

No. \_\_\_\_\_

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In the

**Supreme Court of the United States**

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NEW MEXICO ASSOCIATION OF NONPUBLIC SCHOOLS,  
*Petitioner,*

*v.*

CATHY MOSES, ET AL.,  
*Respondents.*

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE NEW MEXICO SUPREME COURT*

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**PETITION FOR A WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

In *Trinity Lutheran Church v. Pauley*, No. 15-577, the Court granted certiorari to determine whether Missouri can deny generally available public benefits to religious organizations based on its Blaine Amendment—a state constitutional provision that arose out of anti-Catholic animus.

In the present matter, the New Mexico Supreme Court held that a “no aid” provision in New Mexico’s constitution is also a Blaine Amendment and relied on it to exclude religious and private schools from a neutral, secular textbook lending program. The court referred to five decisions interpreting other state Blaine Amendments—including Missouri’s—to bolster its conclusion that this subset of schools could be excluded from the textbook program.

The question presented is:

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

**PARTIES TO THE PROCEEDINGS AND  
RULE 29.6 DISCLOSURE**

Petitioner, who was an Intervenor-Defendant below, is the New Mexico Association of Non-Public Schools, an unincorporated association. Petitioner does not have any parent corporation. No publicly held corporation owns any portion of Petitioner, and Petitioner is not a subsidiary or affiliate of any publicly owned corporation.

Respondents, who were Plaintiffs below, are Cathy Moses and Paul Weinbaum.

Hanna Skandera, Secretary of Education for the New Mexico Public Education Department, was the Defendant below and may participate as Respondents here under Rule 12.6.

Albuquerque Academy, Rehoboth Christian School, St. Francis School, Hope Christian School, Sunset Mesa School, Anica Benia, and Maya Benia were Intervenor-Defendants below and may participate as Respondents here under Rule 12.6.

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## PETITION FOR A WRIT OF CERTIORARI

Karl Marx said that history repeats itself, first as tragedy, then as farce. But some history keeps repeating as tragedy. Blaine Amendments are one example. In just the last two years, courts have applied Blaine Amendments to keep religious organizations in Missouri from accessing generally available safety programs for kids; to deny disabled children in Oklahoma scholarships to access schools suited to their individual needs; and, in this case, to shut down an 83-year-old program providing secular textbooks to New Mexico schoolchildren. When state officials deny needed secular services to children solely based on their religious identity, the Blaine Amendments' ugly history repeats itself.

In this case, the New Mexico Supreme Court acknowledged its state Blaine Amendment's anti-Catholic origins but applied the Amendment anyway. In so doing, it extinguished a long-standing, democratically-enacted literacy law that uses federal grant dollars to provide secular textbooks to all New Mexico school students, regardless of where they go to school. This result cannot be squared with the First or Fourteenth Amendments.

Next Term in *Trinity Lutheran Church v. Pauley*, No. 15-577, the Court will consider the implications of Missouri's Blaine Amendment. The Court also appears to be holding three petitions involving Colorado's Blaine Amendment. Petitions involving at least three other states' Blaine Amendments may be forthcoming as cases work their way through the lower courts.

Petitioners respectfully request that the Court hold this petition pending resolution of *Trinity Lutheran*. Depending on the Court's final ruling in that matter, this petition should then be set for plenary review, or alternatively, the Court should then grant the petition, vacate the judgment below, and remand for further proceedings.

### **OPINIONS BELOW**

The decision of the First Judicial District Court of New Mexico denying Respondents' motion for summary judgment is unreported, but is available at No. D-101-cv-2012-00272, 2013 WL 11037177 (N.M. 1st Dist. Ct. June 19, 2013). The decision of the Court of Appeals of New Mexico affirming the district court is reported at 346 P.3d 396 (N.M. Ct. App. 2014). The original opinion of the New Mexico Supreme Court reversing the Court of Appeals is unreported but is available at No. S-1-SC-34,974, 2015 WL 7074809 (N.M. Nov. 12, 2015). The opinion of the New Mexico Supreme Court denying the Petitioners' motion for rehearing, withdrawing the November 12, 2015 opinion, and substituting a new opinion is reported at 367 P.3d 838 (N.M. 2015).

### **JURISDICTION**

The original judgment of the New Mexico Supreme Court was entered on November 12, 2015. Pet. App. 28a. The judgment of the New Mexico Supreme Court denying Petitioner's motion for rehearing and substituting a new opinion was entered December 17, 2015. Pet. App. 1a. On March 4, 2016, Justice Sotomayor extended the time within which to file a petition for a

writ of certiorari to and including May 16, 2016. Jurisdiction is invoked under 28 U.S.C. § 1257(a).

Because this petition calls into question the constitutionality of Article XII, section 3 of the New Mexico Constitution and 28 U.S.C. § 2403(b) may thus apply, service will be made on the Attorney General of New Mexico.

### **CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED**

This case involves the following constitutional provisions:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. Amend. I.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.

The schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other 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.

The following statutory provision is reproduced in Appendix E (Pet. App. 86a): Instructional Material Law, N.M. Stat. Ann. 1978 §§ 22-15-1 to 22-15-14 (2010). The following statutory provision is reproduced in Appendix F (Pet. App. 99a): Federal mineral leasing funds, N.M. Stat. Ann. 1978 § 22-8-34 (2001).

### **STATEMENT OF THE CASE**

#### **A. The origins of the federal and state Blaine Amendments.**

The anti-religious origins of the federal Blaine Amendment and its state progeny are well-known to the Court. See, *e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 720 (2002) (Breyer, J., dissenting); *Mitchell v. Helms*, 530 U.S. 793, 829 (2000) (plurality). As Justice Breyer has observed, “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.” *Zelman*, 536 U.S. at 720 (Breyer, J., dissenting)

(citing David Tyack, Onward Christian Soldiers: Religion in the American Common School, in *History and Education* 217-226 (P. Nash ed. 1970)). But in the mid-1800s, a wave of immigration brought significant religious strife. Catholics “began to resist the Protestant domination of the public schools,” and “Protestants fought back to preserve their domination.” *Ibid.* (citing John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 300 (2001)).

Amidst the ongoing religious tension, in 1874 the Democratic party gained control of the House of Representatives for the first time in nearly twenty years. Driven in large part by the public’s response to the Panic of 1873 and the scandal-ridden administration of President Ulysses S. Grant, the election cycle signaled the post-Reconstruction-Era resurgence of Democrats in the South. In a move calculated to shore up supporters, the Republicans seized upon the growing anti-Catholic sentiment.

Specifically, in December 1875, President Ulysses S. Grant “issued [a] call to prevent government aid to ‘sectarian’ schools, a move which \* \* \* ‘clearly aligned the Republican Party with the Protestant cause.’” 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, 565 (2003) (citation omitted). Within a week of Grant’s speech, Republican Congressman James G. Blaine—who had just lost his position as Speaker of the House and was positioning himself to be Grant’s successor to the White House—introduced a proposed



amendment to the United States Constitution, “capitaliz[ing]” on the “anti-Catholic sentiment” stoked by Grant. *Id.* at 565-66.

The provision passed overwhelmingly in the House, where Democrats who feared being “too closely connected with the Catholic Church” essentially “neutered” the amendment’s proposed language so they could support it without upsetting their Catholic constituents. DeForrest, 26 Harv. J.L. & Pub. Pol’y at 566-68 (citing Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 55 (1992)). By contrast, the Senate version unambiguously barred aid to “sectarian” schools and expressly allowed the public common schools to conduct Bible reading, thus leaving the common schools free to continue “feed[ing] at the public trough” while also “preserving [their] dominant Protestant character.” *Id.* at 568. The debate on the Senate floor reflected the provision’s blatant anti-religious bigotry with “a tirade against Pope Pius IX,” open attacks on Catholics’ patriotism, and appeals that certain states were “vulnerable to takeover by local Catholic majorities.” *Id.* at 570-72. Ultimately, the proposed amendment failed, just shy of the two-thirds majority needed to approve it. See *Id.* at 573.

But by then, “the spirit of Blaine had possessed the nation.” Joseph P. Viteritti, *Blaine’s Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol’y 657, 673 (1998). Several state legislatures enacted constitutional amendments in their state constitutions, *ibid.*, and the Republican-controlled U.S. Congress began requiring

such provisions as a condition for any new state entering the Union, *id.* at 675; see also Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493, 512 (2003).

### **B. The New Mexico Blaine Amendment**

New Mexico's status as a predominantly Catholic territory did not insulate it from the general religious tension enveloping the country. Indeed, its overwhelmingly Catholic population was a significant reason why New Mexico's efforts to become a state were stymied for several decades, creating significant pressure to accept Congress's condition that a Blaine Amendment be included in any new state constitution.

New Mexico's religious demographics changed drastically between when it became a U.S. Territory in 1853 and its statehood in 1912. Its largely Catholic population that was "ninety-five percent \* \* \* Hispano or Native American \* \* \* shrunk to just over half" by 1912 with the continuous arrival of Anglo Protestant settlers. Kathleen Holscher, *Religious Lessons: Catholic Sisters and the Captured Schools Crisis in New Mexico* 31 (2012). From the beginning there was conflict, 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.'" *Ibid.*

But Catholics had a different story. Prior to 1853, formal schooling had experienced an "uneven and idiosyncratic presence in the region." Holscher, *Religious Lessons* at 28. In 1853, "a French priest named Jean Baptiste Lamy"—a strong proponent of Catholic education—was appointed to be the first Bishop (and later

Archbishop) of Santa Fe. *Ibid.* 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 a significant part of 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.” *Ibid.* 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.

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 on the proper role of religion in education. Holscher, *Religious Lessons* 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.

Thus, 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.” *Ibid.*; 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 federal Blaine Amendment “had concluded that Catholicism was an unacceptable presence in the classrooms of any territory with aspirations of statehood.” Holscher, *Religious Lessons* at 38-39. When New Mexico finally attained statehood in 1912, it was with 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 Pet. App. 14a (same) (citing Enabling Act for New Mexico of June 20, 1910, 36 Stat. 557, ch. 310, § 8) (prohibiting aid in “support of any sectarian or denominational school, college or university”).

Although the language of the Enabling Act was amended in Article XII, section 3 of the New Mexico Constitution to prohibit aid to both “sectarian” and “private” schools, the impact was the same. The missionaries that ran New Mexico’s private Protestant schools had an “unshakeable confidence in the compatibility between their own vision of Christian education” and the moral culture of public schools. Holscher, *Religious Lessons* at 39. As a result, Protestant private school educators “became among the strongest advocates for keeping Catholicism out” of New Mexico’s new public schools. *Ibid.* By contrast, Catholic educators faced a constitutional amendment

whose ban on aid to “sectarian” schools was designed to exclude them. *Id.* at 45; see also DeForrest, 26 Harv. J.L. & Pub. Pol’y at 572 (noting that “the Blaine Amendment guaranteed Catholics and Protestants equal rights in the public schools” only in the same way that “the law prevents both rich men and beggars from sleeping under bridges”).

### **C. The New Mexico Instructional Materials Law**

The New Mexico Instructional Materials Law also has its roots in New Mexico’s struggle for statehood. High illiteracy rates during territorial times were a significant obstacle to statehood. See David V. Holtby, *Forty-Seventh Star: New Mexico’s Struggle for Statehood* 51, 54 (2012). A major factor contributing to high illiteracy was the lack of reading material available to students.

In 1891 the Territorial Legislature passed its first measure to address the lack of available instructional material. N.M. Laws 1891, Ch. 25, § 42 (requiring school boards to furnish textbooks for children in “poverty”). A few years later, the statute was amended to clarify that textbooks were being loaned to students and remained the property of the school district. N.M. Laws 1903, Ch. 39, p. 59; see also N.M. Laws 1915 Comp., § 4691 (first post-statehood statute amending textbook laws). In 1933, the Legislature made free textbooks available to “all children in the schools in the State of New Mexico, from the first to eighth grades inclusive.” N.M. Laws 1933, Ch. 112, § 1. And the Legislature has continued authorizing free textbooks for all New Mexico students, whether in public or private schools, ever since. See N.M. Stat. Ann.

1941, § 55-1712 (requiring a “detailed budget” for all “educational institutions, public or private, the pupils of which are entitled to receive free textbooks”); N.M. Stat. Ann. 1953, § 77-13-5 (1967) (creating a “free textbook fund”); § 77-13-7(B) (providing that free instructional materials were to be “distributed to [state] and private schools for the benefit of students”).

Under the current law, New Mexico maintains a textbook lending library comprising a collection of secular “school textbooks and other educational media that are used as the basis for instruction \* \* \* .” N.M. Stat. Ann. 1978, § 22-15-2(C). Any K-12 student attending a public or private school “is entitled to the free use” of the materials, but they are only on loan. § 22-15-7(A). The law ensures that the library will reflect the State’s diversity, requiring that at least ten percent of items “contain material that is relevant to the cultures, language, history and experience of multi-ethnic students.” N.M. Stat. Ann. 1978, § 22-15-8(A). All materials must be strictly secular. § 22-15-9(C).

Since 1931, the textbook lending program has been federally funded under the Federal Mineral Lands Leasing Act (“MLLA”). See N.M. Stat. Ann. § 22-8-34(A). During the 83 years that the textbook program has been extended to private schools, it has never before been challenged on Blaine Amendment grounds.

#### **D. Proceedings Below**

On January 23, 2012, Respondents sued the New Mexico Secretary of Public Education, alleging that the textbook lending program violated New Mexico’s

Constitution by supporting “sectarian, denominational, or private schools” and by “forc[ing] [Respondents] \* \* \* to support the religious dictates of others.” Pet. App. 6a. Respondents primarily objected to the distribution of textbooks to “sectarian” schools, citing Blaine Amendment cases in five states, including Missouri. Pls.’ Mem. re Mot. for Sum. J. 1 (see <http://bit.ly/1Yujtp9>) (objecting that the program distributes materials to “private schools, the majority of which are sectarian”); *id.* at 3-6 (citing Blaine cases).

Petitioner intervened to defend the program, arguing that when Blaine Amendments are used to “target religious conduct for distinctive treatment,” such action violates the Free Exercise Clause and Equal Protection. Intervenors’ Memo. in Opp. to Pls.’ Mot. for Summ. J. 8-9 (see <http://bit.ly/1TgIt36>).

The district court upheld the textbook lending program. Pet. App. 84a-85a. The New Mexico Court of Appeals affirmed, holding that the Blaine Amendment should be interpreted consistently with current federal Establishment Clause jurisprudence and that New Mexico’s historic textbook lending program did not violate New Mexico’s Blaine Amendment. Pet. App. 76a.

The New Mexico Supreme Court granted review. On November 12, 2015, the court ruled that the then-82-year-old textbook lending program was unconstitutional under Article XII, section 3. Pet. App. 28a. The court held that federal Establishment Clause jurisprudence was irrelevant to interpreting Article XII, section 3, because that section banned state aid to all private schools, not just religious ones. Pet. App. 17a. The court detailed the history behind Article XII’s

adoption, concluding that it was a Blaine Amendment that New Mexico was compelled to include in its constitution as a condition of statehood. Pet. App. 17a-18a. The court proceeded to look to cases interpreting Blaine Amendments in seven other states—including Missouri—and concluded that New Mexico’s Blaine Amendment should be interpreted consistently with those cases. Pet. App. 22a-26a. The court recognized that Blaine Amendments arose from anti-Catholic bigotry manifest in efforts to use the public schools as “an instrument for the acculturation of immigrant populations, rendering them good productive citizens in the image of the ruling [Protestant] majority.” Pet. App. 10a (quoting Viteritti, 21 Harv. J.L. & Pub. Pol’y at 668). It also acknowledged that the territories seeking statehood were “[p]articularly vulnerable to the Republican agenda” of using public aid as a “wedge” for advancing this cause. Pet. App. 13a. Nevertheless, it applied Article XII, section 3 to prevent religious and private schools from participating in the textbook lending program. Pet. App. 26a.

Petitioner moved for rehearing and reasserted its claim that applying Article XII, section 3 in this way “rais[ed] significant concerns under the First and Fourteenth Amendments” to the federal Constitution. Pet’s Memo. re Mot. for Rehearing 6-7 (<http://bit.ly/1TReJWq>). The court denied Petitioner’s motion, withdrew its opinion, and substituted a new opinion that reiterated the court’s analysis of the Blaine Amendment and added new material addressing the Instructional Material Law’s funding under the Mineral Leasing Land Act. Pet. App. 1a. This petition now follows.



## REASONS FOR GRANTING THE PETITION

This case presents the same question on which the Court recently granted plenary review in *Trinity Lutheran Church v. Pauley*, No. 15-577: whether a state may rely on its own constitutional provision adopted out of religious animus to exclude religious organizations from neutral and generally available aid programs without violating the First and Fourteenth Amendments. The New Mexico Supreme Court held that Article XII, section 3 of the New Mexico Constitution—like the constitutional provision at issue in *Trinity Lutheran*—is a Blaine Amendment that bars aid to “sectarian” organizations. The New Mexico Court explicitly recognized the Blaine Amendment’s anti-Catholic pedigree. It then breathed new life into the provision by relying on it to expel nearly 100 religious schools from a federally funded, secular textbook lending program that has been operating in New Mexico since 1933. Pet. App. 55a-56a. Because there is a “reasonable probability” that the Court’s decision in *Trinity Lutheran* will undermine the discriminatory “premise” on which the New Mexico Supreme Court’s decision rests, the Court should hold this petition until *Trinity Lutheran* is decided. *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

The Court already appears to be holding three petitions challenging Colorado’s Blaine Amendment pending the outcome of *Trinity Lutheran*. See *Doyle v. Taxpayers for Public Educ.*, No. 15-557; *Douglas Cnty. Sch. Dist. v. Taxpayers for Public Educ.*, No. 15-557; *Colo. State Bd. of Educ. v. Taxpayers for Publ. Educ.*, No. 15-558. The issue presented in this matter is essentially identical to the issue in those three cases, as

well as the issue in *Trinity Lutheran*. Thus, holding this petition pending the Court’s “own decisions” in these other related matters is fully warranted. *Lawrence*, 516 U.S. at 166. The Court then should set this case for plenary review or, alternatively, grant this petition, vacate the judgment below, and remand to the New Mexico Supreme Court for further proceedings.

The New Mexico court’s reliance on the fact that Article XII, section 3 forbids aid to any private school, whether religious or not, Pet. App. 16a, is of no moment. Where, as here, a law was motivated by hostility towards a protected class and in fact disadvantaged members of that class, it makes no difference that the law’s language includes a semblance of neutrality—it violates the First and Fourteenth Amendments and must be struck down. Thus, for example, the voting law struck down in *Hunter v. Underwood* on its face applied to *all* persons convicted of certain petty offenses, regardless of race. 471 U.S. 222, 227 (1985) (observing that the law in question was “racially neutral”). But there was overwhelming historical evidence that the voting law was intended to disenfranchise African-Americans and in fact had a disparate impact on African-American voters. *Id.* at 227-28 (“[B]y January 1903 section 182 had disfranchised approximately ten times as many blacks as whites. This disparate effect persists today.”). As a result, the Court held that the law violated the Fourteenth Amendment. *Id.* at 233.

The Court rejected a similar effort to gloss over discriminatory animus in *United States Department 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 ‘hippies’ and ‘hippie communes’ from participating in the food stamp program.” *Id.* at 534. Ultimately, the Court struck the provision, holding 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—a targeted group is entitled to heightened protection. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (“At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.”)

Thus, the attempted facial neutrality of Article XII, section 3 cannot save it, because “no aid” provisions like this one were adopted out of anti-Catholic animus and in fact had an intended disparate impact on Catholic schools, which now had to compete with public schools infused with Protestantism. Holscher, *Religious Lessons* at 40; see also *Lukumi*, 508 U.S. at 534 (“Facial neutrality is not determinative.”). More than a century later, this lawsuit, which explicitly targets “sectarian” schools and complains that the “majority” of private schools participating in the textbook program are religious, has resurrected Article XII’s bitter legacy. Pls.’ Memo. re Mot. for Summ. J. 1-2 (see <http://bit.ly/1TgIt36>). In short, Article XII was “born of

bigotry” and cannot be allowed to continue to disadvantage religious groups today. *Mitchell*, 530 U.S. at 829.

Finally, the question presented is of exceptional importance, and this petition presents an excellent opportunity to address it. Blaine Amendments are now found in the constitutions of more than 30 states. Here, the New Mexico Supreme Court explicitly acknowledged that Article XII, section 3—the provision at issue—is a Blaine Amendment that was forced upon the state by a federal Congress driven by nativist religious animosity against Catholics. Pet. App. 39a-41a. In contrast, the Instructional Materials Law has deep roots in New Mexico’s own history. Its predecessor laws were democratically enacted well before New Mexico became a state, seeking to address the significant problems with illiteracy that existed in the territory. Those laws have on numerous occasions been revisited by both the territorial and state legislatures to ensure equal access to sound secular textbooks for all children in New Mexico, particularly those in poorer rural areas with limited educational opportunities. This protection existed for nearly 80 years without controversy. Striking it down based on Respondents’ expressed religious animosity gives new life to the religious bigotry underlying Article XII, section 3 in violation of the First and Fourteenth Amendments.

### CONCLUSION

The petition should be held pending the Court’s disposition of *Trinity Lutheran*. Once *Trinity Lutheran* has been decided, the Court should set this case for plenary review or grant the petition, vacate the decision below, and remand for further proceedings.

Respectfully submitted.

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