No. CV-08-0189-PR

IN THE SUPREME COURT OF ARIZONA

VIRGEL CAIN, *et al*.,
Plaintiffs-Appellants,

v.

TOM HORNE, SUPERINTENDENT OF PUBLIC TRANSPORTATION,
Defendant-Appellee,

and JESSICA GEROUX, *et al.*
Intervenors-Appellees.

On Appeal from the Arizona Court of Appeals, Division Two
(Case No. 2-CA-CV 07-0143)

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF DEFENDANTS-APPELLEES

Of Counsel:

Eric C. Rassbach
Luke W. Goodrich
Lori H. Windham
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1350 Connecticut Ave., NW
Suite 605
Washington, DC 20036-1735
(202) 955-0095

Timothy J. Casey (#013492)
SCHMITT, SCHNECK, SMYTH &
HERROD, P.C.
1221 East Osborn Road, Suite 105
Phoenix, AZ 85014-5540
Telephone: (602) 277-7000
Facsimile: (602) 277-8663
timcasey@azbarristers.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Constitutional Provisions and Statutes

Other Authorities

INTRODUCTION

Plaintiffs and the Court of Appeals would have this Court turn a blind eye to the sordid history of systematic anti-Catholic discrimination in Arizona and elsewhere that taints Article IX, § 10 (the "Aid Clause"). Both the text and history of the Aid Clause mark it as a "Blaine Amendment," a provision adopted in numerous state constitutions in the late 1800s and early 1900s, designed to suppress Roman Catholic schools in favor of Protestant-dominated public schools. As the Supreme Court has repeatedly explained, Blaine Amendments, and the "hostility to aid to pervasively sectarian schools" that they embody, have "a shameful pedigree that we do not hesitate to disavow." *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality). The enforcement of Blaine Amendments against religious schools raises serious federal constitutional issues that this Court should avoid.

Under *Hunter* v. *Underwood*, 471 U.S. 222 (1985), a state constitutional provision that was based on discriminatory animus and continues to have a discriminatory effect violates the Equal Protection Clause. That is so even if the groups discriminated against today are not identical to the original targets of the constitutional provision. *Id.* at 233. Here, the Court of Appeals' interpretation of the Aid Clause has just such a discriminatory effect and is therefore constitutionally suspect. This Court should reverse the Court of Appeals and construe the Aid Clause to avoid a conflict with the United States Constitution.

ARGUMENT

I. The text and history of the "Aid Clause" manifest an unconstitutional, discriminatory purpose.

Article IX, § 10 of the Arizona Constitution provides: "No tax shall be laid or appropriation of public money made in aid of any church, or private or ***sectarian*** school, or any public service corporation." (emphasis added). The key to understanding the Aid Clause is the word "sectarian" and the history of anti-Catholic discrimination it embodies. As explained below, the Supreme Court has repeatedly documented the history of anti-Catholic animus underlying state Blaine Amendments. The Aid Clause is directly linked—both textually and historically—to that sad history. The Court of Appeals' interpretation and enforcement of the Aid Clause thus raises serious questions under the federal Equal Protection Clause.

A. The United States Supreme Court has consistently repudiated the anti-Catholic bigotry underlying state "Blaine Amendments" such as the "Aid Clause."

Seven current and two former U.S. Supreme Court Justices have documented and confirmed the discriminatory history of the legal term "sectarian," particularly as used in Blaine Amendments as code for "Roman Catholic." In *Mitchell* v. *Helms*, a plurality of four Justices condemned the religious bigotry that gave rise to state laws targeting "sectarian" faiths, commonly called "Blaine Amendments." 530 U.S. 793, 828-29 (2000). The plurality 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.

As the plurality explained, "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." *Id.* "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.'" *Id.* (citing Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38 (1992)). The plurality thus concluded that "the exclusion of pervasively sectarian schools from otherwise permissible aid programs"—the very purpose and effect of the Aid Clause here—represented a "doctrine, born of bigotry, [that] should be buried now." *Id.* at 829.

In *Zelman* v. *Simmons-Harris*, three different Justices provided an even more detailed account of the relevant history. *See* 536 U.S. 639, 720-21 (2002). They explained that early public schools were largely dominated by Protestantism:

> [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. . . .

Id. at 720 (citation omitted). The Justices then recounted how a wave of Catholic immigration in the mid-1800s resulted in a Protestant backlash, particularly over the question of religion in public schools (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.

Id. at 720-21. Finally, the Justices detailed how Catholic efforts to gain equal access to government school aid resulted in a movement to ban such aid—first through the federal Blaine Amendment, then through 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.

The Supreme Court most recently addressed these issues in *Locke* v. *Davey*, 540 U.S. 712 (2004). Although the Court did not discuss the history of Blaine Amendments in detail, it affirmed the basic conclusion that Blaine Amendments are "linked with anti-Catholicism." *Id*. at 723 n.7 (citing *Mitchell* plurality). Thus,

seven current justices (all but the Chief Justice and Justice Alito) have recognized that Blaine Amendments are based on anti-Catholic animus. This conclusion is backed by a weight of legal[1] and historical[2] scholarship that is nothing short of

---

[1] *See, e.g.*, Ira 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."); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 50 (1997) ("[T]he nineteenth century opposition to funding religious schools drew heavily on anti-Catholicism."). *See generally* Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J. L. & PUB. POL'Y 551 (Spring 2003); Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 FORDHAM L. REV. 493, 508-509 (2003); Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38 (1992); Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117 (2000); Richard A. Baer, Jr., *The Supreme Court's Discriminatory Use of the Term 'Sectarianism,'* 6 J.L. & POL. 449 (1990); Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J. L. & PUB. POL'Y 657 (1998); Joseph P. Viteritti, *Davey's Plea: Blaine, Blair, Writers, and the Protection of Religious Freedom*, 27 HARV. J.L. & PUB. POL'Y 299 (2003).

[2] *See, e.g.*, PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 335 (Harvard 2002) ("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."); *See generally* RAY A. BILLINGTON, THE PROTESTANT CRUSADE, 1800-1860: A STUDY OF THE ORIGINS OF AMERICAN NATIVISM (1938); CHARLES L. GLENN, JR., THE MYTH OF THE COMMON SCHOOL (1988); LLOYD JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925 (1987); CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860 (1983); PAUL KLEPPNER, THE CROSS OF CULTURE: A SOCIAL ANALYSIS OF MIDWESTERN POLITICS, 1850-1900 (1970); WARD M. MCAFEE, RELIGION, RACE AND RECONSTRUCTION: THE PUBLIC SCHOOL IN THE POLITICS OF THE 1870S (1998); JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM (2003); DIANE RAVITCH, THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973 (1974); WILLIAM G. ROSS,

crushing. There should therefore be no doubt about the discriminatory basis of the federal and state Blaine Amendments. *See also Kotterman* v. *Killian*, 193 Ariz. 273, 291 (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.'").

Locke also provided guidance for identifying what kinds of state constitutional amendments are, in fact, Blaine Amendments. According to the Court, Article I, § 11 of the Washington State Constitution was not a Blaine Amendment because there was no "credible connection" between that section and the federal Blaine Amendment. 540 U.S. at 723 n.7. In fact, Article I, § 11 did not even use the term "sectarian." Instead, it prohibited the use of public money or property for "any religious worship, exercise or instruction, or the support of any religious establishment." *Id.* at 719 n.2 (quoting WASH. CONST., art. 1, § 11); *cf.* Arizona Constitution, Art. 2, § 12 (using identical language). By contrast, the Court noted that Article IX, § 4 of the Washington Constitution, which required public schools to be free from "sectarian control," was directly tied to a Blaine provision in Washington's enabling act and used the term "sectarian." *Locke*, 540 U.S. at 723 n.7.

FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION 1917-1927 (1994); JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY (1999).

Here, as explained below, the Aid Clause not only uses the term "sectarian" and is tied to a Blaine provision in Arizona's enabling act, but also bears its very own local history of anti-Catholic discrimination. It is therefore a Blaine Amendment under *Locke*, raising serious concerns under the federal constitution.

B. Both the text and history of the Aid Clause demonstrate that it, like other state Blaine Amendments, was motivated by anti-Catholic sentiment.

Although the Court of Appeals concluded that the history of Blaine Amendments was "irrelevant" because there is "no recorded history directly linking the [Blaine] amendment with Arizona's constitutional convention," nothing could be further from the truth. *Cain* v. *Horne*, 218 Ariz. 301, ___, ¶ 6 n.2 (App. 2008). Both the text and history of the "Aid Clause" demonstrate that it based on the same anti-Catholic animus fuelling the nationwide Blaine movement.

1. The text of the Aid Clause embodies anti-Catholic animus.

Most importantly, the text of the Aid Clause bans aid to "any . . . ***private or sectarian*** school." Art. 9, § 10 (emphasis added). This phrasing is problematic for two reasons: first, the Aid Clause uses the narrow and loaded term "sectarian" instead of the term "religious"; second, the Aid Clause refers redundantly to both "private" and "sectarian" schools when, at least under the current understanding of those terms, all "sectarian" schools are necessarily "private." When examined in

light of the historical record, both of these features demonstrate that the Aid Clause was based on anti-Catholic discrimination.

The term "sectarian." First, as explained above, the Supreme Court has repeatedly noted that the term "sectarian" is narrower than the term "religious"; in fact, in the 1870s, "it was an open secret that 'sectarian' was code for 'Catholic.'" *Mitchell*, 530 U.S. at 828.

There is no evidence that the meaning of "sectarian" had changed by the time Arizona adopted its constitution in 1910. In fact, dictionaries of that time period uniformly define "sectarian" more narrowly than "religious," often in terms that would most easily apply to the Roman Catholic church. Webster's, for example, defined "sectarian" as "devoted to the tenets and interests of a sect"; it defined "sect" as "[a] body of persons who have separated from others in virtue of some special doctrine, or set of doctrines, which they hold in common." WEBSTER'S PRACTICAL DICTIONARY 371 (1910). The act of "separat[ing] from others in virtue of some special doctrine" is precisely what the dominant Protestant establishment accused immigrant Catholics of doing, and exactly what the "common schools" were designed to eradicate. Other dictionaries are to the same effect.[3]

---

[3] *See, e.g.*, THE NEW AMERICAN ENCYCLOPEDIC DICTIONARY OF THE ENGLISH LANGUAGE 3605 (1911) (defining "sectarian" as "strongly or bigotedly devoted to the tenets and interests of a particular sect or religious denomination; characterized by bigoted devotion to a particular sect or religious denomination"); WINSTON DICTIONARY 745 (1908) (defining "sectarian" as "pertaining to . . . a sect"; defin-

State court decisions from the early 1900s confirm that "sectarian" was far narrower than "religious" and often referred primarily to Roman Catholicism. In Colorado, for example, the Supreme Court held that reading from the King James Bible was *not* a form of "sectarian" instruction, noting that, although "the King James Bible is proscribed by Roman Catholic authority . . . proscription cannot make that sectarian which is not actually so." *People ex rel. Vollmar* v. *Stanley*, 255 P. 610, 617 (Colo. 1927). Similarly, the Nebraska Supreme Court declared: "Nebraska is a Christian state, and its normal [i.e. public] schools are *Christian schools; not sectarian,* nor what would be termed religious schools." *Tash* v. *Ludden*, 129 N.W. 417, 421 (Neb. 1911). Other examples of cases connecting the term "sectarian" to the Catholic church, as opposed to Protestantism or Christianity in general, abound.[4]

Early Arizona laws also used the term "sectarian" in direct contrast to the term "religious," often in a context making clear that "sectarian" meant Roman

---

ing "sect" as "a number of persons who, following a teacher or leader, are united by a common attachment to some particular religious or philosophical doctrines").

[4] *E.g. Nevada ex rel. Nevada Orphan Asylum* v. *Hallock*, 16 Nev. 373, 385 (1882) ("The framers of the [Nevada] constitution undoubtedly considered the Roman Catholic a sectarian church."); *Church* v. *Bullock*, 109 S.W. 115, 118 (reading of King James Bible and recitation of the Lord's Prayer were not sectarian); *Billard* v. *Board of Educ.*, 76 P. 422, 423 (Kan. 1904) (reading of the Lord's Prayer and Twenty-Third Psalm did not constitute "sectarian or religious doctrine"); *Commonwealth* v. *Board of Educ. Of Methodist Episcopal Church*, 179 S.W. 596, 598 (Ky. 1915) (daily religious services at Methodist College were not "sectarian instruction").

Catholic. For example, in 1885, the Legislative Assembly revised the territory's school laws to tighten restrictions on sectarian influence in the public schools. In so doing, the assembly was careful to distinguish between the term "sectarian" and the term "religious":

> Any teacher who shall use any ***sectarian*** or denominational books or teach any ***sectarian*** doctrine, or conduct any ***religious*** exercises in his school . . . shall be deemed guilty of unprofessional conduct . . .

Act to Establish a Public School System and to provide for the maintenance and supervision of Public Schools in the Territory of Arizona § 84 (approved March 12, 1885) (emphasis added) (quoted in *Kotterman* 193 Ariz. at 302 ¶ 117 (Feldman, J., dissenting)).

Not surprisingly, Arizona Protestants complained about the prohibition on "religious exercises," but not the prohibition on "sectarian" books or doctrine. As a 1918 Report from the U.S. Bureau of Education notes, "[t]he prohibiting of '***religious exercises***' in schools . . . met with strong condemnation from ***many Protestant church members***." Stephen B. Weeks, United States Bureau of Education, HISTORY OF PUBLIC SCHOOL EDUCATION IN ARIZONA 55 (1918) (quoted in *Kotterman* 193 Ariz. at 302 ¶ 117 (Feldman, J., dissenting)). The same report makes no mention of opposition to the narrower prohibition on "***sectarian***" books or "***sectarian***" doctrine. "Protestant church members" in Arizona—like the dictionaries and court decisions of the era—obviously saw "sectarian" as code for Roman Catholic.

Use of the term "sectarian" is also directly traceable to Arizona's enabling act, and thus to the original, anti-Catholic federal Blaine Amendment. *See* 36 U.S. Stat. 568-79 (1910). After the original Blaine Amendment failed at the national level, "the Blaine agenda was advanced in Congress by inserting requirements in the enabling acts for prospective states." *Kotterman* 193 Ariz. at 300 ¶ 108 n.11 (Feldman, J., dissenting). Arizona's enabling act included just such a requirement: "[P]rovisions shall be made for the establishment and maintenance of a system of public schools which shall be open to all the children of said State and ***free from sectarian control***." *Id.* ¶ 4 (emphasis added). The "Aid Clause," which ensures that "sectarian" schools will not receive aid at the expense of public schools, is one of several constitutional provisions establishing this "system of public schools . . . free from sectarian control." *Id.*[5] Use of the term "sectarian," then, is a direct reflection of the national, anti-Catholic Blaine movement. *See Locke*, 540 U.S at 723 n.7 (suggesting that a state constitutional provision is a Blaine amendment when it implements Blaine-inspired provisions of an enabling act).

The term "private or sectarian." The fact that the Aid Clause applies to any "private or sectarian" school is also suggestive of discriminatory animus. Al-

[5] *See also* Art. 11, § 7 ("No ***sectarian instruction*** shall be imparted in any school or state educational institution that may be established under this Constitution . . ."") (emphasis added); Art. 20, § 7 ("Provisions shall be made by law for the establishment and maintenance of a system of public schools which shall be open to all the children of the state and be free from ***sectarian control***, and said schools shall always be conducted in English.") (emphasis added).

though the dissent in *Kotterman* suggested that "private or sectarian" merely functioned as a broad prohibition on aid "to *all private schools, sectarian or secular*," *Kotterman*, 193 Ariz. at 300 ¶ 109 (Feldman, J., dissenting) (emphasis added), neither the text nor history of the "Aid Clause" supports this reading.

First, such a reading renders the term "sectarian" superfluous. If "private" means every school that is not public, it already encompasses all "sectarian" schools. There are no "public" "sectarian" schools. *See* Art. 20, § 7. If the framers intended to cover "all private schools, sectarian or secular," they could have simply prohibited aid to any "private school." But they chose not to do so.[6]

The meaning of "private or sectarian" becomes clearer when one examines the historical record. As the *Kotterman* dissent noted, the champion of public support for Catholic schools in the late 1800s was Chief Justice Edmund Dunne of the Arizona Territorial Supreme Court. *Id.* at 301 ¶ 114. He sought funding for Catholic schools *not* by directly funding schools that were controlled by the Catholic church. Rather, "[h]e sought to enforce his vision of state-funded Catholic schools by asking the Assembly to create corporations that would establish ***private schools***. These corporations would then receive tax funds based on the number of enrolled

---

[6] The *Kotterman* dissent also incorrectly assumes that "sectarian" is synonymous with "religious." Thus "private or sectarian school" means, according to the dissent, "private secular or religious school." But as discussed above, the historical record demonstrates that "sectarian" is significantly narrower than "religious." Moreover, the dissent cites no evidence that there were any purely "secular" private schools in early 1900s Arizona.

students in their schools." *Id.* (emphasis added) (citing John C. Bury, Dissertation, *The Historical Role of Arizona's Superintendent of Public Instruction* 117-118 (N. Ariz. U. 1974)). In other words, the leading proposal for funding Catholic schools sought funding not for schools directly under Roman Catholic Church control (sectarian schools), but for "private schools" created by government corporations.

Although Dunne's measure ultimately failed, it suggests a more coherent meaning for the term "private or sectarian." The term "sectarian" refers to schools directly controlled by a religious sect such as the Roman Catholic Church; the term "private" refers to plans such as Dunne's, which would circumvent public opposition to sectarian schools by creating "private" schools that were, in effect, Catholic. In other words, the prohibition on aid to "private or sectarian schools" was designed to prohibit aid to Catholic schools, whether they were directly run by the Catholic church or were innocuously labeled "private." Far from manifesting neutrality towards religious and secular beliefs, then, the term "private or sectarian" simply demonstrates an intent to stamp out aid to Catholic schools regardless of how those schools were labeled.

2. The history of the "Aid Clause" demonstrates anti-Catholic animus.

The history surrounding adoption of the Aid Clause also confirms that it was adopted with discriminatory intent. *See* Intervenors' Supplemental Brief at 2-5 (reciting history). The *Kotterman* dissent enumerates many examples of Catholic-

Protestant conflict, culminating in the adoption of the Aid Clause. *See Kotterman* 193 Ariz. at 300-305 ¶¶ 109-124 (Feldman, J., dissenting). For example:

- In 1866, the Arizona territorial government's first educational grant was $250 to a Catholic School. *Id.* at ¶ 109.
- In 1875, the Legislative Assembly ordered reimbursement to the Sisters of St. Joseph for school books used at a Catholic School. *Id.* at ¶ 113.
- Also in 1875, the Catholic community boycotted fundraising efforts on behalf of the public schools, "set[ting] off a wave of debate on the issue of state funding of private religious institutions." *Id.* at ¶ 114.
- Governor A.P.K. Safford warned that funding "sectarian, ***primarily Catholic***, schools" would damage the system of public education; the Chief Justice of the Arizona Territorial Supreme Court, by contrast, argued to the legislature in favor of direct aid to Catholic schools. *Id.* at ¶¶ 111 (emphasis added), 114.
- Governor Safford's faction prevailed, and President Ulysses S. Grant (one of the most vocal supporters of the federal Blaine Amendment) removed Chief Justice Dunne from his post. *Id.* at ¶ 113.

Against this backdrop, it is simply not credible to view the adoption of the Aid Clause as a religion-neutral attempt to ensure separation of church and state. Rather, the Aid Clause was driven by the same forces driving the federal Blaine Amendment and its state progeny—a Protestant majority seeking to "preserve the [Protestant] religious aspects of the public school curriculum and to protect the common culture from the growing Catholic menace." *Kotterman* 193 Ariz. at 300 ¶ 109 (Feldman, J., dissenting) (quoting Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. & POL'Y REV. 113, 145-46 (1996).).

Moreover, this anti-Catholic animus was intimately bound up with anti-Latino animus, perhaps best exemplified by the infamous "Great Arizona Orphan Abduction" of 1904. *See generally* Linda Gordon, THE GREAT ARIZONA ORPHAN ABDUCTION (Harvard 1999). In that incident, Catholic orphans were forcibly taken from their adoptive Latino parents in Clifton, Arizona, and given to Anglo families. *Id.* The Arizona Territorial Supreme Court upheld the forcible removal because, in its view, the adoptive parents recruited by the priest were the "lowest class of half-breed Mexican Indians." *New York Foundling Hospital* v. *Gatti*, 9 Ariz. 105, 111 (Ariz. Terr. 1905).

This incident was but one part of a greater trend of anti-Catholic animus. As one scholar has described it:

> From the mid-1850's through the early decades of the 20th century, the children of New York City's poor were "rescued" from its streets—some of them stolen, in fact, from unsuspecting parents—by the New York Children's Aid Society and packed onto trains headed to farms in the West. These "orphan trains" transported more than 110,000 girls and boys—most of them Catholic and Irish but by century's end often of Italian and East European parentage—to grow up away from the squalor of urban immigrant poverty. Sanitized by the fresh air and wholesome hard work of rural America, these thousands were also to be cleansed of their parents' "race" and religion by growing up in Protestant homes that would remove the tarnish of Catholic superstition and idolatry. Before this practice was regulated out of existence, New York's Catholic community got up its own orphan trains to conduct thousands more children to the trans-Mississippi West to be raised as Catholics. The orphans shipped to Clifton-Morenci[, Arizona] in 1904 represented the church's reply to Protestant child rescue and were part of a broader program of westward Catholic expansion.

Stephen Lassonde, *Family Values, 1904 Version*, N.Y. TIMES (Jan. 9, 2000). The effort to "remove the tarnish of Catholic superstition and idolatry" from orphans was exactly what motivated adoption of the Aid Clause, which targeted "sectarian" institutions for special disfavor. For Appellees and the Court of Appeals to argue that this history is "irrelevant" is a form of willful blindness.

C. The Aid Clause continues to have a discriminatory effect on religion generally and Catholicism in particular.

Not only was the Aid Clause motivated by anti-Catholic animus, but it continues to have a discriminatory effect today. Even assuming (contrary to the historical record) that the Aid Clause applies to *all* private schools, both religious and secular, the Clause has a dramatically discriminatory effect on religious schools in general and Roman Catholic schools in particular.

According to the National Center for Education Statistics, 87% of all private school students in Arizona attend religious schools; only 13% attend secular schools. *See* National Center for Education Statistics, 2005-06 Private School Universe Survey (searchable at http://nces.ed.gov/surveys/pss/privateschoolsearch/); *see also* Appendix 1, *infra* (compiling search data). Of those students attending religious schools, the vast majority—64%—attend Roman Catholic schools. *Id.* Roman Catholic schools thus host well over half of all private school students in Arizona (56% of total). *Id.*

Thus, the burden of the Aid Clause does not fall equally on "all private schools, sectarian or secular," *Kotterman* 193 Ariz. at 300 ¶ 109 (Feldman, J., dissenting). Rather, based on the percentages listed above, Roman Catholic schools are 4.2 times more likely than secular private schools to be denied funds under the Aid Clause; religious schools generally (Catholic and non-Catholic) are 6.5 times more likely than secular schools to be denied funds. The Aid Clause thus disproportionately burdens religious schools as opposed to secular, and especially Roman Catholic, schools. *See Hunter* v. *Underwood*, 471 U.S. 222, 227 (1985) (blacks 1.7 times as likely to be disenfranchised as whites).

II. This Court should construe the "Aid Clause" to avoid violating the United States Constitution.

In light of the discriminatory animus underlying the Aid Clause, the Court of Appeals' aggressive interpretation of that clause raises serious issues under the Equal Protection Clause of the United States Constitution. *Amicus* respectfully submits that this Court should interpret the Aid Clause in a way that avoids that conflict. *See NLRB* v. *Catholic Bishop*, 440 U.S. 490, 500 (1979). Here the constitutional issues cannot be avoided without reversing the court below.

In *Hunter* v. *Underwood*, 471 U.S. 222 (1985) (Rehnquist, J.), the United States Supreme Court invalidated a facially neutral Alabama constitutional provision because it had been enacted with the primary purpose of discriminatorily disenfranchising blacks. *Id.* at 232-33. The Court did not have direct evidence that

the purpose of the invalid provision was to discriminate. Rather, acknowledging that finding discriminatory purpose in a facially neutral law "is often a problematic undertaking," it relied on the undisputed historical backdrop to determine purpose: "the Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks[.]" *Id.* at 229. The existence of this historical discriminatory movement, even without a showing of specific purpose, was enough discriminatory intent for purposes of the Equal Protection Clause. *Id.* Thus "where both impermissible racial motivation and racially discriminatory impact are demonstrated" the state constitutional provision was subject to invalidation under the Equal Protection Clause. *Id* at 232.

The Aid Clause has all the faults that the Alabama disenfranchisement clause had. First, the Aid Clause was very much "part of a movement that swept the [United States] to [discriminate against Catholics.]" *Hunter*, 471 U.S. at 229. As described above, like other Blaine Amendments, the Aid Clause was part of a movement to ensure that "sectarian" Catholic schools would not receive equal treatment by the government. *See* Section I.B. above.

Second, the Aid Clause has "disproportionate effects along [religious] lines, affecting both religious schools generally and Catholic schools in particular. *See Hunter*, 471 U.S. at 227; Section I.C. above. In *Hunter*, a disproportionate impact of only 1.7:1 was enough to trigger the Equal Protection Clause. *Id.* at 227 (blacks

1.7 times as likely to be disenfranchised as whites). Here, the disproportionate impact is 4.2:1—Catholic schools are 4.2 times as likely to affected.

Under *Hunter*, the Aid Clause is therefore constitutionally suspect. Just as Jim Crow laws still on the books across the South may not be enforced to enable discrimination today, Arizona may not enforce constitutional provisions enacted out of religious animus in order to discriminate against religious believers today.

It is no defense to this conclusion to argue that there is no discriminatory intent in the enforcement of the Aid Clause today. The absence of any discriminatory intent today would—even if true—not allow Arizona to escape its obligations under the Equal Protection Clause:

> Without 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 . . . .”

Hunter, 471 U.S. at 233. As in *Hunter*, the original enactment of Article IX, Section 10 was motivated by a desire to discriminate against Catholics, and today has a discriminatory effect on religious private schools generally. The Aid Clause's discriminatory effect on religious groups of all stripes today cannot be excused just because the Aid Clause originally targeted Catholics. The Court of Appeals missed this point entirely:

> And, in any event, none of the parties has produced any authority suggesting we may disregard constitutional provisions merely because we suspect they

> may have been tainted by questionable motives. We thus agree with the position of the National School Boards Association, expressed in its amicus brief, that this question "is irrelevant to the resolution of this case.

Cain v. *Horne*, 218 Ariz. ___ ¶ 6 n.2 (Ariz. Ct. App. 2008). The authority the Court of Appeals should have known about was *Hunter* v. *Underwood*, which not only "disregard[ed]" an Alabama constitutional provision, but invalidated it because of the suspicion that it was "tainted by questionable motives."

It is also no defense to argue that there may have been multiple purposes for enacting the Aid Clause, only one of which was discrimination against Catholics. In *Hunter*, Alabama argued that the disenfranchisement provision at issue was also directed at poor whites. *Id.* at 230-32. The Court rejected this argument, holding that "an additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against all blacks … ." *Id.* at 232. Thus the question for this Court is not whether the Aid Clause solely targeted Catholics but whether that was one of its primary purposes. Given the history surrounding the Aid Clause, that conclusion is inescapable.

Rather than resolving the federal constitutional issues raised by the Court of Appeals' decision, this Court should avoid them entirely by reversing that decision and construing the Aid Clause to allow the challenged programs to go forward.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

SCHMITT, SCHNECK, SMYTH & HERROD, P.C.

Timothy Casey (by permission)

Timothy J. Casey (#013492)
Schmitt, Schneck, Smyth & Herrod, P.C.
1221 E. Osborn Rd., Suite 105
Phoenix, Arizona 85014
Telephone: (602) 277-7000
Facsimile: (602) 277-8663
timcasey@azbarristers.com

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to ARIZ. R. CIV. APP. P. 14, this brief is double-spaced, uses a proportionally spaced type of 14 points in Times New Roman font, contains 4,593 words and does not exceed 20 pages.

Timothy Casey (by permission)
Timothy J. Casey

CERTIFICATE OF SERVICE

I certify that on December 3, 2008 copies of the attached brief were sent to the following via Federal Express:

Paula S. Bickett
William A. Richards
Chad B. Sampson
Assistant Attorney General
Office of the Attorney General
1275 W. Washington
Phoenix, AZ 85007

Donald M. Peters
Wendy L. Kim
Miller LaSota & Peters, PLC
722 E. Osborn, Ste. 100
Phoenix, AZ 85014

Timothy M. Hogan
Arizona Center for Law in the Public Interest
202 E. McDowell, Ste. 153
Phoenix, AZ 85004

Thomas W. Pickrell
63 E. Main St., No. 101
Mesa, AZ 85201

Thomas A. Zlaket
Thomas A. Zlaket, PLLC
310 S. Williams Blvd., Ste. 170
Tucson, AZ 85711

Timothy Casey (by permission)
Timothy J. Casey