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**FIRST JUDICIAL DISTRICT COURT**

**IN AND FOR CARSON CITY, NEVADA**

HELLEN QUAN LOPEZ, individually and on behalf of her minor child, et al.,
*Plaintiffs*,

v.

DAN SCHWARTZ, in his official capacity as Treasurer of the State of Nevada,
*Defendant*.

**CASE NO. 15-0C-00207-1B**

**Dept. No. II**

**MOTION FOR LEAVE TO FILE PROPOSED BRIEF OF AMICUS CURIAE THE BECKET FUND FOR RELIGIOUS LIBERTY**

This Motion for Leave to File Proposed Brief of Amicus Curiae, the Becket Fund for Religious Liberty, is made and based upon the following Points and Authorities, the papers

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and pleadings on file, and any hearing this Court may entertain at the time of this matter.

DATED this 17th day of November 2015.

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**NOTICE OF MOTION**

TO: ALL PARTIES AND THEIR RESPECTIVE COUNSEL

PLEASE TAKE NOTICE that the undersigned will bring the foregoing Motion to appear as Amicus for hearing in Department II of the above-entitled Court, on the _____ day of _____, 2015 at _____ __.m., or as soon thereafter as counsel may be heard.

DATED this 17th day of November 2015.

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## POINTS AND AUTHORITIES

This case challenges Nevada's "Educational Savings Account Program" ("ESA Program") based on a provision of Nevada's constitution that invokes a notorious history of anti-Catholic discrimination. The Becket Fund for Religious Liberty respectfully suggests that this Court would be well served to allow the Becket Fund to appear as amicus curiae and inform the Court about the historical and legal implications of adopting the interpretation of the law the plaintiffs suggest.[1] The Becket Fund's proposed amicus brief is attached to this motion.

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

Because it supports rights to equal participation for religious organizations, the Becket Fund has participated for many years in litigation challenging the nineteenth century state

[1] Amici informed counsel of record for the parties of this motion. Defendant does not oppose the motion. Plaintiffs take no position on the motion.



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constitutional provisions that single out religious people and institutions for special disfavor, some of which are known as Blaine Amendments. These state constitutional amendments arose during a shameful period when our national history was tarnished by anti-Catholic and anti-immigrant sentiment. They expressed and implemented that sentiment by excluding all government aid from disfavored faiths (mainly Catholicism), while allowing those same funds to support a "common" faith, a faith that is fairly described as a lowest common denominator Protestantism. The Becket Fund resolutely opposes the application of these state constitutional provisions to citizens today.

To that end, the Becket Fund has filed amicus briefs in states across the country and in the Supreme Court to document in detail the history of these state constitutional provisions and to protect the rights of children and their parents to be free from religion-based exclusion from government educational benefits.

The Becket Fund trusts that the attached brief, as well as the Becket Fund's special expertise in this area of the law, will provide the Court a historical perspective to aid it in the resolution of this case.

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## CERTIFICATE OF SERVICE

The undersigned does certify that on the 17th day of November 2015, the foregoing motion was served by way of U.S. Mail, first class postage prepaid on the following:

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# EXHIBIT A

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**FIRST JUDICIAL DISTRICT COURT**
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*Plaintiffs*,

v.

DAN SCHWARTZ, in his official capacity as Treasurer of the State of Nevada,

*Defendant*.

**CASE NO. 15-0C-00207-1B**

**Dept. No. II**

**PROPOSED BRIEF OF AMICUS CURIAE THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF DEFENDANT'S COUNTERMOTION TO DISMISS**

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## TABLE OF CONTENTS

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## TABLE OF AUTHORITIES

**Cases**

**Constitutions**



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**Other Authorities**



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## SUMMARY

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

This discrimination took the form of antagonism and sometimes violence. By the 1830s, nativist groups had begun agitating in earnest, resulting in events like the Ursuline Convent Riots in Boston in 1834 and the Philadelphia Nativist Riots of 1844, which ended in mass violence and the burning of Catholic churches. This violence was intimately connected with the so-called "common school" movement that had arisen in response to nativist concerns that Catholic immigrants would swamp "American" culture. Public education was seen as a method of changing Catholic immigrants into "Americans" by forcing them to read the Protestant version of the Bible. Fear of Catholic influence over public schools and opposition to Catholic requests for public funding for Catholic schools led to the adoption of anti-Catholic, pro-Protestant state constitutional provisions across the country.

In the middle of this ideological movement, Nevada adopted Article 11, Section 2 of its constitution, the Common Schools provision. This was no accident. It was intended to prevent Catholics from influencing Nevada's public school system.

To claim today that the Education Savings Account Program (ESA Program) deviates from "uniform[ity]" or funds "sectarian" purposes is simply a modern spin on the same

discrimination that birthed the Common Schools provision. A state law originally designed to harm one group does not shed its unconstitutionality by harming additional groups today. Use of the Common Schools provision to strike down the ESA Program would conflict with the Free Exercise, Establishment, and Equal Protection Clauses of the U.S. Constitution. Under the principle of constitutional avoidance, this Court should interpret section 2 of Article 11 to avoid violating the United States Constitution—which means the ESA Program must be upheld.

## ARGUMENT

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

Plaintiffs seek an interpretation of Article 11, Section 2 (the Common Schools provision) that would render the Education Savings Account Program (ESA Program) unconstitutional. This interpretation collides with the federal constitutional provisions against laws rooted in discrimination against religious minorities.

The doctrine of constitutional avoidance must be applied in interpreting the Common Schools provision. In *Mangarella v. State*, 117 Nev. 130, 134-35, 17 P.3d 989, 992 (2001), the Nevada Supreme Court held that "[w]henever possible," Nevada courts "must interpret statutes so as to avoid conflicts with the federal or state constitutions." *Id. Amicus* does not address here the different possible interpretations of the ESA Program under the Common Schools provision, but it is clear that an interpretation of the Nevada Constitution that would invalidate the ESA Program raises grave federal constitutional questions under three separate provisions: the Equal Protection Clause, the Free Exercise Clause, and the Establishment Clause. This Court should therefore uphold the ESA Program.

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The Supreme Court has recognized that certain laws have a "shameful pedigree" rooted in "pervasive hostility to the Catholic Church and to Catholics in general." *Mitchell v. Helms*, 530 U.S. 793, 828, 120 S. Ct. 2530, 2551 (2000) (plurality). That history means that modern attempts to enforce these provisions in a discriminatory manner will conflict with the federal constitution.

Anti-Catholic hostility arose in the mid-1800s as a wave of Catholic immigrants threatened the longstanding Protestant dominance of public schools and other social institutions. *See generally*, Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 667 (1998). This hostility prompted an attempt by many states to protect their schools from Catholic influence by prohibiting "sectarian" influence in public schools but allowing "generic" (Protestant) religious instruction, including reading from the King James Version of the Bible, Protestant prayers, and hymns. *See id.* at 666-67. These state provisions were a reactionary attempt to protect the dominant religious culture of mainstream Protestantism by ensuring both that public schools would teach a certain brand of Christianity, and that private Catholic schools—branded as "sectarian"—would not receive state funding.

A number of states, including eventually Nevada, began to adopt "common schools" provisions to counter what was seen as the growing influence of Catholic immigrants. Like Nevada, Arizona, Idaho, Indiana, North Carolina, Oregon, South Dakota, Washington, West

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Virginia, Wyoming, and other states called for the establishment of "uniform" public schools.[1] Those calls were sometimes reinforced with requirements that the schools exclude "sectarian" instruction. For instance, North Dakota's constitution called for a "system of public schools which shall be open to all children of the state of North Dakota and free from sectarian control." N.D. Const. art. VIII, § 1. New Mexico required "a system of public schools which shall be open to all the children of the state and free from sectarian control, and said schools shall always be conducted in English." N.M. Const. art. XXI, § 4.[2]

Then, in 1875, Speaker of the House and presidential candidate James G. Blaine made an attempt to amend the federal constitution to prohibit any state funding of "sectarian" schools. Though the federal Blaine Amendment was narrowly defeated in the Senate, its momentum carried forward a wave of "anti-sectarian" funding provisions in state constitutions across the country. Many states adopted their own Blaine Amendments. And at the time that the Blaine Amendment failed in the federal arena, Nevada already had its Blaine-like Common Schools provision that carried out the same purpose of the Blaine Amendments with the same intent.

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[1] Colo. Const. art. IX, § 2; Fla. Const. art. IX, § 1(a); Idaho Const. art. IX, § 1; Ind. Const. art. VIII, § 1; Minn. Const. art. XIII, § 1; N.M. Const. art. XII, § 1; N.C. Const. art. IX, § 2; N.D. Const. art. VIII, § 2; Or. Const. art. VIII, § 3; S.D. Const. art. VIII, § 1; Wash. Const. art. IX, § 2; Wis. Const. art. X, § 3; Wyo. Const. art. VII, § 1.

[2] Then-professor Jay Bybee and David Newton published an extensive account of both the Common Schools provision and the subsequent "Little Blaine Amendment" that describes, *inter alia*, the intent to oppose an orphanage in Virginia City run by the Catholic Sisters of Charity. Jay S. Bybee & David W. Newton, *Of Orphans and Vouchers: Nevada's "Little Blaine Amendment" and the Future of Religious Participation in Public Programs*, 2 Nev. L.J. 551, 561-65 (2002).



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The basic history of the various common schools provisions, the Blaine Amendments, and their basis in anti-Catholic bigotry is well documented and widely accepted. *See* Viteritti, 21 Harv. J.L. & Pub. Pol'y 657; Defendants' Mot. to Dismiss at 16-20, *Duncan v. Nevada*, No. A-15-723703-C (8th Jud. Dist., filed Oct. 19, 2015). Indeed, the Supreme Court has addressed that history in at least two opinions. First, in *Zelman v. Simmons-Harris*, three dissenting Justices detailed the history of the Blaine Amendments at length. 536 U.S. 639, 720-21, 122 S. Ct. 2460, 2503-04 (2002) (dissenting opinion of Breyer, J., joined by Stevens and Souter, JJ.). Their historical account was not disputed by the majority.

As they explained, "during the early years of the Republic, American schools—including the first public schools—were Protestant in character. Their students recited Protestant prayers, read the King James version of the Bible, and learned Protestant religious ideals." *Id.* at 720, 122 S. Ct. at 2503 (citing David Tyack, *Onward Christian Soldiers: Religion in the American Common School*, *in* History and Education 217 (P. Nash ed. 1970)). But in the mid-1800s, a wave of immigration brought significant religious strife. Catholics "began to resist the Protestant domination of the public schools," and "religious conflict over matters such as Bible reading 'grew intense,' as Catholics resisted and Protestants fought back to preserve their domination." *Id.* (citing John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 300 (2001)). Finding that they were unwelcome in public schools, "Catholics sought equal government support for the education of their children in the form of aid for private Catholic schools." *Id.* at 721, 122 S. Ct. at 2504. Protestants insisted in response "that public schools must be 'nonsectarian' (which was usually understood to allow Bible reading and other Protestant observances)."



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*Id.* And they insisted that "public money must not support 'sectarian' schools (which in practical terms meant Catholic.)" *Id.* (citing Jeffries & Ryan, 100 Mich. L. Rev. at 301). The idea for the failed Blaine Amendment came as the Protestant position gained political power, with the goal "to make certain that government would not help pay for 'sectarian' (*i.e.*, Catholic) schooling for children." *Id.* (citing Jeffries & Ryan, 100 Mich. L. Rev. at 301-05).

In *Mitchell v. Helms*, a four-Justice plurality similarly acknowledged and condemned the religious animosity that gave rise to state Blaine Amendments. 530 U.S. at 828-29, 120 S. Ct. 2551-52 (plurality op. of Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.). As the Court explained, "Consideration of the [federal Blaine] amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'" *Id.* at 828, 120 S. Ct. at 2551. The plurality concluded that "the exclusion of pervasively sectarian schools from otherwise permissible aid programs"—the very purpose and effect of the state constitutional provisions here—represented a "doctrine, born of bigotry, [that] should be buried now." *Id.* at 829, 120 S. Ct. at 2552.

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

Plaintiffs' "Common Schools" claim under Article 11, Section 2 suffers from the same anti-Catholic taint that plagues the Blaine Amendments. It states:

> The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year, and any school district which shall allow instruction of a sectarian character therein may be deprived of its proportion of the interest of the public school fund during such neglect or infraction. . . .

Nev. Const. art. XI, § 2.



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Though it was in place before the federal Blaine Amendment was proposed, it contains all the relevant characteristics of a Blaine Amendment and is—like the Blaine Amendments—an anti-Catholic provision. First, it was passed during a time of sweeping anti-Catholic sentiment and with an intent to remove Catholic influence on public schools; second, it prohibits "sectarian" instruction in schools while leaving unharmed "generic" religious practices in public schools; and third, it demands uniformity, which in 1864 meant a generic Protestant set of values to be imposed on recent immigrants and their children.

Indeed, the "Common Schools" provision was part and parcel of the "Common Schools Movement," which sought to homogenize diverse groups of immigrant children by putting them into Protestant-dominated public schools. *See* Viteritti, 21 Harv. J.L. & Pub. Pol'y at 667 (1998). ("One cannot separate the founding of the American common school and the strong nativist movement that had its origins at the Protestant pulpit."); *see also* Bybee & Newton, 2 Nev. L.J. at 554-56. Indeed, uniformity meant *conformity*, and an absence of pluralism:

> Cultural conformity and educational uniformity went hand in hand; a set of moral values centering on hard work and subordination were well conveyed in busy, highly organized schools. ... The presence of so many culturally alien people in antebellum America greatly reinforced the use of emerging public school systems to teach children a common English language and a common Protestant morality, much as earlier charity schools had been directed at those qualities of blacks or poor whites that educational reformers saw as undesirable or threatening. ... Antebellum immigration greatly swelled the ranks of the Roman Catholic Church in America. Protestants, heir to centuries of English enmity toward Catholicism, staunchly rejected religious pluralism for public schools.

Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society, 1780-1860* 71 (1983). "Common schools" and "uniform[ity]" were thus designed, at the time the Nevada



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Constitution was adopted, to stamp out religious difference in general, and manifestations of Catholic religious belief in particular.

At the time of Nevada's constitutional convention in 1864, Nevada was by no means immune to the notorious anti-Catholic and anti-immigrant sentiment that was sweeping the nation. "The movement to adopt 'Little Blaine Amendments' actually predated [the] call for a constitutional amendment." Bybee & Newton, 2 Nev. L.J. at 559. In 1864, Irish Catholic immigrants had settled in Nevada mining towns and begun establishing institutions. James S. Olson, *Pioneer Catholicism in Eastern and Southern Nevada, 1864-1931*, 26 Nev. Hist. Soc'y Q. 159, 163 (1983). Conflict was already brewing between Catholic immigrants and the rest of the population by the time of the constitutional convention. *See id.*

The record of the debates from the constitutional convention is evidence that the Common Schools provision was intended to keep Catholic influence out of the public schools. The convention was plagued with anti-Catholic sentiment. Delegates to the constitutional convention explicitly discussed Catholics as a sectarian influence and wondered if the Common Schools provision could be read to prevent Catholic schools from existing even outside the public school system. "Will the Chairman of the committee explain a little . . . ? Does that mean they have no right to maintain Catholic schools, for example?" Official Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada 568 (1866) (statement of Mr. Warwick).

Delegate Lockwood, hardly bothering to disguise his disgust for Catholics, said "I have seen persons so bigoted in their religious faith—as, for example, the Roman Catholics, although I do not mean to mention them invidiously—that they would claim that all the



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public schools were sectarian, and rather allow their children to grow up in ignorance than attend them." *Id.* at 572 (Statement of Mr. Lockwood). Delegate Collins made it clear that he was worried about Catholic encroachment: "I also hope, most sincerely, that we shall provide in our Constitution for keeping out of our schools sectarian instruction. It will require strong influences to exclude such instruction, and money is the great motor." *Id.* at 577 (Statement of Mr. Collins).

The Common Schools provision that the delegates adopted at the end of their deliberations possesses the key language of Blaine Amendments and other anti-Catholic provisions: it penalizes "any school district which shall allow instruction of a sectarian character," while allowing "non-sectarian" religious activities to continue, thereby prohibiting Catholic influence in public schools but allowing Protestant-influenced traditions to remain. Nev. Const. art. XI, § 2.

That reality played out in Nevada schools after the constitution was ratified. The Superintendent of public education in 1877 noted that though the law "prohibit[s] sectarianism," it did not object to "the reading of the Bible." Exhibit 1 at 22, *Report of the Superintendent of Public Instruction of the State of Nevada* (1875-76). Indeed, the Pacific Coast Speller, the textbook used in Nevada public schools, contained numerous Bible verses and theological statements, instructing children in Protestant Christianity. *See, e.g.*, A.W. Patterson, M.D., *Pacific Coast Speller* 87 (1873) ("The way of the transgressor is hard."); *id.* at 90 ("Purify your heart of all evil thoughts. No true Christian can be entirely hopeless."); *id.* at 92 ("If ye fulfill the law according to the Scriptures, 'Thou shalt love they neighbor as thyself,' ye do well."). Thus the Common Schools provision accomplished its goal of shoring



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up Protestant-dominated public schools while excluding Catholic influences from those through the threat of revoking funds. Because the Common Schools provision was designed to discriminate against Catholics, enforcing it in the manner Plaintiffs propose would create grave constitutional problems.

In light of the anti-Catholic animus that birthed the Common Schools provision, the doctrine of constitutional avoidance strongly counsels this Court to avoid using those provisions to strike down the Education Savings Account Program. If it were applied in that manner, the Common Schools provision would run afoul of the federal Constitution in at least three ways: it would violate the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause. The hostility shown towards Catholics in the enactment of the Common Schools provision implicates the Equal Protection Clause and violates the neutrality standard of the Free Exercise Clause. And the provision's discriminatory treatment of religious groups violates the federal Establishment and Equal Protection Clauses.

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

The Common Schools provision creates serious conflicts with the federal Free Exercise Clause, and would run directly counter to decisions of the United States Supreme Court, other state supreme courts, and the federal courts of appeals. When laws impacting religion are "not neutral or not of general application," they are subject to strict scrutiny. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546, 113 S. Ct. 2217, 2233 (1993).

The Common Schools provision is neither "neutral" nor "generally applicable" because, as explained in detail above, its original purpose was to target Catholic institutions. It cannot



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be neutral because "the minimum requirement of neutrality is that a law not discriminate on its face." *Lukumi*, 508 U.S. at 533, 113 S. Ct. at 2227. But, as described above and recognized by the Supreme Court, the law bans "sectarian" instruction, a pejorative term that was code for "Catholic." The history of the provision confirms that interpretation. *See supra* Part I.A. In this respect, the Common Schools provision is even more troubling than the ordinance in *Lukumi*, which was passed with the object of suppressing Santería, but was neutral on its face. *Id.* at 534-35, 113 S. Ct. at 2227-28.

In addition to the lack of facial neutrality, the Common Schools provision also violates the Free Exercise Clause because it creates a "'religious gerrymander,' an impermissible attempt to target petitioners and their religious practices." *Id.* at 535 (quoting *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 696, 90 S. Ct. 1409, 1425 (1970) (Harlan, J., concurring)). Specifically, it targeted Catholic religious institutions, but left Protestant religious exercises in the public schools undisturbed. *See supra* at 9. Striking down the ESA Program would allow that gerrymander to persist today, in a slightly different form. Denying non-"uniform" schools which "need not be open to all children" the same funds as other schools would leave in place the discrimination intended by Nevada's constitutional convention. Ps' Mot. for Prelim. Injunction at 2, 16.

Indeed, government-enforced uniformity within the context of education is specifically disfavored under the First Amendment:

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. . . . As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel



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> youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

*W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640-41, 63 S. Ct. 1178, 1186-87 (1943). Yet Plaintiffs would have the Nevada Constitution do just that: "coerce uniformity." And that violates the First Amendment.

A ruling excluding all religiously-affiliated institutions from receiving ESA funds would far exceed the scope of permissible action under the First Amendment. In *Colorado Christian University v. Weaver*, the Tenth Circuit explicitly emphasized that, while the state might choose not to fund devotional theology degrees, that narrow limitation "does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available" programs. 534 F.3d 1245, 1255 (10th Cir. 2008) (citing *Locke v. Davey*, 540 U.S. 712, 725, 124 S. Ct. 1307, 1315 (2004)). A ruling that no religiously-affiliated institution could participate in the program—even through the independent private choices of parents directing their own accounts—would have sweeping ramifications, rendering religious individuals and institutions second-class citizens, and accomplishing a different "religious gerrymander" within the state. *Lukumi*, 508 U.S. at 534, 133 S. Ct. at 2227; *see also Locke*, 540 U.S. at 724, 124 S. Ct. at 1314 (laws "evincing . . . hostility toward religion" are impermissible).

The violation would be no less even if the distinction were not based upon specific discriminatory intent against religious groups. The Third Circuit recently held that Muslim



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plaintiffs could state a Free Exercise claim based on the discriminatory impact of the government's surveillance of Muslims. *Hassan v. City of New York*, 804 F.3d 277, 309 (3d Cir. 2015). That surveillance, according to the plaintiffs in that case, was based upon their religion, without any further evidence of wrongdoing. *Id.* at 285. Even without proving specific discriminatory intent, "'[t]he indignity of being singled out [by a government] for special burdens on the basis of one's religious calling'" constitutes an injury for First Amendment purposes. *Id.* at 289 (quoting *Locke*, 540 U.S. at 731, 124 U.S. at 1318) (alterations in original). In this case, Plaintiffs seek to enforce a provision that on its face distinguishes between "sectarian" and other, presumably "nonsectarian" entities. The ESA Program would stand or fall based upon a court's determination of whether the fund promotes "uniform," non-"sectarian" instruction, or non-"uniform," "sectarian" instruction. That is precisely the kind of "singl[ing] out" the Third Circuit forbade.

For all these reasons, if the Common Schools provision is construed to strike down the ESA Program, then the Common Schools provision must face strict scrutiny under the federal constitution.

**C. Plaintiffs' interpretation of the Common Schools provision fails strict scrutiny.**

Under *Lukumi*, the Common Schools provision must therefore be subject to strict scrutiny, which requires that a law must have a compelling governmental interest and must be narrowly tailored to pursue that interest. *Lukumi*, 508 U.S. at 546, 113 S. Ct. at 2233; *see also Weaver*, 534 F.3d at 1266 (laws involving religious discrimination are subject to strict scrutiny, but laws involving excessive entanglement are "unconstitutional without further inquiry").



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But there can be no compelling interest in prohibiting Nevada parents from using their ESA accounts because the funds might go to schools run by disfavored religious groups. Since the United States Supreme Court has upheld programs with even less private choice than the ESA Program, *see Zelman*, 536 U.S. 639, 122 S. Ct. 2460, that Court is unlikely to find that Nevada has a "compelling" interest in prohibiting parents from using their accounts at religious institutions.[3]

**D. Invalidating the ESA Program would create conflict with the Establishment Clause.**

The Common Schools provision's language and history of discriminating among religious groups—*i.e.*, those considered "sectarian" and those considered "non-sectarian"—also violates the Establishment Clause. "[N]o State can pass laws which aid one religion or that prefer one religion over another." *Larson v. Valente*, 456 U.S. 228, 246, 102 S. Ct. 1673, 1684 (1982) (citation omitted). Indeed, "neutral treatment of religions [is] '[t]he clearest command of the Establishment Clause.'" *Weaver*, 534 F.3d at 1257 (citing *Larson*, 456 U.S. at 244, 102 S. Ct. at 1683).

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

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



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organizations that solicited more than fifty percent of their funds from nonmembers. According to the Court, these requirements impermissibly distinguished between "well-established churches," which had strong support from their members, and "churches which are new and lacking in a constituency," which had to rely on solicitation from nonmembers. *Larson*, 456 U.S. at 246, 102 S. Ct. at 1684 n.23; *see also Lukumi*, 508 U.S. at 536, 113 S. Ct. at 2228 ("differential treatment of two religions" might be "an independent constitutional violation."). The Common Schools provision shares this flaw, drawing an impermissible distinction between "uniform" schools and "sectarian" Catholic schools.

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

Here, the Plaintiffs seek to enforce the Common Schools provision, which on its face engages in exactly that form of impermissible discrimination among religious organizations. That is a direct violation of the Establishment Clause.



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

The Equal Protection Clause of the Fourteenth Amendment subjects laws to strict scrutiny if they interfere with a fundamental right or discriminate against a suspect class. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 3254 (1985). Religion is a suspect class. *See United States v. Batchelder*, 442 U.S. 114, 125, 99 S. Ct. 2198, 2205 n.9 (1979) ("The Equal Protection Clause prohibits selective enforcement 'based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'"); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1322 n.10 (10th Cir. 2010) ("Religion is a suspect classification"). And religious rights are fundamental. *See, e.g., Johnson v. Robison*, 415 U.S. 361, 375, 94 S. Ct. 1160, 1169 n.14 (1974) ("Unquestionably, the free exercise of religion is a fundamental constitutional right."); *Niemotko v. State of Md.*, 340 U.S. 268, 272, 71 S. Ct. 325, 328 (1951) (Equal Protection Clause bars government decision based on a "City Council's dislike for or disagreement with the [Jehovah's] Witnesses or their views"). Because it was intended to discriminate between Catholics and Protestants, and could be interpreted to discriminate against religious groups generally, the Common Schools provision violates the Equal Protection Clause.

Just as vestigial Jim Crow laws may not be relied on to prohibit political speech and enable discrimination, Nevada may not rely on constitutional provisions enacted out of religious animus in order to discriminate among religious believers today. In *Hunter v. Underwood*, for example, the United States Supreme Court considered a facially neutral state constitutional provision. 471 U.S. 222, 232-33, 105 S. Ct. 1916, 1922-23 (1985). The Court held that even without a showing of specific purpose of individual lawmakers, it could rely

on the undisputed historical backdrop of the law to determine its purpose—in particular, the fact that "the Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks." *Id.* at 228-29, 105 S. Ct. at 1920. Thus, "where both impermissible racial motivation and racially discriminatory impact [were] demonstrated" the state constitutional provision violated the Equal Protection Clause. *Id* at 232, 105 S. Ct. at 1922.

Here, not only is there direct evidence that Nevada's Common Schools provision was enacted in a discriminatory manner, but Nevada's Common Schools provision was very much "part of a movement that swept the [United States] to [discriminate against Catholics.]" *Id.* at 229, 1920; *see also supra* Part I.A.

Nor is it any defense to argue that there is no discriminatory intent towards Catholics today. As *Hunter* explained, "[w]ithout deciding whether [the challenged section of the Alabama constitution] would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate . . . and the section continues to this day to have that effect. As such, it violates equal protection . . . ." 471 U.S. at 233, 105 S. Ct. at 1922. As in *Hunter*, the original enactment of the Common Schools provision was motivated by a desire to discriminate against Catholics, and today has a discriminatory effect on Catholic religious schools, as well as those of other faiths.

## CONCLUSION

The Court should dismiss the Plaintiffs' complaint.



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The undersigned does certify that on the 17th Day of November 2015, the foregoing Amicus Brief was served by way of the Eighth Judicial District's Wiznet online E-File & Serve Program on the following:

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