COLORADO COURT OF APPEALS 101 W. Colfax, Suite 800, Denver, CO 80203 Appeal from District Court, Denver County, Colorado District Court Judge Michael A. Martinez Case No. 2011CV4424 *consolidated with* 2011CV4427	▲ COURT USE ONLY ▲ Case Number: 2011CA1856
Defendants-Appellants: DOUGLAS COUNTY SCHOOL DISTRICT and DOUGLAS COUNTY BOARD OF EDUCATION, **and** **Defendants-Appellants:** COLORADO STATE BOARD OF EDUCATION AND COLORADO DEPARTMENT OF EDUCATION, **and** **Intervenors-Appellants:** FLORENCE AND DERRICK DOYLE, on their own behalf and as next friends of their children, ALEXANDRA and DONOVAN; DIANA AND MARK OAKLEY, on their own behalf and as next friends of their child NATHANIEL; and JEANETTE STROHM-ANDERSON and MARK ANDERSON, on their own behalf and as next friends of their child, MAX, **v.** **Plaintiffs-Appellees:** JAMES LARUE; SUZANNE T. LARUE; INTERFAITH ALLIANCE OF COLORADO; RABBI JOEL R. SCHWARTZMAN; REV. MALCOLM HIMSCHOOT; KEVIN LEUNG; CHRISTIAN MOREAU; MARITZA CARRERA; SUSAN MCMAHON **and** **Plaintiffs-Appellees:** TAXPAYERS FOR PUBLIC EDUCATION, a Colorado non-profit corporation; CINDRA S. BARNARD, an individual; and MASON S. BARNARD, a minor child.	2011CA1857

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BRIEF FOR *AMICUS CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY SUPPORTING APPELLANTS DOUGLAS COUNTY SCHOOL DISTRICT AND BOARD OF EDUCATION

CERTIFICATE OF COMPLIANCE

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

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

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☑ It contains 7,704 words.

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s/ Scott W. Johnson
Scott W. Johnson

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

Constitutional Provisions

SUMMARY OF THE ARGUMENT

Beginning in the mid-nineteenth century, our nation endured an epoch of malicious anti-Catholic and anti-immigrant bigotry. This "Know-Nothing" movement—decried at the time by Abraham Lincoln and in modern times by the U.S. Supreme Court—unleashed a spasm of religious discrimination at war with both founding-era and present-day understandings of religious liberty. It is an era whose memory should be buried. Sadly, its legacy persists to this day in the form of "Blaine Amendments," provisions adopted in numerous state constitutions in the late 1800s and early 1900s that were designed to suppress Catholic schools in favor of Protestant-dominated public schools. Today, Blaine Amendments often stand as the last available weapon for attacking democratically-enacted, religion-neutral government aid programs.

That is precisely the role they played in the court below. At least two sections of the Colorado Constitution—sections 7 and 8 of Article IX—bear the unmistakable earmarks of a Blaine Amendment. In striking down the Choice Scholarship Program, the district court used those provisions to bar the participation of students in certain religious schools because they are "sectarian." This is simply a modern spin on the same discrimination that birthed the Blaine Amendments. A state law originally designed to harm one group does not shed its

unconstitutionality by harming different groups today. *See, e.g., Hunter* v. *Underwood*, 471 U.S. 222, 233 (1985) (holding that a discriminatory provision violates equal protection, even if the groups discriminated against today differ from the original targets). The district court's use of the Colorado Blaine provisions creates a severe conflict with the Equal Protection, Free Exercise, and Establishment Clauses of the U.S. Constitution. Under the principle of constitutional avoidance, this Court should therefore avoid relying on any of the Colorado Blaine provisions in assessing the Choice Scholarship Program.

ARGUMENT

I. ARTICLE IX, SECTION 7 AND SECTION 8 OF THE COLORADO CONSTITUTION ARE BLAINE AMENDMENTS.

Two provisions of the Colorado Constitution relied on by the district court single out the "sectarian" for legal disfavor. Article IX section 7 prohibits government from making any appropriation "in aid of any church or *sectarian* society, or for any *sectarian* purpose," or to help any institution "controlled by any church or *sectarian* denomination whatsoever." It also prohibits government grants or donations "for any *sectarian* purpose." Colo. Const., art. IX, § 7 (emphasis added). Similarly, Article IX section 8 prohibits the teaching of "*sectarian* tenets or doctrines" in public schools. Colo. Const. art. IX, § 8 (emphasis added).

Laws like these[1] that exclude the "sectarian" from public benefits are widespread in this country and share a common and pernicious heritage: the anti-immigrant, anti-Catholic nativist political movement of the 1850s-90s. This tradition of discrimination is unfortunately long-standing, but it does not originate with James Madison, Thomas Jefferson, or any other framers of the federal constitution. Instead, it emerged with force over seventy-five years later, as part of a broad, generation-long movement reacting against a growing Catholic minority whose beliefs threatened the dominant Protestant religious ideology of the day. Coinciding with a failed attempt by then-Senator James G. Blaine to amend the federal constitution in 1875, a wave of "anti-sectarian" no-funding provisions crept into numerous state constitutions. *See, e.g., 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

[1] This brief focuses on Article IX sections 7 and 8 because they bear the particular earmarks of a Blaine Amendment, as defendants' expert Professor Charles Glenn explained. *See* Tr. 704-05:1 (Article IX, §7), Tr. 705:6-20 (Article IX, §8). Professor Glenn identified two additional provisions that may also have been tainted by anti-Catholicism. *See* Tr. 706:12 (Article V, § 34 has the same intention as a Blaine Amendment); Tr. 708:3 (same as to Article IX, § 3). As such, reliance on those provisions creates the same constitutional problems as does reliance on Article IX, sections 7 and 8.

Protestantism by ensuring both that public schools would teach their brand of Christianity and also that private religious schools—branded as "sectarian"—would not receive state funding.

A. The text of the Colorado Blaine Amendments embodies anti-Catholic animus.

There is nothing secret about the discrimination built into Blaine Amendments. Provisions like those in the Colorado Constitution *openly* discriminate against minority religious groups. Their use of the word "sectarian" is a none-too-subtle code for targeting certain faiths for special disfavor. It is little different from historically stigmatizing terms such as "imbecile," "idiotic," "bastard," "red man" and "colored." *See, e.g.*, *Buck* v. *Bell*, 274 U.S. 200, 207 (1927) (O.W. Holmes, J.) ("Three generations of imbeciles are enough"); *Plessy* v. *Ferguson*, 163 U.S. 537, 551 (1896) ("[T]he underlying fallacy [is] the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is . . . solely because the colored race chooses to put that construction upon it.").[2] Courts have unmasked the hostile discrimination inherent in such

[2] *See also, e.g., Doe* v. *Rowe*, 156 F. Supp.2d 35, 54 (D. Me. 2001) (state's use of "archaic" and "stigmatizing [] terms such as 'idiotic'" supported mentally disabled persons' equal protection claim); *Davis* v. *Sitka Sch. Bd.*, 3 Alaska 481, 484-85 (D.D. Alaska 1. Div. 1908) ("The Indian in his native state has everywhere been found to be savage, an uncivilized being, when measured by the white man's

terms, and they should be as candid about the historically freighted term "sectarian." *See, e.g.*, *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1258 n.5 (10th Cir. 2008) (recognizing the pejorative nature of the word "sectarian"); *see also* Tr. 664:13 ("Sectarian was a put-down.").

In sum, the repeated use of the shibboleth "sectarian" is *alone* sufficient to create serious constitutional doubt about applying Colorado's Blaine Amendments. Besides being facially pejorative, the term is invidiously discriminatory, treating certain religions differently merely for reasons of distrust and hostility. Such treatment warrants strict scrutiny under the Free Exercise Clause (because it shows that they law is not neutral or generally applicable) and renders the provisions void under the Establishment Clause (because they discriminate on the basis of religious denomination). *See infra* Part II.

In other words, the Court need not inquire into legislative history in order to recognize that Blaine Amendments like those in the Colorado Constitution practice illicit discrimination. To be sure, the remarks of bigoted legislators would be an additional and helpful confirmation that animus was a motivating factor behind the adoption of Colorado's Blaine Amendments. But such evidence is not strictly

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standard. . . . Nor is the status of the Alaskan native materially different from that of the red men of the States.").

necessary. *See, e.g.*, *Colo. Christian. Univ.*, 534 F.3d at 1260 ("[T]he [Supreme] Court has made clear that the First Amendment prohibits not only laws with "the object" of suppressing a religious practice, but also '[o]fficial action that targets religious conduct for distinctive treatment.'") (citation omitted). However, as the detailed discussion below illustrates, the social and legislative context of the Colorado Blaine provisions confirms that they arose out of the same anti-Catholic ferment as the vast majority of other state Blaine Amendments.

B. The 1876 Colorado Constitutional Convention adopted the Blaine Amendments out of hostility to Catholics.

American nativism during the 1850s-90s enthroned its anti-Catholic sentiments in law by excluding all government aid from so-called "sectarian" faiths (mainly Catholicism), while allowing those same funds to support a common "nonsectarian" faith, that is, non-denominational Protestantism. *See* Exhibit NN, pg. 11-12 (anti-Catholic Blaine Amendment failed in Congress but spread from state to state). In other words, Blaine Amendments were neither designed to implement benign concerns for the separation of church and state nor traceable to founding-era understandings of the First Amendment. *See* id. at 3 ("[N]ineteenth century objections to public funding of parochial schools were not generally based upon abstract concerns about 'separation of Church and State,' but upon the presumed nefarious effect of Catholic schooling."). Abraham Lincoln himself

lamented the influence of the anti-Catholic movement's perversion of the principle that "all men are created equal" to exclude "foreigners and Catholics": "When it comes to this, I should prefer emigrating to some country where they make no pretense of loving liberty . . . ." Letter from Abraham Lincoln to Joshua Speed (Aug. 24, 1855), *in* 2 *The Collected Works of Abraham Lincoln* 320, 323 (R. Basler ed. 1953).

Regrettably, Article IX sections 7 and 8 of the Colorado Constitution are a product of this movement. They possess the hallmark of a Blaine Amendment: they target the "sectarian," instead of the "religious" generally, for exclusion from government funding programs. Tr. 709:16-17 (one of two ways to accomplish anti-Catholic intentions is "to forbid funding to sectarian education"). And when Colorado's Blaine Amendments were adopted in 1876, that distinction was laden with meaning. "Sectarian" referred to those faiths (especially Catholicism) that resisted assimilation to the "nonsectarian" Protestantism taught as the "common faith" in what were known as the "common schools" (*i.e.*, public schools). Exhibit NN, pg. 7. Both the text and history of Article IX, Sections 7 and 8 reflect that they were passed out of religious *animus*. The amendments' use of the term "sectarian" to deny government benefits to some religious groups while allowing those same

benefits to flow to "nonsectarian" religions makes their pejorative meaning especially clear.

The Colorado Constitutional Convention was assembled in December 1875, the same month that President Grant called upon Congress to adopt a federal amendment banning public sectarian schools. Tr. 670:23 to 671:5. The national Blaine movement was known in Colorado through newspapers and the telegraph. Tr. 671:6–13. Some even worried, during the convention, that Congress would not admit Colorado as a state unless it adopted Blaine-style language in its constitution. Tr. 691:6–20.

The convention that adopted the Colorado Constitution was plagued by religious animosity and specifically anti-Catholic feeling then widespread in the territory. One Colorado newspaper editorialized, "[I]s it not enough that Rome dominates in Mexico and all South America?" Donald W. Hensel, *Religion and the Writing of the Colorado Constitution*, 30 Church History No. 3, 349, 354 (Sept. 1961) (quoting Boulder County News, Jan. 21, 1876). During the time preceding the popular vote on ratification of the proposed Colorado Constitution, which included Article IX sections 7 and 8, "[a] Protestant minister [stated that] the people could feel right in 'voting up a constitution which the Pope of Rome . . .

[had] ordered voted down." *Id*. At 356 (quoting Boulder County News, May 12, 1876)).

These public expressions of animus were mirrored at the Constitutional Convention itself, which included at most three Catholic delegates out of 39, though Catholics composed 25% of the population of the state at that time. Tr. 671:17–21.[3] Controversial issues were drawn along religious lines, and the Protestants prevailed on all of them, including taxes on church-owned property, but not on property used for religious purposes, given that "most Protestant churches did not own much income-producing property as did the Catholic Church." Dale A. Oesterle and Richard B. Collins, *The Colorado State Constitution: A Reference Guide* 7 (2002).

The Blaine Amendments in particular drew competing petitions from Catholic and Protestant leaders. The Catholic bishop of Denver, Joseph Machebeuf, was prompted to twice petition the Convention directly against impending adoption of the Amendments, calling them a "great injustice." *Proceedings of the Constitutional Convention: Colorado 1875-1876* 235 (1907). Referencing the

[3] Notably, the convention was held in a lodge of the Odd Fellows, a secret society that did not admit Catholics. *Proceedings of the Constitutional Convention: Colorado 1875-1876* 15 (1907).

broader national animosity towards Catholics, Machebeuf reproved the Convention for allowing "[p]rejudice [to stand] for argument," *id.* at 330, and begged them to look past their religious differences: "But we look forward hopefully to the future. A day shall at last dawn—surely it shall—when the passions of this hour will have subsided . . . and political and religious equality shall again seem the heritage of the American citizen." *Id.* at 331 (emphasis added). Until that day, however, he insisted that "[w]e shall feel bound in conscience, both as Catholics and American citizens, to oppose any Constitution which shall show such contempt of our most valued rights, both political and religious." *Id.* at 235.

The Bishop's plea, which was read into the record at the convention, was met with petitions from Protestants (that were likewise submitted and read): "Resolved, First, that we urge upon our Constitutional Convention . . . the necessity of preserving our present school system against any attempts to divide the school fund for ***sectarian*** purposes ***or to expel the Bible***, our only text book of morality heart culture." *Id.* at 87 (emphasis added).

Even the Ex-Governor of Colorado, John Evans, petitioned the convention on behalf of eleven Protestant churches asking for guarantees that the common school be "kept free from sectarian influences," that school funds not be shared, and that the Bible be allowed in schools. *Id.* at 113. In private letters, the same Evans

contemporaneously characterized the happenings at the convention as follows: "It seems much ***like the Know Nothing movement***—the Republicans are going ***into secret societies against the Catholics*** . . . But I keep my hand covered while I stir them up." Letter from John Evans to Margaret Evans, January 9, 1876, quoted in Hensel, *Religion and the Writing of the Colorado Constitution*, 30 Church History No. 3, 349, 352 (1961) (emphasis added).

Ratification of the constitution, no less than its drafting, reflected religious discord and anti-Catholic sentiment. A March 17, 1876 editorial in the *Rocky Mountain News* predicted that the Blaine provisions would drive more Protestants to vote for the constitution than Catholics to vote against it. Tr. 688:17 to 690:8. The Blaine clauses, predicted the editors, that at "first seemed the weakest link in the constitutional chain[,] no doubt will prove as source of strength to all the others." Exhibit MM, pg. 1. Governor Evans was even more candid: "Only one thing may save [the constitution], the Catholics are going to oppose it because it prohibits a division of the School fund. If they come out on that issue it will rally Protestants for it and carry it." Letter from John Evans to Margaret Evans, (Mar. 13, 1876), *quoted in* Donald W. Hensel, *A History of the Colorado Constitution in the Nineteenth Century* 224–25 (1957) (unpublished manuscript) (Pl's Ex. 149).

With deep support from primary sources, Hensel's 1961 article exposes the "religious animosity" that pervaded the constitutional convention—culminating in bans on funding "parochial schools" and "sectarian" teaching. These were the *only* two issues on which the "convention refused to compromise contending factions. The Protestant majority saw to that." Hensel, *Religion and the Writing of the Colorado Constitution*, 30 Church History No. 3, at 356. While Hensel suggested in 1961 that "Coloradans had to pay an initial price of animosity to avoid later and more corrosive bitterness," *id*., Bishop Machebeuf may have proved more prescient in 1876: Colorado's Blaine Amendments are still causing division and religious discrimination today.[4]

C. The District Court mistakenly disregarded the historical evidence against the Colorado Blaine Amendments.

While relying in part on Colorado's Blaine Amendments to justify invalidating the Choice Scholarship Program, the court below refused to inquire into those provisions' tainted origins. *See* D. Ct. Order at 45. The court candidly announced that, regardless of whether such provisions were "written and ratified under the guise of 'Catholic bigotry," their historical provenance would simply "not factor

[4] Notably, the State of Colorado has already *admitted* elsewhere that Article IX section 7 was, like other state Blaine Amendments, motivated by anti-Catholic animus. *See* State Defendants' Cross Motion for Partial Summary Judgment, p. 31 n. 18 in *Colo. Congress of Parents, Teachers and Students* v. *Owens*, No. 03-cv-3734 (Dist. Ct., Denv. City and Cnty.) (filed Nov. 10, 2003).

into the Court's decision." *Id.* at 35. This was a grave mistake. Considering the illicit origins of the Colorado provisions is unavoidable, because implementation *today* of those provisions' Blaine-era hostility violates the Equal Protection, Free Exercise, and Establishment Clauses of the federal constitution. *See infra* Part II. This Court should repudiate any reliance on the Colorado Blaine Amendments in assessing the validity of the Choice Scholarship Program.

The district court offered two reasons for rejecting the anti-Catholic history of the Blaine Amendments, neither of which withstands scrutiny.

First, the Court reasoned that the text of Article IX section 7 mirrors the Illinois Blaine Amendment, which was enacted earlier than other Blaine Amendments. D. Ct. Order at 35. Whether the Colorado provision was based on the Illinois provision, however, cannot overcome the evidence demonstrating *why* the Colorado legislature enacted its provision. Whatever the motives of the Illinois legislature,[5] the overwhelming evidence from the Colorado Constitutional Convention in the record below shows that Colorado's amendments were steeped in animus toward Catholics. Furthermore, it is a fallacy to suppose that, by dating the Colorado provisions earlier than Blaine's failed federal amendment, this

[5] *See* Brief of Intervenor-Appellants 38-39 (discussing less-than-pristine motives of the Illinois legislature).

somehow distances Colorado from the accompanying history of anti-Catholic animus. But the federal Blaine Amendment did not come out of nowhere. The anti-Catholic Know-Nothing movement has its roots in the *1850s*; it had plenty of time to fester before it produced an attempted constitutional amendment by the mid-1870s. *See* Michael F. Holt, *The Politics of Impatience: The Origins of Know Nothingism* 60 Journal of American History 2, 309 (1973). In other words, the rancorous debate between Protestant majority and Catholic minority did not begin with Senator Blaine's 1875 attempted constitutional Blaine Amendment. As just one example, in 1869 the contemporary version of the National Education Association, the National Teachers Association, waded into the fight, "resolv[ing] both that 'the appropriation of public funds for the support of sectarian schools is a violation of the fundamental principles of our American system of education'" but also that "the Bible should not only be studied, venerated, and honored . . . but devotionally read, and its precepts inculcated in all the common schools of the land." John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 301 (2001) (internal citations omitted).

Second, the court cited one rally conducted by Catholics in the days leading up to the ratification of the Constitution, presumably negating the discriminatory

motives behind the Blaine Amendments. This is a red herring. Not only does the record below fail to reflect the political impetus behind the rally, but the fact that some Catholics supported the Constitution as a whole does not support the conclusion that the purpose of the Blaine Amendments was benign. This one fact, picked from pages of testimony about anti-Catholic animus rampant in Colorado at the time, cannot inoculate the plainly illicit motives behind the Blaine Amendments, nor does it represent a full picture of the political landscape, as laid out by Professor Glenn's expert testimony as well as the scholarship of Plaintiff's withdrawn expert, Professor Green. *See* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38 (1992).

The court also purported to rely on two cases where courts refused to address the constitutional infirmities of state Blaine Amendments, one from Florida and the other from Arizona. The Florida case, however, is inapposite because, contrary to the court's understanding, the Florida Supreme Court avoided considering Florida's Blaine Amendment altogether. *See Bush* v. *Holmes*, 919 So.2d 392, 400 (Fla. 2006), *affirming in part Bush* v. *Holmes*, 886 So.2d 340 (Fla. Dist. Ct. App. 2004). The Arizona case is simply wrong. In *Cain* v. *Horne*, 202 P.3d 1178, 1184 (Ariz. 2009), the Arizona Supreme Court struck down a school choice program while declining to consider the shameful history of the Blaine Amendments. This

Court should not make the same mistake. Instead, it should assess the Colorado Blaine Amendment in the context of the palpable and well-documented anti-Catholic animus that led to its adoption.

II. RELIANCE ON THE COLORADO BLAINE AMENDMENTS CREATES SEVERE CONFLICTS WITH THE U.S. CONSTITUTION.

In light of the bigotry that birthed the Blaine Amendments and its Colorado iteration, the well settled doctrine of constitutional avoidance strongly counsels this Court to avoid reliance on those provisions in assessing the Choice Scholarship Program. *See, e.g., NLRB* v. *Catholic Bishop of Chicago,* 440 U.S. 490, 501 (1979) ("[A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."). Sections 7 and 8 run afoul of the U.S. Constitution in at least three ways: they violate the Equal Protection Clause, the Establishment Clause, and the Free Exercise Clause. Avoiding these constitutional issues requires this Court to avoid relying on the Blaine Amendments.

These different clauses have overlapping application to the Colorado Blaine Amendments. The hostility shown towards Catholics in the enactment of those provisions implicates the Equal Protection Clause and violates the neutrality standard of the Free Exercise Clause. The provisions' discriminatory treatment of religious groups violates the Equal Protection Clause and the Establishment

Clause, and lastly, government's power to evaluate those differences violates the requirement of general applicability under the Free Exercise Clause.

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

The Equal Protection Clause of the 14th Amendment subjects laws to strict scrutiny if they interfere with a fundamental right or discriminate against a suspect class. *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432, 440 (1985). Not only is religion 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 on an unjustifiable standard such as race, religion, or other arbitrary classification.'"); *Abdulhaseeb* v. *Calbone*, 600 F.3d 1301, 1322 n.10 (10th Cir. 2010) ("Religion is a suspect class"), but religious rights are fundamental. *See, e.g., Johnson* v. *Robison*, 415 U.S. 361, 375 n.14 (1974) ("Unquestionably, the free exercise of religion is a fundamental constitutional right."); *Niemotko* v. *State of Md.*, 340 U.S. 268, 272 (1951) (Equal Protection Clause bars government decision based on a "City Council's dislike for or disagreement with the [Jehovah's] Witnesses or their views"). Because they openly discriminate between religions—Catholicism in "sectarian" schools and generic Protestantism in public schools—and against religious groups, Blaine Amendments are unlikely to survive an Equal Protection examination based on their discriminatory intent. Tr. 697:21-25.

i. Colorado courts have consistently interpreted the Colorado Blaine Amendments to disfavor some religions but not others.

Colorado courts have consistently interpreted sections 7 and 8 to disfavor only some religions and have not treated the term "sectarian" as synonymous with "religious." The term refers instead to a narrower subcategory, connoting one or more sects or denominations.[6] Although that distinction may be blurred in common usage today, it was clear when sections 7 and 8 became law, and clear to the Colorado courts that have interpreted it since. *See People ex rel. Vollmar* v. *Stanley*, 81 Colo. 276, 290 (Colo. 1927) ("Religious and sectarian are not synonymous."); *see also Colo. Christian Univ.* v. *Baker*, 2007 WL 1489801, *15 (D. Colo. 2007) ("Colorado does not consider other types of aid to religious institutions to violate Article IX, § 7.").

Indeed, the historical context of those provisions demonstrates that use of the term "sectarian" was the common and *preferred* legal device for targeting those who resisted the "common religion" then taught in the "common schools." In other words, the meaning of "sectarian" can only be understood by reference to the

[6] For example, "nonsectarian prayer" is unmistakably religious but is not tied to any one religious sect. *See, e.g.*, *Lee* v. *Weisman*, 505 U.S. 577, 581-82, 588-89 (1992). The term "sectarian" is also often used pejoratively to denote narrow-mindedness.

"nonsectarian" religion that *was* funded and promoted at the time by the government.

Nativists used the law to target Catholic education in two primary ways: (1) by requiring daily, devotional reading of the King James Version of the Bible in the common schools,[7] and (2) by withdrawing all government support from "sectarian" schools with Blaine Amendments. Colorado followed the pattern exactly.

As to the first point, though there may have been widespread demand for publicly funded education, there was no viable demand at that time that it be *secular*; any suggestion that the emergent "common schools" should *not* teach the "common Christianity" of the era[8] met with great disapproval. For example,

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[7] *See Lemon* v. *Kurtzman*, 403 U.S. 602, 628, 629 (1971) (Douglas, J., concurring) (noting that "Protestants obtained control of the New York school system and used it to promote reading and teaching of the Scriptures as revealed in the King James version of the Bible," and that the Know-Nothing party "included in its platform daily Bible reading in the schools") (citation omitted); *See also State ex rel. Finger* v. *Weedman*, 226 N.W. 348, 351 (S.D. 1929) ("The King James version is a translation by scholars of the Anglican church bitterly opposed to the Catholics, apparent in the dedication of the translation, where the Pope is referred to as 'that man of sin . . . .'"); *People ex rel. Ring* v. *Bd. of Educ. of Dist. 24*, 92 N.E. 251, 254 (Ill. 1910) (". . . Catholics claim that there are cases of willful perversion of the Scriptures in King James' translation . . . .").

[8] That "common" Christianity was a part of the fabric of everyday life in Colorado, as elsewhere, in the late 1800's is not controversial. *See, e.g.*, *Ex parte Burke*, 59 Cal. 6, 15-16 (Cal. 1881) ("[T]he Christian religion is recognized as constituting a part of the common law, . . . The foregoing [is] . . . in no manner influenced by *sectarian* or puritanical ideas. The same current of authority runs

Colorado "common schools" used Protestant-leaning McGuffey readers[9] and *mandated* that students read the King James Bible, while totally excluding Catholic (*i.e.* "sectarian") translations of the Bible. *See Vollmar***,** 81 Colo. at 287 ("It is not the Bible itself that is sectarian. If any part of it is so, it is a small part. It therefore cannot be said that Bible reading in the public schools causes the taxpayers to pay for aid to a sectarian purpose.") (upholding KJV Bible reading in public schools as consistent with Colorado's Blaine Amendment) (citation omitted);[10] *Id*. at 285 ("neither children nor parent are supporting a religious sect or denomination by listening to the reading of the Bible or by supporting a school where it is read.").

In *Vollmar*, Catholic parents complained that their children, "conscientiously believe in the doctrines and worship of the Roman Catholic Church, which teaches that the King James translation is in part incorrect, is incomplete . . . It is further alleged that such reading is religious service and sectarian instruction." *Vollmar*, 81 Colo. at 280. In response, the Colorado Supreme Court argued at length that the teaching of common Christianity was not "sectarian" (and therefore allowed) even

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through the cases to be found in the legal reports of the Eastern, Western, and Middle States.") (emphasis added).

[9] William H. McGuffey, *The Eclectic Third Reader*, orig. preface, reprinted by Mott Media, Inc. (1982 ed.). "For the copious extracts made from the Sacred Scriptures, [author makes] no apology. . . ."

[10] Overruled by *Conrad* v. *City and Cnty. of Denver*, 656 P.2d 662 (Colo. 1982) (citing *Sch. of Abington Twp.* v. *Schempp*, 374 U.S. 203 (1963)).

if the vehicle used for the teaching was *exclusive* use of the Protestant King James Version of the Bible. It pointed out first that the drafters of the Blaine Amendment did not understand the reading of the Bible to be "the teaching of a sectarian tenet or doctrine," and second, that to equate the word "sectarian" with the word "religious" would "push it to its logical limit, and say that believers are a sect, and that, in deference to atheists no reference to God may be made (unless to deny Him, which we suppose would not be regarded as sectarian) . . . . ***Religious and sectarian are not synonymous***." *Vollmar*, 81. Colo at 290 (emphasis added) (citation omitted).

So as to not leave any doubt that "sectarian" did not exclude common Christian teaching in the minds of Colorado's founders, the Court added: "'If the Legislature or the Constitutional Convention had intended that the Bible should be proscribed, they would simply have said so. . . . It is not conceivable that, if it had been intended to exclude the Bible from the public schools, that purpose would have been obscured within a ***controversial word.***'" *Id.* at 292 (citing *Hackett* v. *Brooksville Graded Sch. Dist*., 120 Ky. 608, 618 (Ky. Ct. App. 1905)) (emphasis added). *Cf. Ams. United* v. *State*, 648 P.2d 1072, 1083 (Colo. 1982) ("Sectarian meant, to the members of the (constitutional) convention and to the electors who voted for and against the constitution, 'pertaining to some one of the various

religious sects', and the purpose of section 7 was to forestall public support of institutions controlled by such sects.") (quoting *Vollmar*, 81 Colo. at 287).

ii. The U.S. Supreme Court has consistently concluded that state provisions targeting the "sectarian" for disfavor were animated by nativism.

This basic history of the legal term "sectarian," particularly as used in Blaine Amendments as code for "Catholic," has been confirmed and noted in U.S. Supreme Court opinions written or joined by five current and four former Justices, most recently in *Locke* v. *Davey*, 540 U.S. 712 (2004).

Locke noted that Blaine Amendments are "linked with anti-Catholicism." *See Locke*, 540 U.S. at 723 n.7 (citing *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality op.). In fact, the Court upheld the particular constitutional provision at issue there, in part, because it was *not* a Blaine Amendment. *Locke*, 540 U.S. at 723 n.7 ("the provision in question is not a Blaine Amendment"). Notwithstanding this connection, *Locke* did not rule on the constitutionality of Washington's Blaine Amendment[11] because it was "not at issue in th[at] case." *Id.* It distinguished Article I, Section 11 of the Washington State Constitution from the Blaine Amendments, *id.* ("the provision in question is not a Blaine Amendment"), linking

[11] *Compare* Wash. Const., art. IX, § 4 ("All schools maintained or supported wholly or in part by the public funds shall be forever free from ***sectarian*** control.") (emphasis added) *with* Colo. Const., art. IX, § 7 (using "sectarian" four times in one sentence).

it instead with amendments "against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an 'established' religion." *Id.* at 722. Amendments like these date back to the founding. *See*, *e.g.*, *id.* at 723 (listing "no compelled support" amendments passed by eight states from 1776 to 1802); *id.* at 722 n.6 (discussing similar law from the same era in Virginia). Notably, like Washington's Article I, Section 11, none of those early amendments used the term "sectarian" to describe those excluded from funding. *Compare Locke*, 540 U.S. at 725 (listing founding-era state amendments) *with* Wash. Const. art. I, § 11 ("No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment . . . .").

In *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002), three Justices provided a detailed account of the relevant history in dissent. *See id.* at 720-21 (dissenting opinion of Breyer, J., joined by Stevens and Souter, JJ.). Not only did they recognize that the Blaine Amendment movement was a form of backlash against "political efforts to right the wrong of discrimination against religious minorities in public education," they explained how the term "sectarian" functioned within that movement. *Id.* at 721. "[H]istorians point out that 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.* citing David Tyack, Onward Christian Soldiers: Religion in the American Common School, *in History and Education* 217-226 (P. Nash ed. 1970)).

The Justices further recounted how the wave of immigration starting in the mid-19th Century increased the number of those suffering from this discrimination: "[M]embers of non-Protestant religions, particularly Catholics, began to resist the Protestant domination of the public schools. . . . [B]y the mid-19th century religious conflict over matters such as Bible reading 'grew intense,' as Catholics resisted and Protestants fought back to preserve their domination." *Zelman*, 536 U.S. at 720-21 (citing Jeffries & Ryan, 100 Mich. L. Rev. at 300), and correspondingly the intensity of religious hostility surrounding the "School Question," the fear of Catholic domination, and subsequent "terrorization" of Catholics: "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).

Finally, the Justices detailed how Catholic efforts to correct this increasingly severe discrimination elicited a reaction in the form of the proposed federal Blaine Amendment and its successful state progeny:

> Catholics sought equal government support for the education of their children in the form of aid for private Catholic schools. But the "Protestant position" on this matter, scholars report, "was that public schools must be 'nonsectarian' (which was usually understood to allow Bible reading and other Protestant observances) and public money must not support 'sectarian' schools (which in practical terms meant Catholic.)" [Jeffries & Ryan] at 301. And this sentiment played a significant role in creating 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. [Jeffries & Ryan] at 301-305. See also Hamburger, *supra*, at 287.

Zelman, 536 U.S. at 721.

In *Mitchell*, 530 U.S. 793, a plurality of four Justices acknowledged and condemned the religious bigotry that gave rise to the state Blaine Amendments. *See id.* at 828-29 (plurality op. of Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.). The opinion flatly described the rise of Blaine Amendments as "a time of pervasive hostility to the Catholic Church and to Catholics in general," noting that "it was an open secret that 'sectarian' was code for 'Catholic.' *Mitchell*, 530 U.S. at 828 (citing Green, *supra*, 36 Am. J. Legal Hist. 38). The opinion further criticized the Court's prior use of the term "sectarian" in Establishment Clause jurisprudence, because "hostility to aid to pervasively sectarian schools has

a shameful pedigree that we do not hesitate to disavow." *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. Unfortunately, although the Supreme Court has condemned the nativist use of the word "sectarian" in unusually strong language in *Mitchell* and elsewhere, the district court is conspicuously silent on this point. *See* D. Ct. Order at 35 ("the historical nature of the Blaine Amendments does not factor into the Court's decision in this Order.").

iii. The Colorado Blaine Amendments are tainted by an historical pedigree of hostility towards Catholics.

Just as vestigial Jim Crow laws may not be relied on to prohibit political speech and enable discrimination, Colorado may not rely on constitutional provisions enacted out of religious animus in order to discriminate among religious believers today. *See, e.g.*, *Hunter* v. *Underwood*, 471 U.S. 222, 232-33 (1985) (facially neutral constitutional provision violated Equal Protection Clause). In *Hunter*, the Court held that although determining whether a discriminatory purpose lurked behind a state constitutional provision "is often a problematic undertaking," it could rely on the undisputed historical backdrop to determine purpose: "the Alabama Constitutional Convention of 1901 was part of a movement that swept

the post-Reconstruction South to disenfranchise blacks." *Hunter*, 471 U.S. at 228-229. The existence of this historical discriminatory movement, even without a showing of specific purpose, was enough discriminatory intent for purposes of the Equal Protection Clause. *Id.* Thus "where both impermissible racial motivation and racially discriminatory impact are demonstrated" the state constitutional provision was subject to invalidation under the Equal Protection Clause. *Id* at 232.

Similarly, Colorado's Blaine Amendment was very much "part of a movement that swept the [United States] to [discriminate against Catholics.]" *See supra* Part I. Nor is it any defense to argue that there is no discriminatory intent towards Catholics today. The absence of any discriminatory intent today would—even if true—not allow Colorado to escape its obligations under the Equal Protection Clause: as *Hunter* explained, "[w]ithout deciding whether [the challenged section of the Alabama constitution] would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate . . . *and the section continues to this day to have that effect*. As such, it violates equal protection . . . ." 471 U.S. at 233 (emphasis added). As in *Hunter*, the original enactment of sections 7 and 8 was motivated by a desire to discriminate against Catholics, and today has a discriminatory effect on all religious schools.

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

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

Sections 7 and 8 do not meet the First Amendment standard of "neutral and general applicability" because, as explained *supra*, their original purpose was to target Catholic institutions, keeping them from receiving public funds while supporting other, "nonsectarian" faiths. Such laws—laws that are "enacted 'because of,' not merely 'in spite of,' their suppression of" religious groups, are subject to strict scrutiny. *Lukumi*, 508 U.S. at 540. Just as the Amendments violate the Equal Protection Clause by treating religious organizations unequally, they violate the Free Exercise Clause by singling out those minorities for disfavor. *Lukumi*, 508 U.S. at 534 ("The Free Exercise Clause protects against governmental hostility which is masked, as well as overt"); *see also Locke* v. *Davey*, 540 U.S. at 724 (ban on state funding of devotional theology studies allowed because

prohibition was "[f]ar from evincing [] hostility toward religion"). The history of the Blaine Amendments presented here shows that the Colorado provisions were enacted with vivid animus towards minority religious faiths, and thus should be subject to strict scrutiny.

A second way the provisions are suspect under the Free Exercise Clause is that they implicitly give the government discretion to make individualized exemptions depending on the individual religious practices of the institution or individual. *Smith*, 494 U.S. at 884; *Lukumi*, 520 U.S. at 537. Such a law invites strict scrutiny because it "creates the opportunity for a facially neural and generally applicable standard to be applied in practice in a way that discriminates against religiously motivated conduct." *Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004). In *Lukumi*, the town of Hialeah passed ordinances prohibiting "unnecessarily" killing an animal. The term "unnecessarily" "require[d] an evaluation of the particular justification for the killing" to determine whether it was "necessary" or not. Because the government must decide whether a particular individual deserved an "individualized exemption" on a case-by-case basis, the ordinance was subject to strict scrutiny. *Lukumi*, 508 U.S. at 537.

The term "sectarian" in the Colorado provisions requires an individualized assessment from the government. When the law was passed, the term sectarian

referred to any religion outside of mainstream Protestantism, leaving room for courts to judge, based on the conduct of funds recipients, whether their religious practices met the standard. Today, even with the term's broader (albeit still pejorative) meaning, it still requires that the government determine on a case-by-case basis just how religious the organization is, leaving room for abuse. In fact, here the district court did just that. It distinguished "sectarian" institutions of "higher learning" from religious elementary and secondary schools, D. Ct. Order at 45, but, more egregiously, it spent several pages of its opinion examining the extent to which each of those schools was "sectarian." *Id.* at 9-12 (considering, among other things, how much "control" religious institutions have over the schools, school hiring policies, funding sources, and religious curricula).[12] Because the Colorado Blaine Amendment evinces hostility toward religion and because it gives the government the power to determine which religious groups are worthy of government benefits in a given scenario, it is not a neutral or a generally applicable law under *Smith* and *Lukumi*, and is therefore suspect under the Free Exercise Clause.

[12] This kind of analysis also poses significant problems of government entanglement in religious affairs in violation of the Establishment Clause, as Defendants explain. D. Br. 36-37. *See also, e.g., Colo. Christian Univ.*, 534 F.3d at 1261 ("It is well established . . . that courts should refrain from trolling through a person's or institution's religious beliefs.").

C. The Colorado Blaine Amendments violate the Establishment Clause.

The effect of discriminating among religious groups—*i.e.*, those considered ”sectarian” and those considered “non-sectarian”—violates the Establishment Clause just as it violates the Equal Protection Clause. The court below attempted to avoid this basic principle by concluding that the Blaine Amendment is not *required* by the Establishment Clause. Dist. Ct. Order at 33 (citing *Ams. United* v. *State*, 648 P.2d 1072, 1082 (Colo. 1982)). But that is irrelevant. The more pertinent principle is that the Establishment clause has long prohibited discrimination between religions. “[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.’” *Colo. Christian Univ.*, 534 F.3d at 1257 (citing *Larson*, 456 U.S. at 244).

In *Colorado Christian University*, the 10th Circuit applied this principle to find that the “‘pervasively’ sectarian” standard was unconstitutional in that it “exclude[d] some but not all religious institutions . . . .” 534 F.3d at 1258. Similarly, in *Larson v. Valente*, 456 U.S. 228, 230 (1982), the Supreme Court struck down a state law that imposed registration and reporting requirements upon only those religious organizations that solicited more than fifty per cent of their

funds from nonmembers. According to the Court, these requirements impermissibly distinguished between "well-established churches," which had strong support from their members, and "churches which are new and lacking in a constituency," which had to rely on solicitation from nonmembers. *Id.* at 247 n.23; *see also Lukumi*, 508 U.S. at 536 ("differential treatment of two religions" might be "an independent constitutional violation.").

That sort of impermissible discrimination among religious organizations was exactly what the Blaine Amendment was designed to do—*i.e.*, to ban Catholic schools from receiving the same funding enjoyed by schools that promoted the majority Protestant faith of the time. That is a direct violation of the Establishment Clause. Nor is such discrimination limited to the past. The Colorado Blaine Amendments continue to bar funding on the basis of specifically religious considerations, as the district court's own analysis richly confirms. Those provisions therefore violate the "clearest command of the Establishment Clause" today.

D. The Colorado Blaine Amendments cannot withstand strict scrutiny.

If they violate any one of these clauses, the Blaine Amendments must be subjected to strict scrutiny, which requires that a law must have a compelling governmental interest, and must be narrowly tailored to pursue that interest.

Lukumi, 508 U.S. at 546. But there can be no compelling interest in withholding federal funding from minority religious groups. Blaine Amendments were neither designed to implement benign concerns for the separation of church and state nor are they traceable to founding-era understandings of the First Amendment. Instead, the Blaine Amendments were designed from the outset to target minority faiths, especially Catholicism, for special disadvantage in the name of preserving American identity from the "un-American" religious beliefs of immigrants.

The court below cited *Locke* for the proposition that "the Free Exercise [C]lause *does not* require a state to fund theology students." D. Ct. Order at 34-35. Yet *Locke* cannot provide the state with a compelling interest to enforce the Colorado Blaine Amendment against Plaintiff for two reasons. First, *Locke* plainly held that "[t]he State's interest in not funding the pursuit of devotional degrees is . . . ," not compelling, but "substantial." *Locke*, 540 U.S. at 725. Second, there is no "anti-establishment" motivation for Colorado's Blaine Amendment. The Amendment cannot be linked to founding-era anti-establishment interests—its broad ban sweeps well beyond the prohibition on funding clergy training upheld in *Locke*. The Amendment was (and is) discriminatory in operation, stemming from impermissible animus against religious minorities. There can be no compelling interest to discriminate on the basis of religion, either between or against religious groups. The

state interest of "achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution . . . is limited by the Free Exercise Clause" and is not "sufficiently 'compelling'" to justify discriminating against religious groups in an otherwise open forum. *Widmar* v. *Vincent*, 454 U.S. 263, 276 (1981). Thus, even if the *Locke* standard did apply to Blaine Amendments (which it does not), there would not even be a substantial interest supporting Colorado's, to say nothing of a compelling one.

By relying expressly on sections 7 and 8 of Article IX to invalidate the Choice Scholarship Program, the district court created an unavoidable conflict with the U.S. Constitution. This Court should reverse that decision and repudiate any reliance on the Colorado Blaine Amendments in assessing the Choice Scholarship Program.

CONCLUSION

The Court should reverse the decision of the district court.

Respectfully submitted,

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