IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

CATHY MOSES and
PAUL F. WEINBAUM,

Plaintiffs-Appellants,

v.

No. S-1-SC-34974

CHRISTOPHER RUSZKOWSKI,
SECRETARY OF EDUCATION,
NEW MEXICO PUBLIC
EDUCATION DEPARTMENT,

ORAL ARGUMENT
REQUESTED

Defendant-Appellee,

and

ALBUQUERQUE ACADEMY, *et al.*,

Intervenors-Appellees.

INTERVENOR-APPELLEES' BRIEF ON REMAND FROM THE UNITED STATES SUPREME COURT

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SUMMARY OF PROCEEDINGS[1]

This matter comes before the Court under New Mexico's Blaine Amendment—Article XII, Section 3 of the State Constitution—which provides that no funds "appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university." N.M. Const. Art. XII, § 3. Under this provision, Plaintiffs challenged New Mexico's Instructional Materials Law (the "IML"), which makes secular textbooks and other educational materials available to all New Mexico students, regardless of where they attend school. NMSA 2010, §§ 22-15-1 to 22-15-14.

Intervenor-Appellees the New Mexico Association of Nonpublic Schools, Albuquerque Academy, Rehoboth Christian School, St. Francis School, Sunset Mesa School, and Anica and Maya Benia (collectively, "Intervenors") joined the lawsuit to defend the IML, in part by asserting that Article XII, Section 3—if construed to bar the textbook lending program—would violate the First and Fourteenth Amendments to the United States Constitution. **[2 RP 300, 312-13]** Without addressing the constitutional issues, the trial court denied Plaintiffs' motion for summary judgment and granted summary judgment to Defendant and Intervenors, upholding the IML for all New Mexico students. **[2 RP 440-43]** The

[1] Intervenors-Appellees adopt in full the procedural background set forth by Defendant-Appellee Christopher Ruszkowski in his brief and emphasize only the most relevant portions here.

New Mexico Court of Appeals affirmed, holding that the IML was designed to benefit students and did not constitute "support of parochial or private schools" under Article XII, Section 3. *Moses v. Skandera*, 2015-NMCA-036, ¶ 39, 346 P.3d 396 (2014). In a final ruling dated December 17, 2015, this Court reversed, holding that Article XII, Section 3 bars *all* educational funding, "direct or indirect," to *any* private schools, religious or secular. *Moses v. Skandera*, 2015-NMSC-036, ¶ 40, 367 P. 3d 838 (2015). The Court then found that, when students are "loaned . . . instructional materials" under the IML, "[p]rivate schools benefit." *Id*. ¶ 40. By providing this "support to private schools," the Court concluded that "the IML violates Article XII, Section 3." *Id*. ¶ 40.

On motion for rehearing, Intervenors emphasized that the Court's broadly restrictive reading of Article XII, Section 3 violated the Free Exercise and Equal Protection Clauses of the United States Constitution. Intervenor-Appellees' Br. in Sup. of Mot. for Rehearing at 6-7 (Nov. 24, 2015). The Court, however, declined to address those concerns.

Intervenor New Mexico Association of Nonpublic Schools (the Association) then raised these arguments on petition for *certiorari* to the United States Supreme Court, presenting the following question:

> Whether applying a Blaine Amendment to exclude religious organizations from a state textbook lending program violates the First and Fourteenth Amendments.

Petition for a Writ of Certiorari, *New Mexico Ass'n of Non-Public Schs. v. Moses*, No. 15-1409 (Sup. Ct. May 16, 2016). The U.S. Supreme Court held the Association's petition pending a decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, where the Court was considering Missouri's denial of playground resurfacing funds to a church for its church-run preschool.

On June 26, 2017, the Supreme Court issued its decision in *Trinity Lutheran*, holding that application of Missouri's Blaine Amendment to deny a church access to generally available funds violated the First Amendment's Free Exercise Clause. *Trinity Lutheran*, 137 S. Ct. 2012 (2017). The next day, the Supreme Court granted the Association's petition for *certiorari*, vacated this Court's December 2015 ruling, and remanded for further consideration in light of the *Trinity Lutheran* decision. *New Mexico Ass'n of Non-Public Schools v. Moses*, 137 S. Ct. 2325 (2017).

This Court subsequently ordered the parties to file simultaneous briefs to address "what effect, if any, *Trinity* has on the validity of Article XII, Section 3, of the New Mexico Constitution." Intervenors now urge the Court to reconsider its December 2015 analysis and uphold the IML's provision of textbooks for all New Mexico students, regardless of where they may choose to receive their education. This corrective ruling is required by the Free Exercise and Equal Protection Clauses of the United States Constitution and the Equal Protection Clause of the New Mexico

Constitution and is essential to protecting against the invidious religious bigotry lurking within Article XII, Section 3 of the New Mexico Constitution.

SUMMARY OF ARGUMENT

It is no mystery that Blaine Amendments are designed to discriminate. Over the past two decades, nine different Supreme Court justices have emphasized the invidious religious discrimination inherent in so-called Blaine Amendments—provisions that target "sectarian" institutions for disfavored treatment.[2] And in its December 2015 ruling, this Court likewise acknowledged the anti-Catholic origins of provisions barring aid to "sectarian" institutions: they arose in response to Catholic opposition to the Protestant-run common schools, which were "'designed to function as an instrument for the acculturation of immigrant [Catholic] populations, rendering them good productive citizens in the image of the ruling [Protestant] majority.'" *Moses*, 2015-NMSC-036, ¶ 19 (quoting Joseph P. Viteritti,

[2] *See Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000) (Thomas, J., joined by Rehnquist, C.J., and Kennedy and Scalia, JJ.) (noting that Blaine Amendments "arose at a time of pervasive hostility to the Catholic Church and to Catholics in general," when "it was an open secret that 'sectarian' was code for 'Catholic,'" and stating that such provisions were "born of bigotry," and "should be buried now"); *see also Zelman v. Simmons-Harris*, 536 U.S. 639, 720-21 (2002) (Breyer, J., dissenting, joined by Stevens and Souter, JJ.) (bans on "sectarian" institutions arose from Protestants' efforts to "preserve their domination" over the public school system in the face of a rapidly growing Catholic population); *see also Locke v. Davey*, 540 U.S. 712, 723 n.7 (2004) (Rehnquist, C.J., joined by six Justices, including O'Connor and Ginsburg, J.J.) (affirming basic conclusion that Blaine Amendments are "linked with anti-Catholicism")

Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law, 21 Harv. J.L. & Pub. Pol'y 657, 668 (1998)).

The Supreme Court's ruling in *Trinity Lutheran* caps these decisions by affirming that laws targeting religious individuals or organizations for disfavored treatment are barred by the Free Exercise and Equal Protection Clauses of the United States Constitution. Such laws are equally "odious" whether they discriminate among religions or against religion generally. *Trinity Lutheran*, 137 S. Ct. at 2025. The New Mexico Blaine Amendment does both by targeting Catholic schools specifically and all religious schools generally.

In its original form, as forced upon the State by the federal government as a condition of statehood, Article XII, Section 3 explicitly discriminated against "sectarian," or "Catholic," organizations. Although the delegates to New Mexico's 1910 Constitutional Convention expanded Article XII, Section 3 to bar aid to other private schools as well, the United States Supreme Court has routinely rejected such efforts to disguise underlying invidious discrimination. Plaintiffs bear the burden to show that the expanded provision undoubtedly would have been enacted even without the anti-Catholic animus that gave rise the original discriminatory language. Plaintiffs cannot meet that burden here. Moreover, Article XII, Section 3—as evidenced by Plaintiffs' statements in this case—continues to inspire anti-religious sentiment and discrimination.

In these circumstances, holding Article XII, Section 3 invalid is an appropriate remedy. The bar on aid to "sectarian" schools is plainly unconstitutional. And the prophylactic bar on aid to "private" schools is an inadequate cure. Such a provision could stand only if re-enacted independent of the bigotry that surrounded enactment of Article XII, Section 3 and without the current language that explicitly identifies "sectarian" schools for disfavored treatment.

Alternatively, the Court should construe Article XII, Section 3 narrowly to avoid conflict with the federal Free Exercise and Equal Protection Clauses. This construction could be easily implemented because it tracks the almost century-old *status quo ante*. The IML has a long history in New Mexico, beginning with pre-statehood efforts to raise the literacy rate across the State. The current version of the law, enacted in 1978, is designed to directly assist all students at private or public schools and helps many of the poorest students gain equal access to quality educational materials. And just as in *Trinity Lutheran*, any benefit to religious or other private schools is purely incidental to the State's legitimate effort to benefit all students. Upholding the IML would both fit New Mexico history and honor the New Mexico Legislature's efforts to educate children.

ARGUMENT

I. Under the United States Supreme Court's ruling in *Trinity Lutheran*, Plaintiffs' interpretation of Article XII, Section 3 of the New Mexico Constitution would violate the Free Exercise and Equal Protection Clauses of the United States Constitution.

The Supreme Court's ruling in *Trinity Lutheran* renders Article XII, Section 3 a nullity, unless this Court construes it narrowly to avoid conflict with the federal Free Exercise and Equal Protection Clauses. Plaintiffs cannot meet their burden of showing that Article XII, Section 3 would have been enacted without the original bigotry-inspired language that was mandated by the federal government. And the fact that other States enacted similar provisions is irrelevant. Theirs are also tainted by the anti-Catholic bigotry that gave birth to Blaine Amendments from the beginning.

A. The Free Exercise and Equal Protection Clauses prohibit laws that target religious organizations for disfavored treatment.

In *Trinity Lutheran*, the Supreme Court emphasized that the Free Exercise Clause "protects religious observers against unequal treatment and subjects to the strictest scrutiny laws that target the religious for special disabilities based on their religious status." 137 S. Ct. at 2019 (quoting *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993)) (internal quotation marks and alterations omitted). Applying both the Free Exercise and Equal Protection Clauses, the Supreme Court has repeatedly made clear that under this principle, a law that results

in a denial of a "generally available benefit" to individuals or organizations with a religious identity "can be justified only by a state interest of the highest order." *Id*. (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)) (internal quotation marks omitted).

Thus, in *Trinity Lutheran*, the Supreme Court invalidated a state policy that excluded churches and religious organizations from receiving a benefit made available to other nonprofits. *Id.* at 2017. In a 7-2 opinion, the Supreme Court held that this "exclusion of [a religious organization] from a public benefit for which it is otherwise qualified . . . is odious to our Constitution . . . and cannot stand." *Id.* at 2025.

Furthermore, the Supreme Court affirmed that this type of "odious" discrimination would be evident even if a challenged law were "facially neutral," if it had "a discriminatory purpose" aimed at "some or all religious beliefs" and imposed a "special disabilit[y]" for religious observers. *Id.* at 2021. In reinforcing this principle, the Court relied on its earlier decision in *Lukumi*. There, the defendant city passed "facially neutral city ordinances that outlawed certain forms of animal slaughter." *Id.* at 2021. But the law's "discriminatory purpose" was really to "prohibit[] sacrificial rituals integral to Santeria but distasteful to local residents."

Id. The Court invalidated this discriminatory law as "void." *Lukumi*, 508 U.S. at 547.[3]

The Court dealt with a similar question in *Hunter v. Underwood*, where it held unconstitutional an Alabama state constitutional provision that applied to all persons convicted of certain petty criminal offenses, regardless of race. 471 U.S. 222, 227 (1985) (observing that the constitutional provision in question was "racially neutral"). But despite its facial neutrality, there was overwhelming historical evidence that the constitutional provision was intended to disenfranchise African-Americans. *Id.* at 227-29. As a result, the Court held that that provision of the Alabama constitution violated the Fourteenth Amendment and could not be enforced. *Id.* at 233.

The Court also rejected the government's effort to gloss over discriminatory animus in *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973). The law at issue in that case "exclude[d] from participation in the food stamp program any household containing an individual . . . unrelated to any other member of the household." *Id.* at 529. In considering a challenge under the Equal Protection Clause, the Court noted that this exclusion was "intended to prevent so-called 'hip-pies' and

[3] Of course, a showing of discriminatory animus is not *required* to invalidate a law. It is simply sufficient. "[T]he Free Exercise Clause is not confined to actions based on animus," *Shrum v. City of Coweta, Okla.*, 449 F.3d 1132, 1145 (10th Cir. 2006) (McConnell, J.). *Lukumi* and *Trinity Lutheran* illustrate many ways that free exercise can be violated without evidence of animus.

'hippie communes' from participating in the food stamp program." *Id.* at 534. Ultimately, the Court held the contested provision invalid, concluding that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Id.* The same is especially true where—as here—the targeted group is entitled to heightened protection under the First Amendment.

Article XII, Section 3 is a precise example of a law that was enacted with a "discriminatory purpose" and that does in fact result in a "special disabilit[y]" for religious organizations. *Trinity Lutheran*, 137 S. Ct. at 2021. The fact that Article XII, Section 3 forbids aid to any private school, and thus presents some semblance of facial neutrality, does not redeem the discriminatory purpose and effect of this law. Article XII, Section 3 thus violates the federal Free Exercise and Equal Protection Clauses and is invalid.

B. Article XII, Section 3 has roots in religious bigotry that continue to inspire anti-religious sentiment and discrimination.

Blaine Amendments like New Mexico's present a particularly invidious form of religious bigotry and discrimination because they "target[] religious beliefs as such." *Lukumi*, 508 U.S. at 533. Catholics were targeted simply for being Catholic. Such laws are "never permissible." *Id*. (citing *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (plurality opinion) and *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940)). In

Trinity Lutheran, the United States Supreme Court suggested that this alone could have been a basis for invalidating Missouri's Blaine Amendment. But ultimately it did not reach the issue because the "strict scrutiny" standard could not be satisfied "in any event." *Trinity Lutheran*, 137 S. Ct. at 2024 n.4. The dissent, however, still recognized that the *effect* of the majority opinion in *Trinity Lutheran* would be to "all but invalidate[]" the discriminatory Blaine provisions adopted in "constitutional provisions of thirty-nine States." 137 S. Ct. at 2041 (Sotomayor, J., dissenting).

Article XII, Section 3 is one of these affected constitutional provisions, as it was passed with a recognized anti-Catholic purpose. As this Court has recognized, "[d]uring the early nineteenth century, public education was provided in public schools known as 'common schools.'" *Moses*, 2015-NMSC-036, ¶ 19 (citing Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551, 558 (2003)). These schools cultivated an undercurrent of anti-immigration nativism, and were "designed to function as an instrument for the acculturation of immigrant populations, rendering them good productive citizens in the image of the ruling majority." *See id*. ¶ 19 (citing Viteritti, 21 Harv. J.L. & Pub. Pol'y at 668). Protestants were "in the forefront" of this "crusade," as they "assumed a congruence of purpose between the common school and the Protestant churches." *Id*. ¶ 19. Indeed, "[i]n many cases, it was difficult to distinguish between public and private

institutions because they were often housed in the same building." *Id*. ¶ 19 (citing Viteritti, 21 Harv. J.L. & Pub. Pol'y at 664). "State statutes at the time authorized Bible readings in public schools and state judges generally refused to recognize the Bible as a sectarian book." *Id.* ¶ 19 (citations omitted).

By the middle of the nineteenth century, the Catholic immigrant population rose significantly, and "the influx of Catholic immigrants created a demand for Catholic education." *Id.* ¶ 20. Consequently, Catholics and other minority religionists challenged the Protestant influence in the common schools, and by the mid-1870s, Catholic church leaders began to lobby their state legislatures for public funds to develop their own educational system. *Id.* ¶ 20 (*citing* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 44 (1992)). In response to this rise in Catholic influence, a movement opposing aid to "sectarian" schools gained prominence. *Id.* ¶ 19. "[I]t was an open secret that 'sectarian' was code for 'Catholic.'" *Id.* ¶ 21 (quoting *Helms*, 530 U.S. at 828). In this political environment, United States Congressman James G. Blaine of Maine agreed to sponsor an amendment to the First Amendment that fulfilled a promise by President Ulysses S. Grant to ensure "that not one dollar be appropriated to support any sectarian schools." *Id.* ¶ 21 (citation omitted). Though the amendment failed to pass the United States Senate, "new territories seeking statehood would be required to incorporate Blaine-like provisions into their new constitutions in order to receive congressional

approval." *Id.* ¶ 23 (quoting Viteritti, 21 Harv. J.L. & Pub. Pol'y at 673). And as this Court recognized, New Mexico was one of them: "Congress granted New Mexico statehood on the explicit condition that it adopt a similar 'Blaine' provision in the New Mexico Constitution." *Id.* ¶ 24; *see also* Enabling Act for New Mexico of June 20, 1910, 36 Stat. 557, ch. 310, § 8. Thus, there can be little dispute that the original anti-"sectarian" language imposed upon New Mexico by the federal Enabling Act and incorporated into Article XXI, Section of IX of the New Mexico Constitution as a condition of statehood was an illicit and unconstitutional law targeting "religion as such." *See Lukumi*, 508 U.S. 533.

The explicit targeting of "sectarian" organizations continues to inspire religious targeting today. For example, as recognized in this Court's previous opinion, the Plaintiffs' own complaint claims that the IML violates their constitutional rights because it forces them to "support[] and aid[] the religious dictates of others with whom they disagree" and supports "sectarian, denominational or private school[s]," Opinion at 6 (Nov. 12, 2015), even though the IML treats all students equally, regardless of where they attend school.

C. Expanding Article XII, Section 3 to bar aid to all private schools did not cure the Free Exercise or Equal Protection violations.

The religious discrimination inherent in Article XII, Section 3, cannot be masked by the fact that the delegates to New Mexico's 1910 Constitutional Convention

expanded the language from the federal Enabling Act to bar aid to *all* private schools, not just religious schools.

Indeed, once unlawful discrimination is identified as *a* reason for a law's enactment, that law "has no legitimacy at all under our Constitution." *City of Richmond v. United States*, 422 U.S. 358, 378 (1975). Rather, "the proper remedy for a legal provision enacted with discriminatory intent is invalidation." *N. Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 239 (4th Cir. 2016), *cert. denied sub nom. N. Carolina v. N. Carolina State Conference of NAACP*, 137 S. Ct. ___ (2017). In *Lukumi*, for example the Court warned that "[l]egislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Lukumi*, 508 U.S. at 547. Because the laws there "were enacted contrary to these constitutional principles," the Court simply declared them "void" even though they were "facially neutral." *Trinity Lutheran*, 137 S. Ct. at 202.

But even if a mixed motive analysis applied here, it is Plaintiffs' burden, not Intervenors' or the Department's, to "demonstrate" that Article XII, Section 3, "would have been enacted without this factor" of religious bigotry. *Hunter*, 471 U.S. at 228; *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977) (stating that proof of a "discriminatory purpose" would have "shifted to the [opposite party] the burden of establishing that the same decision would have

resulted even had the impermissible purpose not been considered"). Plaintiffs cannot meet that burden here.

First, facial neutrality standing alone is never sufficient. *Lukumi*, 508 U.S. at 534 ("Facial neutrality is not determinative."). Rather, the Free Exercise Clause forbids even "subtle departures from neutrality" and "covert suppression of particular religious beliefs." *Id.* (internal citations and quotation marks omitted). It "protects against governmental hostility which is masked, as well as overt." *Id.* Thus, "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id.*

Rather, Plaintiffs' burden is "to prove" that the expansion of Article XII, Section 3 "completely cures the harm in this case." *McCrory*, 831 F.3d at 240. That's not possible here, because anti-Catholic bigotry was inextricably woven throughout the education system at the time of the 1910 Constitutional Convention. Indeed, animus toward New Mexico's predominantly Catholic population was a significant reason why its attempts at statehood had been stymied for decades. When New Mexico became a U.S. Territory in 1853, its population was "ninety-five percent . . . Hispano or Native American" and overwhelmingly Catholic. Kathleen Holscher, *Religious Lessons: Catholic Sisters and the Captured Schools Crisis in New Mexico* 31 (2012). With the continuous arrival of Anglo-Protestants around the turn of the century, that number had "shrunk to just over half" by the granting of statehood in 1912. *Id.*

From the beginning, there was conflict over the education system as it developed organically through those years, with the new arrivals blaming the Catholic education system for "contriving to 'entangle the mind [sic] of their pupils in the meshes of superstition and bigotry.'" *Id.* But the Catholic perspective was more nuanced. Prior to 1853, formal schooling had experienced an "uneven and idiosyncratic presence in the region." *Id.* at 28. In that year, "a French priest named Jean Baptiste Lamy"—a strong proponent of Catholic education—was appointed to be the first Bishop (and later first Archbishop) of Santa Fe. *Id.* He found "only nine priests in all of New Mexico" and a population that was "a far cry from anything [he or the Church] considered orthodox," belying Protestant assumptions that "Catholic" schools were the problem. *Id.* at 29. Observing that "under Mexican rule, 'every vestige of school had vanished,'" Lamy set out to establish the territory's "first parochial school system," inviting "the first Catholic women religious to New Mexico to help him with the project." *Id.* Together, they developed "an expansive education the likes of which New Mexicans had never seen." *Id.* at 30. In short, it was Catholic educators who pioneered the first systematic efforts to educate the children of New Mexico against a pre-existing background of widespread illiteracy.

These contrasting views of New Mexico's educational landscape set the stage for a state-level conflict that paralleled the national conflict, with Protestant territorial leaders appointed by Washington frequently clashing with the Archdiocese of Santa

Fe over the proper role of religion in education. *Id.* at 37. For decades, this tension resulted in a rough system of public funding that supported both the Protestant-established and parochial schools. *Id.* at 37-38.

In the 1870s and 1880s, "a series of attempts to codify the territory's *ad hoc* educational infrastructure" met significant resistance, largely because each of the "proposals relied on the familiarly Protestant objection to sectarianism" and sought "to eliminate Catholic influence." Holscher, *Religious Lessons* at 38. These proposals were voted down by the citizens of New Mexico—"evidence of mounting hostility between public education advocates and the Archdiocese of Santa Fe." *Id.*; *see also* Diana Everett, *The Public School Debate in New Mexico: 1850-1891*, Arizona and the West 26, 132-33 (1984).

"The push for nonsectarian schools was also bound up with the quest for statehood," as by 1876, U.S. officials influenced by the movement behind the federal Blaine Amendment "had concluded Catholicism was an unacceptable presence in the classrooms of any territory with aspirations of statehood." Holscher, *Religious Lessons* at 38-39. Thus, when in 1910 Congress finally passed the Enabling Act that would grant New Mexico statehood, it was on the condition that the new state include in its constitution a Blaine Amendment "reflect[ing] the nonsectarian language Protestant education advocates had been pushing for the last half-century."

Id. at 44; *see also* Enabling Act for New Mexico § 8 (prohibiting aid in "support of any sectarian or denominational school, college or university").

In this context, Plaintiffs cannot meet their burden of showing that expansion of Article XII, Section 3 to bar aid to *all* private schools stemmed from a benign preference for public over private schooling, independent of the Enabling Act's anti-Catholic bias. Although not all private schools were Catholic, proponents of the Protestant private schools (there were "approximately twenty-five" by the 1890s), were mainly concerned about providing "adequate alternatives—either public *or* Protestant—to" what they deemed "the antiquated and spiritually flawed Catholic system." Holscher, *Religious Lessons* at 39. They had a "working appreciation of American common schooling, and an unshakeable confidence in the compatibility between their own vision of Christian education and the 'moral and political culture based on Anglo-American Protestantism' public schools instilled in their students." *Id.* They "denounced Catholic education as a threat to the common Anglo-Protestant values" found in "both" their mission schools and the public schools. *Id.* Thus, "[w]hen state-sponsored schooling finally did gain a foothold in New Mexico, the focus of these [Protestant] home missions began to shift" and their "emphasis on private education gave way before the emerging public system." *Id.* Because their own religious values were unthreatened—public schools included uniformly Protestant religious prayer and practices—their focus was not so much on supporting

a public school system as it was on "keeping Catholicism safely out of the system taking shape." *Id.*

In this context, the Court's suggestion that the 1910 delegates "chose to play it safe" by broadening Article XII, Section 3 to ban "all private schools" from accessing "any" education funds, *Moses*, 2015-NMSC-036, ¶ 27, is insufficient to satisfy Plaintiffs' burden. Efforts to cloak the evident religious discrimination had no practical effect—Protestant values were still safely ensconced within the emerging public system, while Catholics faced a constitutional provision that was designed to exclude them. The expanded Blaine Amendment thus guaranteed Catholics and Protestants equal rights only in the same way that "the law prevents both rich men and beggars from sleeping under bridges." DeForrest, 26 Harv. J.L. & Pub. Pol'y at 572 (originally expressed by Anatole France, *Le Lys Rouge* [The Red Lily] 118 (1894) ("la majestueuse égalité des lois, qui interdit au riche comme au pauvre de coucher sous les ponts")). The expansion of the ban to all private schools cannot disguise that the ultimate target was Catholic organizations; *see also Trinity Lutheran*, 137 S. Ct. at 2024 (rejecting Missouri's effort to justify its Blaine Amendment as a "policy preference for skating as far as possible from religious establishment concerns").

If the constitutional delegates had been independently motivated to preclude funding to private schools, they could have directly said so. Especially considering

that the mandated Blaine language was separately incorporated into New Mexico's Constitution under Article XXI, Section 9, there is no reason that Article XII, Section 3—if truly motivated by a preference for public over private schools, as opposed to anti-Catholic concerns—could not have simply barred aid "to all private schools." But instead the delegates re-adopted as their baseline the religiously discriminatory "sectarian" language from the Enabling Act.

Furthermore, the fact that Article XII, Section 3 still explicitly prohibits "sectarian" funding means that the law is not even facially neutral. As this Court has recognized, "it was an open secret that 'sectarian' was code for 'Catholic.'" *Moses*, 2015-NMSC-036, ¶ 21 (quoting *Helms*, 530 U.S. at 828). The religious reference clarifies the motivation behind the provision. As the Supreme Court has made clear, "[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Lukumi*, 508 U.S. at 533.

At best, the Court may assume that—despite the clear history of anti-Catholic bias—the delegates' true intentions are indiscernible because they never had meaningful opportunity to consider the finer distinctions once the Blaine "sectarian" language was forced upon them by the federal government. But because the delegates expressly adopted that language in Article XII, Section 3, there is no path for concluding that the delegates would have adopted a public/private distinction independent of the anti-Catholic sentiments that had permeated the State

debate over education. So while this Court's assumption that the delegates chose to "play it safe" may be "'plausible' and 'not unreasonable,'" it is still "a far cry from a finding that a particular law would have been enacted without considerations of [religion]." *McCrory*, 831 F.3d at 234. "As the Supreme Court has made clear, such deference in that inquiry is wholly inappropriate." *Id*. Moreover, even if the delegates simply "passed through" a Congressional requirement that was itself discriminatory, then their inaction could hardly be held to whitewash Congress' anti-Catholic animus.

Finally, even if it could be shown that the 1910 delegates were independently motivated by a desire not to fund private schools, it is unlikely that they would have intended to preclude funding for textbooks to individual students. New Mexico's textbook funding laws preceded the constitutional convention, and were enacted to raise New Mexico's chances of becoming a state by improving the population's literacy rate. 1891 N.M. Laws, ch. 25, § 42 (requiring school boards to furnish textbooks for children in "poverty"); David V. Holtby, *Forty-Seventh Star: New Mexico's Struggle for Statehood* 54 (2012) (explaining that illiteracy rates were a significant obstacle to statehood). And similar laws continued to be re-enacted following the Constitutional Convention. *See, e.g.*, 1915 N.M. Laws Comp., § 4961 (first post-statehood statute amending textbook laws); 1933 N.M. Laws, Ch. 112, § 1 (free textbooks available to "all children in the schools in the State of New Mexico,

from the first to the eighth grades"); NMSA 1941, § 55-1712 (requiring a "detailed budget" for all "educational institutions, public or private, the pupils of which are entitled to receive free textbooks"); NMSA 1953, § 77-13-5 (1967) (creating a "free textbook fund"); NMSA 1953, § 77-13-7(B) (providing that free instructional materials were to be "distributed to [state] and private schools for the benefit of students"). Certainly, the 1910 delegates had no reason and no intention to bring within the scope of Article XII, Section 3 the very laws that helped make the Constitutional Convention a reality in the first place.

This Court cited the 1969 rejection of "a proposed constitutional amendment that would have required New Mexico to provide free textbooks to all New Mexico school children," as evidence of New Mexico voters' intent not to provide indirect support to private schools. *Moses*, 2015-NMSC-036, ¶ 2. But there are many reasons why voters may have rejected the amendment, not least of which was that New Mexico *already* had a program for providing free textbooks to schoolchildren. *See supra* NMSA 1953, § 77-13-5; § 77-13-7(B). Significantly, voters did not simply reject one amendment pertaining to textbooks. The 1969 Constitutional Convention proposed a revision of the entire Constitution with many changes, and it was narrowly rejected by voters. Richard F. Holmar, *Piecemeal Amendment of the Constitution of New Mexico 1911 to 2004* 12 (16th ed. 2005). There is no way of knowing what the voters thought of one single provision.

More importantly, while the 1969 proposed amendment would have made free textbooks for all students a constitutional principle, it did not attempt to remove the language of today's Blaine Amendment. Article VIII, Section 6 of the proposed amendment reiterated the Blaine-like restriction on "support of any sectarian, denominational or private school, college or university." *Proposed New Mexico Constitution* (*as adopted by the New Mexico Constitutional Convention of 1969*). Thus, rather than showing that New Mexico voters opposed laws providing free textbooks for all students, it reinforces the conclusion that it was commonly accepted that there was no conflict between a textbook program and Article XII, Section 3.

D. Other States' Blaine Amendments relied on by this Court also violate the Free Exercise Clause.

In its initial ruling, this Court relied on the interpretations that several states had given to Blaine Amendments to support its own understanding of Article XII, Section 3. But the history underlying these provisions, particularly those of Massachusetts, Missouri, and South Dakota, reveals the looming shadow of nativist, anti-Catholic bigotry.[4] The parallels that the Court identified between those

[4] The evidence of anti-Catholic sentiment is present in many of the other states that the court relied on, including Oregon and California. In Oregon, territorial expansion was marked by Protestant suspicion and apprehension of Catholic settlers. William G. Ross, *Forging New Freedoms: Nativism, Education, and the Constitution* 149 (1994). Likewise in California the enactment of a precursor to the later Blaine Amendment in the 1850s was motivated by an anti-Catholic backlash against earlier efforts to provide public compensation to Catholic schools. Lloyd P. Jorgensen, *The State and the Non-Public School, 1825-1925* 104-106 (1987).

provisions and the New Mexico provision thus provide further support for the argument that Article XII, Section 3 violates the Free Exercise Clause.

Massachusetts first amended its constitution to prohibit aid to religious schools in 1855. At that time, the Know Nothing Party, a virulently nativist and anti-Catholic party, had control of the statehouse. John R. Milkern, *The Know-Nothing Party in Massachusetts: The Rise and Fall of a People's Movement* 102 (1990). The anti-aid provision was part of a larger package of anti-Catholic and anti-immigrant school reforms, which also included mandatory reading of the Protestant Bible in public schools, compulsory school attendance, and the barring of foreign language instruction. *Id.* An editorial published at the time made clear that these efforts were directed at "teach[ing] these deluded aliens, that their poverty and ignorance in their own country arose mainly from their ignorance of the Bible." Viteritti, 21 Harv. J.L. & Pub. Pol'y at 667 n.42. In the early 20th century, after another wave of anti-Catholic sentiment, a second anti-aid amendment was enacted erecting an even stronger restriction on all aid to "sectarian" institutions. *See Bay State Constitution Patchers*, N.Y. Times, June 7, 1917, at 10 (critiquing the Constitutional amendment as "a fine bit of political bigotry" that was "directed in reality against the Catholic Church").

Like Massachusetts, Missouri experienced an intense wave of anti-Catholicism in the 1850s. The anti-Catholic Know-Nothing Party held sway over local politics,

and unleashed a reign of terror in the streets of St. Louis during the August 1854 elections, resulting in the ransacking of Catholic homes. 4 William Hyde, *Encyclopedia of the History of St. Louis* 1917 (1899). Such anti-Catholic bigotry persisted into the 1870s when the State's Blaine Amendment was enacted. For instance, an article published in 1870 in the official publication of the Missouri State Board of Education perpetuated the anti-Catholic smear that the Church was the "Romish Church" and could not, even if it tried, "allow any liberty of thought." J. Michael Hoey, *Missouri Education at the Crossroads: The Phelan Miscalculation and the Education Amendment of 1870*, 95 Mo. Hist. Rev. 372, 389 (2001) (July 2001). And proponents of the Missouri Blaine Amendment rallied support by claiming that the school system was under attack by Catholic sectarians. *See Synopsis of Remarks by Senator Spaunhorst*, Weekly Tribune, Mar. 1870 (summarizing remarks made by a Catholic Senator critical of the effort to pass the Blaine Amendment).

Finally, like New Mexico, South Dakota was required to adopt a Blaine Amendment as a condition of statehood. The legislative history surrounding the enactment of the Enabling Act for South Dakota (along with North Dakota, Montana, and Washington) again shows that the purpose of these legislative requirements was to accomplish retail what Blaine's constitutional amendment failed to accomplish wholesale. See 20 Cong. Rec. 2100-01 (1889) (statement of

Sen. Blair) (praising failed Blaine Amendment and discussing the importance of preserving "nonsectarian" Protestantism in the common schools, while excluding "sectarian" doctrine, and supporting Enabling Act for that purpose). And support for the measure in South Dakota was motivated by both anti-Catholic and anti-Lutheran animus directed toward South Dakota's large German immigrant population. William G. Ross, *Forging New Freedoms: Nativism, Education, and the Constitution* 24-26 (1994). Indeed, the effort to enact a Blaine Amendment predated the enabling act, and anti-Catholic rhetoric was rampant in the state constitutional conventions in the early 1880s. *See* Jon K. Lauck, *Prairie Republic: The Political Culture of Dakota Territory, 1879-1889* 78-79 (2012) (providing several examples including a debate over the taxation of church property which was expressly directed at the Catholic Church because of its perceived wealth).

The South Dakota Blaine Amendment also had the effect of propping up nondenominational Protestantism, even as it suppressed Catholicism and other disfavored denominations. For instance, school boards were largely run by Protestant ministers, and public schools and universities continued to require students to attend religious exercises or chapel services where Protestant versions of scripture were read. Sister M. Claudia Duratschek, *Builders of God's Kingdom: The History of the Catholic Church in South Dakota* 87, 89 (1979); *see State ex rel. Finger v. Weedman*, 55 S.D. 343, 226 N.W. 348, 350 (S.D. 1929) (noting use of the

KJV in schools through 1929). As the Dakota Catholic observed, "[t]oo often 'freedom from sectarian control' in our public schools, practically is made to mean the careful exclusion of every thing Catholic." Dakota Catholic, August 3, 1889.

This Court should draw several lessons from the history of Blaine Amendments in these states. In Massachusetts, the effort to expand the Blaine Amendment, rather than expiating the original sin of nativism was in fact motivated by a further wave of nativism. A broader prohibition was not a sign that the Blaine Amendment was not motivated by the same anti-religious bigotry—quite the contrary. In Missouri, deeply held stereotypes about Catholic inferiority were at the root of efforts to exclude Catholic schools from funding. And South Dakota shows that even states that were forced to enact Blaine Amendments under their respective Enabling Acts were nevertheless fertile soil for anti-religious and nativist ferment. All of those lessons are equally applicable to New Mexico. There is no meaningful evidence that the expansion of Article XII, Section 3 was inspired by concerns independent of the anti-Catholic sentiment that permeated the debate over public education in New Mexico. Anti-Catholic stereotypes motivated the adoption of the Blaine Amendment in the first place. And even though New Mexico was required to enact its Blaine Amendment as a condition for statehood, the Amendment found fertile soil due to the long history of anti-Catholic animus within the territory.

E. Applying the IML only to public schools would also violate the New Mexico Equal Protection Clause.

The Court's December 2015 opinion did not consider the importance of the New Mexico Equal Protection Clause, Article II, Section 18, in considering the IML's provision of schoolbooks to *all* children in New Mexico, not only those attending public school.[5] If the Court does not reconsider its opinion, the schoolchildren of the state will be treated unequally based on where they attend school, in violation of the Equal Protection Clause.

Article II, Section 18 of the New Mexico Constitution provides that no person "shall . . . be denied equal protection of the laws." In *Rodriguez v. Brand West Dairy*, the Court ruled that the farm and ranch laborer exception to the Workers' Compensation Act violated the New Mexico equal protection clause. 2016-NMSC-029, ¶ 2, 378 P.3d 13. "Like its federal equivalent, this is essentially a mandate that similarly situated individuals be treated alike, absent a sufficient reason to justify the disparate treatment." *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 21, 137 N.M. 734, 114 P.3d 1050. The Court's equal protection analysis involves two steps.

[5] Intervenors' Answer asserted an affirmative defense of the Equal Protection Clauses of the United States and New Mexico Constitutions. **[2 RP 300]**. Intervenors also raised the Equal Protection argument in their motion to reconsider. Br. in Supp. of Mot. for Rehearing at 6-7 (Nov. 24, 2015). Thus, the Court may consider the equal protection argument. *See Maralex Res., Inc. v. Gilbreath*, 2003-NMSC-023, ¶ 13, 134 N.M. 308, 76 P.3d 626 (noting that "an appellate court 'will affirm the district court if it is right for any reason and if affirmance is not unfair to the appellant.'") (citation omitted).

First, the Court must "determine 'whether the legislation creates a class of similarly situated individuals and treats them differently.'" *Rodriguez*, 2016-NMSC-029, ¶ 9 (quoting *Griego v. Oliver*, 2014-NMSC-003, ¶ 27, 316 P.3d 865). If the answer to the first step is in the affirmative, the Court must "determine the level of scrutiny that applies to the challenged legislation and conclude the analysis by applying the appropriate level of scrutiny to determine whether the legislative classification is constitutional." *Griego*, 2014-NMSC-003, ¶ 27.

By declaring unconstitutional the IML's provision of books and other instructional materials to all school children of the State, regardless of the school they attend, the Court altered the law to create two classes of similarly situated individuals—school children—and to treat them differently—providing public school children with books, but depriving private school children of the same benefit. *See Rodriguez*, 2016-NMSC-029, ¶ 17 (finding the exclusion from the Workers' Compensation Act treated similarly situated individuals differently and was contrary to the Act's goals). Because the Court's opinion would result in a statute that treats similarly situated classes of students differently, it renders the statute unconstitutional unless rationally related to a legitimate government purpose. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973).

In New Mexico, the rational basis test is "highly deferential to the Legislature by presuming the constitutionality of social and economic legislation," but "is also

cognizant of our constitutional duty to protect discrete groups of New Mexicans from arbitrary discrimination by political majorities and powerful special interests." *Rodriguez*, 2016-NMSC-029, ¶ 27. As a result, a statute is unconstitutional if "the classification created by the legislation is not supported by a firm legal rationale or evidence in the record." *Id.* ¶ 25 (quotation marks and citation omitted). *Trinity Lutheran* demonstrates that treating school children differently based on where they attend school is not supported by a firm legal rationale and, as discussed herein, Article XII, Section 3 of the New Mexico Constitution is similarly not a firm legal rationale for disparate treatment of children. Because the Court's opinion would result in a statutory scheme that violates the Equal Protection Clause of the New Mexico Constitution, the opinion of the Court of Appeals should be affirmed.

II. The Court should hold Article XII, Section 3 to be unconstitutional or construe it to avoid conflict with the Instructional Materials Law.

Laws motivated by discriminatory intent have "no legitimacy at all under our Constitution," *City of Richmond*, 422 U.S. at 378, and must be "eliminated root and branch," *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 437-38 (1968). "Thus, the proper remedy for a legal provision enacted with discriminatory intent is invalidation." *McCrory*, 831 F.3d at 239 (citing *City of Richmond*, 422 U.S. at 378-79); *see also Lukumi*, 508 U.S. at 547 (invalidating religiously discriminatory law as "void"). This is true even where—as in *Hunter*—the challenged constitutional provision's "more blatantly discriminatory" portions have already been removed. 471 U.S. at 232-33;

see also McCrory, 831 F.3d at 240 (holding that failure to "invalidate or repeal" law enacted with discriminatory purpose "falls short of the remedy that the Supreme Court has consistently applied in cases of this nature"). Invalidating Article XII, Section 3—and acknowledging that *Trinity Lutheran* invalidated Article XXI, Section 9 to the extent it adopts Section 8 of the Enabling Act's prohibition on funds to "sectarian or denominational" schools—is the only way to completely cure the religious animus lingering in the New Mexico Constitution.

Alternatively, the Court may construe Article XII, Section 3 narrowly to avoid any conflict with the IML, specifically by finding that the IML does not "support" schools. This conclusion would be consistent with the history of textbook laws in New Mexico, which demonstrates an intent to ensure that all students have equal access to quality educational materials. The 1891 territorial textbook law, for example, authorized free textbooks for students whose "parent or guardian is not able by reason of poverty to buy books" or for whom there was "no school taught within two miles of the place of residence of such child." 1891 N.M. Laws, Ch. 25,§ 42. The law thus focused on disadvantaged students, rather than any distinction between public and private schools. After statehood, a 1915 version of the law kept the same scheme, and provided that books may be "loaned to . . . indigent pupil[s] during the school term, yet shall remain the property of the district under the care and custody of the district clerk." 1915 N.M. Laws Comp., § 4961. Under the 1929

version, textbooks were issued "to children of residents" with the parents held "responsible for the loss, damage or destruction of books issued to their children." 1929 N.M. Laws, § 120-1707. And this emphasis on students has continued through to the present version. Thus, the Court of Appeals held that the legislative purpose of the IML "does not focus on support of parochial or private schools," but rather on "provid[ing] instructional material for the benefit of students," with the children and their parents being the "direct recipients of the program's financial support." *Moses*, 2015-NMCA-036 ¶¶ 39-40.

Ultimately, of course, it is "the parents" who—through tuition payments or otherwise—"bear the financial burden of providing the instructional material" to students who attend private schools. *Id*. ¶ 40. Thus, this Court wrongly assumed that "[p]rivate schools benefit" from the lending program because they can "divert" the money they save under the IML "to other uses in their schools." *Moses*, 2015-NMSC-036, ¶ 40. The reality is that, if the IML is rendered void, students will now have to purchase the textbooks themselves through tuition increases or fundraising efforts. The IML is a benefit to students and their parents, not to the non-profit schools, most of which serve students from low-income communities. Focusing on the Legislature's student-focused purpose in enacting the IML, rather than the incidental, non-financial benefits that may accrue to private schools, would allow the Court to avoid invalidating Article XII, Section 3.

That outcome would parallel the United States Supreme Court's longstanding conclusion that the federal Establishment Clause allows state textbook sharing programs of this sort. *See Board of Ed. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 238 (1968) (state program lending secular textbooks to religious schools did not violate Establishment Clause). And it also would be the same approach that other state supreme courts have taken when confronted with a request to enforce a Blaine Amendment in a way that would result in a federal constitutional violation. *See, e.g.*, *Meredith v. Pence*, 984 N.E.2d 1213, 1227 (Ind. 2013) (interpreting "[a]ncillary indirect benefits" to religious schools as not "for the benefit of any religious or theological institution" under Indiana's Blaine Amendment).[6]

[6] Pursuant to the Court's October 10, 2017 Order directing the parties to address "issues . . . with respect to the United States Supreme Court's order vacating this Court's judgment and remanding for further consideration in light of *Trinity Lutheran*" and "what effect, if any, *Trinity* has on the validity of Article XII, Section 3," Intervenors do not here address Plaintiffs' challenges to the IML under other provisions of the New Mexico Constitution. Those claims were fully addressed in the parties' initial briefing to this Court, *see* **[AB 17-24]**, and will be addressed as necessary in Intervenors' response brief due on December 18, 2017.

CONCLUSION

For all the foregoing reasons, the Court should invalidate Article XII, Section 3 as applied to the IML or construe it to avoid conflict with the textbook lending program and the United States Constitution.

Respectfully submitted,

THE BECKET FUND FOR RELIGIOUS LIBERTY

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Certificate of Compliance

As required by Rule 12-318(G), we certify that the foregoing brief complies with the type-volume limitation of Rule 12-318(F)(3). According to Microsoft Office Word 2016, the body of this brief, as defined by Rule 12-213(F)(1), contains 7,968 words.

/s/ *Eric S. Baxter*
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Request for Oral Argument

Intervenors respectfully request oral argument as the issues raised in this appeal invoke provisions of the United States and New Mexico Constitutions and argument may assist the Court in resolving the appeal.

Certificate of Service

WE HEREBY CERTIFY that a true and correct copy of the foregoing was via the Court's electronic filing system to the following counsel of record on the 13th day of November 2017:

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