No. _____

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 Petition For A Writ Of Certiorari To The Montana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does it violate the Religion Clauses or Equal Protection Clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools?

PARTIES TO THE PROCEEDING

Petitioners (Plaintiffs below) are mothers Kendra Espinoza, Jeri Anderson, and Jaime Schaefer. Respondents (Defendants below) are the Montana Department of Revenue and its Director, Gene Walborn, in his official capacity.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Kendra Espinoza, Jeri Anderson, and Jaime Schaefer respectfully petition for a writ of certiorari to review the judgment of the Montana Supreme Court in this case.

OPINIONS BELOW

The opinion of the Montana Supreme Court reversing the trial court's grant of summary judgment to Petitioners and invalidating the tax-credit scholarship program, Pet. App. 4, is reported at *Espinoza v. Department of Revenue*, 393 Mont. 446 (2018). The order of the Montana Supreme Court granting a partial stay of its order pending review by this Court is available at Pet. App. 1. The opinion and order of the Montana Eleventh Judicial District Court granting summary judgment to Petitioners is available at Pet. App. 86.

JURISDICTION

The Montana Supreme Court entered its judgment on December 12, 2018, and Petitioners have timely filed this petition. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that a state shall not "deny to any person within its jurisdiction the equal protection of the laws."

Article X, Section 6 of the Montana Constitution, pursuant to which the Montana Supreme Court enjoined the state's tax-credit scholarship program, provides:

> (1) 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. (2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education.

STATEMENT OF THE CASE

This case raises the question of whether government may bar religious options from otherwise neutral and generally available student-aid programs. On December 12, 2018, the Montana Supreme Court declared unconstitutional a state scholarship program that helped needy children attend the private school of their families' choice. The court held that because families may choose to use the scholarships at religious schools, the program aided religious institutions, making the program unconstitutional under Article X, Section 6 of the Montana Constitution. Pet. App. 16–17, 25–32. With this decision, the Montana court further deepened the long-standing split on whether barring religious options from student-aid programs violates the federal Religion and Equal Protection Clauses.

This split has matured over the last 24 years and now includes 10 federal Circuit courts and state courts of last resort. *See infra* at p. 30 (chart showing split). This Court offered guidance on the issue in *Locke v. Davey*, 540 U.S. 712 (2004), this Court's last student-aid case. But *Locke* did not address the issue head-on, and the lower courts became more divided after the decision. In fact, while some courts have read *Locke* to prohibit the wholesale exclusion of religious options from student-aid programs, *see*, *e.g.*, *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1255, 1256 & n.4 (10th Cir. 2008), other courts have read the decision for the exact opposite conclusion and therefore upheld such exclusions, *see*, *e.g.*, *Eulitt ex rel. Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344, 355 (1st Cir. 2004). In addition,

while *Trinity Lutheran Church of Columbia v. Comer* involved the constitutionality of religious exclusions in public programs, that case was decided on narrow grounds and did not address the student-aid question. *See* 137 S. Ct. 2012 (2017). Thus, after *Trinity Lutheran*, courts continue to express confusion regarding student-aid programs, with two more courts joining the split, on opposite sides, in the last two years.[1]

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[1] The court split in this case is distinctly different for three reasons than the split presented by *Freedom From Religion Foundation v. Morris County Board of Chosen Freeholders*, in which this Court just denied certiorari. *See* 232 N.J. 543 (2018), *cert. denied*, 586 U.S. ___ (March 4, 2019) (Nos. 18-364 & 18-365). First, in *Morris County*, the split was about whether government can exclude religious institutions from receiving direct government aid through historic-preservation grant programs. Here, in contrast, the split is about whether government can exclude religious institutions from student-aid programs, in which government aid flows to religious institutions (schools) only as the result of individual choices. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) (noting that in its Establishment Clause jurisprudence, this Court has drawn a "consistent distinction" between direct aid to religious schools and aid to individuals, who can choose to use that aid to attend religious or nonreligious schools). Second, the split regarding historic-preservation grant programs involved only four courts and had matured for only the two years since *Trinity Lutheran* was decided. Petition for a Writ of Certiorari at 8–11, *Morris Cty. Bd. of Chosen Freeholders v. Freedom From Religion Found.*, 586 U.S. ___ (Sept. 18, 2018) (No. 18-364); *see also Morris Cty. Bd. of Chosen Freeholders v. Freedom From Religion Found.*, 586 U.S. ___ (March 4, 2019) (Kavanaugh J., statement regarding denial of certiorari at 5) (stating "there is not yet a robust post-*Trinity Lutheran* body of case law in the lower courts on the question whether governments may exclude religious organizations from general historic preservation grants programs"). But here, the split regarding student-aid programs involves 10 Circuit courts and state courts of last resort and has matured for 24

This Court should grant certiorari to finally resolve whether government can bar religious options in student-aid programs. Every year that the split continues, tens of thousands of children are denied educational opportunities, with Montana being only the most recent example.

I. Facts

The facts in this case are not in dispute. Below, Petitioners recount the events leading to this lawsuit, as well as the proceedings in the lower courts.

A. The Montana Scholarship Program Statute Allowed Scholarship Recipients to Choose Any Private School.

The Montana Legislature enacted a tax-credit scholarship program on May 8, 2015 ("the program" or "the scholarship program"). The purpose of the scholarship program "is to provide parental and student choice in education" for K to 12 students. Mont. Code Ann. § 15-30-3101. It does so by providing a modest tax credit—up to $150 annually—to individuals and businesses who donate to private, nonprofit scholarship organizations. *Id*. at § 15-30-3111. Scholarship

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years. Finally, in contrast to *Morris County*, the split in this case does not originate from *Trinity Lutheran*. Instead, the split in this case existed for two decades before *Trinity Lutheran*, and *Trinity Lutheran* simply did not resolve it. There is thus no reason for this Court to wait to resolve the split on student-aid programs presented by this case.

organizations then use the donations to give scholarships to families who wish to send their children to private school. Recipients can use the scholarships at any "qualified education provider," which is broadly defined by statute to include virtually every private school in the state. *Id*. at § 15-30-3102(7). The program is similar to the 23 other tax-credit scholarship programs that operate in 18 states across the country.[2]

So far, one Montana scholarship organization, Big Sky Scholarships, has formed to participate in the scholarship program. Big Sky is a small nonprofit run by part-time and volunteer staff. Pet. App. 121–22, ¶¶ 4–5. While the program statute allows any Montana family to apply for scholarships, Big Sky awards scholarships only to families who are low income or who have children with disabilities. Pet. App. 122, ¶ 8. Big Sky's scholarship recipients attend both religious and nonreligious schools. *Id*. at ¶ 9.

B. The Department Enacted a Rule Excluding Religious Schools from the Scholarship Program.

Shortly after the program was enacted, Respondent Montana Department of Revenue enacted an administrative rule that prohibited scholarship recipients from using their scholarships at religious schools. Mont. Admin. R. 42.4.802. Specifically, "Rule 1"

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[2] *See*, *e.g.*, EdChoice, *Tax-Credit Scholarship Programs*, https://www.edchoice.org/school-choice/types-of-school-choice/tax-credit-scholarship/ (listing all tax-credit scholarship programs).

changed the definition of "qualified education provider" to exclude any organization "owned or controlled in whole or in part by any church, religious sect, or denomination." *Id*. According to the Department, Rule 1 was necessary to comply with Article X, Section 6 of the Montana Constitution, also known as Montana's "Blaine Amendment."[3] *See*, *e.g.*, Appellants' Opening Br. at 13, *Espinoza v. Dep't of Rev*., No. 17-0492 (Mont. Sup. Ct. Nov. 22, 2017). Section 6 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."

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[3] Blaine Amendments derive their name from U.S. Representative and Senator James Blaine, who, in the 1870s, introduced a federal constitutional amendment to prohibit public school funding from being used for the schools of any "religious sect or denomination." *See*, *e.g.*, Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 670–71 & n.64 (Summer 1998). As several members of this Court have recognized, "[c]onsideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.' " *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion); *see also Zelman v. Simmons-Harris*, 536 U.S. 639, 719–21 (2002) (Breyer, J., dissenting) (discussing the bigoted history behind Blaine Amendments). Although the federal amendment failed, 37 states adopted their own Blaine Amendments. Richard D. Komer & Olivia Grady, *School Choice and State Constitutions* 11 (Inst. for Justice & Am. Legis. Exchange Council eds., 2d ed. 2017). Like Montana's clause, all contain language prohibiting public funding from aiding religious schools.

Rule 1 threatened the success of the program. About 69 percent of Montana private schools for K to 12 students are religiously affiliated, and excluding them severely limited the choices of families. *See* Aff. of Erica Smith in Supp. of Pls.' Mot. for Summ. J. ¶ 2, *Espinoza v. Dep't of Rev.*, No. 15-1152A (Mont. Eleventh Judicial Dist. Ct. May 13, 2016). Three of these families are Petitioners and their children.

C. The Rule Prevented Petitioners and Other Scholarship Recipients from Using Scholarships.

Petitioners Kendra Espinoza, Jeri Anderson, and Jaime Schaefer are all low-income mothers who were counting on the scholarships to keep their children in Stillwater Christian School, a nondenominational school in Kalispell, Montana. Although all three receive financial aid from the school, they still struggle to make their monthly tuition payments.[4]

Petitioner Kendra Espinoza is a single mom who transferred her two daughters out of public school after her youngest struggled in her classes and her oldest was repeatedly bullied by her classmates. Kendra and her daughters are Christian, and a "major reason" Kendra chose Stillwater Christian was because she "love[s] that the school teaches the same Christian

[4] The record contains affidavits from Petitioners and other families who are counting on the scholarships. These affidavits do not contain disputed facts and are available in Petitioners' Appendix.

values that [she] teach[es] at home." Pet. App. 152, ¶ 12. Her daughters, now 14 and 11, are flourishing in Stillwater.

Kendra, however, struggles to pay Stillwater's tuition. She works nights as a janitor, in addition to her full-time job as an office assistant, just to afford her monthly tuition payments. Kendra has also had to raise tuition money from her community by raffling off donated quilts and holding yard sales, and Kendra's daughters have chipped in by taking odd jobs. Kendra was counting on receiving the program scholarships this year to ease her family's burden. Without the scholarships, Kendra may have to pull her children out of Stillwater.

Like Kendra, Petitioner Jeri Anderson is a single mom struggling to pay Stillwater's tuition for her 10-year-old daughter, Emma. Jeri adopted Emma from China, and Emma is academically gifted. Jeri chose to send her to Stillwater for its academics, and Emma thrives on the individualized attention she receives from her teachers, who guide her in advanced studies. Yet even though Stillwater has been generous with its financial aid for Emma, "paying the remaining tuition every month is still a serious struggle" and Jeri "worr[ies] about it constantly." Pet. App. 139, ¶ 15. Fortunately, Jeri was able to rely on the program scholarships the last two years to make ends meet. Without the scholarships, Jeri and her daughter would suffer even greater financial hardship.

Petitioner Jaime Schaefer also struggles to pay tuition for her son and daughter to attend Stillwater. Jaime and her husband transferred their daughter out of public school after they became disappointed with its academic expectations. For instance, her daughter already knew how to read in kindergarten, but her class was still learning the alphabet. Jaime now sends both her children to Stillwater, where she has been impressed by its curriculum and music program. Paying the tuition, however, "is like a second mortgage payment" and "[i]t is a year by year decision" whether the Schaefers can keep their children there. Pet. App. 167, ¶ 8. Jaime was counting on the scholarships for "significant financial and psychological relief."

Petitioners' stories are not unique. They echo those of dozens of other families who are relying on the scholarships to make tuition payments, including families living in poverty and those with disabled children.

D. Petitioners Challenged the Rule as Unconstitutional.

Petitioners filed this case on December 16, 2015, challenging Rule 1 as ultra vires, unnecessary, and unconstitutional. Petitioners made three arguments. First, they argued the rule was ultra vires because the Legislature intended the scholarship program to include both religious and nonreligious schools, which was clear from the plain text of the statute and its legislative history. Second, they argued that Article X, Section 6 of the Montana Constitution did not apply to

the program because that section applied only to public funds, and not private donations incentivized by tax credits. Finally, Petitioners argued that even if Article X, Section 6 requires exclusion of religious schools from the program, this would violate the Religion and Equal Protection Clauses of the U.S. Constitution.

E. The Trial Court Sided with Petitioners and Enjoined the Rule.

On March 31, 2016, the trial court issued a preliminary injunction against enforcement of Rule 1, agreeing it was likely both ultra vires and unconstitutional under the U.S. Constitution. On May 26, 2017, the trial court made the injunction permanent and granted Petitioners summary judgment. At the core of both decisions was the court's determination that the tax credits implicated private, not public funds, and that Rule 1 was thus not required by Article X, Section 6 of the Montana Constitution. Pet. App. 94, 115–19. The court also found that to conclude otherwise and apply Section 6 to exclude religious options might violate the U.S. Constitution. Pet. App. 117–18. Respondents appealed the decision to the Montana Supreme Court.

F. The Montana Supreme Court Reversed and Invalidated the Entire Scholarship Program.

In a 5–2 decision, the Montana Supreme Court reversed on December 12, 2018. Pet. App. 4. The court's opinion had three conclusions. First, the court held

that the program's inclusion of religious options was unconstitutional under Article X, Section 6 of the Montana Constitution. Pet. App. 24–25. The court next held that the inclusion of religious schools was not severable from the rest of the scholarship program, and thus found both the program and Rule 1 to be invalid. Pet. App. 34. Finally, the court rejected the assertion that its application of Section 6 to bar religious schools from participating in the scholarship program conflicted with the federal Constitution. Pet. App. 31–32.

In its first conclusion, the court found that the program's inclusion of religious schools violated Article X, Section 6. Pet. App. 16–17, 25–32. Specifically, the court found that by providing the $150 tax credit to donors of the program, the Legislature "indirectly pay[ed] tuition at private, religiously-affiliated schools" and thus aided religious schools. Pet. App. 26. The court emphasized that "[r]eligious education is a rock on which the whole church rests, and to render tax aid to a religious school is indistinguishable from rendering the same aid to the church itself." Pet. App. 30 (internal punctuation omitted).

The court then held that the inclusion of religious schools was not severable from the rest of the scholarship program. According to the court, "there is no mechanism within the [program] to identify where the secular purpose ends and the sectarian begins" or "when the tax credit is indirectly paying tuition at a secular school and when the tax credit is indirectly paying tuition at a sectarian school." Pet. App. 29 (internal punctuation omitted). For the same reasons, the

court held Rule 1 to be ultra vires. As the court found, "[a]n agency cannot transform an unconstitutional statute into a constitutional statute with an administrative rule." Pet. App. 34. Thus, the court invalidated the entire program.

Finally, the court summarily rejected Petitioners' claim that interpreting Article X, Section 6 to prohibit scholarships for children at religious schools violated the Religion and Equal Protection Clauses. The court concluded that although "an overly-broad analysis of [Section 6] could implicate free exercise concerns[, . . .] this is not one of those cases." Pet. App. 32. In reaching this conclusion, the court relied on this Court's statement in *Locke* that there is "room for play in the joints" of the Religion Clauses and held that Montana may impose stricter barriers between government and religion than required by the Establishment Clause. Pet. App. 16 (citing *Locke*, 540 U.S. at 722).[5]

Two justices dissented. Both expressed deep concern that the court's opinion ran afoul of the First Amendment. Pet. App. 61–85. As one dissenting justice quoted, "[t]he exclusion of a group 'from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution.' " Pet. App. 76 (quoting *Trinity Lutheran*, 137 S. Ct. at 2025).

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[5] The court did not cite to *Trinity Lutheran*, despite Petitioners briefing it extensively.

G. The Montana Supreme Court Grants a Partial Stay of the Decision.

On December 24, 2018, Petitioners moved the Montana Supreme Court to stay the effective date of its judgment pending final disposition of an appeal to this Court. As Petitioners argued, dozens of families are expecting to apply for scholarships this spring and receive them in the summer, and depriving them of these scholarships would impose irreparable harm. Appellees' Mot. Stay Judgment at 1, 4–7, *Espinoza v. Dep't of Rev.*, No. 17-0492 (Mont. Sup. Ct. Dec. 24, 2018). Respondents did not oppose the stay, explaining that they had already approved tax credits for donors to the program, and it would be administratively burdensome for Respondents to revoke these credits. Appellants' Resp. to Mot. Stay Judgment at 1–2, 4, *Espinoza v. Dep't of Rev.*, No. 17-0492 (Mont. Sup. Ct. Jan. 11, 2019).

On January 24, the court granted a partial stay of the program, allowing Big Sky to award its current scholarship funds this summer, but prohibiting it from doing any further fundraising with the tax credits. Pet. App. 1. Big Sky currently has funds for only 40 students. Pet. App. 124, ¶ 16.

Petitioners now file this timely petition for review of the decision invalidating the program.

REASONS TO GRANT THE PETITION

Petitioners request that this Court grant the petition to resolve whether the government may bar religious choices from otherwise neutral and generally available student-aid programs. This Court should grant this petition for two reasons. First, there is a deep and well-acknowledged split on this question. *See* Rules of the Supreme Court of the United States 10(a)-(b). Second, this question is of great importance to thousands of families across the country.

I. There Is a Deep Split on Whether the Government May Bar Religious Options from Otherwise Neutral and Generally Available Student-Aid Programs.

In recent decades, this Court has often protected against attempts to exclude individuals and entities from receiving public benefits solely because of their religion. *See*, *e.g.*, *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) (collecting cases in which the Court had "prohibited governments from discriminating in the distribution of public benefits based upon religious status"). Yet this Court has not decided the question raised in this case: Whether the government may bar religious options from otherwise neutral and generally available student-aid programs.

Over the last 24 years, this question has split the federal Circuits and state courts of last resort. On one side, the Sixth, Seventh, Eighth, and Tenth Circuits, along with the New Mexico Supreme Court, hold that

government may not, consistent with the federal Constitution, prohibit religious options in student-aid programs. On the other side, the First and Ninth Circuits, as well as the Maine and Vermont Supreme Courts, hold that it may. With its decision in this case, the Montana Supreme Court joined the second group and further deepened the schism. *See infra* at p. 30 (chart showing split).

Although this Court offered some guidance on this question in *Locke v. Davey*, 540 U.S. 712 (2004), *Locke* was decided on narrow grounds that left the question unanswered. And while *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), dealt with the permissibility of religious exclusions in an institutional-aid program, it did not address the question of whether such exclusions are permissible in student-aid programs. As a result, the student-aid question has continued to divide the lower courts.

A. The Split Began to Develop in the Decade Before *Locke* Was Decided.

By the mid-1990s, it had become clear that government can include religious schools alongside nonreligious schools in student-aid programs, as long as families, not the government, choose which schools to attend. *See, e.g.*, *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983). But courts began to struggle with the

separate, but related, question of whether government may *exclude* religious schools from such programs.

On one side of that split were the Sixth and Eighth Circuits. According to these courts, prohibiting religious options in otherwise neutral and generally available student-aid programs violated the Free Exercise, Establishment, and/or Equal Protection Clauses. *See Peter v. Wedl*, 155 F.3d 992, 996–97 (8th Cir. 1998) (holding that a regulation prohibiting school districts from providing special-education benefits to students at religious schools drew an "unconstitutional distinction between private religious schools and private non-religious schools" and imposed a disability on students "because of the religious nature" of the schools their parents had chosen for them); *Hartmann v. Stone*, 68 F.3d 973, 977, 986 (6th Cir. 1995) (holding that a regulation barring providers that "teach or promote religious doctrine" from a federal child-care program violated the Free Exercise Clause).

On the other side of this split were the First and Ninth Circuits, as well as the Supreme Courts of Maine and Vermont. According to these courts, the federal Constitution allows the exclusion of religious schools from otherwise neutral and generally available student-aid programs. *Strout v. Albanese*, 178 F.3d 57, 60–65 (1st Cir. 1999) (upholding the exclusion of "sectarian" schools from a state voucher program for students in towns without public schools); *KDM ex rel. WJM v. Reedsport Sch. Dist.*, 196 F.3d 1046, 1050–52 (9th Cir. 1999) (upholding regulation that, like the one the Eighth Circuit invalidated, prohibited school

districts from providing special-education benefits to students at religious schools); *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 147 (Me. 1999) (same); *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539, 563–64 (Vt. 1999) (same).

Around the time these cases were decided, Justice Thomas recognized this "growing confusion among the lower courts." *Columbia Union Coll. v. Clarke*, 527 U.S. 1013, 1013 (1999) (Thomas, J., dissenting from denial of certiorari). He stressed that "we cannot long avoid addressing the important issues that [the split] presents" and urged the Court to "reaffirm that the Constitution requires, at a minimum, *neutrality* not *hostility* toward religion." *Id*. This Court, however, decided to let the split mature, denying certiorari in several of these cases. *See KDM*, 531 U.S. 1010 (2000); *Andrews v. Vt. Dep't of Educ.*, 528 U.S. 1066 (1999); *Bagley*, 528 U.S. 947 (1999); *Strout*, 528 U.S. 931 (1999).

Although it appeared the Court might resolve the issue when it agreed to hear *Locke v. Davey*, this Court decided that case on narrow grounds that did not resolve the split. To the contrary, the split has only deepened in *Locke*'s wake.

B. *Locke* Did Not Resolve the Split.

Locke v. Davey concerned a Washington merit- and need-based scholarship program for college students. *Locke*, 540 U.S. at 715–16. The program allowed students to attend religious colleges, but it excluded

students who were majoring in "devotional theology"—that is, "religious instruction that will prepare students for the ministry." *Id.* at 715, 719. Joshua Davey received a scholarship under the program, only to lose it when he chose devotional theology as his major. *Id.* at 717. Davey then challenged the exclusion under the Religion and Equal Protection Clauses. *Id.* at 718.

Although the religious exclusion in *Locke* was narrow, this Court was sensitive to the potentially far-reaching impact of any decision it might render. During oral argument, for example, Justices repeatedly questioned counsel regarding the power of states to broadly bar religious options in publicly-funded scholarship programs, also known as voucher programs:

> Suppose a state has a school voucher program such as the Court indicated could be upheld in the Zelman case. Now, if the state decides not to give school vouchers for use in religious or parochial schools, do you take the position it must, that it has to do one or the other? It can have a voucher program, but if it does, it has to fund all private and religious schools with a voucher program?

Transcript of Oral Argument at 31, *Locke*, 540 U.S. 712 (No. 02-1315) (O'Connor, J.); *see also id.* at 32 (O'Connor, J.), 34 (Ginsburg, J.), 35–36 (Kennedy, J.), 37–38 (Souter, J.), 52–53 (Kennedy, J.).

This Court ultimately decided it did not have to resolve these broader questions, and resolved the case in a "narrow[]" way that would not, in Justice

Kennedy's words, "foreclose this Court on the voucher issue." *See id.* at 36.

This Court began its analysis by noting that there is some "play in the joints" between the Free Exercise and Establishment Clauses. *Locke*, 540 U.S. at 718. "In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.* at 718–19. Davey's case, the Court noted, involved that "play." *Id.* at 719. While "there [wa]s no doubt that the State could, consistent with" the Establishment Clause, permit scholarship recipients to pursue a degree in devotional theology, the question before the Court was "whether Washington, pursuant to its own constitution, . . . can *deny* them such funding without violating the Free Exercise Clause." *Id.* (emphasis added) (citations and footnote omitted).

While the Court upheld the devotional theology exclusion, it limited the reach of its holding with two critical factors. First, the Court emphasized that the exclusion was justified by the state's unique "interest in not funding the religious training of clergy." *Locke*, 540 U.S. at 722 n.5. As this Court found, this state interest has a powerful historical pedigree going back to the "founding of our country." *Id*. at 722–23. Second, this Court stressed the fact that, "[f]ar from evincing . . . hostility toward religion," the scholarship program went "a long way toward including religion in its benefits" by, among other things, "permit[ting] students to attend pervasively religious schools." *Id.* at 724. This

Court then stated that it would "not venture further into this difficult area." *Id.* at 725.

After *Locke* was decided, lower courts expressed confusion about the opinion. As one court found, "[t]he precise bounds of" the opinion were "far from clear." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1254 (10th Cir. 2008). While *Locke* emphasized that there is a "'joint' between the Establishment Clause and the Free Exercise Clause," it shed little light on "[h]ow big that joint is." *Ruiz-Diaz v. United States*, No. C07-1881RSL, 2008 WL 4962685, at *6 (W.D. Wash. Nov. 18, 2008) (unreported).

C. The Split Deepened After *Locke*.

In the last 15 years, an "active academic and judicial debate about the breadth of" *Locke* developed. *See Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 785 (8th Cir. 2015). As that opinion involved only a narrow religious exclusion from a student-aid program, courts struggled to apply *Locke* to the total exclusion of religious options in such programs, with courts arriving at opposite conclusions. As a result, the split that existed before *Locke* deepened.

Some courts—namely, the First Circuit and Maine Supreme Court—have read *Locke* to allow the wholesale exclusion of religious schools from student-aid programs. After *Locke* was decided, these courts doubled down on their earlier opinions upholding the exclusion of "sectarian" schools from the Maine voucher program. The First Circuit, for example, read *Locke*

"broadly" and rejected the argument that "the 'room for play in the joints' identified by [*Locke*] is applicable to certain education funding decisions but not others." *Eulitt ex rel. Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344, 355 (1st Cir. 2004). The Maine Supreme Court applied the same analysis. *Anderson v. Town of Durham*, 895 A.2d 944, 961 (Me. 2006). "*Locke* and *Eulitt*," it claimed, "clarified that a statute does not lose its neutrality and become subject to strict scrutiny simply because it precludes state funding of a religious educational choice." *Id.* at 959. As a result, the Maine court held that states have "leeway to choose not to fund" student tuition at religious schools even though they fund it at nonreligious private schools. *Id.*[6]

The Seventh and Tenth Circuits, on the other hand, have read *Locke* far more narrowly. In *Colorado Christian University v. Weaver*, for example, the Tenth

[6] The Florida First District Court of Appeal adopted a similar reading of *Locke* in *Bush v. Holmes*, 886 So. 2d 340 (Fla. Dist. Ct. App. 2004) (en banc), *aff'd on other grounds*, 919 So. 2d 392 (2006). There, a group of plaintiffs challenged a voucher program that *allowed* religious schools to participate, claiming the program violated a provision of the Florida Constitution barring aid to "sectarian institution[s]." 886 So. 2d at 343 (quoting Fla. Const. art. I, § 3). Voucher recipients intervened and argued that to apply the state constitutional provision to invalidate the program would violate the federal Free Exercise Clause. *Id.* at 344. The Florida First District Court of Appeal rejected their argument, reading *Locke* as broadly holding that "a state constitutional provision . . . can preclude state financial aid to religious institutions without violating either the Establishment Clause or Free Exercise Clause." *Id.* at 360. The Florida Supreme Court affirmed the decision on other grounds but did not reject the appellate court's interpretation of *Locke*. *See Bush*, 919 So. 2d at 413.

Circuit invalidated Colorado's exclusion of "pervasively sectarian" schools from state scholarship programs pursuant to the Religion and Equal Protection Clauses. *See* 534 F.3d at 1258, 1266–68. The State had argued that the exclusion was required by the Blaine Amendment in Colorado's Constitution, which is almost identical to Montana's.[7] *See id.* at 1253, 1267–68. The State also argued that its interpretation of the amendment was consistent with the federal Constitution, an issue which it claimed "was definitively resolved . . . in *Locke v. Davey*." *Id.* at 1254. The Tenth Circuit disagreed.

In an opinion authored by then-Judge Michael McConnell, the Tenth Circuit held that *Locke* "suggests, even if it does not hold, that the State's latitude to discriminate against religion . . . does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Id.* at 1255. The court further found that the First Circuit's decision in "*Eulitt* went well beyond" *Locke*, as *Locke* did not empower states to "declin[e] funding the entire program of education at . . . disfavored schools, based on their religious affiliation." *Id.* at 1256 n.4.

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[7] Colorado's Blaine Amendment states that government shall not "make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever." Colo. Const. art. IX, § 7.

The Seventh Circuit adopted a similarly narrow reading of *Locke* in *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775 (7th Cir. 2010). There, the court addressed a challenge to a state university's ban on using student activity funds for "worship, proselytizing, or religious instruction." *Id.* at 777.[8] In defending the ban, the university argued that it had simply "made the sort of choice that *Locke* approved." *Id.* at 780. In a 2–1 decision authored by Judge Easterbrook, the Seventh Circuit rejected that argument. "[I]n *Locke*," the majority explained, "the Court stressed . . . that the state's program did not evince hostility to religion," as "[t]he scholarships could be used at pervasively sectarian colleges, where prayer and devotion were part of the instructional program; only training to become a minister was off limits." *Id.* The university's exclusion, on the other hand, *did* evince hostility toward religion, as it completely barred support for "programs that include prayer or religious instruction." *Id.* In dissent, one judge disagreed with the majority's interpretation of *Locke* and with what he viewed as its implication: "that a school district which . . . provide[s] vouchers must allow vouchers to be used at religious schools." *Id.* at 789 (Williams, J., dissenting).

In short, lower courts are reading *Locke* for two diametrically opposed propositions: that government

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[8] Although the program in *Badger Catholic* was not a student-aid program in the sense of providing benefits to individual students, it did provide funds to student organizations that, in turn, exercised "private choice" in using them. *Badger Catholic*, 620 F.3d at 778, 780.

may—or may not—mandate the exclusion of religious options from otherwise neutral and generally available student-aid programs. Thirteen years later, some thought this Court might address the split in *Trinity Lutheran*. But *Trinity Lutheran* involved different facts, and this Court again decided that case on narrow grounds, leaving the split intact.

D. *Trinity Lutheran* Did Not Address the Split.

Trinity Lutheran concerned Missouri's grant program for institutions to resurface their playgrounds with soft tire scraps. 137 S. Ct. at 2017. A church-run daycare applied for the grant and the State initially selected it to be one of 14 grant recipients. *Id*. But the State denied the daycare pursuant to the State's Blaine Amendment.[9] *Id*. The daycare brought a Free Exercise challenge against the grant denial and this Court ruled for the daycare in a 7–2 decision. Four Justices joined the Court's opinion in its entirety, and two more joined it in all but one footnote, discussed below. Justice Breyer concurred in the Court's judgment, and Justices Ginsburg and Sotomayor dissented.

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[9] The language in Missouri's Blaine Amendment is very similar to Montana's. Missouri's amendment states "[t]hat no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship." Mo. Const. art. I, § 7.

In analyzing the daycare's claim, this Court reiterated three "fundamentals of [its] free exercise jurisprudence." *Id*. at 2021. First, a law "may not discriminate against 'some or all religious beliefs.' Nor may a law regulate or outlaw conduct because it is religiously motivated." *Id*. (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993)). And finally, laws cannot "impose[ ] special disabilities on the basis of religious status." *Id.* (quoting *Lukumi*, 508 U.S. at 533) (internal punctuation omitted). This Court then held that Missouri's grant denial violated this third principle, as it discriminated against the daycare based solely on its religious status. *Id.* This discrimination forced the daycare to choose between "participat[ing] in an otherwise available benefit program or remain[ing] a religious institution," a choice which penalized the daycare's free exercise rights. *Id.* at 2021–22.

Although this is the same choice forced upon both schools and religious families when government excludes religious options from student-aid programs, *Trinity Lutheran* did not address such programs. In fact, four of the seven Justices in the majority (Chief Justice Roberts and Justices Kennedy, Alito, and Kagan) joined a footnote expressing their view that the Court's decision was very limited to the narrow facts of the case. *Id.* at 2024 n.3 (plurality opinion) ("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."). The footnote seems to imply, at least

to some, that *Trinity Lutheran*'s analysis is not applicable to religious "uses" of student aid.[10]

As a result, the lower courts continue to divide on the student-aid issue. The day after issuing *Trinity Lutheran*, this Court vacated—and remanded for further consideration—two decisions in which state supreme courts had invalidated student-aid programs because they included religious options. *Moses v. Skandera*, 367 P.3d 838 (N.M. 2015), *vacated sub nom. N.M. Ass'n of Non-Pub. Schs. v. Moses*, 137 S. Ct. 2325 (2017); *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461 (Colo. 2015), *vacated sub nom. Doyle v. Taxpayers for Pub. Educ.*, 137 S. Ct. 2324 (2017). On remand, however, neither case moved the lower courts any closer to consensus on the student-aid question.

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[10] *See*, *e.g.*, *Trinity Lutheran*, 137 S. Ct. at 2029 n.2 (Sotomayor, J., dissenting) ("Because Missouri decides which Scrap Tire Program applicants receive state funding, this case does not implicate a line of decisions about indirect aid programs in which aid reaches religious institutions 'only as a result of the genuine and independent choices of private individuals.'" (quoting *Zelman*, 536 U.S. at 649)); Patrick Weil, *Freedom of Conscience, but Which One? In Search of Coherence in the U.S. Supreme Court's Religion Jurisprudence*, 20 U. Pa. J. Const. L. 313, 359 n.266 (2017) ("The Court decided to consider not what the entity was—i.e. religious—but what it was doing: opening a playground to children of all or no faith, in a preschool and daycare center (i.e., at an early age, when they cannot be submitted to a religious indoctrination). Moreover, the fact that the decision was limited in scope to a playground shows . . . the Court did not want to open the door to the financing of sectarian activities by governmental expenditures.").

In *Moses*, the New Mexico Supreme Court had invalidated a state textbook loan program pursuant to that state's Blaine Amendment,[11] which prohibits public funds to support private schools. 367 P.3d at 841. On remand, the New Mexico Supreme Court issued a new decision, this time upholding the textbook loan program. *Moses v. Ruszkowski*, 2019-NMSC-003, ¶ 53, ___ P.3d ___. As that court held, interpreting the state's Blaine Amendment to bar students attending private schools from the program would "raise[] concerns under the Free Exercise Clause," and "[w]hen a state constitutional provision is susceptible to two constructions, one supporting it and the other rendering it void, this Court should adopt the construction which upholds its constitutionality." *Id*. ¶¶ 2, 45 (internal punctuation omitted). The court thus adopted a new interpretation of the amendment that would allow the program to go forward. *Id*. ¶ 46. With this decision, the New Mexico Supreme Court became the tenth court to weigh in on the split.

The other student-aid case this Court remanded after *Trinity Lutheran* was *Douglas County v. Taxpayers for Public Education*: a scholarship case with almost identical facts to the present case. In *Douglas County*, the Colorado Supreme Court had invalidated a K–12 scholarship program after a plurality decided that families could not use scholarships at religious

[11] Although New Mexico's Blaine Amendment prohibits funding for all private schools, regardless of religion, the focus of the plaintiffs' challenge was on religious schools. *See*, *e.g.*, *Weinbaum*, 367 P.3d at 841.

schools under Colorado's Blaine Amendment. 351 P.3d at 475. Families hoping to receive scholarships appealed, alleging violations under the Religion and Equal Protection Clauses. This Court granted certiorari, vacated the decision, and remanded the case to be reconsidered in light of *Trinity Lutheran*. 137 S. Ct. 2324. On remand, however, the case became moot before the Colorado Supreme Court could issue a new opinion. *Taxpayers for Pub. Educ. v. Douglas Cty.*, No. 2013SC233, 2018 WL 1023945 (Colo. Jan. 25, 2018).

Today, courts remain conflicted regarding whether government may bar religious options from otherwise neutral and generally available student-aid programs. The Montana Supreme Court did not even cite to *Trinity Lutheran* in its opinion, despite extensive briefing by both parties. Instead, the only federal precedent that the Montana Supreme Court relied on was the last student-aid case decided by this Court: *Locke v. Davey*.

The only way for this Court to resolve the split is to grant certiorari in another student-aid case. The lower courts cannot resolve this issue on their own. And every year the split continues, it deprives thousands of children of educational opportunities.

E. Chart Showing the Court Split on Whether Government May Bar Religious Options from Otherwise Neutral and Generally Available Student-Aid Programs.

SPLIT OF AUTHORITY	
Courts holding that the federal Constitution *prohibits* the government from excluding religious options in student-aid programs.	**Courts holding that the federal Constitution *allows* the government to exclude religious options in student-aid programs.**
• *Peter v. Wedl*, 155 F.3d 992, 996–97 (8th Cir. 1998) (holding unconstitutional Minnesota regulation prohibiting school districts from providing special-education benefits to students at religious schools under the Free Exercise, Equal Protection, and Free Speech Clauses) • *Hartmann v. Stone*, 68 F.3d 973, 977, 986 (6th Cir. 1995) (holding unconstitutional Army regulation excluding providers that "teach or promote religious doctrine" from a federal	• *KDM ex rel. WJM v. Reedsport Sch. Dist.*, 196 F.3d 1046, 1050–52 (9th Cir. 1999) (upholding Oregon regulation prohibiting school districts from providing special-education benefits to students at religious schools and rejecting challenges under the Religion and Equal Protection Clauses) • *Strout v. Albanese*, 178 F.3d 57, 60–65 (1st Cir. 1999) (upholding exclusion of "sectarian" schools from a Maine scholarship program for students in towns

child-care program under the Free Exercise Clause).	without public schools and rejecting challenge under the Religion and Equal Protection Clauses) • *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 147 (Me. 1999) (upholding exclusion of "sectarian" schools from a Maine voucher program for students in towns without public schools and rejecting challenges under the Religion and Equal Protection Clauses) • *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539, 563–64 (Vt. 1999) (upholding exclusion of "sectarian" schools from a Vermont voucher program for students in towns without public schools and rejecting challenge under Free Exercise Clause)

The Split Deepened Post *Locke v. Davey* (2004)	
• *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1254–57, 1266–69 (10th Cir. 2008) (holding unconstitutional exclusion in Colorado scholarship program of "pervasively sectarian" schools under the Free Exercise and Equal Protection Clauses and rejecting that *Locke* allowed this exclusion) • *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 777–81 (7th Cir. 2010) (holding unconstitutional a Wisconsin university's exclusion in student activity fund for religious activities and rejecting that *Locke* allowed this exclusion) • *Moses v. Ruszkowski*, 2019-NMSC-003, ¶ 2, ___ P.3d ___ (rejecting challenge to New Mexico textbook loan program that included religious school students and upholding	• *Eulitt ex rel. Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344, 355 (1st Cir. 2004) (reaffirming *Strout* under *Locke*) • *Anderson v. Town of Durham*, 895 A.2d 944, 960–61 (Me. 2006) (reaffirming *Bagley* under *Locke*) • *Espinoza v. Mont. Dep't of Rev.*, 393 Mont. 446, 459 (2018) (holding unconstitutional Montana scholarship program because it allowed families to choose religious schools and rejecting free exercise, establishment, and equal protection challenges pursuant to *Locke*)

the program to avoid "concerns under the Free Exercise Clause")	

II. The Question Presented Is a Recurring One of Great Importance for Parents and Their Children.

The question presented in this case is a recurring one that affects thousands of families across the country. The split has already deprived low-income children in both religious and nonreligious schools of student aid, including now in Montana. Resolving this issue will allow these children to legally participate in student-aid programs and also bring much-needed clarity to state and local governments that wish to enact such programs.

Families most harmed by courts upholding religious exclusions in student-aid programs are those who wish to send their children to religious schools. Under the current legal landscape, whether a child attending a religious school is permitted to participate in a student-aid program is based solely on the state or federal Circuit within which that child happens to reside. This has caused gross inequities across the country. For example:

- a child in Indiana, Wisconsin, or Ohio may use a state scholarship program to attend a

religious school,[12] but a child in Maine, Vermont or Montana may not;[13]

- a child in Connecticut may receive publicly-funded transportation to her religious school,[14] but a child in Washington may not;[15] and
- a child in New Mexico, New York, or Rhode Island may receive a public loan of textbooks at her religious school,[16] but a child in California or Kentucky may not.[17]

As a result, families in many states are forced to choose between attending a religious school and participating in these otherwise available public programs.

These decisions have also harmed students who wish to attend nonreligious private schools. This is true in states like Colorado, New Mexico, and Montana

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[12] *Meredith v. Pence*, 984 N.E.2d 1213, 1230–31 (Ind. 2013); *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211–12 (Ohio 1999); *Jackson v. Benson*, 578 N.W.2d 602, 620–23 (Wis. 1998).

[13] *Eulitt*, 386 F.3d at 353–56; *Chittenden Town Sch. Dist.*, 738 A.2d at 563–64; *Espinoza*, 393 Mont. at 459.

[14] *Bd. of Educ. of Stafford v. State Bd. of Educ.*, 709 A.2d 510, 517 (Conn. 1998).

[15] *Mitchell v. Consol. Sch. Dist. No. 201*, 135 P.2d 79, 81–82 (Wash. 1943).

[16] *Moses v. Ruszkowski*, 2019-NMSC-003, ¶¶ 1-2, 53, ___ P.3d ___; *Bd. of Educ. v. Allen*, 228 N.E.2d 791, 794 (N.Y. 1967), *aff'd*, 392 U.S. 236 (1968); *Bowerman v. O'Connor*, 247 A.2d 82, 83 (R.I. 1968) (per curiam).

[17] *Cal. Teachers Ass'n v. Riles*, 632 P.2d 953, 964 (Cal. 1981); *Fannin v. Williams*, 655 S.W.2d 480, 481–84 (Ky. 1983).

where courts relied on Blaine Amendments to invalidate student-aid programs in their entirety, just because they included religious options. In Montana, for example, several students participating in the scholarship program are disabled and have been using scholarships to attend Cottonwood Day School, a secular school specializing in treating students with special needs. But after the Montana Supreme Court invalidated the scholarship program, the education of these students is in jeopardy. Jenna Dodge, for example, is a mother of four children and has been using the scholarships for the last two years to send her disabled 8-year-old son to Cottonwood. She dreads the possibility of having to pull her son out of his current school: "I am very concerned that if he were [returned to his] public school where he did not get this type of instruction, he would always feel left behind and this would affect his desire to learn his entire life." Pet. App. 147, ¶ 8.

Finally, all children suffer when these court decisions discourage legislatures from enacting new student-aid programs. Every session, dozens of state legislatures consider bills that would give families greater educational choice, whether in the form of tuition scholarships, private educational savings accounts, textbook loan programs, or transportation subsidies. But when a court interprets a Blaine Amendment to prohibit aid to students at religious schools, legislators in the 37 states with these clauses take notice. Legislators are understandably reluctant to pass a bill if it will only be later invalidated for

including religious schools. In the last two legislative sessions, for example, legislators in Idaho, Kentucky, Missouri, and New Hampshire expressed concerns about passing student-aid programs because of their state's Blaine Amendments. None of those states has since passed a new program.[18]

This Court should not allow this uncertainty to continue. It should grant certiorari to bring clarity to this area once and for all.

[18] *See*, *e.g.*, *Private Scholarship Bill Headed to the Idaho Senate*, U.S. News & World Rep. (Mar. 5, 2018), https://www.usnews.com/news/best-states/idaho/articles/2018-03-05/private-scholarship-bill-headed-to-the-idaho-senate ("Opponents of the bill argue HB 590 is a cleverly disguised attempt to establish a voucher system in Idaho—which would violate Idaho's constitutional ban on funneling public funds to religious or sectarian schools."); Rick Ganley & Michael Brindley, *School Voucher Opponent: N.H. Bill Is Unconstitutional, Bad for Public Schools*, N.H. Pub. Radio (April 13, 2017), https://www.nhpr.org/post/school-voucher-opponent-nh-bill-unconstitutional-bad-public-schools#stream/0 ("Opponents of a school voucher bill say the proposal would violate the state constitution by allowing public money to be used at private, religious schools."); Camille Phillips, *Missouri Bill would expand access to private schools, but also cut tax base*, St. Louis Pub. Radio (Feb. 5, 2017), https://news.stlpublicradio.org/post/missouri-bill-would-expand-access-private-schools-also-cut-tax-base#stream/0 (quoting legislator stating, "[i]n Missouri we have a particularly stringent Blaine Amendment, and it's a concern that trying to test that Blaine Amendment could delay implementation for months, if not years [of a voucher program] . . . [a]nd there's not a real assurance that we would win that case").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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