No. 18-1195

In the Supreme Court of the United States

KENDRA ESPINOZA, ET AL., PETITIONERS

v.

MONTANA DEPARTMENT OF REVENUE, ET AL.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MONTANA

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the no-aid provision of the Montana Constitution, which disqualifies religious schools from receiving neutral and generally available public funds, violates the Free Exercise Clause of the U.S. Constitution.

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in the preservation of the free exercise of religion. The United States participated in the proceedings below as amicus curiae supporting petitioners.

STATEMENT

1. In 1875, Congressman James G. Blaine proposed an amendment to the Federal Constitution that would have provided that "no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect." H.R. Journal, 44th Cong., 1st Sess. 1383 (1875). Congress considered that proposal during an era of widespread hostility to Catholicism in general and to Catholic schools in particular. See Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal

Hist. 38 (1992). The proposed amendment garnered the necessary two-thirds majority in the House of Representatives, but fell four votes short in the Senate. 4 Cong. Rec. 5191, 5595 (1876). Blaine's proposal proved more successful, however, in the States. By the 1890s, around 30 States had incorporated bans on aid to religious schools into their constitutions. See Green 43.

Montana is one such State. When it achieved statehood in 1889, Montana included in its state constitution a ban on using public funds "to aid in the support of any school * * * controlled in whole or in part by any church, sect or denomination whatever." Mont. Const. of 1889, Art. XI, § 8. Montana carried forward that ban when it adopted a new constitution in 1972. Article X, Section 6 of that new constitution, captioned "Aid prohibited to sectarian schools," 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. of 1972 (Mont. Const.). The Montana Supreme Court refers to that clause as the "no-aid provision." Pet. App. 16.

2. In 2015, the Montana Legislature created a program "to provide parental and student choice in education." Mont. Code Ann. § 15-30-3101 (2017). Through the program, the State granted a tax credit of up to $150 a year to any taxpayer who donated money to a participating scholarship organization. *Id.* § 15-30-3111. The

organizations, in turn, used those donations to fund scholarships for students at qualifying private schools. *Id.* § 15-30-3103. Students could use those scholarships at any qualifying private schools chosen by their parents or legal guardians; neither the donors nor the scholarship organizations could restrict the scholarships to a particular type of school. *Id.* § 15-30-3103(1)(b).

Soon afterward, however, the Montana Department of Revenue adopted a regulation, known as Rule 1, that "excluded religiously-affiliated private schools" from the tax-credit program. Pet. App. 13. Rule 1 prohibited the recipient of a scholarship from using the funds at any school "owned or controlled in whole or in part by any church, religious sect, or denomination." Mont. Admin. R. 42.4.802(1)(a) (2016). The Department explained that it adopted Rule 1 to reconcile the tax-credit program with the no-aid provision. Pet. App. 89.

3. Petitioners Kendra Espinoza, Jeri Ellen Anderson, and Jaime Schaefer brought this lawsuit in Montana state court in order to challenge Rule 1. Pet. App. 102. Petitioners' children received scholarships from Big Sky Scholarships, an organization that participated in the state tax-credit program and that "prioritize[d] families who are low income as well as families with children who have physical, mental, and/or learning disabilities." *Id.* at 122. Petitioners' children used those scholarships to attend Stillwater Christian School, a nondenominational Christian school in the Flathead Valley in northwestern Montana. *Id.* at 102 & n.2.

a. The Montana Eleventh Judicial District Court granted petitioners a preliminary injunction and later summary judgment and a permanent injunction against Rule 1. Pet. App. 86-95; *id.* at 96-119. The court held

that Rule 1 rested on a "mistake of law." *Id.* at 94. In the court's view, the state constitution's no-aid provision prohibited only "appropriations" to religious schools, "not tax credits." *Ibid.* The court thus concluded that the no-aid provision could not justify the Department's decision to disqualify religious schools from the tax-credit program. *Ibid.*

b. The Department appealed to the Montana Supreme Court. The United States filed a brief as amicus curiae supporting petitioners, arguing that Rule 1 contravened the Free Exercise Clause by imposing a special disability on the basis of religious status. See U.S. Amicus Br. 7-16.

In a 5-2 decision, the Montana Supreme Court reversed. Pet. App. 4-85. The court first held that the tax-credit program violated the no-aid provision. *Id.* at 16-32. It explained that the provision "broadly prohibits 'any' state aid to sectarian schools," including aid provided through tax credits. *Id.* at 16, 28. And it concluded that the program violated that prohibition because schools that benefit from the program could be "religiously affiliated." *Id.* at 28.

The Montana Supreme Court next held that the violation of the state constitution required the invalidation of the whole tax-credit program. The court explained that there was "no mechanism within the Tax Credit Program itself" that would have prevented the flow of funds to religious schools and that, as a result, the program "cannot, under *any* circumstance, be construed as consistent with Article X, Section 6." Pet. App. 28-29. The court further held that the Department had exceeded its authority by attempting to reconcile the statute with the no-aid provision through Rule 1. *Id.* at 29,

32-34. The court explained that the statute "broadly defined" the class of eligible schools "to include all private schools in Montana, including religiously-affiliated schools," and that the agency had no authority to narrow that definition. *Id.* at 33. In the court's view, the agency could not "transform an unconstitutional statute into a constitutional statute with an administrative rule." *Id.* at 34.

Finally, the Montana Supreme Court concluded that its interpretation of the no-aid provision complied with the Free Exercise Clause. Pet. App. 31-32. It explained that the U.S. Constitution left "'room for play' between the joints of the Establishment and Free Exercise Clauses." *Id.* at 32. It acknowledged that "an overly-broad" interpretation of the no-aid provision "could implicate free exercise concerns" in some cases, but declared that "this is not one of those cases." *Ibid.*

Two justices issued concurring opinions. Justice Gustafson concluded that, in addition to violating the no-aid provision of the state constitution, the tax-credit program also violated the Religion Clauses of the U.S. Constitution. Pet. App. 35-51. And Justice Sandefur "concur[red] with the majority" that the state no-aid provision "does not violate the Free Exercise Clause of the First Amendment." *Id.* at 57-58; see *id.* at 52-60.

Two justices dissented. Justice Baker explained that, in her view, tax credits fell outside the scope of the no-aid provision. Pet. App. 61-77. And Justice Rice explained that, in his view, the tax-credit program complied with the no-aid provision because the program involved "no government action endorsing or directing funds for sectarian or religious purposes," but rather

"create[d] a neutral opportunity for genuine independent choices of donors and scholarship recipients." *Id.* at 82-83; see *id.* at 78-85.

SUMMARY OF ARGUMENT

A. The Free Exercise Clause, as incorporated by the Fourteenth Amendment, generally prohibits discrimination on the basis of religious status in the distribution of public benefits. The Framers of the Bill of Rights were well aware that Parliament and colonial legislatures had denied civil and political privileges on account of religious status, and they adopted the Free Exercise Clause in part in order to prevent those abuses. Against the backdrop of that history, this Court has long held that the Clause bars laws that target religion for special disabilities. Montana's no-aid provision contradicts those principles because it discriminates on the basis of religious status by disqualifying "sectarian" private schools, but not secular private schools, from receiving public funding. That imposition of a special disability on religious schools, because they are religious, violates the Free Exercise Clause.

B. Montana's contrary arguments lack merit. Montana emphasizes that the state court has now terminated the tax-credit program in its entirety as a remedy for the violation of the no-aid provision, and it claims that the remedy means that it has not discriminated on the basis of religious status at all. Montana focuses on the wrong link in the chain. Regardless of whether *the remedy* discriminates on account of religion, *the no-aid provision* certainly does, by subjecting religious schools alone to a special disability. Montana also contends that the no-aid provision discriminates on the basis of the religious use of funds, rather than religious status. But

the provision denies funds to schools with religious affiliations, even if those schools provide a secular education. That is discrimination because of status, not use. Finally, Montana asserts an interest in avoiding religious establishments. But the Establishment Clause generally does not require a State to subject religious adherents to special disabilities because of their religious status. Nor may a State justify such disabilities by invoking an interest in achieving an even greater degree of church-state separation than the Establishment Clause requires.

ARGUMENT

The Constitution forbids imposing special disabilities on religious adherents on the basis of their religious status. The Montana no-aid provision violates that elementary rule. It prohibits religious schools, simply because of their religious character, from receiving funds available to the rest of the community. That discriminatory restriction is "odious to our Constitution," and it "cannot stand." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2025 (2017).

A. Montana's No-Aid Provision Violates The Free Exercise Clause Of The U.S. Constitution

1. The Free Exercise Clause generally prohibits the denial of benefits on the basis of religious status

The Free Exercise Clause protects religion against discrimination by the Federal Government, and the Fourteenth Amendment makes that guarantee applicable to the States. As a general rule, the Clause prohibits laws that disqualify religious entities, because of their religious character, from benefits that are available to the rest of the public.

a. To the Framers of the Bill of Rights, the denial of civil and political privileges on the basis of religion was a familiar tool of religious persecution. In the early 17th century, for example, Parliament required people to worship in the Church of England before obtaining naturalization or certain forms of clemency, justifying that condition on the ground that naturalization and clemency were "Matters of meere Grace and Favour," "not fitt to be bestowed upon any others then such as are of the Religion nowe established." Naturalization and Restoration of Blood Act, 1609, 7 Jac. 1, c. 2 (Eng.), *reprinted in* 4 Statutes of the Realm 1157 (1963). Later statutes disqualified religious dissenters from serving as legal guardians to orphans; holding civil, military, and municipal office; sitting in Parliament; teaching at Oxford and Cambridge; and receiving teachers' licenses.[*] Colonial legislatures, too, enacted a "host of laws" that imposed "burdens and disabilities of various kinds" on the basis of religion. *Torcaso* v. *Watkins*, 367 U.S. 488, 490 (1961).

Many colonists—"too many to mention"—"spoke out" against "the philosophy of intolerance" underlying those laws. *Torcaso*, 367 U.S. at 490. The most notable denunciation came in the Virginia Act for Establishing Religious Freedom, an act of the Virginia legislature that was written by Thomas Jefferson and sponsored by

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[*] See Tenures Abolition Act 1660, 12 Car. 2, c. 24, § 8 (Eng.), *reprinted in* 5 Statutes of the Realm 260 (1963); Corporation Act, 1661, 13 Car. 2, Stat. 2, c. 1, § 1 (Eng.), *reprinted in* 5 Statutes of the Realm 321-323 (1963); Act of Uniformity, 1662, 14 Car. 2, c. 4, § 6 (Eng.), *reprinted in* 5 Statutes of the Realm 366 (1963); First Test Act, 1673, 25 Car. 2, c. 2, § 1 (Eng.), *reprinted in* 5 Statutes of the Realm 782-783 (1963); Second Test Act, 1678, 30 Car. 2, Stat. 2, c. 1, § 1 (Eng.), *reprinted in* 5 Statutes of the Realm 894-895 (1963); Schism Act, 1714, 13 Ann., c. 7, § 2 (London, 1714).

James Madison. The statute's preamble condemned the imposition not only of "punishments," but even of "civil incapacitations," on the basis of religion. Virginia Act for Establishing Religious Freedom (Oct. 31, 1785), *reprinted in* 5 *The Founders' Constitution* 84-85 (Philip B. Kurland & Ralph Lerner eds., 1987). Proclaiming that "our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry," the preamble explained that "laying upon [a person] an incapacity to being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow citizens he has a natural right." *Ibid.* And the statute itself provided that religious beliefs "shall in no wise diminish, enlarge, or affect [one's] civil capacities." *Ibid.*

The Religion Clauses of the First Amendment "had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute." *Everson* v. *Board of Educ.*, 330 U.S. 1, 13 (1947). Through the Free Exercise Clause, the Framers of the First Amendment prevented the abuses that they had witnessed in England and the colonies, and denied the government the power to withhold public benefits on the basis of the recipient's religious character.

b. This Court's precedents confirm that understanding of the Free Exercise Clause. The Court has explained that a State "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation."

Everson, 330 U.S. at 16. It has noted that a State may not "condition the availability of benefits" upon a person's surrender of his "religious faith," *McDaniel* v. *Paty*, 435 U.S. 618, 626 (1978) (plurality opinion) (citation omitted), or require a person to "purchase his right" to exercise his religion "by sacrificing" a state-granted privilege, *id.* at 634 (Brennan, J., concurring in the judgment). It has said that the government may not "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988). It has observed that the government may not "impose special disabilities on the basis of religious views or religious status." *Employment Div.* v. *Smith*, 494 U.S. 872, 877 (1990). It has recognized that the Constitution "protects religious observers against unequal treatment." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 542 (1993) (citation and brackets omitted). And it has remarked that its decisions "have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality opinion).

This Court applied those principles most recently in *Trinity Lutheran*, *supra*. In that case, the State of Missouri offered grants to help schools improve their playgrounds, but prohibited schools controlled by churches from participating in the program. 137 S. Ct. at 2017. This Court explained that the Free Exercise Clause "'protects religious observers against unequal treatment'" and, as a general matter, prohibits "laws that target the religious for 'special disabilities' based on

their 'religious status.'" *Id.* at 2019 (citation and brackets omitted). The Court determined that Missouri's policy violated that "basic principle" because it "expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." *Id.* at 2019, 2021. That "express discrimination against religious exercise" imposed a forbidden "penalty on the free exercise of religion." *Id.* at 2021-2022. That penalty was "nothing so dramatic" as "chains," "torture," or "the denial of political office," but it was "odious to our Constitution all the same, and [could not] stand." *Id.* at 2024-2025.

In *Trinity Lutheran*, this Court distinguished its previous decision in *Locke* v. *Davey*, 540 U.S. 712 (2004), which upheld Washington State's refusal to fund degrees in theology as part of a state scholarship program. *Davey* emphasized that the State had gone "a long way toward including religion in its benefits," and had "merely chosen not to fund a distinct category of instruction." *Id.* at 721, 724. The Court explained that the State's decision reflected the "historic and substantial state interest" in declining to subsidize the "essentially religious endeavor" of "[t]raining someone to lead a congregation." *Id.* at 721, 725. *Trinity Lutheran* therefore interpreted *Davey* to mean that, where a State denies funds because of what the recipient "propose[s] to do" with those funds, rather than because of the recipient's identity, the State's "'historic'" interests may justify a refusal to fund certain "'essentially religious endeavor[s].'" *Trinity Lutheran*, 137 S. Ct. at 2023 (citation and emphasis omitted).

In *Trinity Lutheran*, this Court suggested only one narrow exception to the general prohibition on discrim-

ination against religious adherents on the basis of religious status. Although "'a law targeting religious beliefs as such is never permissible,'" the Court left open the possibility that a law that discriminates on the basis of religious status may be constitutional if it satisfies "the 'most rigorous' scrutiny." 137 S. Ct. at 2024 & n.4 (citations omitted). "Under that stringent standard, only a state interest 'of the highest order' can justify [a] discriminatory policy." *Ibid.* (citation omitted).

c. The prohibition on discrimination on the basis of religious status serves vital purposes. First and foremost, the ban protects religious liberty—the right to practice one's religion without coercion or pressure from the government to change one's beliefs. Whenever a State "conditions receipt" of a "benefit" upon the surrender of one's faith, it puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas* v. *Review Bd.*, 450 U.S. 707, 717-718 (1981). As the English and colonial experience of test oaths and civil incapacities proves, such a condition "inevitably deters or discourages the exercise" of religion. *Trinity Lutheran*, 137 S. Ct. at 2022 (citation and brackets omitted).

The ban on discrimination on the basis of religious status also protects religious equality. Under our Constitution, any citizen who "seeks the benefits of citizenship" does so "not as an adherent," but "as an American." *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1841 (2014) (Kagan, J., dissenting). That principle means that, in "seeking civic benefits, each person of this nation must experience a government that belongs to one and all, irrespective of belief." *Id.* at 1849. A State contravenes that principle when it "treat[s] religion and those who teach or practice it, simply by virtue of their

status as such, as subversive of American ideals and therefore subject to unique disabilities." *McDaniel*, 435 U.S. at 641 (Brennan, J., concurring in the judgment).

Finally, the ban on discrimination on the basis of religious status helps avoid religious strife. When a State denies "religious groups" benefits that are "open to others," it demonstrates "hostility toward religion." *Board of Educ.* v. *Mergens*, 496 U.S. 226, 248 (1990) (plurality opinion). That "aggressively hostile" attitude toward religion tends to "'create the very kind of religiously based divisiveness'" that the Free Exercise Clause was meant to prevent. *American Legion* v. *American Humanist Ass'n*, 139 S. Ct. 2067, 2085 (2019) (citation omitted).

2. Montana's no-aid provision impermissibly denies benefits on the basis of religious status

Montana's no-aid provision, as interpreted by the Montana Supreme Court, violates the Free Exercise Clause. The provision's text demonstrates its unconstitutionality, and history, precedent, and the purposes of the Free Exercise Clause confirm that conclusion.

The no-aid provision, on its face, discriminates on the basis of religious status. The caption explains that the provision prohibits aid to a particular category of schools: "sectarian schools." Mont. Const. Art. X, § 6. The provision's operative text forbids aid to any school "controlled in whole or in part by any church, sect, or denomination." *Ibid.* And the Montana Supreme Court confirmed that the provision "broadly and strictly prohibits aid to sectarian schools." Pet. App. 17 (emphasis omitted). The provision thus incapacitates a school from receiving public funds simply because of what it is—a "sectarian" school, or a school controlled by a

"church, sect, or denomination." By adopting that incapacitation, Montana has "expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character," in violation of the Free Exercise Clause. *Trinity Lutheran*, 137 S. Ct. at 2021.

The disability imposed by the no-aid provision resembles the religious disabilities that the Founders rejected when they adopted the First Amendment. For instance, Montana's denial of public funds on account of religious status parallels the English Parliament's denial of "any Pay, Salary, Fee or Wages" from the Crown on account of religious status. First Test Act, 1673, 25 Car. 2, c. 2, § 1 (Eng.), *reprinted in* 5 Statutes of the Realm 782-783 (1963). In Jefferson's words, by disqualifying religious schools, and religious schools alone, from receiving public funds from the State, the no-aid provision deprives such schools of the "privileges and advantages" that they have a "natural right" to enjoy "in common" with the rest of the community. Virginia Act for Establishing Religious Freedom. The Framers of the Bill of Rights denied the government the power to impose such "civil incapacitations." *Ibid.*

The disability in this case is also far more severe than the disability in *Trinity Lutheran*. The policy in *Trinity Lutheran* excluded a church from a single governmental program that enabled schools to improve their playgrounds. The no-aid provision, in contrast, excludes religious schools from every single funding program that the state legislature might ever enact. In addition, the policy in *Trinity Lutheran* disqualified churches only from receiving funding directly from the government. The no-aid provision, in contrast, prohibits even "indirect" payments to religious schools, Mont.

Const. Art. X, § 6—meaning, in this case, that the state legislature may not allow parents to choose to use their children's scholarship dollars at religious schools. It is bad enough for a State to discriminate against religion when distributing funds itself; it is even worse for a State to prohibit private parties from independently directing funds to religious entities.

Further, the disability in this case frustrates the purposes of the Free Exercise Clause. It undermines religious liberty by pressuring religious parents and religious schools to forgo religious education in order to obtain a public benefit. See *Trinity Lutheran*, 137 S. Ct. at 2022. It undermines religious equality by treating religious schools, "simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *McDaniel*, 435 U.S. at 641 (Brennan, J., concurring in the judgment). And it foments religious division by demonstrating an "aggressively hostile" attitude toward religion. *American Legion*, 139 S. Ct. at 2085.

The constitutional violation in this case is especially egregious because it involves the education of children. The right of a parent to determine the role of religion in his child's education is one of the most important elements of religious liberty. See *Wisconsin* v. *Yoder*, 406 U.S. 205, 213-214 (1972); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-536 (1925). Some parents believe that schools should "inculcate all needed temporal knowledge" but should "maintain a strict and lofty neutrality as to religion"—so that the child can receive his religious instruction at home or in church, or so that "after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion" on his own. *Everson*, 330 U.S. at 24 (Jackson, J., dissenting). Other

parents prefer "not [to] leave the individual to pick up religion by chance," but insist on "early and indelible" religious instruction in their children's schools. *Id.* at 23. The no-aid provision allows the State to fund the first religious choice, but not the second. It thus penalizes parents who choose a religious rather than a secular school for their children. And it demonstrates "special hostility" for people who "take their religion seriously" and "think that their religion should affect the whole of their lives"—including their (or their children's) education. *Mitchell*, 530 U.S. at 827-828 (plurality opinion).

B. The Contrary Arguments Lack Merit

In the briefs that it has filed so far, Montana appears to make four broad arguments. Montana first argues that procedural obstacles preclude the Court from reaching the merits at all. Moving to the merits, Montana argues that it has not discriminated on the basis of religion, that the discrimination in this case is permissible because it relates to the religious use of funds rather than the religious status of the funding recipient, and that the discrimination is justified by the State's interests in avoiding an establishment of religion. All of those arguments are unsound.

1. Montana first argues (Br. in Opp. 15-24) that procedural obstacles preclude this Court from reaching the merits. "In granting certiorari, [the Court] necessarily considered and rejected that contention as a basis for denying review." *United States* v. *Williams*, 504 U.S. 36, 40 (1992). Montana nevertheless argues (Br. in Opp. 15-21) that this Court may not review the constitutionality of the no-aid provision because petitioners did not raise that issue in the state courts below. But petitioners *did* raise that issue below. They argued (Pet. Mont.

Sup. Ct. Br. 34, 39 & n. 30) that the Free Exercise Clause prohibits "discrimination against all religion," that the Department of Revenue's reading of the no-aid provision placed that provision "on a collision course with the U.S. Constitution," and that the invalidation of the whole program still "fails to harmonize [the no-aid provision] with the Religion Clauses."

In any event, "[i]t is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided." *Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 667 (1991). The Montana Supreme Court explicitly decided that the no-aid provision complies with the Free Exercise Clause, stating that, although "there may be a case" where an "overly broad" application of the no-aid provision "could implicate free exercise concerns," "this is not one of those cases." Pet. App. 32. Justice Sandefur "concur[red] with the majority" that the tax-credit program "does not violate the Free Exercise Clause." *Id.* at 57-58. And Justice Baker's dissent observed that the Court had "dismisse[d] any Free Exercise Clause concerns by proclaiming simply that 'this is not one of those cases.'" *Id.* at 75 (citation omitted).

Montana also argues (Br. in Opp. 21-24) that the decision below rests on independent and adequate state grounds. That, too, is incorrect. The doctrine of independent and adequate state grounds has no application where the "ruling under state law implicates an underlying question of federal law"—for instance, where the challenger contends that the state court had no authority to apply the state law in the first place, because the state law itself violates federal law. *International Longshoremen's Ass'n* v. *Davis*, 476 U.S. 380, 388 (1986). The

state court's ruling under the no-aid provision "implicates an underlying question of federal law," *ibid.*—namely, whether the no-aid provision violates the Free Exercise Clause of the U.S. Constitution. This Court has jurisdiction to "ascertain whether [the state] court correctly resolved th[at] antecedent federal question." *Ibid.*

2. Turning to the merits, Montana argues (Br. in Opp. 31-37) that, because the state court remedied the violation of the no-aid provision by terminating the tax-credit program in its entirety—thereby making the tax credits unavailable to religious and secular schools alike—the State of Montana has not discriminated on the basis of religion. Montana's argument focuses on the wrong link in the chain—on the closure of the tax-credit program, rather than the provision of state law that triggered that closure. As explained earlier, the no-aid provision discriminates against religion because it disqualifies "sectarian" schools from receiving public funds solely on account of those schools' "sectarian" character. See p. 13, *supra*. The provision therefore violates the U.S. Constitution.

Because the no-aid provision contravenes the U.S. Constitution, the state court had no authority to enforce it, and certainly no authority to award a remedy for its violation. In general, "[a]n unconstitutional law is void, and is as no law." *Ex parte Siebold*, 100 U.S. 371, 376 (1880). A court faced with an unconstitutional law must thus decide the case "conformably to the constitution, disregarding the law." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 178 (1803). The Montana Supreme Court violated that obligation when, instead of disregarding the unconstitutional no-aid provision, it applied that provision to terminate the tax-credit program.

That conclusion is not contrary to *Palmer* v. *Thompson*, 403 U.S. 217, 221 n.6 (1971), and *Evans* v. *Abney*, 396 U.S. 435 (1970), where this Court held that a State does not violate the Equal Protection Clause's prohibition on racial discrimination by closing a public facility (such as a swimming pool or a public park) to black and white citizens alike. Neither *Palmer* nor *Evans* involved a state law that discriminated on its face on the basis of race in the way that the no-aid provision discriminates on its face on the basis of religion. To the contrary, in *Evans*, the Court emphasized that the closure of the park resulted from "the operation of neutral and nondiscriminatory state trust laws." 396 U.S. at 446. And in *Palmer*, it emphasized that the closure of the swimming pools resulted from an ordinance with neutral "facial content," and it distinguished that ordinance from "explicitly" discriminatory laws. 403 U.S. at 221 n.6, 225.

The conclusion that Montana has violated the Free Exercise Clause is also consistent with the principle that a State may cure a denial of equal treatment either by leveling up (extending the benefit to all) or leveling down (withholding the benefit from all). See, *e.g.*, *Levin* v. *Commerce Energy, Inc.*, 560 U.S. 413, 426-427 (2010). The state court's invalidation of the tax-credit program may have cured the discrimination in the Department of Revenue's regulation excluding religious groups from the program, but it has not cured the discrimination in the no-aid provision itself. The State has neither leveled that provision up (allowing both religious and secular private schools to receive public funds) nor leveled that provision down (prohibiting all private schools

from receiving public funds). The discriminatory restriction on religious schools remains intact, and the violation of the First Amendment remains unaddressed.

3. Montana next argues (Br. in Opp. 35) that the U.S. Constitution distinguishes between a funding recipient's religious status and a funding recipient's use of the funds for religious purposes. In Montana's view, a State may not deny a person funds because of his religious status, but it may deny him funds because he plans to put those funds to a religious use.

Whether the distinction between religious use and religious status should be constitutionally significant is not free from doubt, and the line between the two may sometimes be difficult to draw. See *Trinity Lutheran*, 137 S. Ct. at 2025 (Gorsuch, J., concurring in part). And even if a restriction could fairly be said to rest on religious use, rather than religious status, a court must guard against reading the restriction too broadly. "If a facially use-based religious-funding restriction is given too broad a sweep, it might well amount to status-based religious discrimination." O.L.C., *Religious Restrictions on Capital Financing for Historically Black Colleges and Universities*, slip op. 23 (Aug. 15, 2019). For example, "[t]o consider all activities of a religious school to be 'related to' sectarian instruction, and prohibit funding for the school on that basis, would risk collapsing the distinction between religious status and religious use." *Ibid.*

This Court need not, however, confront those issues in this case. Regardless of whether or where one draws the line between status and use, the no-aid provision plainly discriminates on the basis of religious status. It disqualifies religious schools from receiving public funds because of their religious identity, not because of

the religious content of the instruction they provide. The provision's caption states that the provision bars aid to "sectarian schools." Mont. Const. Art. X, § 6. The operative text disqualifies a school from receiving public funds if the school is "controlled in whole or in part by any church, sect, or denomination." *Ibid.* And the Montana Supreme Court has explained that the provision "broadly and strictly prohibits aid to sectarian schools." Pet. App. 17 (emphasis omitted). The caption, the text, and the Montana Supreme Court's interpretation all make plain that it is the "sectarian" character of the school, rather than the manner in which the school proposes to use the funds, that triggers the disqualification. That is discrimination on the basis of status, not use.

The Montana Supreme Court's analysis in this case confirms that the state no-aid provision discriminates on the basis of religious status. In order to qualify for Montana's tax-credit program, private schools (whether secular or religious) were required to "provide an organized course of study that includes instruction in the subjects required of public schools." Mont. Code Ann. § 20-5-109(4) (2017); see *id.* § 15-30-3102(7). In other words, they were required to teach standard, secular subjects such as reading, writing, mathematics, and science. Despite that requirement, the Montana Supreme Court held that the no-aid provision prohibited such schools from receiving any public funds, simply because those schools are "religiously affiliated." Pet. App. 28. The court explained that a "religiously-affiliated private school" may not receive "public funds," even if that school "provide[s] standard, non-religious instruction." *Id.* at 29-30. And it relied on an earlier decision in which it had interpreted the no-aid provision to prohibit "a tax

levy intended to fund general teaching positions at a religiously-affiliated private school," "[e]ven though the teachers would have taught general, secular subjects." *Id.* at 22-23 (citing *State ex rel. Chambers* v. *School Dist. No. 10*, 472 P.2d 1013, 1020-1021 (Mont. 1970) (per curiam)). Disqualifying a school from receiving any public funds because it is "religiously affiliated," even if the school provides "standard, non-religious instruction," is discrimination on the basis of religious status, not religious use.

4. Montana last argues (Br. in Opp. 35) that "constitutional no-aid principles" justify denying aid to religious schools. That argument is unsound.

a. Montana properly has not argued that compliance with the Establishment Clause requires the exclusion of religious schools from funding programs that are open to others. Time and again, this Court has rejected contentions that a State has violated the Establishment Clause by allowing religious groups to benefit from neutral governmental programs that are generally open to broad classes of participants. "If a program offers permissible aid to the religious (including the pervasively sectarian), the areligious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be." *Mitchell*, 530 U.S. at 827 (plurality opinion); see *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 649-653 (2002); *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 113 (2001); *Agostini* v. *Felton*, 521 U.S. 203, 230-231 (1997); *Rosenberger* v. *Rector*, 515 U.S. 819, 842-843 (1995); *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 762-763 (1995); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8-11 (1993); *Lamb's Chapel* v. *Center Moriches Union Free Sch.*

Dist., 508 U.S. 384, 395 (1993); *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 486-488 (1986); *Mueller* v. *Allen*, 463 U.S. 388, 399-401 (1983); *Widmar* v. *Vincent*, 454 U.S. 263, 273 (1981); *Board of Educ.* v. *Allen*, 392 U.S. 236, 238, 243-244 (1968); *Everson*, 330 U.S. at 17-18.

Unable to argue that the no-aid provision is necessary to comply with the Establishment Clause, Montana asserts an interest in pursuing an even greater degree of separation between religion and government than the Establishment Clause requires. This Court has repeatedly determined, however, that such an interest, standing alone, is insufficient to justify discrimination against religion. For instance, in *McDaniel*, the Court held that the "interest in preventing the establishment of a state religion" could not justify disqualifying ministers from running for political office. 435 U.S. at 628 (plurality opinion); see *id.* at 636-642 (Brennan, J., concurring in the judgment). In *Widmar*, the Court held that the interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause" could not "justify content-based discrimination against * * * religious speech." 454 U.S. at 276. And in *Trinity Lutheran*, the Court held that, "[i]n the face of [a] clear infringement on free exercise," a "preference for skating as far as possible from religious establishment concerns" could not "qualify as compelling." 137 S. Ct. at 2024.

b. *Davey* is not to the contrary. In that case, as noted earlier, this Court upheld a State's refusal to fund degrees in devotional theology as part of a state scholarship program. The Court explained that the Establishment Clause did not require the State to take that step, but that the State's "antiestablishment interests"

nonetheless supported its policy. 540 U.S. at 722. For three reasons, *Davey* does not support Montana here.

First, this Court has explained that *Davey* involved the denial of funds for religious uses, not the denial of funds on the basis of religious status. And the Court "took account of [the State's] antiestablishment interest only after determining" that the theology student "was denied a scholarship because of what he proposed *to do*" rather than "because of who he *was*." *Trinity Lutheran*, 137 S. Ct. at 2023 (citation omitted). In this case, the no-aid provision denies funds to "sectarian" schools, even if the schools seek to use those funds for secular instruction. See pp. 20-21, *supra*. Nothing in *Davey* suggests that a State's interests in avoiding an establishment of religion could justify that kind of discrimination.

Second, *Davey* involved payment for the "essentially religious endeavor" of "[t]raining someone to lead a congregation." 540 U.S. at 721. This case, by contrast, involves education at a religious school. This Court has recognized that "religious schools pursue two goals, religious instruction and secular education," and that the "secular teaching" provided at a religious school can still promote "the State's interest in education." *Allen*, 392 U.S. at 245. Because education at a religious school can still serve secular purposes, such an education does not amount to an "essentially religious endeavor" in the sense that "[t]raining someone to lead a congregation" does. *Davey*, 540 U.S. at 721.

Third, the Court in *Davey* emphasized that the State's restriction rested on a strong "historic[al]" foundation. 540 U.S. at 725. It noted that the use of public funds to support the clergy "was one of the hallmarks of an 'established' religion" at the time of the Founding,

that the Founders experienced "popular uprisings against procuring taxpayer funds to support church leaders," and that many States "around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry." *Id.* at 722-723. There is no comparable historical justification for allowing States to disable religiously affiliated schools from receiving public funds. To be sure, numerous States have adopted constitutional provisions, modeled on the Blaine Amendment, prohibiting aid to "sectarian" schools. But unlike the provisions discussed in *Davey*, the Blaine provisions generally date to the late 19th century rather than to the founding era. And the Blaine provisions have "a shameful pedigree" and were "born of bigotry." *Mitchell*, 530 U.S. at 828-829 (plurality opinion). The States considered those provisions "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.'" *Id.* at 828; see *Zelman*, 536 U.S. at 721 (Breyer, J., dissenting). Such provisions do not establish a compelling interest justifying the discrimination embodied in Montana's no-aid provision.

CONCLUSION

The judgment of the Supreme Court of Montana should be reversed.

Respectfully submitted.

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