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COLORADO SUPREME COURT
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COLORADO COURT OF APPEALS
Judges Jones, Graham, and Bernard
Appeals Court Case No. 11CA1856 and 11CA1857

Appeal from District Court, Denver County, Colorado
District Court Judge Michael A. Martinez
Case No. 2011CV4424 *consolidated with* 2011CV4427

^ COURT USE ONLY ^

Case Number:
13 SC 233

Petitioners: JAMES LARUE; SUZANNE T. LARUE; INTERFAITH ALLIANCE OF COLORADO; RABBI JOEL R. SCHWARTZMAN; REV. MALCOLM HIMSCHOOT; KEVIN LEUNG; CHRISTIAN MOREAU; MARITZA CARRERA; SUSAN MCMAHON

and

Petitioners: TAXPAYERS FOR PUBLIC EDUCATION, a Colorado non-profit corporation; CINDRA S. BARNARD, an individual; and MASON S. BARNARD, a minor child.

vs.

Respondents: DOUGLAS COUNTY SCHOOL DISTRICT and DOUGLAS COUNTY BOARD OF EDUCATION,

and

Respondents: COLORADO STATE BOARD OF EDUCATION AND COLORADO DEPARTMENT OF EDUCATION, **and** **Intervenors-Respondents:** FLORENCE AND DERRICK DOYLE, on their own behalf and as next friends of their children, ALEXANDRA and DONOVAN; DIANA AND MARK OAKLEY, on their own behalf and as next friends of their child NATHANIEL; and JEANETTE STROHM-ANDERSON and MARK ANDERSON, on their own behalf and as next friends of their child, MAX, **Attorneys for Amicus Curiae:** Scott W. Johnson, CO Bar No. 12830 SPARKS WILLSON BORGES BRANDT & JOHNSON P.C. 24 S. Weber Street, Suite 400 Colorado Springs, CO 80903 Telephone: 719.634.5700; Fax: 719.633.8477 Email: swj@sparkswillson.com. Diana M. Verm, VA Bar No. 79168 Luke W. Goodrich, DC Bar No. 977736 THE BECKET FUND FOR RELIGIOUS LIBERTY 3000 K Street NW, Suite 220 Washington, D.C. 20007 Telephone: 202.955.0095; Fax: 202.955.0090 Email: dverm@becketfund.org; lgoodrich@becketfund.org.	
BRIEF FOR *AMICUS CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY SUPPORTING RESPONDENTS	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The Brief complies with C.A.R. 28(g).

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s/ Scott W. Johnson
Scott W. Johnson

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SUMMARY OF THE ARGUMENT

Beginning in the mid-1800s, our nation experienced a shameful era of anti-Catholic and anti-immigrant bigotry. A homogenous Protestant majority, suspicious of a growing Catholic minority, gave birth to a movement that sought to suppress Catholics and immigrants through the political process. This movement—decried at the time by Abraham Lincoln and in modern times by the U.S. Supreme Court—unleashed religious discrimination at war with both founding-era and present-day understandings of religious liberty. Sadly, its legacy persists to this day in the form of "Blaine Amendments," provisions adopted in numerous state constitutions in the late 1800s and early 1900s that were designed to suppress Catholic schools in favor of Protestant-dominated public schools. Today, Blaine Amendments often stand as the last available weapon for attacking democratically-enacted, religion-neutral government aid programs.

That is precisely the role they play in this case. At least two sections of the Colorado Constitution—sections 7 of Article IX—bear the unmistakable hallmarks of a Blaine Amendment. In striking down the Choice Scholarship Program, the district court used those provisions to bar the participation of students in certain religious schools because they are "sectarian." The court of appeals rightly held that

such an inquiry violates the federal Establishment Clause, and interpreted the Blaine Amendments so as to avoid this inquiry.

The claim that the Choice Scholarship Program funds "sectarian" purposes is simply a modern spin on the same discrimination that birthed the Blaine Amendments. A state law originally designed to harm one group does not shed its unconstitutionality by harming different groups today. *See*, *e.g.*, *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (holding that a discriminatory provision violates equal protection, even if the groups discriminated against today differ from the original targets). Use of the Colorado Blaine provisions to strike down the Choice Scholarship Program would conflict with the Equal Protection, Free Exercise, and Establishment Clauses of the U.S. Constitution. Under the principle of constitutional avoidance, this Court should interpret sections 7 and 8 of Article IX to avoid violating the United States Constitution—which means that the Choice Scholarship Program must be upheld.

ARGUMENT

I. The Colorado Blaine Amendments are tainted by anti-Catholic animus.

The Petitioners attempt to invoke at least two provisions of the Colorado Constitution that single out "sectarian" doctrines or institutions for disfavor. Article IX section 7 prohibits government from making any appropriation "in aid of any

church or *sectarian* society, or for any *sectarian* purpose," or to help support any institution "controlled by any church or *sectarian* denomination whatsoever." (emphasis added). Article IX section 8 prohibits the teaching of any "*sectarian* tenets or doctrines" in public schools. (emphasis added).[1]

Unfortunately, as the Supreme Court has recognized, laws like these have a "shameful pedigree" rooted in "pervasive hostility to the Catholic Church and to Catholics in general." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality). Anti-Catholic hostility arose in the mid-1800s, as a wave of Catholic immigrants threatened the longstanding Protestant dominance of the public schools and other social institutions. This hostility prompted a failed attempt by then-Senator James G. Blaine in 1875 to amend the federal constitution to prohibit any state funding of "sectarian" schools. And it gave rise to a wave of "anti-sectarian" funding provisions in state constitutions across the country, including in Colorado. *See generally*, *e.g.*,

[1] This brief focuses on Article IX sections 7 and 8 because they bear the particular hallmarks of a Blaine Amendment—namely, discriminatory intent and discriminatory text—as defendants' expert Professor Charles Glenn explained. *See* Tr. 704:15-705:1 (Article IX, section 7), Tr. 705:2-20 (Article IX, section 8). Professor Glenn identified two additional provisions that may also have been tainted by anti-Catholicism. *See* Tr. 706:3-12 (Article V, section 34 has the same intention as a Blaine Amendment); Tr. 708:3-9 (same as to Article IX, section 3). As such, reliance on those provisions creates the same constitutional problems as reliance on Article IX, sections 7 and 8.

Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657 (1998).

These "state Blaine Amendments" were a reactionary attempt to protect the dominant religious culture of mainstream Protestantism by ensuring both that public schools would teach their brand of Christianity, and that private Catholic schools—branded as "sectarian"—would not receive state funding.

As explained below, abundant evidence demonstrates that Sections 7 and 8 of Article IX are quintessential Blaine Amendments driven specifically by anti-Catholic animus.

A. The Colorado Blaine Amendments were enacted when anti-Catholic animus was sweeping the United States.

The basic history of Blaine Amendments and their basis in anti-Catholic bigotry is largely undisputed. It has been outlined in U.S. Supreme Court opinions written or joined by seven recent or current justices.

In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), three dissenting Justices detailed the history of Blaine Amendments at length. *See id.* at 720-21 (dissenting opinion of Breyer, J., joined by Stevens and Souter, JJ.). Their historical account was not disputed by the majority.

As they explained, "during the early years of the Republic, American schools—including the first public schools—were Protestant in character. Their students

recited Protestant prayers, read the King James version of the Bible, and learned Protestant religious ideals." *Id.* at 720 (citing David Tyack, Onward Christian Soldiers: Religion in the American Common School, *in History and Education* 217-226 (P. Nash ed. 1970)). But in the mid-1800s, a wave of immigration brought significant religious strife. Catholics "began to resist the Protestant domination of the public schools," and "religious conflict over matters such as Bible reading 'grew intense,' as Catholics resisted and Protestants fought back to preserve their domination." *Id.* (citing John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 300 (2001)). "In some States 'Catholic students suffered beatings or expulsions for refusing to read from the Protestant Bible, and crowds . . . rioted over whether Catholic children could be released from the classroom during Bible reading.'" *Id.* at 720-21 (citing Jeffries & Ryan, 100 Mich. L. Rev., at 300).

Finding that they were unwelcome in public schools, "Catholics sought equal government support for the education of their children in the form of aid for private Catholic schools." *Id.* at 721. Protestants insisted in response "that public schools must be 'nonsectarian' (which was usually understood to allow Bible reading and other Protestant observances)." *Id.* And they insisted that "public money must not support 'sectarian' schools (which in practical terms meant Catholic.)" *Id.* (citing

Jeffries & Ryan 100 Mich. L. Rev., at 301). As the Protestant position gained political power, it gave rise to "a movement that sought to amend several state constitutions (often successfully), and to amend the United States Constitution (unsuccessfully) to make certain that government would not help pay for 'sectarian' (*i.e.*, Catholic) schooling for children." *Id.* (citing Jeffries & Ryan, 100 Mich. L. Rev., at 301-305).

In *Mitchell v. Helms*, a four-Justice plurality similarly acknowledged and condemned the religious animosity that gave rise to state Blaine Amendments. 530 U.S. at 828-29 (plurality op. of Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.). As the Court explained, "Consideration of the [federal Blaine] 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.'" *Id.* at 828. The plurality concluded that "the exclusion of pervasively sectarian schools from otherwise permissible aid programs"—the very purpose and effect of the state constitutional provisions here—represented a "doctrine, born of bigotry, [that] should be buried now." *Id.* at 829.

B. The Colorado Blaine Amendments were driven by local, specific, and thoroughly-documented anti-Catholic animus.

The same anti-Catholic bigotry drove the Colorado Blaine Amendments—as documented by abundant historical evidence from Colorado's constitutional

convention. This evidence was summarized in the trial court by the Defendants' expert witness, Professor Charles Glenn. Tr. 647 to 741. The Petitioners planned to put forward their own expert, but withdrew him during trial. Tr. 743:15 to 744:4.

First, as a textual matter, Article IX sections 7 and 8 possess the key language of a Blaine Amendment: they target the "sectarian," instead of the "religious" generally, for exclusion from government funding programs. Though "sectarian" is not the only word in the Blaine Amendments used to restrict funds for religious entities, it accomplishes much more than the prohibition on funding for simply "churches," and much less than a prohibition on funding for any religious entity. In other words, the Blaine Amendments accomplish their anti-Catholic purposes by prohibiting funding for any "sectarian society," "sectarian purpose," or "sectarian denomination," and by prohibiting "sectarian tenets or doctrines" in public schools.

Second, the historical background of Article IX sections 7 and 8 shows that they were driven by anti-Catholic animus. The Colorado Constitutional Convention was assembled in December 1875, the same month that President Grant called upon Congress to adopt a federal amendment banning public funding for "sectarian" schools. Tr. 670:23 to 671:5. The national Blaine movement was known in Colorado through newspapers and the telegraph. Tr. 671:6–13. Some even worried, during the

convention, that Congress would not admit Colorado as a state unless it adopted Blaine-style language in its constitution. Tr. 691:6–20.

The convention was plagued with religious animosity—and specifically anti-Catholic sentiment—which was widespread in the territory. One Colorado newspaper editorialized, "[I]s it not enough that Rome dominates in Mexico and all South America?" Donald W. Hensel, *Religion and the Writing of the Colorado Constitution*, 30 Church History No. 3, 349, 354 (Sept. 1961) (quoting Boulder County News, Jan. 21, 1876). Shortly before the popular vote on ratification of the proposed Colorado Constitution, which included Article IX sections 7 and 8, "[a] Protestant minister [stated that] the people could feel right in 'voting up a constitution which the Pope of Rome . . . [had] ordered voted down." *Id*. at 356 (quoting Boulder County News, May 12, 1876) (edits in original).

These public expressions of animus were mirrored at the constitutional convention itself, which included at most three Catholic delegates out of thirty-nine (8%), though Catholics then composed 25% of the state's population. Tr. 671:17–21. The convention was held in a lodge of the Odd Fellows, a secret society that did not admit Catholics. *Proceedings of the Constitutional Convention: Colorado 1875-1876* 15 (1907) ("*Proceedings*"). Controversial issues were drawn along religious lines, and the Protestants prevailed on all of them. For example, the convention

decided to tax church-owned property, but not property used for religious purposes, precisely because "most Protestant churches did not own much income-producing property as did the Catholic Church." Dale A. Oesterle and Richard B. Collins, *The Colorado State Constitution: A Reference Guide* 7 (2002).

The Blaine Amendments in particular drew competing petitions from Catholic and Protestant leaders. The Catholic bishop of Denver, Joseph Machebeuf, twice petitioned the convention against adopting the Amendments, calling them a "great injustice." *Proceedings* at 235. Referencing the broader national animosity towards Catholics, Machebeuf reproved the convention for allowing "[p]rejudice [to stand] for argument," *id.* at 330, and begged them to look past their religious differences: "But we look forward hopefully to the future. A day shall at last dawn—surely it shall—when the passions of this hour will have subsided . . . and political and religious equality shall again seem the heritage of the American citizen." *Id.* at 331 (emphasis added). Until that day, however, he insisted that "[w]e shall feel bound in conscience, both as Catholics and American citizens, to oppose any Constitution which shall show such contempt of our most valued rights, both political and religious." *Id.* at 235.

Protestants responded to the Bishop's plea with their own petition: "Resolved, First, that we urge upon our Constitutional Convention . . . the necessity of

preserving our present school system against any attempts to divide the school fund for ***sectarian*** purposes ***or to expel the Bible***, our only text book of morality and heart culture." *Id.* at 87 (emphasis added).

Even the ex-Governor of Colorado, John Evans, petitioned the convention on behalf of eleven Protestant churches asking for guarantees that the common school be "kept free from sectarian influences," that school funds not be shared, and that the Bible be allowed in schools. *Id*. at 113. In private letters, Evans characterized the proceedings at the convention as follows: "It seems much like the Know Nothing movement—the Republicans are going into secret societies against the Catholics . . . . But I keep my hand covered while I stir them up." Letter from John Evans to Margaret Evans (Jan. 9, 1876), quoted in Hensel, *Religion and the Writing of the Colorado Constitution*, 30 Church History No. 3, at 352 (emphasis added). Thus, even the Protestant ex-Governor privately admitted to "stirring up" hostility against Catholics.

Ratification of the constitution, no less than its drafting, reflected religious discord and anti-Catholic sentiment. Three days after the convention approved a draft constitution, an editorial in the *Rocky Mountain News* predicted of the Blaine Amendments that "far more protestants can be got to vote for the constitution on account of this very clause than Catholics for the same reasons to vote against it."

Exhibit MM, pg. 1; Tr. 688:17 to 690:8. Ex-Governor Evans was even more candid: "Only one thing may save [the constitution], the Catholics are going to oppose it because it prohibits a division of the School fund. If they come out on that issue it will rally Protestants for it and carry it." Letter from John Evans to Margaret Evans (Mar. 13, 1876), *quoted in* Donald W. Hensel, *A History of the Colorado Constitution in the Nineteenth Century* 224–25 (1957) (unpublished manuscript) (Pet.'s Ex. 149).

In sum, as Dr. Hensel has documented, with deep support from primary sources, the constitutional convention was pervaded by "religious animosity," culminating in bans on funding "parochial schools" and "sectarian" teaching. *Id.* at 197-98. These were the *only* two issues on which the "convention refused to compromise contending factions. The Protestant majority saw to that." Hensel, *Religion and the Writing of the Colorado Constitution*, 30 Church History No. 3, at 356. While Hensel suggested in 1961 that "Coloradans had to pay an initial price of animosity to avoid later and more corrosive bitterness," *id*., Bishop Machebeuf may have proved more prescient in 1876: Colorado's Blaine Amendments are still causing division and religious discrimination today.

C. The Colorado Blaine Amendments were interpreted and applied to discriminate in favor of generic Protestantism and against Catholicism.

In keeping with this history, the practical effect of the Colorado Blaine Amendments has been to discriminate in favor of generic Protestantism and against Catholicism. And that is precisely how they were interpreted by Colorado courts.

When the Colorado Blaine Amendments were first adopted, Colorado public schools were unabashedly Protestant. They used the Protestant-leaning McGuffey Reader, with its "copious extracts made from the Sacred Scriptures." William H. McGuffey, *The Eclectic Third Reader*, orig. preface, reprinted by Mott Media, Inc. (1982 ed.). They required daily reading of the King James Bible; they required daily Protestant prayer; and they forbade "sectarian" (*i.e.*, Catholic) translations of the Bible. *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, 286-7 (Colo. 1927) (overruled by *Conrad v. City and Cnty. of Denver*, 656 P.2d 662 (Colo. 1982)). Funding for Catholic schools, which were virtually the only private schools at the time, was obviously forbidden. Tr. 710:7-8. The end result—which was the goal of the Blaine movement across the country—was Protestant-dominated public schools, and no funding for Catholic schools. Notably, the State of Colorado itself has admitted in litigation that Article IX section 7 was motivated by anti-Catholic animus. *See* State Defendants' Cross Motion for Partial Summary Judgment, p. 31 n.18 in *Colo.*

Congress of Parents, Teachers and Students v. Owens, No. 03-cv-3734 (Dist. Ct., Denv. City and Cnty.) (filed Nov. 10, 2003).

This discriminatory intent is exactly what the Colorado courts have interpreted the Blaine Amendments to require. The first case interpreting the Blaine Amendments was *Vollmar*, 81 Colo. at 290. There, Catholic parents complained that their children "conscientiously believe in the doctrines and worship of the Roman Catholic Church, which teaches that the King James translation is in part incorrect," and thus objected to the reading of the King James Bible in public schools as "sectarian instruction." *Vollmar*, 81 Colo. at 280. In response, the Colorado Supreme Court held that the teaching of common Christianity (*i.e.*, Protestantism) was not "sectarian," and was therefore allowed, even if the vehicle used for the teaching was exclusive use of the Protestant Bible. It pointed out first that the drafters of the Blaine Amendment did not understand the reading of the Bible to be "the teaching of a sectarian tenet or doctrine," *id*. at 289, and second, that to equate the word "sectarian" with the word "religious" would "push it to its logical limit, and say that believers are a sect, and that, in deference to atheists no reference to God may be made." *Id.* at 290. In short: "***Religious and sectarian are not synonymous***." *Id.* (emphasis added) (citation omitted).

In case there was any doubt that the word "sectarian" did not encompass common Christian teaching in the minds of Colorado's founders, the Court added: "'If the Legislature or the Constitutional Convention had intended that the Bible should be proscribed, they would simply have said so. . . . It is not conceivable that, if it had been intended to exclude the Bible from the public schools, that purpose would have been obscured within a ***controversial word***'"—namely, "the word 'sectarian.'" *Id.* at 292-293 (quoting *Hackett v. Brooksville Graded Sch. Dist.*, 120 Ky. 608, 618 (Ky. Ct. App. 1905)) (emphasis added).

Nor is *Vollmar*'s interpretation of the Colorado Blaine Amendments an outlier. In *Americans United for Separation of Church & State Fund, Inc. v. State*, 648 P.2d 1072, 1083 (Colo. 1982), this Court reaffirmed *Vollmar*'s interpretation of the term "sectarian": "Sectarian meant, to the members of the (constitutional) convention and to the electors who voted for and against the constitution, 'pertaining to some one of the various religious sects', and the purpose of section 7 was to forestall public support of institutions controlled by such sects." *Id.* (quoting *Vollmar*, 81 Colo. at 287). Similarly, a federal district court agreed in 2007 that "Colorado does not consider other types of aid to religious institutions to violate Article IX, § 7 of its constitution . . . ." *Colo. Christian Univ. v. Baker*, 2007 WL 1489801 (D. Colo. 2007) *rev'd and remanded sub nom. Colo. Christian Univ. v. Weaver*, 534 F.3d 1245 (10th

Cir. 2008); *but see Conrad*, 656 P.2d at 670 n.6 (noting that the U.S. Supreme Court had struck down Bible reading in public schools as a violation of the federal Establishment Clause, and therefore overruling *Vollmar* "to the extent that it is inconsistent with the Establishment Clause").

D. Attempts to downplay the history of the Colorado Blaine Amendments are unconvincing.

The Petitioners and the dissent below have attempted to downplay the history of the Colorado Blaine Amendments in several ways. But their arguments are unconvincing.

First, the dissent attempts to minimize the focus on the anti-Catholic animus behind the Blaine Amendments, suggesting that they might also have been motivated by the need to find a political solution to a "larger controversy over the responsibility and role of government in public education." *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, 2013 COA 20 at ¶ 180. But this argument is doubly flawed. First, it ignores the great weight of the historical record. Even the dissent admits that "it is undeniable that anti-Catholic prejudice existed in Colorado at the time," and that there was conflict "between Catholics and Protestants." *Id.* at ¶ 209. Given that admission, the idea that the Blaine Amendments were simply a political "compromise" in a time when the Republican Party "needed an issue" is dubious, *Id.* at ¶ 174—particularly in the face of evidence that they were not a "compromise"

at all; rather, they were a complete victory for the Protestants, and they were expressly used to whip up anti-Catholic sentiment. *See* Tr. 690: 2-8 (Blaine amendments were a way to get Protestant votes); Viteritti, 21 Harv. J.L. & Pub. Pol'y at 670-71 (Blaine "fully appreciated the wide political appeal of the nativist and anti-Catholic rhetoric that accompanied" his campaign for a federal Blaine Amendment).

Second, even assuming that the blatant, anti-Catholic animus was accompanied by other self-serving motives, that does not cure the constitutional defect. The same was true in *Hunter v. Underwood*, which involved a state constitutional provision that disenfranchised both black voters and poor white voters, in an attempt to "stem the resurgence of Populism which threatened [the Democrats'] power." 471 U.S. at 230. Although the amendment had both racist and political motives, the Supreme Court struck it down as a violation of the Equal Protection Clause.

Next, the dissent argues that the Catholics brought the anti-Catholic animus on themselves, noting that some historians fault Bishop Machebeuf for "open[ing] the door to anti-Catholic fulminations." *Taxpayers*, ¶ 190. The dissent also suggests that Bishop Machebeuf was motivated not only by a "sincere . . . commitment to opposing anti-Catholic bigotry," but also by the monetary gains the church stood to receive from the public lands available for schools. *Id.* at ¶ 192. But imagine a modern court saying that the victims of the racist law in *Hunter* "brought it on

themselves" by arguing for equal voting rights or equal economic opportunity. *Cf.* 471 U.S. 222. It is inconceivable. And it is no more appropriate here. The Bishop's remarks may have brought anti-Catholic animus vehemently to the surface. But it is still illegitimate, anti-Catholic animus.

Third, the dissent suggests that Colorado was not the first state to adopt a Blaine provision, so it might have gotten the idea from one of the other seventeen states with similar prior provisions. But mere speculation about the possible source of the Colorado provision cannot overcome the detailed, documented evidence of *why* the convention adopted the provisions. Whatever the motives of other states, the overwhelming record evidence from the Colorado Constitutional Convention shows that Colorado's amendments were driven by anti-Catholic animus. Even if those similar provisions were enacted "before the controversy over the Blaine Amendment erupted," neither the federal nor the Colorado Blaine Amendments came out of nowhere. *Taxpayers*, ¶ 199. The anti-Catholic Know-Nothing movement has its roots in the *1850s*; it had plenty of time to spread to Colorado (and beyond) by the mid-1870s, and it obviously did. *See* Michael F. Holt, *The Politics of Impatience: The Origins of Know Nothingism*, 60 J. Am. Hist. 309 (1973).

Fourth, the dissent cites one rally by Catholics in favor of ratifying the Constitution, suggesting that it negated the discriminatory intent behind the Blaine

Amendments. *Taxpayers*, ¶ 216. But that is a *non sequitur*. Not only does the record below fail to reflect the political impetus behind the rally, but the fact that some Catholics supported the Constitution as a whole says nothing about the purpose of the Blaine Amendments.

Fifth, the dissent said that it is difficult to discern the intent of a constitutional amendment without knowing the words or intent of those who enacted it. *Taxpayers*, ¶ 205. That, however, was exactly the case in *Hunter*, where the Supreme Court found it sufficiently damning for the constitutional amendment that it was part of a "movement that swept the post-Reconstruction South to disenfranchise blacks." 471 U.S. at 228-229; *see infra* Part II(A).

In contrast with the dissent, the Petitioners try to ignore the religious disputes behind the Blaine Amendments entirely. They suggest that the Amendments had the benign purpose of "prevent[ing] any use of public funding to support religious schools and . . . prohibit[ing] any religious instruction in schools aided by the State. Pet. Br. at 48-50. But that argument is even more far-fetched than the dissent. It flies in the face of the great weight of primary sources and scholarship, all of which confirm the anti-Catholic purpose and effect of the Blaine Amendments. Much of this evidence was presented at trial, and Petitioners did not even attempt to rebut it; rather, they withdrew the only historical expert they had prepared. Nor does their

argument address the fact that the two opposing sides of the issue were a religious majority and minority, and that the "solution" was to exclude Catholic schools from public funding and Catholic influence from public schools, all while mandating Protestant Bible reading and allowing the Protestant majority to dictate the definition of "nonsectarian" in public schools. *See supra* Part I(A).

Ultimately, the dissent and the Petitioners would have this Court sweep the deplorable history of the Blaine Amendments under the rug, and give full effect to constitutional provisions that were clearly motivated by anti-Catholic animus. But that history cannot be ignored. And it raises serious problems under the federal Constitution.

II. Reliance on the Colorado Blaine Amendments to strike down the Choice Scholarship Program creates severe conflicts with the U.S. Constitution.

In light of the anti-Catholic animus that birthed the Colorado Blaine Amendments, the doctrine of constitutional avoidance strongly counsels this Court to avoid using those provisions to strike down the Choice Scholarship Program. This Court has consistently construed Colorado laws to avoid state and federal constitutional questions. "Statutes should be interpreted whenever possible to avoid a construction that might contravene constitutional standards." *Forbes v. Poudre Sch. Dist. R-1*, 791 P.2d 675, 680 (Colo. 1990) (en banc) (avoiding conflict with due process clauses of the Colorado and United States Constitutions); *see also, e.g.*, *Pine*

Martin Mining Co. v. Empire Zinc Co., 90 Colo. 529, 537 (Colo. 1932) ("Where practicable, state Constitutions and statutes should be so construed as to avoid conflict with the federal Constitution.").

Sections 7 and 8 run afoul of the U.S. Constitution in at least three ways: they violate the Equal Protection Clause, the Establishment Clause, and the Free Exercise Clause. The hostility shown towards Catholics in the enactment of the Blaine Amendments implicates the Equal Protection Clause and violates the neutrality standard of the Free Exercise Clause, and the provisions' discriminatory treatment of religious groups violates the Equal Protection Clause and the Establishment Clause.

A. The Colorado Blaine Amendments violate the Equal Protection Clause.

The Equal Protection Clause of the 14th Amendment subjects laws to strict scrutiny if they interfere with a fundamental right or discriminate against a suspect class. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). Not only is religion a suspect class, *see United States v. Batchelder*, 442 U.S. 114, 125 n.9 (1979) ("The Equal Protection Clause prohibits selective enforcement 'based on an unjustifiable standard such as race, religion, or other arbitrary classification.'"); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1322 n.10 (10th Cir. 2010) ("Religion is a suspect classification"), but religious rights are fundamental. *See, e.g.*, *Johnson v.*

Robison, 415 U.S. 361, 375 n.14 (1974) ("Unquestionably, the free exercise of religion is a fundamental constitutional right."); *Niemotko v. State of Md.*, 340 U.S. 268, 272 (1951) (Equal Protection Clause bars government decision based on a "City Council's dislike for or disagreement with the [Jehovah's] Witnesses or their views"). Because they openly discriminate between Catholics and Protestants, and against religious groups generally, Blaine Amendments violate the Equal Protection Clause.

Just as vestigial Jim Crow laws may not be relied on to prohibit political speech and enable discrimination, Colorado may not rely on constitutional provisions enacted out of religious animus in order to discriminate among religious believers today. In *Hunter v. Underwood*, for example, the United States Supreme Court considered a facially neutral state constitutional provision. 471 U.S. at 232-33. The Court held that even without a showing of specific purpose of individual lawmakers, it could rely on the undisputed historical backdrop of the law—in particular, the fact that "the Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks." *Id.* at 228-229. Thus "where both impermissible racial motivation and racially discriminatory impact are demonstrated" the state constitutional provision violated the Equal Protection Clause. *Id* at 232.

Similarly, Colorado's Blaine Amendment was very much "part of a movement that swept the [United States] to [discriminate against Catholics.]" *See supra* Part I. Nor is it any defense to argue that there is no discriminatory intent towards Catholics today. As *Hunter* explained, "[w]ithout deciding whether [the challenged section of the Alabama constitution] would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate . . . *and the section continues to this day to have that effect*. As such, it violates equal protection . . . ." 471 U.S. at 233 (emphasis added). As in *Hunter*, the original enactment of sections 7 and 8 was motivated by a desire to discriminate against Catholics, and today has a discriminatory effect on all religious schools.

B. The Colorado Blaine Amendments violate the Free Exercise Clause.

The Petitioners' interpretation of sections 7 and 8 also creates serious conflicts with the federal Free Exercise Clause. A law burdening religious groups generally does not violate the Free Exercise Clause if it is neutral and generally applicable. *Employment Div. v. Smith*, 494 U.S. 872, 880 (1990). But if the law is "not neutral or not of general application," it is subject to strict scrutiny. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

Sections 7 and 8 are neither "neutral" nor "generally applicable" because, as explained in detail above, their original purpose was to target Catholic institutions. Laws that are "enacted 'because of,' not merely 'in spite of,' their suppression of" religious groups are subject to strict scrutiny. *Id.* at 540 (internal quotation marks omitted). Just as the Amendments violate the Equal Protection Clause by treating religious organizations unequally, they violate the Free Exercise Clause by singling out those minorities for disfavor. *Id.* at 534 ("The Free Exercise Clause protects against governmental hostility which is masked, as well as overt"); *see also Locke v. Davey*, 540 U.S. 712, 724 (2004) (ban on state funding of devotional theology studies allowed because prohibition was "[f]ar from evincing [] hostility toward religion"). The history of the Blaine Amendments presented here shows that the Colorado provisions were enacted with vivid animus towards minority religious faiths. Thus, they are neither neutral nor generally applicable under *Smith* and *Lukumi*, and must be subject to strict scrutiny.

C. The Colorado Blaine Amendments violate the Establishment Clause.

The effect of discriminating among religious groups—*i.e.*, those considered "sectarian" and those considered "non-sectarian"—also violates the Establishment Clause. "[N]o State can pass laws which aid one religion or that prefer one religion over another." *Larson v. Valente*, 456 U.S. 228, 246 (1982) (citation omitted).

Indeed, "neutral treatment of religions [is] '[t]he clearest command of the Establishment Clause.'" *Weaver*, 534 F.3d at 1257 (citing *Larson*, 456 U.S. at 244).

In *Weaver*, the Tenth Circuit applied this principle to find that the "'pervasively' sectarian" standard was unconstitutional, because it "exclude[d] some but not all religious institutions . . . ." *Id.* at 1258. Similarly, in *Larson*, the Supreme Court struck down a state law that imposed registration and reporting requirements upon only those religious organizations that solicited more than fifty per cent of their funds from nonmembers. According to the Court, these requirements impermissibly distinguished between "well-established churches," which had strong support from their members, and "churches which are new and lacking in a constituency," which had to rely on solicitation from nonmembers. *Larson*, 456 U.S. at 247 n.23; *see also Lukumi*, 508 U.S. at 536 ("differential treatment of two religions" might be "an independent constitutional violation."). That sort of impermissible discrimination among religious organizations was exactly what the Blaine Amendments were designed to do, and they continue to have that effect. That is a direct violation of the Establishment Clause.

The Petitioners' interpretation of the Colorado Blaine Amendments would also require this Court to violate the Establishment Clause by "entangling itself" in religious questions. *Weaver*, 534 F.3d at 1263. Originally, the term sectarian referred

to any religion outside of mainstream Protestantism, requiring courts to judge, based on the conduct of funds recipients, whether their religious practices met the standard. Today, even with the term's broader (albeit still pejorative) meaning, it still requires that the government determine just how religious the organization is. "It is well established . . . that courts should refrain from trolling through a person's or institution's religious beliefs." *Weaver*, 534 F.3d at 1261. Here, Petitioners suggest that courts should inquire into whether a school is "controlled" by a religious institution by reviewing admission policies, mandatory worship attendance, and curricula, Pet. Br. 64, the very factors decried as intrusive in *Weaver*. 534 F.3d at 1259, 1265.[2] Notably, the court of appeals in this case rebuked the district court for doing that very thing: "[T]he district court said that it would not 'analyze the religiousness of a particular institution.' . . . But the court proceeded to do precisely that." *Taxpayers*, ¶ 68 n.15. The Establishment Clause does not permit courts to determine whether an organization is too "sectarian."

[2] Allowing the government to determine whether a school is "controlled" by a religious organization also violates the First Amendment by giving the government power to make "individualized exemptions" depending on the particular religious practices of the institution or individual. See *Lukumi*, 508 U.S. at 537. Such a law is subject to strict scrutiny because it "creates the opportunity for a facially neutral and generally applicable standard to be applied in practice in a way that discriminates against religiously motivated conduct." *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004).

D. The Colorado Blaine Amendments cannot withstand strict scrutiny.

If they violate any one of these clauses, the Blaine Amendments must be subjected to strict scrutiny, which requires that a law must have a compelling governmental interest, and must be narrowly tailored to pursue that interest. *Lukumi*, 508 U.S. at 546; *see also Weaver*, 534 F.3d at 1266 (laws involving religious discrimination are subject to strict scrutiny, but laws involving excessive entanglement are "unconstitutional without further inquiry"). But there can be no compelling interest in withholding federal funding from minority religious groups. Blaine Amendments were neither designed to implement benign concerns for the separation of church and state nor are they traceable to founding-era understandings of the First Amendment.

The court of appeals correctly rejected the district court's attempt to rely on *Locke* to uphold the Blaine Amendments. The district court cited *Locke* for the proposition that "the Free Exercise [C]lause *does not* require a state to fund theology students." D. Ct. Order at 34-35. Yet *Locke* cannot provide the state with a compelling interest to enforce the Colorado Blaine Amendment against Petitioners for three reasons. First, *Locke* held that "[t]he State's interest in not funding the pursuit of devotional degrees is substantial"—not compelling. *Locke*, 540 U.S. at 725. Second, *Locke* involved a narrow ban on funding for the training of ministers; its logic "does not extend to the wholesale exclusion of religious institutions and their students from

otherwise neutral and generally available government support." *Weaver*, 534 F.3d at 1255. Third, *Locke* did not involve "discrimination among religions." *Id.* at 1256. Colorado's Blaine Amendments, by contrast, are discriminatory in nature and effect, rooted in impermissible animus against religious minorities. There is no compelling interest in discriminating on the basis of religion, either among or against religious groups.

CONCLUSION

The Court of Appeals was correct to avoid the constitutional issues that would arise as a result of applying the Colorado Blaine Amendments. Its decision should be affirmed.

Respectfully submitted,

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ADDENDUM

Colorado Constitution art. IX, section 3

§ 3. School fund inviolate

The public school fund of the state shall, except as provided in this article IX, forever remain inviolate and intact and the interest and other income thereon, only, shall be expended in the maintenance of the schools of the state, and shall be distributed amongst the several counties and school districts of the state, in such manner as may be prescribed by law. No part of this fund, principal, interest, or other income shall ever be transferred to any other fund, or used or appropriated, except as provided in this article IX. The state treasurer shall be the custodian of this fund, and the same shall be securely and profitably invested as may be by law directed. The state shall supply all losses thereof that may in any manner occur. In order to assist public schools in the state in providing necessary buildings, land, and equipment, the general assembly may adopt laws establishing the terms and conditions upon which the state treasurer may (1) invest the fund in bonds of school districts, (2) use all or any portion of the fund or the interest or other income thereon to guaranty bonds issued by school districts, or (3) make loans to school districts. Distributions of interest and other income for the benefit of public schools provided for in this article IX shall be in addition to and not a substitute for other moneys appropriated by the general assembly for such purposes.

Colorado Constitution art. IX, section 7

§ 7. Aid to private schools, churches, sectarian purpose, forbidden

Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever 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; nor shall any grant or donation of land, money or other personal property, ever be made by the state, or any such public corporation to any church, or for any sectarian purpose.

Colorado Constitution art. IX, section 8

§ 8. Religious test and race discrimination forbidden--sectarian tenets

No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as a teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatsoever. No sectarian tenets or doctrines shall ever be taught in the public school, nor shall any distinction or classification of pupils be made on account of race or color, nor shall any pupil be assigned or transported to any public educational institution for the purpose of achieving racial balance.

Colorado Constitution art. V, section 34

§ 34. Appropriations to private institutions forbidden

No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association.