**In the Supreme Court of the State of Montana**
No. DA 17-0492

KENDRA ESPINOZA, JERI ELLEN ANDERSON and JAIME SCHAEFER,

*Plaintiffs and Appellees,*

v.

MONTANA DEPARTMENT OF REVENUE, and MIKE KADAS, in his official capacity as DIRECTOR of the MONTANA DEPARTMENT OF REVENUE.

*Defendants and Appellants.*

# BRIEF OF AMERICAN CIVIL LIBERTIES UNION, ACLU OF MONTANA FOUNDATION, INC., AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AND THE ANTI-DEFAMATION LEAGUE AS *AMICI CURIAE* SUPPORTING APPELLANT AND REVERSAL

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## INTRODUCTION

*Amici* are civil-liberties and civil-rights organizations which believe that religious freedom flourishes best when religion is funded privately, without support from taxpayers. The regulation challenged in this case vindicates that fundamental principle.

Montana students and their parents certainly have a fundamental right to choose a religious education, but not at the state's expense. Montana's government is expressly barred from providing "direct or indirect" aid for religious education by Article X, Section 6 of the Montana Constitution. This No-Aid Clause—based on its text, history, and case law—prohibits state funding of religion more stringently than does the federal Establishment Clause.

Squarely in the face of the No-Aid Clause's prohibition against "indirect" state aid to religious education, the state legislature passed a tax-credit program that was intended to substantially support religious instruction and that would in fact do so if implemented without restrictions. The Department of Revenue's Rule 1 was necessary to render this program compliant with the No-Aid Clause.

The federal Free Exercise and Equal Protection Clauses do not compel states to fund religious education equally with secular education. Although the Free Exercise Clause prohibits denying religious institutions funding for some secular public-safety expenditures solely because of their religious status, it does not

override states' historic and important interests in ensuring that tax revenues are not diverted to religious education.

## IDENTITY AND INTERESTS OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 1.5 million members dedicated to defending the principles embodied in the U.S. Constitution and our nation's civil rights laws. For nearly a century, it has been dedicated to preserving religious liberty, including the right to be free from compelled support for religion, and has appeared before the United States Supreme Court and courts around the country towards that end.

The ACLU of Montana Foundation ("ACLU-MT") is the state affiliate of the ACLU. ACLU-MT is a non-profit, nonpartisan corporation, whose mission is to support and protect civil liberties in the State of Montana. ACLU-MT has a long history of advocating in support of the religious freedoms guaranteed by the Constitutions of the United States and Montana and educating the public on religious freedom in Montana's public schools. ACLU-MT regularly appears as *amicus* before this Court, and believes that its extensive experience in advocating for religious freedom will assist the Court in reaching a just decision.

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that is committed to preserving the constitutional principles of religious freedom and separation of church and state.

Americans United represents more than 125,000 members and supporters across the country, including many in the State of Montana. Since its founding in 1947, Americans United has frequently participated as a party, as counsel, or as an *amicus curiae* in church-state cases before the U.S. Supreme Court, the federal appeals courts, and state courts throughout the country.

The Anti-Defamation League was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States. Today, ADL is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Among ADL's core beliefs is strict adherence to the separation of church and state. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and belief in America, and to the protection of minority religions and their adherents. ADL opposes government programs that publicly fund private religious education, including the tax-credit program at issue here. Directing public funds to private religious education undermines the separation of church and state by supporting religious activity, indoctrination, and worship. Furthermore, the program at issue in this case and many other similar state programs fund schools that discriminate on the basis of immutable characteristics. Such state-funded discrimination is antithetical to ADL's mission.

## ARGUMENT

### I. The Montana Constitution's No-Aid Clause was intended to strictly prohibit state aid to religious education, including aid that flows indirectly through private intermediaries.

Plaintiffs argue that Montana's No-Aid Clause should be interpreted in the same manner as the federal Establishment Clause, and should therefore permit the funneling of state aid to religious schools through intermediaries who can direct the aid to religious or secular instruction. This view is contrary to the No-Aid Clause's text, history, and case law, as well as other states' interpretations of similar constitutional provisions.

#### A. The text and history of the No-Aid Clause make clear that it was intended to prohibit use of intermediaries to funnel aid to religious education.

Montana's No-Aid Clause unambiguously declares:

> 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 . . . 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.

MONT. CONST. art. X, § 6. This language is much more specific than the federal Establishment Clause, which generally prohibits any "law respecting an establishment of religion." U.S. CONST. amend. I.

Plaintiffs argue that, because Montana's 1972 Constitutional Convention adopted in Section 5 of Article II the language of the federal Free Exercise and

Establishment Clauses, the convention delegates intended that all religion-related clauses of the Montana Constitution be interpreted the same way as their federal counterparts. This reading, however, would render the No-Aid Clause mere surplusage. Rather, the Convention's records demonstrate that the framers of the 1972 Constitution intended to maintain a far stricter prohibition on aid to religious education than the federal Establishment Clause's.

On March 11, 1972, Delegate Gene Harbaugh introduced an amendment to remove the word "indirect" from the No-Aid Clause. He argued that this amendment would allow the "state to authorize . . . forms of indirect aid permissible under the [federal First] Amendment," based on the "child-benefit theory," which justifies certain kinds of aid to religious education as aid to students, not schools. *See* MONT. CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT, VOLUME VI, at 2011 (1981). The majority rejected this proposal, however, and instead voted to bar all "indirect" aid (with an exception for federal funds). *Id.* at 2025–26. As Delegate Chet Blaycock explained, if the term "indirect" "were out of [the No-Aid Clause] . . . it would be fairly easy to appropriate a number of funds . . . to some other group and then say this will be done indirectly." *Id.* at 2015. The 1972 delegates thus firmly rejected indirect state aid to religious education in any form, including through student or parent intermediaries.

### B. Cases interpreting the No-Aid Clause confirm that it strictly prohibits any diversion of tax revenue to support religious education.

Given its specific textual command and history, members of this Court have recognized that "Montana's constitutional prohibition against aid to sectarian schools is even stronger than the federal government's." *Kaptein ex rel. Kaptein v. Conrad Sch. Dist.*, 281 Mont. 152, 164, 931 P.2d 1311, 1319 (1997) (Nelson, J., specially concurring). Montana's No-Aid Clause "expressly prohibits either direct or indirect aid, while the [federal Establishment Clause only] prohibits aid which is found to be 'direct.'" *Id.*

Thus, in *State ex rel. Chambers v. School District No. 10,* this Court endorsed the view that the No-Aid Clause prohibits state funding for transportation of students to sectarian schools, even though the federal constitution permits such funding. *Compare* 155 Mont. 422, 438–40, 472 P.2d 1013, 1021–22 (1970), *with Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). "[T]he federal and sister state cases" that allow significant state aid to religious education in certain circumstances "have no application to the unique and broad proscription contained in the Montana Constitution regarding aid to sectarian schools." *See Kaptein*, 281 Mont. at 166, 931 P.2d at 1320 (Gray, J., concurring in part and dissenting in part). Such independent interpretation of the No-Aid Clause is consistent with the general principle that, "in interpreting our own Constitution, this Court need not

defer to the [U.S.] Supreme Court." *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 14, 326 Mont. 304, 109 P.3d 257.

*Montana State Welfare Board v. Lutheran Social Services of Montana*, 156 Mont. 381, 480 P.2d 181 (1971), upon which Plaintiffs heavily rely, is not to the contrary. In that case, this Court held that a religiously affiliated adoption agency could receive reimbursement from the state solely for specific secular services relating to adoption. *See id.*, 156 Mont. at 383, 480 P.2d at 182. In those limited circumstances, the Court concluded that "private adoption agencies are [not] directly or indirectly benefited." *Id.*, 156 Mont. at 391, 480 P.2d at 186. In contrast, Montana's tax-credit legislation has no limit on how tax-credit scholarships may be used: They may pay directly for religious instruction or the salaries of religious leaders.

### C. Other states have interpreted similar no-aid clauses as strictly prohibiting state support for religious education.

This Court is not alone in interpreting its state constitution as restricting state funding of religion more stringently than the federal constitution does. At least fourteen other state constitutions have been interpreted, based on their specific language, as limiting public funding of religion to a greater extent than does the federal Establishment Clause. *See Sheldon Jackson Coll. v. State*, 599 P.2d 127, 129–30 (Alaska 1979); *Cain v. Horne*, 202 P.3d 1178, 1185 (Ariz. 2009) (en banc); *Cal. Teachers Ass'n v. Riles*, 632 P.2d 953, 960 (Cal. 1981); *Op. of the*

*Justices*, 216 A.2d 668, 671 (Del. 1966); *Bush v. Holmes*, 886 So. 2d 340, 351 (Fla. Dist. Ct. App. 2004), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006); *Spears v. Honda*, 449 P.2d 130, 135–36 (Haw. 1968); *Epeldi v. Engelking*, 488 P.2d 860, 865 (Idaho 1971); *Op. of the Justices to the Senate*, 514 N.E.2d 353, 356–57 (Mass. 1987); *Gaffney v. State Dep't of Educ.*, 220 N.W.2d 550, 554 (Neb. 1974) (constitution subsequently amended); *Op. of the Justices (Choice in Educ.)*, 616 A.2d 478, 480 (N.H. 1992); *Hartness v. Patterson*, 179 S.E.2d 907, 909 (S.C. 1971) (constitution subsequently amended); *McDonald v. Sch. Bd.*, 246 N.W.2d 93, 97–98 (S.D. 1976); *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539, 564 (Vt. 1999); *Visser v. Nooksack Valley Sch. Dist. No. 506*, 207 P.2d 198, 205 (Wash. 1949) (en banc).

These states have rejected the "child-benefit" theory's distinction between aid to schools and aid to children as illusory and capable of being "used to justify any type of aid" to religious education. *See, e.g.*, *Riles*, 632 P.2d at 960. "'Practically every proper expenditure for school purposes aids the child'" (*id.* at 960 (quoting *Gurney v. Ferguson*, 122 P.2d 1002, 1003 (Okla. 1981)), so "application of the 'child-benefit' theory . . . 'would lead to total circumvention of the principles of [no-aid clauses]'" (*id.* at 963 (quoting *Gaffney*, 220 N.W.2d at 556)).

Therefore, unlike federal Establishment Clause jurisprudence, strict state no-aid clauses such as Montana's prohibit all aid to religious education, even when provided indirectly through intermediaries. *Compare, e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002) (upholding program that provided parents vouchers that could be used for secular or religious education), *with, e.g.*, *Bush*, 886 So. 2d at 352–53 (striking down school-voucher program because the "indirect path for the aid" via payment to parents did not make the program immune from the state's no-aid clause), *and Chittenden*, 738 A.2d at 563 (even if "the intervention of unfettered parental choice between the public funding source and the educational provider will eliminate any [federal constitutional] objection to the flow of public money to sectarian education," "parental choice" does not "ha[ve] the same effect with respect to" the state no-aid clause).

## II. The tax-credit legislation, improperly, attempts to circumvent the No-Aid Clause.

As the Department of Revenue correctly argues, when tax-credit scholarships are used at religious schools, the state is indirectly paying for religious education. That result would run afoul of both the express proscription against "indirect" aid in the No-Aid Clause and the general principle, reaffirmed repeatedly by this Court, that the state may not accomplish indirectly what it is barred from doing directly.

### A. The legislature may not indirectly do what it is prohibited from doing directly.

The lower court reasoned that a tax credit with the same effect as a direct appropriation for religious education is subject to different legal rules simply because it is a tax credit. But Montana case law rejects this formalistic approach: This Court has long held that the government "cannot do indirectly that which is prohibited when done directly." *Bozeman Deaconess Found. v. Ford*, 151 Mont. 143, 147, 439 P.2d 915, 917 (1968); *accord Evans v. City of Helena*, 60 Mont. 577, 594, 199 P. 445, 448 (1921) (city council must not "do indirectly that which the council is expressly prohibited from doing directly"); *Board of Regents of Higher Educ. v. Judge*, 168 Mont. 433, 450, 543 P.2d 1323, 1333 (1975) ("[T]he legislature cannot do indirectly through the means of line item appropriations and conditions what is impermissible for it to do directly."); *Montanans for the Coal Trust v. State*, 2000 MT 13, ¶¶ 48–51, 298 Mont. 69, 996 P.2d 856 (legislature cannot constitutionally divert restricted-use tax funds indirectly, through the mechanism of a new tax coupled with a credit against the restricted-use tax).

Consistent with this principle, two other state courts have rejected attempts to circumvent their state no-aid clauses through tax-benefit programs. The Massachusetts Supreme Court struck down a proposed tax deduction for private-school tuition, textbooks, and transportation because "it [was] plain that the statutory scheme and the anticipated functioning . . . disclose[d] an intent to aid

and to maintain private schools" by "circumvent[ing] the strictures of" the state's no-aid clause. *Op. of the Justices*, 514 N.E.2d at 355–57. The form of payment was not dispositive because a "tax deduction . . . is no less a form of financial assistance to private schools." *Id.* at 357. Likewise, a trial court in New Hampshire held that a tax-credit program similar to Montana's violated the state no-aid clause. *Duncan v. State*, No. 219-2012-CV-00121 (N.H. Super. Ct. June 17, 2013) (Attachment 1 hereto) at 40, *vacated on standing grounds*, 102 A.3d 913 (N.H. 2014). The court concluded that tax-credit scholarships were financed with "public funds" because "[t]he New Hampshire tax code is the avenue used for producing and directing much money into the program." *Id.* at 26.

### B. The tax-credit legislation was intended to use intermediaries to divert tax funds to religious education.

The legislative record here makes clear that the intent of the tax-credit legislation, SB 410, was to indirectly accomplish—through intermediaries—what the No-Aid Clause clearly prohibits. At the first senate committee hearing on SB 410, the bill's sponsor, Senator Llew Jones, acknowledged that the legislature could not "give the money directly" for religious education. *Hearing on SB 410 Before the H. Comm. on Finance*, 2015 Leg., 64th Sess., at 30 (Mont. Mar. 25, 2015) (Attachment 2 hereto). Senator Jones later explained that he proposed the tax-credit program because "we couldn't give [funds] directly . . . but there could be an organization in between that we would give the money to that could choose

to distribute it." MONT. DEP'T OF REVENUE, PROCEEDINGS RE THE ADOPTION OF NEW RULE I THROUGH III, at 18 (Nov. 5, 2015) (Attachment 3 hereto).

Indeed, Senator Jones testified that the Department of Revenue's Rule 1 "intentionally ignor[ed the legislature's] intent" by barring scholarships for religious education. *Id.* at 13. Similarly, when polled, a majority of Montana legislators asserted that excluding religious education would be contrary to the purpose of the tax-credit program. *See* Pls.' Br. in Supp. of Their Mot. for Summ. J., May 17, 2016, at 7. As Senator Jones stated, "the legislative intent here was fairly obvious" (Attachment 3 at 23): to use "some other group" to channel funds to religious education—exactly what the framers of the No-Aid Clause intended to prohibit by including in the Clause the word "indirect" (*see* MONT. CONSTITUTIONAL CONVENTION, *supra*, at 2025–26).

### C. The result of unfettered implementation of the tax-credit program would be substantial diversion of tax revenues to religious education.

Without Rule 1, the principal objective achieved by the tax-credit program would be the channeling of funds through intermediaries to religious education. As Plaintiffs themselves have stated, "[approximately] 69 percent of Montana's private schools are religious . . . and many Montana families do not even live near a nonreligious private school or only live near one that teaches elementary school." Pls.' Br. in Supp. of Their Mot. for Summ. J., at 1.

In fact, in much of Montana, the only private educational options are religious. Twenty-six of Montana's fifty-six counties have private schools. *See* Attachment 4 (summary of publicly available information about private schools in Montana). Half of these counties have no secular private schools. *Id.* An additional third of these counties do not have secular private schools for all grade levels. *Id.* For example, Lewis and Clark County, where this Court sits, does not have secular private schools that teach past the sixth grade. *Id.* In two counties, tribal schools are the only secular private option. *Id.* Only three counties have secular, non-tribal private schools that teach all grade levels. *Id.*

In light of these facts, there is no question that permitting implementation of the tax-credit program without Rule 1 would result in the program principally financing religious education. Such an outcome cannot be reconciled with the No-Aid Clause or this Court's admonitions against efforts to skirt state law.

## III. The Religion and Equal Protection Clauses of the U.S. and Montana Constitutions do not compel the State to finance religious education.

Plaintiffs argue that Rule 1 violates the federal and state Religion and Equal Protection Clauses. The U.S. Supreme Court, however, has repeatedly rejected arguments that states must aid religious education on an equal basis with secular education. Plaintiffs will likely rely on the Court's recent decision in *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012 (2017), but that case is inapplicable because it did not involve religious uses of public funds.

### A. States are not required to fund religious activity on an equal basis with secular activity.

The U.S. Supreme Court, federal appellate courts, and state appellate courts have repeatedly rejected arguments that government must fund religious activity if it funds comparable secular activity. *Locke v. Davey*, 540 U.S. 712 (2004), the leading case, held that a Washington State regulation prohibiting the use of state scholarships to pursue theology degrees did not violate the federal Free Exercise, Equal Protection, Free Speech, or Establishment Clauses. The Court explained that, although allowing the scholarships to be so used would not violate the Establishment Clause, "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.* at 719.

The Court noted that the scholarship applicant was not denied a benefit based on his religious beliefs or status; instead, "[t]he State ha[d] merely chosen not to fund a distinct category of instruction." *Id.* at 720–21. The Court emphasized that the limitation on funding was supported by an important, historic state interest in not financing the training of ministers or religious instruction. *Id.* at 721–23. The student's Free Exercise claim thus failed, as the state interest was "substantial" and any burden on religion was "minor." *Id.* at 725. In footnotes, the Court made clear that a religion-based challenge to a denial of funding for education cannot be successfully leveled under another clause if it does not violate the Free Exercise Clause. *See id.* at 720 n.3, 725 n.10.

*Locke*'s conclusion was far from novel. Indeed, earlier Supreme Court decisions involving primary and secondary schools rejected arguments that the Free Exercise or Equal Protection Clauses require states to provide funding for religious education if they fund public or private secular education. *See Norwood v. Harrison*, 413 U.S. 455, 462, 469 (1973); *Sloan v. Lemon*, 413 U.S. 825, 834–35 (1973); *Brusca v. State Bd. of Educ.*, 405 U.S. 1050 (1972), *aff'g mem*. 332 F. Supp. 275 (E.D. Mo. 1971).

Following *Locke*, numerous appellate courts have rejected contentions that the U.S. Constitution requires governmental bodies to provide funding for religious uses on the same terms as for secular uses. *See Bowman v. United States*, 564 F.3d 765, 772, 774 (6th Cir. 2008) (religious ministry to youth); *Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 409–10 (6th Cir. 2007) (religious programming in childcare services); *Eulitt ex rel. Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344, 353–57 (1st Cir. 2004) (religious education); *Bush*, 886 So. 2d at 343–44, 357–66 (religious education); *Anderson v. Town of Durham*, 895 A.2d 944, 958–61 (Me. 2006) (religious education).

### B. The Supreme Court's recent decision in *Trinity Lutheran* is a narrow one, restricted to denials of funding for non-religious uses.

The recent *Trinity Lutheran* decision is limited to circumstances far different from those in *Locke* and the other above-cited cases. The Court held that a state violated the Free Exercise Clause by denying a church-operated preschool—solely

because of its religious status—a grant to purchase a rubber surface for its playground. 137 S. Ct. at 2017–18, 2024–25.

The record in *Trinity Lutheran* contained no evidence that the playground was used for religious activity. *See id.* at 2017–18, 2024 n.3. The Court thus strictly limited the scope of its holding: "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 (emphasis added).[1]

Indeed, *Trinity Lutheran* reaffirmed *Locke*'s holding that "there is 'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels." *Id.* at 2019 (quoting *Locke*, 540 U.S. at 718). The *Trinity Lutheran* Court emphasized that, in the case before it, the state had "expressly den[ied] a qualified religious entity a public benefit *solely* because of its religious character." *Id.* at 2024 (emphasis added). *Locke* was different because the scholarship applicant there "was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry." *Id.* at 2023.

[1] Though this footnote was joined by only four Justices, it is controlling because it set forth narrower grounds for the judgment than did the two Justices who joined the majority opinion but not the footnote. *See Trinity Lutheran*, 137 S. Ct. at 2025–26 (concurring opinions of Thomas, J., and Gorsuch, J.); *Marks v. United States*, 430 U.S. 188, 193 (1977). In addition, Justice Breyer, who did not join any of the majority opinion, wrote a concurrence expressing views similar to those in the footnote. *See id.* at 2026–27.

Moreover, the denial of funding in *Locke* was based on a state "interest in not using taxpayer funding to pay for the training of clergy" that "lay at the historic core of the Religion Clauses." *Id.* "Nothing of the sort can be said about a program to use recycled tires to resurface playgrounds." *Id.*

### C. This case is like *Locke*, not *Trinity Lutheran*.

Rule 1 is well within the "play in the joints" affirmed in *Locke*, 540 U.S. at 718, and *Trinity Lutheran*, 137 S. Ct. at 2019. Because the funds here would go to religious uses, and because Montana has long-standing, traditional state interests in not funding religious education, *Locke*—not *Trinity Lutheran*—governs here.

#### 1. Tax-credit scholarships would be put to religious uses.

As in *Locke*, and unlike in *Trinity Lutheran*, this case involves "religious uses of funding." *Cf. Trinity Lutheran*, 137 S. Ct. at 2024 n.3. Absent Rule 1, the tax-credit scholarships will fund the "essentially religious endeavor" (*Locke*, 540 U.S. at 721) of religious education of youth.

Nothing in the tax-credit legislation itself bars use of scholarships for religious instruction or other religious activity. And religious schools in Montana require students to take religious classes that indoctrinate the students in the schools' faiths. *See* Attachment 4, column 5. The schools also integrate religious instruction into classes that teach secular subjects. *Id.*, column 7. For example, the handbook of Heritage Christian School states, "Our aim is to teach our children to

think biblically when they are studying math, science, language arts, music, history, or when exercising their bodies, thereby fulfilling Christ's command." *Id.*

What is more, religious schools in Montana inculcate particular religious beliefs through means that go beyond classroom instruction. Students are required to take part in prayers, religious services, and other religious exercises. *Id.*, column 5. Students or their parents must meet religious tests for admission, and in some cases are required to profess agreement with particular doctrines in statements of faith. *Id.*, column 6. Students who engage in conduct barred by certain religious tenets—such as sex outside marriage, same-sex relationships, terminating a pregnancy, or advocating the same—are subject to discipline, including expulsion. *Id.* Thus, absent Rule 1, tax payments due to the state will be diverted to fund not only religious instruction and indoctrination, but also religious coercion and discrimination.

**2. Rule 1 serves historic, substantial state interests.**

Similarly to the restriction in *Locke*, and unlike the one in *Trinity Lutheran*, Rule 1 serves long-standing, substantial state interests in not financing religious instruction. *Locke* explained that, from the founding of our republic, states have recognized that "religious instruction is of a different ilk" than other endeavors and have "prohibit[ed] . . . using tax funds to support the ministry." 540 U.S. at 722–23. Religious education of a religious group's youth is, of course, essential to the maintenance of the religion's ministry. *See, e.g.*, *Chambers*, 155 Mont. at 437–38,

472 P.2d at 1021. Indeed, to explain the scope of traditional "State[ ] antiestablishment interests," *Locke* looked to the "public backlash" (540 U.S. at 722 n.6) that resulted from the proposal in Virginia of *A Bill Establishing A Provision for Teachers of the Christian Religion* (1784), http://bit.ly/2ssSCRw, which called for tax funding of "learned teachers" of "Christian knowledge."

In addition to protecting the long-standing antiestablishment interest of ensuring that the tax system is not used to support religious training, Montana's No-Aid Clause was intended to protect the stability of the public schools by guaranteeing that their funding would not be diverted to religious education. *See Kaptein*, 281 Mont. at 163–64, 931 P.2d at 1318 (Nelson, J., specially concurring) ("Article X, Section 6 . . . represents the Constitutional Convention's strong and continuing belief in the necessity to maintain Montana's public school systems apart from any entanglements with private sectarian schools and to guard against the diversion of public resources to sectarian school purposes."). Yet the tax-credit program could threaten the finances of public schools by diverting, to religious indoctrination, tax revenues which could otherwise support public education. Stopping such diversion is another important state interest that was not presented in *Trinity Lutheran*, where the state attempted to justify its exclusion of the church-operated preschool with nothing other than a "policy preference for skating as far as possible from religious establishment concerns." *See* 137 S. Ct. at 2024.

Further, *Locke* noted that Washington State has "been solicitous in ensuring that its constitution is not hostile toward religion." 540 U.S. at 724 n.8. The same is true for Montana: Its constitution contains provisions that protect religious exercise, prohibit religious discrimination, and permit tax exemptions for places of worship. *See* MONT. CONST. art. II, §§ 4, 5; art. VIII, § 5(b). Thus the No-Aid Clause and its implementation through Rule 1 cannot be understood as being based in hostility toward religion. Indeed, it is not antireligious to require that decisions about the religious education and spiritual life of children be left to their families and houses of worship, without either governmental funding or intrusion. *See, e.g.*, *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 217 (1948) ("[B]oth religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.").

## CONCLUSION

The judgment of the district court should be reversed.

Dated this 21st day of November, 2017.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced (except that footnotes and quoted and indented material are single spaced); with left, right, top and bottom margins of 1 inch; and that the word count calculated by Microsoft Word does not exceed 4,730 words, excluding the Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance.

DATED this 21st day of November, 2017.

GOETZ, BALDWIN & GEDDES PC

By: /s/ James H. Goetz
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## CERTIFICATE OF SERVICE

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