No. 22-1175

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BISHOP OF CHARLESTON, d/b/a Roman Catholic Diocese of Charleston, a Corporation Sole; SOUTH CAROLINA INDEPENDENT COLLEGES AND UNIVERSITIES, INC.,

Plaintiffs-Appellants,

v.

MARCIA ADAMS, in her official capacity as the Executive Director of the South Carolina Department of Administration; BRIAN GAINES, in his official capacity as budget director for the South Carolina Department of Administration; HENRY DARGAN MCMASTER, in his official capacity as Governor of South Carolina,

Defendants-Appellees,

and

STATE OF SOUTH CAROLINA,

Intervenor/Defendant-Appellee.

On Appeal from the United States District Court for the District of South Carolina, Case No. 2:21-cv-1093, Hon. Bruce H. Hendricks

Brief in Support of Appellees and Affirmance of *Amici Curiae* Americans United for Separation of Church and State; Bend the Arc: A Jewish Partnership for Justice; Central Conference of American Rabbis; Disciples Center for Public Witness; Disciples Justice Action Network; Equal Partners in Faith; Global Justice Institute, Metropolitan Community Churches; Hindu American Foundation; Interfaith Alliance Foundation; Men of Reform Judaism; National Council of Jewish Women; Women of Reform Judaism; and Union for Reform Judaism

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 22-1175 Caption: Bishop of Charleston v. Adams

Pursuant to FRAP 26.1 and Local Rule 26.1,

See attachment for list of amici curiae making disclosures. The disclosures below apply to all amici
(name of party/amicus)

curiae on the attached list.

who is amicus curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
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7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
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Signature: /s/ Alex J. Luchenitser Date: May 26, 2022

Counsel for: amici curiae on attached list

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Attachment to Disclosure Statement: List of *Amici Curiae*

Americans United for Separation of Church and State.

Bend the Arc: A Jewish Partnership for Justice.

Central Conference of American Rabbis.

Disciples Center for Public Witness.

Disciples Justice Action Network.

Equal Partners in Faith.

Global Justice Institute, Metropolitan Community Churches.

Hindu American Foundation.

Interfaith Alliance Foundation.

Men of Reform Judaism.

National Council of Jewish Women.

Women of Reform Judaism.

Union for Reform Judaism.

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IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

Amici are religious and civil-rights organizations that share a commitment to religious freedom and the separation of religion and government. *Amici* believe that religious freedom flourishes best when religion is funded privately and that governmental funding of religious activities does a disservice both to religion and to government. *Amici* therefore oppose Appellants' efforts to overturn a South Carolina constitutional provision that bars all direct funding of private education, including religious education.

The *amici* are:

- Americans United for Separation of Church and State.
- Bend the Arc: A Jewish Partnership for Justice.
- Central Conference of American Rabbis.
- Disciples Center for Public Witness.
- Disciples Justice Action Network.
- Equal Partners in Faith.
- Global Justice Institute, Metropolitan Community Churches.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

- Hindu American Foundation.
- Interfaith Alliance Foundation.
- Men of Reform Judaism.
- National Council of Jewish Women.
- Women of Reform Judaism.
- Union for Reform Judaism.

INTRODUCTION AND SUMMARY OF ARGUMENT

South Carolina's constitution contains a clause that forbids direct aid from the state to private schools, whether or not those schools are religiously affiliated. Appellants contend that the clause as it exists today must be invalidated because it allegedly is irredeemably tainted with anti-Catholic prejudice stemming from the constitutional convention of 1895. But Appellants' arguments are neither factually accurate nor legally relevant.

The national history surrounding adoption of no-aid clauses—state constitutional provisions that prohibit public funding of religious education—shows that states had legitimate and important reasons, stemming from founding-era concerns, for adopting those provisions. South Carolina-specific history confirms that the state's 1895 no-aid clause, like the 1868 clause on which it was based, was enacted not out of any anti-Catholic animus but instead to safeguard funding for the state's burgeoning public-education system and to prevent religious divisiveness. But even if the 1895 no-aid clause had originally been motivated by some form of religion-related animus, any taint was removed when the clause was substantially revised in 1972 to render it equally applicable to religious and secular private schools.

ARGUMENT

I. Nineteenth-century no-aid clauses were intended to protect religious freedom and the public schools.

Appellants assume that no-aid clauses enacted by states during the nineteenth century were exclusively or predominantly motivated by anti-Catholic animus. That is not so. To be clear, shameful anti-Catholic sentiment was present in the United States in the nineteenth century. But nineteenth-century no-aid clauses were motivated largely by nondiscriminatory considerations, including protecting the separation of religion and government and safeguarding public-school funding, not by animus toward any religion. Indeed, many no-aid clauses were enacted before the major waves of Catholic immigration to the United States and the proposal of the federal Blaine amendment, so they could not have been motivated by the anti-Catholicism that Appellants ascribe to these events. And later no-aid clauses were based on those earlier ones and thus, like them, were rooted in legitimate church-state and public-school-funding concerns, not anti-Catholic animus.

A. The no-aid principle emanated from founding-era concerns about protecting taxpayers' freedom of conscience and the independence of religious institutions.

State no-aid clauses reflect the views of our nation's founders, who believed that preventing governmental funding of religious education

protected individuals' freedom of conscience against coercion to support a religion different from one's own and shielded religion and religious institutions from the deleterious effects of governmental support and interference.

For example, in response to a 1784 proposal that Virginia use property taxes to fund religious education by paying "learned teachers" of "Christian knowledge" "to correct the morals of men, restrain their vices, and preserve the peace of society" (*see* Patrick Henry, *A Bill Establishing a Provision for Teachers of the Christian Religion* (1784), https://bit.ly/3KvV8Nf), James Madison objected that the bill would infringe "the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience" (*see* James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 15 (1785), https://bit.ly/3LEw4Fc (internal quotations omitted)). Madison successfully advocated for the passage instead of a bill, previously drafted by Thomas Jefferson, that provided that "no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever." Thomas Jefferson, *The Virginia Statute for Religious Freedom* (1786), https://bit.ly/3s77k0I. Jefferson explained that public funding of religious activities, including religious education, violates the freedom of conscience

of taxpayers, for "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Id.*

The founders' opposition to tax support for religious instruction was also rooted in a profound desire to protect religion from the pernicious effects of governmental involvement in the affairs of religious groups. Madison warned that governmental aid would "weaken in those who profess this Religion a pious confidence in its innate excellence" and "foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust it to its own merits." Madison, *supra*, at ¶ 6. Jefferson agreed, noting that public funding "tends also to corrupt the principles of that religion it is meant to encourage, by bribing with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it." Jefferson, *supra*. And Benjamin Franklin likewise counseled: "When a Religion is good, I conceive that it will support itself; and when it cannot support itself, . . . so that its Professors are oblig'd to call for the help of the Civil Power, 'tis a Sign, I apprehend, of its being a bad one." Letter from Benjamin Franklin to Richard Price (Oct. 9, 1780), http://bit.ly/2jMsrVO.

The founders thus saw "quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general." *Flast v. Cohen*, 392 U.S. 83, 103–04 (1968). In their view, such governmental aid for the support of religious instruction and education was not to be tolerated, much less mandated. *See id.*

Similar concerns about religious assessments and establishments animated debates in the states. For example, John Leland, a leading Baptist minister who influenced Madison, wrote that "[s]ecular force, in religious concerns, to make christianity appear honorable, is like lacker upon gold or paint upon a diamond. The religion of Jesus disdains such aid." Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. Rev. 1385, 1511 n.441 (2004) (quoting John Leland, *Van Tromp Lowering His Peak with a Broadside* 30 (1806)); *see also id.* at 1498–1501.

Many states accordingly enacted constitutional clauses in the late eighteenth century that barred the use of tax dollars to support religion. *See Locke v. Davey*, 540 U.S. 712, 723 (2004). "The plain text of these constitutional provisions prohibited *any* tax dollars from supporting the clergy" or "the ministry." *Id.* As a leading early treatise explained, among

"[t]hose things which [were] not lawful under any of the American constitutions" was "[c]ompulsory support, by taxation or otherwise, of religious instruction." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 469 (1st ed. 1868), https://bit.ly/2OW1Djf.

Pennsylvania's 1776 constitution, for example, provided that "no man ought or of right can be compelled to . . . support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent." Pa. Const. of 1776, art. II, https://bit.ly/2Bd5fW9. New Jersey's 1776 constitution likewise stated that no "Person within this Colony [shall] ever be obliged to pay Tithes, Taxes, or any other Rates, for the Purpose of building or repairing any Church or Churches, Place or Places of Worship, or for the Maintenance of any Minister or Ministry, contrary to what he believes to be right, or has deliberately or voluntarily engaged himself to perform." N.J. Const. of 1776, art. XVIII, https://bit.ly/2VIjN9G. And Delaware's 1792 constitution read, "no man shall or ought to be compelled to . . . contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against his own free will and consent." Del. Const. of 1792, art. I, § 1, https://bit.ly/2IU8tlz; *accord*, *e.g.*, Vt. Const. of 1793, ch. I, art. 3,

https://bit.ly/3lf0DGF; Ky. Const. of 1792, art. XII, § 3, https://bit.ly/33zLqEM; Tenn. Const. of 1796, art. XI, § 3, https://bit.ly/2qc1b6c.

B. Nineteenth-century no-aid clauses continued founding-era tradition and were also intended to safeguard developing public-school systems.

States continued to prohibit funding of religious education in the nineteenth century. A good number of nineteenth-century state no-aid provisions preceded (some substantially) not only Senator Blaine's proposal to amend the U.S. Constitution to bar religious groups from controlling public-school funds but also the waves of Catholic immigration to the United States in the mid-nineteenth century. *See, e.g.*, Jill Goldenziel, *Blaine's Name in Vain: State Constitutions, School Choice, and Charitable Choice*, 83 Denver U. L. Rev. 57, 66 (2005); Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 BYU L. Rev. 295, 327–28 (2008). These provisions obviously could not have been motivated by either a failed federal proposal or reactions to demographic shifts that they predated.

In 1818, for example—more than fifty years before Senator Blaine introduced the federal Blaine amendment—Connecticut approved a constitutional provision that prohibited the diversion of school funds "to

any other use than the encouragement and support of public or common schools." Conn. Const. of 1818, art. VIII, § 2, https://bit.ly/3uKyQRO. 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). Michigan likewise adopted a no-aid clause in its 1835 constitution, before any substantial Catholic immigration and before the appearance of any significant number of Catholic schools in the state. *See* Steven K. Green, *Blaming Blaine: Understanding the Blaine Amendment and the No-Funding Principle*, 2 First Amend. L. Rev. 107, 126 (2003); Mich. Const. of 1835, art. I, § 5, https://bit.ly/3DjhT44. In fact, Catholic clergy were active in the push to establish a public-school system in Michigan, which is what the constitutional provision advanced. Green, *Blaming Blaine*, *supra*, at 126 n.77.

Similar provisions were passed in other states where there was minimal Catholic immigration or before anti-Catholicism became a political or cultural issue. No-aid clauses were enacted in Wisconsin in 1848, Indiana and Ohio in 1851, and Minnesota and Oregon in 1857, all without contemporaneous conflicts over the funding of religious schools. *Id.* at 127; Green, *The Insignificance of the Blaine Amendment*, *supra*, at

313–14. Wisconsin, for example, adopted its no-aid clause before any parochial-school system existed in the state. Green, *Blaming Blaine*, *supra*, at 127 & n.80. Indiana did so despite Catholics' comprising less than six percent of the state population. *Id.* at 127 & n.84. And Ohio adopted its no-aid clause against a background of "amicable" relations between public-school and Catholic-school officials in Cincinnati, the city with the state's largest immigrant population. Green, *The Insignificance of the Blaine Amendment*, *supra*, at 314.

Moreover, because states frequently relied on language in other states' constitutions to craft their own (*see* Goldenziel, *supra*, at 67), many no-aid clauses were drawn from earlier provisions elsewhere—and thus had their origins in provisions adopted before widespread anti-Catholicism. *See id.* (Wisconsin's provisions may have been drawn from Massachusetts's and Pennsylvania's); Green, *Blaming Blaine*, *supra*, at 127 (Michigan's constitution was a model for those of Indiana and Minnesota); Green, *The Insignificance of the Blaine Amendment*, *supra*, at 314 (Indiana's 1851 constitution was the model for Oregon's 1857 constitution, and Ohio's 1851 no-aid clause was the model for Kansas's similar 1858 no-aid clause); Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide* 9 (2002) (Oregon's 1857

constitution was the model for much of Washington's 1899 constitution); Dale A. Oesterle & Richard B. Collins, *The Colorado State Constitution: A Reference Guide* 222 n.987 (2011) (Illinois's 1870 no-aid clause was the model for Colorado's 1876 no-aid clause).

In addition, even if the run of states' no-aid clauses had been tethered to the federal Blaine amendment—which they weren't—there is not even a meaningful consensus that the Blaine amendment itself was the product of anti-Catholic animus. In that regard, for example, though some of Senator Blaine's supporters expressed anti-Catholic sentiments, there is no evidence that Blaine himself was motivated by anti-Catholic fervor. *See* Green, *Blaming Blaine*, *supra*, at 113–14. 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 he repeatedly made clear that he was not anti-Catholic but instead intended only to prevent controversy by resolving the school issue once and for all. *Id.*; *see also* Goldenziel, *supra*, at 64.

Far from being motivated by anti-Catholicism, states that enacted no-aid clauses in the nineteenth century did so both because of the vital church-state concerns described above and to safeguard their emerging and vulnerable public-school systems. *See* Goldenziel, *supra*, at 68; Green,

The Insignificance of the Blaine Amendment, *supra*, at 310; Green, *Blaming Blaine*, *supra*, at 116. Protecting the separation of religion and government was a concern throughout the century for lawmakers who supported these provisions. *See, e.g.*, Green, *The Insignificance of the Blaine Amendment*, *supra*, at 310. For instance, the Common Council of New York City, which disbursed the city's school funds, twice denied requests in the 1820s for public support of Protestant-affiliated private schools. *See, e.g.*, *id.* at 310–11. As the Council explained, "the leading principle of all our legislation has ever been, to let religion support itself." *Id.* (quoting William Oland Bourne, *History of the Public School Society of the City of New York* 88 (1870)). And the council further recognized that funding religious schools in the same way as the common schools would "give rise to a religious and anti-religious party," after which a "fierce and uncompromising hostility will ensue." *Id.* at 311 (quoting Bourne, *supra*, at 140). New York City's refusals to fund *Protestant* religious education plainly did not reflect anti-Catholic animus.

New York City's rationale for refusing to provide public funding for religious schools was emblematic of the legislative efforts elsewhere. A delegate to the Oregon constitutional convention of 1857 argued that "[a] man in this country had a right to be a Methodist, Baptist, Roman

Catholic, or what else he chose, but no government had the moral right to tax all of these creeds and classes to inculcate directly or indirectly the tenets of any one of them." *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857*, at 305 (Charles Henry Carey ed., 1926). Delegates at Illinois's 1870 constitutional convention likewise sought to prevent governmental entanglement with religion by precluding public funding for schools of any religion (including Presbyterian, Methodist, Baptist, and Congregationalist schools). *See* 1 *Debates and Proceedings of the Constitutional Convention of the State of Illinois* 618–26 (1870). And the Colorado Constitution's framers "almost all seemed to be in agreement" that a "rigid separation of church and state" should exist. Tom I. Romero, II, *"Of Greater Value Than the Gold of Our Mountains": The Right to Education in Colorado's Nineteenth Century Constitution*, 83 U. Colo. L. Rev. 781, 830 (2012).

Nineteenth-century no-aid clauses were also significantly influenced by the development of public education (i.e., "common schools"), which began to take root early in the century. *See, e.g.*, Green, *Blaming Blaine*, *supra*, at 116. Proponents of public education feared that their public-school systems would be starved of resources if funding were extended to or divided with private schools, and they enacted no-aid clauses to guard

against that concern. *See* Green, *The Insignificance of the Blaine Amendment*, *supra*, at 317.

For example, one delegate to Colorado's constitutional convention asserted that the state's no-funding provision "was basic to maintaining a system of popular education." Donald W. Hensel, *Religion and the Writing of the Colorado Constitution*, 30 Church Hist. 349, 355 (1961). Convention petitions expressed similar sentiments, with one arguing that "funds raised for [public schools] should not be diverted to other uses." *Proceedings of the Constitutional Convention Held in Denver, December 20, 1875 to Frame a Constitution for the State of Colorado* 113 (1907), https://bit.ly/3lGi6Ht; *see also id.* at 277. Likewise, in Missouri, concern that diversion of money to parochial schools would "destroy the public schools" led public-education advocates to propose a "constitutional amendment to ensure the public school funds remained solely for public education." J. Michael Hoey, *Missouri Education at the Crossroads: The Phelan Miscalculation & the Education Amendment of 1870*, 95 Mo. Hist. Rev. 372, 373 (2001); *see also id.* at 384–86; Mo. Const. of 1865, art. IX, § 10 (1870), https://bit.ly/3lCcBd6.

States thus acted based on several legitimate, secular reasons in adopting no-aid provisions during the nineteenth century. As Justice

Brennan, himself a devout Catholic, put it, the "widespread demands throughout the States for secular public education" were a product of powerful social forces that included "[t]he Nation's rapidly developing religious heterogeneity, the tide of Jacksonian democracy, and growing urbanization." *Lemon v. Kurtzman*, 403 U.S. 602, 646–47 (1971) (Brennan, J., concurring) (citations and footnote omitted).

II. South Carolina's 1895 no-aid clause was designed to protect public-school funding and to prevent religious division.

South Carolina's 1895 no-aid provision was motivated by the same types of legitimate, secular considerations that motivated such provisions nationwide. It was born in part from the state's desire to safeguard the integrity of and financial support for free public schools. It also reflected the state's deep and enduring commitment to protecting the religious freedom of South Carolinians by ensuring that no taxpayer in the state would ever be forced to subsidize religion or religious exercise. In arguing that South Carolina's 1895 no-aid clause was the product of anti-Catholic animus, Appellants wrongly downplay that the 1895 clause was based on a similar clause in the state's 1868 constitution, disregard the historical evidence that both the 1868 and 1895 no-aid provisions were driven by legitimate motivations, and fail to present evidence linking anti-Catholic

animus to these South Carolina no-aid provisions or the constitutional conventions that voted to adopt them.

A. South Carolina's no-aid clause was motivated by legitimate, secular purposes.

As was the case in many other states, an intent "to secure the financial stability of the nascent common schools" (Green, *The Insignificance of the Blaine Amendment*, *supra*, at 310) lay at the heart of South Carolina's no-aid clause. From its earliest days, South Carolina "was especially alive to the necessity of mental development." Colyer Meriwether, *History of Higher Education in South Carolina* 3 (Herbert B. Adams ed., 1888). Attempts to establish a system of free, public education began in 1811 with the passage of an act providing for the free instruction of all children with "preference to poor children." *Id.* at 4. But that law failed to create an administrative or supervisory body to oversee public education in the state—an "insuperable bar to success." *Id.* And the schools were substantially underfunded (*id.*), a problem that only worsened in the Civil War's aftermath (*see id.* at 76–77).

Against this backdrop, Article X of the 1868 constitution required the creation of a public-school system—a "keystone" of a constitution that "contemplated the extensive use of public funds to make educational and health benefits widely available." James Lowell Underwood, *The*

Constitution of South Carolina, Volume III: Church and State, Morality and Free Expression 166 (1992). One section of Article X stated that "[t]he General Assembly shall, as soon as practicable after the adoption of this Constitution, provide for a liberal and uniform system of free public schools throughout the State." S.C. Const. of 1868, art. X, § 3, https://bit.ly/39MbEMH; *see also id.* §§ 1–2, 4, 5 (creating a state board of education, making attendance mandatory for school-age children, and requiring the General Assembly to fund the public-school system through property and poll taxes).

Article X also included South Carolina's inaugural no-aid clause: "No religious sect or sects shall have exclusive right to, or control of, any part of the school funds of the State, nor shall sectarian principles be taught in the public schools." *Id.* § 5. This 1868 no-aid clause was part and parcel of South Carolina's establishment of constitutionally mandated public education: If the public-school system was to be successful, the state could ill afford to let limited public funds flow to private institutions. *See* Underwood, *The Constitution of South Carolina*, *supra*, at 167.

The no-aid provision was also intended to forestall the church-state ills, of which Madison and Jefferson warned, that would result from public funding of religious education. *See id.* at 166–67. South Carolina had long

expressed a deep commitment to maintaining religious tolerance and harmony: Its 1790 constitution had eliminated any state-established church and done away with earlier constitutional provisions that conditioned the right to vote on belief in God and imposed religious tests for officeholders. *See id.* at 77–79. So it is no surprise that, by the mid-1800s, South Carolina legislators had recognized that "opening the schools to a diverse student body and burdening all property taxpayers with the support of this system made more concrete guarantees of fiscal and ideological neutrality toward religion in the schools desirable." *Id.* at 167. If religious schools were allowed to be funded, "[t]he greater infusion of public funds into the educational system and the opening of that system to a diverse group of students would prompt maneuvering for control of those funds as well as attempts to control the curriculum." *Id.* at 166. To maintain a "harmonious environment, the government could not afford to let funds raised for education from all property taxpayers . . . be used to spread the ideological message of any particular religion." *Id.*

Appellants nonetheless insist that the 1868 provision was motivated by "anti-Catholic bias." Br. 29. But what they cite to support that assertion is equal parts weak and misleading. The argument that the Black South Carolinians who largely drafted the 1868 Constitution led opposition to

missionary schools (Br. 29–30) is directly contradicted by one of Appellants' own experts, who notes opposition to missionary schools by Whites but not by Blacks (*see* J.A. 71 ¶ 22 ("These missionaries from the North were by no means welcomed by *White Southerners*") (emphasis added)). The same expert likewise notes that it was not until "the mid-1870s that [Catholic school] funding became a major political issue" (J.A. 78 ¶ 51), giving lie to the notion (*see* Br. 29) that Republican delegates at the 1868 convention were motivated by an anti-Catholic political agenda. In all events, the 1868 provision predated the proposal of the federal Blaine amendment by nearly a decade, and the journal of the 1868 proceedings is devoid of even the slightest hint of animus toward Catholics or any other religious group or denomination. *See generally* 1 *Proceedings of the Constitutional Convention of South Carolina* (1868), https://bit.ly/3FgkjCn.

The concerns that actually animated the 1868 no-aid clause remained salient when the constitutional convention of 1895 convened twenty-six years later. The public-education system remained precarious and vastly underfunded at that time. *See, e.g.*, Meriwether, *supra*, at 76–77. And because South Carolina was even "more diverse" religiously than it had been in 1868, the government "had to be more neutral or else

fractious quarrels would be set off as the various denominations would vie for the biggest share of public funds." Underwood, *The Constitution of South Carolina*, *supra*, at 170.

The 1895 clause was also motivated by an additional concern: fiscal restraint. "In a sense," the clause was "an extension of the traditional South Carolina fiscal conservatism to the educational and social services area with specific emphasis upon prohibiting grants to religious organizations as those most likely to be operating in those fields. Let private organizations look to private sources." *Id.* at 171.

With all these rationales in mind, the 1895 convention readopted a no-aid clause. In doing so, it built on the 1868 clause, which had been "strong" but could still have been interpreted to allow religious organizations to exert substantial influence over public funding for education, as long as the organizations did not have "exclusive" control over the funds. *Id.* at 167. "This loophole was plugged" by the more detailed and expansive 1895 provision (*id.*), which forbade public funds to "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. of 1895, art. XI, § 9, https://bit.ly/38aMYgl).

B. Appellants fail to demonstrate that the 1895 no-aid provision was tied to anti-Catholic sentiment.

Appellants bear the burden of proving that the 1895 provision was enacted with discriminatory intent instead of the above-described legitimate reasons. *See, e.g.*, *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). They do not come close to doing so.

As explained above in Part I, Appellants wrongly suggest that state no-aid clauses were generally motivated by anti-Catholic animus. But even if anti-Catholicism did play some role in other states, the history and demographics of South Carolina do not support Appellants' assumption that the same occurred there. South Carolina experienced a much smaller influx of Catholic immigration than the nation at large. *See, e.g.*, Dennis C. Rousey, *Catholics in the Old South: Their Population, Institutional Development, and Relations with Protestants*, 24 U.S. Cath. Historian 1, 21 (2006); Randall M. Miller, *Catholics*, South Carolina Encyclopedia (2016), https://bit.ly/3yZVGFu. As a result, anti-Catholic sentiment was "never as strong" in South Carolina as it was in northern states with larger Catholic populations. Rousey, *supra*, at 16; *see also Miller*, *supra*.

Appellants also rely on South Carolina's seventeenth- and eighteenth-century legislative and constitutional enactments establishing Protestantism as the state's religion and excluding Catholics from certain religious-exercise protections. *See* Br. 14. But South Carolina's 1790 constitution eliminated the Protestant establishment and expressly forbade preferring any denomination over another—more than a century before the 1895 no-aid clause was enacted. *See* James L. Underwood, *The Dawn of Religious Freedom in South Carolina: The Journey from Limited Tolerance to Constitutional Right*, 54 S.C. L. Rev. 111, 170–71 (2002).

To be sure, Appellants do cite some undeniably repugnant anti-Catholic language from late-nineteenth-century publications. *E.g.*, Br. 19–21. But much of that language has nothing to do with the 1895 no-aid clause, and at least one source *postdates* 1895 and hence could not have been an impetus for enacting that year's provision. *See* Br. 20–21 & n.11. While isolated newspaper columns, editorials, and even statements of elected officials may reflect anti-Catholic biases harbored by some South Carolinians in the late nineteenth century, they do not establish that the 1895 no-aid clause itself was infected by any such bias. *Cf., e.g.*, *United States v. O'Brien*, 391 U.S. 367, 383–84 (1968) ("What motivates one

legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it . . . .").

Indeed, the record of the 1895 constitutional convention contains very little debate regarding the clause, and what discussion there was evinces no trace of anti-Catholic animus. *See Journal of the Constitutional Convention of the State of South Carolina* (1895), https://bit.ly/2XZY2r6. The *sole* piece of direct evidence connected to the 1895 constitutional convention that Appellants cite is a line-item in the convention journal noting that "the convention accepted a communication from 'The National League for the Protection of American Institutions.'" Br. 18–19 (citing *Journal of the Constitutional Convention*, *supra*, at 205). Appellants say that this organization was an extension of the anti-Catholic American Protective Association, and that its letter therefore demonstrates the influence of anti-Catholic rhetoric on the delegation. Br. 19.

But the National League was not an extension of the Protective Association. Quite the opposite: The League explicitly disavowed the Protective Association's anti-Catholic platform, with its spokesperson noting that—unlike the Protective Association—it "attacks no church" and "is absolutely unsectarian and non-partisan in character." *Not Modeled After A.P.A.: National League to Protect American Interests*, N.Y. Times

(June 2, 1894), https://nyti.ms/3F3LQXt; *see also, e.g.*, Circular from John Jay, National League President, and James M. King, National League General Secretary (May 21, 1890), https://bit.ly/3uF30pk (identifying the League as "non-partisan and unsectarian").

Regardless, no further reference to the organization or its letter appears in the journal of the convention's proceedings. There is therefore no evidence that the delegates even considered the contents of the communication, much less that the letter was persuasive. In fact, by the time the convention documented receipt of the communication, readoption of the no-aid clause had already been proposed. *See Journal of the Constitutional Convention, supra*, at 88.

Appellants ultimately try to gloss over their lack of evidence of anti-Catholic animus by arguing that the word "sectarian" in the 1895 clause was code for "Catholic." Br. 17–18. But that reading is inconsistent with the original meaning of the term, which denoted differences among Protestant denominations. *See, e.g.*, *Sectarian*, Oxford English Dictionary (2d ed. 1989) (term first used in the seventeenth century "by the Presbyterians with reference to the Independents [and] subsequently by Anglicans with reference to Nonconformists"). The use of "sectarian school" into the nineteenth century accordingly meant "any religious

school in which particular doctrines were taught." Green, *Blaming Blaine*, *supra*, at 122. And contemporaneous speakers in the years leading up to and following South Carolina's adoption of its nineteenth-century no-aid clauses (in both 1868 and in 1895) used "sectarian" to refer to religious differences broadly, rather than to Catholicism specifically. *See, e.g.*, Meriwether, *supra*, at 4 (an 1888 letter from then-Commissioner of Education N.H.R. Dawson used the term "strictly sectarian" in reference to religious colleges of various denominations); Underwood, *The Dawn of Religious Freedom, supra*, at 171. In any event, the 1895 clause prohibited public funding of educational institutions controlled by "any *religious or* sectarian denomination, society or organization" (S.C. Const. of 1895, art. XI, § 9 (emphasis added)), so even if "sectarian" did have a narrower meaning to some, the word "religious" ensured that the clause applied equally to all faiths.

At bottom, Appellants have not met their burden to show that anti-Catholic sentiment motivated South Carolina's 1895 no-aid clause. Because such a discriminatory motivation cannot properly be imputed by mere association or implication (*see Abbott*, 138 S. Ct. at 2324–30), this Court should reject Appellants' arguments, which amount to little else. *Cf., e.g.*, *Locke*, 540 U.S. at 723 n.7 ("Neither [the plaintiff] nor amici have

established a credible connection between the Blaine Amendment and . . . the relevant [state] constitutional provision," and hence "the provision in question is not a Blaine Amendment."); *Univ. of Cumberlands v. Pennybacker*, 308 S.W.3d 668, 681–82 (Ky. 2010) (concluding that there was no evidence that Kentucky'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) (same for Florida clause), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006).

III. Even if South Carolina's 1895 no-aid clause had been motivated by anti-Catholic animus, the 1972 revision erased any taint.

Even if anti-Catholic animus did play some role in the adoption of South Carolina's 1895 no-aid clause, the substantial revision of the clause in 1972 eliminated any possible vestiges of religious discrimination. Even where past discrimination exists, it "cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Abbott*, 138 S. Ct. at 2324 (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (plurality opinion)). While previous animus may be "'one evidentiary source' relevant to [determining] intent," the "allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination." *Id.* at 2324–25 (quoting *Arlington Heights*

v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977)). Here, even if any improper intent had existed, the 1972 revision of the no-aid clause remedied it by putting religious and nonreligious private schools on an equal footing while relaxing the limits on aid to religious schools. And there is no evidence that antireligious animus motivated the 1972 revision.

A. The 1972 revision loosened restrictions on aid to religious schools and subjected nonreligious private schools to the same rules.

In 1966, the South Carolina General Assembly created a committee—known as the West Committee—to study and propose changes to the state constitution. The Committee recommended two changes to the no-aid clause. First, it recommended extending the bar on direct aid to cover not just private religious education but also private *secular* education. Second, it recommended removing the restriction on *indirect* aid. Together, these changes would allow the state to provide aid (in the form of tuition grants, for example) to *students* attending religious *or* secular private institutions, but not to the institutions themselves. *See Final Report of the Committee to Make a Study of the S.C. Const. of 1895* 99–101 (1969), https://bit.ly/3BevdG4. The proposed amendment was ratified in 1972, and the no-aid clause now reads: "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, § 4, https://bit.ly/3lDjIlk.

The West Committee sought to respect long-standing principles of separation of religion and government while also addressing other legitimate considerations.

On the one hand, the Committee was concerned that a "tremendous number of South Carolinians [were] being educated at private and religious schools in this State and that the educational costs to the State would sharply increase if these programs ceased." *Final Report*, *supra*, at 99–101. And in the Committee's view, "[t]he benefits of preserving a variety of higher education providers in the form of private institutions, both secular and religious, as well as state-operated schools would be many." Underwood, *The Constitution of South Carolina*, *supra*, at 171; *see also Final Report*, *supra*, at 99–101. Permitting indirect aid in the form of student scholarships would, for example, "make it more feasible for low- and middle-income students" to attend religiously affiliated colleges and bring greater diversity of thought and perspectives to South Carolina's student bodies. Underwood, *The Constitution of South Carolina*, *supra*, at 171.

On the other hand, "[f]rom the standpoint of the State and the independence of the private institutions, . . . public funds should not be granted outrightly to such institutions." *Final Report, supra*, at 101. For "government support of private, religiously-operated educational institutions[ ] could lure such institutions away from the purity of their religious perspective and make them cater to the whims of government as a means of attracting more funds." Underwood, *The Constitution of South Carolina*, *supra*, at 171.

Removing the barrier on indirect aid while retaining the barrier on direct funding was a satisfying compromise to the Committee and others. In the view of South Carolina's then-Attorney General, for instance, the amended no-aid provision would not "impede religion but rather . . . further the general educational development of students who attend private as well as public schools." *See* Opinion of the South Carolina Attorney General, 1974 WL 27574 (Jan. 4, 1974).

The Committee's decision to bar the direct funding of *secular* institutions in addition to religious ones, moreover, was not only a reflection of religious neutrality but also a continued "expression of the fiscal conservatism of the state." Underwood, *The Constitution of South Carolina*, *supra*, at 174. "Promiscuous state fiscal aid to all forms of

private endeavor, whether religious or not, was to be viewed with deep skepticism." *Id.*

The 1972 revisions thus eliminated any connection between anti-Catholicism and the no-aid clause, even if one had existed before. They put religious education on precisely the same footing as secular education—in text and in practice—explicitly barring both religious and secular schools from receiving direct aid. The revisions in fact *benefited* Catholic (and other religious) institutions by permitting them to receive support through indirect governmental funding. And the changes did away with the use of "sect" and "sectarian," words that Appellants (incorrectly) depict as anti-Catholic.

B. There is no evidence that the 1972 revision was itself motivated by anti-Catholicism.

Appellants do not come close to demonstrating that the 1972 revision was nevertheless somehow marred by religious animus. Appellants' reliance on the apparent anti-Catholic views of a single member of the West Committee (*see* Br. 41–42) do not prove that such views infected the Committee or had any bearing whatever on the revisions to the no-aid clause itself. *See O'Brien*, 391 U.S. at 383–84.

Appellants also suggest that concern for the separation of religion and government itself evinces anti-Catholic animus. *See* Br. 49–50. But

Appellants again mischaracterize their own expert's evidence, which—properly read—contradicts their argument. Dr. Glenn did not, as Appellants assert, "testif[y]" that "'the separation of church and state' was as much code for anti-Catholic as 'sectarian.'" Br. 49 (quoting J.A. 77 ¶ 47). Setting aside that Dr. Glenn's report addressed beliefs of nineteenth-century lawmakers across the nation—not the entirely distinct motivations of South Carolina's legislators in the 1970s—he explicitly distinguished between "concerns about 'separation of Church and State'" and "nefarious" concerns about "Catholic schooling." J.A. 77 ¶ 47.

More than that, the principles of church-state separation that Appellants attack as anti-Catholic date back to the founders of our nation, predating any substantial wave of Catholic immigration to the United States and any accompanying anti-Catholic sentiment, and were designed to protect all faiths equally. *See supra* § I(A). And Appellants' logic has no bounds: If advocating for church-state separation were inherently anti-Catholic, it would seemingly call into question *any* legislative action or court decision that protects the separation of religion and government. That would wrongly read out of the U.S. Constitution the First Amendment's Establishment Clause, which—as the Supreme Court has

unanimously held—"commands a separation of church and state" (*Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005)).

Finally, while Appellants rely on the conclusions contained in Dr. Graham's expert report, the report itself cites no evidence tying the West Committee or the 1972 revisions to anti-Catholic animus. *See* J.A. 87–142 (Graham Report). Nor does Appellants' other expert, Dr. Glenn. *See* J.A. 66–86 (Glenn Report).

CONCLUSION

For the foregoing reasons, the district court's decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because, excluding the parts of the brief exempted by Rule 32(f), it contains 6,443 words.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared using Microsoft Word in Century Schoolbook font measuring no less than 14 points.

/s/ *Alex J. Luchenitser*