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Jennifer Carr Allmon
EXECUTIVE DIRECTOR

Office of the Attorney General
Attention Opinion Committee
PO Box 12548
Austin, TX 78711-2548

Re: Attorney General Opinion Request No. 0502-KP

Dear Attorney General Paxton:

Thank you for the opportunity to submit briefing on the following three questions, which were submitted in a request for an attorney general opinion by State Senator Brandon Creighton:

1. Do Texas's Blaine Amendments (Article I, § 7 or Article VII, § 5 of the Texas Constitution) violate the Free Exercise Clause of the First Amendment to the U.S. Constitution?
2. Would an education savings account ("ESA") program that makes available education assistance payments to program participants, including for sectarian schools and tutors, violate the Establishment Clause of the First Amendment to the U.S. Constitution?
3. Would an ESA program that makes available education assistance payments to program participants in order to achieve a general diffusion of knowledge violate Article I, § 7 or Article VII, § 5 of the Texas Constitution?

The Texas Catholic Conference of Bishops is pleased to assist your consideration of these important questions.

We will begin with Senator Creighton's second and third questions. ESA programs fund students, not schools. They therefore violate neither the First Amendment's Establishment Clause nor the Texas Constitution. Over twenty years ago, in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the U.S. Supreme Court rejected the argument that giving students the option of using public funds to attend religious schools violates the Establishment Clause. In *Zelman*, the Court upheld a voucher program benefiting disadvantaged students in Cleveland, Ohio, despite the fact that 96 percent of program participants attended a religious school. As the Court observed, the primary beneficiaries of a parental choice program are students, not schools, and "government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Id.* at 649. This is equally, if not more, true of the funds provided in ESA programs. After all, in contrast

to a voucher program, which provides publicly-funded scholarships for private-school tuition only, ESA programs allow participating students to spend resources on a wide range of educational expenses *other* than tuition at a private school.

The Texas Supreme Court has not yet opined on the legality of parental choice programs, such as ESAs, vouchers, or tax-credit-scholarships, under the Texas Constitution. In another context, however, it has assumed that the State's Blaine Amendments are "coextensive" with the First Amendment's Establishment Clause. *HEB Ministries, Inc. v. Tex. Higher Educ. Coordinating Bd.*, 235 S.W.3d 627, 642 (Tex. 2007). It is therefore reasonable to assume that the Texas Supreme Court would apply the logic of *Zelman* and reject a Blaine-Amendment challenge to an ESA program, as have the vast majority of state supreme courts to consider such challenges.¹

Even if Texas's Blaine Amendments did impose a greater degree of church-state separation than the Establishment Clause (and there is no reason to believe they do), Texas courts would be prohibited by the United States Constitution from relying on them to invalidate an ESA program.

Less than three years ago, the U.S. Supreme Court reversed a decision by the Montana Supreme Court for doing just that. *See Espinoza v. Mont. Dep't of Rev.*, 140 S. Ct. 2246 (2020). Like Texas's Constitution, Montana's Constitution contains a Blaine Amendment, which bars public funds from being used to support any "sectarian purpose" or to aid schools affiliated with "any church, sect, or denomination." Mont. Const., Art. X, § 6(1). In 2018, the Montana Supreme Court invalidated the state's private-school scholarship program because it ran afoul of this Blaine Amendment by allowing state aid (in the form of tax credits) to help pay children's tuition at religious schools. The U.S. Supreme Court reversed, making clear that the federal Constitution does not tolerate such a result.

Espinoza explained that the Free Exercise Clause of the First Amendment prohibits a state from creating a public benefit (*e.g.*, scholarship tax credits or ESAs) and then denying that benefit to recipients because of their religious character. 140 S. Ct. at 2255. The Court emphasized that using Montana's Blaine Amendment to strike down the scholarship program had impermissibly done exactly that. *Id.* at 2255–57. The Supreme Court admonished that when a court is asked to apply a "no-aid" provision "to exclude religious schools from [a benefits] program, it [*is*] obligated by the Federal Constitution to reject the invitation." *Id.* at 2262 (emphasis added). As the Court explained, "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools because they are religious." *Id.* at 2261; *see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (holding that Missouri's Blaine Amendment could not be used to bar religious schools and daycares from participating in a playground-renovation grant program).

Last year, the Supreme Court applied these same "unremarkable" principles to invalidate a Maine law that excluded religious schools from its tuition assistance program. *Carson v. Makin*, 142 S. Ct. 1987 (2022). *Carson* made clear that states cannot exclude from educational

¹ *See* Nicole Stelle Garnett, *Sector Agnosticism and the Coming Transformation of Education Law*, 70 *Vanderbilt Law Review* 1, 24–25 (2017) (collecting cases).

benefits programs children who attend schools that engage in religious “conduct”—such as “promot[ing] a particular faith” or “present[ing] academic material through the lens of that faith.” *Id.* at 2001. The Court emphasized that denying benefits to schools and children based on their religious “use” of the funds is no different than denying those benefits based on their religious “identity.” *Id.* at 2001–22. In either case, prohibiting these benefits from flowing to religious schools and religious families “is discrimination against religion” and, as such, “is odious to our Constitution and [can]not stand.” *Id.* at 1996–98 (cleaned up).

These decisions effectively render Texas’s Blaine Amendments a dead letter. Thus, there is no obstacle under the federal or Texas Constitution to the adoption of the proposed ESA program.

We now turn to Senator Creighton’s first question. The Supreme Court’s recent decisions show a broad rejection of the Blaine Amendments themselves, as they unconstitutionally “exclude[] schools from government aid solely because of religio[n].” *Espinoza*, 140 S. Ct. at 2255. The Court has held that the Blaine Amendments were “‘born of bigotry’ and ‘arose at a time of pervasive hostility to the Catholic Church and to Catholics in general.’” *Id.* at 2259 (citing *Mitchell v. Helms*, 530 U.S. 793, 828–829 (2000) (plurality op.); Lloyd P. Jorgenson, *The State and the Non-Public School, 1825–1925*, 69-70, 216 (1987); John C. Jeffries Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 301–305 (2001)). Indeed, the Court has repeatedly “disavow[ed]” the Blaine Amendments’ “shameful pedigree.” *Mitchell*, 530 U.S. at 828; *see also, e.g., Espinoza*, 140 S. Ct. at 2259; *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2097 n.3 (2019) (Thomas, J., concurring).

The Blaine Amendments were adopted during a wave of virulent anti-immigrant and anti-Catholic nativism, perhaps epitomized by the rise of the Know-Nothing Party, which was something of a “forerunner” of the Ku Klux Klan. *See Espinoza*, 140 S. Ct. at 2269–72 (Alito, J., concurring). During the mid-19th century, Know-Nothing representatives were elected to hundreds of seats at the state and federal level. *See id.* at 2269, Luke Ritter, *Inventing America’s First Immigration Crisis* 148 (2021).

Know-Nothings and other anti-Catholics spread fear that Catholics would subvert the “distinctively . . . Protestant” public schools of that era by “siphon[ing] off” public money “for dark Catholic purposes.” Kyle Duncan, *Secularism’s Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493, 502 (2003). Thus was born the “Blaine Amendment” movement, spurred by Congressman James Blaine’s 1875 proposal to amend the federal Constitution to bar *every* state from using public education funds to support “any religious sect.” Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 50 (1992) (quotation omitted); *see also Espinoza*, 140 S. Ct. at 2268 (Alito, J., concurring). At the time, “[i]t was an open secret” that “sect” and “sectarian” were “code for ‘Catholic.’” *Espinoza*, 140 S. Ct. at 2259; *accord Mitchell*, 530 U.S. at 828. Blaine’s amendment garnered significant support in Congress, passing the House and falling just two votes short of passing the Senate. *See Espinoza*, 140 S. Ct. at 2268 (Alito, J., concurring).

Despite the failure of Blaine’s efforts at the federal level, “baby Blaine” amendments animated by the same prejudices swept across the country. Both of Texas’s Blaine Amendments were adopted in 1876—the year after Blaine’s federal amendment failed. As of 2020, thirty-eight state constitutions, including Texas’s, still contain these Amendments; thirty-four, including

Texas's, contain the "bigoted code language" "sectarian." *Id.* at 2269–70. Both the Know-Nothing Party and the Klan were ardent supporters of these amendments. *See id.* at 2268, 2272.

The very point of the Blaine Amendments was to ensure that religious schools—and especially Catholic ones—would be treated with special disfavor in order to eradicate them. These provisions cannot be separated from their invidious and unconstitutional purposes—purposes that would be impermissibly furthered by any decision to enforce them today. *See id.* at 2267–68. We urge you to take this opportunity to disavow the Texas Constitution's own relic of this shameful history. We urge you to clarify that the Texas Constitution should not—and indeed cannot—be used to discriminate against religious believers, and that it does not stand as an impediment to expanding authentic educational opportunity and robust educational pluralism. Rather, the Texas Constitution must be understood to respect and safeguard those important values that programs like ESAs reflect: the belief that Texas parents ought to be empowered by the State to make decisions about their children's education.

Parents know their children better, and love them more, than anyone else in the world. As the Catholic Church has long taught, parents are the first and best educators of their children, entrusted with the right and sacred duty of forming them intellectually, morally and spiritually. *Catechism of the Catholic Church*, Par. 2221-2229. An ESA program would make that a reality for many Texas parents who currently lack the resources to take control over their children's future. We urge you to lend the full support of your office to such a program.

Yours in Christ,



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