IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 17-0492

KENDRA ESPINOZA, JERI ELLEN ANDERSON,
AND JAIME SCHEFER,

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 *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PLAINTIFFS AND APPELLEES

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, The Honorable Heidi J. Ulbricht, Presiding

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The Becket Fund for Religious Liberty is a non-profit, public interest legal and educational institute that protects the free expression of all faiths. Becket has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. Becket believes that because the religious impulse is natural to human beings, public and private religious expression is natural to human culture.

In accordance with this belief, Becket has long combated the use of state constitutional provisions (often referred to as "Blaine Amendments") that discriminate on their face against religious people and institutions. To that end, it has litigated as counsel cases concerning Blaine Amendments in Florida, Massachusetts, New Mexico, Oklahoma, and South Dakota. *See*, *e.g.*, *N.M. Ass'n of Non-Public Schs. v. Moses*, 137 S. Ct. 2325 (2017) (Mem.) (vacating and remanding New Mexico Supreme Court decision in light of *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017)). And Becket has acted as *amicus curiae* in Blaine Amendment appeals in the state supreme courts of Alabama, Arizona, Colorado, Florida, Georgia, Indiana, Kentucky, Massachusetts,

Nevada, New Hampshire, New Jersey, and Oklahoma, arguing in each that the state's Blaine Amendment should not be applied to discriminate against religious people.

In this case, Becket is concerned that Rule 1 is an extreme application of Montana's Blaine Amendment that discriminates on its face against religious people. Rule 1 should not be allowed to treat religious people worse than other Montanans.

Becket is also concerned that the Department's argument is that the remedy for a violation of the Free Exercise Clause is to throw out state laws that do not violate the Free Exercise Clause instead of the ones that do. That argument would wrongly stand the Supremacy Clause on its head.

ARGUMENT

The Department of Revenue has done the Court the favor of making this appeal far clearer than it might have been. In many cases, government officials try hard to hide the fact that they are discriminating on the basis of prohibited characteristics such as race, sex, or religion. Here, however, the Department freely admits that it seeks to discriminate against religious schools solely on the basis of their religious

identity. Under *Trinity Lutheran*, that violates the Free Exercise Clause. Indeed, just as in Trinity Lutheran, the government is seeking to justify a facially discriminatory policy on the basis of a 19th-century "Blaine Amendment" provision. The Department's brazenness in promulgating Rule 1 makes the case easier to decide, but makes its discrimination no less "odious" than the discrimination rejected by the United States Supreme Court in *Trinity Lutheran*. If this Court determines, contrary to the court below, that the Department was authorized under state law to promulgate Rule 1, the rule nonetheless cannot stand.

The Department makes a second argument as brazen as the first: that the Supremacy Clause should be turned on its head and used to invalidate a tax-credit program that does *not* violate the federal Constitution instead of the provision—Rule 1—that *is* invalid under the federal Constitution. That is not how the Supremacy Clause works. The Department's overbroad "remedy" would itself violate the Constitution.

I. Rule 1 violates the federal Free Exercise Clause under *Trinity Lutheran*.

Under the federal Free Exercise Clause, excluding an otherwise eligible religious organization from a public benefits program solely because of its religious status "is odious to our Constitution . . . and

cannot stand." *Trinity Lutheran*, 137 S. Ct. at 2025. Because the Department's Rule 1 proposes to do just that—exclude religious schools from the tax-credit program solely because they are religious—the rule violates the First Amendment.

A. *Trinity Lutheran* holds presumptively unconstitutional state policies that, like Rule 1, treat religious groups on worse terms than secular groups.

In *Trinity Lutheran*, a Missouri agency offered reimbursement grants to public and private schools, nonprofit daycares, and other nonprofit entities that resurfaced their playgrounds using recycled shredded tires. *Id.* at 2017. But Missouri interpreted its constitution to require it to "categorically disqualify[ ]" churches and other religious organizations from its public benefits program. *Id.* Under this interpretation of the Missouri Constitution, the agency in charge of the tire scrap program promulgated a "strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity." *Id.*

The Supreme Court held that the agency's policy violated the Free Exercise Clause. The policy, the Court explained, "expressly discriminates against otherwise eligible recipients" of funding "by

disqualifying them from a public benefit solely because of their religious character." *Id.* at 2021. Such discrimination "imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Id.*

The Court rejected the government's argument that there was no serious burden on the free exercise of religion merely because the state was denying a subsidy that it "had no obligation to provide in the first place." *Id.* at 2022-23. As the Court explained, what was constitutionally suspect about the agency's policy was not that it resulted in "the denial of a grant" but instead that it constituted a "refusal to allow" the plaintiff church—"solely because it is a church—to compete with secular organizations for a grant." *Id.* at 2022. In other words, religious organizations' eligibility for public benefits must be evaluated "on an equal footing" with secular organizations. *Id.* A different rule would impermissibly put religious organizations "to the choice between being [religious] and receiving a government benefit": "to pursue the one, [they] would have to give up the other." *Id.* at 2020, 2024.

If this Court reaches the issue of Rule 1's constitutionality, this case will be governed by *Trinity Lutheran*. Just like the Missouri agency in *Trinity Lutheran*, the Department interprets the Montana Constitution

to "categorically disqualify[]" religious organizations from receiving public benefits. *Id.* at 2017; *see also* Appellants' Br. at 1 (characterizing the Montana Constitution as including a "strict prohibition on aid to religious schools"). And just like the agency in *Trinity Lutheran*, the Department has therefore promulgated a policy in the form of Rule 1 that "expressly discriminates against" religious schools by denying them benefits to which they would otherwise be entitled under the tax-credit program. *Trinity Lutheran*, 137 S. Ct. at 2021; *see also* Appellants' Br. at 8.

But the Department cannot "refus[e] to allow" religious private schools—solely because they are religious—to compete with secular private schools for government benefits. *Trinity Lutheran*, 137 S. Ct. at 2022. Such a policy constitutes a "special disabilit[y]" based on religious private schools' "religious status," which the U.S. Supreme Court has "repeatedly confirmed" is unconstitutional. *Id.* at 2019 (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993)).

Rule 1 by its terms forces schools to choose between continuing to be religious and being eligible to participate in a public benefits program. But religious organizations are "member[s] of the community too," and

under the Free Exercise Clause, that is a choice they do not have to make. *Id.* at 2022. If this Court reaches the issue of the constitutionality of Rule 1, the rule should be subject to strict scrutiny. *Id.*

B. Rule 1 is not justified by *Locke*.

The Department does not, because it cannot, dispute that its rule "excludes religious organizations" that would otherwise be eligible under the tax-credit program. Appellants' Br. at 36 (so describing Rule 1). Nor does it mount any serious argument that permitting religious schools to participate in the tax-credit program would violate the federal Establishment Clause. *Id.* at 23-31 (conceding that Rule 1 reflects an "earlier, more separationist understanding of anti-establishment principles" than have been articulated by the modern Supreme Court). Instead, the Department invokes the Supreme Court's pre-*Trinity Lutheran* decision in *Locke v. Davey*, in which the Court recognized some "play in the joints" between "state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." 540 U.S. 712, 718-19 (2004) (citation omitted); *see also* Appellants' Br. at 36-38.

But *Locke* does not apply here, for at least two reasons. First, although in *Locke* the Court permitted a state to bar one "essentially religious" *use* of a state benefit, *Locke*, 540 U.S. at 721; *Trinity Lutheran* makes clear that *Locke* can never be used to justify discrimination based on religious *status*. *Trinity Lutheran*, 137 S. Ct. at 2023.

Second, the *Locke* Court relied on the fact that the particular use at issue in *Locke*—the religious training of clergy—was one that states have a uniquely powerful antiestablishment interest in refusing to fund, because funding for clergy training was at the founding era a "hallmark[ ] of an 'established' religion." *Locke*, 540 U.S. at 722-23. The Department has demonstrated no analogous historically-rooted antiestablishment interest here. Thus, whatever "play in the joints" remains after *Trinity Lutheran*, the First Amendment cannot be pliable enough to permit Rule 1.

1. *Locke* is irrelevant in cases of discrimination based on religious status.

Locke is simply irrelevant in cases, like this one, in which government attempts to discriminate against potential benefit recipients on the basis of their religious *status*.

In *Locke*, the Supreme Court upheld against Free Exercise challenge a state's decision not to fund the plaintiff's degree in devotional theology, even though it funded degrees in other programs like history and biology. 540 U.S. at 719-20. Critically, however, the state did not deny funding to the plaintiff because of his religious *status*—that is, because he himself was religious. *Id.* at 720-21. Instead it denied funding to him because of his planned, "essentially religious" *use* of the funds—training to become a minister—which, the Court believed, implicated the historic "antiestablishment interest[ ]" in the state not paying for clergy training. *Id.* at 721-22.

As *Trinity Lutheran* makes clear, this distinction between discrimination based on religious *status* and discrimination based on religious *use* is the key to determining whether *Locke* can possibly be relevant at all. In *Trinity Lutheran*, the state "rel[ied] on *Locke*," emphasizing its "constitutional tradition of not furnishing taxpayer money directly to churches." 137 S. Ct. at 2023. But the Court refused to apply *Locke*. Under *Locke*, the Court explained, traditional antiestablishment interests are relevant "*only after*" it is "determin[ed]" that the state is not attempting to discriminate on the basis of religious

status—that is, that it is not requiring a potential benefits recipient "to choose between their religious beliefs and receiving a government benefit." *Id.* (emphasis added, internal quotation marks omitted). If instead the state *is* discriminating on the basis of religious status—that is, its challenged rule requires potential benefits recipients to choose between their religiosity and their eligibility—then *Locke* is irrelevant, and the program is presumptively unconstitutional under the Free Exercise Clause. *Id.* at 2023-24.

Here, the Department is attempting to discriminate against religious schools simply because they are religious—that is, based on their *status* as religious schools. Indeed, the face of Rule 1 demonstrates as much. Under Rule 1, a school is rendered ineligible to participate in the tax-credit program if it is "owned or controlled in whole or in part by any church, religious sect, or denomination." Admin. R. Mont. § 42.4.802(1). In other words, schools that have the status of being "owned or controlled" by a religious organization are ineligible to participate in the program, regardless of what they *do*. *Cf. Locke*, 540 U.S. at 716 (*Locke* exclusion triggered only if student "pursue[d] a degree" in devotional theology). That is a nakedly status-based exclusion. Indeed, Rule 1's

exclusion is nearly identical to the exclusionary policy at issue in *Trinity Lutheran*—the very policy that *Trinity Lutheran* unambiguously identified as status-based. *Trinity Lutheran*, 137 S. Ct. at 2017 (policy was to deny grants "to any applicant owned or controlled by a church, sect, or other religious entity").

Aware of the problem with the religious status-based distinction drawn on the face of Rule 1, the Department offers the Court a red herring, arguing that Rule 1 is in fact based on religious use, rather than status, because "the religious beliefs of" any particular student, of the "donor claiming the tax credit, or [of] the status of the SSO making the award, are irrelevant" to determining Rule 1's applicability. Appellants' Br. at 39. This is an attempt at misdirection. Rule 1—the law challenged in this case—purports to govern the eligibility of *schools* for benefits, not students, donors, or SSOs. The question under *Trinity Lutheran* and *Locke*, then, is whether Rule 1 discriminates against the schools it disqualifies on the basis of their religious status. *See Trinity Lutheran*, 137 S. Ct. at 2021 (evaluating whether distinctions drawn by the challenged policy were based on religious status); *Locke*, 540 U.S. at 720-21. (same). And the answer is, again, clearly yes. Rule 1 by its terms turns

exclusively on whether a school is "owned or controlled in whole or in party by any church, religious sect, or denomination," Admin. R. Mont. § 42.4.802(1); and *Trinity Lutheran* clearly teaches that this is a status-based inquiry. *Trinity Lutheran*, 137 S. Ct. at 2017, 2021.

Indeed, although the *Locke* section of the Department's brief attempts to distract the Court from Rule 1's status-based exclusion of religious schools, the rest of its brief is unabashed. The Department explains that Rule 1's aim is to avoid "providing state aid to *religious institutions*." Appellants' Br. at 1 (emphasis added). It worries that, absent Rule 1, the tax-credit program would "benefit" some schools that "*are religious*." *Id.* at 24 (emphasis added). And it accurately characterizes Rule 1 as a rule that "excludes *religious organizations*" that would otherwise be eligible under the tax-credit program. *Id.* at 36 (emphasis added). These statements corroborate what is clear from the face of the rule: that the only distinction Rule 1 draws between schools that are eligible to participate in the program and those that aren't is whether the school *is* religious or not. Because that is the epitome of a status-based distinction, this case is governed by *Trinity Lutheran*, not *Locke*.

2. In any event, there is no uniquely powerful historical antiestablishment interest underlying the Rule that is comparable to *Locke*.

Even if the Department had demonstrated that Rule 1 was not a religious status-based distinction—and it has not—its attempted analogy to *Locke* would fail.

As explained above, *Locke* turned not just on the status–use distinction but on the fact that the state demonstrated that the particular use at issue there—training to become a minister—was one that governments have a uniquely substantial and historically-rooted antiestablishment interest in declining to fund. 540 U.S. at 721-22. This is so, the Court explained, because at the "founding of our country, . . . procuring taxpayer funds to support church leaders . . . was one of the hallmarks of an 'established' religion." *Id.* at 722. Collecting numerous founding-era state constitutional provisions prohibiting the use of "tax funds to support the ministry," the Court explained that it "c[ould] think of few areas in which a State's antiestablishment interest[] come more into play." *Id.* at 722-23. In light of this special historical context, the Court expressly confined the scope of its holding, emphasizing that "the

only interest at issue" in the case was "the State's interest in not funding the religious training of clergy." *Id.* at 722 n.5.

This case, however, does not involve the denial of an otherwise-available benefit for the specific purpose of clergy training. It instead involves the denial of an otherwise-available benefit for religious schools, *period*. And when a state "will pay for secular private schools but not religious private schools," it is "not refusing to pay for the training of clergy"; it "is refusing to pay for education that satisfies the state's compulsory education requirements in math, reading, and other secular subjects." Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 Harv. L. Rev. 155, 184-85 (2004). Whatever the strength of the historical reasons for refusing to fund clergy training, those reasons do not extend to a refusal to provide any benefits at all to religious schools.

And indeed, whatever "tradition" there may be of discriminating against religious schools in this way, "that tradition does not go back to the Founding and is not reflected in early state constitutions." *Id.* at 185. Instead, that tradition dates back only to the mid-19th century, when

restrictions on the provision of funds to religious schools were enacted as part of a nationwide effort to "refus[e] to fund Catholic education in private schools" at a time when "Protestant education flourished in public schools." *Id.*; *see also Zelman v. Simmons-Harris*, 536 U.S. 639, 720-21 (2002) (Breyer, J., dissenting) ("during the early years of the Republic, American schools—including the first public schools—were Protestant in character," leading Catholics to seek "equal government support for the education of their children" and Protestants to support "amend[ing] several state constitutions . . . to make certain that government would not help pay for 'sectarian' (*i.e.*, Catholic) schooling for children"). It is widely accepted that the resulting state constitutional provisions—called "Blaine Amendments," after their failed forebear at the federal level, *see, e.g.*, Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493, 502 (2003)—were "deeply rooted in historic anti-Catholicism." Laycock, *supra*, at 185; *see also Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) ("Opposition to aid to 'sectarian' schools acquired prominence in the 1870's," "at a time of pervasive hostility to the Catholic Church and to Catholics in general . . . .");. It is striking, then, that the Department

acknowledges that the provision of the Montana Constitution it says justifies Rule 1 had its origin in this Blaine Amendment tradition, rather than in the founding as required by *Locke*. Appellants' Br. at 16; *cf. Locke*, 540 U.S. at 723 n.7 (finding that the provision of the Washington Constitution relied on there was part of the relevant founding-era tradition because it *was not* a Blaine Amendment).

The Department does make one attempt to locate Rule 1 within a founding-era tradition, but the result is a *non sequitur*. The Department invokes Jefferson and Madison's opposition to Virginia's "A Bill Establishing A Provision for Teachers of the Christian Religion," as expressed in Madison's "Memorial and Remonstrance" and the Jefferson-penned "Virginia Bill for Religious Liberty," arguing that the "central concern" of "religious freedom" has always "been the prevention of state aid to religious education." Appellants' Br. at 25-26, 36). But for one thing, the Virginia law opposed by Jefferson and Madison did not propose to provide state funds to aid religious schools in providing a general education; it proposed to provide state funds to clergy so that they could "Teach[ ] the Gospel of their denomination"—the precise sort of funding of clergy training that *Locke* called a "hallmark[ ] of an 'established'

religion" at the founding. A Bill Establishing a Provision for Teachers of the Christian Religion (1784), *reprinted in Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 72-74 (1947); *Locke*, 540 U.S. at 722 & n.6. More importantly, the law proposed to provide public benefits *only* to religion. The tax-benefit program here, by contrast, provides benefits to nonreligious and religious private schools alike, on the basis of nonreligious criteria. The Department's attempt to compare the Virginia general assessment opposed by Jefferson and Madison to a religion-"neutral benefits program" like the tax-credit program "gives historical analogy a bad name." *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 297 (6th Cir. 2009).

* * *

Although it is apparently undisputed that the provision of the Montana Constitution the Department relies on to justify Rule 1 originated as a Blaine Amendment, this Court does not have to impugn the motives of the drafters and ratifiers of the Montana Constitution in order to recognize Rule 1's First Amendment problem. Instead, it need only recognize that, unlike the law at issue in *Locke*, Rule 1 discriminates on the basis of religious status, and that, in any event, the Department

has failed to show any tradition dating back to the founding of denying otherwise-available public benefits to religious schools that provide a general education. *Trinity Lutheran* makes clear that both elements are necessary to satisfy *Locke*, yet the Department has demonstrated neither. *Locke* does not apply.

C. Rule 1 does not satisfy strict scrutiny.

Because Rule 1 "den[ies] a generally available benefit solely on account of religious identity," it is subject to strict scrutiny. *Trinity Lutheran*, 137 S. Ct. at 2019. Strict scrutiny requires the government to show that its law "advance[s] 'interests of the highest order' and" is "narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546 (quoting *McDaniel v. Paty,* 435 U.S. 618, 628 (1978)). Here, Rule 1 fails at the first step, because *Trinity Lutheran* demonstrates that the only interest the Department asserts for passing Rule 1—providing prophylactic protection for the separation of church and state—is not "compelling" for purposes of strict scrutiny. *Trinity Lutheran*, 137 S. Ct. at 2024.

In *Trinity Lutheran*, Missouri attempted to justify its exclusion of religious organizations from the tire-scrap program based on its interest

"in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution." *Id.* at 2024 (quoting *Widmar v. Vincent*, 454 U.S. 263, 276 (1981)). But the Court rejected this asserted interest as non-compelling. While the state may have a "policy preference for skating as far as possible from religious establishment concerns," it "goes too far" when it pursues that policy "to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character." *Id.*

Here, although the Department fails to expressly argue that Rule 1 would survive strict scrutiny, it does identify an alleged "interest" that the government has in discriminating against religious schools—"avoid[ing] Establishment Clause claims" and vindicating Montana's supposed commitment to a notion of the "separation of church and state" that is "more separationist" than that imposed under the federal Establishment Clause. Appellants' Br. at 26-27. The trouble is, that is precisely the interest that Missouri offered in *Trinity Lutheran*. Again, in *Trinity Lutheran*, Missouri also argued that it had to discriminate against religious schools in order to respect its state constitution, which it interpreted to require "a strict and express policy of denying grants" to

religious organizations. *Trinity Lutheran*, 137 S. Ct. at 2017-18. But in *Trinity Lutheran*, the Court held that this purported "state interest" was insufficient to justify denying public benefits to a religious organization on the basis of its religion. *Id.* at 2024 (quoting *Widmar*, 454 U.S. at 276).

Because the sole interest the Department has offered in support of Rule 1 is the one the *Trinity Lutheran* Court flatly rejected, the Department has failed to show that Rule 1 is "justified . . . by a state interest of the highest order." *Id.* at 2019 (internal quotation marks omitted). Rule 1 thus fails strict scrutiny, and is unconstitutional.

II. If Rule 1 violates the federal Free Exercise Clause, the appropriate remedy is to strike down Rule 1.

Because Rule 1 disqualifies religious schools from receiving a public benefit solely because they are religious, the Rule violates the federal Free Exercise Clause under *Trinity Lutheran*. Thus, the outcome of this case should be the same as the outcome in *Trinity Lutheran*: the discriminatory state policy—here, Rule 1—"cannot stand." *Id.* at 2025.

The Department's argument to the contrary disregards *Trinity Lutheran* and misunderstands the relationship of federal and state law in our federal system. According to the Department, if this Court determines that excluding religious organizations from the tax-credit

program violates the Free Exercise Clause, then it will be in a pickle, because Article X, section 6 of the Montana Constitution *requires* this exclusion. The Department's proposed solution is for the Court to strike down not just the discriminatory Rule 1, but the entire tax-credit program. Appellants' Br. at 40-41. According to the Department, this is the proper remedy because it "compl[ies] with both" Article X, section 6 and the federal Free Exercise Clause. *Id.* at 41.

The problem with this argument is that the federal Constitution itself "instructs courts what to do when state and federal law clash": federal law (including of course the federal Constitution) controls. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015). Under the Supremacy Clause, courts "must not give effect to state laws that conflict with federal laws." *Id.* (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210 (1824)). Instead, when there is "a conflict between a law and the Constitution, judges . . . have a duty 'to adhere to the latter and disregard the former.'" *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1220 (2015) (quoting The Federalist No. 78, at 468 (A. Hamilton)). Indeed, to the extent of the conflict between an inferior law (like Rule 1 or a provision of the Montana Constitution) and the federal constitution, the inferior

law is best thought of as "not a law" at all. *Norton v. Shelby County*, 118 U.S. 425, 442 (1886); *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (a law "repugnant to the constitution . . . is void").

Here, by asking this Court to "compl[y] with" a provision of the Montana Constitution that, the Department says, requires it to discriminate against religious schools on the basis of their religious status, the Department asks this Court to do precisely what the Supremacy Clause forbids. To the extent Art. X, section 6 requires religious organizations to be denied public benefits solely because they are religious, that provision, like Rule 1, violates the federal Constitution. Thus, this Court may not give effect to Art. X, section 6 by striking down the tax-credit program. To do so would be to judicially veto a piece of the Montana Legislature's handiwork on the basis of a state constitutional provision that—again, to the extent it requires the result the Department seeks—is "void" and "not a law" at all. *Norton*, 118 U.S. at 442; *Marbury*, 5 U.S. at 177.[1]

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[1] To be sure, when a constitutional provision "simply calls for *equal treatment*," equality generally may be accomplished either "by extension or invalidation of the unequally distributed benefit or burden." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 426-27 (2010). But this is not a

And indeed, if this Court were to strike down the tax-credit program in order to give effect to Art. X, section 6, it would *itself* be committing an independent violation of the federal Free Exercise Clause. The Free Exercise Clause applies to the states through the Fourteenth Amendment, *Cantwell v. Connecticut*, 310 U.S. 296 (1940), and "the action of the States to which the [Fourteenth] Amendment has reference, includes action of state courts and state judicial officials." *Shelley v. Kraemer*, 334 U.S. 1, 18 (1948); *see also, e.g., NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463 (1958) ("It is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to

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question of "comply[ing]" with the unconstitutional exclusion, Appellants' Br. at 41; it's a question of legislative intent: the court must "attempt, within the bounds of [its] institutional competence, to implement what the legislature would have willed had it been apprised of the constitutional infirmity." *Levin,* 560 U.S. at 427; *cf. State v. Theeler*, 385 Mont. 471, 474, 385 P.3d 551, 553-44 (Mont. 2016) (question whether to sever only unconstitutional portion of a statute depends on "the apparent legislative intent" (citation and internal quotation marks omitted)), *cert. denied,* 136 S. Ct. 66 (2017). Here, that determination couldn't be easier: the legislature was actually *asked* through the Section 2-4-403 poll procedure whether it intended that religious schools be excluded from the tax-credit program, and it answered *no*. Thus, not only should the Court not discriminate against religious schools in order to comply with Art. X, section 6; it should not strike down the program as a way of rectifying the unequal treatment, either.

scrutinize."). Thus, this Court can no more deny religious organizations eligibility for public benefits solely on the basis of their religion than the Department can.

Yet the relief the Department seeks would require this Court to do just that. If this Court, having determined that Rule 1 violates the Free Exercise Clause, nonetheless gives effect to its exclusion of religious organizations from the tax-credit program by striking the program down altogether, then it will be denying religious schools a public benefit to which they would otherwise be entitled under Montana law, solely on the basis of their being religious. That is a violation of *Trinity Lutheran*, whether it is accomplished by Rule 1, article X of the Montana Constitution, or an order of this Court.

CONCLUSION

Even if this Court determines that the Department was authorized to enact Rule 1 under state law, the decision below should still be affirmed, because Rule 1 violates the federal Constitution.

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Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Mont. R. App. P. 11(4) because the brief is double spaced (except that footnotes are single spaced); it is in a proportionately spaced, 14-point Century Schoolbook font; and it contains 4,870 words, excluding the parts of the brief excluded by Rule 11.

Dated: January 19, 2018.

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