

IN THE SUPREME COURT

STATE OF ARIZONA

VIRGEL CAIN, et al.,

Plaintiffs-Appellants,

v.

TOM HORNE, in his capacity as
Superintendent of Public Instruction,

Defendant-Appellee,

and

JESSICA GEROUX, et al.,

Intervenor Defendants-Appellees.

No. CV-08-0189-PR

Court of Appeals

No. CA-CV 2007-0143

Maricopa County Superior Court No.
CV2007-002986

**BRIEF OF *AMICUS CURIAE*
FATHER'S HEART CHRISTIAN SCHOOL**

December 1, 2008

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INTEREST OF *AMICUS*

Father's Heart Christian School was founded by John and Dina Phipps and Brendan and Susan Fay—all parents of children with special needs. The Phippses' two children, Weston and Montgomery, have autism. The Fays' daughter, Rebecca, has developmental disabilities and physical challenges. These children receive vouchers through the Arizona Scholarships for Pupils with Disabilities program to attend Father's Heart Christian School.

The Phipps and Fay children previously attended public school in Arizona. Their experience was similar to that of many of special needs children in the Arizona public school system: school policy prevented their teachers from altering classes to teach them at their learning level, and even when the schools' special-needs programs identified the need for special help, such as one-on-one speech classes or a qualified aid, resources to provide that help were lacking.

At Father's Heart Christian School all three children have made astonishing progress in their educations. The Phipps boys, who were uncontrollable and unable to speak or write when they arrived at the school, can now sit quietly for long periods of time, and have learned to write their names and to speak words. In one year at Father's Heart Christian School, Rebecca Fay improved from a 1st grade reading level and beginning kindergarten math to a 6th grade level in

reading, science, and math. Teachers at the school are able to give each child the type of individual instruction he or she needs, with remarkable results.

All the voucher program funds used at the school go entirely to the children, for teachers, classrooms, materials, books, and special assistive technology. The school does not pay its administrative staff, who work as volunteers. The Phipps and Fay parents believe that their children are on their way to becoming independent adults through progress made at the school, with the help of the Arizona voucher programs.

SUMMARY OF ARGUMENT

Arizona's religion clauses—Article 2, § 12 and Article 9, § 10 of the Arizona Constitution—do not embody a broad principle of separation of church and state in regard to schools. Rather, their purpose is to prevent the state from financially supporting a private or religious school with direct aid in the same way Arizona provides direct funding to public schools. The Arizona voucher programs for children with special needs and foster children do not directly aid private or religious schools, thus they do not violate Arizona's religion clauses.

This Court must interpret Arizona's religion clauses to determine the type of aid they prohibit. To interpret constitutional provisions uniformly, this Court applies established canons of construction. One of this Court's main canons of construction is to follow the original intent of the framers. The original meaning of

state appropriations “in aid of” a religious school must inform the interpretation of the text today.

In the case of Arizona’s religion clauses, this Court must consider the broad historical movement of states implementing similar “Blaine Amendment” provisions. Blaine Amendments are provisions in state constitutions that resemble and were inspired by the original “Blaine Amendment” to the United States Constitution that was proposed in 1875, but never ratified. Blaine Amendments sprang from popular conviction in the late 1800s that parochial schools, unlike public schools, must not be supported directly by funds from states. Public schools were heavily influenced by Protestantism at that time, leading Catholics to advocate for funding for Catholic schools as a matter of equity. The movement occurred at a time when some states already were funding private, religious schools. The Blaine movement at the state level emerged in response to the threat that states would fund parochial schools as they funded public schools, and were intended to prohibit that type of funding. Arizona’s religion clauses were drafted during this nationwide movement at the state level. Understanding Arizona’s religion clauses in this context provides necessary insight into the original intent of the framers.

The plain meaning of Arizona’s religion clauses is to prevent the state from appropriating aid directly to a non-public or religious school. The historical

context confirms that the original intent of these provisions was that singular purpose. To read the meaning as a broader prohibition against the state contracting with any non-public school, or against indirect state funding being diverted through the choice of a beneficiary, is to interpret the text too broadly. The original intent of Arizona's religion clauses, as informed by the Blaine Amendment movement that preceded their passage, was to prohibit direct aid to private and religious schools equal to that of public schools, and does not extend to striking down voucher programs for foster children and children with special needs.

ARGUMENT

I. THE RELIGION CLAUSES OF THE ARIZONA CONSTITUTION ORIGINATED FROM THE BLAINE AMENDMENT MOVEMENT.

The historical account of the Blaine Amendment evidences that Arizona's religion clauses, like those of many states, originated from the Blaine Amendment movement in the late 1800s. After the federal constitutional amendment proposed by James Blaine narrowly failed to pass Congress in 1875, numerous states passed similar provisions in their constitutions. These state amendments became known as "Blaine Amendments" after the original Blaine Amendment. Arizona's religion clauses, while not identical to the Blaine Amendment language of other states, are similar enough in text and the timing of their passage that they undoubtedly originated from the Blaine Amendment movement.

A. Understanding Arizona’s Religion Clauses as Part of the Blaine Amendment Movement Aids in Interpretation by Clarifying the Original Intent of the Text.

Understanding Arizona’s religion clauses as part of the Blaine Amendment movement informs the interpretation of Arizona’s religion clauses. Each clause inherits a rich cultural history that is well-documented and provides insight into the intent of the framers.

The intent behind Arizona’s religion clauses is relevant to their interpretation because original intent clarifies textual meaning. *See generally* Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997) (arguing that original meaning should govern constitutional interpretation). One of this Court’s main canons of construction is to follow the intent of the framers. As this Court stated in *County of Apache v. Southwest Lumber Mills, Inc.*, “[t]he governing principle of constitutional construction is to give effect to the intent and purpose of the framers of the constitutional provision and of the people who adopted it.” 92 Ariz. 323, 327, 376 P.2d 854, 856 (1962). This Court affirmed that principle again in 1990: “The cardinal rule of constitutional construction is to follow the text and the intent of the framers, where it can be ascertained.” *Fain Land & Cattle Co. v. M.J. Hassell*, 163 Ariz. 587, 595, 790 P.2d 242, 250 (1990).

B. Arizona’s Use of the Term “Sectarian” Indicates Blaine Amendment Influence.

The use of the term “sectarian” in Article 9, § 10, particularly in light of the timing of enactment of Arizona’s religion clauses during a trend of other states incorporating Blaine Amendments, indicates Blaine Amendment influence. The word “sectarian” sometimes serves as a synonym for “religious” but its modern definition is more restricted, referring to one or more sects or denominations within a religion. *See, e.g., Black’s Law Dictionary* 1382 (8th ed. 2004). When the original Blaine Amendment and its state analogs were enacted, “sectarian” had an even narrower meaning. As the Supreme Court and many historians have recognized, “sectarian” was widely understood at that time to be code for “Catholic.” *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion); *see also Lee v. Weisman*, 505 U.S. 577, 581-582, 588-589 (1992) (holding that “nonsectarian prayer” is considered religious but is not representing any particular “sect”). The original Blaine Amendment used the term “religious sects” and the states enacting Blaine Amendments often used the term “sect” or “sectarian” to differentiate, as the original Blaine Amendment did, between the accepted Protestant “common religion” and Catholicism. *See Joseph P. Viteritti, Blaine’s Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 *Harv. J.L. & Pub. Pol’y* 657, 666 (1998) (explaining how common-schools

included religious instructions “centered on the teachings of mainstream Protestantism”).

States enacting Blaine Amendment provisions, including Arizona, could have used the broader term “religious” but instead chose “sectarian.” For example, drafters of Washington’s state constitution specifically considered using the term “religious” in place of “sectarian” but rejected that option. *See The Journal of the Washington State Constitutional Convention 1889* 329 (B. Rosenow ed., 1999); *see also* Robert F. Utter & Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 *Hastings Const. L. Q.* 451, 478 (1988). The original Blaine Amendment opposed funding for Catholicism and any sect other than Protestantism, and the states employed similar language to accomplish that goal.

C. The Enactment of Arizona’s Religion Clauses Was Part of a Broad Movement Incorporating Blaine Amendments.

While the issue of separation of church and state in education had arisen before the time of the Blaine Amendment, responses of the states widely varied and the issue remained unsettled. Viteritti, *supra*, at 661-62. Some states directly funded religious schools. *Id.* at 664. “No federal court had ever ruled, at that point in time, that it was unconstitutional for a government agency to provide direct or indirect aid to religious institutions.” *Id.* at 671. The First Amendment did not yet apply to state governments through the 14th Amendment. Whether states would

directly fund private, often Catholic, schools as they funded public schools was still an open question.

Tensions over school funding heightened in the late 1800s. The public school system had become much more developed since the country's founding, and its incorporation of Protestant curriculum and Bible-reading had increased.¹ By the mid-1800s the population of Catholics and other minorities had grown tremendously, adding to tensions. Catholic children who refused to read from the Protestant Bible in public school were punished, and Catholics advocated for state-supported Catholic schools. *See, e.g.,* Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendments Concerns*, 26 Harv. J.L. & Pub. Pol'y 551, 561 (2003). Nativist and anti-Catholic sentiment escalated, opposing state funding for Catholic schools. As the Supreme Court explained in *Mitchell*, "opposition to aid to 'sectarian' schools acquired prominence in the 1870's at a time of pervasive hostility to the Catholic Church and to Catholics in general." 530 U.S. at 828. The Catholic population continued to grow and began to succeed in acquiring direct public aid for Catholic schools. *See* DeForrest, *supra*, at 562.

¹ "In all levels of education, both public and private, primary through collegiate, the moral teachings of the Bible were taught and, to varying degrees, religious services were conducted. But public schools did more than serve as surrogates for church instruction. The entire curriculum centered on general assumptions of God's existence, the sense of His universe, and the 'spirituality' of human nature. Schools were the primary promulgators of this Protestant way of life." Stephen K. Green, *The Blaine Amendment Reconsidered*, 36 Am J. Legal Hist. 38, 45 (1992).

The Blaine Amendment and state Blaine Amendments following it were part of one cohesive movement in response to the school-funding issue crisis. President Grant suggested a federal constitutional amendment to deny support to religious institutions, and Congressman James Blaine proposed the Amendment in Congress. *See Viteritti, supra*, at 669. Both were capitalizing, for political reasons, on what was then one of the top issues in the country. *See DeForrest, supra*, at 565.

When the Blaine Amendment failed to pass by a narrow margin in the Senate, many states rushed to incorporate similar language in their own constitutions. These provisions were no coincidence:

Within a year of the defeat of Blaine's proposal, fourteen states had legislation on the books preventing state funds from being used in support of religious schools. By the 1890s, roughly thirty states would incorporate Blaine-style amendments into their constitutions. This trend continued into the twentieth century; even as late as the 1950s, Alaska and Hawaii would incorporate Blaine-style language into their state charters.

Id. at 573. The Arizona Constitution of 1912, when the territory became a state, falls squarely within this timeline. Thus, history is clear that the Blaine Amendment movement in response to the tensions of the late 1800s was cohesive, widespread and covered the period when Arizona's religion clauses were written.

Congress added to the spread of the Blaine movement by compelling territories to include Blaine Amendments in their constitutions as a condition of

statehood. For example, the 1889 Enabling Act explicitly required the Dakotas, Montana, and Washington State to include Blaine Amendment provisions in their state constitutions. *See id.*; *see also* Frank J. Conklin & James M. Vache, *The Establishment Clause and the Free Exercise Clause of the Washington Constitution—a Proposal to the Supreme Court*, 8 U. Puget Sound L. Rev. 411, 460 (1985). Blaine Amendments are now found in roughly thirty state constitutions. *See* DeForrest, *supra*, at 576.

In the context of this history, it is beyond dispute that Arizona’s constitutional language had Blaine Amendment influence. Arizona’s religion clauses are “standard Blaine language” according to scholars. *Id.* at 582. Justice Feldman of this Court, in his dissent in *Kotterman v. Killian*, detailed how the national Blaine Amendment movement unfolded in Arizona. 193 Ariz. 273, 299, 972 P.2d 606, 632 (1999) (Feldman, J., dissenting). He referred to Arizona’s religion provisions as “Arizona’s Blaine Amendment clauses.” 193 Ariz. at 300, 972 P.2d at 633.

Those who assert that the text of Arizona’s religion clauses are not Blaine Amendments but broadly encompass the separation of church and state point to the Supreme Court’s dicta in *Locke v. Davey*, which inferred that one of the religion clauses in the Washington State Constitution does not have a “credible connection” to the original Blaine Amendment proposed in Congress. 540 U.S. 712, 723 n.7

(2004). But scholarship has since shown a clear link between the Washington Constitution and the Blaine movement, casting doubt on the historical accuracy of the Court's finding in *Locke*. See Mark Edward DeForrest, *Locke v. Davey: The Connection Between the Federal Blaine Amendment and Article I, § 11 of the Washington State Constitution*, 40 *Tulsa L. Rev.* 295 (2004); Utter & Larson, *supra*.²

Advocates of the irrelevancy of the Blaine Amendment movement to the interpretation of Arizona's religion clauses also point to dicta in this Court's majority opinion in *Kotterman v. Killian*. In a discussion with no controlling effect on its decision, this Court declined to find evidence "directly linking" the original Blaine Amendment and the Arizona constitutional convention. *Kotterman*, 193 *Ariz.* at 291, 972 P.2d at 624. But proof of a "direct link" is not required to make the Blaine Amendment movement relevant or to aid this Court's interpretation of the constitutional provisions at issue. Arizona canons of constitutional construction allow this Court to consider well-documented historical evidence of a broad trend of the states, including Arizona, incorporating similar Blaine language in their constitutions.

² Among other compelling historical connections between Washington's religion clauses and the Blaine Amendments is the fact that the Washington State Convention was dominated by a large majority of the Washington Republican Party, which had "supported [James] Blaine's well-known and long-standing views on religious establishment and common schools." Utter & Larson, *supra*, at 469.

To say the broad movement of the states to incorporate Blaine Amendment language is irrelevant to the interpretation of Arizona's religion provisions is to turn a blind eye to history, and to pretend that constitutional framers operate in a vacuum. With such a widespread movement sweeping the nation, so many states adopting Blaine Amendments, and school funding remaining one of the top cultural issues of the day, it cannot be seriously argued that the religion clauses drafted during this time and incorporating Blaine Amendment language were not influenced by the Blaine movement.

II. THE PURPOSE OF THE BLAINE AMENDMENTS, INCLUDING ARIZONA'S PROVISIONS, IS LIMITED TO PROHIBIT THE AID THREATENED AT THE TIME.

The fact that the two religion clauses in the Arizona Constitution originate from the Blaine Amendment movement has multiple implications. Here, we focus not on objectionable motivations nor on the issue of constitutionality, but only on the specific purpose of the Blaine Amendments in prohibiting a certain type of aid to schools.

A. The Blaine Amendments Responded to Demands for Direct State Aid of Parochial Schools.

The purpose of the Blaine Amendment—and the related provisions applied in each state—was to keep states from supporting sectarian schools in the way they supported state public schools. This purpose is evidenced by the fact that the

Blaine Amendment movement arose in direct response to demands that states directly support religious schools.

Catholics advocated for public funding to support Catholic schools. Catholic leaders regularly petitioned state legislatures for state funding for Catholic schools, and as the Catholic population grew, so did the success of their efforts. Green, *supra*, at 42; *see also*, Viteritti, *supra*, at 669 (reporting instances of Catholics advocating for state funding for parochial schools in 1842 in New York and in 1853 in the Michigan legislature, both having been met with extreme opposition).

The type of aid requested was the same type of direct funding from the state that public schools were receiving. As a matter of historical understanding, this was the meaning for a request of “aid.” “From the advent of publicly supported, compulsory education until very recently, aid to sectarian schools primarily meant aid to Catholic schools *as an enterprise to rival publicly supported, essentially Protestant schools.*” Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory L.J. 43, 50 (1997) (emphasis added).

The existence of Protestant teaching in the public schools also provided Catholics with an equity-based argument for Catholic school funding—that Catholic schools should receive the same support from the state as public schools teaching Protestantism. “Catholics were forced to pay taxes to support the

Protestant common schools, and it was only fair, from the Catholic perspective, that Catholic schools also be eligible for public funding.” Green, *supra*, at 42-44. Catholics contended that public funds should equally support a school that teaches from a Protestant Bible and a school that teaches from a Catholic Bible. In a country with freedom of religion, funding for one religion should mean funding for another religion as well.

Direct state support for religious schools was a legitimate possibility at that time. For example, in 1871 the New York City Catholic diocese received more than \$700,000 from the public treasury, earmarked for Catholic schools. *Id.* at 42.

Until the middle of the Nineteenth Century, it was not unusual for religious schools to be supported with public funds in New York, New Jersey, Connecticut, Massachusetts, and Wisconsin. In many cases it was difficult to distinguish between public and private institutions because they were often housed in the same building. Frequently the lines were purposely blurred by Democratic party politicians who sought to appease their Catholic constituents in big cities.

Viteritti, *supra*, at 664.

In the face of a growing Catholic population that was increasingly successful in its demands for parochial school funding, the Protestant response was strong and swift. The Blaine Amendments—both federal and state—were passed in direct opposition to demands for direct aid to Catholic schools. They were the response to counter the threat that Catholic schools, among others, would be supported equally with public schools. *See generally* Green, *supra*, at 43. In the United

States Supreme Court’s landmark school voucher decision, *Zelman v. Simmons-Harris*, the Court described the perceived threat and its response:

Catholics sought equal government support for the education of their children in the form of aid for private Catholic schools....And this sentiment played a significant role in *creating a movement that sought to amend several state constitutions* (often successfully), and to amend the United State Constitution (unsuccessfully) to make certain that government would not help pay for “sectarian” (*i.e.*, Catholic) schooling for children. [Jeffries & Ryan] at 301-305. *See also* Hamburger, *supra*, at 287.

Zelman, 536 U.S. 639, 721 (2002) (emphasis added). The reactionary nature of the Blaine Amendment history demonstrates what the provisions were meant to prevent.

The purpose of the Blaine Amendments was not to keep tax dollars from finding their way to a school that taught religion. After all, government-supported public schools at the time taught the “common religion,” and students read from the “Protestant” King James Bible. Blaine Amendment language was not implementing a broad principle of separation of church and state, because Blaine Amendment provisions did not intend to remove funds from public schools where Protestantism was taught.

The amicus brief of the National School Boards Association submitted in the Court of Appeals makes the argument that the provisions should be interpreted “as they are understood today—as a reflection of [Arizona’s] longstanding

commitment to the separation of church and state.”³ Br. of Amicus Curiae Nat’l Sch. Boards Ass’n at 13, *Cain v. Horne*, No. 2 CA-CV 2007-0143 (Ariz. Ct. App. Div. 2 Feb. 7, 2008). In fact, the provisions have always been a reflection of a narrower concern: that government should not directly fund and support a separate school system to compete with the public schools.

The effect of the Blaine provisions is the same regardless of the motivation behind them. For some supporters of Blaine Amendment provisions, the motivation may have been to prevent a second school system alongside the public school system, with both school systems supported by the state, diluting education funds. For others, promoting Protestantism over Catholicism in education may have been the reason to support Blaine Amendments. In any case, the response was to deny to Catholic (or any sectarian) schools the aid that would rival that of the public schools.

B. The Intent of Arizona’s Religion Clauses and the Blaine Amendments Was the Same—to Prevent a Dual School System and Divided Public Funds.

In Arizona, as in other states, the school funding debate focused on the specific issue of whether public money would directly support sectarian schools in the way it supported public schools. Arizona’s historical sources describe the type

³ The premise of this argument by the National School Boards Association is that the interpretation of these constitutional provisions should be governed by modern understanding. This premise has no support in Arizona law of constitutional construction. To the contrary, this Court’s “cardinal rule” of constitutional construction is to

of aid that caused concern as “public moneys for [sectarian, primarily Catholic schools’] support.” See Samuel Pressly McCrea, *Establishment of the Arizona School System*, in Biennial Report of the Superintendent of Public Instruction of the Territory of Arizona, for the Years Ending June 30, 1907 and June 30, 1908, at 96 (1908). When Arizona was still a Territory, the Legislative Assembly passed a law that “[a]ny school in which such sectarian or denominational doctrine had been taught could not receive public school funds.” Act to Establish Public Schools in the Territory of Arizona § 34 (approved Feb. 18, 1871). The type of aid causing concern in Arizona was the “public school funds,” by which the territory “supported” schools. Nothing in those descriptions suggests that the type of aid under debate concerned anything other than the same direct financial support the public schools received.

Striving to keep Arizona from having state-funded Catholic schools was in itself a desired objective, because, as in other states and territories at the time, advocates called for the state to equally support public and Catholic schools.

Chief Justice Edmund Dunne of the Arizona Territorial Supreme Court . . . argued before the 1875 Legislative Assembly that either Catholics whose children attended private, sectarian schools should be exempt from paying taxes to support public schools or public moneys should be used to support Catholic schools.

follow the meaning of the text as informed by the original intent of the framers. See, e.g., *Fain Land & Cattle Co. v. M.J. Hassell*, 163 Ariz. 587, 595, 790 P.2d 242, 250 (1990).

John C. Bury, Dissertation, *The Historical Role of Arizona's Superintendent of Public Instruction* 114-29 (Northern Arizona University 1974). Arguments against public support of sectarian schools centered around the idea that there would be a dual school system and division of the public school funds. *Journal of the Ninth Legislative Assembly*, at 32 (1877) (quoting Governor Safford's message to the Legislative Assembly). Similar concerns garnered debate across the country, and were particularly meaningful in the Arizona Territory because of the large Mexican-American Catholic population. The current religion provisions in the Arizona Constitution logically follow from the nation-wide movement, as it progressed in Arizona.

C. The “Aid” Prohibited by Arizona’s Religion Clauses Is Not Provided by the State Voucher Programs.

Arizona’s religion clauses forbid that direct aid from the state support a private or sectarian school. Article 2, § 12 of the Arizona Constitution provides that “[n]o public money or property shall be appropriated for or applied to any religious . . . instruction, or to the support of any religious establishment.” Article 9, § 10 of the Arizona Constitution provides that “[n]o . . . appropriation of public money [shall be] made in aid of any . . . private or sectarian school” The words “support” and “in aid of” depict the type of funding the constitutional framers were trying to avoid at that time: direct aid to private schools just like the state aid appropriated for the support of public schools.

There are several ways to distinguish the voucher program funds from the direct aid prohibited by Arizona's religion clauses. First, under the voucher programs, the true beneficiary of the voucher funds is the child who is receiving the education. This Court has often relied on the doctrine that "it is not the school or sectarian institution that is receiving the benefits of the appropriation but the child itself." *Community Council v. Jordan*, 102 Ariz. 448, 455, 432 P.2d 460, 467 (1967). In doing so, this Court has disregarded any indirect benefit to entities "who are not in fact the real or true beneficiaries." *Id.*

Second, provision of voucher funds reflects no intention to aid a school's existence, as state aid to public schools does. While it is true that private schools need to educate children and receive tuition payments or other donations in order to exist, the voucher program funds have no connection at all to the well-being of any particular school. Public schools, without funding from the state, would cease to exist. Private schools, in contrast, depend on funds from parents, and often on donations. If a private school went bankrupt, it would mean nothing to the state, whereas if a public school system ran out of money, the state would be obligated to increase funding for the sake of the school's continued existence. Thus, private schools do not depend on aid from the state; their support has nothing to do with the reason states offer voucher programs.

Third, nothing about Arizona’s voucher programs for special needs and foster children remotely resembles “an enterprise to rival publicly supported...schools.” *See supra* at Part II.A. (quoting Laycock, *supra*, at 50). In the cases of children using vouchers, the state is providing additional options for only those children who have educational needs the public school system is not designed to meet. The programs apply only where the public schools, for whatever reason, do not fill the need. This is not the type of side-by-side school system feared at the time the Blaine Amendments were implemented.

Fourth, voucher program funds go to a particular school only through the choice of the recipient family. The state does not directly appropriate funds for any specific religious institution or private or sectarian school. The Supreme Court made this distinction in *Mueller v. Allen*, upholding a state program that provided aid to parochial schools only as a result of decisions of individual parents rather than directly from the State to the schools themselves. 463 U.S. 388 (1983). Thus, while there may be some benefit to the school attended by a voucher-program child, it is a secondary effect because of the family’s choice; it is not because of any state appropriation to that school.

The history of the Blaine Amendments illuminates the purpose of Arizona’s religion provisions: to prevent the state from directly funding private schools as it funded public schools. Nothing in Arizona’s constitutional text implies that its

religion clauses prohibit anything beyond the direct aid from the state to a private or sectarian school. Tuition payments from state program beneficiaries were not contemplated at the time the clauses were drafted. To say now that the Arizona religion clauses should be broadly read to go beyond their original purpose and forbid payments from state program beneficiaries is to ignore historical context. Arizona's highest Court should interpret its provisions as they were intended, and continue the tradition in the state of Arizona of prohibiting direct aid to religious establishments while upholding the state's many beneficial programs to promote the education of its children.

CONCLUSION

The issue for the Court is whether state voucher programs for foster children and children with disabilities constitute the "aid" for private or sectarian schools that is prohibited by the Arizona religion clauses. Understanding Arizona's religion clauses within the context of the Blaine Amendments informs the original meaning of the text: that the type of "aid" intended to be prohibited was direct aid equal to that of the public schools. Arizona's statutory voucher programs are not this type of aid, and thus, are constitutional.

RESPECTFULLY SUBMITTED this 1st day of December 2008.

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I certify that the attached brief uses proportionately spaced Times New Roman font of 14 points or more, is double-spaced except for headers and footnotes, and contains fewer than 12,000 words.

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I hereby certify that the **ORIGINAL PLUS 7 COPIES** of the foregoing (1) Brief of Amicus Curiae Father's Heart Christian School and (2) written consents of all parties to file this amicus brief, were filed with the Clerk this 1st day of December, 2008, via Federal Express overnight delivery, at the following address:

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I further certify that **TWO COPIES** of the foregoing (1) Brief of Amicus Curiae Father's Heart Christian School and (2) written consents of all parties to file this amicus brief, were served via Federal Express overnight delivery this 1st day of December, 2008, upon each of the following:

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