IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

Bishop of Charleston, a Corporation Sole, d/b/a The Roman Catholic Diocese of Charleston, and South Carolina Independent Colleges and Universities, Inc. , **Plaintiffs,** **v.** **Marcia Adams, in her official capacity as Executive Director of the South Carolina Department of Administration, and Brian Gaines, in his official capacity as budget director of the South Carolina Department of Administration, and Henry McMaster, in his official capacity as Govenor of South Carolina ,** **Defendants.**	**Case No.: 2:21-cv-01093-BHH** **PROPOSED MEMORANDUM OF *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS**

***AMICUS CURIAE*: South Carolina Association for Christian Schools for Excellence, Inc.**

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STATEMENT OF AMICUS CURIAE

South Carolina Association for Christian Schools for Excellence, Inc. (commonly known as "South Carolina Association for Christian Schools" and hereinafter abbreviated as "SCACS") submits this amicus brief.[1] SCACS is a nonprofit corporation and is comprised of its members, which are sixty-nine Christian schools across thirty-one of South Carolina's forty-six counties. Membership in SCACS is offered to any Christian school that ascribes to SCACS's Statement of Faith. SCACS promotes Christian education through the offering of numerous benefits to member schools, including accreditation, access to other member schools, scholarships for students, organized athletics for students, teacher certification, provision of standardized testing, and provision of helpful and relevant publications among other items. South Carolina's General Assembly recognizes member schools as qualifying entities with which parents can partner in order to provide education for their children and comply with South Carolina's compulsory education laws. Member schools serve over 9,000 students. In addition, many more students—also affected by the subject Blaine Amendment—attend non-member Christian schools with which we share the commonality of seeking to provide quality private education.

SUMMARY OF ARGUMENT

Under the guise of reinforcing the principle of separation of church and state, South Carolina's Blaine Amendment in fact abridges South Carolinians' rights to the free exercise of their religion and freedom of association. It first fails the test of strict scrutiny because there is no

[1] Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae or their counsel made a monetary contribution to the brief's preparation or submission.

compelling state interest in enlarging the scope of what is prohibited by the Establishment Clause beyond that that which the United States Constitution protects.

Futhermore, South Carolina's Blaine Amendment violates the Equal Protection Clause of the 14th Amendment of the United States Constitution. In *U.S. v. Fordice*, the United States Supreme Court made clear in the context of race that facially neutral state laws which are "traceable" to laws upholding segregation in schools and which still "have discriminatory effects" offend the Equal Protection Clause. 505 U.S. 717, 729 (1992). The upshot of *U.S. v. Fordice* is the reaffirmation by the Supreme Court that the Equal Protection Clause is "offended by 'sophisticated as well as simple-minded modes of discrimination.'" *Id*. (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)).

In *Ramos v. Louisiana*, the Supreme Court again took account of laws born in racial animus when it struck down Louisiana and Oregon's laws permitting non-unanimous jury verdicts. 140 S.Ct. 1390, 1394 (2020). And in *Espinoza v. Montana Department of Revenue*, the Supreme Court struck down Montana's Blaine Amendment which prohibited parents from using tax-credit scholarships to help pay for tuition at religious schools as a violation of the Free Exercise Clause. 140 S.Ct. 2246, 2263 (2020). The long and sordid history of anti-immigrant, anti-Catholic Blaine Amendments, vehemently supported in former Speaker of the House James Blaine's day, was brought to the forefront in the context of the public policy and legal debate over education choice programs. The same history is manifesting itself today in South Carolina.

ARGUMENT

In *Espinoza v. Montana Department of Revenue*, the Supreme Court struck down Montana's Blaine Amendment (colloquially named after Former Speaker of the House James Blaine) which, like South Carolina's own amendment, prohibits public funds from being used for

the benefit of religious or sectarian institutions. *See* South Carolina Const. Ann. Art. XI, § 4; *Espinoza,* 140 S.Ct. 2246, 2263 (2020). In doing so, the Supreme Court arrived at the same unremarkable and precedential conclusion as it did in *Trinity Lutheran Church of Columbia, Inc. v. Cromer:* "disqualifying an otherwise eligible recipient from a public benefit 'solely because of their religious character' imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Espinoza,* 140 S.Ct. at 2256 (2020).

South Carolina's own Blaine Amendment should fare no better than Montana's did in *Espinoza* for two primary reasons: (1) like the Blaine Amendment in Montana, South Carolina's Amendment cannot withstand strict scrutiny analysis, thereby running afoul of the Free Exercise Clause of the First Amendment to the Constitution, and (2) the taint of racial and anti-Catholic bigotry and discrimination which gave rise to South Carolina's Blaine Amendment and its sibling Amendments in over thirty other states is not untethered from the current iteration of the Amendment and still has discriminatory effects which offends the Equal Protection Clause of the United States Constitution. Additionally, there is a yet a third argument, based partly in public policy, which supports the Plaintiffs' position: South Carolina's Blaine Amendment is an impediment to affording every student in South Carolina with the unparalleled opportunity for success that the opportunity of education makes possible. *See Brown v. Bd. of Educ. (Brown I),* 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873 (1954). This point is all the more relevant in South Carolina where in 2014 the South Carolina Supreme Court determined that certain public school districts failed to provide a "minimally adequate" education to their students in violation of the South Carolina Constitution. *See Abbeville County School District v. State of South Carolina*, 410 S.C. 619 (2014).

1. South Carolina's Blaine Amendment is subject to the strictest scrutiny because it singles out schools based on their religious character. It fails strict scrutiny because there is not a compelling government interest in infringing on the Free Exercise Clause by purporting to uphold the Establishment Clause.

A. South Carolina's Blaine Amendment should be subject to the strictest scrutiny.

It was the "historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause." *Bowen v. Roy*, 476 U.S. 693, 703 (1986). "Laws that impose special disabilities on the basis of religious status" are subject to strict scrutiny. *Trinity Lutheran Church of Columbia, Inc. v. Cromer*, 137 S.Ct. 2012, 2015 (2017). "There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct. To determine the object of a law, we must begin with its text. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S.Ct. 2217, 2227 (1993). However, the Supreme Court has "reject[ed] the contention…that our inquiry must end with the text of the law at issue. Facial neutrality is not determinative. The Free Exercise Clause…extends beyond facial discrimination." *Ibid.*

Like in *Espinoza*, the text of South Carolina's Blaine Amendment leaves no doubt that the Amendment uses religious status as a basis to determine eligibility for benefits. South Carolina's Blaine Amendment prohibits public funds from directly benefitting "any religious or other private educational institution." *See* South Carolina Const. Ann. Art. XI, § 4. Furthermore, even if the text was not sufficiently clear, the historical context giving rise to South Carolina's Blaine Amendment and outlined in the Plaintiff's complaint shows that the Blaine Amendment was "born of bigotry," targeting primarily Catholic institutions.

While the Department of Administration has opposed the Plaintiffs' motion for injunction, including by arguing that South Carolina's Blaine Amendment includes non-religious

schools, this argument overlooks that "the [Free Exercise] Clause 'forbids subtle departures from neutrality,'" *Gillette v. United States*, 401 U.S. 437, 452 (1971), and "covert suppression of particular religious beliefs[.]" *Bowen v. Roy*, *supra*, 476 U.S. at 703.

B. South Carolina's Blaine Amendment fails strict scrutiny because it is not narrowly tailored to advance compelling government interests.

To satisfy strict scrutiny, government action "must advance 'interests of the highest order and must be narrowly tailored in pursuit of those interests.'" *Espinoza*, 140 S.Ct. at 2260. Achieving greater separation of church and State than ensured under the Establishment Clause is limited by the Free Exercise Clause. *See ibid.* Furthermore, it is no compelling interest, and is instead unconstitutional, to seek to enhance the separation of church and State beyond the protections afforded by the Constitution in the Establishment clause itself. *Ibid.* Therefore, the question is whether South Carolina's Blaine Amendment recognizes the appropriate "play in the joints" between the two religion clauses of the Constitution without infringing on either clause. *See id.* at 2254 (2020).

It is certainly the case that education choice programs, such as the SAFE Grants Program in South Carolina or the tax-credit scholarship program in Montana, can be drafted and administered in ways that do not violate the Establishment clause. As noted in *Espinoza*, the Supreme Court has "repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral governing programs." *Ibid.*

On the other hand, South Carolina's Blaine Amendment is the mechanism by which otherwise "eligible recipients" of neutral state programs are excluded from a public benefit, such as the SAFE Grants Program, "*because of* their religious character." *Espinoza*, 140 S.Ct. at 2256 (2020). This exclusion violates the Free Exercise Clause and fails the strict scrutiny standard because it is based on the religious character of the institution.

2. The taint of racial and anti-Catholic bigotry and discrimination that gave rise to South Carolina's Blaine Amendment is not untethered from the current iteration of the Amendment and still has discriminatory effects which offend the Equal Protection Clause.

In *Ramos v. Louisiana*, the original motivation for laws in Oregon and Louisiana that allowed convictions in state court with non-unanimous juries was of importance to the Court in determining that the laws violated the Sixth Amendment to the Constitution. 140 S.Ct. 1390, 1394-1395 (2020). Though *Ramos* concerns an issue not present in the case at bar, the same attention to a law's contextual beginning as instructive to the Court's equal protection jurisprudence is found in *U.S. v. Fordice*, 505 U.S. 717, 729 (1992).

In *Fordice*, the issue before the Supreme Court was whether, in response to *Brown v. Board of Education*, Mississippi had dismantled its segregated university system. The Supreme Court stated clearly:

> If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects - whether by influencing student enrollment decisions or by fostering segregation in other facts of the university system – and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system. **Such policies run afoul of the Equal Protection Clause,** even though the State has abolished the legal requirement that whites and blacks be educated separately and has established **racially neutral policies not animated by a discriminatory purpose.**

Fordice, 505 U.S. at 731 (1992) (emphasis added). Thus, as Justice Sotomayor summarizes in her *Ramos* concurrence, "policies that are 'traceable' to a states *de jure* segregation and that still "have discriminatory effects" offend the Equal Protection Clause." *Ramos* at 140 S.Ct. at 1410 (J. Sotomayor concurring) (quoting *Fordice*, 505 U.S. at 729 (1992)).

While SCACS' arguments address primarily religion rather than race, discrimination on the basis of religion and race are analyzed in the strict scrutiny context. In his concurrence in

Espinoza, Justice Alito draws out the contextual history of Blaine Amendments in state constitutions:

> A wave of immigration in the mid-19th century, spurred in part by potato blights in Ireland and Germany, significantly increased this country's Catholic population. Nativist fears increased with it. An entire political party, the Know Nothings, formed in the 1850s 'to decrease the political influence of immigrants and Catholics,' gaining hundreds of seats in Federal and State government
>
> Catholics were considered by such groups not as citizens of the United States, but as 'soldiers of Rome,' who 'would attempt to subvert representative government.' Catholic education was a particular concern. As one series of newspaper articles argued, 'Popery is the natural enemy of *general* education… If it is establishing schools, it is to make them *prisons* of the youthful intellect of the country.'

Espinoza, 140 S.Ct. at 2269 (J. Alito concurring).

As outlined in the Plaintiff's complaint, South Carolina's Blaine Amendment was originally born of bigotry in the midst of the failure to add a Blaine Amendment in the United States Constitution. It, like the Blaine Amendment in Montana, was amended in 1972, but the amendment is no salve to the violations of the Equal Protection Clause inherent in the Blaine Amendment. In fact, the context of the 1972 revision of the Blaine Amendment only highlights another basis for animus – race – in the context of the integration of public schools in South Carolina. The 1972 revision of the Blaine Amendment was, in part, carefully crafted to allow for state-funded scholarships for students in South Carolina to attend private segregation academies. *See Pl. Compl.* ¶ 28. Thus, the Blaine Amendment stands today, and the Department of Administration's argument is unavailing.

3. South Carolina's Blaine Amendment is inimical to the spirit of *Brown v. Board of Education*.

In *Abbeville County School District v. State of South Carolina*, the South Carolina Supreme Court determined that South Carolina had failed to provide a constitutionally required "minimally adequate education" to students in certain school districts. *Abbeville County School*

Dist. v. State of South Carolina, 410 S.C. 619, 653 (2014). This failure by the State speaks to the need for attention to access to quality education in South Carolina. Religious schools in South Carolina, such as those associated with SCACS, work to provide such quality education. However, when religious schools are excluded from neutral public benefits due to unconstitutional restrictions such as South Carolina's Blaine Amendment, in many cases access to schools other than the very schools determined to be failing students is all but eliminated, especially for lower-income families.

It is clear too – and made more so in the midst of the pandemic – that parents wish to have these options. For example, in a January 17, 2021 article in the *Post and Courier*, it was noted that dissatisfaction with public schools and virtual learning in the midst of the COVID-19 pandemic have left many South Carolina families "opt[ing] to leave the public school system entirely." Jenna Schiferl and Anna Mitchell, *SC Public School Enrollment Dips Amid Pandemic, Private Schools Get Unexpected Boost*, Post and Courier, January 17, 2021. The article further notes that "overall, private school enrollment across the state is up by an estimated 2 percent to 3 percent this year, which defied experts' early predictions of widespread enrollment shortfalls." Jenna Schiferl and Anna Mitchell, *SC Public School Enrollment Dips Amid Pandemic, Private Schools Get Unexpected Boost*, Post and Courier, January 17, 2021.

While the pandemic perhaps has forced many parents to seek alternate education to local public school, such options and opportunity are thwarted by South Carolina's Blaine Amendment, which prohibits neutral education choice programs such as the SAFE Grants Program from being used by parents wishing to send their child to a specifically religious school.

In *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), the Supreme Court noted the following:

> Today, education…is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship…In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

This underpins the Blaine Amendment's role in preventing religious schools participation in neutral government programs.

CONCLUSION

South Carolina's Blaine Amendment fails strict scrutiny and therefore violates the United States Constitution's Free Exercise Clause and Equal Protection Clause. Thus, SCACS, as *amicus curiae,* respectfully requests that this Court grant the relief sought by Plaintiffs.

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