Nos. 04-55732, 04-56167

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BARNES-WALLACE, *et al.*,

Plaintiffs-Appellants/Cross-Appellees

v.

BOY SCOUTS OF AMERICA, *et al.*,

Defendants-Appellees/Cross-Appellants

On Appeal From the United States District Court
for the Southern District of California

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY SUPPORTING DEFENDANTS-APPELLEES AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus* states that it does not have a parent corporation, nor does it issue any stock.

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INTEREST OF THE *AMICUS*

The Becket Fund for Religious Liberty submits this brief *amicus curiae* in support of Defendants-Appellees and reversal, under FRAP 29. All parties have consented to the filing of this brief. *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 all government aid from so-called "sectarian" faiths (mainly Catholicism), while allowing those same funds to support the "common" faith, that is, non-denominational Protestantism.

This discriminatory funding regime manifested itself most vividly in two related ways. "Common schools" that taught Protestant Christianity deemed "nonsectarian" received full government support on the one hand, while schools that taught "sectarian" faiths were completely denied aid on the other. In other

words, Blaine Amendments were not designed to implement benign concerns for the separation of church and state, or traceable to the founding. Instead, the Amendments were designed from the outset to target the faiths of immigrants, especially Catholicism, for special disadvantage.

For years, the Becket Fund has worked to correct the historical revisionism that prefers to ignore (as done by the court below) this shameful chapter in our nation's history in order to protect state Blaine Amendments—often the last legal weapon available to attack democratically enacted, religion-neutral, government aid programs. In this effort, 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 children and their parents who have suffered religion-based exclusion from government educational benefits because of Blaine Amendments;[2] and we maintain a website dedicated

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[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*, No. 03-CV-5033 (D.S.D. filed Apr. 23, 2003); *Boyette v. Galvin*, 311 F. Supp. 2d 237 (D. Mass 2004), *on appeal*, No. 04-1625 (1st Cir.). *See also* Brief *Amicus Curiae* of the Becket Fund for Religious Liberty

exclusively to the history and current effects of Blaine Amendments (www.blaineamendments.org).

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.

SUMMARY OF ARGUMENT

Laws that single out the "sectarian" for exclusion from government 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. At its peak, American nativism succeeded not only in buttressing its hostility to Catholic immigrants (and especially their schools) with the force of law, but also in cloaking and mythologizing 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).

Regrettably, Article XVI, Section 5 of the California Constitution falls squarely within this tradition. It is a true Blaine Amendment. That is, it is one of

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in Support of Reversal (Apr. 12, 2001) (*Gallwey v. Grimm*, Wash. S. Ct. No. 68565-7) (available at www.becketfund.org/litigate/GallweyAmicus.pdf).

many "antisectarian" no funding provisions inserted into state constitutions throughout the country in the latter half of the 19th century, when nativist fervor was at its height. Unlike the "no compelled support" provision recently upheld by the U.S. Supreme Court in *Locke v. Davey*, 540 U.S. 712 (2004), Article XVI, Section 5 of the California Constitution targets the "sectarian," instead of the "religious" generally, for exclusion from government funding programs. And when Article XVI, Section 5 was passed in 1879, that distinction was laden with meaning: "sectarian" referred to those faiths (especially Catholicism) that resisted assimilation to the "nonsectarian" Protestantism taught as the "common faith" in what were known as the "common schools" (*i.e.*, public schools).

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 a disparaging 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 telltale term "sectarian." These judicial opinions, moreover, reflect the overwhelming weight of historical scholarship regarding the meaning and purpose of this term, notwithstanding the complete neglect of this fact by the court below.

Thus, both the text and history of Article XVI, Section 5 reflect that it was passed out of religious *animus*. Its use of the term "sectarian" in an historical

context makes its pejorative meaning especially clear. The court below relied on California's tainted Blaine Amendment to deny public aid (through real estate leases) to an organization it deemed religious.[3] Rather than implement Blaine era hostility today, and so needlessly generate federal constitutional issues, this Court should interpret California's Blaine Amendment to allow the leases at issue.

ARGUMENT

I. THE TEXT AND HISTORY OF ARTICLE XVI, SECTION 5 MANIFEST ITS UNCONTITUTIONAL 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 by excluding certain religions from government funding in an era when the "nonsectarian" religion was funded freely. Most recently, in *Locke v. Davey*, 540 U.S. 712 (2004), 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

[3] The court below held that San Diego's lease of Balboa Park camp grounds to the Boy Scouts violated California's Blaine Amendment. *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003). On April 12, 2004, the district court held that San Diego's Fiesta Island lease similarly violated California's Blaine Amendment (See "Excerpts of Record" submitted by Plaintiffs on January 3, 2005 at 3732-51).

not a Blaine Amendment[4] and upheld it. It bears repeating that it is not the remarks of bigoted legislators, but implementation of the conspicuous word "sectarian" that demonstrates impermissible *animus* in targeting some faiths for special disfavor. It is in this light that this Court must scrutinize California's Blaine Amendment, which provides in relevant part,

> Neither the Legislature, nor any . . . city and county . . . shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious *sect*, church, creed, or *sectarian* purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or *sectarian* denomination whatever.[5]

CAL. CONST. of 1879 Art. XVI, § 5 (emphasis added)

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, and stated

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[4] 540 U.S. at 723 n.7.

[5] *See also* Article IX, § 8 of the California constitution. "No public money shall ever be appropriated for the support of any *sectarian* or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any *sectarian* or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State." (emphasis added).

that "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.[6]

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

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[6] Unfortunately, the court below flatly ignored the history of the "antisectarian" movement, even after having evaluated the *Mitchell* opinion. *Barnes-Wallace*, 275 F. Supp. 2d at 1268-1269. And, as discussed below, the Supreme Court has repeatedly condemned the nativist use of the word "sectarian" in unusually strong language; yet on this point, the court below is conspicuously silent. *See also infra* § B.

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 infra* notes 16-18. 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.

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 text of Article XVI, Section 5 to California's constitution bears the watermark of a true Blaine Amendment: it uses the terms "sect" and "sectarian" to describe those excluded from government funding. Although this represents a critical distinction from the general anti-funding provision upheld in *Locke*, the court below simply ignored the difference. Without any reference to history, the court below states that California's specific Blaine Amendment ban on funding "sectarian purposes" was in fact not a ban on sectarian purposes, but rather a

prohibition on funding *all* "religious purposes." *Barnes-Wallace*, 275 F. Supp. 2d at 1279-1280. 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.[7] Although that distinction may be blurred in common usage today, it was not when Article XVI, Section 5 became law, the relevant time period for constitutional purposes.

Indeed, the historical context of Article XVI, Section 5 makes clear that its use of the term "sectarian" was not an oversight or a matter of mere semantics, but 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.[8] Indeed, one of the

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[7] 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).

[8] Horace Mann, often called the "Father of Public Education," vehemently denied any attempt "to exclude religious instruction from school," and affirmed as

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.[9] Those who resisted this publicly funded religion—at this early stage, mostly evangelical Protestants—were maligned as "sectarian."[10]

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[11] and the American Protective Association.[12]

"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).

[9] 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).

[10] *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.").

[11] Abraham Lincoln wrote of that party:

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."[13]

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

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> 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).

[12] 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.

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.")

[13] 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)).

the common schools,[14] and (2) by withdrawing all government support from "sectarian" schools.[15] As to the first point, though there may have been widespread demand for publicly funded education, there was no viable demand at that time that it be *secular*; any suggestion that the emergent "common schools" should *not* teach the "common religion" met with howls of disapproval. *See supra* notes 8, 9. As Justice Brennan himself acknowledges, "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

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[14] *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 . . . .").

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

(1963) (striking down requirement that public schools begin each day with Bible readings).

As to the second point (*i.e.*, withdrawing support for "sectarian" institutions), the most prominent attempt 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.[16] Although the Blaine language narrowly failed as a federal constitutional amendment,[17] 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.[18] In addition, several states—including California—adopted similar "Blaine Amendments" voluntarily as part of the same movement.[19]

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[16] 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).

[17] 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).

[18] *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,

California Supreme Court decisions interpreting the term "sectarian" and the continuing practice of a "nonsectarian" religion in California's common schools after the passage of California's Blaine Amendment further make clear that the nativist purposes embodied in the term "sectarian" was understood and implemented in California. Two years after the Blaine Amendment's adoption, the California Supreme Court stated the following,

> "The Christian religion is recognized as constituting a part of the common law, its institutions are entitled to profound respect, and may well be protected by law. The Sabbath, properly called the 'Lord's Day,' is amongst the first and most sacred institutions of Christianity, and the act for the punishment of Sabbath-breaking is not in derogation of the liberty of conscience". . . . The foregoing [is] . . . in no manner influenced by *sectarian* or puritanical ideas. The same current of authority runs through the cases to be found in the legal reports of the Eastern, Western, and Middle States.

Ex parte Burke, 59 Cal. 6, 16 (Cal. 1881) (emphasis added) (finding California's mandatory Sunday closing laws constitutional) (citing *Shover v. The State*, 5 Eng. 259 (Ark. 1850). Thus California's highest court, having "views [] fully in accord with those expressed by other Judges," *Ex parte Burke*, 59 Cal. at 19,

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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 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).

[19] *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).

acknowledged and endorsed the historically prevailing opinion that a non-denominational form of Christianity could be recognized in law as long as it was free from "sectarian" influences and ideas.

"Common" Christianity was so much a part of the fabric of everyday life and law in California as to be practically taken for granted at the time of the Blaine Amendments and for many years after. For example, California "common schools" universally[20] taught the King James Bible as well as prayers through the use of uniform textbooks known as McGuffey Readers. These common school textbooks extensively quoted the King James Bible while excluding the Catholic or other "sectarian" translations of the Bible.

Tellingly, when the California Supreme Court in *People v. Bd. of Educ. of Oakland*, 55 Cal. 331 (Cal. 1880) debated the propriety of the McGuffey Readers in public schools, the debate focused only on whether an individual California city could ever legally choose to *not* use the McGuffey Readers. The fact that McGuffey Readers were replete with King James Bible lessons, prayers, and used "common" Christian morals as the basis for lessons was not cause for concern by the court. Nor was the fact that the preface to the McGuffey Readers stated that

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[20] Maintenance of common schools was a constitutional requirement in California before and after adoption of its Blaine Amendment. See CAL. CONST. of 1879 art. IX, § 5 "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each District . . . ."

"[t]he Christian religion is the religion of our country. From it are derived our prevalent notions of the character of God, the great moral governor of the universe."[21] The propriety of "common religion" in textbooks was an uncontroversial "given" to the *Oakland* court.

Simply put the *Oakland* court did not find that public funding of the Readers' religious content to be objectionable because its religious content was not the "sectarian" type that the Blaine Amendment targeted for disfavor. Thus—one year after California adopted its Blaine Amendment—the California Supreme Court allowed the "common religion" taught in McGuffey Readers to continue to dominate the public schools because they were considered "nonsectarian" and therefore permissible under California's Blaine Amendment.[22]

Another example of how California's courts applied the Blaine Amendment use of the term "sectarian" in accordance with its bigoted, nativist intent can be seen in a pair of 1920's cases. In *Frohliger v. Richardson*, 63 Cal. App. 209 (Cal. Ct. App. 1923), the court applied the state Blaine Amendment to deny public benefits to disfavored "sectarian" Catholics. *See id*. (holding that because "[t]he Roman Catholic Church is a sectarian institution" state aid could not fund historic

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[21] *See* William F. Jasper, *Before the Public Schools*, THE NEW AMERICAN, June 4, 2001.

[22] The *Oakland* court's approval of the McGuffey Reader despite its religious content also contradicts the lower court's claim that California courts view the term "sectarian" as synonymous with anything "religious" under the Blaine Amendment. *See also infra* note 24.

Mission restorations). Yet just a year later, the same court held that the King James Bible (the same Bible used in the McGuffey Readers in the California's public schools) was a "nonsectarian" book. *Evans v. Selma Union High School Dist. of Fresno County*, 193 Cal. 54, 57 (Cal. 1924) (holding that the King James version of the Bible was not "sectarian" therefore allowed in public libraries). Thus schools could maintain and use overtly religious materials (such as the King James Bibles and the McGuffey Readers), as long as they did not stray from "broad principles and simple fundamentals," yet things such as "catechisms or other publications of a sectarian or denominational character" were strictly forbidden. *Id.* at 58.

Finally, 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 like California's, 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. *See 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.[23]

In sum, the historical record demonstrates that Blaine Amendments, like California's, acted to further, not prevent, government discrimination by sect precisely because the word "sectarian" meant something other than merely "religious." In light of this historical record (all of which the lower court ignored),

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

this Court should reject the lower court's unfounded claim that California's Blaine Amendment does not "promote[] the purposes of one religion over those of another." *Barnes-Wallace*, 275 F. Supp. 2d at 1279.[24] Instead, this Court should

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[24] Equally baseless is the lower court's claim that the term "sectarian" in California's Blaine Amendment (and presumably other states' Blaine Amendments) is "synonymous with [the word] 'religious.'" *Barnes-Wallace*, 275 F. Supp. 2d at 1279. As an initial matter, this Court recently rejected such an interpretation in a case applying California's Blaine Amendment. In *Paulson v. City of San Diego*, 294 F.3d 1124 (9th Cir. 2002) (en banc), this Court affirmed an injunction preventing the city of San Diego from supporting a "sectarian war memorial," *id.* at 1126, and explicitly retained the Blaine Amendment's "sectarian" (not "religious") test:

> In summary, the California appellate cases make clear that article XVI, section 5, prohibits the government from (1) granting a benefit in any form (2) to any *sectarian* purpose (3) regardless of the government's secular purpose (4) unless the benefit is properly characterized as indirect, remote, or incidental. A *sectarian* benefit that is ancillary to a primary secular purpose may qualify as "incidental" if the benefit is available on an equal basis to those with *sectarian* and those with secular objectives.

Id. at 1131 (emphasis added). Moreover, none of the California court cases that the lower court cites remotely suggests, let alone holds, that the term "sectarian" in California's Blaine Amendment is synonymous with anything "religious." Indeed, in all three of those cases, the courts found that the terms of the Blaine Amendment were not even implicated. *See East Bay Asian Local Dev. Corp. v. California*, 24 Cal. 4th 693, 720 (Cal. 2000) (holding constitutional a state law allowing exemptions from historical preservation laws for all religious organizations); *Woodland Hills Homeowners Org. v. Los Angeles Cmty. Coll. Dist.*, 218 Cal. App. 3d 79, 93 (Cal. Ct. App. 1990) (allowing a long-term lease of surplus public school land to a reform Jewish congregation); *California Educ. Facilities Auth. v. Priest*, 12 Cal. 3d 593, 605 (1974) (upholding program permitting colleges—both sectarian and nonsectarian—to borrow money at below-market rates for improvements to their facilities, so long as the relevant facilities were not used for sectarian purposes, because any aid to sectarian purposes was merely incidental to the Act's primary public purpose of encouraging higher education).

make its decision in this case grounded in the fact that the text and history of California's Blaine Amendment reflects impermissible religious animus.

II. THIS COURT SHOULD AVOID ANY INTERPRETATION OF ARTICLE XVI, SECTION 5 THAT RISKS VIOLATING THE UNITED STATES CONSTITUTION.

In light of this regrettable history, *amicus* respectfully submits that this Court should avoid interpreting Article XVI, Section 5 in a manner that would exclude from funding religious institutions that ostensibly fall within the Blaine Amendment's reach and its "sectarian" grip. The court below contends that the California Blaine Amendment may be constitutionally applied to exclude the government aid at issue in this case. However, such an application would generate serious federal constitutional issues, under both the federal Free Exercise Clause, *see Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993) ("The Free Exercise Clause protects against governmental hostility which is masked, as well as overt"); *Locke v. Davey*, 540 U.S. 724 (2004) (Allowing a ban on state funding of devotional theology studies because prohibition was "far from evincing [] hostility toward religion"), and the Equal Protection Clause. *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") (internal citation omitted); *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 federal constitutional issues, this Court should avoid them entirely by construing Article XVI, Section 5 to allow the leasing program here at issue.

CONCLUSION

For the foregoing reasons, the decision of the lower court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to FED. R. APP. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the foregoing brief *amicus curiae* is proportionally spaced, has a typeface of 14 points or more, and contains 6,427 words, as calculated by Microsoft Word.

By: _____
Anthony R. Picarello, Jr.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that, on this 24th day of February, 2005, two copies of the foregoing BRIEF AMICUS CURIAE OF THE BECKET FUND FOR RELIGIOUS LIBERTY SUPPORTING DEFENDANTS-APPELLEES AND REVERSAL were sent by United States mail, first class postage prepaid, to the following:

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