No. 15-577

In The
Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,

Petitioner,

v.

SARAH PARKER PAULEY, Director,
Missouri Department of Natural Resources,

Respondent.

On Writ Of Certiorari To The U.S. Court Of Appeals For The Eighth Circuit

BRIEF OF THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

STATUTES

RULES AND REGULATIONS

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS CURIAE*[1]

The Union of Orthodox Jewish Congregations of America ("Orthodox Union") is the nation's largest Orthodox Jewish synagogue organization, representing nearly 1000 congregations across the Nation. The Orthodox Union, through its OU Advocacy Center, has participated in many cases before this Court that, like this one, raise issues of importance to the Orthodox Jewish community, including *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Locke v. Davey*, 540 U.S. 712 (2004); and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). Through *amicus curiae* briefs, the Orthodox Union seeks to inform the Court of the perspective of our community and the impact a ruling will have. The overwhelming majority of the Orthodox Union's constituents, as well as an increasing number of Jewish parents who are not affiliated with the Orthodox Union, choose to send their children to Jewish schools as well as attend prayer services and educational programs at synagogues. The Orthodox Union is concerned that if the decision below is permitted to stand, it would not only perpetuate bigotry against minority religious faiths, but it

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

would also expose religious institutions to significant health, safety and security dangers.

The Orthodox Union thus has a strong interest in this Court's reversal of the decision below. In particular, this case affords the Court an opportunity to end the discrimination against religious minorities perpetuated by state Blaine Amendments and hold that states may not discriminate against faith-based institutions in administering neutral and generally available government funding programs. *Amicus* respectfully requests that this Court reverse the decision below.

INTRODUCTION AND SUMMARY OF ARGUMENT

Today, hundreds of Jewish schools educate more than 250,000 students across the nation. Although the first Jewish "day school" in America opened four decades before the American Revolution, a large number of Jewish schools opened in the nineteenth century in response to the same bigotry against minority faiths that spurred many states to adopt Blaine Amendments. Thus, although state Blaine Amendments are typically associated with anti-Catholic bias, history discloses that they more broadly reflect bigotry toward a number of minority faiths – including Judaism.

Accordingly, whether state Blaine Amendments can mandate state funding programs to exclude

religious institutions – such as Jewish schools and synagogues – solely because they are faith-based is therefore an issue of vital concern to Jewish schools, communities as well as parents in Missouri and across the nation. This Court now has the opportunity to remove unconstitutional barriers from programs that protect children and families who attend Jewish and other faith-specific institutions from real health, safety and security risks.

Like many other non-profit institutions, religious schools and houses of worship face a significant – and growing – range of threats in the 21st century. And it is precisely for this reason that governments have responded to these challenges by providing funding to promote the health, safety, security and sustainability of those institutions in need. Indeed, the federal government and some state and local governments have increasingly embraced their responsibility in these areas to provide funding to protect all of its citizens from these growing dangers on the basis of religion-neutral criteria. And yet, Blaine Amendments – with all their discriminatory history and perilous consequences – persist, serving as an unconstitutional obstacle that singles out religious institutions and exposes them to unwarranted hazards. The price of religious membership cannot and should not be exposure to the health, safety and security dangers of the 21st century.

Blaine Amendments serve to discriminate against religious institutions by imposing blanket and unyielding prohibitions against granting them

government aid. The time has come for this Court to declare such laws unconstitutional.

ARGUMENT

I. Blaine Amendments' Blanket Prohibition Against All Government Funding of Religious Institutions Is Not Only Unconstitutional, But Places Religious Citizens at Risk.

Blaine Amendments, which require states to withhold any and all forms of funding from religious institutions, place religious communities in danger by cutting off religious institutions from vital funding for the health, safety and security of their members. This is particularly true of Missouri's Blaine Amendment, which is one of the most restrictive versions of the original Blaine Amendment in the entire United States. *See* Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 587 (2003) ("Missouri teams an extensive prohibition on government aid to religious bodies and religious schools with another constitutional provision that mandates that the state educational fund be used only for the establishment and maintenance of 'free public schools.' ").

Thus, Missouri's state constitutional provisions categorically discriminate against religious institutions by refusing to grant them any form of government

funding under any and all circumstances regardless of the context or interests at stake. *See* Mo. Const. Art. I § 7 ("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, as such; and that no preference shall be given to nor any discrimination made against any church, sect, or creed of religion, or any form of religious faith or worship.") (emphasis added); Mo. Const. Art. IX § 8 ("Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, *shall ever make* an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever.") (emphasis added).

A blanket and unyielding refusal to provide direct or indirect state funding to religious institutions – funding made available to all other institutions – exposes religious institutions to significant dangers. Indeed, the inequities – and frankly, the dangers – of Blaine Amendments come into full focus when considering the growth of key government

funding initiatives aimed at protecting and sustaining other vulnerable institutions. There are several important Federal security and safety programs awarded on the basis of religion neutral criteria that are available to religious institutions. *See, e.g.*, Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5206 (1988) (providing federal disaster funds directly to entities which deliver "critical services" including "education");[2] Nonprofit Security Grant Program (NSGP) (providing grants through the U.S. Dept. of Homeland Security "for target hardening and other physical security enhancements to nonprofit organizations that are at high risk of terrorist attack[s]" in the 25 largest metropolitan areas across the U.S.; since its inception in 2007, more than $100 million in grants have been awarded to hundreds of nonprofit institutions – including synagogues, mosques and parochial schools);[3]

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[2] In the DHS Appropriations Act of 2007, Pub. L. No. 109-295, 120 Stat. 1355 (Oct. 4, 2006), Congress amended the Stafford Act to include "education" in the list of "critical services" and did not exclude parochial schools from eligibility for federal disaster recovery grants. *Id.* at § 689h. Therefore, pursuant to 42 U.S.C. § 5172(a)(3)(b), aid for "critical services" includes "education," thereby ensuring that all schools, both public and parochial, can receive funding to repair, restore and replace damages facilities. *See also* Alan Cooperman, *Parochial Schools to Get U.S. Funds for Rebuilding*, WASH. POST (Oct. 19, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/10/18/AR2005101801622.html.

[3] *See* FEMA, Fiscal Year 2016 Nonprofit Security Grant Program, https://www.fema.gov/fiscal-year-2016-nonprofit-security-grant-program. Under the NSGP, funds have been provided to

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Emergency Supplemental Appropriations for Additional Disaster Assistance, For Anti-Terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act, 1995, Pub. L. No. 104-19, 109 Stat. 194, 253-254 (1995) (authorizing additional amounts for "'Community Development Grants,' as authorized by Title I of the Housing and Community Development Act of 1974" and providing "[t]hat notwithstanding any other provision of law, such funds may be used for the repair and reconstruction of religious institution facilities damaged by the explosion in the same manner as private nonprofit facilities providing public services"); Save America's Treasures Grants, Nat'l Park Serv. (program administered by the National Parks Services in partnership with the National Endowment for the Arts, the National Endowment for the Humanities, the Institute of Museum and Library Services, and the President's Committee on the Arts and the Humanities);[4] Asbestos

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religious schools and congregations. In 2014 alone, 30 New York Jewish organizations received funding pursuant to these programs. Office of U.S. Senator Kirsten Gillibrand: Schumer, Gillibrand Secure Over $2.1 Million To Improve Emergency Preparedness For Religious Institutions & Organizations In-And-Around NYC; Grants Awarded To 30 At-Risk Jewish Schools & Congregations (July 28, 2014), at http://www.gillibrand.senate.gov/newsroom/press/release/schumer-gillibrand-secure-over-21-million-to-improve-emergency-preparedness-for-religious-institutions-and-organizations-in-and-around-nyc-grants-awarded-to-30-at-risk-jewish-schools_congregations.

[4] *See* Save America's Treasures Grants, http://www.nps.gov/preservation-grants/sat/. Save America's Treasures grants have

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School Hazard Abatement Act, 20 U.S.C. §§ 4011-4022 (1988) (providing financial assistance for the abatement of asbestos threats to the health and safety of school children and employees, with grants made to parochial schools).

In recent years, some states and localities have undertaken similar initiatives. *See, e.g.*, New York Secure Ammunition and Firearms (SAFE) Act of 2013, 2013 Sess. Law News of N.Y. Ch. 1 (S. 2230) (McKinney's) (providing for, among other things, the establishment of "New York state school safety improvement teams" and funding to schools for safety equipment);[5] Pennsylvania Safe Schools Act of 2013,

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been awarded for the preservation of the Old North Church in Boston, the Touro Synagogue in Rhode Island, the Eldridge Street Synagogue in New York City, and the Mission Conception in San Antonio. *See* Dep't of the Interior, Office of the Secretary, Old North Foundation Awarded $317,000 Grant Under Save America's Treasures Program (May 27, 2003), http://home.nps.gov/applications/release/Detail.cfm?ID=395, and Dep't of the Interior, Office of the Secretary, Secretary Norton Announces Grants to Rhode Island's Touro Foundation, N.Y. Eldridge Street Project and Texas's Mission Concepcion (Nov. 13, 2013), https://www.doi.gov/sites/doi.gov/files/archive/news/archive/03_News_Releases/031113c.htm.

[5] Funding under the SAFE Act was extended to parochial schools in a budget bill passed a few months after the Act. Aid to Localities Budget, 2013 New York Senate Bill No. 2603, New York Two Hundred Thirty-Sixth Legislative Session, lines 195:38-39 (allocating $4.5 million "[f]or services and expenses of Safety Equipment for Nonpublic Schools."); *see also* Jim Cultrara, *Lawmakers Correct Disparity in School Safety Funding for Catholic Schools*, NEW YORK STATE CATHOLIC CONFERENCE (March 26, 2013), http://www.nyscatholic.org/2013/03/lawmakers-

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24 Pa. Stat. and Cons. Stat. Ann. § 13-1302-A (West) (providing, among other provisions, targeted grants to schools to fund programs which address school violence by establishing or enhancing school security);[6] Local Law to Amend the Administrative Code of the City of New York, in Relation to a Program to Reimburse Nonpublic Schools for the Cost of Security Guard Services, New York City Council, Law No. 2016/002 (2016) (providing funds to nonpublic – including parochial – schools for the costs of security guards).[7]

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correct-disparity-in-school-safety-funding/ (reporting that a group of New York legislators successfully "led the fight to ensure that [SAFE Act] funding for safety and security would be provided to all schools" including parochial schools.); Announcement of SAFE Act Funds Application, Christina Coughlin, Coordinator, Educational Management Services to Nonpublic School Administrators (June, 2015), http://www.p12.nysed.gov/nonpub/schoolsafety/documents/SAFE_Act_Funds_Application_Guidance-2014-2015_and_2015-2016%20-%20Revised.pdf (advising that "[t]he 2014-15 Enacted State Budget provided $4.5 million appropriate for safety equipment for nonpublic schools under the SAFE Act (Year 2). The 2015-16 Enacted State Budget provided an appropriation of the same size (Year 3).")

[6] The Pennsylvania Safe Schools Act was amended by 2013 Pa. Legis. Serv. Act 2013-70 (S.B. 10) (West), to authorize the Office for Safe Schools "to . . . assign school resource officers to carry out their official duties on the premises of the school entity or *nonpublic school*." (emphasis added).

[7] http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1672726&GUID=04BB4A3A-3782-49F9-84E9-9B88AED78713. *See also* Eliza Shapiro & Gloria Pazmino, *Council, de Blasio Reach Deal to Hire Security Guards for Non-Public Schools*, POLITICONewYork (Nov. 25, 2015, 4:13 PM), http://www.capitalnewyork.com/article/city-hall/2015/11/8584137/council-de-blasio-reach-deal-hire-security-guards-non-public-schoo (stating that

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When it comes to health, safety, security and sustainability, religious institutions deserve the same legislative protections afforded all other institutions. This is precisely the principle set forth by this Court nearly six decades ago in *Everson v. Board of Education*, 330 U.S. 1, 17-18 (1947). "Of course, cutting off church schools from . . . services [such as police and fire protection, connections for sewage disposal, public highways and sidewalks] . . . is obviously not the purpose of the First Amendment . . . State power is no more to be used so as to handicap religions than it is to favor them." *Everson v. Bd. of Educ*., 330 U.S. 1, 18 (1947)

Moreover, it is precisely this emphasis on neutrality that this Court has embraced in its more recent Establishment Clause decisions. *See, e.g., Agostini v. Felton*, 521 U.S. 203, 234-35 (1997) ("We therefore hold that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here."); *Zobrest v. Catalina Foothills Sch. Dist*., 509 U.S. 1, 8 (1993) ("[W]e have consistently held that government programs that neutrally provide benefits

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the law "would provide at least one private security guard in non-public schools, including yeshivas and other religious schools with 300 or more students.")

to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."); *Mueller v. Allen*, 463 U.S. 388, 398-99 (1983) ("As *Widmar* [*v. Vincent*, 454 U.S. 263 (1981)] and our other decisions indicate, a program, like § 290.09(22), that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause."); *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 488-89 (1986) ("Nor does the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion."). Indeed, the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

But Blaine Amendments ignore these core First Amendment principles of neutrality. They perniciously single out religious institutions by denying them access to any and all forms of state government funding – even those necessary to protect schoolchildren and worshipers from danger and violence. In this way, Blaine Amendments pervert non-establishment principles and violate the most central constitutional protections afforded by the First Amendment; they discriminate against religion and

thereby expose religion to harms deemed unacceptable for all other similarly situated institutions.

Missouri's Playground Scrap Tire Surface Material Grants would enable Trinity Lutheran Church to provide a safer playground environment for its students. But Trinity Lutheran Church was denied this funding solely because it is a religious institution. *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 782 (8th Cir. 2015). That denial exposes children, because they attend a religious institution, to unnecessary danger. There is a reason the Establishment Clause does not prohibit such funding. *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("[I]f the Establishment Clause did bar religious groups from receiving general government benefits, then a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.") (internal quotation marks and citation omitted). Government has an obligation to protect religious citizens from danger and harm just as it does any other citizen. To allow states to leverage Blaine Amendments – laws motivated by base discrimination – to deny religious institutions neutral and generally available funding for such protections violates the most fundamental of First Amendment principles.

II. State Blaine Amendments Not Only Place Religious Citizens at Risk, But Perpetuate Bigotry Against Minority Faiths, Including Judaism, in Violation of the Free Exercise Clause.

A. The Pernicious Pedigree of Blaine Amendments.

Understanding the history of American Jewish education is helpful in understanding the impact of state Blaine Amendments – and, in turn, understanding that state Blaine Amendments are rooted in bigotry not only against Catholicism specifically (bad as that is), but also against minority faiths generally, including Judaism. This case provides the Court an important opportunity to make clear that nineteenth-century bigotry against minority faiths has no place in twenty-first–century America.

During the early days of our Nation, most Jewish parents educated their children in "common pay (private) schools that assumed the religious identity of their headmaster; or in charity (free) schools supported by religious bodies with financial support from the State." Jonathan D. Sarna, *American Jewish Education in Historical Perspective*, 64 J. OF JEWISH EDU. 8, 10 (1998). Indeed, "[u]ntil the middle of the [n]ineteenth [c]entury, it was not unusual for religious schools to be supported with public funds . . . " Joseph Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 664 (1998); William G. Ross, Pierce *After Seventy-Five Years: Reasons to*

Celebrate, 78 U. DET. MERCY L. REV. 443, 443 (2001) ("[E]ven many of the so-called public schools of the later colonial and early national periods were jointly financed and managed by churches and the state.").

For example, in 1803, New York's only Jewish congregation, Shearith Israel, established a charity school that enjoyed equal footing with Protestant and Catholic schools in the city – and in 1813, sought state funding based on "'the liberal spirit of our constitution.'" JONATHAN D. SARNA, AMERICAN JEWS AND CHURCH-STATE RELATIONS: THE SEARCH FOR "EQUAL FOOTING" 7 n.20 (1997) (quoting Petition (Jan. 10, 1813), reprinted in 27 PUBL'NS AM. JEWISH HIST. SOC'Y 92-95 (1920)); *see also* Sarna, *American Jewish Education*, *supra*, at 10 (citing JONATHAN D. SARNA & DAVID G. DALIN, RELIGION AND STATE IN THE AMERICAN JEWISH EXPERIENCE 85-89 (1997)). More broadly, "[i]n early America . . . Jews readily supported state aid to parochial schools, and at least in New York City received funds on the same basis as Protestant[s] and Catholics." SARNA, AMERICAN JEWS AND CHURCH-STATE RELATIONS, *supra*, at 27. In the early 19th century, however, the creation of "state-supported nondenominational public school spawned a revolution in American education, and affected American Jewish education profoundly." Sarna, *American Jewish Education*, *supra*, at 11. In the eyes of many, these public schools "were imbued with Protestant (and not infrequently anti-Catholic and anti-Jewish) religious and moral teaching." Michael W. McConnell,

Religious Freedom at a Crossroads, 59 U. CHI. L. REV. 115, 121 (1992).

Faced with public schools that were "culturally Protestant" and with "[c]urriculum and textbooks [that] were, consequently, rife with material that Catholics and Jews found offensive," SARNA, AMERICAN JEWS AND CHURCH-STATE RELATIONS, *supra*, at 19, many "Catholics and Orthodox Jews created separate schools." McConnell, *Religious Freedom at a Crossroads*, *supra*, at 121. "As a result, Jews who could afford to do so sent their children to Jewish schools – which flourished not only in New York but in every major city where Jews lived." SARNA, AMERICAN JEWS AND CHURCH-STATE RELATIONS, *supra*, at 19.[8]

The federal Blaine Amendment and its state counterparts sought to stop this flow of funds into minority-faith schools, including Jewish schools. As a periodical published in the years leading up to the Blaine Amendment stated, "[t]he Romanists insist on the appropriation of the public moneys to support the Romish schools in which their religion is taught. . . . To concede this demand, in the present circumstances of the nation, is to break up the whole system of common schools. For if it is allowed to the Romanists,

[8] For example, Emanuel Nunes Carvalho operated a school in Charleston, South Carolina; Talmud Yelodim did the same in Cincinnati, Ohio; the Washington Hebrew Elementary School operated in Washington, D.C.; and there were many more. *See* Sarna, *American Jewish Education*, *supra*, at 11.

it cannot be withheld . . . from Jews and people of other religious and irreligious persuasions." *Recent Publications on the School Question*, 42 BIBLICAL REPERTORY & PRINCETON R. 315-16 (1870); *see also* Viteritti, *Blaine's Wake*, *supra*, at 666 ("The common-school curriculum promoted a religious orthodoxy of its own that was centered on the teachings of mainstream Protestantism and was intolerant of those who were non-believers.").

While the predominant theory in public schools during the nineteenth century was Horace Mann's Common School model – a supposedly "secular" vision of public education adapted from European versions – his curriculum still relied heavily on Protestant elements as a part of the normal coursework. *See* Margaret F. Brinig & Nicole Stelle Garnett, *Catholic Schools, Urban Neighborhoods, and Education Reform*, 85 NOTRE DAME L. REV. 887, 895 (2015) (citing LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925, 69-146 (1987)); TOWARD A USEABLE PAST: LIBERTY UNDER STATE CONSTITUTION 124-25 (Paul Finkelman & Stephen E. Gottleib, eds., 2009) (citing DAVID TYACK ET AL., LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785-1954, 20-42 (1987)).

It was "an open secret," then, that in barring aid to sectarian institutions under the Blaine Amendments, "sectarian" was merely a code word for "Catholic." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (opinion of Thomas, J.); Lindsey M. Burke & Jarrett Stepman, *Breaking Down Blaine Amendments' Indefensible Barrier to School Choice*, 8 J. OF SCH. CHOICE:

INT'L RESEARCH & REFORM 637, 638, 646 (2014). In this way, "Horace Mann and his followers used the common schools to impose on Catholic immigrants and other religious minorities the non-sectarian value of the de facto Protestant Establishment." Richard W. Garnett, Brown's *Promise, Blaine's Legacy*, 17 CONST. COMM. 651 (2000) (reviewing JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY (1999)) (internal quotation marks and citations omitted).

Although the Blaine Amendment failed at the federal level, many states, including Missouri, amended their constitutions to adopt the language of the Blaine Amendment nearly verbatim. *See, e.g.*, Mo. Const. Art. I § 7 ("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, as such; and that no preference shall be given to nor any discrimination made against any church, sect, or creed of religion, or any form of religious faith or worship."). Missouri's Amendments, enacted against the backdrop of the anti-Catholic riots of the 1850's,[9] thereby captured the governing sentiment that no funding could be granted "the Romish

[9] *See, e.g.*, William Barnaby Faherty, *Nativism and Midwestern Education: The Experience of Saint Louis University, 1832-1856*, 8 HISTORY OF EDUC. QUARTERLY 447, 456 (1968); William Hyde, 4 ENCYCLOPEDIA OF THE HISTORY OF ST. LOUIS, 1917 (1899).

Church," which would never allow "any liberty of thought . . . if it could help it." J. Michael Hoey, *Missouri Education at the Crossroads: The Phelan Miscalculation and the Education Amendment of 1870*, 95 MO. HIST. REV. 372, 389 (2001).

B. Missouri's Blaine Amendment Violates the Free Exercise Clause.

The Supreme Court has been unequivocal in deeming laws that discriminate on the basis of religion as violating the Free Exercise Clause. In C*hurch of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Supreme Court emphasized that "the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." 508 U.S. 520, 532 (1993). Indeed, as the Court further underscored, "the minimum requirement of neutrality is that a law not discriminate on its face." *Id*. at 533.

To be sure, in *Locke v. Davey*, the Supreme Court did hold that a state-funded scholarship program could deem students pursuing "degrees in theology" as ineligible. 540 U.S. 712, 716 (2004). The Court's rationale in justifying this limited exclusion focused on the constitutionality of laws that ensure state funds will not be used to "support the ministry." *Id*. at 723. Thus, the narrow exclusion of scholarship applicants pursuing the ministry through degrees of theology did not "suggest[ ] animus towards religion."

Id. at 725. The Court supported its conclusion by noting the fact "[t]hat early state constitutions saw no problem in explicitly excluding *only* the ministry from receiving state dollars." *Id*. at 723 (emphasis in original).

But Blaine Amendments, and in particular Missouri's most-restrictive Blaine adaptation, go far beyond the limited exception granted in *Locke v. Davey*. It is undeniable that two of Missouri's state constitutional provisions categorically discriminate against religious institutions by refusing to grant them any form of government funding under any circumstances. *See* Mo. Const. Art. I § 7 ("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, as such; and that no preference shall be given to nor any discrimination made against any church, sect, or creed of religion, or any form of religious faith or worship.") (emphasis added); Mo. Const. Art. IX § 8 ("Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, *shall ever make* an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal

property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever.") (emphasis added).

Indeed, as noted above, Missouri has implemented one of the most restrictive versions of the original Blaine Amendment in the entire United States. *See* Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 587 (2003). Surely, such an unyielding rule finds no support in the religion clauses of the First Amendment.

Courts cannot, of course, uphold legislation specifically passed to disadvantage religious organizations. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) ("[A] law targeting religious beliefs as such is never permissible."). As the Court has observed, "[t]he principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions." *Id*. at 523. State Blaine Amendments, though, are among those (thankfully few) violations, and those who passed them "did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom" by discriminating against minority faiths. *Id*. at 524. Accordingly, Blaine Amendments violate core free exercise principles, "exclud[ing] individual Catholics, Lutherans, Mohammedans, Baptists, Jews,

Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (emphasis in original). The Court should, therefore, reverse the decision below and make clear that such discrimination has no place in our increasingly pluralistic society – especially where, as demonstrated next, that discrimination exposes religious communities to the health, safety and security dangers the contested forms of government aid are meant to protect against.

CONCLUSION

For the reasons set forth above, the *amicus* respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Eighth Circuit. Religious discrimination is never justified and it surely cannot be leveraged to establish a blanket and unyielding prohibition against granting religious institutions funding from neutral and generally-available government programs. For Blaine Amendments to persist is not only unconstitutional, but it exposes members of religious institutions

and communities to health, safety and security dangers – the precise dangers such neutral government programs are aimed to avoid.

Respectfully submitted,

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