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 CHRISTIAN LEGAL SOCIETY, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS, THE ANGLICAN CHURCH IN NORTH AMERICA, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, COUNCIL FOR AMERICAN PRIVATE EDUCATION, COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES, ETHICS & RELIGIOUS LIBERTY COMMISSION, EVANGELICAL COUNCIL FOR FINANCIAL ACCOUNTABILITY, THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE, THE LUTHERAN CHURCH – MISSOURI SYNOD, NATIONAL ASSOCIATION OF EVANGELICALS, QUEENS FEDERATION OF CHURCHES, AND WORLD VISION, INC. (U.S.) AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does it violate the First Amendment's Free Exercise Clause to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools and on the basis of a state-law provision that singles out religious schools for adverse treatment?

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are religious and civil liberties organizations who all endorse a vital principle: that the First Amendment's Religion Clauses are meant to protect the choices of private individuals and organizations in religious matters by preserving government neutrality toward those choices. Some *amici* operate or support private religious schools that families choose for their children. All *amici* agree that families that use private schools should not suffer government discrimination because their choice of school is religious—and that the decision below unconstitutionally gives effect to a state provision that discriminates against religion.

The specific interests of *amici* are detailed in the Appendix to this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Montana Supreme Court invalidated a religion-neutral tax credit for donations to organizations supporting students in private schools (student scholarship organizations, or "SSOs") solely because some donations would benefit students whose families choose religiously affiliated schools. The court invalidated the

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. Blanket consent letters are on file with the Clerk.

program under the state constitutional provision, Article X, § 6(1), that prohibits any "direct or indirect appropriation or payment" of public funds "to aid any church, school," or other institution "controlled in whole or part by any church, sect, or denomination." The court thus relied on a provision singling out religious schools for exclusion from a neutral program of government benefits. By depriving petitioners of access to benefits on this basis, the ruling below violates the First Amendment's Free Exercise Clause.

I. This Court has held—consistent with its longstanding prohibition on discrimination against religion—that government violates the Free Exercise Clause when it "den[ies] a generally available benefit solely on account of religious identity" or status. *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2019 (2017) (holding that state could not declare an organization ineligible for a playground-resurfacing grant on the ground that it was a church). Here, likewise, the Montana Supreme Court invalidated the tax-credit program "solely on" a discriminatory ground: that some families receiving scholarships would use the scholarships to send their children to religious schools.

It is irrelevant that, as a matter of remedy, the court struck down the entire program (Pet. App. 32-34). The court relied on a legal rule that singles out religious activity for exclusion from a state benefit, and it gave effect to that rule to deny the benefits. Because the state court based its authority to act on an unconstitutional ground of decision, this Court should

reverse and remand for the court below to proceed only on grounds consistent with the federal Constitution.

II. *Trinity Lutheran* forbade discrimination based on religious status, reserving the question whether the state might discriminate against claimants who would use the benefit for activities that included religious teaching. But a "status-use" distinction cannot be the proper constitutional line for discrimination against religion in student-aid programs. The status-use distinction conflicts with the Free Exercise Clause's text and this Court's jurisprudence, both of which protect the right not just to have a religious identity but to act on it—here, by including religious teaching in the education that a school provides and a family chooses.

Moreover, the status-use distinction collapses in the context of benefits for religiously grounded K-12 education. Religious schools teach the same secular subjects as other schools; in providing benefits assisting the teaching of these subjects, the state cannot discriminate on the basis that some of the schools also teach religion. To bar religious schools from an education-benefits program is to bar them because they teach religion as well: that is, to bar them because of their religious status or identity. Moreover, schools that go beyond mere religious affiliation to integrate religion into their secular subjects—and families who use those schools—do so because their religious identity permeates education. Whether called "belief or status" or "use," "[i]t is free exercise either way" (*Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring in

part)), and the state presumptively cannot discriminate against it.

Finally, this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), provides no basis for giving government substantial room to discriminate against religious uses of a benefit. *Locke* allowed a denial of benefits to students majoring in devotional theology, a "distinct category of instruction" compared with the range of other subjects, and it noted that the state permitted students receiving benefits to attend religious schools and take religious courses. *Id.* at 721, 724-25. That narrow ruling is essentially limited to aid supporting the training of clergy. It provides no warrant for state rules, like the one applied below, that discriminatorily bar beneficiaries from any use of their benefit at religious schools, including use for the secular education the schools provide.

III. A. In addition, discrimination against religious uses of general benefits presumptively offends basic principles underlying the Free Exercise Clause and the First Amendment's Religion Clauses as a whole—government neutrality toward religion and protection of private choice in matters of religion ("voluntarism"). In the context of government benefits available in both religious and nonreligious settings, all the basic constitutional principles point in the same direction: forbidding government from favoring either religious choices or secular choices. In this case, neutrality toward religion in the "formal" sense (giving aid on a religion-blind basis, i.e., without religious classifications) also embodies voluntarism and neutrality in

the "substantive" sense (that is, creating neutral incentives that neither discourage nor encourage individuals' religious choices).

B. Tax credits for contributions to SSOs provide a clear case for requiring government neutrality toward private religious choices. Under the decision below, the choice by some families to use their benefits—state-encouraged scholarships—at religious schools entirely deprives them of the benefits. Invalidating the program because it includes religious schools also penalizes those taxpayers who donate to enable families to choose religious schools. And when a private-choice program is administered through tax credits, the element of choice increases and the flimsy connection between government and religion becomes even flimsier. Taxpayers choose whether or not to contribute to an SSO and claim a credit, and the government, by declining to impose a tax, does not force dissenting taxpayers to contribute to whatever religious uses beneficiaries of the program choose to make. To invalidate such a program of private choice based on a rule discriminating against religion violates free exercise.

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ARGUMENT

I. The Montana Supreme Court Relied on a Constitutional Provision That Singles Out Religion to Deny Otherwise Available Educational Benefits That Would Assist Families.

The Montana program involved here is neutral toward religion: it gives a tax credit for any taxpayer who donates to an SSO, and any family may seek scholarships from SSOs to attend either secular or religious private schools. The Montana Supreme Court invalidated the program solely on the basis of the state constitution's Article X, § 6, which prohibits any "direct or indirect appropriation or payment" of public funds "to aid any church, school," or other institution "controlled in whole or part by any church, sect, or denomination." The constitutional violation, according to the court, was that the program "aids sectarian schools." Pet. App. 17; see *id.* at 28 ("The Legislature violates Article X, Section 6's prohibition on aid to sectarian schools when it provides any aid [to such schools], no matter how small."). The court's legal rule thus singles out religious schools, and the families using them, for exclusion from generally available government benefits.

Such discrimination against religion is presumptively unconstitutional. "The Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their religious status." *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2019 (2017) (quoting *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 533, 542

(1993)) (modifications by the Court). Thus the government violates the Free Exercise Clause when it "den[ies] a generally available benefit solely on account of [the claimant's] religious identity" or status. *Trinity Lutheran*, 137 S. Ct. at 2019 (holding that state could not declare an organization ineligible for a grant supporting playground resurfacing on the ground that it was a church). Indeed, a rule excluding religious schools and children attending them from "'the benefits common to the rest of [their] fellow-citizens'" is "odious to our Constitution." *Id.* at 2024-25 (quotation omitted).

It is irrelevant that the Montana Supreme Court ultimately invalidated the SSO tax-credit program entirely. The court acted solely on the authority of a state constitutional provision that discriminates against religion on its face. The court struck down the program because religious schools would benefit from it, not because private schools would benefit generally. Under the Supremacy Clause, courts "must not give effect to state laws that conflict with federal laws." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015). That includes state constitutional provisions that conflict with the Free Exercise Clause or other federal constitutional rights. See *Trinity Lutheran*, 137 S. Ct. at 2023 (asserted state constitutional interest in discrimination "'is limited by the Free Exercise Clause'") (quoting *Widmar v. Vincent*, 454 U.S. 263, 276 (1981)); see also *Hunter v. Underwood*, 471 U.S. 222 (1985) (invalidating a provision of the Alabama constitution). Under judicial review, a

court must "disregar[d]" an unconstitutional provision, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803); such a provision is "inoperative" and cannot "supersede any existing valid law." *Chicago, I. & L.R. Co. v. Hackett*, 228 U.S. 559, 566 (1913). By striking down the tax-credit program, the court below "g[a]ve effect" to the discriminatory state constitutional rule instead of "disregard[ing]" it.

A state generally has no obligation to enact a program of benefits for private education in the first place. But once the legislature has enacted such a program, a court cannot invalidate it by giving operative legal effect to a state provision that unconstitutionally discriminates against religion. Courts have power to act only on the basis of valid legal provisions and rules.

The rest of this brief therefore addresses why Article X, § 6, is unconstitutional as applied in this case. Because that application of the provision is unconstitutional, the state court's decision based on it cannot stand. Accordingly, this Court should reverse and remand for the court below to proceed only on grounds consistent with the U.S. Constitution.

II. Denial of Neutrally Available Benefits Violates the Free Exercise Clause Not Only When Singling Out Religious "Status" or "Identity," but Also When Singling Out Religious Uses of Such Benefits.

Trinity Lutheran forbade discrimination on the ground of claimants' religious "status" or "identity." 137

S. Ct. at 2019. It reserved the question whether the state could discriminate on the ground that claimants would use the benefit for activities involving religious teaching. *Id.* at 2024 n.3. But a "status-use" distinction cannot be the proper constitutional line concerning discrimination against religion in student-aid programs. That distinction conflicts with the text of the Free Exercise Clause and decisions of this Court, and it collapses in the context of benefits to religiously grounded education.

A. Discrimination Against Religious Uses Conflicts with the Text of the Free Exercise Clause.

First, the constitutional text offers no basis for distinguishing a beneficiary's religious affiliation from its use of benefits. It is difficult to "see why the First Amendment's Free Exercise Clause should care" about a "status-use" distinction when "that Clause guarantees the free *exercise* of religion, not just the right to inward belief (or status)." *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring in part) (emphasis in original). The clause encompasses "two concepts,—freedom to believe and freedom to act." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). "[T]he 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain

modes of transportation." *Employment Division v. Smith*, 494 U.S. 872, 877 (1990).

The "exercise of religion" covers not just having a religious identity but also living out that religious identity, including giving or receiving religious instruction in educational institutions. The constitutional text simply cannot support forbidding discrimination against religious affiliation but allowing discrimination against religious teachings and activities.

B. Discrimination Against Religious Uses Conflicts with This Court's Free Exercise Clause Decisions.

When citizens "use" a government benefit to support religiously grounded schools or help their children attend them, they engage in religious actions. This Court's Free Exercise Clause decisions forbid discrimination and non-neutrality not only against religious affiliation but also against those who live out their religious identity in actions. See, e.g., *Lukumi*, 508 U.S. 520; *Thomas v. Review Board*, 450 U.S. 707 (1981); *McDaniel v. Paty*, 435 U.S. 618 (1978); *Sherbert v. Verner*, 374 U.S. 398 (1963).[2]

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[2] This Court has reaffirmed *Sherbert* and *Thomas* on the ground that when a state's unemployment-benefits law recognizes certain reasons as "good cause" for declining available work, the state's refusal to accept a religiously based reason is non-neutral toward religious exercise. *Employment Division v. Smith*, 494 U.S. 872, 884 (1990).

In *Sherbert*, for example, South Carolina denied unemployment benefits to a woman who had been discharged from her job and refused to accept a different job in which she would be required to work on Saturday, her Sabbath. The state did not penalize Adele Sherbert because she was a Seventh-day Adventist; it penalized her because she acted in accordance with that identity and status. *Sherbert*, 374 U.S. at 404. This Court still found the denial of benefits unconstitutional.

Likewise, in *Thomas*, the Court held unconstitutional the state's denial of unemployment benefits to a Jehovah's Witness who had resigned his job rather than produce armaments in violation of his beliefs. The state did not penalize Eddie Thomas for being a Jehovah's Witness; it penalized him for acting on that identity. The government violates free exercise if, absent a compelling reason, it "conditions receipt of an important benefit upon *conduct* proscribed by a religious faith, or ... denies such a benefit because of *conduct* mandated by religious belief, thereby putting substantial pressure on an adherent to modify his *behavior* and to violate his beliefs." *Thomas*, 450 U.S. at 717-18 (emphases added).

Moreover, *McDaniel v. Paty*—which is sometimes cited as an example of this Court invalidating discrimination based on "status" (see *Trinity Lutheran*, 137 S. Ct. at 2020)—actually reflects a broader rule. *McDaniel* struck down a state constitutional provision barring clergy from serving in the state legislature or a state constitutional convention. The plurality held

that the state had placed an unconstitutional disability on McDaniel—ineligibility for office—because of his "status as a 'minister.' " 435 U.S. at 627. But it immediately noted that Tennessee defined ministerial status "in terms of conduct and activity." *Id.* Tennessee's interest in disestablishment could not justify discriminating against this religious activity. *Id.* at 627-29.

As Justice Brennan noted in his influential concurring opinion, the state had actually asserted a distinction between mere religious affiliation and something more: the state court had defended the disqualification because it rested "not [on] religious belief, but [on] the career or calling, by which one is identified as dedicated to the full time promotion of the religious objectives of a particular religious sect." *Id.* at 630 (Brennan, J., concurring in the judgment) (brackets added, internal quotation marks omitted).

Justice Brennan rejected that distinction for reasons that are highly relevant here:

> Clearly, freedom of belief protected by the Free Exercise Clause embraces freedom to profess or practice that belief, even including doing so to earn a livelihood. One's religious belief surely does not cease to enjoy the protection of the First Amendment when held with such depth of sincerity as to impel one to join the ministry.

Id. at 631. *McDaniel* thus illustrates that the state may not discriminate against a person's religious practice

on the ground that the person pursues it seriously or pervasively. Justice Brennan continued (*id.* at 632):

> The provision imposes a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity. Such a classification as much imposes a test for office based on religious conviction as one based on denominational preference. A law which limits political participation to those who eschew prayer, public worship, or the ministry as much establishes a religious test as one which disqualifies Catholics, or Jews, or Protestants.

McDaniel likewise condemns placing a "unique disability" upon religious uses of a neutral educational benefit. Forbidding religious uses of such aid discriminates against those families and schools whose "intensity" of religious practice calls for integrating religion into the educational process. Such discrimination imposes a bar as much "based on religious conviction as one based on denominational preference" or religious affiliation. *Id.* at 632. The Free Exercise Clause forbids discrimination against schools (and their students) not only when it rests on mere religious affiliation, but also when it rests on the act of integrating religious content into teaching.

C. The Status-Use Distinction Collapses in the Context of Religiously Grounded Schools, Because They Offer Education of Secular Value While Incorporating Their Religious Identity.

The distinction between religious status and religious use of funds, if ever valid, collapses in the context of instruction in religious schools. See *Trinity Lutheran*, 137 S. Ct. at 2025-26 (Gorsuch, J., concurring in part) (arguing that the distinction is unstable). It collapses for two related but independent reasons.

1. First, religious schools typically provide instruction in the familiar range of subjects—English, history, math, science—while also teaching a religion class or conducting chapel services or, in some cases, integrating relevant religious perspectives and teachings into the secular subjects. The religious elements could be characterized as religious "uses." But simultaneously, religious schools "teach the full secular curriculum and satisfy the compulsory education laws." Douglas Laycock, *Comment: Churches, Playgrounds, Government Dollars—And Schools?*, 131 Harv. L. Rev. 133, 162 (2017). Schools participating in the Montana program must satisfy the compulsory enrollment law and must teach basic subjects required in the public schools. Mont. Code Ann. § 15-30-3102(7)(f); *id.* § 20-5-109(4).

Since religious schools teach the same subjects as other schools, to bar them from an education-benefits program is to bar them because they additionally

provide religious instruction. "If we consider that [state aid] is funding the secular curriculum, [the schools are] excluded because of who and what they are—exactly what *Trinity Lutheran* says is unconstitutional." Laycock, *supra*, 131 Harv. L. Rev. at 162.[3]

2. There is a second way in which the status-use distinction collapses with respect to religious schools. As already discussed, the exclusion of religious uses of educational benefits targets religious schools that incorporate faith into their secular instruction: those that perceive most or all aspects of life from a religious lens. See pp. 11-12 *supra*. But these schools' religious identity is defined by such teaching. Denying benefits to the schools (and the students who attend them) simply because they incorporate such teaching imposes a penalty on "those who take their religion seriously, who think that their religion should affect the whole of their lives." *Mitchell v. Helms*, 530 U.S. 793, 827-28 (2000) (plurality opinion of Thomas, J., for four justices).

"[M]any of those who choose religious schools believe that secular knowledge cannot be rigidly separated from the religious without gravely distorting the child's education.... From this perspective, it is not sufficient to introduce religious education on the side." Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 Harv. L. Rev. 989,

[3] The state here clearly receives full secular educational value for the aid that is ultimately used at religious schools. Whether or not one could ever argue that the state is not receiving full value from its aid, no such argument is possible here, where the tax credit is capped at $150 annually.

1017-18 (1991). To allow aid to religious schools but not to their religiously grounded teaching "singles out those religions that cannot accept such 'bracketing' of religious teaching, and penalizes them by denying them the entire state educational benefit." Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. Cin. L. Rev. 151, 177 (2003). It imposes a "unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity." *McDaniel*, 435 U.S. at 632 (Brennan, J., concurring in the judgment).

Thus, the context of religious schooling validates Justice Gorsuch's prediction that the distinction between status and use cannot remain stable. "[T]he same facts can be described both ways." *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring in part). It is untenable to prohibit a state from discriminating against schools because they are religious but allow it to discriminate against schools because they add religious instruction to secular instruction. Accordingly, whatever "play in the joints" exists between the Religion Clauses (*Trinity Lutheran*, 137 S. Ct. at 2019), a status-use distinction cannot define the extent of that play.

D. *Locke v. Davey* Does Not Support Broad Discrimination Against Religious Uses of Benefits.

Finally, the Montana Supreme Court erred in suggesting that its rule singling out religious uses of aid

for prohibition was justified by this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004). See Pet. App. 16. *Locke* permitted the state of Washington to exclude a student from a generally available scholarship because he was majoring in "devotional theology." But *Locke* is a narrow decision that does not give the government license to discriminate against religious uses of a benefit. See *Trinity Lutheran*, 137 S. Ct. at 2022-24 (reading *Locke* narrowly based on factors similar to those discussed here).

First, the exclusion permitted in *Locke* aimed to prevent government support of clergy training—a goal that the Court said reflects a "historic and substantial state interest" dating back to "the founding of our country." 540 U.S. at 725, 722. By contrast, for reasons described *infra* (pp. 26-32), government benefits such as the tax credits here have little connection to the ultimate religious uses; thus any anti-establishment interests are neither historic nor substantial.

Second and relatedly, the Court believed that a post-secondary theology degree—"training for a religious profession"—is a "distinct category of instruction," not "fungible" with "training for secular professions." *Locke*, 540 U.S. at 721. By contrast, most religious colleges and K-12 schools involved in student-aid cases "pursue not only religious instruction but also secular education. They train students for the same secular professions and careers that secular schools do." Thomas C. Berg and Douglas Laycock, *The Mistakes in* Locke v. Davey *and the Future of State Payments for Services Provided by Religious Institutions*, 40 U. Tulsa

L. Rev. 227, 248 (2004). Thus "excluding them excludes instruction that falls within the same category as secular schools"—"a pure case of discrimination against an activity solely because of its religious motivation or viewpoint." *Id.*

Third, *Locke* emphasizes that, even with the theology-degree exclusion, the Washington program went "a long way toward including religion in its benefits." 540 U.S. at 724. Joshua Davey could use his state scholarship to attend a pervasively religious college (so long as it was accredited) and take courses in religion, including "devotional theology courses," or courses that integrated religion into secular subjects; he suffered only the relatively "minor burden" of not being able to major in theology. *Id.* at 724-25. Unlike the state law in *Locke*, the Montana Supreme Court's rule excludes all of a religious school's instruction from scholarship programs encouraged by a tax credit.

As *amici* discuss in Part III *infra*, the degree of burden that an exclusion of religious schooling places on religious choice informs whether that exclusion violates the Free Exercise Clause. Thus, as Judge Michael McConnell observed, *Locke* "implies that major burdens and categorical exclusions from public benefits might not be permitted in service of lesser or less long-established governmental ends." *Colorado Christian College v. Weaver*, 534 F.3d 1245, 1256 (10th Cir. 2008). *Locke* does not broadly immunize states' denial of benefits based on religious uses of funds.

III. Discrimination Against Religious Choices in Generally Available Student-Aid Programs Violates the Fundamental Principles of the Religion Clauses: Government Neutrality and Private Choice in Matters of Religion.

As explained above, the distinction between "status" and "use" cannot justify discrimination against the religious activity of either individuals or religious schools. The constitutional prohibition of discrimination against religious uses is an application of larger principles underlying the Religion Clauses. Those central principles include government neutrality toward religion and protection of private choice in matters of religion. When a tax-credit program benefits religious and nonreligious schools on neutral terms, a legal rule excluding religious beneficiaries violates these core principles.

A. The Religion Clauses Protect Private Religious Choice and Require Government Neutrality Toward Religious Activity.

"The ultimate goal of the Constitution's provisions on religion is religious liberty for all—for believer and nonbeliever, for Christian and Jew, for Protestant and Catholic, for Western traditions and Eastern, for large faiths and small, for atheist and agnostic, for secular humanist and the religiously indifferent, for every individual human being in the vast mosaic that makes up the American people." Berg and Laycock, *supra*, 40

Tulsa L. Rev. at 232. The ultimate goal is that every American should be free to hold his or her own views on religious questions, and live the life that those views direct, with a minimum of government interference or influence. The fundamental principle to achieve that goal is government neutrality toward religion in the "substantive" sense.

> [S]ubstantive neutrality [means] this: the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance.... [R]eligion [should] be left as wholly to private choice as anything can be. It should proceed as unaffected by government as possible....
>
> This elaboration highlights the connections among religious neutrality, religious autonomy, and religious voluntarism. Government must be neutral so that religious belief and practice can be free. The autonomy of religious belief and disbelief is maximized when government encouragement and discouragement is minimized.

Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1001-02 (1990). Substantive neutrality requires neutral government incentives with respect to religion. It is distinct from "formal" neutrality, or religiously neutral categories in government programs. *Id.* at 999-1000. In some contexts, the two versions of neutrality correspond with each other; eliminating religious

categories sometimes creates neutral incentives. But when the two forms of neutrality diverge, substantive neutrality—that is, voluntarism or religious choice—is more fundamental.

Differently stated, the goal of the Religion Clauses is that religion in America should flourish or decline "according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). This formulation restates the principles of voluntarism and private choice, as Justice Brennan summarized in *McDaniel*: "Fundamental to the conception of religious liberty protected by the Religion Clauses is the idea that religious beliefs are a matter of voluntary choice by individuals and their associations, and that each sect is entitled to 'flourish according to the zeal of its adherents and the appeal of its dogma.' " 435 U.S. at 640 (Brennan, J., concurring in the judgment) (quoting *Zorach*; footnote omitted). See also *Abington School Dist. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) ("The basic purpose of the religion clause of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.").

1. Equal government aid to religious and secular schools is both formally and substantively neutral.

This Court has repeatedly ruled that neutral educational aid directed by private choice is consistent

with the Establishment Clause. See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Witters v. Dept. of Services*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983). These rulings directly reflect voluntarism and substantive-neutrality principles. In such programs, "government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Zelman*, 536 U.S. at 649; accord *Witters*, 474 U.S. at 488; *Mueller*, 463 U.S. at 399-400. A program whose terms are "neutral with respect to religion" creates no "financial incentive for parents to choose a religious school" over a nonreligious one. *Zelman*, 536 U.S. at 652, 655; accord *Witters*, 474 U.S. at 487-88. Individuals use their benefit based on their "zeal" for, or the "appeal" they find in, a particular school's education, ideology, or religious teaching. See *Zorach*, 343 U.S. at 313.

Thus, in the context of a government benefits program involving private choice, the Religion Clauses' core principles require that religious options be included equally with nonreligious options. Equal inclusion of religious options is "formally" neutral: it treats religious and secular schools identically, without classifications or categories based on religion. It is also "substantively" neutral: it neither discourages nor encourages individuals' religious choices. Donors to SSOs get the same $150 credit whether the SSO funds a religious school or a secular school, and families can benefit from SSO funds whichever school they choose. "Financial aid can be distributed in a way consistent

with individual choice": "[e]ach family receiving a government voucher can choose the school that it prefers among all the options available," and whatever that range of options may be, "there are more choices with the voucher than without it." Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 Harv. L. Rev. 155, 157 (2004).

The Court's private-choice decisions hold that exclusion of religious choices is not required by the Establishment Clause, and they similarly show why such exclusion presumptively violates the Free Exercise Clause: the exclusion contravenes the fundamental principles of neutrality and religious choice. Accordingly, most cases where a state singles out private religious choices for exclusion from generally available benefits "should not be difficult": such exclusion is invalid. *Morris County Board of Chosen Freeholders v. Freedom from Religion Foundation*, 139 S. Ct. 909, 910-11 (2019) (statement of Kavanaugh, J., respecting denial of certiorari). "Barring religious organizations because they are religious from a general ... program [of state benefits] is pure discrimination against religion." *Id.* at 911. Singling out religion typically interferes with and distorts voluntary religious choice—especially, regarding educational benefits, the choice of families who wish to support religious schools or send their children to them.[4]

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[4] In focusing on the fact that a particular program channels aid through explicit choices by beneficiaries, we do not mean to

2. These principles also explain other categories of cases under the Religion Clauses.

The principles of substantive neutrality and respecting religious choice also significantly underlie this Court's decisions in two other categories of cases under the Religion Clauses: (1) protection of religious exercise against burdens from generally applicable laws and (2) religious speech by the government itself, such as a government-sponsored prayer or symbolic religious display.

Religious exercise and generally applicable laws. Principles of substantive neutrality and religious choice explain why government may—and sometimes must—accommodate religious exercise in the face of generally applicable laws and regulations.

Applying a general law to a religiously motivated practice may be formally neutral, if the law treats religious and secular violations alike. But if the law significantly burdens religious practice, it prevents people from exercising voluntary religious choice and thus

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suggest that this is a constitutional prerequisite for the inclusion of religious providers. See *Trinity Lutheran*, 137 S. Ct. at 2023 (holding that state could not exclude institution from program of direct aid solely because it was religious). Including religious providers in well designed and formally neutral direct-aid programs is typically also substantively neutral and facilitates the choices of the ultimate beneficiaries. See, e.g., *Mitchell v. Helms*, 530 U.S. 793, 810-14 (2000) (plurality opinion of Thomas, J., for four justices). The explicit element of family choice in programs like Montana's simply makes it clear that they promote substantive neutrality and choice.

lacks substantive neutrality. The threat of civil or criminal penalties or loss of government benefits profoundly discourages the prohibited religious practice. Exempting the religious practice from regulation eliminates that discouragement, and it rarely encourages the exempted practice. Nonbelievers will not suddenly start observing the Sabbath, or traveling by horse-and-buggy, or holding their children out of high school just because observant Jews or Adventists or Amish are permitted to do so.

Formal and substantive neutrality both suggest equal treatment of religious and secular schools with respect to financial aid, because money has the same value for everyone. But most exemptions of religious practices have value only for believers in some particular faith. So even though an exemption is a form of religious category, religious exemptions create neutral religious incentives.

These principles explain why government clearly may accommodate voluntary religious practice by exempting it from burdensome laws, even if such exemptions do not "come packaged with benefits to secular entities." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 338 (1987). Such an exemption is constitutional when it "does not have the effect of 'inducing' religious belief, but instead merely 'accommodates' or implements an independent religious choice." *Thomas v. Review Bd.*, 450 U.S. 707, 727 (1981) (Rehnquist, J., dissenting on other grounds). Exemption preserves government "neutrality in the face of religious differences," differences that the general law in question

does not take into account. *Sherbert v. Verner*, 374 U.S. at 409.

Moreover, this Court has unanimously required such exemptions when a generally applicable law "interferes with the internal governance of [a] church" or other religious organization, "depriving the church of control over the selection of those who will personify its beliefs." *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 188 (2012). The "ministerial exception" to nondiscrimination suits, affirmed in *Hosanna-Tabor*, protects religious choice: "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." *Id.* at 196 ("The church must be free to choose those who will guide it on its way.").

In cases not involving religious organizations' internal governance, this Court's decision in *Smith*, 494 U.S. 872, treats accommodation of religious choices as frequently a matter of government discretion rather than constitutional mandate. But that interpretation of the Free Exercise Clause stems from worries about judicial competence to decide when exemptions are appropriate, not from a rejection of the importance of religious choice. See *id.* at 890 ("to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that ... the appropriate occasions for its creation can be discerned by the courts"). Whether or not these concerns about the judicial role should override a constitutional requirement of substantive neutrality, no such concerns are present here. A prohibition on religious

discrimination in funding programs requires no such case-by-case judgments: discrimination toward religious choices in programs of student aid should be presumed unconstitutional.[5]

Government-sponsored religious speech. A final important category of cases applying the Religion Clauses involves the constitutionality of government-sponsored religious speech, such as prayers or symbolic displays, under the Establishment Clause. The rules in this category are also shaped—even if not conclusively—by the principle of voluntarism, and by the principle of neutrality in the sense that government is limited in taking sides on disputed religious questions. Voluntarism is clearly reflected in the basic Establishment Clause principle "that government may not coerce anyone to support or participate in religion or its exercise." *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (rule against coercion is "beyond dispute").

Noncoercive exercises or displays are more likely to be upheld, but even there the principle of

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[5] In any event, the meaning and vitality of *Smith*'s general-applicability rule are currently matters of some uncertainty. See, e.g., Petition for Certiorari, *Fulton v. City of Philadelphia*, No. 19-123, at 18, 19-28 (docketed July 25, 2019) (documenting "deepening split among the Courts of Appeals over how plaintiffs prove free exercise claims" under *Smith*'s rule); *Kennedy v. Bremerton School Dist.*, 139 S. Ct. 634, 637 (2019) (statement of Alito, J., for four justices, respecting denial of certiorari) (noting that *Smith* cut back on free exercise claims but that the Court "ha[d] not been asked to revisit" *Smith* in that case); Petition for Certiorari, *Ricks v. Idaho Contractors Bd.*, No. 19-66 (docketed July 12, 2019) (presenting question "[w]hether the Court should revisit its holding in [*Smith*]").

government noninvolvement in religious disputes plays a role. Most recently, this Court, in upholding a 95-year-old cross-shaped veterans' memorial, rested on its view that such "longstanding monuments, symbols, and practices" tend to develop secular purposes and meanings alongside their religious roots. *American Legion v. American Humanist Association*, 139 S. Ct. 2067, 2082-83 (2019). The majority carefully refrained from suggesting that government could erect new displays today with the purpose of promoting its favored religious view as against others. *Id.* at 2085 ("retaining established" religious displays "is quite different from erecting or adopting new ones"). Indeed, one reason the Court gave for presuming the constitutionality of a longstanding monument or practice is that when such a feature develops "familiarity and historical significance, *removing* it may no longer appear neutral" but rather may "strike many as aggressively hostile to religion." *Id.* at 2084-85 (emphasis added).[6] And the Court indicated it would not approve monuments or displays whose design "deliberately disrespected" other faiths. *Id.* at 2089.

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[6] Some of the *amici* and counsel joining on this brief took opposing positions from each other in *American Legion*. *Contrast* Brief for *Amici Curiae* Religious Denominations and Other Religious Institutions Supporting Petitioners; *with* Brief of Baptist Joint Committee, et al., as *Amici Curiae* in Support of Respondents. But we agree here that the Constitution forbids giving effect to a state rule that singles out religious educational choices for discrimination.

B. Denying Tax Credits for Educational Contributions Because Religious Schools Might Benefit Is a Clear Violation of Religious Neutrality and Choice.

This case, of course, raises no issues concerning religious accommodation or government religious speech. Whatever precise rule should govern those categories of cases, the rule here should be clear. This case exemplifies how discrimination against religion, violating formal neutrality, also constrains private religious choice, violating voluntarism and substantive neutrality.

As enacted, the Montana program promotes the private choice of families concerning religion in their children's education. It provides that SSOs shall give scholarships to "eligible student[s] to enroll with any qualified education provider of the parents' or legal guardian's choice." Mont. Code Ann. § 15-30-3103(b). Because the program's terms are neutral concerning religion, they create no "financial incentive for parents to choose a religious school" over a nonreligious one. *Zelman*, 536 U.S. at 654; accord *Witters*, 474 U.S. at 487-88. Scholarships encouraged by the program are ultimately used at a religious school "only by way of the deliberate choices of numerous individual recipients." *Zelman*, 536 U.S. at 652. See *Griffith v. Bower*, 747 N.E.2d 423, 426 (Ill. App. 5th Dist. 2001) (under similar tax-credit program, "[f]unds become available to schools only as the result of private choices made by individual parents").

But under the decision below, the fact that some families choose to use scholarships encouraged by tax credits at religious schools invalidates the credits. The state constitutional provision discriminates against families' choice to use SSO funding at a religious school, and the decision below applied that provision to deprive the families of the assistance encouraged by the tax credits.[7] Invalidating the credits because they could ultimately assist religious schools also penalizes those taxpayers who donate to help other, needy families benefit from scholarships and who wish those families to be able to choose religious schools.[8]

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[7] As explained in Part I (pp. 7-8 *supra*), it is irrelevant that the court expanded its remedy to invalidate the whole program. The court acted solely on the authority of a provision discriminating against religious schools and families' choices to use them, and it gave effect to that discriminatory provision to deny the tax credits that had encouraged SSO funding and thereby facilitated families' choices.

[8] The state court asserted, without citation, that "[m]any" donors claiming credits "would be parents of children who attend" qualifying schools and thus would be able "to claim [the] credit instead of paying that amount of tuition to the [school]." Pet. App. 26. Of course, that situation would still involve true private choice, as this Court ruled in upholding tax deductions claimed directly by parents for tuition and other expenses at varying schools including religious schools. *Mueller v. Allen*, 463 U.S. 388 (1983).

Moreover, the ruling below is not limited to situations where donors also apply for scholarships. The court held that "[t]he tax credit encourages the transfer of money from a taxpayer donor to a sectarian school because the taxpayer donor knows she will be reimbursed, dollar-for-dollar, for her donation to an SSO" and "SSOs, in turn, directly fund tuition scholarships at religiously-affiliated [schools]." Pet. App. 25. That supposed violation exists

The nature of tax credits makes the element of private choice in the program even more dominant. Indeed, this Court held that with SSO tax-credit programs, the supposed connection between government action and religious schools is so attenuated that taxpayers lack standing to challenge such credits in federal court. *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011).[9] First, as the Court observed, taxpayers choose whether to contribute to a scholarship organization and claim a tax credit. See *id.* at 143 ("contributions result from the decisions of private taxpayers regarding their own funds"). Moreover, "[w]hile the State, at the outset, affords the opportunity to create and contribute to an STO,"[10] that organization then directs money to the private school based on the eligible family's choice: thus "the tax credit system is implemented by private action and with no state intervention." *Id.* at 143.

Winn also makes clear that the nature of a tax credit greatly weakens a central argument asserted in challenges to programs benefiting religious educational choices: that non-beneficiary taxpayers are

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whether or not the donor also seeks a scholarship. Because the program bars a donor from designating a specific family or school, Mont. Code Ann. § 15-30-3111, parents who both donate and claim a credit must do so separately. They pay into the SSO like any donor, without receiving any guarantee of later obtaining a scholarship.

[9] The dissent in *Winn* disagreed with the Court's holding of no standing but did not claim that the program should fail on the merits. See 563 U.S. at 147-48 (Kagan, J., dissenting).

[10] "STO," meaning "student tuition organization," is the equivalent term in Arizona to "SSO."

being forced to subsidize religious teaching. See, e.g., Pet. App. 39 (Gustafson, J., concurring, for three justices) (asserting that the program forces nonqualifying taxpayers to become "indirect and vicarious donors") (quotation omitted). But *Winn* points out that when the government (through a credit) "declines to impose a tax," rather than imposing one, the dissenting taxpayer "has not been made to contribute" to whatever religious uses occur. 563 U.S. at 142. As the Court said:

> When Arizona taxpayers choose to contribute to STOs, they spend their own money, not money the State has collected from respondents or from other taxpayers. [The tax credit] does not "extrac[t] and spen[d]" a conscientious dissenter's funds.... On the contrary, respondents and other Arizona taxpayers remain free to pay their own tax bills, without contributing to an STO.

Id. Likewise, "[a]ny financial injury" to other taxpayers—the mere possibility that government would raise their assessments to compensate for credits given to donors—"remains speculative." *Id.*

In short, a tax-credit program separates government action from religious schools by "multiple layers of private, individual choice." *Winn v. Arizona Christian School Tuition Organization*, 586 F.3d 649, 662 (9th Cir. 2009) (O'Scannlain, J., dissenting from denial of rehearing en banc), rev'd, 563 U.S. 125 (2011).

The fact that religious schools ultimately benefit from families' and donors' exercise of choice cannot justify application of a provision that singles out religious

choices for exclusion. The state court here, like the state agency in *Trinity Lutheran*, sought to justify discrimination based on "nothing more than" a "preference for skating as far as possible from religious establishment concerns." *Trinity Lutheran*, 137 S. Ct. at 2024. The court said that Montana's ban on aiding religious schools not only was broader than the federal Establishment Clause but was "unique from other states' no-aid provisions": "'among the most stringent no-aid clauses in the nation.'" Pet. App. 16, 21, 19 (brackets and citation omitted).

As in *Trinity Lutheran*, this interest "cannot qualify as compelling" under the "rigorous" showing required to justify discrimination against religion. 137 S. Ct. at 2024. As in prior cases, "'the state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause'"—cannot justify applying the discriminatory state rule. *Id.* (quoting *Widmar v. Vincent*, 454 U.S. 263, 276 (1981)).

Finally, this discrimination is barred even if most families choose to use SSO scholarships at religious schools. This Court has repeatedly held that "[t]he constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are religious, or most recipients choose to use the aid at a religious school." *Zelman*, 536 U.S. at 657 (criticizing such approach for producing "absurd" result that a program would be legal in some locations and not others); *Mueller v. Allen*, 463 U.S. 388, 401 (1983) ("Such

an approach would scarcely provide the certainty that this field stands in need of, nor [are there] principled standards by which such statistical evidence might be evaluated."); *Agostini v. Felton*, 521 U.S. 203, 221 (1997).

Those were Establishment Clause decisions. But it would be just as absurd and unworkable to allow denials of benefits under the Free Exercise Clause on the ground that too many beneficiaries choose to apply the benefits at religious schools.

When a program's terms are neutral, the percentage of benefits used at religious schools does not prove the existence or nonexistence of genuine private choice. Rather, it commonly reflects "the zeal of [the] adherents" of those faiths for providing, supporting, and using religious education. *Zorach*, 343 U.S. at 313. See, e.g., *Zelman*, 536 U.S. at 657 (noting that 82 percent share of voucher-participating private schools that were religious corresponded with 81 percent share of overall Ohio private schools that were religious).[11]

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[11] For all the reasons in text, the tax credit for private-school donations in itself promotes individuals' and families' voluntary choices (so barring religious choices from the program is unconstitutional). But in addition, the legislature simultaneously enacted a credit (likewise capped at $150) for donations to public schools addressing "innovative educational programs and technology deficiencies." Mont. Code Ann. § 15-30-3110. And of course state and local governments in Montana spend vast sums on free public schools available to all students. No assertion can be made that the state is pushing anyone toward religious education, since that question "must be answered by evaluating *all* options" the state provides. *Zelman*, 536 U.S. at 655-56 (emphasis in original).

Under a neutral choice-based program, groups that approach education from secular perspectives (or other religious perspectives) can exercise the same choice and zeal to create their own schools, which would then be eligible to accept students with SSO scholarships. A program encouraging donations lowers the barriers to forming such schools. Montana's program might have done so had it been allowed to continue in existence.

CONCLUSION

The decision of the Montana Supreme Court should be reversed. The case should be remanded to that court to be decided without regard to Article X, § 6, and on grounds that do not discriminate against religious schools and families using them.

Respectfully submitted,

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