No. 18-1195

IN THE

Supreme Court of the United States

KENDRA ESPINOZA, ET AL.,

PETITIONERS,

V.

MONTANA DEPARTMENT OF REVENUE, ET AL.,

RESPONDENTS.

On Writ of Certiorari to the Montana Supreme Court

BRIEF OF THE LIBERTY JUSTICE CENTER AND AMERICAN FEDERATION FOR CHILDREN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Brian K. Kelsey
Counsel of Record
Jeffrey M. Schwab
Daniel R. Suhr
LIBERTY JUSTICE CENTER
190 LaSalle St., Ste. 1500
Chicago, IL 60603
(312) 263-7668
bkelsey@libertyjusticecenter.org

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QUESTIONS PRESENTED

1. Does Montana violate the First Amendment's Establishment Clause by prohibiting students and families who choose to enroll in private religious schools from participating in the Montana Tax Credit Scholarship Program while allowing participation by students enrolling in private non-religious schools.

2. Does Montana violate the Fourteenth Amendment's Equal Protection Clause by enforcing its Blaine Amendment to bar religious schools from participation in its Tax Credit Scholarship Program?

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INTEREST OF THE AMICI CURIAE[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest legal aid firm that seeks to protect economic liberty, private property, free speech, and other fundamental rights through precedent-setting litigation. The Liberty Justice Center takes an interest in this case because of its dedication to expanding liberty and individual rights, including its defense of parental choice in education in legal settings nationwide.

The American Federation for Children is a leading national advocacy organization promoting school choice with a specific focus on school vouchers, scholarship tax credit programs, and Education Savings Accounts ("ESAs"). The American Federation for Children seeks to improve our nation's K-12 education by advancing public policy that empowers parents, particularly those in low-income families, to choose the education they determine is best for their children.

In their joint amicus brief at the certiorari stage, LJC and AFC highlighted the importance of this case for the many children that school choice serves, such as students with physical and intellectual disabilities, students from military or tribal families, and students who are victims of bullying.

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than *amici* funded its preparation or submission. Both Petitioners and Respondents submitted letters with blanket consent for *amicus* briefs in support of either party.

SUMMARY OF ARGUMENT & INTRODUCTION

"Today many of our inner-city public schools deny emancipation to urban minority students." *Zelman v. Simmons-Harris*, 536 U.S. 639, 676 (2002) (Thomas, J., concurring). Sadly, the bureaucrats of the Montana Department of Revenue have erected regulatory barriers that also deny emancipation to thousands of low-income students in urban, suburban, and rural schools across the Big Sky State.

They do so in a misguided attempt to enforce a state constitutional clause—Montana's Blaine Amendment—originally enacted to exclude a disfavored religious minority. The Department's rule achieves this very goal. It cuts off low-income families from educational institutions founded in a diversity of faith traditions. This excise is not permitted by the Establishment Clause of the U.S. Constitution. The Establishment Clause is a shield to protect minority religious adherents from majoritarian coercion, not a sword to sever them from generally available government programs.

The Equal Protection Clause also shelters within its embrace those minorities who are targeted by laws whose primary interest is prejudice, animus, or hostility. The Department straightforwardly acknowledges that the motive behind its rule was to implement the state's Blaine Amendment. This is an illegitimate interest, based on an Amendment explicitly motivated by prejudice against Catholics and other

people of faith. The Court should not overlook Petitioners' Equal Protection claim or unthinkingly fold it into the Establishment Clause claim. Rather, this Court should take the time to toss Blaine Amendments into the dustbin of history, alongside other laws prompted by ugly prejudices.

ARGUMENT

I. The Department's rule flips the Establishment Clause on its head by punishing rather than protecting adherents to minority religions.

A core purpose of the Establishment Clause is to protect adherents to minority religious beliefs from being coerced into majoritarian preferences. *See Engel v. Vitale*, 370 U.S. 421, 431 (1962) ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."); *Ill. ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 217 (1948) (plurality opinion) (the Establishment Clause is one of the "Constitutional provisions primarily concerned with the protection of minority groups."). As Justice Brennan observed when defending the right of patriotic Orthodox Jews to serve our nation in the military, "A critical function of the Religion Clauses of the First Amendment is to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices . . . ." *Goldman v. Weinberger*, 475 U.S. 503, 524 (1986) (Brennan, J., dissenting).

The Montana Legislature's decision to create a tax credit scholarship program serves this aspect of the Establishment Clause: the program protects low-income people of minority faiths by opening the opportunity for them to attend a religious school when they would otherwise be forced into the most majoritarian of all social institutions, the local public school. As this Court has recognized, educational choice is a lifeboat for children from "low-income and minority families [. . . who lack . . .] means to send their children to any school other than a[]. . . public school." *Zelman*, 536 U.S. at 644.

There are numerous reasons why a family from a minority religion may wish to send its children to a school affiliated with its faith. First, parents may wish to raise their children in their faith and to send them to a school which offers "[s]ystematic religious instruction and moral training according to the tenets" of that faith. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 532 (1925). One Jewish mother, Miriam, moved her daughter from a public school to a Jewish day school, explaining, "This is her bat mitzvah year. She's missing out on the Jewish part of her education, and that's important to us. When it's Purim, I want her to feel like it's Purim that day. When it's Chanukah, I want her to feel it's Chanukah all week long. You're not going to get that in a public school. And that's an experience I want my daughter to have." Uriel Heilman, "Why some public school parents are switching to Jewish day schools," Jewish Telegraph Agency (Aug. 28, 2015). For many Jewish families, a state's school choice program makes this option possible, according to Rabbi Yitz Frank of Ohio: "There is something to be gained by attending a

Jewish day school and the reality is that there are many families that would not have the resources to do that without the help of programs like this." Amanda Koehn, "Orthodox educators praise school choice," Cleveland Jewish News (Feb. 10, 2017).

Second, parents' faith may include a deeply held commitment to community service, which they see encouraged at their faith's educational institutions. *See* Margaret F. Brinig & Nicole S. Garnett, *Catholic Schools, Urban Neighborhoods, and Education Reform*, 85 NOTRE DAME L. REV. 887 (2010) (documenting the positive social effects of Catholic schools). The Muslim Academy of Greater Orlando serves students through Florida's school-choice program. Once there, Muslim students find a welcoming community with high academic standards. Principal Jameer Abass says, "[W]hat I am trying to teach the kids is you are part of a larger society. You are American. We do fundraising for the Leukemia society and try to be as much as possible part of the community." Livi Stanford, "Muslim schools share concerns about security," RedefinED (May 22, 2017), https://www.redefinedonline.org/2017/05/muslim-schools-refuge/. Parents from minority religions may wish to enroll their children at schools like the Muslim Academy because they feel their faith compels them to teach their children the value of community service.

Third, parents may have religious or moral objections to the majoritarian social values taught by the local public school, such as materials concerning sex, marriage, and family life. *See, e.g.,* Caleb Parke, "Wisconsin parents outraged after teacher gives transgender

lesson to K-5th grade without permission," FoxNews.com (June 4, 2019) (at an all-student assembly, public elementary school features video by transgendered teacher, followed by a reading of the book "They Call Me Mix," which contains statements such as, "'BOY or GIRL?' Are you a boy or a girl? How can you be both? Some days I am both. Some days I am neither. Most days I am everything in between."). Or perhaps they object to science and Social Studies curricula that teach students to accept the majoritarian views on those topics without question. *See, e.g., Freiler v. Tangipahoa Par. Bd. of Educ.*, 975 F. Supp. 819, 821 (E.D. La. 1997) (court strikes down initiative of parents and school board to give a disclaimer at the start of science class that recognizes students may have other religious beliefs about creation, even if the curriculum only presents the theory of evolution). For many, a choice voucher makes it possible to enroll in a school that reinforces rather than undermines a family's faith-based values. In the words of one parent, "As a Latina mom who has taken advantage of educational options for my own children, I can attest to the importance of exercising the right to pick the school that best reflects our family's values and that best serves the educational needs of our children." Daniel Garza, "The LIBRE Institute Joins Voices of Support During National School Choice Week," LIBRE Initiative (Jan. 26, 2016).

Fourth, parents from a minority-faith family may wish their children to attend a single-sex educational environment. Dominique is one of many children who use school choice to select a single-sex learning environment. She attended the historically black, all-girls St. Mary's Academy in New Orleans. Thanks to Loui-

siana's Student Scholarships for Educational Excellence Program, she says, "I formed bonds that I'm not sure I would have made had I gone somewhere else. . . . My school offers a very familial atmosphere. The people here truly care for me, and they motivate me rather than try to change or discourage me." "Dominique Hagans," Am. Fed. for Children, https://www.federationforchildren.org/voices-for-choice/dominque-hagans/.

Fifth, parents may choose a religious school because they perceive it to be a safer learning environment for their children. Research shows that private schools have a "lower likelihood of crime-related incidences at their campuses." M. Danish Shakeel & Corey A. DeAngelis, *Can private schools improve school climate? Evidence from a nationally representative sample*, 12 J. OF SCHOOL CHOICE 426 (Abstract) (Aug. 2018). The data collected from a U.S. Department of Education survey shows that "private schools are about 8 percentage points less likely to have physical conflicts among students and 12 percentage points less likely to have students using illegal drugs than government schools. Moreover, private schools are about 18 percentage points less likely to have gang activities at school and 28 percentage points less likely to have student possession of weapons than government schools." Corey A. DeAngelis, "Kids are safer when they're in private schools," Wash. Examiner (Aug. 9, 2018).

This feeling of safety is especially important for parents who may utilize religious schools as a safe-harbor for children from minority faiths who experience bullying and harassment at school. Sadly, many

children pick on classmates who are not like them. Students who look different or stand out because of religiously motivated dress or hair-style are particular targets for bullying. *See* Nadia S. Ansary, "Religious-Based Bullying: Insights on Research and Evidence-Based Best Practices from the National Interfaith Anti-Bullying Summit," Institute for Social Policy and Understanding (2018), http://icnacsj.org/wp-content/uploads/2018/11/ISPU-AMHP-Religious-Based-Bullying.pdf (finding young "Muslims and Jews experience disproportionately high rates of hate speech and bullying").

A news report tells the story of one such safe harbor that accepts Florida's school-choice scholarships:

> Two parents were trying to relocate to Orlando, inquiring about educational opportunities for their children at Ibn Seena Academy, an Islamic school serving students in Pre-K through eighth grade. Rehannah Hemmali, the principal, said they told her their children did not feel accepted in public schools in Port Charlotte, a Southwest Florida city 159 miles away. Hemmali said the students felt isolated. Other students ridiculed their dress and their food.
>
> "They are concerned with raising their children in an environment that they do not always feel welcome," said Hemmali in a phone interview. "They want to make a change for their child." . . .

> Principals, parents and educational experts believe Muslim schools help children feel safer and freer from bullying.

Livi Stanford, "Muslim schools share concerns about security," RedefinED (May 22, 2017), https://www.redefinedonline.org/2017/05/muslim-schools-refuge/.

Other children may look like most of their classmates, but they find themselves socially isolated or friendless because of their adherence to religious principles. They are bullied for not participating in the majoritarian activities of students at their public school: smoking e-cigarettes and marijuana, consuming alcohol underage, and sexting. Consider Colton:

> At his church, he sings in the worship band, he's preached a few times and he helps in the children's church. . . . Growing up Colton would be picked on at school for his religious beliefs. "I used to be called 'Jesus freak' and all the names in the book," he said.
>
> After a while he didn't want to go to school anymore, so his mother decided to switch him to an online school, Arizona Virtual Academy. "I love it there, and it's changed who I am," Colton said.

Vanessa Mendoza, "Local teenage silversmith overcomes bullying through online education, faith," *The Daily Miner* (Kingman, Arizona) (March 17, 2019).

Parents often find that school choice is their only alternative when their child has been consistently,

even violently, bullied at school. Kevin Currie-Knight & Jason Bedrick, "Can School Choice Keep Children Safe from Bullying?" EdChoice (Sept. 26, 2017), https://www.edchoice.org/blog/can-school-choice-keep-children-safe-from-bullying/. A national survey of students in private and public schools found that the students in private schools felt greater enforcement of the school's anti-bullying policy, greater acceptance of students from minority groups, and greater social inclusivity. "School Bullying Report Card," Niche (2015), https://ink.niche.com/school-bullying-report-card/ (aggregating responses from over 185,000 student users). Students at religious schools also report lower levels of bullying than students in public schools. *2015 School Crime Supplement (SCS) to the National Crime Victimization Survey (NCVS)*, U.S. Dept. of Ed., (Dec. 2016) (Table 2.2), https://nces.ed.gov/pubs2017/2017015.pdf.

Rather than protecting these students, the Department would deny them the option of attending a religious school. The Department's rule flips the Establishment Clause on its head. It uses the power of the state to prohibit the exercise of civil liberties. Thus, the Department finds itself portrayed as the bouncer in the comic on the next page, barring the school house door to low-income children by relying on a state Blaine Amendment:[2]

[2] Comic copyrighted by and permission secured from Benjamin Hummel, www.politixcartoons.com.

SCHOOL CHOICE

This Court should show more respect for the civil liberties of those low-income children and families than the bouncer illustrated above. If the Court wishes to protect the civil liberties of minority religious adherents who desire to live and learn differently from majoritarian views and values, it should recognize that school choice is often a saving grace for low-income children. The Establishment Clause exists to protect these minorities, not to punish them for choosing a faith-filled learning environment for their children.

II. The Department's rule violates the Equal Protection Clause because its classification stems from an interest motivated by animus and hostility.

When it enacted the tax credit scholarship program, the Montana Legislature made a legislative finding "that the purpose of student scholarship organizations is to provide parental and student choice in education with private contributions through tax replacement programs." 15-30-3101, Mont. Code Ann. The Department of Revenue, *sua sponte*, subsequently created the classification permitting nonsectarian schools to participate in the scholarship program while excluding religiously affiliated private schools. Admin. Rules of Mont. 42.4.8.

"The challenged statutory classification ([nonsectarian versus religiously affiliated]) is clearly irrelevant to the stated purposes of the Act." *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 546 (1973). The classification here not only is irrelevant to the purposes of the Act—it actually *undermines* the purposes of the Act. The Legislature's express purpose was to "provide parental and student choice in education." 15-30-3101, Mont. Code Ann. Yet the classification created by the Department severely limits parental and student choice in education. Across our nation, approximately two-thirds of private schools are religious in character or background. U.S. Dept. of Ed., National Center for Education Statistics, Private Universe School Survey, 2015-16 (September 2017) (C-62), https://nces.ed.gov/pubs2017/2017160.pdf. *See Zelman*, 536 U.S. at 656-57 (82% of Cleveland's private

schools participating in the school choice program were religiously affiliated). Available statistics from school choice programs in Arizona, Florida, Nevada, and Wisconsin tell the same story: most schools in each program are religiously affiliated.[3] By excluding the majority of schools that could participate, the Department cut in half the number of choices given to students and parents.

In fact, as part of the administrative procedures associated with the Department's adoption of the rule, the Legislative Services Division conducted a written poll of the Montana Legislature. Two-thirds of state senators and 59 of 95 state representatives indicated that the Department's rule was contrary to the legislative intent of the program. *Notice of interim committee poll of the Legislature on proposed rule action by the Department of Revenue*, Mont. Admin. Reg. Notice 42-2-939 (Dec. 24, 2015). During the public comment period on the Department's rule, "Llew Jones, State Senator and primary sponsor of SB 410, L. 2015, testified in opposition to the proposed new rules. Sena-

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[3] Andrew D. Catt, Exploring Arizona's Private Education Sector, EdChoice (Dec. 2016), https://www.edchoice.org, at 42.
Florida Dept. of Ed., Office of Independent Education & Parental Choice, Florida Private Schools Directory, https://www.floridaschoolchoice.org.
Nevada Dept. of Ed., 2019-2020 Registered Schools Opportunity Scholarship, http://www.doe.nv.gov/.
Wis. Dept. of Public Instruction, Private School Search, available at https://apps4.dpi.wi.gov/SchoolDirectory/Search/PrivateSchoolsSearch.

tor Jones stated that the department has failed to follow legislative intent and, further, in its justification the department acknowledges that it is not following the legislative intent." *Notice of Adoption*, Mont. Admin. Reg. Notice 42-2-939 (Dec. 24, 2015) (Comment 6). In other words, the legislators who adopted the program recognized that the Department's rule undermines their intention by cutting off many parents and students from otherwise available educational alternatives.

"[T]he lack of a rational relationship between the legislative classification and the purported legislative goal suggests that the true goal is illegitimate." *Lyng v. Int'l Union*, 485 U.S. 360, 375-76 (1988) (Marshall, J., dissenting, citing *Moreno* and *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432 (1985)).

The admitted goal of the Department was compliance with an illegitimate state constitutional provision motivated by animus: the Blaine Amendment. In its notice of rule-making for the provision excluding religious schools, the Department stated its reasoning: "to administer the tax credit for taxpayer donations in accordance with Art. V, Section 11(5) and Art. X, Section 6(1) of the Montana Constitution, which prohibits the direct or indirect appropriations or payment from any public fund to any sectarian or religious purpose." *Notice of public hearing on proposed adoption*, Mont. Admin. Reg. Notice 42-2-939 (Oct. 5, 2015). Several interest groups provided testimony during the comment period on the rule commending the Department for adopting the rule pursuant to the Blaine Amendment, and in response the Department expressed its "appreciat[ion]… for specifically the

comments that describe the constitutional requirements that the department must follow." *Notice of Adoption*, Mont. Admin. Reg. Notice 42-2-939 (Dec. 24, 2015) (Comment 3).

The Department lacks a rational basis for its rule. The state Blaine Amendment on which it relies is exactly the sort of illegitimate interest that the Court has struck down in the past. This Court recently explained the correct standard and summarized the relevant cases in *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018):

> On the few occasions where we have done so [i.e., struck down a law on rational-basis review], a common thread has been that the laws at issue lack any purpose other than a "bare . . . desire to harm a politically unpopular group." *Department of Agriculture v. Moreno*, 413 U. S. 528, 534, 93 S. Ct. 2821, 37 L. Ed. 2d 782 (1973). In one case, we invalidated a local zoning ordinance that required a special permit for group homes for the intellectually disabled, but not for other facilities such as fraternity houses or hospitals. We did so on the ground that the city's stated concerns about (among other things) "legal responsibility" and "crowded conditions" rested on "an irrational prejudice" against the intellectually disabled. *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432, 448-450, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (internal quotation marks omitted). And in another case, this Court overturned a state constitutional amendment that denied gays and les-

> bians access to the protection of antidiscrimination laws. The amendment, we held, was "divorced from any factual context from which we could discern a relationship to legitimate state interests," and "its sheer breadth [was] so discontinuous with the reasons offered for it" that the initiative seemed "inexplicable by anything but animus." *Romer v. Evans*, 517 U. S. 620, 632, 635, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996).

The Blaine Amendment which the Department's rule implements is just such a law animated by "animus" and "prejudice." The justices of this Court have recognized the "shameful" "hostility" and "bigotry" that characterized the Blaine Amendments and their era. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2097 n.3 (2019) (Thomas, J., concurring); *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion); *Zelman*, 536 U.S. at 720 (Breyer, J., dissenting). As Professor Philip Hamburger of Columbia Law School has written concerning Blaine Amendments,

> [T]he amendments that generally bar funding for religious institutions are inescapably stuck in the mire of theological prejudice. The old animosity against the Catholic Church never entirely went away, but rather was generalized.

Philip Hamburger, "Prejudice and the Blaine Amendments," FirstThings.com (June 20, 2017). *Accord* Ashley Berner, *Pluralism in American School Systems*, Johns Hopkins School of Educ. Institute for

Educ. Policy (Jan. 2018) (discussing the intended impact of Blaine Amendments on religious schools).

The anti-Catholic, anti-church hostility that animated the policy which the Department implemented with its administrative rule is precisely the sort of interest which failed rational-basis review in *Moreno*, *Cleburne*, and *Romer*. This Court should follow these precedents and not countenance prejudice and hostility against churches and people of faith as a legitimate governmental interest.

CONCLUSION

Education may well be "the most important function of state and local governments." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). But that has never meant that it is the exclusive responsibility of government to provide every child's education. *Pierce*, 268 U.S. at 535. Rather, Americans rightly recognize that "private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience." *Bd. of Educ. v. Allen*, 392 U.S. 236, 247 (1968). This court has witnessed a "persistent desire of a number of States to find proper means of helping sectarian education," *Wolman v. Walter*, 433 U.S. 229, 262 (1977) (Powell, J., concurring/dissenting), first with *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930), to most recently in *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011). The score of cases in this category all stem from the fact that legislators and citizens wish to see their states support private, religious schools in their communities. The Court should decide this case in line with our nation's tradi-

tion of pluralism and diversity in education, from the Quaker or Congregationalist one-room schoolhouses of the founding era to the modern panoply of religious schools that dot urban neighborhoods and rural landscapes across our land. Ashley Berner, *Pluralism in American School Systems*, Johns Hopkins School of Educ. Institute for Educ. Policy (Jan. 2018); David J. Wenthold, *Public Events in the Church House: The Establishment Clause, Historical Practice Analysis, and Graduations at Religious Facilities*, SSRN.com (Nov. 28, 2018).

This Court should reverse the Montana Supreme Court and hold that the Establishment Clause forbids the exclusion of religious schools from a generally available government program. The Court should recognize the important ways in which faith-filled families use school choice to protect and reinforce their religious and moral precepts and should respect the Establishment Clause's purpose as a bulwark and shelter for people of minority faiths from majoritarian pressures to conform.

The Court should also confront clearly the shameful provenance of the Montana Blaine Amendment. Enforcing the amendment was the Department's primary reason for adopting the rule at issue in this case, and it is an illegitimate state interest. The Court should not allow the Department to rely on a bigoted and prejudiced law as the basis for its rule.

Respectfully submitted,

Brian K. Kelsey
Counsel of Record
Jeffrey M. Schwab
Daniel R. Suhr
LIBERTY JUSTICE CENTER
190 LaSalle St.
Suite 1500
Chicago, IL 60603
(312) 263-7668
bkelsey@libertyjusticecenter.org

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