UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

BISHOP OF CHARLESTON, et al.
Plaintiffs,

v.

MARCIA ADAMS, et al.,
Defendants.

Case No. 2:21-cv-1093-BHH

MEMORANDUM IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

"No reasonable person with an enlightened mind would attempt to defend the racially insidious motives of Benjamin Ryan 'Pitchfork Ben' Tillman. . . His segregationist politics and ardent efforts to disenfranchise African-Americans were as abhorrent in the late nineteenth century as they are now. Likewise, the contemporaneous anti-immigrant, anti-Catholic campaign of U.S. Congressman James G. Blaine and the American Protective Association offend all well-reasoned standards of decency, tolerance, and fairness." *Bishop of Charleston v. Adams*, No. 2:21-cv-1093-BHH, 2021 U.S. Dist. LEXIS 89775, at *16 (D.S.C. May 11, 2021) (ECF-34).

The policies advanced by Tillman and Blaine live with us still, as the South Carolina Blaine Amendment, in modified form, remains on the books, bringing their legacies into the present day. While this memorandum will discuss the 1895 constitution, its focus will be on answering the two questions this Court needs to decide this case: (1) Does the legal framework require the Court to view the 1972 revision thru the lens of the 1895 original? And (2) Regardless, would the 1972 amendment fail the discriminatory intent test if evaluated standing on its own?

The answer to both questions is yes. Historical background is always part of the *Arlington Heights* analysis to determine whether a facially neutral law was adopted for discriminatory purposes. But laws that are "rooted in" a prior or "antecedent" version especially bear the weight of the earlier enactment's animus. The historical record here shows that the West Committee took

a "revise and tweak" approach to the 1895 Constitution rather than a "start from scratch" approach, such that the current version must bear the full weight of the original's animus. But even were that not the case, racial and religious animus were substantial motivating factors for the West Committee in the 1960s, such that the 1972 provision fails judicial scrutiny on its own.

STANDARD OF REVIEW

Summary judgment should be granted if "taking the facts in the best light for the nonmoving party, no material facts are disputed and the moving party is entitled to judgment as a matter of law." *Goodman v. Diggs*, 986 F.3d 493, 498 (4th Cir. 2021). This case is well-suited to summary judgment: the facts are undisputed, relying on governmental actions, expert reports, and the unchallenged affidavits of plaintiffs testifying to matters easily confirmed in the public record. Thus, this case essentially presents "the purely legal question" that "is always capable of decision at the summary judgment stage." *Ray v. Roane*, 948 F.3d 222, 228 (4th Cir. 2020).

If Plaintiffs prove their case that the 1972 Amendment embodied and retained racial and religious animus, then the amendment must survive strict scrutiny. *Washington v. Davis*, 426 U.S. 229, 241-242 (1976); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993).

FACTS AND BACKGROUND

This case starts from a simple premise: religious and independent schools and colleges deserve the same access to COVID-19 relief funds as any other similarly situated institutions. But that is not possible in South Carolina because when the federal CARES, CRISSA, or ARPA[1] funds flow through the South Carolina state treasury, they become subject to the South Carolina state

[1] Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. No. 116-136); Coronavirus Response and Relief Supplemental Appropriations Act of 2021 (Pub. L. No. 116-260); American Rescue Plan Act of 2021 (Pub. L. No. 117-2).

constitution, *Adams v. McMaster,* No. 28000, 2020 S.C. LEXIS 140, *14 (Oct. 7, 2020), including Article XI, Section 4 of the South Carolina Constitution, which provides, "No money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution."

Because of this Blaine Amendment[2], Plaintiff Bishop of Charleston, a Corporation Sole ("the Diocese"), was unable to participate in a Governor's Emergency Education Relief (GEER) grant program worth $32 million. Decl. of William Ryan ¶¶ 5, 9, ECF No. 6-2. The Diocese was also prevented from participating in a nonprofit COVID-19 relief program worth $25 million that Act 154 authorized. *Id*. Plaintiff South Carolina Independent Colleges and Universities, Inc. (SCICU) includes among its membership five historically black colleges and universities who collectively were denied $1.6 million in GEER funds. First Decl. of Jeff Perez ¶¶ 4, 7-8, 13-15 & Ex. B (ECF No. 6-5). SCICU members are being denied a further $12 million that that they applied for from a higher education relief fund created by Act 154. *Id.* at ¶ 7. Plaintiffs fear that moving ahead, they will be denied access to new COVID-19 relief funds that may become available after the General Assembly acts to budget the ARPA money. Second Decl. of Jeff Perez, ¶ 9. Plaintiffs

[2] There is no doubt the original 1895 provision is properly classified as a "Blaine Amendment." Graham Expert Report, pg. 28 ("[M]any states later adopted the Blaine amendment in their state constitutions, including by South Carolina in its 1895 Constitutional Convention."). Whether or not the 1972 revision carries through this Blaine-ness, such that it should also be called a Blaine Amendment, is a matter of debate in this case. Plaintiffs call the 1972 revision a Blaine Amendment in accord with the Attorney General of South Carolina, Op. S.C. Atty. Gen., 2018 S.C. AG LEXIS 4, *7, and numerous scholars. *See, e.g*., Ellen Halstead, *After Zelman v. Simmons-Harris, School Voucher Programs Can Exclude Religious Schools,* 54 Syracuse L. Rev. 147, 169 n.188 (2004); Steven Calabresi et al., *Individual Rights Under State Constitutions in 2018: What Rights Are Deeply Rooted in a Modern-Day Consensus of the States?,* 94 Notre Dame L. Rev. 49, 58 n.31 (2018); Durham, Cole. *§4:46. Chart: State Constitutional Protections and Limitations on Religion,* Religious Organizations and the Law, (Robert Smith et al. eds., 2020).

are also denied access to $21 million in GEER II money for which they would otherwise be eligible to apply. *Id*. at ¶ 6. Plaintiffs' goal is to secure fair, equal access to these relief funds.

ARGUMENT

I. Courts use the historical record to discern whether a facially neutral law was adopted with a racially or religiously discriminatory animus as a motive. This *Arlington Heights* analysis is used to evaluate whether facially neutral laws were motivated by discriminatory purposes.

A. *Arlington Heights* sets the legal standard for proving discriminatory intent was a motivating factor.

"In *Village of Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252 (1977), the Supreme Court addressed a claim that racially discriminatory intent motivated a facially neutral governmental action. The Court recognized that a facially neutral law, like the one at issue here, can be motivated by invidious racial discrimination. If discriminatorily motivated, such laws are just as abhorrent, and just as unconstitutional, as laws that expressly discriminate on the basis of race." *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 220 (4th Cir. 2016) (en banc). This is so because "the Equal Protection Clause is offended by sophisticated as well as simple-minded modes of discrimination." *United States v. Fordice*, 505 U.S. 717, 729 (1992).

The Supreme Court later decided it would use the same *Arlington Heights* tools to discern discriminatory intent for religious-animus claims under the First Amendment as in racial-animus claims under the Fourteenth Amendment. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 540 (1993). In addition to racial and religious animus, the Court should also be aware of anti-immigrant animus. *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 970 (9th Cir. 2017).

Though *Arlington Heights* and *Church of the Lukumi Babalu Aye* were both decided while reviewing a municipal ordinance, "[t]his same analysis applies to a provision in a state constitution." *United States v. Louisiana*, 9 F.3d 1159, 1167 (5th Cir. 1993). *See Hunter v. Underwood*, 471 U.S. 222, 223 (1985) (evaluating an Alabama constitutional provision).

In such a case, the plaintiffs' responsibility is to show "an invidious discriminatory purpose was a motivating factor in the relevant decision." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020) (plurality). A plaintiff "need not show that discriminatory purpose was the sole or even a primary motive for the legislation, just that it was a motivating factor." *N.C. State Conference*, 831 F.3d at 220 (cleaned up; emphasis original).

How does a court determine whether racial or religious discrimination was a motivating factor behind a law? The court undertakes a "sensitive inquiry" and uses a "holistic approach" that looks to "the historical background of the challenged decision; the specific sequence of events leading up to the challenged decision; departures from normal procedural sequence; the legislative history of the decision; and of course, the disproportionate impact of the official action -- whether it bears more heavily on one race [or religion] than another." *N.C. State Conference*, 831 F.3d at 220-21 (cleaned up); *see also Thai Meditation Ass'n v. City of Mobile*, 349 F. Supp. 3d 1165, 1190 (S.D. Ala. 2018) (describing the same test, as to religion).

Admittedly, "[p]roving the motivation behind official action is often a problematic undertaking." *Hunter*, 471 U.S. at 228. But this won't be one of those difficult cases. We have the convention journal of 1895, the minutes and reports of the West Commission, numerous articles from contemporaneous newspapers, and learned treatises as background, with two expert reports to guide our way. *See N.C. State Conference*, 831 F.3d at 229. The politicians in charge in the 1890s were not shy about their motives; the voters who elected them wanted these policies, and the politicians were only too happy to brag about delivering for their constituents.[3] By the 1960s

[3] Graham Expert Report, pg. 10 ("To get elected to public office in South Carolina required a candidate to validate, to some degree of vigor, public sympathy if not outright endorsement of racist views. Racist oratory was just a tool to win elections. Streaming from Tillman, the more strident the racist view as necessary, the better.").

and 1970s, politics had evolved a bit, and though voters generally supported segregation of the races in schools and other public spaces, politics was run in smoke-filled backrooms rather than in the open.[4] Thus, the direct historical record is sparser in the modern era, but "discriminatory intent need not be proved by direct evidence." *Rogers v. Lodge*, 458 U.S. 613, 618 (1982). A smoking gun piece of evidence is not required; an "invidious discriminatory purpose may often be inferred from the totality of the relevant facts . . . ." *Washington v. Davis*, 426 U.S. 229, 242 (1976). Here, the relevant context and some direct evidence make clear the racial and religious prejudice motivating the West Committee in the 1960s.

B. The *Arlington Heights* analysis, as explained in *Fordice*, raises the defendants' burden if the plaintiffs show the 1972 provision is rooted in the 1895 provision.

This Court is rightly concerned with the amendment of 1972, not the constitution of 1895, because it is the amendment of 1972 that is currently on the books. What weight should be granted to the prior history of 1895 in analyzing the 1972 provision?

Under *Arlington Heights*, "the historical background and specific sequence of events leading up to the challenged decision are relevant factors in determining whether discriminatory purpose was a motivating factor in the decision." *NAACP, Inc. v. City of Myrtle Beach*, No. 4:18-cv-00554-SAL, 2020 U.S. Dist. LEXIS 222029, at *6 (D.S.C. Nov. 26, 2020).

In *N.C. State Conference*, the Fourth Circuit began its analysis of a 2013 voting law by looking at the state's history, from slavery through Jim Crow to the present. "Examination of North Carolina's history of race discrimination and recent patterns of official discrimination, combined with the racial polarization of politics in the state, seems particularly relevant in this inquiry. The district court erred in ignoring or minimizing these facts." 831 F.3d at 223. The Court then

[4] South Carolina politics at this time was "a system in which most public policy was made in private, with few brakes on the conduct of those at the top." Graham Expert Report, pg. 47, n.60 (quoting a *New York Times* article).

chastised the District Court a second time for ignoring this history: "In considering Plaintiffs' discriminatory results claim under § 2, the district court expressly and properly recognized the State's 'shameful' history of 'past discrimination.' But the court inexplicably failed to grapple with that history in its analysis of Plaintiffs' discriminatory intent claim." *Id*.

Thus, even if the Court concludes that there is not a direct tie between the 1895 provision and the 1972 amendment, the history of race- and religion-based discrimination in public funding of nonprofit social-service providers remains "particularly relevant to this inquiry" and should be the Court's starting point for its work as part of the "historical background" analysis. *N.C. State Conference of the NAACP v. Raymond*, 981 F.3d 295, 305 (4th Cir. 2020).

This Court should conclude that the 1895 provision is not only part of the general "historical background" of the 1972 amendment, but is the "traceable root" of the 1972 amendment, and therefore bears the full brunt of the 1895 history. "Once it is determined that a particular policy was originally adopted for discriminatory reasons, the *Fordice* test inquires whether the current policy is 'traceable' to the original tainted policy, or is 'rooted' or has its 'antecedents' in that original policy." *Knight v. Alabama*, 14 F.3d 1534, 1550 (11th Cir. 1994).[5]

[5] "[S]ince *Fordice* was decided in 1992, the Fourth Circuit has had no opportunity to establish guidance for the trial courts in this Circuit." *Coal. for Equity & Excellence in Md. Higher Educ. v. Md. Higher Educ. Comm'n*, No. CCB-06-2773, 2018 U.S. Dist. LEXIS 19007, at *5-6 (D. Md. Feb. 6, 2018). But a majority of the Eleventh Circuit, sitting en banc, has since limited the *Fordice* traceability test to the education context, over a strong dissent. *Compare Johnson v. Governor of Fla.*, 405 F.3d 1214, 1226 (11th Cir. 2005) ("[T]his circuit has been reluctant to extend the education line of cases to other areas.") *with id*. at 1244-45 (Barkett, J., dissenting). As Judge Barkett points out, the Circuit's holding is in conflict with its own prior precedent using *Fordice* in the context of discrimination in public employment. *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1575 (11th Cir. 1994). Other courts have also cited *Fordice's* traceability principle outside the education context. *Trump v. Hawaii*, 138 S. Ct. 2392, 2439 (2018) (Sotomayor, J., dissenting) (describing religious animus behind immigration proclamation); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring) (describing racial animus behind criminal procedure provision); *Walker v. City of Mesquite,* 402 F.3d 532, 536 (5th Cir. 2005) (considering argument that public housing location was traceable to racial animus)*; Rutherford v. City of*

This "antecedents" test makes sense, because "given an initially tainted policy, it is eminently reasonable to make the [Government] bear the risk of nonpersuasion with respect to intent at some future time, both because the [Government] has created the dispute through its own prior unlawful conduct, and because discriminatory intent does tend to persist through time." *Trump v. Hawaii*, 138 S. Ct. 2392, 2439 (2018) (Sotomayor, J., dissenting) (quoting *Fordice*, 505 U. S. at 746-747 (Thomas, J., concurring)). Figuring out whether a provision has its "roots" or "antecedents" in a prior policy is a factual question, determined by asking whether the new policy represents a "later, distinct amendment," perhaps prompted by an "independent intervening event." *Wirzburger v. Galvin*, 412 F.3d 271, 285 (1st Cir. 2005); *Raymond*, 981 F.3d at 305.

In *Ramos v. Louisiana*, the Supreme Court considered a state constitutional provision in Louisiana that originated in its state constitutional convention of 1898, but the "constitutional convention of 1974 adopted a new, narrower rule, and its stated purpose was judicial efficiency, and [i]n that debate no mention was made of race." 140 S. Ct. 1390, 1426 (2020) (Alito, J., dissenting). Yet even though the provision had been readopted, revised, and narrowed, Justice Sotomayor said that under her understanding of the equal-protection intent analysis, this was likely insufficient: the state must "truly grapple[] with the laws' sordid history in reenacting them." *Id.* at 1410 (Sotomayor, J., concurring). Only "[w]here a law . . . is untethered to racial bias—and perhaps also where a legislature actually confronts a law's tawdry past in reenacting it—the new law may well be free of discriminatory taint." *Id.*

Cleveland, 179 F. App'x 366, 385 (6th Cir. 2006) (Moore, J., concurring) (discussing the need to look at history of racial discrimination in public employment). *See Alaska Inter-Tribal Council v. State*, 110 P.3d 947, 958 (Alaska 2005) (analyzing racial animus in a law-enforcement policy).

Later the same term, Justice Alito grappled with a Blaine Amendment in *Espinoza v. Montana*.[6] There too, the original Montana Blaine Amendment of 1889 was readopted, word-for-word, in 1972. Justice Alito says, "Under *Ramos*, it emphatically does not matter whether Montana readopted the no-aid provision for benign reasons. The provision's 'uncomfortable past' must still be '[e]xamined.'" *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2273 (2020) (Alito, J., concurring) (quoting *Ramos*, 140 S.Ct. at 1401 n.44). "And once again, there appears to have been little doubt which schools this provision would predominantly affect. In 1970, according to the National Center for Educational Statistics, Montana had 61 religiously affiliated schools. Forty-five were Roman Catholic." *Id.* Justice Alito concludes that "the no-aid provision's terms keep it "[t]ethered" to its original "bias," and it is not clear at all that the State "actually confront[ed]" the provision's "tawdry past in reenacting it." *Id*. (quoting *Ramos*, 140 S.Ct. at 1410 (Sotomayor, J., concurring)). "[A]nd the discrimination in this case shows that the provision continues to have its originally intended effect." *Id.*

So too here. As will be shown below, the 1972 Amendment is directly traceable to the 1895 Blaine provision. The state did not confront the provision's tawdry past at the time, it embraced it. Though this reasoning stems from two concurrences which are not binding in themselves, it is persuasive. The District Court of Nevada recently confronted a law, the 1952 immigration act,

[6] To be clear, Plaintiffs are *not* asserting any claims under *Espinoza*, but only under *Arlington Heights* and *Church of the Lukumi Babalu Aye*. Indeed, as Justice Sotomayor said in her dissent in *Espinoza*, "those questions [about intent] are not before the Court" in that case. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2293 n.2 (2020) (Sotomayor, J., dissenting). The Supreme Court did not need to reach questions about intent because the Montana amendment was facially discriminatory against religion. Obviously the South Carolina version on its face discriminates against all private schools, whether a secular Montessori Academy or a religious Catholic school. That is why the intent inquiry is necessary here, and why *Espinoza* is only relevant for the majority's brief discussion of Blaine Amendments and Justice Alito's concurrence, which reached beyond the issues directly before the Court to discuss the history of Blaine Amendments.

which was a revised version of the 1929 immigration act. There, Chief Judge Mirandu Du found that "Carrillo-Lopez has established, and the government concedes, that the Act of 1929 was motivated by racial animus. The government does not assert the 1952 Congress addressed that history when it reenacted Section 1326. Moreover, the government fails to demonstrate how any subsequent amending Congress addressed either the racism that initially motivated the Act of 1929 or the discriminatory intent that was contemporaneous with the 1952 reenactment. The record before the Court reflects that at no point has Congress confronted the racist, nativist roots of Section 1326." *United States v. Carrillo-Lopez*, No. 3:20-cr-00026-MMD-WGC, 2021 U.S. Dist. LEXIS 155741, at *62 (D. Nev. Aug. 18, 2021). Chief Judge Du reached this holding after acknowledging that the Congress had amended the provision multiple times. *Id*. So too here. The 1895 Constitution was obviously motivated by racial and religious animus. There is no evidence the West Commission confronted that animus. Rather, the 1972 revision started from the 1895 original. Therefore, the reenacted version must bear the full weight of that animus.

C. **South Carolina experienced unfortunate racial and religious prejudice before, during, and after the Convention of 1895**.

This Court already knows Ben Tillman was a bigot, and the anti-Catholic efforts of Blaine & Co. were offensive. Plaintiffs, therefore, will not belabor these points, as the historical record is overwhelming and the Court is already convinced of their abhorrence. But recounting the basics of this history is still necessary, both to show the "historical background" for the 1972 Amendment and to provide the foundation for a *Fordice* traceability analysis. Expert Witness Professor Graham's report summarizes this part of our case: "[t]he Blaine Amendment was adopted in the

1895 South Carolina Constitution as a way to avoid education of Catholic and African-American youth in private schools by prohibiting state aid for private schools."[7]

1. *The historical background of the Convention of 1895 shows racial and religious prejudice.*

First, racial and religious prejudice predated the Constitutional Convention of 1895. The "historical backdrop" of the 1972 Amendment really started in 1619, when the first slaves came to America's shores, and in 1670 when they first came to the Carolinas.[8] And the anti-Catholic attitude is equally ancient; the colonial legislature of 1697 passed an ordinance granting liberty of conscience with "Papists only excepted."[9] The March 26, 1776, Constitution complained that the king had protected "the Roman Catholic religion" in Quebec as "fit instruments to overawe and subdue" "free Protestant English settlements."[10] The March 19, 1778, Constitution stated that only the "Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of the State."[11]

Race and religion were not only separate sources of prejudice, but often ended up intertwined. For instance, "St. Mary's Catholic Church was scorned in the 1790s for receiving into its congregation black Catholics who had come to Charleston along with the waves of refugees fleeing the bloody revolution on the island colony of Saint Domingue (now Haiti)."[12] A few decades later, an angry mob forced a Catholic school in Charleston to close after a two-day standoff

[7] Graham Expert Report, pg. 9.
[8] Graham Expert Report, pg. 12.
[9] "An Act for the making aliens free of this part of this province, and for granting liberty of conscience to all Protestants," ratified on 10 March 1696/7, in Thomas Cooper, ed., The Statutes at Large of South Carolina, volume 2 (Columbia, S.C.: A. S. Johnston, 1837), 131–33.
[10] The South Carolina Constitution of 1776 (Yale Law School Law Library Avalon Project).
[11] The South Carolina Constitution of 1778 (Yale Law School Law Library Avalon Project).
[12] Nic Butler, Ph.D., "The Myth of the Holy City," Charleston County Public Library (Jan. 24, 2020), https://www.ccpl.org/charleston-time-machine/myth-holy-city#_ednref2.

outside the Catholic seminary, with calls to lynch the bishop for permitting African-American students to enroll. "Many reluctantly accepted the Catholic presence in Charleston, and a growing opinion maintained that the Catholic bishop was transgressing the racial order. Any tampering with the fixed and stern race relations was deemed unacceptable."[13]

(a) ***The South Carolina of 1895 generally, and the convention specifically, were awash in anti-Catholic attitudes.***

The Constitution of 1895 incorporated a Blaine Amendment:

> The property or credit of the State of South Carolina, or of any County, city, town, township, school district, or other subdivision of the said State, or any public money, from whatever source derived, shall not, by gift, donation, loan, contract, appropriation, or otherwise, be used, directly or indirectly, in aid or maintenance of any college, school, hospital, orphan house, or other institution, society or organization, of whatever kind, which is wholly or in part under the direction or control of any church or of any religious or sectarian denomination, society or organization.

S.C. Const. Art. XI, Sec. 9 (1895).

How do we know this provision was a "Blaine Amendment"? Three reasons:

First, the national organization pushing the Blaine movement lobbied the delegates. The Convention journal records that on September 21, 1895, the convention accepted a communication from "The National League for the Protection of American Institutions."[14] Prof. James Underwood explains the Convention was the target of "the lobbying efforts" of the League, "which contacted state conventions and legislatures throughout the country in an effort to enlist support for insertion in the federal and state constitutions of an amendment forbidding the use of federal or state funds to support organizations, especially schools, controlled wholly or in part by religious

[13] Joe Regan, *Irish Frontier Catholicism in the Antebellum US South*, 2 Irish Studies South 24, 35 (2016).
[14] *Constitutional Convention of 1895, Journal of the Constitutional Convention of the State of South Carolina* 205 (1895).

denominations."[15] The National League for the Protection of American Institutions was "anti-Catholic and an extension of the American Protective Association (APA)—a significant anti-Catholic group at the time."[16]

Second, the wording closely mirrors the proposed federal Blaine Amendment and American Protective Association propaganda. The federal Blaine Amendment sought to rewrite the First Amendment to read: "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, 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. 5453 (1876).[17] The references to "religious sects" was intentional, used at a time when "it was an open secret that 'sectarian' was code for 'Catholic.'" *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality).[18]

Third, we know the general context in which the provision arose. The Blaine movement nationally was motivated by a deep-seated, wide-spread nativist anti-Catholic sentiment that spread across the country in the 1870s-1890s. *Id.* at 828 ("[H]ostility to aid to pervasively sectarian schools has a shameful pedigree"); *Kotterman v. Killian*, 972 P.2d 606, 624 (Ariz. 1999) ("The

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[15] James Underwood, *The Constitution of South Carolina, Vol. 3: Church and State, Morality and Free Expression* 196 n.1 (1992). *Accord* Amasa M. Eaton, *The late constitutional convention and constitution of South Carolina*, 31 American L. Rev. 198, 206-207 (1897) (similar).

[16] Colin Gunstream, *Thesis: Home Rule or Rome Rule? The Fight in Congress to Prohibit Funding for Indian Sectarian Schools and Its Effects on Montan*a, at 4 (2015), https://scholars.carroll.edu/handle/20.500.12647/3689?show=full. *See* Glenn Report ¶ 64.

[17] The federal amendment was supported by the Klu Klux Klan. Graham Expert Report, pg. 28.

[18] A federal report in 1895 found that Catholic schools accounted for 80 percent of parochial school enrollment in South Carolina. H.R. DOC. NO. 54-5, at 1664 (1895) (report by the US Commissioner of Education. In one chapter, the report details the number of "pupils in parochial schools" in every state, sorted by denomination. South Carolina had 877 such pupils in 1895, of which 697 were Roman Catholic).

Blaine amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing 'Catholic menace.'"); *see also* Philip Hamburger, *Separation of Church and State passim* (2002). "[T]his sentiment played a significant role in creating a movement that sought to amend several state constitutions (often successfully), and to amend the United States Constitution (unsuccessfully) to make certain that government would not help pay for 'sectarian' (i.e., Catholic) schooling for children." *Zelman v. Simmons-Harris*, 536 U.S. 639, 720-21 (2002) (Breyer, J., dissenting). South Carolina is one such state where it was adopted successfully.[19] Thus, Professor Graham concludes in his expert report, "The 1895 Constitution also included South Carolina's original Blaine Amendment. The Blaine Amendment reflected a national effort to prohibit allocation of state funds to Catholic institutions. In the south, the impact of the prohibition extended to African Americans in private schools and universities founded by Catholic and non-Catholic northern missionaries to educate freed slaves."[20]

One South Carolina newspaper reveals that the APA had already reached Charleston by 1895 and was heavily engaged in local politics.[21] The APA capitalized on sentiments already widespread among opinion leaders in South Carolina in the years immediately before the 1895

[19] "The proposed [federal Blaine] amendment nevertheless 'propelled' a movement among the states; fourteen 'had enacted legislation prohibiting the use of public funds for religious schools' by 1876, and twenty-nine 'had incorporated such provisions into their constitutions' by 1890." *Freedom From Religion Found. v. Morris Cty. Bd. of Chosen Freeholders*, 232 N.J. 543, 561, 181 A.3d 992, 1002 (2018) (quoting Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 659 (1998)). *Accord Chaplaincy of Full Gospel Churches v. United States Navy (In re Navy Chaplaincy),* 697 F.3d 1171, 1177 (D.C. Cir. 2012); *On Fire Christian Ctr. v. Fischer*, 453 F. Supp. 3d 901, 906 (W.D. Ky. 2020) ("Bigotry toward Roman Catholics motivated a majority of states to enact Blaine Amendments."); *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 132 n.8 (Maine 1999).

[20] Graham Expert Report pg. 5.

[21] *Religion and Politics*, The Darlington News, November 14, 1895.

Convention. A call for greater immigration by Europeans to supply labor needs in the South met this reply from one South Carolina paper:

> This movement means, we repeat, Roman Catholic immigrants for the South. It should die still born. The people of the South should declare themselves against it in unmistakable terms . . . A Roman Catholic peasantry in our society would be the entering wedge to Catholic dominion . . . It means antagonism to everything distinctively American.[22]

Other papers in South Carolina echoed this view.[23] *See Espinoza*, 140 S. Ct. at 2268 (Alito, J., concurring) ("[T]he [federal Blaine] amendment was prompted by virulent prejudice against immigrants, particularly Catholic immigrants.").

Anti-Catholic animus, though latent since the Palmetto State's founding, reached fever pitch among the Tillmanites. The "Junior Order of United American Mechanics" South Carolina Chapter made the APA look positively broad-minded.[24] Walther Oeland, who identified himself as their Deputy Organizer in the state, left no doubt about his prejudice. Calling the Catholic Church "America's most dangerous and deadly foe," he went on:

> Her highest ambition is to gain control of the affairs of our government and to force us (the Protestants) to come to her terms and the only hope of [their] success is keeping the masses of our good people in ignorance . . . . The Catholic church is not purchasing thousands upon thousands of stacks of arms and storing them in their Churches, Convents and Cathedrals just for fun. They are not arranging and drilling a military body of 700,000 men for pastime . . . . We are working for the spread of Christ's kingdom by demanding that the Bible shall be read in our public schools . . . . Our order is growing very rapidly and will continue to do so until the

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[22] *A Denominational View*, Yorkville Enquirer, May 9, 1888.

[23] *See, e.g., The Immigration Convention*, The Fairfield News and Herald, May 30, 1888; *Immigration*, The Newberry Herald and News, May 31, 1888. *See* Graham Expert Report, pg. 30 ("From a dominant Protestant perspective, there was room for anti-Catholic sentiment among the population. Practically, Catholics were small enough in number and political influence for statewide political leaders to ignore, tolerate, or berate").

[24] The Order had as its objects, "to promote the interests of Americans and shield them from foreign competition, to assist them in obtaining employment, to encourage them in business, to establish a sick and funeral fund, and to maintain the public school system, prevent sectarian interference with the same, and uphold the reading of the Holy Bible in the schools." *Nat'l Council of Junior Order of U. A. M. v. State Council of Va., etc.*, 203 U.S. 151, 158 (1906).

> gates of Castle Garden are locked against this worse than trash from other shores made so by the rottenness of the institutions from whence they come, and the free school in every city, town and hamlet, the Bible firmly planted within, and Old Glory is floating in the breeze from mountain to seashore.[25]

Other South Carolina editorialists singled out the dangers of Catholic schools: "Roman Catholic parochial schools are avowedly intended to utterly destroy the American public school system" (in an article entitled *Romish Schools*).[26] Another, reacting to the suggestion that the State might even facilitate such immigration, wrote vehemently: "It is wrong to use Protestants' money to help the Catholic Church, and the people will not submit."[27] Instead, the people found a solution: bar any taxpayer funds from going to the Catholic Church by adopting the Blaine Amendment.[28]

If this anti-Catholic history were the full extent of what motivated the Blaine Amendment in South Carolina, it would be a scandal and a shame that would clearly flunk the *Arlington Heights* test. But sadly that is not so, because South Carolina's Blaine Amendment stemmed from a second, simultaneous prejudice: a deep-seated racism against recently freed slaves and the religious institutions that served and educated them.

(b) *The 1895 Convention also adopted the Blaine Amendment to cut off funds to religious schools that were educating freed blacks.*

"The South Carolina Constitutional Convention of 1895 was a leader in the widespread movement to disenfranchise Negroes . . . . Senator Tillman was the dominant political figure in the state convention . . . ." *South Carolina v. Katzenbach*, 383 U.S. 301, 310 n.9 (1966).[29] One key

[25] Letter to the Editor, *Gaffney Ledger*, August 20, 1896.
[26] The Abbeville Press and Banner, September 19, 1888.
[27] *That Catholic Scheme*, The Aiken Recorder, August 14, 1888.
[28] Plaintiffs have not been able to find any direct evidence that Tillman personally held anti-Catholic views, though we know he believed educational institutions "should not tolerate professors with religious views at variance with those of a majority of South Carolinians." Francis Butler Simkins, Pitchfork Ben Tillman: South Carolinian 177 (1944).
[29] *See* Graham Expert Report, pg. 5.

tool for that disenfranchisement was a literacy test for voting.[30] And the biggest threat to a literacy test to stop newly freed but illiterate ex-slaves from voting were schools teaching black ex-slaves to read and rise in society.[31] As Professor Glenn says in his expert report, "It was surely no accident, for example, that the provision for such a literacy requirement in the South Carolina Constitution of 1895 (Article II, Section 4(d)) was accompanied by another provision (Article XI, Section 9) blocking public funding for the faith-based schools that had done so much to promote literacy among Black South Carolinians." Glenn Report ¶ 67.

In the days following the Civil War, Catholics and Northern Protestant missionaries defied prevailing social norms by extending social services to African-Americans.[32] This was especially true of education: "During the years after the war, black and white teachers from the North and South, missionary organizations, churches and schools worked tirelessly to give the emancipated population the opportunity to learn. Former slaves of every age took advantage of the opportunity to become literate."[33] One historian describes it as "a massive missionary effort, [as] northern black churches established missions to their southern counterparts, resulting in the dynamic growth of independent black churches in the southern states between 1865 and 1900. Predominantly white denominations, such as the Presbyterian, Congregational, and Episcopal churches, also sponsored missions, opened schools for freed slaves, and aided the general welfare of southern blacks . . . ."[34]

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[30] Graham Expert Report, pg. 20.
[31] Simpkins, at 303.
[32] Glenn Expert Report ¶¶ 9-13, 17-21, 31 (specific to colleges); Graham Expert Report, pg. 28 and n. 29. *See* Laurie F. Maffly-Kipp, *An Introduction to the Church in the Southern Black Community*, Univ. of North Carolina (May 2001); Troy Lee Kickler, *Black Children and Northern Missionaries, Freedmen's Bureau Agents, and Southern Whites in Reconstruction Tennessee, 1865 -1869* (2005) (Ph.D. diss., Univ. of Tenn.).
[33] Library of Congress, https://www.loc.gov/exhibits/african-american-odyssey/reconstruction.html.
[34] Laurie Maffly-Kipp, *African American Christianity, Pt. II: From the Civil War*

Though these efforts often featured white teachers and funders, many were started and staffed by African-Americans to serve their fellow believers.[35]

For instance, the Penn School in Sea Island, South Carolina, was an independent Quaker school run by Northern missionaries that was the first school in the South for freed slaves. In 1867, as a wave of Reconstruction Republicans swept into power, the Penn School began receiving public funds for books and school operations. That taxpayer support ended a decade later when Reconstruction ended and racist white Democrats reasserted control of the public fisc.[36] Other examples of Northern missionary zeal for the newly freed slaves included the Avery Institute in Charleston, the nonprofit school for freed slaves that the American Missionary Association founded,[37] and the Zion Presbyterian Church School in Charleston, which enrolled thousands of black students in the decades following the Civil War.[38] In fact, in 1895, there were eight institutions that served black students—four still exist today (Allen, Benedict, Claflin, Clinton), and four are defunct (Avery, Brainerd, Brewer, Coulter). All eight were religiously affiliated.[39]

These historically black schools and colleges constituted a direct threat to Tillman's plans for maintaining the social subservience of African-Americans as a laboring lower class.[40] Tillman's "handling of the highest-level school for black Carolinians, commonly known as Claflin

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to the Great Migration, 1865-1920, Nat. Humanities Center, http://nationalhumanitiescenter.org/tserve/nineteen/nkeyinfo/aarcwgm.htm.

[35] Glenn Expert Report ¶¶ 15-16.

[36] Penn Center, http://www.penncenter.com/explore-penn-centers-history. *See* Glenn Expert Report ¶ 30.

[37] Avery Institute, http://www.averyinstitute.us/history.html.

[38] Otis Westbrook Pickett, Neither Slave Nor Free... : *Interracial Ecclesiastical Interaction In Presbyterian Mission Churches From South Carolina To Mississippi, 1818-1877*, 23-38 (2013). Electronic Theses and Dissertations 638, https://egrove.olemiss.edu/cgi/viewcontent.cgi?article=1637&context=etd.

[39] *See generally* Lewis K. McMillan, *Negro Higher Education in South Carolina* (1952).

[40] *See* Glenn Expert Report ¶¶ 22-23, 29 (reporting the number of black-serving schools burned down).

College [now South Carolina State], clearly illustrated the Tillmanist program of leveraging state resources to ensure proper power relationships between whites and blacks."[41] "[I]n Tillman's plan, [the state] would . . . educate white males to be independent producers and patriarchs of households, women to be useful helpmates of their provider-husbands, and African Americans to contentedly labor without aspirations of social mobility."[42] At the state-controlled Claflin College, Tillman and others "steered the school towards more practical training. This practical education, unlike that at Clemson College, was not intended to produce independent producers, but a subordinate underclass."[43] Tillman saw the future if he did not put a stop to these faith-based schools: "with Negroes constantly going to school, the increasing number of people who can read and write among the coloured race . . . will in time encroach upon our White men."[44]

The independent, religious colleges were founded "to prepare recently freed slaves to take their rightful places as fully trained and productive members of society."[45] Claflin University, for instance, adopted an ambitious program, teaching not just technical trades but Greek and Latin, "furnish[ing] a grade of instruction almost equal to that of any white college in the State."[46]

The 1895 Constitution offered an opportunity for Tillman to further his vicious vision of a permanent African-American underclass by suppressing religious HBCUs.[47] "This proposal [to

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[41] Kevin Krause, *A Different State of Mind: Ben Tillman and the Transformation of State Government in South Carolina, 1885-1895* (2014), at 84.
[42] Krause, at 58-59.
[43] Krause, at 94.
[44] Quoted in Glenn Report ¶ 75.
[45] Claflin University, *Panther STEPS: Students in Transition Engaged and Preparing for Success*, March 2011, www.claflin.edu/docs/default-source/planning-assessment/claflin-panther-steps-plan.pdf, at 3; *see also* S.C. Dep't of History & Archives, United States Department of Interior National Register of Historic Places Inventory—Nomination Form, at 4, http://www.nationalregister.sc.gov/MPS/MPS044.pdf.
[46] Colyer Meriwether, *History of Higher Education in South Carolina* 124-25 (1888).
[47] Krause, at 97.

bar public Claflin College from collaborating with private Claflin University] was supported by Ben Tillman . . . and other white leaders because it would help ensure the segregation of South Carolina's colleges and because a state-controlled college would be free of the influence of northern religious denominations."[48] *See* S.C. Const. Art. XI, Sec. 8 (1895).[49] Tillman himself crafted and sponsored the final version of the language which was adopted.[50]

Section 8 worked in conjunction with section 9, the Blaine Amendment, which ensured that only the Tillman-controlled Claflin College (now S.C. State) would receive public support; the eight other historically black colleges existing at the time, all religiously affiliated, would not see another dime. Thus, the historical record shows the concerted, multi-year effort by Tillman and his white contemporaries to suppress educational opportunities for freed blacks, and the important role of the Blaine Amendment in cutting off public funds for any institution that would challenge Tillman's belief that African-Americans should only be trained for menial labor jobs.

2. *The 1972 Amendment was also awash in segregationist attitudes, which aligned with an anti-Catholic prejudice.*

In 1966, the General Assembly pushed through a proposal for a comprehensive overhaul of the 1895 state constitution. The legislation empaneled the Committee to Make a Study of the South Carolina Constitution of 1895, known as the West Committee after its chair and champion, Senator John C. West. The Committee did its work for three years, and eventually recommended multiple amendments. The proposed new article on education incorporated the prior ban on direct aid to religious schools, but opened the door for indirect aid. The new provision was ushered

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[48] *National Register* at 6.
[49] "[T]he General Assembly shall, as soon as practicable, wholly separate Claflin College from Claflin University, and provide for a separate corps of professors and instructors therein, representation to be given to men and women of the negro race; and it shall be the Colored Normal, Industrial, Agricultural and Mechanical College of this State."
[50] *Convention Journal* at 581.

through the legislature in the second of two packages of amendments to be sent through for approval in November 1972 and legislative ratification in 1973. The new provision read: "No money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution." S.C. Const. Art. XI, Sec. 4.

In evaluating this provision, which is the provision at the heart of this lawsuit, this Court needs to go through the *Arlington Heights* factors outlined above. The historical background, sequence of events, legislative history, and disproportionate impact all show race and religion were the motivating factors behind the way the 1972 amendment was written.

(a) ***The historical background preceding 1972 shows the consistent prejudice from 1895.***

The historical background starts in 1619 and carries through 1895, but the Tillman attitude towards race and religion in South Carolina did not end in 1895; it persisted over time. In the 1910s, for instance, Governor Blease "labeled blacks as 'baboons' and 'apes' and urged that there be no spending of white men's taxes on black schools."[51] U.S. Senator "Cotton Ed" Smith fought European immigration that brought too many Catholics to America's shores when he wasn't busy fighting for "state's rights" to preserve segregation.[52] The politics were sadly symbolic of and responsive to the general attitudes of white Southern culture at the time: most white South Carolinians simply did not want integration, most voted against it, and some even reacted violently against it.[53] In a particularly poignant example of the confluence of religion and race, in 1940 an

[51] Graham Expert Report, pg. 35.
[52] Graham Expert Report, pg. 36-37.
[53] *See* Graham Expert Report, pg. 49 ("Publicly, there had to be rigorous opposition to any changes in segregated black-white politics to get elected. The winning votes in an election came from poor whites and other whites who opposed blacks ideologically as well as from Whites who opposed spending programs that may benefit blacks and require them to pay more taxes.").

arsonist burned Christ The King Catholic Church and School for Negroes in Orangeburg days before it was set to open.[54]

As time went on, public rhetoric evolved from brutal, overt racism to a subtler segregation of "separate but equal." From 1951 thru 1966 (though secretly until 1954), the General Assembly funded and relied on the work of the descriptively named School Segregation Committee (informally known as the Gressette Committee for chairman Senator Marion Gressette) to maintain this new Jim Crow: "With the onset of legal action in federal courts to challenge the 'separate but equal' policy in South Carolina's public schools, the General Assembly created the committee to prepare for, delay, and even stop implementation of federally mandated desegregation."[55]

Segregationist and anti-Catholic attitudes were still dominant in 1966 when the South Carolina Legislature established the West Committee.[56] Plaintiffs could point to any of dozens of academic dissertations, newspaper articles, or books to show racism was widespread in South Carolina during the relevant timeframe. But as one data point, consider the South Carolina legislative manual. The manual is an official publication of the General Assembly, often used by incumbent politicians as a souvenir or memento for supporters and visitors. Its cover image displays the mindset predominating the General Assembly at the time:

1958	*Confederate General Wade Hampton and Confederate Flag.*
1959	*A picture of John C. Calhoun.*
1960	*The Great Seal of the Confederacy encircled by outlines of Southern states.*
1961	*Confederate Monument with crossed US and Confederate flags.*
1962	*Women of the Confederacy Monument with SC and Confederate flags.*
1963	*Statehouse Dome with US, SC and Confederate Flags.*

[54] "New Catholic Church Destroyed by Fire," Orangeburg Times & Democrat, December 18, 1940, p.1.
[55] Graham Expert Report, pg. 46.
[56] Final report of the Committee to Make a Study of the South Carolina Constitution of 1895, to His Excellency the Governor and the General Assembly of the State of South Carolina ("West Committee Report") (1969), https://catalog.hathitrust.org/Record/006178331. *See* Glenn Report ¶ 83 ("Segregation's rationale was still defended in 1956 by most Southern congressmen…").

1964 *Calhoun Statue, Statehouse Lobby.*
1966 *SC Senate Rostrum with Calhoun Portrait and US, SC and Confederate Flags.*
1972 *United States Seal with US, SC and Confederate Flags.*
1974 *House Rostrum with US, SC and Confederate Flags.*

As these covers illustrate, the Confederate-Calhounian and segregationist cause were connected and continued to dominate South Carolina politics at all the relevant times of this analysis.

3. *The West Committee's membership, legislative history, and context show the purpose behind the revision of the Blaine Amendment: segregation scholarships.*

(a) *The West Committee's membership was stacked with ardent racists.*

The West Committee's membership reflected the white Democratic power structure that ran South Carolina from 1966 to 1969. Its chairman, John C. West, was a "moderately segregationist" politician whose racially moderate attitudes did not emerge until later in his career.[57] In his earlier career, West made his mark as chairman of the legislative Committee to Investigate Communist Activities in South Carolina,[58] which started its investigation by looking into the NAACP for alleged Communist ties.[59]

The Governor's appointee and secretary on the committee, William D. Workman, Jr., was an enthusiastic segregationist whose racial attitudes bled into his religious prejudices.[60] In the early 1960s, Workman published *The Case for the South*, an extensive diatribe against integration. According to Workman, "intelligent discrimination and natural segregation make up the very essence of good order. To remove them and to abolish all barriers which stand in the way of

[57] Graham Expert Report, pg. 11.
[58] S.C. State Library, Committee to Investigate Communist Activities, https://dc.statelibrary.sc.gov/handle/10827/26066.
[59] *The State*, September 10, 1958. *See* George David Gwynder Lewis, The Uses and Abuses of Anti-Communism by Southern Segregationists as a weapon of Massive Resistance, 1948 – 1965 (Ph.D. Dissertation) (2000) ("A resolution carried by the South Carolina House of Representatives . . . requested that the Attorney General of the United States 'place the... [NAACP] on the subversive list.'").
[60] Graham Expert Report, pg. 16, n. 15.

indiscriminate mingling of diverse groups would be to invite chaos."[61] This racist rhetoric reveals how Workman's thinking did not stray far from the prevailing attitudes at the 1895 convention.

Workman also embodied anti-Catholic views typical of his times in his book. He considered the South's cultural uniformity as a strength; at one point he asserts how "[a] contributing factor to the homogeneity of the South is the overwhelming prevalence of Protestantism in the region, save for the heavy Roman Catholic population of Louisiana."[62] He then contrasts this reality with the North, where "great numbers of Catholics" surged into the region via immigration and "banded together by religious and cultural affinities in virtual enclaves."[63] He later criticizes the Catholic Church for its stand in favor of integration as opposed to continued segregation.[64] In fact, Workman explained away prejudice against Catholics as the natural response of Southerners to their counter-cultural stance in favor of desegregation, saying they "invite retaliatory prejudice by their own criticism and condemnation of the South. The matter is not so much one of anti-Negro feeling 'spilling over' into other fields as a matter of Catholic, Jewish, and other organized groups engendering prejudice against themselves."[65]

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[61] William D. Workman, Jr., *The Case for the South* 37 (1960).
[62] Workman, *The Case for the South* 5.
[63] *Id*.
[64] *Id*. at 101-102.
[65] *Id*. at 119-120. Sadly, that attitude endured. When Pope John Paul II traveled to South Carolina in 1987 to celebrate Mass and make an address at the University of South Carolina, anti-Catholic billboards appeared along his route from the airport. The dean of Tabernacle Bible College in Greenville, who supported the effort, referred to the Vatican as a "threat to my children and grandchildren." "Campaign Against Pope Resurrected," Jeff Miller, June 3, 1987, *The State*, p. 17-A. The leader of the effort in a later interview on the Statehouse steps that he felt that the Pontiff was "getting a little too close to secular powers around the world." "Critic Says He Dislikes Pope's Acts," Staff Report, June 5, 1987, *The State*, p. 24-A.

The powerful Speaker of the State House, Solomon Blatt, Sr., served on both the West Committee and the earlier Gressette Committee to stop school desegregation.[66] He headlined the inaugural statewide meeting of the South Carolina Association of Citizens' Councils,[67] founded to oppose racial desegregation, delivering a "fiery speech[] against integration."[68] "Blatt, who served as speaker from 1937-1973, was an architect of the state's "massive resistance" to integration.[69]

Another member, Senator T. Allen Legare, Jr., was so impressed by Governor Ernest Hollings' April 1959 trip to Washington, DC, to speak out in support of segregation that he asked that the remarks of Hollings and a host of other South Carolina officials who testified against *Brown v. Board of Education* be printed as a pamphlet and distributed to the state's citizens.[70]

Senator Marion H. Smoak of Aiken also served on the Committee. Smoak in 1967 accused Governor Robert McNair of giving in to protestors when the Governor and NAACP attorneys reached a compromise with SC State College (now University) students who had engaged in a boycott of classes.[71] Smoak later sponsored a resolution condemning the boycott.[72] In May 1968, Smoak sought to amend a bond bill by cutting bonds for S.C. State College from $6.5 million to $2 million, leaving only funds borrowed from the federal government.[73] Smoak also called for a

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[66] "Committee Studies Ways to Avoid Mixed Schools," Associated Press, The State, June 16, 1954, p. 1-A.
[67] Originally known as "White Citizens' Councils."
[68] S.C. Dep't of Archives & History, National Historical Register nomination form, at 7, https://npgallery.nps.gov/GetAsset/3f1f8b6d-fb96-4dd8-9beb-a0c7e8b3c682.
[69] Leonard Roghoff, *Review Essay: Fight Against Fear: Southern Jews and Black Civil Rights* (Athens: University Press of Georgia, 2001), J. of Southern Religion (2003), http://jsr.fsu.edu/2003/Rogoff.htm.
[70] "Senate Praises Junket: Stand on Civil Rights Commended," *Charleston New & Courier*, April 17, 1959, p.6-B.
[71] "Student Boycott Squelch Urged," *The Charleston News & Courier*, March 16, 1967, p. 46.
[72] "Boycott Resolution Reaches Senate," *The State*, April 7, 1967, p. 7-D.
[73] "Bond Cut Try Fails; Filibuster Follows," *The State*, May 31, 1968, p.1.

complete purge of the voter registration rolls that would have forced any citizen wishing to vote in the 1968 elections to re-register. Many called the move one made under a "racial cloud."[74]

Another member, Rep. Robert L. McFadden, while a legislator from York County, opposed adding black representation on the Rock Hill District Three Board of Trustees in 1972.[75]

Gubernatorial appointee and attorney Huger Sinkler was an outspoken supporter of segregation. In a letter to *The State* published on May 23, 1954, Sinkler called *Brown* a "judicial farce," and the U.S. Supreme Court "nine little men."[76] Sinkler said President Dwight Eisenhower received bad advice on desegregating the Charleston Naval Shipyard, likening Eisenhower to President Ulysses S. Grant who had received advice from Thaddeus Stevens, a man with a "mulatto mistress."[77] Slinker suggested that the Civil War had not ended, called for a "new 1876" (the end of Reconstruction), and argued that South Carolina should not give up on segregation.[78] He suggested legal maneuvers to prevent integration.[79]

It should be no surprise, then, given this membership, that the West Committee took a decidedly racist view in the modifications it suggested to the state constitution.

(b) ***The West Committee's revised the Blaine Amendment to pave the way for segregation scholarships.***

The overall story of South Carolina's state constitution is one of constant evolution, as one set of constitution framers revisits and revises the work of their predecessors.[80] This is confirmed

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[74] "GOP Loses Fight to Cut Negro Vote," *The Charleston News & Courier*," June 2, 1967, p.1.
[75] "Request Denied to Enlarge Board," *The State*, March 18, 1972, p. 2-B.
[76] "Sinker Says SC Should Not File Brief But Seek Rehearing on Segregation," *The State*, May 23, 1954, p. 8-B.
[77] *Id*.
[78] "Sinker Says SC Should Not File Brief But Seek Rehearing on Segregation," *The State*, May 23, 1954, p. 1.
[79] *Id*.
[80] Cole Blease Graham, Jr., "The Evolving South Carolina Constitution," 24 J. of Political Science 23 (1996).

several times in the expert report of Dr. Graham, who literally wrote the book on the South Carolina constitution.[81] The West Committee was empaneled "to revise the 1895 constitution using an item-by-item process" which reviewed and kept, cut, or modified each individual provision.[82]

As part of its recommended revisions to the 1895 Constitution, the West Committee suggested streamlining the sections addressing public education.[83] The primary difference between the old provision and the new provision was the removal on the bar on "indirect support." Though public money was still stopped from flowing to independent and religious institutions directly, it could go directly to students in the form of so-called scholarship aid.[84]

Why begin permitting aid to elementary and high school students? These scholarships were the new preferred solution to federally mandated integration of the public schools: state subsidies for students in white-only academies.[85] In 1951, the state empaneled the Gressette Committee to coordinate the legal and legislative fight against integration. The idea of scholarships for students to attend white-only, private academies "had been under study by the Gressette Committee for some time" as a solution to court-ordered integration.[86] When Governor Donald Russell advanced the idea of segregation scholarships in his 1963 State of the State speech, none other than Senator

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[81] Cole Blease Graham, Jr., *The South Carolina State Constitution* (Oxford Commentaries on the State Constitutions of the United States) (2011).

[82] Graham Expert Report, pg. 8; *id*. at pg. 22 (""In the course of its work, the study committee focused on each section of the 1895 document, painstakingly reviewed it, and made a specific evaluation to carry over or delete a section. If carried over, the report recommended needed revisions.").

[83] The Committee also recommended retaining the ban on public credit being loaned to other types of religious and nonprofit institutions, though in a different section of the Constitution. West Committee Report at 101.

[84] West Committee Report at 101.

[85] Graham Expert Report, pg. 44. *See generally* Note: *Segregation academies and state action*, 82 Yale L.J. 1436 (1973).

[86] *Stanley v. Darlington Cty. Sch. Dist*., 879 F. Supp. 1341, 1395 (D.S.C. 1995), *rev'd on other grounds,* 84 F.3d 707 (4th Cir. 1996).

West told the media he had no problem with the legislation even if it was "camouflage" for segregation.[87] Just days before Governor George Wallace blocked the schoolhouse door in Alabama, the South Carolina General Assembly had passed Act 297 that provided segregation scholarships for private school tuition to help white families avoid integrated public K-12 schools.[88] "Although the law made no mention of race, it was perceived as a 'safety valve' in the event of public school desegregation."[89] Sure enough, when the Charleston School District admitted eleven African-Americans students under federal court order in September 1963, the program went into effect.[90] The 1964 General Assembly appropriated $250,000 for the segregation scholarships program.[91]

The legislation defined "private school" as "a private or independent elementary or high school which is not operated or controlled by any church, synagogue, sect or other religious organization or institution,"[92] excluding Catholic or other religious schools that were already integrated.[93] The Catholic Men of the Diocese of Charleston at their annual meeting tabled a resolution petitioning the state to include Catholic schools in the program as such a request might "put the church in the position of favoring segregation."[94]

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[87] "If it is camouflage [for an anti-integration measure], then it offers a fresh approach and seems to have a lot of merit." Charleston News & Courier, January 30, 1963, p. 7-A.
[88] Statutes at Large of South Carolina, General and Permanent Laws, 1963, p. 498-500.
[89] *Stanley*, 879 F. Supp. at 1395.
[90] *Id*.
[91] *Id*.
[92] Most independent schools, including the large contingent of Independent Baptist schools, were not founded until well after federal courts enjoined segregation scholarships.
[93] The Catholic schools of the Diocese Charleston desegregated in Spring 1961. Gretchen Keiser, *Photo inspires look back at era when Catholic schools desegregated*, Georgia Bulletin (Jan. 9, 2014), https://georgiabulletin.org/news/2014/01/photo-inspires-look-back-at-era-when-catholic-schools-desegregated/.
[94] *Sumter Daily Item*, April 22, 1963, p. 12.

The segregation scholarship program was eventually suspended by court order. *Brown v. S.C. State Bd. of Educ.*, 296 F. Supp. 199 (D.S.C.), *aff'd*, 393 U.S. 222 (1968) (per curiam).

The history of the segregation scholarships and the overlapping legislative supporters on the West Committee show the sub-rosa reasons for adopting the "indirect scholarship aid" option in the West Committee report: to make constitutional the segregation scholarship program for private, whites-only schools.[95] The West Committee report itself reluctantly admitted that the U.S. Supreme Court had "nullified" segregation and therefore said the Separate Schools section should come out of the Constitution, but then so that there was no mistake about its actual wishes, adding "*even if it were thought desirable*" to leave segregation in.[96]

After the West Committee did its work, the proposed reports had to be adopted through the General Assembly. The man responsible for shepherding the West Committee's 17 proposed amendments through the state legislature: Senator Marion Gressette, chairman of the infamous School Segregation Committee and father of the segregation scholarships.[97] He parceled out the amendments, putting ten on the 1970 ballot and a further seven on the 1972 ballot, including the education amendment.[98] Moreover, even within the 1972 ballot question on the education amendment, this provision occupied one innocuous line.[99]

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[95] Dr. Graham confirms this account of the history: Graham Expert Report pg. 8 ("Much of the newly available public funding for private educational institutions went to newly developing 'private schools.' Many of these private schools were formed for white students allegedly to improve the quality of education compared to racially integrated public schools. The silent public conversation was that public schools were becoming more and more black, thus lending credibility to a general assessment of newly forming private schools as 'segregation academies.'").
[96] West Committee Report, p. 103.
[97] Graham, 24 J. of Political Science at 23. *See* Graham Expert Report, pg. 23.
[98] Graham, 24 J. of Political Science at 24-25.
[99] Official Sample Ballot, *Florence Morning News*, November 5, 1972, p.12-C.

For this reason, this Court's focus in analyzing the history of the 1972 amendment should stay on the West Committee. The people in 1972 voted on *seven* constitutional amendments all on the same ballot, and this section was only one line in a multi-prong education article, and not a prominent prong at that. With local questions, some ballots asked voters to decide twelve or more questions on that election day. It is really the West Committee that wrote the education article and rewrote the Blaine provision; the focus should be there.

After evaluating the West Committee process and subsequent legislative adoption and popular ratification, Dr. Graham concludes, "Constitutional revision in the 1972s removed only part of the original Blaine Amendment in order to permit indirect aid to private education institutions."[100] Because of the ongoing ban on direct aid, he concludes "[t]he incomplete revision maintains, even if latently, the racism and anti-Catholicism embedded in the South Carolina constitution since Ben Tillman."[101]

(c) ***The revised Blaine Amendment had a disproportionate impact on religious schools.***

There were 106 private schools in South Carolina in 1969-70. 36 were Catholic, and 28 identified as some other version of Protestant.[102] In 1969, there were 21 private universities and an additional eight private junior colleges. 13 of the universities and 5 of the junior colleges were religious.[103]

(d) ***The West Committee's public rationale for the change confirms the ulterior motive and itself reflects anti-Catholic prejudice.***

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[100] Graham Expert Report, pg. 9. *Accord* South Carolina Legislative Council's Editor's Note to Section 4, S.C. Constitution art. XI, sec. 9 (2021), https://www.scstatehouse.gov/scconstitution/A11.pdf.

[101] Graham Expert Report, pg. 9. *Accord id*. at pg. 53 ("The incomplete revision maintains, even if latently, the distortions of racism and anti-Catholicism embedded in the South Carolina constitution since the inclusion of the Blaine Amendment in 1895.").

[102] School Directory of South Carolina, State Superintendent of Education (October 1969), pg. 132-36, https://digital.tcl.sc.edu/digital/collection/schldirect/id/6714.

[103] *Id*. at 137-38.

The West Committee said it was adopting the revised Blaine Amendment "in conjunction with interpretations being given by the federal judiciary to the 'establishment of religion' clause in the federal constitution."[104] Far from providing an animus-free "interest" or "justification" for the law, *N.C. State Conference*, 831 F.3d at 233-34 (cleaned up), the stated concern for "the separation of church and state" was really just code for more prejudice against Catholic schools for two reasons.

First, during the Blaine era, advocates for Blaine amendments often wrapped their proposals in the rhetoric of "separation of church and state," knowing full well they needed to amend the Constitution because the Establishment Clause did not itself accomplish what they wanted (at least as the Supreme Court read it at the time), and even as they were also vigorously defending daily reading of the Protestant Bible in public schools.[105] Dr. Glenn exposes the lie in his report: "The objections to public funding of parochial schools were not generally based upon abstract concerns about 'separation of Church and State,' but rather upon the presumed nefarious effect of Catholic schooling upon the children of immigrants."[106]

The same was true in the 1940s-70s, the era of and immediately preceding the West Committee. During this time, the United States was going through a series of cultural moments around reading the Bible in public schools (*see, e.g., Engel v. Vitale*, 370 U.S. 421 (1962)) and public support for parochial schools (*see, e.g., Lemon v. Kurtzman*, 403 U.S. 602 (1971)). *See Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2097 n.3 (2019) (Thomas, J., concurring); Doug Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory L.J. 43, 58 (1997)

[104] West Committee Report at 99.
[105] *See, e.g.*, William Oland Bourne, *History of the Public School Society of the City of New York* (1879), p. 636-44.
[106] Glenn Report ¶ 47.

("[E]ven at the time of *Lemon*, some Justices were influenced by residual anti-Catholicism and by a deep suspicion of Catholic schools. This appears most clearly in Justice Douglas's citation of an anti-Catholic hate tract in his concurring opinion in *Lemon*, and in Justice Black's dissenting opinion in *Board of Education v. Allen.*").

In many parts of the country, anti-Catholicism motivated state constitutional amendments targeting religious education.[107] And in the South, in particular, anti-Catholicism was especially pronounced because the Church was leading the fight for African-American civil rights. Bishop Ernest Unterkoefler of Charleston was known nationally "as a fighter for civil rights in the 1960's," according to the *New York Times*;[108] he was one of seven bishops to join in the invocation at the Lincoln Memorial when Martin Luther King, Jr., delivered his famed "I Have a Dream" speech.[109] Nuns marched with striking black Charleston workers[110] and the Carolina Catholic Laymen's Council opposed segregation,[111] speaking up even when doing so would be unpopular.[112] Catholic

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[107] *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2273 (2020) (Alito, J., concurring) (discussing Montana Constitutional Convention of 1972); Jared Key and Ben DeGrow, "The Animus Behind Michigan's Anti-Aid Amendment," Mackinac Center (September 9, 2020), https://www.mackinac.org/the-animus-behind-michigans-anti-aid-amendment-20200909 ("Anti-Catholicism clearly was a driving force behind the 1970 amendment.").

[108] Ari L. Goldman, "Visit to South Carolina Reflects Rise of Catholics in Bible Belt," N.Y. Times (Sept. 11, 1987), https://www.nytimes.com/1987/09/11/us/the-papal-visit-visit-to-south-carolina-reflects-rise-of-catholics-in-bible-belt.html. Elsewhere in the same story, the *Times* reports, "Over the years, Catholics in much of the South have been derided as 'mackerel snappers' and viewed with suspicion, if not disdain, because they worshipped in an alien language, Latin, and sought guidance from an alien power, the Vatican. To bigots, especially away from the coast, they were often lumped together with Jews and blacks for taunting and violence."

[109] "Bishops' Support Of Civil Rights March Commended," The Catholic Northwest Progress (Seattle, WA) (Aug. 23, 1963), https://washingtondigitalnewspapers.org/?a=d&d=CATHNWP19630823.2.7.

[110] "Franciscan Sisters Colleen Waterman, Maigread Conway, and Joachim protest during the Charleston Hospital Workers' Strike (1969)," Diocese of Charleston Archives, https://dioceseofcharleston.omeka.net/exhibits/show/historyofthediocese/item/207.

[111] Workman, *The Case for the South* 119-120.

[112] *See* Graham Expert Report, pg. 7 (quoting 1959 letter from Vicar General Bernadin).

K-12 schools desegregated in 1961,[113] and Our Lady of Mercy Junior College in Charleston is considered by historians the first South Carolina college (public or nonprofit) to desegregate when it did so in the summer of 1962.[114] In other words, just as religious schools were leading the way on educating African-Americans in 1895, they were also leading the way on integrating African-Americans in 1966, a fact that did not sit well with their segregationist neighbors (Workman's anti-Catholic bias in *The Case for the South* was hardly unique).

Second, the West Committee had separately recommended that the South Carolina Declaration of Rights be amended to incorporate a state version of the establishment clause. As the Committee staff working paper on the education article put it, "the section in the Declaration of Rights on religious freedom is essentially the same statement as contained in the U.S. Constitution. . . . Therefore it seems logical that the S.C. provision in the Declaration of Rights would receive a similar interpretation . . . ."[115]

So why include the revised Blaine Amendment at all if it was redundant of the federal and state establishment clauses? The obvious reason is because the education-specific provision reaches *beyond* the Establishment Clause; it is necessary because simply relying on the Establishment Clause's restrictions would mean "many things not permitted at present would be allowed."[116] As the staff report noted, "Most state constitutions do have some type of regulation which generally restricts the use of state funds for religious schools beyond that which comes under the general clause on religious freedom."[117] So it was that the anti-Catholic prejudices of the

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[113] *See supra* at n.93.
[114] Courtney Tollison, dissertation, *Moral Imperative and Financial Practicality: Desegregation of South Carolina's Denominationally-affiliated Colleges and Universities* (University of South Carolina, 2003).
[115] Robert H. Stoudemire, West Committee Working Paper #4, pg. 13.
[116] *Id*. at pg. 13.
[117] *Id*. at pg. 14.

committee members, under the veneer of safeguarding "the separation of church and state," was incorporated into the state constitution.

As has been seen throughout this case, in this last aspect the twin prejudices of racism and anti-Catholicism continued to work hand-in-hand. The Committee's recorded intent ("the separation of church and state") was code for its anti-Catholic motives, while the Committee's unrecorded intent was to advance its racist motives through the segregation scholarships.

CONCLUSION

Striking down a provision of a state constitution, passed by the General Assembly and adopted by the people only fifty years ago, is a big deal. A court should be appropriately hesitant about doing so, out of respect for its limited role in our system of government.

But a court should also not stand by in the face of racial and religious discrimination. South Carolina has come a long way in the past 50 years, even the past 30 years. But the ghosts of politicians past live with us still, in a provision yet on the books that stops historically black colleges and Catholic schools, along with all independent colleges and all nonpublic schools, from equal access to COVID relief funds.

The New Mexico Supreme Court confronted a similar situation in *Moses v. Ruszkowski*, 458 P.3d 406 (N.M. 2018). There, the state's high court confronted a state constitutional provision, a Blaine Amendment, that like South Carolina's encompassed *both* secular and religious nonpublic schools. *Id.* at 412. Because of this distinction, the New Mexico provision (like the South Carolina amendment) did not automatically fail under *Trinity Lutheran* (the precursor to *Espinoza*) because it did not facially discriminate based on religious status. *Id*. at 416. But the Court proceeded to analyze whether the New Mexico provision was motivated by religious animus, a discriminatory intent prohibited by *Church of the Lukumi Babalu Aye*. *Id*. at 416-17.

New Mexico's Supreme Court concluded that the Congress which passed the enabling act requiring a Blaine Amendment in the new state's original constitution was deeply flawed: "the history of the federal Blaine amendment and the New Mexico Enabling Act lead us to conclude that anti-Catholic sentiment tainted its adoption. New Mexico was caught up in the nationwide movement to eliminate Catholic influence from the school system, and Congress forced New Mexico to eliminate public funding for sectarian schools as a condition of statehood." *Id*. at 419.

The New Mexico Supreme Court's decision tracing the history of its Blaine Amendment through the anti-Catholic animus of the mandating Congress is instructive to this Court. Just as New Mexico's Blaine Amendment was born of the anti-Catholic animus in Congress, so the 1895 South Carolina Blaine Amendment was born of anti-Catholic animus that dominated those days. Tillman's constitution had a second motive as well: to squeeze religious schools educating ex-slaves by cutting off any state support.

The 1972 Amendment revised and modified the 1895 Constitution; it was not a clean break or a "start from scratch" effort. Thus, as Professor Graham concludes, the 1972 Amendment continues to embody the prejudice inherent in the 1895 Constitution. Moreover, the 1972 Amendment itself stemmed from a deeply racist society and an ardently segregationist committee, whose modification permitting indirect aid was to safeguard segregation scholarships. And the Committee's stated purpose, defending the separation of church and state, was simply code for anti-Catholic prejudice prevalent at the time.

This Court's duty is clear. Courts are the guardians of equal justice under law. Here, the quest for equal justice relies on this Court to follow the law set down in *Arlington Heights* and *Church of the Lukumi Babalu Aye*, to end a century of prejudice and discrimination.

Respectfully submitted,

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