No. _____

In the

Supreme Court of the United States

NEW MEXICO ASSOCIATION OF NONPUBLIC SCHOOLS,
Petitioner,
v.
CATHY MOSES, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW MEXICO SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Trinity Lutheran Church* v. *Pauley*, No. 15-577, the Court granted certiorari to determine whether Missouri can deny generally available public benefits to religious organizations based on its Blaine Amendment—a state constitutional provision that arose out of anti-Catholic animus.

In the present matter, the New Mexico Supreme Court held that a "no aid" provision in New Mexico's constitution is also a Blaine Amendment and relied on it to exclude religious and private schools from a neutral, secular textbook lending program. The court referred to five decisions interpreting other state Blaine Amendments—including Missouri's—to bolster its conclusion that this subset of schools could be excluded from the textbook program.

The question presented is:

Whether applying a Blaine Amendment to exclude religious organizations from a state textbook lending program violates the First and Fourteenth Amendments.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE

Petitioner, who was an Intervenor-Defendant below, is the New Mexico Association of Non-Public Schools, an unincorporated association. Petitioner does not have any parent corporation. No publicly held corporation owns any portion of Petitioner, and Petitioner is not a subsidiary or affiliate of any publicly owned corporation.

Respondents, who were Plaintiffs below, are Cathy Moses and Paul Weinbaum.

Hanna Skandera, Secretary of Education for the New Mexico Public Education Department, was the Defendant below and may participate as Respondents here under Rule 12.6.

Albuquerque Academy, Rehoboth Christian School, St. Francis School, Hope Christian School, Sunset Mesa School, Anica Benia, and Maya Benia were Intervenor-Defendants below and may participate as Respondents here under Rule 12.6.

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PETITION FOR A WRIT OF CERTIORARI

Karl Marx said that history repeats itself, first as tragedy, then as farce. But some history keeps repeating as tragedy. Blaine Amendments are one example. In just the last two years, courts have applied Blaine Amendments to keep religious organizations in Missouri from accessing generally available safety programs for kids; to deny disabled children in Oklahoma scholarships to access schools suited to their individual needs; and, in this case, to shut down an 83-year-old program providing secular textbooks to New Mexico schoolchildren. When state officials deny needed secular services to children solely based on their religious identity, the Blaine Amendments' ugly history repeats itself.

In this case, the New Mexico Supreme Court acknowledged its state Blaine Amendment's anti-Catholic origins but applied the Amendment anyway. In so doing, it extinguished a long-standing, democratically-enacted literacy law that uses federal grant dollars to provide secular textbooks to all New Mexico school students, regardless of where they go to school. This result cannot be squared with the First or Fourteenth Amendments.

Next Term in *Trinity Lutheran Church* v. *Pauley*, No. 15-577, the Court will consider the implications of Missouri's Blaine Amendment. The Court also appears to be holding three petitions involving Colorado's Blaine Amendment. Petitions involving at least three other states' Blaine Amendments may be forthcoming as cases work their way through the lower courts.

Petitioners respectfully request that the Court hold this petition pending resolution of *Trinity Lutheran*. Depending on the Court's final ruling in that matter, this petition should then be set for plenary review, or alternatively, the Court should then grant the petition, vacate the judgment below, and remand for further proceedings.

OPINIONS BELOW

The decision of the First Judicial District Court of New Mexico denying Respondents' motion for summary judgment is unreported, but is available at No. D-101-cv-2012-00272, 2013 WL 11037177 (N.M. 1st Dist. Ct. June 19, 2013). The decision of the Court of Appeals of New Mexico affirming the district court is reported at 346 P.3d 396 (N.M. Ct. App. 2014). The original opinion of the New Mexico Supreme Court reversing the Court of Appeals is unreported but is available at No. S-1-SC-34,974, 2015 WL 7074809 (N.M. Nov. 12, 2015). The opinion of the New Mexico Supreme Court denying the Petitioners' motion for rehearing, withdrawing the November 12, 2015 opinion, and substituting a new opinion is reported at 367 P.3d 838 (N.M. 2015).

JURISDICTION

The original judgment of the New Mexico Supreme Court was entered on November 12, 2015. Pet. App. 28a. The judgment of the New Mexico Supreme Court denying Petitioner's motion for rehearing and substituting a new opinion was entered December 17, 2015. Pet. App. 1a. On March 4, 2016, Justice Sotomayor extended the time within which to file a petition for a

writ of certiorari to and including May 16, 2016. Jurisdiction is invoked under 28 U.S.C. § 1257(a).

Because this petition calls into question the constitutionality of Article XII, section 3 of the New Mexico Constitution and 28 U.S.C. § 2403(b) may thus apply, service will be made on the Attorney General of New Mexico.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. Amend. I.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.

> The schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university.

N.M. Const. Art. XII § 3.

The following statutory provision is reproduced in Appendix E (Pet. App. 86a): Instructional Material Law, N.M. Stat. Ann. 1978 §§ 22-15-1 to 22-15-14 (2010). The following statutory provision is reproduced in Appendix F (Pet. App. 99a): Federal mineral leasing funds, N.M. Stat. Ann. 1978 § 22-8-34 (2001).

STATEMENT OF THE CASE

A. The origins of the federal and state Blaine Amendments.

The anti-religious origins of the federal Blaine Amendment and its state progeny are well-known to the Court. See, *e.g.*, *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 720 (2002) (Breyer, J., dissenting); *Mitchell* v. *Helms*, 530 U.S. 793, 829 (2000) (plurality). As Justice Breyer has observed, "during the early years of the Republic, American schools—including the first public schools—were Protestant in character. Their students recited Protestant prayers, read the King James version of the Bible, and learned Protestant religious ideals." *Zelman*, 536 U.S. at 720 (Breyer, J., dissenting)

(citing David Tyack, Onward Christian Soldiers: Religion in the American Common School, in *History and Education* 217-226 (P. Nash ed. 1970)). But in the mid-1800s, a wave of immigration brought significant religious strife. Catholics "began to resist the Protestant domination of the public schools," and "Protestants fought back to preserve their domination." *Ibid.* (citing John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 300 (2001)).

Amidst the ongoing religious tension, in 1874 the Democratic party gained control of the House of Representatives for the first time in nearly twenty years. Driven in large part by the public's response to the Panic of 1873 and the scandal-ridden administration of President Ulysses S. Grant, the election cycle signaled the post-Reconstruction-Era resurgence of Democrats in the South. In a move calculated to shore up supporters, the Republicans seized upon the growing anti-Catholic sentiment.

Specifically, in December 1875, President Ulysses S. Grant "issued [a] call to prevent government aid to 'sectarian' schools, a move which * * * 'clearly aligned the Republican Party with the Protestant cause.'" 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, 565 (2003) (citation omitted). Within a week of Grant's speech, Republican Congressman James G. Blaine—who had just lost his position as Speaker of the House and was positioning himself to be Grant's successor to the White House—introduced a proposed

amendment to the United States Constitution, "capitaliz[ing]" on the "anti-Catholic sentiment" stoked by Grant. *Id.* at 565-66.

The provision passed overwhelmingly in the House, where Democrats who feared being "too closely connected with the Catholic Church" essentially "neutered" the amendment's proposed language so they could support it without upsetting their Catholic constituents. DeForrest, 26 Harv. J.L. & Pub. Pol'y at 566-68 (citing Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 55 (1992)). By contrast, the Senate version unambiguously barred aid to "sectarian" schools and expressly allowed the public common schools to conduct Bible reading, thus leaving the common schools free to continue "feed[ing] at the public trough" while also "preserving [their] dominant Protestant character." *Id.* at 568. The debate on the Senate floor reflected the provision's blatant anti-religious bigotry with "a tirade against Pope Pius IX," open attacks on Catholics' patriotism, and appeals that certain states were "vulnerable to takeover by local Catholic majorities." *Id.* at 570-72. Ultimately, the proposed amendment failed, just shy of the two-thirds majority needed to approve it. See *Id.* at 573.

But by then, "the spirit of Blaine had possessed the nation." Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 673 (1998). Several state legislatures enacted constitutional amendments in their state constitutions, *ibid.*, and the Republican-controlled U.S. Congress began requiring

such provisions as a condition for any new state entering the Union, *id.* at 675; see also Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493, 512 (2003).

B. The New Mexico Blaine Amendment

New Mexico's status as a predominantly Catholic territory did not insulate it from the general religious tension enveloping the country. Indeed, its overwhelmingly Catholic population was a significant reason why New Mexico's efforts to become a state were stymied for several decades, creating significant pressure to accept Congress's condition that a Blaine Amendment be included in any new state constitution.

New Mexico's religious demographics changed drastically between when it became a U.S. Territory in 1853 and its statehood in 1912. Its largely Catholic population that was "ninety-five percent * * * Hispano or Native American * * * shrunk to just over half" by 1912 with the continuous arrival of Anglo Protestant settlers. Kathleen Holscher, *Religious Lessons: Catholic Sisters and the Captured Schools Crisis in New Mexico* 31 (2012). From the beginning there was conflict, with the new arrivals blaming the Catholic education system for "contriving to 'entangle the mind [sic] of their pupils in the meshes of superstition and bigotry.'" *Ibid.*

But Catholics had a different story. Prior to 1853, formal schooling had experienced an "uneven and idiosyncratic presence in the region." Holscher, *Religious Lessons* at 28. In 1853, "a French priest named Jean Baptiste Lamy"—a strong proponent of Catholic education—was appointed to be the first Bishop (and later

Archbishop) of Santa Fe. *Ibid.* He found "only nine priests in all of New Mexico" and a population that was "a far cry from anything [he or the Church] considered orthodox," belying Protestant assumptions that Catholic schools were a significant part of the problem. *Id.* at 29. Observing that "under Mexican rule, 'every vestige of school had vanished,'" Lamy set out to establish the territory's "first parochial school system," inviting "the first Catholic women religious to New Mexico to help him with the project." *Ibid.* Together, they developed "an expansive education the likes of which New Mexicans had never seen." *Id.* at 30. In short, it was Catholic educators who pioneered the first systematic efforts to educate the children of New Mexico.

These contrasting views of New Mexico's educational landscape set the stage for a state-level conflict that paralleled the national conflict, with Protestant territorial leaders appointed by Washington frequently clashing with the Archdiocese of Santa Fe on the proper role of religion in education. Holscher, *Religious Lessons* at 37. For decades, this tension resulted in a rough system of public funding that supported both the Protestant-established and parochial schools. *Id.* at 37-38.

Thus, in the 1870s and 1880s, "a series of attempts to codify the territory's *ad hoc* educational infrastructure" met significant resistance, largely because each of the "proposals relied on the familiarly Protestant objection to sectarianism" and sought "to eliminate Catholic influence." Holscher, *Religious Lessons* at 38. These proposals were voted down by the citizens of New Mexico—"evidence of mounting hostility between

public education advocates and the Archdiocese of Santa Fe." *Ibid.*; see also Diana Everett, *The Public School Debate in New Mexico: 1850-1891*, Arizona and the West 26, 132-33 (1984).

"The push for nonsectarian schools was also bound up with the quest for statehood," as by 1876, U.S. officials influenced by the federal Blaine Amendment "had concluded that Catholicism was an unacceptable presence in the classrooms of any territory with aspirations of statehood." Holscher, *Religious Lessons* at 38-39. When New Mexico finally attained statehood in 1912, it was with the condition that the new state include in its constitution a Blaine Amendment "reflect[ing] the nonsectarian language Protestant education advocates had been pushing for the last half-century." *Id.* at 44; see also Pet. App. 14a (same) (citing Enabling Act for New Mexico of June 20, 1910, 36 Stat. 557, ch. 310, § 8) (prohibiting aid in "support of any sectarian or denominational school, college or university").

Although the language of the Enabling Act was amended in Article XII, section 3 of the New Mexico Constitution to prohibit aid to both "sectarian" and "private" schools, the impact was the same. The missionaries that ran New Mexico's private Protestant schools had an "unshakeable confidence in the compatibility between their own vision of Christian education" and the moral culture of public schools. Holscher, *Religious Lessons* at 39. As a result, Protestant private school educators "became among the strongest advocates for keeping Catholicism out" of New Mexico's new public schools. *Ibid.* By contrast, Catholic educators faced a constitutional amendment

whose ban on aid to "sectarian" schools was designed to exclude them. *Id.* at 45; see also DeForrest, 26 Harv. J.L. & Pub. Pol'y at 572 (noting that "the Blaine Amendment guaranteed Catholics and Protestants equal rights in the public schools" only in the same way that "the law prevents both rich men and beggars from sleeping under bridges").

C. The New Mexico Instructional Materials Law

The New Mexico Instructional Materials Law also has its roots in New Mexico's struggle for statehood. High illiteracy rates during territorial times were a significant obstacle to statehood. See David V. Holtby, *Forty-Seventh Star: New Mexico's Struggle for Statehood* 51, 54 (2012). A major factor contributing to high illiteracy was the lack of reading material available to students.

In 1891 the Territorial Legislature passed its first measure to address the lack of available instructional material. N.M. Laws 1891, Ch. 25, § 42 (requiring school boards to furnish textbooks for children in "poverty"). A few years later, the statute was amended to clarify that textbooks were being loaned to students and remained the property of the school district. N.M. Laws 1903, Ch. 39, p. 59; see also N.M. Laws 1915 Comp., § 4691 (first post-statehood statute amending textbook laws). In 1933, the Legislature made free textbooks available to "all children in the schools in the State of New Mexico, from the first to eighth grades inclusive." N.M. Laws 1933, Ch. 112, § 1. And the Legislature has continued authorizing free textbooks for all New Mexico students, whether in public or private schools, ever since. See N.M. Stat. Ann.

1941, § 55-1712 (requiring a "detailed budget" for all "educational institutions, public or private, the pupils of which are entitled to receive free textbooks"); N.M. Stat. Ann. 1953, § 77-13-5 (1967) (creating a "free textbook fund"); § 77-13-7(B) (providing that free instructional materials were to be "distributed to [state] and private schools for the benefit of students").

Under the current law, New Mexico maintains a textbook lending library comprising a collection of secular "school textbooks and other educational media that are used as the basis for instruction * * * ." N.M. Stat. Ann. 1978, § 22-15-2(C). Any K-12 student attending a public or private school "is entitled to the free use" of the materials, but they are only on loan. § 22-15-7(A). The law ensures that the library will reflect the State's diversity, requiring that at least ten percent of items "contain material that is relevant to the cultures, language, history and experience of multi-ethnic students." N.M. Stat. Ann. 1978, § 22-15-8(A). All materials must be strictly secular. § 22-15-9(C).

Since 1931, the textbook lending program has been federally funded under the Federal Mineral Lands Leasing Act ("MLLA"). See N.M. Stat. Ann. § 22-8-34(A). During the 83 years that the textbook program has been extended to private schools, it has never before been challenged on Blaine Amendment grounds.

D. Proceedings Below

On January 23, 2012, Respondents sued the New Mexico Secretary of Public Education, alleging that the textbook lending program violated New Mexico's

Constitution by supporting "sectarian, denominational, or private schools" and by "forc[ing] [Respondents] * * * to support the religious dictates of others." Pet. App. 6a. Respondents primarily objected to the distribution of textbooks to "sectarian" schools, citing Blaine Amendment cases in five states, including Missouri. Pls.' Mem. re Mot. for Sum. J. 1 (see http://bit.ly/1Yujtp9) (objecting that the program distributes materials to "private schools, the majority of which are sectarian"); *id.* at 3-6 (citing Blaine cases).

Petitioner intervened to defend the program, arguing that when Blaine Amendments are used to "target religious conduct for distinctive treatment," such action violates the Free Exercise Clause and Equal Protection. Intervenors' Memo. in Opp. to Pls.' Mot. for Summ. J. 8-9 (see http://bit.ly/1TgIt36).

The district court upheld the textbook lending program. Pet. App. 84a-85a. The New Mexico Court of Appeals affirmed, holding that the Blaine Amendment should be interpreted consistently with current federal Establishment Clause jurisprudence and that New Mexico's historic textbook lending program did not violate New Mexico's Blaine Amendment. Pet. App. 76a.

The New Mexico Supreme Court granted review. On November 12, 2015, the court ruled that the then-82-year-old textbook lending program was unconstitutional under Article XII, section 3. Pet. App. 28a. The court held that federal Establishment Clause jurisprudence was irrelevant to interpreting Article XII, section 3, because that section banned state aid to all private schools, not just religious ones. Pet. App. 17a. The court detailed the history behind Article XII's

adoption, concluding that it was a Blaine Amendment that New Mexico was compelled to include in its constitution as a condition of statehood. Pet. App. 17a-18a. The court proceeded to look to cases interpreting Blaine Amendments in seven other states—including Missouri—and concluded that New Mexico's Blaine Amendment should be interpreted consistently with those cases. Pet. App. 22a-26a. The court recognized that Blaine Amendments arose from anti-Catholic bigotry manifest in efforts to use the public schools as "'an instrument for the acculturation of immigrant populations, rendering them good productive citizens in the image of the ruling [Protestant] majority.'" Pet. App. 10a (quoting Viteritti, 21 Harv. J.L. & Pub. Pol'y at 668). It also acknowledged that the territories seeking statehood were "[p]articularly vulnerable to the Republican agenda" of using public aid as a "wedge" for advancing this cause. Pet. App. 13a. Nevertheless, it applied Article XII, section 3 to prevent religious and private schools from participating in the textbook lending program. Pet. App. 26a.

Petitioner moved for rehearing and reasserted its claim that applying Article XII, section 3 in this way "rais[ed] significant concerns under the First and Fourteenth Amendments" to the federal Constitution. Pet's Memo. re Mot. for Rehearing 6-7 (http://bit.ly/1TReJWq). The court denied Petitioner's motion, withdrew its opinion, and substituted a new opinion that reiterated the court's analysis of the Blaine Amendment and added new material addressing the Instructional Material Law's funding under the Mineral Leasing Land Act. Pet. App. 1a. This petition now follows.

REASONS FOR GRANTING THE PETITION

This case presents the same question on which the Court recently granted plenary review in *Trinity Lutheran Church* v. *Pauley*, No. 15-577: whether a state may rely on its own constitutional provision adopted out of religious animus to exclude religious organizations from neutral and generally available aid programs without violating the First and Fourteenth Amendments. The New Mexico Supreme Court held that Article XII, section 3 of the New Mexico Constitution—like the constitutional provision at issue in *Trinity Lutheran*—is a Blaine Amendment that bars aid to "sectarian" organizations. The New Mexico Court explicitly recognized the Blaine Amendment's anti-Catholic pedigree. It then breathed new life into the provision by relying on it to expel nearly 100 religious schools from a federally funded, secular textbook lending program that has been operating in New Mexico since 1933. Pet. App. 55a-56a. Because there is a "reasonable probability" that the Court's decision in *Trinity Lutheran* will undermine the discriminatory "premise" on which the New Mexico Supreme Court's decision rests, the Court should hold this petition until *Trinity Lutheran* is decided. *Lawrence on Behalf of Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996).

The Court already appears to be holding three petitions challenging Colorado's Blaine Amendment pending the outcome of *Trinity Lutheran*. See *Doyle* v. *Taxpayers for Public Educ.*, No. 15-557; *Douglas Cnty. Sch. Dist.* v. *Taxpayers for Public Educ.*, No. 15-557; *Colo. State Bd. of Educ.* v. *Taxpayers for Publ. Educ.*, No. 15-558. The issue presented in this matter is essentially identical to the issue in those three cases, as

well as the issue in *Trinity Lutheran*. Thus, holding this petition pending the Court's "own decisions" in these other related matters is fully warranted. *Lawrence*, 516 U.S. at 166. The Court then should set this case for plenary review or, alternatively, grant this petition, vacate the judgment below, and remand to the New Mexico Supreme Court for further proceedings.

The New Mexico court's reliance on the fact that Article XII, section 3 forbids aid to any private school, whether religious or not, Pet. App. 16a, is of no moment. Where, as here, a law was motivated by hostility towards a protected class and in fact disadvantaged members of that class, it makes no difference that the law's language includes a semblance of neutrality—it violates the First and Fourteenth Amendments and must be struck down. Thus, for example, the voting law struck down in *Hunter* v. *Underwood* on its face applied to *all* persons convicted of certain petty offenses, regardless of race. 471 U.S. 222, 227 (1985) (observing that the law in question was "racially neutral"). But there was overwhelming historical evidence that the voting law was intended to disenfranchise African-Americans and in fact had a disparate impact on African-American voters. *Id.* at 227-28 ("[B]y January 1903 section 182 had disfranchised approximately ten times as many blacks as whites. This disparate effect persists today."). As a result, the Court held that the law violated the Fourteenth Amendment. *Id.* at 233.

The Court rejected a similar effort to gloss over discriminatory animus in *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528 (1973). The law at issue in that case "exclude[d] from participation in the

food stamp program any household containing an individual * * * unrelated to any other member of the household." *Id*. at 529. In considering a challenge under the Equal Protection Clause, the Court noted that this exclusion was "intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program." *Id*. at 534. Ultimately, the Court struck the provision, holding that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Id*. The same is especially true where—as here—a targeted group is entitled to heightened protection. See *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.")

Thus, the attempted facial neutrality of Article XII, section 3 cannot save it, because "no aid" provisions like this one were adopted out of anti-Catholic animus and in fact had an intended disparate impact on Catholic schools, which now had to compete with public schools infused with Protestantism. Holscher, *Religious Lessons* at 40; see also *Lukumi*, 508 U.S. at 534 ("Facial neutrality is not determinative."). More than a century later, this lawsuit, which explicitly targets "sectarian" schools and complains that the "majority" of private schools participating in the textbook program are religious, has resurrected Article XII's bitter legacy. Pls.' Memo. re Mot. for Summ. J. 1-2 (see http://bit.ly/1TgIt36). In short, Article XII was "born of

bigotry" and cannot be allowed to continue to disadvantage religious groups today. *Mitchell*, 530 U.S. at 829.

Finally, the question presented is of exceptional importance, and this petition presents an excellent opportunity to address it. Blaine Amendments are now found in the constitutions of more than 30 states. Here, the New Mexico Supreme Court explicitly acknowledged that Article XII, section 3—the provision at issue—is a Blaine Amendment that was forced upon the state by a federal Congress driven by nativist religious animosity against Catholics. Pet. App. 39a-41a. In contrast, the Instructional Materials Law has deep roots in New Mexico's own history. Its predecessor laws were democratically enacted well before New Mexico became a state, seeking to address the significant problems with illiteracy that existed in the territory. Those laws have on numerous occasions been revisited by both the territorial and state legislatures to ensure equal access to sound secular textbooks for all children in New Mexico, particularly those in poorer rural areas with limited educational opportunities. This protection existed for nearly 80 years without controversy. Striking it down based on Respondents' expressed religious animosity gives new life to the religious bigotry underlying Article XII, section 3 in violation of the First and Fourteenth Amendments.

CONCLUSION

The petition should be held pending the Court's disposition of *Trinity Lutheran*. Once *Trinity Lutheran* has been decided, the Court should set this case for plenary review or grant the petition, vacate the decision below, and remand for further proceedings.

Respectfully submitted.

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MAY 2016

APPENDICES

APPENDICES

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

December 17, 2015

No. S-1-SC-34974

CATHY MOSES AND PAUL F. WEINBAUM

PLAINTIFFS-PETITIONERS,

v.

HANNA SKANDERA, Designate Secretary of Education,
New Mexico Public Education Department,

DEFENDANT-RESPONDENT,

and

ALBUQUERQUE ACADEMY, ET AL.,

DEFENDANTS/INTERVENORS-RESPONDENTS

Original Proceeding on Certiorari
Sarah M. Singleton, District Judge

CHÁVEZ, *Justice*: Intervenors' motion for rehearing is denied. However, our prior opinion filed on November 12, 2015 is withdrawn and the following is substituted in its place.

Since the adoption of the New Mexico Constitution on January 21, 1911, New Mexico has had a constitutional responsibility to provide a free public education for all children of school age. N.M. Const. art. XII, § 1. However, "*no part* of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or *private school*, college or university." N.M. Const. art. XII, § 3 (emphasis added). The New Mexico Department of Public Education's (Department) Instructional Material Bureau purchases non-religious instructional materials selected by public or private schools, with funds appropriated by the Legislature and earmarked for the schools, and lends these materials to qualified students who attend public or private schools. NMSA 1978, § 22–15–7 (2010); *see also* NMSA 1978, § 22–8–34 (2001). The question we address in this case is whether the provision of books to students who attend private schools violates Article XII, Section 3. We conclude that the New Mexico Constitutional Convention was not willing to navigate the unclear line between secular and sectarian education, or the unclear line between direct and indirect support to other than public schools. Indeed, in 1969 the voters rejected a proposed constitutional amendment that would have required New Mexico to provide free textbooks to all New Mexico school children. *See Proposed New Mexico Constitution* (*as adopted by the Constitutional Convention of 1969*) 45 (October 20, 1969). We hold that the plain meaning and history of Article XII, Section 3 forbids the provision of books for use by students attending

private schools, whether such schools are secular or sectarian.

I. The Instructional Material Law is funded by appropriations

The Instructional Material Law (IML), NMSA 1978, §§ 22–15–1 to –14 (1967, as amended through 2011), grants the Department's Instructional Material Bureau statutory authority to lend approved instructional materials[1] to "[a]ny qualified student ... attending a public school, a state institution *or a private school* approved by the department in any grade from first through the twelfth grade of instruction...." Section 22–15–7(A) (emphasis added). "Instructional material shall be distributed to school districts, state institutions and private schools *as agents* for the benefit of students entitled to the free use of the instructional material." Section 22–15–7(B) (emphasis added). In turn, "[a]ny school district, state institution or private school as *agent* receiving instructional material pursuant to the Instructional Material Law is responsible for distribution of the instructional material for use by eligible students and *for the safekeeping* of the instructional material." Section 22–15–7(C) (emphasis added). Students or their parents are "responsible for the loss, damage or destruction of instructional material while the

[1] " '[I]nstructional material' means school textbooks and other educational media that are used as the basis for instruction, including combinations of textbooks, learning kits, supplementary material and electronic media." Section 22–15–2(C); *see also* § 22–15–3(A) ("The 'instructional material bureau' is created within the department of education [public education department]." (alteration in original)).

instructional material is in the possession of the student." Section 22–15–10(B).

The Department is required to publish a "multiple list" of state-approved instructional materials. Section 22–15–8(A), (B); § 22–15–2(D) (" '[M]ultiple list' means a written list of those instructional materials approved by the department."). Using the multiple list of state-approved instructional materials, "each school district, state institution or private school as agent may select instructional material for the use of its students...." Section 22–15–8(B). "At least ten percent of instructional material on the multiple list concerning language arts and social studies shall contain material that is relevant to the cultures, languages, history and experiences of multi-ethnic students." Section 22–15–8(A). Moreover, "[t]he Department shall ensure that parents and other community members are involved in the adoption process at the state level." *Id.*

The IML is funded through a non-reverting "instructional material fund" established by the State Treasurer "consist[ing] of appropriations, gifts, grants, donations and any other money credited to the fund." Section 22–15–5(A). In 1931, the Legislature enacted the State School Building, Text Book and Rural Aid Fund to purchase instructional materials with unappropriated federal funds obtained through the Mineral Lands Leasing Act (MLLA), 30 U.S.C. §§ 181 to 287 (1920, as amended through 2012). N.M. Laws 1931, ch. 138, § 2 ("There is hereby appropriated for the purposes of this fund, annually, all of the balance, not otherwise appropriated, in the [MLLA] Fund...."). Today the Department's Instructional Material Bureau continues to purchase instructional materials for New Mexico students using federal MLLA funds.

See § 22–8–34(A) ("Except for an annual appropriation to the instructional material fund and to the bureau of geology and mineral resources of the New Mexico institute of mining and technology ... all other money received by the state pursuant to the provisions of the federal [MLLA], shall be distributed to the public school fund." (citation omitted)).

Each public and private school is allocated a percentage of money available in the IML fund based on the number of students enrolled in their school. Section 22–15–9(A). "Private schools may expend up to fifty percent *of their instructional material funds* for items that are not on the multiple list; provided that *no funds* shall be expended for religious, sectarian or nonsecular materials...." Section 22–15–9(C) (emphasis added). Such instructional material purchases must be identified and purchased through the Department's in-state depository. Section 22–15–9(C), (E); *see also* § 22–15–4(D). "Any balance remaining in an instructional material account of a private school at the end of the fiscal year shall remain available for reimbursement by the department for instructional material purchases in subsequent years." Section 22–15–9(F). The Department's Instructional Material Bureau has the authority to "withdraw or withhold the privilege of participating in the free use of instructional material in case of any violation of or noncompliance with the provisions of the Instructional Material Law or any rules adopted pursuant to that law." Section 22–15–4(C).

In summary, the Legislature appropriates instructional materials funds and private schools are allocated a percentage of the funds based on the number of students enrolled in their schools. Private

schools select instructional materials from a multiple list, but they may spend up to 50 percent of their instructional materials funds on items that are not on the multiple list, as long as the material is not religious in content. Any money remaining in the private schools instructional material fund may be carried over to subsequent years. Once the materials are purchased, the materials are loaned to the students. Hereafter in this opinion we will refer to this process as a "schoolbook loan program" for ease of reference.

II. Procedural history

Plaintiffs–Petitioners Cathy Moses and Paul F. Weinbaum (Petitioners) are New Mexico residents and have been taxpayers for at least the past five years. Petitioners currently have one or more children enrolled in elementary and/or secondary public schools in New Mexico. As New Mexico residents and taxpayers, Petitioners assert that the IML violates their constitutional rights because it supposedly forces them to "support[ ] and aid[ ] the religious dictates of others with whom they disagree"; appropriates or donates public funds to private parties; and supports "sectarian, denominational or private school [s]."

Petitioners filed a verified complaint for declaratory judgment in the district court against Defendant–Respondent Hanna Skandera (Respondent), Secretary of the Department, seeking a declaration that the State issuing instructional materials to students attending private schools is unconstitutional because doing so supports sectarian, denominational, or private schools in violation of New Mexico Constitution Article XII, Section 3; forces them as taxpayers to support the religious dictates of others

in violation of New Mexico Constitution Article II, Section 11; and appropriates or donates public funds to private parties in violation of New Mexico Constitution Article IX, Section 14. Petitioners also relied on *Zellers v. Huff,* 1951–NMSC–072, 55 N.M. 501, 236 P.2d 949 to support their allegation that the schoolbook loan program is unconstitutional.

Petitioners filed a motion for summary judgment, and Respondent and Albuquerque Academy, et al. (Intervenors) each filed a memorandum in opposition. The district court ruled that *Zellers* did not control and the provisions of the IML challenged by Petitioners did not violate the New Mexico Constitution. The district court then entered its order denying Petitioners' motion for summary judgment and granted summary judgment to Respondent.

Petitioners appealed to the Court of Appeals, which affirmed the district court's grant of summary judgment to Respondent. *Moses v. Skandera,* 2015–NMCA–036, ¶¶ 3, 54, 346 P.3d 396, *cert. granted,* 2015–NMCERT–001, 350 P.3d 91. We granted Petitioners' petition for writ of certiorari to consider the following issues: (1) whether this Court's decision in *Zellers* constituted dicta; (2) whether the IML violates Article XII, Section 3 of the New Mexico Constitution; (3) whether the IML violates Article IV, Section 31 of the New Mexico Constitution; (4) whether the IML violates Article IX, Section 14 of the New Mexico Constitution; and (5) whether the IML violates Article II, Section 11 of the New Mexico Constitution.

We conclude that the schoolbook loan program violates Article XII, Section 3, and therefore we do not

address the remaining issues. We reverse both the Court of Appeals and the district court.

III. The IML violates Article XII, Section 3 of the New Mexico Constitution

Article XII, Section 3 provides:

> The schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational *or private school,* college or university.

(Emphasis added.)

Whether the schoolbook loan program violates the New Mexico Constitution is a question of law that we review de novo. *Tri–State Generation & Transmission Ass'n v. D'Antonio,* 2012–NMSC–039, ¶ 11, 289 P.3d 1232. "It is well settled that there is a presumption of the validity and regularity of legislative enactments." *Bounds v. State ex rel. D'Antonio,* 2013–NMSC–037, ¶ 11, 306 P.3d 457 (internal quotation marks and citations omitted). Petitioners bear the burden of proof to overcome the presumption of the validity and regularity of the IML. *Id.* We will uphold the constitutionality of the IML unless we are satisfied beyond all reasonable doubt that the Legislature exceeded the bounds of the New Mexico Constitution in enacting the IML. *Id.*

"[T]he rules of statutory construction apply equally to constitutional construction." *State v. Boyse,* 2013–NMSC–024, ¶ 8, 303 P.3d 830 (internal quotation marks and citation omitted). "[W]e examine the plain language of the statute as well as the context in which it was promulgated, including the history of the statute and the object and purpose the Legislature sought to accomplish." *State v. Nick R.,* 2009–NMSC–050, ¶ 11, 147 N.M. 182, 218 P.3d 868 (internal quotation marks and citation omitted).

The Court of Appeals interpreted Article XII, Section 3 to provide protection only against the establishment of religion, similar to the Establishment Clause of the First Amendment to the United States Constitution and the Establishment Clause of Article II, Section 11 of the New Mexico Constitution. *Moses,* 2015–NMCA–036, ¶ 22, 346 P.3d 396. Accordingly, the Court of Appeals relied primarily on First Amendment cases to hold that the IML did not violate Article XII, Section 3. *Moses,* 2015–NMCA–036, ¶ 34, 346 P.3d 396 (citing *Elane Photography, LLC v. Willock,* 2012–NMCA–086, ¶ 33, 284 P.3d 428).

We might agree with the Court of Appeals if the language of Article XII, Section 3 only prohibited the use of any public funds for the support of sectarian or denominational schools. The plain language of Article XII, Section 3 is more restrictive, and it therefore stands as a constitutional protection separate from the Establishment Clause as illustrated by the difference in language in each provision.

The Establishment Clause provides, in relevant part, that "Congress shall make no law respecting an

establishment of religion...."U.S. Const. amend. I. In contrast, Article XII, Section 3 provides:

> The schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational *or private school,* college or university.

(Emphasis added.) The plain language of Article XII, Section 3 expressly restricts the use of public funds to other than sectarian schools, and therefore our analysis cannot be restricted by cases that analyze the Establishment Clause.

The historical context in which Article XII, Section 3 was adopted helps explain why this constitutional provision was not a recodification of the Establishment Clause of the New Mexico Constitution. During the early nineteenth century, public education was provided in public schools known as "common schools." *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, 558 (2003). "The common school was designed to function as an instrument for the acculturation of immigrant populations, rendering them good productive citizens in the image of the ruling majority." Joseph P. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law,* 21 Harv. J.L. & Pub. Pol'y 657,

668 (1998). "Protestant ministers and lay people were in the forefront of the public-school crusade and took a proprietary interest in the institution they had helped to build. They assumed a congruence of purpose between the common school and the Protestant churches." *Id.* (internal quotation marks and citation omitted). "In many cases, it was difficult to distinguish between public and private institutions because they were often housed in the same building." *Id.* at 664. State statutes at the time authorized Bible readings in public schools and state judges generally refused to recognize the Bible as a sectarian book. G. Alan Tarr, *The New Judicial Federalism in Perspective,* 72 Notre Dame L. Rev. 1097, 1103–04 nn. 22–23 (citing Miss. Const. of 1890, art. 3, § 18); (*Hackett v. Brooksville Graded Sch. Dist.,* 120 Ky. 608, 87 S.W. 792 (1905); *Donahoe v. Richards,* 38 Me. 379 (1854)); Viteritti, *supra,* at 667–68.

By the middle of the nineteenth century, the Catholic immigrant population rose significantly. Viteritti, *supra,* at 669. The influx of Catholic immigrants created a demand for Catholic education, and consequently Catholics and other minority religionists challenged the Protestant influence in the common schools. *Id.* at 667–68; Steven K. Green, *The Blaine Amendment Reconsidered,* 36 Am. J. Legal Hist. 38, 44 (1992). By the 1870s, Catholic church leaders began to lobby their state legislatures for public funds to develop their own educational system. Viteritti, *supra,* at 668; Green, *supra,* at 44. This rise in Catholic influence created an obvious tension between the Protestant majority and the mostly Catholic minority on the issue of education, *see* Viteritti, *supra,* at 670–72, because the Protestant-run

"common school was designed to function as an instrument for the acculturation of immigrant populations, rendering them good productive citizens in the image of the ruling majority." *Id.* at 668.

In response, "[o]pposition to aid to 'sectarian' schools acquired prominence in the 1870's...." *Mitchell v. Helms,* 530 U.S. 793, 828, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000). "[I]t was an open secret that 'sectarian' was code for 'Catholic.' " *Id.* Common school leaders successfully lobbied their state legislatures to adopt amendments prohibiting the use of state funds to support sectarian schools by the mid-to-late nineteenth century. *See, e.g.,* Colo. Const. art. IX, § 7; Del. Const. art. X, § 3; N.D. Const. art. VIII, §§ 1, 5; Ohio Const. art. VI, § 2. "In September of 1875, President Ulysses S. Grant responded to mounting political pressure when he publicly vowed to '[e]ncourage free schools, and resolve that not one dollar be appropriated to support any sectarian schools.' " Viteritti, *supra,* at 670 (alteration in original). President Grant called on Congress to draft a proposed constitutional amendment that would deny public support to religious institutions. *Id.*

Congressman James G. Blaine of Maine agreed to sponsor an amendment to the First Amendment that fulfilled President Grant's request. *See id.* at 670–71. Congressman Blaine's proposed constitutional amendment read:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund

> therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects and denominations.

Green, *supra,* at 38 n. 2 (quoting 4 Cong. Rec. 5453 (1876) (quotation marks omitted)). Congressman Blaine believed that his proposed constitutional amendment would correct a "constitutional defect" because at the time, the Establishment Clause had not been interpreted to apply to the states under the Fourteenth Amendment. Viteritti, *supra,* at 671 n. 66 (citing *Permoli v. Municipality No. 1 of New Orleans,* 44 U.S. (3 How.) 589, 609, 11 L.Ed. 739 (1845)) ("The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws....").

Despite the fact that Congressman Blaine's proposed amendment failed to pass in the United States Senate, several states amended their constitutions to include a ban on funding of sectarian education. Viteritti, *supra,* at 672. "By century's end [congressional] leaders had come to understand that federal aid could be used as a wedge for manipulating public policy.... Particularly vulnerable to the Republican agenda were those new territories seeking statehood." *Id.* at 672–73. "As a matter of course, [new territories seeking statehood] would be required to incorporate Blaine-like provisions into their new constitutions in order to receive congressional approval." *Id.* at 673.

Congress granted New Mexico statehood on the explicit condition that it adopt a similar "Blaine" provision in the New Mexico Constitution. *See* Enabling Act for New Mexico of June 20, 1910, 36 Stat. 557, ch. 310, § 8 (Enabling Act).[2] In the Enabling Act, "Congress set forth the terms by which New Mexico would be admitted as a state." *Forest Guardians v. Powell,* 2001–NMCA–028, ¶ 6, 130 N.M. 368, 24 P.3d 803. In an election held on January 21, 1911 to vote on the New Mexico Constitution adopted by the Constitutional Convention of 1910, New Mexico voters ratified all of the terms of the Enabling Act in Article 21, Section 9 of the 1911 New Mexico Constitution. *See Constitutions of New Mexico 1910–34.* Article 21, Section 10 of the 1911 New Mexico Constitution provides that "[t]his ordinance is irrevocable without the consent of the United States and the people of this State, and no change or abrogation of this ordinance, in whole or in part, shall be made by any constitutional amendment without the consent of Congress." *Id.;* Enabling Act § 2; *see also* N.M. Const. art. 21, §§ 1–11 (incorporating all Enabling Act measures into the New Mexico Constitution and making the Enabling Act irrevocable without the consent of Congress and the citizens of New Mexico). Because the Enabling Act was adopted during New Mexico's 1910 Constitutional Convention, N.M. Const. art. 21, §§ 1–11, it functions

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[2] Section 8 of the Enabling Act explicitly requires that [t]he schools, colleges and universities provided for in this act shall forever remain under the exclusive control of the said state, and no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college or university.

as a "fundamental law to the same extent as if it had been directly incorporated into the Constitution." *State ex rel. King v. Lyons,* 2011–NMSC–004, ¶ 3, 149 N.M. 330, 248 P.3d 878 (internal quotation marks and citation omitted).

Sections 6 through 9 of the Enabling Act pertain to specified public lands that were granted to New Mexico to be held in trust "for the support of common schools." Enabling Act § 6. To the extent that lands "are mineral, or have been sold, reserved or otherwise appropriated or reserved by or under the authority of any act of congress," they are to be treated as all other public lands specified under Sections 6 through 9 of the Enabling Act. Enabling Act § 6.

> Congress contemplated that any change ... to the use of the proceeds of the lands granted to the state should be effectuated by amendment to the Constitution, and ... any change in the use and application of the proceeds of these land grants may ... be done by way of a constitutional amendment.

Lyons, 2011–NMSC–004, ¶ 4, 149 N.M. 330, 248 P.3d 878 (first and third omissions in original) (internal quotation marks and citation omitted).

Grants of land were made to New Mexico specifically for, among other things, "university purposes, ... schools and asylums for the deaf, dumb and the blind, ... normal schools, ... agricultural and mechanical colleges, ... school of mines, [and] military institutes." Enabling Act § 7. Lands granted to New Mexico and any proceeds derived from them are to be held in trust. Enabling Act § 10, ¶ 1. If the lands or money so derived are used for something other than

the named purposes, it is a breach of the Enabling Act. Enabling Act § 10, ¶ 2. The Enabling Act "is binding and enforceable and the legislature is without power to divert the fund for another purpose than that expressed." *State ex rel. Interstate Stream Comm'n v. Reynolds,* 1963–NMSC–023, ¶ 22, 71 N.M. 389, 378 P.2d 622.

Specifically relevant to our inquiry is Section 8 of the Enabling Act, which may be characterized as a Blaine provision because of the time of its adoption and because it precludes the use of public funds for the support of sectarian or denominational schools.

> [T]he schools, colleges, and universities provided for in this act shall forever remain under the exclusive control of the said state, and no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college or university.

Id. This language is nearly identical to that of Article XII, Section 3, with two critical differences. The Enabling Act prohibits the use of "proceeds arising from the sale or disposal of any lands granted [in the Enabling Act] for educational purposes" to support sectarian schools. Enabling Act § 8. In contrast, the drafters of the New Mexico Constitution restricted the use of proceeds from *any* lands granted to New Mexico by Congress, not only those granted in the Enabling Act, and they also restricted the use of any funds appropriated, levied, or collected for educational purposes for the support of not only sectarian schools, but also the much broader category of private schools.

Through these changes, the Constitutional Convention decided to provide for additional restrictions on public funding of education beyond the restrictions required by Section 8 of the Enabling Act. *See Highlights of the August 15, 1969, Session of the 1969 Constitutional Convention Submitted August 14, 1969* at 4. The members of the Constitutional Convention chose to play it safe—by broadening the provision to reach all private schools, they avoided drawing a line between secular and sectarian education. In addition, they were not willing to limit the funds that would be restricted from use for private schools—they went well beyond "proceeds arising from the sale or disposal of any lands granted" under Section 8 of the Enabling Act and chose to restrict the use of "any other funds appropriated, levied or collected for educational purposes." N.M. Const. art. XII, § 3.

The MLLA appropriates funds to New Mexico "to be used by such State and its subdivisions, as the legislature of the State may direct ..., for (i) planning, (ii) construction and maintenance of public facilities, and (iii) provision of public service." 30 U.S.C. § 191(a). MLLA funds are not specifically allocated for schools or school books. The Legislature, which has the constitutional responsibility to appropriate funds, *see* New Mexico Constitution Article IV, Section 30, has discretion to appropriate MLLA funds for any purpose consistent with the broad purposes described in the MLLA. Intervenors contend that the provision of school books for children attending both public and private schools constitutes a "public service." Although we agree with this broad philosophical statement, the provision of school books is an educational purpose. Article XII, Section 3 controls the Legislature's

discretion when money is appropriated for educational purposes by prohibiting the appropriation of educational funds to private schools.

Intervenors contend that the MLLA preempts any state constitutional restriction on the Legislature's discretion with respect to MLLA funds as long as the Legislature appropriates the funds consistent with the broad purposes of the MLLA. In support of their argument, Intervenors cite to *State ex rel. Sego v. Kirkpatrick,* 1974–NMSC–059, 86 N.M. 359, 524 P.2d 975 and *Lawrence County v. Lead–Deadwood School District No. 40–1,* 469 U.S. 256, 105 S.Ct. 695, 83 L.Ed.2d 635 (1985). These cases are inapposite. The *Sego* Court held that the Legislature does not have the power to control the manner and extent of the use or expenditure of funds received by institutions of higher learning from Congress or from private donations. 1974–NMSC–059, ¶¶ 48–51, 86 N.M. 359, 524 P.2d 975. In *Lawrence,* the United States Supreme Court held that a federal statute specifically providing local governments with discretion in distributing federal funds preempted a state statute attempting to control how local governments allocated such funds. 469 U.S. at 261–68, 105 S.Ct. 695. Stated simply, Congress appropriated the funds to local governments, not to the State; therefore, the State did not have authority to dictate how local governments spent the money directly allocated to them by Congress. Similarly, when Congress appropriates money to New Mexico institutions of higher learning, under this Court's holding in *Sego,* the Legislature lacks authority to direct the use of such funds. The MLLA does not specifically appropriate funds to or for school purposes. Simply because the MLLA gives discretion to our

Legislature does not mean that the Legislature is at liberty to ignore state constitutional limitations on its discretion. The MLLA has neither expressly nor impliedly preempted the application of Article XII, Section 3 because restricting funds appropriated for educational purposes to public schools is not incompatible with the purposes announced in the MLLA. Thus, Intervenors' argument that funds from the MLLA that are used for the Instructional Material Fund are federal funds which are "not subject to state constitutional limitations" is without merit.

The Court of Appeals held that the direct recipients of the IML financial program are the parents of the children, and therefore the benefit to private schools is not direct enough to violate Article XII, Section 3. *Moses,* 2015–NMCA–036, ¶ 40, 346 P.3d 396. We can not agree that Article XII, Section 3 only prohibits direct support to private schools. The broad language of this provision and the history of its adoption and the efforts to amend it evince a clear intent to restrict both direct and indirect support to sectarian, denominational, or private schools, colleges, or universities. Our interpretation is supported by the failed attempt in 1969 of the delegates to the New Mexico Constitutional Convention to amend the precursor of Article XII, Section 3. *Report of the Constitutional Revision Commission* 158 (1967). Using the Alaska Constitution as a template, the Constitutional Revision Commission proposed revising the precursor of Article XII, Section 3 to read "[t]he public schools and institutions of the state shall be free from sectarian control. No money shall be paid from public funds for the *direct benefit* of any religious or other private educational institution." New Mexico

Legislative Council Service, *Workbook of Selected Constitutions Prepared For Delegates to the New Mexico Constitutional Convention 1969* (July 15, 1969) (emphasis added). This proposed revision would not have been necessary if a reasonable interpretation of Article XII, Section 3 as written only precluded direct support of sectarian and private schools. However, the proposed revision was never submitted to the voters for ratification in December 1969. *See generally Proposed New Mexico Constitution* (*as adopted by the New Mexico Constitutional Convention of 1969*) (October 20, 1969).

Instead, the Constitutional Convention proposed a constitutional amendment that would address the crux of the question: may public funds be used to provide free textbooks to all students, including those who attend private schools? *See id.* at 45. The constitutional amendment submitted to the voters for adoption read: "The legislature shall provide for a system of free textbooks for use by school children of this state. The system shall be administered by the state board of education." *Id.* The Legislative Council Service warned the Constitutional Convention that "[t]his [provision] violates the Enabling Act and conflicts with other provisions of the proposed constitution." New Mexico Legislative Council Service, *A New Constitution for New Mexico? An Analysis of Major Changes and Arguments For and Against* 43 (October 31, 1969). Specifically, the Legislative Council Service was concerned that "[t]his provision requires the state to indirectly aid and support sectarian and denominational schools." *Id.* Notwithstanding the Legislative Council Service's concerns, the Constitutional Convention submitted this

constitutional amendment to the voters for ratification, which the voters rejected. *See Proposed New Mexico Constitution* at 45; N.M. Const. art. XII, § 3.

The history of Congressman Blaine's attempt to amend the United States Constitution coupled with the New Mexico Enabling Act demonstrates why Article XII, Section 3 cannot be interpreted under jurisprudence analyzing the Establishment Clause. Article XII, Section 3 must be interpreted consistent with cases analyzing similar Blaine amendments under state constitutions. For example, in *California Teachers Ass'n v. Riles,* the California Supreme Court addressed a challenge to a California law authorizing the Superintendent of Public Instruction to lend to students attending non-profit, non-public schools textbooks used in the public schools without charge. *See generally* 29 Cal.3d 794, 176 Cal.Rptr. 300, 632 P.2d 953 (1981). Article IX, Section 8 of the California Constitution provided that "[n]o public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools...." Similar to Article XII, Section 3 of the New Mexico Constitution, this constitutional provision incorporated a Blaine-like amendment for sectarian and denominational schools, but it also extended the restriction to non-public schools. Additionally, Article XVI, Section 5 of the California Constitution provided:

> Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any

> religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever....

In *California Teachers Ass'n,* the California Supreme Court was critical of the "child benefit theory" in light of its state constitutional provision because the "doctrine may be used to justify any type of aid to sectarian schools[;] ... practically every proper expenditure for school purposes aids the child." 176 Cal.Rptr. 300, 632 P.2d at 957, 960 (internal quotation marks and citation omitted). The California Supreme Court reasoned that "the application of the 'child benefit' theory in this circumstance 'ignores substance for form, reality for rhetoric, *and would lead to total circumvention of the principles of our Constitution.*' " *Id.,* 176 Cal.Rptr. 300, 632 P.2d at 963 (emphasis added) (citation omitted). The California Supreme Court noted that the broad language of Article IX, Section 8 and Article XVI, Section 5 of the California Constitution "do not confine their prohibition against financing sectarian schools *in whole or in part* to support for their religious teaching function, as distinguished from secular instruction." *California Teachers Ass'n,* 176 Cal.Rptr. 300, 632 P.2d at 964 (emphasis added). As a result, a full majority of the California Supreme Court concluded that the textbook program could not survive state constitutional scrutiny, even if the benefit to the schools was only incidental. *See id.,* 176 Cal.Rptr. 300, 632 P.2d at 961–62 n. 12.

In *Gaffney v. State Department of Education,* the Nebraska Supreme Court addressed the

constitutionality of a textbook lending program under Article VII, Section 11 of the Nebraska Constitution:

> Neither the state Legislature nor any county, city or other public corporation, shall *ever* make *any appropriation* from any public fund, or grant any public land *in aid of any sectarian* or denominational *school or college,* or any educational institution which is not *exclusively owned and controlled* by the *state* or a *governmental subdivision* thereof.

192 Neb. 358, 220 N.W.2d 550, 553 (1974) (quoting Neb. Const. art. VII, § 11 (emphasis in original) (internal quotation marks omitted)). The Nebraska Supreme Court relied on the broad language of Article VII, Section 11 of the Nebraska Constitution to hold that the textbook loan program unconstitutionally furnished aid to private sectarian schools. *Gaffney,* 220 N.W.2d at 557. The Nebraska Supreme Court concluded that the fact that the loan of textbooks was to the parents and students was not determinative because the program "lends strength and support to the school and, although indirectly, lends strength and support to the sponsoring sectarian institution." *Id.*

The Supreme Courts of Oregon, Massachusetts, and Missouri interpreted similar Blaine-like state constitutional provisions and determined that even indirect aid to the sectarian, denominational, or private schools violates the constitutional provision. *See Dickman v. Sch. Dist. No. 62C, Or. City, of Clackamas Cty.,* 232 Or. 238, 366 P.2d 533, 543 (1961) (en banc) (holding that "the aid is extended to the pupil only as a member of the school" the pupil attends, and although the pupil may share in the indirect benefit,

"such aid is an asset to" the sectarian or private school); *see also Bloom v. Sch. Comm. of Springfield,* 376 Mass. 35, 379 N.E.2d 578, 580 (1978) (same); *Paster v. Tussey,* 512 S.W.2d 97, 104 (Mo.1974) (en banc) (same).

South Dakota and Hawaii have reached similar conclusions under their state constitutions. This is important because like New Mexico, these states were required to adopt Blaine-like amendments into their respective state constitutions for their admission into the Union. For example, in *In re Certification of a Question of Law from the United States District Court, District of South Dakota, Southern Division,* the South Dakota Supreme Court addressed a textbook lending program in which the defendants raised arguments similar to those raised by Respondent and Intervenors in this case. *See generally* 372 N.W.2d 113 (S.D.1985). The South Dakota Supreme Court noted that it was charged "with the responsibility of interpreting provisions of [its] state constitution that are more restrictive than the Establishment Clause of the United States Constitution." *Id.* at 116, 118 ("[T]hose provisions of our constitution ... are not mere reiterations of the Establishment Clause of the United States Constitution but are more restrictive as prohibiting aid in every form." (internal quotation marks and citation omitted)). In ultimately holding that the textbook loan program was unconstitutional, the South Dakota Supreme Court specifically rejected the defendants' analogy between the textbook lending program "and the lending of books by the public libraries in the state," because any benefit to sectarian or private schools violated its state constitutional provision. *Id.* at 117.

In addition, Hawaii, which was the last state admitted into the Union, has a constitutional provision similar to New Mexico's. Article X, Section 1 of the Hawaii Constitution provides: "[N]or shall public funds be appropriated for the support or benefit of any sectarian or nonsectarian private educational institution...." Like the New Mexico Constitution, the Hawaii Constitution is more restrictive than the federal Establishment Clause. In *Spears v. Honda,* the Hawaii Supreme Court addressed the constitutionality of a statute requiring state-subsidized bus transportation for all school children, including sectarian and private school students. 51 Haw. 1, 449 P.2d 130, 132, 135, 135 n. 5 (1968). The Court attributed great significance to the history of what was then Article IX, Section 1 of the Hawaii Constitution, now codified as Hawaii Constitution Article X, Section 1. *Spears,* 449 P.2d at 134–36. The Court's review of the constitutional history of Article IX, Section 1 revealed that the prohibition on using public funds to benefit private schools in Hawaii was intended to narrow the gap between the quality of education provided by private schools and public schools. *Spears,* 449 P.2d at 132–33, 135 n. 5.

The *Spears* Court concluded that it was important to understand that, unlike the Establishment Clause of the United States Constitution, what was then Article IX, Section 1 of the Hawaii Constitution was not exclusively about religion. 449 P.2d at 137–38. The Court found that

> [(1)] the bus subsidy buil[t] up, strengthen[ed] and ma[d]e successful the nonpublic schools[; (2)] the subsidy induce[d] attendance at nonpublic schools, where the school children

> are exposed to a curriculum that, in many cases, if not generally, promotes the special interests and biases of the nonpublic group that controls the school[; and (3)] to the extent that the State [paid] out funds to carriers owned by the nonpublic schools or agents thereof, the State [gave] tangible support or benefit to such schools.

Id. (internal quotation marks omitted). The *Spears* Court ultimately held that the bus subsidy violated Article IX, Section 1, because it constituted an appropriation of public funds to non-public schools. *Id.* at 139. It is worth noting that the *Spears* Court suggested that the Legislature "return to the people to ask them to decide whether their State Constitution should be amended to grant the Legislature the power that it seeks, in this case, the power to provide 'support or benefit' to nonpublic schools." *Id.*

Article XII, Section 3 of the New Mexico Constitution prohibits the use of any part of the proceeds from the sale or disposal of any land granted to the state by Congress or any other funds appropriated, levied, or collected for educational purposes for sectarian, denominational schools. The framers of our Constitution chose to further restrict the use of public funds by prohibiting their use for the support of private schools. As a result, a public school under the control of the State can directly receive funds, while a private school not under the exclusive control of the State can not receive either direct or indirect support.

It is clear that private schools in New Mexico have control of what instructional materials will be

purchased with their allocation of instructional material funds. The fact that students who attend private schools, just like students who attend public schools, are only loaned these instructional materials is not material to the analysis. Private schools benefit because they do not have to buy instructional materials with money they obtain by tuition or donations and they can divert such money to other uses in their schools. Consistent with the rules of statutory construction and the majority of jurisdictions interpreting similar state constitutional provisions, the IML violates Article XII, Section 3 because it provides support to private schools.

IV. Conclusion

We reverse the Court of Appeals and the district court and determine that the IML violates New Mexico Constitution Article XII, Section 3.

IT IS SO ORDERED.

WE CONCUR: BARBARA J. VIGIL, Chief Justice, PETRA JIMENEZ MAES, RICHARD C. BOSSON, Retired Sitting by designation, and CHARLES W. DANIELS, Justices.

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

November 12, 2015

No. S-1-SC-34974

CATHY MOSES AND PAUL F. WEINBAUM

PLAINTIFFS-PETITIONERS,

v.

HANNA SKANDERA, Designate Secretary of Education,
New Mexico Public Education Department,

DEFENDANT-RESPONDENT,

and

ALBUQUERQUE ACADEMY, ET AL.,

DEFENDANTS/INTERVENORS-RESPONDENTS

Original Proceeding on Certiorari
Sarah M. Singleton, District Judge

CHÁVEZ, *Justice*: Since the adoption of the New Mexico Constitution on January 21, 1911, New Mexico has had a constitutional responsibility to provide a free public education for all children of school age. N.M. Const. art. XII, § 1. However, "*no part* of the

proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational *or private school*, college or university." N.M. Const. art. XII, § 3 (emphasis added). The New Mexico Department of Public Education's (Department) Instructional Material Bureau purchases non-religious instructional materials selected by public or private schools, with funds appropriated by the Legislature and earmarked for the schools, and lends these materials to qualified students who attend public or private schools. NMSA 1978, § 22-15-7 (2010); *see also* NMSA 1978, § 22-8-34 (2001). The question we address in this case is whether the provision of books to students who attend private schools violates Article XII, Section 3. We conclude that the New Mexico Constitutional Convention was not willing to navigate the unclear line between secular and sectarian education, or the unclear line between direct and indirect support to other than public schools. Indeed, in 1969 the voters rejected a proposed constitutional amendment that would have required New Mexico to provide free textbooks to all New Mexico school children. *See Proposed New Mexico Constitution* (*as adopted by the Constitutional Convention of 1969*) 45 (October 20, 1969). We hold that the plain meaning and history of Article XII, Section 3 forbids the provision of books for use by students attending private schools, whether such schools are secular or sectarian.

I. The Instructional Material Law is funded by appropriations

The Instructional Material Law (IML), NMSA 1978, §§ 22-15-1 to -14 (1967, as amended through 2011), grants the Department's Instructional Material Bureau statutory authority to lend approved instructional materials[3] to "[a]ny qualified student . . . attending a public school, a state institution *or a private school* approved by the department in any grade from first through the twelfth grade of instruction . . . ." Section 22-15-7(A) (emphasis added). "Instructional material shall be distributed to school districts, state institutions and private schools *as agents* for the benefit of students entitled to the free use of the instructional material." Section 22-15-7(B) (emphasis added). In turn, "[a]ny school district, state institution or private school *as agent* receiving instructional material pursuant to the Instructional Material Law is responsible for distribution of the instructional material for use by eligible students and *for the safekeeping* of the instructional material." Section 22-15-7(C) (emphasis added). Students or their parents are "responsible for the loss, damage or destruction of instructional material while the instructional material is in the possession of the student." Section 22-15-10(B).

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[3] "'[I]nstructional material' means school textbooks and other educational media that are used as the basis for instruction, including combinations of textbooks, learning kits, supplementary material and electronic media." Section 22-15-2(C); *see also* § 22-15-3(A) ("The 'instructional material bureau' is created within the department of education [public education department]." (alteration in original)).

The Department is required to publish a "multiple list" of state-approved instructional materials. Section 22-15-8(A), (B); § 22-15-2(D) ("'[M]ultiple list' means a written list of those instructional materials approved by the department."). Using the multiple list of state-approved instructional materials, "each school district, state institution or private school as agent may select instructional material for the use of its students . . . ." Section 22-15-8(B). "At least ten percent of instructional material on the multiple list concerning language arts and social studies shall contain material that is relevant to the cultures, languages, history and experiences of multi-ethnic students." Section 22-15-8(A). Moreover, "[t]he Department shall ensure that parents and other community members are involved in the adoption process at the state level." *Id.*

The IML is funded through a non-reverting "instructional material fund" established by the State Treasurer "consist[ing] of appropriations, gifts, grants, donations and any other money credited to the fund." Section 22-15-5(A). In 1931, the Legislature enacted the State School Building, Text Book and Rural Aid Fund to purchase instructional materials with unappropriated federal funds obtained through the Mineral Lands Leasing Act, 30 U.S.C. §§ 181 to 287 (1920, as amended through 2012). N.M. Laws 1931, ch. 138, § 2 ("There is hereby appropriated for the purposes of this fund, annually, all of the balance, not otherwise appropriated, in the Mineral [Lands Leasing] Act Fund . . . ."). Today the Department's Instructional Material Bureau continues to purchase instructional materials for New Mexico students using federal Mineral Lands Leasing Act funds. *See* § 22-8-

34(A) ("Except for an annual appropriation to the instructional material fund and to the bureau of geology and mineral resources of the New Mexico institute of mining and technology . . . all other money received by the state pursuant to the provisions of the federal Mineral Lands Leasing Act, shall be distributed to the public school fund." (citation omitted)). Each public and private school is allocated a percentage of money available in the IML fund based on the number of students enrolled in their school. Section 22-15-9(A). "Private schools may expend up to fifty percent *of their instructional material funds* for items that are not on the multiple list; provided that *no funds* shall be expended for religious, sectarian or nonsecular materials . . . ." Section 22-15-9(C) (emphasis added). Such instructional material purchases must be identified and purchased through the Department's in-state depository. Section 22-15-9(C), (E); *see also* § 22-15-4(D). "Any balance remaining in an instructional material account of a private school at the end of the fiscal year shall remain available for reimbursement by the department for instructional material purchases in subsequent years." Section 22-15-9(F). The Department's Instructional Material Bureau has the authority to "withdraw or withhold the privilege of participating in the free use of instructional material in case of any violation of or noncompliance with the provisions of the Instructional Material Law or any rules adopted pursuant to that law." Section 22-15-4(C).

In summary, the Legislature appropriates instructional materials funds and private schools are allocated a percentage of the funds based on the number of students enrolled in their schools. Private

schools select instructional materials from a multiple list, but they may spend up to 50 percent of their instructional materials funds on items that are not on the multiple list, as long as the material is not religious in content. Any money remaining in the private schools instructional material fund may be carried over to subsequent years. Once the materials are purchased, the materials are loaned to the students. Hereafter in this opinion we will refer to this process as a "schoolbook loan program" for ease of reference.

II. Procedural history

Plaintiffs-Petitioners Cathy Moses and Paul F. Weinbaum (Petitioners) are New Mexico residents and have been taxpayers for at least the past five years. Petitioners currently have one or more children enrolled in elementary and/or secondary public schools in New Mexico. As New Mexico residents and taxpayers, Petitioners assert that the IML violates their constitutional rights because it supposedly forces them to "support[] and aid[] the religious dictates of others with whom they disagree"; appropriates or donates public funds to private parties; and supports "sectarian, denominational or private school[s]."

Petitioners filed a verified complaint for declaratory judgment in the district court against Defendant-Respondent Hanna Skandera (Respondent), Secretary of the Department, seeking a declaration that the State issuing instructional materials to students attending private schools is unconstitutional because doing so supports sectarian, denominational, or private schools in violation of New Mexico Constitution Article XII, Section 3; forces them

as taxpayers to support the religious dictates of others in violation of New Mexico Constitution Article II, Section 11; and appropriates or donates public funds to private parties in violation of New Mexico Constitution Article IX, Section 14. Petitioners also relied on *Zellers v. Huff*, 1951-NMSC-072, 55 N.M. 501, 236 P.2d 949 to support their allegation that the schoolbook loan program is unconstitutional.

Petitioners filed a motion for summary judgment, and Respondent and Albuquerque Academy, et al. (Intervenors) each filed a memorandum in opposition. The district court ruled that *Zellers* did not control and the provisions of the IML challenged by Petitioners did not violate the New Mexico Constitution. The district court then entered its order denying Petitioners' motion for summary judgment and granted summary judgment to Respondent.

Petitioners appealed to the Court of Appeals, which affirmed the district court's grant of summary judgment to Respondent. *Moses v. Skandera*, 2015-NMCA-036, ¶¶ 3, 54, 346 P.3d 396, *cert. granted*, 2015-NMCERT-001. We granted Petitioners' petition for writ of certiorari to consider the following issues: (1) whether this Court's decision in *Zellers* constituted dicta; (2) whether the IML violates Article XII, Section 3 of the New Mexico Constitution; (3) whether the IML violates Article IV, Section 31 of the New Mexico Constitution; (4) whether the IML violates Article IX, Section 14 of the New Mexico Constitution; and (5) whether the IML violates Article II, Section 11 of the New Mexico Constitution.

We conclude that the schoolbook loan program violates Article XII, Section 3, and therefore we do not

address the remaining issues. We reverse both the Court of Appeals and the district court.

III. The IML violates Article XII, Section 3 of the New Mexico Constitution

Article XII, Section 3 provides:

> The schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational *or private school*, college or university.

(Emphasis added.)

Whether the schoolbook loan program violates the New Mexico Constitution is a question of law that we review de novo. *Tri-State Generation & Transmission Ass'n v. D'Antonio*, 2012-NMSC-039, ¶ 11, 289 P.3d 1232. "It is well settled that there is a presumption of the validity and regularity of legislative enactments." *Bounds v. State ex rel. D'Antonio*, 2013-NMSC-037, ¶ 11, 306 P.3d 457 (internal quotation marks and citations omitted). Petitioners bear the burden of proof to overcome the presumption of the validity and regularity of the IML. *Id.* We will uphold the constitutionality of the IML unless we are satisfied beyond all reasonable doubt that the Legislature exceeded the bounds of the New Mexico Constitution in enacting the IML. *Id.*

"[T]he rules of statutory construction apply equally to constitutional construction." *State v. Boyse*, 2013-NMSC-024, ¶ 8, 303 P.3d 830 (internal quotation marks and citation omitted). "[W]e examine the plain language of the statute as well as the context in which it was promulgated, including the history of the statute and the object and purpose the Legislature sought to accomplish." *State v. Nick R.*, 2009-NMSC-050, ¶ 11, 147 N.M. 182, 2P.3d 868 (internal quotation marks and citation omitted).

The Court of Appeals interpreted Article XII, Section 3 to provide protection only against the establishment of religion, similar to the Establishment Clause of the First Amendment to the United States Constitution and the Establishment Clause of Article II, Section 11 of the New Mexico Constitution. *Moses*, 2015-NMCA-036, ¶ 22. Accordingly, the Court of Appeals relied primarily on First Amendment cases to hold that the IML did not violate Article XII, Section 3. *Moses*, 2015-NMCA-036, ¶ 34 (citing *Elane Photography, LLC v. Willock*, 2012-NMCA-086, ¶ 33, 284 P.3d 428).

We might agree with the Court of Appeals if the language of Article XII, Section 3 only prohibited the use of any public funds for the support of sectarian or denominational schools. The plain language of Article XII, Section 3 is more restrictive, and it therefore stands as a constitutional protection separate from the Establishment Clause as illustrated by the difference in language in each provision.

The Establishment Clause provides, in relevant part, that "Congress shall make no law respecting an

establishment of religion . . . ." U.S. Const. amend. I. In contrast, Article XII, Section 3 provides:

> The schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational *or private school*, college or university.

(Emphasis added.) The plain language of Article XII, Section 3 expressly restricts the use of public funds to other than sectarian schools, and therefore our analysis cannot be restricted by cases that analyze the Establishment Clause.

The historical context in which Article XII, Section 3 was adopted helps explain why this constitutional provision was not a recodification of the Establishment Clause of the New Mexico Constitution. During the early nineteenth century, public education was provided in public schools known as "common schools." *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, 558 (2003). "The common school was designed to function as an instrument for the acculturation of immigrant populations, rendering them good productive citizens in the image of the ruling majority." Joseph P. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, Harv. J.L.

& Pub. Pol'y 657, 668 (1998). "Protestant ministers and lay people were in the forefront of the public-school crusade and took a proprietary interest in the institution they had helped to build. They assumed a congruence of purpose between the common school and the Protestant churches." *Id.* (internal quotation marks and citation omitted). "In many cases, it was difficult to distinguish between public and private institutions because they were often housed in the same building." *Id.* at 664. State statutes at the time authorized Bible readings in public schools and state judges generally refused to recognize the Bible as a sectarian book. G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 Notre Dame L. Rev. 1097, 1103-04 nn.22-23 (citing Miss. Const. of 1890, art. 3, § 18); *Hackett v. Brooksville Graded Sch. Dist.*, 87 S.W. 792 (Ky. 1905); *Donahoe v. Richards*, 38 Me. 379 (1854)); Viteritti, *supra*, at 667-68.

By the middle of the nineteenth century, the Catholic immigrant population rose significantly. Viteritti, *supra*, at 669. The influx of Catholic immigrants created a demand for Catholic education, and consequently Catholics and other minority religionists challenged the Protestant influence in the common schools. *Id.* at 667-68; Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 44 (1992). By the 1870s, Catholic church leaders began to lobby their state legislatures for public funds to develop their own educational system. Viterriti, *supra*, at 668; Green, *supra*, at 44. This rise in Catholic influence created an obvious tension between the Protestant majority and the mostly Catholic minority on the issue of education, *see* Viterriti, *supra*, at 670-72, because the Protestant-run

"common school was designed to function as an instrument for the acculturation of immigrant populations, rendering them good productive citizens in the image of the ruling majority." *Id.* at 668.

In response, "[o]pposition to aid to 'sectarian' schools acquired prominence in the 1870's . . . ." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). "[I]t was an open secret that 'sectarian' was code for 'Catholic.' " *Id.* Common school leaders successfully lobbied their state legislatures to adopt amendments prohibiting the use of state funds to support sectarian schools by the mid-to-late nineteenth century. *See, e.g.*, Colo. Const. art. IX, § 7; Del. Const. art. X, § 3; N.D. Const. art. VIII, §§ 1, 5; Ohio Const. art. VI, § 2. "In September of 1875, President Ulysses S. Grant responded to mounting political pressure when he publicly vowed to '[e]ncourage free schools, and resolve that not one dollar be appropriated to support any sectarian schools.' " Viterriti, *supra*, at 670 (alteration in original). President Grant called on Congress to draft a proposed constitutional amendment that would deny public support to religious institutions. *Id.*

Congressman James G. Blaine of Maine agreed to sponsor an amendment to the First Amendment that fulfilled President Grant's request. *See id.* at 670-71. Congressman Blaine's proposed constitutional amendment read:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto,

> shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects and denominations.

Green, *supra*, at 38 n.2 (quoting 4 Cong. Rec. 5453 (1876) (quotation marks omitted)). Congressman Blaine believed that his proposed constitutional amendment would correct a "constitutional defect" because at the time, the Establishment Clause had not been interpreted to apply to the states under the Fourteenth Amendment. Viterriti, *supra*, at 671 n.66 (citing *Permoli v. Municipality No. 1 of New Orleans*, 44 U.S. (3 How.) 589, 609 (1845) ("The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws . . . .").

Despite the fact that Congressman Blaine's proposed amendment failed to pass in the United States Senate, several states amended their constitutions to include a ban on funding of sectarian education. Viterriti, *supra*, at 672. "By century's end [congressional] leaders had come to understand that federal aid could be used as a wedge for manipulating public policy. . . . Particularly vulnerable to the Republican agenda were those new territories seeking statehood." *Id.* at 672-73. "As a matter of course, [new territories seeking statehood] would be required to incorporate Blaine-like provisions into their new constitutions in order to receive congressional approval." *Id.* at 673.

Congress granted New Mexico statehood on the explicit condition that it adopt a similar "Blaine" provision in the New Mexico Constitution. *See*

Enabling Act for New Mexico of June 20, 1910, 36 Stat. 557, ch. 310, § 8 (Enabling Act).[4] In the Enabling Act, "Congress set forth the terms by which New Mexico would be admitted as a state." *Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 6, 130 N.M. 368, 24 P.3d 803. In an election held on January 21, 1911 to vote on the New Mexico Constitution adopted by the Constitutional Convention of 1910, New Mexico voters ratified all of the terms of the Enabling Act in Article 21, Section 9 of the 1911 New Mexico Constitution. *See Constitutions of New Mexico 1910-34*. Article 21, Section 10 of the 1911 New Mexico Constitution provides that "[t]his ordinance is irrevocable without the consent of the United States and the people of this State, and no change or abrogation of this ordinance, in whole or in part, shall be made by any constitutional amendment without the consent of Congress." *Id.*; Enabling Act § 2; *see also* N.M. Const. art. 21, §§ 1-11 (incorporating all Enabling Act measures into the New Mexico Constitution and making the Enabling Act irrevocable without the consent of Congress and the citizens of New Mexico). Because the Enabling Act was adopted during New Mexico's 1910 Constitutional Convention, N.M. Const. art. 21, §§ 1-11, it functions as a "fundamental law to the same extent as if it had been directly incorporated into the Constitution." *State ex rel. King v. Lyons*,

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[4] Section 8 of the Enabling Act explicitly requires that

> [t]he schools, colleges and universities provided for in this act shall forever remain under the exclusive control of the said state, and no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college or university.

2011- NMSC-004, ¶ 3, 149 N.M. 330, 248 P.3d 878 (internal quotation marks and citation omitted).

Sections 6 through 9 of the Enabling Act pertain to specified public lands that were granted to New Mexico to be held in trust "for the support of common schools." Enabling Act § 6. To the extent that lands "are mineral, or have been sold, reserved or otherwise appropriated or reserved by or under the authority of any act of congress," they are to be treated as all other public lands specified under Sections 6 through 9 of the Enabling Act. Enabling Act § 6.

> Congress contemplated that any change . . . to the use of the proceeds of the lands granted to the state should be effectuated by amendment to the Constitution, and . . . any change in the use and application of the proceeds of these land grants may . . . be done by way of a constitutional amendment.

Lyons, 2011-NMSC-004, ¶ 4 (first and third omissions in original) (internal quotation marks and citation omitted). Thus, Intervenors' argument that funds from the Mineral Lands Leasing Act that are used for the Instructional Material Fund are "federal funds which are not subject to state constitutional limitations" is without merit.

Grants of land were made to New Mexico specifically for, among other things, "university purposes, . . . schools and asylums for the deaf, dumb and the blind, . . . normal schools, . . . agricultural and mechanical colleges, . . . school of mines, [and] military institutes." Enabling Act § 7. Lands granted to New Mexico and any proceeds derived from them are to be held in trust. Enabling Act § 10, ¶ 1. If the

lands or money so derived are used for something other than the named purposes, it is a breach of the Enabling Act. Enabling Act § 10, ¶ 2. The Enabling Act "is binding and enforceable and the legislature is without power to divert the fund for another purpose than that expressed." *State ex rel. Interstate Stream Comm'n v. Reynolds*, 1963-NMSC-023, ¶ 22, 71 N.M. 389, 378 P.2d 622.

Specifically relevant to our inquiry is Section 8 of the Enabling Act, which may be characterized as a Blaine provision because of the time of its adoption and because it precludes the use of public funds for the support of sectarian or denominational schools.

> [T]he schools, colleges, and universities provided for in this act shall forever remain under the exclusive control of the said state, and no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college or university.

Id. This language is nearly identical to that of Article XII, Section 3, with two critical differences. The Enabling Act prohibits the use of "proceeds arising from the sale or disposal of any lands granted [in the Enabling Act] for educational purposes" to support sectarian schools. Enabling Act § 8. In contrast, the drafters of the New Mexico Constitution restricted the use of proceeds from *any* lands granted to New Mexico by Congress, not only those granted in the Enabling Act, and they also restricted the use of any funds appropriated, levied, or collected for educational purposes for the support of not only sectarian schools,

but also the much broader category of private schools. Through these changes, the Constitutional Convention decided to provide for additional restrictions on public funding of education beyond the restrictions required by Section 8 of the Enabling Act. *See Highlights of the August 15, 1969, Session of the 1969 Constitutional Convention Submitted August 14, 1969* at 4. The members of the Constitutional Convention chose to play it safe—by broadening the provision to reach all private schools, they avoided drawing a line between secular and sectarian education. In addition, they were not willing to limit the funds that would be restricted from use for private schools—they went well beyond "proceeds arising from the sale or disposal of any lands granted" under Section 8 of the Enabling Act and chose to restrict the use of "any other funds appropriated, levied or collected for educational purposes." N.M. Const. art. XII, § 3.

The Court of Appeals held that the direct recipients of the IML financial program are the parents of the children, and therefore the benefit to private schools is not direct enough to violate Article XII, Section 3. *Moses*, 2015-NMCA-036, ¶ 40. We can not agree that Article XII, Section 3 only prohibits direct support to private schools. The broad language of this provision and the history of its adoption and the efforts to amend it evince a clear intent to restrict both direct and indirect support to sectarian, denominational, or private schools, colleges, or universities. Our interpretation is supported by the failed attempt in 1969 of the delegates to the New Mexico Constitutional Convention to amend the precursor of Article XII, Section 3. *Report of the Constitutional*

Revision Commission 158 (1967). Using the Alaska Constitution as a template, the Constitutional Revision Commission proposed revising the precursor of Article XII, Section 3 to read "[t]he public schools and institutions of the state shall be free from sectarian control. No money shall be paid from public funds for the *direct benefit* of any religious or other private educational institution." New Mexico Legislative Council Service, *Workbook of Selected Constitutions Prepared For Delegates to the New Mexico Constitutional Convention 1969* (July 15, 1969) (emphasis added). This proposed revision would not have been necessary if a reasonable interpretation of Article XII, Section 3 as written only precluded direct support of sectarian and private schools. However, the proposed revision was never submitted to the voters for ratification in December 1969. *See generally Proposed New Mexico Constitution* (*as adopted by the New Mexico Constitutional Convention of 1969*) (October 20, 1969).

Instead, the Constitutional Convention proposed a constitutional amendment that would address the crux of the question: may public funds be used to provide free textbooks to all students, including those who attend private schools? *See id.* at 45. The constitutional amendment submitted to the voters for adoption read: "The legislature shall provide for a system of free textbooks for use by school children of this state. The system shall be administered by the state board of education." *Id.* The Legislative Council Service warned the Constitutional Convention that "[t]his [provision] violates the Enabling Act and conflicts with other provisions of the proposed constitution." New Mexico Legislative Council Service,

A New Constitution for New Mexico? An Analysis of Major Changes and Arguments For and Against 43 (October 31, 1969). Specifically, the Legislative Council Service was concerned that "[t]his provision requires the state to indirectly aid and support sectarian and denominational schools." *Id.* Notwithstanding the Legislative Council Service's concerns, the Constitutional Convention submitted this constitutional amendment to the voters for ratification, which the voters rejected. *See Proposed New Mexico Constitution* at 45; N.M. Const. art. XII, § 3.

The history of Congressman Blaine's attempt to amend the United States Constitution coupled with the New Mexico Enabling Act demonstrates why Article XII, Section 3 cannot be interpreted under jurisprudence analyzing the Establishment Clause. Article XII, Section 3 must be interpreted consistent with cases analyzing similar Blaine amendments under state constitutions. For example, in *California Teachers Ass'n v. Riles*, the California Supreme Court addressed a challenge to a California law authorizing the Superintendent of Public Instruction to lend to students attending non-profit, non-public schools textbooks used in the public schools without charge. *See generally* 632 P.2d 953 (Cal. 1981). Article IX, Section 8 of the California Constitution provided that "[n]o public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools . . . ." Similar to Article XII, Section 3 of the New Mexico Constitution, this constitutional provision incorporated a Blaine-like amendment for sectarian and denominational schools,

but it also extended the restriction to non-public schools. Additionally, Article XVI, Section 5 of the California Constitution provided:

> Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever . . . .

In *California Teachers Ass'n*, the California Supreme Court was critical of the "child benefit theory" in light of its state constitutional provision because the "doctrine may be used to justify any type of aid to sectarian schools[;] . . . practically every proper expenditure for school purposes aids the child." 632 P.2d at 957, 960 (internal quotation marks and citation omitted). The California Supreme Court reasoned that "the application of the 'child benefit' theory in this circumstance 'ignores substance for form, reality for rhetoric, *and would lead to total circumvention of the principles of our Constitution*.' " *Id.* at 963 (emphasis added) (citation omitted). The California Supreme Court noted that the broad language of Article IX, Section 8 and Article XVI, Section 5 of the California Constitution "do not confine their prohibition against financing sectarian schools *in whole or in part* to support for their religious teaching function, as distinguished from secular instruction." *California Teachers Ass'n*, 632 P.2d at

964 (emphasis added). As a result, a full majority of the California Supreme Court concluded that the textbook program could not survive state constitutional scrutiny, even if the benefit to the schools was only incidental. *See id.* at 961-62 n.12.

In *Gaffney v. State Department of Education*, the Nebraska Supreme Court addressed the constitutionality of a textbook lending program under Article VII, Section 11 of the Nebraska Constitution:

> Neither the state Legislature nor any county, city or other public corporation, shall *ever* make *any appropriation* from any public fund, or grant any public land *in aid of any sectarian* or denominational *school or college,* or any educational institution which is not *exclusively owned and controlled* by the *state* or a *governmental subdivision* thereof.

220 N.W.2d 550, 553 (Neb. 1974) (quoting Neb. Const. art. VII, § 11 (emphasis in original) (internal quotation marks omitted)). The Nebraska Supreme Court relied on the broad language of Article VII, Section 11 of the Nebraska Constitution to hold that the textbook loan program unconstitutionally furnished aid to private sectarian schools. *Gaffney*, 220 N.W.2d at 557. The Nebraska Supreme Court concluded that the fact that the loan of textbooks was to the parents and students was not determinative because the program "lends strength and support to the school and, although indirectly, lends strength and support to the sponsoring sectarian institution." *Id.*

The Supreme Courts of Oregon, Massachusetts, and Missouri interpreted similar Blaine-like state constitutional provisions and determined that even

indirect aid to the sectarian, denominational, or private schools violates the constitutional provision. *See Dickman v. Sch. Dist. No. 62C, Or. City, of Clackamas Cty.*, 366 P.2d 533, 543 (Or. 1961) (en banc) (holding that "the aid is extended to the pupil only as a member of the school" the pupil attends, and although the pupil may share in the indirect benefit, "such aid is an asset to" the sectarian or private school); *see also Bloom v. Sch. Comm. of Springfield*, 379 N.E.2d 578, 580 (Mass. 1978) (same); *Paster v. Tussey*, 512 S.W.2d 97, 104 (Mo. 1974) (en banc) (same).

South Dakota and Hawaii have reached similar conclusions under their state constitutions. This is important because like New Mexico, these states were required to adopt Blaine-like amendments into their respective state constitutions for their admission into the Union. For example, in *In re Certification of a Question of Law from the United States District Court, District of South Dakota, Southern Division*, the South Dakota Supreme Court addressed a textbook lending program in which the defendants raised arguments similar to those raised by Respondent and Intervenors in this case. *See generally* 372 N.W.2d 113 (S.D. 1985). The South Dakota Supreme Court noted that it was charged "with the responsibility of interpreting provisions of [its] state constitution that are more restrictive than the Establishment Clause of the United States Constitution." *Id.* at 116, 118 ("[T]hose provisions of our constitution . . . are not mere reiterations of the Establishment Clause of the United States Constitution but are more restrictive as prohibiting aid in every form." (internal quotation marks and citation omitted)). In ultimately holding

that the textbook loan program was unconstitutional, the South Dakota Supreme Court specifically rejected the defendants' analogy between the textbook lending program "and the lending of books by the public libraries in the state," because any benefit to sectarian or private schools violated its state constitutional provision. *Id.* at 117.

In addition, Hawaii, which was the last state admitted into the Union, has a constitutional provision similar to New Mexico's. Article X, Section 1 of the Hawaii Constitution provides: "[N]or shall public funds be appropriated for the support or benefit of any sectarian or nonsectarian private educational institution . . . ." Like the New Mexico Constitution, the Hawaii Constitution is more restrictive than the federal Establishment Clause. In *Spears v. Honda*, the Hawaii Supreme Court addressed the constitutionality of a statute requiring state-subsidized bus transportation for all school children, including sectarian and private school students. 449 P.2d 130, 132, 135, 135 n.5 (Haw. 1968). The Court attributed great significance to the history of what was then Article IX, Section 1 of the Hawaii Constitution, now codified as Hawaii Constitution Article X, Section 1. *Spears*, 449 P.2d at 134-36. The Court's review of the constitutional history of Article IX, Section 1 revealed that the prohibition on using public funds to benefit private schools in Hawaii was intended to narrow the gap between the quality of education provided by private schools and public schools. *Spears*, 449 P.2d at 132-33, 135 n.5.

The *Spears* Court concluded that it was important to understand that, unlike the Establishment Clause of the United States Constitution, what was then

Article IX, Section 1 of the Hawaii Constitution was not exclusively about religion. 449 P.2d at 137-38. The Court found that

> [(1)] the bus subsidy buil[t] up, strengthen[ed] and ma[d]e successful the nonpublic schools[; (2)] the subsidy induce[d] attendance at nonpublic schools, where the school children are exposed to a curriculum that, in many cases, if not generally, promotes the special interests and biases of the nonpublic group that controls the school[; and (3)] to the extent that the State [paid] out funds to carriers owned by the nonpublic schools or agents thereof, the State [gave] tangible support or benefit to such schools.

Id. (internal quotation marks omitted). The *Spears* Court ultimately held that the bus subsidy violated Article IX, Section 1, because it constituted an appropriation of public funds to non-public schools. *Id.* at 139. It is worth noting that the *Spears* Court suggested that the Legislature "return to the people to ask them to decide whether their State Constitution should be amended to grant the Legislature the power that it seeks, in this case, the power to provide 'support or benefit' to nonpublic schools." *Id.*

Article XII, Section 3 of the New Mexico Constitution prohibits the use of any part of the proceeds from the sale or disposal of any land granted to the state by Congress or any other funds appropriated, levied, or collected for educational purposes for sectarian, denominational schools. The framers of our Constitution chose to further restrict the use of public funds by prohibiting their use for the

support of private schools. As a result, a public school under the control of the State can directly receive funds, while a private school not under the exclusive control of the State can not receive either direct or indirect support.

It is clear that private schools in New Mexico have control of what instructional materials will be purchased with their allocation of instructional material funds. The fact that students who attend private schools, just like students who attend public schools, are only loaned these instructional materials is not material to the analysis. Private schools benefit because they do not have to buy instructional materials with money they obtain by tuition or donations and they can divert such money to other uses in their schools. Consistent with the rules of statutory construction and the majority of jurisdictions interpreting similar state constitutional provisions, the IML violates Article XII, Section 3 because it provides support to private schools.

IV. Conclusion

We reverse the Court of Appeals and the district court and determine that the IML violates New Mexico Constitution Article XII, Section 3.

IT IS SO ORDERED.

WE CONCUR: BARBARA J. VIGIL, Chief Justice, PETRA JIMENEZ MAES, RICHARD C. BOSSON, Retired Sitting by designation, and CHARLES W. DANIELS, Justices.WE CONCUR: BARBARA J. VIGIL, Chief Justice, PETRA JIMENEZ MAES, RICHARD C. BOSSON, Retired Sitting by designation, and CHARLES W. DANIELS, Justices.

APPENDIX C

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

October 27, 2014

No. 33,002

CATHY MOSES AND PAUL F. WEINBAUM

PLAINTIFFS-APPELLANTS,

v.

HANNA SKANDERA, ACTING SECRETARY OF EDUCATION and NEW MEXICO PUBLIC EDUCATION DEPARTMENT,

DEFENDANTS-APPELLEES,

and

ALBUQUERQUE ACADEMY, ET AL.,

DEFENDANTS/INTERVENORS-APPELLEES

Appeal from the District Court of Santa Fe County
Sarah M. Singleton, District Judge

WECHSLER, *Judge*: Under the Instructional Material Law, NMSA 1978, §§ 22–15–1 to –14 (1967, as amended through 2011) (IML), the State of New Mexico Public Education Department (the

Department) purchases and distributes instructional material to school districts, state institutions, and private schools as agents for the benefit of eligible students. Section 22–15–5, –7(B). Plaintiffs, Cathy Moses and Paul F. Weinbaum, challenge the constitutionality of the IML with respect to the purchase and distribution of instructional material to private schools. They rely upon the New Mexico Constitution Article IX, Section 14 (prohibiting the state from directly or indirectly lending or pledging "its credit or mak[ing] any donation to or in aid of any person, association or public or private corporation"); Article XII, Section 3 (prohibiting funds from use in support of sectarian, denominational, or private school); Article IV, Section 31 (prohibiting appropriation for educational purposes "to any person, corporation, association, institution or community, not under the absolute control of the state"); and Article II, Section 11 (granting the freedom to worship God according to one's own conscience and prohibiting the support of any religious sect or denomination). Plaintiffs further contend that *Zellers v. Huff,* 1951–NMSC–072, 55 N.M. 501, 236 P.2d 949, is controlling precedent in this case.

The district court rejected Plaintiffs' arguments and granted summary judgment to Defendants Hanna Skandera, Acting Secretary of Education, and New Mexico Public Education Department. We hold that *Zellers* is not controlling and that the IML does not violate the New Mexico Constitution. We therefore affirm the district court's summary judgment.

PROCEDURAL BACKGROUND

Plaintiffs filed a verified complaint seeking a declaratory judgment as to the constitutionality of the IML. After Defendants answered, Plaintiffs filed a motion for summary judgment. At a hearing on the motion for summary judgment, the district court stated that it intended to grant the motion based on *Zellers*. Intervenors, the Albuquerque Academy, Anica and Maya Benia, the New Mexico Association of Nonpublic Schools, Rehoboth Christian School, St. Francis School, Sunset Mesa School, and Hope Christian School, then filed a motion to intervene. After Plaintiffs withdrew their initial opposition to intervention, the district court granted intervention and ordered additional briefing concerning the applicability of *Zellers*. The district court held a second hearing on the motion for summary judgment, reversed its prior ruling, and denied Plaintiffs' motion for summary judgment. It entered an order granting summary judgment to Defendants.

THE IML

The IML emanates from attempts by the New Mexico Legislature over time to provide textbooks and instructional material to New Mexico students. In 1929, the Legislature enacted legislation entitled "Free Text Books" to provide free textbooks in the public schools and appropriated funds to cover purchases for first and second grade students. NMSA 1929, §§ 120–1701, 1702 (1929). In 1931, the Legislature created "a state school building, text book and rural aid fund" under the supervision of the State Board of Education and appropriated the annual balance of the fund under the Mineral Leasing Land

Act (MLLA). 1931 N.M. Laws, ch. 138, §§ 1, 2. In 1933, the Legislature expanded the Free Text Book Fund of the Free Text Books statute to include "free text books for all children in the schools in the State of New Mexico, from the first to eighth grades inclusive[.]" 1933 N.M. Laws, ch. 112, § 1. The statute was amended and recodified in 1941 and entitled "Text Books." It provided appropriation from the fund under the MLLA. NMSA 1941, §§ 55–1701 to –20 (1941 Comp.); § 55–1705. This law was amended and recodified in 1967 and entitled "School Textbook Law." NMSA 1953, § § 77–13–1to –14 (Vol. 8, 1967 Repl. Pocket Supp.). The School Textbook Law was amended in 1975 and labeled the "Instructional Material Law." NMSA 1953, §§ 77–13–1 to –14 (Interim Supp.1975). The IML was, in turn, amended and recompiled in 1978. NMSA 1978, §§ 22–15–1 to –14 (2005).

The operation of the IML has historically been connected to the MLLA. Indeed, the principal, if not exclusive, funding source for the instructional material fund is the MLLA. Under the MLLA, one-half of the monies that the federal government receives from the rental of public lands is paid to the state within which the public land is located. 30 U.S.C. § 191 (2012). The New Mexico Legislature makes an annual appropriation from the MLLA to the instructional material fund. NMSA 1978, § 22–8–34(A) (2001).

As currently enacted, the IML establishes the instructional material fund, a non-reverting fund administered by the Department, to be used to purchase "instructional material," defined under the IML as "school textbooks and other educational media that are used as the basis for instruction[.]" Section

22–15–2(C); –5. Free use of instructional material is provided to students attending early childhood programs and any grade through grade twelve in a public school, a state institution, or a private school approved by the Department. Section 22–15–7(A). Under the IML, schools obtain instructional material as agents for their students. Section 22–15–7(B). The process differs for private schools. While the Department distributes funds to public schools and state institutions to acquire instructional material, it makes payment directly to an in-state depository for the instructional material for private schools. Section 22–15–9(D), (E). The school district or school is then responsible to distribute the instructional material for the students' use and to keep it safe. Section 22–15–7(B), (C).

The school districts or schools, as agents for their students, select particular instructional material from a multiple list adopted by the Department. Section 22–15–8(A), (B). Local school boards must solicit parental involvement in the process. Section 22–15–8(B). School districts may apply for a waiver to use a maximum of fifty percent of their annual allocations for instructional material not on the multiple list, and private schools may expend "up to fifty percent of their instructional material funds for items that are not on the multiple list; provided that no funds shall be expended for religious, sectarian or nonsecular materials[.]" Section 22–15–9(C).

CONSTITUTIONAL ARGUMENTS

Standard of Review

Plaintiffs' constitutional arguments assert that the IML conflicts with four provisions of the New Mexico

Constitution. In addressing these provisions, we review questions concerning constitutional interpretation as matters of law under de novo review. *Tri–State Generation & Transmission Ass'n, Inc. v. D'Antonio,* 2012–NMSC–039, ¶ 11, 289 P.3d 1232. We must presume that statutes are valid and uphold them against constitutional challenge "unless we are satisfied beyond all reasonable doubt that the Legislature" exceeded its constitutional authority. *State ex rel. Udall v. Pub. Emps. Ret. Bd.,* 1995–NMSC–078, ¶ 7, 120 N.M. 786, 907 P.2d 190.

Article XII, Section 3 of the New Mexico Constitution

As pertinent to this case, Article XII, Section 3 provides that no "funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school [.]" Our Supreme Court has stated that the purpose of this provision "is to insure exclusive control by the state over our public educational system, and to insure that none of the state's public schools ever become sectarian or denominational." *Prince v. Bd. of Educ. of Cent. Consol. Indep. Sch. Dist. No. 22,* 1975–NMSC–068, ¶ 20, 88 N.M. 548, 543 P.2d 1176. By "control," it meant "control over all of the affairs of the school[,]" including curriculum, discipline, finances, and administration. *Id.* ¶ 21.

Plaintiffs do not assert that the distribution of instructional material to private schools as agents for their students interferes with the state's control over the public educational system. Indeed, under the IML, the Department controls the distribution and content of instructional material used by all students,

including those in private schools. Sections 22–15–7(B), –8(A)–(C). Plaintiffs also do not assert that the instructional material itself is sectarian or denominational because the IML specifically prohibits the use of funds for such material. Section 22–15–9(C).

Plaintiffs do argue, more generally, that the furnishing of free instructional material to private schools conflicts with Article XII, Section 3. In addition to relying upon *Zellers,* Plaintiffs rely upon cases from other states in which courts have held unconstitutional provisions that Plaintiffs state are similar to Article XII, Section 3, preventing the state's distribution of free textbooks to students in private schools. Rather than accepting the rationale of these cases, the district court determined that cases from other states that upheld free textbook distribution were more persuasive because the constitutional provisions of those states more closely tracked Article XII, Section 12.

In addressing Plaintiffs' position, we initially discuss *Zellers* because Plaintiffs argue that it controls this case and because, as we discuss, it is illustrative of the problems addressed by Article XII, Section 3. Concluding that *Zellers* is not controlling, we next discuss cases of the United States Supreme Court and the supreme courts of other states that consider the Establishment Clause of the First Amendment to the United States Constitution and state constitutions. We then analyze whether Article XII, Section 3 applies to this case.

Zellers v. Huff

The district court initially indicated its intent to hold that *Zellers* applies to the IML, but, after allowing

intervention and additional briefing, and holding a second hearing, decided that *Zellers* did not control this case. Plaintiffs urge this Court on appeal to hold that *Zellers* is binding precedent.

Zellers was a class action in which the plaintiffs requested the district court to declare illegal the teaching of sectarian religion in the public schools and the expenditure of public funds in aid of Roman Catholic parochial schools, to declare members of Roman Catholic religious orders ineligible to teach in public schools, to bar certain Roman Catholic sisters and brothers from teaching in the public schools, and to enjoin the activities embraced within the district court's rulings. 1951–NMSC–072, ¶¶ 1–2, 55 N.M. 501, 236 P.2d 949. The complaint named as defendants the individual members of the State Board of Education, members of certain county, independent, and municipal boards of education, the State Educational Budget Auditor, and various members of Roman Catholic religious orders teaching in the schools included in the complaint. *Id.* ¶ 1.

The district court in *Zellers* addressed a number of issues arising from the multi-faceted interrelationship of the Roman Catholic Church, the State of New Mexico, and local schools in the operation of both public and parochial schools in various school districts in the state. *Id.* ¶¶ 1, 2, 4. The district court summarized this interrelationship by finding that "New Mexico had a Roman Catholic school system supported by public funds within its public school system." *Id.* ¶ 13.

The district court issued a broad-ranged declaratory judgment that included declaring that "the

furnishing of free textbooks to schools other than tax supported schools" violates Article IX, Section 14 and Article XII, Section 3 of the New Mexico Constitution; that the furnishing of free textbooks for private, parochial, or sectarian schools was unlawful; and that public funds expended by the state in furnishing free textbooks were illegally used "in furtherance of the dissemination of Roman Catholic doctrines." *Zellers,* 1951–NMSC–072, ¶ 18, 55 N.M. 501, 236 P.2d 949. Its relevant findings concerning textbooks were that, in some school districts within New Mexico, the state furnished textbooks without charge to parochial schools, *id.* ¶ 4; Roman Catholic sisters and brothers were paid by the state to teach in public schools, free textbooks were furnished, and religious doctrines were disseminated, *id.;* and the state had adopted a complete line of textbooks for use in Catholic schools that was furnished to the Catholic schools and some public schools without charge. *Id.* The district court enjoined the individual members of the State Board of Education from certain actions with respect to textbooks that included, "furnishing sectarian indoctrinated textbooks to tax supported schools," "[f]urnishing free textbooks to schools other than tax supported schools," and "[f]urnishing sectarian and indoctrinated textbooks or textbooks for Catholic schools only to private or parochial schools at the expense of the state." *Id.* ¶ 19.

The issue before our Supreme Court in *Zellers* that is relevant to this case concerns the injunction the district court issued barring the individual board members from taking action that the district court declared to be unconstitutional. Our Supreme Court vacated the injunction because the district court lacked

subject matter jurisdiction. *Id.* ¶ 77. It otherwise affirmed the district court's judgment with exceptions not applicable to this case. *Id.* ¶ 83. Making an exception to its rule of refraining from addressing issues not before it for decision, because of the "grave importance of the matters involved," the Court stated that if the district court had properly had jurisdiction, its rulings underlying its injunction were correct. *Id.* ¶ 79.

We do not believe that *Zellers* is precedent for this case for three reasons. First, both the district court and our Supreme Court lacked subject matter jurisdiction to address an injunction against the individual board members. When the lower court lacks jurisdiction to decide issues, the court on appeal also may not decide them. *State ex rel. Overton v. N.M. State Tax Comm'n,* 1969–NMSC–140, ¶ 20, 81 N.M. 28, 462 P.2d 613.

Second, our Supreme Court's expression of its opinion concerning aspects of the district court's judgment over which it did not have jurisdiction is dictum. Dictum is a statement "unnecessary to [a] decision of the issue before the Court ... no matter how deliberately or emphatically phrased." *Ruggles v. Ruggles,* 1993–NMSC–043, ¶ 22 n. 8, 116 N.M. 52, 860 P.2d 182. The Court's statement of the importance of the issue only emphasizes that it was expressing an opinion that was unnecessary to its decision. *Id.; see also Pincheira v. Allstate Ins. Co.,* 2007–NMCA–094, ¶ 51, 142 N.M. 283, 164 P.3d 982 ("When an appellate court makes statements that are not necessary to its decision, those statements are without the binding force of law.").

Third, the issues of *Zellers,* as included in the district court's judgment in *Zellers,* are different from the issues in this case. Although the district court in *Zellers* enjoined the state from furnishing free textbooks to private schools, it did not rule upon the constitutionality of a predecessor statute to the IML, entitled "Text Books," NMSA 1941, Sections 55–1701 to –20, that was in effect at that time. That statute, like the IML, provided for the distribution of free textbooks to the students of the state regardless of the schools they attended. *Id.* In addition, the context in which the textbooks in *Zellers* were furnished is different from the manner in which instructional material is distributed under the IML. The furnishing of textbooks in *Zellers* was merely one aspect of the unconstitutional interrelationship that was the foundation for the education system. 1951–NMSC–072, ¶ 13, 55 N.M. 501, 236 P.2d 949. ("In short, New Mexico had a Roman Catholic school system supported by public funds within its public school system."). The district court in *Zellers* found that public funds used for free textbooks "are used in furtherance of the dissemination of Roman Catholic religious doctrines to students attending" private schools and that the state had adopted a "complete line of text books ... for use in Catholic schools" that it furnished to those schools as well as certain public schools without charge. *Id.* ¶ 4. There is no such record in this case. In contrast, the IML specifically provides that public funds cannot be used for sectarian materials. Section 22–15–9(C).

Plaintiffs contend that this Court has the obligation to follow *Zellers* because of the principle of stare decisis. *See Trujillo v. City of Albuquerque,* 1998–NMSC–031, ¶ 33, 125 N.M. 721, 965 P.2d 305 ("Stare

decisis is the judicial obligation to follow precedent[.]"). However, for the principle of stare decisis to apply, the prior case must be binding precedent. As we have discussed, *Zellers* is not binding precedent for this case.

United States Supreme Court Establishment Clause Cases

The issue underlying Plaintiffs' argument is whether the furnishing of instructional material to students attending private schools provides unconstitutional support to private schools. Before discussing the cases involving constitutional provisions of other states cited by the parties, we note that the United States Supreme Court has determined issues involving the Establishment Clause of the First Amendment to the United States Constitution that are relevant to our analysis. The Establishment Clause prevents Congress from making any law "respecting an establishment of religion[.]" U.S. Const. amend. I. Among its prohibitions is the levying of a tax "to support any religious activities or institutions[.]" *Everson v. Bd. of Educ. of Ewing Twp.,* 330 U.S. 1, 15–16, 67 S.Ct. 504, 91 L.Ed. 711 (1947). Most states have also adopted constitutional provisions with similar protections. *Id.* at 13–14, 67 S.Ct. 504. Article XII, Section 3 of the New Mexico Constitution adopts a similar protection.

The United States Supreme Court has specifically addressed the question of whether a state statutory program providing textbooks to all students violates the Establishment Clause. In *Board of Education of Central School District No. 1 v. Allen (Allen II),* 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968), the

Court upheld a New York program in which local public school authorities loaned textbooks to all students in grades seven through twelve against an Establishment Clause challenge. *Id.* at 238, 88 S.Ct. 1923. In its analysis, the Court looked to whether there was "a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Id.* at 243, 88 S.Ct. 1923. It determined that the New York textbook law was intended to advance educational opportunities by extending the benefits of a general textbook lending program to all children and that the financial benefit was to the parents, not the schools the children attended. *Id.* at 243–44, 88 S.Ct. 1923. The Court declined to hold, based on the record in the case, that the textbooks, which required approval by public school authorities and included only secular textbooks, were "instrumental in the teaching of religion" at sectarian schools. *Id.* at 247–48, 88 S.Ct. 1923. The Court recognized that the textbooks in part fulfilled the state's interest in providing a secular education. *Id.* The Court noted that the problem presented to it of drawing a "line between state neutrality to religion and state support of religion" was not an easy one and was "one of degree." *Id.* at 242, 88 S.Ct. 1923 (internal quotation marks and citation omitted).

The United States Supreme Court subsequently ruled upon textbook lending programs on two other occasions. In *Meek v. Pittenger,*421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975), *overruled by Mitchell v. Helms,* 530 U.S. 793, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000), following *Allen II,* the Court upheld a Pennsylvania program that authorized the loan of textbooks that would be acceptable in the public schools to children attending nonpublic schools. *Meek,*

421 U.S. at 353–54, 362, 95 S.Ct. 1753. As a guideline, it applied the three-part test it had developed in its recent Establishment Clause cases: (1) whether the statute has a secular purpose, (2) whether the statute has a primary effect that neither advances religion nor inhibits it, and (3) whether the statute and its administration avoids excessive government entanglement with religion. *Id.* at 358–59, 95 S.Ct. 1753. The Court noted, as in *Allen II,* that the Pennsylvania program was part of a policy to lend textbooks to all schoolchildren, the financial benefit inured to the parents and children rather than the nonpublic schools, and the textbooks to be loaned were acceptable for the public schools and used only for secular purposes. *Meek,* 421 U.S. at 360–62, 95 S.Ct. 1753. It reiterated that the constitutional problem "is one of degree[,]" stating that "not all legislative programs that provide indirect or incidental benefit to a religious institution are prohibited by the Constitution." *Id.* at 359, 95 S.Ct. 1753 (internal quotation marks and citation omitted). The Court thought otherwise, however, about the lending of instructional material and equipment such as maps, charts, and laboratory equipment directly to nonpublic schools rather than to the students. *Id.* at 362–63, 365, 95 S.Ct. 1753. The Court found constitutional fault with the legislation because it did not take into account that the "substantial amounts of direct support authorized" would make it impossible "to separate secular educational functions from the predominantly religious role" of the schools. *Id.* at 365, 95 S.Ct. 1753.

The United States Supreme Court again considered a statutory textbook program in *Wolman v. Walter,* 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977),

overruled by Mitchell, 530 U.S. 793, 120 S.Ct. 2530. The Court followed *Allen II* and *Meek. Wolman,* 433 U.S. at 238, 97 S.Ct. 2593. It also determined that provisions of the Ohio statute that provided public funds for standardized tests and scoring services; speech and hearing diagnostic services; and therapeutic, guidance, and remedial services were not constitutionally inappropriate but that the lending of instructional materials and equipment to students and the funding of field trip transportation and services was. *Id.* at 239–54, 97 S.Ct. 2593.

In *Wolman,* the Supreme Court specifically declined to overrule the textbook rulings of *Allen II* and *Meek. Wolman,* 433 U.S. at 238, 97 S.Ct. 2593. In *Mitchell,* however, it did overrule *Meek* and *Wolman* with respect to its previous instructional material and equipment rulings. *Mitchell,* 530 U.S. at 808, 120 S.Ct. 2530. In *Mitchell,* the Court held that a federal program under which state and local governmental agencies received funds to loan educational materials and equipment to public and private schools based on enrollment did not offend the Establishment Clause. *Id.* at 801, 120 S.Ct. 2530. According to the Court, the program was neutral with respect to religion because it "makes a broad array of schools eligible for aid without regard to their religious affiliations or lack thereof" and because "[t]he aid follows the child." *Id.* at 830, 120 S.Ct. 2530.

As demonstrated by *Allen II, Meek,* and *Wolman,* the United States Supreme Court's analysis under the Establishment Clause does not support Plaintiffs' position in this case. The Court's analysis focuses upon the neutrality of a challenged law and does not invalidate a law that applies neutrally to students of

public and private schools, even if there may be a degree of benefit that inures to the private school. But this case is based on state constitutional provisions, not on the Establishment Clause. We thus turn to the cases cited by the parties and the state constitutional provisions at issue in those cases.

Cases Addressing Other State Constitutional Provisions

Plaintiffs rely on five cases that they contend involve similar issues to Article XII, Section 3 of the New Mexico Constitution. They first refer to *California Teachers Association v. Riles,* 29 Cal.3d 794, 176 Cal.Rptr. 300, 632 P.2d 953 (1981). That case involved a challenge to a California law authorizing the Superintendent of Public Instruction to lend to students attending nonprofit, nonpublic schools textbooks used in the public schools without charge. *Id.*, 176 Cal.Rptr. 300, 632 P.2d at 953. Article IX, Section 8 of the California Constitution provided: "No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools[.]" *Riles,* 176 Cal.Rptr. 300, 632 P.2d at 954 n. 3 (internal quotation marks and citation omitted). Under Article XVI, Section 5 of the California Constitution:

> Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any

> school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever[.]

Riles, 176 Cal.Rptr. 300, 632 P.2d at 954 n. 4.

The California court discussed at some length United States Supreme Court cases concerning the Establishment Clause. It independently decided that the textbook program could not survive state constitutional scrutiny. *Id.*, 176 Cal.Rptr. 300, 632 P.2d at 964. Persuaded by Justice Brennan's dissent in *Meek,* which was critical of the characterization of the textbook program as a loan to students, it did not accept the "child benefit" theory that the program benefitted the students and not the schools or that the benefit to the schools was only incidental. *Riles,* 176 Cal.Rptr. 300, 632 P.2d at 960–64.

Gaffney v. State Department of Education, 192 Neb. 358, 220 N.W.2d 550 (1974) addressed a broad constitutional provision with similar language to Article XVI, Section 5 of the California Constitution. *Gaffney,* 220 N.W.2d at 552; *Riles,* 176 Cal.Rptr. 300, 632 P.2d at 964. The Nebraska Supreme Court relied on the broad language of its constitutional provision to hold that the textbook loan program furnished "aid" to private sectarian schools. *Gaffney,* 220 N.W.2d at 552–54. It stated that, even assuming neutrality, the loan program "is for the purpose of augmenting the public school secular education with religious training" and

was "aiding the church" in advancing religious education. *Id.* at 557. It further stated that the fact that the loan of the textbooks was to the parents and students was not determinative because the program "lends strength and support to the school and, although indirectly, lends strength and support to the sponsoring sectarian institution." *Id.*

In *Dickman v. School District No. 62C,* 232 Or. 238, 366 P.2d 533 (1961) (en banc), the Supreme Court of Oregon considered a textbook loan program in the context of two constitutional provisions: one prohibited in part money to be drawn from the state treasury "for the benefit" of any religious or theological institution; and the other provided that various revenue sources "shall be exclusively applied to the support, and maintenance of common schools in each School district, and the purchase of suitable libraries, and apparatus therefor." *Id.* at 535 nn. 2–3, 537. It noted that the first provision expressed "in more specific terms" the policy of the First Amendment. *Id.* at 537. Like the California Supreme Court, the Oregon court rejected the child benefit principle. *Id.* at 539, 543–44. It stated that "the aid is extended to the pupil only as a member of the school" the pupil attends and, thereby, although the pupil may share in the benefit, "such aid is an asset to" the school. *Id.* at 543.

Bloom v. School Committee of Springfield, 376 Mass. 35, 379 N.E.2d 578 (1978), and *Paster v. Tussey,* 512 S.W.2d 97 (Mo.1974), also involve particular constitutional provisions. The Massachusetts provision at issue in *Bloom* prohibited in relevant part the "grant, appropriation or use of public money ... for the purpose of ... maintaining or aiding any ... school, or charitable or religious undertaking which is not

publicly owned and under the exclusive control, order and supervision of public officers...." 379 N.E.2d at 581, 585 (internal quotation marks and citation omitted). As stated by the *Paster* court, the Missouri Constitution "goes even farther than those of some other states" and is more restrictive than the Establishment Clause. 512 S.W.2d at 101–02 (internal quotation marks and citation omitted).

The district court determined that the out-of-state cases cited by Defendants provided more persuasive authority than those cited by Plaintiffs. Defendants cited *Board of Education of Central School District No. 1 v. Allen* (*Allen I*), 20 N.Y.2d 109, 281 N.Y.S.2d 799, 228 N.E.2d 791 (1967); *Chance v. Mississippi State Textbook Rating & Purchasing Board,* 190 Miss. 453, 200 So. 706 (1941) (in banc); and *Borden v. Louisiana State Board of Education,* 168 La. 1005, 123 So. 655 (1929). The New York Court of Appeals in *Allen I,* in rejecting the state constitutional challenge, recognized the legislative intent "to bestow a public benefit upon all school children, regardless of their school affiliations." 281 N.Y.S.2d 799, 228 N.E.2d at 794. It considered any benefit to parochial schools to be "collateral." *Id.* In *Chance,* the Mississippi Supreme Court analyzed a constitutional provision that barred, similarly to Article XII, Section 3 of the New Mexico Constitution, the appropriation of funds "toward the support of any sectarian school[.]" *Chance,* 200 So. at 707. It too noted the duty of the state to educate the children of the state and considered the aid to the parochial schools to be only incidental. *Id.* at 712–13. It further noted the non-sectarian content of the textbooks and the continued control over them by the state. *Id.* at 713. *Borden* involved a constitutional

provision like the restrictive Missouri one addressed in *Paster*. *Borden,* 123 So. at 660. Nevertheless, the Louisiana Supreme Court reached a contrary result, stating in part that the state and the children were the beneficiaries of the appropriations, not the schools, which were not "relieved of a single obligation" by the appropriations. *Id.* at 660–61. The cases cited by Defendants were decided before the United States Supreme Court addressed textbook programs in connection with the Establishment Clause.

Interpretation of Article XII, Section 3 of the New Mexico Constitution

Article XII, Section 3 prohibits the use of state funds for the support of sectarian, denominational, and private schools. It was adopted, like similar provisions of many states, in the wake of the Establishment Clause of the First Amendment. *Everson,* 330 U.S. at 13–14, 67 S.Ct. 504. In the United States Supreme Court's interpretation of the Establishment Clause, programs such as the IML are not prohibited. The states that have interpreted their constitutional provisions have reached conflicting results. In interpreting Article XII, Section 3, we are not bound by any of these strains of cases and, even though New Mexico, and the other states, have followed the concepts of the United States Constitution, we may interpret Article XII, Section 3 differently. *See N.M. Right to Choose/NARAL v. Johnson,* 1999–NMSC–005, ¶ 28, 126 N.M. 788, 975 P.2d 841 (*NARAL*) (stating that our Supreme Court may "undertake independent analysis of our state constitutional guarantees" (internal quotation marks and citation omitted)). We may, nevertheless, look to cases of either the United States Supreme Court or the courts of other

states for guidance. Moreover, this Court has observed that because the goals of Article II, Section 11 of the New Mexico Constitution serve the same goals as the Free Exercise and Establishment Clauses of the First Amendment, New Mexico courts have cited First Amendment cases to address both the United States and state constitutions. *Elane Photography, LLC v. Willock,* 2012–NMCA–086, ¶ 33, 284 P.3d 428, *aff'd,* 2013–NMSC–040, 309 P.3d 53, *cert. denied,* —— U.S. ––––, 134 S.Ct. 1787, 188 L.Ed.2d 757 (2014). We see no reason to treat Article XII, Section 3 differently.

An essential difference between the United States Supreme Court cases and the cases cited by Plaintiffs is the approach to the public benefit of textbook programs. The principle underlying such programs is the public obligation to educate all children regardless of where they attend school. *See, e.g., Allen II,* 392 U.S. at 243, 88 S.Ct. 1923 (stating that the purpose of the New York textbook law was to further "the educational opportunities available to the young.... The law merely makes available to all children the benefits of a general program to lend school books free of charge."). In Plaintiffs' cases, the courts have held that the programs do not only benefit the children and their parents, but also the private, parochial schools. As stated in *Riles,* textbooks are "a basic educational tool." 176 Cal.Rptr. 300, 632 P.2d at 963 (internal quotation marks and citation omitted). As discussed in *Gaffney,* and quoted in *Riles,* because "one of the main purposes of the parent sending his child to a parochial school is to insure the early inculcation of religion[,]" even if textbooks are secular, the loan of textbooks to students "is for the purpose of augmenting the public school secular training with religious training." *Gaffney,* 220

N.W.2d at 557; *Riles,* 176 Cal.Rptr. 300, 632 P.2d at 964, n. 15 (internal quotation marks and citation omitted); *see also Dickman,* 366 P.2d at 544 (noting that textbooks are an "integral part of the educational process" and that the teaching of religious precepts is an inseparable part of the educational process in the school at issue).

We are not persuaded that the cases cited by Plaintiffs should be followed in this case. We believe that the legislative intent in promoting the education of all schoolchildren in New Mexico deserves greater weight than the cases cited by Plaintiffs afford. Despite Justice Brennan's dissent in *Meek,* relied upon in *Riles,* the United States Supreme Court has repeatedly recognized the general, public nature of such programs and has declined to hold that "the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." *Allen II,* 392 U.S. at 248, 88 S.Ct. 1923; *Meek,* 421 U.S. at 360–62, 95 S.Ct. 1753; *Wolman,* 433 U.S. at 257, 97 S.Ct. 2593. Under the IML, the instructional material is strictly secular. Section 22–15–9(C). Plaintiffs did not present any evidence to demonstrate that the secular materials are used in a non-secular manner. *See Allen II,* 392 U.S. at 248, 88 S.Ct. 1923 (noting that the record on summary judgment did not support that the textbooks were used to support religion).

As part of its analysis rejecting the "child benefit" principle, the California court in *Riles* stated that it could not harmonize the reasoning of *Allen II, Meek,* and *Wolman* with regard to the loan of other instructional material such as maps, globes, and charts. *Riles,* 176 Cal.Rptr. 300, 632 P.2d at 960–61.

Indeed, the United States Supreme Court has had difficulty reaching harmony in this regard. However, such a disharmony no longer exists in the United States Supreme Court jurisprudence since the Court stated in *Mitchell* that *Meek* and *Wolman* were "no longer good law" in this regard. *Mitchell,* 530 U.S. at 808, 120 S.Ct. 2530.

Moreover, not only is the United States Supreme Court now clear in its analysis that textbook and instructional material programs that benefit all children regardless of the school of their attendance do not conflict with the Establishment Clause, since *Riles,* it has also upheld the constitutionality of other governmental programs that benefit all students, including those who attend private and parochial schools. *See Zelman v. Simmons–Harris,* 536 U.S. 639, 645, 662, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002) (concluding that a law in which the state of Ohio created a program that provided tuition assistance to parents of eligible children to attend a participating public or private school of the parent's choosing was "entirely neutral with respect to religion" and did not violate the Establishment Clause); *Mitchell,* 530 U.S. at 793, 120 S.Ct. 2530 (upholding program lending educational materials and equipment to public and private schools based on enrollment); *Agostini v. Felton,* 521 U.S. 203, 209–10, 240, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (holding that a federally-funded program in which public school teachers provided remedial education to disadvantaged children in parochial schools as well as public schools did not violate the Establishment Clause); *Zobrest v. Catalina Foothills Sch. Dist.,* 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993) (holding that the Establishment

Clause does not bar local school district from providing a publicly-employed interpreter for a deaf student in a parochial school).

The United States Supreme Court has in addition repeatedly stated that the constitutional issue involved in these types of programs is one of degree. *Allen II,* 392 U.S. at 242, 88 S.Ct. 1923; *Meek,* 421 U.S. at 359, 95 S.Ct. 1753. We agree. In this regard, we do not interpret Article XII, Section 3 to prohibit indirect and incidental benefit when the legislative purpose does not focus on support of parochial or private schools. We would read too much into the record of this case to conclude that the loan of instructional material to students under the IML is so inextricably intertwined that the IML instructional material is instrumental in the religious education. Our focus is therefore whether the IML provides impermissible other support of a financial nature. In contrast, the evidence in *Riles* indicated that without the loan program parochial schools purchased their own textbooks and charged the parents a rental fee. 176 Cal.Rptr. 300, 632 P.2d at 956. There is no similar evidence in this case.

Nevertheless, even if we were to assume a similar arrangement, the focus of the IML is to provide instructional material for the benefit of students. Section 22–15–7(A). It is secular in nature. Section 22–15–9(C). Private schools do not own the instructional material, and the state controls its use and disposition. *See* Section 22–15–10(D), (E) (requiring private schools to return to the Department money collected for sale, loss, damage, or destruction of instructional material as well as any instructional material in usable condition for which there is no expected use). Although

private schools maintain a possessory control, they do so as agents for their students. Section 22–15–7(B). The instructional material is, of course, used in the schools for the benefit of the students, and the schools thereby receive some benefit. But the parents of the students bear the financial burden of providing the instructional material and are the direct recipients of the program's financial support. This case is not like *Zellers* in which there was an apparent infringement of the purpose of Article XII, Section 3 "to insure exclusive control by the state over our public educational system [.]" *Prince,* 1975–NMSC–068, ¶ 20, 88 N.M. 548, 543 P.2d 1176. The benefit to the schools is not of the degree that falls within Article XII, Section 3.

Article IX, Section 14 of the New Mexico Constitution

Article IX, Section 14, the Anti–Donation Clause, provides in relevant part:

> Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation....

Appellants, quoting from *Village of Deming v. Hosdreg Co.,* contend that the IML violates this provision because "the lending of free textbooks and other instructional materials at public expense to private schools constitutes a 'donation to or in aid of [a] person, association or public or private corporation.' " 1956–NMSC–111, ¶ 36, 62 N.M. 18, 303 P.2d 920.

In *Village of Deming,* our Supreme Court addressed Article IX, Section 14. In that case, the Village of Deming, following a recently-enacted statute, had passed an ordinance to issue revenue bonds to finance a manufacturing project that the Village would in turn lease to a private company. *Id.* ¶¶ 4, 5, 21. The complaint alleged a violation of Article IX, Section 14 because the revenue bonds issued under the statute and the ordinance "would constitute the giving of aid to private enterprise." *Id.* ¶ 30 (internal quotation marks and citation omitted). The Court noted that the language of the complaint differed from the constitutional prohibition that, as also relevant to the case before us, forbids a "donation to or in aid of" a private corporation. *Id.* ¶ 31 (internal quotation marks and citation omitted). The Court construed a donation under Article IX, Section 14 to be "a gift, an allocation or appropriation of something of value, without consideration to a person, association or public or private corporation." *Id.* ¶ 36 (internal quotation marks omitted); *see also State ex rel. Office of State Eng'r v. Lewis,* 2007–NMCA–008, ¶ 49, 141 N.M. 1, 150 P.3d 375 (citing *Village of Deming* for the definition of a donation under Article IX, Section 14). It held that the statute authorizing the revenue bonds did not entail such a "donation." With respect to the language of the complaint, it declined to conclude that the statute provided for an unconstitutional violation even if there was "incidental aid or resultant benefit to a private corporation" that did not "take on character as a donation in substance or effect." *Vill. of Deming,* 1956–NMSC–111, ¶¶ 34, 37, 62 N.M. 18, 303 P.2d 920.

Applying *Village of Deming* to this case, we see no constitutional infirmity in the IML. There is no

"donation" to a private school because there is neither a "gift" nor an "allocation or appropriation of something of value, without consideration." *Id.* ¶ 36.

As to a gift, although private schools receive possession of the instructional material, they never have an ownership interest in it. They receive possession only as agents for their students. Section 22–15–7(B). They may sell instructional material only with approval of the director of the Department's instructional material bureau and must return all proceeds from sales and monies collected for lost, damaged, and destroyed items to the Department. Section 22–15–2(B), –10(A), (D). The Department may require them to return to the Department any usable instructional material that they no longer intend to use. Section 22–15–10(E). There is thus no gift of the instructional material as contemplated by *Village of Deming*.

Nor is there an allocation or appropriation of something of value, without consideration. As we have discussed, the IML authorizes the distribution of instructional material to private schools only as agents for their students. Section 22–15–7(B). With this distribution, although the private schools may receive an "allocation," it is only as a conduit for their students, who, presumably, would otherwise need to pay for instructional material. Section 22–15–9(A).

Our Supreme Court has also stated that Article IX, Section 14 "should be construed with reference to the evils it was intended to correct." *City of Clovis v. Sw. Pub. Serv. Co.,* 1945–NMSC–030, ¶ 23, 49 N.M. 270, 161 P.2d 878. Such evils occurred when public bodies loaned their credit to, or obtained an interest in,

commercial entities that ultimately required the public to assume responsibilities for their obligations to the detriment of the public fisc. *Id.* ¶¶ 23–24. No such danger exists due to the IML. The State has not loaned its credit or obtained any financial interest in any private school.

The absence of any lending of credit also distinguishes *Hutcheson v. Atherton,* 1940–NMSC–001, 44 N.M. 144, 99 P.2d 462, relied upon by Plaintiffs. Indeed, as stated by Plaintiffs, our Supreme Court in *Hutcheson* affirmed the district court's finding that a county's issuing bonds to finance an auditorium for the purposes of a private corporation violated Article IX, Section 14. *Hutcheson,* 1940–NMSC–001, ¶¶ 34–35, 37, 44 N.M. 144, 99 P.2d 462. But the county's inappropriate action in *Hutcheson* was its proposed lending of its credit through the issuance of bonds. *Id.* ¶ 1. The provision of Article IX, Section 14 at issue in this case pertains to a prohibited donation, not the lending or pledging of credit. It does not involve a prohibited donation under Article IX, Section 14.

We note that Intervenors argue that Article IX, Section 14, as well as Article XII, Section 3 and Article IV, Section 31, do not apply to the IML because the IML is funded by the New Mexico Legislature with federal MLLA funds. Because we hold that the IML does not violate these constitutional provisions, we do not address this argument.

Article IV, Section 31 of the New Mexico Constitution

Article IV, Section 31 prohibits appropriations "for charitable, educational or other benevolent purposes to any person, corporation, association, institution or

community, not under the absolute control of the state[.]" Plaintiffs assert that the use of public, state funds to finance the IML is unconstitutional to the extent such funds support sectarian or denominational private schools.

Plaintiffs, however, have not demonstrated that funds used to support the IML are not within the control of the state. Under the IML, appropriations are made to the Department's instructional material fund, created by the state treasurer. Section 22–15–5(A). Disbursements from the instructional material fund are made "by warrant of the department of finance and administration upon vouchers issued by" the Department. Section 22–15–6. The Department makes payment to an in-state depository for instructional material distributed to private schools as agents for their students. Sections 22–15–7(B), –9(E). No funds are appropriated to any private school. The mere indirect or incidental benefit to the private schools does not violate Article IV, Section 31. *Cf. State ex rel. Interstate Stream Comm'n v. Reynolds,* 1963–NMSC–023, ¶ 17, 71 N.M. 389, 378 P.2d 622 (holding that incidental benefits to a non-profit organization from appropriations made to the state engineer with absolute control of the expenditure does not violate Article IV, Section 31).

Plaintiffs rely on *Harrington v. Atteberry,* 1915–NMSC–058, 21 N.M. 50, 153 P. 1041, to contend that the IML is in "direct conflict" with Article IV, Section 31. *Harrington,* however, is not on point. In that case, our Supreme Court held that an appropriation to a private corporation for the purpose of conducting a county fair violated the New Mexico Constitution. *Id.* ¶¶ 1, 63. Although the concurring opinion would have

relied on Article IV, Section 31, the opinion of the Court addressed only Article IX, Section 14. *Id.* ¶¶ 6, 66–67 (Hanna, J., concurring in result).

Article II, Section 11 of the New Mexico Constitution

Article II, Section 11 states:

> No person shall be required to attend any place of worship or support any religious sect or denomination; nor shall any preference be given by law to any religious denomination or mode of worship.

Plaintiffs argue that the IML violates Article II, Section 11.

This Court has stated that Article II, Section 11 serves the same goals as the Establishment Clause and the Free Exercise Clause of the First Amendment. *Elane Photography,* 2012–NMCA–086, ¶ 33, 284 P.3d 428. As a result, New Mexico courts have discussed Article II, Section 11 and the First Amendment together, citing federal case law in connection with Article II, Section 11. *Elane Photography,* 2012–NMCA–086, ¶ 33, 284 P.3d 428. Indeed, New Mexico courts may "diverge from federal precedent" and afford greater protections under provisions of the New Mexico Constitution. *NARAL,* 1999–NMSC–005, ¶ 28, 126 N.M. 788, 975 P.2d 841(internal quotation marks and citation omitted). However, Plaintiffs have not argued a basis to do so. As we have discussed in connection with Article XII, Section 3 and the Establishment Clause, the United States Supreme Court does not interpret the First Amendment to

prohibit programs such as those contained within the IML.

CONCLUSION

We affirm the district court's grant of summary judgment to Defendants.

IT IS SO ORDERED.

WE CONCUR: MICHAEL D. BUSTAMANTE and M. MONICA ZAMORA, Judges.

APPENDIX D

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEW MEXICO FOR THE COUNTY OF SANTA FE

June 19, 2013

No. D-101-CV-2012-00272

CATHY MOSES AND PAUL F. WEINBAUM

PLAINTIFFS,

v.

HANNA SKANDERA, Designate Secretary of Education, New Mexico Public Education Department,

DEFENDANTS,

and

ALBUQUERQUE ACADEMY, ET AL.,

DEFENDANTS/INTERVENORS

SINGLETON, *Justice*: This matter came before the Court for hearing on May 20, 2013, on Plaintiffs'

Motion for Summary Judgment and supplemental briefing ordered by the Court. Plaintiffs, Defendants and Intervenors appeared at the hearing through their respective counsel.

The Court, having considered the pleadings submitted by the parties, the oral argument of the

parties and being otherwise fully advised in the premises, **FINDS** that there are no genuine issues of material fact in dispute, and based on the briefing and oral argument presented to this Court, as set out in the Court's oral ruling at the hearing held on May 20, 2013, pursuant to Rule 1-056 NMRA, Plaintiffs' Motion for Summary Judgment should be denied and summary judgment should be granted in favor of Defendants as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The New Mexico Instructional Material Law, NMSA 1978, § 22-15-1 to -14 does not violate Art. II, § 11; Art. IV, § 31; Art. IX, § 14; or Art. XII, § 3 of the New Mexico Constitution;

2. Plaintiffs' Motion for Summary Judgment is denied; and

3. Summary Judgment in favor of Defendants on all claims is granted.

APPENDIX E

N.M. Stat. Ann. 1978 §§ 22-15-1 to 22-15-14 (2010)
Students eligible; distribution

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§22-15-1. Short title

Sections 22-15-1 through 22-15-14 NMSA 1978 may be cited as the "Instructional Material Law".

§22-15-2. Definitions

As used in the Instructional Material Law:

A. "division" or "bureau" means the instructional material bureau of the department;

B. "director" or "chief" means the chief of the bureau;

C. "instructional material" means school textbooks and other educational media that are used as the basis for instruction, including combinations of textbooks, learning kits, supplementary material and electronic media;

D. "multiple list" means a written list of those instructional materials approved by the department;

E. "membership" means the total enrollment of qualified students on the fortieth day of the school year entitled to the free use of instructional

material pursuant to the Instructional Material Law;

F. "additional pupil" means a pupil in a school district's, state institution's or private school's current year's certified forty-day membership above the number certified in the school district's, state institution's or private school's prior year's forty-day membership;

G. "school district" includes state-chartered charter schools; and

H. "other classroom materials" means materials other than textbooks that are used to support direct instruction to students.

§ 22-15-3. Bureau; chief

A. The "instructional material bureau" is created within the department of education [public education department].

B. With approval of the state board [department], the state superintendent [secretary] shall appoint a chief of the bureau.

§ 22-15-4. Bureau; duties

Subject to the policies and rules of the department, the bureau shall:

A. administer the provisions of the Instructional Material Law;

B. enforce rules for the handling, safekeeping and distribution of instructional material and instructional material funds and for inventory and accounting procedures to be followed by school

districts, state institutions and private schools pursuant to the Instructional Material Law;

C. withdraw or withhold the privilege of participating in the free use of instructional material in case of any violation of or noncompliance with the provisions of the Instructional Material Law or any rules adopted pursuant to that law;

D. enforce rules relating to the use and operation of instructional material depositories in the instructional material distribution process; and

E. enforce rules that require local school boards to implement a process that ensures that parents and other community members are involved in the instructional material review process.

§ 22-15-5. Instructional material fund

A. The state treasurer shall establish a nonreverting fund to be known as the "instructional material fund". The fund consists of appropriations, gifts, grants, donations and any other money credited to the fund. The fund shall be administered by the department, and money in the fund is appropriated to the department to carry out the provisions of the Instructional Material Law.

B. The instructional material fund shall be used for the purpose of paying for the cost of purchasing instructional material pursuant to the Instructional Material Law. Transportation charges for the delivery of instructional material to a school district, a state institution or a private school as agent and emergency expenses incurred in providing instructional material

to students may be included as a cost of purchasing instructional material. Charges for rebinding of used instructional material that appears on the multiple list pursuant to Section 22-15-8 NMSA 1978 may also be included as a cost of purchasing instructional material.

§ 22-15-6. Disbursements from the instructional material fund

Disbursements from the instructional material fund shall be by warrant of the department of finance and administration upon vouchers issued by the department of education [public education department].

§ 22-15-7. Students eligible; distribution

A. Any qualified student or person eligible to become a qualified student attending a public school, a state institution or a private school approved by the department in any grade from first through the twelfth grade of instruction is entitled to the free use of instructional material. Any student enrolled in an early childhood education program as defined by Section 22-13-3 NMSA 1978 or person eligible to become an early childhood education student as defined by that section attending a private early childhood education program approved by the department is entitled to the free use of instructional material.

B. Instructional material shall be distributed to school districts, state institutions and private schools as

agents for the benefit of students entitled to the free use of the instructional material.

C. Any school district, state institution or private school as agent receiving instructional material pursuant to the Instructional Material Law is responsible for distribution of the instructional material for use by eligible students and for the safekeeping of the instructional material.

§ 22-15-8. Multiple list; selection; review process

A. The department shall adopt a multiple list to be made available to students pursuant to the Instructional Material Law. At least ten percent of instructional material on the multiple list concerning language arts and social studies shall contain material that is relevant to the cultures, languages, history and experiences of multi-ethnic students. The department shall ensure that parents and other community members are involved in the adoption process at the state level.

B. Pursuant to the provisions of the Instructional Material Law, each school district, state institution or private school as agent may select instructional material for the use of its students from the multiple list adopted by the department. Local school boards shall give written notice to parents and other community members and shall invite parental involvement in the adoption process at the district level. Local school boards shall also give public notice, which notice may include publication in a newspaper of general circulation in the school district.

C. The department shall establish by rule an instructional material review process for the adoption of instructional material on the multiple list. The process shall include:

(1) a summer review institute at which basal materials in the content area under adoption will be facilitated by content and performance experts in the content area and reviewed by reviewers;

(2) that level two and level three-A teachers are reviewers of record; provided that level one teachers, college students completing teacher preparation programs, parents and community leaders will be recruited and partnered with the reviewers of record;

(3) that reviewed materials shall be scored and ranked primarily against how well they align with state academic content and performance standards, but research-based effectiveness may also be considered; and

(4) the adoption of supplementary materials that are not reviewed.

D. Participants in the summer review institute shall receive a stipend commensurate with the level of responsibility and participation as determined by department rule.

E. The department shall charge a processing fee to vendors of instructional materials not to exceed the retail value of the instructional material submitted for adoption.

§ 22-15-8.1. Instructional material adoption fund

The "instructional material adoption fund" is created in the state treasury. The fund consists of fees charged to publishers to review their instructional materials, income from investment of the fund, gifts, grants and donations. Money in the fund shall not revert to any other fund at the end of a fiscal year. The fund shall be administered by the department and money in the fund is appropriated to the department to pay expenses associated with adoption of instructional material for the multiple list.

§ 22-15-8.2. Reading materials fund created; purpose; applications

A. The "reading materials fund" is created in the state treasury. The fund consists of appropriations, gifts, grants and donations. Money in the fund shall not revert to any other fund at the end of a fiscal year. The fund shall be administered by the department, and money in the fund is appropriated to the department to assist public schools that want to change their reading programs from the current adoption. Money in the fund shall be disbursed on warrant of the secretary of finance and administration pursuant to vouchers signed by the secretary of public education or the secretary's authorized representative.

B. A school district that wants to use a scientific research-based core comprehensive, intervention or supplementary reading program may apply to the department for money from the reading materials fund to purchase the necessary instructional materials for the selected program. A school district may apply for funding for its reading program if:

(1) core and supplemental materials are highly rated by either the Oregon reading first center or the Florida center for reading research or the materials are listed in the international dyslexia association's framework for informed reading and language instruction;

(2) the district selects no more than two comprehensive published core reading programs; and

(3) the district has established a professional development plan describing how it will provide teachers with professional development and ongoing support in the effective use of the selected instructional materials.

§ 22-15-9. Distribution of funds for instructional material

A. On or before April 1 of each year, the department shall allocate to each school district, state institution or private school as agent not less than ninety percent of its estimated entitlement as determined from the estimated forty-day membership for the next school year. A school district's, state institution's or private school's entitlement is that portion of the total amount of the annual appropriation less a deduction for a reasonable reserve for emergency expenses that its forty-day membership bears to the forty-day membership of the entire state. For the purpose of this allocation, additional pupils shall be counted as six pupils. The allocation for adult basic education shall be based on a full-time equivalency obtained by multiplying the total previous year's enrollment by .25. The department shall transfer the amount of the

allocation for adult basic education to the adult basic education fund.

B. On or before January 15 of each year, the department shall recompute each entitlement using the forty-day membership for that year, except for adult basic education, and shall allocate the balance of the annual appropriation adjusting for any over- or under-estimation made in the first allocation.

C. An amount not to exceed fifty percent of the allocations attributed to each school district or state institution may be used for instructional material not included on the multiple list provided for in Section 22-15-8 NMSA 1978, and up to twenty-five percent of this amount may be used for other classroom materials. The local superintendent may apply to the department for a waiver of the use of funds allocated for the purchase of instructional material either included or not included on the multiple list. If the waiver is granted, the school district shall not be required to submit a budget adjustment request to the department. Private schools may expend up to fifty percent of their instructional material funds for items that are not on the multiple list; provided that no funds shall be expended for religious, sectarian or nonsecular materials; and provided further that all instructional material purchases shall be through an in-state depository.

D. The department shall establish procedures for the distribution of funds directly to school districts and state institutions. Prior to the final distribution of funds to any school district or charter school, the department shall verify that the local school board or governing body has adopted a policy that requires that

every student have a textbook for each class that conforms to curriculum requirements and that allows students to take those textbooks home.

E. The department shall provide payment to an in-state depository on behalf of a private school for instructional material.

F. A school district or state institution that has funds remaining for the purchase of instructional material at the end of the fiscal year shall retain those funds for expenditure in subsequent years. Any balance remaining in an instructional material account of a private school at the end of the fiscal year shall remain available for reimbursement by the department for instructional material purchases in subsequent years.

§ 22-15-10. Sale or loss or return of instructional material

A. With the approval of the chief, instructional material acquired by a school district, state institution or private school pursuant to the Instructional Material Law may be sold at a price determined by officials of the school district, state institution or private school. The selling price shall not exceed the cost of the instructional material to the state.

B. A school district, state institution or private school may hold the parent or student responsible for the loss, damage or destruction of instructional material while the instructional material is in the possession of the student. A school district may withhold the grades, diploma and transcripts of the student responsible for damage or loss of instructional material until the parent or student has paid for the damage or loss. When a parent or student is unable to pay for damage

or loss, the school district shall work with the parent or student to develop an alternative program in lieu of payment. Where a parent is determined to be indigent according to guidelines established by the department, the school district shall bear the cost.

C. A school district or state institution that has funds remaining for the purchase of instructional material at the end of the fiscal year shall retain those funds for expenditure in subsequent years.

D. All money collected by a private school for the sale, loss, damage or destruction of instructional material received pursuant to the Instructional Material Law shall be sent to the department.

E. Upon order of the chief, a school district, state institution or private school shall transfer to the department or its designee instructional material, purchased with instructional material funds, that is in usable condition and for which there is no use expected by the respective schools.

§ 22-15-11. Record of instructional material

Each school district, state institution or private school shall keep accurate records of all instructional material, including cost records, on forms and by procedures prescribed by the bureau.

§ 22-15-12. Annual report

Annually, at a time specified by the department, each local school board of a school district and each governing authority of a state institution or private school acquiring instructional material pursuant to the Instructional Material Law shall file a report with

the department that includes an itemized list of instructional material purchased by the eligible entity, by vendor; the total cost of the instructional material; the average per-student cost; and the year-end cash balance.

§ 22-15-13. Contracts with publishers

A. The department may enter into a contract with a publisher or a publisher's authorized agent for the purchase and delivery of instructional material selected from the multiple list adopted by the department.

B. Payment for instructional material purchased by the department shall be made only upon performance of the contract and the delivery and receipt of the instructional material.

C. Each publisher or publisher's authorized agent contracting with the state for the sale of instructional material shall agree:

(1) to file a copy of each item of instructional material to be furnished under the contract with the department with a certificate attached identifying it as an exact copy of the item of instructional material to be furnished under the contract;

(2) that the instructional material furnished pursuant to the contract shall be of the same quality in regard to paper, binding, printing, illustrations, subject matter and authorship as the copy filed with the department; and

(3) that if instructional material under the contract is sold elsewhere in the United States for a price

less than that agreed upon in the contract with the state, the price to the state shall be reduced to the same amount.

D. Each contract executed for the acquisition of instructional material shall include the right of the department to transcribe and reproduce instructional material in media appropriate for the use of students with visual impairment who are unable to use instructional material in conventional print and form. Publishers of adopted textbooks also shall be required to provide those materials to the department or its designated agent in an electronic format specified by the department that is readily translatable into Braille and also can be used for large print or speech access within a time period specified by the department.

E. Beginning with instructional material for the 2013-2014 school year, publishers of instructional material on the multiple list shall be required to provide those materials in both written and electronic formats.

§ 22-15-14. Reports; budgets

A. Annually, the department of education [public education department] shall submit a budget for the ensuing fiscal year to the department of finance and administration showing the expenditures for instructional material to be paid out of the instructional material fund, including reasonable transportation charges and emergency expenses.

B. Upon request, the department of education [public education department] shall make reports to the state board [department] concerning the administration and execution of the Instructional Material Law.

APPENDIX F

N.M. Stat. Ann. 1978 § 22-8-34 (2001)
Federal mineral leasing funds

A. Except for an annual appropriation to the instructional material fund and to the bureau of geology and mineral resources of the New Mexico institute of mining and technology, and except as provided in Subsection B of this section, all other money received by the state pursuant to the provisions of the federal Mineral Lands Leasing Act, 30 U.S.C.A. 181, *et seq.*, shall be distributed to the public school fund.

B. All money received by the state as its share of a prepayment of royalties pursuant to 30 U.S.C. 1726(b) shall be distributed as follows:

(1) a portion of the receipts, estimated by the taxation and revenue department to be equal to the amount that the state would have received as its share of royalties in the same fiscal year if the prepayment had not been made, shall be distributed to the public school fund; and

(2) the remainder shall be distributed to the common school permanent fund.