No. 18-1195

IN THE

Supreme Court of the United States

KENDRA ESPINOZA, JERI ELLEN ANDERSON, AND JAIME SHAEFER,
Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE, AND GENE WALBORN, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE MONTANA DEPARTMENT OF REVENUE,
Respondents.

On Writ of Certiorari to the Montana Supreme Court

BRIEF FOR *AMICI CURIAE* AMERICANS FOR PROSPERITY AND YES. EVERY KID. IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does it violate the Religion Clauses or Equal Protection Clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools?

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BRIEF OF *AMICI CURIAE* AMERICANS FOR PROSPERITY AND YES. EVERY KID. IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2, Americans for Prosperity and **yes. every kid.** respectfully submit this *amicus curiae* brief in support of Petitioners.[1]

INTEREST OF AMICI CURIAE

Amicus curiae Americans for Prosperity ("AFP") is a 501(c)(4) nonpartisan organization that drives long-term solutions to the country's biggest problems. AFP and its activists engage friends and neighbors on key issues and encourage them to take an active role in building a culture of mutual benefit where people succeed by helping one another.

Amicus curiae **yes. every kid.** believes the purpose of education is to help all students discover, develop and apply their unique abilities, establishing a foundation for a life of fulfillment and success. **yes. every kid.** supports education policy that respects the dignity of every student, fosters a diversity of approaches, and is open to the free flow of ideas and innovation. **yes. every kid**. is a member of the Stand Together community and is committed to working

[1] In accordance with Supreme Court Rule 37.2(a), a blanket consent has been granted by all parties. No counsel for a party authored this brief in whole or in part, and neither the parties, their counsel, nor anyone except *amici* and their counsel, Cause of Action Institute, financially contributed to preparing this brief.

with anyone who supports policies that advance all educational options for all kids.

Amici have a particular interest in this case because they are national organizations dedicated to ensuring families have every available educational option to choose for their children. That includes the freedom to choose the education that best fits a student's needs, whether it is a public school, private school, charter school, or homeschooling. The use of Blaine Amendments undermines the fundamental freedom for families to select the education that best serves their children.

INTRODUCTION

"All who have meditated on the art of governing mankind have been convinced that the fate of empires depends on the education of youth." – Aristotle

The Montana Constitution includes a "Blaine Amendment" that prohibits state "appropriation or payment" to sectarian schools. The Montana Supreme Court's recent ruling, striking down a facially-neutral school-choice program, demonstrates that Blaine Amendments are fundamentally incompatible with the First and Fourteenth Amendments.

Although the Montana school-choice program did not directly fund sectarian schools, and thus might have escaped constitutional review, the Montana Supreme Court construed its amendment to require excision of any possibility that religion may receive a public benefit. In doing so, the court demonstrated that it could not apply its Blaine Amendment without

labeling and discriminating against religious actors. Moreover, the ruling exposed a fundamental weakness of Blaine Amendments: their application to constrain a neutral benefit will naturally infringe free speech and due process rights, as well as free exercise.

The Montana Supreme Court's construction is binding on this Court, which must now decide whether Montana's Blaine Amendment can be reconciled with the First and Fourteenth Amendments. The broad implications of the Montana Supreme Court's ruling show that it cannot.

SUMMARY OF ARGUMENT

The Montana State Legislature enacted a tax-credit program that mirrors the program this Court reviewed in *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011). That program allows donors to claim tax credits for their donations to private, non-profit scholarship organizations but no tax money flows through the State's treasury, or from the treasury to any school—either directly or indirectly—and the State has no control over which student or school receive the benefit of a scholarship.

By setting up the tax-credit program the way it did, in addition to promoting "parental and student choice in education," the Legislature protected and promoted a variety of rights, including: (1) the speech rights of donors, parents, children, and educators, who would be free to speak, listen, or financially support speech as they chose; (2) the economic freedom of

donors and educators, who could use their own money to support private endeavors according to their own preferences; (3) the fundamental interest of parents in the upbringing of their children, who could select the most-responsive educational environment for their children; and (4) the free exercise rights of donors, parents, children, and educators, who could independently elect to support or participate in religiously-affiliated education. The statute was drafted to avoid violating Montana's Blaine Amendment, which prohibits any "appropriation or payment from any public fund or monies . . . for any sectarian purpose or to aid any . . . school," Mont. Const., art. X, § 6(1), by ensuring that no appropriation or payment of public monies was implicated in the program.

In promulgating rules to implement the program, however, the Montana Department of Revenue changed the definition of "qualified education provider" to exclude schools controlled by any religious entity. This change nullified the provision that had ensured the neutrality of the program by allowing scholarships to be applied toward tuition at *any* qualified school.

The district court resolved the initial legal challenge to the program by relying on the plain meaning of the constitutional provision, holding that tax credits are not appropriations or public monies and thus the tax-credit program did not violate the Montana Constitution.

The Montana Supreme Court, by contrast, interpreted the Montana Constitution to reach beyond the State's treasury and into the private pockets of taxpayers to hold that the donation of private funds—that the State could have taxed but did not—is akin to an appropriation or use of public monies. This judicial expansion of the constitutional text was the hook to bring the neutral school-choice program within the Blaine Amendment and opened the door for scrutiny of potential religious entanglement. But the program had no such identifiable entanglement.

Undeterred, the court concluded that the tax credit's very neutrality, which precluded the State from discriminating between religious and non-religious beneficiaries of scholarship funds, meant that it was impossible to guarantee that religious participants were excluded, and thus struck the entire private school program—whether religiously-affiliated or secular. The court allowed a parallel program relating to tax credits for public school contributions to stand however, thus violating not only the free exercise rights of potential scholarship recipients, but also the broader rights of all citizens—religious or not—to deploy their personal funds, to control the education of their children, and to express their educational philosophies through direct participation or financial support. All Montanans who wished to participate in a neutral school choice program were forced to suffer, alongside religious citizens, with the loss of that choice. This ruling exhibits an extraordinary degree of hostility to religion, where the violation of myriad rights is collateral damage to the court's quest to root out

potentially religious participants from a facially neutral program.

Moreover, by allowing the public option to stand while striking the private option, the Montana Supreme Court put its thumb on the scale in favor of donations to public education by making support to private schools more expensive than to public schools. Now, donors with an interest in funding education must pay more to express support for private schools than they would to express the same degree of support for public schools—an impermissible burden on the free speech rights of the donors. This is not the neutral benefit the Legislature enacted, which allowed the tax credit for public, private, religious, or secular donations, impartially providing tax relief for educationally-minded taxpayers.

The ruling shows that no matter the degree of care a legislature may take to avoid a Blaine Amendment conflict and seek neutrality, by its very nature, a constitutional quest to treat religious participants differently from all others must end in encroachment of multiple rights. That the Montana Supreme Court did not even consider the free-speech or parental-rights implications of its decision shows the pernicious effect of Blaine Amendments. They cannot be applied to preclude participation in generally applicable government benefits without impermissible examination of viewpoints and beliefs and discrimination against those that are unfavored.

ARGUMENT

I. The Montana Supreme Court Recast the Montana Constitution and its History to Unconstitutionally Penalize Private Action by Any Party that Could Not Be Verified as Non-Religious.

The Montana Supreme Court's recasting of Article X of the Montana Constitution ("Article X") to burden constitutionally protected rights beyond the reach of its plain text, is subject to review by this Court. This Court has said that "'voters may no more violate the United States Constitution by enacting a ballot issue than the general assembly may by enacting legislation.'" *Buckley v. Am. Constitution Law Found., Inc*, 525 U.S. 182, 194 (1999) (quoting *Buckley v. Am. Constitution Law Found., Inc*, 120 F.3d, 1092, 1100 (10th Cir. 1997)). Here, the Montana Supreme Court put itself into the role of legislator by recasting the law. That court's construction of Article X is binding on this Court. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 381 (1992). Thus, its recasting of Article X is subject to the same constitutional review as ballot initiatives or legislative acts by any other lawmaker.

A. The Montana Constitution's Text is Clear and Does Not Reach Tax Credits.

Article X, Section 6 of the Montana Constitution, which prohibits appropriations or payments from public funds to aid sectarian schools, reads as follows:

> **Section 6. Aid prohibited to sectarian schools.** (1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.
>
> (2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education.

According to the section's plain text, the words "direct or indirect" modify the terms "appropriation or payment from any public fund or monies." Thus, the prohibition on aid to sectarian schools is limited to appropriations or payments from public funds or monies. The reach of this text is unambiguous and can be expanded only by changing or inserting terms.

The district court's opinion was in accord, using straightforward textual analysis to note that:

- The Montana Constitution is "silent regarding tax credits," and
- The term "appropriation" does not encompass tax credits.

Espinoza v. Mont. Dep't of Revenue, No. DV-15-1152C, 2017 WL 11317587, at *3–4 (Dist. Ct. Mont. May 23, 2017). The district court's observations are not only self-evident, but also are consistent with the Montana Supreme Court's traditional reliance on a "long line of Montana cases" confirming that "'appropriation' refers only to the authority given to the legislature to expend money from the state treasury[.]" *Id*. at *3 (citing *Nicholson v. Cooney*, 877 P.2d 486, 491 (1994)). Based on the plain text and a long line of state precedent, the district court ruled for the plaintiffs and held that the Department's exclusionary rule was based on an incorrect interpretation of the law.

Nevertheless, when the Department appealed, the Montana Supreme Court abandoned its traditional posture on "appropriations" and overturned the lower court's plain-language analysis, to conclude:

- The section title, "Aid prohibited to sectarian schools," should be read to "manifest[ ] the Delegates' intent to broadly prohibit aid to sectarian schools";
- The prohibited action, "direct or indirect appropriation or payment," should be read to mean "direct or indirect aid"; and
- Thus, the text demonstrates the Delegates' intention to prohibit "'any' type of state aid" to benefit sectarian education.

Espinoza v. Mont. Dep't of Revenue, 435 P.3d 603, 609 (Mont. 2018) [hereinafter *Espinoza II*].

The limited constitutional prohibition on use of public funds was thus transformed into a generalized prohibition against all "aid." The remainder of the opinion routinely substituted "aid" for "appropriation or payment," judicially amending the text.

The Montana Supreme Court also examined the history of the current Montana Constitution in light of the original 1889 Montana Constitutional Convention, which adopted a provision that read:

> [T]he Legislative Assembly . . . shall [n]ever make directly or indirectly, any appropriation, or pay from any public fund or monies . . . in aid of any church, or for any sectarian purpose, or to aid in the support of any school . . . controlled in whole or in part by any church[.]

Espinoza II, 435 P.3d at 610 (quoting Mont. Const. of 1889, art. XI, § 8 (alterations in *Espinoza II*)). This historical incarnation is relevant, the court surmised, because "the 1972 Constitutional Convention Delegates intended Article X, Section 6, to retain the meaning of Article XI, Section 8 of the Montana Constitution of 1889." *Id.* at 611. If so, it does not follow, as the court concluded, that the Delegates—whether in 1889 or in 1972—intended the provision to "broadly and strictly prohibit aid to sectarian schools," *id.*, including in the form of income tax credits, because the 1889 Delegates could not possibly have had that construction in mind.

Indeed, the court's entire analysis is historically suspect because Montana did not even have a state

income tax until 1933.[2] Nor did ratification of the Sixteenth Amendment to the United States Constitution occur until 1913. Thus, it cannot be the case that the 1889 Delegates intended to include income tax credits within the terms "appropriation" or "public fund or monies," nor could the 1972 Delegates have inherited that definition from them.

Nevertheless, whatever may be gleaned from a plain-text reading of Article X, or an historical review of Montana's constitutional delegations, the Montana Supreme Court has now subsumed that analysis into its construction of Article X, which cannot now be saved by revisiting its text or its history. The court has spoken: Article X demands the identification and excision of religious actors from public benefits.

B. The Montana Supreme Court Was Perversely Motivated by the Neutrality of the Tax Credits that Made it Impossible to Discriminate Against Religious Participants.

By trying to root out religious participation from a neutral program, the Montana Supreme Court applied a framework that is wholly incompatible with this Court's Establishment Clause and Free Exercise Clause jurisprudence. The Montana Supreme Court struck down the entire tax-credit program for all private schools—not because it *could* identify

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[2] *See* Mont. Dep't of Revenue, Individual and Corporate Income Tax Biennial Report, at 54 (2016), *available at* http://bit.ly/2YUqQ3M.

payments to religious schools, but because it *could not* prove a negative: that no private donations would ever benefit religiously-affiliated schools. The court wrote:

> There is simply no mechanism within the Tax Credit Program itself that operates to ensure that an indirect payment of $150 is *not* used to fund religious education . . . The Department . . . has no ability to ensure that indirect payments are not made to religious schools . . . Because the Tax Credit Program does not distinguish between an indirect payment to fund a secular education and an indirect payment to fund a sectarian education, it cannot under *any* circumstance, be construed as consistent with Article X, Section 6.

Espinoza II, 435 P.3d at 613. In other words, the program's neutrality, which made it impossible to single out religious participants, was its death knell.[3]

This Court has instructed that a state may not establish a "religion of secularism." *See, e.g.*, *School Dist. Of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963). Nor can otherwise-eligible participants be denied a benefit based on their religious status, *Trinity Lutheran Church of Columbia, Inc. v. Comer*,

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[3] Had the program been non-neutral, conditioning participation on religion or the lack thereof, that distinction would have run afoul of the Free Exercise Clause. *See generally, e.g.*, *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (plurality opinion).

137 S. Ct. 2012, 2019 (2017), or failure to pass a religious test. *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961).

Here, the Montana Supreme Court violated both precepts—ruling that the tax-credit program could not comport with the Montana Constitution unless, (1) all beneficiaries of the program were wholly secular, and (2) it could be proven that any potentially religious participants had been identified and completely excluded. This ruling goes beyond "exaggerated fears of contagion of or by religion" *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 10 (1989), and well into the mandatory religious inquiry that this Court has found unconstitutional. *See Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 26 (1947).

II. This Court has Consistently Held that Tax Credits are Not Appropriations and Private Funds are Not Public Funds.

The Montana Supreme Court's ruling rests on the erroneous presumption that a tax credit is an indirect payment from the Legislature to a private, religiously-affiliated school, equivalent to an appropriation or payment from the state treasury. *Espinoza II*, 435 P.3d at 612. The opinion includes no citation to legal authority for the notion that a taxpayer's money is the government's money until, or even if, the government decides not to take it.

This Court addressed a similar assertion in *Winn* and held that a tax credit is not a governmental expenditure for the purposes of establishing taxpayer

standing.[4] 563 U.S. at 141. The Court rejected the premise that "income should be treated as if it were government property even if it has not come into the tax collector's hands." *Id* at 144. "Private bank accounts cannot be equated with the . . . state treasury." *Id*.

At oral argument in *Winn*, several justices expressed deep skepticism with the notion that any money the government declines to take from a taxpayer is still government money. Justice Scalia remarked that it's "a great leap to say that it's government funds, that any money the government doesn't take from me, because it gives me a deduction, is government money." Tr. 30:18–21. Likewise, Justice Kennedy had "some difficulty [with the idea] that any money that the government doesn't take from me is still the government's money." Tr. 31:12–14. Justice Alito also found that there was "a very important philosophical point here. You think that all the money belongs to the government . . . except to the extent that it deigns to allow private people to keep some of it." Tr. 35:13–19 (intervening response from counsel omitted).

Nor is this perspective new. The Court addressed a similar presumption regarding exemption from property taxes in *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 669–70 (1970). There, the

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[4] *Amicus* expresses no position on the wisdom or propriety of using tax credits to support school choice. However, if a tax-credit approach is implemented, it should be recognized that untaxed money is private property and not public property.

Court held that a property tax exemption for churches was not equivalent to a transfer of state funds that would implicate establishment concerns.

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees 'on the public payroll.' There is no genuine nexus between tax exemption and establishment of religion.

Id. at 675.

The Montana Supreme Court's atextual expansion of the language to deem that the donation of private income exempted from taxation is akin to a government expenditure undergirds its entire opinion and provided the means by which that court could invoke its Blaine Amendment to root out religious viewpoints or participants.

III. By Targeting Religious Viewpoints, the Montana Supreme Court Has Infringed Freedom of Speech.

The tax-credit program the Montana Legislature passed was strictly neutral regarding the educational viewpoints of donors, scholarship organizations, students, parents, and educational organizations. It

was designed to facilitate access to a variety of educational viewpoints, fostering diversity. This Court has found this approach to be lawful and laudatory. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001).

In reviewing this neutral program, however, the Montana Supreme Court interpreted Article X to exclude education from a religious viewpoint. As shown above, that court's interpretation was not founded on the plain language of Article X. Nevertheless, this Court is bound by the construction given by the Montana court. *See R.A.V.*, 505 U.S. at 381 (1992); *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). This Court must thus accept the Montana Supreme Court's expansive construction of the Montana Blaine Amendment as requiring the exclusion of not just state funding of religious education, but also the exclusion of any benefit to speech in support of religious education or secular private education if secular speech cannot be segregated from potentially religious speech. Article X, especially as judicially amended, is unconstitutional.

A. The Montana Supreme Court Has Imposed Impermissible Viewpoint Discrimination.

The issue of viewpoint discrimination in violation of the First Amendment was not raised below because it was not an element of the tax-credit program or the district court's opinion. Rather, the issue originated

with the Montana Supreme Court's denial of access to a neutral government program to any participant with a viewpoint in favor of private—and particularly religious—education. That court's construction of Article X, which affects speech relating to private or religious education, is content-based and presumptively invalid under the First Amendment. *See R.A.V.*, 505 U.S. at 382; *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, (1991). That express content- and viewpoint-based restriction is "subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained' in the regulated speech." *Reed v Town of Gilbert,* 135 S. Ct. 2218, 2228 (2015) (citation omitted).

This Court reviewed similar viewpoint discrimination in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), and found that it violated the Free Speech Clause of the First Amendment. In *Rosenberger*, the University of Virginia had a program that authorized payments from the Student Activities Fund to outside contractors for costs incurred by qualified student organizations. The purpose of the fund was to support a broad range of extracurricular activities and its funding was derived from student fees—not from the state. *Id.* at 822, 824. Student news organizations were among the categories of student groups that could seek payments. *Id.* at 824. The university denied reimbursement of printing costs for one publication—a magazine that addressed personal and community issues from a Christian perspective—on

the basis that publishing the magazine was a religious activity. *Id.* at 825, 826. Although the university defended its position on Establishment grounds, this Court held that the university's requirement that student publications be scanned and interpreted to discern their religious philosophy violated the First Amendment. *Id.* at 845. The Court added that the university's course of action "would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Id.* at 845–46.

So too here. The Montana Legislature enacted a program that authorized payments from independent third-parties to qualified education providers to support a broad range of school choice using non-state funds. There is no dispute that the participating students are entitled to attend school in Montana nor that the schools they wish to attend are qualified under state law. The only basis on which the Montana Supreme Court denied the program was the inability of the State to discern the religious philosophy of the recipient schools for the express purpose of rooting out religious participants. This, as the Court noted in *Rosenberger*, would undermine the neutrality the Establishment Clause requires.

It is also viewpoint discrimination. Like the publication in *Rosenberger*, some participating schools in the Montana tax-credit program may present educational topics from a religious perspective. Others may present educational topics from a secular viewpoint, but one that is distinct from the viewpoint expressed in the public schools. Students enrolled in

those schools may wish to hear educational material presented from a religious, or from a specialized secular, perspective. As listeners, the students have an equal free speech interest in the viewpoint of the schools they choose to attend. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976) ("freedom of speech 'necessarily protects the right to receive'"). To burden the speech of religious or other private schools because they may extoll a viewpoint different from the public schools, violates the rights of the educators to speak and the students to listen.

Moreover, the Montana Supreme Court's fear of religious viewpoints is especially pernicious here because it has precluded participation in the tax-credit program for all speakers due to the fear that non-religious speakers could not be singled out. While there was no arguable cause for overturning the legislature's decision to extend tax credits for contributions to secular private schools, they were excluded too in a zealous attempt to exclude the participation of schools with a religious viewpoint.

B. This is Not a Case of Government Sponsored Speech.

This is not a case in which the State of Montana is speaking on its own behalf. Were that the case, viewpoint neutrality would not be required. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009) ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."). Nor is this a case in which Montana has chosen to fund certain activities but not

others, where, again, viewpoint neutrality would not be necessary. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998) ("The legislature may 'selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.'" (citation omitted)). It is, instead, a case in which the Legislature chose to enact a neutral benefit. While not required to subsidize activities that it does not wish to promote, having enacted a general benefit, the State "may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." *Matal v. Tam*, 137 S. Ct. 1744, 1760–61, (2017) (cleaned up).

Here, the law, as drafted by the Montana Legislature, involved no government speech and no government funds. As such, it was like the use of student activity funds that the Court found significant in *Rosenberger*. *See* 515 U.S. at 842. (noting the significance of the fact that no public funds flowed to the Christian publisher). The Legislature did, however, incentivize school choice without reference to viewpoint, thus creating a neutral benefit to donors, parents, students, and private schools. And, while none were entitled to the enactment of the tax exemption program, once the benefit was created, the Montana Supreme Court could not, consistent with the Free Speech clause of the First Amendment, "single[] out a subset of messages for disfavor based on the views expressed." *Tam*, 137 S. Ct. at 1766.

It is beyond doubt that the Montana Supreme Court sought to single out and negate any benefit to "any aspect of religious education, including those areas heavily entrenched in religious doctrine." *Espinoza II*, 435 P.3d at 614. This is viewpoint discrimination on its face and incompatible with the First Amendment right not only to "identify with a particular side" but also to "present arguments for particular positions in particular ways, as the speaker chooses." *Tam*, 137 S. Ct. at 1766.

C. The Montana Supreme Court's Prophylactic Approach is the Opposite of Narrow Tailoring.

This Court "require[s] the most exacting scrutiny in cases in which the State undertakes to regulate speech on the basis of its content." *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). Accordingly, such regulation is subject to strict scrutiny and may be "justified only if the government proves that [it is] narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226–27. The Montana Supreme Court's construction of Article X fails on both points.

First, Montana has no valid interest in excluding religious entities from participating in a neutral benefit program. *See, e.g.*, *Comer*, 137 S. Ct. at 2025 ("[T]he exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution[.]").

Second, the Montana Supreme Court's ruling was based on the State's inability to identify and preserve

the program for non-religious entities. *Espinoza II*, 435 P.3d at 613 ("Because the Tax Credit Program does not distinguish between an indirect payment to fund a secular education and an indirect payment to fund a sectarian education, it cannot under *any* circumstance, be construed as consistent with Article X, Section 6."); *id.* at 615 (severing provisions relating to private schools from the program).

The Montana Supreme Court has undertaken to exclude participation by religious education and its supporters by eliminating the program for all participants. This is the ultimate prophylactic approach—excluding from the program all private education and its supporters to ensure that the court has excised every last religious viewpoint. But, as Justice Scalia explained in his dissent to *Hill v. Colorado*, "[p]rophylaxis is the antithesis of narrow tailoring." 530 U.S. 703, 762 (2000) (Scalia, J., dissenting). Nor does it answer that the Montana Supreme Court's ruling affects tax credits rather than imposing a direct prohibition on speech. Content-based financial burdens are subject to the same strict scrutiny as direct prohibitions and must be narrowly-tailored. *Simon & Schuster, Inc.*, 502 U.S. at 118 (financial disincentive to create or publish works with a particular content subject to strict scrutiny); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987) (content-based approach to taxation of magazines subject to strict scrutiny). Accordingly, the Montana Supreme Court's prophylactic approach to the speech rights of private school supporters is not narrowly-tailored and thus fails strict scrutiny.

IV. Under *Yoder*, the Ruling Infringes the Rights of Parents to Raise Their Children.

Much like the unconstitutional burdens on speech, the matter of parental rights was not at issue until the Montana Supreme Court construed the Montana Blaine Amendment to include indirect aid to religious schools, making parental rights collateral damage to that court's effort to stamp out potential religious participation in the tax credit program.

The purpose of the tax credit scholarship program was to "provide parental and student choice in education" for K-through-12 students. Mont. Code Ann. § 15-30-3111. In enacting the program, the Montana Legislature trod a well-worn path consistent with the Fourteenth Amendment's protection of "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men," such as the upbringing and education of children. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Similar to other states, in Montana, school attendance is compulsory through a child's sixteenth birthday or the completion of the eighth grade, whichever is later. Mont. Code Ann. § 20-5-102. Subject to certain enumerated exceptions, the State compels school attendance, which this Court has held to be within the State's authority. *Meyer*, 262 U.S. at 402–03. The State's authority is not unlimited but is cabined by fundamental rights, both enumerated and unenumerated, including free speech, free exercise, due process, the privileges and immunities of citizenship, and the right of parents to guide the education of their children.

This Court has long recognized that the Fourteenth Amendment guarantees liberty in the realm of family matters and the raising of children. Sometimes that liberty has been recognized as a privilege. *Meyer*, 262 U.S. at 399 (raising children is among those privileges long recognized at common law). At other times, if has been recognized as a due process right. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."). Among these rights are the rights of parents to control the education of their children. Indeed, the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

In *Meyer*, this Court, while recognizing state power to compel school attendance and to make reasonable regulations for schools, also recognized that "it is the natural duty of the parent to give his children education suitable to their station in life." 262 U.S. at 402–03. The Court thus held that prohibiting teaching in any modern language other than English interfered with "the power of parents to control the education of their own" children in violation of the Fourteenth Amendment. *Id*. at 399–401.

Similarly, in *Pierce v. Society of Sisters*, the Court held that a law requiring almost all children to be sent to public school, "unreasonably interfere[d] with the

liberty of parents and guardians to direct the upbringing and education of children under their control." 268 U.S. 510, 534–35 (1925). Accordingly, parents who choose to educate their children in a privately-run school not only have the right to do so, but also "the high duty" to prepare their children for their future life.

The right to direct the education of one's children does not end with the selection of which school they attend but extends to whether their public education should continue if school attendance becomes contrary to their religion and way of life and a danger to the salvation of the parents and children. *Yoder*, 406 U.S. at 209. In *Yoder*, the Court held that the interest of the state in providing for the education of children, must yield to the "fundamental interest" of parents "to guide the religious future and education of their children," and thus the parents were within their rights to withdraw their children from public school after eighth grade. *Id*. at 232, 234.

This Court has rarely found a state interest to transcend the interest of the parent in the child's upbringing. *Prince v. Massachusetts*, 321 U.S. 158, 161 (1944) (upholding child labor law that prohibited girl under age eighteen from selling magazines in a street or public place.). But even in *Prince*, the Court was careful to annunciate the cardinal rule that "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder," *id*. at 166, and to affirm

that the ruling in that case should not extend beyond its facts. *Id*. at 171.

Accordingly, the Montana Legislature acted in harmony with the rights protected by the Fourteenth Amendment and nearly a century of precedent when it promoted parental choice in schools. The Montana Supreme Court, by contrast, gave no consideration to the rights of parents to guide the education of their children, focusing exclusively on a perceived state interest in avoiding any indirect aid to religious schools. Even if such an interest were valid, the attenuated aid the Montana Supreme Court divined does not approach the material and valid state interests in providing for the education of all children that this Court has repeatedly reviewed and consistently found must yield to parental rights in all but the most compelling circumstances.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Montana Supreme Court.

Respectfully submitted,

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