COMMONWEALTH OF KENTUCKY
SUPREME COURT
Case No. 2008-SC-000253

UNIVERSITY OF CUMBERLANDS

APPELLANT

V.

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY

REV. ALBERT M. PENNYBACKER, et al.

APPELLEES

ON APPEAL FROM
FRANKLIN COUNTY CIRCUIT COURT
NO. 06-CI-00554
[COURT OF APPEALS CASE NO. 2008-CA-000682]

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to KY. R. CIV. P. 76.12(6), the undersigned does hereby certify that copies of this brief were served upon the following individuals by U.S. Mail on March 31, 2009: the Honorable Roger Crittenden, Franklin County Courthouse, P.O. Box 678, Frankfort, Kentucky, 40602; Ellen Hesen, General Counsel, Office of Governor, 101 Capitol Building, 700 Capitol Avenue, Frankfort, Kentucky, 40601; Mark R. Overstreet, STITES & HARBISON, 421 West Main Street, P.O. Box 634, Frankfort, Kentucky 40602; David Tachau, TACHAU, MADDOX, HOVIOUS & DICKENS, 2700 National City Tower, 101 S. Fifth Street, Louisville, Kentucky 40202; James D. Jordan, GUENTHER, JORDAN, & PRICE, 1150 Vanderbilt Plaza, 2100 West End Ave., Nashville, Tennessee 37203; Bryan Beauman, STURGILL, TURNER, BARKER, & MOLONEY, PLLC, 333 West Vine St., Suite 1400, Lexington, Kentucky 40507.

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STATEMENT OF POINTS AND AUTHORITIES

Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*,
26 HARV. J. L. & PUB. POL'Y 551 (Spring 2003) 4

Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*,
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PAUL KLEPPNER, THE CROSS OF CULTURE: A SOCIAL ANALYSIS OF MIDWESTERN POLITICS, 1850-1900 (1970).....4

PURPOSE AND LEGAL ISSUES

Section 189 of the Kentucky Constitution prohibits the appropriation of educational funds to any "church, sectarian or denominational school." Unfortunately, both the text and history of Section 189 mark it as a "Blaine Amendment," a provision adopted in numerous state constitutions in the late 1800s and designed to suppress Roman Catholic schools in favor of Protestant-dominated public schools. The U.S. Supreme Court has repeatedly documented the ugly, bigoted history of Blaine Amendments, explaining that their "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow." *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality). In fact, the Court has suggested that the enforcement of Blaine Amendments against religious schools could well violate the U.S. Constitution. *Id.* This Court should, accordingly, disavow the anti-Catholic pedigree of Section 189 and construe it in a way that avoids conflict with the U.S. Constitution.

ARGUMENT

I. The text and history of Section 189 manifest an unconstitutional, discriminatory purpose.

The key to understanding Section 189 is the use of the term "sectarian" and the history of anti-Catholic discrimination surrounding its adoption. Section 189 was adopted in 1891—near the height of anti-Catholic fervor in Kentucky—and both its text and history unmistakably mark it as a Blaine Amendment. It is thus part of the same anti-Catholic movement repeatedly condemned by the Supreme Court.

A. The United States Supreme Court has consistently repudiated the anti-Catholic bigotry underlying state "Blaine Amendments" such as Section 189.

Seven current and two former U.S. Supreme Court Justices have joined opinions documenting the discriminatory history of state Blaine Amendments.[1] The most thorough judicial account of that history is contained in *Zelman*, 536 U.S. at 720-21 (Breyer, J., dissenting). (Although the *Zelman* opinion is a dissent, the history of Blaine Amendments was not in dispute.)

As Justice Breyer explained, "during the early years of the Republic, American schools—including the first public schools—were Protestant in character. Their students recited Protestant prayers, read the King James version of the Bible, and learned Protestant religious ideals." *Id.* at 720 (citation omitted). In the mid-1800s, however, a wave of Catholic immigration rendered the Protestant domination of the public schools highly controversial. *Id.* "Religious conflict over matters such as Bible reading grew intense, as Catholics resisted and Protestants fought back to preserve their domination." *Id.* (citations and quotations omitted). "Dreading Catholic domination, native Protestants terrorized Catholics." *Id.* at 720-21 (citations and quotations omitted). In some states, "Catholic students suffered beatings or expulsions for refusing to read from the Protestant Bible, and crowds . . . rioted over whether Catholic children could be released from the classroom during Bible reading." *Id.* at 720-21 (citations and quotations omitted).

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[1] *See Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (opinion of Thomas, J., joined by Rehnquist, C.J., Scalia, and Kennedy, JJ.); *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002) (opinion of Breyer, J., joined by Stevens and Souter, JJ.); *Locke* v. *Davey*, 540 U.S. 712 (2004) (opinion of Rehnquist, CJ., joined by Stevens, O'Connor, Kennedy, Souter, Ginsburg, and Breyer, JJ.)

Catholics responded by seeking equal government funding for Catholic schools. *Id.* at 721. Protestants vehemently resisted. The Protestants argued "that public schools must be 'nonsectarian' (which was usually understood to allow Bible reading and other Protestant observances)" and that "public money must not support 'sectarian' schools (which in practical terms meant Catholic.)." *Id.* (citations and quotations omitted).

The Protestant resistance culminated in a campaign led by Senator James G. Blaine to amend the federal constitution to ban government aid to sectarian (*i.e.*, Catholic) schools.[2] In 1875, the so-called "Blaine Amendment" passed the House of Representatives by a vote of 180 to 7, but failed the two-thirds requirement in the Senate by four votes. Blaine and his supporters then turned to state legislatures, where Kentucky, along with many other states, ultimately passed constitutional provisions banning aid to sectarian schools.[3] Thus, state Blaine Amendments were born.

Other Supreme Court opinions confirm this historical account. As the plurality in *Mitchell* v. *Helms* explained, "[c]onsideration of the [Blaine] amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'" 530 U.S. at 828. *Mitchell* condemned the the Blaine Amendments in the strongest possible terms: they had a "shameful pedigree," were "born of bigotry," and "should be buried now." *Id.* at 828-29.

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[2] The proposed federal amendment stated: "No public property and no public revenue . . . shall be appropriated to or made or used for the support of any school, educational or other institution under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creeds or tenets shall be taught. . . ." Jeffries & Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 302 n.115 (Nov. 2001). At the same time, the amendment sought to protect the widespread practice of reading the King James Bible in public schools: "This Article shall not be construed to prohibit the reading of the Bible in any school or institution . . . ." *Id.*

[3] *See* Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J. L. & PUB. POL'Y 657, 670-75 (1998)

The Supreme Court most recently addressed Blaine Amendments in *Locke* v. *Davey*, 540 U.S. 712 (2004). Although the Court did not discuss the history in any detail, it affirmed the basic conclusion that Blaine Amendments are "linked with anti-Catholicism." *Id.* at 723 n.7 (citing *Mitchell* plurality). Thus, through opinions in *Zellman*, *Mitchell*, and *Locke*, all nine members of the Rehnquist Court (including seven current Justices) recognized that Blaine Amendments are based on anti-Catholic animus. This conclusion is backed by a weight of legal[4] and historical[5] scholarship that is nothing

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[4] *See, e.g.*, Ira Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 375, 386 (1999) ("From the advent of publicly supported, compulsory education until very recently, aid to sectarian schools primarily meant aid to Catholic schools as an enterprise to rival publicly supported, essentially Protestant schools."); Douglas Laycock, *The Underlying Unity of Separation and Neutrality,* 46 EMORY L.J. 43, 50 (1997) ("[T]he nineteenth century opposition to funding religious schools drew heavily on anti-Catholicism."). *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 (Spring 2003); Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 FORDHAM L. REV. 493, 508-509 (2003); Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38 (1992); Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117 (2000); Richard A. Baer, Jr., *The Supreme Court's Discriminatory Use of the Term 'Sectarianism,'* 6 J.L. & POL. 449 (1990); Joseph P. Viteritti, *Davey's Plea: Blaine, Blair, Writers, and the Protection of Religious Freedom*, 27 HARV. J.L. & PUB. POL'Y 299 (2003).

[5] *See, e.g.*, PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 335 (Harvard 2002) ("Nativist Protestants also failed to obtain a federal constitutional amendment but, because of the strength of anti-Catholic feeling, managed to secure local versions of the Blaine amendment in the vast majority of the states."). *See generally* RAY A. BILLINGTON, THE PROTESTANT CRUSADE, 1800-1860: A STUDY OF THE ORIGINS OF AMERICAN NATIVISM (1938); CHARLES L. GLENN, JR., THE MYTH OF THE COMMON SCHOOL (1988); LLOYD JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925 (1987); CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860 (1983); PAUL KLEPPNER, THE CROSS OF CULTURE: A SOCIAL ANALYSIS OF MIDWESTERN POLITICS, 1850-1900 (1970); WARD M. MCAFEE, RELIGION, RACE AND RECONSTRUCTION: THE PUBLIC SCHOOL IN THE POLITICS OF THE 1870S (1998); JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM (2003); DIANE RAVITCH, THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973 (1974); WILLIAM G. ROSS, FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION 1917-

short of crushing. There is therefore no doubt about the discriminatory basis of the federal and state Blaine Amendments.

B. Section 189 was the product of anti-Catholic animus.

In light of this broad historical consensus, the only question is whether Section 189 of the Kentucky Constitution is, in fact, a discriminatory Blaine Amendment. Both the text and history of Section 189 unequivocally demonstrate that it is.

1. The text of Section 189 embodies anti-Catholic animus.

Most importantly, the text of Section 189 bans funds or taxes raised for educational purposes from being used in aid of "any church, sectarian or denominational school." KY. CONST. § 189 (emphasis added). This phrasing is problematic because it uses the narrow and loaded phrase "church, sectarian or denominational" instead of the broader term "religious." When examined in light of the historical record, this language indicates that Section 189 was an outgrowth of pervasive anti-Catholic discrimination.

First, as explained above, the Supreme Court has repeatedly noted that the term "sectarian" applied almost exclusively to Catholics. In fact, in the 1870s, "it was an open secret that 'sectarian' was code for 'Catholic.'" *Mitchell*, 530 U.S. at 828. This conclusion is bolstered by the fact that Section 189 also bans funds to "church" and "denominational" schools. That language mirrors the federal Blaine Amendment, which banned aid to any school controlled by a "sect," religious organization, or "denomination" (while simultaneously protecting "the reading of the Bible" in the Protestant-dominated public schools). Jeffries & Ryan, *supra* note 2, at 302 & n.115. It is widely recognized that this

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1927 (1994); JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY (1999).

sort of language was designed "to close every possible loophole" through which public aid might flow to sectarian schools. *Id.*

Second, dictionaries from the time that Kentucky adopted its current constitution (1891) uniformly define "sectarian" more narrowly than "religious," generally as a pejorative for a minority religion. Funk & Wagnalls defined "sectarian" as "marked by attachment to a sect or denomination: often used in derogation as ***implying heresy or bigotry***, and also as an ***opprobrious epithet for schools*** not sectarian but under the auspices of a denomination . . . ."[6] Webster's defined a "sectarian" group as one "which holds tenets different from those of the prevailing denomination in a state."[7] Engaging in "heresy or bigotry" and holding tenets "different from those of the prevailing denomination" are precisely what the dominant Protestant establishment accused immigrant Catholics of doing, and exactly what the "common schools" were designed to eradicate.[8]

Third, Kentucky precedent from this time period confirms that Section 189 applied primarily to Catholics and not to religion generally. In *Hackett* v. *Brooksville Graded School Dist.*, 87 S.W. 792, 120 Ky. 608 (Ky. App. 1905), for example, the parents of Roman Catholic school children sued under Section 189, arguing that daily prayers and readings from the King James Bible rendered the public school "sectarian."

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6 A STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 1616 (Funk & Wagnalls 1895) (emphasis added).

7 WEBSTER'S INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (G. & C. Merriam 1891).

8 *See also* A NEW ENGLISH DICTIONARY 361 (Oxford 1914) (defining "sectarian": "In recent use, often a pejorative synonym of *denominational*, esp. with reference to education."); THE NEW AMERICAN ENCYCLOPEDIC DICTIONARY OF THE ENGLISH LANGUAGE 3605 (1911) (defining "sectarian" as "strongly or bigotedly devoted to the tenets and interests of a particular sect or religious denomination; characterized by bigoted devotion to a particular sect or religious denomination").

The Kentucky Court of Appeals disagreed. According to the court, the King James Bible was not "a sectarian book" because it did not teach the distinctive doctrines of any one denomination. *See id.* at 794. Moreover, although the daily prayer specifically mentioned both God and Christ,[9] the court held that "it is not sectarian, in the sense that the word is commonly used and understood" because "neither the form nor substance of the prayer complained of seem to represent any peculiar view or dogma of any sect or denomination." *Id.* at 793 (emphasis added). In short, as the Court explained, the law in question was not "intended to keep ***religion*** out of the school, . . . [it was intended] to keep ***the 'church'*** out." *Id.* at 793 (emphasis added). And there is no doubt what the court meant when it referred to "the church"—it repeatedly used that term to refer specifically to the *Roman Catholic* church.[10] Thus, under Kentucky law, "sectarian" was not a synonym for "religious," but rather for teachings that departed from the generic Protestantism of the common schools.

Fourth, other Kentucky laws confirm that, notwithstanding Section 189, the common schools were *intended* to include religious teaching. In 1903, the legislature

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[9] The full text: "Our Father who art in Heaven, we ask Thy aid in our day's work. Be with us in all we do and say. Give us wisdom and strength and patience to teach these children as they should be taught. May teacher and pupil have mutual love and respect. Watch over these children, both in schoolroom and on the playground. Keep them from being hurt in any way, and at last, when we come to die, may none of our number be missing around Thy Throne. These things we ask for Christ's sake. Amen." *Id.* at 793.

[10] *See, e.g., id.* at 794 ("[The Roman Catholic parents'] view seems to be that *the church* is the custodian and interpreter of the Bible as God's word."); *id.* (Under the parents' view, "the authority of *a church* could largely control the course of study in the public schools by issuing its bull [a term exclusive to the Roman Catholic Church] against certain scientific or moral treatises as being atheistic or heretic."); *id.* ("A learned witness for [the Catholic parents] . . . says that *the church* is the interpreter of the Bible, but that the Protestants teach on the contrary that every one is his own interpreter."); *id.* ("Milton, Newton, Galileo, as well as Wickliffe, Whittingham, and Tyndale, came under the bans of *the church* . . . [because] they were believed to be hostile to God's revelations as interpreted by *the church*.") (emphases added).

mandated that "[n]o books or other publications of a sectarian, infidel or immoral character, shall be used or distributed in any common school; nor shall any sectarian, infidel or immoral doctrine be taught therein." Ky. Stat. § 4368 (1903) (recodified in 1942 and 1990 at KRS § 158.190). This provision is interesting for two reasons. First, it bans not only "sectarian" teaching, but also "infidel" and "immoral" teaching—suggesting *not* that schools would be free of religious teaching, but that they would be free of *the wrong kind* of religious teaching. Second, the ban on sectarian teaching coexisted with a law *requiring* daily Bible reading in every public school classroom: "The teacher in charge shall read or cause to be read a portion of the Bible daily in every classroom or session room of the common schools of the state in the presence of the pupils therein assembled . . . ." K.R.S. § 158.170. Again, these laws demonstrate that the ban on funding "sectarian" schools was not about keeping religion out of government funded schools—it was about keeping the wrong kind of religion (Catholicism) out of government funded schools.

This understanding of the ban on "sectarian" teaching was not limited to Kentucky; numerous states adopted the same understanding. In Nebraska, for example, the Supreme Court declared: "Nebraska is a Christian state, and its normal [*i.e.* public] schools are ***Christian schools; not sectarian,*** nor what would be termed religious schools." *Tash* v. *Ludden*, 129 N.W. 417, 421 (Neb. 1911) (emphasis added). Other examples of state courts connecting the term "sectarian" to the Catholic church, as opposed to generic Protestantism or Christianity, abound.[11]

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[11] *E.g. People ex rel. Vollmar* v. *Stanley*, 255 P. 610, 617 (Colo. 1927) (stating that although "the King James Bible is proscribed by Roman Catholic authority . . . proscription cannot make that sectarian which is not actually so"); (*Nevada ex rel. Nevada Orphan Asylum* v. *Hallock*, 16 Nev. 373, 385 (1882) ("The framers of the [Nevada] constitution undoubtedly considered the Roman Catholic a sectarian church."); *Church* v. *Bul-*

2. The history of Section 189 demonstrates anti-Catholic animus.

In addition to the text, the history surrounding Section 189 powerfully demonstrates that it is a discriminatory Blaine Amendment. In the mid to late 1800s, Kentucky was a hotbed of nativist and anti-Catholic sentiment. In 1855, the governor, the attorney general, and five U.S. congressmen were members of the Know-Nothing party—a party founded in the mid-1800s on the basis of anti-immigrant and anti-Catholic hostility. As the KENTUCKY ENCYCLOPEDIA explains, "The Know-Nothing party in Kentucky was an *unusually strong* outgrowth of the nativist political movement in the United States during the 1850s. . . . Unfamiliar habits, speech, and religion (*primarily Roman Catholicism*) became targets of Kentuckians in the 1850s . . . ." JOHN KLEBER, THE KENTUCKY ENCYCLOPEDIA 523 (University Press of Kentucky 1992) (emphasis added). The Know-Nothings seized power in 1855, largely through a concerted effort to keep naturalized citizens away from the polls.[12] "This election, inflamed with hatred for foreigners and Catholics, resulted in the Louisville riots of August 6, 1855—'Bloody Monday.' At least nineteen men were killed, most of them Irish or German Catholic immigrants."[13]

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lock, 109 S.W. 115, 118 (reading of King James Bible and recitation of the Lord's Prayer were not sectarian); *Billard* v. *Board of Educ.*, 76 P. 422, 423 (Kan. 1904) (reading of the Lord's Prayer and Twenty-Third Psalm did not constitute "sectarian or religious doctrine"); *Commonwealth* v. *Board of Educ. of Methodist Episcopal Church*, 179 S.W. 596, 598 (Ky. 1915) (daily religious services at Methodist College not "sectarian instruction").

[12] *See Kentucky Election: Terrible Rioting between the Irish and Americans, Great Loss of Life and Property*, N.Y. TIMES 1 (Aug. 7, 1855); *The Louisville Riots*, N.Y. TIMES (Aug. 9, 1855) ("[T]he provocation to violence was the premeditated denial of the legal rights of the foreign voters.")

[13] KENTUCKY ENCYCLOPEDIA at 524; *see also* AGNES GERALDINE MCGANN, NATIVISM IN KENTUCKY TO 1860 93-103 (Catholic University 1944).

Although the Know-Nothing party died out after the Civil War, anti-Catholic animus did not. The Know-Nothing spirit was reincarnated in the American Protective Agency, or A.P.A. The A.P.A. was an anti-Catholic, anti-immigrant secret society, and it was widespread in Kentucky by 1892.[14] During debates over the common schools at the 1891 Constitutional Convention, anti-Catholic hostility manifested itself repeatedly, as delegates championed the common schools as a remedy for the distinctive religious and cultural practices of the largely Catholic immigrants:

> The public school . . . is the mill into whose hopper may be poured Germans, Irishmen, Italians, Englishmen, Scandinavians, or the representatives of any other race, and yet may be relied on to turn out Americans, patriotic in purpose and intelligent in their devotion to our institutions.

OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION 4461 (E. Polk Johnson ed. 1890) ("Debates") (delegate Beckner quoting Andrew Carnegie). Delegates to the Constitutional Convention touted the common schools not only as a state duty, but as a religious obligation. One delegate grounded the obligation to provide public education in the writings of Martin Luther, saying "[t]he apostle of an open Bible was the first prophet of a State school." Debates 4460. Another opposed "sectarian" schools because "[y]ou can educate them in the sectarian schools, but instead of educating them in the light of toleration and freedom, you instill certain dogmas, certain instruction in their minds, which they must follow through their lives." Debates 4537. Yet another delegate, railing against the pernicious actions of the state churches of Europe, decried "the infamous sectarian spirit" which sought to "inject its deadly poison [and] fasten its everlast-

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[14] *American Protective Association*, ENCYCLOPÆDIA BRITANNICA (2009), *available at* http://www.britannica.com/EBchecked/topic/20094/American-Protective-Association. *See also* SMITH, Z.F. THE HISTORY OF KENTUCKY 823 (Prentice Press 1895) (contemporary account noting the A.P.A.'s "formidable balance of power" and "spirit of hostility to the Catholic Church and to foreign emigration and foreign influence").

ing fangs on the throat of popular and state education." Debates 4519. Delegates consistently extolled the common school as a bulwark against foreign influences, primarily against the state churches of Europe, and particularly against the Catholic church. The statements of the delegates debating Section 189 thus mark it unequivocally as a nativist, anti-Catholic Blaine Amendment.

C. Section 189 continues to have a discriminatory effect on religion generally and Catholicism in particular.

Not only was Section 189 ratified with discriminatory intent, but it continues to have a discriminatory effect today—both against religious groups generally, and Catholic groups in particular. *Wooley* v. *Spalding,* 293 S.W.2d 563 (Ky. 1956), is a perfect example of how the prohibition on sectarian instruction has had a disparate impact on Catholic groups. There, the Court addressed a "released time" program in which Catholic students were released from public school during the day to receive Catholic instruction. Kentucky law authorized the program, allowing students to be released to "their respective places of worship or some other suitable place to receive moral instruction in accordance with the religious faith or preference of the pupils." KRS § 158.220. But the Court struck down the program on the ground that the Catholic students received "sectarian religious training." *Wooley,* 293 S.W. 2d at 567. According to the Court, the county was required "to abolish sectarianism in all parts" of the system of public schools. *Id.* Thus, even under a program expressly permitting religious moral instruction, Catholic teaching was deemed impermissibly "sectarian."[15]

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[15] Section 189 has also been used to exclude non-Catholic religious schools from neutral state aid programs. *See, e.g., Butler* v. *United Cerebral Palsy of Northern Kentucky*, 352 S.W.2d 203 (Ky. 1961) (excluding from a neutral school aid program any "schools that give sectarian instruction or have any denominational requirements with

Nor is the disparate impact of Section 189 on religious and Catholic schools merely anecdotal. According to the National Center for Education Statistics, 59% of all private school students in Kentucky (K-12) attend Catholic schools; 40% attend another type of religious school; and only 1% attend a private secular school.[16]

Thus, the burden of Section 189 falls disproportionately on students attending religious schools in general and Catholic schools in particular. In fact, based on the percentages listed above, Section 189 is 1.4 times more likely to affect students at Catholic schools that at other religious schools, and 99 times more likely to affect students at private religious schools than at private secular schools. *Compare Hunter* v. *Underwood*, 471 U.S. 222, 227 (1985) (striking down a law that was 1.7 times more likely to disenfranchise blacks than whites).

II. This Court should construe Section 189 to avoid violating the United States Constitution.

In light of the discriminatory animus and effect of Section 189, enforcement of Section 189 raises serious issues under the Equal Protection Clause. This Court should, accordingly, interpret Section 189 in a way that avoids constitutional conflict. *See NLRB* v. *Catholic Bishop,* 440 U.S. 490, 500 (1979) (a law "ought not be construed to violate

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respect to their teachers or pupils"). It has also been used to strike down neutral state aid programs indistinguishable from those that the U.S. Supreme Court has upheld under the Establishment Clause. *Compare Sherrard* v. *Jefferson County Bd. of Educ.*, 171 S.W.2d 963, 294 Ky. 469 (Ky. App. 1942) (striking down a neutral busing program for private school students living on existing bus routes) *with Everson* v. *Board of Education,* 330 U.S. 1 (1947) (upholding a neutral busing program).

[16] *See* National Center for Education Statistics, 2005-06 Private School Universe Survey (data compiled from searches at http://nces.ed.gov/surveys/pss/privateschoolsearch/).

the Constitution if any other possible construction remains available"). Here the constitutional issues cannot be avoided without reversing the court below.

The Equal Protection Clause restricts the ability of governments to pass laws that discriminate on the basis of a suspect classification, such as race or religion. *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976). In *Hunter* v. *Underwood*, 471 U.S. 222 (1985), the Supreme Court concluded that a law violates the Equal Protection Clause when it (1) was based on discriminatory animus at the time of its passage and (2) continues to have a discriminatory effect today. *Id.* at 232.

Hunter involved a provision of the Alabama Constitution disenfranchising any person convicted of a crime involving "moral turpitude." *Id.* at 223. Although the provision was facially neutral, the Court invalidated it on the ground that it had been enacted with the discriminatory intent of disenfranchising blacks. *Id.* at 232-33. The Court reached this conclusion *not* on the basis of direct evidence of discriminatory intent, but on the basis of "opinions of historians . . . show[ing] that the Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks." *Id.* at 229. In other words, the historical backdrop of racial discrimination was enough to establish a racially discriminatory motive. *Id.* Moreover, because the constitutional provision continued to have a discriminatory effect at the time of its application—blacks were at least 1.7 times as likely as whites to suffer disfranchisement—the Court invalidated it under the Equal Protection Clause. *Id* at 227, 232.

Section 189 has all the faults of the Alabama disenfranchisement clause and more. First, Section 189 was very much "part of a movement that swept the [United States] to [discriminate against Catholics]." *Id.* at 229. Indeed, as explained above, the anti-

Catholic movement in Kentucky was "unusually strong," KENTUCKY ENCYCLOPEDIA at 523, and the debates over Section 189 revealed a specific intent deny "sectarian" Catholic schools equal treatment by the government. *See* Section I.B. above.

Second, like the Alabama disenfranchisement provision, Section 189 has "disproportionate effects" along the lines of a suspect class—in this case, religion in general and Catholicism in particular. *See Hunter*, 471 U.S. at 227. As noted above, while the Alabama provision was 1.7 times more likely to disenfranchise blacks than whites, here Section 189 is 1.4 times more likely to affect students at Catholic schools that at other religious schools, and 99 times more likely to affect students at private religious schools than at private secular schools.

Under *Hunter*, then, Section 189 is constitutionally suspect. Just as Jim Crow laws still on the books across the South cannot be enforced with discriminatory effect today, Kentucky laws enacted out of religious animus cannot be enforced with a discriminatory effect on religious believers today.

It is no defense to this conclusion to argue that there is no discriminatory intent in the enforcement of Section 189 today. *Hunter* made clear that a *present* discriminatory intent is not necessary under the Equal Protection Clause:

> Without deciding whether [the challenged section of the Alabama constitution] would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate . . . and the section continues to this day to have that effect. As such, it violates equal protection . . . .

471 U.S. at 233.

Nor is it any defense to argue that Section 189 is being applied here against a non-Catholic religious school, or that, because "sectarian" is now generally taken to be syn-

onymous with "religious," Section 189 passes muster by treating all religious groups with equal disfavor. First, it is simply wrong as a factual matter to assert that Section 189 treats all religious schools equally; as noted above, even assuming Section 189 applies to all religious schools, it still has a disproportionate impact on students attending Catholic schools. Second, under *Hunter*, it makes no difference whether the group discriminated against today is identical to the original target of discrimination. *Id.* at 231, 233. Just as Alabama could not save its disenfranchisement provision by showing that it disenfranchised both blacks and poor whites, Kentucky cannot save section 189 by showing that it penalizes both Catholic and Protestant schools.

In short, Section 189 was motivated by a desire to discriminate against Catholics and still has a discriminatory effect on Catholics (and other religious groups) today. It therefore raises serious concerns under the Equal Protection Clause and should be interpreted narrowly to avoid a constitutional conflict.

CONCLUSION

The decision of the Circuit Court should be reversed.

Respectfully submitted,

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