

No. 68565-7

---

**IN THE SUPREME COURT OF WASHINGTON**

---

STATE *ex rel.* MARY GALLWEY,

Respondent,

v.

DANIEL K. GRIMM, Treasurer of the State of Washington;  
THE HIGHER EDUCATION COORDINATING BOARD,

Appellants,

and

WASHINGTON ASSOCIATION OF INDEPENDENT COLLEGES  
AND UNIVERSITIES,

Intervenor Appellant,

and

THE UNIVERSITY OF PUGET SOUND,

Intervenor Appellant,

---

**BRIEF *AMICUS CURIAE* OF  
THE BECKET FUND FOR RELIGIOUS LIBERTY  
IN SUPPORT OF REVERSAL**

---

James E. McCutcheon III,  
WSBA #28280  
VANDER WEL, JACOBSON &  
BISHOP, PLLC  
Bellevue Place  
Bank of America Building  
Suite 1900  
10500 N.E. Eighth Street  
Bellevue, WA 98004  
Telephone: (425) 462-7070  
Facsimile: (425) 646-3467

Kevin J. Hasson  
Eric W. Treene  
Roman P. Storzer  
Anthony R. Picarello, Jr.  
THE BECKET FUND FOR  
RELIGIOUS LIBERTY  
1350 Connecticut Avenue, N.W.  
Suite 605  
Washington, DC 20036  
Telephone: (202) 955-0095  
Facsimile: (202) 955-0090

April 12, 2001

**TABLE OF CONTENTS**

Page

TABLE OF AUTHORITIES ..... ii

INTEREST OF *AMICUS* ..... 1

STATEMENT OF THE CASE ..... 2

ARGUMENT ..... 3

I. THE LANGUAGE AND HISTORY OF ARTICLE IX,  
SECTION 4 DEMONSTRATE ITS ORIGINS IN NATIVIST  
BIGOTRY, WHICH THIS COURT SHOULD REPUDIATE ..... 4

II. THE COURT SHOULD REJECT ANY INTERPRETATION OF  
ARTICLE IX, SECTION 4 THAT RISKS VIOLATING THE  
UNITED STATES CONSTITUTION ..... 11

A. The Superior Court’s Interpretation of Article IX,  
Section 4 Violates the Free Exercise Clause ..... 12

B. The Superior Court’s Interpretation of Article IX,  
Section 4 Violates the Equal Protection Clause ..... 15

1. Article IX, Section 4 triggers and fails strict  
scrutiny ..... 15

2. Even if Article IX, Section 4 did not trigger strict  
scrutiny, it would fail rational basis scrutiny ..... 16

CONCLUSION ..... 17

## TABLE OF AUTHORITIES

### CASES

<i>Almendarez-Torres v. United States</i> , 523 U.S. 224 (1998) .....	11
<i>Bishop v. Miche</i> , 137 Wn.2d 518, 973 P.2d 465 (1999) .....	11
<i>Church of the Lukumi Babalu Aye v. City of Hialeah</i> , 508 U.S. 520 (1993) .....	11
<i>City of New Orleans v. Dukes</i> , 427 U.S. 297 (1976) .....	15
<i>Employment Division v. Smith</i> , 494 U.S. 872 (1990) .....	13
<i>Epperson v. Arkansas</i> , 393 U.S. 97 (1968) .....	14
<i>Fellowship Baptist Church v. Benton</i> , 815 F.2d 485 (8 <sup>th</sup> Cir. 1987) .....	15
<i>Garnett v. Smith</i> , 987 F.2d 641 (9 <sup>th</sup> Cir. 1993) .....	14
<i>In re Williams</i> , 121 Wn.2d 655, 853 P.2d 444 (1993) (en banc) .....	11
<i>Johnson v. Robison</i> , 415 U.S. 361 (1974) .....	15
<i>Kotterman v. Killian</i> , 972 P.2d 606 (1999) .....	9
<i>Kreisner v. City of San Diego</i> , 1 F.3d 775 (9 <sup>th</sup> Cir. 1993) .....	14
<i>Lee v. Weisman</i> , 505 U.S. 577 (1992) .....	4
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971) .....	7
<i>McDaniel v. Paty</i> , 435 U.S. 618 (1978) .....	15
<i>Mitchell v. Consol. Sch. Dist. 201</i> , 17 Wn.2d 61, 135 P.2d 79 (1943) ...	11
<i>Mitchell v. Helms</i> , 120 S. Ct. 2530 (2000) .....	1, 9, 11, 13
<i>Nevada ex rel. Nevada Orphan Asylum v. Hallock</i> , 16 Nev. 373 (1882) .	9
<i>NLRB v. Catholic Bishop of Chicago</i> , 440 U.S. 490 (1979) .....	12
<i>People ex rel. Ring v. Bd. of Educ. of Dist. 24</i> , 92 N.E. 251 (Ill. 1910) ...	7
<i>Romer v. Evans</i> , 517 U.S. 620 (1996) .....	16
<i>State ex rel. Finger v. Weedman</i> , 226 N.W. 348 (S.D. 1929) .....	7
<i>State Higher Educ. Assistance Auth. v. Graham</i> , 84 Wn.2d 813, 529 P.2d 1051 (1974) .....	2, 11
<i>The Dublin Case</i> , 38 N.H. 459 (1859) .....	5
<i>Visser v. Nooksack Valley Sch. Dist. 506</i> , 33 Wn.2d 699, 207 P.2d 198 (1949) .....	11
<i>Weiss v. Bruno</i> , 82 Wn.2d 199, 509 P.2d 973 (1973) .....	3, 10, 11, 12
<i>Widmar v. Vincent</i> , 454 U.S. 263 (1981) .....	14

### STATUTES

Act of Feb. 22, 1889, 25 Stat. 676, ch. 180 (1889) .....	8, 10
Act of July 3, 1890, 26 Stat. 215 § 8, ch. 656 (1890) .....	8
Act of June 20, 1910, 36 Stat. 557 § 26 (1910) .....	8

## OTHER AUTHORITIES

2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 320, 323 (R. Basler ed. 1953) .....	6
20 CONG. REC. 2100-01 (1889) .....	8
4 CONG. REC. 205 (1875) .....	10
4 CONG. REC. 5191 (1876) .....	8
4 CONG. REC. 5595 (1876) .....	8
Conklin & Vaché, <i>The Establishment Clause and the Free Exercise Clause of the Washington Constitution – A Proposal to the Supreme Court</i> , 8 U. PUGET SOUND L. REV. 411 (1985) .....	9
E.I.F. WILLIAMS, HORACE MANN: EDUCATIONAL STATESMAN (1937) ...	5
Green, <i>The Blaine Amendment Reconsidered</i> , 36 AM. J. LEGAL HIST. 38 (1992) .....	9
H.R.J. Res. 1, 44 <sup>th</sup> Cong., 1 <sup>st</sup> Sess., 4 CONG. REC. 205 (1875) .....	8
HORACE MANN, LIFE AND WORKS: ANNUAL REPORTS OF THE SECRETARY OF THE BOARD OF EDUCATION OF MASSACHUSETTS FOR THE YEARS 1845-48 (1891) .....	5
HUMPHREY J. DESMOND, THE A.P.A. MOVEMENT, A SKETCH (1912) .....	6
JORGENSEN, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925 (1987) .....	7
KINZER, AN EPISODE IN ANTI-CATHOLICISM (1964) .....	6
Laycock, <i>The Underlying Unity of Separation and Neutrality</i> , 46 EMORY L.J. 43 (1997) .....	6, 9
Lupu, <i>The Increasingly Anachronistic Case Against School Vouchers</i> , 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 375, 386 (1999) .....	9
R. MICHAELSEN, PIETY IN THE PUBLIC SCHOOL (1970) .....	5
THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889, at 329, 689 (B. Rosenow ed. 1999) .....	10
Utter & Larson, <i>Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution</i> , 15 HASTINGS CONST. L.Q. 451 (1988) .....	9, 10
Viteritti, <i>Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism</i> , 15 YALE L. POL'Y REV. 113, 146 (1996) .....	9

## RULES

RAP 10.3(e) .....	2
-------------------	---

**CONSTITUTIONAL PROVISIONS**

ARIZ. CONST. Art. IX § 10 ..... 8  
DEL. CONST. Art. X § 3 ..... 8  
IDAHO CONST. Art. X § 5 ..... 8  
KY. CONST. § 189 ..... 8  
MASS. CONST. Amend. Art. XLVI ..... 7  
MASS. CONST. Amend. Art. XVIII ..... 7  
MO. CONST. Art. IX § 8 ..... 8  
MONT. CONST. Art. X § 6 ..... 8  
N.D. CONST. Art. 8 § 5 ..... 8  
N.Y. CONST. Art. XI § 3 ..... 8  
S.D. CONST. Art. VIII § 16 ..... 8  
WASH. CONST. Art. I § 11 ..... 8  
WASH. CONST. Art. IX § 4. .... 2, 4, 8, 10

## INTEREST OF *AMICUS*

The Becket Fund for Religious Liberty is an interfaith, nonpartisan public interest law firm dedicated to protecting the free expression of all religious traditions, and the freedom of religious people and institutions to participate fully in public life. The Becket Fund litigates in state and federal courts throughout the United States, both as primary counsel and as *amicus curiae*. The Becket Fund defends, among others, the core principle that when the government funds social services, such as education, health care, or welfare, it should not – indeed, in most circumstances, it may not – discriminate among service providers or recipients based on their religious status or affiliation.

Accordingly, the Becket Fund has been involved in litigation regarding “Blaine Amendments,” state constitutional amendments that were adopted in the latter half of the 19<sup>th</sup> Century out of nativist sentiment, and that deny “sectarian” institutions government benefits that are available to otherwise similar institutions. In *Mitchell v. Helms*, 120 S. Ct. 2530 (2000), we filed an *amicus curiae* brief before the United States Supreme Court that traced the historical origins of the principle barring aid to “sectarian” institutions to demonstrate how this concept grew not out of benign concerns for the separation of church

and state, but out of nativist bigotry. In *Boyette v. Galvin*, No. 98-CV-10377 (D. Mass.), we represent parents challenging the “Anti-Aid” Amendment to the Massachusetts Constitution under the federal Equal Protection and Free Exercise Clauses on the grounds that the Amendment was based on antireligious and irrational animus.

This brief is limited to issues of The Becket Fund’s concern and expertise. RAP 10.3(e). We have reviewed the parties’ briefs on file, and we believe that our brief does not repeat matters in those briefs. *Id.*

#### **STATEMENT OF THE CASE**

On May 17, 1999, the Superior Court for Thurston County struck down Washington’s Educational Opportunity Grant (“EOG”) program, as applied to students attending the member schools of the Washington Association of Independent Colleges and Universities (“WAICU”), on the sole ground that the program violates Article IX, Section 4 of the Washington State Constitution. *See* Opinion Judge Daniel J. Berschauer, Thurston County Superior Court, Dept. 1, May 17, 1999, at 9 (the “Opinion”). That section provides:

All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.

WASH. CONST. Art. IX § 4.

More specifically, relying on *State Higher Educ. Assistance Auth. v. Graham*, 84 Wn.2d 813, 529 P.2d 1051 (1974), and *Weiss v. Bruno*, 82 Wn.2d 199, 509 P.2d 973 (1973), the Superior Court found that WAICU schools would be “maintained or supported wholly or in part by the public funds” because allowing students to use EOG scholarships to attend WAICU schools “indirectly benefits” those schools. Opinion at 5. The court also found that no WAICU schools were “free from sectarian influence or control” because, although “some of these schools have very few of the [eleven] prohibited elements” suggesting sectarian influence, “none is free from all prohibited elements.” *Id.* at 8.

#### ARGUMENT

For years, Article IX, Section 4 has been interpreted to single out “sectarian” institutions for official disfavor, prohibiting the State of Washington from benefiting them on an equal basis with others similarly situated, even in “‘indirect’ or ‘incidental’” ways. *Weiss*, 82 Wn.2d at 211. For at least two reasons, the Court should take this opportunity to curtail that interpretation. First, Article IX, Section 4 is a law with a shameful history: it is a classic “Blaine Amendment,” whose language and history manifest the nativist bigotry behind its forced inclusion in the Washington Constitution. Second, Article IX, Section 4 – as currently

interpreted – very likely violates the Free Exercise and Equal Protection Clauses of the United States Constitution.

**I. THE LANGUAGE AND HISTORY OF ARTICLE IX, SECTION 4 DEMONSTRATE ITS ORIGINS IN NATIVIST BIGOTRY, WHICH THIS COURT SHOULD REPUDIATE**

Article IX, Section 4 prohibits the State of Washington from funding schools unless they are “free from sectarian control or influence.” WASH. CONST. Art. IX § 4. Notably, this provision does not bar public funding of “religious” schools generally, only “sectarian” ones. On its face, the term “sectarian” is not synonymous with “religious” but instead refers to a narrower subcategory, connoting one or more sects or denominations of religion.<sup>1</sup> This choice of words, moreover, is not an oversight or a matter of mere semantics. Instead, it reflects a concerted effort by nativist legislators, over a century ago, to single out and disadvantage members of certain religious groups – especially Catholics – who resisted enforcement of the “common religion” in the “common schools.”

The meaning of “sectarian” can only be understood by reference to the “common religion” to which it was opposed. In the mid-19<sup>th</sup> Century, the emerging principle of universal education and the desire to eliminate strife among increasingly varied religious groups gave rise to the movement for publicly funded “common schools.” Early proponents of

---

<sup>1</sup> For example, “nonsectarian prayer” is unmistakably religious but is not tied to any one religious sect. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 581-82, 588-89 (1992).

this movement emphatically denied that the common schools were intended to, or could effectively, function without religious instruction.<sup>2</sup> Indeed, one of the primary purposes of the common schools was to instill in all American children the same “common religion,” a form of Protestantism designed initially to be acceptable to Unitarian and Orthodox Congregationalists.<sup>3</sup> Those who resisted this publicly funded religion – at this early stage, mostly evangelical Protestants – were maligned as “sectarian.”<sup>4</sup>

However, with the surge of Irish, German, and other European Catholic immigration later in the 19<sup>th</sup> Century, “sectarian” took on a more precise, and more pejorative, meaning. Popular backlash against these

---

<sup>2</sup> Horace Mann, often called the “Father of Public Education,” denied any attempt “to exclude religious instruction from school,” and affirmed as “eternal and immutable truths” that the public schools’ “grand result in practical morals is a consummation of blessedness that can never be attained without religion, and that no community will ever be religious without a religious education.” HORACE MANN, LIFE AND WORKS: ANNUAL REPORTS OF THE SECRETARY OF THE BOARD OF EDUCATION OF MASSACHUSETTS FOR THE YEARS 1845-48, at 292, 311 (1891).

<sup>3</sup> MANN, *supra*, at 311 (emphasizing that public school system “earnestly inculcates all Christian morals; it founds its morals on the basis of religion; it welcomes the religion of the Bible.”); see E.I.F. WILLIAMS, HORACE MANN: EDUCATIONAL STATESMAN 266 (1937); *The Dublin Case*, 38 N.H. 459 (1859) (describing conflicts among Unitarian and Orthodox Congregationalists in New England);

<sup>4</sup> See R. MICHAELSEN, PIETY IN THE PUBLIC SCHOOL 69 (1970) (“Horace Mann scorned sectarianism. By that he meant chiefly the sectarianism of the evangelical Protestant denominations.”).

immigrants gave rise to the nativist movement, which found various forms of expression at various times, including the Know-Nothing party<sup>5</sup> and the American Protective Association.<sup>6</sup> Even President Grant, calling for an end to all funding for “sectarian” schools in 1875, spoke of the Catholic Church as a source of “superstition, ambition and ignorance.”<sup>7</sup>

---

<sup>5</sup> Abraham Lincoln wrote of that party:

As a nation we began by declaring that “all men are created equal.” We now practically read it “all men are created equal, except Negroes.” When the Know-Nothings get control, it will read “all men are created equal except Negroes and foreigners and Catholics.” When it comes to this, I shall prefer emigrating to some country where they make no pretense of loving liberty.

Letter from Abraham Lincoln to Joshua Speed (Aug. 24, 1855), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 320, 323 (R. Basler ed. 1953).

<sup>6</sup> Oath number four of the APA began:

I do most solemnly promise and swear that I will always, to the utmost of my ability, labor, plead and wage a continuous warfare against ignorance and fanaticism; that I will use my utmost power to strike the shackles and chains of blind obedience to the Roman Catholic Church from the hampered and bound consciences of a priest-ridden and church-oppressed people; that I will never allow any one, a member of the Roman Catholic Church, to become a member of this order, I knowing him to be such; that I will use my influence to promote the interest of all Protestants everywhere in the world that I may be; that I will not employ a Roman Catholic in any capacity if I can procure the services of a Protestant.

HUMPHREY J. DESMOND, THE A.P.A. MOVEMENT, A SKETCH 36 (1912); See KINZER, AN EPISODE IN ANTI-CATHOLICISM 139 (1964) (the APA’s “initials identified almost any activity or proposal that could by any stretch of the imagination be called anti-Catholic.”)

<sup>7</sup> President Ulysses S. Grant, Address to the Army of Tennessee at Des Moines, Iowa (quoted in Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 51 (1997)).

Nativists used the law to target Catholic education in two primary ways: (1) by requiring daily, devotional reading of the King James Version of the Bible in the common schools,<sup>8</sup> and (2) by withdrawing all government support from “sectarian” schools.<sup>9</sup>

The most prominent attempt at the latter came in 1875, when nativist Representative James G. Blaine – in response to President Grant’s call – introduced a proposed federal constitutional amendment in the U.S. House of Representatives to bar states from funding “sectarian” schools.<sup>10</sup>

---

<sup>8</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 629 (1971) (Douglas, J., concurring) (noting that Know-Nothing party “included in its platform daily Bible reading in the schools.”) (citation omitted); see, e.g., JORGENSEN, *THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925*, at 88 (1987) (describing Massachusetts Know-Nothing party’s passage of law requiring reading of King James Bible in common schools). See also *State ex rel. Finger v. Weedman*, 226 N.W. 348, 351 (S.D. 1929) (“The King James version is a translation by scholars of the Anglican church bitterly opposed to the Catholics, apparent in the dedication of the translation, where the Pope is referred to as ‘that man of sin.’”); *People ex rel. Ring v. Bd. of Educ. of Dist. 24*, 92 N.E. 251, 254 (Ill. 1910) (“Catholics claim that there are cases of willful perversion of the Scriptures in King James’ translation.”).

<sup>9</sup> See, e.g., MASS. CONST. Amend. Art. XVIII (superseded by MASS. CONST. Amend. Art. XLVI) (passed in 1854, immediately after local ascendancy of Know-Nothing party, and providing that “all moneys which may be appropriated by the state for the support of common schools ... shall never be appropriated to any religious sect for the maintenance exclusively of its own schools”).

<sup>10</sup> The original Blaine Amendment provided:

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised

Although the Blaine language narrowly failed as a federal constitutional amendment,<sup>11</sup> it had gained enough support in Congress that Congress thereafter required new states – including Washington State – to adopt similar language in their state constitutions as a condition of admittance to the Union.<sup>12</sup>

A growing number of courts (including the United States<sup>13</sup> and

---

or lands so devoted be divided between religious sects or denominations.

H.R.J. Res. 1, 44<sup>th</sup> Cong., 1<sup>st</sup> Sess., 4 CONG. REC. 205 (1875).

<sup>11</sup> The measure passed in the House by a margin of 180-7, 4 CONG. REC. 5191 (1876), but fell four votes short of the supermajority required in the Senate. 4 CONG. REC. 5595 (1876).

<sup>12</sup> *See, e.g.*, Act of Feb. 22, 1889, 25 Stat. 676, ch. 180 (1889) (enabling act for North Dakota, Montana, South Dakota, and Washington); Act of June 20, 1910, 36 Stat. 557 § 26 (1910) (enabling act for Arizona and New Mexico); Act of July 3, 1890, 26 Stat. 215 § 8, ch. 656 (1890) (enabling act for Idaho); S.D. CONST. Art. VIII § 16; N.D. CONST. Art. 8 § 5; MONT. CONST. Art. X § 6; WASH. CONST. Art. IX § 4, Art. I § 11; ARIZ. CONST. Art. IX § 10; IDAHO CONST. Art. X § 5. *See also* 20 CONG. REC. 2100-01 (1889) (statement of Sen. Blair) (arguing in favor of Enabling Act requirement that state constitutions guarantee “public schools ... free from sectarian control,” in part because requirement would accomplish purposes of failed federal Blaine Amendment). In addition, several states adopted similar “Blaine Amendments” voluntarily as part of the same movement. *See, e.g.*, N.Y. CONST. Art. XI § 3 (adopted 1894); DEL. CONST. Art. X § 3 (adopted 1897); KY. CONST. § 189 (adopted 1891); MO. CONST. Art. IX § 8 (adopted 1875).

<sup>13</sup> As four Justices of the U.S. Supreme Court recently recognized: Opposition to aid to “sectarian” schools acquired prominence in the 1870's with Congress's consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that “sectarian” was code for “Catholic.” *See generally* Green, *The Blaine Amendment*

Arizona<sup>14</sup> Supreme Courts) and scholars<sup>15</sup> (including former Justice Utter of this Court<sup>16</sup>) have acknowledged the anti-Catholic animus behind the original Blaine Amendment and its progeny. Article IX, Section 4 is no exception: not only does its language closely track the federal Blaine

---

*Reconsidered*, 36 AM. J. LEGAL HIST. 38 (1992).  
*Mitchell v. Helms*, 120 S. Ct. 2530, 2251 (2000) (plurality opinion).

<sup>14</sup> *Kotterman v. Killian*, 972 P.2d 606, 624 (1999) (“The Blaine amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing ‘Catholic menace.’”) (internal quotations omitted). *Cf. Nevada ex rel. Nevada Orphan Asylum v. Hallock*, 16 Nev. 373, 385 (1882) (“The framers of the [Nevada] Constitution undoubtedly considered the Roman Catholic a sectarian church.”).

<sup>15</sup> *See, e.g., Lupu, The Increasingly Anachronistic Case Against School Vouchers*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 375, 386 (1999) (“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.”); Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 50 (1997) (“Although there were legitimate arguments made on both sides, the nineteenth century opposition to funding religious schools drew heavily on anti-Catholicism.”); Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. POL’Y REV. 113, 146 (1996); Conklin & Vaché, *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) (“[H]istorical evidence suggests that conditions [on Washington’s admission to the Union] were extracted to promote anti-Catholic and anti-Mormon ideology.”)

<sup>16</sup> *See Utter & Larson, Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L.Q. 451, 466 (1988) (“Without expressly identifying any wrongful sectarian instruction, the ensuing debate repeatedly focused on the divisiveness of separate schools for Roman Catholics.”).

Amendment and the Enabling Act,<sup>17</sup> the framers of Article IX, Section 4 expressly considered – and rejected – both replacing the term “sectarian” with the term “religious,” and excluding “religious exercises or instructions” from public schools.<sup>18</sup> Even to this day, this provision has been interpreted to distinguish among religious institutions, favoring the less religious over the more religious.<sup>19</sup>

In light of this regrettable history, *amicus* respectfully submits that this Court may wish to reconsider whether to continue interpreting Article IX, Section 4 as such an “absolute” and “sweeping prohibition” against

---

<sup>17</sup> Compare WASH. CONST. Art. IX § 4 (“All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.”), with Act of Feb. 22, 1889, 25 Stat. 676, ch. 180 (1889) (requiring Washington to maintain “public schools ... free from sectarian control”), and with 4 CONG. REC. 205 (1875) (“no money raised by taxation in any State for the support of schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect”); See also Utter & Larson, *supra*, at 468 (“The language of the state constitution’s establishment clauses is similar to that found in the Blaine Amendment.”).

<sup>18</sup> THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889, at 329, 689 (B. Rosenow ed. 1999); see also Utter & Larson, *supra*, at 478 (“In distinguishing between religion and sectarianism, the framers [of Art. IX § 4] comported with the fifty-year-old common school movement. ... [which] was natural for a convention dominated by Blaine Republicans and influenced by the Enabling Act’s public school provisions.”).

<sup>19</sup> See, e.g., Opinion at 6-7 (applying multi-factored test of *Weiss v. Bruno*, 82 Wn.2d 199, 224, 509 P.2d 973 (1973), and finding University of Puget Sound, but not other independent schools “free from sectarian control or influence”).

aid to “sectarian” schools. *Weiss*, 82 Wn.2d at 206 & n.2.<sup>20</sup> As the plurality in *Mitchell v. Helms* recently concluded, “hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. ... This doctrine, born of bigotry, should be buried now.”<sup>21</sup>

## **II. THE COURT SHOULD REJECT ANY INTERPRETATION OF ARTICLE IX, SECTION 4 THAT RISKS VIOLATING THE UNITED STATES CONSTITUTION**

This Court should reverse the Superior Court’s interpretation of Article IX, Section 4 not only as a rejection of the provision’s nativist past, but to avoid generating a federal constitutional issue.<sup>22</sup> As described more fully below, the Superior Court’s interpretation of the Washington Blaine Amendment very likely violates two federal constitutional provisions: (1) the Free Exercise Clause of the First Amendment (as

---

<sup>20</sup> *See, e.g., id.; State Higher Educ. Assistance Auth. v. Graham*, 84 Wn.2d 813, 529 P.2d 1051 (1974); *Visser v. Nooksack Valley Sch. Dist.* 506, 33 Wn.2d 699, 207 P.2d 198 (1949); *Mitchell v. Consol. Sch. Dist. 201*, 17 Wn.2d 61, 135 P.2d 79 (1943).

<sup>21</sup> *Mitchell*, 120 S. Ct. at 2251-52 (plurality opinion). *See also Bishop v. Miche*, 137 Wn.2d 518, 529, 973 P.2d 465 (1999) (noting that Court should depart from established rules of law when rule is shown to be harmful or incorrect).

<sup>22</sup> *In re Williams*, 121 Wn.2d 655, 665, 853 P.2d 444 (1993) (en banc); *see Almendarez-Torres v. United States*, 523 U.S. 224, 237-38 (1998); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500-01 (1979); *see also Weiss*, 82 Wn.2d at 206 n.2 (recognizing that interpretation of WASH. CONST. Art. IX § 4 is constrained by federal free exercise guarantees).

applied to Washington through the Fourteenth Amendment), and (2) the Equal Protection Clause of the Fourteenth Amendment.

**A. The Superior Court’s Interpretation of Article IX, Section 4 Violates the Free Exercise Clause**

In *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), the U.S. Supreme Court clarified the standard for evaluating state laws under the Free Exercise Clause:

Although a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.

*Id.* at 533 (internal citations omitted). Moreover, “the minimum requirement of neutrality is that a law not discriminate on its face” against religious status, belief, or conduct. *Id.* Even if a law is not facially discriminatory, it still fails the neutrality requirement if it “targets religious conduct for distinctive treatment” or involves “covert suppression of particular religious beliefs.”<sup>23</sup>

Article IX, Section 4 fails the neutrality requirement. By explicitly treating “sectarian” schools differently and worse than similarly situated

---

<sup>23</sup> *Id.* at 534; *Employment Division v. Smith*, 494 U.S. 872, 877 (1990) (“The government may not ... impose special disabilities on the basis of religious views or religious status.”).

“nonsectarian” schools, Article IX, Section 4 “discriminates on its face” based on religious status. *Lukumi*, 508 U.S. at 533. As discussed above, the term “sectarian” is directed at some, but not all religious schools. This is plain not only from the very term’s incorporation of the word “sect,” connoting a denomination or other religious subdivision, *see supra* at 4, but from the framers’ specific rejection of the alternative term “religious” and their refusal to exclude “religious exercises” from public schools, *see supra* at 10, and from the way this Court has since applied the term, *see id.*

This facial discrimination is only reinforced by the nativist history of the term’s use in constitutional prohibitions of this sort. It would be discrimination enough for “sectarian” to refer to less than all religions, as it does on its face. But the history of nativist political action – which gave rise to the federal Blaine Amendment and the imposition of similar language on Washington’s Constitution through the Enabling Act – reveals that “it was an open secret that ‘sectarian’ was code for ‘Catholic.’” *Mitchell*, 120 S. Ct. at 2251. Thus, even if the ban on aid to “sectarian” schools were neutral on its face – which it is not – it would still fail the neutrality requirement because it represents “covert suppression of particular religious beliefs.”<sup>24</sup>

---

<sup>24</sup> *Lukumi*, 508 U.S. at 534; *see id.* (“The Free Exercise Clause protects against governmental hostility that is masked as well as overt,” and is not

Therefore, the language and history of the ban on funding “sectarian” schools not only “targets religious conduct for distinctive treatment,” it targets the conduct of some subset of all religious adherents (*i.e.*, any who reject the nonsectarian “common religion”), and even the conduct of a particular denomination (*i.e.*, Roman Catholicism). *Lukumi*, 508 U.S. at 534. Because all these forms of religious discrimination trigger the protections of the First Amendment,<sup>25</sup> this application of Article IX, Section 4 is not neutral, and should be subject to strict scrutiny.

Article IX, Section 4 does not survive strict scrutiny because there is no compelling government interest to justify its discriminatory application. More specifically, federal courts have made clear that any alleged state interest in a marginally wider separation of church and state than the Establishment Clause affords is not a compelling interest.<sup>26</sup> Thus,

---

<sup>25</sup> See *Lukumi*, 508 U.S. at 532 (“[T]he First Amendment forbids a state’s official purpose to disapprove of a particular religion or of religion in general.”) (emphasis added); *id.* (“At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs....”) (emphasis added); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”) (emphasis added).

<sup>26</sup> See *Kreisner v. City of San Diego*, 1 F.3d 775, 779 n.2 (9<sup>th</sup> Cir. 1993) (“[A] state’s interest in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution is limited by the Free Exercise Clause and the Free Speech Clause as well.”) (citing *Widmar v. Vincent*, 454 U.S. 263, 275-76 (1981)); see also *Garnett v. Smith*, 987 F.2d 641, 646 (9<sup>th</sup> Cir. 1993)

this Court should reverse the Superior Court’s interpretation of Article IX, Section 4 in order to avoid violating the federal Free Exercise Clause.<sup>27</sup>

**B. The Superior Court’s Interpretation of Article IX, Section 4 Violates the Equal Protection Clause**

*1. Article IX, Section 4 triggers and fails strict scrutiny*

Similarly, Article IX, Section 4 triggers strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment because religion, like race, is a suspect classification.<sup>28</sup> Strict scrutiny is also required here because the free exercise of religion is a fundamental right.<sup>29</sup> As discussed above, the present interpretation of Article IX, Section 4 will not survive strict scrutiny because the state lacks a compelling government interest to justify its discrimination against religious educational activities.

---

(finding Washington State’s constitutional interest in additional church-state separation “must ... yield” to federal Equal Access Act because “states cannot abridge rights granted by federal law”).

<sup>27</sup> See, e.g., *McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (striking down under Free Exercise Clause state constitutional provision barring clergy from serving as state constitutional delegates).

<sup>28</sup> See *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (listing “race, religion [and] alienage” as suspect classifications that trigger heightened scrutiny).

<sup>29</sup> See *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (“Unquestionably, the free exercise of religion is a fundamental constitutional right.”); *Fellowship Baptist Church v. Benton*, 815 F.2d 485, 497 (8<sup>th</sup> Cir. 1987) (holding that “[b]ecause religion is a fundamental right, any classification of religious groups is subject to strict scrutiny.”).

2. *Even if Article IX, Section 4 did not trigger strict scrutiny, it would fail rational basis scrutiny.*

Even if religion were not a suspect classification, Article IX, Section 4 would still violate the Equal Protection Clause under the U.S. Supreme Court’s analysis in *Romer v. Evans*, 517 U.S. 620 (1996):

A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. ... [I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.

*Id.* at 633, 634 (quotations omitted).

Article IX, Section 4, as interpreted here, makes it “more difficult for one group of citizens” – namely, “sectarian” school students and their parents – “to seek aid from the government,” by cutting off their right to seek government scholarships. *Id.* at 633. Moreover, the anti-Catholic animus behind Article IX, Section 4, as discussed above, represents a classic case of the “bare ... desire to harm a politically unpopular group [that] cannot constitute a *legitimate* governmental interest.” *Id.* at 634. Thus, the Superior Court’s application of Article IX, Section 4 would fail even the rational basis test.

## CONCLUSION

For the reasons set forth above, the Judgment of the Superior Court of Thurston County should be reversed.

April 12, 2000

Respectfully submitted,

THE BECKET FUND FOR RELIGIOUS LIBERTY

By: \_\_\_\_\_

Kevin J. Hasson  
Eric W. Treene  
Roman P. Storzer  
Anthony R. Picarello, Jr.  
1350 Connecticut Avenue, N.W.  
Suite 605  
Washington, DC 20036

VANDER WEL, JACOBSON & BISHOP, PLLC

By: \_\_\_\_\_

James E. McCutcheon III, WSBA #28280  
Bellevue Place  
Bank of America Building  
Suite 1900  
10500 N.E. Eighth Street  
Bellevue, WA 98004

*Counsel for Amicus Curiae*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing Brief *Amicus Curiae* of The Becket Fund for Religious Liberty in Support of Reversal was hand delivered by courier this 12th day of April, 2001, to the following:

Greg Montgomery, Esq.  
MILLER NASH LLP  
601 Union Street  
Suite 4400  
Seattle, WA 98101-2352

Michael Reiss, Esq.  
DAVIS WRIGHT TREMAINE LLP  
2600 Century Square  
1501 Fourth Avenue  
Seattle, WA 98101-1688

William R. Hickman, Esq.  
REED MCCLURE  
601 Union Street  
Suite 4901  
Seattle, WA 98101-3920

John Alkire, Esq.  
PERKINS COIE, LLP  
1201 Third Avenue  
Seattle, WA 98101-3099

W. Howard Fischer, Esq.  
Senior Assistant Attorney  
General  
1125 Washington Street  
P.O. Box 40100  
Olympia, WA 98504-0100

---

---

James E. McCutcheon III