No. 18-1195

In The
Supreme Court of the United States

KENDRA ESPINOZA, JERI ELLEN ANDERSON, and JAIME SCHAEFER,

Petitioners,

v.

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

Respondents.

On Petition For A Writ Of Certiorari To The Montana Supreme Court

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This case calls on this Court to resolve a fundamentally important constitutional question: Whether the First Amendment allows the government to bar religious options from otherwise neutral and generally available student-aid programs. As Petitioners' opening brief showed, resolving this question is both crucial and time-sensitive. Over the last 24 years, this question has led ten federal appellate courts and state courts of last resort to reach opposite conclusions. And every year that goes by without resolution means that thousands of children are denied educational opportunities, with the low-income children in Montana being only the most recent example.

Respondents' opposition brief fails to refute the importance of resolving this federal question. Instead, Respondents primarily claim that this Court lacks jurisdiction and cannot reach it. But, as discussed below, this claim is baseless and misunderstands this Court's power to resolve constitutional questions. The rest of Respondents' arguments similarly miss the mark. There is a widely acknowledged split on this issue, and Respondents' attempts to argue otherwise are unconvincing. Moreover, in claiming that this issue has no national importance, Respondents casually disregard the real-world impact that student-aid has on countless families nationwide. Finally, Respondents argue that the lower court's invalidation of the scholarship program—solely because it included religious options—actually furthered, rather than contravened, the commands of the Free Exercise and Equal Protection Clauses. It did no such thing.

Respondents' brief confirms that the question presented is worthy of and ready for this Court's review now.

ARGUMENT

I. It Cannot Be Reasonably Disputed That This Court Has Jurisdiction over the Federal Question Presented by this Case.

Respondents make three arguments for why this Court lacks jurisdiction over this case. These arguments fail even cursory review.

First, although Petitioners have briefed the same federal issues throughout this case, Respondents argue that Petitioners have waived the federal question their Petition presents. Br. in Opp. 15–17. Specifically, Respondents complain that Petitioners only argued below that it would be unconstitutional to exclude religious options from the program—not that it would be unconstitutional to invalidate the program solely because the program included religious options.

Respondents' argument is meritless. Petitioners have consistently argued throughout this case that interpreting Article X, Section 6 of the Montana Constitution[1] to prohibit religious options in the program

[1] Respondents spend several pages attempting to refute a footnote in the Petition, which noted that Article X, Section 6 was originally adopted in 1889 to discriminate against Catholics. Br. in Opp. 2–6, 20; Pet. 7, n.3. Respondents state that the provision was readopted in 1973, which Respondents imply cleansed it of this bigotry. Yet the 1973 provision is nearly identical to the original (Article XI, section 8 of the 1889 Constitution), with the only

would violate the federal Religion and Equal Protection Clauses. *See*, *e.g.*, Pls.' Compl. 22–25, *Espinoza v. Dep't of Rev*., No. DV-15-1152 (Flathead Cty. Dist. Ct. Dec. 16, 2015); Pls.' P.I. Br. 22–24 (Jan. 29, 2016); Pls.' Summ. J. Br. 16–20 (May 16, 2016); Appellees' Answer Br. 33–34, *Espinoza v. Dep't of Rev*., No. 17-0492 (Mont. Sup. Ct. Jan. 19, 2018). This is true whether Section 6 is used to justify an administrative rule excluding religious options or instead to invalidate the entire program because the statute failed to exclude religious options. No matter the lower court's remedy, the core legal issue remains the same: Whether the U.S. Constitution allows the exclusion of religious options.

Indeed, both this Court's jurisdictional statute and caselaw show that Petitioners have more than adequately preserved this issue. 28 U.S.C. § 1257(a) gives this Court jurisdiction over state high court decisions when any "right . . . is specially set up or claimed under the Constitution . . . [of] the United States."[2] Contrary to Respondents' argument, a petitioner need not

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substantive difference being the addition of a clause regarding federal funding. In fact, the provision was readopted *despite* several delegates recognizing that it was a "Blaine Amendment," "archaic," "a badge of bigotry," and a "remnant[ ] of a long-past era of prejudice." 6 Montana Constitutional Convention (March 11, 1972) at 2010-2012 (statements of Delegates Harbaugh, Driscoll, and Schiltz). The provision thus continues to evince "hostility" toward religion. *See Locke v. Davey*, 540 U.S. 712, 724 (2004).

[2] Petitioners have also preserved their claim under Section 1257(a) by consistently challenging "the validity of a statute"—that statute being Section 6, as applied to the scholarship program. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 79 (1980) ("It has long been established that a state constitutional provision is a 'statute' within the meaning of § 1257[a].").

make precisely the same constitutional arguments about these rights to preserve their claim under Section 1257(a). *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991). Rather, in appealing a state high court decision, what matters is that "the federal *right* sought to be vindicated in this Court be *one claimed below*." *Raley v. Ohio*, 360 U.S. 423, 436–37 (1959) (emphasis added). And here, Petitioners have pressed their rights to religious liberty and equal protection throughout every stage of this case.

Moreover, the Montana Supreme Court's wholesale invalidation of the program was unexpected—indeed, Petitioners never challenged the program itself, but only the Department's rule excluding religious options—and this Court has jurisdiction "where the grounds of the decision supply a new and unexpected basis" for a constitutional claim. *See Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 367 (1932). Respondents only briefly addressed the possibility of the court invalidating the entire program. Appellants' Br. 40–41, *Espinoza v. Dep't of Rev.*, No. 17-0492 (Mont. Sup. Ct. Nov. 22, 2017). Petitioners responded in a footnote that this would still be unconstitutional. Appellees' Answer Br. 39 n.30 (Jan. 19, 2018) ("The Department argues that if the Montana Constitution requires Rule 1 but the U.S. Constitution prohibits it, then the program is invalid in its entirety. Defs. Br. at 40–41. Not only does this incorrectly assume that Article X, § 6 requires Rule 1, but it fails to harmonize § 6 with the Religion Clauses of both Constitutions."). Section 1257(a) confers jurisdiction in

such an "unexpected" situation because the state high court introduced a novel violation of federal rights. *See Great N. Ry. Co.*, 287 U.S. at 367 (bar on deciding federal claims not raised before state high courts "does [not] apply where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right"); *Howlett v. Rose*, 496 U.S. 356, 370–71 (1990) (holding that the federal Supremacy Clause forbids state courts from "deny[ing] a federal right, when the parties and controversy are properly before it," for any reason "that is inconsistent with or violates federal law"). Thus, Respondents' claim that Petitioners waived the federal question in this case fails.

Respondents next argue that this case actually involves *no* federal question, since the lower court based its decision solely on its interpretation of a state constitutional provision—Section 6—and did not reach the federal question. Br. in Opp. 21–22. This is incorrect. The lower court unquestionably reached it and rejected Petitioners' position. Pet. App. 32 (majority opinion holding that although "an overly-broad analysis of Article X, Section 6 could implicate free exercise concerns[, . . .] this is not one of those cases"). Furthermore, the concurrences and dissents discussed the federal question at length. Pet. App. 57–60 (Sandefur, J., concurring); *id*. at 75–77 (Baker, J., dissenting); *id*. at 84–89 (Rice, J., dissenting), and the trial court likewise addressed it in granting Petitioners a preliminary injunction. Pet. App. 117–18. In any event, only this Court can ultimately decide whether the lower court's

interpretation of Section 6 complied with the U.S. Constitution.

Finally, Respondents claim that the federal issue is moot because the scholarship program no longer exists since the lower court decided to invalidate it. Br. in Opp. 22–23. Yet the very thing Petitioners are appealing is the lower court's invalidation. The legislature did not repeal the program, the statute is still on the books, and Big Sky Scholarships—the nonprofit organization that formed to distribute scholarships under the program—is still active.[3] The program is poised to continue just as before—the only thing standing in the way is the Montana Supreme Court's decision.[4]

Thus, Respondents cannot reasonably argue that this Court lacks jurisdiction over the federal issue in this case.

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[3] Respondents refer to "out-of-time" affidavits filed by Petitioners on behalf of Big Sky Scholarships and families and schools participating in the program. Br. in Opp. 18–19. These affidavits were timely filed in support of Petitioners' Motion to Stay Judgment to the Montana Supreme Court, which the court granted in part. Pet. App. 1–2.

[4] The state also argues that the case is moot because the scholarship program is a pilot program set to expire in 2023. Br. in Opp. 23. But Petitioners (and many other Montanan families) have a right to scholarships *today*, and a case does not become moot simply because it *may* resolve four years from now. Indeed, the Legislature may even renew the program.

II. There is a Clear Split that this Case Compounds.

Respondents' second argument—a sort of "move along, Court, nothing to see here" approach—fares no better. Despite the widely acknowledged split and "growing confusion among the lower courts" regarding the constitutionality of barring religious options from student-aid programs, *Columbia Union Coll. v. Clarke*, 527 U.S. 1013, 1013 (1999) (Thomas, J., dissenting from denial of certiorari), Respondents insist there is no split at all.

Respondents attempt to explain away the split by drawing a series of irrelevant distinctions among the cases on either side of it. For example, Respondents stress that *Hartmann v. Stone*, 68 F.3d 973, 975 (6th Cir. 1995), "did not involve public funding for religious education." Br. in Opp. 25. Petitioners never claimed that it did. Nor does this case, for that matter. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 142 (2011) (explaining the "distinction between governmental expenditures and tax credits"). Rather, Petitioners claimed that *Hartmann* involved the constitutionality of "prohibiting religious options in otherwise neutral and generally-available student-aid programs"—a federal child-care program in that case. Pet. 17. That is the same question presented here.

Respondents' attempt to distinguish *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998), and *KDM ex rel. WJM v. Reedsport School District*, 196 F.3d 1046, 1050–52 (9th Cir. 1999), is similarly unavailing. Those cases,

Respondents insist, involved a state's power to bar "students enrolled in religious schools" from a student-aid program, whereas this case involves a state's power to bar "religious education" itself. Br. in Opp. 26. On similar grounds, Respondents attempt to distinguish *Moses v. Ruszkowski*, 2019-NMSC-003, arguing that "the aid" in question there "consisted of nonreligious textbooks that . . . could not support religious indoctrination." *Id*. at 28. Respondents' "distinction," however, is no distinction at all. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025–26 (2017) (Gorsuch, J., concurring in part) (rejecting the distinction between discrimination based on religious status and religious use). It is also belied by the Montana Supreme Court's decision below, which interpreted Section 6 broadly to bar aid for "religiously-affiliated private school[s], even if . . . [to] provide[ ] standard, non-religious instruction." Pet. App. 29.

Next in Respondents' catalog of irrelevant distinctions is the quintet of cases involving the Maine and Vermont "tuitioning" programs. Br. in Opp. 27–28 (discussing *Anderson v. Town of Durham*, 895 A.2d 944 (Me. 2006); *Eulitt ex rel. Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344 (1st Cir. 2004); *Strout v. Albanese*, 178 F.3d 5 (1st Cir. 1999); *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127 (Me. 1999); and *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539 (Vt. 1999)). Respondents acknowledge that these cases concern a state's power to bar religious options from student-aid programs, but they discount their relevance because they are "old." Br. in Opp. 28. The age of the decisions—the "old[est]"

of which is a relatively youthful 20—is irrelevant to whether there is a split on the question they involved. There is a split, it has matured for two decades, and it cries out for resolution.

Respondents next attempt to distinguish the more recent, post-*Locke* decisions in *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), and *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775 (7th Cir. 2010), on the ground that the former concerned a state's power to bar "*pervasively* sectarian," as opposed to *all* sectarian, options in student-aid programs, and the latter was not ultimately resolved on Free Exercise grounds. Br. in Opp. 25–26 (emphasis added). Yet Respondents do not—indeed, cannot—dispute that, in those cases, the Seventh and Tenth Circuits joined the pre-*Locke* Sixth and Eighth Circuits in holding that the Constitution does not tolerate the wholesale exclusion of religious options from student-aid programs. *Colo. Christian Univ.*, 534 F.3d at 1255 (interpreting *Locke* for the proposition that "the State's latitude to discriminate against religion . . . does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support"); *Badger Catholic, Inc.*, 620 F.3d at 777, 780 (rejecting the argument that *Locke* authorized a state university's ban on use of extracurricular student funds for "worship, proselytizing, or religious instruction").

Finally, Respondents dismiss the relevance of *Taxpayers for Public Education v. Douglas County School District*, 351 P.3d 461 (Colo. 2015), on the ground that

the case was mooted after this Court vacated the lower court's decision in the case. Br. in Opp. 28. Respondents, however, do not dispute that the later-vacated decision turned on the (incorrect) conclusion that, under *Locke*, applying a state constitution to bar religious options in student-aid programs "does not encroach upon the First Amendment." *Taxpayers for Pub. Educ.*, 351 P.3d at 475. While the decision was correctly vacated by this Court, it still evinces the conflicting answers that lower courts have given to that question.

In short, there is a clear split on the question presented: Whether a state may, consistent with the U.S. Constitution, bar religious options in student-aid programs. Respondents cannot explain that split away.

III. This Case Involves an Issue of National Importance.

Respondents also accuse Petitioners of "exaggerat[ing] the case's national importance and urgency." Br. in Opp. 28. Although the education of Petitioners' children may not be an "urgen[t]" matter for Respondents, it is for Petitioners—and for the many other families who have been denied educational opportunity because of the jurisdiction in which they happen to live. Meanwhile, the two arguments that Respondents advance against the national importance of this case are baseless.

First, Respondents insist that affording state courts the power to decide whether religious options may be barred from student-aid programs "is a feature

of federalism . . . to celebrate"—"not a bug for free exercise." Br. in Opp. 29, 30. But whether the U.S. Constitution even *tolerates* the barring of religious options is a federal constitutional question—and the precise question that this Court can resolve.

Second, Respondents insist that the scholarship program's relatively small size means this case is not one of "national importance." Br. in Opp. 31. But there is no threshold number of children whose rights Respondents may violate before this Court steps in. In addition, Respondents ignore that the program's size is a direct result of the legal cloud that has surrounded it, discouraging donations and limiting scholarships. Respondents likewise ignore the children in Maine and Vermont who have been denied educational opportunities because of the position that the First Circuit and Maine and Vermont supreme courts have taken on the underlying constitutional question, as well as the many more children in states that have refrained from adopting or expanding student-aid programs because of the ongoing split.

In short, this case does present an issue of national importance, and the time to resolve it is now.

IV. The Decision Below Creates, Not Cures, Free Exercise and Equal Protection Problems.

In a final effort to prevent review by this Court, Respondents insist that the decision below actually *furthers* the requirements of the Free Exercise and

Equal Protection Clauses. The decision does not further those requirements—it contravenes them.

Once again, Respondents' argument turns on the remedy below. Br. in. Opp. 32, 36. Citing *Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010), and *Heckler v. Mathews*, 465 U.S. 728 (1984), Respondents argue that by denying educational opportunity to *all* students, "the decision below . . . remedied any inequality Petitioners could claim." Br. in Opp. 36. *Levin* and *Heckler*, however, concerned judicial remedies to rectify legislatively imposed inequalities. *Levin*, 560 U.S. at 426–27; *Heckler*, 465 U.S. at 740. Here, the Legislature treated everyone *equally*, affording them religious and non-religious educational options alike. The *in*-equality arises from the lower court's own judgment, which (1) denies Petitioners and their children scholarships that the Legislature sought to afford them and (2) mandates the exclusion of religious options from all student-aid programs in the future.

Finally, Respondents make much of the fact that "[n]o case has held such a result under a state constitution to violate the federal constitution." Br. in Opp. 32. That may be true, but only two years ago, this Court granted certiorari and vacated a state supreme court judgment that had invalidated a scholarship program in its entirety because it included religious options in violation of the state constitution. *See Taxpayers for Pub. Educ.*, 351 P.3d at 475, *vacated and remanded*, 137 S. Ct. 2327 (2017). The present case comes to this Court in the *identical* posture as that case, and this Court should again grant certiorari to make clear that

such discrimination against religion is impermissible under the U.S. Constitution.

CONCLUSION

Therefore, Petitioners request that this Court grant certiorari.

Respectfully submitted,

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