IN THE SUPREME COURT
OF THE STATE OF GEORGIA

RAYMOND GADDY, *et al.*,

Appellants,

v.

GEORGIA DEPARTMENT OF REVENUE, *et al.*,

Appellees,

and

RUTH GARCIA, *et al.*

Intervenor-Appellees.

NO. S17A0177

Brief of *Amicus Curiae* the Becket Fund for Religious Liberty in Support of Appellees

Lori H. Windham
Admitted Pro Hac Vice
D.C. Bar No. 501838
Diana M. Verm
Admitted Pro Hac Vice
D.C. Bar No. 1811222
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1200 New Hampshire Ave., N.W.
Suite 700
Washington, D.C. 20036
(202) 955-0095
lwindham@becketfund.org
Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authorities

INTEREST OF *AMICUS CURIAE*

The Becket Fund for Religious Liberty is a nonpartisan, public-interest law firm dedicated to protecting the free expression of all religious traditions and the equal participation of religious people and institutions in public life. It has long worked to educate courts about the religious biases inherent in state Blaine amendments, which had their genesis in anti-Catholic bigotry of the mid-19th Century. Becket seeks to correct the historical revisionism that would erase this shameful chapter in our nation's history.

Becket has filed three *amicus* briefs in the United States Supreme Court, detailing the history of Blaine amendments,[1] and numerous briefs in state courts—as both primary counsel and *amicus curiae*—seeking to protect the rights of individuals to be free from religion-based exclusion from educational benefits.[2] Becket has also litigated many Blaine cases as primary counsel. Earlier this year, Becket won a long-running Blaine case in Florida, securing a ruling that Florida's Blaine Amendment

[1] *See Mitchell v. Helms*, 530 U.S. 793 (2000); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Locke v. Davey*, 540 U.S. 712 (2004).

[2] *See, e.g.*, *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013); *Schwartz v. Lopez*, 382 P.3d 886 (Nev. 2016); *Magee v. Boyd*, 175 So. 3d 79 (Ala. 2015).

did not bar neutral, nondiscriminatory government contracts with religious groups providing social services.[3]

Becket trusts that this brief, as well as Becket's special expertise in this area of the law, will aid the Court in the resolution of this appeal.

SUMMARY OF THE ARGUMENT

Appellants' challenge to the tax credit program relies in part on an archaic provision of the Georgia Constitution, a "Blaine Amendment" that was enacted during a time of anti-Catholic animus and which disfavored Catholic schools. That history is not negated simply because the Blaine Amendment could be used to disfavor *all* religious schools today. Appellants' preferred application of the Blaine Amendment would violate the U.S. Constitution in multiple ways.

The Court has many reasons to uphold the tax credit program, and it should not credit an extreme interpretation of a discriminatory constitutional provision that would itself create additional constitutional problems. The tax credit program should be upheld, and Georgia's Constitution should be interpreted to ensure free religious exercise and the equal protection of all faiths.

[3] Final Judgment, *Center for Inquiry v. Jones*, No. 2007-CA-1358 (Fla. Cir. Ct. Jan. 20, 2016) (summary judgment issued), http://www.becketfund.org/wp-content/uploads/2016/01/CFI-v-Jones-for-Web.compressed.pdf.

ARGUMENT AND CITATION OF AUTHORITY

By dismissing the Plaintiffs-Appellants' challenge to the tax credit scholarship program, the Superior Court rightly avoided relying on a provision of the Georgia Constitution that was adopted as part of a movement of anti-Catholic bigotry that spread through the United States in the mid-to-late nineteenth century.

I. The text and history of the Georgia Blaine Amendment manifest its anti-Catholic animus.

A. The U.S. Supreme Court has consistently concluded that the term "sectarian" is animated by anti-Catholic nativism.

The basic history of Blaine Amendments and their basis in anti-Catholic bigotry is largely undisputed. "No aid" provisions like Georgia's article 1, section 2, paragraph VII used the term "sectarian" to exclude certain organizations from government funding in an era when their "nonsectarian" counterparts were funded freely. Such provisions are rooted in impermissible animus and target some faiths for special disfavor.

The Blaine Amendments take their name from a failed attempt to include a similar amendment in the U.S. Constitution. In the mid-1800s, anti-Catholic hostility arose 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 Georgia. *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 type of Christianity, and that private Catholic schools—branded as "sectarian"—would never receive similar funding.

The history of Blaine Amendments has been discussed in detail by the Supreme Court. In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), three dissenting Justices detailed their history 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 the "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.* (internal citation omitted). 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 301-05). [4]

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. 793, 828-29 (2000) (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 Georgia Blaine Amendment built upon a history of anti-Catholicism in Georgia.

Georgia was not spared the effects of this shameful chapter of anti-Catholicism that spread through the rest of the nation. The Georgia Blaine Amendment was enacted as a result of that history. Founded as a colony by King George II at a time

[4] This understanding played out in Georgia as well. *See Wilkerson v. City of Rome*, 152 Ga. 762, 777-78 (Ga. 1922) ("The mere reading of extracts from the New Testament or the Bible in the public schools cannot in any legitimate sense be considered as an appropriation of public moneys to the support or establishment of a system of religion or a sectarian institution.").

of religious strife in Europe, Georgia's colonial charter offered "liberty of conscience" and "free exercise of . . . religion" to all, "except papists." Charter of Georgia (1732), http://avalon.law.yale.edu/18th_century/ga01.asp; *Wilkerson*, 152 Ga. at 767 (recognizing Georgia's charter). By the time of Georgia's Constitutional Convention in 1877, the Catholic community was small but subject to the same discrimination as Catholics in other parts of the country. In the 1850s, the Know-Nothing movement became popular in Georgia as in other parts of the nation. Royce McCrary, *John Macpherson Berrien and the Know-Nothing Movement in Georgia*, 61 The Georgia Historical Quarterly 35, 35 (1977). In Georgia, the movement went by the nickname "Sam." *Id.* When Catholics did begin putting down roots in Georgia and starting schools, they encountered significant opposition. For example, in 1868, an article in the *Southern Banner* discussed the increasing number of Protestant girls attending Catholic schools and the criticism the schools received as a result. "A Methodist paper says Protestant girls are being led to them 'like lambs to the slaughter;' that these nuns' schools 'present a most repulsive and gloomy look' externally." *Protestant Girls in Catholic Nuns' Schools*, Southern Banner (Athens, Ga.), Mar. 13, 1868, at 4.

By the time the Blaine Amendments came into popularity nationally, their goal of neutralizing Catholics was well-known and recognized in Georgia, as memorialized in an editorial the year the national Blaine amendment was debated:

"In several of the States where elections are about to be held, the Catholics are to be persecuted, and the Democrats are accused of being under the influence of the Pope." *The Political Resurrection of Sam*, Union & Recorder (Milledgeville, Ga.), Aug. 31, 1875, at 2. The atmosphere of anti-Catholicism was recognized at the Georgia Constitutional Convention as well. Samuel W. Small, *A Stenographic Report of the Proceedings of the Constitutional Convention Held in Georgia, 1877*, 21 (Const. Publ'g Co., 1877) ("there are some people who think that the grand old religion of Rome is no religion at all").

The text of Article 1, § 2, ¶ VII bears the watermark of a true Blaine Amendment: it uses the term "sectarian" to describe those excluded from government funding, and it was passed in 1877, just two years after the federal Blaine Amendment failed in 1875, as part of the anti-Catholic feeling that swept through the nation. These tell-tale signs in the text and history of the Georgia Blaine Amendment indicate its impermissible religious animus.

II. The Georgia Blaine Amendment should be interpreted to avoid conflict with the federal Constitution.

The Court cannot, and should not, apply the Blaine Amendment in a way that perpetuates the religious animus upon which it was based. The State of Georgia and the Intervenor-Appellees have provided powerful arguments for why Georgia's Blaine Amendment should not be interpreted to limit or invalidate the tax credit

program. By contrast, Appellants urge this Court to adopt a reading of the Georgia Constitution which would put it squarely at odds with the federal Constitution.

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

As applied by Appellees, Georgia's Blaine Amendment creates 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 (1993).

The Blaine Amendment is neither "neutral" nor "generally applicable" because, as explained in detail above, its original purpose was to target Catholic schools. It cannot be neutral because "the minimum requirement of neutrality is that a law not discriminate on its face." *Lukumi*, 508 U.S. at 533. But, as described above and recognized by the Supreme Court, the law penalizes "sectarian" institutions, a pejorative term that was code for "Catholic." The history of the provision confirms that interpretation. *See supra* Part I.A. In this respect, the Blaine Amendment is 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.

In addition to the lack of facial neutrality, the Blaine Amendment also violates the Free Exercise Clause because it creates 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 N. Y.*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)). Specifically, it targeted Catholic schools, but left Protestant religious exercises in the public schools undisturbed. *See supra* at 4-6. Striking down the tax credit program would allow that gerrymander to persist today, in a slightly different form.

The problem would be compounded if the Blaine Amendment was interpreted, as Appellees seem to suggest, in a manner that specifically excluded religious schools. *See* Appellants' Br. at 23 (Georgia Blaine "must prevent the Program's expenditure of tax revenues through the tax credits for scholarships to attend religious schools"). A ruling excluding all religiously-affiliated institutions from receiving scholarship funds would far exceed the scope of permissible action under the First Amendment. In *Colorado Christian University v. 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. 534 F.3d 1245, 1255 (10th Cir. 2008) (citing *Locke v. Davey*, 540 U.S. 712, 725 (2004)). A ruling that no religiously-affiliated institution could participate in the program—even through the independent private choices of parents directing private funds—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; *see also Locke*, 540 U.S. at 724 (laws "evincing . . . hostility toward religion" are impermissible).

For all these reasons, if the Blaine Amendment is used to strike down the tax credit program, or limit is participation to non-religious schools, then the Blaine Amendment must face strict scrutiny under the federal Constitution. The Blaine Amendment cannot pass strict scrutiny, which requires that a law have a compelling governmental interest and be narrowly tailored to pursue that interest. *Lukumi*, 508 U.S. at 546; *see also Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1235 (11th Cir. 2004) (laws which discriminate against religion "must therefore undergo the most rigorous of scrutiny").

But there can be no compelling interest in prohibiting Georgia citizens from donating their income to scholarship programs that might benefit students at religious schools, nor to prohibiting Georgia students from receiving those scholarships simply because they choose to attend a religious school. Since the United States Supreme Court has upheld programs with even less private choice than the tax credit program, *see Zelman*, 536 U.S. 639, that Court is unlikely to find that Georgia has a "compelling" interest in prohibiting citizens from donating to scholarships or students from using their scholarships, simply because some of

those scholarships may be used at religious schools. *See Chabad-Lubavitch of Ga. v. Miller*, 5 F.3d 1383, 1395 (11th Cir. 1993) (where there was no actual Establishment Clause violation, state could not pass strict scrutiny).[5]

B. Invalidating the tax credit program would create conflict with the Establishment Clause.

The Blaine Amendment's language and history of discriminating among religious groups—*i.e.*, disfavoring "sectarian" groups while permitting allegedly non-sectarian Bible readings in public schools—also violates the Establishment Clause. For "[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 percent of their funds

[5] *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.

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 n.23 (internal citations omitted); *see also Lukumi*, 508 U.S. at 536 ("differential treatment of two religions" might be "an independent constitutional violation."); *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.").

Georgia's Blaine Amendment shares this flaw; its history and early enforcement demonstrate that it had the purpose and effect of disfavoring "sectarian" schools while permitting generic Protestant religious exercises in public schools. *See Wilkerson*, 152 Ga. at 779 (permitting readings from King James Bible while acknowledging that such readings might be offensive to Catholics and Jews). The Court should not compound this problem by invalidating a program of private choice simply because some individuals might use that choice to select "sectarian" schools.

C. Invalidating the tax credit program would create conflict with the Equal Protection Clause.

The Equal Protection Clause of the Fourteenth Amendment subjects laws to strict scrutiny if they interfere with a fundamental right or discriminate against a suspect class. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440

(1985). Religion is a suspect class. *See United States v. Batchelder*, 442 U.S. 114, 125 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"). And 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 it was intended to discriminate between Catholics and Protestants, and could be interpreted to discriminate against religious groups generally, the Blaine Amendment violates the Equal Protection Clause.

Just as vestigial Jim Crow laws may not be relied on to prohibit political speech and enable discrimination, Georgia 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 (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 to determine its purpose—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. Thus, "where both impermissible racial motivation and racially discriminatory impact [were] demonstrated" the state constitutional provision violated the Equal Protection Clause. *Id* at 232. Here, there is direct evidence that Georgia's Blaine Amendment was very much "part of a movement that swept the [United States] to [discriminate against Catholics.]" *Id.* at 229; *see also supra* Part I.B. And that animus would have a discriminatory impact upon religious groups today if the tax credit program were invalidated simply because some students might select religious schools.

This problem cannot be avoided by arguing 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. As in *Hunter*, the original enactment of the Georgia Blaine Amendment 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.

For this reason, the Georgia Blaine Amendment should be interpreted in a manner that does not disfavor one particular religion, nor religion generally.

D. The Court should interpret Georgia's Blaine Amendment to avoid constitutional conflicts.

The appellants' preferred interpretation of the Blaine Amendment raises all these constitutional problems. Other states have avoided constitutional conflict by interpreting their Blaine Amendments to avoid constitutional infirmities. For example, Oklahoma, which like Georgia prohibits even indirect funding of "sectarian" institutions, recently upheld a state scholarship program which used state funds—not private tax credits—to help disabled students attend the school of their choice. Oklahoma found no state constitutional violation because "[w]hen the scholarship payment is directed to a *sectarian* private school it is at the sole and independent choice and direction of the parent and *not the State*." *Oliver v. Hofmeister*, 368 P.3d 1270, 1276 (Okla. 2016). Similarly, Nevada held that an education savings account program, which allowed parents to direct state-provided funds to the schools of their choice, did not violate Nevada's Blaine Amendment: "Once the public funds are deposited into an education savings account, the funds are no longer 'public funds' but are instead the private funds of the individual parent who established the account. The parent decides where to spend that money for the child's education and may choose from a variety of participating entities, including religious and non-religious schools." *Schwartz v. Lopez*, 382 P.3d 886,

899 (Nev. 2016). Georgia's program, which involves tax credits rather than funds that originate with the state, stands on even firmer ground. A similar ruling here would avoid constitutional problems raised by the state Blaine Amendment.

CONCLUSION

For all these reasons, the Court should not use Georgia's Blaine Amendment to strike down or limit the tax credit program.

Respectfully submitted,

/s/ Lori H. Windham

Lori H. Windham
Admitted Pro Hac Vice
D.C. Bar No. 501838
Diana M. Verm
Admitted Pro Hac Vice
D.C. Bar No. 1811222
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1200 New Hampshire Ave., N.W.
Suite 700
Washington, D.C. 20036
(202) 955-0095
lwindham@becketfund.org
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

This is to certify that I have this day filed a true and correct copy of the foregoing **Brief of *Amicus Curiae* the Becket Fund for Religious Liberty in Support of Appellees** with the Clerk of the Court using the SCED electronic filing system, and have served a copy of the same in the United States Mail, proper postage prepaid, addressed as follows:

William King Whitner
Shauna Tameka Phillips
Andrea Joy Pearson
PAUL HASTINGS, LLP
1170 Peachtree Street, N.E., Suite 100
Atlanta, GA 30309

Attorneys for Appellant

William Wright Banks, Jr.,Sr. A.A.G.
Warren R. Calvert, Sr. A.A.G.
Alex F. Sponseller, A.A.G.
Samuel S. Olens, A.G.
Mitchell Philip Watkins
Department of Law
40 Capitol Square, S.W.
Atlanta, Georgia 30334

Attorneys for Appellee

Frank B. Strickland
John J. Park, Jr.
Strickland Brockington Lewis, LLP
Midtown Proscenium, Suite 2200
1170 Peachtree Street, N.E.
Atlanta, Georgia 30309

Attorneys for Intervenors-Appellees

Timothy D. Keller
Institute for Justice
298 South Mill Ave., Suite 301
Tempe, Arizona 85281

Erica J. Smith
Institute for Justice
901 N. Glebe Road, Suite 900
Arlington, Virginia 22203

Attorneys for Intervenors-Appellees

Dated: December 22, 2016

/s/ Lori H. Windham
Lori H. Windham