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ORPHANS, BABY BLAINES, AND THE BRAVE NEW
WORLD OF STATE FUNDED EDUCATION: WHY NEVADA'S
NEW VOUCHER PROGRAM SHOULD BE UPHELD UNDER
BOTH STATE AND FEDERAL LAW

*David Wilhelmsen**

INTRODUCTION

In May 2015, the Nevada Assembly transformed its education system by passing Senate Bill 302.¹ This new law enabled Nevada students to opt out of public schools and receive roughly \$5,000 in state funding applicable toward private schooling.² But before the ink dried, two separate lawsuits emerged challenging its constitutionality. First, the ACLU alleged it violated the Nevada constitution's prohibition on funding "sectarian purpose[s]"³ by permitting private religious schools to receive funds.⁴ It also claimed ESAs ran afoul of Nevada's duty to provide "a uniform system of public schools"⁵ by funding a competing alternative.⁶ Aside from the ACLU's lawsuit, *Educate Nevada Now* (hereafter *ENN*) filed a separate action alleging that two

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1. NEV. DEP'T. OF EDUCATION, http://www.doe.nv.gov/Legislative/Education_Savings_Accounts/ (last visited 01/15/2016) [hereinafter Education Savings Account (SB 302)].

2. Emma Brown, *Nevada's New School Voucher Program Faces Second Legal Challenge*, WASH. POST, (Sept. 10, 2015), https://www.washingtonpost.com/local/education/nevadas-new-school-voucher-program-faces-second-legal-challenge/2015/09/10/29e4183a-57cf-11e5-8bb1-b488d231bba2_story.html.

3. NEV. CONST. of 1864, art. XI, § 10 (1880). No funding clauses are often called "baby Blaine" amendments since they originate in failed language proposed as part of the Federal Constitution by then Speaker of the House, James Blaine. See Meir Katz, *The State of Blaine: A closer Look at the Blain Amendments and Their Modern Application*, 12 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 111, 112 (2011). The Blaine Amendment and consequent "baby Blaines" modeled after it flowed from anti-Catholic sentiment sweeping the nation during the 1970s. Speaker Blaine seized upon this sentiment in the hopes of boosting his chances of becoming the next president. While some dispute his personal feelings regarding Catholicism, his proposed amendment was a clear attack on the growing influence of the Catholic Church in America. See e.g. Katz, *supra* note 3, at 112.

4. See Emma Brown, *ACLU Sues to Stop Nevada's New School Voucher Program*, WASHINGTON POST, Aug. 27, 2015, https://www.washingtonpost.com/local/education/aclu-says-its-suing-to-stop-nevadas-new-school-voucher-program/2015/08/27/db57dcd2-4cd0-11e5-902f-39e9219e574b_story.html; see also Katz, *supra* note 3 ("Today, the term "sectarian," is widely interpreted (contrary to its historical meaning) as a synonym for "religious." The Blaine Amendments thus operate to impose a per se bar against funding to all religious organizations.").

5. Complaint at 13, *Lopez v. Schwartz*, filed (Nev. Dist. Ct. Sep. 9, 2015), available at <http://apps.washingtonpost.com/g/documents/local/nevada-voucher-complaint/1736/>.

6. *Id.*

obscure constitutional provisions barred the Nevada Legislature from using the Education Fund on anything besides public schools.⁷ Because *ENN*'s procedural arguments defy constitutional language, this Note will only briefly outline and refute them. The bulk of discussion will be geared toward Nevada's no funding clause (i.e. "baby Blaine" amendment) and its uniformity clause. Thus, this Note will analyze (1) Nevada case law, (2) precedent from other states, (3) and Supreme Court jurisprudence to argue Nevada's ESA program must be upheld under both state and federal law. The latter is particularly timely in light of the Supreme Court's fresh grant of certiorari to a Missouri case involving whether a state can deny funding to an organization purely on the basis of religious viewpoint.⁸

Part I of this Note will demonstrate that Nevada law permits upholding its new voucher program. Under Nevada's no funding clause, ESAs pass muster because they provide funding to individual families who independently decide how to spend the money.⁹ The Nevada legislature, therefore, is not responsible if they put the money toward religious schooling.¹⁰ However, even if a court interpreted the voucher program as directly funding religious schools, the matter would not be settled. Nevada case law only deems certain religions "sectarian".¹¹ Consequently, construing voucher money to be a direct allocation to schools would force Nevada courts decide which religious schools qualified as sectarian, resulting in a judicial nightmare.¹² Regarding its uniformity clause, the Nevada Supreme Court has minimally expounded upon it, stating only that school districts cannot count children ineligible to attend public schools toward their funding.¹³ One interpretation of this is that only children attending public schools should receive public education money. However, a better reading is that since ESA recipients are entitled to attend public schools, they are thereby eligible to receive state education money. Lastly, the Nevada Supreme Court has instructed courts to interpret laws using original public meaning with a thumb on the scale favoring constitutionality.¹⁴ ESAs, then, should

7. *Nevada School Choice*, IJ.org, <http://ij.org/case/nevada-school-choice/> (last visited 01/16/2016).

8. See Eugene Volokh, *The Supreme Court Will Consider: When Does Government Discrimination Against Churches Violate the First Amendment?*, WASHINGTON POST, (Jan. 15, 2015), www.washingtonpost.com/news/volokh-conspiracy/wp/2016/01/15/the-supreme-court-will-consider-when-does-government-discrimination-against-churches-violate-the-first-amendment/.

9. See Brown, *supra* note 2.

10. It is hardly different than a state government holding itself responsible for an employee using part of his pay to support a religious organization.

11. See *State v. Hallock*, 16 Nev. 373, 385-86 (Nev. 1882).

12. Interpreting Nevada's ESA program as direct aid to religious schools would force the courts to distinguish between sectarian and non-sectarian schools by analogizing them to either general Protestantism or Catholicism. In addition to causing obvious problems, this would likely violate various clauses of the U.S. Constitution. See e.g. Katz, *supra* note 3, at 113 (quoting *Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000) ("It is no surprise that the Supreme Court in 2000 condemned the doctrine of sectarianism embodied by the Blaine Amendments in the strongest possible terms: they have a 'shameful pedigree,' were 'born of bigotry,' and 'should be buried now.'")). Aspects of this issue will be discussed in the federal portion of the paper.

13. See *State v. Westerfield*, 49 P. 119, 121 (Nev. 1897) (court said orphans educated in their orphan asylum could not be used by a local school district to increase its own funding since doing so would result in a windfall for the district).

14. See *Koscot Interplanetary, Inc. v. Draney*, 530 P.2d 108, 112 (Nev. 1974) "Every reasonable presumption must be indulged in support of the controverted statute. . ."; see also *Thomas v. Nevada Yellow Cab Corp.*, 327 P.3d 518, 522 (Nev. 2014) (court said to interpret documents according to their "original public

be presumed constitutional and read to allow funding for many religious schools since only Catholics, Presbyterians, and other such denominations were viewed as “sectarian” when both clauses were enacted.

Part II of this Note will illustrate how neighboring states have construed similar constitutional provisions to permit voucher programs like the one at issue. While the Washington Supreme Court held that a scholarship recipient could not pursue a degree in religious studies because of the state’s no funding clause, the facts of that case differ from Nevada’s ESA program.¹⁵ Meanwhile, other states have approved voucher programs like Nevada’s under their own no funding clauses because the legislature allocates voucher money to individual families, not religious schools.¹⁶ Concerning uniformity clauses, states with language mirroring Nevada’s have interpreted them as a floor, not a ceiling. They have concluded that this permits the legislature to fund vouchers so long as public schools remain a baseline option.¹⁷ Precedent from states with similar facts and constitutional language, then, suggests Nevada courts should uphold its ESA program.

Finally, Part III of this Note will argue that under the U.S. Constitution, Nevada must reject the challenges to its ESA program. This year, the Court will render a long awaited decision on whether states can bar schools from generally available aid programs purely on the basis of their religion.¹⁸ *Trinity Lutheran Church of Columbia, Inc. v. Pauley*¹⁹ centers on whether Missouri can refuse to supply a Christian school with rubber to resurface its playground solely because it is religiously affiliated.²⁰ The Supreme Court has never formally ruled on the Constitutional validity of “baby Blaine” amendments. However, it has said laws crafted to prejudice religion either directly or indirectly violate the Free Exercise Clause.²¹ While it has allowed narrow carve-outs for extreme cases like training for the clergy²², it has advocated a principle of neutrality when funding religious and non-religious recipients alike.²³ It has also said states cannot discriminate against groups due to their religious viewpoint.²⁴ This applies even to voluntary state

understanding. . .not some abstract purpose underlying them.”).

15. See *Witters v. State Comm’n for the Blind*, 771 P.2d 1119, 1120 (Wash. 1989).

16. See *Meredith v. Pence*, 984 N.E.2d 1213, 1229 (Ind. 2013); see also *Niehaus v. Huppenthal*, 310 P.3d 983, 987 (Ariz. Ct. App. 2013).

17. See e.g., *Meredith*, 984 N.E.2d at 1222.

18. See *Volokh*, *supra* note 8.

19. 2016 WL 205949 (2016), *cert. granted*.

20. *Volokh*, *supra* note 8 (“A Missouri program gives grants to organizations that want to resurface playgrounds with this material, which is often made from recycled tires. . .Trinity Lutheran Church’s application was, according to the U.S. Court of Appeals for the 8th Circuit, ‘ranked fifth out of forty four applications in 2012, and. . .fourteen projects were funded.’ But Trinity’s application was rejected [on account of Missouri’s ‘baby Blaine’ amendment.”).

21. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (law targeting religious beliefs as such are never permissible).

22. See *Locke v. Davey*, 540 U.S. 712, 721 (2004) (Court said “training for religious professions and training for secular professions are not fungible” and therefore the state could refuse to fund training for the former).

23. See *Everson v. Bd. of Educ. Of Ewing Twp.*, 330 U.S. 1, 16 (1947).

24. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (the state cannot discriminate based on religious viewpoint).

funding.²⁵ Lastly, the Court has said prohibiting certain groups from seeking generally available legal benefits violates Equal Protection.²⁶ Thus, in anticipation of the Court's upcoming decision in *Trinity Lutheran*, this Note will explain why federal law prohibits Nevada from excluding religious schools.

In sum, Nevada law, precedent from other states with similar constitutional provisions, and U.S. Supreme Court jurisprudence suggest Nevada courts must uphold its ESA program.

I. WHY THE NEVADA CONSTITUTION PERMITS EDUCATION SAVINGS ACCOUNTS

A. *Snap Shot of Nevada Law as it Relates to Education and Government Funding for Religious Groups*

The first half of this Part will conduct a brief overview of Nevada decisions interpreting its own "baby Blaine" and uniformity clauses.²⁷ It will then apply those decisions to Nevada's ESA program. Parts II and III will follow in similar fashion. Concerning Nevada's "baby Blaine" amendment, the only case on point is *State v. Hallock*.²⁸ There, the Nevada Supreme Court deemed a Catholic orphan asylum "sectarian" and thereby ineligible to receive public funding.²⁹ The Nevada Attorney General consequently issued several opinions prohibiting the state from promoting religious purposes, but permitting it to fund religious groups so long as it acted neutrally.³⁰ Regarding Nevada's uniformity clause, case law is even more limited. In *State v. Dovey*, the Nevada Supreme Court held that children enrolled in a state orphan asylum could not count toward district funding because they were legally barred from attending them.³¹ It consequently held in *State v. Westerfield* that the salary for the asylum's teacher had to come from the General Fund rather than the School Fund.³² Finally, the Nevada Supreme Court has said to interpret laws according to original public meaning and in favor of constitutionality.³³ This section, then, will explain Nevada law relating to its no funding and uniformity clauses.

In 1866, the Nevada Assembly began appropriating money to an orphan asylum run by Catholic nuns.³⁴ Anti-Catholic sentiment made this controversial from the very beginning.³⁵ For example, a house legislative committee said supporting the

25. *Id.*

26. See *Romer v. Evans*, 517 U.S. 620, 633 (1996).

27. Unfortunately, there appears to be no Nevada case law relevant to *ENN*'s two procedural objections. Consequently, a close examination of the constitutional language at issue must suffice to invalidate them.

28. See *Hallock*, 16 Nev. at 385-86.

29. *Id.*

30. Jay S. Bybee & David W. Newton, *Of Orphans and Vouchers: Nevada's "Little Blaine Amendment" and the Future of Religious Participation in Public Programs*, 1 NEV. L.J. 551, 573 (2002) (citing various opinions written over the years by the Nevada Attorney General).

31. *State v. Dovey*, 12 P. 910, 912 (Nev. 1887).

32. *State v. Westerfield*, 49 P. 119, 121 (Nev. 1897).

33. See *Hallock*, 16 Nev. at 385-86.

34. Bybee, *supra* note 23, at 564.

35. See *e.g. Id.* at 563; see also Brief of Amici Curiae for the Becket Fund for Religious Liberty, the Catholic League for Religious and Civil Rights, and Historians and Legal Scholars as Amici Curiae in Support of Respondent, at 11, *Locke v. Davey*, No. 02-1315 (Sep. 8, 2003) [hereinafter *Brief*] ("This was not a fringe

asylum allowed it “to train up the children in the tenets” of the Catholicism.³⁶ Consequently, in 1970 the Nevada Assembly opened a state-operated orphan asylum to compete with its Catholic counterpart, hoping “it might be forced to close.”³⁷ By 1976, James Blaine, then Speaker of the House, introduced an amendment to the Federal Constitution prohibiting “any school funds, or school taxes...for the benefit of or in aid...of any *religious sect or denomination*.”³⁸ Most scholars agree it was “a thinly veiled attack on Catholic schools.”³⁹ Blaine’s Amendment ultimately failed to become part of the Federal Constitution. Nonetheless, Nevada became one of the first states to take up his torch. In 1877, a Nevada assemblyman proposed amending the Nevada Constitution to read: “No public funds, of any kind or character whatever, State, county, or municipal, shall be used for sectarian purposes.”⁴⁰ It was ratified soon thereafter. Although some saw no conflict between the new amendment and allocating state money to the Catholic asylum, the others, including the Governor, believed it signaled a long-awaited end to state funding for Catholic organizations.⁴¹ Consequently, when another bill was passed to fund the asylum, the State Comptroller refused to sign over the money to the Catholic asylum, insisting it violated the Nevada constitution.⁴² This withholding gave rise to *Hallock*.⁴³

The *Hallock* court held that the Catholic asylum was indeed sectarian and therefore ineligible to receive state funding.⁴⁴ While the court conceded that it was “not plain, from the amendment itself, what the people meant by the words ‘sectarian purposes,’”⁴⁵ it said the Catholic asylum qualified because it had “...greatly, if not entirely, impelled the adoption of the constitutional amendment [at issue.]”⁴⁶ In other words, the court reasoned that the authors of Nevada’s “baby Blaine” must have meant for it to encompass the Catholic asylum since it sparked the amendment.⁴⁷

movement. In Massachusetts, the Know-Nothing party swept the elections of 1854, gaining the governorship, the entire congressional delegation, all forty seats in the Senate, and all but 3 of the 379 members of the House of Representatives.”).

36. Bybee, *supra* note 30, at 563.

37. *Id.* at 565.

38. Katz, *supra* note 3 (emphasis added).

39. *Id.*; see also *Mitchell* 530 U.S. 828-29 (2000) (plurality opinion) (Four Justices, led by Justice Thomas, discussed the nativism and anti-Catholic sentiment that sparked both the failed federal Blaine Amendment and consequent state “baby Blaines.”).

40. Bybee, *supra* note 30, at 565.

41. *Id.* at 556-57; see also Bybee, *supra* note 30, at 584 (Explaining that many of the original proponents of Nevada’s “baby Blaine” amendment saw it as “a silver bullet, a constitutional fix” intended to prohibit funding to the Catholic asylum once and for all).

42. *Id.* at 567.

43. *Hallock* was the case resulting from the Catholic asylum’s decision to sue the State Controller to recover the funds he refused to sign over to it. See Bybee, *supra* note 23, at 568 (“When *Hallock* refused to release the Asylum’s funds authorized by the legislature, the Asylum filed an original action in the Nevada Supreme Court, seeking a writ of mandamus against the state controller to compel payments of \$1,279.79.”).

44. See *Hallock*, 16 Nev. at 387.

45. *Id.* at 380.

46. *Id.* at 383; see also Brief, *supra* note 35 (indicating that the Nevada amendment was typical of “State Blaine Amendments [which were] frequently used to strike down” Catholic programs).

47. This conclusion was likely due less to historical research than it was to the well-known motives behind the Blaine Amendment and its state counterparts at the time. For example, President Grant called for an end to “sectarian” funding around that time in a speech where he accused the Catholic Church as perpetuating “superstition, ambition and ignorance.” See Brief, *supra* note 35.

Although this accomplished the bulk of the logical heavy lifting, the court proceeded to define sectarian to mean “a distinct organization or party, holding sentiments or doctrines different from those of other sects or people.”⁴⁸ Curiously, however, it said teachings “common to all Christians” did not fall within this category.⁴⁹ Nevada’s “baby Blaine” amendment, then, permitted state funding for general Protestant teachings, but proscribed their Catholic equivalent.⁵⁰ Moreover, the ideological alignment of a group made its activities irrelevant; the Catholic asylum, then, was denied funding even for the purely corporeal needs of the orphans.⁵¹ The court justified this by reasoning that it could not “separate the legitimate use from that which is forbidden.”⁵² Thus, under *Hallock*, Catholics and other yet-to-be-defined sectarian groups were denied funding, while Protestant groups faced no such banishment.

Since *Hallock*, the Nevada Attorney General has issued multiple opinions interpreting Nevada’s no funding provision. These have no binding effect. However, they generally permit funding religious groups for non-religious purposes. In 1963, the Attorney General interpreted Nevada’s no funding clause to “prevent[] sectarian religious instruction in the public schools,”⁵³ reasoning that young children should not be subjected to religious indoctrination by the state. He later used that logic to opine that a state prison could hire a pastor because inmates were less impressionable than young children.⁵⁴ In 1970, the new Nevada AG said religious schools could receive free access to state educational broadcasts because they neither imposed an added cost on the state nor flowed from bias toward a certain religion.⁵⁵ Nevada’s no funding clause, then, permitted the state to aid religion so long as it did so in a general and neutral manner. Finally, in 1993, yet another Nevada AG said religious groups could use public school property for religious purposes so long as no public funds were “expended for the sectarian purpose.”⁵⁶ This contradicted *Hallock*’s reasoning that the legitimate could not be separated from the forbidden.⁵⁷ In essence, the opinion seemed to indicate Nevada could cooperate with religion so long as it did not actively promote it. Thus, the Nevada Attorney General’s office has generally said state aid to religious groups for non-sectarian purposes is constitutional, but funding flowing from religious biases or aimed at promoting religion in schools is

48. *Hallock*, 16 Nev. at 385.

49. See Katz, *supra* note 3, at 112 (Noting that “public schools in the nineteenth century were largely Protestant institutions. They often required daily Bible reading, typically without commentary from a teacher or other school personnel.” Consequently, it is hardly surprising that the court would draw this distinction.); see also e.g. *Billard v. Board of Educ.*, 76 P. 422, 423 (Kan. 1904) (holding that reading the Lord’s prayer and the Twenty-Third Psalm did not equate to sectarianism, but rather instilled basic morals essential to education).

50. *Hallcok*, 16 Nev. at 386.

51. See *id.*, (contending that “baby Blaine” amendments “disqualify all religious groups from receiving any government funds, regardless of their purpose”).

52. *Id.* at 388.

53. Bybee, *supra* note 30, at 573.

54. *Id.*

55. *Id.*

56. Bybee, *supra* note 30, at 571.

57. See *Hallcok*, 16 Nev. at 388.

forbidden.⁵⁸

Interestingly, the two Nevada cases addressing Nevada's uniform schools clause involve the same state asylum created to compete with the Catholic orphanage. In *State v. Dovey*, the court said orphans living within a school district could not be counted for funding purposes because they were legally barred from enrolling in public schools.⁵⁹ State law provided that the orphans had to be educated within the home by a resident teacher.⁶⁰ Consequently, the court reasoned that using them to augment district funding was unfair since they were effectively foreign to it. Building on *Dovey's* logic, *Westerfield* said the asylum's resident teacher could not be paid out of the state education fund,⁶¹ reasoning that money from the general Education Fund could only be used for state expenditures "immediately connected with the education system."⁶² Because the orphans could not attend public schools, their education costs did not fall within that category. The Education Fund, therefore, had to be apportioned by district according to the number of children *eligible* to attend.⁶³

Finally, the Nevada Supreme Court has instructed lower courts to uphold statutes whenever possible and interpret the constitution according to its original public meaning. "Every reasonable presumption must be indulged in support of the controverted statute..."⁶⁴ Therefore, doubts about the constitutionality of legislation should be decided against the challenging party.⁶⁵ The court also reiterated (as recently as 2014) that documents should be interpreted according to "original public understanding...not some abstract purpose underlying them."⁶⁶ Judges must determine what the text would mean to the average reader at the time it was written. Meanwhile, legislative intent should be irrelevant.⁶⁷ Thus, the Nevada Supreme Court supports reading statutes in favor of constitutionality and interpreting them according to their original public meaning.

In sum, the Nevada Supreme Court has said sectarian organizations cannot receive public funding; however, it has emphasized that not all religious organizations are sectarian. The Attorney General, meanwhile, has said that the state legislature can fund religious groups only if (1) the purpose is secular, (2) it imposes a marginal cost, (3) *or* it does not show bias toward a particular sect. Regarding its uniform school clause, the Supreme Court has cryptically said the Education Fund money cannot be spent on schooling for children ineligible to attend public schools. Finally, the Nevada Supreme Court has instructed courts to read statutes in favor of constitutionality using original public meaning.

58. Bybee, *supra* note 30, at 574 ("In general, the Attorney General has concluded that Section 10 does not bar state subsidies to sectarian institutions, such as hospitals or parochial schools, where the purpose for the expenditure can be clearly identified and is not sectarian in nature; the Attorney General has thus made some effort to distinguish legitimate from illegitimate purposes.").

59. *See Dovey*, 12 P. at 912.

60. *Id.* at 911.

61. *See Westerfield*, 49 P. at 120.

62. *Id.*

63. *Id.*

64. *Koscot Interplanetary, Inc.*, 530 P.2d at 112.

65. *Id.*

66. *Thomas v. Nevada Yellow Cab Corp.*, 327 P.3d 518, 522 (Nev. 2014).

67. *Id.*

B. Why Education Savings Accounts Are Permissible Under Nevada Law

This section of Part I will demonstrate that ESA's are permissible under Nevada's "baby Blaine" amendment, uniform school clause, and the procedural provisions flagged by *ENN*. ESAs transfer state funds to families, not private religious schools. Therefore, they bypass any "baby Blaine" concerns. However, even if ESA's were seen as a direct legislative allocation to religious schools, many religious schools would remain eligible since *Hallock* rendered general protestant teachings nonsectarian.⁶⁸ Regarding Nevada's uniformity clause, ESAs are also permissible because it establishes a baseline obligation to provide public schools, not a ceiling barring funding for other educational options. Lastly, the two procedural arguments raised by *ENN* are complicated but contrary to logic and constitutional language. Thus, ESA's conform to the Nevada constitution.

Under *Hallock*, Nevada's ESA program does violate its "baby Blaine" amendment. Nevada's new law puts state money into an education savings account controlled by the participating child's parents; they choose when, where, and how to spend that money, subject only to mild certification standards set by the state.⁶⁹ Any subsequent transfer to a private religious school, then, results purely from the independent choice of individual families. As we will see later, this line of logic has been accepted by several states.⁷⁰ Although the analysis should end there, it is important to note that even if ESA money represented a direct allocation to private religious schools, this would still be permissible in many instances.⁷¹ While the ACLU claims all private religious schools are sectarian because they teach religious principles or hold religious viewpoints, the word "sectarian" is inherently *unclear* under Nevada law.⁷² The *Hallock* court classified the Catholic asylum as sectarian primarily because it fueled the amendment in question.⁷³ It also defined "sectarian" to mean "a distinct organization or party, holding sentiments or doctrines different from those of other sects or people."⁷⁴ However, the court emphasized that general Protestant teachings were not sectarian.⁷⁵ The Catholic asylum only qualified as such because: "The framers of the constitution undoubtedly considered [it] a sectarian church."⁷⁶ Therefore, under *Hallock*, Nevada courts would have to determine whether the religious principles taught at each school were sectarian or not.⁷⁷ The

68. *Hallcok*, 16 Nev. at 386.

69. Education Savings Accounts (SB 302), *supra* note 1.

70. *See e.g.*, Meredith v. Pence, 984 N.E.2d 1213, 1229 (Ind. 2013).

71. *But see* Bybee, *supra* note 30, at 584 (concluding that Nevada's no funding clause must be read either as a prohibition on funding specific religious sects at the expense of others, or as referring to religion generally). However, this approach seems to ignore the fact that Nevada's "baby Blaine" amendment was largely a result to injure Catholicism while leaving Protestant teachings in place.

72. Brown, *supra* note 3. *See also* *Hallock*, 16 Nev. at 380.

73. *Hallock*, 16 Nev. at 380.

74. *Id.* at 385.

75. *Id.*

76. *Id.* at 385-86.

77. *But see* Kyle Duncan, *Secularism's Laws: State Blain Amendments and Religious Persecution*, 72 *FORDHAM L. REV.* 493, 523 (2003) ("The social and religious contexts in which the State Blaines operate today are far different from those of their origins and, consequently, faithful applications of the language of the State Blaines no longer divides, for purposes of public funding, the Protestant public schools from the Catholic private

Nevada Supreme Court has said to interpret constitutional amendments according to “original public understanding...not some abstract purpose underlying them.”⁷⁸ Hence, the proper test would be whether any given school fell under the common definition of “sectarian” as generally understood in Nevada one hundred and fifty years ago.⁷⁹ This would be a judicial nightmare, likely to yield arbitrary results. Therefore, Nevada courts should avoid this pitfall in a principled and practical manner by recognizing that ESAs fund individual families, not religious schools.

The Attorney General’s opinions (though not legally binding on the court) also permit ESAs under its “baby Blaine” Amendment. If ESA’s are seen as funding families, further discussion is irrelevant. However, even if ESAs were found to directly fund religious schools, the Attorney General’s reasoning over the years might still permit them. First, the Attorney General approved state-funded broadcasts for religious schools because the funding did not flow from bias toward a certain religion.⁸⁰ Within this framework, ESAs allow individual families to choose which (if any) religious school they want their children to attend. Such a system makes government bias toward a specific religion highly unlikely. Second, the AG said religious groups could use public school property for religious purposes so long as no public funds were “expended for the sectarian purpose.”⁸¹ ESAs do not expend money for a sectarian purpose; they provide money to individual families to increase educational opportunities. A counterargument would highlight the AG’s traditional aversion to funding any religious purposes in public schools;⁸² however, private religious schools fall into a different category. While parents expect neutrality from public schools, they usually desire a religious element in private religious schools. Thus, ESAs are clearly permissible since they go to families to fund better education, not sectarian institutions for the purpose of advancing a certain religion.

ESAs are also constitutional under Nevada’s uniformity clause. The ACLU claims Nevada’s voucher program “violates this clause by providing public funding to a non-uniform and competing system of private schools” with different standards from public schools.⁸³ However, Nevada’s uniformity clause does not purport to prevent funding for other types of education.⁸⁴ It just establishes a baseline duty. In *Dovey*, the Nevada Supreme Court said orphans did not count toward funding the

schools.”). While this might be true as a general matter, the Nevada Supreme Court has never indicated that it plans to abandon the old distinction between sectarian and non-sectarian religions. Moreover, the Nevada Supreme Court should not lightly redefine the word sectarian since it has instructed courts to interpret statutes according to their original public meaning. *See Koscot Interplanetary, Inc. v. Draney*, 530 P.2d 108, 112 (Nev. 1974); *see also Thomas v. Nevada Yellow Cab Corp.*, 327 P.3d 518, 522 (Nev. 2014).

78. *See Thomas*, 327 P.3d at 522.

79. *See e.g. Bybee*, *supra* note 30, at 585 (Noting the severe confusion that this would cause, the author suggests: “The Nevada courts may cure this latent hostility by reading Section 10 to mean that the state cannot fund the purposes of a single religious sect, but that Section 10 does not disqualify religious institutions from receiving state aid or participating in state programs under a neutral scheme.”).

80. *Bybee*, *supra* note 30, at 573.

81. *Id.* at 571.

82. *Id.*

83. Complaint at 19, *Duncan v. Nevada*, (Nev. Dist. Ct., filed Aug. 27, 2015), *available at* <https://apps.washingtonpost.com/g/documents/local/aclu-lawsuit-challenging-nevada-school-voucher-program/1710/>.

84. *See NEV. CONST.* art. 11 § 2.

school district in which they lived because they were not entitled to attend those public schools.⁸⁵ The orphans in question were unique since state law compelled the asylum to educate them separately within its walls. By contrast, children eligible to receive ESAs can attend Nevada's public schools if they so choose (that choice is the very essence of the ESA program).⁸⁶ One could argue that ESA recipients are ineligible to attend public school once they elect ESAs, just as the orphans were ineligible to attend public school so long as they remained within the asylum. However, *Dovey* centered on the reasoning that school districts should not receive a windfall for children they did not educate.⁸⁷ ESAs, meanwhile, do not unfairly augment public school districts; in fact, funding flows directly to the school each child attends.⁸⁸ Finally, *Westerfield* said the teacher in the orphan home could not be paid out of the education fund because "the constitution does not include the education of these children in the term 'educational purposes.'"⁸⁹ This could be used to argue that only public school children are included within the term "educational purposes" and therefore ineligible for funding. However, a better reading is that funding can flow to any child *entitled* to attend public school. ESA recipients, then, are included within the term "educational purposes" because they can choose to attend public schools. Thus, funding ESAs is constitutional under Nevada's uniform school clause.

In the second lawsuit, *Educate Nevada Now* makes two additional procedural claims that are complicated but constitutionally weak. There is no Nevada case law interpreting either provision, but logic serves to dissuade both. First, *ENN* says ESAs violate the Nevada Legislature's duty to allocate the amount of funding "[it] deems sufficient, when combined with the local money reasonably available for this purpose, to fund the operation of the public schools"⁹⁰ By channeling some of that money to ESAs, *ENN* argues, the Legislature reduces its appropriation "below the level [it previously] deemed sufficient."⁹¹ *ENN*, in other words, concedes that the Legislature is entrusted to determine what is sufficient to fund public schools, but then accuses them of making it insufficient by reducing it according to the number of students who elect ESAs instead of attending those public schools. It is silly to conclude that the legislature invalidates the sufficiency of its own allocation by directing part of it to the ESA program, especially since the Nevada constitution specifies no concrete process that must be followed in making this allocation.⁹² Second, *ENN* claims Nevada's ESA program violates the Legislature's duty to use funds derived from "[a]ll lands granted [to the state] for educational purposes...for educational purposes."⁹³ It claims the phrase "educational purposes" really

85. *Dovey*, 12 P. at 912.

86. See Education Savings Accounts (SB 302), *supra* note 1.

87. *Dovey*, 12 P. at 911.

88. See Education Savings Accounts (SB 302), *supra* note 1.

89. *State v. Westfield*, 49 P. 119, 121 (Nev. 1897).

90. See NEV. CONST. art. 11 § 6.2.

91. Complaint at 13, *Lopez v. Schwartz*, filed (Nev. Dist. Ct. Sep. 9, 2015), available at <http://apps.washingtonpost.com/g/documents/local/nevada-voucher-complaint/1736/>.

92. See NEV. CONST. art. 11 § 2.

93. Complaint, *supra* note 91, at 13 (emphasis added).

corresponds to “public schools.”⁹⁴ However, the provision in question never mentions “public schools”, or even alludes to the concept of public education. It simply says proceeds “are hereby pledged for *educational purposes*.”⁹⁵ ESAs qualify as such.⁹⁶ Thus, the two procedural claims raised by *ENN* attempt to confuse the court by twisting constitutional language.

ESAs, therefore, are constitutional under Nevada’s baby Blaine amendment, uniform school clause, and additional procedural sections.

II. PRECEDENT FROM SIMILARLY SITUATED STATES SUPPORTS UPHOLDING NEVADA’S ESA PROGRAM

A. An Overview of How Neighboring States Have Treated Voucher Programs and Religious Schooling under Similar Constitutional Clauses

States have come to diverging conclusions regarding funding for religious schooling under their own no funding and uniformity clauses. In terms of the former, one approach has been to say no funding clauses prohibit state money from being appropriated or *applied* to religious instruction.⁹⁷ Washington adopted this logic to bar a student from earning a devotional degree with his state scholarship.⁹⁸ However, other states have said voucher programs are permissible because they allocate money to independent families.⁹⁹ Their private choice thereby severs the legal link between the state funding and any religious school that ultimately receives it.¹⁰⁰ Alternatively, other states have said state money can go to religious schools so long as its primary effect is not to advance religion;¹⁰¹ voucher programs are therefore permissible because their primary effect is to advance *education*. In terms of uniformity clauses, Florida concluded that the duty to promote uniform public schools included a converse duty not to fund any competing system of education.¹⁰² Other states, however, have reasoned that uniformity clauses merely impose a minimum duty to offer public schooling and permit funding alternative options such as vouchers.¹⁰³ Thus, states have interpreted similar no provisions to reach very different results.

In *Witters v. State Commission for the Blind*, the Washington Supreme Court said a college student could not use his state scholarship to pursue a degree in pastoral

94. *Id.* at 15.

95. See NEV. CONST. art. 11 § 3 (emphasis added).

96. See e.g., Education Savings Accounts (SB 302), *supra* note 1.

97. *Witters v. State Comm’n for the Blind*, 771 P.2d 1119, 1120 (Wash. 1989).

98. *Id.*

99. But see Isabel Chou, “Opportunity” For All?: How Tax Credit Scholarships Will fare in New Jersey, 64 RUTGERS L. REV. 295, 316 (2011) (The author argues that school vouchers are more troubling under no funding clauses than tax credits, stating: “In states that operate under moderately- to most-restrictive compelled support provisions or “baby Blaine” amendments, the fact that taxpayer dollars will end up in parochial schools may very well be grounds for a court to find a constitutional violation.”).

100. *Witters*, 771 P.2d at 1128-29 (Utter, J., dissenting).

101. See *Jackson v. Benson*, 578 N.W.2d 602, 621 (Wis. 1998).

102. *Bush v. Holmes*, 919 So.2d 392, 408-09 (Fla. 2006).

103. See *Davis v. Grover*, 480 N.W.2d 460, 474 (Wis. 1992) (“The uniformity clause clearly was intended to assure certain minimal educational opportunities for the children of Wisconsin. It does not require the legislature to ensure that all of the children in Wisconsin receive a free uniform basic education.”).

studies in order to prepare for a career in the clergy.¹⁰⁴ Washington's "baby Blaine" amendment read: "No public money...shall be appropriated for or applied to any religious...instruction."¹⁰⁵ The Plaintiff, Witters, argued that while Washington's no funding clause might apply to a state scholarship program as a whole,¹⁰⁶ it did not bar his personal decision to pursue a devotional degree.¹⁰⁷ The court, however, rejected this view. It interpreted Washington's no funding clause to prohibit "not only the appropriation of public money for religious instruction, but also the *application* of public funds to religious instruction."¹⁰⁸ Consequently, Witters could not choose to pursue "a career promoting Christianity" using state funds, even though the state had no influence on that decision.¹⁰⁹ One interpretation of this holding would be that any allocation of state funds to a religious purpose violates Washington's no funding clause; however, an alternative reading is that that this outcome flowed from the extreme nature of the case. In either event, however, the court concluded that state funds could not be applied toward a degree in devotional theology.¹¹⁰

By contrast, in *Niehaus*, the Arizona Supreme Court left intact a court of appeals decision permitting the independent application of state money toward a religious education. The court acknowledged that Arizona's no funding provision was "virtually identical" to that of Washington.¹¹¹ However, it said attending a religious school was not analogous to training for the clergy: "The ESA students are pursuing a basic secondary education with state standards; they are not pursuing a course of religious study."¹¹² In other words, a K-12 education at a religious private school did not rise to the level of earning a devotional degree. The court then said that indirect application of state voucher money to a private religious school was permissible.¹¹³ ESAs steered clear of funding religious purposes since they simply transferred money to individual families for educational purposes. Any consequent benefit to private religious schools resulted from "the genuine and independent private choices of the parents", thereby relieving the state of responsibility.¹¹⁴ Unlike Washington, then,

104. *Witters*, 771 P.2d at 1119.

105. WASH. CONST., art. 1, § 11.

106. Thereby prohibiting, say a state scholarship program crafted to promote an education only in pastoral ministries.

107. *Witters*, 771 P.2d at 1122.

108. *Id.* See also Duncan, *supra* note 77, at 569 ("Notice a further complicating factor in Witters' situation. The Washington Supreme Court suggested that its Blaine Amendment targeted only 'devotional' religious purposes. That is, if Witters had wanted to use the funds to become a purely secular expert in comparative religion, the State Blaine would not have barred his use of the funds.").

109. *Witters*, 771 P.2d at 1122.

110. But see Richard G. Bacon, *Rum, Romanism and Romer: Equal Protection and the Blaine Amendment in State Constitutions*, 6 DEL. L. REV. 1, 15 (2003) ("The Washington court's holding simply begs the question whether Washington's classification might survive analysis under the Equal Protection Clause and does not even consider whether Washington's Blaine Amendment might itself violate the Equal Protection Clause.").

111. *Niehaus*, 310 P.3d at 986.

112. *Id.*

113. *Id.* at 987 (defining an appropriation as a direct legislative allotment to a particular cause, the court reasoned that the indirect application of state money to a religious education was distinct and therefore permissible under Arizona's no funding clause).

114. *Id.*; see also Meredith v. Pence, 984 N.E.2d 1213, 1227 (Ind. 2013), (The Indiana Supreme Court said the proper test "is not whether a religious or theological institution *substantially* benefits from the expenditure, but whether the expenditure *directly* benefits such an institution." Consequently, school vouchers were

Arizona said state money could be applied toward religious purposes so long as it resulted from true private choice.¹¹⁵ An unclear dimension of the decision, however, was whether that logic would apply to *Witters*. While one might argue independent choice permits families to apply state money toward *any* religious purpose, it is worth remembering that the court took the time to distinguish *Witters*. Thus, the potency of the religious purpose seemed to play a strong role in its decision.¹¹⁶ The Arizona court, therefore, opined that ESAs were permissible because the independent choice of parents stripped the state of liability for money applied to a private religious education, but it took the time to distinguish attending a private religious school from training to become pastor.

In *Jackson v. Benson*, the Wisconsin Supreme Court said a voucher program aimed to assist low-income children access private schools did not violate its no funding clause. Wisconsin's religion clause read: "[N]or shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries."¹¹⁷ Hence, while the Washington constitution banned only legislative appropriations to religious groups, the Wisconsin constitution prohibiting state money from being used to *benefit* religious groups. One could construe this as a bar on school vouchers since they undoubtedly benefit religious schools. The Wisconsin Supreme Court, however, said the proper test was "not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion."¹¹⁸ The legislature, therefore, could allocate tax money to religious schools so long as its main purpose was not to advance religion. Its voucher program consequently passed muster because it was not crafted to advance religion, but to promote better education.¹¹⁹

Transitioning to uniformity clauses, in *Holmes*, the Florida Supreme Court interpreted its own version to forbid the legislature from funding any alternative to public schools.¹²⁰ Its uniformity clause made it "a paramount duty of the state" to provide "a uniform, efficient, safe, secure, and high quality system of free public schools."¹²¹ While it said nothing about private schools or vouchers, the Florida Supreme Court reasoned that the "paramount duty" to provide uniform, high quality, and free public schools imposed a converse duty not to fund competing

permitted since they flowed from the indirect choices of individual families.).

114. *Niehaus*, 310 P.3d at 987.

115. *Id.*

116. Compare *id.* at 986 ("The ESA does not bear any similarity to the circumstances in *Witters*. The parents of a qualified student under the ESA must provide an education in reading, grammar, mathematics, social studies, and science. Whether that is done at a private secular or sectarian school is a matter of parental choice."); with *id.* at 988 ("No funds in the ESA are earmarked for private schools. Thus, we hold that the ESA does not violate the Aid Clause.").

117. WIS. CONST. art. I, § XVIII.

118. *Jackson v. Benson*, 578 N.W.2d 602, 621 (Wis. 1998) (quoting *Tilton v. Richardson*, 403 U.S. 672, 679 (1971)).

119. *Jackson*, 578 N.W.2d at 621.

120. *Bush v. Holmes*, 919 So.2d 392, 398 (Fla. 2006).

121. FLA. CONST. art 9, § 1(a); but see Patrick H. Ouzts, *School Choice: Constitutionality and Possibility in Georgia*, 24 GA. ST. U. L. REV. 587, 600 (2007) (noting that even the Florida Supreme Court recognized "lesser provisions in other states may only require free public schools, a minimum standard of quality" permitting the legislature to fund other educational options).

alternatives.¹²² The voucher program at issue allowed students to leave failing public schools and put state money toward the private school of their choice. Consequently, the court reasoned: “OSP by its very nature undermines the system of ‘high quality’ free public schools that are the sole authorized means of fulfilling the constitutional mandate to provide for the education of all children residing in Florida.”¹²³ Thus, the Florida Supreme Court held that the duty to provide uniform public schools barred funding any competing, non-uniform system of education.

By contrast, in *Meredith*, the Indiana Supreme Court said its uniformity clause was merely a floor, permitting alternative educational options.¹²⁴ Indiana’s recently enacted “Choice Scholarship Program” offered vouchers for low-income families to send their children to private schools.¹²⁵ Adopting *Holmes*’ line of logic, opponents claimed this violated the constitutional mandate “to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a *general and uniform system of Common Schools*.”¹²⁶ Indiana’s uniformity clause, however, did not include the “paramount duty” language.¹²⁷ The Indiana Supreme Court seized on this to differentiate itself from Florida, reasoning that the duty to encourage intellectual improvement was separate and distinct from the duty to provide a uniform system of public schools.¹²⁸ Consequently, so long as the legislature maintained public schools as a baseline option, it had “fulfilled [its] duty.”¹²⁹ This permitted it to fund an alternative voucher program. Thus, the Indiana Supreme Court used the absence of a paramount duty clause to reason that the obligation to provide uniform public schools was merely a floor.

Likewise, in *Davis*, the Wisconsin Supreme Court said state scholarships intended to help low-income children attend private schools did not violate its uniformity clause.¹³⁰ Opponents alleged that the scholarship program defied the legislature’s duty to “provide by law for the establishment of district schools, which shall be as nearly uniform as practicable”¹³¹ by promoting a system of non-uniform

122. *Holmes*, 919 So.2d at 408-09. The court also placed great weight on the fact that Florida readopted its no funding provision in 1968. See Jill Goldenziel, *Blaine’s Amendment in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 *Denv. U. L. Rev.* 57, 68 (2005). One could argue that this poses a similar problem for Nevada’s ESA program since it re-ratified its uniformity clause in 1937. See *NEV. CONST.* art. 11 § 2. While the argument might be that Nevada reaffirmed its duty to ensure uniform public schools, a logical response is that Nevada did not reaffirm language making that a “paramount duty” since its constitution has no such language.

123. *Holmes*, 919 So.2d at 409.

124. See *Meredith v. Pence*, 984 N.E.2d 1213, 1220-21 (Ind. 2013).

125. *Id.* at 1229.

126. *IND. CONST.* art. 8, § 1 (emphasis added).

127. See *id.*

128. *Meredith*, 984 N.E.2d at 1222. See also Martha McCarthy, Ph.D., *The legal Status of School Vouchers: The Saga Continues*, 297 *ED. LAW. REP.* 655, 667 (2013) (“The Indiana high court reasoned that unlike the Florida Constitution’s specification of the state’s “paramount duty” to make “adequate provision” for the education of children in the state, which must be carried out by providing a uniform system of public education, the Indiana Constitution’s two distinct duties are not linked in that the second is not a restriction on the first.”).

129. *Meredith*, 984 N.E.2d at 1223.

130. *Davis v. Grover*, 480 N.W.2d 460, 464 (Wis. 1992)

131. See *WIS. CONST.* art. X, § 3.

schools that afforded a totally different “character of instruction.”¹³² Like Florida, they argued the duty to support uniform public schools imposed an embargo on funding any alternative to it.¹³³ However, the Wisconsin constitution contained no paramount duty clause modifying its obligation to provide uniform public schools.¹³⁴ Therefore, like Indiana, the Wisconsin Supreme Court said it merely mandated a baseline educational option; so long as it fulfilled this duty, the Legislature could support other educational options.¹³⁵ The court reasoned: “[E]xperimental attempts to improve upon that foundation in no way denies any student the opportunity to receive the basic education in the public school system.”¹³⁶ Thus, so long as Wisconsin provided a baseline opportunity to attend uniform public schools, it could fund an alternative voucher program.

In sum, state courts have interpreted similar constitutional clauses differently. Some have said no funding clauses forbid the application of state money for religious training; others have permitted vouchers due to the independent choice of families or the incidental, instead of primary, benefit to religion. Likewise, concerning uniformity clauses, while some states have interpreted them as forcing the legislature to fund only public schools, others have deemed them a baseline. However, the presence or absence of a paramount duty clause has been a factor in their reasoning. Thus, while “baby Blaine” clauses have been interpreted sporadically, the reading of uniformity clauses by courts has rested partly on the language modifying them.

*B. Case Law from States with Similar Constitutional Provisions Suggests
Nevada Should Uphold its ESA Program*

Nevada should emulate the decisions of states with similar facts and constitutional clauses by upholding its ESA program.¹³⁷ Unlike *Witters*, Nevada’s ESA program does not involve training for the priesthood.¹³⁸ Instead, it is analogous to the voucher programs reviewed by states like Indiana and Arizona.¹³⁹ Regarding its uniformity clause, Nevada has nothing resembling the “paramount duty” clause used to prohibit vouchers by the Florida Supreme Court in *Holmes*.¹⁴⁰ This likens it to Indiana and Wisconsin;¹⁴¹ therefore, it should adopt their reasoning and interpret its uniformity clause as a floor not a ceiling.¹⁴² Nevada should follow in the footsteps

132. *Davis*, 480 N.W.2d at 473.

133. *Id.*

134. See WIS. CONST. art. X, § 3.

135. *Davis*, 480 N.W.2d at 474.

136. *Id.*

137. Some will contend that states largely mold their religion clauses to fit the ideological opinions they secretly hold, e.g. Aaron E. Schwartz, *Dusting Off the Blaine Amendment: Two Challenges to Missouri’s Anti-Establishment Tradition*, 73 MO. L. REV. 129, 151 (2008), but this Note will operate under the assumption that facts and legal reasoning have value beyond masking hidden policy agendas.

138. *Witters*, 771 P.2d at 1121.

139. See *Niehaus*, 310 P.3d at 986; see also *Jackson v. Benson*, 578 N.W.2d 602, 621 (Wis. 1998).

140. *Bush v. Holmes*, 919 So.2d 392, 405 (Fla. 2006).

141. See IND. CONST. art. 8, § 1; see also WIS. CONST. art. X, § 3.

142. See *Meredith v. Pence*, 984 N.E.2d 1213, 1222 (Ind. 2013); see also *Jackson v. Benson*, 578 N.W.2d 602, 628 (Wis. 1998).

of states with similar voucher programs and constitutional provisions by upholding its ESA program.

The K-12 education provided by Nevada's ESA program is distinguishable from *Witters*. There, the Washington Supreme Court said it violated the state constitution to provide scholarship money to a man pursuing "a career promoting Christianity."¹⁴³ This prohibited both direct appropriations by the state legislature and indirect *applications* by individuals like *Witters*.¹⁴⁴ However, the court centered its decision on the unique facts of the case, noting: "[T]he applicant is asking the State to pay for a religious course of study at a religious school, with a religious career as his goal."¹⁴⁵ Nevada's ESA program, by contrast, helps families afford to educate their children at the K-12 schools.¹⁴⁶ While some religious training might take place, Nevada law requires all eligible schools to provide an education in English, Mathematics, and other core areas.¹⁴⁷ Unlike *Witters*, the focus is not religious instruction, let alone a career in the clergy. Arizona used precisely this point to uphold its own voucher program, reasoning: "The ESA students are pursuing a basic secondary education...not pursuing a course of religious study."¹⁴⁸ The same holds true for Nevada. Consequently, it should reject *Witters*.

Instead, Nevada should emulate states with similar "no funding" provisions. In *Niehaus*, the Arizona court upheld an ESA program permitting disabled students to attend private religious schools.¹⁴⁹ It reasoned that "the genuine and independent private choices of the parents" relieved the state of any responsibility for supporting religious instruction.¹⁵⁰ Likewise, Nevada's ESA program gives money to individual families who decide where to spend the money.¹⁵¹ This independent choice cleanses the state of responsibility for any benefits to schools receiving the money thereafter.¹⁵² As an alternative to Arizona's private choice approach, Nevada could also uphold its ESA program under the reasoning of Wisconsin. The *Jackson* court said the proper test was "not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary

143. *Witters*, 771 P.2d at 1122. See also Duncan, *supra* note 77, at 569 (2003) (arguing the Washington Supreme Court suggested its Blaine Amendment targeted only "devotional" religious purposes).

144. *Witters*, 771 P.2d at 1122.

145. *Id.* at 1121.

146. Brown, *supra* note 2.

147. S.B. 302, 2015 Leg., 78th Sess. (Nev. 2015), available at https://www.leg.state.nv.us/Session/78th2015/Bills/SB/SB302_EN.pdf, pp. 8-9.

148. *Niehaus*, 310 P.3d at 986.

149. See Howard Fischer, *Supreme Court Deems Voucher-Like Program Legal*, ARIZONA CAPITOL TIMES (Mar. 21, 2014, 11:28 AM), <http://azcapitoltimes.com/news/2014/03/21/supreme-court-deems-voucher-like-program-legal/>.

150. *Niehaus*, 310 P.3d at 986.

151. See Duncan, *supra* note 77, at 530 ("[W]hen . . . secular benefits, neutrally distributed, end up in the hands of religious organizations because of the private choices of individuals—and not because of any deliberate government design to nudge the benefits toward religious ends—government has not impermissibly 'subsidized' religion.").

152. Private choice still clashes with the Washington Supreme Court's prohibition on direct legislative appropriation and indirect private application. However, they are distinguishable because vouchers indirectly aid religion in a far milder way.

effect advances religion.”¹⁵³ In other words, even direct legislative allocations to religious schools were permissible if they were not crafted to promote religion. This would permit Nevada’s ESA program since it was created to improve the educational options of families.¹⁵⁴ Any benefit to religion is indirect and uncertain. Thus, like Arizona and Wisconsin, Nevada should approve its voucher program.

Regarding its uniformity clause, Nevada should follow in the footsteps of states with similarly worded provisions. The Florida constitution makes it “a paramount duty of the state” to educate Florida children by providing “a uniform, efficient, safe, secure, and high quality system of free public schools.”¹⁵⁵ Consequently, it implies a parallel prohibition on funding a competing system of education (i.e. vouchers).¹⁵⁶ The Nevada constitution, by contrast, contains no “paramount duty” clause, thereby voiding Florida’s reasoning. Instead, its uniformity clause mirrors those of states that have permitted voucher programs. Indiana said the duty to offer uniform public schools was distinct from the duty to encourage education generally.¹⁵⁷ So long as a free, uniform public school system was maintained, “the General Assembly ha[d] fulfilled [its] duty.”¹⁵⁸ Likewise, the Wisconsin Supreme Court said its uniformity clause ensured a minimal baseline that permitted “experimental attempts to improve upon that foundation...”¹⁵⁹ Thus, because Nevada’s uniformity clause contains no paramount duty language, it should distinguish itself from Florida and apply the reasoning of states with similarly worded provisions to uphold its ESA program.

Nevada should permit its ESA program under both its no funding and uniformity clauses. Regarding the former, a K-12 education is far milder than earning a devotional degree to pursue a career in the clergy. Thus, Nevada’s ESA program is distinguishable from *Witters*. Meanwhile, it is almost identical to the voucher programs upheld by states like Indiana and Arizona. Under the latter, the Florida Supreme Court used its paramount duty language to imply a converse prohibition on funding competing alternatives. But the Nevada constitution contains no such language. Consequently, it is analogous (once again) to Indiana and Wisconsin, both of which interpreted their uniformity clauses as a floor, permitting the legislature to fund alternative educational options like voucher programs. Thus, the facts and constitutional language surrounding Nevada’s ESA program are analogous to states that have upheld similar voucher programs. Consequently, it should adopt their reasoning.

III. BARRING RELIGIOUS SCHOOLS FROM PARTICIPATING IN NEVADA’S ESA

153. *Jackson v. Benson*, 578 N.W.2d 602, 621 (Wis. 1998) (quoting *Tilton v. Richardson*, 403 U.S. 672, 679 (1971)).

154. See Nev. State Treasurer, *Welcome to the Nevada’s Education Savings Account Program*, NV.GOV, <http://www.nevadatreasurer.gov/SchoolChoice/Home/> (last visited Jan 27, 2016) (“SB 302 provides a means for Nevada Parents with children enrolled in a public/charter school to choose a different option to meet their educational needs.”).

155. *Bush v. Holmes*, 919 So.2d 392, 408-09 (Fla. 2006).

156. *Id.*

157. *Meredith v. Pence*, 984 N.E.2d 1213, 1222 (Ind. 2013).

158. *Id.*

159. *Davis v. Grover*, 166 Wis.2d 501, 539 (Wis. 1992).

PROGRAM WOULD VIOLATE THE FEDERAL CONSTITUTION

A. An Overview of Federal Constitutional Law Regarding State Voucher Programs and Religious Schools

While the Supreme Court has said voucher programs are permissible under the Federal Constitution,¹⁶⁰ it has not definitively decided whether states can *exclude* religious schools.¹⁶¹ Fortunately, it granted certiorari to *Trinity Lutheran* this year and will finally say whether states can exclude groups from generally available benefits on the basis of religion.¹⁶² But since that ruling has yet to arrive, this section will explore Supreme Court jurisprudence relevant to state voucher programs in an attempt to predict how Nevada courts should proceed. This section will demonstrate that, under the Establishment Clause, the Court has said states must employ neutrality in dealing with religious and non-religious groups alike.¹⁶³ Likewise, it has said the Free Exercise Clause bars states from outlawing otherwise legal conduct because it is carried due to religious beliefs;¹⁶⁴ however, somewhat contrary to this axiom, the Court nonetheless upheld the denial of state scholarship funds to a student seeking to earn a devotional degree in *Witters*.¹⁶⁵ Moving onto the Free Speech Clause, the Court has determined that while states can deny funding for religious topics, they cannot discriminate against groups based on religious viewpoint.¹⁶⁶ Finally, it has said that invalidating the ability of a group to seek *heightened* protection or government benefits constitutes a violation under the Equal Protection Clause.¹⁶⁷ Thus, while the Supreme Court has not formally ruled whether states can exclude religious schools from participating in their voucher programs, its jurisprudence sheds light on the subject.

The Supreme Court has said religious schools can participate in state voucher programs under the Establishment Clause. In *Zelman v. Simmons-Harris*, it upheld a Cleveland voucher program providing low-income children in failing schools up to \$2,250 to attend private schools.¹⁶⁸ The vast majority of the children (roughly 96%) chose to go to religious schools.¹⁶⁹ Opponents used this to argue the voucher program gave religious schools a windfall and thereby violated the Establishment Clause.¹⁷⁰ Nonetheless, the Court disregarded its predominant benefit to religious schools

160. *Zelman v. Simmons-Harris*, 536 U.S. 639, 645 (2002).

161. See Goldenziel, *supra* note 122, (“After *Zelman* and *Davey*, an open question remains as to whether state or federal free exercise clauses would permit a state to exclude religious schools from participating in a school choice program.”). However, as stated earlier, the Supreme Court will formally rule on the question this term (2016).

162. *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, (8th Cir. 2015) *cert. granted*. See also Volokh, *supra* note 8.

163. Bacon, *supra* note 110, at 20.

164. *Church of the Lukumi Babalu Aye*, 508 U.S. at 533.

165. *Locke*, 540 U.S. at 721.

166. *Rosenberger*, 515 U.S. at 829.

167. *Romer*, 517 U.S. at 620.

168. *Zelman v. Simmons-Harris*, 536 U.S. 639, 646 (2002).

169. *Id.* at 647. See also Clint Bolick, *The Constitutional Parameters of School Choice*, 2008 B.Y.U.L. REV. 335, 339 (2008).

170. *Zelman*, 536 U.S. at 646.

because it flowed from true private choice, allowed schools to participate regardless of religious status, and created no financial incentives to attend religious schools.¹⁷¹

Zelman's reasoning flowed from the seminal *Everson* decision, where the Court endorsed neutrality in dealing with believers and non-believers alike. The case centered on whether New Jersey could reimburse parents for their children's transportation costs to and from Catholic schools.¹⁷² While challengers alleged this violated the First Amendment Establishment Clause,¹⁷³ the Court flipped this reasoning on its head by holding that just as the government could not set up a church or prefer a certain religion, it could not influence a person *away* from religion.¹⁷⁴ The Court said states could not: "[E]xclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the *benefits of public welfare legislation.*"¹⁷⁵ The holding of the case, then, was that New Jersey could use taxpayer money to transport students to Catholic schools.¹⁷⁶ However, *Everson's* reasoning rendered discrimination *against* religion unconstitutional as well.

In *Lukumi*, the Court determined that laws aimed at suppressing religion violated the Free Exercise Clause. The City of Hialeah passed an ordinance "making religious animal sacrifice unlawful" in order to prevent practitioners of the Santeria religion from conducting their rituals within the city limits.¹⁷⁷ While the Court acknowledged "a law that is neutral and of general applicability need not be justified by a compelling governmental interest",¹⁷⁸ it emphasized that legislature could not "discriminate[] against some or all religious beliefs or regulate[] or prohibit[] conduct *because it is undertaken for religious reasons.*"¹⁷⁹ Evidence of such discrimination could come from the text itself, or the intent behind it. *Lukumi* presented an example of the latter, as the statute was facially neutral but accomplished "an impermissible attempt to target petitioners and their religious practices."¹⁸⁰ In other words, it did not specifically mention the Santeria religion, but clearly targeted it. The Court concluded: "The principle that government...not impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause."¹⁸¹ Thus, targeting conduct merely because it was religious violated the Constitution.

However, in *Locke v. Davey*, the Court said Washington did not violate the Free Exercise Clause by refusing to allow a college student to use his state scholarship to

171. *Id.* at 653. *But see* Richard W. Garnett, *The Theology of the Blaine Amendments*, 45 FIRST AMEND. L. REV. 84, 46-47 (2003) (noting that *Zelman* was not and did not purport to be the end of discussion regarding state vouchers, but merely said they were permitted under the Federal Constitution).

172. *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 3 (1947).

173. *Id.* at 9.

174. *Id.* at 16.

175. *Id.* (emphasis added).

176. *Id.*

177. *Church of the Lukumi Babalu Aye*, 508 U.S. at 527.

178. *Id.* at 531.

179. *Id.* at 532 (emphasis added).

180. *Id.* at 535.

181. *Id.* at 543.

earn a devotional degree.¹⁸² The case did not rise to the level of *Lukumi* because Washington's "disfavor of religion" was of a much milder form.¹⁸³ After all, it did not require the student to choose between his religion and a government benefit.¹⁸⁴ He could pursue any other major without abandoning a central *requirement* of his faith.¹⁸⁵ The Court's reasoning turned on the distinct nature of training to enter the clergy.¹⁸⁶ It noted that America had a long history of dealing differently with religious education for the ministry than with education for other callings.¹⁸⁷ In fact, according to the Court, there were few areas in which the State's "antiestablishment interest [came] more into play."¹⁸⁸ In addition, Washington's carve-out for religious training was narrowly tailored to minimally burden religion. While it barred students from using state funds to earn devotional degrees, it still allowed them to attend pervasively religious colleges using state funds.¹⁸⁹ The Court concluded: "The State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places relatively minor burden on Promise Scholars."¹⁹⁰ In conclusion, then, unique nature of studying for the clergy combined with the minimal burden of refusing to pay for it allowed Washington's program to pass muster.

Regarding the Free Speech Clause, the *Rosenberger* Court prohibited states from discriminating based on religious viewpoint.¹⁹¹ *Rosenberger* turned on whether the University of Virginia's could deny funding to "Wide Awake", a student publication dedicated to exploring a variety of topics from a Christian viewpoint. The Court said that while the school could refuse to fund certain topics, it could not discriminate against articles written from a certain *viewpoint*.¹⁹² In the case at bar, the problem was that "the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints."¹⁹³ In other words, it was denying funds to "Wide Awake" solely because it addressed topics from a Christian viewpoint. The Court found it irrelevant that the University was withholding its own funds, stating: "[T]he government cannot justify viewpoint discrimination...on the economic fact of scarcity."¹⁹⁴ If the state

182. *Locke*, 540 U.S. at 716.

183. *Id.* at 720. *But see* Steven K. Green, *Locke v. Davey and the Limits to Neutrality Theory*, 77 TEMP. L. REV. 913, 925 (2004) ("[E]ven assuming this facial distinction was not unconstitutional as is imposing a criminal or civil sanction, the opinion never explains why the denial of funding on its own does not constitute a burden on religious practice.").

184. *Locke*, 540 U.S. at 721.

185. *But see* Green, *supra* note 181, at 124 ("However, this distinction obscures the fact that Davey still could not receive his benefit and pursue his religious calling at the same time. He was effectively forced to choose between exercising his religious beliefs and receiving a government benefit. . .").

186. *Locke*, 540 U.S. at 721.

187. *Id.*

188. *Id.* at 722.

189. *Id.* at 721.

190. *Id.* at 725.

191. *Rosenberger*, 515 U.S. at 832.

192. *Id.*

193. *Id.* at 831.

194. *Id.* at 835. *See also* Bd. of the Univ. of Wisconsin Sys. v. Southworth, 529 U.S. 217, 218 (2000) ("The proper measure, and the principal standard of protection for objecting students, is the requirement of viewpoint

extended funding to student newspapers covering current events, it could not deny funding to a group of Muslim or Christian students seeking to do it from the perspective of their religion.¹⁹⁵ Thus, while religious subject matter could be excluded, groups with religious viewpoints could not.

Finally, in *Romer*, the Supreme Court invalidated an amendment to the Colorado constitution singling out homosexuals as ineligible to receive heightened protections against discrimination.¹⁹⁶ Colorado claimed the amendment maintained gays and lesbians in the same position as everyone else, since it did not strip them of basic rights, but prohibited them from receiving *heightened* protection.¹⁹⁷ However, the Court found this argument implausible, stating: “The amendment withdraws from homosexuals, but no others, specific legal protection from injuries caused by discrimination.”¹⁹⁸ In other words, it selected homosexuals as the only group constitutionally barred from every receiving heightened protection.¹⁹⁹ The Court explained: “A law declaring that in general it shall be more difficult for one group than for all others to seek aid from the government is itself a denial of equal protection.”²⁰⁰ While such a law might survive if it advanced a compelling government interest,²⁰¹ the Court said the amendment in question was inexplicable by anything other than animus toward gays and lesbians.²⁰² “[I]t is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.”²⁰³ Such hostility, in the Court’s view, could never constitute a legitimate government interest. Thus, removing homosexuals from the pool eligible to receive special protection violated the Equal Protection Clause.

The Supreme Court, then, has generally advocated a principle of neutrality toward religion, but has permitted certain carve-outs for situations like training for the clergy.

B. Supreme Court Jurisprudence Strongly Suggests Nevada Cannot Exclude Religious Schools from its Voucher Program

This section will explain why excluding religious schools from Nevada’s ESA program violates the Federal Constitution.²⁰⁴ Blaine’s failure to successfully pass his amendment in the first place casts some doubt over its congruence with the

neutrality in the allocation of funding support.”).

195. See *Rosenberger*, 515 U.S. at 832. See also Bolick, *supra* note 169, at 346 (noting that in *Jackson v. Benson*, the Wisconsin Supreme Court “ruled that the uniformity clause created a floor, not a ceiling” for legislative action regarding educational opportunities).

196. *Romer*, 517 U.S. at 626.

197. *Id.* at 626-27.

198. *Id.* at 631.

199. *Id.* at 630.

200. *Id.* at 633.

201. “In general, if a law distinguishes between two or more classes of individuals, the government must articulate a rational basis for doing so.” Katz, *supra* note 3, at 115 (quoting *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)).

202. *Romer*, 517 U.S. at 632.

203. *Id.* at 635.

204. See sources cited *supra* note 162.

Constitution as a whole when asserted on a state-level.²⁰⁵ Moreover, Supreme Court decisions since then have suggested discriminating against religious schools violates several branches of Constitutional jurisprudence.²⁰⁶ The *Zelman* Court rendered voucher programs permissible under the Establishment Clause.²⁰⁷ However, long before that, in *Everson*, the Court held that states should exercise neutrality in dealing with religious and non-religious schools alike.²⁰⁸ *Zelman* and *Everson* together, then, not only permit Nevada's ESA program, but also prohibit courts from judicially amending it to bar parents from sending their children to religious schools. Concerning the Free Exercise Clause, *Locke* permitted a narrow carve-out for clerical studies.²⁰⁹ However, *Lukumi* forbid states from legislating against conduct undertaken for religious purposes.²¹⁰ Excluding schools because they provide education with a religious component violates this principle. Next, *Rosenberger* said states could deny funding to groups covering certain topics, but not from holding a religious viewpoint.²¹¹ Nevada, therefore, cannot discount certain schools because, in the words of the ACLU, they "filter their entire curricula through a religious worldview."²¹² If Nevada makes funding available to schools with a secular perspective, it must do the same for schools with a religious perspective. Finally, *Romer* ruled that disqualifying gays from contending for heightened government benefits violated the Equal Protection Clause.²¹³ Using Nevada's no funding clause to disqualify religious schools from contending for state voucher money runs afoul of this holding. Thus, under a variety of Constitutional clauses, Nevada cannot exclude schools from participating in their voucher program on account of religion.

There is no real question that Nevada's ESA program is permissible under the Federal Constitution. *Zelman* upheld an Ohio voucher program because it (1) was based on "true private choice," (2) afforded benefits to schools regardless of religious affiliation, (3) and did not skew financial incentives in favor of religious schools.²¹⁴

205. See *Duncan*, *supra* note 77, at 529 ("As we have seen, the anti-funding advocates of that era failed to amend the federal Constitution, naturally raising the question whether the State Blaines themselves conflict with federal norms of religious liberty."). Successfully injecting Blaine's amendment into the federal Constitution would have provided a counterweight against other clauses; by contrast, its language carries no such weight in state constitutions, where any conflict with Supreme Court jurisprudence simply implicates the Supremacy Clause.

206. See *id.* at 500, (discussing how the Free Exercise, Establishment, and Free Speech clauses all apply to states through Fourteenth Amendment). See also *id.* at 533 (quoting *Church of the Lukumi Babalu Aye*, 508 U.S. at 523 ("[The] Free Exercise, Establishment, and Free Speech [clauses] combine in one overarching rule—what the Supreme Court has referred to as the 'fundamental nonpersecution principle of the First Amendment.' Simply stated, the non-persecution rule means, among other things, that neither state nor federal governments may, consistently with the First Amendment, restrict access to generally available public benefits based on persons' or organizations' religious status, purpose, affiliation, or identity.")).

207. *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

208. *Everson v. Bd. of Educ. Of Ewing Twp.*, 330 U.S. 1, 17 (1947).

209. *Locke*, 540 U.S. at 724.

210. *Church of the Lukumi Babalu Aye*, 508 U.S. at 533.

211. *Rosenberger*, 515 U.S. at 831.

212. Complaint at 25, *Duncan v. Nevada*, (Nev. Dist. Ct., filed Aug. 27, 2015), available at <http://apps.washingtonpost.com/g/documents/local/acclu-lawsuit-challenging-nevada-school-voucher-program/1710/>.

213. *Romer*, 517 U.S. at 633.

214. *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002).

The Nevada voucher program, likewise, centers on the private choice of families, who receive the money then decide where to allocate it,²¹⁵ does not discriminate based on religion;²¹⁶ gives recipients have a plethora of options including private, religious, or even homeschooling; and creates no financial incentivizes to attend religious schools.²¹⁷ Thus, Nevada's ESA program is clearly permissible under the Federal Constitution.

Having established the permissibility of ESAs on the federal level, we will now examine why denying access to religious schools violates the neutrality principle articulated in *Everson*. The *Everson* Court reasoned that states could not "exclude individual Catholics, Lutherans...or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation."²¹⁸ Denying school vouchers on account of a school's religious affiliation violates this principle.²¹⁹ By arguing that "the voucher program is unconstitutional... because it will lead to state funds being given to religiously-affiliated private schools",²²⁰ the ACLU contradicts *Everson*'s prohibition against considering people's "faith, or lack of it" in allocating public benefits.²²¹ Therefore, their interpretation should be rejected.²²²

Nevada's ESA program should be distinguished from *Locke*. There, the Court centered its ruling on the unique nature of earning a religious degree to pursue a career as a pastor.²²³ Noting that states had a long history of refusing to support clergymen,²²⁴ the Court reasoned: "The State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars..."²²⁵ This reasoning, however, does not extend to

215. See Brown, *supra* note 2.

216. In fact, this would only happen if the Nevada Supreme Court read Nevada's "baby Blaine" amendment to bar funding religious groups, in which case the ESA program would discriminate *against* religion.

217. As already discussed, the ESA program simply provides a flat figure to participating families, "discriminating" only against those with higher incomes. See Brown, *supra* note 2. Funding does not depend on the status or religious of the school chosen. *Id.*

218. *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 16 (1947). See also Duncan, *supra* note 77, at 536.

219. See Bolick, *supra* note 169, at 344-45. ("Blaine Amendments, if construed in broad fashion, violate the neutrality principle by singling out religious schools for exclusion from otherwise generally applicable educational aid programs.").

220. Blake Neff, *ACLU Aims to Destroy Nevada School Choice Law*, THE DAILY CALLER (Aug. 27, 2015 11:32 PM), available at <http://dailycaller.com/2015/08/27/aclu-aims-to-destroy-nevada-school-choice-law/>. Interestingly, the ACLU ignores *Hallock*'s distinction between sectarian and non-sectarian religious schools. See *Hallock*, 16 Nev. at 385. While it likely does this to evade the legal quicksand of espousing such a distinction, it also rejects the only interpretation of "sectarian" offered by Nevada courts and simply assumes current courts will take the word to mean religion generally.

221. *Everson*, 330 U.S. at 16.

222. See Duncan, *supra* note 77, at 497. ("[T]he most obvious function of the State Blaines will be to separate the religious from the secular in the allocation of public funds, raising explicit barriers against the use of public assistance for a variety of, if not all, religious ends and religiously affiliated organizations.").

223. See Bolick, *supra* note 169, at 345. ("Under this view, *Locke v. Davey* could be seen as result of states traditionally being able to refuse funding ministry specifically."). See also Duncan, *supra* note 77, at 502 ("Before the middle third of the 1800s, there was no public education in America to speak of. Education was largely administered by churches and clergy and was intertwined with religious instruction.").

224. *Locke*, 540 U.S. at 722.

225. *Id.* at 724.

religious schools under Nevada's no funding clause. First, opponents of Nevada's school choice program interpret its no funding clause to prohibit funding nearly any religious school.²²⁶ Denying funds to every K-12 religious school is far broader in scope than refusing to fund college degrees in pastoral ministry for future pastors.²²⁷ Second, states do not have a long history of denying funds to religious causes, especially private religious schools.²²⁸ This clearly cuts against *Locke's* bedrock argument that states had traditionally refused to fund pastors.²²⁹ Lastly, the *Locke* Court noted with approval that, besides its narrow carve-out for pastoral studies, Washington still permitted students to attend "pervasively religious colleges" using state funds.²³⁰ By contrast, invalidating the voucher program at issue here would permit no such compromise; it would ban the application of state money toward any school the court deemed sectarian. Thus, it should be distinguished from the narrow facts in *Locke*.

Instead, ESAs should be upheld under the reasoning in *Lukumi*. One must concede that disqualifying religious schools from participating in a voucher program does parallel criminalizing religious practices. However, *Lukumi* said the "legislature could not "discriminate[] against some or all religious beliefs or regulate[] or prohibit[] conduct because it is undertaken for religious reasons."²³¹ Religious schools presumably inculcate religious subject into their K-12 educations because of their religious convictions.²³² Proceeding from this premise, interpreting Nevada's no funding clause to exclude them from receiving ESA money violates the same principle *Hialeah* did by criminalizing animal sacrifices motivated by Santeria. Moreover, the *Lukumi* Court said evidence of discrimination could come either from the text of a bill itself or the intent behind it.²³³ The Nevada Supreme Court candidly admitted that a Catholic orphan asylum "...greatly, if not entirely, impelled the adoption of [its "baby Blaine"] amendment."²³⁴ This provides prima facie evidence of discriminatory intent.²³⁵ Thus, claiming religious schools cannot receive voucher

226. See Complaint at 19, *Duncan v. Nevada*, (Nev. Dist. Ct., filed Aug. 27, 2015), available at <http://apps.washingtonpost.com/g/documents/local/acu-lawsuit-challenging-nevada-school-voucher-program/1710/>.

227. Refusing to allow parents to send their children to a school that incorporates their faith, or teaches a different faith but offers a better general education, presents a much greater burden on the citizens of Nevada than would barring a tiny portion of the population from using state money to study for the clergy.

228. See *Everson v. Bd. of Educ. Of Ewing Twp.*, 330 U.S. 1, 17 (1947) (The entire case centered on New Jersey funding transportation for Catholic Schools, showing just one example of state funding for religious schools.). See also *Hallock*, 16 Nev. at 385 (stating general Christian teachings are not sectarian and therefore permissible for the state to promote).

229. *Locke*, 540 U.S. at 713. There, the Court reasoned: "That early state constitutions saw no problem in explicitly excluding *only* the ministry from receiving state dollars reinforces the conclusion that religious instruction is of a different ilk from other professions." *Id.*

230. *Id.* at 721.

231. *Church of the Lukumi Babalu Aye*, 508 U.S. at 532.

232. To hold otherwise would be to claim either that they teach religion for no reason or that they teach it because of the benefits it confers. But regarding the former, humans rarely do something for no reason at all; and in terms of the latter, religious affiliation of precisely the reason such schools are currently under attack, suggesting its material benefits are greatly outweighed by its cost.

233. *Church of the Lukumi Babalu Aye*, 508 U.S. at 532.

234. *Hallock*, 16 Nev. at 383.

235. See Toby J. Heytens, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 148-49 (2000)

money on account of their faith violates *Lukumi*'s admonition against "impos[ing] burdens only on conduct motivated by religious belief..."²³⁶ Consequently, such an interpretation should be rejected.

Under the Free Speech Clause, interpreting Nevada's no funding clause to bar religious schools from its ESA program constitutes viewpoint discrimination under *Rosenberger*. The ACLU said "the private religious schools [at issue]" should be disqualified from participating in Nevada's ESA program because they "filter their entire curricula through a religious worldview."²³⁷ Yet, *Rosenberger* prohibited this.²³⁸ There, the Court took issue with the fact that: "[T]he University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints."²³⁹ While the University could deny funding to student groups writing about subject matter like the Bible, it could not deny funding because they approached subject matter from a Biblical worldview.²⁴⁰ Likewise, Nevada's ESA program could theoretically exclude paying for Bible study or Catholic catechism without violating the U.S. Constitution;²⁴¹ however, it cannot deny funding to schools educating students from a religious viewpoint. Moreover, as the *Rosenberger* Court said, "the government cannot justify viewpoint discrimination...on the economic fact of scarcity."²⁴² *Rosenberger's* prohibition, then, clearly applies to affirmative funding like the voucher program at issue. Consequently, disqualifying schools from state funding because they filter their curricula through a religious worldview violates the Free Speech Clause.

Finally, rendering religious schools constitutionally eligible to compete for ESA funding would violate the Equal Protection Clause under *Romer*.²⁴³ There, the Court

(arguing that while some might deem the passage of time sufficient to purge the taint of a "baby Blaine" amendment's original invidious purpose, Supreme Court jurisprudence holds that they should nonetheless be subject to strict scrutiny). *But see* Goldenziel, *supra* note 122, at 68 noting that Nevada reenacted its "no funding" clause in 1938). This leaves room for the argument that Nevada purged the original anti-Catholic intent of its no funding clause by reenacting it (ostensibly) due to different motivations.

236. *Church of the Lukumi Babalu Aye*, 508 U.S. at 543.

237. Complaint at 19, *Duncan v. Nevada*, (Nev. Dist. Ct., filed Aug. 27, 2015), available at <http://apps.washingtonpost.com/g/documents/local/acLU-lawsuit-challenging-nevada-school-voucher-program/1710/> (emphasis added).

238. See 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, 618 (2003) ("Under the classic formulation of [the viewpoint discrimination] doctrine, once the government establishes a public forum, it is not allowed to regulate aspects of that forum on the basis of individuals' perspectives on various issues.").

239. *Rosenberger*, 515 U.S. at 831.

240. See DeForrest, *supra* note 238, at 621 ("The Supreme Court's rulings in *Rosenberger* and *Southworth* provide strong evidence that the courts will likely apply viewpoint discrimination doctrine in evaluating the restrictive characteristics of state Blaine Amendments."). *But see* *Duncan*, *supra* note 77, at 497 ("Anti-Catholic bias may no longer be ascendant, but our public institutions have embraced, in Justice Goldberg's memorable phrase, a "brooding and pervasive devotion to the secular" that instinctively confines serious religion to the private sphere and recoils from its intrusion into the public sphere.").

241. One might argue that religious schools offering classes on religious subjects could be excluded. However, one would still be hard pressed that offering one class on religion would disqualify a school from funding entirely, given that the majority of classes would still cover approved subject matter.

242. *Rosenberger*, 515 U.S. at 835.

243. See Bolick, *supra* note 169, at 344-45 (arguing that "a state court decision striking down a school choice program on Blaine Amendment grounds because it includes religious schools might be overturned as a violation of...the Fourteenth Amendment"). Compare *Univ. of Cumberland v. Pennybacker*, 308 S.W.3d

invalidated an amendment to the Colorado constitution barring gay people from receiving special legal protections. It explained: “A law declaring that in general it shall be more difficult for one group than for all others to seek aid from the government is itself a denial of equal protection.”²⁴⁴ Yet the ACLU’s interpretation of Nevada’s no funding clause similarly singles out religious schools as the only group ineligible to receive voucher money.²⁴⁵ The ACLU might respond that Nevada has a compelling interest in retaining “...the walls separating church and state erected in Nevada’s constitution.”²⁴⁶ However, the *Romer* court said a law targeting gays was inherently motivated by animus.²⁴⁷ The same seems to hold true for denying funds to religious schools. This argument is further compounded by the historical role of baby Blaine Amendments as targeting Catholicism.²⁴⁸ As discussed earlier, the amendment in question was pushed largely as a means of defunding a Catholic orphan asylum. Thus, interpreting Nevada’s no funding clause to single out religious schools as the only group unable to compete for voucher money would violate the Equal Protection Clause under *Romer*.

Interpreting Nevada’s no funding clause to exclude religious schools from participating in its ESA program violates various Constitutional clauses. First, under the Establishment Clause, *Zelman* approved voucher programs like the one at issue; meanwhile, *Everson* proposed a principle of neutrality regarding religious and non-religious schools alike. Excluding religious schools from Nevada’s ESA program not neutral. While *Locke* interpreted the Free Exercise Clause to permit a narrow carve out for states to refuse funding the clergy, *Lukumi* invalidated state laws targeting conduct undertaken for religious reasons. A religious K-12 education clearly flows from religious conviction and is hardly analogous to training for the clergy. Under the Free Speech Clause, *Rosenberger* said states could not discriminate based on religious viewpoint. Therefore, the ACLU’s allegation that religious schools should

668, 681 (Ky. 2010) (Kentucky Supreme Court upheld Blaine Amendment as prohibiting building a pharmacy school on a religious campus and discussed why it did not violate equal protection); *with Katz*, *supra* note 3, at 116 (“The [Kentucky] court dismissed the equal protection argument simply by noting that the author of the Blaine Amendment apparently harbored no animus towards Catholics. Even if true, the court did not consider the present discriminatory application of the Blaine Amendment.”).

244. *Romer*, 517 U.S. at 633.

245. See Bacon, *supra* note 110, at 33 (“The typical Blaine Amendment certainly has the effect of making it harder for one group of citizens to seek aid from the government by requiring those citizens first to amend their state’s constitution.”). See also Heytens, *supra* note 235, at 144 (The author contends that under *Caroline Products*, one might argue Catholics or Christians are a discrete and insular minority because: “The Court has made clear that the issue in equal protection cases is not whether a suspect group is being discriminated against but rather whether the basis of the classification is suspect.”).

246. See Ian Whitaker, *ACLU Launches Lawsuit Against Nevada School Voucher Law*, LASVEGASSUN.COM, (Aug. 27, 2015 11:51 AM), <http://lasvegassun.com/news/2015/aug/27/aclu-launches-lawsuit-against-nevada-school-voucher/> (quoting Todd Story, Executive Director of the Nevada ACLU). See also Schwartz, *supra* note 137, at 145 (noting the argument that it is dangerous to remove bricks from the wall of separation between church and state).

247. *Romer*, 517 U.S. at 632.

248. See Heytens, *supra* note 219, at 141-42 (“State action can discriminate along suspect lines in two ways: either through overt discrimination or through a facially neutral policy that was enacted with a discriminatory purpose. . . . Anti-Catholic intent would thus subject them to heightened scrutiny.”). See also Katz, *supra* note 3, at 115 (“[T]he discriminatory history of the Blaine Amendments reveals that they were enacted not as a means of protecting the separation of church and state but as a means of suppressing particular minority religious groups.”).

be excluded because they filter curricula through a Christian worldview should be rejected. Finally, *Romer* said Colorado's constitutional amendment removing gays from among those eligible to receive heightened protection constituted a denial of equal protection and could be motivated by nothing other than animus. Likewise, rendering religious schools the only group ineligible for voucher money hardly reflects a benevolent view of them. Hostility becomes even harder to deny in light of the Nevada Supreme Court's admission that its no funding clause was enacted to defund a Catholic orphan asylum creates clear proof of hostile motivations. Nevada courts, therefore, should not interpret its no funding clause to exclude religious schools.

IV. CONCLUSION

Nevada case law and precedent from other states suggest its ESA program is constitutionally permissible. Beginning with its "baby Blaine" amendment, Nevada should recognize vouchers as funding families, not religious schools. As states like Arizona and Indiana have said, this severs the connection between legislature and religious schools. While Washington barred even independent applications of state money, the case at issue involved a student seeking a devotional degree to join the clergy. Nevada's ESA program promotes a general K-12 education, thereby distinguishing it. Moreover, even if Nevada adopted Washington's reasoning, many religious schools would remain eligible for ESA funding under Nevada's own case law. The *Hallock* Court interpreted "sectarian" to include Catholics, Presbyterians, and others, but not general Protestantism. Consequently, rendering ESAs a form of direct aid to religious schools would merely devolve the situation into the unwieldy task of determining, by judicial fiat, whether a given religious school qualified as sectarian or not. Fortunately, that Pandora's box need not be opened. Nevada courts can elect an outcome that is both principled and practical by recognizing that its ESA program puts money into an account for individual families to use as the please.

Transitioning to Nevada's uniformity clause, Nevada case law and precedent from other states once again support upholding its ESA program. The *Hallock* court said orphans could not augment district funding because they were legally barred from attending public schools. By contrast, all ESA recipients are free to attend public schools. Moreover, ESA funding is subtracted from the public school fund according to the number of ESA recipients who elect to leave them. While one can quibble about the desirability of such a program, it does not provide a windfall for any party. Looking to other states, Florida relied on its "paramount duty" clause to justify restricting funding to public schools. Nevada lacks analogous language. Indiana and Wisconsin, meanwhile, used the absence of such language to interpret their uniformity clauses as a floor permitting other educational options. Thus, under the current uniformity clause landscape, it would be natural for Nevada to adopt the later approach given the similarity of its constitutional language.

ENN's two procedural objections deserve little discussion given their minimal merit. The Nevada legislature is constitutionally entrusted to fund public schools. By directing ESA money to be allocated from the Education Fund according to the number of students who utilize them, the legislature has thereby deemed the

remaining amount sufficient for public schools. It would be illogical to hold the Nevada legislature renders its own allocation insufficient by directing part of to the ESA program. Second, it is simply false to claim Nevada Education Fund is constitutionally restricted to public schools. As already discussed, the clause in question says money from the Education Fund must be used for *educational* purposes; it never mentions public schools. Education Savings Accounts permit various means of education – private schooling, homeschooling and the like – but fall within its purview. Thus, *ENN*'s claims should be rejected.

Finally, this year the Supreme Court will deliver an affirmative ruling on whether states can deny funding to religious organizations solely on the basis of religion. While the question has thus far gone without a formal answer, Supreme Court jurisprudence prohibits the exclusion of religious organizations from otherwise available programs solely on the basis of creed. Under the Establishment Clause, *Everson* demanded neutrality toward religious and non-religious schools alike in allocating government benefits. Predicating participation on whether a school is “sectarian” violates this principle. Moving to the Free Exercise Clause, *Locke* permitted Washington to prohibit a scholarship recipient from using it to earn a devotional degree in preparation for the clergy. While this cuts against other cases discussed in the Note, the Court based its reasoning largely on the unique nature of training to become a pastor and the fact that states had historically refused to fund it. Nevada's situation is distinguishable since private religious schools do not prepare children for the ministry or have a history of being denied state funding. Thus, *Locke* is inapplicable. *Lukumi*, meanwhile, prohibited the government from targeting conduct undertaken for religious reasons. Since religious schools incorporate their respective faiths for religious reasons, targeting them for disfavored treatment on that basis is impermissible. One might object that while *Lukumi* dealt with criminal sanctions, Nevada's voucher program bestows a positive benefit. However, that objection smoothly transitions us to *Rosenberger*. There, the Court said states could not discriminate against groups based on their religious viewpoint. Moreover, it expressly said this applied to government funding. Nevada, then, cannot exclude religious schools from voucher money because they teach from a religious perspective. Lastly, *Romer* prohibited the practice of stripping certain groups of their eligibility to seek heightened government benefits. One might argue the government can overcome this through its compelling interest in maintaining the wall of separation between church and state, but *Everson*'s neutrality principle once again cuts against that theory. Therefore, Supreme Court jurisprudence not only permits voucher programs; it invalidates state discrimination against religious schools.

Throughout our analysis of Supreme Court jurisprudence, a striking theme appears: that targeting specific groups for disfavored treatment based on religious creed, sexual orientation, or other such characteristics is impermissible. And while individual states can extend their protections and prohibitions beyond the Federal Constitution, the Supremacy Clause prevents attempts to undermine it. Interpreting Nevada's “baby Blaine” amendment to bar religious schools violates our Constitution. Consequently, Nevada courts should reject any argument reaching that outcome.