

**RECEIVED**

By Opinion Committee at 5:18 pm, Mar 10, 2023



**RQ-0502-KP**

**FILE# ML-49246-23**

**I.D.# 49246**

**BRANDON CREIGHTON**

STATE SENATOR  
DISTRICT 4

March 10, 2023

The Honorable Ken Paxton  
Office of the Attorney General  
ATTN: Opinion Committee  
P.O. Box 12548  
Austin, Texas 78711-2548

Re: Request for legal opinion on the constitutionality of Texas's "Blaine Amendments" and the constitutionality of a Texas Education Savings Account program

Dear Attorney General Paxton:

Pursuant to Texas Government Code § 402.042, I respectfully request your expedited legal opinion on several questions of constitutional law relating to the Legislature's potential enactment of an Education Savings Account (ESA) program. The proposed ESA program would make education assistance payments available to program participants, including payments to help defray the costs of sectarian schools and tutors.

Opening the proposed ESA program to participation by religious schools would appear to implicate the so-called "Blaine Amendments" to the Texas Constitution, which provide in relevant part as follows:

"No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes." — TEX. CONST. art. I, § 7

"The permanent school fund and the available school fund may not be appropriated to or used for the support of any sectarian school." — TEX. CONST. art. VII, § 5(c)

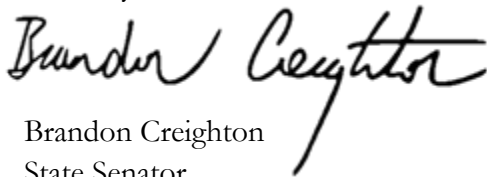
In recent years, however, the U.S. Supreme Court has repeatedly condemned materially indistinguishable state laws that discriminate on the basis of religion, in violation of the Free Exercise Clause.<sup>[1]</sup> Insofar as Texas's Blaine Amendments might discriminate against religious schools seeking access to the proposed ESA program, despite the lack of any compelling governmental interest in barring their participation, it would seem that those Blaine Amendments are likewise unconstitutional.

Of course, the proposed ESA program would still be subject to other constitutional provisions even if Texas's Blaine Amendments were held void and inapplicable. To take the most relevant example, the Texas Constitution has conferred upon the Legislature both the power and the duty to provide for a system of public schools that meets certain standards.[2] To aid the Legislature's deliberations on the proposed ESA program, therefore, I respectfully submit the following questions for your consideration:

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

Thank you for your attention to this matter of great public interest. I look forward to expedited issuance of your written opinion on the foregoing questions.

Sincerely,



Brandon Creighton  
State Senator  
Senate District 4

---

[1] *See, e.g., Carson v. Makin*, 142 S. Ct. 1987, 1998 (2022) (“The State pays tuition for certain students at private schools—so long as the schools are not religious. That is discrimination against religion.”); *Espinoza v. Montana Dep’t of Revenue*, 140 S. Ct. 2246, 2261 (2020) (“A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.”); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017) (“[T]he exclusion of [the Trinity Lutheran Church Child Learning Center] from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution . . . and cannot stand.”).

[2] *See, e.g., TEX. CONST. art. VII, § 1; TEX. CONST. art. VII, § 5.* In reviewing whatever ESA program the Legislature may enact, the Texas Supreme Court would have a more modest role to play. *See, e.g., Morath v. Tex. Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826, 833 (Tex. 2016) (“[O]ur judicial responsibility is not to second-guess or micromanage Texas education policy or to issue edicts from on high increasing financial inputs in hopes of increasing educational outputs. . . . Judicial review . .

. does not license second-guessing the political branches' policy choices, or substituting the wisdom of nine judges for that of 181 lawmakers.”).