IN THE SUPREME COURT OF FLORIDA

JOHN ELLIS "JEB" BUSH, ETC.,
ET AL.,

Appellants,

v.

RUTH D. HOLMES,
ET AL.,

Appellees.
______________________________/

Case Nos.: SC04-2323, SC04-2324
& SC04-2325

LT Nos.: 1D02-3160,1D02-3163
& 1D02-3199

AMICI CURIAE BRIEF IN SUPPORT OF APPELLANTS BY FLORIDA CATHOLIC CONFERENCE, INC., ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, CHRISTIAN SCHOOLS INTERNATIONAL, FRIENDS OF LUBAVITCH OF FLORIDA, INC., SALVATION ARMY-FLORIDA DIVISION, AMERICAN CENTER FOR LAW AND JUSTICE, AND CHRISTIAN LEGAL SOCIETY

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STATEMENTS OF INTEREST OF THE AMICI

The Florida Catholic Conference, Inc. (Conference), a Florida not-for-profit corporation, is comprised of all the active Roman Catholic Bishops in the State of Florida. The Conference is the vehicle through which the Bishops speak, cooperatively and collegially, in the field of public affairs. The Conference's interests in the issues before the Court are significant and wide-ranging. There are 181 Catholic elementary schools, 36 Catholic high schools, 7 Catholic special education schools and 4 Catholic colleges in Florida. A significant number of parents are using Opportunity Scholarships to send their children to Catholic schools. The Conference believes that prohibiting parents from utilizing Opportunity Scholarships at Catholic schools violates basic constitutional principles, and will disproportionately harm lower income families. The Conference is also concerned about the impact this case could have on other Catholic not-for-profit institutions such as Catholic hospitals, nursing homes, and relief organizations, which receive different types of state funding in return for providing needed services to many Floridians.

The Association of Christian Schools International (ACSI) is a nonprofit organization that supports Protestant Christian schools including preschools, elementary and secondary schools, and colleges throughout the United States and internationally. One of ACSI's eleven U.S. regions is Florida, with headquarters in Dunedin. The Florida region serves 373 schools that provide instruction, both religious and secular, for 57,000 students. ACSI's services include teacher and administrator conferences, school accreditation, teacher certification, and the publication of curriculum materials. ACSI believes it is unlawful and contrary to

public policy to discriminate against persons solely on the basis of their faith by prohibiting parents from expending Opportunity Scholarships at member schools.

Christian Schools International (CSI) is a non-profit international organization serving over 6,400 students through 23 members schools in the State of Florida, and over 100,000 students in 500 schools worldwide with accreditation, publication, and other educational services. These schools in the Protestant Christian tradition represent all levels of schooling, including preschool, elementary, and secondary programs, and provide academic instruction that exceeds all state and local standards. CSI believes that excluding persons from general eligibility in secular programs such as the Opportunity Scholarship Program solely on the basis of their religion is unlawful, and detrimental to the cultivation of a strong and diverse community in Florida.

Friends of Lubavitch of Florida, Inc. is a not-for-profit Florida corporation serving Jewish schools in the State of Florida including preschools, elementary and secondary schools and a Rabbinical college. Between 75-85% of the roughly 1,300 students served are on full or partial scholarship due to their inability to pay full tuition. Friends of Lubavitch of Florida, Inc. believes that prohibiting parents of these students from expending Opportunity Scholarships at its schools violates federal law and seriously disadvantages low income students. Friends of Lubavitch of Florida, Inc. is also concerned by the implications of the lower court's ruling for its other social services including, for example, adult education, food, housing, visitation, and drug prevention.

The Salvation Army's Florida Division has an interest in the outcome of this case because it has provided a variety of social and disaster services in virtually

every county in Florida for over one hundred and thirteen years on both a pro bono and contractual basis. The mission statement of The Salvation Army, in pertinent part, provides: "Its ministry is motivated by the love of God. Its mission is to preach the gospel of Jesus Christ and to meet human needs in his name without discrimination." In 2004, The Salvation Army assisted 1,254,483 persons in the State of Florida. Of particular interest to The Salvation Army are the implications of this case for its decades-long involvement in the State of Florida's corrections programs and more recent involvement in state-funded programs for children.

The American Center for Law and Justice (ACLJ) is a not-for-profit public interest law firm and education organization. The ACLJ is particularly committed to religious liberty and to parental choice in the education of children. ACLJ attorneys represented Joshua Davey in the Supreme Court case of *Locke v. Davey*, and thus have a particular interest and expertise in the interpretation and application of that decision.

The Christian Legal Society (Society) is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at over 140 accredited law schools. The Society's legal advocacy and information division, the Center for Law and Religious Freedom (Center), works for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in state and federal courts throughout this nation. The Center strives to preserve religious freedom in order that men and women might be free to do God's will, and because the founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may

abridge nor any citizen waive. Among such inalienable rights is the right of religious liberty.

SUMMARY OF ARGUMENT

The Opportunity Scholarship Program reflects the Legislature's proper appreciation for the fact that – as the Supreme Court memorably emphasized in *Brown v. Board of Education* – "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." 347 U.S. 483, 493 (1954). Notwithstanding the Program's commendable purpose, and even though it is even-handed in its treatment of schools – whether public or private, religious or secular – the district court held below that the Program violates article I, section 3 of the Florida Constitution "to the extent that [it] authorizes state funds to be paid to sectarian schools." *Bush v. Holmes*, 886 So. 2d 340, 344 (Fla. 1st DCA 2004) (en banc). In other words, according to the district court, the Florida Constitution requires the Legislature to exclude religious schools from a generally available educational program with a secular purpose precisely and only because the schools are religious.

This discriminatory exclusion is irreconcilable with the First Amendment to the U.S. Constitution, which demands that the government be neutral toward religion and respect individuals' choices in religious matters. The district court's ruling imposes a discriminatory disability on families who choose to educate their children in a religious setting and will pressure families – especially those with low incomes – to choose a secular school, for which they can receive state aid, over the religious school that they would choose as a matter of conscience.

The Constitution's bedrock requirements of neutrality and religious choice are in no way undermined by the U.S. Supreme Court's recent decision in *Locke v. Davey*, 540 U.S. 712, 124 S. Ct. 1307 (2004). There, the Court permitted a state to

deny scholarships to college students taking theology courses in specific preparation for a career in the ministry. *Davey* was explicitly and clearly limited to funding of "the religious training of clergy"; indeed, the Justices said that avoiding support for clergy was the "only interest" that supported the state's denial of funding. Correctly understood, then, *Davey* disapproves excluding from benefit programs religious schools that provide a basic education in the same academic subjects as do secular schools and that prepare students for a broad range of careers.

Finally, it should be emphasized that provisions excluding religious schools from educational programs reflect not the pluralistic values and commitments of founders such as Adams and Madison, but rather the discriminatory fears of nineteenth century nativists. Article I, section 3 must be assessed and interpreted in the light of the relevant historical context, which the court below either overlooked or seriously misunderstood. *See* 886 So. 2d at 348-51 & nns. 7-9 (noting, but not engaging, the anti-Catholic roots and purposes of state "Blaine Amendments" such as Florida's).

To be clear, wholly and apart from the relevant history, the district court's decision requiring discriminatory exclusion of religious schools should be reversed under established U.S. Supreme Court precedent. But the motives underlying and animating no-aid provisions like article I, section 3 supply *additional* reasons to reject the decision below, and to interpret Florida's Constitution in a way that responds to the needs and hopes of Florida's children, not to narrow fears and abandoned prejudices.

STANDARD OF REVIEW

The Amici agree with the Standard of Review stated in the Initial Brief filed by the Appellants.

ARGUMENT

I. EXCLUDING RELIGIOUS SCHOOLS FROM THE OPPORTUNITY SCHOLARSHIP PROGRAM VIOLATES CORE FIRST AMENDMENT PRINCIPLES.

The "fundamental" and "minimum" requirement of the Free Exercise Clause is that governments may not single out religiously motivated activity for discriminatory treatment. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 523, 532 (1993). "A law that targets religious conduct for distinctive treatment" must "undergo the most rigorous of scrutiny" and "will survive strict scrutiny only in rare cases." *Id.* at 546; *see also Employment Div. v. Smith*, 494 U.S. 872, 877-78, 888 (1990). This principle forbids laws that "impose special disabilities on the basis of . . . religious status." *Smith*, 494 U.S. at 877 (citing *McDaniel v. Paty*, 435 U.S. 618, 643 (1978)). The "unique disability" imposed in *McDaniel* was denying to members of the clergy a generally available opportunity, *i.e.,* the right to serve in the state legislature if elected by the voters. 435 U.S. at 632 (Brennan, J., concurring). Similarly, in *Sherbert v. Verner*, the Court understood that by denying unemployment benefits to a claimant who refused to work on Saturday, her Sabbath, the state placed "unmistakable" pressure on her "to forego that religious practice." 374 U.S. 398, 404 (1963) (noting that "the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege").

All of these cases – *Sherbert, McDaniel, Smith*, and *Lukumi* – confirm that the state may not discriminate against a religious practice without a compelling reason, if at all. The U.S. Supreme Court's First Amendment jurisprudence is often confusing, but this much is clear: the Free Exercise Clause is violated when a citizen's "declared ineligibility for benefits derives solely from the practice of her religion." *Sherbert*, 374 U.S. at 404.

An Opportunity Scholarship is unquestionably a generally available benefit. Under the decision below, however, children stuck in failing schools become ineligible for state assistance – they are denied an otherwise available benefit – "solely" because their families choose to educate them in a religious setting. *Sherbert*, 374 U.S. at 404. This singling out of religion flagrantly violates the nondiscrimination principle and, as in *Lukumi*, "fall[s] well below the minimum standard [of neutrality] necessary to protect First Amendment rights." 508 U.S. at 543. By denying a scholarship to families who want religion integrated into their children's education, the ruling below "impos[es] a civil disability upon those deemed to be too deeply involved in religion." *McDaniel*, 435 U.S. at 639-40 (Brennan, J., concurring).

In addition, the discriminatory denial of Opportunity Scholarships distorts individual choice in religious matters. The U.S. Supreme Court has repeatedly embraced the idea that providing aid to private individuals under neutral, secular criteria and allowing them to use it at either religious or nonreligious schools promotes the "genuine and independent choices of [those] individuals." *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002); *see also, e.g., Mueller v. Allen,* 463 U.S. 388 (1983); *Witters v. Washington Dep't of Servs.,* 474 U.S. 481 (1986).

Conversely, to withhold aid merely because a family chooses a religious school for their children's basic education interferes with the family's choice. A large percentage of the families eligible for Opportunity Scholarships lack the financial resources to pay school tuition themselves, and many families who would conscientiously choose religious schools now face financial pressures to choose secular schools instead. *Cf. Sherbert,* 374 U.S. at 404; *id.* at 417-18 (Stewart, J., concurring) (observing that the prospect of modest unemployment benefits could distort private religious choices). In fact, the threat of distortion is even greater here than in *Sherbert,* because the district court's ruling could induce some religious schools to give up their religious affiliation, or eliminate religious elements from their programs, in order to compete with schools that can receive scholarship students.

II. *LOCKE v. DAVEY* SUGGESTS DISAPPROVAL OF EXCLUDING RELIGIOUS SCHOOLS THAT PROVIDE A BASIC EDUCATION IN STANDARD ACADEMIC SUBJECTS.

It is clear that court-ordered and state-required discrimination against religious educational choices violates the Free Exercise Clause. The district court, however, relied almost entirely on *Locke v. Davey,* in not only authorizing, but even requiring, such discrimination. *See* 886 So. 2d at 363-66. But the court's reading of *Davey* is mistaken and, in fact, turns the decision on its head.

Davey involved a student majoring in "devotional" theology at an evangelical Protestant college, preparing specifically to become a pastor. 124 S. Ct. at 1310. The Court made it clear that its ruling dealt only with funding of clergy training, and took care to emphasize that "the *only* interest at issue here is

the State's interest in not funding the religious training of clergy." *Id.* at 1313 n.5 (italics added). The Court found that states have a "historical and substantial" interest in denying funds for clergy training, *id.* at 1313, and its arguments confirm both that the scope of the *Davey* ruling is narrow and that denying state funding to parents who choose religious schools that give the same basic education as secular schools is improper.

First, the Court treated the training of clergy as a "distinct category of instruction" from training in other subjects. 124 S. Ct. at 1313. "Training for religious professions and training for secular professions are not fungible"; the former is "an essentially religious endeavor" that "resembles worship" and is "akin to a religious calling as well as an academic pursuit." *Id.* (quotation omitted). Thus, the Court found it permissible "that a State would deal differently with religious education for the ministry than with education for other callings." *Id.* at 1313.

The argument that clergy training is a "distinct category of instruction" is plainly irrelevant to the religious primary and secondary schools that families receiving Opportunity Scholarships may choose. As the Court has long recognized, such schools "pursue [not only] religious instruction [but also] secular education." *Board of Education v. Allen*, 392 U.S. 236, 245 (1968); *id.* at 247 (recognizing that religious schools "pla[y] a significant and valuable role in raising national levels of knowledge, competence, and experience"). The schools teach the same "common subjects like math, English, social studies, and science, that all accredited schools provide"; and "a decent elementary or secondary school education in English, math, and science provides secular educational value, even if

it takes place in a thoroughly religious setting." Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. CIN. L. REV. 151, 173, 174 (2003).

The district court's ruling excludes religious schools not because they provide "a distinct category of instruction," but merely because they provide instruction in the same category as secular schools but from a religious perspective. The ruling below presents a pure case of viewpoint discrimination, in that schools become ineligible solely because they educate from a religious motive and a religious perspective, and families become ineligible solely because they embrace that perspective. Discrimination purely because of religious status or viewpoint is the core case of a violation of the First Amendment. *See, e.g., Lukumi*, 508 U.S. at 533 (forbidding laws that "impos[e] special disabilities on the basis of . . . religious status") (quoting *Smith*, 494 U.S. at 877); *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995) (describing it as a "blatant" and "egregious" First Amendment violation "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject").

Second, government discrimination on the basis of religious motivation or viewpoint constitutes strong evidence of a constitutionally impermissible animus against religion. The Court in *Davey* believed that Washington's funding policy reflected no anti-religious animus. 124 S. Ct. at 1314. Crucial to that conclusion, though, was the fact that scholarship students *could* pursue non-theology majors, *could* take classes taught from a religious perspective, and *could* attend religious schools. *See id.* at 1315 (noting that students at Northwest College not majoring in theology received scholarships even though the College's "concept of education is

distinctly Christian in the evangelical sense" and that "the entirety of the [Washington] Promise Scholarship Program goes a long way toward including religion in its benefits") (quoting Joint App. 168). It was in *this* context of general and pervasive even-handedness that the *Davey* majority said that Washington's action fell within the "play in the joints" between the Free Exercise Clause and the Establishment Clause. *Id.* at 1311.

The district court's opinion, however, requires precisely what the State of Washington did not, namely, the exclusion of schools that train students in basic academic subjects, preparing them for a variety of secular vocations, simply because the schools also train students to integrate religious values with their learning and careers. The discriminatory exclusion here far exceeds – both in its nature and in the number of affected citizens – the exclusion of students receiving instruction in the specifically religious profession of the clergy.

Third, because the total exclusion of religious schools from the Opportunity Scholarship Program extends far beyond the "distinctive[ly]" religious course of study at issue in *Davey*, the court below had to find and seize upon some other criterion, to prevent its holding from wiping out *all* state aid that incidentally benefited, in any way, *any* religiously-affiliated institution. Accordingly, the court suggested that aid could permissibly benefit "non-profit organizations that are not sectarian or, at least, not pervasively sectarian institutions." 886 So. 2d at 362.

The opinion therefore requires the state to determine whether a private school chosen by a scholarship-eligible family is "sectarian," or "pervasively" so, and thus disqualified from receiving the family's children. However, the "pervasively sectarian" criterion has been rejected by the U.S. Supreme Court,

with four justices criticizing it in the strongest terms. *Mitchell v. Helms*, 530 U.S. 793, 826 (2000) (plurality op.) (giving "numerous reasons" to "dispense with this factor"); *see also id.* at 857-58 (O'Connor, J., concurring in the judgment). After all, to exclude pervasively sectarian schools "reserve[s] special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives." 530 U.S. at 827-28 (plurality op.). Moreover, determining whether schools are pervasively sectarian will require Florida courts time and again to make sensitive, controversial "inquir[ies] into the [K-12 school's] religious views" – to "trol[l] through [the] institution's religious beliefs" – in a way "offensive" to basic First Amendment principles of government non-entanglement with religion. *Id.; see also, e.g.*, *Smith*, 494 U.S. at 887 ("Repeatedly . . . we have warned that courts must not presume to determine the place of a particular belief in a religion"); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976) (forbidding "extensive inquiry by civil courts into religious law and polity").

Finally, the Supreme Court in *Davey* cited a long history of opposition to state funding of "church leaders," dating back to "the founding of our country." 124 S. Ct. at 1313. But that history is entirely irrelevant here. The question whether a general program of educational benefits may or should exclude religious schools did not arise at the time of the Founding, because general funding for education did not exist. The Founding-era battles over state aid are exemplified by the famous 1785 dispute in Virginia over taxes earmarked specifically to support "teachers of the Christian religion." *See id.* at 1313 & n.6. Virginia's tax "was to be imposed for the support of clergy in the performance of their function of

teaching religion," *Rosenberger*, 515 U.S. at 853 (Thomas, J., concurring), in a context where the state offered little or no support to competing private activities. The preferential funding of clergy bears no resemblance to the nondiscriminatory inclusion of religious options in school-choice programs today.

III. EXCLUSIONARY NO-AID PROVISIONS LIKE FLORIDA'S WERE ANIMATED BY ANTI-CATHOLICISM AND DESIGNED TO BURDEN CATHOLIC SCHOOLS.

General opposition to funding religious schools – or, more precisely, to funding parents' choices to send their children to such schools – dates not to the Founding, but to the mid-nineteenth century campaign by Protestants to privilege "common" schools and disadvantage Catholic schools. A central feature of this campaign was the enactment into many state constitutions – including Florida's – of strict no-aid provisions, known today as "Blaine Amendments."[1] *See* 886 So. 2d at 348-49 (noting that Florida's provision "was adopted . . . during the historical period in which so-called 'Blaine Amendments' were commonly enacted into state constitutions") (footnotes omitted).

Seven of the Justices now sitting on the U.S. Supreme Court have acknowledged that anti-Catholic nativism was a driving force behind both the federal Blaine Amendment and its state law progeny. In *Mitchell v. Helms,* four Justices acknowledged and condemned the prejudice that led to the federal and

[1] For more on the proposed federal "Blaine Amendment," see generally, *e.g.,* LLOYD JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925, at 138-139 (1987). *See also* HAMBURGER, *supra,* at 335 ("Nativist Protestants also failed to obtain a federal constitutional amendment but, because of the strength of anti-Catholic feeling, managed to secure local versions of the Blaine amendment in the vast majority of the states.").

state Blaine Amendments. *See* 530 U.S. at 828-29 (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.) (noting that "consideration of [the Blaine Amendment] arose at a time of pervasive hostility to the Catholic Church and to Catholics in general"). Two years later, in *Zelman v. Simmons-Harris,* three more Justices recognized that the Blaine Amendments were part of a backlash against "political efforts to right the wrong of discrimination against religious minorities in public education." 536 U.S. at 720-21 (dissenting opinion of Breyer, J., joined by Stevens and Souter, JJ.).

In contrast to the court below, these Justices have not attempted to brush aside the relevant history as the idiosyncratic preoccupation of "[c]ertain commentators." *Holmes*, *supra,* at n. 9. Indeed, the Justices' recent historical conclusions merely restate a long-established but growing historical record – one that the district court's citation to a solitary, law student authored and Indiana-specific article cannot begin to unsettle – documenting the pervasive role of nativism in American school funding debates. Contrary to the court's assertion, "[w]hether the Blaine-era amendments are based on religious bigotry" is *not* "a disputed and controversial issue among historians and legal scholars." *See, e.g.,* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002); JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM (2004); JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY (1999); CHARLES GLENN, THE MYTH OF THE COMMON SCHOOL (1988); Richard W. Garnett, *The Theology of the Blaine Amendments,* 2 FIRST AMD. L. REV. 45 (2003); John Jeffries & James Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001). Scholars and jurists have come to different conclusions

about the implications for contemporary litigation of these provisions' unsavory animating ideology, but this should not obscure the fact that the Blaine Amendments exist because of a widespread desire to disadvantage, and even to eliminate, Catholic parochial schools.[2]

The court below noted, but did not appreciate, the relevant history, when it stated that "[t]he primary purpose of [the Blaine] amendments was to bar the use of funds to support religious schools." *Holmes*, 886 So. 2d at 349; *see also id.* at 348-49 nn.7,8. In fact, it was *Catholic* schools, and not "religious" schools, that were the intended target of the various no-aid provisions. *See Zelman,* 536 U.S. at 720 (Breyer, J., dissenting). Indeed, the "common schools" cherished by the nineteenth century nativists were founded in substantial part to entrench the dominant position of "nonsectarian" Protestantism. *See, e.g., Lemon v. Kurtzman*, 403 U.S. 602, 628 (1971) (Douglas, J., concurring) ("[E]arly in the 19th century the Protestants obtained control of the New York school system and used it to promote reading and teaching of the Scriptures as revealed in the King James version of the Bible.").

The spirit of these times was well captured in President Grant's famous 1875 speech, in which he called for an end to all funding for "sectarian" schools on the ground that the Catholic Church was a source of "superstition, ambition and ignorance." President Ulysses S. Grant, Address to the Army of Tennessee at Des Moines, Iowa (*quoted in* Douglas Laycock, *The Underlying Unity of Separation*

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[2] For a far more detailed treatment of this record, *see, e.g.,* Brief of *Amicus Curiae* the Becket Fund for Religious Liberty, *et al.* in Support of Respondent, *Locke v. Davey*, No. 02-1315. This *amicus* brief was endorsed by nearly 20 of the Nation's leading historians and legal scholars, all of whom are experts on the history and context of the Blaine Amendments.

and Neutrality, 46 EMORY L.J. 43, 51 (1997)); *see also* MCGREEVY, *supra,* at 91-92 (discussing importance of Grant's speech to the no-aid movement). Indeed, the district court acknowledged President Grant's support for no-aid proposals. 886 So. 2d at 348 n.7. It is curious, then, that the court appears to have remained innocent of, or agnostic about, these proposals' aims and underlying ideology. *Cf. id.* at 377 (Polston, J., dissenting) ("The majority is selectively picking and choosing from so-called history to avoid the appearance of giving effect to anti-catholic bigoted language.").

Contrary to the suggestion of the majority below, *Holmes, supra,* at 9, there is no reason to think that Florida's no-aid provision is uniquely free of the taint of the unattractive biases and homogenizing ambitions underlying the Blaine Amendments generally. On the contrary, as one commentator put it, Florida's provision is quite "representative" of the Blaine-era no-aid provisions. Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution,* 72 FORD. L. REV. 493, 495 n.7 (2003). Nor does Chief Justice Rehnquist's *Davey* opinion provide any warrant for the district court's hasty conclusion that "there is no evidence of religious bigotry relating to Florida's no-aid provision." *Holmes,* 886 So. 2d at 351 n.9 (citing *Davey,* 124 S. Ct. at 1314 n.7). That the Chief Justice refused to categorize a particular provision of the Washington Constitution as a Blaine Amendment certainly does not suggest any doubt on his part that the Blaine Amendments were, in fact, tainted by anti-Catholic and nativist prejudices.

Finally, the district court asserted, by way of an afterthought, that there was no "bigoted purpose in retaining the no-aid provision in the 1968 general Revision of the Florida Constitution." *Holmes,* 886 So. 2d at 351 n.9. *But see id.* at 377-78

(Polston, J., dissenting). It should be emphasized, however, that, *first,* even were it the case that the 1968 revision somehow laundered clean article I, section 3 of any insidious antipathies, it would still be true – as has already been established in Parts I and II of this brief – that the lower court's exclusionary application of this provision runs afoul of the First Amendment's equality and neutrality principles. *Second,* the provision's mere re-enactment, without more, does nothing to remove the taint of nativist animus. *Cf., e.g., Irby v. Virginia State Board of Elections,* 889 F.2d 1352, 1356 (4th Cir. 1990) (emphasizing that revisions to Virginia's Constitution could not, standing alone, establish that the state had "purged the discriminatory intent originally underlying [its] appointive system for school boards"). After all, as Justice Thomas noted in *United States v. Fordice,* it is "eminently reasonable to make the State bear the risk of nonpersuasion" when it comes to discriminatory intent, because such intent "tends to persist through time." 505 U.S. 717, 746-47 (1992) (Thomas, J., concurring). *Third,* there is no reason to think that the 1968 re-enactment of the anti-aid provision was itself untouched by the anti-Catholicism that enveloped the provision originally. Unfortunately, even in recent times, the strict "no-aid position has given off airs of rank anti-Catholicism" and "significant elements of the no-aid coalition in modern times have sounded the same themes as did the mid-nineteenth century nativist movement." Berg, *Vouchers and Religious Schools, supra,* at 206-07. *See generally, e.g.,* John T. McGreevy, *Thinking on One's Own: Catholicism in the American Intellectual Imagination, 1928-1960,* 84 J. AMER. HIST. 97 (1997); Laycock, *The Underlying Unity of Separation and Neutrality, supra.*

In sum, the history of the Blaine Amendments provides this Court with still more reasons to interpret and apply Florida's no-aid provision in a manner consistent with our Nation's constitutional embrace of pluralism and religious diversity, and with the best interests of Florida's children. *Cf., e.g., Kotterman v. Killian,* 972 P.2d 606 (Ariz. 1999) (observing that "the Blaine Amendment was a clear manifestation of religious bigotry" and declining to interpret Arizona's no-aid provision as prohibiting indirect aid to religious schools through tax credits).

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

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