

No. 18-1195

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IN THE  
**Supreme Court of the United States**

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KENDRA ESPINOZA, JERI ELLEN ANDERSON  
AND JAIME SCHAEFER,

*Petitioners,*

v.

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

*Respondents.*

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**On Writ of Certiorari to the  
Montana Supreme Court**

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**BRIEF FOR ALLIANCE FOR CHOICE IN  
EDUCATION AS *AMICUS CURIAE*  
SUPPORTING PETITIONERS**

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<i>Everson v. Bd. of Educ. of Ewing</i> , 330 U.S. 1 (1947).....	26
<i>Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.</i> , 508 U.S. 384 (1993).....	24
<i>Locke v. Davey</i> , 540 U.S. 712 (2004).....	<i>passim</i>
<i>Mitchell v. Helms</i> , 530 U.S. 793 (2000).....	24
<i>Mueller v. Allen</i> , 463 U.S. 388 (1983).....	24
<i>Rosenberger v. Rector &amp; Visitors of Univ. of Virginia</i> , 515 U.S. 819 (1995).....	24
<i>Sch. Dist. of Abington Twp. v. Schempp</i> , 374 U.S. 203 (1963).....	5
<i>Trinity Lutheran Church of Columbia v. Comer</i> , 137 S. Ct. 2012 (June 26, 2017).....	<i>passim</i>
<i>Widmar v. Vincent</i> , 454 U.S. 263 (1981).....	24
<i>Zelman v. Simmons-Harris</i> , 536 U.S. 639 (2002).....	26
CONSTITUTION	
U.S. Const. amend. I .....	<i>passim</i>

## TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES	Page(s)
Andrew Sum et al., <i>The Consequences of Dropping Out of High School: Joblessness and Jailing for High School Dropouts and the High Cost for Taxpayers</i> (Ne. U. Ctr. for Lab. Mkt. Stud., Oct. 2009), <a href="http://tinyurl.com/yyl64nk6/">http://tinyurl.com/yyl64nk6/</a> .....	16
Angela K. Dills & Rey Hernández-Julián, <i>More Choice, Less Crime</i> , 6 <i>Educ. Fin. &amp; Pol'y</i> 246 (2011), <a href="http://tinyurl.com/y2ob2wuc">http://tinyurl.com/y2ob2wuc</a> .....	18
Anna J. Egalite, <i>How Family Background Influences Student Achievement</i> , <i>EducationNext</i> , Spring 2016, <a href="http://tinyurl.com/yxdexjmd">http://tinyurl.com/yxdexjmd</a> .....	13
Atila Abdulkadiroglu et al., <i>Free to Choose: Can School Choice Reduce Student Achievement</i> , 10 <i>Am. Econ. J. Applied Econ.</i> 175 (2018), <a href="http://tinyurl.com/y6rt n8xk">http://tinyurl.com/y6rt n8xk</a> .....	19
Bruce Sacerdote, <i>How Large are the Effects from Changes in Family Environment? A Study of Korean American Adoptees</i> , 122 <i>Q. J. of Econ.</i> 119 (2007), <a href="http://tinyurl.com/y2wavd9g">http://tinyurl.com/y2wavd9g</a> .....	14
Corey A. DeAngelis & Patrick J. Wolf, <i>Private School Choice and Crime: Evidence from Milwaukee</i> , <i>Soc. Sci. Q.</i> , July 7, 2019, <a href="https://tinyurl.com/y5elnsaw">https://tinyurl.com/y5elnsaw</a> .....	17

## TABLE OF AUTHORITIES—Continued

	Page(s)
Corey DeAngelis & Patrick J. Wolf, <i>Private School Choice Helps Students Avoid Prison and Unplanned Pregnancies</i> , EducationNext, Feb. 26, 2019, <a href="https://tinyurl.com/y64z8kyc">https://tinyurl.com/y64z8kyc</a> .....	17
Corey DeAngelis & Patrick J. Wolf, <i>The School Choice Voucher: A ‘Get Out of Jail’ Card?</i> , (U. Ark. Dep’t of Educ. Reform, Working Paper 2016-03, Mar. 8, 2016), <a href="http://tinyurl.com/y3nxeqhu">http://tinyurl.com/y3nxeqhu</a> .....	17
David Figlio and Krzysztof Karbownik, <i>Evaluation of Ohio’s EdChoice Scholarship Program: Selection, Competition, and Performance Effect</i> (Thomas B. Fordham Inst., July 2016), <a href="http://tinyurl.com/y5qok96n">http://tinyurl.com/y5qok96n</a> .....	22-23
David J. Deming, <i>Better Schools, Less Crime?</i> 126 Q. J. of Econ. 2063 (2011), <a href="http://tinyurl.com/y3ua4lev">http://tinyurl.com/y3ua4lev</a> .....	17-18
Didi Fahey, <i>2018 State Summary: Colorado</i> , (Quantitative Res. Evaluation & Measurement, Mar. 2019), <a href="http://tinyurl.com/yy3qfef7">http://tinyurl.com/yy3qfef7</a> .....	10, 11
Didi Fahey, <i>2018 State Summary: Montana</i> , (Quantitative Res. Evaluation & Measurement, Mar. 2019), <a href="http://tinyurl.com/y48nbcvo">http://tinyurl.com/y48nbcvo</a> .....	6, 12, 13

## TABLE OF AUTHORITIES—Continued

	Page(s)
Didi Fahey, <i>ACE Scholarship Brief – 2018</i> , (Quantitative Res. Evaluation & Measurement, Sep. 2018), <a href="http://tinyurl.com/y4w5x9n8">http://tinyurl.com/y4w5x9n8</a> .....	11
Didi Fahey, <i>National Executive Summary</i> , (Quantitative Res. Evaluation & Measurement, Mar. 2019), <a href="http://tinyurl.com/y37angj3">http://tinyurl.com/y37angj3</a> .....	12
Didi Fahey, <i>The Alliance for Choice in Education: Social Mobility</i> (Quantitative Res. Evaluation & Measurement, Oct. 2017), <a href="http://tinyurl.com/y6hmu33w">http://tinyurl.com/y6hmu33w</a> .....	15
Didi Fahey, <i>Value of a High School Diploma</i> , (Quantitative Res. Evaluation & Measurement, June 15, 2017), <a href="http://tinyurl.com/yyexzyhu">http://tinyurl.com/yyexzyhu</a> .....	16
Doris Kearns Goodwin, <i>Team of Rivals: The Political Genius of Abraham Lincoln</i> (2012).....	6
Eric F. Dubow et al., <i>Long-term Effects of Parents’ Education on Children’s Educational and Occupational Success: Mediation by Family Interactions, Child Aggression, and Teenage Aspirations</i> ,” 55 <i>Merrill-Palmer Q.</i> 224 (2009), <a href="http://tinyurl.com/y5xt8muj">http://tinyurl.com/y5xt8muj</a> .....	13-14
Eric Frank, <i>Use Caution in Drawing Conclusions from Ohio Voucher Study</i> , EducationNext, July 24, 2016, <a href="http://tinyurl.com/yx9kzv3w">http://tinyurl.com/yx9kzv3w</a> .....	23

## TABLE OF AUTHORITIES—Continued

	Page(s)
Greg Forster, <i>A Win-Win Solution: The Empirical Evidence for School Choice</i> (Friedman Found. for Educ. Choice, 4th ed., May 2016), <a href="http://tinyurl.com/zjrdjad">http://tinyurl.com/zjrdjad</a> .....	18
Jason Bedrick, <i>The Folly of Overregulating School Choice</i> , <i>EducationNext</i> , Jan. 5, 2016, <a href="http://tinyurl.com/y3wytqj3">http://tinyurl.com/y3wytqj3</a> .....	19
Jonathan N. Mills & Patrick J. Wolf, <i>How Has the Louisiana Scholarship Program Affected Students? A Comprehensive Summary of Effects After Three Years</i> 4 (Educ. Res. Alliance for New Orleans Pol’y Br., June 26, 2017), <a href="http://tinyurl.com/y3ay3bf6">http://tinyurl.com/y3ay3bf6</a> .....	19
John C. Jeffries, Jr. & James E. Ryan, <i>A Political History of the Establishment Clause</i> , 100 <i>Mich. L. Rev.</i> 279 (2001).....	7
Joseph P. Viteritti, <i>Blaine’s Wake: School Choice, the First Amendment, and State Constitutional Law</i> , 21 <i>Harv. J.L. &amp; Pub. Pol’y</i> 657 (1998).....	6
Joshua M. Cowen et al., <i>School Vouchers and Student Attainment: Evidence from a State-Mandated Study of Milwaukee’s Parental Choice Program</i> , 41 <i>Policy Studies J.</i> 147 (Feb. 2013), <a href="https://tinyurl.com/yxqs4x38">https://tinyurl.com/yxqs4x38</a> .....	21
Kyle Duncan, <i>Secularism’s Laws: State Blaine Amendments and Religious Persecution</i> , 72 <i>Fordham L. Rev.</i> 493 (2003)....	7



## TABLE OF AUTHORITIES—Continued

	Page(s)
Mark Dynarski, et al., <i>Evaluation of the DC Opportunity Scholarship Program: Impacts After One Year</i> (U.S. Dep’t of Educ., Nat’l Ctr. for Educ. Evaluation & Regional Assistance, June 2017), <a href="http://tinyurl.com/lafonhh">http://tinyurl.com/lafonhh</a> .....	22
Matthew M. Chingos and Daniel Kuehne, <i>The Effects of Statewide Private School Choice on College Enrollment and Graduation: Evidence from the Florida Tax Credit Scholarship Program</i> (Urban Inst., Sep. 2017), <a href="http://tinyurl.com/yxg98qly">http://tinyurl.com/yxg98qly</a> .....	20
Matthew M. Chingos and Paul E. Peterson, <i>The Effects of School Vouchers on College Enrollment: Experimental Evidence from New York City</i> (Brown Ctr. on Educ. Pol’y, Aug. 2012), <a href="http://tinyurl.com/y2sogegd">http://tinyurl.com/y2sogegd</a> ...	21
Patrick J. Wolf, <i>What Happened in the Bayou?</i> , EducationNext, Fall 2019, <a href="https://tinyurl.com/y4x6ngtn">https://tinyurl.com/y4x6ngtn</a> .....	19
Patrick Wolf et al., <i>How Has the Louisiana Scholarship Program Affected Students? A Comprehensive Summary of Effects After Four Years</i> (La. Scholarship Program Evaluation Pol’y Br., Apr. 24, 2019), <a href="https://tinyurl.com/y4ty37fa">https://tinyurl.com/y4ty37fa</a> .....	19

## TABLE OF AUTHORITIES—Continued

	Page(s)
Patrick J. Wolf, et al., <i>School Vouchers and Student Outcomes: Experimental Evidence from Washington, DC</i> , 32 J. of Pol’y Analysis & Mgmt 246 (2013), <a href="http://tinyurl.com/y3lyb3fr">http://tinyurl.com/y3lyb3fr</a> .....	22
Patrick Wolf, John F. White & Brian Kisida, <i>Do Voucher Students Attain Higher Levels of Education</i> (Urban Inst., Feb. 2018), <a href="http://tinyurl.com/y2xhznyk">http://tinyurl.com/y2xhznyk</a> .....	20
R. Joseph Waddington & Mark Berends, <i>Impact of the Indiana Choice Scholarship Program: Achievement Effects for Students in Upper Elementary and Middle School</i> , 34 J. of Pol’y Analysis & Mgmt. 783 (2018), <a href="http://tinyurl.com/y5a9l4q6">http://tinyurl.com/y5a9l4q6</a> ...	22
Ross Izard, <i>Blaine’s Shadow: Politics, Discrimination, and School Choice</i> (Independence Inst., Mar. 2017), <a href="https://tinyurl.com/y6dbyjor">https://tinyurl.com/y6dbyjor</a> .....	8
Steven K. Green, <i>The Insignificance of the Blaine Amendment</i> , 28 BYU L. Rev. 295 (2008).....	6
U.S. Census Bureau, <i>QuickFacts: Montana – Income and Poverty</i> , <a href="http://tinyurl.com/yysqvb79">http://tinyurl.com/yysqvb79</a> (last visited Sept. 18, 2019).....	11
U.S. Dep’t of Labor Bureau of Labor Statistics, <i>Unemployment rates and earnings by educational attainment, 2018</i> , <a href="https://tinyurl.com/y9dncmw4">https://tinyurl.com/y9dncmw4</a> , (last modified Sep. 4, 2019).....	16

## INTERESTS OF AMICUS CURIAE<sup>1</sup>

Amicus Curiae Alliance for Choice in Education (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 private 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 scholarships worth \$83 million. The organization currently provides nearly 7,000 scholarships across eight states, including 921 in Montana.

ACE has an interest in this case for three reasons. First, the enactment of parental 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 scholarship programs provides 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 parental choice programs continue to expand across the United States, ACE has a substantial interest in protecting the rights of its 673 religiously diverse partner schools to participate in otherwise available public benefit programs irrespective of their beliefs.

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<sup>1</sup> In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties consented to this filing. Their letters of consent are on file with the Clerk as required by Rule 37.3(a).

ACE currently provides scholarships to Montana students through ACE Scholarships Montana, LLC, a subsidiary of the Alliance for Choice in Education, d/b/a ACE Scholarships. These scholarships fall outside the Montana scholarship tax credit program that is the subject of this case. ACE currently does not participate in that program because of certain aspects of its design. However, the organization hopes to participate in the program at a later date. Additionally, because ACE's resources are too limited to assist every student, the organization supports any program with the potential to further its mission of helping low-income families access a quality K-12 education. 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**

Prohibiting faith-based schools from participating in K-12 scholarship programs like Montana's perpetuates discrimination and severely curtails the ability of these programs to improve outcomes for students.

The public benefits of parental choice programs are broad, deep, and persistent. These benefits are not limited to students attending private schools of one particular belief system. Rather, they reflect the natural and intended outcomes of programs designed to advance the secular purposes of increased academic achievement, higher educational attainment, and improved life outcomes. Indeed, the broad effectiveness of choice programs is a key reason that ACE remains entirely agnostic about religious affiliation. Across its current eight states, the organization partners with Catholic, Protestant, Jewish, Muslim, and nonreligious schools following myriad educational models.

As the largest dedicated provider of K-12 scholarships in Montana, ACE knows educational choice can change the lives of students. Not only individuals, but families, generations, and ultimately entire communities are positively impacted when students have more educational options.

As an organization operating in multiple states, including states that administer successful tax credit programs, ACE understands that the fair treatment of religious participants in public benefit programs like Montana's is a key component of achieving the intended academic and long-term results for students.

### **ARGUMENT**

Barring faith-based schools from participation in programs like the one at issue in this case perpetuates a historical cycle of discrimination and precludes such programs from achieving the secular purposes of enhancing student achievement and outcomes.

Students have diverse educational needs that demand access to diverse educational options. Families with the financial means to do so access public K-12 options by choosing to live in the best school districts or open-enrolling into the best public schools. In dozens of states—notably not including Montana, where such choices are severely limited—thousands more families choose to enroll in a public charter school or other specialized public school if space is available.

These public options serve thousands of children well. Yet even the best public schools cannot effectively serve every student or meet every need, and access to many public choice options is limited by availability, enrollment capacity, and practical considerations such as geographic location. In the absence of broad parental choice programs, many families, and especially

economically disadvantaged families, find themselves unable to access either more appropriate public options or private alternatives. K-12 private school scholarships like those offered under the Montana tax credit program are an effective means of ensuring that every student—regardless of socioeconomic status—can access the educational support they need to overcome academic hurdles, achieve more, and ultimately build successful, independent lives. This is borne out by ACE’s experience and confirmed in studies around the country.

In striking down the program, the Montana Supreme Court relied on a misreading of this Court’s discussion in *Locke v. Davey*, 540 U.S. 712, 718 (2004), of the “play in the joints” between the Free Exercise and Establishment Clauses. As a result, the court ruled that Montana could permissibly exclude religious schools from the state’s otherwise neutral and generally available public scholarship program. *Espinoza v. Mont. Dep’t of Rev.*, 393 Mont. 446, ¶ 30 (2018). But excluding the religious, simply because they are religious, from generally available public aid programs runs headlong into this Court’s First Amendment decisions, most recently *Trinity Lutheran Church of Columbia v. Comer, Inc.*, 137 S. Ct. 2012 (2017). It also severely limits the substantial benefits that parental choice programs like Montana’s can provide both to participating students and to society as a whole.

**I. Barring faith-based schools from participation in scholarship programs perpetuates discrimination by ignoring the historical connection between religious persecution and the makeup of today’s private school sector.**

In its sweeping ruling against the Montana tax credit program, the Montana Supreme Court repeatedly

referenced the fact that most of the schools that met the legislative definition of a “qualified education provider” were religiously affiliated. *See, e.g.*, 393 Mont. at 457 ¶ 9, 466 ¶ 36. This reliance on the modern makeup of the Montana private education sector is problematic. A focus on the fact that a majority of qualified education providers in Montana are religiously affiliated obscures the historical reasons for this phenomenon—reasons ironically rooted in the very question before this Court.

In ACE’s experience across its current eight states, most private schools are religiously affiliated to varying degrees. Nationwide, approximately 88 percent of ACE’s 673 partner private schools ascribe to a religion. 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. Others are nonreligious. In Montana specifically, 74 percent of ACE’s 62 partner private schools are religiously affiliated.

That a majority of today’s private schools are religious is hardly surprising. In modern public education systems, many parents perceive the same “brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious” so eloquently captured by Justice Arthur Goldberg in 1963. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring). For these parents, the ability to access schools that better align with their value and belief systems—and that integrate these systems into their educational models—is a significant factor when choosing an education provider. Among ACE parents in Montana, for instance, 76 percent cited satisfaction with their chosen schools’ faith-based curriculum. Only safer environments,

better academics, and better access to teachers ranked higher for parental satisfaction. Didi Fahey, *2018 State Summary: Montana 1* (Quantitative Res. Evaluation & Measurement, Mar. 2019), <http://tinyurl.com/y48nbcvo>.

Parents sought the same educational freedom in the early common schools of the nineteenth century. These predominantly immigrant families contended with open and aggressive discrimination against “sectarian” beliefs that deviated from the dominant Protestantism of the era, which was viewed as inseparable from goal of educating the next generation of virtuous American citizens. “Public schools were seen as indispensable for inculcating the civic, moral, and religious virtues upon which the republic depended,” and Protestant teachings were the keystone of that mission. Steven K. Green, *The Insignificance of the Blaine Amendment*, 28 *BYU L. Rev.* 295, 302 (2008).

Due in large part to fears stoked by the high numbers of European Catholics immigrating to the United States in the mid-nineteenth century, Catholic students faced particularly dim prospects. Common schools’ “virulently anti-Catholic curriculum frightened immigrants away, dooming vast numbers to illiteracy, poverty, and vice.” Doris Kearns Goodwin, *Team of Rivals: The Political Genius of Abraham Lincoln* 83 (2012). But while it has become popular to limit the scope of historical discrimination against “sectarian” beliefs to Catholics, this view is too limited. Jews also took issue with Protestant rituals in public schools. See Joseph P. Viteritti, *Blaine’s Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 *Harv. J.L. & Pub. Pol’y* 657, 668, 701 n.216 (1998). And the overwhelming focus on Protestant teachings and beliefs “plainly excluded . . . other non-



mainstream believers (Mormons, Jehovah's Witnesses, and the like), and non-believers." Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493, 504 (2003). In some early public schools, even certain denominations of Protestantism were suppressed in the name of keeping the peace through curricula that "evidenced a pan-Protestant compromise, a vague and inclusive Protestantism designed to tranquilize conflict among Protestant denominations." *Id.* at 503 (quoting John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 299 (2001)) (internal quotation marks omitted).

Parents who ascribed to faiths outside the Protestant mainstream were left with little choice but to endure persecution, forgo education, or form their own schools and school systems. Many chose the latter option, and that legacy lives on in the form of today's largely religious private school sector. For instance, the high number of Catholic schools today can be attributed in large part to the fact that Catholics felt compelled to create their own parochial school systems to avoid discrimination in the common schools. Although many factors influenced the evolution of today's private education sector, the fact remains that the large number of religious private schools in modern America is, in part, a byproduct of historical efforts to escape persecution in common schools.

Opponents of parental choice policy no longer limit the discriminatory applications of no-aid clauses to a specific religion. Instead, in today's increasingly secular society, these clauses are often used to enforce broad discrimination against religiosity in general. The definition of "sectarian" has shifted away from being largely specific to certain faiths and toward a broader

understanding that includes all people of faith, but this shift represents only an iterative evolution of no-aid clauses' application, not a change in their purpose. "[O]nce placed into a state constitution, no-funding provisions could serve as permanent devices for denying public funds to any religious minority that happened to offend the majority." Ross Izard, *Blaine's Shadow: Politics, Discrimination, and School Choice 6* (Independence Inst., Mar. 2017), <https://tinyurl.com/y6dbjor>. In other words, these clauses exist as hammers to be used against any religious group that offends the prevailing sentiment at any given moment in history—including against religion itself. The only variable is which groups are targeted.

As such, this case and others like it reflect a sort of circular evolution—and perhaps even an escalation—of the same religious discrimination that led to bans on aid to “sectarian” institutions in the first place. Early public schools discriminated against religious minorities—then defined as belief systems falling outside of mainstream Protestantism—which in many cases led those minorities to create their own separate, independent schools. These separate systems laid the foundation for the modern private school sector, which is, as the Montana court noted, made up primarily of faith-based schools. But the court failed to acknowledge that most private schools are religious in large part because of historical discrimination. Instead, it offered the very fact that many private schools are religiously affiliated as support for its decision to strike down the Montana tax credit program.

Thus, a reality created by historical discrimination has been used to justify further discrimination in the modern era—a vicious cycle that this Court now has an opportunity to address.

**II. Excluding faith-based schools from participation in religiously neutral school choice programs hampers these programs' ability to achieve the secular purposes of raising student achievement, improving life outcomes, and providing benefits to both students and society as a whole.**

Like scholarship tax credit programs in 17 other states, the Montana program provides a state tax credit to those who contribute toward scholarships provided by private charities called Student Scholarship Organizations. The tax credit creates an incentive for donors to make charitable contributions toward privately funded scholarships. Although the value of Montana's tax-credit incentive is limited, the additional private donations generated under the program have improved families' ability to choose different education options that help their children realize higher levels of academic success. Severely restricting the number or types of schools that can participate in the tax credit, or eliminating the program entirely as the Montana Supreme Court ordered, cuts off these benefits and cripples the program's ability to meet the secular objectives of improving student outcomes.

While ACE does not currently participate in the Montana tax credit program, it does serve nearly 1,000 Montana students with similar privately funded scholarships. Additionally, ACE serves approximately 7,000 students across eight states, including two states with scholarship tax credit programs like Montana's. The organization carefully monitors academic and other outcomes for its scholars, as well as the results of empirical research on parental choice generally—results that the Court may wish to weigh as it

considers the secular purpose and public benefits of the Montana program.

**A. ACE's third-party evaluation of its programs shows significant improvement for students, including students attending religious schools, across a variety of metrics.**

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 during the 2012-13 school year with 506 scholars. Since then, the program has grown by 82 percent. It now serves 921 Montana scholars attending 62 private schools state-wide. ACE draws no distinctions between religious or nonreligious schools, nor does it serve only one faith or denomination. Nationwide, ACE works with Protestant, Catholic, Jewish, Islamic, and nonreligious schools and tracks academic progress and other outcomes across the entire ACE network.

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 Res. Evaluation & Measurement, Mar. 2019), <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*, at 5 (Quantitative Res. Evaluation & Measurement, Sep. 2018), <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. *Id.* at 3.

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 ACE’s Montana operation is significantly newer and therefore lacks the same longitudinal data of the Colorado program, the two states show similar trends. 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*, <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 Fahey, *2018 State Summary: Montana, supra*. 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 because most current Montana ACE scholars are concentrated in earlier grades. However, these early results broadly track with the performance on college-entrance exams ACE has observed in its programs nationally. Didi Fahey, *National Executive Summary* (Quantitative Res. Evaluation & Measurement, Mar. 2019), <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 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.*

**B. Scholarship programs can positively impact more than one generation at a time through an educational and social “ripple effect.”**

In addition to direct benefits to students, an early field of new research is examining how the benefits of parental 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*, EducationNext, Spring 2016, <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. 224 (2009), <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. Econ. 119 (2007), <http://tinyurl.com/y2wavd9g>.

Parental 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, *The Alliance for Choice in Education: Social Mobility* 31 (Quantitative Res. & Evaluation Measurement, Oct. 2017), <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 stayed 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.

Though more research is needed to establish a causal link between these intergenerational trends and participation in the ACE program or others like it, evaluators theorize that school choice allows low-income 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 K-12 scholarship students provides widespread and significant benefits 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). Bureau of Labor Statistics, *Unemployment Rates and Earnings by Educational Attainment, 2018* (last modified Sep. 4, 2019), <https://tinyurl.com/y9dncmw4>.

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* 15 (Ne. U. Ctr. for Lab. Mkt. Stud., Oct. 2009), <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 associated 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* 15-16 (Quantitative Res. Evaluation & Measurement, June 15, 2017), <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. The same would likely be true of a flourishing, well-designed scholarship tax credit program allowing families to access a variety of educational options.

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 K-12 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 & Patrick J. Wolf, *The School Choice Voucher: A 'Get Out of Jail' Card?*, at 1 (U. Ark. Dep't of Educ. Reform, Working Paper 2016-03, Mar. 8, 2016), <http://tinyurl.com/y3nxeqhu>. These results were corroborated by the authors in a later peer-reviewed version of the study, Corey A. DeAngelis & Patrick J. Wolf, *Private School Choice and Crime: Evidence from Milwaukee*, Soc. Sci. Q., July 7, 2019, <https://tinyurl.com/y5elnsaw>, and an additional expansion study (also in Milwaukee) found that exposure to the Milwaukee voucher program also lowers the rate of unplanned pregnancy as measured by later-life paternity suits, Cory DeAngelis & Patrick J. Wolf, *Private School Choice Helps Students Avoid Prison and Unplanned Pregnancies*, EducationNext, Feb. 26, 2019, <https://tinyurl.com/y64z8kyc>.

Though not conclusive, these studies' 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. Econ. 2063 (2011), <http://tinyurl.com/y3ua4lev>; Angela K. Dills & Rey Hernández-Julián, *More Choice, Less Crime*, 6 Educ. Fin. & Pol'y 246 (2011), <http://tinyurl.com/y2ob2wuc>.

**D. Empirical research on parental choice programs corroborates their effectiveness at achieving secular purposes related to improved academic achievement, higher educational attainment, and life outcomes.**

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 on School Choice* 10 (Friedman Found. for Educ. Choice, 4th ed., May 2016), <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 & Patrick J. Wolf, *How Has the Louisiana Scholarship Program Affected Students? A Comprehensive Summary of Effects After Three Years 4* (Educ. Res. Alliance for New Orleans Pol’y Br., June 26, 2017), <http://tinyurl.com/y3ay3bf6>. However, yet another reevaluation confirmed negative impacts for many students in the Louisiana Scholarship Program, though these results varied to some extent across student subgroups, academic subjects, and particular subsets of participating private schools. Patrick Wolf et al., *How Has the Louisiana Scholarship Program Affected Students? A Comprehensive Summary of Effects After Four Years* (La. Scholarship Program Evaluation Pol’y Br., Apr. 24, 2019), <https://tinyurl.com/y4ty37fa>. One of the authors of that study theorized in a separate article that these negative results could be due in part to the extremely tight regulatory requirements of the program, which is “one of the most highly regulated among the 58 private-school choice programs in the country.” Patrick J. Wolf, *What Happened in the Bayou?*, EducationNext, Fall 2019, <https://tinyurl.com/y4x6ngtn>. Many other scholars and policy experts share the belief that the 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. See, e.g., Atila Abdulkadiroglu et al., *Free to Choose: Can School Choice Reduce Student Achievement?*, 10 Am. Econ. J. Applied Econ. 175, 196 (2018), <http://tinyurl.com/y6rtn8xk>; Jason Bedrick, *The Folly of Overregulating School Choice*, EducationNext, Jan. 5, 2016, <http://tinyurl.com/y3wytqj3>.

The 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. To the extent that intense regulation on participating private schools can lead to a weaker pool of providers, a system that facilitates a greater degree of genuine choice among providers could enhance outcomes for participating students, despite the Montana Supreme Court's apparent concern with such a structure.

Several other studies published since the 2016 literature review support the notion that educational choice programs benefit students in ways other than performance on standardized tests. For example, a recent study on 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 the program 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 Chingos & Daniel Kuehn, *The Effects of Statewide Private School Choice on College Enrollment and Graduation: Evidence from the Florida Tax Credit Scholarship Program*, at V (Urban Inst., Sep. 2017), <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 J. Wolf, John F. Witte & Brian Kisida, *Do Voucher Students Attain Higher Levels of Education?* (Urban Inst., Feb. 2018), <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 & Paul E. Peterson, *The Effects of School Vouchers on College Enrollment: Experimental Evidence from New York City*, at iii-iv, (Brown Ctr. on Educ. Pol’y, Aug. 2012), <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 Stud. J.* 147, 147 (Feb. 2013), <https://tinyurl.com/yxqs4x38>.

Although research tends to find that that parental 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 K-12 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 important 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* (U.S. Dep't of Educ. Nat'l Ctr. for Educ. Evaluation & Regional Assistance, June 2017), <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. Pol'y Analysis & Mgmt.* 246 (2013), <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. R. Joseph Waddington & Mark Berends, *Impact of the Indiana Choice Scholarship Program: Achievement Effects for Students in Upper Elementary and Middle School*, 34 *J. Pol'y Analysis & Mgmt.* 783, 802, 804 (2018), <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 & Krzysztof Karbownik, *Evaluation of Ohio's EdChoice Scholarship Program: Selection, Competition, and Performance*



*Effects* (Thomas B. Fordham Inst., July 2016), <http://tinyurl.com/y5qok96n>; Eric Frank, *Use Caution in Drawing Conclusions from Ohio Voucher Study*, EducationNext, July 24, 2016, <http://tinyurl.com/yx9kzv3w>.

### **III. Withholding a generally available public benefit solely on the basis of religion violates the Free Exercise Clause.**

As the foregoing discussion makes clear, scholarship programs that broaden educational choices for parents and students provide significant public benefits, particularly for underperforming and disadvantaged students. See *Trinity Lutheran*, 137 S. Ct. at 2027 (Breyer, J., concurring in judgment) (emphasizing the benefits of a “general program designed to secure or to improve the health and safety of children”). In *Trinity Lutheran*, this Court affirmed that the government may not make a public benefit generally available but then disqualify recipients, otherwise eligible, “solely because of their religious character.” *Id.* at 2021 (majority opinion). That, however, is what the Montana Supreme Court did here, using a categorical no-aid rule to require the exclusion of religious schools, simply because they are religious, from the state’s public scholarship program. This violates the Free Exercise Clause.

The Montana Supreme Court nonetheless justified its no-aid rule by reference to *Locke v. Davey* and this Court’s “play in the joints” metaphor. See 540 U.S. at 718 (internal quotation marks omitted). But *Locke* is a narrow decision focused on a historic antiestablishment concern: taxpayer support for the clergy. *Locke* provides no basis for the kind of overt religious discrimination created by Montana’s no-aid rule.

**A. Montana’s exclusion of religious schools from its public scholarship program is a “clear infringement on free exercise.”**

Religious institutions need not renounce their religious missions or character to participate in public benefit programs. This Court repeatedly has recognized that the First Amendment “prohibit[s] governments from discriminating in the distribution of public benefits based upon religious status.” *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) (citing *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981)). These decisions recently led the Court to the “unremarkable” conclusion that a state cannot “disqualif[y] [recipients] from a public benefit solely because of their religious character.” *Trinity Lutheran*, 137 S. Ct. at 2021. The same conclusion is warranted here.

The Montana State Legislature created a religiously neutral K-12 scholarship program for plainly secular purposes. In structuring the program, the legislature recognized what ACE’s experience confirms: educational choice is a public good. It enhances educational opportunity, reduces financial burdens for parents, and generates positive social externalities. And it promotes these benefits regardless of the religious faith, or lack of faith, of participating schools and families. As this Court has said, “[a] state’s decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable” because “[a]n educated populace is essential to the political and economic health of any community.” *Mueller v. Allen*, 463 U.S. 388, 395 (1983).

In administering and invalidating this program, Montana’s Department of Revenue and Supreme Court concluded that the state constitution *requires* the categorical exclusion of religious schools. But such a rule is the antithesis of religious neutrality. Effectively telling religious schools and the families who wish to attend them that they “need not apply” singles out religion for disfavored treatment. It puts otherwise qualified religious schools to the unconstitutional choice of participating in a public benefit program or renouncing their religious identity. This is a “clear infringement on free exercise.” *Trinity Lutheran*, 137 S. Ct. at 2024.<sup>2</sup>

Under the Free Exercise Clause, religious institutions have a right “to participate in a public benefit program without having to disavow [their] religious character.” *Id.* at 2022. Montana’s rule is repugnant to the Constitution, not because it has denied a public benefit to families who want to attend religious schools, but because it has made an available public benefit *unavailable* based solely on those schools’ religious status.

**B. *Locke* does not justify Montana’s categorical exclusion of religious schools.**

The “play in the joints” between the Establishment and Free Exercise Clauses, *Locke*, 540 U.S. at 718 (internal quotation marks omitted), is not a license to discriminate against religion. But since *Locke* was

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<sup>2</sup> Indeed, such a “choice” is even more coercive in the educational context of this case than the playground-resurfacing context of *Trinity Lutheran*. Forcing schools to forgo participation in a public benefit program in order to retain their religious identity puts them at a serious disadvantage in the highly competitive market for K-12 education.

decided, courts and policymakers have used the decision that way, invoking it to justify excluding the religious from public benefits. *Locke* stands for no such principle. As this Court said decades ago, the First Amendment requires government to “be a neutral in its relations with groups of religious believers and non-believers. . . . State power is no more to be used so as to handicap religions, than it is to favor them.” *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 18 (1947).

*Locke* is a narrow decision. The exclusion there was justified by one of the central concerns animating the Establishment Clause: the direct use of taxpayer funds to support the clergy, “one of the hallmarks of an ‘established’ religion.” 540 U.S. at 722. Perhaps there are other cases like *Locke* where a narrow religious exclusion is necessary to vindicate a state’s historically grounded antiestablishment interest. See *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring in part). But this is not such a case.

As conceived, the primary purpose of Montana’s student-centric scholarship tax credit program was not to aid any particular set of schools, but to expand educational choice for families, regardless of religion. The program was one of “true private choice” where private funds would have reached religious schools “only as a result of . . . genuine and independent private choices,” backed by tax credits for contributors to the program. *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002). The program easily passes Establishment Clause muster.

In invalidating the program, the Montana Supreme Court invoked *Locke* to justify its no-aid rule. This was error. To extend *Locke* that far and sanction such a rule would not only condone overt religious discrim-

ination, but also jeopardize the demonstrable public good that parental choice programs have achieved.

Montana's use of a no-aid rule in this case crosses the constitutional line. There is no historic, "*Lockean*" antiestablishment interest in play here. Rather, in applying this rule, Montana went from neutrally dispensing public benefits to actively discriminating against religious schools and the families who want to attend them. As *Trinity Lutheran* teaches, such anti-religious bias in a public aid program is odious to the Constitution and cannot stand.

### CONCLUSION

For the foregoing reasons, *amicus* respectfully submits that the decision of the Montana Supreme Court should be reversed.

Respectfully submitted,

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