

No. 18-1195

In the
Supreme Court of the United States

KENDRA ESPINOZA, JERI ELLEN ANDERSON,
AND JAMIE SCHAEFER,

Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE AND GENE
WALBRON, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF
THE MONTANA DEPARTMENT OF REVENUE,

Respondents.

**On Petition for a Writ of Certiorari
to the Montana Supreme Court**

**BRIEF OF *AMICUS CURIAE*
ALLIANCE FOR CHOICE IN EDUCATION
IN SUPPORT OF PETITIONERS**

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INTERESTS OF AMICUS CURIAE¹

The Amicus Curiae Alliance for Choice in Education Scholarships (ACE) is a nonprofit organization dedicated to the proposition that every child deserves a great education. Since its founding in 2000, ACE has sought to achieve that goal by providing K-12 nonpublic school scholarships to help as many low-income students as possible attend the schools of their choice. To date, ACE has awarded more than 35,000 K-12 nonpublic school scholarships worth \$83 million. The organization currently provides nearly 7,000 K-12 private school scholarships across eight states, including 921 in Montana.

ACE has an interest in this case for at least three reasons. First, the enactment of school choice programs like Montana's scholarship tax credit program expands access to high-quality private educational options for disadvantaged families. Second, ACE's extensive work and investment in third-party evaluation of its work in the field of nonpublic school choice have provided the organization with a unique perspective on the positive impacts of private school access both on individual students and on society as a whole. Third, as school choice programs continue to expand across the United

¹ In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amici and their counsel, make a monetary contribution to the preparation or submission of this brief. The parties consented to this filing. Counsel timely notified the parties of intent to file this amicus brief as required by Rule 37.2(a).

States, ACE has a substantial interest in protecting the rights of its 673 partner schools to participate in otherwise available public benefit programs related to school choice.

ACE currently provides scholarships to Montana students through ACE Scholarships Montana, LLC, a subsidiary of the Alliance for Choice in Education, DBA ACE Scholarships.² These scholarships fall outside Montana's relatively new tax credit system that is the subject of this appeal. ACE's interest includes supporting greater student choice for education, as the Montana program at issue would have done. The experience of ACE scholars confirms that improving access to educational options for students and families is a major step toward student success.

SUMMARY OF ARGUMENT

The public benefits of K-12 scholarship programs are broad, deep, and persistent. As the largest dedicated provider of education scholarships in Montana, ACE knows the power of scholarships in the lives of students. There are many quantifiable and proven public benefits to providing scholarships to K-12 students, such as those students who would be eligible for scholarships under Montana's scholarship tax credit program. Not only individuals, but families,

² Of note, ACE does not participate in the Montana scholarship tax credit program due to policy limitations in the governing statute. The organization hopes to revisit participation in that program at a later date. However, because ACE's resources are far too limited to help more than a small fraction of the students and families who might benefit from increased educational options, it welcomes other efforts to do so.

generations, and ultimately entire communities are positively impacted when students have more educational options.

In ACE's experience, many, though not all, private schools are associated with religious institutions. This is hardly surprising given the deep historical interconnections between faith and private schooling in America. Nationwide, approximately 88 percent of ACE's 673 partner private schools are religiously affiliated. In keeping with ACE's mission to provide broad choices to disadvantaged families, these schools represent a variety of faiths—Protestantism, Catholicism, Judaism, and Islam. In Montana specifically, 74 percent of ACE's 62 partner private schools are religiously affiliated.

Excluding such schools from participation in religiously neutral school choice programs, as the Montana Supreme Court ordered, would hamper the goal of providing the greatest possible educational opportunity to the greatest number of students. Montana has flaunted this Court's holdings that when a government provides a public benefit, it cannot exclude some citizens or institutions from the program merely because they are religious. ACE's experience bears on this case because it involves a scholarship program that, much like ACE-funded scholarships, is intended to provide expanded educational opportunities and lifelong benefits for students who may otherwise have less opportunity to pursue an educational setting better fitted to their individualized needs.

As an organization operating in multiple states, including states that administer tax credit programs

like the one in Montana, ACE also understands that this Court’s promise of fair treatment towards religious participants in public benefit programs will have no purchase if States can do an end-run around the Constitution in this area.

ARGUMENT

Students have diverse educational needs that are best served by an educational system that provides diverse educational options. Even the finest public school systems cannot effectively serve every student or meet every need. Allowing families—and especially economically disadvantaged families—to choose nonpublic schools can help broaden access to effective educational options that might otherwise be out of reach. These options, in turn, can help students access the educational support they need to overcome academic or other hurdles, break the cycle of poverty, and ultimately build successful, independent lives. This has been borne out by ACE’s experience and is confirmed in studies around the country.

In striking down the program, the Montana Supreme Court relied upon an unfortunate misreading of this Court’s discussion of the “play in the joints” between the Free Exercise Clause and Establishment Clause in *Locke v. Davey*, 540 U.S. 712, 718 (2004). The result was a ruling that Montana’s neutral and generally available school-aid program could exclude religious schools from being an option. *Espinoza v. Mont. Dep’t of Rev.*, 393 Mont. 446, ¶ 30 (2018). This exclusion of religious options runs contrary to the U.S. Constitution’s nondiscrimination guarantees. It also severely limits the substantial

benefits the program and others like it provide both to participating students and to society as a whole.

I. Educational choice creates widespread and long-lasting public benefits without regard to the religious identity of participating schools.

The Montana Legislature enacted a tax credit program that would make it easier for students to receive scholarships from private “Student Scholarship Organizations,” which provide scholarships to any “qualified education provider.” Although the value of the tax-credit incentive offered is limited, the additional private donations generated under the program have improved families’ ability to choose different education options.

A. ACE scholarships have a track record of producing positive results for students and families.

ACE was founded in Colorado in 2000. Since then, the organization has steadily expanded into seven more states. Montana was the first of these expansion states. ACE began operations in Montana the 2012-13 school year with 506 scholars. Since then, the program has grown by 82 percent. It now serves 921 scholars attending 62 private schools statewide.

Because of the longstanding nature of the organization’s scholarship program in Colorado, ACE has been able to engage in the most detailed evaluation of its results in that state. The average Colorado ACE student enters his or her private school at levels below proficient in both math and reading. After two years in their new schools, however, these

scholars have achieved proficiency in both subjects. Didi Fahey, *2018 State Summary: Colorado*, Quantitative Research Evaluation & Measurement, March 2019, at <http://tinyurl.com/yy3qfef7>. Three-year academic growth is highest for ACE students who enter their new schools in the lowest quartile of academic performance, further illustrating that access to new educational options offers significant academic benefits to the disadvantaged students who face the steepest hurdles. Didi Fahey, *ACE Scholarship Brief – 2018*, Quantitative Research Evaluation & Measurement, Sept. 2018, at 5, available at <http://tinyurl.com/y4w5x9n8>. Indeed, low-income ACE students in the aggregate outperform Colorado public school students of all income levels in third-grade reading and eighth-grade math—two of the most important benchmarks for any K-12 student.

The benefits of the ACE program extend beyond proficiency on standardized tests. Colorado ACE scholars also outperform their low-income peers in public schools on college entrance exams in both math and reading. Fahey, *2018 State Study, Colorado, supra*. Nearly 98 percent of Colorado ACE scholars graduate high school on time, compared to just 68.5 percent of low-income Colorado students in public schools. These scholars also matriculate directly to college at a rate of 96.4 percent—nearly 40 points higher than the same rate for all Colorado public school students. *Id.*

Though the Montana program is significantly newer, ACE's evaluative data in the state largely mirror the patterns seen in Colorado. As in other states, ACE's work in Montana focuses exclusively on

assisting economically disadvantaged students and families. In 2017-18, the average household income among Montana ACE families was just \$32,500, which was considerably lower than Montana's overall median household income of \$58,801.4 See U.S. Census Bureau, *QuickFacts: Montana – Income and Poverty*, at <http://tinyurl.com/yysqvb79>.

Montana ACE scholars typically enter their chosen private schools below proficient in both reading and math. After less than two years in his or her chosen school, however, the typical ACE student in Montana has achieved proficiency in math. It takes slightly longer than two years for these students to reach proficiency in reading. See Didi Fahey, *2018 State Summary: Montana*, Quantitative Research Evaluation & Measurement, March 2019, at <http://tinyurl.com/y48nbcvo>. In general, Montana ACE scholars achieved significantly higher rates of proficiency at the critical third-grade level in reading than their public school peers of all income levels. Similarly, ACE scholars achieved higher levels of proficiency in eighth-grade math, which is widely viewed as a critical benchmark for how students will fare in high school math classes. *Id.*

As in Colorado, ACE Montana students outperformed their public school peers on other critical measures of academic success beyond proficiency rates. On the ACT college entrance assessment, low-income ACE scholars perform slightly better in English than Montana public school students of all income levels. *Id.* These same low-income scholars perform only slightly worse—within one point on the ACT score scale—than Montana public school students of all income levels in math,

reading, and science. The number of Montana ACE scholars taking college-entrance exams is very limited at this stage in the program because most current Montana ACE scholars are concentrated in earlier grades for a variety of reasons. However, these early results broadly track with the performance on college-entrance exams ACE has seen in its programs nationally. Didi Fahey, *National Executive Summary, Quantitative Research Evaluation & Measurement*, March 2019, at <http://tinyurl.com/y37angj3>. Montana ACE scholars consistently graduate from high school at rates greater than 90 percent. By comparison, just 78 percent of low-income students in Montana public schools graduated on time the same year. Fahey, *State Summary: Montana, supra*.

Perhaps most importantly, Montana ACE parents express high levels of satisfaction with various aspects of their new schools. *Id.* For instance, 89.6 percent of parents believe their new schools offer better academics. Similarly, 84.7 percent believe their schools provide a safer learning environment, and 77.1 percent believe these schools afford students with better access to teachers and support. Importantly for this case, more than three-quarters of ACE parents expressed satisfaction with the faith-based curriculum offered by their chosen schools. *Id.*

Not all school choice programs are as effective as ACE's, but the wider body of empirical research generally supports the positive impacts these programs can have both on students and on other schools. A 2016 literature review of "gold-standard" random-control-trial (RCT) studies on nonpublic school choice in the United States found that 14 of 18 available studies concluded that private school choice

programs produce positive academic impacts for participating students, either in the aggregate or by subgroups. Of these 14 studies, six find that the programs positively impact all students. The remaining eight find that they impact some subgroups of students and produce neutral academic impacts on others. Two studies find no visible impact on participating students.

Only two of the studies examined by the literature review—both on Louisiana’s voucher program—found negative impacts. See Greg Forster, *A Win-Win Solution: The Empirical Evidence for School Choice*, Friedman Found. for Educ. Choice, May 2016, available at <http://tinyurl.com/zjrdjad>. A later study reevaluated these negative impacts and found that “by the third year, the performance of [Louisiana Scholarship Program] scholarship users was statistically similar to their [public school] counterparts in both English Language Arts and Math.” Jonathan N. Mills and Patrick J. Wolf, *How Has the Louisiana Scholarship Program Affected Students? A Comprehensive Summary of Effects after Three Years*, Educ. Research Alliance for New Orleans, June 26, 2017, at 4, <http://tinyurl.com/y3ay3bf6>.

Many scholars and policy experts have theorized that the initial negative findings in Louisiana were at least partially caused by adverse selection of private schools as a result of heavy state regulation of the program. Jason Bedrick, *The Folly of Overregulating School Choice*, *Educ. Next*, Jan. 5, 2016, at <http://tinyurl.com/y3wytqj3>. Only about one-third of the private schools in Louisiana choose to participate in the program, in large part due to onerous state

requirements on participating schools. See Brian Kisida, et al., *Views from Private Schools: Attitudes about School Choice Programs in Three States*, Am. Enterprise Inst., Jan. 2015, at 9, 19, available at <http://tinyurl.com/yxjzj4d8>. Coupled with a finding in one of the initial papers that the private schools opting to participate in the Louisiana Scholarship Program tended to be those with low tuition and sharp relative enrollment declines, these trends seem to indicate that stronger, more stable private schools could afford to forgo participation in the program in the interest of avoiding the accompanying state interference. Atila Abdulkadiroglu et al., *Free to Choose: Can School Choice Reduce Student Achievement*, 10 Am. Econ. J. 1, Jan. 2018, at 15, available at <http://tinyurl.com/y6rtn8xk>. The weaker providers could not, and the eligible pool of options from which students could choose was therefore disproportionately composed of lower-quality schools. Thus, the initial negative findings in Louisiana may be best interpreted as a cautionary tale about excessive government restrictions—direct or indirect—on which schools are available to families in school choice programs.

Several other studies have been published since the 2016 literature review, many of which have supported the notion that educational choice programs benefit students in ways other than performance on standardized tests. For example, a recent study of Florida’s scholarship tax credit program, the largest of its kind in the nation with approximately 100,000 participating students, found that low-income students participating in FTC are substantially more likely to enroll in a Florida

community college—the most financially accessible postsecondary option for low-income students. The authors find evidence that these benefits are larger for students who participate in the program for a greater number of years. Matthew M. Chingos and Daniel Kuehne, *The Effects of Statewide Private School Choice on College Enrollment and Graduation: Evidence from the Florida Tax Credit Scholarship Program*, Urban Inst., Sept. 2017, at V, available at <http://tinyurl.com/yxg98qly>. A similar study on educational attainment among participants in the Milwaukee Parental Choice Program finds that these students tend to have higher levels of enrollment and persistence in four-year colleges. See Patrick Wolf, et al., *Do Voucher Students Attain Higher Levels of Education*, Urban Inst., Feb. 2018, available at <http://tinyurl.com/y2xhznyk>.

These findings are consistent with those of earlier research on the subject. One 2012 study examined the impacts of a private school scholarship program in New York City on college enrollment patterns and found that it had a large and statistically significant positive impact on college enrollment by African American students. See Matthew M. Chingos and Paul E. Peterson, *The Effects of School Vouchers on College Enrollment: Experimental Evidence from New York City*, Brown Ctr. on Educ. Pol’y, Aug. 2012, at iii-iv, available at <http://tinyurl.com/y2sogegd>.

Likewise, a 2013 study on vouchers in Milwaukee found that “exposure to voucher schools was related to graduation and, in particular, to enrollment and persistence in a 4-year college. These differences are apparent despite controls for student neighborhoods, demographics, early-career test scores and—for a

subsample of survey respondents—controls for parental education, income, religious behavior, and marital status.” Joshua M. Cowen et al., *School Vouchers and Student Attainment: Evidence from a State-Mandated Study of Milwaukee’s Parental Choice Program*, 41 *Pol’y Studies J.* 1, Feb. 2013, at 147, available at <http://tinyurl.com/y4jtffuy>.

Although research tends to find that that school choice programs positively affect college enrollment and persistence, these benefits do not always clearly translate to the rate at which low-income students earn college degrees. More research is needed to understand why this disconnect may occur, but it is clear that private school choice generally increases students’ opportunity to access postsecondary education.

Three additional studies in Indiana, Ohio, and Washington, D.C. have found negative academic results in voucher programs. Of these, only the Washington, D.C., study employed a methodology relying on gold-standard RCT design. This study found that voucher students experienced a negative impact in mathematics after one year of using a voucher. However, it also found that parents perceived their new schools as safer than those they left by significant margins, raising questions about how and why D.C. parents are selecting schools. Mark Dynarski, et al., *Evaluation of the DC Opportunity Scholarship Program: Impacts After One Year*, Nat’l Ctr. for Educ. Evaluation and Regional Assistance, U.S. Dep’t of Educ., June 2017, at <http://tinyurl.com/lafonhh>. A similar RCT study conducted on the same program several years earlier found evidence of positive impacts on high school

graduation rates and suggestive positive results in reading achievement. Patrick J. Wolf, et al., *School Vouchers and Student Outcomes: Experimental Evidence from Washington, DC*, 32 J. of Pol'y Analysis & Mgmt 2, Feb. 2013, at 225, available at <http://tinyurl.com/y3lyb3fr>.

The study in Indiana finds statistically significant losses in math achievement among voucher students generally. However, this finding does not hold for some subgroups of students after several years in the program, and voucher students performed at statistically similar levels as public school students in English Language Arts. The authors also concede that families may choose schools for reasons unrelated to academics, such as safety or curricula tied to certain belief or value systems. Joseph Waddington and Mark Berends, *Impact of the Indiana Choice Scholarship Program: Achievement Effects for Students in Upper Elementary and Middle School*, 34 J. of Pol'y Analysis & Mgmt. 7, Oct. 2018 at 802, 804, available at <http://tinyurl.com/y5a9l4q6>. The Ohio study was subject to significant methodological limitations that prevent its findings from being generalized to programs outside that state. David Figlio and Krzysztof Karbownik, *Evaluation of Ohio's EdChoice Scholarship Program: Selection, Competition, and Performance Effects*, Thomas B. Fordham Inst., July 2016, at <http://tinyurl.com/y5qok96n>; Eric Frank, *Use Caution in Drawing Conclusions from Ohio Voucher Study*, Educ. Next, July 24, 2016, at <http://tinyurl.com/yx9kzv3w>.

B. Scholarship programs positively impact more than one generation at a time.

In addition to direct benefits to students, an early field of new research is examining how the benefits of school choice can ripple across generations. Parental education levels are typically recognized as “the single strongest correlate of children’s success in school, the number of years they attend school, and their success later in life.” Anna J. Egalite, *How Family Background Influences Student Achievement*, 16 *Educ. Next* 2, Spring 2016, available at <http://tinyurl.com/yxdexjmd>. As such, it stands to reason that improving students’ academic prospects will have benefits far into the future that researchers have only begun to quantify.

In particular, parental education level plays a major role in inculcating educational aspirations and creating expectations for higher levels of educational attainment during the critical adolescent phase of a student’s life. Eric. F. Dubow et al., *Long-term Effects of Parents’ Education on Children’s Educational and Occupational Success: Mediation by Family Interactions, Child Aggression, and Teenage Aspirations*,” 55 *Merrill-Palmer Q.* 3, July 2009, at 224–49, available at <http://tinyurl.com/y5xt8muj>.

Family environment also heavily impacts other aspects of children’s lives, including the colleges they eventually attend and their behavior. One unique study of Korean-American adoptees finds that family environment, in this case defined as parental education levels and family size, accounts for 14 percent of the variation in student educational attainment, 35 percent of the variation in the

selectivity of colleges attended by students, and 33 percent of the variation in drinking behavior. Bruce Sacerdote, *How Large are the Effects from Changes in Family Environment? A Study of Korean American Adoptees*, 122 Q. J. of Econ. 1, Feb. 2007, at 119-57, available at <http://tinyurl.com/y2wavd9g>.

School choice programs provide an opportunity to alter disadvantaged students' social spheres, habits, and expectations. In so doing, and by improving the prospects for higher educational attainment on the part of scholarship students, these programs hold the potential to provide benefits to future generations. Although quantifying the exact effects can be difficult, research indicates that providing students with a path to higher levels of educational attainment and success today will lead to positive impacts for their future children—and to society as a whole.

Not only do future generations stand to benefit from educational opportunities provided to today's students, but ACE's evaluative work provides early evidence that the trend also works in reverse. Even the parents of ACE scholarship recipients begin to display different behaviors over time. For instance, the average parent of an ACE scholarship recipient advances from having no post-secondary credentials (including certificates) to earning the equivalent of at least one while their student participates in the program. Didi Fahey, *Alliance for Choice in Education: Social Mobility*, Oct. 2017, at 31, available at <http://tinyurl.com/y6hmu33w>.

Similarly, between 2011 and 2015, income levels for both low- and middle-income families decreased slightly while high-income families' incomes

increased. Conversely, ACE's low-income families experienced steady increases in their per capita incomes the longer their children stay in the ACE program. Between year one and year two in the ACE program, ACE families experienced an average earnings increase of 12.4 percent. *See id.* at 3, 8, 19–20.

Although more research is needed to establish a causal link between these intergenerational trends and participation in the ACE program, evaluators theorize that school choice allows low-income ACE parents to build the economic, human, social, and cultural capital needed to improve their situations by allowing them to engage in their children's education, create relationships outside their normal peer groups, and observe the progress of their own children.

C. The success of ACE scholars provides widespread benefit to society as a whole.

It is well documented that incomes and employment rates rise with higher levels of educational attainment. Americans without a high school diploma earn \$177 less per week than Americans with a high school diploma, and are more likely to be unemployed. Americans with a bachelor's degree can expect to weekly earn more than twice what an American without a high school diploma earns. Additionally, unemployment rates for Americans with a bachelor's degree (2.2 percent) are significantly lower than for Americans without a high school diploma (5.6 percent). *See Unemployment rates and earnings by educational attainment, 2018*, U.S. Dep't of Labor Bureau of Labor Statistics, at

<http://tinyurl.com/ln9p4pk> (last modified March 27, 2018).

The stakes are high when it comes to high school graduation. The estimated cost of a single high school dropout to society is \$292,000. Andrew Sum et al., *The Consequences of Dropping Out of High School: Joblessness and Jailing for High School Dropouts and the High Cost for Taxpayers*, Ctr. for Labor Market Studies, Ne. Univ., Oct. 2009, at 15, available at <http://tinyurl.com/yyl64nk6/>. This figure includes lower tax revenues as a result of lower wages, higher costs associated with government assistance, and a higher risk of incarceration and its associate costs. ACE's own independent evaluation of U.S. Census Bureau and U.S. Bureau of Labor Statistics data estimates that a high school dropout will also experience an average loss of wages equal to \$888,460 over the course of 30 years after controlling for the number of students who return to school to earn a GED or certificate. Considering both individual and societal costs together, these figures indicate that a single high school dropout costs \$1,180,456. Didi Fahey, *Value of a High School Diploma*, Quantitative Research Evaluation & Measurement, June 15, 2017, at 15–16, available at <http://tinyurl.com/yyexzyhu>.

In 2016, an estimated 14,857 of the 99,861 18–24 year-olds residing in Montana did not have a high school diploma. *Id.* at 16. Based on the preceding estimates, these individuals will cost society \$4,338,244,000 over the course of their lives in addition to incurring a cost of \$13,199,850,220 to themselves in lost earnings. *Id.* at 17. In light of these figures, ACE's four-year high school graduation rates, which are consistently much higher than those among

low-income students in public schools, translate to very real positive economic impacts both for participating students and for society as a whole.

Finally, there is some emerging evidence that access to school choice programs may help reduce criminal activity, thereby reducing costs to society. A 2016 examination of Milwaukee's voucher program finds preliminary evidence that "merely being exposed to private schooling for a short time through a voucher program may not have a significant impact on criminal activity, though persistently attending a private school through a voucher program can decrease subsequent criminal activity, especially for males." Corey DeAngelis and Patrick J. Wolf, *The School Choice Voucher: A 'Get Out of Jail' Card?*, March 8, 2016, at 1 (Working paper) (on file at the University of Arkansas Department of Education Reform), available at <http://tinyurl.com/y3nxeqhu>. Though not conclusive, the study's findings closely mirror similar findings in public school choice programs elsewhere in the nation. See David J. Deming, *Better Schools, Less Crime?* 126 Q. J. of Econ. 1 (2011), at 2063–2115, available at <http://tinyurl.com/y3ua4lev>; and Angela K. Dills and Rey Hernandez-Julian, *More Choice, Less Crime*, 6 Educ. Finance & Policy 2, Spring 2011, at 246–66, available at <http://tinyurl.com/y2ob2wuc>.

No one, including Respondents, seriously contests the proposition that improved educational outcomes provide significant public benefits. Yet some do not acknowledge the role private school choice can play in producing those improved outcomes, particularly for students who find their needs not met in traditional public schools. ACE's third-party evaluation and the

wider body of empirical research on the topic show that individuals, families, school districts, and society in general benefit when more parents are provided with the ability to choose the best schools for their children. The challenged program here seeks to do the same thing. These studies and the success of ACE scholars through private school choice clearly establish that the expansion of educational opportunity generates a substantial public benefit.

II. Categorical exclusion of religious education providers from generally available tax credit programs violates the U.S. Constitution.

Lower courts are split on the question of whether religious participants can be excluded from generally available public aid programs merely on account of religious identity. There is a disturbing trend of lower courts approving discrimination against religious actors' participation in government benefit programs, even after this Court's recent decision in *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012 (June 26, 2017).

The Montana Supreme Court ruled that exclusion of religious school participation was mandatory and did not violate the U.S. Constitution, even after *Trinity Lutheran* re-affirmed the Constitution's non-discrimination rules. There, similar to here, the State attempted to categorically exclude a religious institution from a generally available benefit—purely on the basis of religious identity. The State also defended this exclusion by invoking the “play in the joints” between the Free Exercise and Establishment Clauses from *Locke v. Davey*. A careful reading of

precedent compels the conclusion that Montana, like Missouri, cannot use a “no aid” provision in its Constitution as justification for disqualifying religious education providers from participating in the Montana tax credit program.

When it comes to limiting which schools can qualify for scholarships from a scholarship-granting organization that accepts private donations, there are miniscule risks that the State will be entangled with religion, even if donors receive a tax benefit.

A. Exclusion of religious actors, even in the education field, violates the U.S. Constitution.

A government program that provides broad public benefits such as those described in this brief cannot exclude institutions simply because they are religious. Unfortunately, some lower courts remain confused about the application of constitutional non-discrimination rules in circumstances like the school-aid provision in this case. The confusion may persist, in part, because the caveat in footnote three of *Trinity Lutheran* that the decision “does not address religious uses of funding or other forms of discrimination” has exasperated the split of authority in lower courts regarding generally available and neutral government benefit programs. 137 S. Ct. at 2024; *but see id.* 137 S. Ct. at 2025–26 (Gorsuch, J., concurring) (questioning the usefulness of footnote three for lower courts).

As explained in Part I, Montana’s scholarship program allows students to use scholarships to help pay tuition at participating private schools. This

program was designed to benefit students and families through increased educational opportunity. And by allowing families to access private schools that might otherwise be out of reach, the program would provide broad public benefits in the form of improved academic performance, higher graduation rates, and the likelihood of better outcomes later in life. Justice Breyer's concurrence in *Trinity Lutheran* in particular emphasized the public benefit of the playground resurfacing program in that case as relevant. *Id.* at 2027 (Breyer, J., concurring in the judgment). In light of such well-established public benefits as those provided by the Montana tax credit program, the discrimination against religious participation, even under the color of a state constitutional provision, should be deemed unconstitutional.

Consistent with the reasoning of the *Trinity Lutheran* majority, these public benefits make the Respondent's scholarship program much more like the playground resurfacing grant program in *Trinity Lutheran* than the narrow restriction on funding for clerical studies in *Locke*. The *Trinity Lutheran* Court rejected Missouri's reliance on *Locke* to justify excluding churches from its grant program and in the process highlighted key distinguishing factors:

- (2) In *Locke* "scholarship recipients were free to use the money in accredited religious and non-religious schools alike." *Id.*
- (3) In *Locke*, the student "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.*

- (4) “*Locke* took account of Washington’s antiestablishment interest only after determining, as noted, that the scholarship program did not ‘require students to choose between their religious beliefs and receiving a government benefit.’” *Id.* (quoting *Locke*).
- (5) In *Locke*, the “scholarship program went ‘a long way toward including religion in its benefits’ ... [because students] were free to use their scholarships at ‘pervasively religious schools.’” *Id.* (quoting *Locke*).

The narrow decision in *Locke* should not be expanded to justify religious exclusion like that mandated by the Montana Supreme Court. The Montana Supreme Court wrongly required the exclusion of religious schools simply because of their religious identity. Such exclusion runs headlong into the illegal discrimination against religion in *Trinity Lutheran*. And *Locke* itself relied on the inclusion of religious schools as valid options for scholarship recipients as being material while Montana’s policy is entirely exclusionary towards religious schools.

B. Government programs of general public benefit need not exclude religious actors to comply with the Establishment Clause.

In *Trinity Lutheran*, Justice Breyer noted that by applying the Missouri Constitution’s broad prohibition on funding going to a church, “the State would cut Trinity Lutheran off from participation in

a general program designed to secure or to improve the health and safety of children.” *Id.* at 2027 (Breyer, J., concurring). A government program with “a limited number of projects” thus should be treated like cutting off churches from “general government services as ordinary police and fire protection,” *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 17–18 (1947), absent some significant showing of state interest that was absent in *Trinity Lutheran*. *Id.*

As in *Trinity Lutheran*, Montana argues it must exclude religious institutions from receiving aid, this time in the form of scholarship funds provided by private, tax-credit-eligible donations to private charities. The court argues that the state needs to prohibit the establishment of religion in the context of a tax credit program as it must with direct taxpayer funding of churches. This logic elides the substantial distinction between government appropriations of taxpayer funds and private donations for which the donors receive a tax credit. It also ignores the predominate purpose behind supporting student scholarships to expand educational choice: benefiting students. The Montana legislature structured this program to help student recipients of the scholarships, not as a means of supporting or sustaining certain non-public schools.

The Montana program’s primary effect was not to advance religion. It was designed to benefit the student, not the institution. The same purpose analysis shows that the challenged program here primarily benefits students (a public benefit), and therefore religious schools need not be excluded on account of being religious. Indeed, the scholarship

program provides “true private choice” where private funds reach religious schools only as a result of “genuine and independent private choice” on the part of participating parents. It therefore provides a clearer public benefit than aid programs that rely upon direct government appropriations, although it should be noted that even these government-funded programs have been found to provide a constitutionally permissible public benefit. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) (upholding direct public scholarship program even where 82 percent of participating schools were religious).

This case provides an ideal vehicle for the Court to affirm that if a government program largely benefits the public and the intended citizens (*i.e.*, students and their families), then the state may not constitutionally exclude religious institutions from participation. These types of government benefit programs extend beyond the widely dispersed services such as police and fire protection to competitive grant programs, and here, scholarship programs.

Creative uses of public funds to improve educational opportunities for Montana students should be encouraged. A clarification of the rule from *Trinity Lutheran* would provide much needed guidance for when the public benefit-rich nature of the school-aid program can be constitutionally permitted.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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