No. 15-577

IN THE

Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, IN HER OFFICIAL CAPACITY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE*, LEGAL AND RELIGIOUS HISTORIANS, IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici are legal and religious historians and constitutional scholars who have studied, taught, and written in the areas of constitutional and religious history and the First Amendment. Many have substantial expertise on the time period and events discussed in this brief. *Amici* file this brief in support of Respondent Director Pauley and in response to arguments raised by Petitioner Trinity Lutheran Church and supporting *amici* concerning an alleged historical anti-religious basis for Article I, § 7 of the Missouri Constitution. *Amici* have a professional interest in the proper disposition of this issue and believe that the Court should decide the case on a complete and accurate historical account.

Amici are listed with their institution for identification only:

Nina J. Crimm, J.D., L.L.M., Professor of Law, and Frank H. Granito, Jr., Faculty Scholar (Retired), St. John's University School of Law;

Paul Finkelman, Ph.D., President William McKinley Distinguished Professor of Law, Emeritus, Albany Law School;

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[1] Pursuant to this Court's Sup. Ct. R. 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and its counsel made such a monetary contribution. The Clerk of this Court has noted on the docket the blanket consent of the Petitioner and Respondent to the filing of *amicus* briefs.

Ronald B. Flowers, Ph.D., John F. Weatherly Emeritus Professor of Religion, Texas Christian University;

Sarah Barringer Gordon, J.D., Ph.D., Arlin M. Adams Professor of Constitutional Law and Professor of History, University of Pennsylvania;

Steven K. Green, J.D., Ph.D., Fred H. Paulus Professor of Law and Affiliated Professor of History, Willamette University;

Mark D. McGarvie, J.D., Ph.D., Visiting Scholar, Institute for the Bill of Rights, Marshall-Wythe School of Law, College of William and Mary;

Frank S. Ravitch, J.D., L.L.M., Professor of Law and Walter H. Stowers Chair in Law and Religion, Michigan State University College of Law;

David Sehat, Ph.D., Associate Professor of History, Georgia State University;

Laura S. Underkuffler, J.D., S.J.D., J. Forest White Professor of Law, Cornell Law School; and

Laurence H. Winer, J.D., Ph.D., Professor of Law and Faculty Fellow, Arizona State University.

INTRODUCTION AND SUMMARY OF ARGUMENT

Trinity Lutheran challenges the legitimacy of Article I, § 7 of the Missouri Constitution ("Article I, § 7" or "the Article"), alleging the Article arose from pervasive anti-Catholic animus. No evidence suggests that Article I, § 7—or the majority of state no-funding provisions that preceded it—were enacted out of anti-Catholic or anti-religious animus. Regarding the Blaine Amendment of 1876, the historical record reveals numerous rationales for that proposal, with

anti-Catholicism being only a minor one. Finally, there is no connection between Article I, § 7 and the Blaine Amendment, as the former was drafted months before the latter.

ARGUMENT

I. The Court Should Rely Cautiously on History, With an Appreciation for Complexity.

For the first time on appeal, Trinity Lutheran argues that Article I, § 7 shares a supposed "credible connection" with the historic Blaine Amendment.[2] *See Locke v. Davey*, 540 U.S. 712, 723 n.7 (2004) ("Neither Davey nor amici have established a credible connection between the Blaine Amendment and . . . the relevant constitutional provision."). While Director Pauley's merits brief discussed the Blaine Amendment, Trinity Lutheran omitted the historic argument even while simultaneously highlighting *Locke* repeatedly. The historicity argument is waived.

Nonetheless, *amici* wish to set the historical record straight, lest an inaccurate version of that history find its way into the legal record. Trinity Lutheran asserts that enforcing Article I, § 7 violates its rights to free exercise of religion and equal protection of the laws.

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[2] Trinity Lutheran has challenged the application of Article I, § 7 as infringing on its free exercise and equal protection rights. Trinity Lutheran does not challenge Article IX, § 8, the second no-funding provision in the Missouri Constitution. Similarly, the Eighth Circuit ruled only on Article I, § 7. *See Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779 (8th Cir. 2015). However, the Eighth Circuit majority also discussed Article IX, § 8, and several *amici* have raised arguments against the constitutionality of both no-funding provisions, seeing them as evincing the same discriminatory intent. *See id.* at 783, 787; *see also* Br. for Institute for Justice 23; Br. for The Union of Orthodox Jewish Congregations of America 5, 19.

Pet'r's Br. 11, 22. In *Locke*, this Court allowed Washington to rely on a similar constitutional no-funding provision to deny a state education grant applicant from applying those monies toward a religious training program.[3] *See Locke*, 540 U.S. at 719–24. Acknowledging legitimate reasons for the Washington provision—which the Washington Supreme Court noted affords "far stricter [protection] than the more generalized prohibition of the first amendment to the United States Constitution," *Weiss v. Bruno*, 509 P.2d 973, 978 (Wash. 1973)—the Court upheld the state's action against Davey's free exercise and equal protection claims. *Locke*, 540 U.S. at 722, 724.

Trinity Lutheran asserts the *Locke* holding's corollary. If the rationales behind Article I, § 7 were illegitimate or corrupted by allegedly bigoted history, then Trinity Lutheran's free exercise and equal protection claims should prevail. The history does not support any such conclusion about illegitimacy or corruption.

This Court should view simplified historical narratives with caution. The bulk of commentary concerning the Blaine Amendment and the development of the no-funding principle has cast a net that is wide in criticism, but not deep in analysis.

History is "complex," and serves as a poor resource for drawing legal conclusions. John Fea, *Was America Founded as a Christian Nation?* (2011). Legal analysis

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[3] This Court permitted the denial even though such use would have been permissible pursuant to the Establishment Clause of the United States Constitution as a result of *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986).

and historical methodology use different processes and ask different questions. The law desires certainty; history seeks understanding human complexity. *See* David Hackett Fischer, *Historians' Fallacies: Toward a Logic of Historical Thought* 4–5 (1970); Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601, 602 (1995); Charles A. Miller, *The Supreme Court and the Uses of History* 195 (1969). In the words of Mark DeWolf Howe: "The complexities of history deserve our respect." Mark DeWolf Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* 176 (1965).

The same caution should apply to Trinity Lutheran's oversimplification of the no-funding provisions' histories. The no-funding principle, based on notions of religious liberty and freedom of conscience, arose prior to the rise of significant Catholic parochial schooling and independently of the nativist anti-Catholic movement. Specifically, no evidence ties Missouri's no-funding provisions to anti-Catholic motivations.

II. The No-Funding Principle Arose Independently of Anti-Religious Animus.

The no-funding principle developed in conjunction with the rise of common schools in the early nineteenth century. During the nation's founding, public education was practically nonexistent. *See* Carl Kaestle, *Pillars of the Republic: Common Schools and American Society* 13–29 (1983); David Nasaw, *Schooled to Order: A Social History of Public Schooling in the United States* 30, 34 (1979). Following the Revolution, early educational reformers such as Benjamin Franklin, Thomas Jefferson, Benjamin Rush, and Noah Webster agitated for universal public schooling, believing childhood education indispensable to the new republic's stability. *See* Noah Webster,

On Education of Youth in America, *in* ESSAYS ON EDUCATION IN THE EARLY REPUBLIC 65–66 (Frederick Rudolph ed., 1965). The early education advocates insisted schooling be moral but nonsectarian for two reasons. Steven K. Green, *The Bible, the School, and the Constitution: The Clash That Shaped Modern Church-State Doctrine* 13–16 (2012). First, proponents wanted the common schools to appeal to the largest number of children and parents. *Id.* Second, advocates wanted to avoid sectarian emphases which they believed caused religious divisiveness rather than promoting cultural unity. *Id.* Early schools thus used a nonsectarian curriculum and avoided religious differences by teaching "universal" Christian values. *See* Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J. L. & POL. 65, 74 (2002).

Common schools supported by tax revenues gradually replaced most existing Protestant denominational schools. Green, *supra*, *The Bible, the School, and the Constitution*, at 13–44. Advocates then pressured state legislatures to reserve state "school funds" for these new public schools. *Id.* Connecticut created one early fund, enacting a constitutional provision that prohibited school fund monies from "divert[ing] to any other use than the encouragement and support of public, or common schools . . . ." Conn. Const. of 1818, art. VIII, § 2.

Similarly, in New York, where early law authorized cities and towns to distribute the school funds, the initial battles over school funding arose between Protestant denominational schools and the Free School Society (soon renamed the Public School Society). Green, *supra*, *The Bible, the School, and the Constitution*, at 45–92. In 1824 and 1830, the Free School Society objected to petitions from a Baptist

school and a Methodist school, respectively, to share in the city's allotment from the state school fund. *Id*. at 52–54. In both instances, the Society argued that public funds should be reserved for common schools. *Id.* Diverting funds for religious schooling would cause competition and rivalry among faiths while also "impos[ing] a direct tax on our citizens for the support of religion." *Id*. at 48. In each case, the New York City Common Council agreed, opining that "to raise a fund by taxation, for the support of a particular sect, or every sect of Christians . . . would unhesitatingly be declared an infringement of the Constitution, and a violation of our chartered rights." *Id.* at 51. The Council could not "perceive any marked difference in principle, whether a fund be raised for the support of a particular church, or whether it be raised for the support of a school in which the doctrines of that church are taught as a part of the system of education." William Oland Bourne, *History of the Public School Society of the City of New York* 49–55, 70–75, 139–40 (1870); *see also* John Webb Pratt, *Religion, Politics, and Diversity: The Church-State Theme in New York History* 158–203 (1967); Diane Ravitch, *The Great School Wars: New York City, 1805–1973* 3–76 (1974).

These early actions limiting public school funds to common schools arose before either the first significant wave of Irish Catholic immigration or the systematic establishment of Catholic parochial schooling.[4] Ray Allen Billington, *The Protestant Crusade,*

[4] The New York Legislature later rejected a petition from Bishop John Hughes for a share of the public school fund for Catholic parochial schools. The Legislature enacted a law prohibiting public funds to any school where "religious sectarian doctrine or tenet shall be taught, inculcated, or practiced." Green,

1800–1860 35–37 (1938); Peter Guilday, *The National Pastorals of the American Hierarchy, 1792–1919* 191 (1923).[5] Thus, many locales established the no-funding principle before the first true controversies arose over Catholic school funding.

III. The Blaine Amendment Arose From a Variety of Motivations, of Which Anti-Catholicism was Only One Factor.

Members of this Court have questioned the legitimacy of the federal no-funding principle and corresponding state constitutional principles based on alleged anti-Catholic origins. *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion). Scholars and advocates have raised similar claims. The chief villain has long been the Blaine Amendment, proposed at a time of heightened tensions between Protestants, Catholics, and secularists. *See* Joseph P. Viteritti, *Choosing Equality: School Choice, the Constitution, and Civil Society* 18 (1999); *see also* Philip Hamburger, *Separation of Church and State* 335 (2002). If passed, the Blaine Amendment would have expressly applied the Religion Clauses to the states and prohibited the public funding of any private religious school by any

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supra, *The Bible, the School, and the Constitution*, at 67. Although the 1842 law may have responded to the Catholic petition, the no-funding principle had already been established in New York for 20 years. Bourne, *supra*, at 496–525; Pratt, *supra*, at 178–90; Ravitch, *supra*, at 46–76; Green, *supra*, *The Bible, the School, and the Constitution*, at 54–68.

[5] Although the Catholic Bishops emphasized the importance of religious education in earlier Pastoral Letters, not until the Pastoral Letter of 1852 did they call for "the establishment and support of Catholic schools; make every sacrifice which may be necessary for this object . . . ." Guilday, *supra*, at 191.

state entity. Ward M. McAfee, *Religion, Race and Reconstruction* 208 (1998).

Opponents malign the 1876 Blaine Amendment as an unfortunate episode in Catholic bigotry. *See Mitchell*, 530 U.S. at 828–29; *see also* Charles L. Glenn, Jr., *The Myth of the Common School* 252–54 (1988); Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. & POL'Y REV. 113, 145–47 (1996). Although anti-Catholic animus may have motivated some supporters, this is an incomplete account. The Blaine Amendment was the culmination of eight years of heightened conflict over the "School Question." McAfee, *supra*, at 105–24. After the Civil War, the School Question focused on more than parochial school funding; the issue was part of a larger controversy over the federal government's role in public education. The debate centered on three points: (1) whether education should be universal for all social and economic classes and races (including the children of recently freed slaves); (2) how to ensure the financial security of the bourgeoning public education system; and (3) whether the education should be secular, nonsectarian, or more religious. *Id.* The battle lines were not drawn solely between Catholics and nativists. The debate also engaged liberal Protestants, free-thinkers, and Jews who opposed the religious exercises and the nonsectarian character of the nation's schools; conservative Protestants who sought to preserve or increase the Protestant character of public schools; education and civil rights reformers who sought a larger government role in funding and regulating public education; Democratic and Republican partisans who had little interest in education issues, but viewed Catholics as a voting block; and state-rights advocates who saw no

government role in education. Green, *supra*, *The Bible, the School, and the Constitution*, at 179–223.

The impetus for the Blaine Amendment came from a controversy over an 1869 Cincinnati school board decision abolishing daily prayer and Bible readings. Although initially enjoined by a trial court, a unanimous Ohio Supreme Court upheld the Board's action. *Board of Education v. Minor*, 23 Ohio St. 211, 254 (1872). Closely followed throughout the country, the Cincinnati "Bible War" reignited a debate over the religious character of public schooling. Following the Cincinnati case, the New York and Chicago city school boards prohibited Bible reading and religious instruction in their respective schools, with Michigan and other northern states adopting similar bans. *The Bible in Schools*, N.Y. Times, Dec. 9, 1872, at 8. The *New York Tribune* opined in 1875 that the "School Question" "excites sharp controversy" and was threatening "the very existence of the republic . . . . Sooner or later the broad question must be met, 'Whether popular education belongs to the State or the churches.'" *A Coming Struggle*, N.Y. Tribune, July 8, 1874, at 4.

From this climate, President Ulysses Grant (and ultimately Representative James G. Blaine) proposed amending the Constitution to settle the School Question. As introduced by Blaine, the amendment sought to achieve two things: (1) apply the First Amendment directly to state actions; and (2) prohibit the allocation of public school funds or other public resources to religious institutions. Grant's proposal, as represented in his annual message to Congress on December 7, 1875, more broadly would have required

states to fund free public schools. McAfee, *supra*, at 4–5, 15–21, 105–24.[6]

Certainly, many observers viewed the amendment as crass political maneuvering designed to appeal to anti-Catholic voters. Others saw opportunity to resolve the larger School Question while avoiding religious strife. Both the Republican *New York Times* and the Democratic *New York Tribune* supported Blaine's proposal as a way of defusing the religious issue. *Reading the Message*, N.Y. Times, Dec. 8, 1875, at 6; *Editorial*, N.Y. Times, Dec. 15, 1875, at 6; *The Message*, N.Y. Tribune, Dec. 8, 1875, at 6; *The News This Morning*, N.Y. Tribune, Dec. 15, 1875, at 4 ("Thinking men of all parties see much more to deplore than to rejoice over, in the virulent outbreak of discussions concerning the churches and the schools, and welcome any means of removing the dangerous question from politics as speedily as possible."). The nation's leading religious journal, *The Independent*, also noted the School Question's complexity, insisting that the funding issue "bring[s] to the surface the whole subject of Church and State, civil government and religion, in their relations to each other."[7] Samuel

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[6] "No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, not any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations." 4 CONG. REC. 205 (1875).

[7] According to *The Independent*, the School Question involved more than the issue of parochial school funding, but also included issues of federal control over public education and whether public schools would retain their Protestant nonsectarian character;

T. Spear, *Religion and the State, or The Bible and the Public Schools* 24 (1876). Significantly, New York Senator Francis Kernan, a Catholic, voiced his support for Blaine's original proposal.[8] 4 CONG. REC. 5453, 5580 (1876).

Therefore, a combination of at least three distinct issues—whether public schooling should be secular or religious; whether the national government should mandate schooling at the state or local levels; and how best to defuse religious strife—fueled the debate surrounding the Blaine Amendment. Despite inflamed rhetoric, most observers viewed the controversy in broader terms about the American educational system's future.[9] Courts should thus view the Blaine Amendment within this larger controversy.

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would become more Protestant in their practices; or would become "purely secular." Spear, *supra*, at 17–18, 21–22, 44–66.

[8] Kernan stated that Blaine's proposal

> met with no considerable opposition in any quarter. It declares that money raised in a State by taxation for the support of public schools or derived from any public land therefor or any public lands devoted thereto shall not be under the control of any religious sect or denomination, nor shall any money so raised by divided among the sects or religious denominations. *Were this before the Senate I would support it.*

4 Cong. Rec. 5453–5580 (emphasis added).

[9] Senate debates reflect the sheer magnitude of issues surrounding the issue: debates centered on federalism, the states' rights to control education, the financial security and religious character of public schools, the partisan nature of the amendment and, finally, the proposed ban on parochial school funding. *See* 4 CONG. REC. 5580–95 (1876).

IV. There Is No Evidence That Anti-Catholicism Played a Significant Role in the Development of Many Early State Constitutions.

Critics argue many early no-funding provisions arose primarily out of a pervasive anti-Catholic animus and the influence of antebellum nativist groups. While nineteenth century nativist groups such as the Know-Nothing Party supported nonsectarian public education and opposed the funding of parochial schools, scholars agree that Know-Nothings were relatively ineffective in enacting anti-Catholic legislation whenever they were in power. Billington, *supra*, at 412–17; *see* John R. Mulkern, *The Know-Nothing Party in Massachusetts* 102–03 (1990); Lloyd P. Jorgenson, *The State and the Non-Public School* 87–89, 96–97 (1987). Even then, anti-Catholicism cannot explain the basis for no-funding provisions in parts of the country with no significant religious dissension or nativist activity. Michigan adopted the first express no-funding provision even though the state lacked a significant number of Catholic parochial schools and preceded the wave of Catholic immigration.[10] Mich. Const. of 1835, art. I, § 5; *see* Thomas M. Cooley, *Michigan: A History of Governments* 306–29 (8th ed., 1897). The Michigan Constitution served as the model for similar constitutional provisions in Wisconsin (1848), Wis. Const. art. I, § 18; Indiana (1851), Ind. Const. art. I, § 6; Ohio (1851); Ohio Const. art. VI, § 2; and Minnesota (1857), Minn. Const. art. I, § 16—all states without significant conflicts over parochial

[10] Apparently, Catholic and Presbyterian clergy were instrumental in the movement to establish universal nonsectarian schooling at both the collegiate and common school levels. Cooley, *supra*, at 309–11.

school funding. Separate studies of both Indiana and Wisconsin indicate there was "no evidence that the lawmakers and constitution makers were anti-religious in making the [no-funding] requirements, or that they harbored a prejudice against any sect." Alice E. Smith, *The History of Wisconsin I* 588–93 (1985); Richard N. Current, *The History of Wisconsin II* 162–69 (1976); *see* Joseph A. Ranney, *"Absolute Common Ground": The Four Eras of Assimilation in Wisconsin Education Law,* 1998 WIS. L. REV. 791, 793, 796–97 (1998) (placing the development of the parochial school systems after the enactment of the 1848 Constitution).[11] The Indiana Constitution served as the basis for a similar provision in Oregon. *See* Or. Const. art. I, § 5; *see also The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857* 302 (Charles Henry Clay ed., 1926). The debates during the Oregon convention do not contain statements hostile to Catholicism. One Oregon delegate articulated his understanding of the constitutional basis for the no-funding provision, stating he did not:

> believe that congress had any right to take the public money, contributed by the people, of all creeds and faith [sic], to pay for religious teachings. It was a violent stretch of power,

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[11] The no-funding provision was not "a remnant of nineteenth century religious bigotry promulgated by nativist political leaders who were alarmed by the growth of immigrant populations and who had a particular disdain for Catholics." Barclay Thomas Johnson, *Credit Crisis to Education Emergency: The Constitutionality of Model Student Voucher Programs Under the Indiana Constitution*, 35 IND. L. REV. 173, 203 (2001). Even Professor Jorgenson, a critic of the common school movement, documented no Catholic animus in his study of the creation of the Wisconsin public education system. *See* Lloyd P. Jorgenson, *The Founding of Public Education in Wisconsin* 68–93 (1956).

> and an unauthorized one. A man in this country had a right to be a Methodist, Baptist, Roman Catholic, or what else he chose, but no government had the moral right to tax all of these creeds and classes to inculcate directly or indirectly the tenets of any one of them.

Id. at 305 (statement of Mr. Williams).

Similarly, the Catholic Church and Cincinnati public school officials had amicable relations prior to the 1851 constitutional amendment. The *Catholic Telegraph* praised the tolerance and "liberality which characterize[d] the Cincinnati [School] Board" and its policies. *Editorial*, Catholic Telegraph, Sept. 3, 1840, at 288. The Ohio Constitution served as the model for the no-funding provision of the Kansas Constitution. Kan. Const. art VI, § 6(c).

Critics somewhat inaccurately credit the Blaine Amendment as the model for twenty–one state constitution no-funding provisions over the next thirty–five years. *See generally* Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 BYU L. REV. 295 (2008) (demonstrating that the momentum propelling the enactment of no-funding provisions preceded the Blaine Amendment, such that states would likely have adopted such provisions irrespective of the events at the national level). The 1870s witnessed multiple proposals for an education-related constitutional amendment, most of which arose from causes other than Catholic animus—and any of which may have influenced subsequent provisions. *See* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL. HIST. 38, 47–55 (1992) (discussing the various competing proposals); Jill Goldenziel, *Blaine's Name in Vain?: State Constitutions, School Choice,*

and Charitable Choice, 83 DENV. U. L. REV. 57, 66–69 (2005).

No-funding principles arose as a result of a complex dynamic of forces intersecting over the issue of American public schooling. Both supporters and opponents were motivated by concerns about universal free public education, protecting the integrity of public school funding, the obligation of states to provide universal education, the federal role in ensuring and funding education at the state level, and the funding of religious instruction and training. Although animus may have motivated some supporters of the various state no-funding provisions, proponents had many legitimate rationales upon which to base their support, as well as numerous models extending back to 1835. Similarly, scant evidence suggests that anti-Catholic animus perpetrated the passage of either Article in the Missouri Constitution.

Thus, little evidence suggests anti-Catholicism played a significant role in the development of many early no-funding provisions. Instead, state constitution drafters were primarily concerned with financial security and the survival of the nascent public schools. Green, *supra*, *Insignificance of the Blaine Amendment*, at 327.

V. The 1870 and 1875 No-Funding Provisions of the Missouri Constitution Were Adopted for Legitimate Reasons in the Absence of Anti-Catholic Animus.

The Missouri Constitution contains three provisions that prohibit expending public monies in support of churches, sects, religious denominations, religious schools, or in aid of religion. The three provisions, while enacted at different times, demonstrate a strong

commitment among Missouri citizens to prevent the state from financially supporting religion and to ensure the integrity and financial stability of public education. The drafters of these various provisions did not act with prejudicial motives against one or more religions.

The first provision directs that "no person can be compelled to erect, support, or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher . . . ." Mo. Const. art. I, § 6. Later amendments expanded the latter clause to include "any sect, church, creed or denomination of religion." *Id*. Non-compelled support provisions commonly appeared in early state constitutions, tracing back to the Pennsylvania Constitution of 1776, Declaration of Rights, Art. II, and the Virginia Statute for Religious Freedom. The original Missouri Constitution drafters followed this precedent. Goldenziel, *supra*, at 64–65.

In 1870, the Missouri General Assembly considered amendments to the 1865 Constitution. The 1865 Constitution required the General Assembly to "establish and maintain free schools for the gratuitous instruction of all persons between the ages of five and twenty-one years." Mo. Const. of 1865, art. IX, § 1; *see also* William E. Parrish, et al., *Missouri: The Heart of the Nation* 202 (1980). That constitution also provided for the security of the public school fund, requiring that the "annual income of [the] fund, together with so much of the ordinary revenue of the state as may be necessary, shall be faithfully appropriated for establishing and maintaining the free schools . . . and for no other uses or purposes whatever." Mo. Const. of 1865, art. IX, § 5.

The inevitable increase in schools and sheer numbers of students placed strains on the state school fund, which public school advocates believed were vulnerable from private religious schools.[12] J. Michael Hoey, *Missouri Education at the Crossroads: The Phelan Miscalculation and the Education Amendment of 1870*, 95 MO. HIST. REV. 372, 377 (2001). In his report to the Missouri legislature, State School Superintendent Thomas Parker recommended a constitutional amendment to secure the school fund: "No portion of the funds now used for the support of public schools, nor the income therefrom, shall ever be applied in aid of any school or institution established or controlled by any religious body, sect, or denomination." *Id.* at 373. In response, General Assembly members overwhelmingly approved a proposed education amendment, beating back an amendment by a Democratic representative that would have divided the school fund between public and private schools.[13] *Id.* at 383, 390–93.

In 1875, Missouri held a constitutional convention, resulting in a revised constitution and the re-adoption of the no-compelled support clause, the provision securing the public school fund, and the 1870 education amendment. The education committee also adopted a resolution barring appropriating public

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[12] According to Hoey, in 1870 approximately 280,000 students attended public schools with an additional 40,000 students attending private and parochial schools. Students in Catholic schools comprised approximately one-half of that latter number. Hoey, *supra*, at 377.

[13] Missouri voters approved the education amendment by a 10-to-1 margin, with the "no" vote only registering an average of approximately 14 percent in the 10 counties with the heaviest Catholic population. *Id.* at 390–91.

money to "the different religious denominations, creeds, sects, or churches of this State to be used by such religious denominations, creeds, sects or churches for educational purposes." Aaron E. Schwartz, *Dusting Off the Blaine Amendment: Two Challenges to Missouri's Anti-Establishment Tradition*, 72 MO. L. REV. 339, 373 (2007). The convention adopted this resolution without dissent or any allegations of anti-Catholic motivations. In fact, Democrats—generally supportive of Catholics—dominated both the education committee and the convention as a whole. *Id.* at 372–73. The new educational amendment passed without controversy. *See id.* at 375–76.

No evidence suggests that religious controversies outside Missouri influenced delegates. *See id.* at 372–76. In fact, the convention met during May and June of 1875, months before both President Grant's Des Moines speech calling for prohibition of sectarian schools' funding and Representative Blaine's proposed amendment on December 14. Green, *supra*, *The Bible, the School, and the Constitution*, 187–94. Nothing connects Article I, § 7 and the Blaine Amendment. Nor does any evidence suggest Article I, § 7 was motivated by anti-Catholic animus. Therefore, no "credible connection" exists between Article 1, § 7 and religious animus.

CONCLUSION

This Court should affirm the Eighth Circuit's decision.

Respectfully Submitted,

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