IN THE

Indiana Supreme Court

No. 49S00-1203-PL-00172

TERESA MEREDITH, DR. EDWARD E. EILER, RICHARD E. HAMILTON, SHEILA KENNEDY, GLENDA RITZ, REV. MICHAEL JONES, DR. ROBERT M. STWALLEY III, KAREN J. COMBS, REV. KEVIN ARMSTRONG, DEBORAH J. PATTERSON, KEITH GAMBILL, and JUDITH LYNN FAILER, Appellants (Plaintiffs below), v. MITCH DANIELS, in his official capacity as Governor of Indiana; and DR. TONY BENNETT, in his official capacity as Indiana Superintendent of Public Instruction and Director of the Indiana Department of Education, Appellees (Defendants below), and HEATHER COFFY and MONICA POINDEXTER, Appellees (Defendant-Intervenors below).	Appeal from the Marion Superior Court Civil Division, Room 7 Cause No. 49D07-1107-PL-025402 The Honorable Michael D. Keele, Judge

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

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INTEREST OF THE *AMICUS CURIAE*

The Becket Fund for Religious Liberty tenders this brief *amicus curiae* in accordance with Indiana Rule of Appellate Procedure 41, along with an accompanying motion for leave to file, in support of Defendants-Appellees Gov. Mitch Daniels and Dr. Tony Bennett, and Defendants-Intervenors-Appellees Heather Coffy and Monica Poindexter.

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 these principles in state and federal courts throughout the United States, as both primary counsel and *amicus curiae*. Most recently it successfully represented the petitioner in *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 132 S. Ct. 694 (2012), a unanimous decision in the first Supreme Court decision to recognize the ministerial exception.

Because it supports rights to equal participation for religious organizations, The Becket Fund has participated for many years in litigation challenging 19th Century state constitutional provisions that single out religious people and institutions for special disfavor. These state constitutional amendments arose during a shameful period in our national history 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, 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 three *amicus* briefs before the U.S. Supreme Court[1] to document in detail the history of these state constitutional provisions. The Becket Fund has also filed numerous briefs in state supreme courts to protect the rights of children and their parents to be free from religion-based exclusion from government educational benefits.[2]

The Becket Fund trusts that this 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 appeal.

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[1] *See Mitchell* v. *Helms*, 530 U.S. 793 (2000); *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002); *Locke* v. *Davey*, 540 U.S. 712 (2004).

[2] *See, e.g., Colorado Christian Univ.* v. *Weaver*, 534 F.3d 1245 (10th Cir. 2008); *Council for Secular Humanism* v. *McNeil*, Case No. 2007-CA-1358 (Fla. Leon County Cir. Ct.).

INTRODUCTION AND SUMMARY OF ARGUMENT

Article 1, Section 6 of the Indiana Constitution was adopted at a time of great social change in the United States and in Indiana. Amidst economic expansion and rising tension over slavery, waves of immigrants were washing into the country, including many who were Irish and Catholic. From 30,000 Catholics in the United States at the time of the Revolution, the Catholic population had increased to 1.5 million by 1850, out of a total population of 23 million.

The reaction to these immigrants was often antagonistic and violent. 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 "without note or comment." Indeed, the Philadelphia riots arose when it was rumored that the local Catholic bishop sought the removal of the King James Bible from public schools in Philadelphia.

Indiana was not immune to these national trends. Catholic religious institutions in Indiana were subjected to severe persecution in the 1840s and 1850s. In 1842, a Catholic priest in Evansville was falsely accused of rape in the confessional and was convicted among scenes of mob violence. Anti-Catholic feeling grew, and by 1854, the virulently anti-Catholic Know-Nothing Party became one of the leading parties in

Indiana politics, leading the legislature elected in 1854 to be called the "Know-Nothing Legislature." At the same time, the "common school" movement was endorsed by the leaders of the Indiana educational establishment.

In the middle of this ideological ferment, Indiana adopted Article 1, Section 6. This was no accident. Article 1, Section 6's historical context demonstrates that it was designed with a pro-Protestant, anti-Catholic approach to public education in mind.

This tainted history has federal constitutional effects. Under the Equal Protection Clause, the Free Exercise Clause, and the Establishment Clause, state constitutional provisions motivated by historic anti-religious animus cannot be used to discriminate against religious individuals and institutions today. Under the doctrine of constitutional avoidance, the Court must therefore construe Article 1, Section 6 in a way that does not discriminate against religious people. Otherwise the Indiana Constitution and the United States Constitution would be put on an unwarranted collision course.

Plaintiffs attempt to downplay the anti-Catholic elements of Indiana's history, claiming that the constitution has always adopted secular values. But it defies common sense to conclude that Indiana in 1851 embraced the values of today's ardent secularists. There was no such thing as a secular school in 1851 in Indiana. *Every* school would be religious by today's standards. The only question is whether it would be lowest common denominator Protestantism or something else. Plaintiffs' alternative universe does not comport with history and should be rejected.

More importantly, the Court should reject Plaintiffs' attempt to enshrine this

historic anti-religious feeling in the Indiana Constitution. The Constitution and the people of Indiana deserve better. The decision below should be affirmed.

ARGUMENT

I. In order to avoid federal constitutional questions, Article 1, Section 6 must be construed in favor of the Choice Scholarship Program's validity.

Plaintiffs seek an interpretation of Article 1, Section 6 that runs counter to existing precedent from this Court. But more than that, their preferred interpretation—one that would render the Choice Scholarship Program unconstitutional—collides with federal constitutional provisions against laws rooted in discrimination against religious minorities.

A. State constitutional law must be interpreted to avoid federal constitutional questions.

Under the Supremacy Clause, Indiana constitutional provisions are subject to constraints posed by the United States Constitution. Thus the doctrine of constitutional avoidance must be applied in interpreting Article 1, Section 6.

In *Indiana Wholesale Wine & Liquor Co., Inc.* v. *State ex rel. Indiana Alcoholic Beverage Comm'n*, 695 N.E.2d 99 (Ind. 1998), this Court relied on two of Justice Brandeis's seven *Ashwander* rules for constitutional avoidance. Specifically, the Court held that it must avoid reaching a constitutional question if it can:

> First, "[t]he [Supreme] Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.... Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction ..., the Court will decide only the latter."

Id. at 106 (quoting *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1998)). Second, where the

Court is presented with two possible interpretations of an ambiguous law, it must choose the interpretation that raises no constitutional questions:

> "'[w]hen the validity of [a statute] is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that [the Supreme Court] will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' ". . ..

Id. (quoting *Ashwander*, 297 U.S. at 348). The Court has reiterated this "better angels" approach many times. *See, e.g.*, *Burris* v. *State,* 642 N.E.2d 961, 968 (Ind. 1994), *cert. denied,* 516 U.S. 922 (1995) ("If a statute can be construed to support its constitutionality, such construction must be adopted."); *Brownsburg Area Patrons Affecting Change* v. *Baldwin*, 714 N.E.2d 135, 141 (Ind. 1999) ("The question thus becomes whether Ind. Code § 3-5-2-37 is amenable to a reasonable constitutional construction."). This approach towards constitutional avoidance also counsels courts to construe state constitutional provisions to avoid federal constitutional issues. *See, e.g.*, *US West Commc'ns., Inc.* v. *Ariz. Corp. Comm'n*, 34 P.3d 351, 355 (Ariz. 2001).

Amicus does not address here the different possible interpretations of the Choice Scholarship Program statutes under Article 1, Section 6. But it is clear that an interpretation of Article 1, Section 6 that would invalidate the Choice Scholarship program raises grave federal constitutional questions under three separate provisions: the Equal Protection Clause, the Free Exercise Clause, and the Establishment Clause. The Court should therefore reject Plaintiffs' anti-religion interpretation of Article 1, Section 6.

B. Plaintiffs' claims under Article 1, Section 6 raise federal constitutional questions under the Equal Protection Clause.

Under the federal Equal Protection Clause, a law rooted in historical bias against minority groups is automatically suspect and cannot be enforced in a way that disparately harms those minority groups today. *See Hunter* v. *Underwood*, 471 U.S. 222, 232-33. This is why it is illegal to enforce Jim Crow laws that remain on the books, even if there is no present-day hostility motivating enforcement of the law. Simply put, laws "born of bigotry" cannot be allowed to disadvantage minorities today. *Mitchell* v. *Helms*, 530 U.S. 793, 829 (2000) (plurality op. of Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.).

As we demonstrate below, Indiana was suffused with anti-Catholic animus both before and after Article 1, Section 6 was enacted in 1851. Moreover, Article 1, Section 6's origins in the "common school" movement demonstrate specific bias motivating the provision. Article 1, Section 6 therefore cannot be interpreted to invalidate the Choice Scholarship Program without violating the Equal Protection Clause.

1. Indiana was rife with animus towards Catholics during the time period Article 1, Section 6 was adopted.

Indiana has a long history of anti-Catholicism; Article 1, Section 6 was enacted as part of it. Like most American Protestants of the mid-19th Century, Indiana's large Protestant majority was deeply suspicious of Catholicism and often openly hostile toward it, even before the Know-Nothing Party swept into power in 1854. This anti-Catholic sentiment was universal, visible both in the population generally and among the elites.

One illustration of public hostility toward Catholics prior to the 1851 Constitution was the controversy that embroiled Fr. Roman Weinzoepfel, a Catholic priest in

Evansville falsely accused in 1842 of raping a parishioner during confession. The accusation was a familiar one, echoing earlier controversies in Kentucky in which priests had been accused of seducing and abducting a penitent or engaging in sexual misconduct with female students at a Catholic school. According to historian C. Walker Gollar, "All of these cases revolved around incidents where at least one woman attempted to confess her sins to a priest in a town which recently had erected a new Catholic church. Each accusation was publicized only after the resident priest had left town. Most likely, suspicion toward Catholic growth had motivated these accusations." *The Alleged Abduction of Milly McPherson and Catholic Recruitment of Presbyterian Girls*, 65 Church History 596, 600 (1996). These false accusations drew much of their force from public suspicion surrounding the distinctively Catholic practices of confession and priestly celibacy. Elements of Catholicism not shared by local Protestants were clearly met with distrust.

Weinzoepfel's case put Catholicism itself on trial, both in the court of public opinion and before the jury. According to a contemporary Catholic periodical, the *Evansville Journal* "pursued [Weinzoepfel] with an almost fiendish hatred," publishing numerous prejudicial articles with titles like "unparallelled [sic] outrage! Great excitement in Evansville." *The Rev. Romain Weinzoepflen* [sic], 2 The Catholic Cabinet, and Chronicle of Religious Intelligence 193, 194, 196 (1844). The *Journal*'s press also printed the accuser husband's own pamphlet on the controversy, "A full and circumstancial [sic] account of the outrage, &c.," which included such anti-Catholic rhetoric as the following:

> I have been greatly surprised at the unblushing impudence with which the holy priesthood, the viceregents of heaven, will fabricate and disseminate what they know to be falsehoods. But still more have I been astonished at the . . . blind confidence, reposed in them by their deluded flock. I have asked myself, can it be possible that in this free and enlightened land, a set of men so numerous as the Catholics can be found who are so egregiously duped, who can be led blindfold at the beck and will of an abandoned clergy? I have also been surprised . . . that a sect so essentially anti-republican as the Catholics should have become so popular amongst us. What I mean by anti-republican is, that they acknowledge obligation to their Bishops . . . paramount to their obligations to our laws. I am even informed that the Bishops take an oath to the Pope . . . to advance the interests of the Church, regardless of the laws and their civil obligations."

Herman Joseph Alerding, *A History of the Catholic Church in the Diocese of Vincennes* 544 (1888) (quoting anti-Catholic pamphlet).

This writing artfully deployed the time-worn trope that Catholics were unfit for democratic society because of their gullibility, their blind obedience to priests, and their allegiance to the Pope. The propaganda campaign was effective. Even before the trial, Weinzoepfel's enemies threatened violence if he did not return to Evansville to respond to the allegations. *Id.* at 515. During the trial, a mob stormed the courtroom, threatening the defendant and his defenders with violence. *The Rev. Romain Weinzoepflen* at 196.

The prosecuting attorneys, who included the editor of the *Journal*, used similar rhetoric at trial. *See* Alerding at 519 (The defense's attempt to offer character evidence against the accuser was branded "an instance . . . of Romish Inquisition"), 526 (The prosecutor's opening remarks attacked the doctrine that priests forgive sin, hinted that "a full-blooded Catholic priest could hardly prove true to his vows of celibacy," and claimed without evidence that the defendant had thought himself able to avoid civil

prosecution by going to Church authorities, despite the defendant's decision to voluntarily return to the district and stand trial.) Weinzoepfel was convicted by an all-Protestant jury on the strength of anti-Catholic slurs, and on appeal this Court upheld his sentence. *See Weinzorpflin* v. *State*, 7 Blackf. 186 (Ind. 1844).

Less than a year later, the Governor pardoned Weinzoepfel after further evidence about his accusers became public. *See* Alerding at 534-537. Charles Blanchard, *History of the Catholic Church in Indiana* 67-68 (1898). The Protestant husband of the alleged victim eventually admitted that he had fabricated the entire story, but Catholics declined to seek perjury charges "because it would certainly and unnecessarily provoke Protestants to anger." *See* Alerding at 540.

The popular anti-Catholic bigotry visible in this case cannot be dismissed as an isolated phenomenon. It had its proponents among the state's most educated leading citizens; even delegates to Indiana's 1850 constitutional convention accepted negative Catholic stereotypes.

For example, Weinzoepfel's accusers' idea that Catholics were unfit for democracy because of their blind obedience to their Church found more erudite expression in the work of Andrew Wylie, the first president of Indiana University (1829-1851), who still held that position during the constitutional convention. In 1835, Wylie gave an address in which he speculated on the reasons for the violence of the French Revolution and its ultimate failure to produce a democratic government. He blamed French citizens' support for extremist movements in part on those "who do[] not think for [themselves]" because they tend to "go[] with a leader," and therefore to "herd with a party, and go to

extremes." *An Eulogy on Lafayette* 20 (May 9, 1835).

That these words have anti-Catholic implications becomes obvious when Wylie turns explicitly to the subject of religion, roughly a page and a half later. He writes:

> At the time of the [French] revolution, a corrupt system of religion had debauched the minds of the common people; and a species of atheism, the result of this, had deplorably weakened all sense of moral obligation in the higher orders. The plenary power of the pope, in spirituals, was an article of their creed: that man is a machine, obedient to the laws of necessity, was a dogma of their philosophy. The actual state of public morals was such as might be expected from such principles—but I shall spare you and myself the pain of a recital. Republican liberty cannot exist where there is so much corruption."

Id. at 21-22. Wylie's argument for the incompatibility of Catholicism and democracy is more nuanced than that of Weinzoepfel's accusers, but the basic narrative is the same: Catholics are too obedient to their church; therefore they do not think for themselves; therefore their moral character is too deficient to sustain a democratic polity.

Catholicism was not a focus of the constitutional convention, but there is evidence that the delegates accepted their state's anti-Catholic stereotypes. Text searches of an electronic copy of the proceedings indicate that Catholicism was mentioned by name only twice, but both times in a negative light. In the first reference, "the Catholic church at Vincennes" is vilified as being among the special interest groups that had successfully pursued "extraordinary claims" for support from the state legislature. H. Fowler, *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana* 998 (1850) (Mr. Nave speaking), available at http://catalog.hathitrust.org/Record/008919745.

In the second, a delegate seeking to water down a proposed "woman's rights"

provision goes on at length about the marital infidelity of the French and Austrians, seeking to blame their supposed unfaithfulness on the civil law's treatment of marriage. To make his point, however, he must discount another explanation: "But it may be remarked in reply that the countries I have instanced are Roman Catholic. True; but look at Sweden, Denmark, and Protestant Germany, and face the light and say if their females, as a class, are not the merest drudges imaginable." *Id.* at 1176 (Mr. Bracken speaking). In other words, the delegate expected his audience to blame Europeans' loose sexual mores on Catholicism, and rather than disagreeing with their assumption that Catholics are unfaithful to their spouses, he asserted that Protestant women are also harmed by the European civil law of marriage—but without slandering Protestants' sexual habits.

The few indirect references to Catholicism in the debates are similarly insulting. In a debate about state banks, one delegate gratuitously mocks "those who believe there can be no religion without an 'established church' and 'no church without a bishop'" doubting "whether such gentlemen have yet ascertained whether or no 'saltpetre will explode.'" *Id.* at 1466 (Mr. Chapman speaking). This insult clearly conveys an anti-Catholic message, specifically that those who believe in a need for ecclesiastical hierarchy are so scientifically and intellectually primitive that they have not yet discovered gunpowder.

A final reference to Catholicism came in a debate about a proposal to share the state's university fund with private colleges. William Foster, a member of the convention's education committee, opposed public funding of private colleges on the

grounds that it would encourage "sectarianism." Austin H. Brown, *Journal of the Convention of the People of the State of Indiana to Amend the Constitution* 54 (1851) (listing Foster on the education committee); Fowler at 858 (Foster's opposition to funding private colleges). Foster does not say that in opposing "sectarianism" he intended chiefly to oppose Catholicism, but there is significant circumstantial evidence that he did. First, there is context: three of Indiana's present-day Catholic colleges were founded in the ten years preceding the convention: Saint Mary-of-the-Woods in 1840, Notre Dame in 1842, and Saint Mary's College in 1844. Second, there is Foster's insistence, over another delegate's disagreement, that the state's own visibly Protestant educational system was free of sectarianism. Fowler at 860.

Third and finally, Foster approvingly cites a pamphlet by Andrew Wylie, the president of Indiana University whose anti-Catholic views are discussed above, "declaring that sectarianism is heresy." Fowler at 860. According to the pamphlet, Catholicism is the archetypal "sectarian" faith:

> The Church of Rome, in the exercise of her usurped authority, made certain tenets, or dogmas, or doctrines of her own arbitrary enactment, to be the terms of union with her, and by so doing, became a great sect, and body of heretics; and the Protestants, by protesting against this usurpation and exposing these tenets, dogmas, and doctrines, as being contrary to reason and scripture, took the true ground, and the only ground on which the proper unity of the church can be maintained, and heresy or sectarianism prevented.

Andrew Wylie, *Sectarianism Is Heresy: In Three Parts in Which Are Shewn Its Nature, Evils, and Remedy* 16 (1840).

In other words, according to Wylie, Catholics who defended religious doctrines with which Protestants disagreed were engaged in sectarianism, but Protestants who

defended religious doctrines with which Catholics disagreed were not engaged in sectarianism but rather in fighting it. That Foster cited this pamphlet approvingly indicates that he likewise equated "sectarianism" with Catholicism, and therefore that he opposed public funding of private colleges at least in part out of an anti-Catholic fear that it would encourage Catholicism.

In sum, anti-Catholic animus was common in Indiana at the time Article 1, Section 6 was adopted. It found expression both in the heated public controversy of the Weinzoepfel trial and in the more genteel public scholarship of the president of Indiana University. And Catholicism was consistently portrayed in a negative light at the 1850 constitutional convention, most notably when a delegate on the convention's education committee spoke approvingly of an anti-Catholic tract. Given this history of anti-Catholic sentiment in Indiana, it is no surprise that when the virulently anti-Catholic Know-Nothing Party arrived there in 1854—three years after adoption of the Constitution—it boasted 60,000 members in the state less than six months after its first Indiana chapter was formed. Carl Fremont Brand, *History of the Know Nothing Party in Indiana,* 18 Indiana Magazine of History 58–61 (1922). The party was so influential that the legislature resulting from the 1854 elections was called the "Know-Nothing Legislature" because of their large numbers. *Id.* at 181. The Know-Nothings were not the beginning of anti-Catholic animus in Indiana, but merely one short chapter in a history that spanned many decades.

Appellees and their *amici* attempt to whitewash this history, claiming that although anti-Catholic animus was present in other periods of Indiana history, the

1850 constitutional convention was somehow immune to this animus. Br. of Americans United at 2-3. This blinks at reality. It is hard to understand how Indiana could be full of anti-Catholic sentiment both in the 1840s—during the time of Fr. Weinzoepfel's celebrated trial and President Wylie's ruminations on Romanism—and in 1854—when the Know-Nothings swept into the Indiana Legislature—but not in 1850-51, when the new Constitution was debated and adopted. This "eye of the storm" approach to history makes little historical sense. The sad fact is that Indiana, like every other state in the Union, consistently suffered from anti-Catholicism for more than a century after its birth. The proper response to this history is not to pretend it didn't happen, but to resolve not to allow it to have any effect today. [3]

Nor does it matter that Article 1, Section 6 did not target Catholics by name. When deciding the relevant history on which constitutional questions turn, courts must look beyond the face of the statute to the context and underlying intent of the law in question. *See Hunter*, 471 U.S. at 227-28; *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 531 (1993) ("Facial neutrality is not determinative."). *Cf. Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (courts must make "independent examination" of constitutional facts). Modern-day examples bear out this constitutional wisdom. No one can plausibly say that recent legislative initiatives to bar the application of "foreign law" in state courts have nothing to do with

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[3] *Amicus* Americans United for Separation of Church and State has left out more than just the anti-Catholic history of Indiana; it has also elided its own history as an anti-Catholic organization originally called Protestants and Other Americans United for Separation of Church and State. *See, e.g., Protestants and Other Americans United for*

anti-Muslim feeling. *See, e.g.*, Omar Sacirbey, *Anti-Shariah bill defeated in Oklahoma senate*, Washington Post, Apr. 6, 2012. These laws cloak religious hostility in facially neutral language.[4]

2. Indiana's "common" school movement pursued anti-Catholic aims.

Anti-Catholicism in Indiana did not merely express itself in false accusations and unfriendly scholarship. It also left its mark on the state's public schools. The national common school movement embraced stereotypes of Catholics as morally unfit for democracy and consciously chose its program of moral education to introduce them to Protestant religious practice. The Indiana common school movement shared both the national movement's prejudice and its chosen method for correcting Catholics' deficient moral education, as can be seen in the writings of Caleb Mills, the leader of the Indiana common schools movement.

Mills was a Presbyterian minister and Wabash College professor who repeatedly urged the Indiana legislature to follow the examples of other states. In his 1847 address urging school reform, he reminded state legislators that they had "rich models for imitation," and he supported many of his recommendations by referring to those models: Connecticut, New Hampshire, Ohio, and New York, all of which followed the "common school" model. Caleb Mills, *An Address to the Legislature of Indiana* 5, 22,

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Separation of Church and State v. *Watson*, 407 F.2d 1264 (D.C. Cir. 1968) (seeking to enjoin Madonna and Child Christmas stamp as Roman Catholic "proselytization").

[4] Americans United's related argument that there weren't that many immigrants so therefore there couldn't have been prejudice makes little sense. Br. of Americans United at 12-14. First, 6% is actually a significant number as religious minorities go. But more importantly, history shows that religious minorities are often targeted even when they represent a minuscule portion of the population.

23–24, 26 (1847). His 1848 address added Massachusetts to the list. Caleb Mills, *An Address to the Legislature of Indiana* 12, 13 (1848); Caleb Mills, *Sixth Annual Address to the Legislature of Indiana* (1851).

Here we agree with *amicus* Americans United on one point: "The importance of Mills' beliefs in this regard cannot be overstated. Mills' addresses have long been considered the basis of the Indiana system of common schools." Br. of Americans United at 8 (internal quotation omitted). But Mills' addresses to the Indiana legislature do not, as Americans United would have it, display an anachronistic post-modern secularism, but instead demonstrate that he shared the national reformers' anti-Catholic goals and methods.

First, Mills shared the national movement's assessment of the importance of moral education, and the need to teach a common Christian religion in schools:

> "Human happiness has no perfect security but freedom; freedom none but virtue; virtue none but knowledge; and neither freedom nor virtue has any vigor . . . except in the principles of the Christian faith and in the sanctions of the Christian religion." . . . A sympathy with such views on your part, cannot fail to impress you with a deep sense of the responsibility resting upon those, whose duty it becomes to mature and perfect a system of means, which shall guarantee that happiness to the latest posterity.

An Address to the Legislature of Indiana 6–7 (1848).

Mills also shared the national movement's focus on the Bible as the preeminent source of American virtue. While opposing the idea of a state school superintendent, Mills argued that anyone who did not belong to a religious denomination would be unqualified for such a position:

> [H]e will not have the confidence, and hearty co-operation of a large portion of the community, for however diversified may be our religious sentiments,

> there is a strong and prevailing impression in society, that the great principles of the Bible, are inwrought in, and inseperable [sic] from, the civil institutions of the land. The Bible is too deeply enthroned in the hearts of the people, to be excluded from our common schools, and other institutions of learning. . . . But with what consistency and success, would one urge the claims of the scriptures, as a standard of moral action, whose own life and character were not regulated by its holy teachings?

Id. at 22.

Again Mills shows no disagreement with the Protestant establishmentarian goals and methods of the national common school movement. He sees the Bible as an essential part of American institutions and public school education; he expects that "urg[ing] the claims of the scriptures, as a standard of moral action" will be an important duty of public school officials; and he considers those who do not regulate their "own life and character" with the Bible to be unfit for service as educators.

Finally, Mills' response to those who do not wish their children to participate in Protestant religious exercises at school shows that he shares the national movement's anti-Catholic ideology. Mills objects to a proposal on the grounds that it will "awaken denominational prejudices and sectarian bigotry." *Id.* at 23. To emphasize the importance of preventing sectarian bigotry, he adds:

> When prominent and influential individuals in leading denominations . . . publicly advocate the distribution of the school funds among the different sects, according to their number, or to urge the withdrawal of their denomination from the common schools to establish and sustain parochial schools under the pretext that the Bible . . . cannot be used in our common schools without interfering with the religious belief of citizens, it is certainly the dictate of wisdom to abstain from introducing any new element of discord. It is deeply to be regretted that such views should be advocated, and their adoption urged by good men. . . . If the ploughshare of sectarian bigotry, must be driven through our common schools, it should be distinctly understood, by the advocates of such measures, that the legitimate result of that policy, will be to sunder some of the strongest ties, that bind our social

> and political fabric, and loosen the very keystone of the arch of our present happy Union.

Id. See also Caleb Mills, *Sixth Annual Address to the Legislature of Indiana, on Popular Education* 19–20 (1852) (advocating "the absorption and annihilation of private and sectarian schools" on the grounds that "[s]ectarian zeal in this department of education is entirely misplaced.").

Amicus Americans United quotes the first sentence of this passage as evidence that Indiana's common school movement opposed public support for private schools, but its brief notably leaves out the reasons Mills gave for that opposition. Brief of Americans United at 8. As the full quote makes clear, Mills opposed not merely public support for Catholic education but the very existence of Catholic education, and he did so on the grounds that allowing Catholic students to opt out of Protestant religious exercise would destroy American "social and political" unity. And like Andrew Wylie, he sees "sectarian bigotry" not in his own belief that Catholic practices were un-American, but in Catholics' desire to avoid forced participation in Protestant religious exercise.

Mills' deep connection with the nativist national common school movement was far from unique among the state's education activists. Indeed, influential Indiana school reformer H.F. West published his magazine *The Common School Advocate* largely to "bridge the gap between the ideas of eastern reformers and the work of Hoosier activists." William J. Reese, *Hoosier Schools: Past and Present* 15 (1998).

On the topic of moral education, the national movement's "rich model[] for imitation" was non-denominational Protestant establishment, with the understood goal of educating the children of Catholic immigrants in Protestant morality. According to

education historian Carl Kaestle, the national common school movement accepted ten basic ideological propositions, including "the sacredness and fragility of the republican polity," "the importance of individual character in fostering social morality," "the superiority of American Protestant culture," and "the necessity of a determined public effort to unify America's polyglot population, chiefly through education." *Pillars of the Republic: Common Schools and American Society, 1780-1860,* at 76–77 (1983). Moral education for citizenship, not academic achievement of career preparation, was seen as the primary purpose of common schools. *Id.* at 97–98.

To inculcate "individual character" consistent with superior "American Protestant culture," common school reformers instituted the practice of reading the Protestant King James Bible in schools "without note or comment." This practice served two purposes: first, it unified mainstream Protestant support for common school moral education, since all members of the Protestant mainstream—including even Unitarians like Horace Mann—accepted the central importance of the Bible, while still disagreeing contentiously about its proper interpretation. Avoiding theological discussion in schools rendered those disagreements irrelevant to the common school movement and eventually persuaded most Protestants to support the movement's ideas of moral education. *Id.* at 98.

Second, it forcibly educated common school students raised outside mainstream Protestantism in Protestant morality and religious practice.[5] In the words of historian

[5] Given the common school practice of corporal punishment, "forcibly" is actually an understatement. For an example, *see* David Sehat, *The Myth of American Religious Freedom* 156 (2011), for the story of Thomas Whall, a Catholic boy who refused to

David Sehat:

> The common-school movement unapologetically embraced what it considered to be mainstream Christianity . . . . It thus excluded Catholicism, Judaism, Mormonism, Chinese Buddhism, and freethought. In practice, nonsectarianism meant reading the Bible without comment as part of a daily devotion. . . . But this flew in the face of Catholic belief. Catholics did not read the Bible themselves. It was the function of a priest to inform parishioners what the Bible said as part of the liturgical service and in the care he offered as a shepherd of the congregation. The use of the [Protestant] King James Version furthered this implicit connection of nonsectarianism with Protestantism and promoted the Protestant form of worship that relied upon the self-sufficiency of individual Bible-reading without priestly mediation. Because Bible-reading and recitation remained at the center of the American common-school curriculum for much of the nineteenth century, so did the Protestant doctrine of *sola Scriptura*, or scripture alone. There was nothing nonsectarian about it.

Sehat at 157. *See also generally* Charles Glenn, *The Myth of the Common School* (1988).

In short, the national common school movement sent a very clear message about religion: all Protestant faiths were equally American because they all encouraged individual engagement with the Bible and therefore with the roots of Americans' republican virtue and moral character. But Catholics, who were taught not to read the Bible without authoritative explanation, and whose Douay Bible had numerous explanatory notes, were morally deficient and needed moral reconstruction through Protestant religious practice in public schools.

As a comparison, the belief in African-American moral deficiency was a common nineteenth-century justification for slavery. Sehat at 73–96. Indeed, both of these bigoted attitudes were bound together by an attitude of moral superiority and

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recite the Protestant version of the Ten Commandments and was beaten by his teacher

hypocrisy that Lincoln condemned in his famous indictment of the Know-Nothings:

> I am not a Know-Nothing. How could I be? How can any one who abhors the oppression of Negroes be in favor of degrading classes of white people? Our progress in degeneracy appears to me pretty rapid. As a nation we began by declaring "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 should prefer emigrating to some country where they make no pretense of loving liberty--to Russia, for example, where despotism can be taken pure and without the base alloy of hypocrisy.

Letter from Abraham Lincoln to Joshua Speed (Aug. 24, 1855).

3. Indiana's history of anti-Catholicism makes it impossible to enforce Article 1, Section 6 against the Choice Scholarship Program without violating the Equal Protection Clause.

Just as vestigial Jim Crow laws may not be relied on to prohibit political speech and enable discrimination, Indiana may not apply constitutional provisions enacted out of religious animus in order to discriminate among religious believers today. *See, e.g.*, *Hunter*, 471 U.S. at 232-33 (facially neutral constitutional provision violated Equal Protection Clause). In *Hunter*, the Court held that although determining whether a discriminatory purpose lurked behind a state constitutional provision "is often a problematic undertaking," it could rely 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 228-229. 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

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until he changed his mind.

racially discriminatory impact are demonstrated" the state constitutional provision was subject to invalidation under the Equal Protection Clause. *Id* at 232.

Similarly, Article 1, Section 6 was very much "part of a movement that swept the [United States] to [discriminate against Catholics.]" *Id.* at 229; *see* Section I.B *supra*. Nor is it any defense to argue that the state bears no discriminatory intent towards Catholics today. The absence of any discriminatory intent today—even if true—would not allow Indiana 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 (emphasis added). As in *Hunter*, the original enactment of Article 1, Section 6 was motivated by a desire to discriminate against Catholics. Were it to be applied today in a way that disadvantages religious schools, it would run afoul of the Constitution.

C. Plaintiffs' claims under Article 1, Section 6 raise federal constitutional questions under the Free Exercise Clause.

Plaintiffs' claims under Article 1, Section 6 would, if credited, also create serious conflicts with the Free Exercise Clause. Under Supreme Court precedent, a law burdening religious groups violates the Free Exercise Clause if it is not "neutral, [and] generally applicable," *Employment Div.* v. *Smith*, 494 U.S. 872, 880 (1990), or if it interferes with the "internal governance" of a religious organization. *Hosanna-Tabor*,

132 S.Ct. at 706.[6]

Article 1, Section 6, does not meet the First Amendment standards of neutrality and general applicability because, as explained above, its original purpose was to disfavor Catholic institutions, keeping them from receiving public funds while supporting other, "common" schools that propounded a different, state-approved religious faith. Such laws—laws that are "enacted 'because of,' not merely 'in spite of,' their suppression of" religious groups, are subject to strict scrutiny. *Lukumi*, 508 U.S. at 540. Just as application of Article 1, Section 6 to invalidate the Choice Scholarship Program would violate the Equal Protection Clause by treating religious organizations unequally, it would also violate the Free Exercise Clause by singling out those minorities for disfavor. *Lukumi*, 508 U.S. at 534 ("The Free Exercise Clause protects against governmental hostility which is masked, as well as overt"). The history of Indiana anti-Catholic animus presented here shows that Article 1, Section 6 was adopted with serious animus towards minority religious faiths, and thus should be subject to strict scrutiny.

A second way that Plaintiffs' reading of Article 1, Section 6 is suspect under the Free Exercise Clause is that it would give the government discretion to make individualized exemptions depending on the individual religious practices of the institution or individual. *Lukumi*. 508 U.S. at 537. A law allowing "individualized exemptions" invites strict scrutiny because it "creates the opportunity for a facially neutral and generally applicable standard to be applied in practice in a way that

[6] The government can raise a strict scrutiny affirmative defense only to a

discriminates against religiously motivated conduct." *Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (Alito, J.).

Here, Plaintiffs' proposed Article 1, Section 6 rule requires an individualized assessment from the government. When the provision was adopted, it was clear that funds would not be denied to any "common" school, despite their promotion and enforcement of least common denominator Protestantism, even on objecting non-Protestant students. Today, Plaintiffs would have government make similar case-by-case decisions about just how religious an organization is. Appellants' Br. at 26 n.20 (claiming universities would not be affected because they are not "pervasively sectarian"). Plaintiffs' interpretation of Article 1, Section 6 would be textbook example of a rule that is not generally applicable and thus violates the Free Exercise Clause.

D. Plaintiffs' claims under Article 1, Section 6 raise federal constitutional questions under the Establishment Clause.

Plaintiffs' approach of disfavoring some religious groups because they are "pervasively sectarian" would also violate 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 (1982). Indeed, "neutral treatment of religions [is] the clearest command of the Establishment Clause." *Colo. Christian Univ.*, 534 F.3d at 1257 (citing *Larson*, 456 U.S. at 244).

In *Colorado Christian University*, the 10th Circuit applied this principle to find that the "pervasively sectarian" standard was unconstitutional in that it "exclude[d] some but not all religious institutions . . . ." 534 F.3d at 1258. Similarly, in *Larson*, 456

Smith/Lukumi claim, not a *Hosanna-Tabor* claim.

U.S.at 230, the Supreme Court struck down a state law because it 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. *Id.* at 247 n.23; *see also Lukumi*, 508 U.S. at 536 ("differential treatment of two religions" might be "an independent constitutional violation."). *Cf. Univ. of Great Falls* v. NLRB, 278 F.3d 1335 (D.C. Cir. 2002) (government could not decide whether a university was "sufficiently religious").

That differential treatment was the original intent behind Article 1, Section 6: to discriminate against Catholic institutions while "common" schools that promoted the state-approved form of Protestantism could continue to receive government funding. And that is also what Plaintiffs seek to have this Court declare: A distinction between the "pervasively sectarian" and the merely "religious." Both are violations of the Establishment Clause's command of neutrality.

CONCLUSION

To reach a decision in this case, the Court need not pass judgment on Indiana's history of anti-Catholicism. This Court's precedents amply demonstrate that despite its anti-Catholic origins, Article 1, Section 6 should not be interpreted today to impose special disabilities on religious people.

But even if Indiana precedent were not so clear, Article 1, Section 6 could not support Plaintiffs' claims without offending the United States Constitution. The Equal Protection Clause, the Free Exercise Clause, and the Establishment Clause all prohibit the application of laws "born of bigotry" to religious minorities today. Article 1, Section

6 cannot be constitutionally applied to invalidate the Choice Scholarship Program. The decision below should be affirmed.

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RULE 44(F) WORD COUNT CERTIFICATE

I verify that this brief contains no more than 7,000 words.

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CERTIFICATE OF SERVICE

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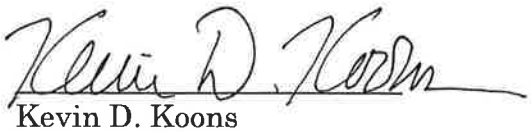

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