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,

Defendant-Appellee,

and

ALBUQUERQUE ACADEMY, *et al.*,

Intervenor-Appellees.

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

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SUMMARY OF THE ARGUMENT

The United States Supreme Court remanded this case for this Court to consider *Trinity Lutheran Church of Columbia, Inc. v. Comer*. And this Court specifically asked the parties to address *Trinity Lutheran* in their supplemental briefing.

But you wouldn't know any of that from reading Plaintiffs-Appellants' brief. Indeed, Plaintiffs fail almost entirely to engage the *Trinity Lutheran*'s holding that "[t]he 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. 2012, 2019 (2017) (internal quotation marks and alterations omitted).

The omission is telling. The unrefuted historical record—already recognized by this Court—overwhelmingly supports the conclusion that Article XII, Section 3 of the New Mexico Constitution was motivated by religious animus that sought to suppress Catholic participation in the development of New Mexico's education system. Given that "odious" history, *Trinity Lutheran* demands that the provision either be invalidated or interpreted narrowly to avoid conflict with the Free Exercise and Equal Protection Clauses of the First Amendment to the United States Constitution. Plaintiffs' utter failure to engage *Trinity Lutheran* is the briefing equivalent of whistling past the graveyard.

Rather than meaningfully engage *Trinity Lutheran*'s holding, Plaintiffs instead focus their attention on two red herrings, again offering Article IV, Section 31 and Article IX, Section 14 of the New Mexico Constitution as alternative grounds for invalidating the New Mexico Instructional Materials Act, NMSA 2010, §§ 22-15-1 et seq. (the "IML"). But under this Court's prior rulings, those provisions have no application here, because the IML does not make any "appropriation" or "donate" anything to a private person or entity. Having effectively conceded the Article XII issue, Plaintiffs cannot save their case by relying on Articles IV and IX instead. Their claims should be dismissed.

ARGUMENT

I. Article XII, Section 3 is invalidated by *Trinity Lutheran.*

Trinity Lutheran underscored that laws that "single out the religious for disfavored treatment" violate the Free Exercise Clause. 137 S. Ct. at 2020 (citing long line of Supreme Court cases). Even where a challenged law is "facially neutral," if it is derived from "a discriminatory purpose" aimed at "some or all religious beliefs" it is an "odious" form of discrimination, *id*. at 2021, 2025, and must be invalidated, *City of Richmond v. United States*, 422 U.S. 358, 378 (1975) (such laws have "no legitimacy at all under our Constitution").

Plaintiffs cannot dispute that Article XII, Section 3 explicitly prohibits aid to "sectarian" schools, showing that the law is not even facially neutral. As this Court

has recognized, "[i]t was an open secret that 'sectarian' was code for 'Catholic.'" *Moses v. Skandera*, 2015-NMSC-036, ¶ 21, 367 P.3d 838, 843 (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000)), and there is no question that the provision was forced upon the New Mexico Constitutional Convention of 1910 for discriminatory reasons, *id.* ¶¶ 18-23. The religious reference alone confirms the motivation behind the provision. As the U.S. 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." *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993). And Intervenor-Appellees' opening brief on remand further points to an extensive historical record illustrating that the origins of both the Federal Blaine Amendment and Article XII, Section 3 were rooted in anti-Catholic bigotry. Intervenors' Opening Br. at 10-13.

Plaintiffs' short brief wholly fails to engage that historical record. Indeed, on remand, Plaintiffs only offer two arguments in defense of Article XII, Section 3. First, that *Trinity Lutheran* is simply "neither applicable nor germane to this Honorable Court's opinion in *Moses (II)*." Pls.' Opening Br. at 7. That argument ignores that the Supreme Court remanded this case "for further consideration in light of *Trinity Lutheran*." *N.M. Ass'n of Non-Public Sch. v. Moses*, 137 S. Ct. 2325 (2017).

Second, Plaintiffs argue that the "all-inclusive reference to 'private school[s],'" Pls.' Opening Br. at 8, insulates Article XII, Section 3 from scrutiny because *Trinity Lutheran* only applies when "religious identity" is the "sole" target of a law. Pls.' Opening Br. at 7. That is an untenable reading of *Trinity Lutheran*, where the Supreme Court affirmed that even a "facially neutral" law is invalid if it has "a discriminatory purpose" aimed at "some or all religious beliefs" and imposes a "special disabilit[y]" for religious observers. *Id.* at 2021; *see also Lukumi*, 508 U.S. at 535, 540, 547 (invalidating law as "void" for "discriminatory object," even though it appeared to be facially neutral and "implicate[d] . . . multiple concerns unrelated to religious animosity"); *see also Hunter v. Underwood*, 471 U.S. 222, 228 (1985) (invalidating facially neutral law because "racial discrimination" was "a 'substantial' or 'motivating' factor behind [its] enactment").

But both in Congress and in the New Mexico Territory, anti-Catholic animus dominated the debate over public education and the granting of statehood. In the Territory, going as far back as the 1850 convention, "Church control of education" was a source of conflict that undermined attempts at statehood. Robert W. Larson, *New Mexico's Quest for Statehood 1846-1912* 35 (1968). Later, in 1872 and 1889, strong Republican support for public education provisions that would bar sectarian funding backfired and helped sink two proposed constitutions after local Democrats trumpeted Republican anti-Catholic motives in campaigns against the constitutions.

Id. at 102, 113, 167-68. Funding for religious schools thus bitterly divided the Territory.

In Congress, bigotry towards religious education likewise dominated the debates over statehood. The Catholic Church was blamed for New Mexico's relatively low literacy rates even though Catholics were some of the first to establish schools in the Territory. Kathleen Holscher, *Religious Lessons: Catholic Sisters and the Captured Schools Crisis in New Mexico* 31 (2012). And federal officials displayed "a strong distrust of the Catholic religion" in their attempt to exert control over the Territory. Howard R. Lamar, *The Far Southwest 1846-1912, A Territorial History* 144 (2000). In the 1870s, for instance, Territory Secretary W. G. Ritch unsuccessfully attempted to push through a law banning New Mexico from diverting any public funds to parochial institutions. *Id.* at 145. He also attempted to enact other anti-Catholic measures such as barring clerics from teaching in public schools and establishing a secular definition of marriage for the state. *Id.*

Locally in New Mexico, proponents of statehood "were very conscious" that outsiders were wary of potential Catholic influence on a new state government, and thus proposed constitutional language that "was so strongly secular" that it purposely shut out not just Catholic institutions but all private institutions from public funding. Larson, *supra* at 160. In an article in the New-York Tribune on November 4, 1889, Governor L. Bradford Prince noted that "[m]any of [the Constitution's] provisions

have been prompted by an inclination on the part of outsiders to prognosticate evil for the new State." *New-Mexico's Strong Plea, Her Desire for Statehood*, New-York Daily Tribune (November 4, 1889). Because "the suggestion[] has been that, owing to the great percentage of a Catholic Mexican population, the State Government would be likely to be influenced by the priesthood," the constitution was drafted with "a well-marked intention of avoiding such a condition." *Id.* In other words, the drafters of the constitution were not simply "play[ing] it safe" by excluding private schools from funding, *Moses*, 2015-NMSC-036, ¶ 27, this record reflects that they went above and beyond the bigoted Blaine Amendment language that the Enabling Act demanded to further appease critics of statehood who feared Catholic dominance. The historical record thus thoroughly demolishes the Plaintiffs' claim that the broad bar of aid to *all* private schools somehow absolves Article XII, Section 3 of its disreputable anti-Catholic origins. To the contrary, the broad language was chosen precisely because it would more fully satisfy anti-Catholic opponents of statehood. The expansion of the ban to all private schools cannot disguise that the ultimate target was Catholic schools. *See 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").

In any event, in light of the history of anti-religious animus, the Plaintiffs have the burden 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. Metropolitan Housing Development 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"). And Plaintiffs have utterly failed even to attempt to meet that burden.

Whether the Court finds that Article XII, Section 3 is facially discriminatory or that discriminatory animus motivated its enactment, the result is the same. The provision violates the Free Exercise Clause and must either be invalidated or narrowly interpreted to avoid offending the Constitution.

II. The IML does not violate the other provisions of the New Mexico Constitution.

Plaintiffs argue that the IML violates two other provisions of the New Mexico constitution that more generally restrict the ability of the state to make appropriations and donations. Pls.' Opening Br. 8-15. However, neither of these provisions apply to the IML because the state retains both control and ownership of the textbooks and merely utilizes the schools as agents to facilitate its efforts to lend textbooks for the benefit of students.

A. The IML does not violate Article IV, Section 31 because it does not make an "appropriation" to anyone "not under the absolute control of the state."

Article IV, Section 31 prohibits "appropriations" for "charitable, educational or other benevolent purposes to any person . . . [or] institution . . . not under the absolute control of the state." This provision is inapplicable to the IML because the only appropriation it makes is to the New Mexico Public Education Department (PED), which is controlled exclusively by the State. The Court of Appeals thus correctly held that "Plaintiffs . . . have not demonstrated that funds used to support the IML are not within the control of the state." *Moses v. Skandera*, 2015-NMCA-036, ¶ 50, 346 P. 396, 408 (2014).

The IML creates an "instructional material fund," which "consists of appropriations, gifts, grants, donations, and any other money credited to the fund." NMSA 2010, § 22-15-5. The fund is "administered by the [PED] and "appropriated to the [PED] to carry out the provisions of the [IML]." *Id*. Furthermore, instructional materials are purchased only "upon vouchers issued by the department of education" to the state "department of finance and administration." NMSA 2010, § 22-15-6. No funds are "appropriated" to private entities, *see* NMSA 2010, § 22-15-9(E), and even the textbooks are only on loan to the students, *see* § 22-15-10 (students and parents liable for loss or damage and unused books, or money from their sale, must be returned to PED). Because there is no "appropriation" to a non-governmental entity,

Article IV, Section 31 is not implicated. *State ex rel. Interstate Stream Comm'n v. Reynolds*, 1963-NMSC-023, ¶ 17, 71 N.M. 389, 396, 378 P.2d 622, 626 ("The fact that nonprofit organizations may incidentally benefit from the appropriations made to the State Engineer, who has absolute control of their expenditure, does not put them within the classifications of this section.").

Plaintiffs try to distinguish *Reynolds*' clear holding by arguing that the IML does more than just "incidentally" benefit private schools. Pls.' Opening Br. 10-11. But that argument misses entirely the point of *Reynolds*, which emphasized that Article IV, Section 31 simply is not triggered by legislative appropriations to state agencies, even if those agencies then expend funds that benefit private parties. The Court stressed that "the appropriations are made to the State Engineer" and that "the funds appropriated to him as such can only be used as directed by the legislature." Accordingly, any "benefit" to private entities was "incidental" or "subordinate" to the appropriation. *Reynolds*, 1963-NMSC-023, ¶ 16.

Plaintiffs' reliance on a dictionary definition of "incidental" is thus irrelevant. Pls.' Opening Br. 10 (citing *Webster's New Collegiate Dictionary*). The Court used the term not to gauge the level of benefits afforded to private parties, but to distinguish between the issues of "appropriation" and "control" of funding—which implicate Article IV, Section 31—from merely "benefit[ting]" from how the government spends funding—which does not. *See Reynolds*, 1963-NMSC-023, ¶ 17.

But even if the definition of "appropriation" did turn on the degree of benefit to private parties, the benefit to schools in this case is even less "incidental" than the benefit to the "non-profits" in *Reynolds*, which received permanent capital improvements to their facilities. 1963-NMSC-023, ¶ 7 ("irrigation systems"). Holding otherwise would call into question an enormous range of legislative appropriations that are then spent in ways that subsidize healthcare, promote tourism, encourage the arts and sciences, or otherwise benefit "charitable, educational or other benevolent purposes." Art. IV, § 31.

Plaintiffs' reliance on *Prince v. Board of Education of Central Consolidated Independent School District No. 22* is inapposite. *See* Pls.' Opening Br. 11. That case addressed whether constructing public schools on land "leased from the Navajo tribe" violated the portion of Article XII, Section 3 requiring that public schools "shall forever remain under the exclusive control of the state." *Prince*, 1975-NMSC-068, ¶¶ 19-21, 88 N.M. 548, 553-54, 543 P.2d 1176, 1181-82. The Court saw "no reason to doubt" that the public school districts could maintain "control over the curriculum, disciplinary control, financial control, administrative control and, in general, control over all the affairs of the school[s]," despite the schools' location on the Navajo Reservation. *Id*. The case has no bearing on the meaning of "control" under Article IV, Section 31, which requires state "control" of entities that receive

appropriations, not entities that receive secondary benefits from government spending.

Plaintiffs' concern that funds might be "funnel[ed]" through a "sub-agency" to "non-profit" entities is also inapposite. Pls.' Opening Br. 12. Article IV, Section 31 only addresses "appropriation[s]" and requires that they be made to entities "control[ed]" by the State. Here, all appropriations are made to the PED, and the PED is controlled exclusively by the State. Moreover, the PED has final control over any spending under the Act, rendering Plaintiffs' concerns irrelevant.

Finally, Plaintiffs threaten that under Intervenor-Appellees' interpretation of Article IV, Section 31, the State "would be free to 'loan'" not just textbooks, but also "school buses, teachers, buildings, desks, and/or any other form of material or materiel assistance to private schools." Pls.' Opening Br. 12. Tellingly, in support of this sky-will-fall argument, Plaintiffs cite a case interpreting the New Mexico Constitution's Anti-Donation Clause instead of Article IV, Section 31. *Id.* (citing *Vill. of Deming v. Hosdreg Co.*, 1956-NMSC-111, 62 N.M. 18, 303 P.2d 920). The anti-donation provision is addressed in the following section of this brief. But under Article IV, Section 31, the only restriction is against appropriations to non-state-controlled entities. But the only appropriations in the IML are to the PED, which—again—is exclusively controlled by the State. *Expenditures* by the PED for "school buses, teachers, buildings, [and] desks" would violate the terms of the IML itself and

could be stricken on that ground. But if authorized by the Legislature with appropriations to the PED, such expenditures would not violate Article IV, Section 31, and would be permissible so long as they satisfied the Anti-Donation Clause (as addressed below) and any other provisions of the New Mexico Constitution. Plaintiffs' desire to end incidental benefits to "any sectarian, denominational or private school" under Article XII, Section 3, is not a sufficient reason to read the Blaine's limitations into every other provision. Article IV, Section 31 has different limitations that are not implicated here. *See Vill. of Deming*, 1956-NMSC-111, ¶ 39. ("[T]he Court must be controlled by the fact that our Legislature may enact any law which our Constitution does not prohibit, and the Courts of this State cannot strike down one of its statutes unless it clearly appears that such statute does contravene some provision of the Constitution.").

In any case, before the Court is the constitutionality of the IML, not a hypothetical law about "buses, teachers, buildings, [and] desks" that the Legislature has not passed. Basing the Court's ruling in this case on a statute that the Legislature might some day pass would create an unconstitutional advisory opinion on a question that is not ripe. *See City of Las Cruces v. El Paso Elec. Co.*, 1998-NMSC-006, ¶ 18, 124 N.M. 640, 645, 954 P.2d 72, 77 ("We avoid rendering advisory opinions."); *New Mexico Indus. Energy Consumers v. New Mexico Pub. Serv. Comm'n*, 1991-NMSC-018, ¶ 25, 111 N.M. 622, 629-30, 808 P.2d 592, 599-600 ("'The basic purpose of

ripeness law is and always has been to conserve judicial machinery for problems which are real and present or imminent, not to squander it on abstract or hypothetical or remote problems.'") (quoting 4 K. Davis, Administrative Law Treatise § 25.1 (2d ed. 1983)). Furthermore, if such an aid program were to arise, the Court could presume the Legislature enacted it in compliance with the New Mexico Constitution and this Court's opinions, including that in this case. *See State v. Segotta*, 1983-NMSC-092, ¶ 5, 100 N.M. 498, 500 672 P.2d 1129, 1131 ("[W]e presume the statute to be constitutional.").

B. The IML does not violate Article IX, Section 14 because the IML does not "make any donation."

Article IX, Section 14—the New Mexico Constitution's Anti-Donation Clause—prohibits the State from "directly or indirectly lend[ing] or pledg[ing] its credit or mak[ing] any donation to or in aid of any person, association or public or private corporation." There is no contention that the IML in any way lends or pledges government credit. Thus, Article IX, Section 14 is implicated only if the IML makes a "donation." In *Village of Deming*, this Court distinguished donations, which require "a 'gratuitous transfer of property from one to another'" from "incidental aid or resultant benefit to a private corporation," and held that Article IX, Section 14 is violated only where there is an actual donation in both "substance and effect." *Vill. of Deming*, 1956-NMSC-lll ¶¶ 34-37; *see also State ex rel. Office of State Eng'r v. Lewis*, 2007-NMCA-008, ¶ 49, 141 N.M. 1, 15, 150 P.3d 375, 389.

The Court of Appeals correctly concluded that the IML does not make a "gift" in violation of the Anti-Donation Clause to non-public schools, because the State retains ownership of all instructional materials loaned to students. *Moses*, 2015-NMCA-036, ¶¶ 43-44. The IML's plain language shows that materials are provided for the "use" of "[a]ny qualified student," with private schools acting "as agents for" the students. NMSA 2010, § 22-15-7(A), (B). Plaintiffs' argument that students will use a book purchased through the IML "for its entire useful life," Pls.' Opening Br. at 11, is incorrect. *See, e.g.*, NMSA 2010, § 22-15-10 (requiring books or funds from sale of books to be returned to the PED). It is also irrelevant since, even if it were true, it would not change the book into a donation to a school rather than, as contemplated by the IML, a loan to the student with the school acting as agent, and the PED retaining ownership. In a principal/agency relationship such as the one established between the PED and private schools, the principal retains sole ownership of the property and there can be no "donation" or "transfer" of ownership. *See Carlsberg Mgmt. Co. v. State, Taxation and Revenue Dep't*, 1993-NMCA-121 ¶ 12, 116 N.M. 247, 250, 861 P.2d 288, 291.

Plaintiffs' reliance on *Hutcheson v. Atherton*, 1940-NMSC-001, 44 N.M. 144, 99 P.2d 462, is unavailing. Pls.' Opening Br. at 14. In *Hutcheson*, a taxpayer challenged Bernalillo County's issuance of a bond for an auditorium to be constructed by a non-profit corporation. 1940-NMSC-001, ¶¶ 1, 3. The Court held that the bond violated

the Anti-Donation Clause because it was a "pledge of its credit" that relieved the corporation of "one of its heaviest financial obligations." *Id*. ¶ 33. By issuing bonds, the State was borrowing money in support of a private project, thereby "pledging its credit" in aid of the project. *Id*. *Hutcheson* is irrelevant here, as the Court of Appeals held, because the IML does not involve the lending or pledging of any governmental entity's "credit." *Moses*, 2015-NMCA-036, ¶ 47. "Credit" refers to the State's "ability to borrow money" or "the faith in [the State's] ability to borrow money." *See* Black's Law Dictionary 374 (7th ed. 1999). On its face, however, the IML loans books and instructional materials to students. The IML does not purport to loan money, or pledge or lend the State's credit in support of loaning books to schoolchildren, and is therefore not a donation.

Holding otherwise would cast a multitude of State programs into doubt. Public libraries, recreation centers, events facilities, sporting fields, and a multitude of other services that are provided at no or discounted cost, and incidentally benefit private individuals and entities, would also have to be held unconstitutional as violating the Anti-Donation Clause. That no such outcome was intended is clear when the Anti-Donation Clause is construed—as it must be—"with reference to the evils it was intended to correct." *City of Clovis v. Sw. Pub. Servo Co.*, 1945-NMSC-030, ¶ 23, 49 N.M. 270, 276, 161 P.2d 878, 881. These "evils" were that the state and its municipalities had too often "become stockholders or bondholders in, and had in

other ways loaned their credit to" railroads, banks, and commercial institutions that often "were poorly managed, and either failed or became heavily involved, and, as a result, the state, counties, and cities interested in them became responsible for their debts and other obligations. These obligations fell ultimately on the taxpayers." *Id.* ¶ 24. As the Court of Appeals held, the IML does not implicate any of these concerns. *Moses*, 2015-NMCA-036, ¶ 46. It does not lend money or give anything to private entities, and creates no attendant risks for taxpayers.

Finally, Article IX, Section 14 only prohibits donations by "the state," and says nothing about the expenditure of *federal* funds. In *Hotels of Distinction West, Inc. v. City of Albuquerque,* Albuquerque contracted with a private entity to build a hotel using funds that—like those at issue here—were from the federal government. 1988-NMSC-047, ¶ 2, 107 N.M. 257, 258, 755 P.2d 595, 596. An existing hotel sued on grounds that using state funds to aid a competing hotel would violate Article IX, Section 14. *Id.* ¶ 1. This Court disagreed, noting that the provision would only be violated if it involved "investment in the project through the lending of *municipal* funds." *Id.* ¶ 4 (emphasis added; citations omitted). Because the hotel project was actually "funded with ten million dollars in *federal* funds," it did not violate Article IX, Section 14. *Id*. ¶ 5. The Court emphasized that the mere "channeling of federal funds through the City does not violate the anti[-]donation clause." *Id*. Similarly,

here, channeling federal dollars through the State Legislature to fund the IML does not implicate Article IX, Section 14.

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. It should conclude that the IML is consistent with Article IV, Section 31 and Article IX, Section 14 of the Constitution.

Respectfully submitted,

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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 3923 words.

/s/ *Eric S. Baxter*
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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 18th day of December 2017:

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