No. 15-1409

In the
Supreme Court of the United States

NEW MEXICO ASSOCIATION OF NONPUBLIC SCHOOLS,
Petitioner,
v.
CATHY MOSES AND PAUL WEINBAUM,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW MEXICOW SUPREME COURT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

INTRODUCTION

In its ruling below, the New Mexico Supreme Court explicitly acknowledged that anti-religious bigotry triggered enactment of Article XII, Section 3, of the New Mexico Constitution. Pet. App. 10a-13a. Respondents do not refute this conclusion or Petitioner's historical evidence confirming it. Instead, Respondents urge the Court to ignore Article XII, Section 3's discriminatory origins because, instead of disenfranchising only religious organizations, it applies to secular organizations as well. Respondents have no answer to Petitioner's showing that, when Article XII, Section 3 was enacted, nearly all private schools in New Mexico had some religious affiliation. Moreover, the Court has repeatedly held that efforts to disguise invidious discrimination by broadening its effects cannot redeem it from constitutional scrutiny. Thus, with closely related issues already set to be heard in *Trinity Lutheran Church* v. *Pauley*, No. 15-577, the Court should hold this petition and then—once *Trinity Lutheran* has been resolved—either set it for plenary review or grant it, vacate the decision below, and remand for further proceedings.

ARGUMENT

Respondents' hodgepodge of arguments provides no basis for denying the petition. The gist of the brief in opposition is that because "Article XII, Section 3, does not favor one religion over any others," and also impacts "private" schools, it "cannot seriously be argued" that it is "discriminatory." BIO at 8, 5-6. But both steps of Respondents' analysis are flawed. First, the Free Exercise and Establishment Clauses bar not only discrimination *among* religious denominations,

but also government discrimination against religion generally. See *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993) ("[T]he First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."). Second, as Petitioner explained, Pet. 15-16, state governments cannot justify discriminatory animus by concealing it with a veneer of neutrality. See *U.S. Dep't of Agriculture* v. *Moreno*, 413 U.S. 528, 529, 534 (1973) (looking beyond broad ban against aid to "unrelated * * * member[s] of [a] household" because true motivation was "to harm a politically unpopular group"); *Lukumi*, 508 U.S. at 534 ("Facial neutrality is not determinative."); see also *Locke* v. *Davey*, 540 U.S. 712, 725 (2004) (indicating that "animus toward religion" renders "denial of funding * * * constitutionally suspect").

Respondents' remaining arguments are similarly without merit.

First they argue that other provisions of the New Mexico Constitution would dictate the same outcome as imposed by the New Mexico Supreme Court under Article XII, Section 3. BIO at 4. But the New Mexico Supreme Court never reached those other provisions and would still have opportunity to do so if this Court granted the petition, vacated the decision below, and remanded for further proceedings.

Respondents say that "[a]t least nine other state Supreme Courts have reached the same conclusion of unconstitutionality" based on their own "constitutional provisions, similar to Article XII, Section 3." BIO at 5. But still other state courts addressing analogous claims under similar provisions have reached

the opposite conclusion. See, *e.g.*, *Oliver* v. *Hofmeister*, 368 P.3d 1270, 1275-76 (Okla. 2016); *Magee* v. *Boyd*, 175 So. 3d 79, 123-24 (Ala. 2015); *Meredith* v. *Pence*, 984 N.E.2d 1213, 1225 (Ind. 2013); *Kotterman* v. *Killian*, 972 P.2d 606, 620-21 (Ariz. 1999); *Chance* v. *Miss. State Textbook Rating and Purchasing Bd.*, 200 So. 706, 713 (Miss. 1941); *Borden* v. *La. State Bd. of Educ.*, 123 So. 655, 661 (La. 1929). But more importantly, none of Respondents' cases address whether applying their respective state Blaine Amendment to restrict funding violated the federal constitution, which is the issue here.

Respondents next contend that this matter is distinguishable from *Trinity Lutheran* because that case involves "federal funds" while this case involves funds that are "not restricted by any federal laws or regulations." BIO at 6. In fact, the exact opposite is true. The funds at issue in *Trinity Lutheran* came from the Missouri Department of Natural Resources. 788 F.3d 779, 782 (8th Cir. 2015). In contrast, the funds here are federal funds appropriated for specific purposes, including the "provision of public service." 30 U.S.C. § 191(a). If anything, this only emphasizes the supremacy that must be given to federal constitutional concerns over the animus that gave life to Article XII, Section 3.

Respondents also assert that a 1969 "constitutional amendment 'to provide free textbooks to all students, including those who attend private schools' was rejected by the voters." BIO at 7. But the motivation for the 1969 failed amendment is unknown and could have included that voters found it unnecessary considering the already-existing textbook law.

Similarly, Respondents wrongly suggest that New Mexico's 80-year history of providing free textbooks to all students was previously considered and struck down in *Zellers* v. *Huff*, 236 P.2d 949 (N.M. 1951). BIO at 9. Not so. In *Zellers*, the trial court enjoined an entirely different program through which the State was providing *religious* texts to nonpublic schools. 236 P.2d at 957, ¶ 15. Due to jurisdictional defects, even that injunction was dissolved by the State Supreme Court. *Id*. at 968, ¶ 77. And the predecessor to the textbook law at issue here was not at issue in *Zellers*. See N.M. Stat. Ann. 1941, § 55-1703. For these reasons, the New Mexico District Court and Court of Appeals both held that *Zellers* "did not control this case," Pet. App. 7a, 59a-60a, and the New Mexico Supreme Court chose not to address it, see *id.* 7a-8a.

Finally, Respondents assert that "[n]o party to these proceedings ever pleaded, argued or relied upon any provision of the United States Constitution in asserting its position." BIO at 9. Also wrong. Petitioner raised the issue at the commencement of this litigation and most recently on petition for rehearing in the New Mexico Supreme Court. See Pet. 12-13. Indeed, where a "state-court decision itself is claimed to constitute a violation of federal law, the state court's refusal to address that claim" even if raised only on "petition for rehearing will not bar [the Court's] review." *Stop the Beach Renourishment, Inc.* v. *Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 712 n.4 (2010). Especially considering the New Mexico Supreme Court's explicit acknowledgment that Article XII, Section 3, arose from religious bigotry, there is no bar to this Court considering

whether such invidious discrimination implicates obvious First Amendment concerns under the Free Exercise and Establishment Clauses.

Perhaps most important is what Respondents don't say. They never explain why they think there is no "reasonable probability" that *Trinity Lutheran* will have no effect on the outcome of this case. *Lawrence ex rel. Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (GVR "appropriate" if there is a "reasonable probability" that an intervening decision will have an impact on the matter). That is grounds enough to hold the petition.

CONCLUSION

The petition should be held pending the Court's disposition of *Trinity Lutheran*. Once *Trinity Lutheran* has been decided, the Court should set this case for plenary review or grant the petition, vacate the decision below, and remand for further proceedings.

Respectfully submitted.

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