

No. 18-1195

---

In the  
**Supreme Court of the United States**

---

KENDRA ESPINOZA, ET AL.,  
*Petitioners,*

v.

MONTANA DEPARTMENT OF REVENUE, ET AL.,  
*Respondents.*

---

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

---

**BRIEF OF *AMICI CURIAE* MONTANA  
CATHOLIC SCHOOL PARENTS, THE  
CATHOLIC ASSOCIATION FOUNDATION,  
AND THE INVEST IN EDUCATION  
FOUNDATION IN SUPPORT OF PETITIONERS**

---

ANDREA PICCIOTTI-BAYER  
*Counsel of Record*  
THE CATHOLIC ASSOCIATION FOUNDATION  
3220 N Street NW, Suite 126  
Washington, DC 20007  
(571) 201-6564  
amariepicciotti@gmail.com

*Counsel for Amici Curiae*

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES. . . . . ii

INTEREST OF *AMICI CURIAE*. . . . . 1

INTRODUCTION. . . . . 21

SUMMARY OF ARGUMENT . . . . . 29

ARGUMENT . . . . . 30

I. PARENTS HAVE THE IMPORTANT RIGHT  
AND DUTY TO MAKE EDUCATIONAL  
DECISIONS FOR THEIR CHILDREN . . . . 30

II. MANY PARENTS PREFER RELIGIOUSLY-  
AFFILIATED SCHOOLS FOR THEIR  
CHILD’S EDUCATION. . . . . 32

III. STATE BLAINE AMENDMENTS VIOLATE  
THE CONSTITUTION . . . . . 35

CONCLUSION. . . . . 38

## TABLE OF AUTHORITIES

### CASES

<i>Church of Lukumi Babalu Aye, Inc. v. City of Hialeah</i> , 508 U.S. 520 (1993) . . . . .	36, 37
<i>Espinoza v. Montana Department of Revenue</i> , 393 Mont. 446 (2018) . . . . .	25, 26, 27, 28, 37
<i>Locke v. Davey</i> , 540 U.S. 712 (2004) . . . . .	27
<i>Mitchell v. Helms</i> , 530 U.S. 793 (2000) . . . . .	23
<i>Pierce v. Society of Sisters</i> , 268 U.S. 510 (1925) . . . . .	31
<i>Romer v. Evans</i> , 517 U.S. 620 (1996) . . . . .	35, 36
<i>Trinity Lutheran Church of Columbia, Inc. v. Comer</i> , 137 S. Ct. 2012 (2017) . . . . .	29, 36, 37
<i>Zelman v. Simmons-Harris</i> , 536 U.S. 639 (2002) . . . . .	23

### CONSTITUTION AND STATUTES

Mont. Const. Art. X, § 6 . . . . .	25, 27, 28
Mont. Const. Art. XI, § 8 (1889) . . . . .	24, 25
Mont. Territorial Const. art. IX, § 9 (1884) . . . . .	24
MCA §§ 15-30-3101 to -3114 . . . . .	25
MCA § 15-30-3101 . . . . .	26

MCA § 15-30-3101(1) . . . . . 26

MCA § 15-30-3102(7) . . . . . 26

MCA § 15-30-3103(1)(h) . . . . . 26

MCA § 15-30-3104(1) . . . . . 26

MCA § 15-30-3111(1) . . . . . 26

**RULES**

Admin. R. M. 42.4.802 . . . . . 27, 36

**OTHER AUTHORITIES**

4 Cong. Rec. 5454 (1876) . . . . . 23

Gerard V. Bradley, *An Unconstitutional Stereotype: Catholic Schools as “Pervasively Sectarian”*, 7 Tex. Rev. L. & Pol. 1 (2002) . . . . . 23

Jay S. Bybee & David W. Newton, *Of Orphans and Vouchers: Nevada’s “Little Blaine Amendment” and the Future of Religious Participation in Public Programs*, 2 Nev. L.J. 551 (2002) . . . . . 24

*Catechism of the Catholic Church*, [http://www.vatican.va/archive/ccc\\_css/archive/catechism/p3s2c2a4.htm](http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a4.htm) . . . . . 32, 33

Charter of the Rights of the Family, Article 5 (1983), [http://www.vatican.va/roman\\_curia/pontifical\\_councils/family/documents/rc\\_pc\\_family\\_doc\\_19831022\\_family-rights\\_en.html](http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_19831022_family-rights_en.html) . . . . . 33

- Declaration on Christian Education (*Gravissimum Educationis*) (1965) (internal citations omitted), [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_19651028\\_gravissimum-educationis\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651028_gravissimum-educationis_en.html) . . . . . 30
- Kyle Duncan, *Secularism’s Laws: State Blaine Amendments and Religious Persecution*, 72 Ford. L. Rev. 493 (2003) . . . . . 22, 24, 29
- Thomas Nast, The American River Ganges, Harper’s Weekly, Sep. 30, 1971, available at: <https://thomasnastcartoons.com/irish-catholic-cartoons/the-american-river-ganges-1871/> . . . . . 22
- National Catholic Educational Association (NCEA), *United States Catholic Elementary and Secondary Schools 2018-2019: The Annual Statistical Report on Schools, Enrollment, and Staffing*,” available at [https://www.ncea.org/ncea/proclaim/catholic\\_school\\_data/catholic\\_school\\_data.aspx](https://www.ncea.org/ncea/proclaim/catholic_school_data/catholic_school_data.aspx) . . . . . 33
- O’Scannlain, Diarmuid F., “Religion and the Courts in the 21<sup>st</sup> Century,” speech given Nov. 6, 2017 at Thomas Aquinas College, <https://thomasaquinas.edu/news/judge-diarmuid-f-o’scannlain-religion-courts-21st-century> . . . . . 37
- United States Conference of Catholic Bishops, *History of the Catholic Church in the United States*, <http://www.usccb.org/about/public-affairs/backgrounders/history-catholic-church-united-states.cfm> . . . . . 21

George Weigel, *The Irony of Modern Catholic History: How the Church Rediscovered Itself & Challenged the Modern World to Reform* (2019)..... 21

**INTEREST OF *AMICI CURIAE*<sup>1</sup>**

*Amici*, Montana Catholic school parents, listed and described below, attest to the support private religious schools in general and Catholic schools in particular have given their children and families.

*Amici*, The Catholic Association Foundation (TCA), is a lay organization dedicated to being a faithful voice for Catholics in the public square. Parents – Catholic and non-Catholic -- throughout the country partner with Catholic schools to fulfill their responsibility as the primary educators of their children. For many Catholics, a private Catholic education is an integral part of parenting consistent with their faith.

*Amici*, The Invest in Education Foundation, is a research and policy not-for-profit organization with a mission of promoting improvement in K-12 education, increasing educational choice, and working to close gaps in educational achievement.

*Amici* oppose the Montana Supreme Court's decision that a student aid scholarship program open to students attending private schools violates the state's Constitution. *Amici* further object to *any* law excluding parents who chose religiously-affiliated schools for their children from state-sponsored student aid programs.

---

<sup>1</sup> All parties received timely notice of the intention to file this *amicus* brief and consented to its filing. No counsel for a party authored this brief in whole or in part. The Catholic Association Foundation contributed the costs associated with the preparation and submission of this brief. All statements made by *amici* parents are on file with counsel for *amici curiae*.

**Brittany Sukhbir**'s little girl Raelyn cried every night after a day at school. Raelyn attended second grade at the local public school in Livingston, and a classmate was bullying her unmercifully. Brittany and her husband Kyle, a retired army veteran injured while serving in Afghanistan, met with teachers and administrators, but nothing changed. "Life at home," Brittany recalls, "was kinda like walking on eggshells."

Brittany and Kyle tried their best to console Raelyn. They were especially concerned about how their daughter was acting when she wasn't at home. "Raelyn was shy, did not want to be around other kids and was clingy whenever we would visit friends," says Brittany. "She did not want to participate in any activities or sports."

That was before St. Mary's.

This Catholic grade school had a good reputation in Livingston and a "zero tolerance policy" regarding bullying. The Sukhbirs did not think that they could afford private school, but the daily bullying simply became too much for Raelyn to bear. They contacted St. Mary's prior to Christmas break. They visited the school and arranged for Raelyn to spend the morning as a visitor when classes resumed. Brittany was impressed: "Every single teacher knew her name and every student was excited to meet Raelyn and play with her."

That was two years ago. Since she started attending St. Mary's, the Sukhbirs have noticed an incredible transformation in their daughter. Raelyn is no longer shy and reserved. In fact, she's outgoing. She

participates in sports and other activities. Changing schools has benefited the entire Sukhbir family, too. “Now that Raelyn is no longer crying when she comes home from school,” says her mom, “we can really enjoy being together.”

Raelyn is also thriving academically. “The public schools are stuck in rigid curricula,” says Brittany, “but at St. Mary’s kids can advance at a faster pace if they are ready.” This past year Raelyn’s teacher, Melissa Beitel, noticed that Raelyn had strong reading skills. She met with Brittany to discuss offering her daughter a more challenging reading course. Beitel, Brittany says, “always consults with parents before she makes any big decisions about a kid’s classwork.”

Kyle and Brittany often remark to each other how special they consider the entire learning experience at St. Mary’s has been for Raelyn. “Kids can learn math and other subjects anywhere,” Brittany says. “But St. Mary’s is teaching self-confidence and kindness.”

The Sukhbirs both work – Kyle at a North Dakota oil field two weeks out of the month and Brittany as an office manager at a local physical therapy clinic. Their combined salaries are not enough to afford tuition at St. Mary’s for Raelyn (now 8) and her five-year-old brother Wyatt. Fortunately, St. Mary’s offered the Sukhbirs tuition assistance so both children can attend. “I thought that St. Mary’s was only for rich kids,” says Brittany. “But I now know that that is 100% not the case.”

Brittany thinks more parents in Livingston would take advantage of enrolling their children at St. Mary’s

if they knew about the already available financial assistance. She also thinks access to additional scholarships would give more Montana families the option of sending their child to St. Mary's – or other schools that might be the right fit for their child. “My kid would not be the kid she is today if we did not have the scholarship supports to send her to St. Mary's,” says a relieved and delighted Brittany. “She has really flourished into an amazing child.”

**Christina Schye's** three older children attended public schools in Montana, but the local public school was just not working for her nine-year-old son, Kellan. Kellan has Down Syndrome, and his experience at the local neighborhood public elementary school had been traumatic.

The Schyes wanted Kellan integrated as much as possible with his school peers. The teachers and school administrators at Kellan's public school, however, thought otherwise. They wanted to place Kellan in a segregated “life skills” classroom with other special needs students rather than a “regular” classroom. “*Kellan can't do what the other kids are doing,*” and “*He can't keep up with the other kids,*” Christina recalls being told.

“We know that Kellan's learning abilities are limited, but his social abilities are not. We wanted him to be in a regular classroom where he could learn and thrive,” says Christina. “We fought all year long,” she lamented.

Despite Kellan making “lots of progress” on his Individual Education Plan – “remarkable progress,”

according to Kellan's teacher that year – Christina anticipated an uphill battle with the public school in the years to come. Encouraged by friends with children at St. Francis K-8 Catholic School in Billings, Christina and her husband Justin visited the Catholic school and met the school's principal and its resource room (special education) teacher. St. Francis school officials "were honest," says Christina. "They never had any student with Kellan's level of need. But they were willing to try and that was good enough for us."

It was the beginning of a great partnership. The school was willing to meet the special needs of Kellan in a way that the public school could not, or would not.

Last year was Kellan's first year at St. Francis and a great year it was. He was in a regular classroom with children his own age. When Kellan needed additional time, it was provided. When he needed to take a break, he could. Teachers and administrators at St. Francis made accommodations for Kellan so he could be with his peers. And he thrived.

Kellan has made "so many friends in his classroom," says Christina, a part-time nurse and mother of four. "Everyone has been so accepting and accommodating," she remarks. "There was no discouraging Kellan to interact with other kids at St. Francis. Everyone thought it was great."

The best part of the year – and the St. Francis school community this past school year – was the group of 8<sup>th</sup> grade boys who would wait for Kellan every morning before school started. After exiting the Schye-family van, the group of guys greeted Kellan at the

school's entrance with "hugs and high-fives." Indeed, Kellan's teachers gave him extra time in the cafeteria to finish his lunch and wait for another round of "hugs and high-fives" when the 8<sup>th</sup>-graders entered the cafeteria for lunch.

Kellan also competed for the first time at the Special Olympics. Kids lined the halls of St. Francis and gave him "high-fives" as he left school and headed to the competition. His teacher arranged transportation for students in all three of the second-grade classes to cheer for Kellan during the competition. Parents offered to cover expenses and ordered pizza for Kellan and his cheering section. Five of the 8<sup>th</sup>-grade boys were there, as was Shaun Harrington, President of Billings Catholic Schools. "Kellan," says Christina, "felt like he was a superstar."

Christina hopes Kellan will continue at St. Francis through eighth grade and go on to study with his classmates at Billings Central Catholic High School, though she is aware of the challenges he'll face in the coming years. The biggest will be "the widening gap in learning with Kellan's peers." Still, she continues, "I think that St. Francis can better meet this because they are more flexible."

Christina was pleased to learn that Montana passed a tax credit program to benefit families with children in private schools. She and Justin would be interested in applying for Kellan. "Without question, having a tax credit would help. We are far from wealthy," she says. "One of our biggest worries is tuition costs and any help would be great."

Would Christina and Justin consider sending Kellan to a private school other than St. Francis in order to take advantage of a tax credit? Not a chance. “St. Francis is such a great school and a great community,” says Christina. “They step up. They try their best.” Enrolling Kellan there has been a “huge blessing” for the entire Schye family, she continues. “We have peace of mind now that Kellan is where he belongs.”

**Teresa Schmit** and husband Mike have their hands full with eight kids. The Catholic schools in Great Falls have made their family’s life – and the education of their children – manageable and successful.

For starters, the K-8 set up at Our Lady of Lourdes allows many of the Schmit children to study at the same school. They’re not spread out at grade and middle schools. Beyond easing logistical challenges, having more of the siblings at the same school has helped Teresa’s younger children. This past school year, for example, her sixth-grader Madeline was able to spend the day with her brother Matthew, a Kindergartner, when he was too anxious to participate in class. Teresa and Mike were both at work and could not pick up their son. “It was really awesome that the school allowed Maddy to be there for her brother,” Teresa recalls.

Early on, when Teresa’s eldest son Noah was still at Our Lady of Lourdes (he’s now a senior at Great Falls Central Catholic High School) he showed an interest in music. His Our Lady of Lourdes band teacher encouraged Noah to take up an instrument and later introduced him to a private music teacher, who is also the first chair flutist for the Great Falls Symphony.

Both teachers encouraged Noah to develop his talent. Noah now plays in the city's youth orchestra, but the support didn't end there. Other educators at school have been especially encouraging as well. The high school's athletic director, for example, never misses one of Noah's orchestra concerts. "That kind of attentiveness is something you just can't replicate," says Teresa.

When the Schmits had only three children, their marriage was in turmoil. They split up for a time. During this period, the Our Lady of Lourdes staff was utterly supportive. "They never said anything to create more division," Teresa remembers. Instead, the school recognized the importance of keeping both parents informed of the kids' progress at school. Teachers took a real interest in how she and Mike – and their kids – were coping and "weren't afraid to get involved."

Indeed, Teresa says, "our avenue back together started with the school." They received a powerful "showering of love and support" from the teachers, administrators and parents at Our Lady of Lourdes. In Teresa's opinion, the school community – teachers, administrators, and other parents – "nurtured our family."

She and Mike, both practicing Catholics, are relieved that their children are studying in Catholic schools. "These schools are saying the same things that we are saying as a family."

Teresa, a licensed clinical social worker, has a private counseling practice. Mike has been working for the same civil engineering firm for the past 17 years.

Their combined salaries, however, are not enough to cover the costs of tuition. Fortunately, they receive scholarships and need-based tuition assistance. Teresa does not know what they would do without the help. Still, the tuition obligations and out-of-pocket expenses for sports and school activities means the family makes sacrifices to keep the kids in school. “We don’t go on family vacations,” she explains without any regret. “We have Catholic education.”

Teresa says, however, that additional scholarships would make it possible for her to work less hours and “spend more time at the kids’ schools.” “I would love,” she says, “to be more involved.”

**Christi Rudolph** and her two youngest children – an 8<sup>th</sup> grade son and 6<sup>th</sup> grade daughter – are proud members of the St. Joseph’s Catholic elementary school community in Missoula.

Christi was not raised Catholic; she converted when she was in her 20s. She decided that a private, Catholic education for her children would be a priority when her children were ready for school. “I am a product of Missoula public schools. But I don’t want that for my kids,” she explains. “They spend eight hours a day away from me and I want them to be around people who have the same values that I do. It is important to me that they are at a school where they can pray and be with other families that will pay attention to my kids when I am not there.”

Christi grew up in Missoula. Now a single mother, she and her kids live in a house next to her parents’ home. Although Christi was a stay-at-home mother

when she was married, she has since returned to the workforce as a healthcare data specialist for a cardiology group at the local hospital. She counts on her parents' help since her children's father lives out of state. She also counts on the families at St. Joseph's. They make sure her children don't miss practices or games if she has to work. "Even if I am at work, people at school – teachers or other parents – will send me a text letting me know that the kiddos are alright," notes Christi. "This is a really wonderful thing for any single parent."

In Christi's opinion, St. Joseph's "educates the whole child." Along with sports and other extra-curriculars, community service is an important part of the educational experience at St. Joseph's. "Learning," says Christi, "goes beyond what they do in the classroom."

Last year, for example, Christi's daughter's 4<sup>th</sup> grade class held a "Sock-tober" campaign in October. The students collected new socks for a local homeless shelter. Each grade also undertakes a unique class service project in addition to adopting a needy family each Thanksgiving. "At St. Joseph's," Christi says, "kids see the importance of giving back."

While not all of the families at the school are Catholic, Christi thinks that they all share the same values. "I think all of the parents here have chosen St. Joseph's because of the school's emphasis on education, faith and community."

Students from the Catholic schools have a great reputation in Missoula, according to Christi: "People

recognize the contributions the kids make in the community and the quality of academics and the sportsmanship of the student athletes.”

Although a private education for her children is a priority for Christi, it’s not for her kids’ father. He refuses to contribute to his children’s tuition expenses so Christi must cover the tuition on her own. Christi’s daughter receives a merit scholarship and both children receive tuition assistance through the diocese and the Missoula Catholic Schools Fund. Still, tuition at St. Joseph’s strains the family budget. It’s a family budget that does not include restaurant meals and big vacation trips, because the money goes toward tuition. Christi’s not complaining. She thinks every dollar she is spending on her kids’ educations at St. Joseph’s is worth it: “You can’t pay enough for this sense of community.”

Even so, Christi can’t understand why parents choosing a religious school for their children should be kept out of scholarship programs. “Private education,” Christi says, “should be attainable for parents whether or not the school is religious.” She also points out that of the four private schools in Missoula, two are religious. In other words, a tax-credit scholarship program that bars religious school participation dramatically limits school choice in Missoula and even more so in many parts of Montana.

**Emily Drazich** and her husband Tyler think of Our Lady of Lourdes Catholic School in Great Falls as part of their family. Their two oldest children – Cooper (9) and Cruz (8) – have attended Our Lady of Lourdes

since each boy started school. There, says Emily, “everyone looks out for each other.”

Neither Emily nor Tyler grew up Catholic. “To be honest,” Emily admits, “I was anti-Catholic for a long time.” The couple chose Our Lady of Lourdes after concluding that their local public school wasn’t a good fit for Cooper, who has high-functioning autism.

The Drazichs first learned of Cooper’s unique needs after he was diagnosed with Childhood Speech Apraxia as a toddler. Emily contacted the public school to see about early intervention speech therapy. She was told “*not to bother*”, Cooper “*would never talk*.” But Emily refused to accept this dim prognosis. She found a speech pathologist, and Cooper started intensive therapy. The result: Cooper had caught up with his peers by the time he was ready for Kindergarten. “Had I just listened to the public school he would have been so far behind and probably wouldn’t have talked,” Emily says. “They gave up before we even started.”

Rather than entrust Cooper’s education to the local public school, Emily and Tyler decided to look elsewhere. They were attracted to the personalized attention the teachers gave to each student at Our Lady of Lourdes.

Both Cooper and Cruz are thriving at school. For Cooper, the attention and kindness Cooper’s teachers provide have proved particularly effective. “They have gone above and beyond,” Emily notes. Cooper, who is also academically gifted, often “gets bored and then is rowdy.” His teachers take the time to redirect him to help mentor younger students. “He felt special and was

serving others,” says his mom. They also offer Cooper advanced work in spelling and reading to keep him challenged. And, if Cooper is “having a bad day,” one of his favorite teachers notices and pulls him aside for some “one-on-one time.” As Emily says, “They always do things to help Coop in a way that does not make him feel bad about himself and gives him the chance to reset.”

Younger Cruz, for his part, suffers from delayed growth. At Our Lady of Lourdes, he’s not bullied or left out as a result of this. His classmates include him in everything. “Cruz is my social butterfly,” says Emily. “Everyone at school loves him.”

The Drazichs have always placed great emphasis on teaching their children Christian values. They are happy they chose Our Lady of Lourdes because the school incorporates God into the children’s daily lives. “We wanted God to be a constant presence, part of their every day,” reflects Emily, who is now a practicing Catholic along with her husband Tyler. Emily believes her family’s fit with Our Lady of Lourdes is perfect.

Sending their kids to Our Lady of Lourdes is not easy financially for the Drazichs. Choosing a private school for their children means that Cooper receives therapy through private specialists, which the Drazichs must pay for, along with private school tuition. “We make other choices – like not taking big vacations,” Emily says. “But I would rather have the kids in the right school than anything else.” She sees these sacrifices part of life and well worth making. Access to scholarships, however, would be helpful. “We could

always use more therapy for Cooper” laments Emily, “and Cruz could benefit from occupational therapy.”

Emily also thinks there are many other Montanans whose children could benefit from a private religious school experience: “I would love to see that my tax dollars go to help other kids like Cooper have the same chances to study at a place like Our Lady of Lourdes.”

**Laura and Jerry Kinsella** have been connected to Catholic schools in Havre for over sixty years. Both attended Catholic schools themselves and sent their four children to St. Jude Thaddeus K-8. Today, in their seventies, they help pay tuition for their six grandchildren to study there. A Catholic education is like “Christmas dinner with 40 people in the house,” says Jerry. “It is our family tradition.”

The Kinsellas think Catholic education offers something different from the local public schools: more discipline, a lower student-teacher ratio, and the promotion of good habits. They have seen first-hand that “kids do better in life” when they have had the benefit of St. Jude’s.

St. Jude’s, which runs from kindergarten through eighth grade, is the only private school in the area. “Teachers from the local high school say they can tell the kids who have gone to St. Jude’s,” Laura says. “They listen more and are more respectful.”

Beyond academics, St. Jude’s teaches the children (and their parents) that helping the entire Havre community is important. “Kids at St. Jude’s help at the hospital, the local soup kitchen, nursing homes, you name it,” Jerry says matter-of-factly. “Wherever you go,

you can see what St. Jude's students have done to help in the community.”

Laura points out that around forty percent of St. Jude's students do not come from Catholic homes. Why would these parents choose St. Jude's for their kids? “Parents want that kind of an education for their children,” Laura concludes.

Many parents have told the Kinsellas that St. Jude's is a much more supportive environment for children than the local public school. Laura points to one child who was bullied at the public school but “turned around” after attending St. Jude's. “Bullying,” Laura notes, “is not allowed at St. Jude's.”

Jerry is an active member of the local Knights of Columbus. Supporting St. Jude's is a priority for the Knights in Havre because, says Jerry, “We definitely don't want to see our Catholic schools disappear.”

The Kinsellas support a state tax-credit scholarship program for parents to send their children to attend any private school they choose. It is “not fair” that some students would not benefit from a scholarship, simply because their families want to send the kids to a private *religious* school. Many families in Havre need financial assistance to send their kids to St. Jude's. Not including families at St. Jude's and other private religious schools, says Jerry, “cuts you out just because of religion.”

**Jay Aitken** grew up in Southeast Asia while his parents served as Seventh Day Adventist missionaries, working with refugees. He and his wife Jill, also raised Seventh Day Adventist, moved to Great Falls from the

Midwest a little over five years ago to be closer to Jill's ailing mother.

Jill works as an audiologist and Jay is a stay-at-home father. Their son Axel has been at Our Lady of Lourdes since Kindergarten. He's now in the second grade. While neither is Catholic, Jill and Jay were drawn to Catholic schools when considering options for their son. "Catholic schools are the shining hope for kids in Montana," says Jay. "They have a missionary-minded philosophy."

Jay thinks that a good school starts at the top, and he's a big fan of Our Lady of Lourdes' principal, Sherri Schmitz. Ms. Schmitz, Jay explains, pays attention and responds to the unique learning needs of each student. Jay also thinks Our Lady of Lourdes teachers are special. "They have a genuine love for their profession and the kids."

The Aitkens are pleased with the education that Axel has received so far. They especially appreciate the love for learning that Our Lady of Lourdes instills in its students. As Jay says, "If we can preserve a joy for learning early in a child's life, they can carry it with them their entire life."

Jay thinks Our Lady of Lourdes students are on a great course academically and that the school is preparing them to make a difference when they are older. As such, he contends, the larger public benefits from what this private school is doing. "If these kids can go on to college and then come back to their hometown," says Jay, "Montana's future will look much better."

Jay worries about the extreme poverty in rural eastern Montana and especially what it means for the region's children. He is pleased that Axel's school offers tuition assistance to some of the poorest families in Great Falls. "Montana has a large chunk of its population who struggle economically," Jay remarks. "Our Lady of Lourdes has stepped up and reached out to families in poverty to give their kids that extra push they need to succeed." Jay sees religious schools as "at the forefront" in teaching the next generation the lesson of charity toward one's neighbor. This pleases the Aitkens and inspires them to make significant financial sacrifices so that other families can benefit from scholarships offered for students at school.

Why is Jay coming forward to support the petitioners? Jay feels it is important to "stand up" on issues like this. "Any little tax break or encouragement that can be given to Montanans to contribute to scholarships is a step in the right direction," he says. Jay hopes that politicians and the courts keep an "open mind" so that families have options for their kids and access to financial support. "For a kid to get a scholarship to attend a Catholic school in Montana," he says, "can be completely life-changing."

**Randi Meyer** is mom to three boys (ages 14, 12, and 9). This Western Montana Clinic nurse is the sole means of support for her family, since a back injury ten years ago left her husband Scott unable to work.

Although neither Randi nor Scott are practicing Catholics, they wanted for years to send their boys to St. Joseph's Catholic school in Missoula but did not think they could afford it. Last year, one of the doctors

who works with Randi and has children at St. Joseph's encouraged her to contact the Missoula Catholic Schools Foundation. Working with the foundation, the Meyers received tuition assistance and were able to enroll all three boys at the school. "It was worth it for us to have the education that St. Joe's gives for our boys," Randi says. "But we couldn't do it without help."

It was only at St. Joe's that Randi's eldest, Beau, was identified as needing additional educational support. "Right away, the St. Joe's teachers noticed 'something,'" says Randi. "Beau had some evaluations and we learned that Beau learns differently than other students."

St. Joe's teachers followed the recommendations in Beau's evaluation and wrote an education plan for him. The plan made a big difference for Beau. He will be starting at Loyola Catholic High School, and Randi is pleased with the plan that Beau's new school developed with the teachers at St. Joe's.

The story was similar for Randi's middle child, Braaden. He went undiagnosed for an attentive deficit disorder while a student at the local public school. Teachers at St. Joe's, however, have worked with Randi to help her son address this challenge and succeed in school.

Last year, all three of Randi's boys attended St. Joe's no-cost, homework assistance after-school program. The school's teachers often meet with students before school starts or during lunchtime to help explain assignments or review lessons. Before St. Joe's, her kids were "not that thrilled" to go to school.

Today, says a relieved Randi, they are “so excited to go to school every day now.”

**Ona Magaro** is the mother of two middle-schoolers (ages 11 and 12) at St. Mary’s Catholic school in Livingston. Although not Catholic herself, Ona attended Catholic schools while growing up in Pennsylvania. “I had a great experience, she says. “I really love Catholic schools.”

Ona’s kids initially attended their local public elementary school, but Ona noticed right away that her son Albion was not doing well. He was simply overwhelmed in a classroom with so many students. Ona sensed that Albion’s teachers also struggled with the high student-teacher ratio. Within two months of his starting the public school’s first grade, Albion’s teachers wanted him taken out of the regular classroom and placed in segregated, special education classes. Ona hired a private tutor to work one-on-one with Albion. This tutor found that Albion had no learning delays. When the public school recommended that Albion be placed in a lower grade, Ona called St. Mary’s to see if Albion would be better off there.

On the second day of her son’s three-day visit to St. Mary’s, Ona noticed that Albion was no longer reserved or overwhelmed in the classroom. He was engaged and participating. Ona was “sold” on St. Mary’s for Albion.

Ona also grew worried that the public school’s overcrowded classrooms would affect her daughter Eva. Ona enrolled her at St. Mary’s as well. Eva, says Ona, excels at school, and St. Mary’s has provided a challenging course of study for her. The school allows

Eva to attend courses above her grade level. “I’ve always found that Catholic schools are much more open and effective,” Ona notes. “It is easier for the teachers to manage different academic levels among students.”

Making sure her kids have a healthy school environment is a priority for Ona: “A child spends so much time at school. It is up to us as parents to find the right fit and environment for our kids to flourish and grow.”

Parental involvement and volunteering is expected of all St. Mary’s families. As Ona says, “parents are 100% involved in the school.” She is a volunteer coach for St. Mary’s basketball teams. She also pitches in two days a week assisting teachers in the classroom and works on many of the school’s community service and fundraising projects. This strong parental involvement at school has created a very special community at St. Mary’s where parents are friends and support each other.

Ona notes that Park County, where Livingston is located, is one of Montana’s poorest counties. She is proud that St. Mary’s helps students and parents participate in a range of civic activities to benefit the larger Livingston community. The St. Mary’s basketball teams she coaches, for instance, are open to students from the public school. St. Mary’s students and parents also visit the local senior citizens’ center and participate in food and clothing drives to help Livingston’s needy.

A St. Mary’s education for her children is Ona’s priority and her kids are thriving there. Covering the

cost of tuition is a challenge and Ona is the sole financial provider for their education. Fortunately, she's received some financial aid. Access to additional scholarships to cover tuition costs – like money from the state tax-credit scholarship program – would be a great help to Ona and her kids.

“Just like any commercial or business decision, parents should have the freedom to ‘shop around’ for the best school they can find,” says Ona, who's a small business owner. “There shouldn't be limits on the kinds of schools where scholarships and other aid can be used.”

## INTRODUCTION

Catholic education in the United States stretches as far back as the early 1600s when Franciscan missionaries from Spain founded the first Catholic school in St. Augustine, Florida.<sup>2</sup> The Nineteenth Century saw the creation of a system of parochial schools in Catholic parishes across the United States.<sup>3</sup> These schools were founded to meet the needs of a

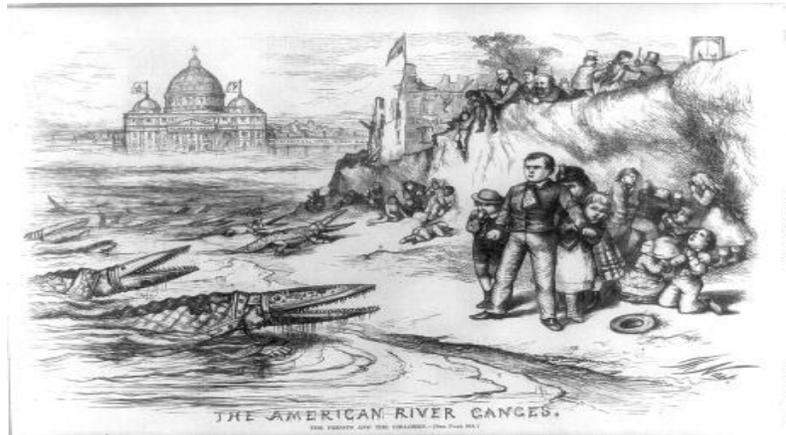
---

<sup>2</sup> United States Conference of Catholic Bishops, *History of the Catholic Church in the United States*, <http://www.usccb.org/about/public-affairs/backgrounders/history-catholic-church-united-states.cfm>

<sup>3</sup> George Weigel, *The Irony of Modern Catholic History: How the Church Rediscovered Itself & Challenged the Modern World to Reform*, at 66 (2019) (“The Church became a primary vehicle for assimilating the immigrants: one of the great nineteenth-century accomplishments of U.S. Catholicism was the ‘Americanization’ of a vast and diverse body of immigrants who nonetheless remained staunch Catholics – and who built a parallel education and health-care system largely run by women, in this case religious sisters.”).

growing Catholic immigrant population at a time when American public schools were overwhelmingly and explicitly Protestant.<sup>4</sup>

At this same time, many non-Catholics in America had profound anxieties about the growing number and political power of Catholic immigrants. They were concerned about the increasing voting power of Catholics and even the danger of papal tyranny. “Nativists” and theological liberals opposed Catholics accessing public funding for private Catholic schools. Thomas Nast’s infamous cartoon, published in *Harper’s Weekly* in 1871 and 1875, reflects the widespread anti-Catholic bigotry prevalent at the time.<sup>5</sup>



<sup>4</sup> Kyle Duncan, *Secularism’s Laws: State Blaine Amendments and Religious Persecution*, 72 Ford. L. Rev. 493, 503-504 (2003) (tracing the history of public education at the time and the general understanding that its “religious and moral foundations plainly excluded Catholics [and] other non-mainstream believers.”).

<sup>5</sup> Thomas Nast, *The American River Ganges*, *Harper’s Weekly*, Sep. 30, 1971, available at: <https://thomasnastcartoons.com/irish-catholic-cartoons/the-american-river-ganges-1871/>

Just prior to the Civil War, several states passed laws forbidding the diversion of public funds to religious or “sectarian” schools. In this context, “sectarian” was a synonym or code word for Catholic.<sup>6</sup>

In 1875, President Ulysses S. Grant proposed, and House Speaker James G. Blaine introduced, an amendment to the U.S. Constitution that would codify this prohibition at the federal level. The original amendment presented by Congressman Blaine effectively rewrote a portion of the First Amendment as follows:

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any States for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.<sup>7</sup>

This proposal, known as the “Blaine Amendment,” passed in the House of Representatives but failed to

---

<sup>6</sup> See e.g., *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) (linking the term “sectarian” with the anti-Catholic hostility surrounding the attempted passage of the federal Blaine Amendment, and noting that “it was an open secret that ‘sectarian’ was code for ‘Catholic’”); *Zelman v. Simmons-Harris*, 536 U.S. 639, 719-20 (2002) (Breyer, J., dissenting). See also Gerard V. Bradley, *An Unconstitutional Stereotype: Catholic Schools as “Pervasively Sectarian”*, 7 *Tex. Rev. L. & Pol.* 1, 5 (2002).

<sup>7</sup> 4 *Cong. Rec.* 5454 (1876).

garner the two-thirds majority in the Senate required to propose a constitutional amendment.<sup>8</sup>

In the aftermath of this failed attempt at the federal level, Congress required territories entering the union to adopt “Little Blaines” or “State Blaine amendments”.<sup>9</sup> Judge Kyle Duncan observed that “[b]y 1890, twenty-nine states in all had incorporated into their constitutions explicit prohibitions against the allocation of public funds to sectarian schools and other institutions.”<sup>10</sup>

Montanans first codified this anti-Catholic animus in their 1884 territorial constitution.<sup>11</sup> The federal Enabling Act, which admitted Montana and several western states into the union, required those states’ constitutional conventions to establish and maintain a system of public schools “free from sectarian control.”<sup>12</sup> Consistent with this requirement, Article XI, Section 8, of the 1889 Montana Constitution established:

---

<sup>8</sup> Duncan, *supra* note 4, 72 Ford. L. Rev. at 509-510 (with an addendum clarifying that it did not “vest, enlarge, or diminish legislative power in the Congress,” Congressman Blaine’s amendment passed the House 180 to 7. Additional changes were made to the Senate version which failed to pass by four votes.)

<sup>9</sup> Jay S. Bybee & David W. Newton, *Of Orphans and Vouchers: Nevada’s “Little Blaine Amendment” and the Future of Religious Participation in Public Programs*, 2 Nev. L.J. 551, 559 n. 46 (2002).

<sup>10</sup> Duncan, *supra* note 4, 72 Ford. L. Rev. at 514.

<sup>11</sup> Petitioners’ Brief on the Merits at 41-42 (citing Mont. Territorial Const. art. IX, § 9 (1884)).

<sup>12</sup> Duncan, *supra* note 4, 72 Ford. L. Rev. at 513-14.

Neither the Legislative Assembly, nor any county, city, town, or school district, or other public corporations, shall ever make directly or indirectly, any appropriation, or pay from any public fund or moneys whatever, or make any grant of lands or other property in aid of any church, or for any sectarian purpose, or to aid in support of any school, academy, seminary, college, university or other literary, scientific institution, controlled in whole or in part by any church, sect or denomination whatever.<sup>13</sup>

In 1972, Montana convened a constitutional convention where modest changes were made to the state's 1889 Blaine Amendment.<sup>14</sup> Article X, Section 6 of the Montana Constitution, specifically prohibits 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.<sup>15</sup>

In May of 2015, the Montana Legislature enacted a tax-credit scholarship program entitled "Tax Credit for Qualified Education Contributions."<sup>16</sup> The program

---

<sup>13</sup> *Espinoza v. Montana Department of Revenue*, 393 Mont. 446 (2018) at ¶ 85 n. 1 (Baker, J., dissenting).

<sup>14</sup> *Id.* at ¶ 85 (Baker, J., dissenting).

<sup>15</sup> Mont. Const. Art. X, § 6.

<sup>16</sup> *Espinoza*, 393 Mont. 446 (2018) at ¶ 4 (citing Section 15-30-3101 to -3114 (MCA (Part 31))).

provided, among other things, “a taxpayer a dollar-for-dollar tax credit up to \$150 based on her donations to a [Student Scholarship Organization or “SSO”].”<sup>17</sup>

SSOs are charitable organizations that fund tuition scholarships for students who attend private schools.<sup>18</sup> The purpose of an SSO “is to provide parental and student choice in education with private contributions through tax replacement programs.”<sup>19</sup> Taxpayers participating in the program “donate to SSOs generally”; they “may not direct or designate contributions to a parent, legal guardian, or specific [private school].”<sup>20</sup> SSOs are in charge of establishing application processes and pay the scholarship directly to the recipient’s school.<sup>21</sup>

Scholarships can only be given to “Qualified Education Providers” or “QEPs”.<sup>22</sup> While complexly defined, the Montana Supreme Court observed that “[e]ssentially, the Legislature’s definition of QEP means ‘a private school.’”<sup>23</sup>

Respondents, the Montana Department of Revenue, implemented rules to administer the scholarship

---

<sup>17</sup> *Id.* at ¶ 1 (citing Section 15-30-3101(1), MCA).

<sup>18</sup> *Id.* at ¶ 6.

<sup>19</sup> *Id.* at ¶ 5 (quoting Section 15-30-3101, MCA).

<sup>20</sup> *Id.* at ¶ 6 (quoting Section 15-30-3111(1), MCA).

<sup>21</sup> *Id.* at ¶ 6 (citing Section 15-30-3103(1)(h) and Section 15-30-3104(1), MCA).

<sup>22</sup> *Id.* at ¶ 1.

<sup>23</sup> *Id.* at ¶ 6 (in reference to Section 15-30-3102(7), MCA).

program. Among the rules implemented is Admin. R. M. 42.4.802 (known as Rule 1) that adds to the Legislature’s definition of a “Qualified Education Provider” or “QEP”, and “excludes religiously-affiliated private schools from qualifying.”<sup>24</sup> Respondents claim that Rule 1 was necessary to comply with Article X, Section 6 of the Montana Constitution.

Petitioners filed suit in state court on December 16, 2015 challenging Rule 1. The trial court issued a permanent injunction against enforcement of Rule 1 on May 26, 2017 and granted petitioner’s request for summary judgement. The Montana Supreme Court reversed the trial court’s decision on December 12, 2018. In a 5-2 opinion, the Montana Supreme Court held that “the Tax Credit Program aids *sectarian* schools in violation of Article X, Section 6, and that it is unconstitutional in all of its applications.”<sup>25</sup>

The majority reasoned that the state legislature “by enacting a statute that provides a dollar-for-dollar credit against taxes owed to the state, is the entity providing aid to sectarian schools via tax credits in violation of Article X, Section 6.”<sup>26</sup> Citing this Court’s decision in *Locke v. Davey*, 540 U.S. 712 (2004), the majority contended that because “[t]he Montana Constitution broadly and strongly prohibits state aid to sectarian schools,” the court did not need to address this Court’s Establishment Clause precedent.<sup>27</sup> With

---

<sup>24</sup> *Id.* at ¶ 1.

<sup>25</sup> *Id.* at ¶ 28 (emphasis added).

<sup>26</sup> *Id.* at ¶ 30.

<sup>27</sup> *Id.* at ¶¶ 15-16, 40.

regard to petitioners' free exercise rights, the court asserted that "[a]lthough there may be a case where an indirect payment constitutes 'aid' under Article X, Section 6, but where prohibiting the aid would violate the Free Exercise Clause, this is not one of those cases."<sup>28</sup>

In furtherance of its conclusion that the tax scholarship program violated Article X, Section 6, the court invalidated the private school tax credit program in its entirety.<sup>29</sup> On January 24, 2019, the court granted a partial stay of its order, permitting scholarship awards to be made by the sole SSO in existence but prohibiting it from undertaking any further fundraising.<sup>30</sup>

Petitioners filed a timely petition for review on March 12, 2019 and this Court granted the petition on June 28, 2019.

---

<sup>28</sup> *Id.* at ¶ 40.

<sup>29</sup> *Id.* at ¶ 45.

<sup>30</sup> Petition for Writ of Certiorari, *Espinoza v. Montana Department of Revenue* (2018) (No. 18-1195), at 14.

## SUMMARY OF ARGUMENT

State Blaine amendments, born and nurtured in anti-Catholic bigotry, have a generalized and widespread operation today.<sup>31</sup> They invidiously exclude religious institutions and religion-exercising individuals from generally available public benefits.

Just two terms ago, this Court held that the state of Missouri violated the First Amendment when, pursuant to Missouri's state Blaine Amendment, it banned a church-run preschool from receiving a grant from the state's scrap tire recycling grant program to resurface its outdoor playground.<sup>32</sup> Chief Justice Roberts, writing for the majority, stated that "the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand."<sup>33</sup>

*Amici* strongly urge this Court to reverse the decision of the Montana Supreme Court and reinstate Montana's tax credit scholarship program as originally envisioned by the state legislature. Parents, as the primary educators of their children, should not be

---

<sup>31</sup> Defining a "state Blaine amendment" as a "state constitutional provision that bars persons' and organizations' access to public benefits explicitly because they are religious persons or organizations," Judge Duncan calculated thirty-seven states with state Blaine amendments. Duncan, *supra* note 4, 72 Ford. L. Rev. at 514-15 n. 95.

<sup>32</sup> *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

<sup>33</sup> *Id.* at 2025.

limited in the choice of schools for their children and many parents prefer religiously-affiliated schools. Barring parents who choose religious schools for their children from state-sponsored scholarship funds subjects these parents to disfavored treatment in violation of the Constitution.

## ARGUMENT

### I. PARENTS HAVE THE IMPORTANT RIGHT AND DUTY TO MAKE EDUCATIONAL DECISIONS FOR THEIR CHILDREN

Parents are the primary educators of their children.<sup>34</sup> To educate their children, parents necessarily turn to others for help to impart integral elements for growth, such as cultural or technical knowledge. Schools are partners in this process.

---

<sup>34</sup> The Catholic Church explains the foundational basis of this universal truth as follows:

Since parents have given children their life, they are bound by the most serious obligation to educate their offspring and therefore must be recognized as the primary and principal educators. This role in education is so important that only with difficulty can it be supplied where it is lacking. Parents are the ones who must create a family atmosphere animated by love and respect for God and man, in which the well-rounded personal and social education of children is fostered. Hence the family is the first school of the social virtues that every society needs.

Declaration on Christian Education (*Gravissimum Educationis*) (1965) (internal citations omitted), [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_19651028\\_gravissimum-educationis\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651028_gravissimum-educationis_en.html).

As far back as the early 1900s, this Court has recognized the responsibility and the right of parents to direct the upbringing and education of their children as fundamental to the American conception of ordered liberty.<sup>35</sup> In striking down an Oregon law requiring all children to attend public schools, this Court made the following observation:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.<sup>36</sup>

*Amici* parents chose private Catholic schools for their children and attest to the numerous benefits these schools have given their child and their family.

*Amici* Brittnay Sukhbir and her husband Kyle credit St. Mary's for helping their daughter Raelyn overcome the trauma of bullying. No longer "walking on eggshells," the Sukhbirs can now enjoy family time with their daughter and son.

Similarly, *amici* Christina Schye and her husband Justin consider St. Francis a "blessing" for their son Kellan and the entire Schye family.

---

<sup>35</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>36</sup> *Id.* at 535.

The six oldest children of *amici* Teresa Schmit are thriving at Our Lady of Lourdes and Great Falls Central Catholic High School. Teresa credits the schools' personalized attention and support for strengthening her large family.

*Amici* Christi Rudolph is thankful to the teachers, staff and other parents at St. Joseph's for keeping her informed of her kids' well-being while she is working. Such support is, as Christi says, "a really wonderful thing for any single parent."

Unlike her local public school, the teachers and administrators at Our Lady of Lourdes were open to working with *amici* Emily Drazich and her son Cooper to address his special learning needs and build his self-confidence.

*Amici* Ona Magaro found the "right fit and environment" for her children at St. Mary's. Unlike her local public school, teachers there have recognized and respond to her kids' particular learning needs.

## II. MANY PARENTS PREFER RELIGIOUSLY-AFFILIATED SCHOOLS FOR THEIR CHILD'S EDUCATION

Many parents opt for religiously-affiliated schools to provide continuity of faith and formation during the school day.<sup>37</sup> Today, for example, nearly 1.8 million

---

<sup>37</sup> The Catechism of the Catholic Church explains:

As those first responsible for the education of their children, parents have the right to *choose a school for them* which corresponds to their own convictions. This right is fundamental. As far as possible, parents have the duty of

children in the United States are enrolled in Catholic schools.<sup>38</sup> Catholic schools provide academic instruction and religious formation to children from Catholic and non-Catholic families.<sup>39</sup> These schools reflect ethnic and racial diversity in their student populations<sup>40</sup> and often serve students with special needs.<sup>41</sup>

While Catholic schools are open to students regardless of the religious affiliation of their family, a majority of students at Catholic schools come from Catholic homes. An educational program consistent with the faith practiced at home is an important consideration for these parents in selecting schools.

---

choosing schools that will best help them in their task as Christian educators.

*Catechism of the Catholic Church*, 2229 (emphasis in original), [http://www.vatican.va/archive/ccc\\_css/archive/catechism/p3s2c2a4.htm](http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a4.htm); see also *Charter of the Rights of the Family*, Article 5 (1983) (identifying the rights which flow to parents by virtue of their status as “first and foremost educators of their children”), [http://www.vatican.va/roman\\_curia/pontifical\\_councils/family/documents/rc\\_pc\\_family\\_doc\\_19831022\\_family-rights\\_en.html](http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_19831022_family-rights_en.html)

<sup>38</sup> National Catholic Educational Association (NCEA), *United States Catholic Elementary and Secondary Schools 2018-2019: The Annual Statistical Report on Schools, Enrollment, and Staffing*, summary available at [https://www.ncea.org/ncea/proclaim/catholic\\_school\\_data/catholic\\_school\\_data.aspx](https://www.ncea.org/ncea/proclaim/catholic_school_data/catholic_school_data.aspx)

<sup>39</sup> *Id.* (NCEA enrollment data indicates that non-Catholic children make up 18.4% of Catholic school students.)

<sup>40</sup> *Id.* (Student diversity in U.S. Catholic schools include 20.7% racial minorities with 16.8% identifying as Hispanic/Latino.)

<sup>41</sup> *Id.* (78.4% of Catholic schools serve students with special needs.)

*Amici* parents chose Catholic schools for their children's education and appreciate the religious nature of the education offered there.

*Amici* Brittany Sukhbir was born and raised Catholic, but was not practicing. Since her daughter Raelyn started at St. Mary's, Brittnay has a renewed interest in her faith and passes it on to her children, both of whom were both baptized this past spring.

*Amici* Christi Rudolph converted to Catholicism in her twenties. For Christi, offering her children a Catholic education is a priority. "They spend 8 hours a day away from me and I want them to be around people who have the same values that I do," says Christi.

Finding a school that makes God "a constant presence" was a priority for *amici* Emily Drazich, and she is thankful that her sons experience that presence at Our Lady of Lourdes.

Schools "saying the same things we are saying as a family" is important for *amici* Teresa Schmit and her husband Mike. Teresa has confidence that the values the Schmits teach their kids at home are supported at their Catholic schools.

*Amici* Laura and Jerry Kinsella are proud to be part of three generations of Kinsellas to attend Catholic schools in Havre. They continue to support Catholic education for their grandchildren by contributing towards the cost of tuition and volunteering at their local Catholic school.

*Amici* Randi Meyer and her husband Scott fully support their sons' recent decisions to be baptized as

Catholics. Randi appreciates how welcoming the Catholic community at St. Joseph's is and how the boys "have grown into such amazing men."

*Amici* Ona Magaro, though not Catholic herself, attended Catholic schools as a child. "I really love Catholic schools," says Ona. Ona has made great sacrifices so that her two children can study at St. Mary's.

*Amici* Christina Schye's believes that Kellan, her youngest, is best served at St. Francis. Christina is so pleased with Kellan's increased interest in participating with the family during Sunday Mass. She hopes that Kellan will be able to study at Billings Central Catholic when he is ready for high school.

*Amici* Jay Aitken thinks that Catholic Schools are "the shining hope for kids in Montana." He is glad his son Axel has the chance to study at Our Lady of Lourdes and wants more kids, especially those coming from low-income families, to have the same opportunity.

### **III. STATE BLAINE AMENDMENTS VIOLATE THE CONSTITUTION**

The bigotry accompanying the passage of state Blaine amendments is probative of unconstitutional animus in violation of the Equal Protection Clause and should be carefully considered by this Court.<sup>42</sup> Such

---

<sup>42</sup> See e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (Colorado constitutional amendment preventing protected status based upon sexual orientation did not satisfy the Equal Protection Clause). This Court specifically noted the "inevitable inference that the

anti-Catholic sentiment has now morphed into a generalized anti-religious bias in favor of “secular” education. To paraphrase Martin Niemoller’s famous “First They Came For” quotation, first they came for the Catholic schools and we said nothing, then they came for the Protestant and all religious schools and ...

Today, the “anti-religion” effects of state Blaine amendments violate the First Amendment’s protection of the free exercise of religion. The minimal free exercise standards are violated when a law “discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.”<sup>43</sup> Said another way, attaching a civil disability to lawful behavior because it is motivated by religious impulses or connected to religious belief is not permissible.

Respondents, in drafting Rule 1, required parents to make the choice between a religiously-affiliated school and eligibility for a publicly-sponsored benefit available to parents making “non-religious” school choices. Such a choice is no choice at all and violates the free exercise rights of parents.

This Court’s recent decision in *Trinity Lutheran* offers further support in favor of petitioners. Excluding an otherwise eligible recipient from participation in a government-sponsored program solely because of the potential recipient’s religious character “imposes a

---

disadvantage imposed is born of animosity toward the class of persons affected.” *Id.* at 634-35.

<sup>43</sup> *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

penalty on the free exercise of religion that triggers the most exacting scrutiny.”<sup>44</sup> There is no principled basis to treat government-sponsored scholarships or student aid programs any different than government grants when it comes to fundamental fairness under the law.

Surprisingly, the Montana Supreme Court failed even to cite *Trinity Lutheran*.<sup>45</sup> This Court should embrace Justice Gorsuch’s concurring opinion regarding the reach of *Trinity Lutheran* when he wrote that “the general principles here do not permit discrimination against religious exercise – whether on the playground or anywhere else.”<sup>46</sup>

State Blaine amendments should be declared unconstitutional *once and for all* as applied to *all* cases. Now is the chance for this Court to make clear that

---

<sup>44</sup> *Trinity Lutheran*, 137 S. Ct. at 2021 (citing *Lukumi*, 508 U.S. at 546).

<sup>45</sup> Justice Beth Baker, joined by Justice Jim Rice, characterized this as a “glaring omission.” *Espinoza v. Montana Department of Revenue*, 393 Mont. 446 at ¶ 104 (Baker, J., dissenting).

<sup>46</sup> *Trinity Lutheran*, 137 S. Ct. at 2026. (Gorsuch, J., concurring) (Justice Gorsuch’s comment addressed Footnote 3 of the majority opinion which states: “This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.” *Id.* at 2024 n. 3.). Chief Justice Roberts, and Justices Gorsuch and Thomas, expressly refused to join footnote 3. Scholars and judges have expressed confusion over the significance of footnote 3. *See e.g.*, O’Scannlain, Diarmuid F., “Religion and the Courts in the 21<sup>st</sup> Century,” speech given Nov. 6, 2017 at Thomas Aquinas College (calling footnote 3 “cryptic and much-discussed”), <https://thomasaquinas.edu/news/judge-diarmuid-f-o-scannlain-religion-courts-21st-century>

barring religious institutions and religion-exercising persons access to generally available public programs and benefits is “odious to our Constitution all the same, and cannot stand.”

### CONCLUSION

For the sake of the parents and children benefiting from religiously-affiliated education, *amici* request this Court declare unconstitutional Montana law discriminating against churches and other religiously-affiliated or inspired institutions and overturn the Montana Supreme Court’s decision in this matter. *Amici* further request this Court direct the reinstatement of the state’s student aid tax credit program for scholarships awarded to students attending all Montana private schools.

Respectfully Submitted,

ANDREA PICCIOTTI-BAYER

*Counsel of Record*

THE CATHOLIC ASSOCIATION FOUNDATION

3220 N Street NW, Suite 126

Washington, DC 20007

(571) 201-6564

amariepicciotti@gmail.com

*Counsel for Amici Curiae*

Dated September 17, 2019