No. 18-1195

IN THE

Supreme Court of the United States

KENDRA ESPINOZA, ET AL.,
PETITIONERS,

V.

MONTANA DEPARTMENT OF REVENUE, ET AL.,
RESPONDENTS.

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

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

Ilya Shapiro
Counsel of Record
Trevor Burrus
CATO INSTITUTE
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

April 15, 2019

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* SUPPORTING PETITIONERS

Amicus curiae Cato Institute respectfully moves for leave to file a brief explaining why this Court should grant certiorari to review the judgment of the Supreme Court of Montana. *Amicus* timely notified counsel of record for both parties more than 10 days before the filing deadline that it intended to submit the attached brief. Petitioners' counsel consented to the filing. Respondents' counsel did not reply. Out of an abundance of caution, *amicus* submits this motion for leave to file pursuant to this Court's Rule 37.2(b).

Cato is a nonprofit organization devoted to the defense of constitutional liberties, including the First Amendment. Cato has a longstanding interest in preserving religious liberty, consistent with First Amendment principles, and in identifying those cases that provide the best vehicles for the Court to provide guidance to lower courts on the application of those principles. The Court has relied on *amicus*'s arguments in several First Amendment cases. See, e.g., *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736-1737 (2017) (citing Cato brief); *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 797 (2011) (citing Cato brief).

The Montana Supreme Court struck down a tax-credit program under the state's Blaine Amendment because the program helped religious parents and schools. Blaine Amendments forbid public funding of religious education and are often used to prevent religious individuals and organizations from receiving certain public benefits. Although the Court has repeatedly held that government must be impartial toward religion, state and lower federal courts are now deeply divided over application of Blaine Amendments, which

allow government to deny someone public benefits purely based on one's religious faith.

Cato respectfully submits that its brief should be accepted in connection with this Court's consideration of the cert. petition. This case presents an issue of considerable practical and constitutional importance: whether states can use Blaine Amendments to deny people publicly available benefits on the basis of their religion. The Court should take this opportunity to resolve an apparent legal ambiguity regarding Blaine Amendments and ensure that, consistent with long-held constitutional principle, the government remains neutral to religious institutions and individuals.

For the foregoing reasons, the motion to file the brief of *amicus curiae* should be granted.

Respectfully submitted,

Ilya Shapiro
Counsel of Record
Trevor Burrus
CATO INSTITUTE
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

April 15, 2019

QUESTION PRESENTED

Does it violate the Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools?

TABLE OF CONTENTS

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* SUPPORTING PETITIONERS 1

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. BLAINE AMENDMENTS DISCRIMINATE ON THE BASIS OF RELIGION, VIOLATING THE FREE EXERCISE CLAUSE 4

II. WITHOLDING TAX CREDITS UNDER A BLAINE AMENDMENT VIOLATES THE ESTABLISHMENT CLAUSE 6

III. STATE AND FEDERAL COURTS ARE SPLIT ON THE RELATIONSHIP BETWEEN THE FIRST AMENDMENT AND BLAINE AMENDMENTS 11

A. The Relationship between the First Amendment and Religious Discrimination Needs a Clear Resolution 11

B. Religious Discrimination Under Blaine Amendments Evades Review 15

IV. CHOICE PROGRAMS WOULD ALLEVIATE, NOT WORSEN, RELIGIOUS CONFLICTS 16

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Legion v. Am. Humanist Ass'n. (No. 17-1717) (2018) 7

Ariz. Christian School Tuition Org. v. Winn, 563 U.S. 125 (2011) 2, 8

Bagley v. Raymond Sch. Dep't, 728 A.2d 127 (Me. 1999) 14

Chittenden Town Sch. Dist. v. Dep't of Educ., 738 A.2d 539 (Vt. 1999) 14

Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) 2, 5, 7

Edwards v. Aguillard, 482 U.S. 578 (1987) 18

Employment Div. v. Smith, 494 U.S. 872 (1990) 5

Epperson v. Arkansas, 393 U.S. 97 (1968) 7

Everson v. Bd. of Educ. of Ewing, 330 U.S. 1 (1947) 2, 4-5, 6

Hartmann v. Stone, 68 F.3d 973 (6th Cir. 1995) 12, 13

KDM ex rel. WJM v. Reedsport Sch. Dist., 196 F.3d 1046 (9th Cir. 1999) 13, 14

Kitzmiller v. Dover Area School Dist., 400 F. Supp. 2d 707 (M.D. Pa. 2005) 18

Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999) 15

Lemon v. Kurtzman, 403 U.S. 602 (1971) 6

Locke v. Davey, 540 U.S. 712 (2004) 10

McCreary Cty. v. ACLU of Ky., 545 U.S. 844 (2005) .. 7

McDaniel v. Paty, 435 U. S. 618 (1978) 6, 9

Mitchell v. Helms, 530 U.S. 793 (2000)..... 15

Mueller v. Allen, 463 U.S. 388 (1983) 7

Peter v. Wedl, 155 F.3d 992 (8th Cir. 1998)..... 11, 14

Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995)..... 11, 12

Sherbert v. Vernor, 374 U.S. 398 (1963) 3, 5

Strout v. Albanese, 178 F.3d 57 (1st Cir. 1999)..... 12

Trinity Lutheran Church v. Comer, 137 S. Ct. 2012 (2017)..... *passim*

Wallace v. Jaffree, 472 U.S. 38 (1985)..... 7

Wisconsin v. Yoder, 406 U.S. 205 (1972)..... 6

Zelman v. Simmons-Harris, 536 U.S. 639 (2002)..... 7-8, 18

Constitutional Provisions

Montana Const., Art. X, § 6..... 2

Other Authorities

Associated Press, "ACLU Protests High School Choirs Singing In Church Concert," Dec. 5, 2013, https://cbsloc.al/2uXRx6f..... 20

Associated Press, "Montana Third-Grader's Field Trip to Creationist Museum Canceled over Legal Concerns," *Casper Star-Tribune*, May 27, 2015, https://bit.ly/2D76tDS..... 20

Austin Ruse, "Horrific Sex Ed Curriculum Is Taking Over in This Virginia County, and Objectors Are Getting Steamrolled," *Daily Signal*, Feb. 15, 2018, https://dailysign.al/2IrSVpQ..... 18

Barry Amundson, "ACLU: Bill Requiring North Dakota Schools to Offer Bible Course 'Blatantly Unconstitutional,'" *Grand Forks Herald*, Jan. 9, 2019, https://bit.ly/2UsVBuC 19-20

Br. of Major Relig. Org.'s as *Amici Curiae* Supp. Pet'r., *Gloucester County School Board v. G.G.*, (No. 16-273) (2017) 17

Brittani Howell, "R-BB Superintendent's Prayer Letter Raises Concerns," *Hoosier Times Online*, Feb. 6, 2019, https://bit.ly/2IeyNs2 20

Cato Inst., Public Schooling Battle Map, https://www.cato.org/education-fight-map 20

Charles L. Glenn, Jr., *Contrasting Models of State and School: A Comparative Historical Study of Parental Choice and State Control* (2011) 21

Charles L. Glenn, Jr., *The Myth of the Common School* (1987) 19

Dave Perozek, "'In God We Trust' Signs Going Up in Schools," *Arkansas Democrat and Gazette*, Mar. 4, 2018, https://bit.ly/2IsqGaH 20

David Skinner, "A Battle Over Books," *Humanities*, Sept./Oct. 2010, https://bit.ly/2G7UgPN 19

Gregory A. Smith, "A Growing Share of Americans Say It's Not Necessary to Believe in God to Be Moral," Pew Research Center, Oct. 16, 2017, https://pewrsr.ch/2TXILQ0 17

Joan Frawley Desmond, "Sex Education in California Sparks Culture Clash," *Nat'l Catholic Register*, Apr. 28, 2017, https://bit.ly/2X2MehW .. 18

John W. Meyer, David Tyack, Joane Nagel & Audri Gordon, "Public Education as Nation-Building in America: Enrollments and Bureaucratization in the American States: 1870-1930," 85 Am. J. Soc. 591 (1979) 17

Neal McCluskey, "Toward Conceptual and Concrete Understanding of the Impossibility of Religiously Neutral Public Schooling," 12 J. Sch. Choice 477 (2018) 16

Report for 1848 *in* Life and Works of Horace Mann (Mary Mann, ed.,1868)..... 1819

Robert Maranto & Dirk C. van Raemdonck, "Letting Religion and Education Overlap," *Wall St. J.*, Jan. 8, 2015..... 21

Rousas John Rushdoony, *The Messianic Character of American Education* 315 (1963) 16-17

State of America's Libraries 2019, Am. Library Ass'n (Mar. 24, 2019), https://bit.ly/2GcYcA3 18

Susan Parker, "Yoga and 'Unholy Spirit'? School Program Draws Christians' Ire," *Delmarva Now*, Apr. 27, 2018, https://bit.ly/2UbhA4b..... 20

Thom Bridge, "ACLU Sues to Block Ballot Initiative on Transgender Bathroom, Locker Room Use," *Missoulian*, Oct. 17, 2017, https://bit.ly/2G7po21. 20

Vincent P. Lannie & Bernard C. Diethorn, "For the Honor and the Glory of God: The Philadelphia Bible Riots of 1840," 8 Hist. of Educ. Q. 44 (1968)..... 19

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of constitutional government that are the foundation of liberty. Cato's Center for Educational Freedom is grounded in the understanding that education works best for all people when it is rooted in the free decisions of those to be educated, and those who educate. Toward those ends, Cato conducts conferences, publishes books, studies, and the annual *Cato Supreme Court Review*.

This case concerns *amicus* because Cato advocates for First Amendment freedoms (and all constitutional protections for liberty). The Establishment Clause shields religious faiths from government interference and the people from official religion, but it isn't a sword enabling government to discriminate against religious people—which would violate the Free Exercise Clause. Accordingly, Cato filed a brief in *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017), in which the Court held that states can't exclude religious institutions from generally available state programs. Cato is equally committed to freedom in education. This freedom includes parents' right to choose where their children go to school. Blaine Amendments restrict parents' and students' opportunities for educational freedom.

---

[1] Rule 37 statement: Counsel for both parties received timely notice of *amicus*'s intent to file this brief. Petitioners consented, while Respondents' counsel did not reply. *Amicus* has thus moved for leave to file. Nobody but *amicus* and its counsel authored any of this brief or funded its preparation and submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Free Exercise Clause protects religious observers from unequal treatment where that inequality is based solely on a religious practice. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). Such protections extend to exclusions from public programs on the basis of religious faith or practice. *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1 (1947). A government preference to "skat[e] as far as possible from religious establishment concerns" does not overcome the strict scrutiny that must be satisfied to justify religious discrimination. *Trinity Lutheran Church v. Comer,* 137 S. Ct. 2012, 2024 (2017). Likewise, the Establishment Clause requires that the government not "handicap religions." *Everson*, 330 U.S. at 18.

Montana created a program to promote freedom in education by giving tax credits to people who donated to school scholarship organizations (SSOs). The SSOs then use those donations to fund both religious and secular private schools. Montana Const., Art. X, § 6 ("Blaine Amendment"), forbids the appropriation or expenditure of any public funds, directly or indirectly, for "sectarian" (*i.e.*, religious) purposes. But a tax-credit program is not a public expenditure. It merely allows taxpayers to keep more of their own money and incentivizes them to spend it in a variety of ways. *Ariz. Christian School Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011). In addition, the tax credits do not go to schools or SSOs, but to the donors themselves. Ignoring these facts, the Montana Department of Revenue relied on the Blaine Amendment to exclude from the program any person who donated to an SSO that funds religious schools.

The Montana Supreme Court held that the Blaine Amendment controlled, striking down the tax-credit program on the grounds that the private donations amounted to public expenditures aiding religious schools. That decision is troubling in two ways. First, the court dismissed summarily any First Amendment implications by claiming that there is "interplay between the joints" between the Free Exercise and Establishment Clauses. Second, it struck down the entire tax-credit program rather than evaluate the Blaine Amendment's constitutionality.

The First Amendment's Free Exercise Clause is implicated whenever the government imposes an undue burden on the free exercise of religion. *Sherbert v. Vernor*, 374 U.S. 398 (1963). Denying neutral, publicly available benefits based on religious status imposes just such a burden. *Trinity Lutheran,* 137 S. Ct. at 2025. To deny religious schools, students, and parents the freedom to benefit from a facially neutral, voluntary donation is a violation of the neutrality principle. States can certainly decide if and how to fund private education, but if they offer grants, tax credits, or even direct funding to private schools—or private school donors—they can't discriminate based on religion.

Montana's Blaine Amendment also violates the Establishment Clause by effectively disfavoring religious individuals and organizations. It flies in the face of the constitutional principle that the government must legislate in a way that does not impair religion. States surely violate that principle when they exclude people from government programs on the basis of their faith. This Court has repeatedly affirmed that states must not be hostile to faith in this regard, and Montana's Blaine Amendment shirks this requirement.

State and lower federal courts are deeply split when it comes to Blaine Amendments and similar laws. To encourage a consistent reading of the Free Exercise and Establishment Clauses, the Court should provide guidance on how the two clauses work together to protect religious liberty and the freedom of conscience. It is essential for the Court to act here, because this issue is capable of consistently evading review. Courts, like the Montana Supreme Court here, often simply destroy school-choice programs rather than do the jurisprudential heavy lifting of evaluating the Blaine Amendments' constitutional concerns.

This Court should also recognize that school choice programs allow parents to select schools that share their values, reducing the need to impose those values on others. In doing so, they improve our nation's social and political cohesion and reduce conflict. Blaine Amendments stoke the flames of ideological conflict that currently threaten to engulf public education. School choice programs are highly beneficial for parents, students, and our society as a whole.

This case presents a clear opportunity for this Court to guide states in the proper application of the First Amendment's religion clauses. The aforementioned "interplay between the joints" does not allow states to gut the Free Exercise Clause in the guise of strengthening the Establishment Clause.

ARGUMENT

I. BLAINE AMENDMENTS DISCRIMINATE ON THE BASIS OF RELIGION, VIOLATING THE FREE EXERCISE CLAUSE

When the government "handicaps" religion, it violates the Free Exercise Clause. *Everson*, 330 U.S. at 18

("State power is no more to be used so as to handicap religions than it is to favor them."). Although *Employment Div. v. Smith*, 494 U.S. 872 (1990), changed the landscape for free exercise claims, it only did so for "neutral, generally applicable laws." *Id.* at 881. Even after *Smith*, a state can't ban the worship of the divine, for example. Nor can a state offer scholarships to all students except those who regularly attend church. A law that requires people to choose between scholarships and religious service, however, does violate the Free Exercise Clause by "burdening a particular religious practice." *Church of Lukumi,* 508 U.S. at 532. It would "impose special disabilities on the basis of religious status." *Smith*, 494 U.S. at 877. *Sherbert v. Vernor* similarly established that government violates the Free Exercise Clause when it forces an individual to choose between a publicly available benefit and the precepts of his or her faith. 374 U.S. 398.

In *Trinity Lutheran Church v. Comer*, the Court held that the Free Exercise Clause prevents the government from excluding a religious group from otherwise publicly available benefits, such as grants, purely due to religious status. 137 S. Ct. 2012, 2025 (2017). The Court there contended with a Blaine Amendment that provided, in relevant part, that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion." *Id.* at 2017. It held that the government violated the Free Exercise Clause in excluding a church playground from a publicly available grant program but did not answer whether Blaine Amendments *themselves* violate the Free Exercise Clause.

As Chief Justice Roberts wrote for the majority, "this Court has repeatedly confirmed that denying a

generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'" *Id.* at 2019 (citing *McDaniel v. Paty*, 435 U. S. 618 (1978) (plurality op.)) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). Blaine Amendments do not comport with those words. To be sure, they present no problem if a state funds neither religious nor secular private schools. But when states launch grant programs or tax-credit programs and exclude religious individuals or organizations because of a Blaine Amendment, they violate the Free Exercise Clause as explicitly set out by this Court.

II. WITHOLDING TAX CREDITS UNDER A BLAINE AMENDMENT VIOLATES THE ESTABLISHMENT CLAUSE

The government must be impartial toward religion, not hostile. *Everson*, 330 U.S. at 18 ("[The First Amendment] requires the state to be a neutral in its relations with groups of believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."). In the past, the Court used the *Lemon* test for assessing Establishment Clause cases.[2] However, the *Lemon* test does not conform to the history and tradition of the Constitution, nor to the original public meaning of the First Amendment, and thus should no longer be used in Establishment Clause

[2] In *Lemon v. Kurtzman*, the Court formulated a test for programs under the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" 403 U.S. 602, 612–13 (1971) (cleaned up).

cases. *Amicus* recently filed a brief stating this point in *Am. Legion v. Am. Humanist Assoc.* (No. 17-1717) (2018), criticizing the *Lemon* test for inconsistency and overbreadth. *Amicus* suggested that the Court create a new test that does not try to articulate the specifications for the wall of church-state separation, but instead prevents government coercion and protects freedom of conscience, in recognition of the original public meaning. Justice Stevens likewise properly identified the thread that binds the Establishment Clause and Free Exercise Clause: the "underlying principle" behind these First Amendment provisions is the protection of one's "individual freedom of conscience." *Wallace v. Jaffree*, 472 U.S. 38, 53–54 (1985).

In *Church of the Lukumi*, the Court held that "the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." 508 U.S. at 532. And in *McCreary Cty. v. ACLU of Ky.*, it explained how the neutrality principle informs both the Free Exercise and Establishment Clauses: "The touchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'" 545 U.S. 844, 860 (2005); *see*, *also Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("[Government] may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite.").

In *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002) and *Mueller v. Allen,* 463 U.S. 388 (1983), the Court likewise upheld education vouchers and subsidies that it found "entirely neutral with respect to religion." *Zelman*, 536 U.S. at 662. The programs provided "benefits

directly to a wide spectrum of individuals" and allowed "individuals to exercise genuine choice among options public and private, secular and religious." *Id.* Donors, by definition, have the choice to donate or not to donate, just as parents who use vouchers can choose which schools receive the vouchers. The tax-credit program here has a distinct separation between the government awarding benefits and religion benefitting: someone donates to an SSO, the state grants that donor a tax credit, and the SSO gives to either religious schools, non-religious schools, or both. The program does not even remove money from the treasury. Instead it allows citizens to keep more of *their own money*. This Court properly understood that tax-credit programs like these are not public expenditures in *Ariz. Christian School Tuition Org. v. Winn*:

> Like contributions that lead to charitable tax deductions, contributions yielding STO tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations. Respondents' contrary position assumes that income should be treated as if it were government property even if it has not come into the tax collector's hands. That premise finds no basis in standing jurisprudence. Private bank accounts cannot be equated with the Arizona State Treasury.

563 U.S. 144. The Montana tax credits, like those in *Arizona Christian School Tuition Organization,* were not public expenditures—and even if they were, it is doubtful that the issuance of such publicly available benefits would have violated the Establishment Clause. The program itself allowed donors to have a choice and maintained government neutrality.

Montana's interpretation and application of its Blaine Amendment has the primary effect of harming religion and conveys an unmistakable message of disapproval. Montana denied tax credits to donors based on the religious nature of the schools funded by SSOs. While SSO donors that gave to non-religious schools could be awarded these credits, if someone supported an SSO that funded religious schools—or gave to *both* religious and non-religious schools, as here—that person would be denied the same benefit. Such a rule clearly places religion at a disadvantage.

The Establishment Clause was never meant to be a weapon against religion or foster complete separation between church and state. Indeed, there is no such thing as complete church-state separation in a world where government is involved in so many aspects of everyday life. Placing handicaps on religion is thus antithetical to the First Amendment. *See*, *McDaniel*, 435 U.S. at 638 (Brennan, J., concurring) ("[W]e have rejected as unfaithful to our constitutionally protected tradition of religious liberty, any conception of the Religion Clauses as stating a 'strict no aid' theory.").

When a state decides to create a tax-credit program, it will naturally find that some SSOs use those donor funds for religious private schools. Having thus found itself face-to-face with religion, the state must either treat religious donors—donors who happen to pick an SSO that funds religious schools—the same way it treats all others, or somehow justify its discrimination. The Montana Supreme Court, however, created a third option: scrap the whole program, reprimand the Montana Department of Revenue for overstepping its procedural authority, and ignore the Blaine Amendment's constitutional concerns.

Moreover, *Locke v. Davey* does not control here. *Locke* was a unique case that dealt with a state's refusal to fund a future minister's devotional training, a historical concern that, "[s]ince the founding of our country, [has seen] popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an 'established' religion." 540 U.S. 712, 722 (2004). The *Locke* program allowed "students to attend pervasively religious schools, so long as they are accredited," and students were "still eligible to take devotional theology courses." *Id.* at 724–25. It exhibited no "hostility toward religion." *Id.* at 724. The Court reaffirmed this distinction in *Trinity Lutheran*: "Washington's scholarship program went 'a long way toward including religion in its benefits.'" 137 S. Ct. at 2023 (quoting *Locke*, 540 U.S. at 724).

Clearly, that is not the case here. When the tax-credit program was enacted, Montana used its Blaine Amendment to leave out certain donors while granting benefits to others, with the only distinction between the two groups being religious status. This is worlds away from a program like the one in *Locke* that treated religious and non-religious individuals equally. Instead, Montana attempted to play six-degrees-of-separation with religious institutions, conflating individual tax credits with taxpayer-funded religious schooling, all in an attempt to punish religious donors. On its face, Montana's Blaine Amendment discriminates against religious donors and schools. This is not a "play in the joints" case, *Locke,* 540 U.S. at 719, but one where the state intentionally inhibits religion.

III. STATE AND FEDERAL COURTS ARE SPLIT ON THE RELATIONSHIP BETWEEN THE FIRST AMENDMENT AND BLAINE AMENDMENTS

A. The Relationship between the First Amendment and Religious Discrimination Needs a Clear Resolution

The Sixth Circuit, Eighth Circuit, and Arizona Supreme Court have properly recognized that Blaine Amendments and similar regulations violate the First Amendment, while the First Circuit, Ninth Circuit, and highest courts in both Maine and Vermont have found the opposite. Such a deep split between jurisdictions cannot be allowed to fester. The lower courts need guidance on this issue, as they are reaching divergent legal conclusions on nearly identical facts. This Court should adopt the sound logic of lower courts that found Blaine Amendments and similar laws unconstitutional and resolve this split in their favor.

In *Peter v. Wedl,* 155 F.3d 992 (8th Cir. 1998), the Eighth Circuit found that school districts violated the Free Exercise Clause when they refused to provide special education services for students in private religious schools while providing those same services for non-religious private schools. *Id.* at 994. The court held that the statute violated the Free Exercise Clause because it discriminated against students who attended private schools without serving a compelling government interest. *Id.* at 996–97. After all, "ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts." *Id.* at 998 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995)). The state asserted—and later abandoned—a

claim that the statute was necessary to avoid violating the Establishment Clause. *Id.* at 997. The court properly held that the school district's rationale was but a post hoc pretext for anti-religious discrimination and a violation of the Free Exercise Clause. *Id.* at 998.

The First Circuit took a much different approach on the same facts as *Peter* in *Strout v. Albanese,* 178 F.3d 57 (1st Cir. 1999). It held that a state law authorizing direct tuition reimbursement grants to secular schools—but not to religious schools—did not implicate the Free Exercise Clause. The court reasoned that the law neither prevented attendance at religious schools, nor burdened any central religious belief or practice. *Id.* at 65. The court did not find a substantial animus against religion like there was in *Church of Lukumi*. *Id.* But as this Court has repeatedly affirmed, the government violates the Free Exercise Clause whenever it denies religious people a publicly available benefit. In light of *Trinity Lutheran*, *Strout* was wrongly decided—and this Court must address the First Circuit's mistake to prevent other courts from relying on an erroneous constitutional interpretation.

Regulations that mirror Blaine Amendments in purpose and effect also violate the Free Exercise Clause, as the Sixth Circuit held in *Hartmann v. Stone,* 68 F.3d 973 (6th Cir. 1995). There, the court found that a U.S. Army regulation similar to a Blaine Amendment could not prohibit on-base day care providers from conducting religious practices in their homes during day care. *Id.* at 973, 975. Parents selected day care providers and the Army's role was in funding and administering a placement program. *Id.* at 975. The court recognized that when parents choose a day-care provider—much like when they choose to

donate to an SSO which disperses money to religious schools—it is an exercise of a private individual's discretion, not a government mandate. *Id.* at 982–83.

Despite the possibility that some government funds might be applied toward religious services, the *Hartmann* court also held that state involvement in programs that benefit religious organizations or individuals is not the same as excessive entanglement with religion and thus is not a compelling state interest that justifies prohibiting religious practices. *Id.* at 980. The court cited many examples of extensive government regulation of church-owned property—such as licensing of church-owned vehicles—which are not excessively entangled with religion despite the pervasive governmental regulation. *Id.* at 981. If the opposing argument is followed to its logical conclusion, the court correctly noted, it would impute general funding or regulatory schemes with religious motives when religious organizations happen to benefit from them ("We do not doubt that a state may spend a great deal of money funding its Department of Motor Vehicles. We do not know of any case that has held that the state's expenditures are somehow imputed to a religious organization that seeks to register a car.") *Id.* at 982.

In *KDM ex rel. WJM v. Reedsport Sch. Dist.*, the Ninth Circuit held that an Oregon regulation that restricted taxpayer-funded special education to non-religious private schools did not violate the First Amendment. 196 F.3d 1046, 1047, 1049 (9th Cir. 1999). The court held that, as applied, the regulation did not have the object or purpose of suppressing religion because the district made these services available for a student off-site. *Id.* at 1050–51. It distinguished this case from *Peter* because, under the facts of that case, the plaintiff

"indeed was forced to choose between enrolling in the religious school or receiving services essential to his ability to attend school." *Id.* (citing *Peter*, 155 F.3d at 1001). *KDM* was indeed factually different from *Peter*, as the school district continued to make at least *some* services available for the student. However, the district still treated some students differently from others based on religion. The court's attempt to justify the state's actions—offering off-site services for religious students and in-school services for the rest—is much like passing off a secondhand sweater as brand new.

This deep split is found in state courts as well. In *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127 (Me. 1999), a tuition program excluded religious schools from the receipt of state funds. At issue was the same Maine statute that was challenged in federal court in *Strout*. The court held that the statute did not violate the Free Exercise Clause, failing to find any substantial burden on plaintiffs' free exercise because the statute did not prevent them from sending their children to a religious high school. *Id.*

A school district granted tuition reimbursements the same way as the Maine program in *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539 (Vt. 1999). When the district changed its policy to include religious schools in the program, the Vermont Department of Education terminated state aid for education to the district. *Id.* at 543. The court held that the denial of tuition reimbursement was both neutral and not hostile to religion because it did not compel plaintiffs to choose between the precepts of their religion and forfeiting government benefits that would otherwise be available. *Id.* at 563.

Unlike the courts in *Bagley* and *Chittenden*, the Arizona Supreme Court refused to apply that state's Blaine Amendment to a tax-credit program, noting that "[t]he Blaine amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing 'Catholic' menace." *Kotterman v. Killian*, 972 P.2d 606, 626 (Ariz. 1999). As this Court has said, laws "born of bigotry" have no place in our legal system, and Blaine Amendments are a centerpiece of that anti-religious tradition. *Mitchell v. Helms,* 530 U.S. 793, 829 (2000).

The Court should resolve this split to ensure that lower courts consistently apply the First Amendment. The First Circuit, Ninth Circuit, and state courts including Maine, Vermont, and the Montana Supreme Court here have misinterpreted the Court's longstanding rulings on the Free Exercise and Establishment Clauses. In the absence of clear guidance, errors like the decision below will continue to haunt federal and state jurisprudence for the foreseeable future.

B. Religious Discrimination Under Blaine Amendments Evades Review

Finally, cases involving Blaine Amendments are capable of continuously evading review. Laws or amendments that deny publicly available benefits to religious organizations only trigger constitutional review when combined with other government spending programs. This means that state and circuit courts can evaluate the programs themselves rather than the constitutionality of the offending statutes or amendments, giving courts an easy way to avoid the underlying constitutional question. Lower courts may simply deny that the state law or amendment violates the

Free Exercise Clause and sometimes even strike down neutral, beneficial programs rather than contend with the state constitution, as the Montana Supreme Court did here. Thus, religious parties could repeatedly be denied benefits available to the rest of the public, and courts may continue to scrap entire programs to maintain state statutes or Blaine Amendments. The Court should address this by properly scrutinizing facially discriminatory Blaine Amendments.

IV. CHOICE PROGRAMS WOULD ALLEVIATE, NOT WORSEN, RELIGIOUS CONFLICTS

A common concern about school choice programs that they it will split society into isolated—and potentially warring—factions along religious lines. This thinking is predicated on the assumption that education can be religiously neutral, treating Americans across the spectrum of religious belief—from none to nuns—equally and without entanglement in religious matters. But this is impossible.

As Cato education-policy expert Neal McCluskey has shown, religion is inextricably entangled with education on numerous levels, from the very broad to the very specific. Neal McCluskey, "Toward Conceptual and Concrete Understanding of the Impossibility of Religiously Neutral Public Schooling," 12 J. Sch. Choice 477 (2018). For instance, for some people nothing in life is separable from God. For others, while not everything is of intrinsic religious import, education is—as it involves the shaping of minds and, inevitably, souls. As one scholar wrote, "If education is in any sense a preparation for life, then its concern is religious. If education is at all concerned with truth, it is again religious. If education is vocational, then it deals

with calling, a basically religious concept," Rousas John Rushdoony, *The Messianic Character of American Education* 315 (1963). Given the prevalence of such beliefs, for much of American history public schooling was overtly religious. John W. Meyer, David Tyack, Joane Nagel & Audri Gordon, "Public Education as Nation-Building in America: Enrollments and Bureaucratization in the American States: 1870-1930," 85 Am. J. Soc. 591 (1979). Education divorced from religious directives about behavior, or without religious interpretations of history, is incomplete, and for some constitutes the imposition of a humanist—a human, rather than God-centered—world view.

Many courses and policies cannot be divorced from religious considerations, especially if morality stems from religion, as many Americans believe. As of July 2017, 42 percent of Americans agreed that "it is necessary to believe in God in order to be moral and have good values." Gregory A. Smith, "A Growing Share of Americans Say It's Not Necessary to Believe in God to Be Moral," Pew Research Center, Oct. 16, 2017, https://pewrsr.ch/2TXILQ0. Religious beliefs are heavily implicated in topics including the teaching of the origins of life, sex education, policies concerning student choices of bathroom and locker rooms,[3] and specific readings, including those touching on morals.[4] *See*

---

[3] A recent *amicus* brief from Catholic, Jewish, Lutheran, and other religious organizations, supporting a challenge to an interpretation of "sex" to include gender identity in certain regulations, noted that nine religious traditions hold "that personal identity as male or female is a divinely created and immutable characteristic." Br. of Major Relig. Org.'s as *Amici Curiae* Supp. Pet'r., *Gloucester County School Board v. G.G.*, No. 16-273 (2017).

[4] Many books repeatedly challenged in public libraries, including school libraries, are challenged over content some consider to be

Edwards v. Aguillard, 482 U.S. 578 (1987); *Kitzmiller v. Dover Area School Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005); *see also* Austin Ruse, "Horrific Sex Ed Curriculum Is Taking Over in This Virginia County, and Objectors Are Getting Steamrolled," *Daily Signal*, Feb. 15, 2018, https://dailysign.al/2IrSVpQ; Joan Frawley Desmond, "Sex Education in California Sparks Culture Clash," *Nat'l Catholic Register*, Apr. 28, 2017, https://bit.ly/2X2MehW.

The effect of this within public schooling is to force people into political conflict over which values will be imposed on all students. By making diverse people pay for a single system of schools, public schooling appears to do what Justice Stevens feared from school choice: create conflict, as one observes historically "in the Balkans, Northern Ireland, and the Middle East," *Zelman*, 536 U.S. at 686 (Stevens, J., dissenting). History is littered with public schooling battles both political and, occasionally, physical. Horace Mann, the "Father of the Common school," faced significant religious opposition to his efforts to create common schools as people of various Protestant sects feared their beliefs would be slighted. *See* Charles L. Glenn, Jr., *The Myth of the Common School* 146–235 (1987). In his last report as Massachusetts education secretary, Mann defended against accusations he would have the Bible, of which there were many interpretations, removed from schools. Mann stated, "The Bible is the acknowledged expositor of Christianity. In strictness, Christianity has no other authoritative expounder. The Bible is in

---

immoral. Of the Top 11 books on the most recent annual American Library Association list of most frequently challenged books, nine were challenged at least in part for sexual material some felt immoral or age-inappropriate. *State of America's Libraries 2019*, Am. Library Ass'n, Mar. 24, 2019, https://bit.ly/2GcYcA3.

our common schools by common consent." Report for 1848, *in* Life and Works of Horace Mann 734 (Mary Mann, ed.,1868). In 1844, neighborhoods around Philadelphia saw massive property destruction and multiple deaths in "Bible Riots" touched off by disputes over whose version of the Bible—Protestant or Roman Catholic—would be used in the public schools. Vincent P. Lannie & Bernard C. Diethorn, "For the Honor and the Glory of God: The Philadelphia Bible Riots of 1840," 8 Hist. of Educ. Q. 44 (1968).[5] In Kanawha County, West Virginia, one person was shot and district property bombed in the 1974 "Textbook War," fought over books adopted by the school board to which many parents objected on religious and other grounds. David Skinner, "A Battle Over Books," *Humanities*, Sept./Oct. 2010, https://bit.ly/2G7UgPN.

Today, overtly religious conflicts are commonplace, as well as many conflicts about moral values that may well be religiously based but not expressly so. Cato's Public Schooling Battle Map, an online database of values- and identity-based conflicts in public schools, contained 2,101 entries as of April 9, 2019. Cato Inst., Public Schooling Battle Map, https://www.cato.org/education-fight-map (accessed April 9, 2019). The map contains conflicts that appeared in media stories between 2005 and 2019, with regular collection starting around 2011. Because it contains only battles that received media attention, it almost certainly understates the number of conflicts. Of the 2,101 entries, 331 explicitly involve religion, such as Bible study, prayer, posting "In God We Trust," and "mindfulness" yoga. Barry Amundson, "ACLU: Bill Requiring North Dakota Schools to Offer Bible Course 'Blatantly

[5] The title date was corrected to "1844" in the subsequent issue.

Unconstitutional,'" *Grand Forks Herald*, Jan. 9, 2019, https://bit.ly/2UsVBuC; Brittani Howell, "R-BB Superintendent's Prayer Letter Raises Concerns," *Hoosier Times Online*, Feb. 6, 2019, https://bit.ly/2IeyNs2; Dave Perozek, "'In God We Trust' Signs Going Up in Schools," *Arkansas Democrat and Gazette*, Mar. 4, 2018, https://bit.ly/2IsqGaH; Susan Parker, "Yoga and 'Unholy Spirit'? School Program Draws Christians' Ire," *Delmarva Now*, Apr. 27, 2018, https://bit.ly/2UbhA4b. Of those conflicts, 194 center on moral, but not explicitly religious, concerns, and 62 deal with "human origins," which can include religious explanations for the origins of life, but also ones not explicitly religious, such as intelligent-design theory.

The Battle Map contains 19 entries for Montana, including over bathroom access, a school trip to a creationist museum, and school choirs singing at a Latter-Day Saints event. Thom Bridge, "ACLU Sues to Block Ballot Initiative on Transgender Bathroom, Locker Room Use," *Missoulian*, Oct. 17, 2017, https://bit.ly/2G7po21; Associated Press, "Montana Third-Grader's Field Trip to Creationist Museum Canceled over Legal Concerns," *Casper Star-Tribune*, May 27, 2015, https://bit.ly/2D76tDS; Associated Press, "ACLU Protests High School Choirs Singing In Church Concert," Dec. 5, 2013, https://cbsloc.al/2uXRx6f.

Allowing families—and funders—to choose schools that share their values would abrogate the need to impose one's values on everyone else, improving the prospects for social and political peace. There is historical evidence of this occurring in other countries, including the Netherlands and Belgium, both of which in the 19th century moved away from education systems intended to impose one worldview to those based in

families' ability to choose schools that shared their religious and philosophical values. Charles L. Glenn, Jr., *Contrasting Models of State and School: A Comparative Historical Study of Parental Choice and State Control* (2011); Robert Maranto & Dirk C. van Raemdonck, "Letting Religion and Education Overlap," *Wall St. J.*, Jan. 8, 2015. In both cases, the intent—and result—was an increase in social harmony.

CONCLUSION

This case provides the Court an opportunity to clarify that states cannot hide behind the Establishment Clause as an excuse for weakening the constitutional protections afforded by the Free Exercise Clause. For the foregoing reasons, and those stated by the petitioners, the Court should grant the petition.

Respectfully submitted,

Ilya Shapiro
Counsel of Record
Trevor Burrus
CATO INSTITUTE
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

April 15, 2019