

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

IN THE
Supreme Court of the United States

FLORENCE DOYLE, DOUGLAS COUNTY SCHOOL
DISTRICT, COLORADO STATE BOARD OF EDUCATION,
ET AL, PETITIONERS,

v.

TAXPAYERS FOR PUBLIC EDUCATION, ET AL,
RESPONDENTS.

ON PETITIONS FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF COLORADO

**BRIEF OF *AMICI CURIAE* CATHOLIC
DIOCESE OF PUEBLO, COLORADO, AND
COLORADO LEGISLATORS IN SUPPORT OF
PETITIONERS**

JOHN J. BURSCH
Counsel of Record
CHARLES N. ASH, JR.
MATTHEW T. NELSON
CONOR B. DUGAN
WARNER NORCROSS & JUDD LLP
111 Lyon Street N.W.
900 Fifth Third Center
Grand Rapids, MI 49503
(616) 752-2000
mnelson@wnj.com
Counsel for Amici Curiae

LIST OF AMICI PARTIES

Catholic Diocese of Pueblo, Colorado

Kevin Priola

Paul Lundeen

Polly Lawrence

Timothy Dore

Justin Everett

Great Lakes Educational Foundation

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
BRIEF OF THE CATHOLIC DIOCESE OF PUEBLO, COLORADO, AND COLORADO LEGISLATORS AS <i>AMICI CURIAE</i> SUPPORTING THE PETITIONERS	1
INTEREST OF THE <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
Colorado’s Blaine Amendment Violates Equal Protection.....	4
A. The Equal Protection Clause Bars Religious Discrimination And Protects Religion in the Political Process.....	5
B. Colorado’s Blaine Amendment Violates Equal Protection.....	6
CONCLUSION.....	9

TABLE OF AUTHORITIES

	Page(s)
Federal Cases	
<i>City of Cleburne v. Cleburne Living Center</i> , 473 U.S. 432 (1985).....	5
<i>Department of Agriculture v. Moreno</i> , 413 U.S. 528 (1973).....	9
<i>Owens v. Colorado Congress of Parents, Teachers, and Students</i> , 92 P.3d 933 (Colo. 2004)	7
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982).....	5
<i>Romer v. Evans</i> , 517 U.S. 620 (1996).....	4, 6, 8, 9
<i>Troxel v. Granville</i> , 530 U.S. 57 (2000).....	7
<i>United States v. Batchelder</i> , 442 U.S. 114 (1979).....	5
<i>United States v. Carolene Products Co.</i> , 304 U.S. 144 (1938).....	6
<i>West Virginia State Board of Education v. Barnette</i> , 319 U.S. 624 (1943).....	5
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972).....	5, 7
<i>Zelman v. Simmons-Harris</i> , 536 U.S. 639 (2002).....	9

TABLE OF AUTHORITIES—Continued

	Page(s)
State Statutes	
Colorado Constitution Article V	6
Colorado Constitution Article XIX.....	7
Other Authorities	
<i>Catechism of the Catholic Church</i>	3
Paul Lundeen, <i>Guest Column: Far Too Many Kids Are Still Left Behind</i> , <i>The Gazette</i> (Jan. 26, 2015).....	1
Paul Lundeen, <i>State Pilot Project Allows Funding to Follow Students</i> , <i>Denv. Post</i> (July 4, 2014).....	2
Steven G. Calabresi & Abe Salander, <i>Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers</i> , 65 Fla. L. Rev. 909 (2013).....	6
<i>The Compendium of the Social Doctrine of the Church</i>	2
Todd Engdahl, <i>SBE Chair Lundeen to Run for State House</i> , <i>Chalkbeat</i> (Sept. 30, 2013)	2

**BRIEF OF THE CATHOLIC DIOCESE OF
PUEBLO, COLORADO, AND COLORADO
LEGISLATORS AS *AMICI CURIAE*
SUPPORTING THE PETITIONERS**

Amici curiae, a group of Colorado legislators, the Catholic Diocese of Pueblo, Colorado (the “Diocese”), and the Great Lakes Education Foundation (“GLEF”), respectfully, submit that the judgment of the Colorado Supreme Court should be reversed.¹

INTEREST OF THE *AMICI CURIAE*

Amici are Colorado State Representatives Kevin Priola, Paul Lundeen, Polly Lawrence, Timothy Dore, and Justin Everett, the Diocese, and GLEF.

Amici-Legislators are members of the Colorado state house and senate. State Representative Kevin Priola represents Colorado House District 56. HD 56 is a diverse district. Over 22% of the population is Hispanic. Over 60% of the district’s residents have only a high school degree or lower. Representative Priola has introduced school choice legislation in the past.

Like Priola, Representative Paul Lundeen is a passionate advocate for school choice.² Before his

¹ Pursuant to this Court’s Rule 37.6, *amici curiae* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have been timely notified of the filing of this brief, and notice of email consent are on file with the Clerk’s Office.

² Paul Lundeen, *Guest Column: Far Too Many Kids Are Still Left Behind*, The Gazette (Jan. 26, 2015), <http://gazette.com/>

[Footnote continued on next page]

election to represent Colorado House District 19, Lundeen was an elected member of the Colorado State Board of Education and served two years as the chair of the Board. In addition to Priola and Lundeen, Representatives Polly Lawrence, Timothy Dore, and Justin Everett of House Districts, 39, 64 and 22, respectively, join this brief. They are committed to furthering educational choice because of their deeply held religious beliefs and those of their constituents.

The Diocese, led by its bishop, Most Rev. Stephen J. Berg, oversees the Catholic Church's ministries in Southern Colorado, including four Catholic schools within the Diocese.

The Catholic Church teaches that "the poor, the marginalized and in all cases those whose living conditions interfere with their proper growth should be the focus of particular concern." *The Compendium of the Social Doctrine of the Church* ¶ 182. This means that the Church has a particular concern for those families who cannot choose the education that will best foster their children's proper formation. Catholic schools across the nation and in the Diocese educate children because the Church is called to serve

[Footnote continued from previous page]
 guest-column-far-too-many-kids-are-still-left-behind/article/1545235; Todd Engdahl, *SBE Chair Lundeen to Run for State House*, Chalkbeat (Sept. 30, 2013), <http://co.chalkbeat.org/2013/09/30/sbe-chair-lundeen-to-run-for-state-house/#.VlxZ6tKrQdU>; Paul Lundeen, *State Pilot Project Allows Funding to Follow Students*, Denv. Post (July 4, 2014), http://www.denverpost.com/ci_26086671/state-pilot-project-allows-funding-follow-students.

children. The four Catholic schools in the Diocese serve a diverse group of children. Thus, the Diocese is called to promote the cause of genuine choice in education for parents and, therefore, supports the school choice program at issue here.

Further, the Catholic Church teaches that parents are the primary educators of their children. *See Catechism of the Catholic Church* ¶ 2223. The Church teaches that “parents have the right to *choose a school for* [their children] which corresponds to their own convictions.” *Id.* at 2229. This means that “[p]ublic authorities have the duty of guaranteeing this parental right and of ensuring the concrete conditions for its exercise.” *Id.* School choice allows parents to fulfill their duty to educate their children. This is an additional reason the Diocese supports school choice.

Amicus-GLEF is a charitable organization exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. GLEF strongly supports efforts to improve academic achievement, increase accountability and empower parental choice in public schools. Among GLEF’s tax-exempt purposes are to empower parents, especially those in low-income families, by educating them to choose the education model best suited to meet the needs of their children. Students and parents should not be penalized for exercising school choice options. GLEF has an interest in this litigation because of its ramifications for the larger school choice movement and its implications for educational choice in Michigan.

SUMMARY OF ARGUMENT

This Court should grant the petitions for certiorari. The petitioners present a compelling case

why the Colorado Blaine Amendment violates the Equal Protection Clause. *Amici* highlight another equal protection justification for granting these petitions and reversing the lower court.

The Colorado Blaine Amendment makes it more difficult for religious persons and entities to seek the aid of the State of Colorado or Colorado's local school districts simply because they are religious. "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Romer v. Evans*, 517 U.S. 620, 633 (1996). Colorado's Blaine Amendment does just that. It bars state legislators, parents, and schools from even advocating for or soliciting aid from the state to support the education of children in private religious schools. In order to petition for such aid on equal terms with non-religious parents and schools, religious parents and schools must undertake the onerous task of amending the Colorado State Constitution.

Colorado's Blaine Amendment violates Equal Protection. Period. There is no justification for this religious discrimination. The Court should grant the petitions and put an end to this religious bias once and for all.

ARGUMENT

Colorado's Blaine Amendment Violates Equal Protection.

The Colorado Blaine Amendment violates the Equal Protection Clause by facially discriminating against religion and, thereby, treating religious and non-religious persons and entities differently in the political process. The Colorado Blaine Amendment

declares that it will be harder for religious groups and persons to obtain state benefits than similarly situated non-religious groups and persons. To petition for or attempt to pass legislation granting state aid to private religious schools on equal terms with non-religious schools, religious parents and schools must amend the Colorado State Constitution. A legislator or parent who desires to seek state aid for a private, non-religious school faces no such hurdle.

**A. THE EQUAL PROTECTION CLAUSE
BARS RELIGIOUS DISCRIMINATION
AND PROTECTS RELIGION IN THE
POLITICAL PROCESS.**

The Equal Protection Clause acts “as a restriction on state legislative action inconsistent with elemental constitutional premises.” *Plyler v. Doe*, 457 U.S. 202, 216 (1982). This means that the Court has “treated as presumptively invidious those classifications that disadvantage a ‘suspect class,’ or that impinge upon the exercise of a ‘fundamental right.’” *Id.* at 216-217. Laws that classify in this manner “are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

Religion is both a suspect classification and a fundamental right. See *United States v. Batchelder*, 442 U.S. 114, 125 n. 9 (1979); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).³

³ The Equal Protection Clause offers separate and distinct protections from those afforded religion under the First

[Footnote continued on next page]

A law which makes it “more difficult for one group of citizens than” others to seek governmental aid, violates the Equal Protection Clause. *Romer*, 517 U.S. at 633 (1996).

**B. COLORADO’S BLAINE AMENDMENT
VIOLATES EQUAL PROTECTION.**

Colorado’s Blaine Amendment, as interpreted here by a controlling plurality of the Colorado Supreme Court, offends the Equal Protection Clause. It discriminates, both *facially* and *as applied*, between religious and non-religious persons and entities. The Blaine Amendment in both its text and effect declares that ‘it shall be more difficult’ for religious persons and entities to seek the aid of the State of Colorado or its public school districts.

Here, Colorado *Amici* are subject to special disadvantage in the political process. They desire to petition the state for aid to allow parents to send children to private religious schools. The only way Colorado *Amici* can even petition for such state aid is by undertaking the onerous state constitutional amendment process. *See* Colo. Const. art. V, § 1;

[Footnote continued from previous page]

Amendment. *See, e.g., United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938) (stating that Equal Protection’s heightened scrutiny applies to “those political processes which can ordinarily be expected to bring about repeal of undesirable legislation” and “statutes directed at particular religious” groups); Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 Fla. L. Rev. 909, 913 (2013) (“[T]he Fourteenth Amendment, standing alone, forbids all discrimination on the basis of religion just as it forbids all discrimination on the basis of race and gender.”).

Colo. Const. art. XIX. The non-religious are not similarly burdened. For instance, parents who desire to seek state aid to send their children to non-religious private schools do not face this bar. They can petition their local school board or state legislators to pass a law funding such aid. While there is no guarantee they will be successful in obtaining such aid, they face no burden on the right to petition because they are non-religious. Yet, simply because of their religious beliefs, Colorado *Amici* are barred from making the same petition.⁴

In the case of *Amici*-Legislators, they are barred even from attempting to pass a genuine school choice program by the Blaine Amendment. They have taken oaths to uphold the state constitution and thus cannot advocate or attempt to pass legislation that would aid religious schools. Yet, under the Blaine Amendment, they can advocate and pass school choice legislation that aids private, secular schools.⁵

⁴ The Colorado Blaine Amendment also raises heightened equal protection concerns because it infringes upon the fundamental right of parents to direct the education of their children. See *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (stating that “the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized” by the Court); *Yoder*, 406 U.S. at 232 (recognizing “the fundamental interest of parents . . . to guide the religious future and education of their children”).

⁵ While Colorado’s Constitution also has a provision requiring local control of public schools, it is clear that school choice programs can be crafted that do not raise any local control questions. See *Owens v. Colorado Congress of Parents, Teachers, and Students*, 92 P.3d 933, 944 (Colo. 2004) (Kourlis, J., dissenting) (stating that “all parties agree that the

[Footnote continued on next page]

The Colorado Blaine Amendment does exactly what this Court has held is forbidden by the Equal Protection Clause: declares that it “shall be more difficult for one group of citizens than for all others to seek aid from the government.” *Romer*, 517 U.S. at 633 . “Central both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.” *Id.* Central to the Blaine Amendment’s logic is that the legislative branch does not remain open to religious persons and entities on impartial terms. There is a standard for those who desire aid to help send children to private, non-religious schools and a higher, more burdensome standard for the religious. That sort of distinction cannot stand under the Equal Protection Clause without a very good reason.

Here, instead of reason, as the un rebutted evidence demonstrated (*see* Pet. Douglas County

[Footnote continued from previous page]

constitution[s]” local control amendment, did “not, on its face, preclude” the Colorado Opportunity Contract Pilot Program, a school choice program passed in the early 2000s). Further, the Colorado Court of Appeals held that the school choice program at here did not violate Colorado’s local control amendment. See Opinion of the Colorado Court of Appeals, Div. IV, *Taxpayers for Public Education, et al., v. Douglas County School District, et al.*, Nos. 11-CA-1856, 11-CA-1857 (Feb. 28, 2013), Petitioner Douglas County School District App. 86. The Colorado Supreme Court did not disturb that holding. Opinion of the Supreme Court of Colorado, *Taxpayers for Public Education, et al., v. Douglas County School District, et al.*, No. 13-SC-233, Petitioner Douglas County School District App. 2 n. 2.

School District 14), the Blaine Amendment was the product of irrational animus. As this Court has commanded, time and time again, “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” *Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973); *see also Romer*, 517 U.S. at 634 (striking down law on equal protection grounds because “the disadvantage imposed is born of animosity toward the class of persons affected”). Nothing justifies Colorado Blaine Amendment’s violation of the Equal Protection Clause. Respondents cannot claim that a compelling interest to avoid government entanglement with religion justifies this unequal treatment. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 643-644 (2002) (holding that a voucher program that provides genuine educational choices to families to send their children to public, secular, or religious schools does not violate the Establishment Clause). This Court should grant these petitions in order to put an end to this irrational animus.

CONCLUSION

The petitions for writ of certiorari should be granted and the judgment of the Colorado Supreme Court should be reversed.

Respectfully submitted,

JOHN J. BURSCH
Counsel of Record
CHARLES N. ASH, JR.
MATTHEW T. NELSON
CONOR B. DUGAN
WARNER NORCROSS & JUDD LLP
111 Lyon Street N.W.
900 Fifth Third Center
Grand Rapids, MI 49503
(616) 752-2000
mnelson@wnj.com
Counsel for Amici Curiae

NOVEMBER 2015