades, 20-A Me. Rev. Stat. Ann. §§ 2701, 2702, or an SAU "that neither maintains a secondary school nor contracts for secondary school privileges . . . shall pay the tuition, . . . , at the public school or the approved private school of the parent's choice at which the student is accepted." 20-A Me. Rev. Stat. Ann. § 5204(4). In order to be an approved private school, a school must be "a nonsectarian school in accordance with the First Amendment of the United States Constitution." 20-A Me. Rev. Stat. Ann. § 2951(2) ("Section 2951(2)"). It is this decision to exclude sectarian schools from receiving public funds that links the States of Maine and Montana. (p. 1)

- Maine believes that Montana should prevail in Espinoza, but in the event that it does not, Maine urges the Court to limit its ruling in a manner that allows for states like Maine to continue to use secular, but not sectarian, schools as part of the provision of a free public education to its children. (p. 2)

- … Maine's tuition program serves not as an opportunity for families to choose an alternative to their local public school, but as a method of delivering a free public education to students who "live within school administrative units that simply do not have the resources to operate a public school system, and whose children would otherwise not be given an opportunity to receive a free public education." (pp. 2-3)

- Of the 260 SAUs, 143 do not operate a secondary school. (p. 5)

- Unlike a sweeping "Blaine Amendment" or "no-aid" clause, the tuition program is the result of specific legislative consideration of whether sectarian education belongs as part of Maine's public education system. In undertaking that consideration, there is no evidence of animus or hostility toward religion; instead, the Maine Legislature sought to reject intolerance and discrimination in schools serving as de facto public schools. (p. 3)

- Section 2951 contains the requirements for a private school to be approved to receive public funds for tuition purposes. JSF, ¶ 13. Those schools must, inter alia, meet the requirements for basic school approval contained in the statute and agree to comply with reporting and auditing requirements. 20-A Me. Rev. Stat. Ann. § 2951(1), (5). In addition, and at the heart of the *Carson v. Makin* litigation, they must be "a nonsectarian school in accordance with the First Amendment of the United States Constitution." 20-A Me. Rev. Stat. Ann. § 2951(2). (p. 6)

- In contrast, "voucher" programs such as the one reviewed by this Court in *Zelman* and the scholarship program before it now in *Espinoza* involve a different type of program: a program that provides not the basic access to a free public education, but the option to use public funds to reject or avoid the free public education offered by a local public school. There is no question that the purpose of the Montana scholarship program "is to provide parental and student choice in education." Mont. Code Ann. § 15-30-3101. (pp. 8-9)

- Bringing all of our children together, no matter what their religious affiliation or background, promotes democracy, tolerance, and what is best in all of us. JSF, ¶ 201. (p. 11)

- The government has an important oversight role with respect to what is taught in schools but cannot, and should not, oversee the religious components of any school. Because of that, public funds should not pay for an education over which the state cannot have oversight. JSF, ¶¶ 194, 201. (p. 12)

- Read together, *Zelman* and *Locke*, both written by Chief Justice Rehnquist, emphasize the deference due to State decision making regarding education, and particularly the funding of religious education. *Zelman* explains what States are permitted to do with respect to funding religious education; *Locke* explains what States cannot be forced to do. (p. 16)

Amicus brief of Montana Constitutional Convention Delegates

Submitted 11.14.19
Narrative length: 29 pages

Entities Represented

Amici are a majority of the surviving framers of Montana's foundational law. Amici include the following delegates:

- Bob Campbell
- Gene Harbaugh
- Jerome Loendorf
- Michael McKeon
- Lyle Monroe
- Marshall Murray
- Arlyne Reichert
- Mae Nan Robinson Ellingson
- Lynn Sparks Keeley
- Roger Wagner

Argument

I. The 1972 Montana Constitution Was Approved By Montana Voters After A Highly Public, Open, And Deliberative Process That Overhauled The State's Constitution.

II. The No-Aid Clause Was A Critical Part Of The Delegates' Efforts To Make High Quality Public Education The State's Highest Public Purpose.

A. A Central Objective of the New Constitution Was to Ensure that Public Funds Were Spent Only for Public Purposes.
B. The Convention Viewed Quality Public Education as Montana's Highest Public Purpose.
C. The No-Aid Clause Was Deemed Essential to Ensuring Continued Support for Quality Public Schools.

III. Far From Reflecting Anti-Religious Bias, The No-Aid Clause Ensured Federal Funds Could Flow To Religious Schools And Reflected Concern About Government Interference In Religious Affairs.

Excerpts

- *Amici* write to share their considerable knowledge of the history and substance of the 1972 Montana Constitution. Having participated in debating and drafting the Constitution and having witnessed firsthand the public discussions surrounding ratification, amici have deep personal knowledge of the animating intent and objectives underlying the Montana Constitution and the no-aid clause, MONT. CONST. art. X, § 6. *Amici* can attest that far from being driven by anti-religious bigotry, the no-aid clause was essential to the Convention's efforts to promote educational opportunity for all through a robust state-funded public school system, and—as adopted to assure the pass-through of federal funding to religious schools—reflected the judgment of the Convention, and the people of Montana, about how to best serve the interests of both religious institutions and public schools. (p. 3)

- The delegates' hard work and tolerance were on full display in their consideration and adoption of the no-aid clause at issue here. That provision, which was exhaustively debated and modified on the floor to enable religious schools to benefit from federal funds provided to the State, sits at the intersection of several overarching concerns of the Convention. Delegates erected a strong wall around public funds generally, barring their use for any private programs (religious or non-religious) and limiting taxation to public purposes. And they built that wall even higher and stronger in the realm of education because their breathtakingly ambitious goals for Montana's educational system—guaranteeing equal educational opportunity—required strict protection of the State's funds for its public schools. (pp. 3-4)

- This sovereign choice regarding how to fund and structure education, endorsed by the people of Montana in a ratification vote, is precisely the sort of choice that the federal constitution leaves to the authority of the States. Nothing in the federal constitution requires dismantling Montana's commitment to use state public funds for state public programs. (pp. 5-6)

- One of the most vital areas of sovereignty vested in the States is education. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973) ("[E]ducation is perhaps the most important function of state and local governments.") (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)). The federal constitution makes no reference to schools or education, leaving to the States the establishment of a public education system, its financing, and the contours of the right to a quality public education. *See id*. at 58 ("The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States."); *see also United States v. Lopez*, 514 U.S. 549, 580-81 (1995) (Kennedy, J., concurring) ("[I]t is well established that education is a traditional concern of the States."). (p. 8)

- The no-aid clause was proposed as part of a Constitution that contained a firm commitment to protecting public funds for public uses along with bold promises of educational equality. The driving force behind the Convention's adoption of some form of a no-aid clause was thus not religious animus, but strong support for the State's guarantee of public education. Convention delegates recognized that a high-quality education system was essential to Montana's future. They were also acutely aware that providing a public education system that was both excellent and equitable would require substantial resources at a time when education spending already accounted for 70 cents of every tax dollar. *See* 6 Tr. 1968 (Martin). Consistent with an overarching concern of the Convention that public funds be preserved for public programs, the Convention deemed it essential to limit public aid to private religious schools in order to guarantee sufficient funding for public education. (p. 14)

- Multiple provisions within the 1972 Constitution reflect the overarching principle that public funds should be spent only on public programs within the control of the State. (p. 14)

- But the question was "should the state, should the Legislature, ever be in the business of making appropriations to anything other than public agencies?" Id. The Convention concluded it should not, ruling out appropriations to support even worthy private programs, of both a religious and nonreligious nature. Similarly, the Constitution requires taxes to "be levied … for public purposes," MONT. CONST. art. VIII, § 1, a provision that generated virtually no floor debate, *see* 5 Tr. 1377-78. (p. 15)

- The Convention Viewed Quality Public Education as Montana's Highest Public Purpose. (p. 16)

- Its promise of educational equality, MONT. CONST. art. X, § 1(1), meant that public funds had to be protected for an increasingly important and difficult (and therefore likely more costly) state endeavor: to provide an equitably-funded, quality education to every Montanan. Preservation of public funds for public education, rather than anti-religious bias, was thus the driving concern behind the no-aid clause. (p. 16)

- The 1972 Constitution set a lofty goal for the State's education system—to "develop the full educational potential of each person"—and guaranteed "[e]quality of educational opportunity … to each person of the state." MONT. CONST. art. X, § 1(1). Delegates recognized that it would take significant funding to realize this goal, and that the state's resources were limited. 6 Tr. 1949-50 (Harbaugh) ("[T]he committee realizes that economic resources of the state limit this goal, and yet it's our belief that it's very important to set forth a goal for education and that the development of our human resources to the fullest possible extent ought to be a primary goal of the state's educational enterprise."). (pp. 16-17)

- In addition, the Constitution imposed a new mandate of equitable funding. At the time, courts had held that four States' localized educational funding mechanisms were unconstitutional classifications based on wealth. 2 Tr. 722. Studies presented to the Education Committee indicated that the wealth of Montana school districts varied by as much as a ratio of 10,000 to 1. Id. at 723. Some "poor districts must tax their residents three or four times as much as rich districts to provide less than half as much money per student." Id. To begin to remedy these vast disparities, the 1972 Constitution required the legislature to "provide a basic system of free quality public elementary and secondary schools" and to "fund and distribute in an equitable manner … the state's share of the cost of the basic elementary and secondary school system." MONT. CONST. art. X, § 1(3). The resulting equitable funding mandate filled precisely the sort of federal constitutional gap that state constitutions are needed to fill, given the 18 importance of a uniform, high caliber system of education to democratic self-governance. (pp. 17-18)

- In the words of Education Committee Chairman Richard Champoux: "Because of this overriding importance of education, the committee recognizes the awesome task of providing the appropriate constitutional provisions necessary to protect and nurture the public educational system." 6 Tr. 1948. (p. 18)

- In the Education Committee's view, the "growth of a strong, universal, and free educational system in the United States has been due in part to its exclusively public character," and "[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*. at 2008-09. (p. 20)

- After revisions by the Committee on Style, the Convention adopted a no-aid clause that read:

> The legislature … shall not make any direct or indirect appropriation or payment from any public fund or monies, … for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.
>
> This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education. MONT. CONST. art. X, § 6. (p. 22)

- The clause was adopted with 80 delegates voting in favor and 17 against, with the vast majority of "no" votes reflecting opposition to the federal pass-through rather than opposition to restricting state aid. (p. 22)

- The official voter information pamphlet reinforces that the driving force behind the no-aid clause was preserving state funds for public schools. (p. 23)

- As one of the committee members reported during the floor debate, "[i]n all our testimony, … we had three different church denominations that spoke before us who are very, very opposed to any public money—or any federal money—to be allocated to any of their church or schools." 6 Tr. 2016 (Conover). A member of the Seventh Day Adventists appeared before the committee and "pointed out very strongly that if any of this money is ever distributed to any private school, then the federal government or the state will take over part of their church work." *Id*. at 2016- 2017. (pp. 23-24)

- Delegate Harbaugh spoke passionately about both educational opportunity and the need to repudiate the "remnants of a long-past era of prejudice" within the no-aid clause, describing the Blaine Amendment's history as involving "a great deal of concern across the country about foreigners and about Catholics in particular." 6 Tr. 2010. To address this history, his proposal permitted "federal aid to nonpublic education," not state aid. *Id*.; see also *id*. at 2011 (reiterating that "[w]e're talking about federal aid in this amendment, not about state aid"). Although initially opposing any form of no-aid clause, the Montana Catholic Conference ultimately supported this approach. *See* 6 Tr. 2027 (Campbell) (describing the Montana Catholic Conference's testimony before the Bill of Rights Committee, in which they "assured us that they did not intend to have the State of Montana funds diverted to nonpublic schools, to their schools," only federal funds). (p. 25)

- For those concerned about excessive government supervision of religious schooling, however, restraining public aid to religious schools was not a "badge of bigotry" but a "very wise" "evolution in history." *Id*. at 2012, 2013 (Harper). (p. 27)

Brief of Religious and Civil-Rights Organizations as Amici Curiae

Submitted 11.15.19
Narrative length: 34 pages

Entities Represented

- American Civil Liberties Union Foundation
- American Civil Liberties Union of Montana
- Americans United for Separation of Church and State
- Anti-Defamation League
- Central Conference of American Rabbis
- Hindu American Foundation
- Interfaith Alliance Foundation
- Men of Reform Judaism
- Muslim Advocates
- National Council of Jewish Women
- People for the American Way Foundation
- Reconstructing Judaism
- Reverend Dr. J. Herbert Nelson, II, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.) (PCUSA)
- Texas Impact
- Texas Interfaith Center for Public Policy
- Union for Reform Judaism
- Unitarian Universalist Association
- Women of Reform Judaism

Argument

I. Montana may vindicate its traditional antiestablishment interests by declining to fund religious education through tuition tax credits.

A. *Trinity Lutheran* did not supersede *Locke*'s holding that states may decline to fund religious instruction.

B. Preventing public financing of religious education is at the core of traditional state antiestablishment interests.

C. Affirming the ruling below would not endanger property-tax exemptions or charitable deductions for religious institutions.

II. A rule requiring government to fund religious education would upend longstanding precedent.

Excerpts

- Although this Court has, in some instances, permitted states to choose to fund religious education as part of a program of indirect aid, the Court has never required that states do so. Indeed, long before Locke, this Court repeatedly rejected arguments that state support for public or secular private education requires equal support for religious education. (p. 4)

- Religious institutions do not have a constitutional right to use taxpayer dollars to support religious instruction merely because a state decides to fund secular instruction. (p. 5)

- Although religious schools are free to operate as they see fit (within the confines of the law), and although states may choose to support religious education in ways that do not run afoul of the Establishment Clause, Montana cannot and should not be compelled to continue the tuition-tax-credit program. (p. 24)

Brief of Amicus Curiae Public Funds Public Schools

Submitted 11.15.19
Brief Length: 27 pages

Entities Represented

- Public Funds Public Schools
- Southern Poverty Law Center
- Education Law Center
- Munger, Tolles & Olson LLP

Argument

I. Article X, Section 6 reflects Montana's commitment to funding public education.
- A. Convention transcripts demonstrate that retention of a no-aid provision was motivated by support for public schools.
- B. Montana voters understood Section 6 to prohibit diversion of state funding to nonpublic schools.
- C. Section 6 must be read in the context of Article X as a whole, which evidences the delegates' concern for the provision of quality education to all Montana's students.

II. Research demonstrates that the diversion of funds from public schools harms students.
- A. Diverting public money to private schools harms student achievement.
- B. Research cited by *Amici* supporting Petitioners is flawed.

Excerpts

- As the legislative history and voting materials make clear, the purpose of Section 6 as enacted in 1972 was to make sure that Montana's limited state funds supported *public* education—and only public education. Section 6 thus constitutes an integral part of Montana's constitutional guarantee of public education and must be read in context. (p. 3)

- Montana's decision to bolster its public education system by prohibiting the diversion of the State's public funds to nonpublic schools has ample support in social science research. Peer-reviewed studies consistently show that programs diverting public funds to private schools negatively affect student achievement. (pp. 3-4)

- Notably, despite a thorough discussion of the history of the 1889 provision, no delegate proposed striking the no-aid language. (p. 5)

- Importantly, the delegates understood that nearly all private education in the state was religious in nature.[2] 2 Montana Constitutional Convention Proceedings 776 (1981) (hereinafter "Committee Proposals") (demonstrating that roughly two-thirds of all nonpublic schools in Montana were sectarian, and roughly 88% of the 11,645 students attending nonpublic schools attended sectarian schools). (pp. 5-6)

- No amendment that would have removed the no-aid provision was ever introduced, debated, or voted on. Contrary to the suggestions of Petitioner and Amici, the record reflects that delegates engaged in a full debate of the 1889 provision's history, rejected that any religious animus motivated retention of a no-aid provision, and voted for Section 6 to ensure the adequate funding of Montana's public schools. (p. 9)

- In guaranteeing Indian Education for All, Montana's delegates entrusted their public school system to right the historical wrongs of western education in American Indian communities, and reaffirmed the State's goal of providing a free quality public education to all Montana's students—with the accompanying commitment to adequately fund these constitutional mandates. (p. 13)

- Section 6 is an integral component of the commitment to educating all students, including a renewed commitment to the public education of Native American students, that was enshrined in Article X of the 1972 Constitution. Montana's constitutional commitment to the education of all of its students without diversion of limited state funds to private schools must be upheld. (p. 14)

- Importantly, seven of nine recent, large-scale studies show detrimental effects from voucher programs, and the remaining two studies show no effect.[5] The researchers, who include several voucher advocates, "conducted nine rigorous, large-scale studies since 2015 on achievement in voucher programs. In no case did these studies find any statistically positive achievement gains for students using vouchers. But seven of the nine studies found that voucher students saw relative learning losses. Too often, these losses were substantial."[6] (p. 15)

- The Brookings Institution concluded: Recent research on statewide voucher programs in Louisiana and Indiana has found that public school students that received vouchers to attend private schools subsequently scored lower on reading and math tests compared to similar students that remained in public schools. The magnitudes of the negative impacts were large. These studies used rigorous research designs that allow for strong causal conclusions. And they showed that the results were not explained by the particular tests that were used or the possibility that students receiving vouchers transferred out of above-average public schools.[8] (pp. 16-17)

- A 2018 longitudinal study of the Indiana Choice Scholarship Program found that low-income students who switched from public to private school using a voucher starting in the 2011-12 school year experienced, on average, an achievement loss of 0.15 standard deviations in mathematics on the statewide standardized assessment during their first year of private school compared to matched students who remained in public schools, and this loss remained consistent regardless of the length of time spent in private school.[10] (p. 17)

- Several briefs submitted by Amici in support of Petitioners claim to rely on social science research extoling the benefits of voucher programs. However, this research suffers from critical flaws. First, most of the cited research is not peer-reviewed. In addition, relying on older, small-scale studies, Amici in support of Petitioners cite only the research aligning with their viewpoint—ignoring the weight of recent, peer-reviewed studies pointing to the opposite conclusion. Finally, several of the articles Amici cite improperly equate correlation with causation. Because students who choose to utilize voucher programs are rarely randomly assigned, a study that fails to control for this merely establishes a correlation. Without eliminating confounding variables and evaluating voucher-users with comparable public school students, a study cannot properly establish a causal effect. (p. 19)

Brief amici curiae of American Federation of Teachers, et al.

Submitted 11.15.19
Narrative length: 36 pages

Entities Represented

- American Federation of Teachers
- National Education Association
- Montana Federation of Public Employees
- Montana Quality Education Coalition

Argument

I. This Court Lacks Jurisdiction Because Petitioners Lack Article III Standing.

- A. Petitioners' Claimed Injury from The Denial of Tax Credits to Third-Party Donors Is Too Attenuated and Speculative to Support Article III Standing.
- B. This Court Has Held That Similar Indirect Beneficiaries Lack Standing to Challenge the Government's Tax Treatment of Third Parties.
- C. Allowing Standing in This Case Would Expose the States and The Federal Government to Suit by Third-Party Beneficiaries of Innumerable Tax Programs.
- D. Petitioners' Reliance on an Analogy to Standing in Affirmative Action Cases Is Inapt.

II. Petitioners' Reading of The Free Exercise Clause as Requiring the Public Funding of Religious Education Is Contrary to Its Original Meaning.

- A. The Framers of The First Amendment Could Not Have Intended to Prohibit States from Declining to Fund Religious Education.
- B. The Congress That Adopted and The States That Ratified the Fourteenth Amendment Could Not Have Understood the Free Exercise Clause to Prohibit States From Declining To Fund Religious Education.

NOTE: *Argument I regarding standing is a highly technical argument that is difficult to distill into a series of excerpts. The AFT/NEA amicus brief argues that the petitioners lack legal "standing" to bring this case because they cannot prove any injury as a result of the Montana tax credit program not going into effect. The state constitutional provision's only effect is to deny a small tax credit for donations to scholarship funds for private schools. Even without that tax credit, the scholarship programs will still receive donations, and it is pure speculation whether any decrease in donations will ultimately affect these particular petitioners' receipt of a scholarship.*

Excerpts

- What petitioners seek is a broad constitutional ruling that the Free Exercise Clause prohibits States from refusing to fund religious education. (p. 5)

- There is simply nothing in the historical record that would support the proposition that the Framers intended to compel States to fund religious education—and certainly nothing to suggest that the First Amendment places an affirmative obligation on States to fund tuition at private religious schools even when they are not otherwise funding tuition at any private schools, religious or secular. (p. 30)

- What cannot be denied with respect to this historical record, however, is that at the time of the adoption and ratification of the Fourteenth Amendment, Congress and the States were both strongly advancing the principle of "no public funding for religious schools"—and indeed enacting such funding prohibitions into their constitutions. This historical fact renders implausible the suggestion that the Free Exercise Clause could have been understood to prohibit the States from declining to fund religious education. Cf. Heller, 554 U.S. at 616 ("It was plainly the understanding in the post-Civil War Congress that the Second Amendment protected an individual right to use arms for self-defense."). (p. 34)

Brief amici curiae of National School Boards Association, et al.

Submitted 11.15.19
Narrative length: 37 pages

Entities Represented

- National School Boards Association
- Montana School Boards Association
- Montana Quality Education Coalition
- School Superintendents Association
- Association of Educational Service Agencies
- Association of Latino Administrators and Superintendents
- Association of School Business Officials International
- Council of Administrators of Special Education
- Council of the Great City Schools
- National Association of Elementary School Principals
- National Association of Secondary School Principals
- National Parent Teacher Association
- National Rural Education Advocacy Consortium
- National Rural Education Association

Argument

I. States' policy decisions not to fund religious instruction as part of their historic commitment to public education are constitutional.

A. Even if Montana's decision not to fund religious uses of public funds is subject to strict scrutiny, it has numerous compelling interests for doing so.

B. Montana's decision not to allow public funds to flow indirectly to religious schools is consistent with this Court's holdings that states need not fund religious education.

II. Programs like Montana's invalidated tax credit scheme harm public education.

A. Tax credit scholarship programs like Montana's divert money otherwise headed for state coffers to private schools.

B. Tax credit scholarship programs support private schools that are not accountable to state taxpayers as public schools are.

Excerpts

- The state of Montana, in a ruling of its Supreme Court based on its state constitution, has invalidated a tax credit scholarship program that would enable the state to fund private sectarian institutions indirectly. It has decided to end the program altogether. Through that ruling, which is reasonable and constitutional under the principles espoused by this Court for decades, the state is choosing to remain neutral with respect to religion on this issue. There is nothing further to decide, and Amici urge this Court to end its analysis here. (p. 4)

- States historically have committed themselves to public education by restricting the use of public funds for private and/or religious schools; this Court never has held that this violates the U.S. Constitution. Nor has this Court ever ruled that a state's decision not to offer any, even indirect, public subsidy to private – religious or nonreligious – schools through a tax credit scholarship program violates the U.S. Constitution. (p. 5)

- Montana's constitutional prohibition on funding to religious schools is rooted in its dedication to funding public schools, and fully consistent with the U.S. Constitution. The delegates to Montana's 1972 constitutional convention passed the no-aid provision after considerable discussion about whether to prohibit "indirect" aid to religious schools, and whether to allow pass-through of federal funds. The delegates decided to do both, noting the importance of support for public education as a primary concern[.] (p. 11)

- When addressing state funding of public education, some states have decided to enforce a stronger "establishment" prohibition, at times tipping the balance in its favor over the "free exercise" requirement; but that difference is tolerable under the federal Constitution and something the framers expected states to do. See Locke, 540 U.S. at 722-723 (noting that at the time of the founding, many states 13 included in their constitutions prohibitions on tax funds going to the ministry). In other words, when it comes to the tug of war between the Establishment and Free Exercise Clauses, states -- with some limits -- have a right to decide what weight gets put on either side of the rope. Under the principles of federalism, states should be allowed to decide that they do not wish to fund religious education through their own state constitutions and statutes enacted through political processes. (pp. 12-13)

- … Montana's choice to restrict public funding to private and/or religious schools is rooted in its dedication of public dollars to public schools. As the Montana constitutional delegates recognized, funneling public money to private schools does not propel improvement of public education, but rather, drains already limited resources and dilutes broad community support, undermining the very schools that most American children, including low-income children, attend. (p. 20)

- When a state government chooses not to support religion with public funds, a court cannot presume its motive to be suppression of religious conduct, but should presume a constitutional goal to avoid "the divisiveness, strife, and violations of conscience that forcing taxpayers to fund the religions of others involves." Laura S. Underkuffler, The Separation of 11 See, e.g. Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rights Commn., 138 S. Ct. 1719, 1732 (2018)(First Amendment requires that laws be applied in a manner neutral toward religion). 22 the Religious and the Secular: A Foundational Challenge to First Amendment Theory, 2 First Amend. L. Rev. 179, 185 (2004); see also Mueller v. Allen, 463 U.S. at 394-395 (noting Court's "reluctance to attribute unconstitutional motives to the states"). (pp. 21-22)

- Taxpayers in states with tax credit scholarship programs often cannot see how students who receive scholarships to attend private schools are performing or how the money is spent, and there are no clear standards to protect against misuse of public funds. The GAO recently reported that of the 22 programs currently operating in seventeen states (not including Montana), only eight require that schools receiving tuition dollars from the scholarship organizations meet the minimal standard of state accreditation. U.S. Government Accountability Office, Private School Choice: Accountability in State Tax Credit Scholarship Programs, GAO-19-664 (September 2019) https://www.gao.gov/assets/710/701640.pdf. The GAO noted that most states with tax credit scholarship programs require participating schools to teach core subjects and to meet minimum attendance requirements, but few require financial audits or reviews. Id. (pp. 31-33)

- …failures in voucher and tax credit scholarship programs' design and implementation belie any stated intention to promote school reform; rather, their primary purpose is to provide public resources to private, mostly religious schools. A program genuinely designed to expand high-quality educational options and to improve student outcomes also presumably would impose public accountability, oversight, and curricular control on any school— public or private—that received public funding. Where public tax dollars are involved, the public has an interest in ensuring quality education is delivered. (p. 34)

- The Montana program runs contrary to the policy concerns expressed by the state's constitutional delegates by draining public money and support for public education, thereby threatening the number and quality of public school options, the only viable choices for the overwhelming majority of the state's students. Tax credit programs like this one hamper a state's ability to provide all of its students with free public education. See Arizona, 563 U.S. at 147 (2011) (Kagan, J., dissenting) ("…the Arizona private-school tuition tax credit has cost the State, by its own estimate, nearly $350 million in diverted tax revenue.") (pp. 34-35)

Brief amici curiae of National Disability Rights Network, et al.

Submitted 11.15.19
Narrative length: 34 pages

Entities Represented

- National Disability Rights Network
- The Arc of the United States
- Council of Parent Attorneys and Advocates
- Advocacy Institute
- American Association of People with Disabilities
- American Diabetes Association
- Association of University Centers on Disabilities
- Autistic Self Advocacy Network
- Autism Society of America
- Center for Public Representation
- Civil Rights Education and Enforcement Center
- Council for Exceptional Children
- Disability Rights Education & Defense Fund
- Education Law Center-PA
- Learning Disabilities Association of America
- National Association of Councils on Developmental Disabilities
- National Association of School Psychologists
- National Center for Learning Disabilities
- National Center for Parent Leadership, Advocacy, and Community Empowerment
- National Center for Youth Law
- School Social Work Association of America

Argument

I. Private-school voucher and tax-credit programs strip away essential protections and services that students with disabilities would receive in public schools.

A. Students with disabilities depend on legal protections to ensure that they are properly educated.
B. Private-school voucher and tax-credit programs provide few if any of these essential federal rights and protections to students with disabilities.
C. No right to an appropriate education tailored to the student's needs.
D. Limited protection against discrimination or segregation.
E. Little if any protection against disability-related discipline.
F. Few procedures to keep parents informed.
G. Abridged administrative or judicial remedies.

II. By shifting public funds to private schools that are not required to offer these crucial protections, private-school voucher and tax-credit programs often harm students with disabilities.

A. Private schools often exclude students with disabilities and rarely educate them adequately.

B. Even when paid for with public funds, private schools are rarely held accountable for failing to educate students with disabilities.

C. Parents of students with disabilities are often not told and are otherwise unaware that their children will lose statutory protections in private schools.

D. . Private-school voucher and tax-credit programs resegregate students with disabilities.

Excerpts

- …private schools paid for by public funds routinely fail to serve students with disabilities adequately—and often refuse to serve these students at all. Many participating schools categorically exclude some or all students with disabilities. Others charge higher tuition and fees, essentially erasing (and then some) the value of the public voucher or credit. A surprising number employ few or no teachers or aides licensed to educate students with disabilities, and otherwise do not 10 offer the support and services that students with disabilities need to succeed. Some are quick to discipline or expel students for behavior caused by their disabilities. And too many are segregated, disability-only schools. Indeed, Petitioners themselves trumpet such a segregated, disability-only Montana school. (pp. 9-10)

- On the other hand, students with disabilities who are not excluded from these programs suffer a different problem: The promise of government subsidies or tax credits may encourage their parents to transfer them from public school to private school, but their parents rarely are told, and seldom are otherwise aware, that their children will lose their statutory rights and services if they use vouchers or tax credits to attend private schools. Too often, parents learn this lesson only after enrolling their children in private schools and watching them flounder. (p.10)

- In fact, many voucher and tax-credit programs require parents to explicitly waive their children's IDEA rights. See, e.g., Dana Goldstein, Special 15 Ed School Vouchers May Come With Hidden Costs, N.Y. Times (April 11, 2017), https://tinyurl.com/y89cnvzq (Goldstein, Hidden Costs) (Arizona, Colorado, Florida, Georgia, Oklahoma, Tennessee, and Wisconsin all have or had voucher programs requiring parents to waive all or most IDEA rights to participate in the programs). (pp. 14-15)

- Several private schools in Milwaukee's voucher program do not serve children in wheelchairs or "who are unable to climb stairs." Barbara Miner, Vouchers: Special Ed Students Need Not Apply, 33 Rethinking Schools 4 (Winter 2013), https://tinyurl.com/wvuwoan. Along similar lines, students with chronic medical disabilities—including epilepsy, asthma, and diabetes—often cannot attend private schools because they have no part-time or full-time nurse. While more than 80 percent of public schools employ a school nurse, less than 35 percent of private schools do so. Nat'l Ass'n of School Nurses, School Nurses in the U.S. (2017), https://tinyurl.com/qrse3c8. (pp. 23-24)

- Petitioners' own example highlights this problem. They have invoked Cottonwood Day School, a participating private school comprised entirely of students with learning disabilities. Pet. App. 142–144 (affidavit from Cottonwood's "Assistant Head of School"). Although it admits students with learning disabilities, the school's policy allows disability discrimination and the school does not admit students "with autism or disabilities other than learning disabilities." Gail Schontzler, New Bozeman Private School to Focus on Learning Disabilities, Bozeman Daily Chron. (June 21, 2015), https://tinyurl.com/yejy8dxu. Cottonwood Day School is not alone: Many private schools serve only students with "lowercost" disabilities (such as speech, language, and learning disabilities) and exclude other students (such as those with autism) whose education requires more significant services. Wisconsin Legislative Audit Bureau, Milwaukee Parental Choice Program 26 (2000), https://tinyurl.com/s5nkupj. (p. 24)

Brief amici curiae of Religion Law Scholars

Submitted 11.15.19
Narrative length: 22 pages

Entities Represented

- Professor Nelson Tebbe (Cornell Law School)
- Professor Ashutosh Bhagwat (UC Davis School of Law)
- Professor Corey Brettschneider (Brown University)
- Professor Emeritus Alan Brownstein (UC Davis School of Law)
- Professor Caroline Mala Corbin (University of Miami School of Law)
- Professor Frederick Mark Gedicks (Brigham Young University Law School)
- Professor William P. Marshall (University of North Carolina School of Law)
- Professor Richard Schragger (University of Virginia School of Law)
- Professor Micah Schwartzman (University of Virginia School of Law)
- Professor Elizabeth Sepper (University of Texas School of Law)
- Professor Nomi Stolzenberg (USC Gould School of Law)
- Professor Laura Underkuffler (Cornell Law School)

Institutional affiliations are for identification purposes only; the signatories' views should not be attributed to their institutions.

Argument

I. A Government's Decision to Fund Only Secular Services Need Not Survive Strict Scrutiny.

A. The Free Exercise Clause permits the benevolent accommodation of anti-establishment concerns.
B. The Court's approach mirrors its general approach to constitutional challenges to funding programs.
C. The Court's approach preserves flexibility to address the serious anti-establishment concerns that funding programs can raise.
D. Petitioners' strict-neutrality approach would prohibit the accommodation of free exercise interests.

II. The Court's Precedents Already Enforce the Requirement That Government Not Discriminate Against Religion.

Excerpts

- The First Amendment's dual commands with respect to religion—"in favor of free exercise, but opposed to establishment"—mean that a government's decision to "deal differently" with religion may be "a product of these views, not evidence of hostility to religion." *Locke*, 540 U.S. at 721. (p. 4)

- Taxpayers can reasonably view a government's funding of a religious institution as infringing the religious freedom of taxpayers who object as a matter of conscience to supporting institutions with which they disagree. *See* Nelson Tebbe, *Excluding Religion*, 156 U. Pa. L. Rev. 1263, 1273–74 (2008). And "[t]axpayers who oppose state aid of religion have equal reason to protest whether that aid flows" directly or in the form of a tax subsidy. *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 148 (2011) (Kagan, J., dissenting). (p. 8)

- Avoiding taxpayer support for religious institutions was a central concern of the Founding era. At that time, the "dominant issue" was not neutrality towards religion and non-religion but "government financial support for churches" of any kind. Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 Ind. J. Global Legal Stud. 503, 508 (2006). (p. 8)

- Montana reasonably concluded that requiring its scholarship program to pay for attendance at religious schools would transgress the Founding-era prohibition on paying for religious education out of taxpayer coffers. Montana's program offers a dollar-for-dollar tax credit of up to $150 dollars for donations to Student Scholarship Organizations, which in turn fund scholarships for students who attend private schools by transferring the funds directly to the schools. Pet. App. 9; Mont. Code Ann. § 15-30- 3104(1). To start, taxpayer funds pay for the scholarship program. Those receiving the credit "'donate[ ]' nothing"; it is the State that provides the aid. Pet. App. 36. The Legislature included a $3 million appropriation for the tax credits in the program's first year, to be increased in later years as needed. Mont. Code Ann. § 15-30-3110(5)(a). That is the practical equivalent of direct taxpayer support for religious education. (p. 8)

- Under Montana's scholarship program, 11 of the 12 schools that received scholarships from Big Sky—the only Student Scholarship Organization to distribute funds under the program—are affiliated with Christian faiths. *Schools*, Big Sky Scholarships, https://bigskyscholarships.org/schools/ (last visited Nov. 15, 2019). This creates a real risk that Montana taxpayers will view the state as having forced them to violate their conscience by supporting not just religious schools, but Christian schools— when the taxpayer may adhere to a different religion or no religion at all. (p. 10).

- Montana's experience demonstrates that this risk of uneven resource allocation is real. Big Sky was the only Student Scholarship Organization to distribute scholarships under the program. According to Big Sky's website, it is affiliated with twelve private schools, eleven of which are Christian and none of which is affiliated with another faith. See supra p. 10. This was Madison's fear precisely: a dominant religion capturing a disproportionate amount of governmental aid to the detriment of religious minorities. Montana has a substantial interest in preventing such disparate treatment and should be afforded the ability to do so. (p. 13)

Brief amici curiae of Montana Association of Rabbis

Submitted 11.15.19
Narrative length: 34 pages

Entities Represented

- **Montana Association of Rabbis** (MAOR, also a Hebrew word meaning "enlighten")

  Founding Members:

  - Rabbi Ed Stafman (Bozeman)
  - Rabbi Mark Kula (Missoula)
  - Rabbi Francine Roston (Whitefish)
  - Rabbi Allen Secher (Whitefish)
  - Senior rabbinic student (now Rabbi) Laurie Franklin (Missoula)

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.

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
- B. The Religious schools that receive funds from the Montana program incorporate Christian religious doctrine in their curricula
  1. All private religious schools in Montana are Christian
  2. The Montana Christian schools that participate in the tax-credit program incorporate religious doctrine in their curricula.
  3. Material taught in Montana's Christian schools may be inconsistent with the beliefs of Judaism and other non-Christian religions.

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

- A. The tax-credit program imposes an unconstitutional condition on the receipt of a public benefit.
- B. As applied by petitioners and the United States, the program discriminates on the basis of taxpayers' religious status, violating the Free Exercise Clause.
- C. As applied by petitioners and the United States, the program violates the Establishment Clause.
  1. The program has a discriminatory purpose.
  2. The program has a discriminatory effect.
  3. The program can be expected to produce "continuing political strife."

Excerpts

- 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. (pp. 2-3)

- 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 7 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).[2] As a practical matter, a population of this size could not sustain a K-12 school. (p. 6-7)

- Religious schools in Montana do more than teach the basis of their faith and religious worldview; in some circumstances, the educational materials used 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. (pp. 14-15)

- [A] geography textbook from Abeka Books … criticizes Hinduism, teaching that a "major reason[] for India's poverty [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. (pp. 15-16)

- 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. … 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. (p. 19)

- 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. (p. 20)

- 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. (p. 24)

- 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. (pp. 27-28)

Brief amici curiae of Colorado, et al.

Submitted 11.15.19
Narrative length: 21 pages

Entities Represented

- **State of Colorado**
- **State of California**
- **State of Hawaii**
- **State of Massachusetts**
- **State of Michigan**
- **State of Minnesota**
- **State of New York**
- **State of Oregon**
- **State of Washington**

Argument

I. The Constitution supports the States' diverse approaches to deciding whether and how to finance religious schools under their own constitutions.

II. This Court's precedents recognize the States' important role in deciding whether and how to fund religious schools.

III. State no-aid provisions have been adopted throughout history, and for reasons unrelated to anti-Catholicism.

Excerpts

- The Free Exercise Clause and the Establishment Clause do not *prohibit* States from funding religious schools, but likewise do not *compel* the funding of religious schools. (pp. 2-3)

- Thirty-eight state constitutions contain a no-aid provision. These provisions have been adopted throughout American history; many have even been re-ratified or amended in recent decades, far removed from the anti-Catholic sentiments that Petitioners assert pervaded the 1876 Blaine Amendment. The States' historical reasons for adopting no-aid provisions in their constitutions are diverse. Some States sought to solidify the Framers' original design separating church and State; others simply sought to guarantee the financial security of their public schools. What the States have in common, however, is that each has substantial and legitimate historical and current reasons—unrelated to anti-Catholicism or other religious bias—for enacting their no-aid provisions. This Court should thus reject Petitioners' argument that state no-aid provisions are facially unconstitutional. (p. 3)

- Petitioners acknowledge that a state legislature may decline to enact a school scholarship program without any constitutional infirmity. But if the state legislature does enact a program and then the state courts invalidate the program under the State's no-aid clause, Petitioners assert this outcome is unconstitutional and, as a matter of federal constitutional law, the State must carry on with the program. (pp. 8-9)

- Petitioners' request that the federal courts *require* Montana to enforce a state education funding program that its state supreme court held is void *ab initio* disrespects state constitutional law and creates significant anticommandeering concerns, as Respondents have ably demonstrated. Resp. Br. 46– 49. To the extent that Petitioners' proposed remedy would bar Montana from taking a stronger antiestablishment stance than federal law—within the constitutionally permissible "play in the joints"—it unnecessarily demands that the States lockstep their state constitutions with the federal Constitution. (p. 9)

- The Montana Supreme Court below rightly avoided this concern, choosing instead to address the state constitutional claims before the federal ones—as was its prerogative—while also assuring itself that its holding posed no problem under the federal Free Exercise Clause. Pet. App. 32; *see* Sutton, *supra*, at 179 ("A state-first approach to litigation over constitutional rights honors the original design of the state and federal constitutions."). (pp. 9-10)

- Taken together, *Zelman* and *Locke* highlight the significant deference granted to state legislatures to fund or not fund religious schools. Zelman permits them to fund religious instruction under certain circumstances; Locke permits them not to. (pp. 11-12)

- The scholarship funds here, if directed towards religious schools, advance religious education, not secular resources. As Petitioners concede, a "'major reason'" motivating parents to use the scholarship funds at religious schools is because they want a school that "'teaches the same Christian values'" that they teach at home. Pet. Br. 6 (quoting Pet. App. 152, ¶ 12). Yet *Locke* made clear that "religious instruction is of a different ilk" and that a State's decision to "deal differently" with religious education is "scarcely novel." 540 U.S. at 721–23. If *Locke* stands for anything, it's that a State does not violate the Free Exercise Clause by declining to fund religious education with taxpayer dollars. (p. 13)

- In total, 22 States have either amended, ratified, or readopted their no-aid provisions after 1960, demonstrating that no-aid provisions in general are far removed from any anti-Catholic fervor that surrounded the 1876 Blaine Amendment proposal. (p. 16)

Brief amici curiae of Tennessee Education Association

Submitted 11.15.19
Narrative length: 18 pages

Entity Represented

- Tennessee Education Association

Argument

I. Montana, like many states, has enacted a "school choice" program under which taxpayers finance individual private school tuition.

II. Tennessee has implemented a comparable program of taxpayer financing of private school tuition.

III. Modern "school choice" programs undermine the societal benefits of public education by diverting needed funds from the public schools.

IV. Reversal of the Montana Supreme Court's decision will do harm to states' efforts to preserve the societal benefits of public education.

Excerpts

- In order to avoid undue harm to the societal benefits of public education, states must remain free to implement reasonable restrictions on "school choice" programs. (p. 2)

- Our nation's founding fathers recognized the societal need for an organized system of public education. Thomas Jefferson frequently referenced the importance of a system of public education. In 1786 Jefferson wrote about the importance of collecting a tax for the "diffusion of knowledge among the people." In his 6th Annual Message, Jefferson said that education was placed among the "articles of public care" because "a public institution alone can supply those sciences which … are necessary to complete the circle, all parts of which contribute to the improvement of the country, and some to its preservation." Later in his life, Jefferson wrote to Joseph C. Cabell, who was instrumental in the establishment of the University of Virginia, that "[a] system of general instruction, which shall reach every description of our citizens," was the first and last of his public concerns. (p. 6)

- The general public finances the cost of public education primarily through state taxes and local property taxes, with federal tax dollars supplying a relatively smaller portion of the overall funding. Public education in turn transmits social values that benefit the collective good of society. "Public education entails the provision of common experiences under conditions consistent with equal protection, due process, free speech, and religious neutrality," bedrock American values preserved in our Constitution. The consumer-based systems of private education are not guaranteed to preserve these societal values, and in the case of religious schools may very well be contrary to these values (p. 10-11)

- Tax-credits, ESA's, and vouchers take needed funds away from the public schools, and they do so without the collective good in mind. In those programs, education is regarded essentially as a commodity. The focus of all of these programs is on the individual consumer of that commodity. Because the focus is on the individual consumer of a commodity, rather than the societal good, there is no justification for compelled societal funding of individual consumption, via taxation, that occurs through these programs.[11] That is especially so given that the good of the individual comes at the expense of the collective good because of the shifting of public funds away from the public schools to fund the cost of vouchers, ESA's, or tax credits.[12] (p. 13)

- The types of school-choice-at-taxpayer-expense programs at issue here frustrate the societal purposes of public education by diverting government funds that otherwise would be spent to achieve those societal purposes.[13] Montana's No-Aid Clause serves as a check on the "self-expanding propensities" of the program. In the absence of a clear showing that the limitation was motivated by a constitutionally suspect concern, Montana's limitation is consistent with general public policy supporting public education for the benefit of society as a whole and should be regarded as encompassed within the "room for play in the joints" between the Establishment Clause and the Free Exercise Clause of the First Amendment. *Locke v. Davey*, 540 U.S. 712, 718 (2004) (quoting *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 669 (1970)). (p. 14)

- [13] It is undeniable that in the South, court-ordered desegregation of public schools led to the development of "segregation academies," private schools that were intended to facilitate white flight from integrated public schools. Many of those academies still exist. While they may not legally discriminate against African Americans, their enrollment tends to remain predominantly white. It is perverse indeed to consider that vouchers or other comparable programs may be used to divert public funds from the public schools in order to prop up these academies. (p. 14)

Brief amici curiae of Baptist Joint Committee for Religious Liberty, et al.

Submitted 11.15.19
Narrative length: 36 pages

Entities Represented

- **Baptist Joint Committee for Religious Liberty**
- **The Evangelical Lutheran Church in America**
- **General Synod of the United Church of Christ**
- **Reverend Dr. J. Herbert Nelson, II, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.)**

Argument

I. The Religion Clauses in the federal and state Constitutions firmly establish the distinctiveness of religion.
- A. The distinctive treatment of religion is central to ensuring the proper balance among federal and state constitutional provisions.
- B. Since the earliest days of the Republic, the no-aid rule has reinforced the distinctive nature of religion.
- C. The constitutional rule prohibiting public funding of religion has long applied to religious activities such as religious education.

II. Article X, Section 6 of the Montana Constitution was adopted out of valid concern for religion and has been maintained for that purpose.
- A. There is no scholarly consensus that the Blaine Amendment was motivated chiefly by anti-Catholic animus.
- B. Evidence of anti-religious animus is lacking in the enactment of the 1889 Montana Constitution.
- C. There is no evidence that the reenactment of article X, section 6 in the 1972 Montana Constitution was motivated by anti-religious animus.

III. Federalism allows states to maintain an independence of religion and government beyond what the establishment clause requires.

Excerpts

- Montana's no-aid rule protects public funding and accountability for public entities. It recognizes the distinctiveness of religious institutions and guards against state interference in religious practice. The limited scope of the grant program at issue in *Trinity Lutheran* is unlike a state's funding of education. While public and private schools, including religious schools, must meet certain state education requirements, they are not similarly situated with regard to sources of funding and regulatory accountability. Petitioners' demand for a state program for equal funding ignores the distinctiveness of religion and the various ways religious education operates to promote faith formation. It ignores the relationship between support and accountability in public programs and the limits on government interference in religion. (pp. 8-9)

- Religious dissenters, Baptists in particular, were at the forefront of the movement urging disestablishment. As Professor Laycock continues, "evangelical dissenters insisted that these new constitutions address issues of religious liberty. Immediately in most states, eventually in all states, the established churches were disestablished – deprived of government sponsorship and deprived of tax support. The details varied from state to state, but disestablishment was not the work of secular revolutionaries. It was mostly the work of evangelical religious dissenters."[11] (pp. 10-11)

- Far from being a form of invidious discrimination against religion, disestablishment marked an essential step toward the protection of religious liberty, of individuals *and* religious institutions. Disestablishment ensured that churches would not be funded through the coercive power of the state but through the voluntary offerings of adherents, thus providing a constraint on government and a measure of religious liberty for individuals – to fund or refuse to fund religious institutions – that had long been denied.[12] (p. 11)

- Importantly, out of the 38 no-funding provisions today, nineteen find their origins before the vote on the 1876 Blaine Amendment (discussed below).[25] As a result, it is inaccurate to designate state no-funding provisions as "Blaine Amendments." The origins of the no-funding principle predate not only the Blaine Amendment but also the advent of significant Catholic immigration in the 1840s. (pp. 17-18)

- Like thirty-seven other states, the Montana Constitution contains an express provision that prohibits any government entity from appropriating public monies in support of a religious institution, including religious schools. Far from being an outlier, Montana's Constitution represents the prevailing practice in state constitutional drafting that began in the 1830s. Adhering to other constitutional mandates to create and support systems of public schools, constitution drafters sought to preserve the school fund and avoid denominational competition over public monies and the religious dissention that it would create. (pp. 26-27)

- Petitioners and their amici attempt to paint a portrait of rampant anti-Catholicism in late-nineteenth century Montana. That image is not supported by the historical record. Catholic missionaries were among the first Christian settlers in Montana, establishing missions among several Native tribes.[44] The discovery of gold, silver, and then copper in Montana after mid-century drew thousands of people to work in the mines, a significant proportion of whom were Irish or Irish Americans, although large numbers of Catholics also arrived from Italy, Germany, and the Austro-Hungarian Empire. Historians have documented that by the early twentieth century, Montana possessed one of the more diverse ethnic populations found anywhere in the American West.[45] At that time seventy-seven percent of all Montanans who considered themselves members of any church denomination identified as Catholic.[46] (pp. 27-28)

- As Petitioners' amici point out, three delegates expressed dissatisfaction with the 1889 provision, article XI, section 8, describing that provision as a "Blaine Amendment." *See* Brief of Becket Fund, at 19.55 Other delegates, however, contested that characterization, with Delegate Harper responding that "I rather think that most of us do not believe that the separation of church and state is an evidence of bigotry."[56] Of greatest significance, in the end, those delegates who asserted a connection between article XI, section 8 and the Blaine Amendment voted *for* the compromise proposal that became article X, section 6.[57] (p. 32)

Appendix A:
Entities and Individuals Represented in Montana Department of Revenue Amici

- **Advocacy Institute**
- **American Association of People with Disabilities**
- **American Atheists**
- **American Civil Liberties Union Foundation**
- **American Civil Liberties Union of Montana**
- **American Diabetes Association**
- **American Federation of Teachers**
- **American Humanist Association**
- **Americans United for Separation of Church and State**
- **Anti-Defamation League**
- **Arlyne Reichert****
- **Association of Educational Service Agencies**
- **Association of Latino Administrators and Superintendents**
- **Association of School Business Officials International**
- **Association of University Centers on Disabilities**
- **Autistic Self Advocacy Network**
- **Autism Society of America**
- **Baptist Joint Committee for Religious Liberty**
- **Bob Campbell****
- **Center for Inquiry**
- **Center for Public Representation**
- **Central Conference of American Rabbis**
- **Civil Rights Education and Enforcement Center**
- **Council for Exceptional Children**
- **Council of Administrators of Special Education**
- **Council of Parent Attorneys and Advocates**
- **Council of the Great City Schools**
- **Disability Rights Education & Defense Fund**
- **Education Law Center-PA**
- **Education Law Center**
- **Freedom from Religion Foundation**
- **Gene Harbaugh****
- **General Synod of the United Church of Christ**
- **Hindu American Foundation**
- **Interfaith Alliance Foundation**
- **Jerome Loendorf****
- **Learning Disabilities Association of America**
- **Lyle Monroe****
- **Lynn Sparks Keeley****

- **Marshall Murray****
- **Mae Nan Robinson Ellingson****
- **Men of Reform Judaism**
- **Michael McKeon****
- **Montana Association of Rabbis**
- **Montana Association of School Business Officials***
- **Montana Federation of Public Employees***
- **Montana Quality Education Coalition**
- **Montana Rural Education Association***
- **Montana School Boards Association***
- **Munger, Tolles & Olson LLP**
- **Muslim Advocates**
- **National Association of Councils on Developmental Disabilities**
- **National Association of Elementary School Principals**
- **National Association of School Psychologists**
- **National Association of Secondary School Principals**
- **National Center for Learning Disabilities**
- **National Center for Parent Leadership, Advocacy, and Community Empowerment**
- **National Center for Youth Law**
- **National Council of Jewish Women**
- **National Disability Rights Network**
- **National Education Association**
- **National Parent Teacher Association**
- **National Rural Education Advocacy Consortium**
- **National Rural Education Association**
- **National School Boards Association**
- **People for the American Way Foundation**
- **Professor Nelson Tebbe (Cornell Law School)*****
- **Professor Ashutosh Bhagwat (UC Davis School of Law) *****
- **Professor Corey Brettschneider (Brown University) *****
- **Professor Emeritus Alan Brownstein (UC Davis School of Law) *****
- **Professor Caroline Mala Corbin (University of Miami School of Law) *****
- **Professor Frederick Mark Gedicks (Brigham Young University Law School) *****
- **Professor William P. Marshall (University of North Carolina School of Law) *****
- **Professor Richard Schragger (University of Virginia School of Law) *****
- **Professor Micah Schwartzman (University of Virginia School of Law) *****
- **Professor Elizabeth Sepper (University of Texas School of Law) *****
- **Professor Nomi Stolzenberg (USC Gould School of Law) *****
- **Professor Laura Underkuffler (Cornell Law School) *****

- **Public Funds Public Schools**
- **Reconstructing Judaism**
- **Reverend Dr. J. Herbert Nelson, II, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.)**
- **Roger Wagner****
- **School Administrators of Montana***
- **School Social Work Association of America**
- **School Superintendents Association**
- **Southern Poverty Law Center**
- **State of Colorado**
- **State of California**
- **State of Hawaii**
- **State of Maine**
- **State of Massachusetts**
- **State of Michigan**
- **State of Minnesota**
- **State of New York**
- **State of Oregon**
- **State of Washington**
- **Tennessee Education Association**
- **Texas Impact**
- **Texas Interfaith Center for Public Policy**
- **The Arc of the United States**
- **The Evangelical Lutheran Church in America**
- **Union for Reform Judaism**
- **Unitarian Universalist Association**
- **United Church of Christ, Montana-Northern Wyoming Conference**
- **Women of Reform Judaism**

*Amici are organizational members of the Montana Quality Education Coalition and serve on the Board of Directors, unequivocally supporting the Montana Department of Revenue in this issue.

**Amici are a majority of the surviving framers of Montana's foundational law.

***Institutional affiliations are for identification purposes only; the signatories' views should not be attributed to their institutions.