In the

Supreme Court of the United States

KENDRA ESPINOZA, JERI 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.

BRIEF OF RESPONDENTS

QUESTION PRESENTED

The Montana Legislature enacted a statute under which taxpayers would receive dollar-for-dollar tax credits for donations to organizations that would in turn disburse those donations to private schools for purposes of paying student tuition. The Montana Supreme Court invalidated the statute under the Montana Constitution's bar on aid to religious schools. The question presented is whether the invalidation of Montana's statute violated the Free Exercise Clause, Equal Protection Clause, or Establishment Clause.

INTRODUCTION

This case lies at the intersection of two traditions that have coexisted since the early Republic.

The first is a tradition of staunch protection of religious freedom, including a recognition that nondiscrimination is crucial to religious freedom. Religious freedom is not limited to the mere right to practice one's faith without facing prosecution. Religious freedom requires that the State not exclude religious adherents from public benefits available to everyone else. Such discrimination penalizes the exercise of religion. It coerces people into abandoning their religion. And it exhibits a hostility to religion that is repugnant to fundamental principles of neutrality.

The second is a tradition of principled opposition to government aid to religious institutions. This view dates back to James Madison, the principal drafter of the Free Exercise Clause. It is not rooted in hostility to religion, but instead reflects the view that barring aid to religious

institutions promotes religious freedom. Barring aid to religious institutions prevents government from using its leverage to dictate religious policy. It prevents religious institutions from becoming dependent on government. And it protects the rights of people who have principled religious objections to supporting a religion in which they do not believe.

States seeking to balance these competing interests have two options. First, a State may neutrally offer a benefit to both religious and non-religious institutions. This Court has made clear that the Establishment Clause authorizes that practice. And a State's desire to avoid funding religious institutions cannot justify excluding them from benefits available to everyone else.

That does not mean that a State with principled opposition to aiding religious institutions *must* aid them. If a State is opposed to aiding religious institutions, it can achieve that goal by taking a second path-by *also* not funding similarly situated nonreligious institutions. So a State can decline to rebuild church playgrounds-but only if it declines to rebuild any playgrounds. And it can decline to support religious private schools-but only if it declines to support any private school.

This case is about whether Montana's decision to take that second path violates the Constitution. Like 37 other States, Montana has a "No-Aid Clause" in its Constitution, which prohibits aid to "sectarian schools." By its terms, the No-Aid Clause does not prohibit any religious practice. Nor does it authorize any discriminatory benefits program. It simply says that Montana will not financially aid religious schools. Overwhelming evidence from the adoption of this provision shows that it is rooted not in bigotry, but in the principled view that barring aid to religious schools would promote, not hinder, religious freedom.

In this case, the Montana Legislature enacted a statute providing for a school-choice program. By its terms, the program provided for aid to both religious and non-religious schools while also requiring adherence to the No-Aid Clause. After the Montana Department of Revenue issued a rule finding only nonreligious schools eligible to participate in the program, Petitioners sued, alleging that the rule was illegal. The Montana Supreme Court held that the program's provision of aid to religious schools violated the No-Aid Clause. But it did not uphold the rule. Instead, it took the only action that would both abide by the No-Aid Clause, while also not excluding religious schools from a generally available benefit: It struck down the statute as a whole.

Petitioners now contend that even *that* is unconstitutional. It matters not, in Petitioners' view, that the government also does not aid similarly situated non-religious schools. Nor does it matter that the state Constitution was adopted based on the same principled views held by James Madison. Petitioners claim that the Constitution prohibits the bare act of applying a state constitutional provision that keeps government out of the business of aiding religious schools.

The Court should reject that claim. It is irreconcilable with the constitutional text, the original public meaning of that text, this Court's precedents, and longstanding national tradition.

STATEMENT

A. The Tax Credit Program

In 2015, the Montana Legislature passed Senate Bill 410, which created a tax-credit program for donations made to certain educational scholarship organizations. Individuals who donated to a nonprofit "student scholarship organization" ("SSO") could receive a dollar-for-dollar tax credit of up to $150 per year.

SSOs used these donations to fund scholarships for use at any "qualified education provider" ("QEP"), which was defined to include essentially all private schools in Montana. SSOs paid the scholarships directly to the private school. Neither the donor nor the SSO could restrict the scholarships to any particular school. By its terms, the program will expire in 2023.

Recognizing that most private schools in Montana are religious schools, the Legislature provided that "the tax credit ... must be administered in compliance with . . . Article X, section 6, of the Montana constitution." That constitutional provision-the "No-Aid Clause"prohibits aid to "sectarian schools." It provides that state and local governments cannot "make any direct or indirect appropriation or payment from any public fund or monies . . . for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination," subject to an exception for "funds from federal sources provided to the state for the express purpose of distribution to non-public education."

In 2015, the Montana Department of Revenue ("Department") promulgated Rule 1, an implementing regulation for the tax-credit program. Rule 1 provided that a QEP may not be "a church, school, academy, seminary, college, university, literary or scientific institution, or any other sectarian institution owned or controlled in whole or in part by any church, religious sect, or denomination." Rule l's purpose was to comply

with the No-Aid Clause, as required by the statute.

Because of this litigation, Rule 1 has never come into effect. Thirteen schools participate in the program: twelve are religious schools, and one (Cottonwood Day School) is a school for children with disabilities. In fall 2018, 94% of the program scholarships (51 of 54) were disbursed to religious schools.

B. Proceedings Below

Petitioners are parents whose children received scholarships through an SSO to attend Stillwater Christian School. Stillwater is a nondenominational school that provides a Christian education.

In 2015, Petitioners sued the Department, seeking an injunction against Rule 1. A Montana trial court enjoined the rule on the state-law ground that it was not required by the No-Aid Clause.

The Montana Supreme Court reversed. It held that the tax-credit program "indirectly paid tuition at private, religious-affiliated schools" and thus violated the No-Aid Clause. The court held that the portion of Senate Bill 410 that included religious schools in the definition of "qualified education provider" could not be severed from the remainder of the statute. In light of that holding, the Montana Supreme Court declined to uphold Rule 1. Instead, it struck down the entire tax-credit program.

Concurring separately, Justice Gustafson concluded that the tax-credit program violated not only the state constitution, but also the Establishment and Free Exercise Clauses of the U.S. Constitution-the latter because it compelled taxpayers to support religious schools in order to obtain the tax credit.

Justice Sandefur concurred separately. Justices Baker and Rice dissented.

SUMMARY OF ARGUMENT

I. The Montana Supreme Court's application of the No-Aid Clause did not violate the Free Exercise Clause.

I.A The Free Exercise Clause bars laws "prohibiting the free exercise" of "religion." This Court has held that the term "prohibition" covers not only direct bans on religious practice, but also "indirect coercion or penalties on the free exercise of religion." In *Trinity Lutheran,* this Court held that when a church was barred from receiving a generally available benefit, it was penalized for being a church, in violation of the Free Exercise Clause.

But here, because the Montana Supreme Court invalidated the statute as to both religious schools and non-religious schools, it ensured that there would be no "indirect coercion or penalties"-and hence no prohibition.

Petitioners contend that the bare application of the No-Aid Clause, as an interlocutory step in a judicial decision, itself violates the Free Exercise Clause. It does not. The No-Aid Clause does not restrain individual liberty. Rather, it restrains the government by barring state aid to religious schools. Giving effect to that restraint on government does not violate the First Amendment.

I.B The No-Aid Clause is not the product of antireligious animus. The current No-Aid Clause was enacted in the Constitutional Convention of 1972. The Delegates' debates show that the Delegates enacted the No-Aid Clause in order to *protect* religious liberty. The Delegates believed that the No-Aid Clause would prevent the government from gaining undue influence over religious schools, preserve funding for public schools, and protect the rights of taxpayers with religious objections to state aid.

The Montana Supreme Court's decision protects religious freedom. The court enforced the No-Aid Clause as written, fulfilling the Delegates' goal of protecting religious liberty by creating a structural barrier between religious schools and government. By striking down the statute in its entirety, it also ensured that no one is penalized for exercising their faith.

I.C Founding-era evidence shows that the No-Aid Clause is constitutional. Several early state constitutions barred taxpayer support to religious institutions-while also disestablishing the church and protecting free exercise. By contrast, the First Amendment includes Establishment and Free Exercise Clauses, while saying nothing about taxpayer support of religious institutions. The First Amendment therefore leaves that question to the People. James Madison's principled opposition to state funding of religious institutions further confirms that the No-Aid Clause-which was enacted based on those same rationales-is constitutional.

I.D In *Locke v. Davey* the majority opinion concluded that a State may support non-religious education while declining to support religious education-thus rejecting the premise of Petitioners' Free Exercise claim. The dissent would have found a Free Exercise violation because Davey was excluded from a generally available benefits program. But it acknowledged that the State could constitutionally eliminate the

scholarship program in its entirety. That is what occurred here.

I.E This case does not present the question reserved in *Trinity Lutheran-whether* excluding religious *use,* rather than religious *people,* from a generally available benefit program is constitutional because here, there is no generally available benefit program. But if that question is relevant, the best reading of Montana law is that the No-Aid Clause bars aid to religious *education.* It does not bar aid to secular education at religiously affiliated schools.

I.F Under Petitioners' position, any constitutional provision that bars funding of religious schools violates the Free Exercise Clause. Yet 38 States have such provisions, and they date back to 1835. The Court should defer to that national tradition, just as it has frequently done in the Establishment Clause context.

I.G Petitioners' position would be a blow to federalism. This Court's Establishment Clause cases hold that States should have latitude to decide whether to enact school-choice programs that support religious schools. States should also have latitude to decide *not* to enact them-which includes the latitude to bar such programs at the state constitutional level.

Petitioners' position would also infringe on state sovereignty by forcing a state to enforce a statute that is void *ab initio* under its state constitution. Even more incongruously, Petitioners contend that a legislature may decline to enact a school-choice program based on church-state concerns. But if a State bars such programs in its constitution, then the state constitution must be invalidated and the void statute must be enforced. That position would interfere with States' right to structure their own governments as they choose.

II. The No-Aid Clause does not violate the Equal Protection Clause. Its application to this case results in no unequal treatment, and it is not grounded in religious animus. This Court invalidated a state constitutional provision that barred gay people from invoking the protections of antidiscrimination laws. Montana's Constitution does not do that. To the contrary, it protects religious people from both private and public discrimination-thus providing even more protection against discrimination than the Free Exercise Clause.

III. The No-Aid Clause does not violate the Establishment Clause. It separates church from state to a greater extent than the Establishment Clause, but that does not mean it *is* an Establishment. Contrary to Petitioners' position, the No-Aid Clause exhibits no hostility toward religion.

CONCLUSION

The judgment below should be affirmed.