No. 14-1382

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,

Plaintiff–Appellant,
v.

SARA PARKER PAULEY, in her official capacity as Director of the Missouri Department of Natural Resources Solid Waste Management Program,

Defendant–Appellee

On Appeal from the United States District Court for the
Western District of Missouri
Civil Case No. 2:13-CV-04022-NKL – Honorable Nanette K. Laughrey

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF MISSOURI, AND AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE

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CERTIFICATE OF INTERESTED PERSONS & CORPORATE DISCLOSURE

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Rule 26.1A, *amici* certify that persons interested in this case are those listed in the briefs filed in this case and also the American Civil Liberties Union Foundation, the ACLU of Missouri, and Americans United for Separation of Church and State. *Amici* are non-profit corporations, have no parent corporations, and are not publicly held.

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Brusca v. State Bd. of Educ.,

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Bush v. Holmes,

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Doe v. Cal. Lutheran High Sch. Ass'n,

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Eulitt ex rel. Eulitt v. Me. Dep't of Educ.,

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Gary S. v. Manchester Sch. Dist.,

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Harfst v. Hoegen,

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Libertarian Party v. Bond,

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Locke v. Davey,

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Luetkemeyer v. Kaufmann,

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Mallory v. Barrera,

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Norwood v. Harrison,

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Sloan v. Lemon,

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St. James Military Acad. v. Gaiser,

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St. Louis Christian Home v. Mo. Comm'n on Human Rights,

634 S.W.2d 508 (Mo. Ct. App. 1982)..41

State ex rel. Pitman v. Adams,

44 Mo. 570 (Mo. 1869)...37

Teen Ranch, Inc. v. Udow,

479 F.3d 403 (6th Cir. 2007)..40

Univ. of Cumberlands v. Pennybacker,

308 S.W.3d 668 (Ky. 2010)..25, 39

Wirzburger v. Galvin,

412 F.3d 271(1st Cir. 2005)..39

B. Constitutional and Statutory Provisions

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Mo. Const. of 1865, art. I, § 13 30

Mo. Const. of 1865, art. II § 9 30

Mo. Const. of 1865, art. IX, § 1 19

Mo. Const. of 1865, art. IX, § 3 19

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Mo. Const. of 1865, art. IX, § 10 (1870) 22-23

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Mo. Const. of 1875, art. XI, § 11 34

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Mo. Const. of 1945, art. IX, § 8 (no aid provision)
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C. Secondary and Miscellaneous Sources

1 James C. Carper & Thomas C. Hunt, 1 *The Praeger Handbook of Religion and Education in the United States* 9 (2009) 32-33

1 *Journal of the Missouri Constitutional Convention, 1875* (Isidor Loeb & Floyd C. Shoemaker, eds., 1920) 35, 36, 37

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2 *Journal of the Missouri Constitutional Convention, 1875*

(Isidor Loeb & Floyd C. Shoemaker, eds., 1920) 35-36

1 *U.S. Bureau of the Census, Ninth Census of the United States: 1870, Statistics of the Population of the United States* table XVIII(A) (1872) 33

2 *Western Educational Review* (E.F. Hobart et al. eds., 1871), *available at* http://google.com/books?id=-WUAAAAAYAAJ..........29

Aaron E. Schwartz, *Dusting Off the Blaine Amendment: Two Challenges to Missouri's Anti-Establishment Tradition*, 72 Mo. L. Rev. 339 (2007)...*passim*

Against Sectarianism, N.Y. Times, Dec. 26, 1889 38

Alison Clark Efford, *German Immigrants, Race, and Citizenship in the Civil War Era* (2013)..23, 28, 29, 31

B. A. Dunn, *Education—Its Relations to us as Individuals and as a Nation*, Maryville Nodaway Democrat, Jan. 15, 1874................32

Brief for Historians & Law Scholars as *Amici Curiae* Supporting Petitioners, *Locke v. Davey*, 540 U.S. 712 (2004) (No. 02-1315) ....*passim*

Claude A. Phillips, *A History of Education in Missouri: The Essential Facts Concerning the History and Organization of Missouri's Schools* 5 (1911).. 18-19

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Debates of the Missouri Constitutional Convention, 1875 (Isidor Loeb & Floyd C. Shoemaker, eds., 1930)..................................... 36-37

Devora L. Lindeman, Zobrest v. Catalina Foothills School District: *Private Choices and Public Funding Under the Establishment Clause*, 47 Rutgers L. Rev. 839 (1995)..16

Elijah P. Lovejoy, Encyclopedia Britannica, http://www.britannica.com/EBchecked/topic/349544/Elijah-P-Lovejoy (last visited June 18, 2014)..27

Francis D. Cogliano, *No King, No Popery: Anti-Catholicism in Revolutionary New England* 155 (1995)...................................... 24-25

J. Michael Hoey, *Missouri Education at the Crossroads: The Phelan Miscalculation & the Education Amendment of 1870*, Mo. Historical Rev., July 2001. ....*passim*

James P. McCartin, *The Waning of the —Catholic Other and Catholicism in American Life After 1965*, Revue Française D'études Américaines (Feb. 2003) 38

Jill Goldenziel, *Blaine's Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 Denv. U. L. Rev. 57 (2005)..24

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Journal of the Missouri State Convention Held at the City of St. Louis, Jan. 6-April 10, 1865 at 197-98 (1865), *available at* https://archive.org/details/journal ofmissou00miss. 19-20

King James Bible..30

Minutes of the Annual Meeting of the General Association of United Baptists of Missouri (Stephens et al. eds., 1871) 33

R.S. Duncan, *A History of the Baptists in Missouri* (1882).........................33

Robert W. Barrow, *The Lord's Prayer and the Constitution*, Mo. Sch. J., Nov. 1899 37-38

Schools in Ohio, Mo. Wkly. Patriot (Springfield), Sept. 2, 1875 32

Steven K. Green, ―*Blaming Blaine: Understanding the Blaine Amendment and the ―No-Funding Principle*, 2 First Amend. L. Rev. 107 (2004) 24

Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38 (1992)...26

Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 B.Y.U. L. Rev. 295 (2008)......................................25, 26, 28, 32

Thomas A. Hendricks, *The Hendricks Letter: Religion and Education*, Marshall Saline Cnty. Progress, Aug. 8, 1876 32

Thomas J. Korčok, *Forward to the Past: A Study of the Development of the Liberal Arts in the Context of Confessional Lutheran Education with Special Reference to a Contemporary Application of Liberal Education* (2009) 30

William Barnaby Faherty, *The St. Louis Irish: An Unmatched Celtic Community* (2001) 27

William E. Parrish et. al.,

Missouri: The Heart of the Nation (1980) 19, 30, 35

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INTERESTS OF *AMICI*

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the U.S. Constitution and our nation's civil rights laws. The ACLU of Missouri is a state affiliate of the national ACLU and has more than 4,500 members. As an organization that has long been dedicated to preserving religious liberty, including the right to be free from compelled support for religious institutions and activities, the ACLU has a strong interest in the proper resolution of this case.

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization committed to preserving religious liberty and the separation of church and state. We represent more than 120,000 members, supporters, and activists across the country, including thousands who reside in this Circuit. Since our founding in 1947, we have regularly served as a party, as counsel, or as an *amicus curiae* in scores of church-state cases before the U.S. Supreme Court, this Court, and other federal and state courts nationwide. We file as *amicus* here to advance one of our principal goals: protecting taxpayers from being coerced to support religious beliefs to which they do not subscribe.

Amici submit this brief principally to address arguments made by *amicus curiae*, the Becket Fund, regarding the history and constitutionality (under the First

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Amendment and other federal provisions) of Article I, Section 7 and Article IX, Section 8 of the Missouri Constitution. No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person – other than *amici*, their members, and their counsel – contributed money that was intended to fund preparing or submitting this brief.[1]

[1] Both parties have consented to the filing of this brief.

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ARGUMENT

Missouri's constitutional tradition, from the start, has provided robust safeguards for religious freedom. Ratified in 1820, the state's first Constitution featured multiple provisions reflecting a deep commitment to protecting people of faith, including the right to be free from compelled support for religion.[2] When a new Constitution was drafted in 1865, the compelled-support clause was not only retained, it was elevated to its own section. Mo. Const. of 1865, art. I, § 10. Further evincing Missouri's early devotion to religious liberty for people of all beliefs, a new provision prevented the government from showing a preference for any church, sect, or mode of worship. *Id.* art. I, § 11. At the same time, during these early constitutional periods, the Framers also signaled a strong commitment to developing a public-school system that would offer education to all children, not just those who could afford private schools.

The Missouri Constitution's no-aid provisions (currently, Article I, Section 7 and Article IX, Section 8) – adopted in 1870 and 1875 and readopted in 1945 – are the natural byproducts of these two longstanding and hallowed ideals: By barring government aid to religious schools and other religious institutions, these

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[2] *See, e.g.*, Mo. Const. of 1820, art. XIII, § 5 (barring religious tests for holding office); art. XIII, § 4 (guaranteeing free exercise of religion and mandating "that no man can be compelled to erect, support, or attend any place of worship, or to maintain any minister of the gospel, or teacher of religion").

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provisions (1) ensure that no taxpayer is forced to subsidize religion or religious exercise, bolstering religious liberty for all, and (2) safeguard the integrity of (and financial support for) free public schools which, unlike many religious schools, are open to children and families of every faith, sexual orientation, and economic class, as well as children with disabilities.[3]

Amicus curiae, the Becket Fund ("Becket"), argues that Missouri's no-aid provisions are so thoroughly infused with anti-Catholic prejudice that they must be struck down. But that claim is based on a distorted and simplified narrative that ignores much of Missouri's actual history when it comes to public education and religious liberty. While anti-Catholic sentiment was prominent in some areas of the country during parts of the nineteenth century, when Missouri's first no-aid provision was adopted in 1870, any direct evidence of anti-Catholic animus tied to the amendment was isolated and thin. And Missouri's funding prohibition applied across the board to schools operated by every faith and denomination, including Catholic, Lutheran, and Baptist schools.

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[3] *See, e.g.*, *Doe v. Cal. Lutheran High Sch. Ass'n*, 170 Cal. App. 4th 828, 841 (2009) (holding that a Lutheran high school acted within its rights when it expelled lesbian students); Devora L. Lindeman, Zobrest v. Catalina Foothills School District: *Private Choices and Public Funding Under the Establishment Clause*, 47 Rutgers L. Rev. 839, 894 (1995) ("[P]arents would have little recourse against a parochial school which refused to provide educational services to a handicapped child.").

When that provision was readopted in 1875, along with a second, broader no-aid provision, there was simply no evidence of any anti-Catholic motive. On the contrary, several members of the constitutional convention observed that the funding ban would apply to and affect schools of every denomination. Finally, by 1945, when both protections were again adopted without controversy, there could be no doubt that even the slightest hint of anti-Catholic motive – to the extent it had existed at all – had vanished. Moreover, from their initial passage in the 1870s through today, Missouri's no-aid provisions have never been applied to discriminate against Catholics.

Given this history, *amici* respectfully request that the Court affirm the holding of the district court. In restricting the limited resources of its tire-mulch program to non-parochial schools, the State is merely obeying the requirements of the Missouri Constitution, and those dictates are plainly lawful under the U.S. Constitution.

I. THE CONSTITUTION'S 1870 NO-AID AMENDMENT WAS INTENDED TO PROTECT THE STATE'S BURGEONING PUBLIC-SCHOOL SYSTEM.

A. By 1870, Missouri Officials Had Long Been Committed to Developing Statewide Free Schools and Ensuring Their Adequate Funding.

Developing a public-school system was an important goal for Missouri officials from the State's founding and even beforehand, although it took decades

to achieve their vision. In 1808, the territorial legislature created the first free school in Missouri. Claude A. Phillips, *A History of Education in Missouri: The Essential Facts Concerning the History and Organization of Missouri's Schools* 5 (1911). Four years later, the act creating the government of the Missouri Territory authorized Congress to fund free education within Missouri using the public lands of the United States. *An Act Providing for the Government of the Territory of Missouri*, ch. 95, § 14, 2 Stat. 743, 747 (1st Sess. 1812). And after Missouri gained statehood in 1820, its first Constitution mandated that each township establish one or more schools, "as soon as practicable and necessary, where the poor shall be taught gratis." Mo. Const. of 1820, art. VI, § 1 (declaring that "[s]chools and the means of education shall forever be encouraged in this state" and that the General Assembly shall apply funds raised from lands granted by the United States to finance free education).

In service of this goal, by 1835, the legislature had formed a State Board of Education, enacted laws requiring that public schools operate at least half the year, and authorized counties to impose taxes for a school fund, create a board of trustees for each district, and set the curriculum for each school. Phillips at 9. Further, in 1839, the legislature established a permanent statewide schools fund and formed the office of the state superintendent of common schools. In 1853, the legislature then expanded the superintendent's powers, authorizing him to

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supervise the general interests of state schools, appoint a commissioner of common schools in each county, direct the state bank to distribute revenue to the common schools, and make provisions for orphans and children to attend schools for free. Phillips at 10-11.

Unfortunately, much of this progress unraveled during the Civil War: Apportionment of public money for schools was suspended, as was operation of the office of the superintendent; many school buildings were damaged and rendered unusable. *Id.* at 17. When the 1865 constitutional convention took place, most counties had no operating public schools, prompting public-education advocates to redouble their efforts to achieve their goals. *See id.*; *see also* William E. Parrish et. al., *Missouri: The Heart of the Nation* 202 (1980).

To that end, proclaiming that "[a] general diffusion of knowledge and intelligence" is "essential to the preservation of the rights and liberties of the people," 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. In addition, the 1865 Constitution reaffirmed the authority of the State Board of Education and elevated the superintendent position to a constitutional office. *Id.* art. IX, § 3.

The 1865 Constitution also reflected officials' grave concerns that the public-school system would fail if it were not adequately funded. *See, e.g.*, *Journal*

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of the Missouri State Convention Held at the City of St. Louis, Jan. 6-April 10, 1865 at 197-98 (1865), *available at* https://archive.org/details/journalofmissou00miss. It mandated that a variety of funding streams be deposited into an official public-school fund, *see* Mo. Const. of 1865, art. IX, § 5, and required 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*." *Id.* (emphasis added).

B. The 1870 Amendment Was Aimed Primarily at Stopping a Renewed Effort to Divide Public-Education Funds Among Private Schools.

With the rebirth of the state superintendent's office, the Missouri governor appointed a staunch advocate of free schooling, Thomas Parker, to the position. J. Michael Hoey, *Missouri Education at the Crossroads: The Phelan Miscalculation & the Education Amendment of 1870*, Mo. Historical Rev., July 2001, at 376-77. Parker, who was subsequently elected to a four-year term, strongly believed that public schools were vital to "advancing the great cause 'of the education of the people, by the people, and for the people.'" *Id.* at 377. Between 1865 and 1870, Parker crisscrossed the state, promoting public education. *Id.* at 376-77. His campaign was very successful; by 1870, the number of public schools and students had skyrocketed. *Id.* at 377.

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Still, there was much more progress to be made. In St. Louis, for example, a city school board report released in February 1870 revealed that "some 700 children had been turned away for want of room, and over 15,000 children did not attend any school, public or private." *Id.* at 382. These children – "many of whom were Irish and Catholic and unrepresented in the parochial schools" – lived in tenements or were homeless, and they usually turned to crime because of their lack of education and employment. *Id.* at 383. Parker and other public-school advocates "envisioned a better future for these children if they would attend school." *Id.* However, despite their previous success, these advocates worried that the state system of public education was still quite vulnerable. They were especially concerned that a renewed movement to divide and allocate public-school funds "among the various school systems, including denominational schools" would make its way to Missouri, undermining the progress made since 1865 and threatening the "emerging public school system." *Id.* at 373, 376.

These concerns were not unwarranted. In 1869, William "Boss" Tweed, a vocal backer of divided school funding, successfully inserted a provision into New York City's municipal budget that allocated $200,000 to private religious schools that provided free education for some children. *Id.* at 373. Closer to home, in early 1870, another prominent advocate of dividing school funds introduced a measure in St. Louis that would have "reduce[d] the mill tax levy that supported the St.

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Louis public schools." *Id.* at 382. Meanwhile, the same month, the St. Louis city council passed an ordinance authorizing $1500 in funding to St. Ann's Orphan Asylum. *Id.* at 383. The following month, State Rep. Michael Phelan introduced a bill that would have authorized the St. Louis public-school board to pay parochial schools $10 per year for every child educated for free. *Id.* After the State House passed the bill, public-school advocates were outraged—not because much of the proposed funding would go to Catholic schools, but because they viewed the measure as "an act to destroy the public schools." *Id.* at 384-85. Other opponents objected because the bill would have provided "substantial assistance" to religious schools, which typically charged only $1 per month in tuition and operated only part of the year, leaving a substantial windfall that could have been put to non-educational religious uses, such as "proselytizing and building churches." *Id.* The bill was defeated in the end. *Id.* at 385.

Troubled by these developments, Parker and other public-education supporters proposed a "constitutional amendment to ensure the public school funds remained solely for public education." *Id.* at 373. The language of the amendment ultimately approved by the General Assembly, *id.* at 385-86, provided, in part:

> Neither the general assembly nor any county, city, township, school district or other municipal corporation, shall ever make any appropriation, or pay, from any public fund whatever, anything in aid of any creed, church, or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other institution of learning controlled by any creed, church, or sectarian purpose whatever . . .

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Mo. Const. of 1865, art. IX, § 10 (1870).

In November 1870, the proposed no-aid provision was presented to the voters and passed "by overwhelming majorities." Hoey, *supra*, at 390. In the "ten counties with the heaviest Catholic population, the average 'no' vote registered only 13.9 percent." *Id.* at 391. And even in St. Louis County, where "most of the school debate had occurred," and large numbers of Catholics resided, the average "no" vote reached only 16.9 percent, meaning that "many Catholic voters did not vote or voted for the amendment." *Id.*; *cf.* Alison Clark Efford, *German Immigrants, Race, and Citizenship in the Civil War Era* 216-17 (2013) (noting that more than 92% of voters, which included many German-Americans, approved the 1870 no-aid amendment).

II. THE 1870 NO-AID PROVISION WAS NOT ANTI-CATHOLIC.

Dubbing the 1870 no-aid provision a "Blaine Amendment," Becket urges this Court to take the extraordinary step of invalidating both the 1870 provision and its broader 1875 counterpart on the ground that the clauses were purportedly rooted in anti-Catholic bias and, therefore, violate the U.S. Constitution. But the campaign to paint all state no-aid provisions as anti-Catholic vestiges of the failed federal Blaine Amendment is deeply flawed. *See, e.g.*, Br. *Amicus Curiae* of Historians and Law Scholars on Behalf of Pet'r's Gary Locke, et al. at 2, *Locke v. Davey*, 540 U.S. 712 (2004) (No. 02-1315) [hereinafter "Brief for Historians"]

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("Such arguments oversimplify the history and purposes of the no-funding principle while they indict valid constitutional provisions based on the possible motivations of a limited number of individuals."). For example, more than fifty years before Senator James Blaine introduced his federal constitutional amendment, which would have barred public-school funds from being controlled by any religious denomination,[4] Connecticut approved a constitutional provision that prohibited monies from its school fund from ever being "diverted to any other use than the encouragement and support of public, or common schools." *See* Conn. Const. of 1818, art. VIII, § 2. At that time, anti-Catholic politics had no traction in New England. *See* Francis D. Cogliano, *No King, No Popery: Anti-Catholicism in Revolutionary New England* 155 (1995) (concluding that after the American Revolution, anti-papal sentiment "would never again be at the center of New

[4] Although some of Sen. Blaine's supporters expressed anti-Catholic sentiments, contrary to claims made by Becket and others, there is no evidence that he was motivated by anti-Catholic fervor. *See* Steven K. Green, *"Blaming Blaine": Understanding the Blaine Amendment and the "No-Funding" Principle*, 2 First Amend. L. Rev. 107, 114 (2004) ("Those who characterize the Blaine Amendment as a singular exercise in Catholic bigotry thus give short shrift to the historical record and the dynamics of the times."). Quite the opposite—Blaine's mother, whom he adored, was Catholic; and his daughters attended Catholic schools. *Id.* at 142. Blaine disavowed any anti-Catholic intent, and repeatedly maintained that that he was not anti-Catholic and only intended to prevent controversy by resolving the school issue. *Id.; see also* Jill Goldenziel, *Blaine's Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 Denv. U. L. Rev. 57, 66 (2005) (writing that no-aid opponents "seem to apply the Blaine name and taint indiscriminately to rhetorically reinforce their argument that all of these provisions have prejudicial origins.").

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England culture”). Similar provisions were passed in other states either before anti-Catholicism became an issue or in places with minimal Catholic immigration. *See, e.g.*, Brief for Historians, *supra*, at 15 (“The Michigan Constitution [(1835)] served as the model for similar constitutional provisions in Wisconsin (1848), Indiana (1851), Minnesota (1857), and Oregon (1857), all states without significant conflicts over parochial school funding at the time.”).[5]

Even no-aid provisions enacted where there may have been some anti-Catholic sentiment cannot be dismissed as categorically anti-Catholic. As a number of historians have recognized, “[t]he no-funding principle was incorporated into many state constitutions during the nineteenth century for reasons unrelated to anti-Catholic animus.” *See* Brief for Historians, *supra*, at 2; Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 B.Y.U. L. Rev. 295, 295-96 (2008) [hereinafter Green, *Insignificance*] (describing the complex social and political environment that surrounded school funding).

Like Missourians, lawmakers and voters across the country were concerned about protecting their states’ emerging and vulnerable public-school systems,

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5 *See also, e.g.*, *Univ. of Cumberlands v. Pennybacker*, 308 S.W.3d 668, 681-82 (Ky. 2010) (concluding that there was no evidence that the Kentucky Constitution’s no-aid clause was motivated by anti-Catholic animus); *Bush v. Holmes*, 886 So. 2d 340, 351 n.9 (Fla. Dist. Ct. App. 2004), *aff’d in part*, 919 So. 2d 392 (Fla. 2006) (“[T]here is no evidence of religious bigotry relating to Florida’s no-aid provision.”).

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which public-education proponents feared would be starved of resources if funding were extended to or divided with parochial schools. *See* Green, *Insignificance*, *supra*, at 317 (observing that concern about "the financial security of a nascent public education system," and efforts to standardize education, were common reasons for opposing funding of religious schools); *cf.* Hoey, *supra*, at 372, 392 (noting that controversy over the 1870 no-aid amendment had stirred up some anti-Catholicism, "but it had also demonstrated a widespread support for the public schools, even among St. Louis Catholics"). For instance, one of the earliest no-aid provisions banned funding for denominational schools in New York. The prohibition was passed in 1824 after a Baptist church received funds that had previously only been available to the nonsectarian Free School Society. Brief for Historians, *supra*, at 9-11.

In some areas, such as Missouri, where Catholics – hoping to protect taxpayer funding of private schools – were among the leading and most vocal proponents of plans to divide school funding,[6] no-aid amendments did place public-school advocates and some in the Catholic community at odds. But Missouri's own history makes clear that the primary reason for this tension was the

[6] *See* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 42-43 (1992) (describing Catholic lobbying for public support of Catholic schools); *id.* at 51 ("Catholics continued their opposition to any restriction on parochial aid."). *See generally* Hoey, *supra* (describing efforts to divide school funding in Missouri, which were generally led by Catholics).

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difference in opinion about the necessity of the amendment, not rank anti-Catholic bigotry. There were, in fact, many signs of support for Catholics even among public-school advocates. Moreover, notwithstanding the outspoken opposition of some Catholics, the language of the 1870 amendment applied across the board to schools of every faith and denomination. It was enacted despite the fact that a number of then-existing Baptist and Lutheran schools in Missouri fell within its purview, further belying Becket's claims that the amendment was motivated by anti-Catholic prejudice.

A. There Is Little Evidence Directly Tying the 1870 No-Aid Provision to Anti-Catholic Sentiment.

Becket and others who seek to invalidate the Missouri Constitution's no-aid provisions cite virtually no contemporaneous evidence of specific anti-Catholic intent behind the 1870 amendment. First, Becket points to the writings of alleged anti-Catholic activist Elijah Lovejoy, but Lovejoy's "Letters from Rome" were published in the 1830s—nearly four decades before Missouri passed its first no-aid provision. *See* William Barnaby Faherty, *The St. Louis Irish: An Unmatched Celtic Community* 62 (2001). Lovejoy died in 1837. *Elijah P. Lovejoy*, Encyclopaedia Britannica, http://www.britannica.com/EBchecked/topic/349544/ Elijah-P-Lovejoy (last visited June 24, 2014). There is no suggestion that his letters had any posthumous influence on the General Assembly of 1870 or on the voters (among

whom were large swaths of Catholics) who overwhelmingly approved the amendment.

Next, Becket points to the 1854 St. Louis riot instigated by members of the Know-Nothing Party, but that incident occurred 16 years before the adoption of the Missouri no-aid provision. By 1870, incidents of violence against Catholics had decreased considerably, and the Know-Nothing Party, which had been condemned by "[a]ll leading newspapers in the State," had "rapidly disintegrated." Aaron E. Schwartz, *Dusting Off the Blaine Amendment: Two Challenges to Missouri's Anti-Establishment Tradition*, 72 Mo. L. Rev. 339, 370 n.208 (2007); *see also* Green, *Insignificance*, *supra*, at 315 ("[T]he Know-Nothings were relatively ineffective in enacting anti-Catholic legislation even in those states where they briefly held clear majorities.").

Becket also relies on March 1870 remarks delivered in opposition to the amendment by state Senator Henry Spaunhorst, who claimed that the measure was anti-Catholic. Hoey, *supra*, at 386. But Spaunhorst, a lay Catholic leader, opposed the notion of common schools in general, explaining, "I do not want the State to dictate the type of education that should be imparted to our children if it is contrary to our conscience and convictions." *See* Efford, *supra*, at 215. He was a staunch supporter of divided school funding and repeatedly called for the State to fund religious schools "according to their respective numbers . . . so as each get their

proportion and can choose for themselves their teachers and text books, and have their children educated and instructed as their conscience dictates." Hoey, *supra*, at 374-75. In 1872, he founded the *Amerika*, "a Catholic weekly that favored state-sponsored parochial schools." Efford, *supra*, at 215. Spaunhorst's complaint of anti-Catholicism must be understood and interpreted in light of his longtime, vigorous support for parochial schools and divided funds. Tellingly, his "charge of anti-Catholic bigotry was denied" by the amendment's supporters and the legislature rejected his sarcastic, but official, proposal to insert the word "Catholic" into the no-aid provision. Hoey, *supra*, at 386.

Finally, Becket points to an article reportedly published in the October 1870 *Western Educational Review*. Entitled, "The Religious Question Once More," the article posits that the Catholic Church would not "allow any liberty of thought even now, if it could help it." Hoey, *supra*, at 389. Even if this one-off piece was published by the State Board of Education,[7] there is no evidence that it was influential in the passage of the no-aid provision. The General Assembly had passed the proposed constitutional amendment months beforehand. *Id.* at 386. And the piece was immediately condemned by many, including the *St. Louis Times*. *Id.*

[7] While Hoey characterizes the *Review* as the "official organ of the State Board of Education," a publicly available copy of the *Review*'s second edition does not identify any association with the Board. *See* 2 *Western Educational Review* (E.F. Hobart et al. eds., 1871), *available at* http://google.com/books?id=-WUAAAAAYAAJ.

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at 389. Though the *Times* was an ardent supporter of the proposed no-aid provision, it emphasized that basing such support on "religious intolerance" was deplorable. *See id.* (noting that the *Times*' support of the no-aid provision was rooted in concern for the budding public-school system).

To be sure, there were certainly some anti-Catholic incidents in the 1850s and 1860s.[8] And there were even isolated expressions of anti-Catholic sentiment in 1870. By that point, however, anti-Catholic sentiment "was not as intense in Missouri as it was in other areas of the country." Schwartz, *supra*, at 370.

B. There Were Signs of Significant Support for Catholics in 1870-Missouri.

Other events of the time signaled significant support for the Catholic community in Missouri. For example, to address Catholics' concerns that public schools promoted a Protestant worldview, the St. Louis public-school superintendent prohibited the reading of the King James Bible "and other sectarian

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[8] Most notably, the pro-Union Radicals who controlled the Missouri legislature immediately after the Civil War drafted a number of provisions widely considered to discriminate against Catholics, including a limit on the amount of land churches could own, Mo. Const. of 1865, art. I, § 13, and a requirement that all members of the clergy take a loyalty oath. Art. II § 9. *See also* Schwartz, *supra*, at 370-71 n.208 ("Missouri's 1865 constitution was widely seen as a means of punishing the Catholic Church for their stance during the war."). However, this period of anti-Catholic sentiment was short-lived. *See* Hoey, *supra*, at 390 (declaring that the vote approving the 1870 no-aid provision also "ended Radical rule in Missouri"); Parrish et al., *supra*, at 212 (noting that the remaining Radical reforms were undone by the 1875 Constitution).

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practices in his schools,"[9] developed policies allowing Catholic children to "absent themselves from school in certain holy seasons for religious exercises," and permitted instruction in German for German-born students, many of whom were Catholic. Hoey, *supra*, at 378-79. "All of these measures, coupled with the fact that the St. Louis public schools provided instruction for free and enjoyed a growing reputation for excellence, encouraged Catholic attendance." *Id.* at 380. Around 1870, a full forty-five percent of Catholic children who attended school in St. Louis opted for a public school. *See id.*; *see also* Efford, *supra*, at 215-16 (noting that Catholic children attended St. Louis city schools "in or about the same numbers as ones run by the Church"). Missouri's public schools were so popular among Catholics that, at one point, the archbishop had "to restrain priests who were denying absolution to parents who chose public schooling." Efford, *supra*, at 215-16; *accord* Hoey, *supra*, at 381.

[9] Many of Missouri's early educational efforts emphasized the importance of secular education. *See* Thomas James Korčok, *Forward to the Past: A Study of the Development of the Liberal Arts in the Context of Confessional Lutheran Education with Special Reference to a Contemporary Application of Liberal Education* 122 (2009). Thus, Becket's claim that the Protestant viewpoint typically promoted in public schools across the country rendered the maintenance of such schools inherently discriminatory against Catholics is not particularly applicable in Missouri, where many advocates of Catholic schools and divided funding complained that the State's public schools were *too secular* and did not provide the religious teachings the Catholic Church thought necessary for a well-rounded education. *See* Hoey, *supra*, at 380-81.

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As another example, during the 1870 General Assembly debate over the no-aid provision, Senator Thomas Reed introduced an amendment that would have expressly authorized Bible readings in publicly funded schools. Hoey, *supra*, at 386. Senator Louis Gottschalk, the chair of the Constitutional Amendments Committee and sponsor of the no-aid amendment, stood by Sen. Spaunhorst in rejecting the demand, which would have offended many Catholics and Jews. *Id.*

Further, there were many supporters of the no-aid provision whose backing was based not on anti-Catholic sentiment, but on concern for the continued viability of the public-school system and/or the religious-freedom principles historically respected by the State. *See, e.g.*, B. A. Dunn, *Education—Its Relations to us as Individuals and as a Nation*, Maryville Nodaway Democrat, Jan. 15, 1874, at 2 (stating that all sectarian influences, whether Protestant, Catholic, or Jewish, do not belong in the classroom); *Schools in Ohio*, Mo. Wkly. Patriot (Springfield), Sept. 2, 1875, at 1 (arguing that school-funding exemptions for one sect would make other schools financially non-viable); Thomas A. Hendricks, *The Hendricks Letter: Religion and Education*, Marshall Saline Cnty. Progress, Aug. 8, 1876, at 1 (stressing the importance of establishing schools that are independent of all parties and sects and instead represent all people); *cf.* Green, *Insignificance*, *supra*, at 317 (stating that nationally, "many opposed dividing the school fund for reasons unrelated to the Catholic Church").

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C. The 1870 No-Aid Provision Applied to Schools of Every Religious Denomination.

Despite Becket's claim that the no-aid amendment was anti-Catholic, it was well-accepted in 1870 that it would apply to private religious schools of every faith, prompting Sen. Reed to complain during the debate that "the proposal would deny aid to a Baptist school in his county, 'but let it be presided over by an infidel, [and] then it can receive aid.'" Hoey, *supra*, at 386. Indeed, Baptists had perhaps the most to lose from the passage of the amendment: By the early 1870s, taking into account schools and colleges (whose funding was also prohibited), Baptists had "more [schools] in the state of Missouri than any other denomination." R.S. Duncan, *A History of the Baptists in Missouri* 846 (1882); *accord Minutes of the Annual Meeting of the General Association of United Baptists of Missouri* 35 (Stephens et al. eds., 1871) ("[W]hen we compare the number and character of our schools and colleges, with that of other denominations, we are found standing in advance of all competition.").

Moreover, there was also a significant Lutheran population in Missouri at the time. *See* 1 *U.S. Bureau of the Census, Ninth Census of the United States: 1870, Statistics of the Population of the United States* 513, table XVIII(A) (1872) (showing roughly half as many Lutheran churches as Roman Catholic). The Lutheran church has a strong religious schooling tradition that would have been affected by the no-aid provisions. *See* 1 James C. Carper & Thomas C. Hunt, *The*

Praeger Handbook of Religion and Education in the United States 9 (2009) ("Lutherans maintained the most extensive 'system' of parochial schools in the country.").

D. The 1870 No-Aid Provision Was Readopted and Expanded in 1875 and 1945 Without Any Evidence of Anti-Catholic Sentiment.

During the 1875 constitutional convention, lawmakers readopted the 1870 no-aid amendment, reaffirming the importance of protecting the public-education system. *See* Const. of 1875, art. XI, § 11. Notably, they also adopted a second, broader no-aid provision mandating that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest preacher, minister or teacher thereof." Mo. Const. of 1875, art. II, § 7. Entitled "Religion, State must not aid church," the new language was inserted into the Bill of Rights alongside the no-preference clause. *Id.* By extending the Constitution's no-aid prohibition to cover public funding of all religious activities and entities, and explicitly linking it to the no-preference clause, the 1875 Framers sent a clear message that Missouri's no-aid provisions were not only vital to defending the public-education system, but that they were also a key component of the Constitution's heightened protections for religious liberty. Both of these provisions are clearly inclusive and exhaustive in scope,

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covering all religions and religious institutions, and both were passed in 1875, and readopted in 1945, without any evidence of anti-Catholic intent.

1. There was no sign of anti-Catholicism at the 1875 constitutional convention.

By the time that the 1875 constitutional convention commenced, Catholic immigrants were pouring into the state, especially in St. Louis. Parrish et. al., *supra*, at 149, 153. Whatever anti-Catholic bias may have existed in previous years had generally subsided. *See, e.g.*, Schwartz, *supra*, at 371.

At the convention itself, the available information suggests that convention members "were not motivated by anti-Catholic sentiment" when they adopted the no-aid provisions. *Id.* at 372. At least several members of the convention were Catholic, and one had helped stop the St. Louis anti-Catholic riot that had occurred in the 1850s. *Id.* Moreover, at least eight convention members were Baptist. 1 *Journal of the Missouri Constitutional Convention, 1875* at 64 (Isidor Loeb & Floyd C. Shoemaker, eds., 1920) [hereinafter *Journal 1875*], *available at* https://archive.org/stream/journalmissouric01miss#page/n5/mode/2up. As noted above, Baptists also operated numerous parochial schools that were subject to the no-aid provision's funding prohibition.

Convention members charged with reviewing the prior Constitution and determining which education-related provisions to retain gave due consideration to the original 1870 no-aid provision, but the only objections or concerns raised

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involved minor changes in wording. 2 *Journal 1875* at 597, *available at* https://archive.org/stream/journalmissouric02miss#page/n5/mode/2up. Not one delegate claimed that the amendment discriminated against Catholics. *See generally Debates of the Missouri Constitutional Convention, 1875* (Isidor Loeb & Floyd C. Shoemaker, eds., 1930) [hereinafter *Debates 1875*]. In fact, one delegate specifically confirmed his understanding that the provision applied equally to schools that might be run by "the Methodist, Episcopalian or Catholic church." 9 *Debates 1875* at 335. Another delegate expressed his view that the provision would serve to prevent religious strife as immigrants brought new religions to the United States. 9 *Debates 1875* at 341-42. In the end, the 1870 no-aid provision was readopted by the delegates by a vote of 48 to 8. That the delegates "barely tinkered" with the provision beyond minor word changes is not a sign of indifference to anti-Catholic bias, as Becket suggests, Becket Br. 11-12 n.8; rather, it is more proof that most people, including lawmakers, did not share the view of the most ardent proponents of divided school funds that prohibiting state financing of religious schools was somehow discriminatory against Catholics.

Not only did the 1875 Framers see no problem with the 1870 amendment restricting aid to parochial schools, but they apparently believed that it did not go far enough in protecting against taxpayer funding of religious activities and institutions. The 1875 Constitution thus saw the addition of a second, broader no-

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aid provision that prohibited the State from providing financial aid to any religious entity. Again, there was no evidence that this expansion of religious-liberty language was motivated in any way by anti-Catholic bias, although the delegates clearly gave the provision their full attention, debating (and ultimately rejecting) a proposed change in text that would have allowed the General Assembly to hire a chaplain. 1 *Journal 1875* at 260; 4 *Debates 1875* at 55-63.

Becket tries to gloss over the lack of anti-Catholic animus by arguing that "sectarian" is code for "Catholic," *see* Becket Br. at 12, but that is not how lawmakers understood the term, and Becket's view is unsupported by common usage of the term leading up to and following Missouri's adoption of the no-aid provisions in 1870 and 1875. *See, e.g.*, *State ex rel. Pitman v. Adams*, 44 Mo. 570, 574, 577 (Mo. 1869) (using the term "sectarian" to refer to the Methodist Episcopal church); *St. James Military Acad. v. Gaiser*, 28 S.W. 851, 851 (Mo. 1894) (referring to the Episcopal church as "sectarian"); Robert W. Barrow, *The Lord's Prayer and the Constitution*, Mo. Sch. J., Nov. 1899 at 625 ("When we remember that in 1875, when the Constitution was adopted, there were many denominational schools and colleges in the State, the Methodists, Presbyterians, Catholics, Baptists, etc., each having their denomination schools, we know these

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schools are referred to when the phrase 'schools controlled by any religious sect, etc.' is used in the Constitution.").[10]

2. *There was no evidence of anti-Catholic sentiment at the convention for the 1945 Constitution.*

Missouri lawmakers and voters again renewed their commitment to the principles embodied in the no-aid provisions by once again adopting both protections as part of the 1945 Constitution. There was not a "shred of historical evidence of illicit anti-Catholic motive." *See* Schwartz, *supra*, at 377 (noting that "the convention saw little discussion of the Blaine Amendment, and none of it involved anti-Catholic rhetoric nor did the key individuals make anti-Catholic contemporary statements"). Indeed, by the 1940s, anti-Catholicism had dramatically decreased nationwide. Catholics had become an integrated, familiar part of American society. James P. McCartin, *The Waning of the "Catholic Other" and Catholicism in American Life After 1965*, Revue Française D'études Américaines, Feb. 2003, at 7, 8 (Feb. 2003) (noting the waning of the "Catholic other" starting in the 1930s); *accord* Schwartz, *supra*, at 378. Similarly, in

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[10] *See also, e.g.*, Brief for Historians, *supra*, at 11 ("According to popular understanding of the [early 19th century], a sectarian school was any religious school in which particular doctrines were taught."); *cf. Against Sectarianism*, N.Y. Times, Dec. 26, 1889, at 8 ("The league is entirely non-partisan and non-sectarian in its character, the membership embracing men of all parties and all sects. One of the managers said yesterday to a *Times* reporter: '…I may say also that we have many liberal Catholics with us . . . Nor are we any more favorably disposed to Protestant schools. We are against sectarianism.'").

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Missouri, "[b]y 1945, any anti-Catholic hysteria existing in the state had largely dissipated." *Id.* at 376-77. Thanks to improved missionary efforts by Catholic priests in the years leading up to the constitutional convention, there was a "period of greater understanding between the Protestant majority and the Catholic minority in Missouri." *Id.* at 378.

III. MISSOURI'S NO-AID PROVISIONS COMPLY WITH THE U.S. CONSTITUTION.

Based on this history, Missouri's no-aid provisions plainly conform to the U.S. Constitution, and the district court and this Court may apply them without hesitation. State and federal courts have consistently upheld the right of states to limit government funding to non-religious recipients, particularly where such funding would offend state constitutional provisions that provide heightened protections for the separation of church and state. *See, e.g.*, *Locke v. Davey*, 540 U.S. 712, 715 (2004) (holding that the state did not violate the U.S. Constitution by prohibiting use of state scholarship funds to pursue a degree in theology).[11]

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[11] *See also, e.g.*, *Norwood v. Harrison*, 413 U.S. 455, 462, 469 (1973) (holding that Free Exercise and Equal Protection Clauses do not entitle "parochial schools to share with public schools in state largesse, on an equal basis or otherwise."); *Sloan v. Lemon*, 413 U.S. 825, 834-35 (1973) (explaining that "valid aid to nonpublic, nonsectarian schools [provides] no lever for aid to their sectarian counterparts"); *Wirzburger v. Galvin,* 412 F.3d 271, 280-81 (1st Cir. 2005) (upholding, under *Locke*, state constitutional provision prohibiting government financial support for religiously affiliated schools in Massachusetts); *Eulitt ex rel. Eulitt v. Me. Dep't of Educ.,* 386 F.3d 344, 354 (1st Cir. 2004) (ruling that the Free Exercise Clause does not include "an affirmative requirement that public entities

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Indeed, the U.S. Supreme Court has already upheld the federal constitutionality of the Missouri Constitution's prohibition against state aid to religious schools. *See Brusca v. State Bd. of Educ.*, 405 U.S. 1050 (1972), *aff'g mem.*, 332 F. Supp. 275 (E.D. Mo. 1971) (three-judge court); *see also Luetkemeyer v. Kaufmann*, 419 U.S. 888 (1974) (rejecting free-exercise and equal-protection attack on Missouri statute that authorized free bus transportation for public-school pupils but not for pupils enrolled in church-related schools), *aff'g* 364 F. Supp. 376, 386-87 (W.D. Mo. 1973) (three-judge court).[12]

Becket's comparison between the no-aid provisions and discriminatory Jim Crow laws, *see* Becket Br. at 5, is wholly inappropriate and ignores the decades of

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fund religious activity simply because they choose to fund secular equivalents of such activity"); *Cumberlands*, 308 S.W.3d at 679-80 ("[T]he Kentucky Constitution does not contravene the Free Exercise Clause when it prohibits appropriations of public tax monies to religious schools."); *Anderson v. Town of Durham*, 895 A.2d 944, 959 (Me. 2006) (holding that statute's prohibition of funding religious schools "does not burden or inhibit religion in a constitutionally significant manner"); *Bush*, 886 So. 2d at 364 ("[L]ike the Washington provision in *Locke*, the Florida no-aid provision is a[] [constitutionally valid] expression of a substantial state interest of prohibiting the use of tax funds 'directly or indirectly' to aid religious institutions."); *accord Bronx Household of Faith v. Bd. of Educ.*, 750 F.3d 184, 193-95 (2d Cir. 2014); *Bowman v. United States*, 564 F.3d 765, 772, 774 (6th Cir. 2008); *Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 409-10 (6th Cir. 2007); *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15, 21-23 (1st Cir. 2004).

[12] Summary affirmances such as *Luetkemeyer* are precedent with respect to the "'issues presented and necessarily decided by those actions.'" *Libertarian Party v. Bond*, 764 F.2d 538, 544 (8th Cir. 1985) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 (1983)).

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actual discrimination suffered by African-Americans when those laws were implemented. *Cf. Hunter v. Underwood*, 471 U.S. 222, 227, 229, 233 (1985) (striking down state constitutional provision that was indisputably passed to discriminate against African-Americans, and that had actual discriminatory effect throughout its history and during the time when the case was decided). By contrast, neither Appellant, a Lutheran school, nor its *amici* here contend that Missouri's no-aid provisions have, in implementation, ever been used to discriminate against Catholics or any other particular faith. These clauses have been applied to religious entities across the board. *See, e.g.*, *Harfst v. Hoegen*, 163 S.W.2d 609, 614 (Mo. 1941) (holding that a Catholic school could not be part of the publicly funded school system); *Mallory v. Barrera*, 544 S.W.2d 556, 562 (Mo. 1976) (denying aid to religious schools generally), *St. Louis Christian Home v. Mo. Comm'n on Human Rights*, 634 S.W.2d 508, 511 (Mo. Ct. App. 1982) (noting that an institution run by the Disciples of Christ had been properly denied state funding). The Court should apply them here.

CONCLUSION

For the reason set forth above, *amici* respectfully urge this Court to affirm the district court's ruling.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,930 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman, font-size 14.

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/s/ Anthony E. Rothert

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CERTIFICATE OF SERVICE

I, Anthony E. Rothert, do hereby certify that I have filed the foregoing Brief Amici Curiae electronically with the Court's CM/ECF system with a resulting electronic notice to all counsel of record on June 25, 2014. Upon approval and filing of this brief, a true and correct paper copy of the Brief with updated certificate of service will be sent via first-class mail, postage prepaid to counsel of record.

/s/ Anthony E. Rothert