Nos. 15-556, 15-557, 15-558

In The Supreme Court of the United States

FLORENCE AND DERRIC DOYLE, *et al.*,
Petitioners,

DOUGLAS COUNTY SCHOOL DISTRICT, *et al.*,
Petitioners,

COLORADO STATE BOARD OF EDUCATION, *et al.*,
Petitioners,

v.

TAXPAYERS FOR PUBLIC EDUCATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

BRIEF OF *AMICI CURIAE* FOUNDATION FOR EXCELLENCE IN EDUCATION, HISPANIC COUNCIL FOR REFORM AND EDUCATIONAL OPTIONS, AND GOLDWATER INSTITUTE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions

Other Authorities

Introduction

Amici curiae Foundation for Excellence in Education, Hispanic Council for Reform and Educational Options, and Goldwater Institute file this brief in support of the petitions for writs of *certiorari* in Nos. 15-556, 15-557, and 15-558. Petitioners have filed a blanket consent to the filing of *amicus* briefs in these cases; respondents have provided written consent for the filing of this brief.[1]

Interest of *Amici*

The Foundation for Excellence in Education ("ExcelinEd") is a nonprofit, nonpartisan organization founded in 2008 whose mission is to build an American educational system that equips every child to achieve his or her God-given potential. ExcelinEd designs and promotes student-centered educational policies, makes available model legislation, and provides rule-making expertise, implementation assistance, and public outreach.

The mission of the Hispanic Council for Reform and Educational Options (HCREO) is to empower and mobilize the Hispanic community to action, ensuring that all children have access to high quality educational options. HCREO's vision is an America in which all children receive a world-class education.

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[1] No party to these cases authored this brief in whole or part or made a monetary contribution to fund the preparation or submission of this brief.

The Goldwater Institute is a nonprofit public policy work organization that promotes educational choice through education savings accounts, school vouchers, scholarship tax credits, charter schools, and other means. The Institute defends educational choice programs against constitutional challenges.

All of the *amici* have encountered Blaine amendments that are the subject of this litigation in their policy work and/or litigation.

Summary of Argument

The Court should grant review in these cases because they deal with an urgent issue of nationwide significance. Specifically, roughly two-thirds of the states have Blaine amendments in their constitutions, which present an obstacle to the provision of high-quality educational opportunities to millions of American schoolchildren. As the petitioners have demonstrated, those provisions offend the constitutional guarantees of the First and Fourteenth Amendments. Their removal is necessary to vindicate our nation's sacred promise of equal educational opportunities.

Argument

THE BLAINE AMENDMENTS PRESENT OBSTACLES TO EDUCATIONAL OPPORTUNITIES FOR MILLIONS OF AMERICAN SCHOOLCHILDREN.

As this Court declared in *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954), "education is perhaps the most important function of state and local governments." Accordingly, educational opportunity "is a right which must be made available to all on equal terms." *Id.*

Tragically, America is still a considerable distance from making good on that promise 61 years later. As a nation, the United States lags far behind other industrialized countries in achievement in science, mathematics, and reading, despite substantially greater educational expenditures than most.[1] Poor educational outcomes are especially pronounced among students who most need educational opportunities in order to achieve the American Dream. Despite significant efforts, a serious racial and ethnic achievement gap persists, with black and Hispanic students lagging far behind their white counterparts.[2]

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[1] *U.S. Education Spending Tops Global List, Study Shows*, CBS News (June 25, 2013), http://www.cbsnews.com/news/us-education-spending-tops-global-list-study-shows/; Joe Weisenthal, *Here's The New Ranking of Top Countries in Reading, Science, and Math*, Business Insider (Dec. 3, 2013), http://www.businessinsider.com/pisa-rankings-2013-12.

[2] *See, e.g.*, Trymaine Lee, *Education Racial Gap Wide As Ever*

Many states are working to expand educational opportunities by, among other steps, making private schools economically accessible to children who otherwise would lack the financial means to attend them. Many of the programs are targeted toward low-income families, children in failing schools, and children with disabilities. The constitutionality of such school choice programs was upheld by this Court in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

For the first time in 2015—25 years after the nation's first means-tested school choice program was launched in Milwaukee—about half of the states have educational choice programs that encompass private school options.[3] The programs show great promise. A recent report summarizing the results of credible academic studies on school choice concludes that most of them find academic gains for students participating in choice programs, academic gains for students remaining in public schools that are exposed to increased competition as a result of choice programs, reduced racial segregation, and improved civic values.[4] Florida, which has more private-school

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According to NAEP, MSNBC (May 7, 2014), http://www.msnbc.com/msnbc/student-proficiency-stagnant-race-gap-wide.

[3] *See* Alliance for School Choice, *School Choice Yearbook 2014–2015: Breaking Down Barriers to Choice* (2015).

[4] Greg Forster, Ph.D., *A Win-Win Solution: The Empirical Evidence on School Choice* (3d ed., Apr. 2013).

choice than any other state, has boosted academic performance for all students and dramatically narrowed the racial academic gap, greatly increasing the number of black and Hispanic students attending college.[5]

Unfortunately, many states are stifled in their ability to create choice programs encompassing private schools by Blaine amendments in their constitutions. As described in the petitions, Blaine amendments typically proscribe appropriations of public funds for the aid or benefit of sectarian schools. At least 37 states have a total of at least 49 Blaine amendments in their constitutions.[6] Many of

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[5] Matthew Ladner and Lindsey M. Burke, *Closing the Racial Achievement Gap: Learning From Florida's Reforms*, Heritage Foundation (Sept. 17, 2010), http://www.heritage.org/research/reports/2010/09/closing-the-racial-achievement-gap-learning-from-floridas-reforms.

[6] Ala. Const. Art. IV, § 73 and Art. XIV, § 263; Alaska Const. Art. VII, § 1; Ariz. Const. Art. II, § 12 and Art. IX, § 10; Cal. Const. Art. IX, § 8 and Art. XVI, § 5; Colo. Const. Art. V, § 34 and Art. IX, § 7; Del. Const. Art. X, § 3; Fla. Const. Art. I, § 3; Ga. Const. Art. I, § 2, ¶ VII; Haw. Const. Art. X, § 1; Ida. Const. Art. IX, § 5; Ill. Const. Art. X, § 3; Ind. Const. Art. I, § 6; Kan. Const. Art. VI, § 6 (c); Ken. Const. § 189; Mass. Const. amend. Art. XVIII, § 2; Mich. Const. Art. I, § 4; Minn. Const. Art. I, § 16 and Art. XIII, § 2; Miss. Const. Art. VIII, § 208; Missouri Const. Art. I, § 7 and Art. IX, § 8; Mont. Const. Art. X, § 6; Neb. Const. Art. VII, § 11; Nev. Const. Art. XI, § 10; N.H. Const. Pt. Second, Art. 83; N.M. Const. Art. XII, § 3 and Art. XXI, § 4; N.Y. Const. Art. XI, § 3; N.D. Const. Art. VIII, § 5; Okla. Const. Art. II, § 5; Ore. Const. Art. I, § 5; Penn. Const. Art. III, § 15; S.C. Const. Art. XI, § 4; S.D. Const. Art. VI, § 3 and Art. VIII, § 16; Tex. Const. Art. I, § 7 and Art. VII, § 5 (c); Utah Const. Art. I, § 4 and Art. X, § 9; Va. Const. Art. IV, § 16; Wash. Const. Art. I, §

the western states admitted in 1889 or after were required to adopt Blaine amendments through enabling acts as a condition of statehood, rather than as a truly voluntary expression of the people of the state. 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, 573-74 (2003).[7]

Because the provisions speak of appropriations, programs that provide tax credits for contributions to private school scholarship funds may avoid Blaine amendment problems. *See, e.g.*, *Kotterman v. Killian*, 972 P.2d 606, 624 (Ariz. 1999) (noting that the Court "would be hard pressed to divorce the amendment's language from the insidious discriminatory intent that prompted it"); but *see id.* at 625-45 (Feldman, J., dissenting) (arguing that the Blaine Amendment forbids tax credits). But such programs are cumbersome, providing educational choices only when taxpayers make contributions to scholarship programs and children successfully apply for scholarships. School vouchers and other forms of direct aid to families often are preferred means of expanding educational opportunities because they are easy to use; they can readily be targeted to disadvantaged students; and they provide healthy competition that, as shown by

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11 and Art. IX, § 4; Wis. Const. Art. I, § 18; and Wyo. Const. Art. I, § 19 and Art. III, § 36.

[7] In order of admission: North Dakota, South Dakota, Montana, Washington, Idaho, Wyoming, Utah, Oklahoma, New Mexico, Arizona, Alaska, and Hawaii.

Dr. Forster's report, can help boost academic outcomes for public school students.

However, school vouchers and other forms of direct financial assistance to families involve appropriations and therefore may be invalidated under a strict application of the Blaine amendments. Some state courts have taken the common-sense approach that vouchers do not constitute aid for the benefit of schools, but rather are aid for the benefit of students, and thus do not violate the provision. *Meredith v. Pence*, 984 N.E.2d 1213, 1230 (Ind. 2013); *Jackson v. Benson*, 578 N.W.2d 602, 621 (Wis. 1998), cert. den., 525 U.S. 997 (1998). Other state supreme courts, like the Colorado Supreme Court in the decision at issue in this case, have concluded that voucher programs violate the Blaine Amendment. *Taxpayers for Pub. Educ. v. Douglas Cnty.*, 351 P.3d 461 (Colo. 2015); *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009).

Although the fate of school vouchers and other forms of school choice programs involving budget appropriations in many states with Blaine amendments is not yet known, court decisions in such states involving various types of monetary and nonmonetary aid (such as transportation for private school students) suggest that school choice programs could face serious obstacles in many such states.[8]

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[8] *See, e.g.*, *Sheldon Jackson Coll. v. State*, 599 P.2d 127 (Alaska 1979); *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961); *Calif. Teachers Ass'n v. Riles*, 632 P.2d 953 (Cal. 1981); *Op. of the Justices*, 216 A.2d 668 (Del. 1966); *Bush v. Holmes*, 886 So.2d 340 (Fla. 1st DCA 2004), *aff'd* on other grounds, 919

Indeed, in Massachusetts, the Court of Appeals for the First Circuit upheld provisions of the state constitution that forbid citizens from removing their Blaine Amendment. *Wirzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005).

Most state constitutions contain provisions prohibiting religious establishment, which are not at issue here. Indeed, approximately 29 states have provisions prohibiting compelled support of religion, which also are not challenged in this case, and which generally have not presented serious obstacles to school choice programs. Rather, these petitions seek review only of Blaine amendments, which were motivated by bigotry at the outset to discriminate against Catholic schools and persist today in discriminating against religious schools and the families who would like to use public funds to attend them. See *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality) (referring to Blaine amendments as having "a shameful pedigree that we do not hesitate to disavow").

So.2d 392 (Fla. 2006); *Spears v. Honda*, 449 P.2d 130 (Haw. 1968); *Doolittle v. Meridian Joint Sch. Dist.*, 919 P.2d 334 (Idaho 1996); *People ex rel. Klinger v. Howlett*, 305 N.E.2d 129 (Ill. 1973); *Op. of the Justices to Senate*, 514 N.E.2d 353 (Mass. 1987); *Otken v. Lamkin*, 56 Miss. 758 (1879); *Mallory v. Barrera*, 544 S.W.2d 556 (Mo. 1976); *Op. of the Justices*, 616 A.2d 478 (N.H. 1992); *Op. of the Justices*, 233 A.2d 832 (N.H. 1967); Att'y Gen. Op. No. 99-01 (N.M. 1999); *Bd. of Educ. For Indep. Sch. Dist. No. 52 v. Antone*, 384 P.2d 911 (Okla. 1963); *Dickman v. Sch. Dist.*, 366 P.2d 533 (Ore. 1961); *Hartness v. Patterson*, 179 S.E.2d 907 (S.C. 1971); *Almond v. Day*, 89 S.E.2d 851 (Va. 1955); *Witters v. Comm'n for the Blind*, 771 P.2d 1119 (Wash. 1989).

The educational opportunities of millions of American schoolchildren are jeopardized by the Blaine amendments. The adoption of such amendments, in some states as a condition for statehood and in others as the result of anti-Catholic bigotry, divides the nation into states where robust school choice including school vouchers is possible and others where it is limited or prohibited. Because of the number of states and children who are affected, and the important stakes for educational opportunities, it is extremely urgent that the Court address the constitutionality of Blaine amendments.

Conclusion

For the foregoing reasons, *amici* respectfully request that this honorable Court grant the petitions.

DATED: November 30, 2015

Respectfully submitted,

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