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

In The
Supreme Court of the United States

FLORENCE DOYLE, *et al.*,

Petitioners,

v.

TAXPAYERS FOR PUBLIC EDUCATION, *et al.*,

Respondents.

DOUGLAS COUNTY SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

TAXPAYERS FOR PUBLIC EDUCATION, *et al.*,

Respondents.

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

Petitioners,

v.

TAXPAYERS FOR PUBLIC EDUCATION, *et al.*,

Respondents.

On Petitions For Writs Of Certiorari To The Supreme Court Of Colorado

BRIEF OF UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether state Blaine Amendments—born of nineteenth-century bigotry toward minority faiths including Judaism—may be used to force state and local governments to discriminate against faith-based schools in administering generally available and religiously neutral student-aid programs.

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INTEREST OF *AMICUS CURIAE*[1]

The Union of Orthodox Jewish Congregations of America ("Orthodox Union") is the nation's largest Orthodox Jewish synagogue organization, representing nearly 1000 congregations across the Nation. The Orthodox Union has participated in cases before this Court that, like this one, raise issues of importance to the Orthodox Jewish community, such as *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), *Locke* v. *Davey*, 540 U.S. 712 (2004), and *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002). The overwhelming majority of the Orthodox Union's constituents, as well as an increasing number of Jewish parents who are not affiliated with the Orthodox Union, choose to send their children to Jewish schools—and many make great sacrifices to do so. The Orthodox Union is concerned that if the decision below is permitted to stand, it would perpetuate bigotry against minority religious faiths, hamper efforts to educate children from underserved and underprivileged communities, and prevent parents (especially

[1] Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and its counsel made such a monetary contribution. Pursuant to this Court's Rule 37.2, counsel of record for petitioners and respondents were timely notified of *amicus*'s intent to file this brief. Counsel for all respondents provided *amicus* with written consent. All petitioners filed blanket consents with this Court.

poor parents) from making meaningful choices concerning their children's education.

The Orthodox Union thus has a strong interest in this Court's review and reversal of the decision below. In particular, this case affords the Court an opportunity to end the discrimination against religious minorities perpetuated by state Blaine Amendments and hold that states may not discriminate against faith-based schools in administering neutral and generally available student-aid and scholarship programs. *Amicus* respectfully requests that the Court grant the petitions and reverse the decision below.

INTRODUCTION AND SUMMARY OF ARGUMENT

Today, hundreds of Jewish schools educate more than 250,000 students across the Nation. Although the first Jewish "day school" in America opened four decades before the American Revolution, a large number of Jewish schools opened in the nineteenth century in response to the same bigotry against minority faiths that spurred many states to adopt Blaine Amendments. Thus, although state Blaine Amendments are typically associated with anti-Catholic bias, history discloses that they more broadly reflect bigotry toward a number of minority faiths—including Judaism.

Accordingly, whether state Blaine Amendments can force state student-aid programs to exclude

faith-specific schools—such as Jewish schools—solely because they are faith-specific is therefore an issue of vital concern to Jewish schools, communities, and parents in Colorado and across the Nation. This Court's review is needed to remove unconstitutional barriers from innovative programs that strive to improve educational opportunities and outcomes, and to ensure fair and even-handed treatment for children who attend Jewish and other faith-specific schools.

Many of these schools—especially those serving children from underprivileged families—face serious financial problems. In particular, the explosive growth in Jewish schools in recent years has been accompanied by skyrocketing costs and increasing requests for tuition assistance from financially struggling parents. Jewish communities, especially those in low-income areas, thus suffer when state Blaine Amendments force the exclusion of Jewish schools (along with other faith-specific schools) from religiously neutral, generally applicable state student-aid programs. The Hobson's choice given to parents in these situations is reminiscent of the Tennessee law prohibiting clergy from holding congressional office—a law unanimously rejected by this Court. *McDaniel* v. *Paty*, 435 U.S. 618 (1978). State Blaine Amendments should be similarly dispatched. The petitions should be granted and the decision below reversed.

ARGUMENT

I. State Blaine Amendments Perpetuate Bigotry Against Minority Faiths, Including Judaism.

Understanding the history of American Jewish education is helpful in understanding the impact of state Blaine Amendments—and, in turn, understanding that state Blaine Amendments are rooted in bigotry not only against Catholicism specifically (bad as that is), but also against minority faiths generally, including Judaism. This case provides the Court an important opportunity to make clear that nineteenth-century bigotry against minority faiths has no place in twenty-first–century America.

During the early days of our Nation, most Jewish parents educated their children in "common pay (private) schools that assumed the religious identity of their headmaster; or in charity (free) schools supported by religious bodies with financial support from the State." Jonathan D. Sarna, *American Jewish Education in Historical Perspective*, 64 J. OF JEWISH EDU. 8, 10 (1998). Indeed, "[u]ntil the middle of the [n]ineteenth [c]entury, it was not unusual for religious schools to be supported with public funds * * * *" Joseph Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J. L. & PUB. POL'Y 657, 664 (1998); William G. Ross, Pierce *After Seventy-Five Years: Reasons to Celebrate*, 78 U. DET. MERCY L. REV. 443, 443 (2001) ("[E]ven many of the so-called public schools of the

later colonial and early national periods were jointly financed and managed by churches and the state.").

For example, in 1803, New York's only Jewish congregation, Shearith Israel, established a charity school that enjoyed equal footing with Protestant and Catholic schools in the city—and in 1813, sought state funding based on "'the liberal spirit of our constitution.'" JONATHAN D. SARNA, AMERICAN JEWS AND CHURCH-STATE RELATIONS: THE SEARCH FOR "EQUAL FOOTING" 7 n.20 (1997) (quoting Petition (Jan. 10, 1813), reprinted in 27 PUBL'NS AM. JEWISH HIST. SOC'Y 92-95 (1920)); see also Sarna, *American Jewish Education*, *supra*, at 10 (citing JONATHAN D. SARNA & DAVID G. DALIN, RELIGION AND STATE IN THE AMERICAN JEWISH EXPERIENCE 85-89 (1997)). More broadly, "[i]n early America * * * Jews readily supported state aid to parochial schools, and at least in New York City received funds on the same basis as Protestant[s] and Catholics." SARNA, AMERICAN JEWS AND CHURCH-STATE RELATIONS, *supra*, at 27.

In the early 19th century, however, the creation of "state-supported nondenominational public school spawned a revolution in American education, and affected American Jewish education profoundly." Sarna, *American Jewish Education*, *supra*, at 11. In the eyes of many, these public schools "were imbued with Protestant (and not infrequently anti-Catholic and anti-Jewish) religious and moral teaching." Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 121 (1992). Faced with public schools that were "culturally Protestant" and with

"[c]urriculum and textbooks [that] were, consequently, rife with material that Catholics and Jews found offensive," SARNA, AMERICAN JEWS AND CHURCH-STATE RELATIONS, *supra*, at 19, many "Catholics and Orthodox Jews created separate schools." McConnell, *Religious Freedom at a Crossroads*, *supra*, at 121. "As a result, Jews who could afford to do so sent their children to Jewish schools—which flourished not only in New York but in every major city where Jews lived." *Ibid.*[2]

The federal Blaine Amendment and its state counterparts sought to stop this flow of funds into minority-faith schools, including Jewish schools. As a periodical published in the years leading up to the Blaine Amendment stated, "[t]he Romanists insist on the appropriation of the public moneys to support the Romish schools in which their religion is taught * * * * To concede this demand, in the present circumstances of the nation, is to break up the whole system of common schools [i.e., Protestant schools]. For if it is allowed to the Romanists, it cannot be withheld * * * from Jews and people of other religious and irreligious persuasions." *Recent Publications on the School Question*, 42 BIBLICAL REPERTORY & PRINCETON R. 315-16 (1870); see also Viteritti, *Blaine's Wake*,

[2] For example, Emanuel Nunes Carvalho operated a school in Charleston, South Carolina; Talmud Yelodim did the same in Cincinnati, Ohio; the Washington Hebrew Elementary School operated in Washington, D.C.; and there were many more. See Sarna, *American Jewish Education*, *supra*, at 11.

supra, at 666 ("The common-school curriculum promoted a religious orthodoxy of its own that was centered on the teachings of mainstream Protestantism and was intolerant of those who were non-believers.").

While the predominant theory in public schools during the nineteenth century was Horace Mann's Common School model—a "secular" vision of public education adapted from European versions—his curriculum still relied heavily on Protestant elements as a part of the normal coursework. See Margaret F. Brinig & Nicole Stelle Garnett, *Catholic Schools, Urban Neighborhoods, and Education Reform*, 85 NOTRE DAME L. REV. 887, 895 (2015) (citing LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925, 69-146 (1987)); TOWARD A USEABLE PAST: LIBERTY UNDER STATE CONSTITUTION 123 (Paul Finkelman & Stephen E. Gottleib, eds., 2009) (citing DAVID TYACK ET AL., LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785-1954, 20-42 (1987)). It was "an open secret," then, that in barring aid to sectarian institutions under the Blaine Amendments, "sectarian" was merely a code word for "Catholic." *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (opinion of Thomas, J.); Lindsey M. Burke & Jarrett Stepman, *Breaking Down Blaine Amendments' Indefensible Barrier to School Choice*, 8 J. OF SCH. CHOICE: INT'L RESEARCH & REFORM 637, 638, 646 (2014).

Although the Blaine Amendment failed at the federal level, many states, including Colorado, amended their constitutions to adopt the language of the Blaine Amendment nearly verbatim. See, e.g.,

COLO. CONST. ART. IX, §7. During the debate over adopting the Blaine Amendment in Colorado, there was concern that the Jewish community would seek state funds for their schools just as Catholics did. See Petitioners Colorado State Board of Education, et al.'s App. 147-48 (noting Denver Daily Times editor's concerns about "what would happen if the Baptists, Methodists, or Jews threatened to defeat the constitution unless it allowed their dogmas to be taught at public expense." (quoting Donald W. Hensel, *Religion and the Writing of the Colorado Constitution*, 30 CHURCH HISTORY 349, 354 (1961))).

While this sordid history is only part of the story, courts cannot, of course, uphold legislation specifically passed to disadvantage religious organizations. See *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993) ("[A] law targeting religious beliefs as such is never permissible."). As the Court has observed, "[t]he principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions." *Id.* at 523. State Blaine Amendments, though, are among those (thankfully few) violations, and those who passed them "did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom" by discriminating against minority faiths. *Id.* at 524. The Court should grant the petitions and make clear that such discrimination has no place in our increasingly pluralistic society—especially where,

as demonstrated next, that discrimination falls particularly hard on underprivileged communities, parents, and children.

II. The Impact Of State Blaine Amendments Is Particularly Severe On Impoverished Minority Faith Communities And Underprivileged Families.

Despite the nineteenth-century effort to defund faith-based schools in states like Colorado, Jewish schools persevered and even flourished in the twentieth century. See SARNA, AMERICAN JEWS AND CHURCH-STATE RELATIONS, *supra*, at 28. In 2014, there were 861 Jewish day schools in 37 states and the District of Columbia. MARVIN SCHICK, A CENSUS OF JEWISH DAY SCHOOLS IN THE UNITED STATES 1 (2014). Those schools educate about 255,000 students from preschool through 12th grade. *Ibid.* Of particular relevance to the instant case, nearly 1000 students attend Jewish day schools in Colorado (including Hillel Academy). *Ibid.* "It is likely that [the current] growth rate will continue * * * so that within a short period total day school enrollment will reach 300,000 students" nation-wide. *Ibid.*

Along with this explosive growth have come skyrocketing costs—so much so that the need for equal access to generally available scholarship funds, particularly for families struggling financially, is great. See *id.* at 1, 34; see generally Maury Litwack, *School Choice Policy Impact on the Jewish Community*,

THE JEWISH POLICY CENTER, INFOCUS QUARTERLY (2015) (noting that "school administrators must accommodate the rising enrollment while facing mounting costs and parents must pay the ever-increasing cost of Jewish day school tuition").[3]

If the decision below is permitted to stand, the ramifications for Jewish schools and the communities they serve will be severe. For one thing, the costs for many families—especially, of course, underprivileged families—to send their children to Jewish schools will be prohibitive. That, in turn, would undercut the rationale of *Pierce* v. *Society of Sisters*, where this Court unanimously rejected the idea of a state educational monopoly and affirmed the "liberty of parents and guardians to direct the upbringing and education of children under their control." *Pierce* v. *Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534-35 (1925). Excluding faith-specific schools from neutral, generally available scholarship funds thus imposes disproportionate costs on underprivileged families by restricting their liberty to choose faith-specific schools and thereby "direct the upbringing and education" of their children.

What is more, Jewish schools will suffer as they must find additional sources of funding to cover tuition costs for families who cannot afford them, cut back on programs, services, or tuition assistance, or

[3] Available at http://www.jewishpolicycenter.org/5487/school-choice-policy-jewish-community (last visited Nov. 24, 2015).

otherwise fill the funding "gap" created by their exclusion from state scholarship programs like the one at issue. An "enormous" challenge for Jewish schools today is finding sufficient resources to operate. SCHICK, A CENSUS OF JEWISH DAY SCHOOLS, *supra*, at 34. In recent years, there has been "a decline in tuition collection and increased requests for financial aid." *Id.* at 3. As a result, schools struggle to meet their budgets, retain quality teachers, and provide needed services to their students. *Id.* at 34. If Jewish schools are excluded from generally available scholarship funds by force of state Blaine Amendments, however, an already serious problem can only get worse.

Not only parents and children, but also whole communities, will suffer, particularly given the role of Jewish schools as "a principal instrumentality for Judaic strengthening among those segments of American Jewish life for whom day school education is a critical determinant of whether Judaic commitment will remain alive." *Ibid.* To many, "day school education is far and away the greatest guarantor of Jewish continuity." *Id.* at 4; see also Litwack, *School Choice Policy Impact*, *supra* ("Jewish education is not a luxury expense but rather a necessity for parents seeking to provide a Jewish foundation for their child."). The Hillel Academy, for example, describes its mission in part as to "imbu[e] in [its] students the joy and fulfillment of living a Torah observant life"

and "to cultivate them to be active members of the Jewish community." Our Mission, HILLEL ACADEMY.[4]

What is more, faith-based education has a long history of superior outcomes for historically underserved and underprivileged communities. See, e.g., ANDY SMARICK & KELLY ROBSON, PHILANTHROPY ROUNDTABLE, CATHOLIC SCHOOL RENAISSANCE: A WISE GIVER'S GUIDE TO STRENGTHENING A NATIONAL ASSET 17 (2015) (noting that "[t]he achievement gap between races and income groups is smaller in faith-based schools" and that " '[m]ultiply disadvantaged' children particularly benefit from [faith-based] schools"). State Blaine Amendments thus have the pernicious effect of limiting educational opportunities precisely for those who need and could benefit from them the most.

[4] http://www.hillelacademyofdenver.com/mission.html (last visited Nov. 24, 2015).

CONCLUSION

The petitions for a writ of certiorari should be granted.

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