No. 15-577

IN THE

Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,

Petitioner,

v.

SARA PARKER PAULEY, IN HER OFFICIAL CAPACITY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE*, LEGAL AND RELIGIOUS HISTORIANS, IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici are legal and religious historians and

anti-Catholicism being only a minor one. Finally, there is no connection between Article I, § 7 and the Blaine Amendment, as the former was drafted months before the latter.

ARGUMENT

I. The Court Should Rely Cautiously on History, With an Appreciation for Complexity.

Pet'r's Br. 11, 22. In *Locke*, this Court allowed Washington to rely on a similar constitutional no-funding provision to deny a state education grant applicant from applying those monies toward a religious training program.[3] *See Locke*, 540 U.S. at 719–24. Acknowledging legitimate reasons for the Washington provision—which the Washington Supreme Court noted affords "far stricter [protection] than the more generalized prohibition of the first amendment to the United States Constitution," *Weiss . Br no*, 509 P.2d 973, 978 (Wash. 1973)—the Court upheld the state's action against Davey's free exercise and equal protection claims. *Locke*, 540 U.S. at 722, 724.

Trinity Lutheran asserts the *Locke* holding's corollary. If the rationales behind Article I, § 7 were illegitimate or corrupted by allegedly bigoted history, then Trinity Lutheran's free exercise and equal protection claims should prevail. The history does not support any such conclusion about illegitimacy or corruption.

This Court should view simplified historical narratives with caution. The bulk of commentary concerning the Blaine Amendment and the development of the no-funding principle has cast a net that is wide in criticism, but not deep in analysis.

History is "complex," and serves as a poor resource for drawing legal conclusions. John Fea, *Was America Fo nded as a Chris.ian Na.ion?* (2011). Legal analysis

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[3] This Court permitted the denial even though such use would have been permissible pursuant to the Establishment Clause of the United States Constitution as a result of *Wi..ers . Washing.on Depar.men. of Ser ices for .he Blind*, 474 U.S. 481 (1986).

On Ed ca.ion of Yo .h in America, *in* ESSAYS ON EDUCATION IN THE EARLY REPUBLIC 65–66 (Frederick Rudolph ed., 1965). The early education advocates insisted schooling be moral but nonsectarian for two reasons. Steven K. Green, *The Bible, .he School, and .he Cons.i. .ion: The Clash Tha. Shaped Modern Ch rch-S.a.e Doc.rine* 13–16 (2012). First, proponents wanted the common schools to appeal to the largest number of children and parents. *Id.* Second, advocates wanted to avoid sectarian emphases which they believed caused religious divisiveness rather than promoting cultural unity. *Id.* Early schools thus used a nonsectarian curriculum and avoided religious differences by teaching "universal" Christian values. *See* Noah Feldman, *Non-Sec.arianism Reconsidered*, 18 J. L. & POL. 65, 74 (2002).

Common schools supported by tax revenues gradually replaced most existing Protestant denominational schools. Green, *s pra*, *The Bible, .he School, and .he Cons.i. .ion*, at 13–44. Advocates then pressured state legislatures to reserve state "school funds" for these new public schools. *Id.* Connecticut created one early fund, enacting a constitutional provision that prohibited school fund monies from "divert[ing] to any other use than the encouragement and support of public, or common schools . . . ." Conn. Const. of 1818, art. VIII, § 2.

Similarly, in New York, where early law authorized cities and towns to distributrly Tc 0 (s)3(t)-ew 1818, . . " Conn. Cw 6.33 0 T

school and a Methodist school, respectively, to share in the city's allotment from the state school fund. *Id.* at 52–54. In both instances, the Society argued that public funds should be reserved for common schools. *Id.* Diverting funds for religious schooling would cause competition and rivalry among faiths while also "impos[ing] a direct tax on our citizens for the support of religion." *Id.* at 48. In each case, the New York City Common Council agreed, opining that "to raise a fund by taxation, for the support of a particular sect, or every sect of Christians . . . would unhesitatingly be declared an infringement of the Constitution, and a violation of our chartered rights." *Id.* at 51. The Council could not "perceive any marked difference in principle, whether a fund be raised for the support of a particular church, or whether it be raised for the support of a school in which the doctrines of that church are taught as a part of the system of education." William Oland Bourne, *His.or of .he P blic School Socie.' of .he Ci.' of Ne York* 49–55, 70–75, 139–40 (1870); *see also* John Webb Pratt, *Religion, Poli.ics, and Di ersi.' : The Ch rch-S.a.e Them*

1800 1860 35–

T. Spear, *Religion and the State, or The Bible and the Public Schools* 24 (1876). Significantly, New York Senator Francis Kernan, a Catholic, voiced his support for Blaine's original proposal.[8] 4 CONG. REC. 5453, 5580 (1876).

Therefore, a combination of at least three distinct issues—whether public schooling should be secular or rhoo sdwhetherheaioloSerhe shoulds

school funding. Separate studies of both Indiana and Wisconsin indicate there was "no evidence that the lawmakers and constitution makers were anti

commitment among Missouri citizens to prevent the state from financially supporting religion and to ensure the integrity and financial stability of public education. The drafters of these various provisions did not act with prejudicial motives against one or more religions.

The first provision directs that "no person can be compelled to erect, support, or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher . . . ." Mo. Const. art. I, § 6. Later amendments expanded the latter clause to include "any sect, church, creed or denomination of religion. *Id.*nn58 0 Td(-)Tj-0.004 Tc -0.004 T0 8.33 0 Td[(co)-4(m)-5(pe)-4(l)-

The inevitable increase in schools and sheer numbers of students placed strains on the state school fund, which public school advocates believed were vulnerable from private religious schools.[12] J. Michael Hoey, *Missouri Education at the Crossroads: The Phelan Miscalculation and the Education Amendment of 1870*, 95 MO. HIST. REV. 372, 377 (2001). In his report to the Missouri legislature, State School Superintendent Thomas Parker recommended a constitutional amendment to secure the school fund: "No portion of the funds now used for the support of public schools, nor the income therefrom, shall ever be applied in aid of any school or institution established or controlled by any religious body, sect, or denomination." *Id.* at 373. In response, General Assembly members overwhelmingly approved a proposed education amendment, beating back an amendment by a Democratic representative that would have divided the school fund between public and private schools.[13] *Id.* at 383, 390–93.

In 1875, Missouri held a constitutional convention, resulting in a revised constitution and the re-adoption of the no-compelled support clause, the provision securing the public school fund, and the 1870 education amendment. The education committee also adopted a resolution barring appropriating public

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[12] According to Hoey, in 1870 approximately 280,000 students attended public schools with an additional 40,000 students attending private and parochial schools. Students in Catholic schools comprised approximately one-half of that latter number. Hoey, *supra*, at 377.

[13] Missouri voters approved the education amendment by a 10-to-1 margin, with the "no" vote only registering an average of approximately 14 percent in the 10 counties with the heaviest Catholic population. *Id.* at 390–91.

money to "the different religious denominations, creeds, sects, or churches of this State to be used by such religious denominations, creeds, sects or churches for educational purposes." Aaron E. Schwartz, *Losing Off the Blaine Amendment: To Challenges to Missouri's Anti-Establishment Tradition*, 72 MO. L. REV. 339, 373 (2007). The convention adopted this resolution without dissent or any allegations of anti-Catholic motivations. In fact, Democrats—generally supportive of Catholics—dominated both the education committee and the convention as a whole. *Id.* at 372–73. The new educational amendment passed without controversy. *See id.* at 375–76.

No evidence suggests that religious controversies outside Missouri influenced delegates. *See id.* at 372–76. In fact, the convention met during May and June of 1875, months before both President Grant's Des Moines speech calling for prohibition of sectarian schools' funding and Representative Blaine's proposed amendment on December 14. Green, *supra*, *The Bible, the School, and the Constitution*, 187–94. Nothing connects Article I, § 7 and the Blaine Amendment. Nor does any evidence suggest Article I, § 7 was motivated by anti-Catholic animus. Therefore, no "credible connection" exists between Article 1, § 7 and religious animus.

CONCLUSION

This Court should affirm the Eighth Circuit's decision.

Respectfully Submitted,

STEVEN K. GREEN