ARIZONA COURT OF APPEALS

DIVISION TWO

VIRGEL CAIN, et al.,

Plaintiffs/Appellants,

v.

TOM HORNE, in his capacity as Superintendent of Public Instruction,

Defendant/Appellee.

and

JESSICA GEROUX; ANDREA WECK; KRISTINIA PETERSON; KIMBERLY WUESTENBERG; EDWIN RIVERA; AND MIKE AND SHIRLEY OKAMURA,

Intervenors-Appellees.

No. 2 CA-CV 2007-0143

BRIEF OF *AMICUS CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION

February 7, 2008

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Interest of *Amicus*

Founded in 1940, the National School Boards Association ("NSBA") is a not-for-profit federation of state associations of school boards across the United States and the school boards of the District of Columbia, Guam, Hawai'i, and the U.S. Virgin Islands. NSBA represents the nation's 95,000 school board members. These board members govern nearly 15,000 local school districts that serve more than 46 million public school students—approximately 90 percent of all elementary and secondary school students in the nation. NSBA is dedicated to the improvement of public education in America and has a longstanding interest in ensuring that state and local governments have maximum flexibility in education funding and other education policy decisions consistent with both federal and state constitutional requirements.

Introduction

NSBA submits this *amicus* brief in support of the Appellants to assist the Court in understanding the relationship of the "Blaine Amendment" to this case. As discussed in the briefs, this case requires the Court to interpret two constitutional provisions prohibiting the state from appropriating or providing public money for religious instruction—Article 9, Section 10 ("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.") and Article 2, Section 12 ("No public

money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment."). Appellants argue that the challenged voucher programs violate these no-funding provisions.

The Appellee and Intervenor Appellee the Institute for Justice ("Appellees") argue that the Arizona Constitution's no-funding provisions are "Blaine Amendments" that are "tainted" by religious discrimination and bigotry, specifically anti-Catholicism. [Appellee's Br. 29; Intervenor Appellees' Br. 18-23] The original Blaine Amendment, which was proposed as a federal constitutional amendment in 1875, expressly prohibited the appropriation of public money to religious sects or denominations. *See, e.g.,* Steven K. Green, *"Blaming Blaine": Understanding the Blaine Amendment and the "No-Funding" Principle*, 2 First Amend. L. Rev. 107, 128 (2004); Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J. L. & Pub. Pol'y 657, 671 (1997-1998). Although Congress never approved the federal amendment, many states, including Arizona, subsequently adopted constitutional provisions prohibiting grants of public money to religious institutions.

The purpose of this brief is to demonstrate that the Blaine Amendment is not relevant to this case. First, the United States Supreme Court has determined that the history of the Blaine Amendment is irrelevant where no direct link exists

between that Amendment and a state constitutional provision. The Arizona Supreme Court has already concluded that no such link exists between the Blaine Amendment and the constitutional provisions at issue here. Second, even if such a link could be proved, the alleged discriminatory history of the Blaine Amendment has been seriously questioned. Third, regardless of any alleged discriminatory history, the contemporary understanding of no-funding provisions reflects a strong and longstanding commitment to the separation of church and state, irrespective of the historical motivation behind the provisions.

Argument

I. THE BLAINE AMENDMENT IS IRRELEVANT TO THE RESOLUTION OF THIS CASE.

The United States Supreme Court, in *Locke v. Davey*, 540 U.S. 712, 723 n.7 (2004), concluded that no "credible connection" existed between the Blaine Amendment and Article 1, Section 11 of Washington's constitution, which contains language identical to that of Article 2, Section 12 of Arizona's constitution. Consequently, the Court refused to consider the Blaine Amendment's history in resolving the case. The Court determined that Article 1, Section 11 was not a "Blaine Amendment" because the federal Enabling Act allowing Washington's admission to statehood did not require that the state's constitution include the provision, a contention that the respondent did not dispute. *Id.* The Supreme Court did not specifically address the parties' arguments regarding

alleged anti-Catholic animus underlying the enactment of Article 1, Section 11; however, it did state that it found nothing in the history or text of the provision that suggested "animus toward religion." *Id.* at 725. This certainly suggests that the Court was unpersuaded by the respondent's attempt to link alleged anti-Catholic bigotry to the constitutional provision.

Given the similar language and history of the Washington and Arizona no-funding provisions and the lack of any evidence of anti-Catholic animus during the founding of either state, the history of the Blaine Amendment should be similarly irrelevant in interpreting Arizona's constitution. In short, Arizona's no-funding provisions, like the Washington provision at issue in *Locke*, are not "Blaine Amendments."

Kotterman v. Killian, Arizona's leading case on interpretation of the no-funding provisions, supports this proposition and is consistent with *Locke*. In *Kotterman*, the Arizona Supreme Court expressly rejected any connection between the Blaine Amendment and Article 2, Section 12 and Article 9, Section 10 of Arizona's Constitution.[1] 193 Ariz. 273, 291, 972 P.2d 606, 624 (1999). While acknowledging that many state constitutions contain language similar to that of the Blaine Amendment, the Court stated that "[t]here is, however, no recorded history

[1] *Kotterman* required the Arizona Supreme Court to interpret Arizona's no-funding provisions to determine the constitutionality of state tax credits for donations to school tuition organizations. 193 Ariz. at 277, 284, 972 P.2d at 610, 617.

directly linking the amendment with Arizona's constitutional convention" and that "it requires significant speculation to discern such a connection." *Id.* at 291, 972 P.2d at 624. Moreover, like Washington's Article 1, Section 11, neither Article 2, Section 12 nor Article 9, Section 10 of Arizona's Constitution was federally-imposed.[2] In short, no credible connection exists between the Blaine Amendment and Arizona's no-funding provisions.[3]

Unfortunately, Justice Feldman's dissent in *Kotterman*, which is *not* binding authority, erroneously characterizes Arizona's no-funding provisions as "Blaine Amendments." 193 Ariz. at 300, 972 P.2d at 633 (Feldman, J., dissenting). However, Justice Feldman clearly states that the framers of Arizona's constitution were motivated by a commitment to strict separation between church and state and not by the alleged anti-Catholic animus that allegedly taints so-called "Blaine Amendments."

By Justice Feldman's own account, Arizona was committed to the principle of separationism well before it was admitted to statehood. By 1885, the Arizona

[2] Arizona, like Washington, was, however, required to insert a provision prohibiting sectarian control of its public schools into its constitution as a condition of admission to statehood. *See* Ariz. Const. art. 20, ¶ Seventh ("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."); Enabling Act of June 20, 1910, ch. 310, 36 Stat. 557. This provision is not at issue here.

[3] Although it refused to consider the history of the Blaine Amendment, the *Kotterman* majority assumed that the Amendment itself was "a clear manifestation of religious bigotry." 193 Ariz. at 291, 972 P.2d at 624. As will be discussed below, the validity of this assertion is far from clear.

Territory had "firmly demonstrated its commitment to the separation of church and state in education" and "radically distinguished itself from most of the rest of the nation by extending its separationist commitment to preclude Protestant, Catholic, and all other religious influence in its public schools." *Id.* at 303, 972 P.2d at 636.

This strong separationist sentiment was incorporated into Arizona's constitution: "[I]t is clear the delegates [to the constitutional convention] sought to preserve strict separation of church and state in the public schools by excluding all religious exercise, consistent with Arizona's territorial history." *Id.* at 305, 972 P.2d at 638. Thus, although Justice Feldman incorrectly characterizes Arizona's no-funding provisions as Blaine Amendments, his historical account disproves the Appellees' argument that Arizona's no-funding provisions are "tainted" by religious bigotry.

Here, as with the Washington constitutional provision at issue in *Locke*, no link between the federal Blaine Amendment and the state constitutional provisions exists. Moreover, Arizona's no-funding provisions stem from a historically demonstrable commitment to strict separationism rather than religious bigotry. Therefore, Arizona's no-funding provisions, like Washington's no-funding provision, are not "Blaine Amendments." Accordingly, this Court need not consider the history of the Blaine Amendment in evaluating the constitutionality of the voucher programs at issue here.

II. SCHOLARLY RESEARCH SERIOUSLY QUESTIONS THE ALLEGED DISCRIMINATORY HISTORY OF THE BLAINE AMENDMENT.

Not all scholars agree with the Appellees' simplistic assertion that the Blaine Amendment was motivated almost entirely by anti-Catholic animus. [*See* Appellee's Br. 29; Intervenor Appellees' Br. 18-20] Given that the historical motivation for the Blaine Amendment is far from clear, it is particularly dubious for courts to use that disputed history to imbue to state no-funding provisions a historical background that does not even accurately reflect the debate surrounding the Blaine Amendment itself, much less the circumstances unique to any particular state.

A. No-Funding Principles Pre-Date and Arose Independently of the Anti-Catholic Movement.

Although voucher advocates argue that the Blaine Amendment was developed specifically to prevent Catholics from obtaining support for parochial schools, they overlook research suggesting that the no-funding principle embodied in that Amendment developed well before the beginning of the anti-Catholic movement of the nineteenth century, as an extension of the ideals of religious liberty and separation of church and state. *See, e.g.,* Green, *supra*, at 114-28; Brief for Historians and Law Scholars as Amicus Curiae on Behalf of Petitioners, [4]

[4] Following is a list of the individual legal and religious historians and law scholars who functioned as *amici*: Robert S. Alley, Ph.D., Professor of Humanities Emeritus, University of Richmond; Anna Bates, Ph.D., Assistant Professor of Legal History, Aquinas College; David Burner, Ph.D., Professor of History,

Locke v. Davey, 540 U.S. 712 (2004) (No. 02-1315), 2003 WL 21697729 at *5-14 [hereinafter Scholars' Brief] (A copy of the Scholars' Brief is attached to Appellants' Reply Brief as Appendix B).

Notably, these separationist principles, which were not aimed at a particular religion or sect, were applied to public funding of religious instruction very early in our history, even though the concept of a universal public education system had not yet been adopted. For example, in the 1770s, before the advent of concerns about public funding of parochial schools, Thomas Jefferson and James Madison opposed the Virginia Assembly's efforts to impose an assessment to support religion teachers, including those in private religious schools, on the ground that

SUNY-Stony Brook; Jon Butler, Ph.D., William Robertson Coe Professor of American History, Yale University; Derek Davis, J.D., Ph.D., Director, J.M. Dawson Institute of Church-State Studies, Baylor University; Norman Dorsen, Stokes Professor of Law, New York University School of Law; James M. Dunn, Ph.D., Professor of Christianity and Public Policy, Wake Forest University Divinity School; Ronald B. Flowers, Ph.D., John F. Weatherly Professor of Religion Emeritus, Texas Christian University; Eric M. Freedman, Professor of Law, Hofstra Law School; Steven G. Gey, J.D., Fonvielle and Hinkle Professor of Litigation, Florida State University; Mark A. Graber, Ph.D., Professor of Government and Adjunct Professor of Law, University of Maryland; Steven K. Green, J.D., Ph.D., Associate Professor of Law, Willamette University; David Gutterman, Ph.D., Department of Political Science, Linfield College; Dr. Donald W. Jackson, Herman Brown Professor of Political Science, Texas Christian University; William Long, M. Div., Ph.D., J.D., Adjunct Professor of Law, Willamette University; Donald G. Mathews, Professor of History, University of North Carolina at Chapel Hill; Roger K. Newman, Adjunct Faculty, Graduate School of Journalism, Columbia University; Robert M. O'Neil, Professor of Law, University of Virginia; Frank Ravitch, Associate Professor of Law, Michigan State University-DCL; Robert E. Shepherd, Jr., Emeritus Professor of Law, University of Richmond; Paul D. Simmons, Ph.D., Th.M., Clinical Professor, University of Louisville, Department of Family and Community Medicine; Professor of Christian Ethics, Southern Baptist Theological Seminary (retired); Norman Stein, Douglas Arant Professor of Law, University of Alabama; Nadine Strossen, Professor of Law, New York Law School; and Donald E. Wilkes, Jr., Professor of Law, University of Georgia.

government support of religion infringed religious liberty. *See* Green, *supra*, at 114. In this context, Jefferson stated, "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical, that even forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern." *A Bill for Establishing Religious Freedom, 12 June 1779, in* 5 *The Founders' Constitution* 77 (Philip B. Kurland & Ralph Lerner, eds., 1987). Moreover, Jefferson and Madison advocated the general principle of keeping *all* religious instruction out of state-funded schools, without reference to any particular sect or denomination. *See* Thomas Jefferson, *Note to Elementary School Act*, 1817, ME 17:419 ("Ministers of the Gospel are excluded [from serving as Visitors of the county Elementary Schools] to avoid jealousy from the other sects, were the public education committed to the ministers of a particular one; and with more reason than in the case of their exclusion from the legislative and executive functions."); Scholars' Brief at *6 (noting that, as President, Madison applied the principle of separationism to veto a bill that authorized an Episcopal Church to receive public funds for the education of poor children (citing *Veto Message to Congress Feb. 21, 1811, in James Madison on Religious Liberty* 79 (Robert S. Alley, ed., 1985))). By the time the First Amendment was drafted, "'[t]he belief that government

assistance to religion, especially in the form of taxes, violated religious liberty had a long history.'" Green, *supra*, at 115-16 (quoting Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 217 (1986)). Thus, the principles of separationism and religious liberty were applied to public funding of religious instruction well before the nineteenth century rise of both parochial schools and the anti-Catholic movement.

Additionally, the no-funding principle developed in conjunction with the rise of the common school movement, which was critical of the role that religion had traditionally played in education. *See, e.g.,* Green, *supra*, at 117-28; Scholars' Brief at *8-14. Eighteenth century educational reformers advocated for a nonsectarian curriculum, focusing on the importance of a broad secular education in maintaining the stability of post-Revolutionary America. *E.g.,* Green, *supra*, at 117-18; Noah Webster, *On Education of Youth in America* (1790), *in Essays on Education in the Early Republic* 65-66 (Frederick Rudolph, ed., 1965) (noting that education was "essential to the continuance of republican governments"). This nonsectarian movement, which included the idea that funding sectarian schools violated constitutional principles of religious liberty, developed not in response to Catholicism, but in response to the control of various *Protestant* sects over education. Green, *supra*, at 119-24 (noting that, for example, the Free School Society of New York City, a nonsectarian school, disputed a grant of public money

to a Baptist school on the ground that the grant violated the principle of religious liberty).

Thus, the no-funding principle pre-dated and arose independently of any anti-Catholic movement. Accordingly, the assertion that the Blaine Amendment was a product of anti-Catholic sentiment grossly oversimplifies the development and history of the no-funding principle.

B. Supporters of the Blaine Amendment Were Motivated By A Variety of Factors.

Appellees cite to the Court's conclusion in *Kotterman* that the Blaine Amendment was a "clear manifestation of religious bigotry" and assert that supporters of the Blaine Amendment were motivated by hostility to the Catholic religion. [Appellee's Br. 29; Intervenor Appellees' Br. 19] The degree to which anti-Catholicism motivated supporters of the Blaine Amendment is, however, debatable. While scholars do not deny that some individuals were motivated by anti-Catholic bigotry, focusing solely on the anti-Catholic aspect of the Blaine Amendment debate paints an incomplete and overly simplistic picture of a complex national issue.

Scholars note that the Blaine Amendment was part of the larger national debate on the "School Question," which concerned the role of government in creating and maintaining a public school system, a much broader topic than funding for parochial schools. *E.g.,* Green, *supra*, at 128-29; Scholars' Brief at

*18-19. The Blaine Amendment, along with a similar constitutional amendment proposed by President Ulysses Grant, was offered as a means of settling debate on the School Question. Green, *supra*, at 140-46; Scholars' Brief at *19-21.

Senate debate on the proposed amendments focused on the broader issues of federalism, the degree of state control over education, and the degree of religious influence in public schools, in addition to the ban on public funding for parochial schools. Scholars' Brief at *24 (citing 4 Cong. Rec. 5580-5595 (1876)). A prominent group of scholars notes that, on a national level, "a combination of issues—whether public schooling should be secular or religious and truly universal for all faiths, races and nationalities, whether the national government should mandate schooling at the state or local levels, and how best to diffuse religious strife—fueled the debate surrounding the Blaine Amendment as much as the issues of parochial school funding or anti-Catholicism." *Id.* at *23. As is the case with any complex national issue, the debate over the School Question pitted numerous interest groups against one another. Although Catholics and anti-Catholics were undoubtedly involved in the debate, they were simply two groups out of many that had a stake in its resolution. *Id.* at *18; *see also* Green, *supra*, at 130-31; Laura S. Underkuffler, *The "Blaine" Debate:* Must *States Fund Religious Schools?*, 2 First Amend. L. Rev. 179, 195 (2004). Given the complexity of the issue and the numerous interest groups involved, it is impossible to attribute the Amendment's

primary support to the anti-Catholic movement. Thus, Appellees grossly oversimplify the historical context of the Blaine Amendment by arguing that its supporters were motivated solely by anti-Catholic animus.

In sum, the history surrounding the Blaine Amendment is much more complex than the Appellees admit, and the Court should be reluctant to accept the Appellees' reductionist historical approach in interpreting Arizona's no-funding provisions, particularly when no historical link can even be established between the Blaine Amendment and the relevant state constitutional provisions.

III. NO-FUNDING PROVISIONS SHOULD BE INTERPRETED IN LIGHT OF THEIR CONTEMPORARY MEANING.

Finally, no-funding provisions, including those in Arizona's constitution, should be interpreted as they are understood today—as a reflection of our longstanding commitment to the separation of church and state—irrespective of any historical motives underlying the enactment of those provisions. Even accepting that the no-funding provisions may have been motivated in part by religious bigotry, the mere identification of one objectionable historical motive is insufficient to call into question the validity of those provisions over 100 years later.[5] *See* Underkuffler, *supra*, at 196 ("[I]f religious bigotry, racism, sexism, or

[5] Intervenor Appellee the Institute for Justice argues that the United States Supreme Court has invalidated laws or constitutional provisions "purely on the basis of discriminatory motivation" and cites *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Hunter v. Underwood*, 471 U.S. 222 (1985); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); and *Mount Healthy City Board of Education v. Doyle*, 429 U.S.

other dark motives of those who enact laws are fatal to those laws, few eighteenth or nineteenth century laws would survive legal scrutiny today.").

In fact, "[c]onstitutional history is replete with laws whose constitutionally problematic origins have been held irrelevant in contemporary adjudication." Frederick Mark Gedicks, *Reconstructing the Blaine Amendments*, 2 First Amend. L. Rev. 85, 94 (2004). For example, Sunday closing laws were originally enacted to codify Christian principles. However, the United States Supreme Court, recognizing that justification for the laws has become increasingly secular over time, upheld the laws on the ground that they promoted the general welfare of citizens—a contemporary interpretation. *McGowan v. Maryland*, 366 U.S. 420, 450-52 (1961). Similarly, anti-polygamy laws, originally targeted at the Mormon faith, are now frequently justified as protections against male dominance and domestic abuse. Gedicks, *supra*, at 94; *cf. Barlow v. Blackburn*, 165 Ariz. 351, 353-55, 798 P.2d 1360, 1362-64 (Ct. App. 1990) (upholding the validity of the Arizona Constitution's anti-polygamy provision and rejecting the argument that it conflicts with the constitutional requirement of perfect toleration of religious sentiment). If we accept the proposition that a discriminatory historical motive invalidates any law or constitutional provision, regardless of its contemporary

274 (1977), in support of this proposition. [Intervenor Appellees' Br. 19 n.9] These cases, however, concerned laws that had a discriminatory effect on particular groups; the laws were not invalidated on discriminatory motive alone. Therefore, these cases are inapposite.

meaning, then even the federal constitution is subject to attack because it helped to perpetuate, among other things, slavery and the subjugation of women and other minority groups. Underkuffler, *supra*, at 196.

Here, the no-funding provisions are certainly not currently viewed as anti-Catholic, nor are they used prejudicially against Catholics. Therefore, it makes no sense to permit a historically dubious allegation of anti-Catholic bias to affect the interpretation of constitutional provisions that embody a bedrock American legal principle—separationism—that has been reaffirmed countless times by courts across the nation.

Conclusion

The issues before the Court are whether state voucher programs for foster children and certain children with disabilities are constitutional. The Court's consideration of these constitutional issues should not be colored by inaccurate and unsupported arguments that Arizona's no-funding provisions are tainted by religious bigotry. In sum, the history of the Blaine Amendment is irrelevant to the resolution of this case.

February 7, 2008

Respectfully submitted,

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Certificate of Compliance

Pursuant to ARCAP 14, I certify that the attached Brief on Appeal uses proportionately spaced type of 14 points or more, is double-spaced using a roman font and contains 2,962 words excluding the Table of Contents, Table of Authorities and Certificate of Service.

Elizabeth J. Kruschek

Certificate of Service

The undersigned counsel for Attorneys for *Amicus Curiae*, National School Boards Association, certifies that on February 7, 2008 an original and six copies of the Brief of *Amicus Curiae* National School Boards Association were sent by FedEx for filing, to:

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