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Written Testimony on the Florida Constitution's No Aid Clause

submitted to the
Declaration of Rights Committee
of the
Florida Constitution Revision Commission

"No Aid Clauses should be preserved and enforced"

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"Every new & successful example . . . of a perfect separation between ecclesiastical and civil matters, is of importance. And I have no doubt that every new example, will succeed, as every past one has done, in showing that religion and government will both exist in greater purity, the less they are mixed together."

– James Madison[1]

Small-minded and dishonest bigot. Jew. Militant secularist and homosexual. Piece of____ Marxist. Racist pig. Anti-Catholic, Anti-American, Anti-Constitutional and Anti-Christian. A cancer on humanity that should be removed. The anti-Christ. Communist. Hideous, deplorable, and anti-god. Mentally ill, anti-Catholic bigot.

These are all names I've been called for fighting to uphold the First Amendment. This is a small, *tame* sample. I work as a constitutional attorney at the Freedom From Religion Foundation, which defends the constitutional separation between state and church and educates the public about nontheism. For those defending what Thomas Jefferson called "the wall of separation between church and state," facing this hate is nothing new. Nor is one of the foundational principles of state-church separation, the principle that underpins the No Aid Clauses, also called Blaine Amendments, that this Committee is examining.

That principle—the no-funding principle[2]—has a long, clear history that shows it was designed to foster religious freedom. The principle is simple: the taxing power of the government should not be used to support religion. As states faced the challenges of a growing pluralistic society, including the challenge of providing a public education to all, they strengthened, invigorated, and implemented this concept with legislation and constitutional amendments, including the so-called Blaine Amendments, from 1776 through the 1950s.

My testimony will explain that the true purpose behind these clauses is to protect religious freedom and that history makes this clear. Abandoning these clauses will erode religious liberty. I will also address the Supreme Court's recent *Trinity Lutheran* decision, which should not impact the Florida No Aid provision.

Throughout, I will disprove the common and alarmingly popular argument that these crucial clauses are anti-Catholic.[3] The catalog of opprobrium I listed at the outset was not to garner your sympathy, but to make a critical and often ignored point in any Blaine Amendment discussion: **advocating for the separation of state and church, including No Aid Clauses, is not anti-religious bigotry**. Bigotry regards any member of a particular group with hatred and intolerance. Seeking to ensure our government stays secular, as required by the Constitution, is neither hateful nor intolerant, even when doing so denies religion a financial benefit to which it feels entitled.[4]

The purpose of No Aid Clauses is to protect religious freedom.

The purpose of No Aid Clauses is to ensure religious freedom. James Madison, the Father of the Bill of Rights and the Father of the Constitution, explained it well: "Religion then of every man must be left to the conviction and conscience of every man," not the taxing power of the state.[5]

The principle in every No Aid Clause, including Florida's, is that the government should not tax citizens to benefit a religion. Religious education, propagation, and worship should be the result of free and voluntary support given by the faithful. The coercive taxing power of the government should not be wielded to oblige Muslims to bankroll temples and yeshivas, or to compel Jews to subsidize Christian churches and Catholic schools, or to force Christians to fund mosques and madrassas. If this still seems unobjectionable, imagine your tax dollars funding a school for Satanism or a Ku Klux Klan (which self-identifies as Christian) school.

Religious duty, including financial support, is a personal duty over which our secular governments can have no jurisdiction. "It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him," as James Madison put it in his paean against a three penny tax to support Christian preachers and churches.[6]

This principle is vital to ensure true religious freedom. Daniel Carroll, a Catholic representative to the Constitutional Convention from Maryland, put it best during the congressional debates on the First Amendment when he said that "the rights of conscience are, in their nature, of peculiar delicacy, will little bear the gentlest touch of the governmental hand."[7] No citizen can have religious freedom when the government can force them to donate to a sect that promises them eternal torture if they happen to exercise that freedom. Compelled support of a religion or god that is not your own is anathema to American principles.

Ben Franklin went so far as to say that religions that need state support are probably "bad," a quip that might get him labeled a bigot today were it more widely known: "When a Religion is good, I conceive that it will support itself; and, when it cannot support itself, and God does not take care to support, so that its Professors are oblig'd to call for the help of the Civil Power, it is a sign, I apprehend, of its being a bad one."[8]

The principle underlying No Aid Clauses dates to America's founding and was uniformly accepted after years of experience.

The early history of state-church separation in our federal government is clear to the Supreme Court: "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."[9]

The history of the states is more varied, each adopting disestablishment principles at different times and to varying degrees. But as Justice Sotomayor recently pointed out, "Despite this rich diversity of experience, the story relevant here is one of consistency. The use of public funds to support core religious institutions can safely be described as a hallmark of the States' early experiences with religious establishment. Every state establishment saw laws passed to raise public funds and direct them toward houses of worship and ministers. And as the States all disestablished, one by one, they all undid those laws."[10]

New Jersey, Pennsylvania, Maryland, North Carolina, and Virginia all began this process in the year of American independence, 1776. Other states took longer to realize the severe problems with sponsoring or financially supporting religion, disestablishing up through the 1830s.[11]

In his Virginia bill for establishing religious freedom, Thomas Jefferson explained that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty . . . ."[12] Madison shepherded this bill through the Virginia legislature and, when president, applied the same principle to veto a bill that would have given a D.C. Episcopal church government funds to educate and care for orphans.[13]

This history is crucial to the issue before this Committee. These states experienced religious establishments and made a careful decision after lengthy debates to stop taxing citizens to

support religion because doing so violated the civil rights of those citizens. This was a hard-learned lesson over decades of living in a pluralistic America, which has only become more diverse.

This history seems distant today, but was the result of centuries—millennia—of oppression by religion blended with government. We should not spurn such lessons. Thanks to the separation of state and church, we have not had that oppressive experience. As a result, Americans have a certain amount of complacency and no real understanding that these provisions protect religious freedom. That has led bodies like this Committee to consider whether or not they are still valuable. They are, and I hope we don't find out the hard way.

The early implementation of the no-funding principle shows that, in an effort to create inclusive schools for all citizens, various states banned funds for "sectarian" schools of *all* denominations, not only Catholic schools.

Another hallowed American constitutional principle, equality, also needed constitutional amendments and supporting statutes to mature and realize its full potential. Like the no-funding principle, without that evolution it was mainly aspirational. Also like the no-funding principle, creating a universal public school system brought the issue to the fore. Indeed the idea that government should not tax citizens to support religion is intimately tied to the idea of nonsectarian schools for all citizens.

The no-funding principle was so integral to the American founding, it necessarily influenced the later debate over common schools and parochial schools. As the leading expert in this history, Prof. Steven Green explained that the "impulse toward nonsectarian public education was based on noble, republican ideals. The fact that nativist groups hijacked the no-funding principle for their bigoted aims does not invalidate the concept or mean that all advocates of the no-funding principle supported nativist goals."[14]

Separating religion from public schools was even a concern for some founders. Thomas Jefferson's plan for public elementary schools excluded religion: "Instead therefore of putting the Bible and Testament into the hands of the children, at an age when their judgments are not sufficiently matured for religious enquiries, their memories may here be stored with the most useful facts from Grecian, Roman, European and American history."[15]

New York City first attempted to create these nonsectarian or "common" schools in 1805. The nonsectarian schools, run by the Free School Society, would not be considered sufficiently nonsectarian by today's more evolved standards. But the more important aspect of this period is that those nonsectarian schools were favored, on religious liberty grounds, over "sectarian" schools—***including sectarian schools that were Protestant***.

After a sectarian school run by the Bethel Baptist Church (a Protestant sect) applied for public funds in the early 1820s, the various legislative bodies controlling funds for New York City schools decided that such a grant would violate "a fundamental principle . . . to allow the funds of the State, raised by a tax on the citizens, designed for civil purposes, to be subject to the control of any religious organization."[16]

This is significant because sectarian Protestant schools were found to violate the no-funding principle before Catholic schools and Catholic immigration surged in NYC.

Moreover, six years later, the Roman Catholic Orphan Asylum was *granted* funding, on the understanding that it would be used to support orphans, while at the same time the Methodist Charity School was denied funding because it was sectarian—even though it was Protestant. The Methodists were denied because "to raise a fund by taxation, for the support of a particular sect, or every sect of Christians . . . would unhesitatingly be declared an infringement of the Constitution, and a violation of our chartered rights."[17]

This history gives lie to the idea that refusing to fund religion and religious schools is anti-Catholic. Catholic schools were denied funds decades later, but by then (about 1841) the no-funding principle was firmly established. Importantly, both the no-funding principle and the idea of universal public education predate significant Catholic immigration and subsequent demands for taxpayer funds.

New York is not an outlier; other states followed a similar pattern.

The history of No Aid Clauses in the Midwest—Ohio, Wisconsin, Indiana, and Michigan—shows that they were motivated by religious freedom and a desire to educate all citizens, not by anti-Catholic bigotry. Each of these states adopted No Aid Clauses in their constitutions decades before Blaine's federal amendment[18] was even proposed and when there were no "significant conflicts over parochial schools."[19]

Catholic schools were not established in Wisconsin when the provision was adopted and critics have failed to document any anti-Catholic bigotry in Wisconsin's establishment of common schools.[20]

Prof. Green summed it up like this: "there is little evidence that anti-Catholicism or disdain for Catholic schooling played a significant role in the development of the no-funding principle or in the enactment of many no-funding provisions prior to the Civil War."[21]

The same is true of Florida. As Florida courts have recognized, like other state No-aid Clauses, "nothing in the history or text of the Florida no-aid provision suggests animus towards religion."[22] Nor was there any contemporaneous suggestion, including from any of the many Catholic Churches in Florida, that the provision was anti-Catholic, either when it was initially adopted in 1885 or when revised in minor ways in 1968, 1977, or 1997.[23] Put simply, "there is no evidence of religious bigotry relating to Florida's no-aid provision . . . nothing in the proceedings . . . indicates any bigoted purpose in retaining the no-aid provision."[24]

More importantly, the Florida No Aid Clause has never been used to discriminate against Catholics—it has been used to maintain a secular government and thereby protect the religious freedom of Florida citizens. If it truly were meant to discriminate, passed to discriminate, and designed to discriminate, it is a curious failure in the long, sad history of discrimination. Like the Florida Constitution, the history of the federal and state constitutions show a concern for religious freedom in state-church clauses, not a desire to discriminate.

The history is clear: the no-funding principle and the No Aid Clauses which embody it are meant to foster religious freedom. To abandon them is to curtail religious freedom.

The No Aid Clauses of the 1870s were partially a response to the Catholic Church pushing for public funds for its parochial schools.

Many American Catholics during the 1870s actually *wanted* the funding prohibitions that the No Aid Clauses provided.[25] However, the Catholic Church in America did attempt to grab a chunk of public funds for its school systems. It even sought its own constitutional amendments to do so.[26] Indeed, when Colorado was debating its no-aid clause, the Church's "anti-Catholic" allegations seem to have been "motivated by financial considerations," as even some state appellate judges recently pointed out.[27]

This push for public funds for parochial schools, which was sometimes successful even in places with No Aid Clauses (again belying the anti-Catholic claims),[28] helped bring the issue of religion in public schools to the fore and showed the need for a permanent solution. Prof. Green explained it like this: "As information about the syphoning of monies from school funds became public, many Protestants began calling for legislation prohibiting sectarian control over public schools and the diversion of public funds to religious institutions. State legislatures responded quickly. By 1876 fourteen states had joined New York in passing measures prohibiting the division of public school funds, often in the form of constitutional amendments. By 1890, the number of states with constitutional prohibitions against the transfer of public funds would rise to twenty nine."[29]

Protestants had the unwarranted and unconstitutional privilege of using the public schools and taxpayer funds to promote their religion. Catholics understandably wanted the same privilege. Catholic challenges to this Protestant privilege inspired the No Aid Clauses. Rather than expand unwarranted privileges that trampled citizens' rights not to fund religion, we the people removed those baseless entitlements from all.

An educated public is necessary to a healthy democratic republic, as more than one founder observed.[30] The government can, of course, provide a generic baseline benefit, an education free of religious divisiveness, to all citizens. This educational core—math, science, English, history, art, etc.—can and should be augmented by parents, who can farm that out to churches or religious schools if they so choose.

This much is clear: There is no discrimination in providing the same baseline benefit to all citizens. But what if the government allows—even though it shouldn't—one religion an edge, an unwarranted privilege? Can the government, when challenged, remove that benefit or must the government extend the benefit to all?

This is the central question: was invoking the no-funding principle—a principle central to America's founding and to religious freedom—a legitimate response to these requests? Yes, because barring an unwarranted privilege to all via No Aid Clauses promoted equality, not favoritism. Denying an unconscionable entitlement is equality, not discrimination. A pair of self-evident examples may help illustrate this point.

In the 1960s, Maurice Bessinger refused to let a minister's wife enter his South Carolina barbeque joint because she was black. He believed he had "a constitutional right to refuse to serve members of the Negro race in his business establishments [and] that to do so would violate his sacred religious beliefs."[31] Accustomed to this dubious privilege, Bessinger fought the

subsequent lawsuit all the way to the Supreme Court. He argued "that the [Civil Rights] Act was invalid because it 'contravenes the will of God' and constitutes an interference with the 'free exercise of the Defendant's religion."[32] No court countenanced the religiously motivated discrimination, however well-entrenched.

Bob Jones, the televangelist and founder of an eponymous religious school, infamously declared that segregation was scriptural in his 1960 Easter sermon: "If you are against segregation and against racial separation, then you are against God . . . ."[33] Bob Jones University enjoyed tax exemption, a privilege. But the IRS revoked the tax exemption because the school discriminated on the basis of race. BJU sued the government, arguing that its religious beliefs required the discrimination and that the government could not remove its privilege because of its religion. The Supreme Court held that the "governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."[34]

These two examples tell us two things. *First*, correcting religiously motivated discrimination is not anti-religious. Parity is not oppression. The erosion of unwarranted privilege is not persecution. This was simply a waypoint on the steady march toward realizing true equality, a founding principle that required periodic reinvigoration by new laws and amendments. *Second*, there is no religious right to violate that important founding ideal. Similarly, laws and amendments strengthening the no-funding principle, even if they remove a religious privilege, are not anti-religious. Nor is their a religious right to violate the no-funding principle, especially given that it protects religious freedom.

Often we cannot see how the rights of minorities are violated until there is a clash, until equality is demanded. The conflict sparks societal friction which in turn produces light.[35] As Catholics began seeking what they viewed as equal funding for parochial schools, many Protestants began to realize for the first time that funding religious education is a serious violation of civil rights. It was not until the majority walked in minority shoes that it began to understand the problem. The Catholic challenge bred empathy, not antipathy.

The No Aid Clauses exclude all religions alike, as they were intended to.

The principal counterargument to the solution in the last point is that, while there may be nothing wrong with removing funding from all religions, that is not what the No Aid Clauses did. Instead, the argument goes, No Aid Clauses funded Protestant schools but excluded Catholic schools. The implication is that No Aid Clauses are discriminatory in practice and that all religious schools should be funded to remedy this discrimination.

But this counter-argument points to an abuse of constitutional principles to support its point. It argues that two wrongs make a right. It's like opening a restaurant in the 1960s and pointing to Bessinger, the stubborn racist, to show that you must be allowed a religious right to violate the Civil Rights Act too. Or pointing to Bob Jones University to claim your religious school can discriminate against non-whites and not pay taxes. It may be true that Protestants used public schools to promote their religion, but that does not make it right, legal, or constitutional.

Put another way, this argument assumes that promoting Protestantism in public school was permissible, rather than violating the rights of students. And this too is belied by history.

In a rather famous 1890 case—it was cited by Justice Brennan in his *Schempp* opinion[36]—the Wisconsin Supreme Court ruled that the Wisconsin No Aid Clause[37] prohibited bible readings in the public schools:

> The only object, purpose, or use for taxation by law in this state must be exclusively secular. There is no such source and cause of strife, quarrel, fights, malignant opposition, persecution, and war, and all evil in the state, as religion. Let it once enter into our civil affairs, our government would soon be destroyed. Let it once enter into our common schools, they would be destroyed.[38]

The case was brought by Catholic families.

Catholic families successfully kept public schools secular using this supposedly anti-Catholic/pro-Protestant provision. And of course, this is the correct decision. The public schools should not be promoting religion, "no one's religion can be taught in our common schools."[39] But the fact that the Protestant majority was abusing its majoritarian status does not mean that these No Aid Clauses are all tainted with an anti-Catholic bias. The solution today is still what it was in 1890, to keep all religion out of the public schools, keep them secular, and to use taxpayer funds for our secular government, not for religious schools and churches.

Even now, some use the machinery of the government to impose their religion on others. The nonprofit I represent, the Freedom From Religion Foundation, exists because people disregard clear constitutional rules *all the time*. We get about 5,000 state church complaints every year from all over the country. In the past five years, we've received more than 1,250 complaints from Florida, addressing more than 400 different violations. I have a job because in our democratic republic, individuals occupying government offices and employed by the government often use their public power to promote their personal religion.

We deal with hundreds of issues that courts have ruled unconstitutional. Creationism is still taught in public schools, regularly. I've dealt with seven separate instances of public school teachers preaching creationism in 2017 alone. In the last three school years, we've dealt with more than 350 instances of school district staff imposing prayer on their students. We even had to sue a school district in Georgia for refusing to stop its teachers from organizing daily prayer with their first and second grade classes.[40]

These are long-standing prohibitions over which there is no dispute. The courts have been clear. And yet, the law is disregarded. But if legislatures were to take up this clear problem and pass an amendment against teaching creationism or against teachers imposing prayer on other people's children, those amendments would not be anti-Christian. If Catholics sought to have their prayers included in the illegal classroom prayers and that prompted such an amendment, it would not be an anti-Catholic amendment, though it would surely be smeared as such.

Protestants had been using the machinery of the state to propagate their religion. When Catholics sought to do the same, the Protestant error became clear and a constitutional solution at the federal level was sought.

The federal Blaine Amendment was motivated partly by politics, but also substantially by President Grant's call for stronger state-church separation.

Not all the motivations for No Aid Clauses were high-minded. Sister Marie Carolyn Klinkhamer, who was writing in *The Catholic Historical Review* as a associate professor at the Catholic University of America, concluded that the federal Blaine amendment was "suggested for purely political reasons," and though it failed, it "inflamed the anti-Catholic, anti-foreign, anti-Negro passions of many persons in the United States."[41] Blaine, who would eventually propose the amendment, thought it might propel him to a presidential nomination. It didn't. In other words, it was not motivated by animosity or bigotry, but bigots adopted the cause.

While some anti-Catholic groups may have agreed with the no-funding principle a century after its inception, that does not detract from the value of the idea. To argue against the principle, or even a constitutional provision implementing the principle, on that basis is like arguing that laws protecting free speech and free assembly are anti-semitic because the principles underlying those laws protect the rights of National Socialists along with everyone else.[42] To try and paint the entire concept, the idea, the principle as anti-Catholic is to oppose every principle, even those enshrined in the Constitution, because a few bigots also fight for those principles.

This is an attempt to use a logical fallacy to paint state-church separation as an instrument of oppression rather than as armor for our rights of conscience. This logical fallacy even has a name, the "genetic fallacy," which attacks not the merits of an idea, but its origins. Here, the true origin of the idea is the American founding, but by alleging origins that are anti-Catholic, opponents can taint a principle that was sacred to our country long before Blaine was a glint in his Roman Catholic mother's eye. That undeniable fact cannot be avoided, so instead it is stigmatized.

Sister Klinkhamer also explains that the impetus for the federal Blaine Amendment was President Ulysses Grant's speech to a joint Session of Congress one week before the amendment was introduced, which in turn was based on his earlier remarks to the Army of the Tennessee in Iowa on September 29, 1875.[43]

Grant's speech was a clarion call to strengthen America's secular foundations. It was not an attack on Catholicism, but an appeal to continue the work of the Founding Fathers:

> The centennial year of our national existence, I believe, is a good time to begin the work of **strengthening the foundations of the structure commenced by our patriotic forefathers** one hundred years ago at Lexington. **Let us all labor to add all needful guarantees for the security of free thought, free speech, a free press, pure morals, unfettered religious sentiments, and of equal rights and privileges to all men, irrespective of nationality, color or religion. Encourage free schools and resolve that not one dollar, appropriated for their support shall be appropriated to the support of any sectarian schools**. Resolve that neither the state nor nation, nor both combined, shall support institutions of learning other than those sufficient to afford every child growing up in the land the opportunity of a good common school education, **unmixed with sectarian, pagan or atheistical dogmas. Leave the matter of religion to the family altar, the Church, and the private school, supported entirely by private contributions. Keep the Church and State forever separate.**[44]

Free thought. Free speech. Free press. Advance religious freedom by leaving religion to the family, not the government. Let private schools be funded with private contributions. Keep state and church forever separate. These are core constitutional principles, not anti-Catholic sentiments. Grant focused on religious freedom and equality—no dogma, be it religious, atheist, or pagan, should be favored.

Grant's speech was well received. A New York Times editorial of the amendment said that it "expresses a conviction profoundly cherished by a very large part of the American people."[45] The sole criticism of the speech came from the Catholic Church and even it admitted that "if the President's speech could be accepted at face value, Catholics would have few complaints with its content."[46]

The Catholic Church's criticism was married to a substantial financial stake, the unwarranted privilege it had been seeking. The Church asked either for public funds for its schools or "to free Catholics from the tax burden of supporting public schools."[47] The Church was asking for what it considered to be its fair share of taxpayer funds when it maligned the proposal that would prevent it from receiving that money as "a veiled attack on Catholicism."[48]

Abandoning No Aid Clauses and the no-funding principle will inhibit religious freedom.

The purpose of the no-funding principle, No Aid Clauses, and state-church separation is to promote religious freedom. There can be no freedom of religion without a government that is free from religion. Doing away with these provisions and taxing citizens to support religion, even indirectly, will inhibit religious freedom. That the Committee is even considering it is alarming.

Justice Robert Jackson was a titan of the Supreme Court. He took a leave of absence from the court to prosecute Nazi war crimes as U.S. Chief of Counsel at Nuremberg. He checked himself out of the hospital on the day *Brown v. Board of Education* was handed down to be present in the courtroom and emphasize the Court's unanimity in that historic case. In the *Korematsu* case, he wrote one of the Court's most famous dissents, condemning America's WWII internment camps for citizens of Japanese ancestry. In a less famous, though equally powerful dissent, he explained how our Constitution protects religious freedom:

> [T]he effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. **That is a difference which the Constitution sets up between religion and almost every other subject matter of legislation, a difference which goes to the very root of religious freedom . . .. This freedom was first in the Bill of Rights because it was first in the forefathers' minds**; it was set forth in absolute terms, and its strength is its rigidity. It was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy **or the public purse**.[49]

State-church separation gives churches some significant benefits, like exclusion from taxation. Attached to these benefits are burdens, most importantly that taxpayers will not fund your religion.

Removing important protections such as No Aid Clauses changes that. The push to eviscerate No Aid Clauses is meant to augment the benefit churches receive under the separation of state and church and to minimize the burdens. Put simply, this push is about giving churches special treatment. Churches want to have their cake—which they think American taxpayers must buy—and eat it too.

If this movement is successful, it will impact religious freedom in two ways. First and most obviously, it will force citizens to bankroll creeds antithetical to their own. Second, and perhaps less obvious because it seems unlikely, is that this will lead to great oversight, control, and entanglement of the government in religion.

Vouchers and school choice provide a perfect example of this second issue. Regulations on private religious schools are foreordained because unregulated funds flowing to unaccountable organizations guarantees abuse. We've seen this play out in the country's longest-lived voucher program. In Milwaukee, over a 10-year period, more than $139 million in taxpayer funds went to voucher schools that failed to meet standards.[50] That's almost $140 million of our money, wasted on religious schools that failed our students.

Unregulated as they currently are, abuse in religious schools that receive taxpayer funds is rife. Examples include:

- Setting up shop in office and industrial buildings that lack a safe place for students to play outside.[51]
- Serving students ramen noodles with hot sauce and a cup of water for lunch before the school was removed from the National School Lunch Program.[52]
- Failing to provide textbooks to students.[53]
- Adopting a "science" curriculum that claims to refute "the man-made idea of evolution."[54]
- Teaching a fundamentalist curriculum, including revisionist U.S. history. One text notoriously said, "The majority of slave holders treated their slaves well."[55]

The solution to these problems is inevitable: accountability through government oversight. Ultimately, publicly funded schools will be regulated. Maybe not now, perhaps not for years, but accepting public money ***will*** open private schools to public oversight and governmental entanglement. The question is not if, but when.

It is shortsighted for religious freedom advocates to believe otherwise and invite such regulation by insisting on a right to dip into the public purse.

Trinity Lutheran's impact on Florida's No Aid clause and vouchers is minimal.

Earlier this year, the Supreme Court decided *Trinity Lutheran v. Comer*, holding that the state could not bar a school, even a religious school, from a state program that resurfaced playgrounds.[56] The First Amendment's Free Exercise Clause prevented a state from denying a

generally available benefit solely because of an applicant's religion, when the benefit does not further that religion.

The *Trinity Lutheran* decision did not analyze or address any federal Establishment Clause concerns,[57] nor did it declare Missouri's No Aid provision unconstitutional. The Court did not analyze whether extending such a grant violated the no-funding principle in those provisions, instead relying on concessions by two parties who, by the time of oral argument, agreed that the church should be eligible for the grants.[58] This is a glaring defect in the case, as Justice Sotomayor explained: "Constitutional questions are decided by this Court, not the parties' concessions. The Establishment Clause does not allow Missouri to grant the Church's funding request because the Church uses the Learning Center, including its playground, in conjunction with its religious mission."[59]

In other words, *Trinity Lutheran* did not explore the famous "play in the joints" between the Free Exercise Clause and the Establishment Clause of the First Amendment because the Court failed to examine one of the two clauses restricting that latitude. Instead, it focused solely on the Free Exercise Clause.

That limited analysis severely confines the opinion, especially when paired with its explicit limiting language: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination."[60]

Perhaps most importantly, *Trinity Lutheran* does not apply to voucher programs. As others have pointed out, "*Trinity Lutheran* can have no applicability to voucher programs, in which the government typically provides to parents funds that they can use to pay tuition for their children to attend the private school of their choice – and in which the overwhelming majority of the private-school options available to parents typically are schools operated by churches and other religious institutions that have as a central purpose the inculcation of religious belief. A state constitutional provision that prohibits the use of public funds for such a purpose disqualifies no one from receiving a public benefit on the basis of his or her status."[61]

Moreover, the opinion was circumscribed to an activity that was not advancing religion in the manner that religious education does. This goes to the distinction between "use" and "status" on which Chief Justice Roberts based his rationale.[62] Florida's No Aid Clause can reasonably be interpreted within this framework, and indeed, it already has been.

Conclusion

Atheists and agnostics now make up 7% of the total U.S. population, which is more than Mormons, Jews, Hindus, Muslims, Jehovah's Witnesses and Buddhists ***combined***.[63] About 12% of millennials are atheist or agnostic.[64] Overall, 23% Americans identify as nonreligious.[65] That 8-point increase since 2007[66] and 15-point jump since 1990 makes the "nones" the fastest growing identification in America.[67] Nationally, about 35% of millennials—born after 1981—are nonreligious.[68]

New studies suggest that the number of atheists is significantly higher.[69] Recognizing that atheists are heavily stigmatized in this country and might be disinclined to use the label when

talking to a researcher, a recent study used a subtler and less direct technique to get at participants' religious beliefs. It concluded that about 26% of Americans do not believe in God.

In the minds of some school choice activists, the rise of nonreligion and the erosion of traditional Protestantism in this country is due to public schools. These same activists "see the weakening of support for public education as a desirable side effect or even a goal of their work. Indeed, the national groups most active in supporting religious initiatives in public schools see our system of public education as a bad thing. These are the same groups that sponsor efforts to undermine, defund, and perhaps ultimately destroy the system altogether."[70]

Sometimes, they are open about this goal. Kyle Olson helped create and chaired National School Choice Week through its 2011 birth, and as its executive director he wrote, "I would like to think that, yes, Jesus would destroy the public education temple and save the children from despair and a hopeless future."[71] School choice is theoretically about privatizing education, but for many it's about ending public education.

And that is what will happen if We the People abandon the no-funding principle and No Aid Clauses. Not only will citizens be taxed to support religions in violation of their rights of conscience, and not only will this call down extensive state regulation of religious operations, it will also destroy our public schools.

ENDNOTES

[1] Letter to Edward Livingston, July 10, 1822.

[2] Steven Green, *'Blaming Blaine': Understanding the Blaine Amendment and the 'No-Funding' Principle*, 2 FIRST AMENDMENT L. REV. 107 (2004).

[3] *See also* Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & POL. 65 (2002).

[4] "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance." *Engel v. Vitale*, 370 U.S. 421, 435 (1962).

[5] James Madison, *Memorial and Remonstrance Against Religious Assessments*, Para. 1 (1785).

[6] *Id*.

[7] 15 Aug. 1789, 1 Annals of Congress 729–31, The Debates and Proceedings in the Congress of the United States. "History of Congress." 42 vols. (Washington, D.C., Gales & Seaton, 1834–56), *available at* http://press-pubs.uchicago.edu/founders/documents/amendI_religions53.html.

[8] Benjamin Franklin, Letter to Richard Price (Oct. 9, 1780).

[9] *Walz v. Tax Comm'n of City of N.Y.,* 397 U.S. 664, 668 (1970).

[10] *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2033 (2017) (Sotomayor, J., dissenting).

[11] For a decently comprehensive summary of this history, with citations, see *id.* at 2032-36.

[12] "82. A Bill for Establishing Religious Freedom, 18 June 1779," *Founders Online,* National Archives, last modified June 29, 2017, http://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082. [Original source: *The Papers of Thomas Jefferson*, vol. 2, *1777–18 June 1779*, 545–53 (Julian P. Boyd. ed., Princeton University Press, 1950).

[13] *See*, Annals of Congress, House of Representatives, 11th Congress, 3rd Session (1811) at 982–85, *available at* https://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=022/llac022.db&recNum=488; James Madison, *Veto*

Message, Feb. 21, 1811, The American Presidency Project (Gerhard Peters and John T. Woolley), http://www.presidency.ucsb.edu/ws/?pid=65921.

[14] Green, *supra* note 2, at 113.

[15] *Thomas Jefferson, Notes on the State of Virginia, Queries 14 AND 19*, The Founders' Constitution Vol. 1, Ch. 18, Document 16 (Univ. of Chicago Press), http://press-pubs.uchicago.edu/founders/documents/v1ch18s16.html.

[16] Green, *supra* note 2, at 121.

[17] *Id.* at 122-24.

[18] Michigan (1835); Wisconsin (1848); Indiana (1851); Minnesota (1857).

[19] Green, *supra* note 2, at 127.

[20] Lloyd Jorgenson, *The Founding of Public Education in Wisconsin*, 68-93 (1956).

[21] Green, *supra* note 2, at 128.

[22] *Bush v. Holmes*, 886 So. 2d 340, 364 (Fla. Dist. Ct. App. 2004), *aff'd in part*, 919 So. 2d 392 (Fla. 2006).

[23] JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF FLORIDA, WHICH CONVENED AT THE CAPITOL, AT TALLAHASSEE, ON TUESDAY, JUNE 9, 1885 (Tallahassee, Fla., N. M. Bowen 1885); Nathan A. Adams, Pedigree of an Unusual Blaine Amendment: Article I, Section 3 Interpreted and Implemented in Florida Education, 30 NOVA L. REV 1, 43 (2005).

[24] *Bush v. Holmes*, 886 So. 2d at 351n.9.

[25] Speaking of the federal Blaine Amendment that came out of the Senate Judiciary Committee, Senator Theodore Fitz Randolph (N.J.) noted that "Most Protestants urge taxation for the support of public schools, in which they would have limited religious instruction. Catholics would have no general taxation for the purpose; or if any be had, then an equitable distribution of the moneys raised. The Catholic preference is for an education dependent upon the will of the parent, or the zeal of rival religious organizations." Congressional Record, 44th Congress, 1st Session, Vol. 4, 5455 (1876), *available at* https://books.google.com/books?id=PrppAAAAcAAJ&pg=PA5455&lpg=PA5455.

[26] "in spite of strenuous efforts in Ohio, Massachusetts, and other places, Roman Catholics have not been able to secure an amendment to a state constitution that would permit grants from public funds to parochial schools," wrote Anson Stokes in his classic, *Church and State in the United States*. Anson Stokes, II *Church and State in the United States*, 71 (Harper & Brothers 1950, New York).

[27] *Douglas Cnty.*, 356 P.3d at 867, ¶ 191–92 (Bernard, J., dissenting).

[28] In 1871 the Catholic diocese of New York City received more than $700,000—about $193,000,000 today—in taxpayer money for parochial education. Even though such grants were banned under the state's No Aid Clause. Steven Green, "The Blaine Amendment Reconsidered," 36 *The Am. Journal of Legal History* 38, 43 (1992). Determining relative historical value of a sum can offer a range of estimates depending on the method of measurement. MeasuringWorth.com is a valuable resource that provides valuations by different methods across the spectrum. In this case, it determined that "In 2016, the relative value of $700,000.00 from 1871 ranges from $12,900,000.00 to $1,700,000,000.00." I used the labor cost method assuming production worker compensation as opposed to an unskilled wage.

[29] Steven Green, "The Blaine Amendment Reconsidered," 36 *The Am. Journal of Legal History* 38, 43.

[30] Jefferson found it particularly important, "A system of general instruction, which shall reach every description of our citizens from the richest to the poorest, as it was the earliest, so will it be the latest of all the public concerns in which I shall permit myself to take an interest." Thomas Jefferson, Letter to Joseph C. Cabell, Jan. 14, 1818, in 10 *The Writing of Thomas Jefferson* 102 (ed. Paul L. Ford) (G.P. Putnam's Sons, 1899), *available at* https://books.google.com/books?id=InAsAAAAIAAJ&pg=PA98#v=onepage&q&f=false.

[31] *Newman v. Piggie Park Enterprises, Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966), *rev'd*, 377 F.2d 433 (4th Cir. 1967), *aff'd*, 390 U.S. 400 (1968) (the issue on appeal was whether the CRA applied to the restaurants, not this conclusion.).

[32] *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 403 n.5 (1968) *citing lower court opinion* 377 F.2d 433, 437–438.

[33] Bob Jones Sr., *Is Segregation Scriptural?* (Greenville, SC: Bob Jones University, 1960). Originally a sermon given as a radio address on WMUU, on April 17, 1960 and later published in pamphlet form.

[34] *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983).

[35] It may have for Blaine too, "This adjustment, it seems to me, would be comprehensive and conclusive, and would be fair alike to Protestant and Catholic, to Jew and Gentile, leaving the religious faith and the conscience of every man free and unmolested." Green, *The Blaine Amendment Reconsidered*, 36 AM. J. OF LEGAL HISTORY 50 (citing J. Boyd, *Life and Public Services of Hon. James G. Blaine*, 353 (1893)).

[36] *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 292, 275 n.51 (1963) (J. Brennan, concurring).

[37] The court analyzed various parts of the clause, and specifically held that the fourth clause, that no money shall "be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries," what is often dubbed the Blaine Amendment, was also violated by the bible reading: "The thing that is prohibited is the drawing of any money from the state treasury for the benefit of any religious school. If the stated reading of the Bible in the school as a text–book is not only, in a limited sense, worship, but also instruction, as it manifestly is, then there is no escape from the conclusion that it is religious instruction; and hence the money so drawn from the state treasury was for the benefit of a religious school, within the meaning of this clause of the constitution." *State ex rel. Weiss v. Dist. Bd. of Sch. Dist. No. 8 of City of Edgerton,* 76 Wis. 177, 44 N.W. 967, 980 (1890) (Cassoday, J., concurring).

[38] *State ex rel. Weiss v. Dist. Bd. of Sch. Dist. No. 8 of City of Edgerton*, 76 Wis. 177, 44 N.W. 967, 981 (1890) (Orton, J., concurring). Interestingly, the language in the Wisconsin Supreme Court decision upholding the rights of Catholics and others to a secular public education sounds like Blaine himself, "The bitterest of all strifes is the strife between religious sects, and if that strife be permitted to cross the threshold of our public schools, free education in this country is at an end." He went on to say, "We must have absolute religious toleration." *See* James Gillespie Blaine letter to A.T. Wikoff, October 29, 1875 in *James Gillespie Blaine family papers*, Library of Congress, http://hdl.loc.gov/loc.mss/eadmss.ms003039 quoted and cited by Sister Marie Carolyn Klinkhamer, "The Blaine Amendment of 1875: Private Motives for Political Action," 42 *Catholic Historical Review* 22 (1955).

[39] *State ex rel. Weiss v. Dist. Bd. of Sch. Dist. No. 8 of City of Edgerton*, 76 Wis. 177, 44 N.W. 967, 981 (1890) (Orton, J., concurring).

[40] *See* https://ffrf.org/news/news-releases/item/24220-ffrf-court-victory-ga-school-stops-school-prayer.

[41] Sister Marie Carolyn Klinkhamer, "The Blaine Amendment of 1875: Private Motives for Political Action," 42 *Catholic Historical Review* 49 (1956).

[42] *See, e.g., Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43 (1977) which paired the ACLU with Nazis to fight for those two rights.

[43] Sister Marie Carolyn Klinkhamer, "The Blaine Amendment of 1875: Private Motives for Political Action," 42 *Catholic Historical Review* 15–16 (1956).

[44] Anson Stokes, II *Church and State in the United States*, 68.

[45] *New York Times*, June 16, 1876, pp. 2, 4.

[46] Steven Green, "The Blaine Amendment Reconsidered," 36 *The Am. Journal of Legal History* 48.

[47] *Id*.

[48] *Id*.

[49] *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 26–27, (1947) (Jackson, J., dissenting).

[50] Molly Beck, "State paid $139 million to schools terminated from voucher program since 2004," *Wisconsin State Journal*, Oct. 12, 2014.

[51] Barbara Miner, "Do Children Deserve Playgrounds? 'Maybe,' Says Milwaukee's Common Council," *Milwaukee Journal Sentinel*, Aug. 2, 2012, *available at* http://archive.jsonline.com/blogs/purple-wisconsin/164835586.html.

[52] Tony Evers, Letter to Taron Monroe, June 28, 2011, *Freedom From Religion Foundation*, *available at* https://ffrf.org/uploads/legal/LifeSkillsDPIjune28.pdf.

[53] Erin Richards, "Former Employees Cast Doubt on Voucher School's Operations," *Milwaukee Journal Sentinel*, Dec. 15, 2014, *available at* http://archive.jsonline.com/news/education/former-employees-cast-doubt-on-voucher-schools-operations-b99407859z1-285881491.html.

[54]Rachel Tabachnick, "Vouchers/Tax Credits Funding Creationism, Revisionist History, Hostility Toward Other Religions," *K-12 News Network*, May 25, 2011, *available at* http://k12newsnetwork.com/blog/2011/05/25/voucherstax-credits-funding-creationism-revisionist-history-hostility-toward-other-religions/.

[55] *Id*.

[56] *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017).

[57] *Id.* ("The parties agree that the Establishment Clause of that Amendment does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program.")

[58] *See, e.g.,* Amy Howe, "Missouri reverses course on aid to religious organizations (UPDATED)," *SCOTUSblog*, Apr. 14, 2017, 10:54 AM, *available at* http://www.scotusblog.com/2017/04/missouri-reverses-course-aid-religious-organizations/.

[59] *Trinity Lutheran*, 137 S. Ct. at 2028 (Sotomayor, J., dissenting).

[60] *Id.* at 2024 n.3.

[61] Alice O'Brien, "Symposium: Playground resurfacing case provides soft landing for state 'no aid' provisions," *SCOTUSblog*, Jun. 28, 2017, *available at* http://www.scotusblog.com/2017/06/symposium-playground-resurfacing-case-provides-soft-landing-state-no-aid-provisions/.

[62] *Trinity Lutheran*, 137 S.Ct. at 2019–21.

[63] *America's Changing Religious Landscape*, PEW RESEARCH CENTER, May 12, 2015, *available at* www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.

[64] *Id.*

[65] *Id.*

[66] *Nones on the Rise: One-in-Five Adults Have No Religious Affiliation*, THE PEW FORUM ON RELIGION & PUBLIC LIFE (October 9, 2012), *available at* http://www.pewforum.org/Unaffiliated/nones-on-the-rise.aspx.

[67] Barry Kosmin, *National Religious Identification Survey* 1989–1990.

[68] *America's Changing Religious Landscape*, PEW RESEARCH CENTER, May 12, 2015, *available at* www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.

[69] Will M, Gervais and Maxine B Najle, "How Many Atheists Are There?," March 3, 2017, available at https://osf.io/preprints/psyarxiv/edzda.

[70] Katherine Stewart, *The Good News Club: The Christian Right's Stealth Assault on America's Children*, 5 (Public Affairs, 2012).

[71] Kyle Olson, "Jesus Isn't in Michigan," *Townhall.com*, March 18, 2011, *available at* https://townhall.com/columnists/kyleolson/2011/03/18/jesus-isnt-in-michigan-n1034051. He went on to say, "And he would smash a temple that has been perverted to meet the needs of the administrators, teachers, school board members, unions, bureaucrats and contractors. But, Jesus isn't in Michigan – or Indiana – so it's incumbent upon leaders to do something about it. And in Indiana, they're trying." *See also* Katherine Stewart, *The Good News Club: The Christian Right's Stealth Assault on America's Children* at 254.