No. 18-1195

IN THE
Supreme Court of the United States

KENDRA ESPINOZA, JERI ELLEN ANDERSON, and JAIME SCHAEFER

Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE, and GENE WALBORN, in his official capacity as DIRECTOR OF THE MONTANA DEPARTMENT OF REVENUE,

Respondents.

On Petition for a Writ of Certiorari to the Montana Supreme Court

BRIEF FOR ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF FOR *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[*]

The Arizona Christian School Tuition Organization (ACSTO) gives Arizona students the opportunity to receive a private Christian education. ACSTO and its mission are made possible by Arizona's Tax Credit Scholarship program, which allows Arizona taxpayers to obtain dollar-for-dollar tax credits for contributions to school tuition organizations. School tuition organizations then, in turn, direct those taxpayer contributions to pay tuition for students at private schools in Arizona.

ACSTO began in 1998 as Arizona's first school tuition organization, and since then has awarded over $200 million in scholarships to 34,000 students attending 150 Arizona Christian schools.

ACSTO has tirelessly championed and defended Arizona's Tax Credit Scholarship program. In 1999, the Arizona Supreme Court upheld the constitutionality of the individual scholarship credit in *Kotterman* v. *Killian*, 972 P.2d 606 (Ariz. 1999). ACSTO also defended the program against an Establishment Clause

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[*] Pursuant to Supreme Court Rule 37.6, *amicus* represents that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received notice of the filing of this brief compliant with Supreme Court Rule 37.2 and each has consented to the filing of this brief.

challenge, prevailing in *Arizona Christian School Tuition Organization* v. *Winn*, in which this Court ruled for ACSTO on the ground that plaintiffs lacked standing to challenge Arizona's Tax Credit Scholarship program. 563 U.S. 125 (2011).

ACSTO is interested in preserving Arizona's Tax Credit Scholarship program and expanding school choice across the country. Montana's Tax Credit Scholarship Program operates similarly to Arizona's program, and ACSTO has a keen interest in ensuring that such programs survive unjustified legal challenges so that families can send their children to schools of their choice, including religious schools.

STATEMENT

The Free Exercise and Equal Protection Clauses forbid government from discriminating against religion. *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2021 (2017). As this Court has unequivocally reaffirmed, states cannot impose "special disabilities on the basis of religious views or religious status." *Ibid.* Yet that is precisely what happened here. The Montana Supreme Court ruled that parents cannot receive taxpayer-funded aid solely because they have chosen a "sectarian" school for their children. This Court's review is needed to resolve the conflict and restore meaningful choice for parents—especially of underprivileged and special-needs children—to send their children to schools that best serve their needs.

1. In flatly prohibiting aid to "sectarian schools," Article X, Section 6 of Montana's Constitution—Montana's Blaine Amendment—"has a shameful pedigree" that this Court should "not hesitate to disavow." *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality). That pedigree dates back to 1875, when President Ulysses S. Grant—riding a tide of nativism and anti-Catholic bigotry—publicly vowed to "[e]ncourage free schools, and resolve that not one dollar * * * shall be appropriated to the support of any sectarian schools." Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Leg. Hist. 38, 47 (1992) (quoting *The Index*, Oct. 28, 1875, at 513).

Maine Congressman James G. Blaine took up the mantle and introduced the so-called "Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions." *Mitchell*, 530

U.S. at 828. "Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'" *Ibid*.

Senator Blaine's federal constitutional amendment failed, but by 1890, some 29 states had incorporated similar prohibitions—so-called Blaine Amendments—into their constitutions. Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 673 (1998). And it is now beyond dispute that these Amendments are "a remnant of nineteenth-century religious bigotry promulgated by nativist political leaders who were alarmed by the growth of immigrant populations and who had particular disdain for Catholics." *Id.* at 659. Some states adopted these provisions voluntarily, but "Congress forced * * * territories seeking admission to the union to adopt Blaine provisions as a condition of statehood." *Moses* v. *Ruszkowski*, --- P.3d ---, 2018 WL 6566646, at *4 (N.M. Dec. 13, 2018).

Montana is one of those states. Its Enabling Act required that its constitution provide for a system of public schools "free from sectarian control." Act of Feb. 22, 1889, ch. 180, §§ 4, 14, 25 Stat. 676, 676–77, 680 (prohibiting state aid to "any sectarian or denominational school, college, or university"). Montana did so and carried forward its "broad and general no-aid provision" when it adopted a new constitution in 1972. Pet. App. 19 (Montana's Blaine Amendment was "among the most stringent [no-aid clauses] in the nation") (alteration in original).

Montana's Blaine Amendment—entitled "Aid prohibited to sectarian schools" and found in Article X, Section 6 of its constitution—provides:

> The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.

Mont. Const. art. X, § 6.

2. In 2015, Montana enacted a student-aid Tax Credit Program, which provides "a dollar-for-dollar tax credit of up to $150" to taxpayers who donate to Student Scholarship Organizations—501(c)(3) organizations that allocate at least 90 percent of their revenue toward private-school scholarships "without limiting student access to only one education provider." Pet. App. 9 (citing Mont. Code §§ 15-30-3111, -3102(9), -3103). That same statute provides an identical credit for taxpayers who donate to public schools. Pet. App. 9 & n.1 (citing Mont. Code § 15-30-3110).

The Department of Revenue was charged with implementing and administering the program. In doing so, it "identified what it saw as a constitutional deficiency: the Tax Credit Program aided sectarian schools in violation of Article X, Section 6." Pet. App. 12. To remedy the deficiency, it adopted a rule that "excluded religiously-affiliated private schools from

the Legislature's definition of [education provider]." Pet. App. 13.

3. Petitioners have chosen to send their children to Stillwater Christian School, a non-denominational school in Kalispell, Montana that qualifies as an education provider under the statute but not under the Department's rule. They challenged the rule under the Free Exercise Clauses of both the Montana and U.S. Constitutions.

The trial court ruled for petitioners on the ground that Montana's Blaine Amendment was not implicated because the tax credits "did not 'involve the expenditure of money that the state has in its treasury.'" Pet. App. 14; see also *Ariz. Christian Sch. Tuition Org.* v. *Winn*, 563 U.S. 125, 141–46 (2011) ("In [respondents'] view the tax credit is * * * best understood as a governmental expenditure. That is incorrect. * * * [T]he tax credit system is implemented by private action and with no state intervention.").

A divided Montana Supreme Court reversed, ruling that "the Tax Credit Program violates Article X, Section 6's stringent prohibition on aid to sectarian schools." Pet. App. 34. The majority relied on this Court's decision in *Locke* v. *Davey*, 540 U.S. 712 (2004), for the proposition that "[w]here a state's Constitution 'draws a more stringent line than that drawn by the United States Constitution,' the 'room for play' between the Establishment and Free Exercise Clauses narrows." Pet. App. 16. And it ignored this Court's decision in *Trinity Lutheran* altogether.

Because the Tax Credit Program "permits the Legislature to indirectly pay tuition at private, religiously-affiliated schools," the court concluded that it

"violates Montana's constitutional guarantee to all Montanans that their government will not use state funds to aid religious schools." Pet. App. 26, 30. As a remedy, the court severed the Tax Credit Program from the remainder of the statute, leaving in place the tax credit for donations to public schools. Pet. App. 34.

The court went on to hold, without explanation, that although there "may be a case where" prohibiting aid to religious organizations "would violate the Free Exercise Clause, this is not one of those cases." Pet. App. 32; see also Pet. App. 75 (Baker, J., dissenting).

SUMMARY OF ARGUMENT

Parents across the Nation struggle to find the resources to send their children to schools that best serve their children's needs. State legislatures have responded by developing innovative programs that allow taxpayers to receive credits for contributing to funds that, in turn, provide parents with sorely needed educational resources. Parents should not be cut off from these resources simply because they send their children to faith-based schools.

As this Court explained just last year, states have a "duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint." *Masterpiece Cakeshop, Ltd.* v. *Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). Yet for over a century, Blaine Amendments—like Montana's—have prevented states from carrying out that duty. Instead, Blaine Amendments have enshrined hostility to religion into law. They facially discriminate against religion and cannot satisfy strict scrutiny. See *Church of the Lukumi Babalu Aye, Inc.* v.

Hialeah, 508 U.S. 520, 524 (1993). This Court's review is needed to ensure that the dead hand of nineteenth-century bigotry relinquishes its stranglehold on educational resources desperately needed by twenty-first century parents and their children.

This Court's review is also needed to dispel the confusion left in the wake of this Court's decision in *Trinity Lutheran*. Some courts have erroneously limited that case to its facts—upholding state policies that blatantly discriminate against religious entities solely because they are religious. E.g., *Caplan* v. *Town of Acton*, 92 N.E.3d 691, 703 (Mass. 2018); *ACLU of N.J.* v. *Hendricks*, 183 A.3d 931, 942 (N.J. 2018); *Freedom from Religion Found.* v. *Morris Cty. Bd. of Chosen Freeholders*, 181 A.3d 992, 1009–10 (N.J. 2018).

Similarly, courts have divided over the scope of this Court's decision in *Locke*—with some reading *that* case, too, as providing license to discriminate against religion. Compare *Eulitt ex rel. Eulitt* v. *Me. Dep't of Educ.*, 386 F.3d 344, 346, 355 (1st Cir. 2004) (relying on *Locke* to uphold exclusion of "private sectarian secondary schools" from program funding "private nonsectarian secondary schools"), and *Anderson* v. *Town of Durham*, 895 A.2d 944, 961 (Me. 2006) (same), with *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1254–68 (10th Cir. 2008) (McConnell, J.) (*Locke* "does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support"), and *Badger Catholic, Inc.* v. *Walsh*, 620 F.3d 775, 779–80 (7th Cir. 2010). This Court's review is needed to confirm that what *Trinity Lutheran* gives, *Locke* does not somehow take away.

This case is an ideal vehicle for the Court to resolve the conflict, dispel the confusion, and confirm that government may not discriminate against religion *qua* religion in distributing benefits and imposing burdens based on nothing more than naked animus against religion and people of faith.

ARGUMENT

I. THIS COURT'S REVIEW IS NEEDED TO RESOLVE A SERIOUS CONFLICT OVER WHEN THE ESTABLISHMENT CLAUSE CAN JUSTIFY RELIGIOUS DISCRIMINATION.

This Court made clear in *Trinity Lutheran* that the Free Exercise Clause limits a state's interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution." 137 S. Ct. at 2024 (quoting *Widmar* v. *Vincent*, 454 U.S. 263, 276 (1981)). Yet in striking down the Tax Credit Program, the Montana Supreme Court held that Montana's Blaine Amendment requires *considerably* greater space between church and state than the First Amendment. Regrettably, the Montana Supreme Court's decision is far from an outlier. This Court should grant certiorari, reverse, and confirm that states may not codify naked discrimination against religion out of nothing more than phantom Establishment Clause fears.

1. In *Trinity Lutheran*, Missouri offered grants to subsidize making playground surfaces safer. But because Missouri's Blaine Amendment prohibited taking money "from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion," Missouri "had a policy of categorically disqualifying churches and other religious organizations

from receiving grants under its playground resurfacing program." *Id.* at 2017 (quoting Mo. Const. art. I, § 7).

Trinity Lutheran's preschool applied for—and would have received—a grant but for its religious affiliation. *Id*. at 2017–21. This Court held that the denial violated the Free Exercise Clause because "Trinity Lutheran was denied a grant simply because of what it is—a church." *Id*. at 2023. As the Court explained, the result was to "single out the religious for disfavored treatment" and therefore "impose[] a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Id*. at 2020–21.

This case is indistinguishable. The Montana Department of Revenue—like Missouri's Department of Natural Resources in *Trinity Lutheran*—"categorically disqualif[ied]" religiously affiliated organizations from reaping the benefits of the Tax Credit Program based on the state's Blaine Amendment even though tax credits are not direct or indirect appropriations of public funds. See Mont. Const. art. X, § 6. Here, as there, the Department's rule "expressly discriminates" against religious schools solely on the basis of their religious affiliation—and forced parents to choose between "participat[ing] in an otherwise available benefit program" or sending their children to faith-based schools. See *Trinity Lutheran*, 137 S. Ct. at 2021–22. But rather than striking down the Department's discriminatory rule as incompatible with *Trinity Lutheran*, the court below struck down the Tax Credit Program—a ruling it said was compelled by the state's Blaine Amendment, which "draws a 'more stringent line than that drawn'" by the federal Establishment Clause. Pet. App. 16.

But Missouri's Blaine Amendment drew a similarly stringent line, and this Court rejected the state's argument in support of its discriminatory policy—and specifically instructed courts to be "careful to distinguish" neutral and generally applicable laws from "those that single out the religious for disfavored treatment." *Trinity Lutheran*, 137 S. Ct. at 2020. In *Trinity Lutheran*, Missouri's sole criterion for denying the grant was the church's religious affiliation. This "refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant" put Trinity Lutheran "to the choice between being a church and receiving a government benefit." *Id.* at 2022, 2024. Because states cannot impose "special disabilities on the basis of religious views or status," the Court ruled in Trinity Lutheran's favor. *Id.* at 2021.

Montana's Blaine Amendment imposes precisely such a disability—yet the Montana Supreme Court did not heed the lesson of *Trinity Lutheran* or even mention the case in its ruling. This case is a clear example of a state "pursu[ing] its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character"—exactly what this Court has described as "go[ing] too far." *Id.* at 2024. And here, the need for the Court's review is especially pressing because the discrimination—bad enough on its own—diminishes the educational resources available to parents and children who most need them.

2. Only the weightiest government interest can justify such blatantly discriminatory treatment—and there is nothing remotely sufficient to justify this shameful relic of nineteenth-century bigotry. Any

state policy requiring an institution "to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified * * * must be subjected to the 'most rigorous' scrutiny." *Ibid.* (quoting *Lukumi*, 508 U.S. at 546). Only a state interest "of the highest order" can justify such unequal treatment. *Ibid.* (quoting *McDaniel* v. *Paty*, 435 U.S. 618, 628 (1978)). Moreover, any such law "must be narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 531–32. Montana's Blaine Amendment fails to satisfy either requirement.

First, it serves no legitimate state interest whatsoever—much less a *compelling* one. The only state interest asserted below was ensuring a robust separation of church and state. See Pet. App. 16, 21–23. But this Court has made clear—in no uncertain terms—that any such interest "is limited by the Free Exercise Clause." *Widmar*, 454 U.S. at 276. The state cannot invoke its interest in separating church and state as grounds for *overriding* the Free Exercise Clause—much less for licensing blatant discrimination.

Indeed, a state's interest in avoiding an Establishment Clause violation *cannot* be compelling when its "fears" are "unfounded." *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993); accord, e.g., *Widmar*, 454 U.S. at 280–81 ("groundless" "fear of violating the Establishment Clause" cannot satisfy strict scrutiny). As the Court has noted, "no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement."

Zelman v. *Simmons-Harris*, 536 U.S. 639, 655 (2002). Montana's program offers even more private choice as taxpayers may reap the same credit by donating to public schools—a credit the Montana Supreme Court did not strike down.

As a matter of history, the primary "state interest" advanced by the Blaine Amendments was marginalization of the Catholic minority. But religious animus is never a legitimate state interest. As this Court recently reiterated, states have a "duty under the First Amendment *not* to base laws or regulations on hostility to a religion or religious viewpoint." *Masterpiece Cakeshop*, 138 S. Ct. at 1731 (emphasis added). And yet hostility to Catholicism and those holding Catholic views was the entire point of Blaine Amendments.

Nor is Montana's Blaine Amendment narrowly tailored. Any interest in avoiding an Establishment Clause violation could "be achieved by narrower [policies] that burdened religion to a far lesser degree" than Article X, Section 6. *Lukumi*, 508 U.S. at 546. Montana's Blaine Amendment instead paints with the broadest possible brush—prohibiting *all* financial assistance, no matter how minimal or indirect—to otherwise eligible parents and children based *solely* on their schools' religious affiliation. Sweeping status-based discrimination like this cannot pass constitutional muster. This Court's review is needed to resolve the conflict between the contrary decision below and this Court's precedents.

3. Like the respondents in *Trinity Lutheran*, the Montana Supreme Court relied on this Court's decision in *Locke*. Pet. App. 16 (citing 540 U.S. at 718, 722). But *Locke* does not authorize states to violate

the Free Exercise Clause by broadly discriminating against religious entities when distributing public benefits.

In *Locke*, the Court held that Washington state could deny scholarship funds to a student pursuing a degree in devotional theology. 540 U.S. at 720–21. In upholding the state's policy, the Court relied on the "historic and substantial state interest" in "not funding the religious training of clergy." *Id.* at 722 n.5, 725; see also *id.* at 723 ("That early state constitutions saw no problem in explicitly excluding *only* the ministry from receiving state dollars reinforces our conclusion that religious instruction is of a different ilk.").

In *Trinity Lutheran*, the respondents "attempt[ed] to get out from under the weight of [this Court's] precedents by arguing that the free exercise question" in that case was "controlled by * * * *Locke*." 137 S. Ct. at 2022–23. The Court rejected that argument, explaining that *Locke* did not immunize discriminatory state laws from all Free Exercise challenges. *Id.* at 2023–24. As the Court clarified, *Locke* "was not like [*Trinity Lutheran*]" because there the state was merely denying scholarships to those who use the money to "prepare for the ministry." *Id.* at 2023. The policy upheld in *Locke* was consistent "with the State's antiestablishment interest in not using taxpayer funds to pay for the training of clergy." *Ibid*. "[N]othing of the sort [could] be said about a program to use recycled tires to resurface playgrounds." *Ibid.*

Nothing of the sort can be said about Montana's Blaine Amendment either—it excludes parents from securing financial aid for their children *only* if they choose to send their children to a school affiliated with

a religion even though the children are receiving a general education, not ministerial training. That is precisely the outcome this Court in *Locke* declined to approve. Given the persistent confusion over the scope of *Locke*'s holding, this Court's review is needed to clarify that *Locke* did not endorse a view of the Establishment Clause that would allow the blatant anti-religious discrimination reflected in Montana's Blaine Amendment.

II. CERTIORARI IS WARRANTED TO CLEAR UP PERSISTENT CONFUSION OVER THE SCOPE OF *TRINITY LUTHERAN*.

Since this Court decided *Trinity Lutheran*, a number of courts have essentially ignored it by limiting this Court's decision to its facts. See, e.g., *Caplan*, 92 N.E.3d at 703 (*Trinity Lutheran* does not apply to historic preservation grants); *Hendricks*, 183 A.3d at 942 (*Trinity Lutheran* footnote 3 "appeared to" limit the Court's broader holding); *Morris Cty.*, 181 A.3d at 1009–10 ("scope" of *Trinity Lutheran* did not "extend * * * beyond playground resurfacing"); see also *Real Alts., Inc.* v. *Sec'y Dep't of Health & Human Servs.*, 867 F.3d 338, 361 n.29 (3d Cir. 2017) (through footnote 3, *Trinity Lutheran* "confine[d] its holding to the particular facts and issue before it").

But "[s]uch a reading would be unreasonable" because this Court's "cases are 'governed by general principles, rather than ad hoc improvisations.'" *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., joined by Thomas, J., concurring) (quoting *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 25 (2004) (Rehnquist, C.J., concurring in judgment)).

Other courts have correctly recognized that *Trinity Lutheran*'s holding—that states cannot "impose special disabilities on the basis of religious status," *id.* at 2021 (majority) (alterations omitted) (quoting *Lukumi*, 508 U.S. at 533)—is not confined to playground equipment. E.g., *Taylor* v. *Town of Cabot*, 178 A.3d 313, 322–25 (Vt. 2017) (applying *Trinity Lutheran* to uphold a historic preservation grant to a church); *Moses*, --- P.3d ---, 2018 WL 6566646, at *1–2 (upholding textbook-loan program for students attending religious schools in light of *Trinity Lutheran*).

As the *Trinity Lutheran* majority explained, its holding was "unremarkable in light of [this Court's] prior decisions"—none of which had anything to do with playgrounds. 137 S. Ct. at 2021 (citing *Mitchell*, 530 U.S. 793, *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995), *Lukumi*, 508 U.S. 520, *Lamb's Chapel*, 508 U.S. 384, and *Widmar*, 454 U.S. 263). Together, these decisions "make one thing clear"—a policy that "expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character" contravenes the Free Exercise Clause. *Ibid.*

This Court's review is needed to clear up the evident confusion and confirm that the general principles announced in *Trinity Lutheran* are not limited to the particular facts of that case. The Court should grant the petition and make expressly clear what *Trinity Lutheran* implies—that state Blaine Amendments are unconstitutional.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted.

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