No. 14-1382

In the United States Court of Appeals for the Eighth Circuit

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Plaintiff–Appellant,

v.

SARA PARKER PAULEY, in her official capacity as Director of the Missouri Department of Natural Resources Solid Waste Management Program,
Defendant–Appellant.

On Appeal from the United States District Court for the Western District of Missouri
Civil Case No. 2:13-CV-04022-NKL – Judge Nanette K. Laughrey

Brief *Amicus Curiae* of the Becket Fund for Religious Liberty in Support of Appellant

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RULE 26.1 DISCLOSURE STATEMENT

The Becket Fund for Religious Liberty has no parent corporations and issues no shares of stock.

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INTEREST OF *AMICUS CURIAE*

The Becket Fund for Religious Liberty tenders this brief *amicus curiae* in accordance with Federal Rule of Civil Procedure 29 in support of Plaintiff-Appellant Trinity Lutheran Church of Columbia.

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions and the equal participation of religious people in public life and benefits. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. The Becket Fund litigates in support of these principles in state and federal courts throughout the United States, as both primary counsel and *amicus curiae*. Most recently it successfully represented the petitioner in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), a unanimous decision in the first Supreme Court decision to recognize the ministerial exception.

Because it supports rights to equal participation for religious organizations, the Becket Fund has participated for many years in litigation challenging 19th Century state constitutional provisions that

single out religious people and institutions for special disfavor. These state constitutional amendments arose during a shameful period in our national history tarnished by anti-Catholic and anti-immigrant sentiment. They expressed and implemented that sentiment by excluding all government aid from disfavored faiths (mainly Catholicism), while allowing those same funds to support Protestantism. The Becket Fund resolutely opposes the application of these state constitutional provisions to citizens today.

To that end, the Becket Fund has filed three amicus briefs before the U.S. Supreme Court[1] to document in detail the history of these state constitutional provisions. The Becket Fund has also filed numerous briefs in state courts to protect the rights of children and their parents to be free from religion-based exclusion from government educational benefits.[2]

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[1] *See Mitchell v. Helms,* 530 U.S. 793 (2000); *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002); *Locke v. Davey*, 540 U.S. 712 (2004).

[2] *See, e.g.*, *Duncan v. New Hampshire*, Docket No. 2013-0455 (N.H. 2013); *Meredith v. Pence,* 984 N.E.2d 1213 (Ind. 2013); *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, 2013 COA 20 (Colo. Ct. App. Div. IV); *Council for Secular Humanism v. McNeil*, Case No. 2007-CA-1358 (Fla. Leon County Cir. Ct.).

The Becket Fund trusts that this brief, as well as its special expertise in this area of the law, will provide the Court a historical perspective to aid it in the resolution of this appeal.

All parties have consented to the filing of this brief.

INTRODUCTION

This case is about whether the State of Missouri, in making benefits available to non-profit organizations generally, can discriminate against organizations that—in the State's own view—are too overtly religious. Through the program at issue here, the State "provides grants to qualifying organizations to use recycled tires for playgrounds." Compl. [Dkt. 1] ¶ 21. By "encourag[ing] the use of re-cycled tires," the program aims to "reduc[e] the landfills and benefit[] the environment" while at the same time "provid[ing] safe surfacing for playgrounds" for children throughout the State. *Id.* ¶ 22. Although the Trinity Lutheran Church Child Learning Center scored fifth out of forty-four applicants seeking to participate in the program, the State denied the application solely because of its affiliation with a church. Compl. [Dkt. 1] ¶ 1.

The complaint filed by the Learning Center alleged that the State in the past "has allowed other similarly-situated non-profit organizations to

participate in the Scrap Tire Program." Compl. [Dkt. 1] ¶ 52. And while the State's motion to dismiss was pending in the lower court, the Learning Center discovered actual evidence that the State has in fact allowed other religious organizations—including several churches—to participate in the program. Mot. for Reconsid. [Dkt. 36] at 3. The State argued, however, that under the Missouri Constitution, Article I, Section 7 and Article IX, Section 8, which prohibit public aid to any "sect" or "sectarian purpose," it may lawfully discriminate against religious organizations that allow their beliefs to "pervade[]" their activities instead of taking a more secular approach. *See* Reply in Supp. of Mot. to Dismiss [Dkt. 29] at 7-8.

This argument reflects the anti-religious sentiment that gave rise to Article I, Section 7 and Article IX, Section 8 (the State's "no aid" provisions) in the first place. Construing those sections to condone such religious hostility would violate the Equal Protection, Free Exercise, and Establishment Clauses of the United States Constitution. The district court's early dismissal of the Learning Center's complaint exacerbates the problem by effectively barring religious organizations even from raising claims of religious discrimination by the State in the

administration of its benefits programs. Accordingly, this Court should reverse the district court's ruling and construe the "no aid" provisions in a manner that does not violate the guarantees of the United States Constitution.

ARGUMENT

I. The State's interpretation of its "no aid" provisions raises federal constitutional questions under the Equal Protection Clause

Under the federal Equal Protection Clause, a law rooted in historical bias against minority groups is automatically suspect and cannot be enforced in a way that disparately harms minority groups today. *See Hunter v. Underwood*, 471 U.S. 222, 232-33 (1985). This is why it is illegal to enforce Jim Crow laws that remain on the books, even if there is no present-day hostility motivating enforcement of the law. *Id.* Simply put, laws "born of bigotry" cannot be allowed to disadvantage minorities today. *Mitchell v. Helms*, 530 U.S. 793, 829 (2000) (plurality op.) (attacking historic anti-Catholic measures).

As we demonstrate below, Missouri was suffused with anti-Catholic animus when Article I, Section 7 and Article IX, Section 8 were enacted in 1870. Those provisions thus cannot be interpreted to invalidate the

Learning Center's participation in the scrap tire program without violating the Equal Protection Clause.

A. Missouri was rife with animus towards Catholics during the time its "no aid" provisions were adopted.

Missouri has a long history of anti-Catholicism; Article I, Section 7 and Article IX, Section 8 were enacted as part of it. The American Protestant majority in mid- to late-19th Century America was deeply suspicious of Catholicism and often openly hostile toward it, even before the Know-Nothing Party swept into power in 1853. This anti-Catholic sentiment was universal, visible both in the population generally and among the elites.

As reflected in the writings of prominent anti-Catholic activist, Elijah Lovejoy, many American Protestants saw the Catholic Church as a threat to national unity. In a series of letters—the "Letters from Rome"—in the *St. Louis Observer*, Lovejoy claimed that Catholicism was spread by "foreign money and foreign influence."[3] Catholic schools were seen as inculcating in new generations a dangerous ideology, one that espoused loyalty to the Catholic hierarchy instead of the American government.

[3] William Barnaby Faherty, The St. Louis Irish: An Unmatched Celtic Community, 62 (Mo. Historical Society Press, St. Louis, 2001).

For opponents of the Church, Catholic schools cultivated students unable to think critically and enslaved to Church doctrine; the *Western Education Review*, the official publication of the Missouri State Board of Education, wrote in 1870 that the Catholic Church was the "Romish Church" and could not, even if it tried, "allow any liberty of thought."[4]

These anxieties were further rooted in the fast-growing Catholic population. Starting in the 1820s, there was a steady stream of Catholics emigrating from Europe. By 1840, the Catholic population in America tripled, going from less than 1% to 3%. Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551, 561 (2003). The population growth rose from 10% in 1866 to 13% of the American population in 1891. *Id.*

As their numbers grew, Catholics in Missouri objected to being forced to contribute monetarily, through taxes, to public schools—which at the

[4] J. Michael Hoey, "Missouri Education at the Crossroads: The Phelan Miscalculation and the Education Amendment of 1870," Missouri Historical Review, 389 (July 2001).

time were generically Protestant.[5] Because their own children attended Catholic schools instead of the public schools, Missouri Catholics argued that Catholic parents should receive tax rebates equal to the amount of their tax bills that were used to fund Protestant public schools.[6]

Whereas these efforts largely failed in the 1840s and 50s, by the 1860s, as the Catholic population grew larger, Catholics began to gain political clout. And the move to "de-Protestantize" public schools was "felt far beyond the areas where it was successful . . . . This new awareness on the part of many Protestants led to fierce attacks on the rise of Catholic influence." DeForrest at 563.

With anti-Catholic feeling on the rise, the virulently anti-Catholic Know-Nothing Party swept into power. Party members "were sworn to do everything in their power to 'remove all foreigners, aliens, or Roman

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[5] Interestingly, the form of Protestantism mandated by the government was of a least-common-denominator variety, further demonstrating that its use by government officials was specifically designed to counter Catholicism, as opposed to promoting a particular subset of Protestant belief. For example, schools specifically promoted use of the King James Version of the Bible because they knew that version was unacceptable to Catholics. That generic approach is of course just as much an establishment of religion as promoting a particular church's doctrine alone.

[6] Hoey, at 374.

Catholics from office' and to refrain from appointing Catholics to positions of power." Meir Katz, *The State Of Blaine: A Closer Look At The Blaine Amendments And Their Modern Application*, 12 Engage: J. Federalist Soc'y Prac. Groups 111, 112 (2011). Following "tremendous success in local, congressional, and state elections" in 1855, the party's presidential candidate in 1856 won "21% of the popular vote." *Id.*

In Missouri, the Know-Nothing party unleashed a reign of terror in the streets of St. Louis during the August 1854 elections. The riot, instigated by reactions to a Know-Nothing-appointed judge's decision to expel Catholic Irishmen from the polls, led to the ransacking of Catholic homes, mobs driving the residents out of their homes and "smashing windows and doors and breaking up the furniture."[7]

In the context of this ideological ferment, Missouri adopted Article I, Section 7 and Article IX, Section 8. Similar no-aid provisions, rooted in anti-Catholic animus, were subsequently adopted in numerous other states, following a failed attempt by then-United States Senator James G. Blaine to amend the United States Constitution in 1875 with a federal

[7] William Hyde, Encyclopedia of the History of St. Louis, Vol. 4, p. 1917. The Southern History Co., New York. 1899.

provision. *See, e.g.*, *generally* Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657 (1998). These "state Blaine Amendments" were a reactionary attempt to "protect" the dominant religious culture of mainstream Protestantism by ensuring both that public schools would teach their brand of Christianity and that private religious schools would not receive state funding.

In sum, anti-Catholic animus was common at the time Article I, Section 7 and Article IX, Section 8 were adopted. There was a "high degree of hostility towards the teaching and practice of the Roman Catholic Church, and . . . a strong desire to ensure that Catholics would be precluded from using the resources of the government to support their parochial schools . . . ." DeForrest at 602. This hostility found expression in the "no aid" provisions of Article I, Section 7 and Article IX, Section 8.

Indeed, the animus in the Missouri constitutional provisions was explicitly noted by a Catholic Senator, Henry Spaunhorst, then serving in the Missouri legislature. In his speech on the floor of the Senate in March 1870, Spaunhorst spoke at length about the intended purpose of the no-aid provision. He sarcastically suggested making the provision

clearer ("[w]hy not say in plain English what is intended") by adding "Catholic" to the proposal. "Synopsis of Remarks by Senator Spaunhorst," *The Weekly Tribune*, March 1870. "There is no use dodging the intent—the measure is aimed at a certain religious organization which asks for no aid here or elsewhere, in a free country. All it asks is justice." *Id.* The Senator further identified the arguments being made at the time that "the public school fund is endangered; the school system is going to be attacked; the funds are going to be taken by sectarian schools, and be devoted to religious purposes, and what is meant but not said is, that Catholics will get part of it, they will overpower us. Now this is all a scare—a delusion." *Id.* His remarks make clear that anti-Catholic animus was very much the unspoken concern behind the text of Article IX, Section 8.[8]

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[8] The version of Article IX, Section 8 reported in the newspaper prohibited "aid of any sectarian purpose." *Id.* The actual version prohibits aid "of any religious creed, church or sectarian purpose." Mo. Const. art. IX, § 8. It is unclear when or why this change took place. But there is no reason to think that the broadened language ameliorated the religious hostility inherent in the "Blaine" provision. Because general Protestantism was already established in the public schools, the broadened language still had the primary effect of barring aid to Catholic-affiliated institutions. DeForrest at 559; *see also* Hoey, "Missouri Education at the Crossroads: The Phelan Miscalculation and

B. The U.S. Supreme Court has consistently concluded that the term "sectarian" in "no aid" provisions like Missouri's is animated by anti-Catholic nativism.

Nine Supreme Court Justices, including six current justices, have recognized the anti-Catholic history of the state Blaine Amendments and the discriminatory use of the term "sectarian." In *Mitchell* v. *Helms*, a plurality of four Justices—Justice Thomas, Justice Rehnquist, Justice Scalia and Justice Kennedy—condemned the religious bigotry that gave rise to state laws targeting "sectarian" faiths, or "Blaine Amendment[s]." 530 U.S. at 828-29. The plurality criticized the Court's prior use of the term "sectarian" in Establishment Clause jurisprudence, because "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow." *Id.* at 828. As the plurality explained, "[o]pposition to aid to 'sectarian' schools acquired prominence in the 1870s with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions." *Id.* "Consideration of the amendment arose at

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the Education Amendment of 1870," at 392 (noting that the 1875 State constitutional convention "barely tinkered" with Article IX, Section 8, which "remains in Missouri's present constitution" as "an enduring legacy of the Radicals' devotion to public education as well as to their suspicion of Catholic schooling").

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.'" *Id.* (citing Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38 (1992)). The plurality thus concluded that "the exclusion of pervasively sectarian schools from otherwise permissible aid programs"—such as the scrap tire program—represented a "doctrine, born of bigotry, [that] should be buried now." *Id.* at 829.

In *Zelman v. Simmons-Harris*, two Justices joined Justice Breyer's dissent, which provided an even more detailed account of the relevant history, explaining how Catholic efforts to gain equal access to government school aid resulted in a movement to ban such aid—first through the federal Blaine Amendment, then through its successful state progeny. *See* 536 U.S. 639, 720-21 (2002) (Breyer, J., dissenting).

> Catholics sought equal government support for the education of their children in the form of aid for private Catholic schools. But the "Protestant position" on this matter, scholars report, "was that public schools must be 'nonsectarian' (which was usually understood to allow Bible reading and other Protestant observances) and public money must not support 'sectarian' schools (which in practical terms meant Catholic)."

Id. at 721 (citing Jeffries & Ryan, A Political History of the Establishment Clause, 100 Mich. L. Rev. 279, 301 (Nov. 2001)). Even the

majority in *Locke v. Davey*, including Justices Kennedy, Breyer and Ginsburg, affirmed the basic conclusion that Blaine Amendments are "linked with anti-Catholicism." 540 U.S. at 723 n.7 (citing *Mitchell* plurality). The legal[9] and historical[10] scholarship explaining the

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[9] *See*, *e.g.*, Ira 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."); *See generally* DeForrest, 26 Harv. J. L. & Pub. Pol'y 551; Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493, 508-509 (2003) ("[T]he Protestant majority was alarmed[,] . . . fearing its tax dollars would be siphoned off for 'dark Catholic purposes,' and so cries went up for laws to prevent public money going to 'sectarian' organizations."); Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 Va. L. Rev. 117, 138 (2000); Richard A. Baer, Jr., *The Supreme Court's Discriminatory Use of the Term 'Sectarianism,'* 6 J.L. & Pol. 449 (1990); Joseph P. Viteritti, *Davey's Plea: Blaine, Blair, Writers, and the Protection of Religious Freedom*, 27 Harv. J.L. & Pub. Pol'y 299, 310-11 (2003).

[10] *See*, *e.g.*, Philip Hamburger, *Separation of Church and State* 335 (Harvard 2002) ("Nativist Protestants also failed to obtain a federal constitutional amendment but, because of the strength of anti-Catholic feeling, managed to secure local versions of the Blaine amendment in the vast majority of the states."); *See generally* Ray A. Billington, *The Protestant Crusade, 1800-1860: A Study of the Origins of American Nativism* (1938); Charles L. Glenn, Jr., *The Myth of the Common School* (1988); Lloyd Jorgenson, *The State and the Non-Public School, 1825-1925* (1987); Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society, 1780-1860* (1983); Paul Kleppner, *The Cross of Culture: A Social Analysis of Midwestern Politics, 1850-1900* (1970); Ward M. McAfee, *Religion, Race and Reconstruction: The Public School*

discriminatory history of the Blaine Amendments and the pejorative nature of the term "sectarian" is the final condemnation of Missouri's Blaine Amendments.

C. Missouri's history of anti-Catholicism makes it impossible to enforce its "no aid" provisions against the Learning Center without violating the Equal Protection Clause.

Missouri may not apply constitutional provisions enacted out of religious animus in order to discriminate among religious believers today. *See, e.g.*, *Hunter*, 471 U.S. at 232-33 (facially neutral constitutional provision violated Equal Protection Clause). In *Hunter*, the Court held that although determining whether a discriminatory purpose lurked behind a state constitutional provision "is often a problematic undertaking," it could rely on the undisputed historical backdrop to determine purpose: "the Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks." *Id.* at 228-229. The existence of this historical

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in the Politics of the 1870s (1998); John T. McGreevy, *Catholicism and American Freedom* (2003); Diane Ravitch, *The Great School Wars: New York City, 1805-1973* (1974); William G. Ross, *Forging New Freedoms: Nativism, Education, and the Constitution 1917-1927* (1994); Joseph P. Viteritti, *Choosing Equality: School Choice, the Constitution, and Civil Society* (1999).

discriminatory movement, even without a showing of specific purpose, was enough discriminatory intent for purposes of the Equal Protection Clause. *Id.* Thus "where both impermissible racial motivation and racially discriminatory impact are demonstrated" the state constitutional provision was subject to invalidation under the Equal Protection Clause. *Id.* at 232.

Similarly, Article I, Section 7 and Article IX, Section 8 were very much "part of a movement that swept the [United States] to [discriminate against Catholics.]" *Id.* at 229; see Part I.A *supra.* Nor is it any defense to argue that the state bears no discriminatory intent towards Catholics today. The absence of any discriminatory intent today—even if true—would not allow Missouri to escape its obligations under the Equal Protection Clause: "Without deciding whether [the challenged section of the Alabama constitution] would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate . . . and the section continues to this day to have that effect. As such, it violates equal protection . . . ." *Hunter*, 471 U.S. at 233 (emphasis added). As in *Hunter*, the original enactment of Article I, Section 7 and Article IX, Section 8 were motivated

by a desire to discriminate against Catholics. Were it to be applied today in a way that specifically disadvantages religious schools, it would run afoul of the Constitution.

II. The State's construction of its "no aid" provisions raises federal constitutional questions under the Free Exercise Clause.

The State's defenses under Article I, Section 7 and Article IX, Section 8 would, if credited, also create serious conflicts with the Free Exercise Clause. Under Supreme Court precedent, a law burdening religious groups violates the Free Exercise Clause if it is not "neutral, [and] generally applicable." *Employment Div. v. Smith*, 494 U.S. 872, 880 (1990).

Article I, Section 7 and Article IX, Section 8 do not meet the First Amendment standards of neutrality and general applicability because, as explained above, their original purpose was to disfavor Catholic institutions, keeping them from receiving public funds while supporting other schools that propounded a different, state-approved religious faith. Such laws—laws that are "enacted 'because of,' not merely 'in spite of,' their suppression of" religious groups, are subject to strict scrutiny. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520,

540 (1993). Just as application of Article I, Section 7 and Article IX, Section 8 to exclude religious organizations from the scrap tire program would violate the Equal Protection Clause by treating religious organizations unequally, it would also violate the Free Exercise Clause by singling out those minorities for disfavor. *Id.* at 534 ("The Free Exercise Clause protects against governmental hostility which is masked, as well as overt."). The history of Missouri anti-Catholic animus presented here shows that Article I, Section 7 and Article IX, Section 8 were adopted with serious animus towards minority religious faiths, and thus should be subject to strict scrutiny.

III. The State's construction of its "no aid" provisions raises federal constitutional questions under the Establishment Clause.

The Establishment Clause prohibits the government from discriminating among religious organizations. It also prohibits the government from excluding religious organizations from neutral benefits programs that are available to the public generally. To bar the Learning Center from participating in the scrap tire program because of its religious beliefs, particularly when other religious organizations have been allowed to participate, is to discriminate based solely on the

religious status of the program applicant. The Establishment Clause prohibits such "religious gerrymandering." *Larson v. Valente*, 456 U.S. 228, 255 (1982).

Larson invalidated a Minnesota law that imposed disclosure requirements on religious organizations that did not "receive[ ] more than half of their total contributions from members or affiliated organizations." 456 U.S. at 231-32. It thus prohibited intentional discrimination between religious non-profits based on their organizational structure. In *Colorado Christian University v. Weaver*, the Tenth Circuit applied the lesson of *Larson* to the "pervasively sectarian" test. 534 F.3d 1245, 1259 (10th Cir. 2008) (McConnell, J.). *Weaver* addressed a grant program that provided government-funded scholarships to students at private universities, excluding "pervasively sectarian" universities. *Weaver* held that discriminating against religious schools that were "pervasively sectarian" violated the Establishment Clause for two reasons. First, it required courts to entangle themselves with religion by inquiring into internal questions such as "the boundary between religious faith and academic theological beliefs." *Weaver*, 534 F.3d at 1262. Second, it discriminated impermissibly against religion

itself: "the State's latitude to discriminate against religion . . . does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Weaver*, 534 F.3d at 1255 (internal citations omitted).

The Learning Center has alleged—and adduced evidence to confirm—that many religious entities, including churches, have been allowed to participate in the scrap tire program. Compl. [Dkt. 1] ¶ 52; Mot. for Reconsid. [Dkt. 36] at 3. And the State essentially concedes that it would not exclude religious organizations as long as their religious beliefs do not pervade their activities. Reply in Supp. of Mot. to Dismiss [Dkt. 29] at 7-8. Thus, denying the Learning Center the opportunity to participate in the scrap tire program presents the same problems addressed in *Weaver* by entangling the State with religion in deciding which religious organizations are "religious" and which are "pervasively religious," and by excluding all "pervasively religious" institutions from a government program that is otherwise neutral and generally available.

The district court's reliance on *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), was unwarranted. *See* 09/26/13 Order [Dkt. 34] at 19-22. The Supreme Court's Establishment

Clause jurisprudence has evolved since *Nyquist*, leaving behind the "pervasively sectarian" test and recognizing the pernicious history of the Blaine Amendments and the discriminatory intentions behind the word "sectarian." *Mitchell*, 530 U.S. at 829; *see also Columbia Union College v. Clark*, 119 S. Ct. 2357, 2358 (1999) (mem.) (Thomas, J., dissenting from denial of *certiorari*) ("We no longer require institutions and organizations to renounce their religious missions as a condition of participating in public programs. Instead, we have held that they may benefit from public assistance that is made available based upon neutral, secular criteria.") (citing cases). Moreover, the Supreme Court has never interpreted *Nyquist* as an absolute bar to government funding that could go to a religious institution. *See, e.g.*, *Bowen v. Kendrick*, 487 U.S. 589, 611 (1988) (upholding government program despite possibility that "grants may go to religious institutions that can be considered 'pervasively sectarian'").

The district court also erred in relying on *Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084 (8th Cir. 2000), to conclude that this Court requires the "pervasively sectarian" test. *Min de Parle* was decided months before *Mitchell v. Helms* and thus did not

address the Supreme Court's disfavor of that test. Moreover, this Court's holding did not turn on the "pervasively sectarian test," it only used the test, in *dictum*, as one factor among many for finding that an exemption accommodating some religious believers from a neutral and generally applicable law was permissible. *Id*. at 1098. Its scope should be restricted to avoid the Establishment Clause problems described above.

IV. The "no aid" provisions should be construed to avoid federal constitutional questions.

Under the Supremacy Clause, Missouri constitutional provisions are subject to constraints posed by the United States Constitution. Thus the doctrine of constitutional avoidance must be applied in interpreting Article I, Section 7 and Article IX, Section 8. The Missouri Supreme Court has a longstanding policy of construing its laws to avoid constitutional questions wherever possible. *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 687 S.W.2d 162, 165 (Mo. 1985) (*en banc*)

Although the precise construction of Article I, Section 7 and Article IX, Section 8 is beyond the purview of this brief, Amicus notes that Article I, Section 7 and Article IX, Section 8 are both susceptible to interpretations that do not invoke federal constitutional concerns. Article I, Section 7, for example, only prohibits aid to a "church, sect or denomination of religion

. . . *as such*," Mo. Const. art. I, § 7 (emphasis added), indicating that generally available secular aid like shredded tires for playgrounds is not violative. *See Staley v. Missouri Dir. of Revenue*, 623 S.W.2d 246, 250 (Mo. 1981) (*en banc*) (stating that, where possible, statues must be construed to give every word meaning). Curiously, the district court omitted the "as such" language from its recitation of Article I, Section 7. 09/26/2013 Order [Dkt. 34] at 3.

Also, the district court's intepretation of the Article I, Section 7, gives no real meaning to its second provision, which explicitly prohibits any "discrimination . . . against" religious organizations. Mo. Const. art. 1, § 7. The court cursorily held that anytime the State denies aid to a religious organization under the first provision, the aid must not be "discrimination" under the second. *See* 09/26/2013 Order [Dkt. 34] at 4. But such *ipse dixit* reasoning gives no real meaning to the anti-discrimination provision. In contrast, construing the first provision as prohibiting only aid specifically directed to religious organizations "as such" and the second as prohibiting discrimination under neutral programs that are open to the public generally would give meaning to both provisions.

Similarly, the plain language of Article IX, Section 8 indicates that it only prohibits aid that has a direct "religious . . . purpose." Mo. Const. art. IX, § 8. Appellants have offered additional textual grounds for construing the Missouri Constitution to avoid violations of the United States Constitution. Appellant's Br. at 19-23. The Court should adopt such a construction to avoid conflicts with the federal constitutional provisions cited above.

CONCLUSION

For the foregoing reasons, the district court's ruling below should be reversed.

Respectfully submitted this 5th day of May 2014,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4825 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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s/ Eric S. Baxter
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 5, 2014, a true and correct copy of the foregoing Brief *Amicus Curiae* of the Becket Fund for Religious Liberty was served electronically on the counsel named below via the CM/ECF system.

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