IN THE SUPREME COURT OF THE STATE OF NEVADA

RUBY DUNCAN, an individual; RABBI MEL HECHT, an individual; *et al.*,

Appellants,

vs.

THE STATE OF NEVADA OFFICE OF THE STATE TREASURER; THE STATE OF NEVADA DEPARTMENT OF EDUCATION; *et al.*,

Respondents.

and

AIMEE HAIRR, an individual, *et al.*,

Respondents-Intervenors.

Case No. 70648

District Court
Case No. A-15-723703-C



# BRIEF OF AMICI CURIAE BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY AND HINDU AMERICAN FOUNDATION IN SUPPORT OF APPELLANTS FOR REVERSAL OF THE DISTRICT COURT DECISION

JOSHUA H. REISMAN
Nevada Bar No. 7152
HEIDI PARRY STERN
Nevada Bar No. 8873
REISMAN SOROKAC
8965 S. Eastern Ave., Suite 382
Las Vegas, Nevada 89123
(702) 727-6258
jreisman@rsnvlaw.com
hstern@rsnvlaw.com

*Attorneys for Amici Curiae*

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

## Other Authorities

## INTEREST OF THE *AMICI CURIAE*

The Baptist Joint Committee for Religious Liberty ("BJC") and the Hindu American Foundation ("HAF") jointly submit this Brief of Amici Curiae in support of Appellants and request reversal of the district court's decision below. *Amici* have sought leave of this Court by motion for authority to file this brief.

*Amici* represent different faith traditions but are united in their firm commitment to the principle that religious education of children is a matter best left to families and their houses of worship. *Amici* recognize through long experience that the use of tax dollars to fund religious institutions and religious education impedes rather than advances the cause of religious freedom. This same understanding motivated adoption of the No-Aid Clause of the Nevada Constitution (Article XI, Section 10).

*Amici* are concerned because the Nevada Education Savings Program, a school voucher program enacted by Senate Bill 302 ("Voucher Program"), encroaches on religious liberty. The Voucher Program has the effect of making religious institutions dependent on government and interferes with free, individual choice in matters of conscience. Accordingly, the program should be struck down as inconsistent with the plain language and spirit of the No-Aid Clause.

The BJC is a religious-liberty organization that serves fifteen cooperating Baptist conventions and conferences in the United States, with supporting congregations throughout the nation. The BJC deals exclusively with issues of religious liberty and church-state separation and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans. The BJC also supports religious-liberty protections in state constitutions—such as the ones in the Nevada constitution—which provide additional safeguards against governmental sponsorship of and interference in religion.

The Hindu American Foundation is a 501(c)(3) national advocacy organization for the Hindu American community. HAF educates the public about Hinduism, speaks out about issues affecting Hindus worldwide, and builds bridges with institutions and individuals whose work aligns with HAF's objectives. HAF focuses on human and civil rights, public policy, media, academia, and interfaith relations. Since its inception, HAF has made legal advocacy one of its main pillars. From issues of religious accommodation and religious discrimination to defending fundamental constitutional rights of free exercise and the separation of church and state, HAF has educated Americans at large and the courts about various aspects of Hindu belief and practice in the context of religious liberty, either as a party to the case or as an amicus. HAF has frequently joined other faith-based and civil rights

groups in cases involving school voucher programs. In such cases, HAF has consistently taken the position that the use of public taxpayer funds to support religious schools through school voucher programs undermines religious liberty and unnecessarily entangles government and religion. The issues before this Court, therefore, have profound implications for HAF, which strongly believes that the religious education of children is a purely private matter that should not be interfered with or supported by the government.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Even before the founding of the United States, influential philosophers and theologians recognized that public funding of religion and religious institutions is inimical to religious freedom. These thinkers observed that reserving questions of conscience to individuals, families, and their houses of worship protected religion against corruption and prevented government from coercing belief or distorting theological doctrine and practice. By avoiding financial entanglement between government and religious institutions, genuine religious belief could flourish, and religious institutions would not be driven to compete with each other for shares of the State's largess.

Nevada's No-Aid Clause (NEVADA CONSTITUTION, Art. XI, Sec. 10), together with the restrictions imposed on the legislature by Nevada's Constitution regarding public education (*see* Art. XI, Secs. 1 and 2), are central components of

Nevada's system for ensuring religious liberty. Together, they further the State's goal of maintaining a strong system of free, common, public schools in which students of all religious beliefs are equally welcome and no faith is ever favored or disfavored.

The district court's decision to adopt federal standards in interpreting the Nevada Constitution conflicts with the text and history of the No-Aid Clause and undermines the Nevada Constitution's goal of preserving religious liberty and common public schools. In holding that Nevada's No-Aid Clause is essentially coextensive with the Establishment Clause of the First Amendment, the district court rejected the more expansive religious liberty protections indicated by the Clause's plain language and supported by its history. The district court likewise rejected the expansive interpretation of these protections articulated by this Court in *State v. Hallock,* 16 Nev. 373 (1882).

Voucher programs like Nevada's Education Savings Program, which divert tax dollars from the public schools to private religious schools, are precisely the types of programs forbidden by the No-Aid Clause. By funding religious instruction and making religious institutions beholden to the State, such programs threaten the social compact that protects the vibrant diversity of religious beliefs and the freedom of conscience that Nevadans currently enjoy. This is true whether State aid is direct or indirect, and regardless of the intent or overarching purpose of

the legislation. In holding that the Voucher Program comports with the No-Aid Clause, the district court's decision not only misunderstands and misapplies the plain language and legislative purpose of the Clause, but also threatens religious freedom.

## ARGUMENT

*Amici* incorporate by reference Appellants' description of Nevada's Voucher Program. (Appellants' Opening Brief ("AOB") at 6-11.) *Amici* are particularly concerned with the broad and expansive nature of the Voucher Program, which is unprecedented in scope. There is no limit to the number of Nevada students who can participate, or to the amount of public funds that can be diverted to private religious schools. Over half of the private schools eligible for Nevada's Voucher Program are religious schools. In fact, Appellants note that in some counties, religious schools are the only available private schools. The scope of Nevada's Voucher Program thus raises particularly serious concerns for the *Amici*, who are committed to protecting religious liberty.

The framers of the Nevada Constitution understood that public funding of religious instruction unwisely redirects resources from public schools and public education to private schools that selectively serve only a few; that it makes religious institutions beholden to government in an attempt to reap the benefits of governmental largess; and that it risks fomenting religious strife by placing

different denominations in competition with each other for scarce public dollars. The No-Aid Clause was designed to safeguard against these harms.

There is no question that the Voucher Program diverts public money from the State's public-school fund to private religious schools. In doing so, the program depletes the funds available to maintain the public schools in Nevada, schools that are meant to provide education for all children on equal terms, regardless of faith or belief. Meanwhile, the program gives private, religious schools free rein to use tax dollars to fund religious instruction and various forms of discrimination. The Voucher Program violates the terms of Nevada's Constitution, and the district court should have permitted Plaintiffs' challenge to the program to proceed.

### A. Our Nation Is Built on the Philosophical, Theological, and Political Understanding That Governmental Involvement with Religion Threatens Religious Liberty

The principle that religion flourishes best when government is least involved has deep roots in philosophy, theology, and political thought going back well before the founding of this State and the Republic. Grounded in the understanding that freedom of conscience is an essential component of faith, as well as the experience of a long, sad history of religious oppression, the principle of separation recognizes that governmental support for and funding of religion corrodes true belief, makes religious denominations and houses of worship beholden to the state,

and places subtle—or not so subtle—coercive pressure on individuals and groups to conform.

### 1. Theology

The notion of freedom of conscience as a moral virtue traces back to the thirteenth-century teachings of Thomas Aquinas, who wrote that conscience must be an important moral guide and that acting against one's conscience constitutes sin. Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 356-57 (2002). Martin Luther and the other early architects of Protestantism built on this idea, preaching that the Church does not have the authority to bind believers' consciences on spiritual questions: "the individual himself c[an] determine the content of his conscience based on scripture and reason." *Id.* at 358-59. John Calvin went further, arguing that this robust notion of individual conscience absolutely deprives civil government of the authority to dictate in matters of faith. *See id.* at 359-61.

Their conception of the theological relationship between government and religion found expression in the New World in the teachings of Roger Williams, the Baptist theologian and founder of Rhode Island. Williams preached that, for religious belief to be genuine, people must come to it of their own free will. Coerced belief and punishment of dissent are anathema to true faith; religious practices are sinful unless performed "with[] faith and true persuasion that they are

the true institutions of God." Roger Williams, *The Bloudy Tennant, Of Persecution for Cause of Conscience* (1644), *reprinted in* 3 COMPLETE WRITINGS OF ROGER WILLIAMS 12 (Samuel L. Caldwell ed., 1963); *see also id.* at 202 ("[T]he Church of Christ doth not use the Arm of secular power to compel men to the true profession of the truth, for this is to be done with Spiritual weapons."). When government involves itself in matters of religion, Williams warned, the coercive authority of the state impedes the exercise of free will, while also causing bloody civil strife. Thus, Williams taught, keeping church and state separate is crucial both to protect individual religious dissenters against persecution and to safeguard religion and the church against impurity and dilution. *See id.*; Edwin S. Gaustad, Roger Williams: Lives and Legacies, at 13, 59, 70 (2005); Richard P. McBrien, Caesar's Coin: Religion and Politics in America at 248 n. 37 (1987) ("'[T]he Jews of the Old Testament and the Christians of the New Testament 'opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world' . . . [I]f He will ever please to restore His garden and paradise again, it must of necessity be walled in peculiarly unto Himself from the world.'" (quoting Williams)).

**2. Political philosophy**

Not only did the theological doctrine of separation have overriding importance for the development of religion in this country, but it also became the

foundation for the political thought on which our nation was built. Notably, for example, John Locke incorporated it into his argument for religious toleration:

> Whatsoever may be doubtful in Religion, yet this at least is certain, that no Religion, which I believe not to be true, can be either true, or profitable unto me. In vain therefore do Princes compel their Subjects to come into their Church-communion, under pretence of saving their Souls. . . . [W]hen all is done, they must be left to their own Consciences.

John Locke, *A Letter Concerning Toleration* at 38 (James H. Tully ed., Hackett Pub. Co. 1983) (1689). Based on this understanding of conscience—and the concern he shared with Williams that bloodshed follows when government intrudes into matters of faith—Locke reasoned that "civil government" should confine itself to the secular sphere and should not "interfere with matters of religion except to the extent necessary to preserve civil interests." Feldman, *Intellectual Origins*, 77 N.Y.U. L. REV. at 368.

This nation's founders took to heart both Williams' theology and Locke's political thought on the proper relationship between religion and government. In the Virginia legislature's debate in 1784 over Patrick Henry's "Bill Establishing a Provision for Teachers of the Christian Religion," for example, these ideas motivated the opposition to Henry's proposal to fund religious education with a property-tax levy (which Henry had proposed as an antidote to a perceived decline in social mores). *See* Vincent Blasi, Essay, *School Vouchers and Religious Liberty:*

*Seven Questions from Madison's* Memorial and Remonstrance, 87 CORNELL L. REV. 783, 783-84 & n.3 (2002). James Madison strenuously objected to Henry's bill on the grounds that it was an offense against individual conscience, a threat to the health of civil government, and a gross intrusion into church governance and the free development of church doctrine. *See, e.g.*, James Madison, *A Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), *reprinted in* Selected Writings of James Madison at 21, 26 (Ralph Ketcham ed., 2006) (arguing that Henry's bill would be "adverse to the diffusion of the light of Christianity," "tend to enervate the laws in general, . . . slacken the bands of Society," and infringe on "the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience").

Drawing on Locke's views on toleration (*see* Blasi, *School Vouchers*, 87 CORNELL L. REV. at 789-90 & n.28), Madison argued that religion "must be left to the conviction and conscience of every man." Madison, *supra*, at 22. Governmental support for religion and religious instruction would only "weaken in those who profess [the benefited] [r]eligion a pious confidence in its innate excellence" while "foster[ing] in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust it to its own merits." *Id.* at 24.

Madison's arguments not only led to the defeat of Henry's bill but also spurred the passage of Thomas Jefferson's Bill for Establishing Religious Freedom

in its place. *See* Merrill D. Peterson, *Jefferson and Religious Freedom*, ATL. MONTHLY (Dec. 1994), *available at* http://www.theatlantic.com/past/docs/issues/96oct/obrien/peterson.htm. Jefferson's Bill forthrightly declared that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." Thomas Jefferson, *The Virginia Statute for Religious Freedom* (Jan. 16, 1786), *reprinted in* Founding the Republic: A Documentary History 94, 95 (John J. Patrick ed., 1995). In Jefferson's view, religious liberty suffers even when the state asks citizens to support teachers of their own faith, because the individual should be absolutely free to contribute to "the particular minister, whose morals he would make his pattern." *Id.* And, Jefferson explained, religion itself neither requires nor benefits from the support of the state: "truth is great and will prevail if left to herself." *Id.* Thus, the Virginia Bill mandated "[t]hat no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever." *Id.*

Jefferson and Madison's vision sowed the seeds for a deeper political, social, and cultural understanding of the relationship between religion and government that would permeate and define the new nation. *See, e.g.*, Alexis de Tocqueville, Democracy in America at 284 (Harvey C. Mansfield & Delba Withrop eds. & trans. 2000) (1835) (observing American understanding that "[r]eligion . . . cannot share the material force of those who govern without being burdened with a part of

the hatreds to which they give rise"); *id.* at 285 ("Insofar as a nation takes on a democratic social state, and societies are seen to incline toward republics, it becomes more and more dangerous for religion to unite with authority. . . . [I]f the Americans, who have delivered the political world to the attempts of innovators, had not placed their religion somewhere outside of that, what could it hold onto in the ebb and flow of human opinions? In the midst of the parties' struggle, where would the respect be that is due it? What would become of its immortality when everything around it was perishing?").

### 3. Educational policy

This distinctly American political and cultural context also gave rise to another critical development in nineteenth-century America—the birth and growth of free, universal public schooling, which came to be recognized as essential to the functioning of representative government in an increasingly diverse and pluralistic society. As the U.S. Supreme Court would later explain in *Brown v. Board of Education*, 347 U.S. 483 (1954) Americans came to understand that public schools were critical because they enabled students of every background to learn to live and work together, and therefore also to acquire the skills and virtues necessary to participate in governance as equal citizens. *See id.* at 493 (stating that education is "required in the performance of our most basic public responsibilities" and is "the very foundation of good citizenship").

The effort to provide free public education for these civic purposes dates back to the early days of the Republic. In 1787, for example, Thomas Jefferson proposed a system of free public schooling for Virginia, *see* Thomas Jefferson, Notes on the State of Virginia (1787), *available at* http://avalon.law.yale.edu/18th_century/jeffvir.asp, and the Free School Society of New York opened its first school in 1806, *see* Diane Ravitch, The Great School Wars: A History of the New York City Public Schools at 11 (3d ed. 2000). As the Free School Society's trustees explained when they began seeking public funding for their "charity" schools (i.e., privately funded free schools for the poor), the drive toward public education was a political one rooted in the American notion of participatory citizenship. Because the people themselves possessed the true political power, it was vitally important that education be provided to all, in order to "enable them to exercise [that power] with wisdom." *Id.* at 24 (internal quotation marks omitted). As Tocqueville observed, "[o]ne cannot doubt that in the United States the instruction of the people serves powerfully to maintain a democratic republic." Tocqueville, Democracy in America, *supra*, at 291.

With those concerns as the driving force, the common-school movement dominated educational reform in nineteenth-century America, with free, universal public schooling increasingly replacing charity schools for the poor. William J. Reese, America's Public Schools: From the Common School to "No Child Left

Behind" at 26 (2011). A central mission of the movement was to prepare students for participatory citizenship. *See* Noah Feldman, *Non-sectarianism Reconsidered*, 18 J.L. & POL. 65, 72 (2002).

It was thus crucial for the new common schools to eschew teaching religious doctrine that was particular to one denomination. As Horace Mann and his fellow educational reformers of the mid-nineteenth century recognized, our Nation was becoming ever more religiously diverse, and nonsectarianism in our schools would therefore be essential to instructing students in civic morality while respecting their "religious heterogeneity." *Id.* at 112. Mann and his contemporaries explained that by avoiding doctrinal disputes and other controversial matters of belief that might be particular to one or another denomination, public schools could teach the moral lessons needed for citizenship while adhering to the American principle of freedom of conscience and avoiding strife between religious communities over whose religion would be instilled in the young. *Id.* at 74.

Thus, for example, a critical early development in the common-school movement was the effort to replace religious instruction in the curriculum with "unmediated" Bible reading. The idea was that the public schools should "emphasize universal religious *values*," not particular and possibly controversial religious *doctrine*. Steven K. Green, The Bible, the School, and the Constitution: The Clash That Shaped Modern Church-State Doctrine at 21 (2012) (emphasis

added). The Bible was to be read as a "source-book for . . . universal religious truths," unembellished by explanation or interpretation that would alienate some groups. *Id.* As Mann, a Unitarian, saw it, this system of instruction "would appeal to all well-meaning Christians, including Catholics." *Id.* at 23; *see also* Feldman, *Non-sectarianism Reconsidered*, 18 J.L. & POL. at 80-81. In a nation that was still almost wholly Christian but comprised many different, competing Christian denominations, this approach (though undoubtedly unconstitutional today, and certainly inadequate to encompass the pluralism that defines our twenty-first century society) was a clear "break from the status quo" and an important first step toward religious inclusivity in the public schools. Green, The Bible, *supra*, at 18, 23.

### B. The Voucher Program Conflicts with Nevada's Goals of Promoting Religious Liberty and Preserving Strong, Inclusive Public Schools

Nevada's No-Aid Clause is an expression of both the philosophical and political traditions of freedom of conscience and the developing national consensus that secular public schools are essential for ensuring civic virtue, civic participation, and freedom of conscience in an increasingly pluralistic society. No-aid provisions like Article XI, Section 10, helped to preserve, protect, and foster the growth of the common schools—and the civic virtues that they promoted—by ensuring that whatever public money was available for education would go to

public institutions open equally to all regardless of their religion, rather than to private schools that might restrict access to persons of one particular faith.

The "impulse toward nonsectarian public education" that led to the adoption of no-aid provisions in state constitutions was most of the time and in most places based on the "noble, republican ideals" of egalitarianism and government by the people. Steven K. Green, *"Blaming Blaine": Understanding the Blaine Amendment and the "No-Funding" Principle*, 2 FIRST AMEND. L. REV 107, 113 (2004). The provisions were generally seen as a "sincere effort to make public education available for children of all faiths and races, while respecting Jeffersonian notions of church-state separation[.]" *Id.* at 114. Indeed, "the no-funding principle and its corollary, nonsectarian education, predate the nineteenth century influx of Catholic immigration, the advent of parochial schooling as a 'threat' to the common schools, and the rise of organized nativism." *Id.* at 113.

By the latter half of the nineteenth century, no-aid clauses had become a "common feature" of state constitutions across the country. *See id.* at 800-01 & n.82. Thus, some 35 states have them in their constitutions today. *See* Jill Goldenziel, *Blaine's Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 DENV. U. L. REV. 57, 58 (2005). Although the specific language—and therefore the precise reach—of the clauses may vary, most "draw[] a more stringent line than that drawn by the United States Constitution" in order to

protect "antiestablishment interests." *Locke v. Davey*, 540 U.S. 712, 722 (2004); *see also, e.g., Witters v. State Comm'n for the Blind*, 771 P.2d 1119, 1121-22 (Wash. 1989) (Washington Constitution); *Americans United v. Rogers*, 538 S.W.2d 711, 720 (Mo. 1976) (Missouri Constitution); *McDonald v. Sch. Bd. of Yankton Indep. Sch. Dist. No. 1*, 246 N.W.2d 93, 98 (S.D. 1976) (South Dakota Constitution).

That is true of Nevada's No-Aid Clause, which goes beyond the limitations of the Establishment Clause, focusing specifically on the expenditure of State funds, and forcefully and unambiguously declaring that:

> No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose.

NEVADA CONSTITUTION, Art. XI, Sec. 10. This language is broad and unequivocal. Nevada's Voucher Program cannot be squared with it. On its face, the Clause bars diverting public money to a "sectarian purpose." Religious schools are the embodiment of just such a purpose. Yet the Nevada Voucher Program takes public money and diverts it to religious schools.

In drafting and adopting this strict No-Aid Clause, the delegates to Nevada's constitutional convention expressly sought to promote religious freedom and protect the public schools and the public-school fund by imposing an absolute prohibition against the use of public dollars for religious instruction. *See* Official

Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada (Frank Eastman, Printer 1866), at 577 (containing a discussion of public schools and the importance of constitutional language aimed to "keep out sectarianism") (hereinafter, "Official Report"). Preventing public funds from being used to fund sectarian instruction was of vital importance to the delegates, who expressed "strenuous opposition" to any sectarian instruction in the public schools. Official Report at 660; *see also id.* at 661 (recognizing that a school with any religious element "is not a public school"); *id.* (stating that "[a] school established by a district, if it shall tolerate sectarian instruction, cannot receive the money or aid of the State. . . . It constitutes no part of the general educational interest."). The delegates made clear their desire to make an unequivocal statement in Nevada's Constitution about keeping government funds out of religious schools.

The desire of Nevada's Constitutional delegates to prohibit government funding of religious institutions was further bolstered by this Court a few years after the Constitutional Convention. In *Hallock* at. 373, this Court held that the No-Aid Clause imposes an absolute ban on diverting public funds to religious institutions. *Id.* at 387 ("It was intended that public funds should not be used, directly or indirectly, for the building up of any sect."). Recognizing the No-Aid Clause's expansive language, this Court found that the Clause prohibited any religious instruction funded by taxpayer money. In doing so, this Court recognized

that "[i]t does not matter that Catholic parents desire their children taught the Catholic doctrines, or that Protestants desire theirs to be instructed in Protestantism. The constitution prohibits the use of any of the public funds for such purposes, whether parents wish it or not." *Id.* at 386. This Court in *Hallock* thus preserved the very rights and protections that *Amici* seek to preserve in this appeal.

In more recent years, Nevada's Attorney General has likewise recognized the strong prohibition again public funding of religious education encapsulated by the No Aid Clause. (*See* AOB at 14 (discussing Nevada Attorney General Opinions).) In opinions issued in 1956, 1965, and 1977, Nevada's Attorney General reiterated again and again Nevada's prohibition on diverting public funds to sectarian purposes. In 1965, the Attorney General issued a particularly clear and unequivocal statement on the issue, proclaiming that "[t]he Constitutional and statutory provisions against the use of public funds for educational purposes in private and parochial schools are as deep seated and deep rooted as our form of government." *See* AOB at 14.

It was improper for the district court to disregard the expansive language of Nevada's Constitution, the pronouncements of this Court, and the historical opinions of Nevada's Attorney General, instead relying on federal law and law from other states. These laws do not determine the religious liberty protections of the Nevada Constitution. The language of Nevada's Constitution, and its

subsequent interpretation in Nevada, do that. In particular, the United States Supreme Court's interpretation of the Establishment Clause in *Zelman v. Simmons-Harris,* 536 U.S. 639, 122 S. Ct. 2460 (2002), does not define the limits of religious liberty protection in Nevada. Both the delegates who voted to propose the No-Aid Clause and the citizenry that ratified it understood and intended that the Clause would protect the public schools and promote religious liberty by denying the legislature any power to divert public money to religious schools. Nevada's protections extend beyond those of the Establishment Clause and should have been interpreted in that manner by the district court.

### C. Nevada's No-Aid Clause Protects Religious Freedom and Supports Religious Pluralism

Upholding the strict requirements of the No-Aid Clause implies no disrespect for religion. It is not now, nor has it ever been, antireligious to say that decisions about the religious education and spiritual life of children should be left to their families and houses of worship, without either governmental support or intrusion. *See, e.g., Engel v. Vitale*, 370 U.S. 421, 435 (1962). Quite the contrary; maintaining that principle is critical to ensuring religious liberty for all. As Roger Williams, John Locke, Thomas Jefferson, James Madison, and the U.S. Supreme Court all recognized, "a union of government and religion tends to destroy government and to degrade religion." *Id.* at 431; *see also, e.g., Illinois ex rel.*

*McCollum v. Bd. of Ed. of Sch. Dist. No. 71*, 333 U.S. 203, 212 (1948) ("both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere"). The principle is one that the framers of the Nevada Constitution took to heart.

It is also one that has served Nevada well. Religion has flourished here and throughout the nation. In 1963, the U.S. Supreme Court observed that it "can be truly said . . . that today, as in the beginning, our national life reflects a religious people." *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 213 (1963).[1] The *Schempp* Court cited census data showing that 64 percent of Americans were members of a church. *See id.* (citing U.S. Census Bureau, *Statistical Abstract of the United States* (1962)). Today, religious identification has increased even more, to nearly 80 percent (U.S. Census Bureau, *Statistical Abstract of the United States*, tbl. 75 (2012), *available at* https://www.census.gov/compendia/statab/2012/tables/12s0075.pdf). The rates of belief are high. *See* Pew Forum on Religion & Public Life, *U.S. Religious Landscape Survey: Religious Beliefs and Practices* 9 (June 2008). And intensity of belief, as measured by regular attendance at worship

[1] That observation is all the more powerful when viewed in light of Madison's reflections on the effects of the Virginia Bill for Establishing Religious Freedom after witnessing the first few decades of its operation: "Religion prevails with more zeal, and a more exemplary priesthood than it ever did when established and patronised by Public authority." Letter from James Madison to Edward Livingston (July 10, 1822), *reprinted in* Selected Writings of James Madison at 307 (Ralph Ketcham ed., 2006).

services, has remained at least constant for the last fifty years. *See* Gallup Politics, *In U.S., Four in 10 Report Attending Church in Last Week* (Dec. 24, 2013), *available at* http://www.gallup.com/poll/166613/four-report-attending-church-last-week.aspx.

Religious pluralism has likewise flourished. In 1875, both this State and the nation were overwhelmingly Christian and Protestant. Today the U.S. population "can be usefully grouped into more than a dozen major religious traditions that, in turn, can be divided into hundreds of distinct religious groups." Pew Forum on Religion & Public Life, *U.S. Religious Landscape Survey: Religious Affiliation* 10 (Feb. 2008).

It is no stretch to say that the success of religion in the United States is attributable to our steadfast adherence to the principle that individual congregations and worshippers are free to define for themselves the terms of belief and religious practice, without dependence on, or interference from, civil authority. *See, e.g., McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 882-83 (2005) (O'Connor, J., concurring) (Americans' commitment to keep religion "a matter for the individual conscience" has "allow[ed] private religious exercise to flourish."); *Lee v. Weisman*, 505 U.S. 577, 609 (1992) (Blackmun, J., concurring) (cautioning "that religious freedom cannot thrive in the absence of a vibrant religious

community and that such a community cannot prosper when it is bound to the secular").

Maintaining this commitment is all the more important today. In our highly pluralistic society, making denominations, houses of worship, or religious schools compete for scarce public resources is the surest recipe for the sectarian strife and degradation of religion that Williams, Madison, Jefferson and the people of this State worked so hard to prevent. *Cf. Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring) (warning that "divisiveness based upon religion ... promotes social conflict, sapping the strength of government and religion alike"); *McCollum v. Board of Education*, 333 U.S. 203, 217 (1948) (Frankfurter, J., joined by Jackson, Rutledge, and Burton, JJ., concurring) ("The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice.").

Nevada's Voucher Program threatens to bring about these very problems. It creates incentives for religious schools to alter their curricula and practices in order to qualify to receive public money. It makes them compete with each other for the voucher payments authorized by the program. And it bleeds the public-school fund

and the School District's coffers to support private schools that may discriminate on the basis of religion and other factors—such as sexual orientation, gender identity, disability, and academic or disciplinary history—rather than being open equally to all comers regardless of faith or belief. The continued religious liberty of Nevadans will be best secured by steadfast adherence to the No-Aid Clause and the principles of freedom of conscience and civic virtue that it embodies. The Voucher Program is as irreconcilable with those principles as it is with the plain language of the Clause. It should not be allowed to stand.

## CONCLUSION

The decision of the district court should be reversed.

Dated this 21st day of July, 2016.

REISMAN SOROKAC

/s/ Heidi Parry Stern, Esq.
JOSHUA H. REISMAN, ESQ.
Nevada Bar No. 7152
HEIDI PARRY STERN, ESQ.
Nevada Bar No. 8873
8965 S. Eastern Ave., Suite 382
Las Vegas, Nevada 89123
Phone: (702) 727-6258
Fax: (702) 446-6756
jreisman@rsnvlaw.com
hstern@rsnvlaw.com

*Attorneys for Amici Curiae*

## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font size.

I FURTHER CERTIFY that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C) it is proportionally spaced, has a typeface of 14 points or more and contains 5,378 words.

FINALLY, I HEREBY CERTIFY that I have read this BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLANTS FOR REVERSAL OF THE DISTRICT COURT DECISION, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I

may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 21st day of July, 2016.

REISMAN SOROKAC

/s/ Heidi Parry Stern, Esq.

JOSHUA H. REISMAN, ESQ.
Nevada Bar No. 7152
HEIDI PARRY STERN, ESQ.
Nevada Bar No. 8873
8965 S. Eastern Ave., Suite 382
Las Vegas, Nevada 89123
Phone: (702) 727-6258
Fax: (702) 446-6756

*Attorneys for Amici Curiae*