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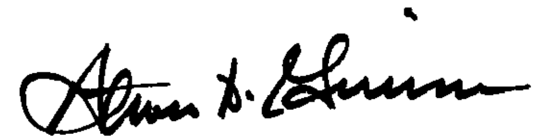

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DISTRICT COURT

CLARK COUNTY, NEVADA

RUBY DUNCAN, an individual; RABBI MEL HECHT, an individual; HOWARD WATTS III, an individual; LEORA OLIVAS, an individual; ADAM BERGER, an individual,
Plaintiffs,

v.

STATE OF NEVADA EX REL, THE OFFICE OF THE STATE TREASURER OF NEVADA AND THE NEVADA DEPARTMENT OF EDUCATION; DAN SCHWARTZ, NEVADA STATE TREASURER, in his official capacity; STEVE CANAVERO, INTERIM SUPERINTENDENT OF PUBLIC INSTRUCTION, in his official capacity,
Defendants.

CASE NO. A-15-723703-C

DEPT. NO. XXIX

MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE

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This Motion to appear as Amicus is made and based upon the following Points and Authorities, the papers and pleadings on file, and any hearing this Court may entertain at the time of this matter.

DATED this 26th day of October 2015.

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NOTICE OF MOTION

TO: ALL PARTIES AND THEIR RESPECTIVE COUNSEL

PLEASE TAKE NOTICE that the undersigned will bring the foregoing Motion to appear as Amicus for hearing in Department XXIX of the above-entitled Court, on the 2 day of December, 2015 at 8:30 a.m., or as soon thereafter as counsel may be heard.

DATED this 26th day of October 2015.

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POINTS AND AUTHORITIES

This case challenges Nevada's "Educational Savings Account Program" ("ESA Program") based on two provisions of Nevada's constitution that invoke a notorious history of anti-Catholic discrimination. The Becket Fund for Religious Liberty respectfully suggests that this Court would be well served to allow the Becket Fund to appear as amicus curiae and inform the Court about the historical and legal implications of adopting the interpretation of the law the plaintiffs suggest.[1] The Becket Fund's proposed amicus brief is attached to this motion.

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions and the equal participation of religious people in public life and benefits. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. The Becket Fund litigates in support of religious liberty in state and federal courts throughout the United States as both primary counsel and *amicus curiae*. The Becket Fund has recently obtained landmark religious accommodation victories in the U.S. Supreme Court in *Holt v. Hobbs*, 135 S. Ct. 2751 (2015) (involving a Muslim prisoner seeking accommodation of a religiously-mandated beard) and *Burwell v. Hobby Lobby*, 135 S. Ct. 853 (2014) (involving religious objections to the Department of Health & Human Services' contraception mandate).

Because it supports rights to equal participation for religious organizations, the Becket Fund has participated for many years in litigation challenging the nineteenth century state

[1] Amici informed counsel of record for the parties of this motion. Defendants consent to the motion. Plaintiffs refused to grant consent.

constitutional provisions that single out religious people and institutions for special disfavor, some of which are considered Blaine Amendments. These state constitutional amendments arose during a shameful period when our national history that was tarnished by anti-Catholic and anti-immigrant sentiment. They expressed and implemented that sentiment by excluding all government aid from disfavored faiths (mainly Catholicism), while allowing those same funds to support a "common" faith, a faith that is fairly described as a lowest common denominator Protestantism. The Becket Fund resolutely opposes the application of these state constitutional provisions to citizens today.

To that end, the Becket Fund has filed amicus briefs in states across the country and in the Supreme Court to document in detail the history of these state constitutional provisions and to protect the rights of children and their parents to be free from religion-based exclusion from government educational benefits.

The Becket Fund trusts that the Proposed Brief of Amicus Curiae attached hereto as Exhibit A, as well as the Becket Fund's special expertise in this area of the law, will provide the Court a historical perspective to aid it in the resolution of this case.

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CERTIFICATE OF SERVICE

The undersigned does certify that on the 26th day of October 2015, the foregoing motion was served by way of the Eighth Judicial District's Wiznet online E-File & Serve Program on the following:

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EXHIBIT A

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DISTRICT COURT
CLARK COUNTY, NEVADA

RUBY DUNCAN, an individual; RABBI MEL HECHT, an individual; HOWARD WATTS III, an individual; LEORA OLIVAS, an individual; ADAM BERGER, an individual,
Plaintiffs,

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STATE OF NEVADA EX REL, THE OFFICE OF THE STATE TREASURER OF NEVADA AND THE NEVADA DEPARTMENT OF EDUCATION; DAN SCHWARTZ, NEVADA STATE TREASURER, in his official capacity; STEVE CANAVERO, INTERIM SUPERINTENDENT OF PUBLIC INSTRUCTION, in his official capacity,
Defendants.

CASE NO. A-15-723703-C

Dept. No. 29

PROPOSED BRIEF OF AMICUS CURIAE THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION AND FAILURE TO STATE A CLAIM

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SUMMARY

Beginning in the mid-1800s, our nation experienced a shameful era of anti-Catholic and anti-immigrant bigotry. A homogenous 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 school choice programs.

That is precisely their role in this case. Both Nevada constitutional provisions which Plaintiffs rely upon contain the anti-Catholic characteristics of a Blaine Amendment. To claim that the Education Savings Account Program (ESA 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 additional groups today. Use of the Nevada Blaine Amendment or the Common Schools provision to strike down the ESA Program would conflict with the Free Exercise, Establishment, and Equal Protection Clauses of the U.S. Constitution. It would also violate Nevada's Ordinance and Enabling Act. Under the principle of constitutional avoidance, this Court should interpret sections 2 and 10 of Article

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11 to avoid violating the Nevada or United States Constitution—which means the ESA Program must be upheld.

ARGUMENT

I. In order to avoid conflict with the United States Constitution, Nevada's Blaine Amendment and the Common Schools provision should be interpreted to uphold the ESA Program.

In seeking to invalidate the ESA Program, the Plaintiffs seek to resurrect long-dormant provisions of the Nevada Constitution. But their interpretation of these provisions would conflict with federal constitutional provisions that prohibit laws rooted in discrimination against religious minorities.

The doctrine of constitutional avoidance must be applied in interpreting the Common Schools provision and the Blaine Amendment. In Mangarella v. State, 117 Nev. 130, 134-35, 17 P.3d 989, 992 (2001), the Nevada Supreme Court held that "[w]henever possible," Nevada courts "must interpret statutes so as to avoid conflicts with the federal or state constitutions." Id. Amicus does not address here the different possible interpretations of the ESA Program under the Blaine Amendment and the Common Schools provision, but it is clear that an interpretation of the Nevada Constitution that would invalidate the ESA Program raises grave federal constitutional questions for two reasons: the Blaine Amendment and the Common Schools provision raise the specter of anti-Catholic animus that has been forbidden by the United States Constitution, and invalidating the ESA Program would result directly in discriminatory treatment of Catholics and other religious believers today.

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A. The no-aid provision is a Blaine Amendment enacted as a direct result of anti-Catholic animus.

Article 2, Section 10 was adopted as an amendment to the Nevada Constitution in 1880. Modeled after a failed amendment attempted for the federal Constitution, it states "No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose." Nev. Const. art. II, § 10. 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, 120 S. Ct. 2530, 2551 (2000) (plurality). That history means that modern attempts to enforce these provisions in a discriminatory manner will conflict with the federal constitution.

Anti-Catholic hostility arose in the mid-1800s as a wave of Catholic immigrants threatened the longstanding Protestant dominance of public schools and other social institutions. This hostility prompted an attempt by then-Speaker of the House James G. Blaine to amend the federal constitution to prohibit any state funding of "sectarian" schools. Though the federal Blaine Amendment was narrowly defeated in the Senate, its momentum carried forward a wave of "anti-sectarian" funding provisions in state constitutions across the country. Many states adopted their own Blaine Amendments, including Nevada. See generally, 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 a certain brand of Christianity, and that private Catholic schools—branded as "sectarian"—would not receive state funding.

The basic history of the Blaine Amendments and their basis in anti-Catholic bigotry is well documented and widely accepted. See Defendants' Mot. to Dismiss at 16-20. Indeed, the Supreme Court has addressed that history in at least two opinions. First, in Zelman v. Simmons-Harris, three dissenting Justices detailed the history of the Blaine Amendments at length. 536 U.S. 639, 720-21, 122 S. Ct. 2460, 2503-04 (2002) (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, 122 S. Ct. at 2503 (citing David Tyack, Onward Christian Soldiers: Religion in the American Common School, in History and Education 217 (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)). 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, 122 S. Ct. at 2504. 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

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practical terms meant Catholic.)" Id. (citing Jeffries & Ryan, 100 Mich. L. Rev. at 301). The idea for the failed Blaine Amendment came as the Protestant position gained political power, with the goal "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 301-05).

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, 120 S. Ct. 2551-52 (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, 120 S. Ct. at 2551. 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, 120 S. Ct. at 2552.

In 1877, during Nevada's first legislative session following the failed federal Blaine Amendment, the Nevada legislature passed a "little Blaine Amendment," which was later adopted by the popular vote in a general election. Historical evidence—as presented by the Defendants—shows that the same anti-Catholic bigotry that drove Speaker Blaine's unsuccessful federal amendment also drove Nevada's Blaine Amendment. Then-Professor Bybee and David Newton published an extensive account of the introduction of the Blaine Amendment in Nevada that lays out the evidence of the anti-Catholic sentiment behind it. Jay S. Bybee & David W. Newton, *Of Orphans and Vouchers: Nevada's "Little Blaine*

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Amendment" and the Future of Religious Participation in Public Programs, 2 Nev. L.J. 551, 561-65 (2002). As they explain, the primary motivation for Nevada's Blaine Amendment was to oppose an orphanage in Virginia City run by the Catholic Sisters of Charity that served local children, particularly those who lost parents to the mines in Storey County. Id. at 561. For several years leading up to the Blaine Amendment, the state legislature contributed funds to support the Orphanage. Id. at 562-64. This support was controversial because of the orphanage's Catholicism. Id. One state representative called a bill supporting the orphanage "the first step toward uniting Church and State." Id. at 563 (internal quotations omitted). Eventually, over objections to the Catholic orphanage, the state appropriated funds to establish its own orphanage, and in the meantime continued to pass controversial bills to support the Sisters of Charity orphanage. Id. at 565. The back-and-forth over whether the state could fund the orphanage had grown so contentious that in 1873, Sister Frederica, the head of the Sisters of Charity, requested the funding bill be withdrawn as a means of avoiding further anti-Catholic sentiment. "[O]f late, a hostile feeling has risen against [the orphans]. If we are not entitled to the appropriation in justice, we do not look for it in charity." Id. at 565 (internal quotations omitted).

Once the Blaine Amendment was passed, the Nevada Daily Tribune celebrated the provision for the effect it would have on Catholics in public life: "[T]his is a stepping stone to the final breaking up of a power that has long cursed the world, and that is obtaining too much of a foothold in these United States." Id. at 566. The Tribune turned out to be at least partially correct about the effect of the Blaine: it meant the downfall of the Sisters of Charity and their orphanage. After the Blaine was passed, the state treasurer refused to release state

funds to the Orphanage. The Orphanage sought a writ of mandamus from the Nevada Supreme Court, and lost. In State ex rel. Nevada Orphan Asylum v. Hallock, the Nevada Supreme Court reasoned that the Blaine Amendment was meant to go farther than the Common Schools provision, which was intended "to keep all sectarian instruction from the schools." 16 Nev. 373, 379 (1882). Indeed, as the orphanage was, "with one exception," "the only applicant for state aid, where the question of sectarianism could have been raised," and the Court was "strongly impressed with the idea that, in the minds of the people, the use of public funds for the benefit of [the orphanage] and kindred institutions, was an evil which ought to be remedied[.]" Id. at 380, 383. The orphanage closed in 1897. Bybee & Newton, 2 Nev. L.J. at 570. As Bybee and Newton have documented with broad support from primary sources, the Blaine Amendment was supported by religious animosity towards Catholics, and the Virginia City Catholic orphanage in particular.

B. The Common Schools provision is tainted by anti-Catholic animus.

Plaintiffs' "Common Schools" claim under Article 11, Section 2 suffers from the same anti-Catholic taint that plagues the Blaine Amendment. Though it was in place before the federal Blaine Amendment was enacted, it contains all the relevant characteristics of a Blaine Amendment and is—like the Blaine Amendment—an anti-Catholic provision. First, it was passed during a time of sweeping anti-Catholic sentiment and with an intent to remove Catholic influence on public schools, and second, it prohibits "sectarian" influences on schools while leaving unharmed "generic" religious practices in public schools.

At the time of Nevada's constitutional convention, Nevada was not immune from the notorious anti-Catholic and anti-immigrant sentiment that was sweeping the nation. "The

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movement to adopt 'Little Blaine Amendments' actually predated [the] call for a constitutional amendment." Bybee & Newton, 2 Nev. L.J. at 570. In 1864, Irish Catholic immigrants had settled in Nevada mining towns and begun establishing institutions. James S. Olson, Pioneer Catholicism in Eastern and Southern Nevada, 1864-1931, 26 Nev. Hist. Soc'y Q. 159, 163 (1983). Conflict was already brewing between Catholic immigrants and the rest of the population by the time of the constitutional convention. See id.

The record of the debates from the constitutional convention is evidence that the Common Schools provision was intended to keep Catholic influence out of the public schools. The convention was plagued with anti-Catholic sentiment. Delegates to the constitutional convention explicitly discussed Catholics as a sectarian influence and wondered if Section 2 could be read to prevent Catholic schools from existing even outside the public school system. "Will the Chairman of the committee explain a little . . . ? Does that mean they have no right to maintain Catholic schools, for example?" Official Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada 568 (1866) (statement of Mr. Warwick).

Delegate Lockwood, hardly bothering to disguise his disgust for Catholics, said "I have seen persons so bigoted in their religious faith—as, for example, the Roman Catholics, although I do not mean to mention them invidiously—that they would claim that all the public schools were sectarian, and rather allow their children to grow up in ignorance than attend them." Id. at 572 (Statement of Mr. Lockwood). Delegate Collins made it clear that he was worried about Catholic encroachment: "I also hope, most sincerely, that we shall provide in our Constitution for keeping out of our schools sectarian instruction. It will require

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strong influences to exclude such instruction, and money is the great motor." Id. at 577 (Statement of Mr. Collins).

At the end of their deliberations, the Common Schools provision that the delegates adopted possessed the key language of a Blaine Amendment: it prohibits "sectarian" activities while allowing "non-sectarian" religious activities to continue, thereby prohibiting Catholic influence in public schools but allowing Protestant influenced traditions to remain. That reality played out in Nevada schools after the constitution was ratified and after the Blaine Amendment was passed. This policy was reflected by the Superintendent of public education in 1877, noting that though the law "prohibit[s] sectarianism," it did not object to "the reading of the Bible." Defendants' Exhibit 2 at 22. Indeed, the Pacific Coast Speller, the textbook used in Nevada public schools, contained numerous Bible verses and theological statements, instructing children in Protestant Christianity. See, e.g., Defendants' Exhibit 3 at 87 ("The way of the transgressor is hard."); id. at 90 ("Purify your heart of all evil thoughts. No true Christian can be entirely hopeless."); id. at 92 ("If ye fulfill the law according to the Scriptures, 'Thou shalt love they neighbor as thyself,' ye do well."). Thus the Common Schools provision accomplished its goal of shoring up Protestant-dominated public schools and prohibiting funding for similar Catholic schools. Because the Common Schools provision contains the key characteristics of a Blaine Amendment, enforcing it in the discriminatory manner the Plaintiffs propose would cause the same constitutional problems that the Blaine Amendment raises.

In light of the anti-Catholic animus that birthed the Nevada Blaine Amendment and the Common Schools provision, the doctrine of constitutional avoidance strongly counsels this

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Court to avoid using those provisions to strike down the Education Savings Account program. Nevada courts construe state laws to avoid state and federal constitutional questions. Mangarella, 117 Nev. at 134-35, 17 P.3d at 992. The Blaine Amendment and the Common Schools provision run afoul of the federal Constitution in at least three ways: they violate the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause. First, the provisions' discriminatory treatment of religious groups—particularly under the Plaintiffs' preferred interpretation—violates the federal Establishment and Equal Protection Clauses. Second, the hostility shown towards Catholics in the enactment of the Blaine Amendment and the Common Schools provision implicates the Equal Protection Clause and violates the neutrality standard of the Free Exercise Clause.

C. Invalidating the ESA Program would create conflict with the Free Exercise Clause.

The Nevada Blaine Amendment and the Common Schools provision—particularly under the Plaintiffs' proposed interpretation—create serious conflicts with the federal Free Exercise Clause, and would run directly counter to decisions of the United States Supreme Court, other state supreme courts, and the federal courts of appeals. When laws impacting religion are "not neutral or not of general application," they are subject to strict scrutiny. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546, 113 S. Ct. 2217, 2233 (1993).

The Nevada Blaine and the Common Schools provision are neither "neutral" nor "generally applicable" because, as explained in detail above, their original purpose was to target Catholic institutions. They cannot be neutral because "the minimum requirement of neutrality is that a law not discriminate on its face." Lukumi, 508 U.S. at 533, 113 S. Ct. at

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2227. But, as described above and recognized by the Supreme Court, the laws ban aid to "sectarian" institutions, a pejorative term that was code for "Catholic." The history of these provisions confirms that interpretation. See supra Parts I.A. & I.B. In this respect, the Blaine Amendment and the Common Schools provision are even more troubling than the ordinance in Lukumi, which was passed with the object of suppressing Santería, but was neutral on its face. Id. at 534-35, 113 S. Ct. at 2227-28.

In addition to the problem of facial neutrality, the Blaine Amendment and the Common Schools provision also violate the Free Exercise Clause because they created a "'religious gerrymander,' an impermissible attempt to target petitioners and their religious practices." Id. at 535 (quoting *Walz v. Tax Comm'n of* the City of New York, 397 U.S. 664, 696, 90 S. Ct. 1409, 1425 (1970) (Harlan, J., concurring)). Specifically, they targeted Catholic religious institutions, but left Protestant religious exercises in the public schools undisturbed. See supra at 9. Plaintiffs would have that gerrymander persist today, in a slightly different form. Under their reading of the Blaine Amendment and the Common Schools provision, Nevada's ESA Program would stand or fall based upon the "sectarian" nature of private schools deemed "too religious." See Compl. ¶¶ 35-81 (objecting to religious content of particular private schools).

That is precisely the sort of distinction prohibited by the Free Exercise Clause. The Tenth Circuit struck down this type of distinction in Colorado Christian Univ. v. Weaver, 534 F.3d 1245 (10th Cir. 2008). There, a state scholarship program permitted students to use the funds at religious schools, but excluded schools deemed "pervasively sectarian." Id. at 1250. That distinction violated both the Free Exercise and Establishment Clauses because it

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"discriminates among religions." Id. A decision striking down the ESA Program because some funds went to schools deemed "too religious" would likewise conflict with the Free Exercise Clause.

This would be true even if the distinction was not based upon animus against particular religious groups. The Third Circuit recently held that Plaintiffs could state a Free Exercise claim based on the discriminatory impact of the government's surveillance of Muslims. Hassan v. City of New York, --- F.3d ---, 2015 WL 5933354, *22 (3d Cir. Oct. 13, 2015). That surveillance, according to Plaintiffs, was based upon their religion, without any further evidence of wrongdoing. Id. Even without proving animus, "[t]he indignity of being singled out [by a government] for special burdens on the basis of one's religious calling" constitutes an injury for First Amendment purposes. Id. at *6. In this case, even were one to take Plaintiffs' tendentious allegations about "public funds" as true, the rule they propose would be flatly unconstitutional. Rather than choosing which religious groups to surveil based on their degree of religiosity, courts would sit in judgment on the question of whether a school is "too religious" a place for parents to choose to spend supposed "public funds," thus impermissibly ranking religious groups by the level of their religiosity.[1]

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[1] Plaintiffs have argued publicly that some religious institutions are immune from the Blaine Amendment, while others are too religious to participate in this sort of program. This is an arbitrary distinction. See Neal Morton, State Seeks Dismissal of Lawsuit Against Education Savings Accounts, Las Vegas Review-Journal, Oct. 19, 2015, available at http://www.reviewjournal.com/education/state-seeks-dismissal-lawsuit-against-education-savings-accounts-0 ("'Using Medicaid at a hospital that happens to be religiously affiliated is completely different. They're not providing indoctrination with their medicine,' she said, noting many religious schools require prayer and scripture study.") (quoting counsel for

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Nor could the constitutional conflict be resolved by interpreting the Blaine and the Common Schools provision to exclude all religiously-affiliated institutions from receiving ESA funds. That interpretation would far exceed the scope of permissible action under the First Amendment. Again in Weaver, the Tenth Circuit explicitly emphasized that, while the state might choose not to fund devotional theology degrees, that narrow limitation "does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available" programs. Weaver, 534 F.3d at 1255 (citing Locke v. Davey, 540 U.S. 712, 725, 124 S. Ct. 1307, 1315 (2004)). A ruling that no religiously-affiliated institution could participate in the program—even through the independent private choices of parents directing their own accounts—would have sweeping ramifications, rendering religious individuals and institutions second-class citizens, and accomplishing a different "religious gerrymander" within the state. Lukumi, 508 U.S. at 534, 133 S. Ct. at 2227; see also Locke, 540 U.S. at 724, 124 S. Ct. at 1314 (laws "evincing . . . hostility toward religion" are impermissible). For all these reasons, if the Blaine Amendment is construed to strike down the ESA Program, then the Blaine Amendment must face strict scrutiny under the federal constitution.

Under Lukumi, the Blaine Amendment must therefore be subject to strict scrutiny, which requires that a law must have a compelling governmental interest and must be narrowly

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Plaintiffs). But this ignores that religious hospitals often employ chaplains and provide spiritual care for their patients. See, e.g., Dignity Health, https://www.dignityhealth.org/las-vegas/patients-and-visitors/spiritual-care (last visited Oct. 26, 2015). This illustrates the difficulty and sweeping impact of a decision limiting the ESA Program to schools deemed religious, but not too religious.

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tailored to pursue that interest. Lukumi, 508 U.S. at 546, 113 S. Ct. at 2233; 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 prohibiting Nevada parents from using their ESA accounts at schools run by disfavored religious groups. Since the United States Supreme Court has upheld programs with even less private choice than the ESA Program, see Zelman, 536 U.S. 639, 122 S. Ct. 2460, it is unlikely to find that Nevada has a "compelling" interest in prohibiting parents from using their accounts at religious institutions.[2]

D. Invalidating the ESA Program would create conflict with 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, 102 S. Ct. 1673, 1684 (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, 102 S. Ct. at 1683).

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

[2] Locke v. Davey is not to the contrary. Locke expressly held that "[t]he State's interest in not funding the pursuit of devotional degrees" was only "substantial"—not compelling. Locke, 540 U.S. at 725, 124 S. Ct. at 1315.

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law that imposed registration and reporting requirements upon only those religious organizations that solicited more than fifty percent 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 246, 102 S. Ct. at 1684 n.23; see also Lukumi, 508 U.S. at 536, 113 S. Ct. at 2228 ("differential treatment of two religions" might be "an independent constitutional violation.").

In Spencer v. World Vision, Inc., the Ninth Circuit considered whether a religious ministry run as a nonprofit organization could claim the "religious employer" exemption from Title VII even though it was not technically a church. The court agreed that it could, explaining that "discrimination between institutions on the basis of the pervasiveness or intensity of their religious beliefs" would be "constitutionally impermissible." 633 F.3d 723, 729 (9th Cir. 2010) (O'Scannlain, J., concurring in the judgment) (internal quotation marks omitted); see also Univ. of Great Falls v. N.L.R.B., 278 F.3d 1335, 1342 (D.C. Cir. 2002) ("[A]n exemption solely for 'pervasively sectarian' schools would itself raise First Amendment concerns—discriminating between kinds of religious schools."). 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 Plaintiffs' preferred interpretation of the Nevada Blaine Amendment and the Common Schools provision would also require this Court to issue an opinion in conflict with

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the Establishment Clause by "entangling itself" in religious questions. Weaver, 534 F.3d at 1263. Plaintiffs ask that the government determine whether religious schools have "sectarian missions and goals," and let the ESA Program stand or fall on that basis. See Compl. ¶¶ 6, 35-81. But "[i]t is well established . . . that courts should refrain from trolling through a person's or institution's religious beliefs." Weaver, 534 F.3d at 1261; see also Spencer, 633 F.3d at 731 (the "very act" of determining "what does or does not have religious meaning" violates Establishment Clause). Here, the Plaintiffs suggest that courts should engage in entangling inquiries such as the schools' relationships with religious institutions, whether their courses tend to indoctrinate or proselytize students, whether they require participation in "worship," and the beliefs and religious practices of students and faculty, see Compl. ¶¶ 39-81, 90, the very factors decried as intrusive and entangling in Weaver. 534 F.3d at 1261-66. The Establishment Clause does not permit courts to determine whether an organization is too "sectarian."

E. Invalidating the ESA Program would create conflict with 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, 105 S. Ct. 3249, 3254 (1985). Not only is religion a suspect class, see United States v. Batchelder, 442 U.S. 114, 125, 99 S. Ct. 2198, 2205 n.9 (1979) ("The Equal Protection Clause prohibits selective enforcement 'based upon 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.

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361, 375, 94 S. Ct. 1160, 1169 n.14 (1974) ("Unquestionably, the free exercise of religion is a fundamental constitutional right."); Niemotko v. State of Md., 340 U.S. 268, 272, 71 S. Ct. 325, 328 (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, Nevada 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. 222, 232-33, 105 S. Ct. 1916, 1922-23 (1985). 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 228-29, 105 S. Ct. at 1920. Thus, "where both impermissible racial motivation and racially discriminatory impact [were] demonstrated" the state constitutional provision violated the Equal Protection Clause. Id at 232, 105 S. Ct. at 1922.

Similarly, Nevada's Blaine Amendment and its Common Schools provision were very much "part of a movement that swept the [United States] to [discriminate against Catholics.]" See supra Parts I.A & I.B. 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

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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, 105 S. Ct. at 1922 (emphasis added). As in Hunter, the original enactment of the Blaine Amendment and the Common Schools provision was motivated by a desire to discriminate against Catholics, and today has a discriminatory effect on Catholic religious schools, as well as those of other faiths.

II. Invalidating the ESA Program would create conflict with both the Nevada Constitution's Ordinance and its Enabling Act.

Plaintiffs' interpretation of the Blaine Amendment would also require a violation of both the state's Ordinance and its Enabling Act. The terms of the Ordinance state that the terms of the Ordinance cannot be altered "without the consent of the United States and the people of the State of Nevada." Nev. Const. Ordinance. Yet Plaintiffs' interpretation of the Blaine Amendment and the Common Schools provision would do just that—work an amendment of the terms of the Nevada Constitution. Since the other terms of the Nevada Constitution cannot be construed to amend or to conflict with the Ordinance, any such interpretation must be invalid.

The Ordinance of the Nevada Constitution states: "That perfect toleration of religious sentiment shall be secured, and no inhabitant of said state shall ever be molested, in person or property, on account of his or her mode of religious worship." Nev. Const. Ordinance. This language is required by Nevada's Enabling Act. As a condition of Nevada's statehood, Congress required the state to hold a constitutional convention. Nevada Enabling Act of 1864, Pub. L. 38-30, § 3, 13 Stat. 30, 31 (1864). That convention would both ratify the

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constitution of the United States and create a state constitution for Nevada. Id. The text of the Ordinance was one of only three provisions that Congress required the state to include, and the Enabling Act and Ordinance cannot be altered without the consent of both the people of Nevada and the United States. Id. Thus, the Ordinance trumps later constitutional amendments. Cf. Gladden Farms, Inc. v. State, 129 Ariz. 516, 518, 633 P.2d 325, 327 (1981) ("The Enabling Act is one of the fundamental laws of the State of Arizona and is superior to the Constitution of the State of Arizona, in that neither the Arizona Constitution nor laws enacted pursuant thereto may be in conflict.").

The Plaintiffs' interpretation of the Blaine Amendment would result in a violation of the Ordinance and Enabling Act in two ways. First, the Plaintiffs' claims conflict with the "perfect toleration of religious sentiment," since they single out institutions deemed "too religious" to participate in the ESA Program on the basis of their ownership, teaching, or employment criteria. This would impermissibly discriminate among religions in a manner inconsistent with the "perfect toleration" mandated by the Ordinance. Second, Plaintiffs' claims conflict with the requirement that "no inhabitant . . . shall ever be molested in . . . property, on account of his or her mode of religious worship." If the ESA Program is interpreted to prohibit citizens from using their funds at schools deemed too 'sectarian,' then they will be deprived of the full enjoyment of property on account of their decision to attend a religious school of their choosing. Thus, the Blaine Amendment must be interpreted in a way that does not create distinctions between acceptable religious schools and unacceptable, "sectarian" schools.

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Moreover, for the reasons stated above, the Blaine Amendment, since it was an amendment to the original constitution, would be void ab initio if its real meaning was to enshrine anti-Catholic and anti-religious discrimination in the Nevada Constitution, in square violation of the Ordinance.

CONCLUSION

The Court should dismiss the Plaintiffs' complaint.

DATED this 26th day of October 2015.

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CERTIFICATE OF SERVICE

The undersigned does certify that on the 26th Day of October 2015, the foregoing Amicus Brief was served by way of the Eighth Judicial District's Wiznet online E-File & Serve Program on the following:

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