Nos. SC04-2323, SC04-2324, SC04-2325

IN THE SUPREME COURT OF THE STATE OF FLORIDA

GOVERNOR JOHN ELLIS "JEB" BUSH, *et al.*
Defendants / Appellants,

CHARLES J. CRIST, JR., *et al.*
Defendants / Appellants,

BRENDA McSHANE, *et al.*
Intervenors / Defendants / Appellants,

- against -

RUTH D. HOLMES, *et al.*
Plaintiffs / Appellees.

On Direct Appeal from the First District Court of Appeal

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF APPELLANTS AND OF REVERSAL

Motion for Leave to File Pending

Anthony R. Picarello, Jr.
Derek L. Gaubatz
THE BECKET FUND FOR RELIGIOUS LIBERTY
1350 Connecticut Avenue, NW, Suite 605
Washington, DC 20036-1735
Telephone: (202) 955-0095
Facsimile: (202) 955-0090

Counsel for Amicus Curiae

Isaac M. Jaroslawicz
GIVNER & JAROSLAWICZ
1177 Kane Concourse
Suite 232
Miami, FL 33154-2027
Telephone: (305) 867-6470
Facsimile: (305) 867-6474

Local Counsel for Amicus Curiae

January 24, 2005

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. UNLIKE THE WASHINGTON CONSTITUTIONAL PROVISION UPHELD IN *LOCKE v. DAVEY*, THE TEXT AND HISTORY OF ARTICLE I, SECTION 3 MANIFEST ITS NATIVIST PURPOSE. 4

A. The U.S. Supreme Court Has Recently Reaffirmed Its Consistent Conclusion That State Constitutional Amendments Targeting the "Sectarian" for Special Disfavor Were Animated by Nativism. 5

B. Use of the Term "Sectarian" to Exclude Institutions from Funding in an Historical Context Where "Nonsectarian" Religious Institutions Continued to Enjoy the Same Funding Is More Than Sufficient Evidence of Impermissible *Animus*. 11

II. THIS COURT SHOULD AVOID ANY INTERPRETATION OF ARTICLE I, SECTION 3 THAT RISKS VIOLATING THE UNITED STATES CONSTITUTION. 19

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) 10
Boyette v. Galvin, No. 98-CV-10377 (D. Mass. filed Mar. 3, 1998) 2
Bush v. Holmes, 886 So.2d 340 (Fla. 1st DCA 2004) 9, 10, 11, 18
Hunter v. Underwood, 471 U.S. 222 (1985) 19
Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999) 17
Lee v. Weisman, 505 U.S. 577 (1992) 12
Lemon v. Kurtzman, 403 U.S. 602 (1971) 9, 15
Locke v. Davey, 540 U.S. 712 (2004) .... passim
Mitchell v. Helms, 530 U.S. 793 (2000) 5, 6, 9, 17
N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) 19
People ex rel. Ring v. Bd. of Educ. of Dist. 24, 92 N.E. 251 (Ill. 1910) 15
Pucket v. Rounds, (D.S.D. filed Apr. 23, 2003) 2
Romer v. Evans, 517 U.S. 620 (1996) 19
State ex rel. Finger v. Weedman, 226 N.W. 348 (S.D. 1929) 15
The Dublin Case, 38 N.H. 459 (1859) 13
Zelman v. Simmons-Harris, 536 U.S. 639 (2002) 6, 7, 9, 17

Statutes

Act of Feb. 22, 1889, 25 Stat. 676, ch. 180 (1889) 16
Act of July 3, 1890, 26 Stat. 215 § 8, ch. 656 (1890) 16
Act of June 20, 1910, 36 Stat. 557 § 26 (1910) 16

Constitutional Provisions

ARIZ. CONST. art. IX, § 10 16
DEL. CONST. art. X, § 3 17
FLA. CONST. art. I, § 3 .... passim
IDAHO CONST. art. X, § 5 16
KY. CONST. § 189 17
MASS. CONST. amend. art. XLVI 15
MASS. CONST. amend. art. XVIII 15
MO. CONST. art. IX, § 8 17
MONT. CONST. art. X, § 6 16
N.D. CONST. art. 8, § 5 16
N.Y. CONST. art. XI, § 3 17
S.D. CONST. art. VIII, § 16 16
WASH. CONST. art. I, § 11 .... 8, 9, 12, 16
WASH. CONST. art. IX, § 4 .... 9, 16

Other Authorities

2 THE COLLECTED WORKS OF ABRAHAM LINCOLN (R. Basler ed. 1953) 14
20 CONG. REC. 2100-01 (1889) 16
4 CONG. REC. 5191 (1876).. 16
4 CONG. REC. 5595 (1876).. 16
Brief *Amicus Curiae* of the Becket Fund for Religious Liberty in Support of Reversal (Apr.12, 2001) (*Gallwey v. Grimm,* Wash. S. Ct. No. 68565-7) (available at www.becketfund.org/litigate/ GallweyAmicus.pdf) 2
Brief of *Amici Curiae* the Becket Fund for Religious Liberty, *et al.,* in Support of Respondent (Sept. 8, 2003) (*Locke v. Davey,* No. 02-1315) (available at www.becketfund.org/litigate/ LockeAmicus.pdf) 2
Brief of the Becket Fund for Religious Liberty as *Amicus Curiae* in Support of Petitioners (Aug. 19, 1999) (*Mitchell v. Helms,* No. 98-1648) (available at www.becketfund.org/litigate/ MitchellAmicus.pdf) 2
Brief of the Becket Fund for Religious Liberty as *Amicus Curiae* in Support of Petitioners (Nov. 9, 2001) (*Zelman v. Simmons-Harris,* Nos. 00-1751, 00-1777, 00-1779) (available at www.becketfund.org/ litigate/ZelmanAmicus.pdf 2
Mark E. DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J. L. & PUB. POL'Y, 551 (Spring 2003) 18
HUMPHREY J. DESMOND, THE A.P.A. MOVEMENT, A SKETCH (1912).......... 15
CHARLES L. GLENN, JR., THE MYTH OF THE COMMON SCHOOL (U. Mass. 1988) 18
Steven K. Green, *The Blaine Amendment Reconsidered,* 36 AM. J. LEGAL HIST. 38 (1992)...6
H.R.J. Res. 1, 44th Cong., 1st Sess., 4 CONG. REC. 205 (1875)..................... 16
PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (Harvard 2002) 3, 7, 17
Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117 (2000)... 18
Indiana State Library, "Ku Klux Klan Resources from the Indiana Division" (available at http://www.statelib.lib.in.us/www/isl/ indiana/Klan.html).. 19
John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (Nov. 2001)............... 7, 18

LLOYD JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925 (1987) 15
JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY (Brookings 1999) 18
KINZER, AN EPISODE IN ANTI-CATHOLICISM (1964) 15
Douglas Laycock, *The Underlying Unity of Separation and Neutrality,* 46 EMORY L.J. 43 (1997) 15, 18
Ira Lupu, *The Increasingly Anachronistic Case Against School Vouchers,* 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 375, 386 (1999) 18
HORACE MANN, LIFE AND WORKS: ANNUAL REPORTS OF THE SECRETARY OF THE BOARD OF EDUCATION OF MASSACHUSETTS FOR THE YEARS 1845-48 (1891) 13
WARD M. MCAFEE, RELIGION, RACE AND RECONSTRUCTION: THE PUBLIC SCHOOL IN THE POLITICS OF THE 1870S (S.U.N.Y. 1998) 18
R. MICHAELSEN, PIETY IN THE PUBLIC SCHOOL (1970) 14
D. TYACK, ONWARD CHRISTIAN SOLDIERS: RELIGION IN THE AMERICAN COMMON SCHOOL, IN HISTORY AND EDUCATION (P. Nash ed. 1970) 6
E.I.F. WILLIAMS, HORACE MANN: EDUCATIONAL STATESMAN (1937) 13

INTEREST OF THE *AMICUS*

Pursuant to Fla. R. App. P. Rule 9.370, the Becket Fund for Religious Liberty submits this brief *amicus curiae* in support of Appellants and reversal. Counsel for Plaintiffs / Appellees and for Intervenors / Defendants / Appellants have consented to the filing of this brief, but Defendants / Appellants have not. Accordingly, this brief is accompanied by a motion for leave to file. *Id.*

The Becket Fund for Religious Liberty is a nonpartisan, interfaith, public-interest 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 litigates in support of these principles in state and federal courts throughout the United States, as both primary counsel and *amicus curiae*.

Accordingly, the Becket Fund has been actively involved in litigation challenging a category of state constitutional amendments commonly called "Blaine Amendments." These were passed in the latter half of the 19th Century out of the nativist sentiment then prevalent in the United States. They expressed and implemented that sentiment by excluding from government funding schools that taught "sectarian" faiths (mainly Catholicism), while allowing those funds to the "common schools," which taught the "common" or "nonsectarian" faith (*i.e.,* non-denominational Protestantism). In other words, Blaine Amendments were not designed to implement benign concerns for the separation of church and state

traceable to the founding, but instead to target for special disadvantage the faiths of immigrants, especially Catholicism.

For years, The Becket Fund has worked to correct the historical revisionism that would erase this shameful chapter in our nation's history in order to protect state Blaine Amendments, the last constitutional weapon available to attack democratically enacted, religion-neutral school voucher programs. We have filed three *amicus* briefs before the U.S. Supreme Court to document in detail the history of the federal and state Blaine Amendments;[1] we pursue lower court litigation on behalf of students and their parents who have suffered exclusion from educational benefits based on religion because of Blaine Amendments;[2] and we maintain a website dedicated exclusively to the history and current effects of Blaine Amendments (www.blaineamendments.org).

---

[1] *See* Brief of *Amici Curiae* the Becket Fund for Religious Liberty, *et al.,* in Support of Respondent (Sept. 8, 2003) (*Locke v. Davey,* No. 02-1315) (available at www.becketfund.org/litigate/LockeAmicus.pdf); Brief of the Becket Fund for Religious Liberty as *Amicus Curiae* in Support of Petitioners (Nov. 9, 2001) (*Zelman v. Simmons-Harris,* Nos. 00-1751, 00-1777, 00-1779) (available at www.becketfund.org/litigate/ZelmanAmicus.pdf; Brief of the Becket Fund for Religious Liberty as *Amicus Curiae* in Support of Petitioners (Aug. 19, 1999) (*Mitchell v. Helms,* No. 98-1648) (available at www.becketfund.org/litigate/MitchellAmicus.pdf).

[2] *See, e.g., Pucket v. Rounds,* (D.S.D. filed Apr. 23, 2003); *Boyette v. Galvin*, No. 98-CV-10377 (D. Mass. filed Mar. 3, 1998), *on appeal,* No. 04-1625 (1st Cir.). *See also* Brief *Amicus Curiae* of the Becket Fund for Religious Liberty in Support of Reversal (Apr. 12, 2001) (*Gallwey v. Grimm,* Wash. S. Ct. No. 68565-7) (available at www.becketfund.org/litigate/GallweyAmicus.pdf).

Thus, The Becket Fund has both special expertise that can assist this Court in the disposition of this case, and a strong interest in its outcome. Rule 9.370(b).

SUMMARY OF ARGUMENT

Laws that single out the "sectarian" for exclusion from government educational benefits are widespread in this country and share a common and pernicious heritage. Though this tradition of religious discrimination is unfortunately long-standing, it does not originate with James Madison, Thomas Jefferson, or any other framers of the federal constitution. Instead, it emerged with force about a half-century later as part of a broader cultural movement reacting against a growing religious minority, whose controversial beliefs directly threatened the dominant religious ideology of the day. American nativism succeeded not only in backing its hostility to Catholic immigrants (and especially their schools) with the force of law, but in cloaking that hostility with the rhetoric of religious freedom and the authority of the founders. *See generally* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (Harvard 2002).

Unfortunately, Article I, Section 3 of the Florida Constitution falls squarely within this tradition. Unlike the "no compelled support" provision recently upheld by the U.S. Supreme Court in *Locke v. Davey,* 540 U.S. 712 (2004), Article I, Section 3 of the Florida Constitution targets the "sectarian" – rather than the "religious" generally – for exclusion from government funds. And when Article I,

Section 3 was passed in the late 19th Century, that distinction was laden with meaning: "sectarian" referred to those faiths (especially Catholicism) that resisted assimilation to the "nonsectarian" Protestantism taught as the "common faith" in the "common schools."

By a series of opinions, at least seven sitting Justices of the U.S. Supreme Court have specifically acknowledged that the term "sectarian" was used in the laws of this era as code for "Catholic." And most recently in *Locke,* the Court specifically distinguished the "no compelled support" provision it upheld from another provision that contains the term "sectarian." These judicial opinions, moreover, reflect the overwhelming weight of historical scholarship regarding the meaning and purpose of this term, notwithstanding the half-hearted attempts at revisionism by the court below.

Thus, both the text and history of Article I, Section 3 – its use of the term "sectarian" in an historical context that makes its pejorative meaning especially clear – reflect that it was passed out of religious *animus*. Rather than implement that hostility today, and so needlessly generate federal constitutional issues, this Court should interpret Article I, Section 3 to allow the voucher program at issue.

ARGUMENT

I. UNLIKE THE WASHINGTON CONSTITUTIONAL PROVISION UPHELD IN *LOCKE v. DAVEY*, THE TEXT AND HISTORY OF ARTICLE I, SECTION 3 MANIFEST ITS NATIVIST PURPOSE.

Decisions of the United States Supreme Court have not only acknowledged the nativist purpose of the federal and state Blaine Amendments, they have explained how use of the term "sectarian" expressed and implemented that purpose. Most recently in *Locke v. Davey,* the Court reaffirmed that the federal Blaine Amendment and similar state constitutional provisions are rooted in bigotry, but found that the provision at issue – which did not include the term "sectarian" – was not a Blaine Amendment and upheld it. It is not the remarks of bigoted legislators, but use of the term "sectarian" to exclude from government funding in an era when the "nonsectarian" was funded freely, that demonstrates impermissible *animus* to target some faiths for special disfavor.

A. The U.S. Supreme Court Has Recently Reaffirmed Its Consistent Conclusion That State Constitutional Amendments Targeting the "Sectarian" for Special Disfavor Were Animated by Nativism.

In *Mitchell v. Helms,* 530 U.S. 793 (2000), a plurality of four Justices acknowledged and condemned the nativism that gave rise to the federal and state Blaine Amendments. *See id.* at 828-29 (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.). The opinion criticized the Court's prior use of the term "sectarian" in Establishment Clause jurisprudence, because "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow." *Id.* at 828. The opinion continued:

> Opposition to aid to "sectarian" schools acquired prominence in the 1870s with Congress' consideration (and near passage) of the Blaine Amendment,

> which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the 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." *See generally* Green, *The Blaine Amendment Reconsidered,* 36 AM. J. LEGAL HIST. 38 (1992).

Mitchell, 530 U.S. at 828. The plurality concluded that "the exclusion of pervasively sectarian schools from otherwise permissible aid programs" – precisely the purpose and effect of the Blaine Amendments – represented a "doctrine, born of bigotry, [that] should be buried now." *Id.* at 829.

In *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002), three Justices provided a detailed account of the relevant history in dissent. *See id.* at 720-21 (dissenting opinion of Breyer, J., joined by Stevens and Souter, JJ.). Not only did they recognize that the Blaine Amendment movement was a form of backlash against "political efforts to right the wrong of discrimination against religious minorities in public education," they explained how the term "sectarian" functioned within that movement. *Id.* at 721.

> [H]istorians point out that during the early years of the Republic, American schools – including the first public schools – were Protestant in character. Their students recited Protestant prayers, read the King James version of the Bible, and learned Protestant religious ideals. *See, e.g.,* D. Tyack, *Onward Christian Soldiers: Religion in the American Common School, in History and Education* 217-226 (P. Nash ed. 1970). Those practices may have wrongly discriminated against members of minority religions, but given the small number of such individuals, the teaching of Protestant religions in schools did not threaten serious social conflict.

Zelman, 536 U.S. at 720. The Justices recounted how the wave of Catholic and Jewish immigration starting in the mid-19th Century increased the number of those suffering from this discrimination, and correspondingly the intensity of religious hostility surrounding the "School Question":

> Not surprisingly, with this increase in numbers, members of non-Protestant religions, particularly Catholics, began to resist the Protestant domination of the public schools. Scholars report that by the mid-19th century religious conflict over matters such as Bible reading "grew intense," as Catholics resisted and Protestants fought back to preserve their domination. Jeffries & Ryan, [*A Political History of the Establishment Clause*, 100 MICH. L. REV. 279,] 300 [(Nov. 2001)] "Dreading Catholic domination," native Protestants "terrorized Catholics." P. Hamburger, *Separation of Church and State* 219 (2002). In some States "Catholic students suffered beatings or expulsions for refusing to read from the Protestant Bible, and crowds ... rioted over whether Catholic children could be released from the classroom during Bible reading." Jeffries & Ryan, 100 MICH. L. REV., at 300.

Zelman, 536 U.S. at 720-21. Finally, the Justices detailed how Catholic efforts to correct this increasingly severe discrimination elicited a reaction in the form of the proposed federal Blaine Amendment and its successful state progeny:

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

Zelman, 536 U.S. at 721.

Although *Locke v. Davey,* 540 U.S. 712 (2004), did not discuss the history of Blaine Amendments in similar detail, it affirmed the same basic facts and provided additional guidance for identifying what kinds of state constitutional amendments are, in fact, Blaine Amendments. The *Locke* Court rejected the claim that Article I, Section 11 of the Washington State Constitution was a Blaine Amendment, *Locke,* 540 U.S. at 723 n.7 ("the provision in question is not a Blaine Amendment"), linking it instead with amendments "against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an 'established' religion." *Id.* at 722. Amendments like these date back to the founding. *See, e.g., id.* at 723 (listing "no compelled support" amendments passed by eight states from 1776 to 1802); *id.* at 722 n.6 (discussing similar law from the same era in Virginia). In light of the "historic and substantial state interest" reflected in these laws, the Court found nothing in them "that suggests animus toward religion." *Id.* at 725. Notably, like Washington's Article I, Section 11, none of those early amendments used the term "sectarian" to describe those excluded from funding. *Compare id.* (listing founding-era state amendments) *with* WASH. CONST. art. I, § 11 ("No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment…").

Importantly, however, the *Locke* majority noted once again the link between the federal Blaine Amendment and anti-Catholic bigotry. *See Locke,* 540 U.S. at 723 n.7 (citing *Mitchell* plurality). The majority went on to trace the connection between another provision of the Washington Constitution – Article IX, Section 4– and the federal Enabling Act from which its language was drawn. *See id.* The language of the Enabling Act, in turn, derives from the failed federal Blaine Amendment. *See supra* notes 12, 14. What all three provisions have in common – in contrast to the provision upheld in *Locke* – is use of the term "sectarian" to describe those excluded from government funding. Notwithstanding this connection, the *Locke* Court did not rule on the constitutionality of Article IX, Section 4, because it was "not at issue in th[at] case." *Locke,* 540 U.S. at 723 n.7.

The opinion below ignores virtually all of this. It elides *Locke's* discussion of the distinction between Article I, Section 11 and Article IX, Section 4; the latter's connection to the federal Enabling Act and federal Blaine Amendment; and the Court's citation of the *Mitchell* plurality. *See Bush v. Holmes,* 886 So.2d 340, 351 n.9 (Fla. 1st DCA 2004) (quoting footnote 7 of *Locke* in part, using ellipses to avoid relevant portions). It makes only passing reference to the *Mitchell* plurality, *see id.,* and no mention whatsoever of Justice Breyer's dissent in *Zelman.*

Instead, in discussing the historical context of Florida's Article I, Section 3, the court below preferred *dicta* from a one-vote concurrence in a case where the

Blaine Amendments were not at issue, *Lemon v. Kurtzman,* 403 U.S. 602, 642 (1971) (Brennan, J. concurring). This opinion contains the patently false statement that increasing religious diversity in the mid-19th Century "'soon led to widespread demands for *secular* public education.'" *Holmes,* 886 So.2d at 349 (quoting *Lemon,* 403 U.S. at 646-47) (emphasis added). Though there may have been widespread demand for publicly funded education, there was no viable demand at that time that it be *secular*; any suggestion that the emergent "common schools" should *not* teach the "common religion" met with howls of disapproval. *See supra* notes 4, 5. As Justice Brennan himself acknowledges in the same excerpt, "nonsectarian" religious exercises in the public schools continued well into the 20th Century, as did the attendant controversies generated by "sectarian" and other minority dissenters. *See Lemon,* 403 U.S. at 647; *see, e.g., Abington Sch. Dist. v. Schempp,* 374 U.S. 203 (1963) (striking down requirement that public schools begin each day with Bible readings).

The court below relies on the same concurrence to support the similarly unsupportable claim that "[t]he primary purpose of [the Blaine] amendments to various state constitutions was to bar the use of public funds to support *religious* schools." *Holmes,* 886 So.2d at 349 (emphasis added). In fact, the purpose of those amendments was *not* to prohibit government funding of *all* religious schools, just the ones deemed "sectarian"; Blaine Amendments were designed specifically

not to disrupt the flow of government funds to the "common schools," which were established in significant part to teach immigrants the "common" and "nonsectarian" religion of non-denominational Protestantism.

In short, even before *Locke,* seven Justices now sitting on the U.S Supreme Court had written or joined an opinion acknowledging that the federal and state Blaine Amendments excluded "sectarian" schools from equal participation in government educational funding as a way to target Catholics and other growing religious minorities for special disadvantage, in fearful reaction to their refusal to conform with "nonsectarian" Protestantism. (To be sure, the Justices differed on the *legal consequences* of these historical facts, but that does not undermine their agreement on those facts.) In *Locke,* the two remaining Justices joined those seven in acknowledging the connection between nativism and the Blaine Amendments. The Court also upheld the particular constitutional provision at issue in that case, in part because it was not actually a Blaine Amendment. Here, the court below actively ignores these conclusions in an attempt to manufacture some uncertainty about the relevant history where there is none. This Court should reject this result-oriented revisionism.

B. Use of the Term "Sectarian" to Exclude Institutions from Funding in an Historical Context Where "Nonsectarian" Religious Institutions Continued to Enjoy the Same Funding Is More Than Sufficient Evidence of Impermissible *Animus*.

The opinion below asserts that "nothing in the history or text of the Florida no-aid provision suggests animus towards religion." 886 So.2d at 364. This is simply false, as both the text and the history of Article I, Section 3 manifest its nativist purpose.

The text of Article I, Section 3 bears the watermark of a true Blaine Amendment: it uses the term "sectarian" to describe those excluded from government funding. Although this represents a critical distinction from the "no compelled support" provision upheld in *Locke,* the court below simply ignored the difference. *See* 886 So.2d at 364 (arguing that "the language of article I, Section 11 of the Washington Constitution … is so similar to [Article I, Section 3] of the Florida Constitution that there can be no question that" Article I, Section 3 must also be consistent with the Free Exercise Clause). On its face, the term "sectarian" is not synonymous with "religious" but instead refers to a narrower subcategory, connoting one or more sects or denominations of religion.[3] Although that distinction may be blurred in common usage today, it was not when Article I, Section 3 became law.

Indeed, the historical context of Article I, Section 3 makes clear that its use of the term "sectarian" was not an oversight or a matter of mere semantics, but

---

[3] For example, "nonsectarian prayer" is unmistakably religious but is not tied to any one religious sect. *See, e.g., Lee v. Weisman,* 505 U.S. 577, 581-82, 588-89 (1992).

instead a common legal device to target for special disadvantage those who resisted the "common religion" then taught in the "common schools." In other words, the meaning of "sectarian" can only be understood by reference to the "nonsectarian" religion to which it was opposed at the time.

In the mid-19th Century, the emerging principle of universal education and the desire to eliminate strife among increasingly varied religious groups gave rise to the movement for publicly funded "common schools." Early proponents of this movement emphatically denied that the common schools were intended to, or could effectively, function without religious instruction.[4] Indeed, one of the primary purposes of the common schools was to instill in all American children the same "common religion," a form of Protestantism designed initially to be acceptable to Unitarian and Orthodox Congregationalists.[5] Those who resisted this

---

[4] Horace Mann, often called the "Father of Public Education," vehemently denied any attempt "to exclude religious instruction from school," and affirmed as "eternal and immutable truths" that the public schools' "grand result in practical morals is a consummation of blessedness that can never be attained without religion, and that no community will ever be religious without a religious education." HORACE MANN, LIFE AND WORKS: ANNUAL REPORTS OF THE SECRETARY OF THE BOARD OF EDUCATION OF MASSACHUSETTS FOR THE YEARS 1845-48, at 292, 311 (1891).

[5] MANN, *supra,* at 311 (emphasizing that public school system "earnestly inculcates all Christian morals; it founds its morals on the basis of religion; it welcomes the religion of the Bible."); *see* E.I.F. WILLIAMS, HORACE MANN: EDUCATIONAL STATESMAN 266 (1937); *The Dublin Case,* 38 N.H. 459 (1859) (describing conflicts among Unitarian and Orthodox Congregationalists in New England).

publicly funded religion – at this early stage, mostly evangelical Protestants – were maligned as "sectarian."[6]

However, with the surge of Irish, German, and other European Catholic immigration later in the 19th Century, "sectarian" took on a more precise, and more pejorative, meaning. Popular backlash against these immigrants gave rise to the nativist movement, which found various forms of expression at various times, including the Know-Nothing party[7] and the American Protective Association.[8]

---

[6] *See* R. MICHAELSEN, PIETY IN THE PUBLIC SCHOOL 69 (1970) ("Horace Mann scorned sectarianism. By that he meant chiefly the sectarianism of the evangelical Protestant denominations.").

[7] Abraham Lincoln wrote of that party:

> As a nation we began by declaring that "all men are created equal." We now practically read it "all men are created equal, except Negroes." When the Know-Nothings get control, it will read "all men are created equal except Negroes and foreigners and Catholics." When it comes to this, I shall prefer emigrating to some country where they make no pretense of loving liberty.

Letter from Abraham Lincoln to Joshua Speed (Aug. 24, 1855), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 320, 323 (R. Basler ed. 1953).

[8] Oath number four of the APA began:

> I do most solemnly promise and swear that I will always, to the utmost of my ability, labor, plead and wage a continuous warfare against ignorance and fanaticism; that I will use my utmost power to strike the shackles and chains of blind obedience to the Roman Catholic Church from the hampered and bound consciences of a priest-ridden and church-oppressed people; that I will never allow any one, a member of the Roman Catholic Church, to become a member of this order, I knowing him to be such; that I will use my influence to promote the interest of all Protestants everywhere in the world that I may be; that I will not employ a Roman Catholic in any capacity if I can procure the services of a Protestant.

Even President Grant, calling for an end to all funding for "sectarian" schools in 1875, spoke of the Catholic Church as a source of "superstition, ambition and ignorance."[9]

Nativists used the law to target Catholic education in two primary ways: (1) by requiring daily, devotional reading of the King James Version of the Bible in the common schools,[10] and (2) by withdrawing all government support from "sectarian" schools.[11]

HUMPHREY J. DESMOND, THE A.P.A. MOVEMENT, A SKETCH 36 (1912); *See* KINZER, AN EPISODE IN ANTI-CATHOLICISM 139 (1964) (the APA's "initials identified almost any activity or proposal that could by any stretch of the imagination be called anti-Catholic.")

[9] President Ulysses S. Grant, Address to the Army of Tennessee at Des Moines, Iowa (quoted in Laycock, *The Underlying Unity of Separation and Neutrality,* 46 EMORY L.J. 43, 51 (1997)).

[10] *See Lemon v. Kurtzman,* 403 U.S. 602, 628, 629 (1971) (Douglas, J., concurring) (noting that "Protestants obtained control of the New York school system and used it to promote reading and teaching of the Scriptures as revealed in the King James version of the Bible," and that the Know-Nothing party "included in its platform daily Bible reading in the schools") (citation omitted); *see, e.g.,* JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925, at 88 (1987) (describing Massachusetts Know-Nothing party's passage of law requiring reading of King James Bible in common schools). *See also State ex rel. Finger v. Weedman,* 226 N.W. 348, 351 (S.D. 1929) ("The King James version is a translation by scholars of the Anglican church bitterly opposed to the Catholics, apparent in the dedication of the translation, where the Pope is referred to as 'that man of sin.'"); *People ex rel. Ring v. Bd. of Educ. of Dist. 24,* 92 N.E. 251, 254 (Ill. 1910) ("Catholics claim that there are cases of willful perversion of the Scriptures in King James' translation.").

[11] *See, e.g.,* MASS. CONST. amend. art. XVIII (superseded by MASS. CONST. amend. art. XLVI) (passed in 1854, immediately after local ascendancy of Know-Nothing party, and providing that "all moneys which may be appropriated by the

The most prominent attempt at the latter came in 1875, when nativist Representative James G. Blaine – in response to President Grant's call – introduced a proposed federal constitutional amendment in the U.S. House of Representatives to bar states from funding "sectarian" schools.[12] Although the Blaine language narrowly failed as a federal constitutional amendment,[13] it had gained enough support in Congress that Congress thereafter required new states to adopt similar language in their state constitutions as a condition of admittance to the Union.[14] In addition, several states – including Florida – adopted similar "Blaine Amendments" voluntarily as part of the same movement.[15]

---

state for the support of common schools … shall never be appropriated to any religious sect for the maintenance exclusively of its own schools").

[12] The original Blaine Amendment provided:

> No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

H.R.J. Res. 1, 44th Cong., 1st Sess., 4 CONG. REC. 205 (1875).

[13] The measure passed in the House by a margin of 180-7, 4 CONG. REC. 5191 (1876), but fell four votes short of the supermajority required in the Senate. 4 CONG. REC. 5595 (1876).

[14] *See, e.g.,* Act of Feb. 22, 1889, 25 Stat. 676, ch. 180 (1889) (enabling act for North Dakota, Montana, South Dakota, and Washington); Act of June 20, 1910, 36 Stat. 557 § 26 (1910) (enabling act for Arizona and New Mexico); Act of July 3, 1890, 26 Stat. 215 § 8, ch. 656 (1890) (enabling act for Idaho); S.D. CONST. art. VIII, § 16; N.D. CONST. art. 8, § 5; MONT. CONST. art. X, § 6; WASH. CONST. art. IX, § 4, art. I, § 11; ARIZ. CONST. art. IX, § 10; IDAHO CONST. art. X, § 5. *See also* 20 CONG. REC. 2100-01 (1889) (statement of Sen. Blair) (arguing in favor of

As discussed above, at least seven Justices of the U.S. Supreme Court have recognized that, when used in the context of these late 19th Century constitutional amendments, the term "sectarian" does not merely connote some subset of all religions, but connotes Catholicism in particular. *See Zelman,* 536 U.S. at 721 (noting purpose of federal and state Blaine amendment movements "to make certain that government would not help pay for 'sectarian' (*i.e.,* Catholic) schooling for children.") (quotations omitted) (dissenting opinion); *Mitchell,* 530 U.S. at 282 ("it was an open secret that 'sectarian' was code for 'Catholic.'") (plurality opinion). The Arizona Supreme Court has reached a similar conclusion. *Kotterman v. Killian,* 972 P.2d 606, 624 (Ariz. 1999) ("The Blaine amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing 'Catholic menace.'") (internal quotations omitted). These judicial decisions simply reflect the fact that the weight of scholarly authority in support of this historical narrative is nothing short of crushing.[16]

Enabling Act requirement that state constitutions guarantee "public schools … free from sectarian control," in part because requirement would accomplish purposes of failed federal Blaine Amendment).

[15] *See, e.g.,* DEL. CONST. art. X, § 3 (adopted 1897); N.Y. CONST. art. XI, § 3 (adopted 1894); KY. CONST. § 189 (adopted 1891); FLA. CONST. art. I, § 3 (adopted 1885); MO. CONST. art. IX, § 8 (adopted 1875).

[16] *See, e.g.,* HAMBURGER, at 335 ("Nativist Protestants also failed to obtain a federal constitutional amendment but, because of the strength of anti-Catholic

Despite citing much of this very scholarship for these very propositions, *see* 886 So.2d at 348-49 & nn.7&8., the lower court asserts that, "Whether the Blaine-era amendments are based on religious bigotry is a disputed and controversial issue among historians and legal scholars." 886 So.2d at 351 n.9. The sole basis cited for this alleged "controversy" among scholars is a single student note arguing that Indiana's Blaine Amendment could not have been animated by bigotry, because Catholics were such a small minority in Indiana that they would not have alarmed nativists. *Id.* This is akin to arguing that racism could not exist in Idaho or Montana because their African-American populations are so small. In fact, Indiana

---

feeling, managed to secure local versions of the Blaine amendment in the vast majority of the states."); Lupu, *The Increasingly Anachronistic Case Against School Vouchers,* 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 375, 386 (1999) ("From the advent of publicly supported, compulsory education until very recently, aid to sectarian schools primarily meant aid to Catholic schools as an enterprise to rival publicly supported, essentially Protestant schools."); Laycock, *The Underlying Unity of Separation and Neutrality,* 46 EMORY L.J. 43, 50 (1997) ("Although there were legitimate arguments made on both sides, the nineteenth century opposition to funding religious schools drew heavily on anti-Catholicism."). *See generally* JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY (Brookings 1999); CHARLES L. GLENN, JR., THE MYTH OF THE COMMON SCHOOL (U. Mass. 1988); WARD M. MCAFEE, RELIGION, RACE AND RECONSTRUCTION: THE PUBLIC SCHOOL IN THE POLITICS OF THE 1870S (S.U.N.Y. 1998); DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J. L. & PUB. POL'Y 551 (Spring 2003); Jeffries & Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (Nov. 2001); Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117 (2000).

has long been a hotbed of activity for the infamously nativist Ku Klux Klan.[17] Here again, the court below attempts to manufacture uncertainty where there is none. This Court should reject that attempt, and should conclude instead that the text and history of Article I, Section 3 reflect impermissible religious *animus*.

II. THIS COURT SHOULD AVOID ANY INTERPRETATION OF ARTICLE I, SECTION 3 THAT RISKS VIOLATING THE UNITED STATES CONSTITUTION.

In light of this regrettable history, *amicus* respectfully submits that this Court should avoid interpreting Article I, Section 3 in a manner that would exclude from educational funding those schools historically targeted as "sectarian." For such an interpretation would generate serious federal constitutional issues, not only under the federal Free Exercise Clause of the First Amendment (as the Appellants have already discussed at length), but under the Equal Protection Clause of the Fourteenth Amendment. *See Romer v. Evans,* 517 U.S. 620, 634 (1996) ("a bare … desire to harm a politically unpopular group cannot constitute a legitimate governmental interest"); *Hunter v. Underwood,* 471 U.S. 222 (1985). It is axiomatic that courts should avoid interpreting statutes in a manner that would create unnecessary constitutional issues. *See N.L.R.B. v. Catholic Bishop of Chicago,* 440 U.S. 490, 500 (1979). Rather than generate and then address those

---

[17] *See* Indiana State Library, "Ku Klux Klan Resources from the Indiana Division" (available at http://www.statelib.lib.in.us/www/isl/indiana/Klan.html) (noting that "[n]ationally, Indiana was said to have the most powerful Ku Klux Klan," and listing bibliographic resources).

federal issues, the Court should avoid them entirely by construing Article I, Section 3 to allow the voucher program here at issue.

CONCLUSION

For the foregoing reasons, the *en banc* decision of the First Appellate District should be reversed.

Respectfully submitted,

____

Isaac M. Jaroslawicz
GIVNER & JAROSLAWICZ
1177 Kane Concourse #232
Miami, FL 33154-2027
Telephone: (305) 867-6470
Facsimile: (305) 867-6474

Local Counsel for Amicus Curiae

Anthony R. Picarello, Jr.
Derek L. Gaubatz
THE BECKET FUND FOR RELIGIOUS LIBERTY
1350 Connecticut Avenue, NW, Suite 605
Washington, DC 20036-1735
Telephone: (202) 955-0095
Facsimile: (202) 955-0090

January 24, 2005

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Brief *Amicus Curiae* of the Becket Fund for Religious Liberty in Support of Appellants and of Reversal was sent this 24th day of January 2005, via First Class Mail to each of the following:

RAQUEL A. RODRIGUEZ
Office of the Governor
The Capitol, Suite 209
Tallahassee, FL 32399-0001

DANIEL WOODRING
Florida Department of Education
325 West Gaines Street, Suite 1244
Tallahassee, FL 32399-0400

CHRISTOPHER M KISE
LOUIS F. HUBENER
Office of the Solicitor General
The Capitol PL-01
Tallahassee, FL 32399-1050

BARRY RICHARD
Greenberg Traurig, P.A.
101 East College Avenue
Post Office Drawer 1838
Tallahassee, FL 32302

CLARK NEILY
Institute of Justice
1717 Pennsylvania Avenue, NW
Suite 200
Washington, D.C. 20006

KENNETH W. SUKHIA
Fowler, White, Boggs, Banker, P.A.
Post Office Box 11240
Tallahassee, FL 32302

RONALD G. MEYER
Meyer and Brooks, PA.
Post Office Box 1547
2544 Blairstone Pines Drive
Tallahassee, FL 32302

ROBERT H. CHANIN
Bredhoff & Kaiser, P.L.L.C
805 Fifteenth Street, NW, Suite 1000
Washington, DC 20005

PAMELA L. COOPER
Florida Education Association
118 North Monroe Street
Tallahassee, FL 32399-1700

ELLIOT M. MINCBERG
JUDITH E. SCHAEFFER
People for the American Way Fndn.
2000 M Street, NW, Suite 400
Washington, DC 20036

RANDALL MARSHALL
American Civil Liberties Union
Fndn. of Florida, Inc.
4500 Biscayne Blvd., Suite 340
Miami, FL 33137

STEVEN R. SHAPIRO
American Civil Liberties Union Fndn.
125 Broad Street, 17th Floor
New York, NY 10004

DAVID STROM
American Federation of Teachers
555 New Jersey Avenue, NW
Washington, DC 20001

JOAN PEPPARD
Anti-Defamation League
2 S. Biscayne Blvd., Suite 2650
Miami, FL 33131

MICHAEL A. SUSSMAN
National Assoc. of Colored People
Law Offices of Michael A. Sussman
25 Main Street
Goshen, NY 10924

STEVEN M. FREEMAN
STEVEN SHEINBERG
Anti-Defamation League
823 United Nations Plaza
New York, NY 10017

MARC D. STERN
American Jewish Congress
15 East 84th Street
New York, NY 10028

AYESHA N. KHAN
Americans United for Separation of
Church and State
518 C Street, NE
Washington, DC 20002

JULIE UNDERWOOD
National School Boards Ass’n
1680 Duke Street
Alexandria, VA 22314

JEFFREY P. SINENSKY
American Jewish Congress
165 East 56th Street
New York, NY 10022

By: ________________________________
Isaac M. Jaroslawicz

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief was prepared in 14-point, Times New Roman font in compliance with Fla. R. App. P. Rule 9.210(a)(2).

By: ________________________________
Anthony R. Picarello, Jr.