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 FOR PETITIONERS

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QUESTION PRESENTED

Does it violate the Free Exercise Clause of the First Amendment 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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Facts

Public funding of religious schools has been an issue since the late 19th century. Catholics, seeing the prevalence of Protestant religious influence in public schools, sought to have the state fund their sectarian schools. After all, they figured, if the public schools were to be filled with readings of the King James Bible and the inculcation of the Protestant faith, why should the state not pay for Catholic education? The Protestants, predictably, objected strenuously. Animus towards Catholics, many of whom were immigrants, already existed, and was all too easy to stir up, especially given the upcoming presidential election.[1]

Animus, rather predictably, sought a figurehead: someone to symbolize the struggle against the maligned. It found a champion in a representative from Maine by the name of James Blaine, who was rather conveniently planning a presidential bid. Blaine proposed an amendment to the Constitution that would have prohibited states from funding religious schools—code for Catholic schools. He took his proposed amendment through the House of Representatives and fell a mere four votes short in the Senate. The legacy of anti-Catholic animus, however, remains not only in the names of cities and towns across the country (one of which, in a stroke of irony, is home to counsel) but in the state constitutions of Montana and 36 other states. The Montana State constitution accordingly prohibits public funding for any school "controlled in whole or in part by any church, sect, or denomination."[2]

In 2015, the Montana state legislature decided it wanted to promote school choice and assist low-income parents. The mechanism of choice was a somewhat convoluted program that gave tax credits to people who donated to certain scholarship organizations. The organizations turned around and used the money private individuals gave them to produce scholarships to various private schools.[3] It was not long before the Montana Department of Revenue instituted a

[1] Stephen K. Green, The Blaine Amendment Reconsidered, 36 Am. J. Legal Hist. 38 (1992).
[2] MONT. CONST. of 1889 art. XI, § 8
[3] Mont. Code Ann. § 15-30-3101.

rule preventing the disbursement of funds to religious schools to follow the requirements of Article X Sec. VI of the Montana constitution.[4] Petitioners filed suit, and the District Court ruled in their favor. Respondents appealed, and the Montana Supreme Court invalidated the program in its entirety. This Court granted certiorari.

JURISDICTION

This case comes to the Court on a writ of certiorari from the Supreme Court of Montana, arising under the appellate jurisdiction granted by 28 U.S.C. § 1257(a).[5]

SUMMARY OF ARGUMENT

The First Amendment, as incorporated through the Fourteenth Amendment, stops state governments from "prohibiting the free exercise" of religion.[6] This Court, in *Sherbert v. Verner*, and as recently as *Trinity Lutheran,* explained that penalties based on religion impermissibly infringe on religious exercise. The Montana Constitution bars even indirect funding to religiously affiliated schools, whether or not they teach religious principles.[7] This Court has before it a clear case of status-based discrimination. Because Petitioners chose to use state-sponsored benefits to attend religious schools, the program providing state-sponsored funds is no longer available. Penalizing everyone for the religious status of one institution by shutting down the entire scholarship program does not cure the Free Exercise Clause violation or deprive anyone of standing because it does not change the fact that Montana still penalizes religion. Accordingly, this Court should hold Montana's amendment unconstitutional.

[4] Mont. Admin. R. 42.4.802
[5] 28 U.S.C. § 1257(a) (1970).
[6] U.S. Const. Amend. I, § I
[7] Mont. Const. Art. X, § VI

ARGUMENT

I. Article X Section VI of the Montana constitution is unconstitutional

A. Article X Section VI runs afoul of the Free Exercise Clause, as originally written and as construed by this Court

The original constitution is often best understood in light of contemporaneous state resolutions and constitutions, as without the votes of representatives from the states, it could not have been ratified. For that reason, it is best to at least begin with state documents. The most canonical state declaration of the rights of citizens is George Mason's Virginia Declaration of Rights. An especially relevant portion of the first draft of the Virginia Declaration reads as follows: "All Men shou'd enjoy the fullest Toleration in the Exercise of Religion, according to the Dictates of Conscience, unpunished and unrestrained by the Magistrate, unless, under Colour of Religion, any Man disturb the Peace, the Happiness, or Safety of Society, or of Individuals."[8] Mason's formulation shares the same basic idea as later Supreme Court precedent: religious activity is to always be protected, unless that activity is detrimental to public peace and good order. Presumably, this prohibits penalties based on religious status. Founding era commitment to the freedom of religion also did not exclude public endorsement or public encouragement of religious exercise. George Washington himself proclaimed a national holiday for the purpose of expressing thanks to God.[9] Founding era political thought in many ways assumed the existence of a populace with a certain moral outlook: respect for the value of religion in public life and a desire to see religion protected and promoted.

Joseph Story, in his Commentaries, echoes the view of Washington and Mason in more explicit terms. Story notes that historically, "every American colony, from its foundation

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[8] GEORGE MASON, VIRGINIA DECLARATION OF RIGHTS (1776), *in* THE PAPERS OF GEORGE MASON, 439-441 (Bernard Bailyn and James Morton Smith ed., 1970).

[9] George Washington, Thanksgiving Proclamation, (Oct. 3, 1789), *in* THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES, 131-132 (Dorothy Twohig ed., vol. 4. 1993).

down to the revolution, with the exception of Rhode Island, (if, indeed, that state be an exception,) did openly, by the whole course of its laws and institutions, support and sustain, in some form, the Christian religion."[10] Story goes on to describe not only the policy attitude of the founding generation, but their legal attitude, saying "This has continued to be the case in some of the states down to the present period, without the slightest suspicion, that it was against the principles of public law, or republican liberty."[11] Not only did the states believe that the government *should* support religion, but that it *could* legally support religion, and perhaps even had an affirmative duty to do so. The inverse logically follows: if the state was to support religion, it was not to penalize it.

As Washington, Mason, and others demonstrated, categorical endorsement of religion was commonplace, and the founders expected government to facilitate and encourage religious behavior among the populace. The idea that government would disfavor religion was foreign to the founding generation. Part of the enjoyment of free exercise was the ability to live out religion free of penalty. Concern about penalizing religion is thus the entire point of much of the recent Free Exercise precedent of this Court. Justices from Scalia to Douglas all reached the same historical conclusion: penalties based on religion are unconstitutional, although religion is not a license to break the law.

The Free Exercise claims that have come before this Court in the past tended to involve neutral and generally applicable laws that incidentally burden the exercise of religion. The story of one of the first begins in the mid-19th century. The Republican party, which had been formed to oppose slavery and polygamy,[12] conditioned Utah's admission to the Union on the adoption of a state constitutional amendment prohibiting polygamy. Utah, of course, was a haven for members of the Church of Jesus Christ of Latter-Day Saints, or Mormons. At that point in history, polygamy

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[10] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1867 (Cambridge, Brown, Shattuck, & Co. 1833.)
[11] *Id.*
[12] ROBERT P. GEORGE, WITH WILLIAM SAUNDERS, CONSCIENCE AND ITS ENEMIES: CONFRONTING THE DOGMAS OF LIBERAL SECULARISM 232 (2013).

was a part of adherence to the Mormon religion. Predictably enough, a Mormon man was prosecuted for marrying multiple women. Because polygamy was a part of his religion, he contended, the Free Exercise Clause shielded him from that prosecution. The case, *Reynolds v. United States*, eventually reached the Supreme Court. In a unanimous decision, the Court found for the United States. In the words of Justice Waite, "Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned. The question to be determined is, whether the law now under consideration comes within this prohibition."[13] The Court held that it did not, chiefly because carving out religious exemptions from neutral and generally applicable laws "would be to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself."[14]

In a later case concerning polygamy and religious liberty, this Court went so far as to say that bigamy and polygamy are odious and "to call their advocacy a tenet of religion is to offend the common sense of mankind."[15] However, the most important aspects of these cases are the significant constitutional findings. The Court found that although the First Amendment provides robust protection to religion, "It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society."[16] That is the crux of the Court's holding: The Free Exercise Clause protects religious activity insofar as it does not frustrate legislation for the general welfare.

Almost a century later, this Court would make another major series of Free Exercise rulings, this time in favor of religious parties. In *Sherbert v. Verner*, this Court sided with a Seventh Day Adventist who was fired for refusing to work on Saturdays.[17] The government had withheld unemployment

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[13] *Reynolds v. United States,* 98 U.S. 145, 162 (1878).
[14] *Id.,* At 167.
[15] *Davis v. Beason,* 133 U.S. 333, 341-342 (1890).
[16] *Id.,* at 342.
[17] 374 U.S. 398 (1963).

benefits from her on the basis that her refusal to work on Saturdays constituted a failure to pursue open work. She sued for her benefits, claiming that they had been withheld in violation of the First and Fourteenth Amendments. A 7-2 opinion vindicated her claim. This Court held that Sherbert could not be forced to abandon her religious tenets in order to collect state benefits, as her particular beliefs did not impose any meaningful hardship on the state, or disturb the health, safety, or morals of the public.

In 1990, this Court decided *Employment Division v. Smith*, the case of a Native American drug counselor who was fired for failing a drug test and later denied unemployment benefits. Smith sued for his benefits, claiming that their denial was a violation of the Free Exercise Clause. By a 5-4 vote, the Court ruled against Smith, refusing to create an exemption for him.

Justice Scalia's majority opinion first seeks to reconcile what seems to be a contradiction between *Sherbert* and *Smith.* One line is particularly helpful. Scalia says that "Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law."[18] He notes that the Court recently refrained from applying *Sherbert,* and then proceeds to distinguish it because it did not involve an exception to a criminal law. Scalia also cites *Reynolds,* which stands for the proposition that there can be no religious exemptions for acts inimical to "peace, good order, and morals of society."[19] In other words, there will be no exceptions to neutral laws if those exceptions would undermine the objectives the state is entitled to pursue under the police power. The exceptions in *Sherbert* and other cases do not endanger the public safety or morals. A polygamy or drug use exception would.

Montana claims they are merely withholding a benefit, not impeding the observance of religion. That argument is thwarted by *Sherbert*. Justice Brennan emphatically declared that "It is too late in the day to doubt that the liberties of

[18] 494 U.S. 872, 884 (1990).
[19] 98 U.S. 145, 162 (1878).

religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."[20] In *Lyng v. Northwest Indian Cemetery,*[21] Justice Douglass explained that "this Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment."[22] Denying privileges is exactly what Montana is doing. This Court also "cannot say that the one form of incidental interference with an individual's spiritual activities should be subjected to a different constitutional analysis than the other."[23] It does not matter whether a state is denying benefits because of a sectarian feud, or whether the means of interference is denial of a tax credit, school voucher, or scholarship. Penalties are penalties, this Court has said time and time again.

Respondents may argue that scholarship money will only indirectly benefit religion, and that they do not seek to impede the exercise of religion. However, this argument is also precluded by aspects of *Sherbert* that *Smith* did nothing to overturn. Justice Brennan's explanation that "[i]f the purpose or effect of a law is to impede the observance of one or all religions, . . . that law is constitutionally invalid even though the burden may be characterized as being only indirect."[24] Even penalties that do not severely impact religious exercise, if they are based on religion, are suspect.

Neutral and generally applicable laws that are motivated by animus are also unconstitutional. This Court made that clear in *Church of Lukumi Babalu Aye v. City of Hialeah.*[25] The Petitioners in that case were adherents of a syncretic religion called Santeria, which fused elements of traditional African religions with Roman Catholicism. Elements of Santeria practice involve the ritual sacrifice of animals. The local Floridian community was ardently opposed to the prospect of such sacrifices taking place in their community. Accordingly, the city council called an emergency

[20] *Id.,* at 404.
[21] 485 U.S. 439 (1988).
[22] *Id.,* at 485.
[23] *Id.*
[24] 374 U.S. 398, 404 (1963).
[25] 508 U.S. 520 (1993).

meeting. There, it adopted resolutions expressing concern and antipathy towards the Santeria religion and criminalizing ritual sacrifice. The regulations were purportedly neutral, but the legislative history revealed clear animus towards the practice of Santeria. Accordingly, this Court struck down the regulations because they had the clear purpose of punishing and preventing religious practice. The Supreme Court of Montana acted with the same clear purpose of punishing religious activity, if only because of a discriminatory amendment. Simply put, the Montana Supreme Court shut down a program because funds were going to religious institutions. Just as with the town of Hialeah, the motive to discriminate against religion is evident, even though the means of discrimination may at first appear neutral.

The enduring theme of this Court's Free Exercise jurisprudence is that protection for those who exercise religion is the rule. This Court has carved out several limited exceptions to that rule. As we saw in *Smith*, neutral and generally applicable laws can be an exception. As we have explained, Art. X Sec. VI is neither neutral nor generally applicable. This Court has also held that in the context of school funding programs, the state can sometimes withhold aid from schools if the program is neutral and the State attempts to draw a reasonable line and accommodate religious organizations. There is no attempt to accommodate religious organizations in Montana, only an attempt to categorically exclude them from receiving funding. The Court also recognizes that laws or policies which pass strict scrutiny do not infringe on religious liberty. This is not such a law, as Montana has not identified a compelling state interest. After examining and evaluating all the exceptions to the Free Exercise Clause, and finding that none are applicable here, the Court should hold Art. X Sec. VI unconstitutional.

Respondents note that their interest is not a mere policy choice, but a decision to abide by their interpretation of the Establishment Clause. Their interpretation of the Establishment Clause, however, has been roundly and consistently rejected by this Court. In *Locke v. Davey,* which Respondents rely on heavily for their Free Exercise claims, the Court stated that "there is no doubt that the State could, consistent with the Federal Constitution, permit Promise

Scholars to pursue a degree in devotional theology."[26] Of course, the Supreme Court is not the only branch with an ability to interpret the Constitution, and states are free to further whatever vision of the Constitution they like. We believe that even state interpretations of the Constitution that are in direct contradiction with Supreme Court precedent can act as a rational basis for a policy. But a differing interpretation is not a license to infringe constitutional rights. This Court would not ignore a total ban on the possession of contraceptives if it were based on a belief that the ban was required by the Constitution. If Montana wishes to engage in religious discrimination, it requires a compelling state interest and a narrowly tailored law, not a repeatedly rejected interpretation of the Constitution.

A common misconception of the Free Exercise Clause is that it only protects the literal exercise of religion, and that it does not require neutral distribution of funding to religious and non-religious organizations. This misunderstanding is dispelled upon consideration of how this argument would fare when made with similar clauses of the Constitution. Imagine a state arguing that "*Obergefell v. Hodges*[27] says the Fourteenth Amendment compels states to issue marriage licenses to same-sex couples. When the state withholds tax benefits from same-sex couples, it is still issuing them marriage certificates. It just declines to endorse same-sex marriages by giving out state money." That argument would be ill-fated. Similarly, it would be unwise to say that "the Free Speech Clause protects only speech. The government is free to withhold tax exemptions from atheist organizations on the sole basis that they are atheist. Atheists are not prohibited from speaking; they are simply not given government money to speak with." This line of argument would also go nowhere.

The First Amendment does not contain a Free Religious Identity Clause. There is no invisible ink, no hidden writing in the margins, and no secret footnotes visible only to those with double ivy league educations and a Supreme Court clerkship. Religion encompasses the lives of the faithful not just for one hour a week, but during every waking moment.

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[26] 540 U.S. 712, 717 (2004).
[27] 576 U. S. ____ (2015) (Slip. Op.)

Giving a child a religious education is one way that people live out their faith. Roman Catholic parents, for example, are instructed to provide their child with a Catholic education if they can.[28] Montana seeks to penalize them and other devoted religious parents. Under a narrow view of the Free Exercise Clause, religious observers would be left free to "whisper their thoughts in the recesses of their homes,"[29] and in their places of worship. But should they dare to honor their religious obligations in the public sphere, they would be at the mercy of the state.

There are many examples of Supreme Court precedent that are pertinent. A 1958 case, *Speiser v. Randall,* is particularly illustrative. In *Speiser*, this Court evaluated a California law which required veterans to affirm that they did not advocate the overthrow of the United States government and would not support any foreign power against the United States in a time of war. Otherwise, they could not receive certain benefits. This Court held that this requirement was a violation of the First Amendment's Free Speech Clause.[30] Specifically, it explained that "It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech."[31] This Court made clear that denying someone benefits based on their speech is itself a restriction on speech. Even if this Court did not explicitly overrule cases where it upheld oath clauses such as *Adler v. Board of Education*[32] and *Gerende v. Election Board,*[33] it certainly cast serious doubt on their validity. The Court made clear that it only upheld the oath requirements because they were directed towards an important public aim, and that "Congress could not enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work."[34] The claim that the Constitution protects only the exercise of religion is the latest in a long line of dubious narrow constructions of the

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[28] Vatican Council II, Gravissimum educationis (1965)
[29] 576 U. S. ____ (2015) (Slip. Op, at 7.) Alito, J., Dissenting.
[30] 357 U.S. 513 (1958).
[31] *Id.,* at 518.
[32] 342 U.S. 485 (1952).
[33] 341 U.S. 56 (1951).
[34] *Wieman v. Updegraff,* 344 U.S. 183, 191-192, (1952).

Constitution. It deserves the same treatment that has been given to its predecessors.

B. The Free Exercise Clause is incorporated against the states

The Free Exercise Clause is incorporated against the states through the Fourteenth Amendment. In *Cantwell v. Connecticut,* this Court held that the concept of liberty embraced by the Fourteenth Amendment includes the fundamental liberties of the First Amendment.[35] It would be baffling indeed if the Fourteenth Amendment, which was designed to thrust out the evil of the black codes, did not protect one of the most fundamental of American liberties: the right to live out one's religion. This Court recognized that protection in *Cantwell* and has affirmed its recognition ever since. It should continue to do so in this case.

II. All precedent to the contrary was made in different circumstances, and established inapplicable rules

A. *Employment Division v. Smith* concerned exceptions to neutral and generally applicable laws, and Article XI Section VI is not one

Even a broad reading of *Employment Division v. Smith* applies only to neutral and generally applicable laws, like anti-discrimination laws. This case is different. Here, Petitioner does not seek an exception to a neutral law that has nothing to do with religion. Petitioner instead seeks to be treated equally in the eyes of a law that has everything to do with religion. By its express terms, Art. X Sec. VI prohibits funding to religious schools. *Smith* also does nothing to touch *Sherbert's* holding that "The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such."[36] Montana's Blaine Amendment is clear: it penalizes those who hold religious beliefs because of their beliefs. That penalty is not incidental, as was the penalty in *Smith.* It does not result from a neutral law, as in *Smith,* nor does it protect

[35] 310 U.S. 296 (1940).
[36] 374 U.S. 398, 402 (1963).

the morals, health, or welfare of the people as any of those terms would have been understood at the founding.

B. The holding of *Locke v. Davey* was based on Washington's extensive efforts to accommodate religion

Respondents place a great deal of faith in one of this Court's earlier cases concerning state aid to religious schools, *Locke v. Davey.* In *Locke,* the State of Washington withheld scholarship money from a high-achieving student who wished to attend not a mere religious school, but a school that would provide him with clerical training. By a 7-2 margin, this Court upheld Washington's decision, after refusing to apply strict scrutiny, asserting that "an exclusion from an otherwise inclusive aid program does not violate the Free Exercise Clause of the First Amendment."[37] It did so in large part because of efforts that were made to accommodate religion. This Court made a great deal out of the fact that "the entirety of the Promise Scholarship Program goes a long way toward including religion in its benefits."[38] This Court then cited the fact that the program "permits students to attend pervasively religious schools"[39] as a reason for the program's neutrality and inclusiveness.

Washington, unlike Montana, allowed scholarship funds to be used at religious schools. Montana will not permit funds to go to even religious schools that provide a secular education. Montana will not allow scholarships to be used at religious schools, even if they have the same curriculum as secular schools. Washington, meanwhile, would allow scholarship money to be used at institutions that teach religion classes. The only type of schools Washington would not allow scholarship money to be used at were institutions that offered clerical education, such as seminaries that train priests. That accommodation was enough for this Court to forbear from applying strict scrutiny, although this Court accepted Washington's interest in church-state separation only as an important or substantial interest, *not* as a compelling interest.

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[37] 540 U.S. 712, (2004).
[38] *Id.,* at 722.
[39] *Id.,* at 722-723.

The case currently before the Court involves a prohibition on state funding and the Free Exercise Clause. The resemblance to *Locke* ends there. Art. X Sec. VI does not attempt to accommodate religion, and draw a reasonable line based on concerns about church-state separation. Instead, it expressly prohibits even indirect funding for religious organizations. If, as the Court said just two terms ago, "the Free Exercise Clause bars even subtle departures from neutrality"[40] then, *a fortiori,* it bars overt departures from neutrality. Montana's constitutional amendment is unapologetically overt.

III. ENDING THE SCHOLARSHIP PROGRAM ENTIRELY NEITHER CURES THE FREE EXERCISE CLAUSE VIOLATION NOR DEPRIVES PETITIONERS OF STANDING

A. *PALMER V. LOUISIANA* DOES NOT SUPPORT RESPONDENTS AND IS A DUBIOUS AUTHORITY REGARDLESS

Another of Montana's chief efforts to avoid Free Exercise claims is to point out that the voucher program no longer exists, and therefore there is no discrimination because religious and nonreligious schools are treated the same. Not only does this line of reasoning rest on faulty precedent, it misunderstands the nature of the Free Exercise Clause.

Precedent does not support Respondent's conclusion. Respondents make much of *Palmer v. Thompson. Palmer* concerned a city, which, rather than desegregate its pools, simply shut them down. The Supreme Court determined that the city had not "conspired . . . to deprive Negroes of the opportunity to swim in integrated pools."[41] This Court distinguished a prior case, *Reitman v. Mulkey*, by saying that it "was based on a theory that the evidence was sufficient to show the State was abetting a refusal to rent apartments on racial grounds."[42] Here, however, we know that the Montana Supreme Court was refusing to provide scholarships on religious grounds. Montana's own constitution expressly indicates so. That evidence makes *Palmer,* by its own

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[40] *Masterpiece Cakeshop v. Colorado Civil Rights Commission,* 584 U. S. ____ (2018) slip op at 17.
[41] 403 U.S. 217, 223 (1971).
[42] *Id.,* at 224.

admission, very different from the case at hand. *Palmer* cuts in the favor of Petitioners, due to its assertion that when a decision to remove a generally available benefit is motivated by discriminatory intent, it is unconstitutional. The discriminatory intent may be benevolent or insidious, but so long as it is discriminatory, it places the law in jeopardy.

Furthermore, when compared with contemporaneous precedent, it is not at all clear that *Palmer* is as authoritative as might be thought. In *Griffin v. School Board,* a county shut down all its public schools to avoid desegregation. As the Court explained, the County clearly enacted their policy to make sure "that white and colored children in Prince Edward County would not, under any circumstances, go to the same school."[43] Montana has done much the same thing: through operation of their constitutional amendment, they have ensured that religious schools can never be recipients of funds in the same way that secular ones can be. In *Griffin,* this Court had no qualms forcing the County to forego its false equality. In *Bush v. Orleans Parish School Board,* this Court affirmed an injunction barring the New Orleans school district from shutting down all its schools.[44] So, not only is *Palmer* an unfavorable precedent for Respondents, it is clouded in doubt when considered in light of other similar cases.

B. PUNISHING PARENTS WHO SEND THEIR CHILDREN TO SECULAR SCHOOLS FOR THE CONDUCT OF THOSE WHO SEND THEIR CHILDREN TO RELIGIOUS SCHOOLS DOES NOT CHANGE THE FACT THAT THE STATE STILL PUNISHES RELIGIOUS ACTIVITY

The Free Exercise Clause does prohibit discrimination. However, it is not simply an anti-discrimination provision. It protects those who wish to live out their religious principles. Montana had established a fund to help people like Petitioners send their children to private schools. Petitioners have chosen to use those funds to send their children to religious private schools. And because those schools are religious, Petitioners cannot participate in the program anymore. What Montana fails to understand is that it does not matter whether they use

[43] 377 U.S. 218, 231 (1964).
[44] 364 U.S. 500 (1960).

their program to discriminate or not. The state cannot penalize religion and then protest innocence because everyone else was penalized as well. The only option is not to penalize religion in the first place. This is the guarantee of the Free Exercise Clause: to be free from punishment, not simply free from disparate treatment. In sum, while leveling down may be an appropriate solution where the Constitution prohibits simple disparate treatment, it is not an excuse for punishing protected activity.

Invalidating the entire program also did nothing to deprive this Court of jurisdiction in this case. When the Montana supreme court held that the subsidy program was unconstitutional, they invalidated the entire program. Respondents argue that this remedy leaves Petitioners with no injury; the program doesn't exist anymore and there is no discrimination to remedy. This argument misses the point. The injury to plaintiffs is their inability to receive scholarship funds, which comes from an unjust constitutional amendment. Consider the following: a state constitutional amendment prohibits the issuance of marriage licenses to interracial couples. When an interracial couple is denied a marriage certificate and sues, the entire state is simply prohibited from issuing marriage licenses at all, regardless of the race of the couple. The interracial couple then appeals. Their claim is still live. After all, the injury is the inability to be married, caused by the state constitutional amendment.[45]

The Montana constitution also creates a policy that threatens to systematically violate the Free Exercise Clause. If every program that provides direct or indirect aid to religious schools is invalidated, then, by definition, only those

[45] We make no claim as to whether a similar remedy in an Establishment Clause case would be permissible. In the aftermath of a recent series of cases involving prison inmates who were denied direct access to their spiritual advisors in execution chambers, a frequent practice has been to deny all inmates access to spiritual advisors, rather than allow all inmates access to spiritual advisors. The claim in those cases was that allowing a minister of one faith into the execution chamber but not another constituted an official state preference for one religion over another, and thus an Establishment Clause violation. That violation would supposedly be remedied by leveling down, rather than leveling up. However, in the Free Exercise context, the violation of rights cannot somehow be cured by violating everyone's rights equally.

programs which do not provide aid to religious schools can remain. The result is a system that benefits only non-religious institutions. That system would at least create a cause of action. Such a system would be remarkably reminiscent of employment law. An employer cannot avoid liability simply by avoiding express, or disparate treatment discrimination. Employers must also avoid disparate impact discrimination; they cannot adopt policies that impact people differently based on protected characteristics.[46]

In any event, this Court has already passed judgement on this issue. Two years ago, this Court granted a petition in the case of *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.* The facts are virtually identical. In *Douglas,* the Colorado Supreme Court considered a similar school choice program. As is the case in Montana, the Colorado constitution contains a prohibition on direct or indirect aid to religious schools, and as in Montana, Colorado's highest court invalidated the entirety of the program.[47] This Court granted certiorari, vacated the judgement below, and remanded in light of its decision in *Trinity Lutheran Inc. v. Comer.*[48] This Court's decision to vacate the lower court's judgement, rather than dismiss the petition for a writ of certiorari, provides a useful precedent. Consistency, as in many other areas of the law, is crucial. Reversing stances on justiciability by dismissing the present writ as improvidently granted is unwise and should be examined with skepticism.

IV. THE ESTABLISHMENT CLAUSE PERMITS MONTANA TO INDIRECTLY FUND RELIGIOUS SCHOOLS

All applicable Supreme Court precedent clearly permits Montana to indirectly fund religious education. The now defunct *Lemon v. Kurtzman's* malleable 'entanglement' test can surely be construed to prohibit all forms of religious funding, but not only is that test a dubious resource given

[46] See *Briggs v. Duke Power Co.,* 401 U.S. 424 (1971).
[47] 351 P.3d 461 (Colo. 2015), vacated and remanded, 137 S. Ct. 2327 (2017).
[48] 582 U. S. ____ (2017) (Slip Op).

recent Supreme Court cases,[49] available precedent strongly supports upholding anything like Montana's program.

In Mueller v. Allen, this Court upheld a Minnesota program that permitted various deductions from state income taxes for parents who sent their students to private schools. As explained in a later decision interpreting Mueller, the situation was such that "public funds bec[ame available only as a result of numerous private choices of individual parents of school-age children." The same thing happens in present day Montana. Zobrest v. Catalina Foothills School District concerned the legitimacy of a program which assisted the disabled in school by providing professional help to students attending private school. It did so regardless of whether the school was religious. This Court ruled that the Establishment Clause did not prevent that program from being used to provide an interpreter to a child attending a religious school. As in Mueller, the benefit was generally available and resulted only from the decisions of parents. Furthermore, because there was "no financial incentive for parents to choose a sectarian school," there was no public involvement. Montana's program acts similarly.

In *Zelman v. Simmons-Harris,* this Court considered an Establishment Clause challenge to an Ohio scholarship program. The Ohio program gave money to low-income parents who wanted their children to attend a private school. It was challenged as a violation of the Constitution, and came before this Court, which held that it passed Establishment Clause muster.[50] In his majority opinion, Chief Justice Rehnquist observed that the program was neutral in respect to religion, because it dispersed aid to parents, who chose where to send their children to school. As a result, aid to religious institutions came about as a result of entirely private choice. Rehnquist concluded that because of the gap between governmental choice and religious funding, the program was

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[49] 403 U.S. 602 (1971). *Town of Greece v. Galloway* (572 U.S. 565, 2014) did not use the test, and *American Legion v. American Humanist Association* (588 U. S. ____ 2019) (Slip Op.) nearly eradicated it entirely. The tests put forth in *Town of Greece* and *Van Orden v. Perry* (545 U.S. 677 2005) are much more in line with current Supreme Court precedent.

[50] 536 U.S. 639 (2002).

constitutional.[51] Now, of course Montana's program is different from Ohio's, but not in a way that helps Respondents. The link between state funds and religious education in Montana is more attenuated than it was in Ohio. Montana gives out a tax credit for a charitable donation to a private third party that gives out scholarships. Ohio gave the money straight to parents, who used it to attend religious schools. If anything, the program in *Zelman* would raise more of an Establishment Clause issue than Montana's program, and since this Court upheld the program in *Zelman*, it should conclude that this program is constitutional as well.

There are many other relevant cases that thwart any Establishment Clause claim, including Witters v. Washington Dept. of Services for the Blind and the more recent American Legion v. American Humanist Association. This Court should note not only the remarkable parallels between Montana's program and the programs in Zobrest and Mueller, but the wide swath of other cases supporting a more restrictive vision of the Establishment Clause. Those cases fend off any remaining Establishment Clause claims.

V. ALL OTHER ARGUMENTS TO THE CONTRARY LACK MERIT

A. PETITIONERS' POSITION WOULD NOT FORCE STATES TO FUND RELIGIOUS EDUCATION

All that Petitioners ask is for the state of Montana to treat them equally. Montana is not obligated to fund religious education if it does not wish to, but it cannot condition the availability of general funds on secular status. If Montana wishes to have no funding for private schools, it can have that. Respondents may argue that is what the Montana Supreme Court did: decline to have a generally available program in the first place. This, however, is a mistake. What Montana really did was institute a generally available program and shut down the program as soon as it was used to fund religious schools, thus penalizing religion. The crucial difference is that the Montana constitution tolerates private education subsidies, so long as they do not go towards religious institutions. It tolerates subsidy programs, but only so long as funds go

[51] *Id.,* at 662.

exclusively to secular schools. The state is not forced to fund religious education, it is prevented from punishing people for religious choices.

B. THE USE-IDENTITY DISTINCTION IS A POOR DEFENSE TO *TRINITY LUTHERAN*

Only two terms ago, this Court decided a major religious freedom case with nearly identical facts. Trinity Lutheran, a church in Missouri, wanted to make safety improvements to their playground. They sought a subsidy from a generally available program, which reimbursed schools for using recycled tires. Trinity Lutheran would have received a subsidy if it had not been religious. However, Missouri refused them a subsidy. This Court decided in favor of Trinity Lutheran, holding that the denial of benefits had been solely on account of religious status, not religious use.

Chief Justice Roberts' narrow majority opinion turns heavily on the fact that Trinity Lutheran was "put to the choice between being a church and receiving a government benefit."[52] Religious status, the Chief Justice explains, is not a permissible means of determining who is and who is not eligible for government benefits. Montana would do well to heed that advice, as its constitution singles out religious status. And just like in Missouri, public benefits that are generally available must be truly generally available, or risk strict scrutiny. Montana, unfortunately, fails on both accounts. *Trinity Lutheran* represents a major problem for them, one which they unconvincingly try to rid themselves of. Problematically for Respondents, part of what it means to be religious is to practice religion. As Justice Gorsuch queried in his concurrence in *Trinity Lutheran,* "Does a religious man say grace before dinner? Or does a man begin his meal in a religious manner?"[53] Justice Gorsuch illustrates the problems with the use-identity distinction, namely that it does a poor job of being a distinction at all. But even assuming a reliable distinction can be drawn between religious identity and religious practice, the Free Exercise Clause protects the behavior here regardless.

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[52] 582 U. S. ____ (2017) (Slip op. at 13).
[53] 582 U. S. ____ (2017) (Slip Op., at 1) (Gorsuch, J, concurring).

Respondents cannot successfully argue that their discrimination is use-based, because that argument is impossible to square with the plain text of Article X Sec. VI. Montana's constitution prohibits aid "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."[54] Montana's constitution plainly prohibits funding to any and all religious institutions regardless of whether they teach a religious curriculum, promote the practice of their religion, or otherwise use the funds in support of religious practice. If Montana wanted to prevent funding only on grounds of religious use, it could have done so. It did not.

VI. CONCLUSION

The precedents of this Court are clear. The history of the Free Exercise Clause is clear. Penalties on religion are unconstitutional, even though they are not prohibitions. Montana cannot sidestep the Constitution by punishing the many for the actions of the few. Neither can it escape the guarantees of the First Amendment by passing off its discrimination as merely use-based, or by protesting that it is subject to intermediate scrutiny under *Locke v. Davey.* This Court should restore the scholarship program that was lawfully enacted and invalidate Art. X Sec. VI.

Respectfully submitted,

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[54] MONT. CONST. Art. X Sec. VI.