22-1175

United States Court of Appeal
for the Fourth Circuit

BISHOP OF CHARLESTON, a Corporation Sole, d/b/a Roman Catholic Diocese of Charleston; Sole; SOUTH CAROLINA INDEPENDENT COLLEGES AND UNIVERSITIES, INC.,
Plaintiffs – Appellants,

v.

MARCIA ADAMS, in her official capacity as the Executive Director of the South Carolina Department of Administration; BRIAN GAINES, in his official capacity as budget director for the South Carolina Department of Administration; HENRY MCMASTER, in his official capacity as Governor of South Carolina,
Defendants – Appellees,

and

STATE OF SOUTH CAROLINA,
Intervenor/Defendant – Appellee.

On Appeal from the United States District Court
for the District of South Carolina

APPELLANTS' PRINCIPAL BRIEF

Daniel R. Suhr
Counsel of Record
Jeffrey D. Jennings
Liberty Justice Center
440 N Wells St Suite 200
Chicago, IL 60654
312-637-2280
dsuhr@libertyjusticecenter.org

Richard S. Dukes, Jr
Turner Padget Graham & Laney, P.A.
40 Calhoun Street, Suite 200
Charleston, SC 29401
843-577-1646
rdukes@turnerpadget.com

Attorneys for Plaintiffs-Appellants

DISCLOSURE STATEMENT

1. The full name of every party that the attorney represents in the case: Appellants Bishop of Charleston, a corporation sole, and South Carolina Independent Colleges & Universities, Inc. ("SCICU").

2. The name of all law firms whose partners or associates have appeared on behalf of the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this Court: the Liberty Justice Center and Turner Padget Graham & Laney P.A.

3. If the party or amicus is a corporation: Bishop of Charleston is a nonprofit, nonstock, religious corporation sole registered in the State of South Carolina. South Carolina Independent Colleges & Universities, Inc., is a nonprofit, nonstock corporation registered in the State of South Carolina. It is a trade association, but all of its members by rule must be non-profit institutions.

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this action pursuant to 28 U.S.C. § 1331, because it arises under the United States Constitution, and pursuant to 28 U.S.C. § 1343, because relief is sought under 42 U.S.C. § 1983. The District Court granted summary judgment disposing of all of Plaintiffs' claims, on January 7, 2022. J.A. 17 (D. Ct. Dkt. 110). The Court entered a memorandum opinion on February 10, 2022, and the clerk entered judgment on February 18. J.A. 17, 300, 330. (D. Ct. Dkt. 112 and 114). Plaintiffs filed a timely notice to appeal on February 4, 2022 (D. Ct. Dkt. 111). J.A. 298. This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

ISSUES FOR REVIEW

1. Did the district court err in granting summary judgment to Respondents based on a finding made without any evidentiary support that neither racial nor religious prejudice were "a motivating factor" in the adoption of the 1895 South Carolina Constitution's Blaine Amendment?
2. Did the district court err in granting summary judgment to Respondents based on a finding made without any evidentiary support that neither racial nor religious prejudice were "a motivating factor" in the adoption of the 1972 revision of the Blaine Amendment in the South Carolina Constitution?
3. Did the district court err in denying Appellants' motion for summary judgment that South Carolina's Blaine Amendment violates the First and Fourteenth Amendments to the United States Constitution?
4. Did the district court err in finding that Governor McMaster's discretion over certain funds insulates them from judicial review when he has an announced policy of exercising his discretion in an unconstitutional manner?

PROCEDURAL BACKGROUND

Congress has adopted a trio of laws—the Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. No. 116-136); Coronavirus Response and Relief Supplemental Appropriations (CRRSA) Act of 2021 (Pub. L. No. 116-260); and American Rescue Plan Act (ARPA) of 2021 (Pub. L. No. 117-2)—all of which provide substantial federal funding to the states to deal with the effects of the COVID-19 pandemic. The CARES Act included a program called the Governors Emergency Education Relief (GEER) fund, which provided virtually unrestricted appropriations to every state's governor to use in his or her discretion to deal with the impact of the pandemic on students. J.A. 304-05 (D. Ct. Dkt. 112 at 5-6).

In July 2020, South Carolina Governor Henry McMaster announced his intention to use his GEER funds for two purposes: to create a $32 million scholarship program for low-income families to access in-person education at independent and religious K-12 schools (the SAFE Grants); and, to provide technology upgrades to South Carolina's historically black colleges and universities, five of whom are members of Appellant South Carolina Independent Colleges & Universities, Inc. (SCICU). J.A. 304-05

(D. Ct. Dkt. 112 at 5-6); *see also* J.A 41 (D. Ct. Dkt. 34 at 3). The six non-public SCICU schools were collectively granted $1.6 million in GEER funds. J.A 41 (D. Ct. Dkt. 34 at 3).

Separately, but contemporaneously, the South Carolina General Assembly passed Act 154, allocating CARES Act funds entrusted to the state legislature. 2020 S.C. Act No. 154. This bill included a $25 million in funds for COVID-19 relief for nonprofit organizations. J.A. 306 (D. Ct. Dkt. 112 at 7). It also included $115 million dollars for public and independent colleges and universities, among other applicants. J.A. 307-08 (D. Ct. Dkt. 112 at 7-8).

A state lawsuit was almost immediately filed by opponents of the Governor's SAFE Grants. They based their challenge on the education article of South Carolina's Constitution, which provides in relevant part that "[n]o money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution." S.C. Const. art. XI, § 4. The South Carolina Supreme Court interpreted the phrase "public funds" to cover federal funds when they enter the state treasury.

Adams v. McMaster, 432 S.C. 225, 238, 851 S.E.2d 703, 710 (2020). Thus, that court struck down the SAFE program. *Id.*

Subsequently, the Commissioner of Administration withheld payments of the Act 154 funds pursuant to the *Adams* decision. J.A. 307 (D. Ct. Dkt. 112 at 8). Similarly, the Governor withdrew an award of over $1 million in GEER funds to the six nonpublic historically black colleges and universities in South Carolina. *See* J.A. 305 (D. Ct. Dkt. 112 at 6). The 33 Catholic schools owned by the Bishop of Charleston were disqualified from the nonprofit relief fund, even as churches and faith-based social-services agencies received substantial grants and other financial aid. D. Ct. Dkt. 73-1 at 3.

Plaintiffs filed this lawsuit on April 14, 2021, alleging that the South Carolina constitutional provision at issue in *Adams v. McMaster*, art. XI, § 4, itself violated the federal constitution's First and Fourteenth Amendments because religious and racial prejudice motivated it. The Plaintiffs sought a preliminary injunction before the deadline for the distribution of the GEER I funds, which the district court denied. J.A. 39 (D. Ct. Dkt. 34). The court acknowledged "[n]o reasonable person with an enlightened mind would attempt to defend the racially insidious motives

of Benjamin Ryan 'Pitchfork Ben' Tillman." J.A. 48 (*Id.* at 10). And the Court further acknowledged "the contemporaneous anti-immigrant, anti-Catholic campaign of U.S. Congressman James G. Blaine and the American Protective Association offend[s] all well-reasoned standards of decency, tolerance, and fairness." *Id.* Yet the Court concluded it would be "premature to apply the *Arlington Heights* analysis to invalidate South Carolina's no-aid provision on the current record." J.A. 49 (*Id.* at 11).

Plaintiffs filed an amended complaint on April 26, 2022, to bring into the case's ambit GEER II, a second round of funding for governors to distribute included in CRRSA. J.A. 306 (D. Ct. Dkt. 112 at 7). The *Adams v. McMaster* decision barred the Catholic schools and SCICU universities from accessing this additional $21 million in aid. *Id.*

Charged by the district court to provide a well-developed record to justify their claims, Plaintiffs retained two expert witnesses: Professor Charles Glenn of Boston University, an authority on racial and religious education in the postbellum era; and Professor Blease Cole Graham, who literally wrote the book on the history of the South Carolina Constitution. These professors authored reports as required under Federal Rule of Civil Procedure 26(b)(2)(B). Together, Professors Glenn and Graham

incorporated dozens of learned treatises, scholarly publications, and original source documents as the bases for their learned opinions, all of which are in the record. J.A. 66 and 87 (D. Ct. Dkt. 73-2 (Glenn Report) and 73-3 (Graham Report)).

The Government Defendants did not designate any expert witness and did not introduce any Rule 26(b)(2)(B) report and did not use an expert testimony or opinions that were admissible under the Federal Rules of Evidence.

Pursuant to an agreed briefing schedule, the parties filed cross-motions for summary judgment. The Plaintiffs also advanced a motion to strike the State of South Carolina's brief as riddled with inadmissible hearsay historical evidence from outside the record, while the Defendants moved to disqualify Dr. Glenn as an expert. J.A. 16 (D. Ct. Dkt. 97). The District Court heard oral argument on December 17, 2021, and invited the parties to submit proposed opinions and orders for the Court's consideration by January 5, 2022. J.A. 17 (D. Ct. Dkt. 108). In their proposed opinion, the State functionally withdrew their *Daubert*

challenge to Dr. Glenn's participation by calling it moot and allowing his opinions and evidence into the record without objection.[1]

The District Court, issued a text order granting summary judgment to the Defendants on January 7, 2022. J.A. 17 (D. Ct. Dkt. 110). The Court subsequently filed a full opinion and order on February 10, 2022 (J.A. 18 (D. Ct. Dkt. 112)), and the clerk entered judgment on February 18, 2022. J.A. 18 (D. Ct. Dkt. 114). This appeal was timely filed on February 4, 2022. J.A. 18 (D. Ct. Dkt. 111).

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*, applying the same standard that the district court was required to apply. To succeed, the movant (in this case, the State Defendants) must show there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. This Court must construe the evidence in the light most favorable to the non-moving party, in this instance the Plaintiffs. *Perdue v. Sanofi-Aventis U.S., LLC*, 999 F.3d 954, 958 (4th Cir. 2021). Where the district court applies an incorrect legal

[1] The State Defendants' submissions were made via email and are not on the District Court docket. The Plaintiffs' submissions are at J.A. 17 (D. Ct. Dkt. 109).

standard on summary judgment, it must be reversed. *Sempowich v. Tactile Sys. Tech., Inc.*, 19 F.4th 643, 647 (4th Cir. 2021).

SUMMARY OF THE ARGUMENT

The district court erred in sustaining the constitutionality of South Carolina's version of the morally and legally abhorrent Blaine Amendments. A Blaine Amendment is traditionally associated with the virulent anti-Catholicism of the late 1800s. "The [proposed federal] Blaine Amendment was born of bigotry and arose at a time of pervasive hostility to the Catholic Church and to Catholics in general; many of its state counterparts have a similarly shameful pedigree." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2259 (2020) (cleaned up).

South Carolina's amendment, like those in many states, is cleverly worded to apply to all private schools, religious and secular, while the Montana amendment at issue in *Espinoza* applies only to sectarian schools. (*Compare* Mont. Const., art. X, § 6(1) *with* S.C. Const. art. XI, § 4). Although they have a slight difference in wording, the Montana Blaine Amendment and the South Carolina provisions being challenged here are

strikingly similar, and carry with them similar constitutional problems. Adopted into new state constitutions written around the same time (Montana, 1889; South Carolina, 1895) and revised around the same time (Montana, 1972; South Carolina, 1972), both are among the state counterparts to the federal Blaine Amendment with "a similarly shameful pedigree." And this shameful pedigree—this deep-seated prejudice against Catholics that motivated each amendment's adoption, renders both unconstitutional, because laws which are facially neutral but were motivated by religious animus "are just as abhorrent, and just as unconstitutional, as laws that expressly discriminate . . ." *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 220 (4th Cir. 2016). Indeed, South Carolina's has a more shameful pedigree than Montana's because it embodies a second prejudice: racist hatred against the education of former slaves in the post-Reconstruction South.

The district court erred in granting summary judgment to the State when the State introduced no expert witness to support its theory of the history or to rebut the Plaintiffs' experts, and it construed every fact in the light most favorable to the Defendants. The district court further erred in denying summary judgment to the Plaintiffs, who put forward

two expert witnesses who convincingly demonstrated that racial and religious animus were at least *a* motivation for South Carolina's Blaine Amendment. The district court further misapplied and misconstrued this Court's standards for judging *Arlington Heights* claims in doing so. Instead, the district court adopted the State's flawed view of the *Arlington Heights* test and relied on the State's extra-record theory of the history without a proper evidentiary foundation. For these reasons, it should be reversed and this Court should find Article XI, § 4 to be unconstitutional.

ARGUMENT

I. The district court erred by artificially elevating the burden on Plaintiffs in contravention of binding precedent.

Plaintiffs had "the burden of showing that racial [or religious] discrimination was a substantial or 'motivating' factor behind enactment of the law.'" *N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 302 (4th Cir. 2020)). Plaintiffs "need not show that discriminatory purpose was the 'sole' or even a 'primary' motive for the legislation, just that it was a motivating factor." *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 220 (4th Cir. 2016) (emphasis original).

In order to determine whether racial or religious animus was *a* motivating factor behind a law, courts look at four familiar factors: "(1) historical background; (2) the specific sequence of events leading to the law's enactment, including any departures from the normal legislative process; (3) the law's legislative history; and (4) whether the law 'bears more heavily on one race [or religion] than another.'" *Raymond*, 981 F.3d at 303 (citing and quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-69 (1977)). These are "a nonexhaustive list of factors to consider," *McCrory*, 831 F.3d at 220, "not exclusive or mandatory but merely a framework within which a court conducts its analysis." *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 580 (2d Cir. 2003).

Here, Plaintiffs convincingly demonstrated that the historical background, events leading to the enactment, legislative history, and impact of the law all reinforce what numerous courts have recognized before in other states: racial and religious prejudice motivated the South Carolina Blaine Amendment, period.[2] The record is bereft of any admissible evidence to contradict that.

[2] The Court should also be aware of anti-immigrant animus. *Ariz. Dream Act Coal. v.*

Plaintiffs proved this through two expert witnesses, Dr. Charles Glenn of Boston University and Dr. Blease Graham of Texas A&M. Dr. Glenn's report drew on his two relevant books: *African American/Afro-Canadian Schooling: From the Colonial Period to the Present* (2011) and *The American Model of State and School: An Historical Inquiry* (2012). Dr. Graham's report included an appendix referencing 44 additional articles or original sources and three books beyond the dozens directly cited in his report.

The State, by contrast, produced no expert witness, filed no expert report, presented no testimony, and had no materials introduced into the record through such a report or testimony. *See generally* Fed. R. Evid. 702 & Fed. R. Civ. Pro. 26(b)(2)(B). Thus, the record before the district court was convincingly one-sided: all of the record evidence supported the Plaintiffs' position.

Because the record is bereft of even a shred of evidence supporting the State's position—and by extension the district court's factual findings in support of entering judgment as a matter of law to the State—and because the record clearly establishes that Article XI, § 4 was born of

Brewer, 855 F.3d 957, 970 (9th Cir. 2017).

racial and religious bigotry and hostility, the district court's judgment should be reversed and this court should hold that South Carolina's Blaine Amendment violates the federal constitution.

II. The district court erred in finding the that racial and religious prejudice were not at least a motivation behind the 1895 Blaine Amendment.

In *McCrory*, this Court began its analysis of a 2013 voting law by looking at the state's history, from slavery through Jim Crow. "Examination of North Carolina's history of race discrimination and recent patterns of official discrimination, combined with the racial polarization of politics in the state, seems particularly relevant in this inquiry. The district court erred in ignoring or minimizing these facts." 831 F.3d at 223.

The district court in this case made the exact same error. The Plaintiffs started their narrative "in 1619, when the first slaves came to America's shores." D. Ct. Dkt. 73-1 at 11. They traced religious and racial prejudice through the South Carolina Constitutions of 1697, 1776, and 1778, which discriminated against Catholics and legalized slavery. *Id.*

They traced the story forward to 1895, when the current constitution of South Carolina was drafted. That 1895 Constitution included this provision:

> The property or credit of the State of South Carolina, or of any County, city, town, township, school district, or other subdivision of the said State, or any public money, from whatever source derived, shall not, by gift, donation, loan, contract, appropriation, or otherwise, be used, directly or indirectly, in aid or maintenance of any college, school, hospital, orphan house, or other institution, society or organization, of whatever kind, which is wholly or in part under the direction or control of any church or of any religious or sectarian denomination, society or organization.

S.C. Const. art. XI, § 9 (1895). The current provision is a direct descendent of this Blaine Amendment. But this Court need not take Plaintiffs' word for it: a South Carolina Attorney General opinion said the same thing in 2018.[3]

[3] Though the Attorney General now says this is not a Blaine Amendment, this position runs directly counter to his prior position, when he opined "that this section is often referred to as 'the Blaine Amendment.'" Op. S.C. Att'y. Gen., 2018 S.C. AG LEXIS 4, n.1 (Jan. 18, 2018) (citing Op. S.C. Att'y. Gen., 2011 WL 1444725 (Mar. 21, 2011)). His opinion then goes on to quote from Justice Thomas's plurality opinion in *Mitchell*: "Consideration of the [federal] amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general. . ." *Id.* (quoting 530 U.S. at 828). The Attorney General then quoted a law review article noting "similar efforts at the state level were successful as alarm grew over efforts by religious interests to secure state funding for their schools." *Id.* (quoting Frank R. Kemerer, *State Constitutions and School Vouchers*, 120 Ed. Law Rep. 1, 6, n.21 (1997)).

A. Plaintiffs proved anti-Catholic animus was a motive behind the 1895 Blaine Amendment, and the district court erred in finding the opposite.

The district court acknowledged that the anti-Catholic Blaine movement was prevalent and powerful in other states, but concluded that South Carolina had bucked this national trend such that this provision was not a Blaine Amendment. J.A. 322-23 (D. Ct. Dkt. 112 at 23-24). But the district court then erroneously concluded that "Dr. Graham, Plaintiffs' own expert, conceded that the national Blaine Amendment movement was not a significant factor in South Carolina" because he had said in his deposition that "Catholics did not immigrate into South Carolina in large numbers." *Id*. This misstates Dr. Graham's opinions. In his report, Dr. Graham says, "The 1895 Constitution also included South Carolina's original Blaine Amendment. The Blaine Amendment reflected a national effort to prohibit allocation of state funds to Catholic institutions." J.A. 91 (Report at 5). Later in his report, he explained how the low number of Roman Catholics in South Carolina led to the adoption of the Amendment. He states forthrightly, "South Carolina did not experience a large influx of Catholics." J.A. 116 (Report at 30). He then explains, "From a dominant Protestant perspective, there was room for

anti-Catholic sentiment among the population. Practically, Catholics were small enough in number and political influence for statewide political leaders to ignore, tolerate, or berate." *Id.* In other words, Catholics were a convenient political foil for those looking to stir prejudicial feelings among their base: they could raise the specter of a coming onslaught of Catholics without actually losing any votes among Catholics because there were very few present in the first place.

Additionally, the district court erred when it found "Plaintiffs have offered no evidence that any anti-Catholic sentiment motivated the 1895 provision. The similarity in language between South Carolina's 1895 provision and Blaine Amendments in other States is not enough to make up for Plaintiffs' failure to demonstrate the existence of pervasive anti-Catholic animus in South Carolina, much less Plaintiffs' failure to establish any corresponding discriminatory intent . . ." J.A. 323 (D. Ct. Dkt. 112 at 24). This is wrong for two reasons.

First, the district court's acknowledgement that the South Carolina provision is similarly worded is strong evidence in favor of finding this is a Blaine Amendment. The reference to "sectarian denominations" was

used at a time when "it was an open secret that 'sectarian' was code for 'Catholic.'" *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality).

Second, Dr. Graham's report directly faulted "anti-Catholicism embedded in the South Carolina constitution since the inclusion of the Blaine Amendment in 1895," J.A. 88 (Report at 2). In fact, the Plaintiffs provided two additional reasons connecting the 1895 provision to the national anti-Catholic Blaine movement. The national organization pushing the Blaine movement lobbied the Convention delegates who were drafting the South Carolina Constitution. The convention journal records that on September 21, 1895, the convention accepted a communication from "The National League for the Protection of American Institutions." [4] Prof. James Underwood explains the Convention was the target of "the lobbying efforts" of the League, "which contacted state conventions and legislatures throughout the country in an effort to enlist support for insertion in the federal and state constitutions of an amendment forbidding the use of federal or state funds to support organizations, especially schools, controlled wholly or in

[4] *Constitutional Convention of 1895, Journal of the Constitutional Convention of the State of South Carolina* 205 (1895). *Accord* "Clearing the Decks," The State (Sept. 22, 1895) (reporting the communique). *See* J.A. 140 (Graham Report at 54) (including journal and article among sources in appendix).

part by religious denominations." [5] The National League for the Protection of American Institutions was "anti-Catholic and an extension of the American Protective Association (APA)—a significant anti-Catholic group at the time."[6]

Not only that, Plaintiffs showed widespread anti-Catholic, anti-immigrant sentiment in South Carolina in this era, with letters to the editor like this one:

> This movement means, we repeat, Roman Catholic immigrants for the South. It should die still born. The people of the South should declare themselves against it in unmistakable terms . . . A Roman Catholic peasantry in our society would be the entering wedge to Catholic dominion . . . It means antagonism to everything distinctively American.[7]

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[5] James Underwood, *The Constitution of South Carolina, Vol. 3: Church and State, Morality and Free Expression* 196 n.1 (1992). *Accord* Amasa M. Eaton, *The late constitutional convention and constitution of South Carolina*, 31 American L. Rev. 198, 206-207 (1897) (similar). *See* J.A. 140 (Graham Report at 54) (including Underwood and Eaton among sources in appendix).

[6] Colin Gunstream, *Thesis: Home Rule or Rome Rule? The Fight in Congress to Prohibit Funding for Indian Sectarian Schools and Its Effects on Montana*, at 4 (2015), https://scholars.carroll.edu/handle/20.500.12647/3689?show=full. *See* J.A. 140 (Graham Report at 54) (including Gunstream among sources in appendix). *See also* J.A. 81 (Glenn Report ¶ 64).

[7] *A Denominational View*, Yorkville Enquirer, May 9, 1888. *See* J.A. 141 (Graham Report at 55) (including report among sources in appendix).

Other papers in South Carolina echoed this view.[8] *See Espinoza*, 140 S. Ct. at 2268 (Alito, J., concurring) ("[T]he [federal Blaine] amendment was prompted by virulent prejudice against immigrants, particularly Catholic immigrants."). These views expressed in newspaper editorials were matched by grassroots activism.

Plaintiffs showed that the APA was active in South Carolina politics in 1895,[9] but the APA looked moderate next to the "Junior Order of United American Mechanics" South Carolina Chapter.[10] One order officer, Walther Oeland, called the Catholic Church "America's most dangerous and deadly foe." He said the church was "purchasing thousands upon thousands of stacks of arms and storing them in their Churches, Convents and Cathedrals" and "arranging and drilling a military body of 700,000 men." He promised to work until "the gates of Castle Garden are locked against this worse than trash from other shores

[8] *See, e.g., The Immigration Convention*, The Fairfield News and Herald, May 30, 1888; *Immigration*, The Newberry Herald and News, May 31, 1888. *See* J.A. 141 (Graham Report at 55) (including report among sources in appendix).
[9] *Religion and Politics*, The Darlington News, November 14, 1895. *See* J.A. 141 (Graham Report at 55) (including article among sources in appendix).
[10] The Order had among its objects "to maintain the public school system, prevent sectarian interference with the same, and uphold the reading of the Holy Bible in the schools." *Nat'l Council of Junior Order of U. A. M. v. State Council of Va., etc.*, 203 U.S. 151, 158 (1906).

made so by the rottenness of the institutions from whence they come, and the free school in every city, town and hamlet, the Bible firmly planted within, and Old Glory is floating in the breeze from mountain to seashore."[11]

Other South Carolina editorialists singled out the dangers of Catholic schools: "Roman Catholic parochial schools are avowedly intended to utterly destroy the American public school system" (in an article entitled *Romish Schools*).[12] Another wrote vehemently: "It is wrong to use Protestants' money to help the Catholic Church, and the people will not submit."[13] So the people found a solution: bar any taxpayer funds from going to the Catholic Church by adopting a Blaine Amendment.

All of this was before the district court, which nevertheless concluded that "Plaintiffs have offered no evidence that any anti-Catholic sentiment motivated the 1895 provision." J.A. 323 (D. Ct. Dkt. 112 at 24).

To the extent the district court was looking for a direct statement in the official convention journal connecting the provision to anti-Catholic

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[11] Letter to the Editor, *Gaffney Ledger*, August 20, 1896. *See* J.A. 141 (Graham Report at 55) (including report among sources in appendix).
[12] The Abbeville Press and Banner, September 19, 1888. *See* J.A. 141 (Graham Report at 55) (including report among sources in appendix).
[13] *That Catholic Scheme*, The Aiken Recorder, August 14, 1888. *See* J.A. 141 (Graham Report at 55) (including report among sources in appendix).

sentiment, it required too much. "[O]fficials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial [or religious] minority." *Smith v. Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982). Thus, "'discriminatory intent *need not be proved by direct evidence*.'" *La Union del Pueblo Entero v. Ross*, 771 F. App'x 323, 324-25 (4th Cir. 2019) (Wynn, J., concurring) (quoting *Rogers v. Lodge*, 458 U.S. 613, 618 (1982)) (emphasis by Judge Wynn)). Otherwise "[t]o require direct evidence of intent would essentially give legislatures free reign to racially discriminate so long as they do not overtly state discrimination as their purpose and so long as they proffer a seemingly neutral reason for their actions. This approach would ignore the reality that neutral reasons can and do mask racial intent, a fact we have recognized in other contexts that allow for circumstantial evidence." *Veasey v. Abbott*, 830 F.3d 216, 235-36 (5th Cir. 2016) (en banc).

The reams of contextual evidence assembled by Plaintiffs, when reviewed and synthesized by the conclusions of expert witnesses, is sufficient. *See McCrory*, 831 F.3d at 220 ("Discriminatory purpose may often be inferred from the totality of the relevant facts" and courts must

decide based on "such circumstantial and direct evidence of intent as may be available." (cleaned up)). When a provision is worded the same as provisions found elsewhere to have been discriminatory, arises at the same time as these discriminatory cognates, is in line with the national trend, is pushed by the same people, and fits historical evidence of the politics of the state, as certified by expert witnesses, a court should comfortably conclude Plaintiffs have proven discriminatory purpose.

B. The district court erred in concluding that racial animus did not motivate the 1895 Amendment.

If this anti-Catholic history were the full extent of what motivated the Blaine Amendment in South Carolina, it would be a scandal and a shame that would clearly flunk the *Arlington Heights* test. But sadly that is not so, because South Carolina's Blaine Amendment stemmed from a second, simultaneous prejudice: a deep-seated racism against recently freed slaves and the religious institutions that served and educated them.

The district court again dismissed Plaintiffs' argument and the evidence that supported it in a bare paragraph, saying "Plaintiffs fare no better by claiming the 1895 provision was motivated by race." J.A. 323 (D. Ct. Dkt. 112 at 24). "The Court finds that the evidence offered by Plaintiffs in an effort to connect racial prejudice with the 1895 provision

is tenuous, as Plaintiffs point to no apparent link between racial motivations and the 1895 provision . . . " *Id.* Again the district court acts as though the Plaintiffs had to have a silver bullet, a quote from the sponsor of the amendment in the convention journal saying, "We must adopt this provision to stop the negroes from learning to read." But that is not the test, has never been the test, and it is wrong to dismiss all of the contextual evidence assembled by Plaintiffs as "tenuous."

Let's start with the basics: "The South Carolina Constitutional Convention of 1895 was a leader in the widespread movement to disenfranchise Negroes." *South Carolina v. Katzenbach*, 383 U.S. 301, 310 n.9 (1966).[14] One key tool for that disenfranchisement was a literacy test for voting.[15] And the biggest threat to a literacy test to stop newly freed but illiterate ex-slaves from voting were schools teaching black ex-slaves to read and rise in society. As Professor Glenn says in his expert report, "It was surely no accident, for example, that the provision for such a literacy requirement in the South Carolina Constitution of 1895 (Article II, § 4(d)) was accompanied by another provision (Article XI, § 9) blocking

[14] *See* J.A. 91 (Graham Report at 5).
[15] *Id.* at 20.

public funding for the faith-based schools that had done so much to promote literacy among Black South Carolinians." J.A. 82 (Report at ¶ 67). And Dr. Graham similarly says, "The main intent [of the Amendment] was to limit public education for blacks. Lack of education, ignorance, and poverty are primary ways to subordinate a significant part of the overall population." J.A. 95 (Report at 9). This was done "to avoid educating . . . African-American youth in private schools by prohibiting state aid for private schools." *Id*. The two experts before the district court both convincingly demonstrated that the purpose of the provision was to prohibit any public funds going to private, religious schools that were educating newly freed slaves.

In the days following the Civil War, Catholics and Northern Protestant missionaries came in "a massive missionary effort;" "they sponsored missions, opened schools for freed slaves, and aided the general welfare of southern blacks."[16] Though these efforts often featured white teachers and funders, many were started and staffed by African-

[16] Laurie Maffly-Kipp, *African American Christianity, Pt. II: From the Civil War to the Great Migration, 1865-1920*, Nat. Humanities Center, http://nationalhumanitiescenter.org/tserve/nineteen/nkeyinfo/aarcwgm.htm. *See* J.A. 140 (Graham Report at 54) (including report among sources in appendix). *See also* J.A. 67-71, 73 (Glenn Report ¶¶ 9-13, 17-21, 31) (specific to colleges); J.A. 114 (Graham Report at 28 and n. 29).

Americans to serve their fellow believers.[17] In fact, in 1895, there were eight college-level institutions focused on African-American students—four still exist today (Allen, Benedict, Claflin, and Clinton), and four are defunct. All eight were religiously affiliated.[18] These independent religious colleges were founded "to prepare recently freed slaves to take their rightful places as fully trained and productive members of society."[19] Claflin University, for instance, taught not just technical trades but Greek and Latin, "furnish[ing] a grade of instruction almost equal to that of any white college in the State."[20]

These historically black schools and colleges constituted a direct threat to the white power structure's plans for maintaining the social subservience of African-Americans as a laboring lower class.[21] Senator

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[17] J.A. 69 (Glenn Report at ¶¶ 15-16).

[18] *See* Lewis K. McMillan, *Negro Higher Education in South Carolina* (1952). *See* J.A. 140 (Graham Report at 54) (including book among sources in appendix).

[19] Claflin University, *Panther STEPS: Students in Transition Engaged and Preparing for Success*, March 2011, www.claflin.edu/docs/default-source/planning-assessment/claflin-panther-steps-plan.pdf, at 3; *see also* S.C. Dep't of History & Archives, United States Department of Interior National Register of Historic Places Inventory—Nomination Form, at 4, http://www.nationalregister.sc.gov/MPS/MPS044.pdf. *See* J.A. 141 (Graham Report at 55) (including both articles among sources in appendix).

[20] Colyer Meriwether, *History of Higher Education in South Carolina* 124-25 (1888). *See* J.A. 141 (Graham Report at 55) (including book among sources in appendix).

[21] *See* J.A. 71-72 (Glenn at Report ¶¶ 22-23, 29) (reporting the number of black-serving schools burned down).

Benjamin Tillman, who managed the 1895 Convention, thought the state should "educate white males to be independent producers and patriarchs of households, women to be useful helpmates of their provider-husbands, and African Americans to contentedly labor without aspirations of social mobility."[22] At the state-controlled college for former slaves, the goal "was not intended to produce independent producers, but a subordinate underclass."[23] Tillman saw the future if he did not put a stop to these faith-based schools: "with Negroes constantly going to school, the increasing number of people who can read and write among the coloured race . . . will in time encroach upon our White men."[24]

The 1895 Constitution offered an opportunity for Tillman to further his vicious vision of a permanent African-American underclass by suppressing religious HBCUs.[25] He personally[26] wrote into the constitution a provision to "ensure the segregation of South Carolina's colleges and [to ensure] a state-controlled college would be free of the

[22] Kevin Krause, *A Different State of Mind: Ben Tillman and the Transformation of State Government in South Carolina, 1885-1895* (2014), at 58-59. *See* J.A. 140 (Graham Report at 54) (including book among sources in appendix).
[23] Krause, at 94.
[24] Quoted in J.A. 83 (Glenn Report at ¶ 75).
[25] Krause, at 97.
[26] *Convention Journal* at 581.

influence of northern religious denominations."[27] *See* S.C. Const. art. XI, § 8 (1895).[28]

Section 8 worked in conjunction with section 9, the Blaine Amendment, which ensured that only the Tillman-controlled public college (now S.C. State) would receive public support; the eight other historically black colleges existing at the time, all religiously affiliated, would not see another dime. Thus, the historical record shows the concerted, multi-year effort by Tillman and other whites in the ruling class to suppress educational opportunities for freed blacks, and the important role of the Blaine Amendment in cutting off public funds for any institution that would challenge Tillman's belief that African-Americans should only be trained for menial labor jobs.

C. The existence of a similar provision in the 1868 Constitution is no answer to Plaintiffs' theory.

The State did not introduce any expert testimony to counter any of this material. And the district court in its decision does not deal with any

[27] *National Register* at 6.

[28] "[T]he General Assembly shall, as soon as practicable, wholly separate Claflin College from Claflin University, and provide for a separate corps of professors and instructors therein, representation to be given to men and women of the negro race; and it shall be the Colored Normal, Industrial, Agricultural and Mechanical College of this State."

of what Plaintiffs introduced into the record. Instead, the district court limits its analysis to one counter fact that it believes disproves all of the above: "This type of provision first appeared in the 1868 Constitution. *See* S.C. Const. art. X, 5 (1868) ('No religious sect or sects shall have exclusive right to, or control of any part of the school funds of the State.')." Because the 1868 constitution was written in a Black/Republican-dominated convention, it supposedly absolves all racial motives behind the 1895 provision. This is hardly so.

The fact that Republicans wrote the 1868 Constitution does not exempt it from anti-Catholic bias. In fact, quite the opposite: the original champions of anti-Catholic, anti-immigrant prejudice in those post-Civil War days were the Republicans (indeed, Blaine himself was a Republican).[29] Whereas in the North, the Blaine Amendment was a partisan issue because many urban Catholics were Democrats, in the South it was a bipartisan issue because there were few Catholics and many on both sides of the aisle disliked the missionary schools.

Many in the African-American community opposed the missionary schools because Northern missionaries (often white) rather than native

[29] *See* J.A. 77-78, 81 (Glenn Report at ¶¶ 51-53. *See id.* at ¶¶ 50, 64).

African-Americans were employed as the teachers and they competed with African-American-controlled schools.[30] Moreover, the African-American community of the time was split between those who sought a traditional, full-scale education and those who sought a farm-labor focus for education (the Tuskegee model Booker T. Washington championed). Similarly, African-Americans may have seen Catholic immigrant workers as competition for menial-labor jobs (a sentiment perhaps shared by white Tillmanites, as Tillman was primarily a champion for working-class whites rather than the wealthier white class.)[31]

Indeed, the State acknowledged below that the 1895 convention drafted a "far more detailed provision" than the 1868 original, adopting it "in strengthened form." D. Ct. Dkt. 74-7 at 5, 7 (quoting Prof. Underwood and S.C. Op. Att'y Gen., 1969 WL 15557 (April 24, 1969)). Such a "strengthened" version is just further evidence of the 1895 Convention's conviction to prevent public funds from reaching religious schools.

[30] *See* J.A. 68-72 (Glenn Report at ¶¶ 11-25).
[31] J.A. 104 (Graham Report at 18).

In sum, the 1868 provision in no way undermines Plaintiffs' core theory: that for the white delegates who controlled the 1895 Convention, religious prejudice against Catholic immigrants and Northern missionaries and racial prejudice against the newly freed slaves the Northern missionaries sought to educate were at minimum "a motivation" for the Blaine provision.

D. The district court's alternative explanation directly conflicts with numerous U.S. Supreme Court cases.

The district court concludes, "This provision (as the State notes) was motivated by support for the State's fledgling public educational system, not prejudice." J.A. 323 (D. Ct. Dkt. 112 at 24). This is the siren song sung by all defenders of Blaine Amendments in cases past, and a wide majority of the justices has consistently rejected it. *See, e.g., Mitchell*, 530 U.S. at 828 (plurality) ("[H]ostility to aid to pervasively sectarian schools has a shameful pedigree"); *Zelman v. Simmons-Harris*, 536 U.S. 639, 720-21 (2002) (Breyer, J., dissenting) ("[A] movement . . . to make certain that government would not help pay for 'sectarian' (i.e., Catholic) schooling for children."); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2097 n.3 (2019) (Thomas, J., concurring); *Espinoza*, 140 S. Ct. at 2259 ("'[B]orn of bigotry' and 'arose at a time of pervasive hostility to the Catholic Church

and to Catholics in general'"); *id.* at 2268 (Alito, J., concurring) ("[P]rompted by virulent prejudice against immigrants, particularly Catholic immigrants."). This Court cannot ignore that the U.S. Supreme Court has consistently attributed these state no-aid provisions to anti-Catholic prejudice.

The district court was in clear error to adopt the State's revisionist explanation of South Carolina history, proffered without any expert witness to back it up. That revisionist history also directly contradicted the experts actually before the court, the supplemental material from those experts' reports quoted to the court, and the consistent conclusion of the U.S. Supreme Court.

Moreover, to say that South Carolinians in 1895 simply loved their public schools so much that they wanted to protect them from competition would not answer Plaintiffs' arguments. Public schools were Tillman's schools—racially segregated, and designed to perpetuate African-American subservience. To say that the motive in 1895 was to promote and protect public schools is to say that the motive in 1895 was to stop African-Americans from receiving a decent education.

The State forthrightly acknowledged this problem below, saying "racial motives played a major role, even in support for the public schools." D. Ct. Dkt. 74-7 at 22. Indeed, it quotes a historian's view that "the increase in public school funds had been brought about largely by arguments for white supremacy." *Id.* (quoting George Brown Tindall). The State reassures us, though, that this increased funding "brought some benefits to the Negro schools by a process of trickling down." *Id.* (still quoting Tindall). The district court erred by failing to emphatically reject any suggestion that white supremacy is acceptable as long as some funds eventually "trickle down" to racial minorities.

E. The district court's disparate impact analysis contravenes precedent.

Lastly, the district court made two errors as to disproportionate impact and the 1895 Convention.

First, and most fundamentally, it misstates the test for an *Arlington Heights* claim as requiring *both* proof of discriminatory intent *and* disproportionate impact. J.A. 318 (D. Ct. Dkt. 112 at 19) ("[C]ourts in this context have generally required plaintiffs to prove both intentional discrimination against an identifiable" group and an actual discriminatory effect on that group.") (cleaned up). This is wrong. To be

sure, "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." *Washington v. Davis*, 426 U.S. 229, 242 (1976); *see also Coal. for TJ v. Fairfax Cny. Sch. Bd.*, No. 22-1280, 2022 U.S. App. LEXIS 8682, at *23 (4th Cir. Mar. 31, 2022) (Rushing, J., dissenting). In fact, disproportionate impact is just one of several factors suggested in *Arlington Heights*, and this case is a good example of why. As Dr. Graham indicates in his report, Catholics were small in number in South Carolina in 1895. J.A. 116 (Report at 30). The Blaine Amendment was nevertheless motivated by anti-Catholic bias: because Catholics were small in number, they were easy to beat up on politically. And the goal, as indicated in the numerous press accounts quoted above, was to stop them from coming into the state and achieving critical mass.

Second, the district court is simply wrong when it opines that Plaintiffs "say essentially nothing about racial impact, and they devote few short sentences to religious impact." J.A. 320 (D. Ct. Dkt. 112 at 21). Dr. Graham reports that: "Religious denominations also founded African-American academies in the South. . . . In South Carolina alone, the Presbyterian Church U.S.A. established 25 schools. The Baptists founded

Bettis Academy in Trenton, S.C., in 1881. The Methodist Episcopal Church founded Mather Academy in Camden, S.C., in 1888. The African Methodist Episcopal Zion Church established Clinton Normal and Industrial Institute in Rock Hill. S.C. in 1896. Avery Institute in Charleston, S.C., was established by the [American Missionary Association] in 1865." J.A. 114 (Report at 28) (quoting J.T. Durham, "America's Other Private Schools," Jan/Feb, 2000, at 68-69). *See* J.A. 69 (Glenn Report ¶¶ 15, 17).

Plaintiffs below also established the disproportionate impact on Catholic schools: "A federal report in 1895 found that Catholic schools accounted for 80 percent of parochial school enrollment in South Carolina. . . . South Carolina had 877 such pupils in 1895, of which 697 were Roman Catholic." D. Ct. Dkt. 73-1 at 13 n.18.[32] Plaintiffs did convincingly demonstrate disproportionate impact.

F. The district court wrongly minimized the state's long history of racial and religious bias.

[32] *Citing* H.R. DOC. NO. 54-5, at 1664 (1895) (report by the U.S. Comm'r of Education). *See* J.A. 140 (Graham Report at 54) (listing report among sources in appendix).

Finally, the district court says with a wave of its hand that "the Court takes this history into account" before dismissing it all. But the court failed to address a basic legal question prompted by the 1895 provision: how to treat it in relation to the 1972 Amendment. Is it simply part of the general "historical background" of the 1972 amendment, and just one collection of evidence relevant to analyze one factor, or is it the "traceable root" of the 1972 amendment?

"Once it is determined that a particular policy was originally adopted for discriminatory reasons, the *Fordice* test inquires whether the current policy is 'traceable' to the original tainted policy, or is 'rooted' or has its 'antecedents' in that original policy." *Knight v. Alabama*, 14 F.3d 1534, 1550 (11th Cir. 1994). *See Trump v. Hawaii*, 138 S. Ct. 2392, 2439 (2018) (Sotomayor, J., dissenting) (quoting *Fordice*, 505 U. S. at 746-747 (Thomas, J., concurring)). Figuring out whether a provision has its "roots" or "antecedents" in a prior policy is a factual question, determined by asking whether the new policy represents a "later, distinct amendment," perhaps prompted by an "independent intervening event." *Wirzburger v. Galvin*, 412 F.3d 271, 285 (1st Cir. 2005); *Raymond*, 981

F.3d at 305; *Ramos v. Louisiana*, 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring).

In *Ramos v. Louisiana*, the Supreme Court considered a state constitutional provision that originated in its state constitutional convention of 1898, but the "constitutional convention of 1974 adopted a new, narrower rule, and its stated purpose was judicial efficiency, and [i]n that debate no mention was made of race." 140 S. Ct. at 1426 (Alito, J., dissenting). Yet even though the provision had been readopted, revised, and narrowed, Justice Sotomayor said that under her understanding of the equal-protection intent analysis, this was likely insufficient to satisfy equal protection. *Id.* at 1410 (Sotomayor, J., concurring). Instead the state must "truly grapple[] with the laws' sordid history in reenacting them." *Id.* Only "[w]here a law . . . is untethered to racial bias—and perhaps also where a legislature actually confronts a law's tawdry past in reenacting it—the new law may well be free of discriminatory taint." *Id.*

Later the same term, Justice Alito grappled with a Blaine Amendment in *Espinoza v. Montana*. There the original amendment of 1889 was readopted in 1972. Justice Alito says, "Under *Ramos*, it emphatically

does not matter whether Montana readopted the no-aid provision for benign reasons. The provision's 'uncomfortable past' must still be '[e]xamined.'" *Espinoza*, 140 S. Ct. at 2273 (Alito, J., concurring) (quoting *Ramos*, 140 S.Ct. at 1401 n.44). Justice Alito concluded that "the no-aid provision's terms keep it "[t]ethered" to its original "bias," and it is not clear at all that the State "actually confront[ed]" the provision's "tawdry past in reenacting it." *Id.* (quoting *Ramos*, 140 S.Ct. at 1410 (Sotomayor, J., concurring)). "[A]nd the discrimination in this case shows that the provision continues to have its originally intended effect." *Id.*

So too here. The 1972 Amendment is directly traceable to the 1895 Blaine provision. As will be shown below, at minimum the state did not confront the provision's tawdry past at the time. Rather, Dr. Graham said in his report: "the revised South Carolina Constitution's Article XI, Public Education, continues to deny direct public funding for individuals in independent and religious schools or universities. The incomplete revision maintains, even if latently, the distortions of racism and anti-Catholicism embedded in the South Carolina constitution since the inclusion of the Blaine Amendment in 1895." J.A. 88 (Report at 2). And

it continues to have the effect of denying SCICU's HBCUs and the Bishop's Catholic schools access to public funds.

III. The 1972 Amendment was also awash in segregationist attitudes, which aligned with anti-Catholic prejudice.

In 1966, the South Carolina General Assembly empaneled the Committee to Make a Study of the South Carolina Constitution of 1895, known as the West Committee after its chair and champion, Senator John C. West.[33] The Committee did its work for three years, and eventually recommended multiple amendments.[34] The education amendment was ushered through the legislature in the second of two packages of amendments to be sent through for approval in November 1972 and legislative ratification in 1973. The historical background, sequence of events, legislative history, and disproportionate impact all show race and religion were at least among the motivating factors behind the way the 1972 amendment was written.

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[33] *See* J.A. 94, 108 (Graham Report at 8, 22) ("In the course of its work, the study committee focused on each section of the 1895 document, painstakingly reviewed it, and made a specific evaluation to carry over or delete a section. If carried over, the report recommended needed revisions.").

[34] *See* Final report of the Committee to Make a Study of the South Carolina Constitution of 1895, to His Excellency the Governor and the General Assembly of the State of South Carolina ("West Committee Report") (1969). *See also* J.A. 140 (Graham Report at 54) (including report among sources in appendix).

The historical background starts in 1619 and carries through 1895, but the Tillman attitude towards race and religion in South Carolina did not end in 1895; it persisted over time, as demonstrated in Dr. Graham's report. J.A. 121-23 (Report at 35-37). As time went on, public rhetoric evolved from brutal, overt racism to a subtler segregation of "separate but equal." *Id.* And because the Catholics were seen as allies of the African-Americans, and out of residual anti-Catholic prejudice in itself, religious animus remained on the scene as well. These Segregationist and anti-Catholic attitudes still dominated in 1966-68. The Confederate-Calhoun and segregationist cause continued to rule South Carolina politics.

A. The West Committee was stacked with ardent racists.

The West Committee's membership reflected the white Democratic power structure that ran South Carolina from 1966 to 1969. Chairman West was a "moderately segregationist" politician whose racially moderate attitudes did not emerge until later in his career.[35]

The Governor's appointee on and secretary of the committee, William D. Workman, Jr., was an enthusiastic segregationist whose racial

[35] J.A. 97 (Graham Report at 11).

attitudes bled into his religious prejudices. In the early 1960s, Workman published *The Case for the South*, an extensive diatribe against integration. J.A. 102 (Graham Report at 16 n.15). According to Workman, "intelligent discrimination and natural segregation make up the very essence of good order. To remove them and to abolish all barriers which stand in the way of indiscriminate mingling of diverse groups would be to invite chaos."[36] This racist rhetoric reveals how Workman's thinking did not stray far from the prevailing attitudes at the 1895 convention.

Workman also embodied anti-Catholic views typical of his times in his book. He considered the South's cultural uniformity as a strength; at one point he asserts how "[a] contributing factor to the homogeneity of the South is the overwhelming prevalence of Protestantism in the region, save for the heavy Roman Catholic population of Louisiana."[37] He then contrasts this reality with the North, where "great numbers of Catholics" surged into the region via immigration and "banded together by religious and cultural affinities in virtual enclaves."[38] He later criticizes the Catholic Church for its stand in favor of integration as opposed to

[36] William D. Workman, Jr., *The Case for the South* 37 (1960). *See* J.A. 102 (Graham Report at 16, n. 15, and 55, incorporating the book into the record).
[37] Workman, *The Case for the South* 5.
[38] *Id.*

continued segregation.[39] In fact, Workman explained away prejudice against Catholics as the natural response of Southerners to their counter-cultural stance in favor of desegregation, saying they "invite retaliatory prejudice by their own criticism and condemnation of the South. The matter is not so much one of anti-Negro feeling 'spilling over' into other fields as a matter of Catholic, Jewish, and other organized groups engendering prejudice against themselves."[40]

The powerful Speaker of the State House, Solomon Blatt, Sr., served on both the West Committee and the earlier Gressette Committee to stop school desegregation. Dr. Graham lists him among the "[n]otable statewide leaders following in the Tillmanite tradition." J.A. 96 (Report at 10). Dr. Graham says Blatt "generally opposed urban interests, promoted racial segregation as long as [he] could, and opposed national civil rights policy changes along with spending on social development issues that may have benefitted the poor—both black and white." *Id.* at 48. In a revealing moment, a newspaper reported he shed tears on the House floor against a bill permitting school integration: "'You may want

[39] *Id.* at 101-102.
[40] *Id.* at 119-120.

a 16-year-old so-and-so to sit by your granddaughter' Mr. Blatt had shouted, 'but Sol Blatt will fight and die to prevent it from happening to his granddaughter.'" *Id.*

Another member was Senator Marion Gressette, chairman of the powerful Senate Judiciary Committee. Dr. Graham also listed Senator Gressette as among the "[n]otable statewide leaders following in the Tillmanite tradition." J.A. 96 (Report at 10). Senator Gressette also chaired the School Segregation Committee, which the General Assembly authorized "to prepare for, delay, and even stop implementation of federally mandated desegregation." *Id.* at 132 (Report at 46).

Other members shared similar views, even if they held less power. D. Ct. Dkt. 73-1 at 25-26. It should be no surprise, then, given this membership, that the West Committee took a decidedly racist view in modifying the state constitution.

B. The West Committee revised the Blaine Amendment to pave the way for elementary and high school segregation scholarships.

Among the provisions revised by the West Committee was the education article, including the Blaine Amendment. J.A. 94 (Report at 8). The revised Blaine Amendment read: "No money shall be paid from

public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution." S.C. Const. art. XI, § 4. The primary difference between the old provision and the new provision was the removal on the bar on "indirect support," thus allowing public money to go directly to students in the form of so-called scholarship aid.[41]

Dr. Graham explains why the change: "[m]uch of the newly available public funding for private educational institutions went to newly developing 'private schools.' Many of these private schools were formed for white students allegedly to improve the quality of education compared to racially integrated public schools. The silent public conversation was that public schools were becoming more and more black, thus lending credibility to a general assessment of newly forming private schools as 'segregation academies.'" *Id.*[42]

[41] West Committee Report at 101. The Committee also recommended retaining the ban on public credit being loaned to other types of religious and nonprofit institutions, though in a different section of the Constitution. *Id.*

[42] This illustrates as well why disproportionate impact is not a helpful factor in this analysis: the revised amendment served to pave the way for segregation scholarships while retaining as much of the 1895 original as possible. That said, even in 1970, the majority of K-12 and higher education schools were religious. D. Ct. Dkt. 73-1 at 30.

In other words, these elementary and high school scholarships were the new preferred solution to federally mandated integration of the public schools: state subsidies for students in white-only academies.[43] The idea of scholarships for students to attend white-only, private academies "had been under study by the Gressette Committee for some time" as a solution to court-ordered integration.[44] Just days before Governor George Wallace blocked the schoolhouse door in Alabama, the South Carolina General Assembly had passed Act 297 providing segregation scholarships for private school tuition to help white families avoid integrated public K-12 schools.[45] "Although the law made no mention of race, it was perceived as a 'safety valve' in the event of public school desegregation."[46] Sure enough, when the Charleston School District admitted eleven African-American students under federal court order in September 1963, the program went into effect.[47] The 1964 General

[43] J.A. 130 (Report at 44). *See generally* Note: *Segregation academies and state action*, 82 Yale L.J. 1436 (1973). *See also* J.A. 141 (Graham Report at 55) (listing article among sources in appendix).
[44] *Stanley v. Darlington Cty. Sch. Dist.*, 879 F. Supp. 1341, 1395 (D.S.C. 1995), *rev'd on other grounds,* 84 F.3d 707 (4th Cir. 1996).
[45] Statutes at Large of South Carolina, General and Permanent Laws, 1963, p. 498-500. *See* J.A. 141 (Graham Report at 55) (including statutes among sources in appendix).
[46] *Stanley*, 879 F. Supp. at 1395.
[47] *Id.*

Assembly appropriated $250,000 for the K-12 segregation scholarships program.[48] The legislation defined "private school" as "a private or independent elementary or high school which is not operated or controlled by any church, synagogue, sect or other religious organization or institution,"[49] excluding Catholic or other religious schools that were already integrated.[50] The K-12 segregation scholarship program was eventually suspended by court order. *Brown v. S.C. State Bd. of Educ.*, 296 F. Supp. 199 (D.S.C.), *aff'd*, 393 U.S. 222 (1968) (per curiam).

The history of the segregation scholarships and the overlapping legislative supporters on the West Committee show the sub-rosa reasons for adopting the "indirect scholarship aid" option in the West Committee report: to make constitutional the segregation scholarship program for private, whites-only elementary and high schools while blocking funds that might go directly to integrated Catholic schools.

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[48] *Id.*

[49] Most independent schools, including the large contingent of Independent Baptist schools, were not founded until well after federal courts enjoined segregation scholarships.

[50] The Catholic schools of the Diocese Charleston desegregated in Spring 1961. Gretchen Keiser, *Photo inspires look back at era when Catholic schools desegregated*, Georgia Bulletin (Jan. 9, 2014), https://georgiabulletin.org/news/2014/01/photo-inspires-look-back-at-era-when-catholic-schools-desegregated/. *See* J.A. 141 (Graham Report at 55) (listing article among resources reviewed).

After the West Committee did its work, the proposed reports went through the General Assembly. The man responsible for shepherding the 17 proposed amendments: Senator Gressette, chairman of the infamous School Segregation Committee and father of the segregation scholarships.[51] He parceled out the amendments, putting ten on the 1970 ballot and a further seven on the 1972 ballot, including the education amendment.[52] Moreover, even within the 1972 ballot question on the education amendment, this provision was the shortest of four proposed parts. *See* S.C. Const. Art. IX.

After evaluating the West Committee process and subsequent legislative adoption and popular ratification, Dr. Graham concludes, "Constitutional revision in the 1972s removed only part of the original Blaine Amendment in order to permit indirect aid to private education institutions."[53] Because of the ongoing ban on direct aid, he concludes "[t]he incomplete revision maintains, even if latently, the racism and anti-Catholicism embedded in the South Carolina constitution since Ben Tillman." J.A. 95, 139 (Report at 9 and 53).

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[51] Cole Blease Graham, Jr., *The Evolving South Carolina Constitution*, 24 J. of Political Sci. 23 (1996). *See* J.A. 109 (Graham Report at 23).
[52] Graham, 24 J. of Political Science at 24-25.
[53] J.A. 95 (Graham Report at 9).

Again, this was the historical record before the district court, supported by expert witness testimony. The district court nevertheless ruled against Plaintiffs, saying "these other racist or anti-religious views or policies [are] unavailing because Plaintiffs do not connect them with Section 4's adoption. . ." J.A. 325 (D. Ct. Dkt. 112 at 26). This ignores Dr. Graham's unchallenged conclusion. It once more ignores this Court's command to consider circumstantial and contextual evidence to establish discriminatory intent, made all the more pertinent by Dr. Graham's separate observation that South Carolina legislative politics in this era ran on "the nod of the head" rather than explicit floor statements. J.A. 132 (Report at 46; *see id.* at 47 n.60 (South Carolina politics at this time was "a system in which most public policy was made in private.")).

The district court improperly relied on four arguments advanced by the State that supposedly disprove the racial and religious prejudice behind the provision.

First, the court said, "As it sought to allow indirect state funding of private schools, the West Committee also said that its recommendation for Section 4's language was made 'in conjunction with interpretations being given by the federal judiciary to the 'establishment of religion'

clause in the federal constitution.'" J.A. 326 (D. Ct. Dkt. 112 at 27) (quoting West Committee Report at 99). This explanation is entirely unconvincing.

The West Committee had separately recommended that the South Carolina Declaration of Rights be amended to incorporate a state version of the First Amendment establishment clause. So why include the revised Blaine Amendment at all if it was redundant of the federal and state establishment clauses? The obvious reason is because the education-specific provision reaches *beyond* the Establishment Clause. In the words of the West Committee report, "the Committee feels that public funds should not be granted outrightly to such institutions." West Committee Report at 101. So it was that the anti-Catholic prejudices of the committee members, under the veneer of safeguarding "the separation of church and state," was incorporated into the state constitution. *See Am. Legion*, 139 S. Ct. at 2097 n.3 (Thomas, J., concurring). Indeed, as Dr. Glenn testified, this was a typical tactic: "the separation of church and state" was as much code for anti-Catholic as "sectarian." J.A. 77 (Report at ¶ 47) ("The objections to public funding of parochial schools were not generally based upon abstract concerns about 'separation of Church and

State,' but rather upon the presumed nefarious effect of Catholic schooling upon the children of immigrants.").

As has been seen throughout this case, in this last aspect the twin prejudices of racism and anti-Catholicism continued to work hand-in-hand. The Committee's recorded intent ("the separation of church and state") was code for its anti-Catholic motives, while the Committee's unrecorded intent was to advance its racist motives through the K-12 segregation scholarships.

Second, the district court erroneously found that even if the West Committee's members were racists motivated by racism and anti-Catholic prejudice, the adoption of the amendment by the people of South Carolina constituted an "independent intervening event." J.A. 327 (D. Ct. Dkt. 112 at 28) (quoting *Raymond*, 981 F.3d at 305). This is wrong on several levels. On the level of law, the *Raymond* Court was considering a constitutional amendment as an intervening event between the first adoption of voter ID in 2013, which this Court had concluded was racially motivated in *McCrory*, with the subsequent adoption of voter ID pursuant to a constitutional amendment in 2018. The *Raymond* Court was saying that the constitutional amendment by the people was an

intervening event between the 2013 legislation and the 2018 legislation, not that a constitutional amendment put on the ballot by a prejudiced legislature is cleansed of that prejudice by popular adoption.

On the level of facts, it was simply incorrect for the district court to state, "Plaintiffs cite nothing in the record or the law that supports their effort to charge the entire voting population of South Carolina with the problematic views of a few selected leaders." J.A. 327 (D. Ct. Dkt. 112 at 28). Plaintiffs did provide substantial evidence that a majority of the people at large shared the prejudices of their political leaders, both racial and religious bigotry.[54] Indeed, the popular sentiment should have weighed in favor of Plaintiffs: "a government decision influenced by community members' religious bias is unlawful, even if the government decisionmakers display no bias themselves." *Jesus Christ is the Answer Ministries, Inc. v. Balt. Cty.*, 915 F.3d 256, 263 (4th Cir. 2019).

Third, the district court erred in finding that, "As for Plaintiffs' claim about Section 4 and segregation scholarships, those scholarships had

[54] J.A. 120, 125, 128, 133, 135 (Graham Report at 34, 39, 42, 47, 49) (racial bias of populace); Ari L. Goldman, "Visit to South Carolina Reflects Rise of Catholics in Bible Belt," N.Y. Times (Sept. 11, 1987) (religious bias) (*see* J.A. 140, Graham Report at 54, listing article among sources in appendix).

been invalidated years before Section 4's adoption. . . . Plaintiffs do not point to any evidence connecting Section 4 with those scholarships." J.A. 114 (D. Ct. Dkt. 112 at 28).

Actually, the Plaintiffs did connect Section 4 to the segregation scholarships. J.A. 94, 130 (Graham Report at 8, 44). Plaintiffs provided a compelling story for the Court: Senator Gressette, who also served on the West Committee, started K-12 segregation scholarships in the early 1960s. The West Committee began its meetings in summer 1966 and finalized its draft January 1969. West Committee Report at 3-4. In other words, federal court consideration of the K-12 segregation scholarships came at the tail end of the Committee's work. That federal courts struck down the segregation scholarships after the West Committee had finished drafting the education article is therefore no answer to Plaintiffs' theory. Again, the State Defendants provided no expert witness in response.

Fourth and lastly, the district court improperly relied on the adoption of "the 1970 Tuition Grants Act, enacted just after the West Committee Report was released." J.A. 328 (D. Ct. Dkt. 112 at 29). Because the Tuition Grants Act was broadly supported and benefited the HBCUs

along with all other private institutions of higher learning, and the Amendment made the Act's implementation possible, the court concluded, "This history evidences a race and religion-neutral purpose to promote educational opportunities rather than any discriminatory intent." *Id.*

But this revisionist interpretation of history was not properly in the record before the district court. The State attached a copy of a newspaper article to its summary judgment motion without laying any foundation for its authenticity. D. Ct. Dkt. 74-3. And the alternative historical explanation the State spun out based on that article and that the district court adopted was never set forth in testimony or admissible evidence. *Gantt v. Whitaker,* 57 F. App'x 141, 150 (4th Cir. 2003) ("This circuit has consistently held that newspaper articles are inadmissible hearsay to the extent that they are introduced 'to prove the factual matters asserted therein.' *United States v. ReBrook,* 58 F.3d 961, 967 (4th Cir. 1995)."). Plaintiffs, by contrast, have laid out a historically grounded, record-based theory. That the constitutional revision drafted by the West Committee in the 1960s to clear the way for K-12 segregation scholarships was

repurposed in the 1970s to provide for programs like modern Tuition Grants does not cure the underlying motivation.

The district court's erroneous factual findings led it to improperly sustain the constitutionality of South Carolina's Blaine Amendment—though its racist and anti-religious origins were clear. This white-washed view of the dark history of Article XI, § 4 does not survive the required strict scrutiny. Rather, South Carolina's abominable Blaine Amendment should be declared facially unconstitutional and cast into the dust bin of history where it belongs.

IV. Governor McMaster's discretion over the GEER I & II funds does not mean his unconstitutional policy regarding those funds is exempt from judicial review.

The district court ruled that it lacked jurisdiction over Governor McMaster because his discretion over the GEER funds insulated his actions from judicial review. The court reasoned that because he had discretion whether to award funds to Plaintiffs, any injury is speculative. J.A. 314 (D. Ct. Dkt. 112 at 15). Plaintiffs realize that they are not legally entitled to the funds—but they are entitled to equal access to apply for an award of funds.

To establish standing, Plaintiffs must establish three elements. First, that they have "suffered an 'injury in fact'—an invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560 (1992) (cleaned up). Second, Plaintiffs must show a "causal connection between the injury and the conduct complained of" such that the injury cannot be traced to some "independent action" of the Defendant. *Id.* (cleaned up). Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 560–61 (cleaned up). The district court said that all three elements fail because the GEER funds are left to the Governor's sole discretion. J.A. 314 (D. Ct. Dkt. 112 at 15). But, again, Plaintiffs are not asking for an award of the funds—just the equal opportunity to apply for an award of the funds. Given the relief sought, Plaintiffs satisfy all three components of standing.

First, Plaintiffs have suffered an injury in fact. The South Carolina Constitution prevents Plaintiffs from applying for access to funds for which they would otherwise be eligible (no one doubts they are educational institutions under GEER's definition). "The express

discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow" the Plaintiffs "to compete with secular organizations" for the funds. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2021, 2022 (2017). A plaintiff "need not allege that he would have obtained the benefit but for the barrier in order to establish standing" because the "'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of a contract." *Adarand Constructors v. Pena*, 515 U.S. 200, 211 (1995) (quoting *Northeastern Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville*, 508 U. S. 656, 666 (1993)). *See Price v. City of Charlotte*, 93 F.3d 1241, 1248 (4th Cir. 1996) ("the injury Appellees suffered is the ignominy and illegality of the City's erecting a racial bar to promotions," *even if* they would not have actually received the promotions if fairly considered in the general applicant pool). It's the lack of a fair shot that is the injury.

Second, Plaintiffs have shown a "causal connection between the injury and the conduct complained of" by the Governor. Plaintiffs undoubtedly qualify for GEER I and II funds under the federal law.[55] The bar to their

[55] The District Court was wrong to say "the CRRSA prohibits the Governor from

consideration is the Governor and Commissioner's announced policy of complying with the state Supreme Court's decision in *Adams* that the Blaine Amendment prohibits the funds going to a private school.[56] Therefore, Plaintiffs' injury is a direct result of the actions of the State Defendants.

Third, the injury would have been redressed by a favorable decision from the district court: they would have been able to apply for the funds. They would not have been guaranteed an award by the Governor, but they would have been allowed to apply on an equal basis as other educational organizations, which would redress the injury they suffer.

"Sole discretion" cannot be an automatic, complete get-out-of-jail-free card for imposing explicitly or implicitly racist or otherwise prejudiced policies, whether discriminatory in form or sub rosa. *See Fulton v. City of Phila.*, 141 S. Ct. 1868, 1879 (2021) (city policy of entrusting

awarding GEER II funds to the Bishop of Charleston's K–12 schools." J.A. 316 (D. Ct. Dkt. 112 at 17). CRSSA prohibits awarding GEER II funds for scholarships specific to individual students like the proposed SAFE Grants. But the Governor could award GEER II funds to the Bishop for innumerable other purposes related to COVID relief.

[56] *See* J.A. 46 (D. Ct. Dkt. 34 at 8) (citing D. Ct. Dkt. 6-5 (Adams letter)) and *Adams v. McMaster*, 432 S.C. 225, 244, 851 S.E.2d 703, 713 (2020) (Governor's counsel guarantees compliance to Court).

commissioner with "sole discretion" to grant exemptions renders law no longer generally applicable as to religious discrimination). *Accord Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 (2018) ("warning of 'the more covert forms of discrimination that may result when arbitrary discretion is vested in some governmental authority,'" *quoting Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U. S. 640, 649 (1981)).

Regardless, even if the district court correctly concluded that the Governor should be dismissed, this Court must still address the merits of the appeal against Adams and Gaines and the State because of the ongoing controversy over the Act 154 funds.

CONCLUSION

The district court erred in granting summary judgment to the Defendants when the entire record before the court consisted of two expert reports from Plaintiffs and the voluminous supporting documentation they incorporated. The court adopted the Defendants' theories and inferences in contradiction of the record, precedent, and the general command that the benefit of inferences should be extended to the nonmoving party.

Instead, the district court should have granted summary judgment to the Plaintiffs. They conclusively proved three things: that religious and racial animus were at least *a* motivation behind the 1895 Blaine Amendment, that the 1895 Blaine Amendment is the traceable root of the 1972 Amendment, and that racial and religious animus were at least *a* motivation behind the 1972 Amendment. The district court erred in concluding otherwise in contravention of the record, the experts, and precedent.

At the end of the day, "upon even slight suspicion that proposals for state intervention stem from animosity to religion [or race] . . ., all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993). More than a slight suspicion, Plaintiffs have proven that "discriminatory purpose was" at least "a motivating factor" behind the amendment in its modern form, *McCrory*, 831 F.3d at 220, and are thus entitled to reversal and judgment in their favor.

/s/ Daniel R. Suhr
Daniel R. Suhr
Counsel of Record
Jeffrey D. Jennings

Liberty Justice Center
440 N Wells St Suite 200
Chicago, IL 60654
312-263-7668

dsuhr@libertyjusticecenter.org

40 Calhoun St, Suite 200
Charleston, SC 29401
(843) 576-2810
rdukes@turnerpadget.com

Attorneys for
Plaintiffs – Appellants

Richard S. Dukes, Jr.
Turner Padget Graham & Laney, P.A.

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REQUEST FOR ORAL ARGUMENT

Because this case presents novel issues of constitutional law and complex issues of history and record, and because of the substantial impact of the case on the Plaintiffs and all South Carolinians, Plaintiffs request oral argument before the U.S. Court of Appeals for the Fourth Circuit.

CERTIFICATE OF COMPLIANCE

I certify that this brief contains 11,959 words, excluding the cover, tables, signature block, and certificates, which is under the limit of 13,000 set in Fed. R. App. Pro. 32.

/s/ Daniel R. Suhr