No. 70648

IN THE SUPREME COURT OF THE STATE OF NEVADA

RUBY DUNCAN, RABBI MEL HECHT, HOWARD WATTS III, LEORA OLIVAS, AND ADAM BERGER,

Appellants,

v.

THE STATE OF NEVADA OFFICE OF THE STATE TREASURER, NEVADA DEPARTMENT OF EDUCATION, DAN SCHWARTZ, AND STEVE CANAVERO,

Respondents.

On Appeal from a Final Judgment of the
District Court for Clark County, Nevada
Case No. A-15-723703-C, Hon. Eric Johnson

BRIEF OF AMICUS CURIAE THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions

Other Authorities

INTEREST OF THE AMICUS

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions and the equal participation of religious people in public life and benefits. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. The Becket Fund litigates in support of religious liberty in state and federal courts throughout the United States as both primary counsel and amicus curiae. The Becket Fund has recently obtained landmark religious accommodation victories in the U.S. Supreme Court in *Holt v. Hobbs*, 135 S. Ct. 2751 (2015) (involving a Muslim prisoner seeking accommodation of a religiously-mandated beard) and *Burwell v. Hobby Lobby*, 135 S. Ct. 853 (2014) (involving religious objections to the Department of Health & Human Services' contraception mandate).

Because it supports rights to equal participation for religious organizations, the Becket Fund has participated for many years in litigation challenging the nineteenth century state constitutional provisions that single out religious people and institutions for special disfavor, some of which are considered Blaine Amendments. These state constitutional amendments arose during a shameful period when our national history that was tarnished by anti-Catholic and anti-immigrant sentiment. They expressed and implemented that sentiment by excluding all government aid

from disfavored faiths (mainly Catholicism), while allowing those same funds to support a "common" faith, a faith that is fairly described as a lowest-common-denominator Protestantism. The Becket Fund resolutely opposes the application of these state constitutional provisions to citizens today.

To that end, the Becket Fund has filed amicus briefs in states across the country and in the Supreme Court to document in detail the history of these state constitutional provisions and to protect the rights of children and their parents to be free from religion-based exclusion from government educational benefits. The Becket Fund files this brief pursuant to Nev. R. App. Proc. 29(a) with the written non-objection of all parties.

SUMMARY

Beginning in the mid-1800s, our nation experienced a shameful era of anti-Catholic and anti-immigrant bigotry. A homogenous majority, suspicious of a growing Catholic minority, gave birth to a movement that sought to suppress Catholics and immigrants through the political process. This movement—decried at the time by Abraham Lincoln and criticized in modern times by the U.S. Supreme Court—unleashed a wave of religious discrimination that is at war with both founding-era and present-day understandings of religious liberty. Sadly, this

discrimination was written into the laws of numerous states in the form of "Blaine Amendments," provisions adopted in state constitutions 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 school choice programs.

That is precisely their role in this case. Both Nevada constitutional provisions which Plaintiffs rely upon were part of the anti-Catholic Blaine Amendment wave. That targeting of unpopular minorities is impermissible, and cannot be cured by Plaintiffs' argument that these discriminatory laws now harm other groups too. Excluding groups from equal participation in society because the government labels them "sectarian" is simply a modern spin on the same discrimination that birthed Blaine Amendments in the first place. Any such use of the Nevada Blaine Amendment or the Common Schools provision to strike down the Education Savings Account (ESA) Program would conflict with the Free Exercise, Establishment, and Equal Protection Clauses of the U.S. Constitution. Under the principle of constitutional avoidance, this Court should interpret sections 2 and 10 of Article 11 to avoid violating the Nevada or United States Constitution—which means the ESA Program must be upheld.

ARGUMENT

I. The Court should affirm a non-discriminatory interpretation of Nevada's Blaine Amendment.

In seeking to invalidate the ESA Program, the Plaintiffs seek to resurrect long-dormant provisions of the Nevada Constitution. But their proposed use of these provisions would conflict with federal constitutional provisions that prohibit laws rooted in discrimination against religious minorities.

The doctrine of constitutional avoidance must be applied in interpreting the Common Schools provision and the Blaine Amendment. In *Mangarella v. State*, 117 Nev. 130, 134-35, 17 P.3d 989, 992 (2001), the Nevada Supreme Court held that "[w]henever possible," Nevada courts "must interpret statutes so as to avoid conflicts with the federal or state constitutions." *Id.* Using the Nevada Constitution to invalidate the ESA Program creates grave federal constitutional questions for two reasons: the Blaine Amendment and the Common Schools provision raise the specter of anti-Catholic animus that has been forbidden by the United States Constitution, and invalidating the ESA Program would result directly in discriminatory treatment of Catholics and other religious believers today.

A. The No-aid provision is a Blaine Amendment enacted as a direct result of anti-Catholic animus.

Article 11, Section 10 was adopted as an amendment to the Nevada Constitution in 1880. Modeled after a failed amendment to the federal Constitution, it states "No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose." Nev. Const. art. XI, § 10. As the Supreme Court has recognized, such laws have a "shameful pedigree" rooted in "pervasive hostility to the Catholic Church and to Catholics in general." *Mitchell v. Helms*, 530 U.S. 793, 828, 120 S. Ct. 2530, 2551 (2000) (plurality). That history means that modern attempts to enforce these provisions in a discriminatory manner will conflict with the federal Constitution.

Anti-Catholic hostility arose in the mid-1800s as a wave of Catholic immigrants threatened the longstanding Protestant dominance of public schools and other social institutions. This hostility prompted an attempt by then-Speaker of the House James G. Blaine to amend the federal Constitution to prohibit any state funding of "sectarian" schools. Though the federal Blaine Amendment was narrowly defeated in the Senate, its momentum carried forward a wave of "anti-sectarian" funding provisions in state constitutions across the country. Many states adopted their own Blaine Amendments, including Nevada. *See generally*, Joseph P. Viteritti, *Blaine's*

Wake: School Choice, the First Amendment, and State Constitutional Law, 21 Harv. J.L. & Pub. Pol'y 657 (1998). These "state Blaine Amendments" were a reactionary attempt to protect the dominant religious culture of mainstream Protestantism by ensuring both that public schools would teach a certain brand of Christianity, and that private Catholic schools—branded as "sectarian"—would never receive similar funding.

In 1877, during Nevada's first legislative session following the failed federal Blaine Amendment, the Nevada legislature passed a state version of the Blaine Amendment, which was later adopted by the popular vote in a general election. Historical evidence—as presented by the Defendants—shows that the same anti-Catholic bigotry that drove Speaker Blaine's unsuccessful federal amendment also drove Nevada's Blaine Amendment. Then-Professor Bybee and David Newton published an extensive account of the introduction of the Blaine Amendment in Nevada that lays out the evidence of the anti-Catholic sentiment behind it. Jay S. Bybee & David W. Newton, *Of Orphans and Vouchers: Nevada's "Little Blaine Amendment" and the Future of Religious Participation in Public Programs*, 2 Nev. L.J. 551, 561-65 (2002). As they explain, the primary motivation for Nevada's Blaine Amendment was to oppose an orphanage in Virginia City run by the Catholic

Sisters of Charity that served local children, particularly those who lost parents to the mines in Storey County. *Id.* at 561. For several years leading up to the Blaine Amendment, the state legislature had contributed funds to support the Orphanage. *Id.* at 562-64. This support was controversial because of the orphanage's Catholicism. *Id.* One state representative called a bill supporting the orphanage "the first step toward uniting Church and State." *Id.* at 563 (internal quotations omitted). Eventually, over objections to the Catholic orphanage, the state appropriated funds to establish its own orphanage, and in the meantime continued to pass controversial bills to support the Sisters of Charity orphanage. *Id.* at 565. The back-and-forth over whether the state could fund the orphanage had grown so contentious that in 1873, Sister Frederica, the head of the Sisters of Charity, requested the funding bill be withdrawn as a means of avoiding further anti-Catholic sentiment. "[O]f late, a hostile feeling has risen against [the orphans]. If we are not entitled to the appropriation in justice, we do not look for it in charity." *Id.* at 565 (internal quotations omitted) (alterations in original).

Once the Blaine Amendment was passed, the *Nevada Daily Tribune* celebrated the provision for the effect it would have on Catholics in public life: "[T]his is a stepping stone to the final breaking up of a power that has long cursed the world,

and that is obtaining too much of a foothold in these United States." *Id.* at 566. The *Tribune* turned out to be at least partially correct about the effect of the Blaine: it meant the downfall of the Sisters of Charity and their orphanage. After the Blaine was passed, the state treasurer refused to release state funds to the Orphanage. The Orphanage sought a writ of mandamus from the Nevada Supreme Court, and lost. In *State ex rel. Nevada Orphan Asylum v. Hallock*, the Nevada Supreme Court reasoned that the Blaine Amendment was meant to go farther than the Common Schools provision, which was intended "to keep all sectarian instruction from the schools." 16 Nev. 373, 379 (1882). Indeed, as the orphanage was, "with one exception," "the only applicant for state aid, where the question of sectarianism could have been raised," and the Court was "strongly impressed with the idea that, in the minds of the people, the use of public funds for the benefit of [the orphanage] and kindred institutions, was an evil which ought to be remedied[.]" *Id.* at 380, 383. The orphanage closed in 1897. Bybee & Newton, 2 Nev. L.J. at 570. As Bybee and Newton have documented with broad support from primary sources, the Blaine Amendment was supported by religious animosity towards Catholics in general, and the Sisters of Charity's Catholic orphanage in particular.

The basic history of the Blaine Amendments and their basis in anti-Catholic bigotry is well documented and widely accepted. *See* Respondents' Br. at 34-38. Indeed, the Supreme Court has addressed that history in at least two opinions. First, in *Zelman v. Simmons-Harris*, three dissenting Justices detailed the history of the Blaine Amendments at length. 536 U.S. 639, 720-21, 122 S. Ct. 2460, 2503-04 (2002) (dissenting opinion of Breyer, J., joined by Stevens and Souter, JJ.). Their historical account was not disputed by the majority.

As they explained, "during the early years of the Republic, American schools—including the first public schools—were Protestant in character. Their students recited Protestant prayers, read the King James version of the Bible, and learned Protestant religious ideals." *Id.* at 720, 122 S. Ct. at 2503 (citing David Tyack, *Onward Christian Soldiers: Religion in the American Common School*, *in* History and Education 217 (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 "religious conflict over matters such as Bible reading 'grew intense,' as Catholics resisted and Protestants fought back to preserve their domination." *Id.*, 122 S. Ct. 2504 (citing John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 300 (2001)).

Finding that they were unwelcome in public schools, "Catholics sought equal government support for the education of their children in the form of aid for private Catholic schools." *Id.* at 721, 122 S. Ct. at 2504. Protestants insisted in response "that public schools must be 'nonsectarian' (which was usually understood to allow Bible reading and other Protestant observances)." *Id.* And they insisted that "public money must not support 'sectarian' schools (which in practical terms meant Catholic)." *Id.* (citing Jeffries & Ryan, 100 Mich. L. Rev. at 301). The idea for the failed Blaine Amendment came as the Protestant position gained political power, with the goal "to make certain that government would not help pay for 'sectarian' (*i.e.*, Catholic) schooling for children." *Id.* (citing Jeffries & Ryan, 100 Mich. L. Rev. at 301-05).

In *Mitchell v. Helms*, a four-Justice plurality similarly acknowledged and condemned the religious animosity that gave rise to state Blaine Amendments. 530 U.S. at 828-29, 120 S. Ct. at 2551-52 (plurality op. of Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.). As the Court explained, "Consideration of the [federal Blaine] amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'" *Id.* at 828, 120 S. Ct. at 2551. 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, 120 S. Ct. at 2552.

No convincing contrary evidence is presented by amici Baptist Joint Committee for Religious Liberty and Hindu America Foundation (collectively "BJC"). Their assertion that the legislature's intent behind Article 11 Section 10 was to "impos[e] an absolute prohibition against the use of public dollars for religious instruction," BJC Br. at 17, is contradicted by the evidence cited in their own brief. They acknowledge that common schools in the Blaine era continued to promote Bible reading and "religious values." BJC Br. at 14-15. Nor does it ring true that schools continued to teach "religious doctrine" as long as it was not "particular to one denomination," as that was an impossible task given the strong religious divisions of the day. Even "unmediated" Bible readings, *id.* at 14, used the King James Version of the Bible, and were offensive to Catholics. Jeffries & Ryan, 100 Mich. L. Rev. at 300. BJC's argument is thus self-contradictory: to arrive at its preferred conclusion, BJC asks the Court to rely upon something other than the original

meaning of the Nevada Blaine. *See* BJC Br. at 15 ("this approach" is "undoubtedly unconstitutional today").

Amici BJC submits that this Court should overlook the anti-Catholic sentiment of Nevada's Blaine Amendment and instead seek its meaning in the precursors to the federal Establishment Clause. *See* BJC Br. at 8-14. This attempt to tie the Blaine to the Establishment Clause has but one logical conclusion: the Blaine ought to be interpreted in a manner consistent with the federal Establishment Clause. The district court, which held that the ESA program is consistent with the principles of separation of church and state as enacted in the Establishment Clause, correctly interpreted and applied the founders' principles.

B. The Common Schools provision is tainted by anti-Catholic animus.

Perhaps to avoid this complex and bigoted history, Plaintiffs also rely upon the "Common Schools" provision. But that argument fares little better. The same anti-Catholic taint applies to Article 11, Section 2. That provision pre-dates the Blaine Amendment, stemming from Nevada's constitutional convention, but it springs from an earlier portion of the same movement that created the Blaine Amendments. *See, e.g.*, Bybee & Newton, 2 Nev. L.J. at 559 ("The movement to adopt 'Little Blaine Amendments' actually predated [the] call for a constitutional amendment."). It

contains the same relevant characteristics and is—like the Blaine Amendment—an anti-Catholic provision. First, it was passed during a time of sweeping anti-Catholic sentiment and with an intent to remove Catholic influence on public schools. Second, it prohibits "sectarian" influences on schools while leaving unharmed "generic" (that is, Protestant) religious practices in public schools.[1]

At the time of Nevada's constitutional convention, Nevada was not immune from the notorious anti-Catholic and anti-immigrant sentiment that was sweeping the nation. In 1864, Irish Catholic immigrants had settled in Nevada mining towns and begun establishing institutions. James S. Olson, *Pioneer Catholicism in Eastern and Southern Nevada, 1864-1931*, 26 Nev. Hist. Soc'y Q. 159, 163 (1983). Conflict was already brewing between Catholic immigrants and the rest of the population by the time of the constitutional convention. *See id.*

The record of the debates from the constitutional convention demonstrates that the Common Schools provision was intended to keep Catholic influence out of the public schools. Delegates to the constitutional convention explicitly discussed Catholics as a sectarian influence and wondered if Section 2 could be read to prevent

[1] This portion of the history of the common schools movement is confirmed by amici for petitioners. *See* BJC Br. at 13-15.

Catholic schools from existing even outside the public school system. "Will the Chairman of the committee explain a little, as to what is meant here by 'sectarian?' . . . ? Does that mean that they have no right to maintain Catholic schools, for example?" Official Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada 568 (1866) (statement of Mr. Warwick). Other delegates expressed concern that Catholics would object to the common school system, or attempt to take it over. Delegate Lockwood said, "I have seen persons so bigoted in their religious faith—as, for example, the Roman Catholics, although I do not mean to mention them invidiously—that they would claim that all the public schools were sectarian, and rather allow their children to grow up in ignorance than attend them." *Id.* at 572 (Statement of Mr. Lockwood). Delegate Collins made it clear that he was worried about Catholic encroachment: "I also hope, most sincerely, that we shall provide in our Constitution for keeping out of our schools sectarian instruction. It will require strong influences to exclude such instruction, and money is the great motor." *Id.* at 577 (Statement of Mr. Collins).

At the end of their deliberations, the Common Schools provision that the delegates adopted possessed the key language of a Blaine Amendment: it prohibits "sectarian" activities while allowing "non-sectarian" religious activities to continue,

thereby prohibiting Catholic influence in public schools but allowing Protestant-influenced traditions to remain. That reality played out in Nevada schools after the constitution was ratified and after the Blaine Amendment was passed. For example, in 1877, the superintendent of public education noted that although the law "prohibit[s] sectarianism," it did not object to "the reading of the Bible." Defendants' Exhibit 2 at 22.[2] Indeed, the Pacific Coast Speller, the textbook used in Nevada public schools, contained numerous Bible verses and theological statements instructing children in Protestant Christianity. *See, e.g.*, Defendants' Exhibit 3 at 87 ("The way of the transgressor is hard."); *id.* at 90 ("Purify your heart of all evil thoughts. No true Christian can be entirely hopeless."); *id.* at 92 ("If ye fulfill the law according to the Scriptures, 'Thou shalt love they neighbor as thyself,' ye do well.") (internal quotations omitted). Thus the Common Schools provision accomplished its goal of shoring up Protestant-dominated public schools and prohibiting funding for similar Catholic schools. Because the Common Schools provision contains the key characteristics of a Blaine Amendment, enforcing it in

[2] This citation and those following refer to the exhibits attached to Defendants' Motion to Dismiss in the district court, which are part of the record in this case. *See* Respondents' Br. at 37 n.14.

the discriminatory manner the Plaintiffs propose would cause the same constitutional problems that the Blaine Amendment raises.

C. The Court should adopt a narrow interpretation that does not give effect to this animus.

In light of the anti-Catholic animus that birthed the Nevada Blaine Amendment and the Common Schools provision, the doctrine of constitutional avoidance strongly counsels this Court to avoid using those provisions to strike down the ESA program. Nevada courts construe state laws to avoid state and federal constitutional questions. *Mangarella*, 117 Nev. at 134-35, 17 P.3d at 992. Here, the problems can easily be avoided. The district court correctly avoided these constitutional issues by construing Nevada's Blaine amendment in a manner consistent with the federal Establishment Clause. In the district court's view, Section 10, as construed in *Hallock*, merely prohibited special favoritism for any one religious group. Op. 33-34.[3] This construction avoids giving Section 10 any discriminatory impact, and is therefore a reasonable alternative to striking the provision entirely.

[3] The district court adopted an interpretation of *Hallock* which overlooked evidence of anti-Catholic animus. Even without taking this evidence into account, the district court still correctly interpreted Section 10 in a manner consistent with the U.S. Constitution.

This interpretation does find support in the statutory text, which prohibits only funds used for a "sectarian purpose." As the Defendants have explained at length, the purpose of the ESA program is not to fund religious education, but to increase the educational choices for Nevada parents and students. *See* Respondents' Br. at 19-26. Any religious discussions which take place are attributable to the independents choices of parents, and are wholly incidental to the secular purpose of providing Nevadans with quality educational choices.

This interpretation is supported by the history of the Blaine Amendment and the Common Schools provision. As detailed above, religious instruction was common in Nevada's early years, and persisted even after the passage of the Blaine Amendment. *See* supra part I.B (describing Bible reading, Pacific Coast Speller). Yet there is no indication that such religious instruction violated either provision. This historical record supports a narrow reading of both clauses, one which recognizes that neither one should prohibit funds reaching a school that may communicate some religious messages.

This interpretation is also supported by the decisions of other states with similar clauses. Several state Blaine amendments, like Nevada's, focus upon the purpose or use of the funds. Oklahoma's constitution bans even indirect funding "for the use,

benefit, or support" of sects. Okla. Const. art. II, § 5. But this provision does not bar a voucher program for disabled students because "[a]ny benefit to a participating *sectarian* school arises solely from the private and independent choice of the parent or legal guardian of the child and *not* from any decree from the State." *Oliver v. Hofmeister*, 2016 OK 15, ¶ 21, 368 P.3d 1270, 1276 (2016) (emphasis in original). Similarly, Georgia's constitution bans indirect state funds used "in aid of" sectarian institutions. But this does not bar the state from "enter[ing] into an arms-length, commercial agreement with a sectarian institution to accomplish a non-sectarian purpose," such as leasing space for a public kindergarten. *Taetle v. Atlanta Indep. Sch. Sys.*, 625 S.E.2d 770, 771 (Ga. 2006). And Indiana's constitution prohibits state funds expended "for the benefit of" religious schools. But this does not bar a voucher program because "[a]ny benefit to program-eligible schools, religious or non-religious, derives from the private, independent choice of the parents of program-eligible students, not the decree of the State, and is thus ancillary and incidental to the benefit conferred on these families." *Meredith v. Pence*, 984 N.E.2d 1213, 1229 (Ind. 2013). Nevada should adopt a similar reading of the term "purpose" in Section 10.

II. In order to avoid conflict with the United States Constitution, Nevada's Blaine Amendment and the Common Schools provision should be interpreted to uphold the ESA Program.

The Blaine Amendment and the Common Schools provision run afoul of the federal Constitution by violating the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause. First, the provisions' discriminatory treatment of religious groups—particularly under the Plaintiffs' preferred interpretation—violates the federal Establishment and Equal Protection Clauses. Second, the hostility shown towards Catholics in the enactment of the Blaine Amendment and the Common Schools provision implicates the Equal Protection Clause and violates the neutrality standard of the Free Exercise Clause.

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

The Nevada Blaine Amendment and the Common Schools provision—particularly under the Plaintiffs' proposed interpretation—create serious conflicts with the federal Free Exercise Clause and would run directly counter to decisions of the United States Supreme Court, other state supreme courts, and the federal courts of appeals. When laws impacting religion are "not neutral or not of general

application," they are subject to strict scrutiny. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546, 113 S. Ct. 2217, 2233 (1993).[4]

The Nevada Blaine and the Common Schools provision are neither "neutral" nor "generally applicable" because, as explained in detail above, their original purpose was to target Catholic institutions. They cannot be neutral because "the minimum requirement of neutrality is that a law not discriminate on its face." *Lukumi*, 508 U.S. at 533, 113 S. Ct. at 2227. But, as described above and recognized by the Supreme Court, the laws ban aid to "sectarian" institutions, a pejorative term that was code for "Catholic." The history of these provisions confirms that interpretation. *See supra* Parts I.A. & I.B. In this respect, the Blaine Amendment and the Common Schools provision are even more troubling than the ordinance in *Lukumi*, which was passed with the object of suppressing Santería, but was neutral on its face. *Id.* at 534-35, 113 S. Ct. at 2227-28.

In addition to the problem of facial neutrality, the Blaine Amendment and the Common Schools provision also violate the Free Exercise Clause because they created a "'religious gerrymander,' an impermissible attempt to target petitioners

[4] The district court found no violation of *Lukumi*, again, because it determined that Section 10 required no more than neutrality among religions. Op. 32 & n.7.

and their religious practices." *Id.* at 535, 113 S. Ct. at 2228 (quoting *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 696, 90 S. Ct. 1409, 1425 (1970) (Harlan, J., concurring)). Specifically, they targeted Catholic religious institutions, but left Protestant religious exercises in the public schools undisturbed. *See supra* at 9. Plaintiffs would have that gerrymander persist today, in a slightly different form. Under their reading of the Blaine Amendment and the Common Schools provision, Nevada's ESA Program would stand or fall based upon the "sectarian" nature of private schools deemed "too religious." *See* Compl. ¶¶ 35-81 (objecting to religious content of particular private schools).

That is precisely the sort of distinction prohibited by the Free Exercise Clause. The Tenth Circuit struck down this type of distinction in *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008). There, a state scholarship program permitted students to use the funds at religious schools, but excluded schools deemed "pervasively sectarian." *Id.* at 1250 (internal quotations omitted). That distinction violates both the Free Exercise and Establishment Clauses because it "discriminates among religions." *Id.* A decision striking down the ESA Program because some funds went to schools deemed "too religious" would likewise conflict with the Free Exercise Clause.

This would be true even if the distinction was not based upon animus against particular religious groups. The Third Circuit recently held that Plaintiffs could state a Free Exercise claim based on the discriminatory impact of the government's surveillance of Muslims. *Hassan v. City of New York*, 804 F.3d 277, 307-08 (3d Cir. 2015). That surveillance, according to Plaintiffs, was based upon their religion, without any further evidence of wrongdoing. *Id.* Even without proving animus, "[t]he indignity of being singled out [by a government] for special burdens on the basis of one's religious calling" constitutes an injury for First Amendment purposes. *Id.* at 289. In this case, even were one to take Plaintiffs' tendentious allegations about "public funds" as true, the rule they propose would be flatly unconstitutional. Rather than choosing which religious groups to surveil based on their degree of religiosity, courts would sit in judgment on the question of whether a school is "too religious" a place for parents to choose to spend supposed "public funds," thus impermissibly ranking religious groups by the level of their religiosity.[5]

[5] Plaintiffs have argued publicly that some religious institutions are immune from the Blaine Amendment, while others are too religious to participate in this sort of program. This is an arbitrary distinction. *See* Neal Morton, *State Seeks Dismissal of Lawsuit Against Education Savings Accounts*, L.V. Rev.-J., Oct. 19, 2015, http://www.reviewjournal.com/education/state-seeks-dismissal-lawsuit-against-education-savings-accounts-0 ("'Using Medicaid at a hospital that happens to be

Nor could the constitutional conflict be resolved by interpreting the Blaine and the Common Schools provision to exclude *all* religiously-affiliated institutions from receiving ESA funds. That interpretation would far exceed the scope of permissible action under the First Amendment. Again in *Weaver*, the Tenth Circuit explicitly emphasized that, while the state might choose not to fund devotional theology degrees, that narrow limitation "does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available" programs. *Weaver*, 534 F.3d at 1255 (citing *Locke v. Davey*, 540 U.S. 712, 725, 124 S. Ct. 1307, 1315 (2004)). A ruling that no religiously affiliated institution could participate in the program—even through the independent private choices of parents directing their own accounts—would have sweeping ramifications, rendering religious individuals and institutions second-class citizens, and accomplishing a different "religious gerrymander[]" within the state. *Lukumi*,

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religiously affiliated is completely different. They're not providing indoctrination with their medicine,' she said, noting many religious schools require prayer and scripture study.") (quoting counsel for Plaintiffs). But this ignores that religious hospitals often employ chaplains and provide spiritual care for their patients. *See, e.g.*, Dignity Health, https://www.dignityhealth.org/las-vegas/patients-and-visitors/spiritual-care (last visited July 21, 2016). This illustrates the difficulty and sweeping impact of a decision limiting the ESA Program to schools deemed religious, but not too religious.

508 U.S. at 534, 133 S. Ct. at 2227 (internal quotation omitted); *see also Locke*, 540 U.S. at 724, 124 S. Ct. at 1314 (laws "evincing . . . hostility toward religion" are impermissible). For all these reasons, if the Blaine Amendment is construed to strike down the ESA Program, then the Blaine Amendment must face strict scrutiny under the federal Constitution.

Under *Lukumi*, the Blaine Amendment must therefore be subject 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, 113 S. Ct. at 2233; *see also Weaver*, 534 F.3d at 1266 (laws involving religious discrimination are subject to strict scrutiny, but laws involving excessive entanglement are "unconstitutional without further inquiry"). But there can be no compelling interest in prohibiting Nevada parents from using their ESA accounts at schools run by disfavored religious groups. Since the United States Supreme Court has upheld programs with even less private choice than the ESA Program, *see Zelman*, 536 U.S. 639, 122 S. Ct. 2460, it is unlikely to find that Nevada has a

"compelling" interest in prohibiting parents from using their accounts at religious institutions.[6]

B. Invalidating the ESA Program would create conflict with the Establishment Clause.

The effect of discriminating among religious groups—*i.e.*, those considered "sectarian" and those considered "non-sectarian"—also violates the Establishment Clause. "[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, 102 S. Ct. 1673, 1684 (1982) (citation omitted). Indeed, "neutral treatment of religions [is] '[t]he clearest command of the Establishment Clause.'" *Weaver*, 534 F.3d at 1257 (citing *Larson*, 456 U.S. at 244, 102 S. Ct. at 1683).

In *Weaver*, the Tenth Circuit applied this principle to find that the "'pervasively' sectarian" standard was unconstitutional, because it "exclude[d] some but not all religious institutions . . . ." *Id.* at 1258 (internal citation omitted). Similarly, in *Larson*, the Supreme Court struck down a state law that imposed registration and reporting requirements upon only those religious organizations that solicited more

[6] *Locke v. Davey* is not to the contrary. *Locke* expressly held that "[t]he State's interest in not funding the pursuit of devotional degrees" was only "substantial"—not compelling. *Locke*, 540 U.S. at 725, 124 S. Ct. at 1315.

than fifty percent 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. *Larson*, 456 U.S. at 246, 102 S. Ct. at 1684 n.23 (internal citation omitted); *see also Lukumi*, 508 U.S. at 536, 113 S. Ct. at 2228 ("differential treatment of two religions" might be "an independent constitutional violation.").

In *Spencer v. World Vision, Inc.*, the Ninth Circuit considered whether a religious ministry run as a nonprofit organization could claim the "religious employer" exemption from Title VII even though it was not technically a church. The court agreed that it could, explaining that "discrimination between institutions on the basis of the pervasiveness or intensity of their religious beliefs" would be "constitutionally impermissible." 633 F.3d 723, 729 (9th Cir. 2010) (O'Scannlain, J., concurring in the judgment) (internal quotation marks omitted); *see also Univ. of Great Falls v. N.L.R.B.*, 278 F.3d 1335, 1342 (D.C. Cir. 2002) ("[A]n exemption solely for 'pervasively sectarian' schools would itself raise First Amendment concerns—discriminating between kinds of religious schools."). That sort of impermissible discrimination among religious organizations was exactly what the Blaine

Amendments were designed to do, and they continue to have that effect. That is a direct violation of the Establishment Clause.

The Plaintiffs' preferred interpretation of the Nevada Blaine Amendment and the Common Schools provision would also require this Court to issue an opinion in conflict with the Establishment Clause by "entangling itself" in religious questions. *Weaver*, 534 F.3d at 1263. Plaintiffs ask that the government determine whether religious schools have "sectarian missions and goals," and let the ESA Program stand or fall on that basis. *See* Compl. ¶¶ 6, 35-81. But "'[i]t is well established . . . that courts should refrain from trolling through a person's or institution's religious beliefs.'" *Weaver*, 534 F.3d at 1261 (internal citation omitted); *see also Spencer*, 633 F.3d at 731 (the "very act" of determining "'what does or does not have religious meaning'" violates Establishment Clause) (internal citation omitted). Here, the Plaintiffs suggest that courts should engage in entangling inquiries such as the schools' relationships with religious institutions, whether their courses tend to indoctrinate or proselytize students, whether they require participation in "worship," and the beliefs and religious practices of students and faculty, *see* Compl. ¶¶ 39-81, 90, the very factors decried as intrusive and entangling in *Weaver*. 534 F.3d at 1261-

66. The Establishment Clause does not permit courts to determine whether an organization is too "sectarian."

C. Invalidating the ESA Program would create conflict with the Equal Protection Clause.

A state constitutional amendment violates the Equal Protection Clause when it excludes a particular group of citizens from legislative remedies. "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Romer v. Evans*, 517 U.S. 620, 633, 116 S. Ct. 1620, 1628 (1996). In *Romer*, the Court struck down an amendment to the Colorado state constitution that prohibited the LGBTQ community from obtaining status as a protected class, except through further amendment of the Colorado constitution. The law failed to pass even the rational basis test, since "'[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Id.* at 634, 116 S. Ct. 1628 (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534, 93 S. Ct. 2821, 2826 (1973)) (emphasis in original). The same is true for a law disadvantaging an unpopular religious minority,

and forcing it to seek redress only through further amendment of the state constitution.

Indeed, the harm is even more serious here. There is direct evidence that Section 10 was enacted out of actual animus for those with a religious identity, namely Catholics. While in *Romer* the animus was merely inferred from the state's exclusion, here, in addition to the bare fact of the religion-based exclusion, there is also historical evidence that Section 10, like other Blaine Amendments, was part of a wave of anti-Catholic bigotry in the middle of the 19th century. *See infra*. The Equal Protection Clause subjects laws to strict scrutiny if they interfere with a fundamental right or discriminate against a suspect class. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 3254 (1985). Not only is religion a suspect class, *see United States v. Batchelder*, 442 U.S. 114, 125, 99 S. Ct. 2198, 2205 n.9 (1979) ("The Equal Protection Clause prohibits selective enforcement 'based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'") (internal citation omitted); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1322 n.10 (10th Cir. 2010) ("Religion is a suspect classification"), but religious rights are fundamental. *See, e.g.*, *Johnson v. Robison*, 415 U.S. 361, 375, 94 S. Ct. 1160, 1169 n.14 (1974) ("Unquestionably, the free exercise of religion is a

fundamental constitutional right."); *Niemotko v. Maryland*, 340 U.S. 268, 272, 71 S. Ct. 325, 328 (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 Catholics and Protestants, and against religious groups generally, Blaine Amendments violate the Equal Protection Clause.

Just as vestigial Jim Crow laws may not be relied on to prohibit political speech and enable discrimination, Nevada may not rely on constitutional provisions enacted out of religious animus in order to discriminate among religious believers today. In *Hunter v. Underwood*, for example, the United States Supreme Court considered a facially neutral state constitutional provision. 471 U.S. 222, 232-33, 105 S. Ct. 1916, 1922-23 (1985). The Court held that even without a showing of specific purpose of individual lawmakers, it could rely on the undisputed historical backdrop of the law—in particular, the fact that "the Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks." *Id.* at 228-29, 105 S. Ct. 1920. Thus, "where both impermissible racial motivation and racially discriminatory impact [were] demonstrated" the state

constitutional provision violated the Equal Protection Clause. *Id.* at 232, 105 S. Ct. 1922.

Similarly, Nevada's Blaine Amendment and its Common Schools provision were very much "part of a movement that swept the [United States] to [discriminate against Catholics.]" *See supra* Parts I.A & I.B. Nor is it any defense to argue that there is no discriminatory intent towards Catholics today. As *Hunter* explained, "[w]ithout deciding whether [the challenged section of the Alabama constitution] would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate . . . and the section continues to this day to have that effect. As such, it violates equal protection . . . ." 471 U.S. at 233, 105 S. Ct. at 1922 (emphasis added). As in *Hunter*, the original enactment of the Blaine Amendment and the Common Schools provision was motivated by a desire to discriminate against Catholics, and today has a discriminatory effect on Catholic religious schools, as well as those of other faiths.

CONCLUSION

The Court should affirm the dismissal of the Plaintiffs' complaint.

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CERTIFICATE OF COMPLIANCE

The undersigned does certify that:

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(2) to the best of my knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(3) the brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the briefs regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found; and

(4) the brief complies with the formatting requirements of Rule 32(a)(4)-(6); it uses a 14-point Times New Roman font;

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