No. 18-1195

IN THE

Supreme Court of the United States

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.

On Writ of Certiorari to the Montana Supreme Court

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international non-profit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the resolution of this case because it touches upon core questions of individual liberty, which both the federal elements of our constitutional structure and the first eight Amendments in the Bill of Rights were created to protect and preserve. The Rutherford Institute writes in support of Petitioners.

SUMMARY OF ARGUMENT

The Montana Supreme Court struck down the state's religion-neutral tax-credit scholarship program because it violated the "stringent prohibition on aid to sectarian schools" found in Article X, Section 6 of the Montana Constitution, a "Blaine Amendment." The court avoided any mention of this term, and in doing so avoided any discussion of the anti-Catholicism that fueled such constitutional provisions in Montana and 36 other states. The Rutherford Institute submits this brief to detail the bigoted and politically opportunistic origins of these provisions.

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[1] This amicus brief is filed with the parties' consent. Petitioners filed their blanket consent for amicus briefs on July 16, 2019, and Respondents filed their blanket consent on July 22, 2019. No counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party.

ARGUMENT

I. Blaine Amendments Were Born of Anti-Catholic Bigotry.

Thirty-seven states currently have some version of a so-called Blaine Amendment in their constitutions. In this case, the Court has the opportunity to address these amendments head on and resolve a significant split of authority as to whether states may bar religious options from otherwise neutral and generally available student-aid programs. When considering this question, *amicus* urges that the Court consider the historical origins of Blaine Amendments.

Blaine Amendments originated in an era where Anti-Catholicism was rampant, public, and unapologetic. Alarmed by the heavy influx of immigrants from Ireland and Germany in the nineteenth century,[2] Protestant leaders formed "nativist" groups to oppose the growing "Catholic menace," warning that Catholic immigrants would take jobs, spread disease and crime, and plot a coup to install the Pope in power. Tyler Anbinder, *Nativism & Slavery: The Northern Know Nothings & the Politics of the 1850s* 8-14 (1992).

During this time, nativist mob violence against Catholics was common and often went unpunished. In 1834, for example, firefighters watched idly as a Protestant mob ransacked and burned the Catholic convent in Charlestown, Massachusetts, inspired by rumors that the Catholic nuns were holding a woman against her will. The self-confessed ringleader of the

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[2] At the end of the eighteenth century, there were approximately 30,000 Catholics living in United States. By 1850, there were 1.6 million. By 1900, twelve million. *See* John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 299 (2001).

mob was acquitted on all charges, aided no doubt by the death threats directed toward the prosecution's witnesses. And petitions for the state to indemnify the diocese for failing to protect the convent were soundly defeated by the Protestant-controlled Massachusetts legislature. Nancy Lusignan Schultz, *Fire & Roses: The Burning of the Charlestown Convent, 1834* 3-5, 223-224, 228 (2000).

In 1844, nativist mobs attacked and burned several Catholic churches and houses in Philadelphia in a series of riots. At least twenty-nine people were killed, including two soldiers responding to the violence. Michael Feldberg, *The Philadelphia Riots of 1844: A Study in Ethnic Conflict* 99-175 (1975). A grand jury report blamed the Irish Catholics for the riots, stating that the outbreak of violence was due to "the efforts of a portion of the community to exclude the Bible from the public schools." Margaret F. Brinig & Nicole Stelle Garnett, *Lost Classroom, Lost Community, Catholic Schools' Importance in Urban America* 14 (2014).

In 1855, armed nativist mobs gathered on Election Day at polls in Louisville, Kentucky, to deter the growing Catholic population from voting. In the ensuing "Bloody Monday" riots, at least twenty-two people were killed, and many German and Irish businesses, homes, and churches were attacked, looted, or burned. The dead included a Catholic priest who was stoned by rioters as he attempted to visit a sick parishioner and several Irish immigrants who were shot down as they tried to escape burning buildings. No one was convicted of any crimes in connection with the riots. C. Robert Ullrich & Victoria A. Ullrich, *Germans in Louisville: A History* 8 (2015).

The nativist movement grew in size and power throughout the mid-1850s. Politically, the anti-

Catholic Native American Party, better known as the "Know Nothings," enjoyed a rise in prominence that reached a high water mark in the 1850s, when it controlled fifty-two seats in the United States House of Representatives, and its nominee for President received 21.5% of the popular vote in 1856. Richard F. Selcer, *Civil War America 1850 to 1875* 197-198 (2006). Although the party would soon collapse under an internal divide over slavery, anti-Catholic sentiment continued with broad public support. *Id*.

Public education proved to be a significant rallying point for nativists, who perceived Catholics as a threat to public schools. In the early nineteenth century, public education was unquestionably religious, specifically Protestant. Reading from the Bible was common and in some cases a mandatory part of the curriculum, as were the singing of hymns and the recital of morning prayers. As one historian observed:

> Protestant ministers and lay people were in the forefront of the public-school crusade and took a proprietary interest in the institution they had helped to build. They assumed a congruence of purpose between the common school and the Protestant churches. They had trouble conceiving of moral education not grounded in religion.

David Tyack, Thomas James & Aaron Benavot, *Law and the Shaping of Public Education, 1785-1954* 162 (1987).[3]

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[3] *See also* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Leg. Hist. 38, 45 (1992) ("Most nineteenth century Americans believed that morality and Christianity were inseparable and that both were necessary for the preservation of republican society. However, too many people failed to attend church to risk

As Catholic populations grew in large cities, they sought to break the Protestant monopoly on public education. *See* Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 669 (Summer 1998). Several Catholic groups filed lawsuits seeking to remove the Protestant Bible from public school curriculum, but they were largely unsuccessful. In *Donahoe v. Richards*, 38 Me. 379 (1854), for example, a Catholic student was expelled from a Maine public school for refusing to read the Protestant version of the Bible, which the town school committee required. The state's highest court ruled that required reading of the Protestant Bible was not an infringement of religious freedoms. *Id.* at 382–83. *Donahue* was the first of twenty-five similar suits brought in nineteen States through 1925, only five of which resulted in favorable rulings for the plaintiffs. *See* Viteritti, *supra* at 667.

In addition, several dioceses lobbied their state legislatures to appropriate funds for the establishment of their own schools. *See id*. at 699. These efforts were not only unsuccessful, they were met with violence and condemnation:

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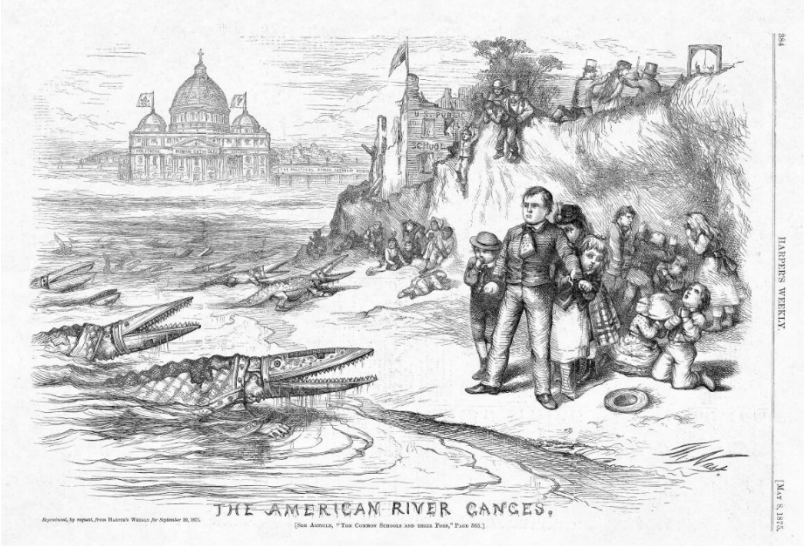
leaving the instruction of morality to religious institutions. Thus the common school quickly became the primary institution for inculcating public morality. In all levels of education, both public and private, primary through collegiate, the moral teachings of the Bible were taught and, to varying degrees, religious services were conducted. But public schools did more than serve as surrogates for church instruction. The entire curriculum centered on general assumptions of God's existence, the sense of His universe, and the 'spirituality' of human nature. Schools were the primary promulgators of this Protestant way of life.").

> This activity provoked a display of majoritarian politics of unprecedented brutality—all under the inverted banner of religious freedom. When Bishop Hughes of New York entered the fray in 1842 to demand public support for Catholic schools, his residence was destroyed by an angry mob, and militia were summoned to protect St. Patrick's Cathedral. When Catholics in Michigan proposed a similar school bill in 1853, opponents portrayed their plan as a nation-wide plot hatched by the Jesuits to destroy public education. Parochial school advocates in Minnesota were accused of subverting basic American principles. When the Know-Nothing Party gained control of the Massachusetts legislature in 1854, it drafted one of the first state laws to prohibit aid to sectarian schools, and simultaneously instituted a Nunnery Investigating Committee. This same Massachusetts body that counted twenty-four Protestant clergymen among its members also tried to pass legislation that would limit the franchise and the right to hold office to native-born people.

Id. at 699–670. The popular anti-Catholic sentiment is perhaps best demonstrated in a cartoon from 1871 from the seminal editorial cartoonist Thomas Nast, which portrayed Catholic bishops as crocodiles, eager to devour school children thrown down from a crumbling public school.



Thomas Nast, *The American River Ganges*, *printed in* HARPER'S WEEKLY (September, 1871).

In September of 1875, President Ulysses S. Grant seized on the rising nativist pressure to protect public schools from Catholic influence for political purposes. The Whiskey Ring conspiracy had recently been exposed, and Grant and the Republican Party were in desperate need of a popular issue to distract the public from the corruption and to reverse the political fortunes of the party, which had recently lost control of the House. *See* Green, *supra* at 49. Grant found his cause in the public school debate. Speaking to a group of Civil War veterans in Iowa, he vowed to encourage a system "of a good common school education, unmixed with sectarian, pagan, or atheistical dogmas," and he resolved "that not one dollar, appropriated for their support, shall be appropriated to the support of any sectarian schools." *Id.* at 47.

Grant's speech was well received by political leaders, who called for a constitutional amendment to

put the suggestions into practice. *Id.* at 48. But the Catholic Church was wary. One prominent Catholic publication wrote that if the President's speech could be accepted at face value, Catholics would have few complaints with its content, but complained that Grant's condemnation of "sectarianism" was a veiled attack on Catholicism—an observation that has been echoed by this Court. *See id.*; *see Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (Thomas, J., joined by Rehnquist, C.J., and Kennedy and Scalia, JJ.) ("[I]t was an open secret that 'sectarian' was code for 'Catholic.'"); *Zelman v. Simmons-Harris*, 536 U.S. 639, 721 (2002) (Breyer, J., dissenting, joined by Stevens and Souter, JJ.) ("But the 'Protestant position' on this matter, scholars report, was that public schools must be "nonsectarian" (which was usually understood to allow Bible reading and other Protestant observances) and public money must not support "sectarian" schools (which in practical terms meant Catholic).'").

Still, Grant's proposal was popular, and in December of 1875, he specifically called for a constitutional amendment to resolve the long simmering "Catholic question" in his annual address to Congress. Green, *supra* at 52. One week later, Representative James G. Blaine of Maine submitted such an amendment in the House, which read:

> 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 State 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.

Id. at 53.

Ironically, there is little evidence that Blaine, who sent his own daughters to a Catholic-run boarding school, was himself anti-Catholic. But Blaine was politically ambitious. After serving in the Maine House of Representatives from 1858 to 1862, he ran for and won a seat in the United States House of Representatives in 1862. By 1869, he had become Speaker of the House, a position he held until his Republican party lost the House in 1875. Unlike Grant, Blaine was free of scandal and perceived as a viable Republican candidate for the presidency, and he hoped his amendment would provide the political mileage necessary to win his party's nomination. Green, *supra* at 50.[4]

Ultimately, however, Blaine's presidential ambitions would contribute to his amendment's undoing. Rivals for the Republican nomination hoped to embarrass him by criticizing the amendment for not being specific enough and suggesting that it could be used to drive Protestant practices out of public schools. Democrats,

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[4] As Green observes, it does not appear that Blaine had any interest in the issue after his federal amendment failed:

> In his autobiography, Twenty Years of Congress, published in 1884, Blaine made no reference to the amendment. Grant's 1875 message received only a brief comment in his book, and he failed to mention his own call for sectarian-free schools. To Blaine, the substance of the amendment was insignificant. After the amendment failed to secure him the nomination, it also lost all importance as even an historical event.

Green, *supra* at 54.

who recognized that the amendment was a political move to shore up Protestant votes in the upcoming election, passed a watered down version of the amendment in hopes of removing it as a campaign issue in 1876. Ultimately, the Republicans proposed a compromise amendment that specifically guaranteed Bible reading in the public schools, but after passing in the House, it fell four votes short of the required two-thirds majority in the Senate to pass. 4 Cong. Rec. 5191-5192 (1876); 4 Cong. Rec. 5595 (1876).

II. Montana's Blaine Amendment Was Forced As a Condition of Statehood.

While Blaine's amendment ultimately failed at the federal level, it found much greater success at the state level. By 1876, fourteen States had enacted legislation prohibiting the use of public funds for religious schools; by 1890, twenty-nine States had incorporated such provisions into their constitutions; today, thirty-seven states include some version of the Blaine Amendment in their state constitution.[5]

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[5] ALA. CONST. art. XIV, § 263; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. IX, § 10, art. II, § 12; CAL. CONST. art. IX, § 8, art. XVI, § 5; COLO. CONST. art. V, § 34, art. IX § 7; DEL. CONST. art. X, § 3; FLA. CONST. art. I, § 3; GA. CONST. art. I, § II, para. VII; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 5; ILL. CONST. art. 10 § 3; IND. CONST. art. I, § 6; KAN. CONST. art. 6, § 6(c); KY. CONST. § 189; MASS. CONST. art. XVIII, § 2; MICH. CONST. art. I, § 4; MINN. CONST. art. I, § 16, art. XIII, § 2; MISS. CONST. art. IV, § 66, art. 8, § 208; MO. CONST. art. I, § 7, art. IX, § 8; MONT. CONST. art. X, § 6; NEB. CONST. art. VII, § 11; NEV. CONST. art. XI, § 10; N.H. CONST. pt. 2, art. 83; N.M. CONST. art. XII, § 3; N.Y. CONST. art. XI, § 3; N.D. CONST. art. VIII, § 5; OKLA. CONST. art. I, § 5; OR. CONST. art. I, § 5; PA. CONST. art. III, § 15, art. III, § 29; S.C. CONST. art. XI, § 4; S.D. CONST. art. VI, § 3, art. VIII, § 16; TEX. CONST. art. I, § 7, art. VII, § 5(C); UTAH CONST. art. I, § 4, art. X,

Montana is one of the thirty-seven. Article X, Section 6 of the Montana Constitution provides:

> The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property 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.

Notably, Article X, Section 6 does not appear to be born of any deep-rooted Catholic hostility that existed in the then-territory. Rather, Montana, like many other western territories, was required to include the amendment as a condition for statehood. ENABLING ACT of 1889, 25 Stat. 676, Ch. 180, 50th Cong. § 4 (2d Sess. 1889). And notably, there was little debate surrounding Montana's 1889 Constitution at all, let alone its Blaine Amendment, suggesting its inclusion was simply a product of the territory's overall desire for statehood. See Michael P. Dougherty, *Montana's Constitutional Prohibition on Aid to Sectarian Schools: "Badge of Bigotry" or National Model for the Separation of Church and State?*, 77 Mont. L. Rev. 41, 46 (2016).

Deficiencies in Montana's Constitution led to a Constitutional Convention in 1972. *See* 6 Montana CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT (March 11, 1972). Several delegates criticized the Blaine Amendment's origins in nineteenth century

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§ 9; VA. CONST. art. IV, § 16; WASH. CONSt. art. I, § 11; WIS. CONST. art. I, § 18; WYO. CONST. art. I, § 19, art. III, § 36, art. VII, § 8.

anti-Catholic bigotry. Delegate Harbaugh, for example, explained the anti-Catholic and anti-immigrant origins of the Blaine Amendment and its required inclusion in Montana's 1889 Constitution by Congress before stating:

> So, here in 1972, or 80 years later, the State of Montana still retains in its constitution remnants of a long-past era of prejudice. And the inflexibility and the rigidity of this borrowed heritage is something that I do not think belongs in our Constitution.

Id. at 2010. Delegate Schiltz added that the prejudice that motivated the Blaine Amendment in 1875 was still alive in Montana:

> I've lived with the Blaine Amendment and the philosophy of the Blaine Amendment all the days of my life. I can remember during the Al Smith campaign when they burned crosses on the rimrocks in Billings. I can remember being let out of school in the fourth grade to erase three "Ks" on the front doors of the Catholic church in Billings. . . . To me, the Blaine Amendment is a badge of bigotry, and it should be repealed. I've been asked to back off on that and I'm going to try to be as reasonable as I can, although I feel much more emotionally about this than I do about our courts of justice . . . .

Id. at 2012.

Despite these criticisms, the delegates ultimately struck a compromise. Mindful that it was unlikely that Montana's Blaine Amendment would be repealed entirely, its opponents agreed to maintain the language of the 1889 Constitution but added an

exemption for the distribution of federal funds for non-public education. Dougherty, *supra* at 48–50. The delegates thus agreed upon the current text of Article X, section 6(1).

III. Current Application of Article X, Section 6(1) Violates Federal Constitution.

Anti-Catholic bigotry has largely subsided since Montana incorporated a Blaine Amendment into its constitution.[6] But this relic of nineteenth century animus toward a particular religion is no less offensive in its current application. The government may not discriminate against religious beliefs, religiously motivated conduct, or religious status. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017). Nor is the government permitted to discriminate against the religious "use" of public money. *See*, *e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). But that is what occurred here.

The First Amendment's Religion Clauses require neutrality among religions and toward religion itself. A state constitutional provision that excludes students who attend religious schools—but no one else—from a student-aid program exhibits precisely the sort of

[6] It would be naïve to suggest that anti-Catholic bigotry has been expunged from the body politic entirely, and examples of anti-Catholic bias abound. Less than two years ago, for example, a United States Senator openly expressed "concern" that a Catholic judicial nominee's faith would interfere with her ability to uphold her oath as a judge. *See* U.S. Senate Committee on the Judiciary, Full Committee Hearing on Nominations, 115 Cong. (Sept. 6, 2017) ("When you read your speeches, the conclusion one draws is that the dogma lives loudly within you, and that's of concern when you come to big issues that large numbers of people have fought for years in this country.").

hostility toward religion that the federal Constitution prohibits.

CONCLUSION

This Court should reverse the judgment of the Montana Supreme Court and hold that Article X, section 6(1) may not be used to bar religious options from Montana's student aid program.

Respectfully submitted,

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