

No. 26-237

IN THE

Supreme Court of the United States

JOHN WOOLARD, *ET AL.*,

Petitioners,

v.

TONY THURMOND, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

**BRIEF OF AMICUS CURIAE PIONEER NEW
ENGLAND LEGAL FOUNDATION IN SUPPORT
OF PETITIONERS**

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INTEREST OF AMICUS CURIAE

PioneerLegal, LLC (PioneerLegal), doing business as Pioneer New England Legal Foundation (the “Legal Foundation”), is a nonprofit, nonpartisan legal research and litigation entity¹. The Legal Foundation seeks to promote open and accountable government, free enterprise, property rights, and educational opportunities, through legal action and public education.

The Legal Foundation has a longstanding commitment to protecting educational opportunities, promoting parental choice, and ensuring that public programs operate in a manner consistent with constitutional guarantees of equal treatment and religious neutrality. The Legal Foundation has worked extensively across New England on legal and policy issues affecting school choice, including the treatment of religious schools within publicly funded education programs. Because the proper resolution of this case will directly affect whether families may choose religious schools without forfeiting access to public benefit, the issues presented fall squarely within the Legal Foundation’s mission and expertise.

¹ Pursuant to Supreme Court Rule 37.6, the Legal Foundation states that neither parties, nor their counsel, nor any individual or entity other than amicus, has authored this brief in whole or in part, or has made any monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The denial of a request for rehearing en banc in this case generated a sharply divided Ninth Circuit and two separate dissents. Both dissents focused on the same basic theme – the pernicious effects of the so-called “Blaine Amendments”, which many states, including California, have adopted to bar the use of state funds to support religious education.

This case presents the Court with the opportunity to state clearly and conclusively that states may not rely on state constitutional provisions to prevent families who choose to pursue a religious education from receiving generally available public benefits. Based on this Court’s decisions in *Trinity Lutheran*, *Espinoza*, and *Carson*, a state may not condition eligibility for generally available public benefits on religious status or religious use, including in the education context. The California independent-study program at issue in this case is an educational benefit offered through the public-school system that permits substantial parental participation while excluding religious curricula because they contain “sectarian or denominational doctrine,” thereby penalizing religious exercise. The Ninth Circuit’s conclusion that the program’s location within public education resolves the constitutional issue conflicts with this Court’s recent precedents, which focus on the nature of the benefit and the reason for exclusion, not the program’s label. This Court’s recognition that parents’ religious exercise includes directing their children’s religious

upbringing, further underscores that California may not discriminate against families who make religiously motivated educational choices when distributing public educational benefits that are otherwise generally available.

Because California provides such a generally available educational benefit and excludes participants on the basis of religion, its policy runs afoul of the Free Exercise Clause as articulated in *Trinity Lutheran*, *Espinoza*, and *Carson*, warranting this Court's review and reversal of the judgment below.

This brief will review the historical development of Blaine Amendments and no-aid provisions in general, to demonstrate the anti-immigrant and anti-Catholic bias that motivated these provisions. Those bigoted motivations have now evolved into a more generalized, and impermissible, anti-religious bias.

ARGUMENT

I. Blaine Amendments Arose from a Nationwide Campaign of Religious Discrimination.

The nationwide campaign to exclude religious schools from public support was not the product of a neutral and isolated concern about church-state separation. It developed during a period of intense anti-Catholic and anti-immigrant sentiment in the United States. It was born of bigotry. And indeed it was the fear of such bigotry that was front of mind when the founders crafted the Free Exercise clause, one hundred years earlier.

The original federal Blaine Amendment was proposed by Representative James G. Blaine on December 14, 1875. The proposal followed President Ulysses S. Grant's September 29, 1875 speech in Des Moines, Iowa, in which Grant called for a constitutional amendment: "Encourage free schools, and resolve that not one dollar of money appropriated to their support, no matter how raised, shall be appropriated to the support of any sectarian school" Ulysses S. Grant, Remarks at the Ninth Annual Meeting of the Army of the Tennessee, Des Moines, Iowa (Sept. 29, 1875), in <https://www.presidency.ucsb.edu/documents/remarks-the-ninth-annual-meeting-the-army-the-tennessee-des-moines-iowa>.

The historical significance of this movement has already been recognized by this Court. In

Espinoza, the Court explained that the federal Blaine Amendment arose from “pervasive hostility to the Catholic Church and to Catholics in general. . . . The no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise clause.” *Espinoza v. Montana Department of Revenue*, 591 U.S. 464, 482 (2020).

The public-school movement itself provides important context. Nineteenth-century public schools were not uniformly secular institutions. Many incorporated Protestant religious practices and teachings, including the reading of the King James Bible. See generally, Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 666-668 (1998).

Catholic opposition to the public-school system was therefore not simply opposition to religion in public education. Catholic families objected in particular to a system in which Protestant religious practices could be incorporated into publicly supported education while Catholic religious instruction was characterized as “sectarian.” This meant the students could read from the Protestant King James Bible and condemnations were geared towards the Catholic Church and any other non-Protestant religions. See generally 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 (2003).

The historical record includes numerous examples of anti-Catholic hostility surrounding nineteenth-century education policy. Catholic communities faced opposition when seeking public support for parochial education, while Protestant religious practices remained embedded in public-school education. Nationwide anti-Catholic violence and bias leading up to the Blaine Amendment proposal further demonstrate the intentional discrimination behind this campaign. In 1842, New York's Catholic bishop was targeted for calling for public funding of parochial schools. A mob burned down his house and then turned to his cathedral, where state troops intervened. *Id.* at 561. In 1853 in Michigan, Catholics who attempted to pass a bill in support of church schools were labeled as conspiracy theorists who wanted to destroy public education. *Id.* In 1854, a Maine public school student was expelled because she refused to read the King James Protestant Bible as it conflicted with her Catholic faith. *Id.* at 561-562.

The federal Blaine Amendment ultimately failed to obtain the necessary two-thirds vote in the Senate. *Id.* at 573. But the campaign continued at the state level. Within a year after the federal Blaine Amendment failed in the Senate, fourteen states had adopted measures forbidding public funding for “sectarian” schools. By the 1890s, approximately thirty states had adopted constitutional provisions restricting public support for sectarian education. *Id.*

Anti-Aid provisions were not confined to states that had independently developed a state

constitutional approach. Rather, the federal government itself helped impose Blaine-style restrictions on several of the states as a condition of admission to the Union.

The 1889 Enabling Act required North Dakota, South Dakota, Montana, and Washington to establish systems of public schools “free from sectarian control” as a condition of statehood. Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676. The Act further provided that the schools, colleges, and universities established under the Act would remain under the exclusive control of the states and that “no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes shall be used for the support of any sectarian or denominational school, college, or university.” *Id.* § 14, 25 Stat. at 679. The federal Enabling Act thus incorporated restrictions on sectarian education into the constitutional formation of four new states.

The Enabling Act’s language, like the proposed national Blaine Amendment and state no-aid provisions, appears facially neutral but operated within a broader nineteenth-century educational environment in which public schools promoted a generic Protestantism. Senator William Blair reinforced this point in a speech on the Senate floor, acknowledging the relationship between the proposed restrictions and the promotion of Christian instruction while simultaneously discouraging “sectarian” education. See 20 Cong. Rec. 2100–01 (1889) (statement of Sen. Blair).

The historical meaning behind these provisions should not be ignored. The evidence demonstrates that the restrictions were adopted within a political and educational environment in which generic Protestant instruction was widely accepted in public schools while Catholic, or any other religion, education was increasingly characterized as “sectarian.” As DeForrest explains, the state-level Blaine provisions adopted during this period reflected the same historical movement that produced the federal Blaine Amendment. DeForrest, *supra*, at 573–74.

The State of Washington provides a particularly illustrative example. Its Constitution provides that “[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.” Wash. Const. art. I, § 11. It also provides that “[a]ll schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.” *Id.* art. IX, § 4.

The Washington Constitution’s language also illustrates that there was no opposition to religion in general, but that there was instead an opposition to particular forms of religious education. The Constitution’s preamble invokes the “Supreme Ruler of the Universe,” Wash. Const. pmbl., demonstrating that the constitutional framers were not hostile to religious belief itself. Rather, the historical concern was directed toward the role of particular religious institutions and forms of religious education within

the public-school system.

This history is relevant because the terminology used by these provisions cannot simply be treated as though it arose from a neutral constitutional commitment to religious equality. As the Court in *Espinoza* recognized, the historical meaning of the Blaine movement included discrimination against Catholic education. *Espinoza v. Montana Department of Revenue*, 591 U.S. 464, 482 (2020). History therefore provides important context for evaluating state provisions that continue to employ the same “sectarian” terminology to exclude religious education from generally available public benefits.

II. Massachusetts Illustrates the Broader Blaine Movement.

A review of the history of anti-Catholic and anti-immigration in Massachusetts illuminates the broader movement that shaped many Blaine Amendments. Massachusetts provides a particularly useful example of the broader movement because anti-Catholic political forces were active in the Commonwealth even before the federal Blaine Amendment was proposed.

Massachusetts opened its first public school in 1837, but anti-Catholic sentiment was a powerful and sometimes violent force in the Bay State. “An angry Boston mob burned down the Ursuline Convent in 1834 because Catholics had protested Bible reading and prayer recitals in public schools.” Viteritti, *supra*,

at 667.

In 1854, the Massachusetts legislature fell under the control of the Know-Nothing Party, originally known as the "American Party". See DeForrest, *supra*, at 562. The Party's chief goal was to prevent the growth and prosperity of the large Catholic immigrant population. To that end, the Know-Nothings established the Nunnery Committee to investigate nuns who they believed to be holding young girls in convent dungeons. They demonstrated bias against certain immigrant groups by dismissing state workers of Irish descent, favored Protestants by requiring the daily reading of the Protestant Bible in public schools, and discriminated against Catholics by barring them from holding public office. See Carol Gerwin, *The Anti-Aid Amendment*, CommonWealth Beacon (Jan. 1, 1999), <https://commonwealthbeacon.org/uncategorized/the-antiaid-amendment/>.

Their most significant legislative victory was Article XVIII, Section 2 of the Massachusetts Constitution. Nicknamed the "Anti-Aid Amendment", it was first adopted in 1854. The Amendment specifically prohibited the use of public funds for religious schools other than those "conducted according to the law" (Mass. Const. amend. art. XVIII, as amended by amend. arts. XLVI & CIII). Protestant schools benefited from this provision because they were generally viewed as properly conducted and locally controlled, rather than controlled by the Catholic Church. Their goal was clear: they wanted to remove Catholic education, not Protestant education.

Massachusetts Catholics came to view the existing prohibition as a permanent disadvantage: even a later victory in securing public funding would leave them struggling to catch up to schools that had received decades of public support. Accordingly, they proposed and supported a new amendment in 1917 that extended the ban to all religious schools and institutions. Voters passed it with a margin of 61 to 39 percent. Gerwin, *supra*. Though the 1917 amendment might appear to be a neutral, evenhanded measure, it is better understood as Catholics' pragmatic response to decades of discrimination: a uniform ban was preferable to one that, in practice, singled them out.

Massachusetts therefore illustrates the tension at the center of the nineteenth-century “sectarian” debate: public institutions could incorporate religious practices associated with the dominant Protestant tradition while characterizing Catholic education as impermissibly sectarian.

The historical lesson is not that every later application of an anti-aid provision necessarily retains the motivations of its original proponents. Indeed, the anti-Catholic bias of the 19th century has evolved into a more generalized anti-religious bias, excluding all religious participants from generally available educational benefits. Lower courts continue to rely on Massachusetts’ Blaine Amendment to constrain families of all faiths from exercising their fundamental right to enroll their children in private religious schools. See, e.g., *Hellman v. Massachusetts*

Dep't of Elementary & Secondary Educ., 171 F.4th 69, 84-85 (1st Cir. 2026), petition for cert. filed Jul. 20, 2026 (No. 26-97); *Wirzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005); *Bloom v. Sch. Comm. of Springfield*, 376 Mass. 35, 379 N.E.2d 578 (1978).

III. California's Blaine Amendment Reflects the Same National Pattern.

Turning now to the California constitutional provision at issue in the present case, California adopted its own constitutional restriction on public support for religious education in the Constitution of 1879. Article IX, section 8 of the California Constitution provides: “No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools.” Cal. Const. art. IX, § 8.

The provision emerged during the same period in which states across the country adopted constitutional restrictions on public support for religious schools. California’s provision is particularly significant because it uses the same terminology that characterized the broader Blaine movement: “sectarian” and “denominational.” The California provision also reflects the broader national pattern in which states sought to restrict public support for religious education while distinguishing religious education from the public-school system.

The historical evidence concerning California therefore reinforces, rather than replaces, the history

recognized by this Court in *Espinoza*. California’s “sectarian” restriction should not be regarded as an isolated state-law provision unrelated to the national movement against publicly supported Catholic education.

The provision’s historical origins also help explain the constitutional problem presented here. California is not merely declining to establish a religious school. It is using a provision directed at so-called “sectarian” education to deny all religious families access to an educational benefit otherwise made available through the State’s public-school system. That application violates the constitutional principles recognized in *Trinity Lutheran*, *Espinoza*, and *Carson*.

IV. This Court Has Already Recognized the Constitutional Problems with Blaine Amendments.

The Supreme Court has repeatedly held that the Free Exercise Clause prohibits States from excluding religious organizations from generally available public benefits solely because of their religious character or because the benefit would be used for religious purposes. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458–63 (2017); *Espinoza v. Montana Department of Revenue*, 591 U.S. 464, 474–87 (2020); *Carson v. Makin*, 596 U.S. 767, 780–90 (2022).

In *Trinity Lutheran*, Missouri made grants available to nonprofit organizations for the

installation of rubberized playground surfaces excluding organizations controlled by churches. 582 U.S. at 454–56. The Court held that the exclusion imposed a penalty on the exercise of religion because the State had conditioned eligibility for a generally available public benefit on the recipient's religious character. *Id.* at 462–63. “The State has pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character. Under our precedents, that goes too far. The Department's policy violates the Free Exercise Clause.” *Id.* at 466.

Three years later, *Espinoza* applied the same principle to education funding. Montana created a tax-credit scholarship program that allowed individuals to receive tax credits for contributions to organizations providing scholarships for private education. 591 U.S. at 467. Montana, however, excluded religious schools from the program. *Id.* This Court held that the exclusion violated the Free Exercise Clause because the State had disqualified religious schools from a generally available public benefit. “A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.” *Id.* at 87.

The Court's decision in *Carson* further confirmed that States may not exclude religious schools from educational benefits merely because those schools provide religious instruction. 596 U.S. at 780–781. Maine provided tuition assistance to students in school districts that did not operate a

secondary school but prohibited students from using that assistance at religious schools. *Id.* at 771. The Court held that Maine's restriction violated the Free Exercise Clause. "A State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise." *Id.* at 781.

Together, *Trinity Lutheran*, *Espinoza*, and *Carson* establish that a State cannot create an otherwise generally available public benefit and then make religious status or religious exercise a disqualifying condition.

That is precisely the effect of California's independent-study program. California provides educational resources through its public-school system to students participating in independent study. The program permits substantial parental participation in the education of children, including the selection of curricular materials. Yet California excludes religious curricula because they contain "sectarian or denominational doctrine."

The Ninth Circuit nevertheless concluded that California could exclude religious instruction because the independent-study program is part of the public-school system. *Woolard v. Thurmond*, 152 F.4th 1050, 1057–62 (9th Cir. 2025), amended Mar. 23, 2026. That distinction does not resolve the constitutional question under this Court's precedents. The constitutional inquiry must consider the nature of the benefit and the reason for the exclusion. California

cannot evade *Trinity Lutheran*, *Espinoza*, and *Carson* simply by re-characterizing home-schooling by parents as part of “public education” just because the parents can obtain curricular materials from a public school.

The Ninth Circuit's decision therefore permits California to do indirectly what the Free Exercise Clause prohibits it from doing directly: provide an educational benefit to families while excluding them from that benefit because they seek to exercise religion through their children's education.

The Court's recent decision in *Mahmoud v. Taylor*, 606 U.S. 522 (2025), further demonstrates the constitutional importance of the educational context. Mahmoud recognized that parents' religious exercise may include directing the religious upbringing and education of their children. *Id.* at 535–60. That principle reinforces the conclusion that California cannot treat religiously motivated parental educational choices as constitutionally irrelevant. The question presented is therefore not whether California must create a public program supporting religious education. It is whether, having created a generally available educational program, California may exclude religious participants from an otherwise available benefit because their educational choices are religious.

Under *Trinity Lutheran*, *Espinoza*, and *Carson*, it may not. The Ninth Circuit's decision therefore conflicts with this Court's established Free Exercise jurisprudence and warrants review.

CONCLUSION

The Blaine-era origins of “sectarian” exclusions expose the discriminatory pedigree of provisions used to bar religious education from public benefits. California’s reliance on such a provision to exclude religious curricula from its independent-study program impermissibly conditions an otherwise available educational benefit on religious status or exercise. Consistent with *Trinity Lutheran*, *Espinoza*, and *Carson* and in light of the parental religious-exercise interests recognized by this Court the petition should be granted and the decision below reversed.

Respectfully submitted,

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