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 Supreme Court of Montana

Brief of Religious and Civil-Rights Organizations as *Amici Curiae* in Support of Respondents

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BRIEF OF RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF THE *AMICI CURIAE*

Amici are religious and civil-rights organizations that share a commitment to religious freedom and the separation of religion and government. *Amici* believe that religious freedom flourishes best when religion is funded privately and that governmental funding of religious activities does a disservice both to government and to religion. *Amici* therefore oppose petitioners' efforts to force states to fund religious education in violation of state constitutional provisions that are designed to protect the independence of religious groups.[1]

The *amici* are:

- Americans United for Separation of Church and State.
- American Civil Liberties Union.
- American Civil Liberties Union of Montana.
- ADL (Anti-Defamation League).
- Central Conference of American Rabbis.
- Hindu American Foundation.
- Interfaith Alliance Foundation.

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution to fund the brief's preparation or submission. The parties' letters consenting to the filing of *amicus* briefs have been filed with the Clerk's office.

- Men of Reform Judaism.
- Muslim Advocates.
- National Council of Jewish Women.
- People For the American Way Foundation.
- Reconstructing Judaism.
- Reverend Dr. J. Herbert Nelson, II, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.) (PCUSA).[2]
- Texas Impact.
- Texas Interfaith Center for Public Policy.
- Union for Reform Judaism.
- Unitarian Universalist Association.
- Women of Reform Judaism.

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[2] Reverend Dr. J. Herbert Nelson, II, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.) (PCUSA), joins this brief as the senior ecclesiastical officer of the PCUSA. The PCUSA is a national Christian denomination with nearly 1.6 million members in over 9,500 congregations, organized into 170 presbyteries under the jurisdiction of sixteen synods. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706. The General Assembly does not claim to speak for all Presbyterians, nor are its policies binding on the membership of the Presbyterian Church. However, the General Assembly is the highest legislative and interpretive body for the denomination, and it is the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has long recognized that there is "play in the joints" between the Establishment Clause and the Free Exercise Clause. *Locke* v. *Davey*, 540 U.S. 712, 719 (2004). Specifically, states may choose to offer more robust protection for religious-freedom rights than the U.S. Constitution provides. The Court has thus held, for example, that states may accommodate the free exercise of religion by exempting churches from property taxation. *Walz* v. *Tax Comm'n,* 397 U.S. 664, 673 (1970). The Court has likewise permitted states to vindicate traditional and important antiestablishment interests by declining to use public funds for the "essentially religious endeavor[s]" of religious institutions. *Locke*, 540 U.S. at 721. That is precisely what Montana has done here in choosing not to underwrite religious instruction even when doing so might otherwise be constitutionally permissible.

Petitioners and their *amici* urge the Court to reduce *Locke* to a narrow, fact-bound decision that has no practical effect on anything beyond itself. But the historical antiestablishment interests that *Locke* respected are not so narrow or insubstantial.

The founders believed that it was critical to protect individuals' freedom of conscience against the coercive extraction of tax funds to support religion. They also thought it vital to shield religion and religious institutions from the deleterious effects of governmental support and interference: dependency of religious institutions on the state, compromise of religious beliefs, and strife among religious denominations. They therefore exhorted against public subsidies for religious ministries—including for religious education,

which is not only a vital function of religious ministries but also essential to generating adherents and maintaining those ministries over time and across communities. The Montana Supreme Court's application of the state constitution to bar the program at issue appropriately vindicates the state's fundamental antiestablishment interests in ensuring that Montanans decide for themselves what religious instruction, if any, they will support and underwrite, and in protecting the autonomy and independence of religious institutions and faith systems.

Concluding that the Free Exercise Clause requires states to fund religious education whenever they fund secular education would be a radical departure from fundamental principles and long-standing precedent under the Religion Clauses. Although this Court has, in some instances, permitted states to choose to fund religious education as part of a program of indirect aid, the Court has never *required* that states do so. Indeed, long before *Locke*, this Court repeatedly rejected arguments that state support for public or secular private education requires equal support for religious education. And it would be particularly inappropriate to disregard that precedent here, as the Montana Supreme Court's ruling terminated the challenged program *in its entirety*, resulting in no differential treatment of secular and religious private schools. The Court should therefore leave undisturbed the unremarkable proposition that, whatever states may be *permitted* to do, they are not *required* to fund the essentially religious endeavors of religious institutions.

ARGUMENT

I. Montana may vindicate its traditional anti-establishment interests by declining to fund religious education through tuition tax credits.

Religious institutions do not have a constitutional right to use taxpayer dollars to support religious instruction merely because a state decides to fund secular instruction. In *Locke*, this Court upheld Washington's decision not to provide financial support for religious education and training even as part of a broader scholarship program. The Court recognized that the state's choice was a permissible exercise of traditional antiestablishment interests. Though the funding restriction there barred the use of tax dollars to support the training of clergy, traditional state antiestablishment interests are not so narrow as to apply solely to *Locke*'s particular facts. Rather, those interests more broadly encompass "essentially religious endeavor[s]," *Locke*, 540 U.S. at 721, that support the maintenance of religious ministries—here, religious indoctrination and training of new adherents through religious instruction for elementary- and secondary-school students. Montana may, therefore, decline to funnel tax payments to religious education without running afoul of the U.S. Constitution.

A. *Trinity Lutheran* did not supersede *Locke*'s holding that states may decline to fund religious instruction.

1. This Court held in *Locke* that a Washington statute prohibiting the use of state scholarship funds to pursue devotional-theology degrees did not violate the Free Exercise, Equal Protection, Free Speech, or Establishment Clauses, even though allowing the

funds to be used for those degrees would have been permissible under the Establishment Clause. 540 U.S. at 715, 719, 720 n.3, 725 n.10. The Court affirmed that "there is room for play in the joints" between the Religion Clauses, *id.* at 718 (quoting *Walz*, 397 U.S. at 669), explaining that "some state actions [are] permitted by the Establishment Clause but not required by the Free Exercise Clause," *id.* at 719. Thus, just as a state may, in deference to free-exercise interests, choose to grant property-tax exemptions to churches, *Walz*, 397 U.S. at 669, 673, so too may it, in deference to antiestablishment interests, choose not to use public funds to support religious training, even indirectly, *Locke*, 540 U.S. at 719, 725.

In concluding that Washington's decision not to fund theological study was well within this "play in the joints," the Court emphasized the "historic and substantial" state antiestablishment interests at issue. *Locke*, 540 U.S. at 725. To vindicate those interests, and in an exercise of its own state sovereignty, Washington could rely on its "differently worded" state constitution—the basis for the challenged statutory restriction—to "draw[] a more stringent line" against public funding of religion "than that drawn by the United States Constitution." *Id.* at 722. And for good reason: "Since the founding of our country," the Court stated, "there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an 'established' religion." *Id.* Accordingly, "[s]tates that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry." *Id.* at 723.

The applicable Washington constitutional provision and the challenged statute advanced these traditional state interests. *Locke*, 540 U.S. at 722–723, 725. And because the interests were "substantial," whereas any burdens on religious exercise were "relatively minor," this Court concluded that Washington's restrictions on the use of public dollars complied with the U.S. Constitution. *Id.* at 725. *Locke* recognized, then, that states have latitude to safeguard their "scarcely novel" antiestablishment interests in preventing tax measures that support religious instruction and training. *Id.* at 722.

2. *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012 (2017), reaffirmed this principle. The Court held that Missouri violated the Free Exercise Clause by denying to a church-operated preschool a grant for a playground surface merely because the school had a religious identity. *Id.* at 2017–2018, 2024–2025. Instead of preventing the use of state funds for religious instruction, such as "the training of clergy," Missouri had "expressly den[ied] a qualified religious entity a public benefit *solely* because of its religious character." *Id.* at 2023, 2024 (emphasis added). The Court expressly distinguished *Locke* on the ground that the plaintiff there "was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry." *Id.* at 2023. The Court further stressed that the playground in *Trinity Lutheran* was not used for religious activity or instruction, and that the preschool allowed children of any faith to enroll and opened the playground to the public during non-school hours. See *id.* at 2017–2018, 2024 n.3.

Whereas Washington's denial of funding in *Locke* was "in keeping with the State's antiestablishment interest" in not funding an "'essentially religious endeavor,'" "nothing of the sort can be said about a program to use recycled tires to resurface playgrounds." *Trinity Lutheran*, 137 S. Ct. at 2023 (quoting *Locke*, 540 U.S. at 721). The Court held, therefore, that Missouri's denial of funding in *Trinity Lutheran* was not supported by traditional antiestablishment interests and violated the Free Exercise Clause. *Id.* at 2023, 2025.

Trinity Lutheran did not impose on states an affirmative duty to direct taxpayer funding to religious schools for religious education; the case resolved only "express discrimination based on religious identity with respect to playground resurfacing" and "d[id] not address religious uses of funding or other forms of discrimination." 137 S. Ct. at 2024 n.3.[3] And the decision unambiguously reaffirmed the Court's long-standing "recogni[tion] that there is 'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels." *Id.* at 2019 (quoting *Locke*, 540 U.S. at 718).

B. Preventing public financing of religious education is at the core of traditional state antiestablishment interests.

Petitioners and their *amici* contend that invalidating the program here falls outside the "play in the

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[3] This limiting language by a four-Justice plurality is controlling because it constitutes the narrowest ground for the judgment. See *Marks* v. *United States*, 430 U.S. 188, 193 (1977). Moreover, Justice Breyer's concurrence in the judgment expressed a similar view. See *Trinity Lutheran*, 137 S. Ct. at 2026–2027 (Breyer, J., concurring in the judgment).

joints" because, in their view, traditional antiestablishment interests are limited to not funding the training of clergy and do not encompass religious education in elementary and secondary schools. See, *e.g.*, Pet. Br. 26; U.S. *Amicus* Br. 24–25. But *Locke* recognized that states, as sovereign entities in our federal system, have broad, historically rooted interests in not supporting religious ministries in any way. The indoctrination or training of new adherents for a religious ministry through religious education of school-age children is surely at the core of those interests.

1. As *Locke* explained, states have "prohibit[ed] * * * using tax funds to support the ministry" since the founding of our republic. 540 U.S. at 723. To illustrate the scope of this traditional antiestablishment interest, *Locke* looked to the "public backlash," *id.* at 722 n.6, that resulted from Patrick Henry's proposal in 1784 that Virginia use property taxes to fund religious education—"learned teachers" of "Christian knowledge" "to correct the morals of men, restrain their vices, and preserve the peace of society," see Patrick Henry, *A Bill Establishing A Provision for Teachers of the Christian Religion* (1784), *reprinted in Everson* v. *Board of Educ.*, 330 U.S. 1, 72–74 (1947) (appendix to dissent of Rutledge, J.).

One of the most prominent opponents of Henry's proposal was James Madison, who responded to it with his famous *Memorial and Remonstrance Against Religious Assessments*. See Carl H. Esbeck, *Protestant Dissent and the Virginia Disestablishment, 1776–1786*, 7 Geo. J.L. & Pub. Pol'y 51, 81–82 (2009). Madison objected that Henry's proposal would infringe "the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience." See James Madison, *Memorial and Remonstrance*

Against Religious Assessments ¶ 15 (1785), *reprinted in Everson*, 330 U.S. at 63–72 (appendix to dissent of Rutledge, J.). According to Madison, any effort to force a citizen to contribute even "three pence only of his property" was unacceptable, for the government could then force the citizen "to conform to any other establishment in all cases whatsoever." *Id.* ¶ 3.

In response to Henry's proposal to fund Christian teachers, Madison successfully advocated for the passage of the Virginia Statute for Religious Freedom. See Esbeck, *Protestant Dissent and the Virginia Disestablishment,* 7 Geo. J.L. & Pub. Pol'y at 87. This statute—which had been previously drafted by Thomas Jefferson, another leading opponent of efforts to fund religion*, id.* at 73—provided that "no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever." Thomas Jefferson, *The Virginia Statute for Religious Freedom* (Jan. 16, 1786), *reprinted in Founding the Republic: A Documentary History* 95 (John J. Patrick ed., 1995). Jefferson explained that public funding of religious activities, including religious education, violates the freedom of conscience of taxpayers, for "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Ibid.* "[E]ven the forcing [of a taxpayer] to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern." *Ibid.*

Petitioners' *amici* argue that the founders' special concern for the coercive extraction of tax funds to support religion has no bearing here because, in their view, donations under Montana's tuition-tax-credit program are voluntary. See, *e.g.*, Christian Legal

Soc'y *Amicus* Br. 31–33; Ctr. for Educ. Reform *Amicus* Br. 17–19. But the program is structured in a manner that renders taxpayers who do not directly contribute to it "indirect and vicarious 'donors.'" See *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 591 (1983); accord *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 14 (1989) (plurality opinion). The program provides a dollar-for-dollar tax credit of up to $150 (and up to $3 million total in its first year alone) to each participating taxpayer. Mont. Code Ann. § 15-30-3111. Those taxpayers thus bear none of the cost of their "contributions." Instead, they are effectively given authority to collectively direct up to $3 million in public funds to religious education. Meanwhile, nonparticipating taxpayers are, in essence, forced to support that $3-million subsidy because they are deprived of the public benefits that could be provided by the government's expenditure of that money on other purposes.

2. What is more, the founders' opposition to tax support for religion was not limited to coercive extractions of tax funds. The founders were also deeply concerned about protecting religion and religious institutions from the pernicious effects of governmental support for, and involvement in, the affairs of religious groups.

Notably, for example, Madison and Jefferson opposed Henry's bill to provide state subsidies for religious teachers, even though the bill did not require any taxpayer to support a religion to which that taxpayer did not subscribe—or even to support any religion at all: Believers could designate their tax payments to support whatever sect they preferred, and objectors' payments would be appropriated by the legislature to secular education instead of religion. See Henry, *A Bill Establishing A Provision for Teachers of*

the Christian Religion, *supra*; Douglas Laycock, *"Non-preferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 897 & n.108 (1986). Madison and Jefferson still objected because governmental support would (1) weaken religious institutions by causing them to become dependent on governmental largesse, (2) lead to governmental interference in religious institutions' internal affairs, and (3) create religious strife among denominations that would be in competition for state aid. See Jefferson, *Virginia Statute for Religious Freedom*, *supra*; Madison, *Memorial and Remonstrance*, *supra*, ¶¶ 1–3, 6, 11.

Madison warned that governmental aid would "weaken in those who profess this Religion a pious confidence in its innate excellence" and "foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust it to its own merits." Madison, *Memorial and Remonstrance*, *supra*, ¶ 6. He wrote that governmental support for religion was "[r]eligious bondage [that] shackles and debilitates the mind and unfits it for every noble enterprize." Letter from James Madison to William Bradford (Apr. 1, 1774), http://bit.ly/2h57Xm5. And he later elaborated, "Religion & Govt. will both exist in greater purity, the less they are mixed together." Letter from James Madison to Edward Livingston (July 10, 1822), https://bit.ly/2lDB31G.

Jefferson agreed, noting that public funding "tends only to corrupt the principles of that religion it is meant to encourage, by bribing with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it." Jefferson, *Virginia Statute for Religious Freedom*, *supra*. Likewise, Benjamin Franklin counseled:

> When a Religion is good, I conceive that it will support itself; and when it cannot support itself, and God does not care to support [it], so that its Professors are oblig'd to call for the help of the Civil Power, 'tis a Sign, I apprehend, of its being a bad one.

Letter from Benjamin Franklin to Richard Price (Oct. 9, 1780), http://bit.ly/2jMsrVO.

Similar concerns animated debates in the states surrounding religious assessments and disestablishment. For example, the leading critic in Connecticut, John Leland, wrote that "[s]ecular force, in religious concerns, to make christianity appear honorable, is like lacker upon gold or paint upon a diamond. The religion of Jesus disdains such aid." Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. Rev. 1385, 1511 n.441 (2004) (quoting John Leland, *Van Tromp Lowering His Peak with a Broadside* 30 (1806)).

All of these arguments had deep roots in theology and political philosophy surrounding faith and freedom of conscience that long predated the founding of our republic. Indeed, the notion of freedom of conscience as a moral virtue traces to the thirteenth-century teachings of Thomas Aquinas, who wrote that conscience must be a moral guide and that acting against one's conscience constitutes sin. See Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. Rev. 346, 356–357 (2002). Martin Luther built on this idea, teaching that the Church lacks authority to bind believers' consciences on spiritual questions: "[T]he individual himself c[an] determine the content of his conscience based on

scripture and reason." *Id.* at 358–359. John Calvin developed the idea further, preaching that individual conscience absolutely deprives civil government of authority to dictate in matters of faith. See *id.* at 359–361.

This theology informed the fundamental principles on which our republic was founded. Notably, John Locke incorporated it into his argument for religious toleration:

> [N]o religion, which I believe not to be true, can be either true, or profitable unto me. In vain therefore do Princes compel their Subjects to come into their Church-communion, under pretence of saving their Souls. * * * [W]hen all is done, they must be left to their own Consciences.

John Locke, *A Letter Concerning Toleration* 38 (James H. Tully ed., Hackett Pub. Co. 1983) (1689). Based on this understanding and the related concern that social strife and bloodshed often follow when government takes positions on matters of faith, Locke reasoned that "civil government" should not "interfere with matters of religion except to the extent necessary to preserve civil interests." Feldman, *Intellectual Origins*, 77 N.Y.U. L. Rev. at 368.

Cognizant of these concerns, Roger Williams, the Baptist theologian and founder of Rhode Island, warned early in American colonial history of the dangers that tax funding poses to religion. Williams explained that, for religious belief to be genuine, people must come to it of their own free will. Roger Williams, *The Bloudy Tenent of Persecution for Cause of Conscience* (1644) ("[T]he *Church of Christ* doth not use the Arme of *Secular Power* to compell men to the

Faith, or profession of the *Truth*; for this is to be done by *Spirituall weapons*."), *reprinted in* 3 *Complete Writings of Roger Williams* 50–51 (Samuel L. Caldwell ed., 1963). When government involves itself in matters of religion, Williams cautioned, the authority of the state impedes this exercise of free will, while also causing civil strife. Keeping government and religion separate, he preached, not only protects individual religious dissenters against persecution but also safeguards religious institutions and religion itself against impurity and dilution. See *ibid.*; Edwin Gaustad, *Roger Williams* 13, 59, 70 (2005); Richard McBrien, *Caesar's Coin: Religion and Politics in America* 248 n.37 (1987).

3. The founders thus understood state antiestablishment interests to broadly encompass *all* forms of tax support for religious purposes. They viewed *any* governmental aid for the support of religious activity—and especially religious instruction and education—as something that should not be tolerated, much less *required*. See *Flast* v. *Cohen*, 392 U.S. 83, 103–104 (1968) ("The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general.").

To further these expansive antiestablishment interests, a number of states enacted constitutional clauses in the late eighteenth century that broadly barred the use of tax dollars to support religion. See *Locke*, 540 U.S. at 723. "The plain text of these constitutional provisions prohibited *any* tax dollars from supporting the clergy" or "the ministry." *Ibid.* As explained in an early leading treatise, among "[t]hose

things which [were] not lawful under any of the American constitutions" was "[c]ompulsory support, by taxation or otherwise, of religious instruction." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 469 (1868), https://bit.ly/2OW1Djf.[4]

Pennsylvania's 1776 constitution, for example, provided that "no man ought or of right can be compelled to * * * support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent." Pa. Const. Art. II (1776), https://bit.ly/2Bd5fW9. New Jersey's 1776 constitution stated, "nor shall any Person within this Colony ever be obliged to pay Tithes, Taxes, or any other Rates, for the Purpose of building or repairing any Church or Churches, Place or Places of Worship, or for the Maintenance of any Minister or Ministry, contrary to what he believes to be right, or has deliberately or voluntarily engaged himself to perform." N.J. Const. Art. XVIII (1776), https://bit.ly/2VIjN9G. Delaware's 1792 constitution read, "no man shall or ought to be compelled to * * * contribute to the erection or support of any place of worship, or to the maintenance of any

[4] Published in 1868, the same year that the ratification of the Fourteenth Amendment rendered the Free Exercise Clause applicable to the states, this treatise illustrates that the Clause could not have been understood at that time as requiring states to fund religious education equally with secular education. See *McDonald* v. *City of Chicago*, 561 U.S. 742, 775–778 (2010) (construing Second Amendment's application to states by looking to understanding of it and analogous state constitutional provisions at time of Fourteenth Amendment's adoption); see also Resp. Br. 28–33 (explaining that Free Exercise Clause could not have been understood at time of adoption of First Amendment as requiring equal funding of religious activity).

ministry, against his own free will and consent." Del. Const. Art. I, § 1 (1792), https://bit.ly/2IU8tlz. And in 1793 Vermont ratified a constitutional clause providing that "no man ought to, or of right can be compelled to * * * erect or support any place of worship, or maintain any minister, contrary to the dictates of his conscience." Vt. Const. Ch. I, Art. 3 (1793), https://bit.ly/2VIsr88; accord, *e.g.*, Ky. Const. Art. XII, § 3 (1792), https://bit.ly/33zLqEM ("no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent"); Tenn. Const. Art. XI, § 3 (1796), https://bit.ly/2qc1b6c (identical to Kentucky's clause).

State courts have long interpreted these types of constitutional clauses as barring public subsidies for religious education. In *Chittenden Town School District* v. *Department of Education*, 738 A.2d 539, 552–559 (Vt. 1999), for instance, the Vermont Supreme Court undertook a thorough review of the history of the state's constitutional provision, concluding that the clause's purpose was to prohibit "*any* public financial support of religious activity," including religious education, "even when [the money was] raised solely from religious adherents." *Id.* at 555 (emphasis added). The court looked specifically to the writings of Madison and Jefferson in determining that Vermont's provision should be construed as broadly as the similarly worded Virginia Statute for Religious Freedom. The court explained that the founders understood the Virginia law to be "about religious education," as "Madison saw no line between it and religious worship." *Id.* at 555–556. Thus, the court reasoned, Vermont's constitutional clause prohibited taxpayer support for religious instruction provided by religious elementary and secondary schools. *Ibid*; accord, *e.g.*, *Knowlton* v. *Baumhover*, 166 N.W. 202, 207 (Iowa

1918) (holding that Iowa Const. Art. I, § 3, adopted in 1857 and providing that no person shall "be compelled to * * * pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry," "forb[ade] * * * all taxation for ecclesiastical support" and barred the use of public funds to aid religious instruction); *Findley* v. *City of Conneaut*, 62 N.E.2d 318, 323 (Ohio 1945) (concluding that Ohio Const. Art. I, § 7, adopted in 1851 and declaring that "[n]o person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent," prohibited "expend[ing] funds raised by taxation for the support or maintenance of a sectarian school").

The Montana constitutional clause at issue here, Section 6 of Article X, was motivated by the same traditional antiestablishment interests that supported similar clauses during the founding era. During the 1972 constitutional convention at which Montana rewrote its 1889 statehood constitution, one delegate explained, "It is fundamentally wrong to take any tax money * * * and apply it to any church purpose." See 6 Montana Constitutional Convention Verbatim Transcript 2016 (1981). Another delegate relayed the perspective of a religious leader who "pointed out very strongly that if any of this money is ever distributed to any private school, then the federal government or the state will take over part of their church work." *Id.* at 2016–2017. For "[i]f we cannot support our private schools, then it's our own fault. We are the ones * * * running it, and we don't want [anybody] to interfere

with us." *Id.* at 2017; see also Resp. Br. 20–22 (detailing additional, similar statements at constitutional convention).[5]

Montana's no-aid clause, then, is part of a long historical tradition demonstrating that avoiding governmental aid for religious education has always been a fundamental antiestablishment interest. This makes sense given the purpose and function of religious instruction: Inculcating particular religious beliefs and tenets through religious education of youth is essential to generating new adherents, which, in turn, is vital to propagating faith systems and maintaining religious ministries. See, *e.g.*, *N.L.R.B.* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 503 (1979) ("[T]he *raison d'être* of parochial schools is the propagation of a religious faith." (quoting *Lemon* v. *Kurtzman*, 403 U.S. 602, 628 (1971) (Douglas, J., concurring))); *Walz*, 397 U.S. at 671 (acknowledging that "an affirmative if not dominant policy of church schools" is "to assure future adherents to a particular faith by having control of their total education at an early age"). And training or evangelizing others in one's religion is itself viewed by many faiths as a form of religious exercise. See, *e.g.*, *Murdock* v. *Pennsylvania*, 319 U.S. 105, 108–109 (1943) (describing religious evangelizing as core religious exercise); Maj. LeRoy F. Foreman, *Religion, Conscience and Military Discipline*, 52 Mil. L. Rev. 77, 92 (1971) ("Most religions impose some sort of apostolic responsibility upon their membership to gain adherents or to gain support for

[5] The records of the 1972 convention confirm that it was these traditional antiestablishment interests and the state interest in preserving public education, not animus against Catholics, that motivated Montana's no-aid clause. See Resp. Br. 17–23; Baptist Joint Comm. *Amicus* Br.

their tenets."). Thus *Locke* itself equated "religious instruction" with support for religious ministries: "That early state constitutions saw no problem in explicitly excluding *only* the ministry from receiving state dollars reinforces our conclusion that *religious instruction* is of a different ilk." 540 U.S. at 723 (second emphasis added).

4. An examination of Montana's private schools illustrates how its tuition-tax-credit program implicates traditional state antiestablishment interests: The program would support the maintenance of religious ministries by primarily funding schools that provide religious education geared toward training new adherents.

Nearly seventy percent of Montana's private schools provide religious education. See Pls.' Br. Supp. Mot. Summ. J. 1. Throughout much of the state, the *only* private educational options are religious. *Ibid.* Of the thirteen schools that have partnered with the sole scholarship organization that operated under the Montana program at the time the Montana Supreme Court enjoined it, twelve provide religious education. Pet. App. 50 n.6 (Gustafson, J., concurring (citing *Schools*, Big Sky Scholarships, https://perma.cc/L8RB-AD69)). The sole secular school is an elementary school for children with learning disabilities. *Ibid.* More than ninety-four percent of scholarships awarded under the program for 2018 went to finance religious education. See Pet. App. 123, 125.

And religious schools in Montana require students to take religious classes that indoctrinate the students in the schools' faiths. The schools also integrate religious instruction into classes that teach secular subjects. They inculcate religious beliefs in ways that go

beyond classroom instruction as well, requiring participation in prayers, religious services, and other religious exercises. For example:

- At Stillwater Christian School, which is the school attended by petitioners' children, Pet. App. 102 & n.2, Bible study is a required subject, and high-school students are offered Apologetics, a discipline "concerned with the defense of the divine origin and authority of the Christian faith," Stillwater Christian School High School Program 2018–2019 School Year 5–8, https://bit.ly/3342qmy. Apologetics will "expose students to some of the most common expressions of unbelief and prepare them for the encounters they will experience in the world." *Id.* at 8. And other subjects are infused with religious teaching: In Biology, for instance, students will "see the contradictions between what is popular science today and the truth of God's word." *Id.* at 22. American Government will educate students as to "a Christian's civic responsibility in the modern political realm." *Id.* at 14.
- Heritage Christian School requires Bible study as a core subject, imposes daily prayer and weekly chapel mandates, and requires students to pledge allegiance to the Christian flag and the Bible. Heritage Christian School Parent/Student Handbook 2019–2020 5, 49, https://bit.ly/2Klibyh. The school's "aim is to teach [its] children to think biblically when they are studying math, science, language arts, music, [or] history, or when exercising their bodies, thereby fulfilling Christ's command." *Id.* at 1.

- "The central function of Foothills Community Christian School is the development of Christians." Foothills Community Christian School Parent/Student Handbook 2019–2020 2, https://bit.ly/2luLNj3. Accordingly, "the foundation and base for all curricula will be the Bible. It will be studied seriously, and its truths will be applied both to our personal lives as teachers and students and to our administration and policies." *Ibid.*
- Whitefish Christian Academy aims to "send[ ] out Christian thinkers and doers of the Word to engage and transform our culture for Christ." *About: Mission & Vision*, Whitefish Christian Academy, https://bit.ly/2ksRHB6. It "[t]rain[s] students using a classical, Christian model" and "[p]romote[s] an environment fostering growth and maturity in Christ." *Ibid.*
- The Western Catholic Education Association's guidelines, which govern Montana's Catholic schools, provide that the curriculum should "[g]ive witness to the message of Christ as it is revealed through a formal program integrating religious belief and practice." Montana Catholic Schools, School Policies 2019–2020 §§ 6000 and 6100, http://bit.ly/2yY2euk.
- At Pretty Eagle Catholic School, students are required to participate in "[l]iturgies, prayer services, retreats, service projects, and/or other liturgical observances through the year." Pretty Eagle K–8 Handbook 2, http://bit.ly/2huzDVE.

- Mount Ellis Academy requires students to enroll in Bible classes each term and to attend worship; failure to do either renders students subject to expulsion. *2017–2018 Handbook*, Mount Ellis Academy, https://bit.ly/2kr8bcY.

See also ACLU *Amicus* Br. to Mont. Supreme Ct. Attachment 4 (describing how numerous other religious schools in Montana inculcate students in particular religious beliefs).

Religious schools in Montana further advance their religious missions and religious teachings by restricting enrollment based on religious criteria. Some, for example, condition admission on students' or their parents' adherence to certain religious beliefs and practices. See, *e.g.*, *Admissions Requirements*, Foothills Community Christian School, http://bit.ly/2jofrpa (requiring students to "come from a family that celebrates Biblical values," and requiring that at least one parent "be born again; that is, be a believer in Jesus Christ as their personal Savior"); Mission Valley Christian Academy Parent-Student Handbook 7, https://bit.ly/2lRYdSa (parent or guardian must "express a personal, saving faith and relationship with Jesus Christ"); *2017–2018 Handbook*, Mount Ellis Academy, https://bit.ly/2kr8bcY (accepting students of all faiths but still requiring them to pursue "a personal relationship with Jesus Christ and a Christian lifestyle"). Other schools give priority in admissions based on students' and their families' faiths or charge higher tuition to students who do not share a school's faith or are not members of a particular house of worship. See, *e.g.*, *2018–2019 Tuition Scale*, Holy Spirit Catholic School, https://bit.ly/2Kl7Vpz; Our Lady of Lourdes Catholic School Parent-Student

Handbook 7, https://bit.ly/2KjbBZ2; *Enrollment Inquiry*, Mount Olive Lutheran School, https://bit.ly/2jZw0s5; *Admissions*, Valley Christian School, https://bit.ly/2QndSq5 (admissions based partly on "Christian testimony and pastoral references"); cf. *Student Commitment*, Stillwater Christian School, https://bit.ly/2qcX3mu (asking prospective students whether they have "accepted Jesus Christ as [their] personal Savior"). And in some schools, students who engage in conduct barred by certain religious tenets are subject to discipline, including expulsion. See ACLU *Amicus* Br. to Mont. Supreme Ct. Attachment 4, column 6 (also providing additional evidence of discrimination based directly on students' or parents' religious beliefs).

By diverting tax payments to private schools that inculcate students in particular religious beliefs and primarily or exclusively serve families who follow particular religious tenets and practices, Montana's tuition-tax-credit program funds "essentially religious endeavor[s]," *Locke*, 540 U.S. at 721. In financing the religious training of youth of particular faiths, and consequently new generations of adherents to those faiths, the program squarely implicates the traditional state interest of ensuring that only private funds are used to support religious ministries. This case is not, therefore, one in which religious institutions are denied tax support for secular activities solely because of their status. Cf. *Trinity Lutheran*, 137 S. Ct. at 2023–2024. Although religious schools are free to operate as they see fit (within the confines of the law), and although states may *choose* to support religious education in ways that do not run afoul of the Establishment Clause, Montana cannot and should not be compelled to continue the tuition-tax-credit program.

C. Affirming the ruling below would not endanger property-tax exemptions or charitable deductions for religious institutions.

Petitioners' *amici* suggest that if Montana can constitutionally prohibit a tuition-tax-credit program that funds religious education, it could then also lawfully deny religious institutions property-tax exemptions and disallow income-tax deductions for charitable contributions to religious institutions, even while allowing similar benefits for secular nonprofits. See Justice & Freedom Fund *Amicus* Br. 8–9; Rusty Bowers *Amicus* Br. 16 n.5. But such discrimination is not at issue here: Because the Montana Supreme Court's ruling struck down the entire program, it results in no discrimination between private secular and religious schools. Even setting that point aside, tuition-tax-credit programs are substantially different from broad and long-standing tax laws that authorize property-tax exemptions and charitable tax deductions for religious institutions.

1. Unlike payments of public funds to support religious ministries, which states have prohibited since the founding of our republic, see Section I.B, *supra*, and unlike tuition-tax-credit programs, which are a relatively new phenomenon, see Stephanie Saul, *Public Money Finds Back Door to Private Schools*, N.Y. Times, May 22, 2012, at A1, property-tax exemptions for religious institutions have long historical precedent, *Walz*, 397 U.S. at 676–678. Emphasizing that religious institutions had by then enjoyed "two centuries of uninterrupted freedom from [property] taxation," this Court in *Walz* rejected an Establishment Clause challenge to property-tax exemptions for places of worship. *Id.* at 678; see also *id.* at 682–685

(Brennan, J., concurring) (expounding on history of property-tax exemptions for religious institutions at time of founding).

In addition, property-tax exemptions for religious institutions, in Montana and elsewhere, are part of a much broader set of property-tax exemptions benefiting a range of institutions and supporting a range of activities that "contribute to the well-being of the community in a variety of nonreligious ways." *Walz*, 397 U.S. at 687 (Brennan, J., concurring). In Montana, the statute that exempts from taxation the property of religious institutions also exempts property owned by the state, counties, cities, towns, and school districts; property used to establish schools, colleges, and universities; public libraries; cemeteries; nonprofit healthcare facilities; nonprofit public museums, art galleries, zoos, and observatories; nonprofit retirement homes; and land used for public parks, recreation, or landscape beautification. Mont. Code Ann. § 15-6-201. Whereas Montana's tuition-tax-credit program would principally advance religious education, Montana's property-tax exemption sweeps broadly and therefore does not preferentially advance religion or implicate the same antiestablishment concerns. See *Walz*, 397 U.S. at 672–673.

Further, a property-tax exemption typically represents only a small portion of the cost of owning property, as purchasing and maintaining the property normally cost far more. For this reason, as well as the fact that property-tax exemptions typically apply to all nonprofit entities, those exemptions do not give anyone an incentive to form a religious entity. In contrast, taxpayers have strong incentives to take part in programs that, like the one at issue here, provide dollar-

for-dollar tax credits for funds "donated" to scholarship organizations and thus effectively give taxpayers a right to control how a portion of their tax liability is spent. See Pet. App. 36 (Gustafson, J., concurring) ("Here, the taxpayer 'donates' nothing, because for every dollar the taxpayer diverts to the [scholarship organization], the taxpayer receives one dollar in consideration from the State in the form of a lower tax bill.").

Finally, an exemption from property taxes is merely a refusal to tax that lifts a government-imposed burden from religious organizations, placing them in the same position as they would have been if the government did not tax property in the first place. See *Walz*, 397 U.S. at 672–673. In contrast, programs like the one here provide an affirmative benefit to religious schools by giving taxpayers strong incentives to contribute funds for them, making the schools better off than they would have been in the absence of any governmental action.

2. For largely the same reasons, tuition-tax-credit programs are distinct from tax laws authorizing deductions for charitable contributions made to religious institutions (and other nonprofits). Like property-tax exemptions for religious institutions, tax deductions for charitable contributions enjoy a long historical pedigree: They were first introduced into the federal tax code more than a century ago and have been a feature of it ever since. See Vada Waters Lindsey, *The Charitable Contribution Deduction: A Historical Review and a Look to the Future*, 81 Neb. L. Rev. 1056, 1061 (2003). Moreover, like property-tax exemptions, charitable deductions support a broad array of groups and activities, including, among other entities, any or-

ganization "operated exclusively for charitable, religious, educational, scientific, or literary purposes, or for the prevention of cruelty to children or animals." *Charitable Contribution Deductions*, Internal Revenue Service, https://bit.ly/2cXW97k; accord Mont. Code Ann. § 15-30-2131(1)(a). And the taxpayer still bears most of the cost of a charitable contribution, even with a tax deduction. See Tax Policy Center, *Briefing Book: A Citizen's Guide to the Fascinating (Though Often Complex) Elements of the Federal Tax System* 253–255 (2018), https://tpc.io/35b9HlX.

Thus, leaving the Montana Supreme Court's ruling undisturbed would do nothing to pave the way for states to limit property-tax exemptions or charitable tax deductions in a manner that disfavors religious institutions.

II. A rule requiring government to fund religious education would upend long-standing precedent.

A reversal by this Court of the Montana Supreme Court's decision would represent a drastic departure from long-standing precedent. Simply put, no case has ever *required* government to fund religious education.

Indeed, decades before *Locke* was decided, this Court on several occasions rejected arguments that the Free Exercise or Equal Protection Clauses required states to fund primary- or secondary-school religious education if they funded public or private secular education. In *Norwood* v. *Harrison*, 413 U.S. 455, 462, 469 (1973), for example, the Court concluded that the Constitution does not entitle "parochial schools to share with public schools in state largesse, on an equal basis or otherwise." And in *Sloan* v. *Lemon*, 413 U.S. 825, 834–835 (1973), the Court held that the

Equal Protection Clause did not bar a state from funding secular private schools but not religious private schools through a tuition-reimbursement program. The Court explained that "valid aid to nonpublic, nonsectarian schools [provides] no lever for aid to their sectarian counterparts." *Id.* at 834; see also *Brusca* v. *State Bd. of Educ.*, 405 U.S. 1050 (1972) (summarily affirming dismissal of free-exercise and equal-protection suit that sought to force state to subsidize religious education), aff'g mem. 332 F. Supp. 275 (E.D. Mo. 1971) (three-judge court).

The leeway for state decision-making at the heart of *Locke*'s "play in the joints" was also recognized decades before *Locke*. This Court proclaimed in 1970 in *Walz*, 397 U.S. at 669, "[W]e will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." The Court repeatedly reaffirmed this "play in the joints" concept thereafter. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 713 (2005); *Sloan*, 413 U.S. at 835; *Norwood*, 413 U.S. at 469.

This precedent is also consistent with a more general principle recognized by the Court in several other contexts—namely, that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Regan* v. *Taxation With Representation*, 461 U.S. 540, 549 (1983). In *Regan*, for example, the Court held that the government is not required to support through tax deductions and exemptions the constitutionally protected lobbying activities of all charities, even though it provides those tax benefits to veterans' organizations. See *id.* at 545–548.

Likewise, in *Maher* v. *Roe*, 432 U.S. 464, 474–476 (1977), and *Harris* v. *McRae*, 448 U.S. 297, 317–318 (1980), the Court rejected claims that the government is constitutionally obligated to subsidize through Medicaid payments the right to abortion. For "[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Harris*, 448 U.S. at 317 n.19; see also *Agency for Int'l Dev.* v. *Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013) ("As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds. This remains true when the objection is that a condition may affect the recipient's exercise of its First Amendment rights."); *Rust* v. *Sullivan*, 500 U.S. 173, 201 (1991) ("The Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected.").

This Court has specifically affirmed that principle in the context of the Free Exercise Clause, explaining that the "Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) (quoting *Sherbert* v. *Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)). Interpreting the Free Exercise Clause to force Montana to fund religious education would be contrary to this settled understanding and would eviscerate, if not entirely eliminate, the play-in-the-joints principle that has long undergirded this Court's religious-freedom jurisprudence.

Further, such a ruling would be in tension with long-standing principles of federalism and state sov-

ereignty. "[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government." *Tafflin* v. *Levitt*, 493 U.S. 455, 458 (1990). States may thus be more protective of their citizens' constitutional rights—such as the conscience rights of taxpayers and the independence rights of religious institutions that are guarded by antiestablishment principles—than is strictly required under the U.S. Constitution. See, *e.g.*, *Oregon* v. *Hass*, 420 U.S. 714, 719 (1975). State constitutional provisions may be cast aside only "[w]hen there is an unavoidable conflict" between the U.S. Constitution and the state constitution. *Reynolds* v. *Sims*, 377 U.S. 533, 584 (1964). The *Locke* Court recognized as much in accepting that "the differently worded Washington Constitution" drew "a more stringent line" than the federal Establishment Clause—and that it was entitled to do so. 540 U.S. at 722; see also Martin H. Belsky, *Locke v. Davey: States' Rights Meet the New Establishment Clause*, 40 Tulsa L. Rev. 279, 286–287 (2004) (in deciding *Locke*, the Court was forced to balance First Amendment principles "against an equally important constitutional principle—the sovereign rights of states").

What is more, it would be especially inappropriate here for the Court to abandon its many decades of decisions that have rejected arguments for a right to funding of religious education on an equal basis with private secular education, because the Montana Supreme Court's decision—which struck down the entire program at issue—does not result in any discrimination between religious and secular private education. Indeed, because the decision below has no discriminatory effect, the Court should consider dismissing the petition as improvidently granted.

CONCLUSION

The judgment of the Montana Supreme Court should be affirmed, or the petition should be dismissed as improvidently granted.

Respectfully submitted.

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