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.*

DOUGLAS COUNTY SCHOOL DISTRICT, *et al.*,
Petitioners,
v.
TAXPAYERS FOR PUBLIC EDUCATION, *et al.*

COLORADO STATE BOARD OF EDUCATION, *et al.*,
Petitioners,
v.
TAXPAYERS FOR PUBLIC EDUCATION, *et al.*

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Colorado

BRIEF *AMICUS CURIAE* OF CHRISTIAN LEGAL SOCIETY, THE BECKET FUND FOR RELIGIOUS LIBERTY, THE ASSOCIATION OF AMERICAN CHRISTIAN SCHOOLS, AND THE LUTHERAN CHURCH—MISSOURI SYNOD IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the use of state Blaine Amendments to single out religious schools and families for exclusion from generally available educational benefits violate the Religion Clauses and the Equal Protection Clause – especially when the unrebutted record shows that the movement to enact these provisions was pervaded by religious bigotry?

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INTEREST OF *AMICI*[1]

Amici are two organizations dedicated to protecting the free expression of all religious traditions and the equal participation of religious people in public life and benefits (the Christian Legal Society and the Becket Fund for Religious Liberty); a national organization serving Christian schools and their students (the American Association of Christian Schools); and a denomination whose member congregations operate the largest Protestant parochial school system in America (the Lutheran Church—Missouri Synod). Full statements of interest of *amici* are set forth in the Appendix.

SUMMARY OF ARGUMENT

The Colorado Supreme Court has held that families who choose a religiously affiliated school for their children's education must be singled out for exclusion from a scholarship program designed to expand families' ability to choose various educational options. Three of the four justices in the majority

[1] Pursuant to Rule 37.2(a), no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* and their counsel, make a monetary contribution to the preparation or submission of this brief. Petitioners' letter granting blanket consent to the filing of briefs *amicus curiae* was filed with the Clerk. The Respondents' consent to the filing of this brief is on file with the Clerk. The parties received ten day's notice of *amici*'s intention to file.

relied on Article IX, §7 of the Colorado Constitution to justify this discrimination against citizens' religious choices. But this ruling violates the First Amendment, which presumptively prohibits government from singling out religious exercise for a disability.

The decision below not only requires unconstitutional discrimination; it does so on the basis of state provisions rooted in 19th-century prejudice and hostility toward Catholics. In this case and a host of others involving state Blaine Amendments, discriminatory intent from decades ago is producing new instances of discrimination today. This Court should intervene to correct these longstanding and widespread wrongs.

I. Colorado's Article IX, §7 is a state version of the 1876 Blaine Amendment, the failed measure that would have amended the federal Constitution to forbid government aid to "sectarian" schools. As seven current or recent members of this Court have recognized, such provisions were the product of a movement stained by "pervasive hostility to the Catholic Church and to Catholics in general." *Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000) (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.) (Blaine Amendments have a "shameful pedigree," "born of bigotry"); *Zelman v. Simmons-Harris*, 536 U.S. 639, 720-21 (2002) (Breyer, J., dissenting, for three justices) (discriminatory sentiment against Catholics "played a significant role in [the] movement" for Blaine Amendments). This history is largely undisputed. The Protestant majority first

imposed Protestant religious practices, such as reading of the King James Bible, in the early public schools. When Catholics then formed their own schools, the majority labeled them "sectarian" and fiercely resisted any government assistance to them, while still maintaining Protestant practices in public schools. These features characterized the versions of the Blaine Amendment that passed in numerous states in the second half of the 19th century. And Colorado's provision is the epitome of a state Blaine Amendment: enacted in the very year of the federal proposal (1876), it also shows the key features of anti-Catholic animus that characterized the overall Blaine movement.

II. The three-judge plurality of the Colorado Supreme Court refused to consider the evidence of anti-Catholic intent behind Article IX, §7, because in their view the term "sectarian" refers to any religious school. This is a non sequitur: the court can interpret its constitution as it sees fit, but it cannot disregard evidence showing discriminatory intent that violates the federal Constitution. The ruling below is irreconcilable with several decisions of this Court, especially *Hunter v. Underwood*, 471 U.S. 222 (1985), which struck down a provision of a 1901 state constitution that, although facially neutral, was designed to disenfranchise African Americans. Here, as with the provision in *Hunter*, "its original enactment was motivated by a desire to discriminate * * * and the section continues to this day to have that effect." *Id.* at 233. And here, as in *Hunter*, the passage of time

cannot remove the taint on a state constitutional provision that was designed to discriminate and continues to do so.

III. Independent of the historical animus behind Article IX, §7, the use of the provision here violates the Constitution by requiring discrimination against religion. To single out families who choose religious schooling and disqualify them from a generally available benefit violates the Free Exercise, Establishment, and Equal Protection clauses.

IV. The misuse of state Blaine Amendments urgently calls for this Court's correction. State provisions are being applied to require indefensible discrimination against individuals who choose to use neutral government benefits in religious settings. Far too many state officials – judges and others – view this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), as giving carte blanche to discriminate against religion in programs of state benefits. Moreover, it is particularly appropriate for this Court to correct these errors, since the federal government bears responsibility for the enactment of several state Blaine Amendments. Congress formally made adoption of a Blaine Amendment a condition of several states' admission to the Union; in Colorado's case, the record shows, the state felt informal pressure to enact its provision.

ARGUMENT

I. Blaine Amendments like Colorado's Article IX, §7, Prohibiting Aid to "Sectarian" Schools, Were Substantially Motivated by Animus toward the Catholic Church and Catholics.

Article IX, §7 is a state version of the Blaine Amendment, the failed measure that would have amended the federal Constitution to forbid government aid to "sectarian" schools. As seven current or recent members of this Court have recognized, such provisions were the product of a movement stained by "pervasive hostility to the Catholic Church and to Catholics in general." *Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000) (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.) (stating that Blaine Amendments have a "shameful pedigree," "born of bigotry"); *Zelman v. Simmons-Harris*, 536 U.S. 639, 720-21 (2002) (Breyer, J., dissenting, joined by Stevens and Souter, JJ.) (describing discriminatory sentiment against Catholics that "played a significant role in [the] movement" for Blaine Amendments).

The basic history of Blaine Amendments and their roots in anti-Catholic bigotry is largely undisputed. See *Mitchell*, 530 U.S. at 828-29 (plurality opinion of Thomas, J.); *Zelman*, 536 U.S. at 720-22 (Breyer, J., dissenting); *Moses v. Skandera*, 2015 WL 7074809, at *5 (N.M. Nov. 12, 2015) (describing religious bigotry behind New Mexico Blaine Amendment). We first review that broader history, then

summarize how Colorado's provision shows the key features of anti-Catholicism that characterized the overall Blaine movement.

A. State Blaine Amendments Emerged from a Decades-Old Movement Characterized by Hostility and Suspicion toward Catholicism.

1. The Protestant and anti-Catholic character of early public schools.

"[D]uring 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* 217-26 (P. Nash ed. 1970)). Protestant features in early public schools reflected Protestantism's numerical and cultural dominance.

These Protestant practices were also a response to a perceived threat from Catholic immigration. An "explosive growth" in the Catholic population from the 1830s forward triggered fear, hostility, and "fierce resistance" from the Protestant majority. Toby Heytens, Note, *School Choice and State Constitutions*, 86 Va. L. Rev. 117, 135, 137 (2000). Many Protestants decided "that, to prevent Catholics from capturing free, Protestant government and imposing a union of church

and state, Catholics had to be denied equal civil and political rights unless they first renounced their allegiance to the pope." Philip Hamburger, *Separation of Church and State* 206 (2002). "Of course, Catholicism was not, in reality, so monolithic, powerful, or dangerous." *Id.*

The new common schools could not teach any theological position on which Protestants disagreed: that would defeat the goal of increasing Protestant unity. At the same time, the schools were by no means secular. Public-school pioneer Horace Mann, Secretary of the Massachusetts Board of Education, emphasized in his yearly reports that the public did not want secular schools. Lloyd C. Jorgenson, *The State and the Non-Public School, 1825-1925*, at 60 (1987). Mann's ingenious solution for "non-sectarian" religious education – a least common denominator Protestantism – was, among other things, to have reading of the Bible without comment. He defended this practice on the ground that it allowed Scripture "'to do what it is allowed to do in no other system – *to speak for itself*.'" *Id.* (quoting Horace Mann, *Twelfth Annual Report to the Board of Education* 117, 124 (1848) (emphasis in original)).

This solution, however, did not appear even-handed to American Catholics. "Unaccompanied Bible reading * * * was to Catholics an affront. * * * [T]he very fact of a direct and unmediated approach to God contradicted Catholic doctrine," which required guidance from the Church in interpreting Scripture. John C. Jeffries, Jr. & James E. Ryan, *A Political*

History of the Establishment Clause, 100 Mich. L. Rev. 279, 300 (2001). "Reading the unadorned text invited the error of private interpretation." *Id.*

The specific translation of the Bible also highlighted the differences between Protestantism and Catholicism. For example, Catholics generally objected to "the Protestant [King James version] second commandment, which cautioned against the worship of any 'graven image.'" John T. McGreevy, *Catholicism and American Freedom: A History* 7 (2003). See Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 Fordham L. Rev. 1477, 1490 (2005) ("The Catholic Church does not have a separate prohibition on graven images"; it is "subsumed in the First [Commandment]"). This has theological ramifications: statues and other visual symbols used in Catholic worship had been destroyed during the Reformation because Protestants regarded them as "graven images." *Id.* at 1493-94.

Favoritism for Protestantism over Catholicism extended beyond religious exercises and into the school curriculum itself. Textbooks frequently contained anti-Catholic slurs. To name just two examples, the McGuffey's *Fifth Reader* spoke of Catholic friars as being slothful and ignorant, and another text labeled immigrants as a "naked mass of unkempt and priest-ridden degradation." Jorgenson, *supra*, at 62 (quoting William C. Fowler, *The Common School Speaker* (1844)).

2. Violent conflict over the Protestant character of public schools.

Within a short time, "religious conflict over matters such as Bible reading 'grew intense,' as Catholics resisted and Protestants fought back to preserve their domination." *Zelman*, 536 U.S. at 720 (Breyer, J., dissenting) (citing Jeffries & Ryan, 100 Mich. L. Rev. at 300). "In some States 'Catholic students suffered beatings or expulsions for refusing to read from the Protestant Bible, and crowds * * * rioted over whether Catholic children could be released from the classroom during Bible reading.'" *Id.* at 720-21 (citing Jeffries & Ryan, 100 Mich. L. Rev. at 300).

In a notorious example of coercion of Catholic schoolchildren, an 11-year-old Boston student named Thomas Whall was instructed to read the King James version of the Ten Commandments. When Whall refused at the instructions of his father and his parish priest, the teacher first reprimanded him and then, a week later, whipped him for a half hour "until [his hands] were cut and bleeding." McGreevy, *supra*, at 7. A local court acquitted the teacher on the ground that "[t]o read the Bible in school for [the general knowledge of God], or to require it to be read without sectarian explanations, is no interference with religious liberty." *Commonwealth v. Cooke*, 7 Am. L. Reg. 417 (Police Ct. 1859). Other Catholic students joined in refusing to recite, and within two days the school had expelled 300 students. McGreevy, *supra*, at 8. Boston's "most important Republican Party newspaper" responded by protesting against "the encroachments

of political and social Romanism (Catholicism), as well as to its wretched superstition, intolerance, bigotry and mean despotism." *Id.* at 9 (quotation omitted).

Full-fledged violence broke out in some cases, most notoriously in Philadelphia in 1844. A nativist organization used local debate over the Bible in schools as fuel for a general attack on Catholic immigrants. Three thousand nativists protested in Independence Square, alleging that "a Catholic conspiracy was at work * * * to trample our free Protestant institutions in the dust." Jorgenson, *supra*, at 80 (internal quotations omitted). The protests turned into riots, and nativist mobs burned over thirty Catholic homes and two churches. *Id.* at 81. The governor declared martial law, and state militiamen guarded Catholic churches for the next two weeks. Still, fighting continued; two months later, conservative estimates counted 58 dead, 140 wounded, and several hundred million dollars of property destroyed in the riots. *Id.* at 83. Nor was this the only example of such violence. "When Bishop Hughes of New York entered the fray in 1842 to demand public support for Catholic schools, his residence was destroyed by an angry mob, and militia were summoned to protect St. Patrick's Cathedral." Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 669 (1998).

The vitriolic conflicts over religion in public schools convinced Catholic leaders that to educate

their children, they had to provide Catholic schools. As these new schools struggled, serving many impoverished immigrants, "Catholics sought equal government support for the education of their children in the form of aid for private Catholic schools." *Zelman*, 536 U.S. at 721 (Breyer, J., dissenting). Protestants insisted in response "that public schools must be 'nonsectarian' (which was usually understood to allow Bible reading and other Protestant observances)." *Id.* And they insisted that "public money must not support 'sectarian' schools (which in practical terms meant Catholic)." *Id.* (citing Jeffries & Ryan, 100 Mich. L. Rev. at 301). New York in the 1840s blocked funding for any school teaching sectarian dogma. And in Massachusetts,

> the anti-Catholic Know-Nothing Party gained a majority in the state legislature in 1854, undertook an investigation of Catholic nunneries, proposed an amendment to bar Catholics from public office, and passed the Anti-Aid Amendment of 1855, which stated that school money "shall never be appropriated to any religious sect for the maintenance exclusively of its own schools."

Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. Cin. L. Rev. 151, 201 (2003) (quoting Mass. Const. art. 18). Other states followed suit, lending momentum to the national anti-aid movement. Jorgenson, *supra*, at 98-106.

This is the dark history that foreshadowed the federal Blaine Amendment. The evidence amply

supports the Court's conclusion: "[T]he amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'" *Mitchell*, 530 U.S. at 828 (plurality).

3. The federal Blaine Amendment and state counterparts.

The movement opposing aid to "sectarian" schools revived and "acquired prominence in the 1870's," *Mitchell*, 530 U.S. at 828 (Thomas, J.). As Reconstruction petered out, President Grant's Republicans suffered a landslide defeat in the 1874 congressional elections, for multiple reasons including their efforts to include school desegregation in their civil rights bill. Following this debacle, "the national Republican party moved to change the political focus from racial integration to one more promising of electoral success": they "chose to use religious prejudice as a political counterpoise to racial prejudice." Ward M. McAfee, *Religion, Race, and Reconstruction: The Public School in the Politics of the 1870s*, at 172 (1998); see Heytens, *supra*, 86 Va. L. Rev. at 137 (Republicans "resolved to make full use of 'the school question' during the presidential election of 1876").

Grant launched the new campaign with an 1875 speech to Union Army veterans in which he claimed that the nation's next dividing line "will not be Mason and Dixon's," but between "patriotism and intelligence on one side, and superstition, ambition, and

ignorance on the other." McAfee, *supra*, at 192-94. Everyone understood the reference to Catholicism. Grant exhorted his audience to "[e]ncourage free schools, and resolve that not one dollar, appropriated for their support, shall be appropriated to the support of any sectarian schools." Steven K. Green, *The Bible, the School, and the Constitution* 187 (2012). He proposed a constitutional amendment to this effect, and Congressman James Blaine introduced a similar amendment in late 1875.

The first version of Blaine's amendment was quite limited, merely barring the provision of religious-school aid from funds designated for public schools, and it passed the House overwhelmingly. 4 Cong. Rec. 5191 (1876). Aid opponents, worried that the modest version had stolen their thunder, introduced their full-fledged proposal in the Senate. In relevant part, it prohibited any form of aid, from any "public revenue," to any

> school, educational or other institution, under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular doctrines of any religious or anti-religious sect, organization, or denomination shall be taught.

4 Cong. Rec. 5580 (1876).

The Senate debate makes plain the significance of anti-Catholicism in motivating this measure. "The word 'Catholic,' for example, was used fifty-nine times during the one-day [d]ebate." Heytens, *supra*, at 138.

"The Pope was mentioned twenty-three times, and there was an extended colloquy about" Pope Pius IX's 1864 document, the *Syllabus of Errors*. *Id*. at 138-39. Senator George Edmunds, a leading Blaine Amendment supporter, described the Catholic Church, in alarmist terms, as "the most powerful religious sect that the world has ever known, or probably ever will know" – a sect that was "universal, ubiquitous, aggressive, restless, and untiring." 4 Cong. Rec. at 5587-88. He concluded from that – and from the premise that "liberty of conscience * * * is universal in every church but one" – that American Catholics inevitably would aim at controlling public institutions, if they were to be "consistent and true men." *Id.*

The Blaine Amendment also held firmly to the defense of Protestant religious practices in the public schools, even though some schools were beginning to eliminate them. The Amendment stated that it "shall not be construed to prohibit the reading of the Bible in any school or institution." 4 Cong. Rec. 5580.

Although the Senate vote for the Amendment (28-16) fell short of the required two-thirds majority, the movement against aid to "sectarian" schools did not stop. Some 29 states enacted their own versions of such provisions by 1890. Viteritti, 21 Harv. J.L. & Pub. Pol'y at 673. With at least eight states, Congress required Blaine provisions as a condition of their admission to the Union. See *infra* pp. 26-27.

B. Colorado Article IX, §7 Epitomizes the Features of Blaine Amendments.

As petitioners have shown at length, Colorado's Article IX, §7 is a perfect example of a state provision stemming from suspicion and hostility toward Catholicism. "[I]f any provision is a state Blaine Amendment – of the kind that multiple Justices of this Court have already identified as animated by anti-Catholic bigotry – it is Article IX, §7." School Bd. Pet. 23. The federal and Colorado measures were very close in time: the Colorado Constitutional Convention assembled in December 1875, the same month in which President Grant urged Congress to adopt a federal amendment banning public funding for "sectarian" schools. Tr. 670:23-671:5. The national Blaine movement was known in Colorado through newspapers and the telegraph. Tr. 671:6-13. In addition, Colorado's provision clearly reflects two key features of anti-Catholicism that characterized the overall Blaine movement. Petitioners have detailed the evidence; we summarize key selections here.

1. Anti-Catholic statements.

First, the Colorado debate included anti-Catholic accusations of the same sort found elsewhere: fearful stereotypes and exaggerations of Catholics' power and motives. Anti-aid voices suggested that allowing Catholic schools equal treatment in educational funding would lead to Catholic oppression: "[I]s it not enough," said one newspaper, "that Rome dominates

in Mexico and all South America?" Donald W. Hensel, *Religion and the Writing of the Colorado Constitution*, 30 Church Hist. 349, 354 (1961) (quoting *Boulder County News*, Jan. 21, 1876). The stereotype that Catholic citizens merely obeyed foreign (Vatican) directives rather than asserting their own rights to equal treatment appeared in the Colorado debate: for example, a noted Protestant minister argued that Coloradans could "feel right in 'voting up a constitution which the Pope of Rome * * * [had] ordered voted down.'" *Id.* at 356 (quoting *Boulder County News*, May 12, 1876) (edits in original). See School Bd. Pet. 9-10 (detailing other anti-Catholic statements).

2. Protection of Protestant-style Bible reading.

Moreover, the Colorado debate and delegates endorsed the Blaine Amendment's provision that Protestant-style Bible readings in public schools should be preserved while aid to "sectarian" schools was barred. When Denver's Catholic bishop proposed equal allocations of the school fund, the convention responded by resolving to preserve "our present school system against any attempts to divide the school fund for sectarian purposes *or to expel the Bible*, our only text book of morality and heart culture." *Proceedings of the Constitutional Convention: Colorado 1875-76*, at 87 (1907) (emphasis added).

In keeping with this history, the provision was interpreted and applied to preserve Protestant-style

Bible reading. In practice, public schoolteachers "saw to it that the constitutional prohibition of 'sectarianism' would not extend to the Bible." Hensel, 30 Church Hist. at 354 & n.35; Richard Gabel, *Public Funds for Church and Private Schools* 475 n.5 (1937) (citation omitted). Within a few decades, the Colorado Supreme Court agreed that the provision did not prohibit such readings. *People ex rel. Vollmar v. Stanley*, 81 Colo. 276 (Colo. 1927) (overruled by *Conrad v. City & Cnty. of Denver*, 656 P.2d 662 (Colo. 1983)). The *Vollmar* court reasoned that the reading of the Bible was not "the teaching of a sectarian doctrine," and it could not believe "that if it had been intended to exclude the Bible from the public schools, that purpose would have been obscured within a controversial word": "the word 'sectarian.'" 81 Colo. at 289, 292-93.

II. By Ignoring the Evidence of the Animus and Discriminatory Intent Underlying Blaine Amendments, the Decision Below Conflicts with *Hunter v. Underwood* and Other Relevant Decisions of This Court.

The three-judge plurality of the Colorado Supreme Court refused to consider the extensive evidence of discriminatory intent behind Article IX, §7. School Bd. Pet. App. 20 (refusing to "wade into" the evidence). It claimed it could avoid the issue because, in its view, the term "sectarian" in the provision refers to any religious school. *Id.* at 18 (quoting definition of "sectarian" in *Black's Law Dictionary*

1557 (10th ed. 2014)). This is a *non sequitur*. While the Colorado Supreme Court can interpret the state constitution as it sees fit, it cannot disregard evidence showing discriminatory intent that violates the federal Constitution. Laws with such discriminatory motivations are prohibited by decisions of this Court such as *Village of Arlington Heights v. Metro. Housing Development Corp.*, 429 U.S. 252 (1977), and *Hunter v. Underwood*, 471 U.S. 222 (1985)). The Colorado plurality simply disregarded those decisions.

In *Hunter*, this Court struck down, under the Equal Protection Clause, a provision of the 1901 Alabama Constitution that disenfranchised any person who committed any crime of "moral turpitude." Although the provision was facially race-neutral, it had a disproportionate impact on African Americans at the time of its enactment and the time of the *Hunter* litigation. *Id.* at 227. And extensive evidence was offered in the district court that the crimes selected were chosen for racial discriminatory reasons (*id.*): the 1901 constitutional convention "was part of a movement that swept the post-Reconstruction South to disenfranchise blacks." *Id.* at 229 (describing "testimony and opinions of historians * * * offered and received without objection"). As such, the burden then shifted to the state to show that the provision would have passed regardless of the discriminatory intent. *Id.* at 228 (citing *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 287 (1977)). Because race was "a 'but-for' motivation for the

enactment," 471 U.S. at 232, the provision violated equal protection.

Hunter and other decisions demanded that the Colorado Supreme Court consider the evidence of anti-Catholic animus motivating Blaine Amendments in general and Colorado's in particular. Just as with Alabama's disenfranchisement provision, here extensive, unrebutted testimony and documentary evidence showed that discrimination toward Catholicism was a significant motivation for Article IX, §7.[2]

The Colorado plurality fundamentally erred when it ignored this evidence on the ground that Article IX, §7 on its face covers all religions. See Pet. App. 21 (saying that the "language is 'plain'" and "we will enforce section 7 as it is written"). *Hunter*, *Arlington Heights*, and other decisions require the court to look beyond facial neutrality and determine whether an enactment with a discriminatory impact was motivated by a discriminatory purpose. The plurality committed a basic error in refusing to do this.

Article IX, §7 not only had a discriminatory purpose, it also clearly inflicts discrimination. It discriminated against Catholics when it was first enacted;

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[2] *Hunter* applies even though this case involves religious rather than racial animus. Laws "involving discrimination on the basis of religion * * * are subject to heightened scrutiny" under the Equal Protection Clause. *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1266 (10th Cir. 2008) (McConnell, J.); see also *Larson v. Valente*, 456 U.S. 228 (1982) (applying strict scrutiny to laws treating religions unequally).

and it continues to discriminate today by preventing parents from using a neutral scholarship program to help offset the costs of their child's education at a Catholic or other religiously affiliated school.

The ruling below also conflicts with the opinions in *Mitchell* and *Zelman* recognizing the anti-Catholic meaning of "sectarian." The Colorado Supreme Court, of course, may give the state provision whatever operative meaning it wishes: it may interpret the provision as covering all religious schools. But it may not disregard this Court's statements – or the supporting evidence – that "sectarian" in the context of Blaine Amendments had an anti-Catholic thrust. It obviously may not disregard this Court's statements that are relevant to the federal constitutional issue of the discriminatory intent behind Blaine Amendments.

The anti-Catholic taint on Article IX, §7 has not been removed by the passage of time, or by the fact that courts have eliminated Protestant religious exercises from public schools (see, e.g., *Conrad*, 656 P.2d 662). In *Hunter*, similarly, the state argued that "regardless of the original purpose of [the disqualification provision], events occurring in the succeeding 80 years had legitimated" it (for example, "[s]ome of the more blatantly discriminatory sections * * * ha[d] been struck down by the courts"). 471 U.S. at 232-33. The Court rejected the argument, stating: "Without deciding whether §182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by

a desire to discriminate * * * and the section continues to this day to have that effect." *Id.* at 233. Likewise, Article IX, §7 was meant to discriminate, and it continues today to authorize discrimination, in the provision of benefits, against parents who choose to educate their children in a religious setting.

III. The Discriminatory Exclusion of Religious Choices from a Neutral Program of Benefits Violates the First Amendment.

The historical animus behind Article IX, §7 is not the only feature that renders its use here unconstitutional. *Amici* agree with petitioners that "[e]ven if §7's sordid origins could be put to the side, requiring state and local governments to discriminate based on religion would still violate the Constitution." School Bd. Pet. 25. To single out families who choose religious schooling and disqualify them from a generally available benefit not only violates the Free Exercise Clause's requirements of neutrality and general applicability (see, e.g., *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993)); it also violates the Establishment Clause and the Equal Protection Clause. See, e.g., School Bd. Pet. 33-34.

The facial discrimination against families' religious choices here cannot be justified on the basis of *Locke v. Davey*, 540 U.S. 712 (2004). See, e.g., School Bd. Pet. 30-33; Doyle Pet. 31-36. *Davey* upheld a narrow exclusion from aid of students training for the ministry, based on a "historic and substantial" state

interest dating back to the founding. 540 U.S. at 725, 723. That ruling provides no warrant for the wholesale exclusion of students receiving education in secular subjects – history, literature, math, science – simply because they receive it in a religiously affiliated school.

IV. The Misuse of State Blaine Amendments Demands This Court's Correction.

A. States Are Reading Their Provisions to Justify Thoroughly Indefensible Discrimination Against Religion.

The issue in this case is important, recurring, and unsettled: as petitioners show, the lower courts are deeply divided over the ability of states to exclude religious options from neutral programs of benefits. *Amici* emphasize a different but related point. Far too many state officials – judges and others – view this Court's decision in *Locke v. Davey* as *carte blanche* to discriminate against religion in programs of state benefits. As a result, opponents of equal treatment for religious schooling have been able to block a variety of legitimate programs through court rulings, or tie them up in burdensome litigation or administrative proceedings.

Some legitimate uses of neutral aid barred by Blaine Amendments have involved school choice programs similar to this one: state scholarships or tuition grants. The petitions for certiorari list those cases (and circuit splits over the issue). School Bd.

Pet. 27, 29; Doyle Pet. 27-29. Here, we call attention to recent examples of other programs affected:

- The Montana Revenue Department has proposed to disqualify religiously affiliated schools from a state program that offers tax credits to persons who donate to nonprofit "student scholarship organizations" that provide scholarships for students, whose families in turn may use them at the private school of their choice. M.A.R. Notice 42-2-939, https://revenue.mt.gov/Portals/9/rules/proposalnotices_hearinginformation/42-2-939pro-arm.pdf. Such a program is so distant from government aid to religion – so insulated by the private choices of donors and families – that this Court has ruled that taxpayers lack standing to challenge it in federal court. *Arizona Christian School Tuition Org. v. Winn*, 563 U.S. 125 (2011). Nevertheless the Department relies on Montana's Blaine Amendment in proposing blatant discrimination against religious schooling. *Id.* (relying on Mt. Const. art. X, §6 (prohibiting any "appropriation or payment" from public funds for any school "controlled in whole or in part by any church, sect, or denomination")); see Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493, 519 n.116 (2003) (identifying Montana provision as a Blaine Amendment).

- In Missouri, the state department of natural resources disqualified a church-operated day care center from a program that offers state

funds to organizations to purchase recycled tires to resurface their playgrounds. See *Trinity Lutheran Church of Columbia v. Pauley*, 788 F.3d 779 (8th Cir. 2015) (upholding the exclusion), *petition for cert. filed*, No. 15-577 (Nov. 4, 2015). In ruling for the state, the court referred to two Missouri constitutional provisions, enacted in 1870 and 1875, that prohibit public money from aiding "any church, sect, or denomination of religion" or any "institution of learning controlled by any religious creed, church or sectarian denomination whatever." *Id.* at 783 (quoting Mo. Const. art. I, §§7, 8); see Duncan, *supra*, at 517 & n.107 (specifically identifying Article I, §8 as a Blaine Amendment).

- In Florida, a secularist group has sued to bar two religiously affiliated halfway houses from participating in a state program that funds services for recently released, drug-addicted prisoners. *Center for Secular Humanism v. Crews*, Case No. 2007-CA-1358 (Fla. Cir. Ct. Leon Cty.). The state gives providers $14-20 a day to partially cover the costs of shelter, food, job-search assistance, and other valuable services, and the providers offer the participants free, wholly optional opportunities to supplement their substance abuse counseling with religious content. The program has been successful, with recidivism rates plummeting to ⅓ of the national average. But since 2007, its opponents have enmeshed it in litigation based on Florida's ban on using state revenue "in aid of any church, sect, or religious denomination or in aid of any

sectarian institution." Fla. Const. art. I, §3; see Duncan, *supra*, at 519 & n.114 (identifying Florida's provision as a Blaine Amendment).

- In Oklahoma, a state district judge barred parents of disabled children from using state scholarships to educate their children in private schools deemed too religious by the court. *Oliver v. Hofmeister*, Case No. CV-2013-2072 (Dist. Ct. Oklahoma Cty. 2014), *appeal pending*, Case No. 113,267 (Okla. Sup. Ct.). The legislature had found that private schools often provide better options for children with disabilities than do public schools. But applying the language of Oklahoma's Blaine Amendment, Okla. Const. art. 2, §5, the district court held that families were barred from using scholarships at any "sectarian" religious school: they could use them only at schools that were merely "religiously affiliated," which the court elsewhere suggested meant "religious * * * in name only," based on the level of "church control" over the school. *Oliver*, Transcript of Proceedings at 65-66, at http://www.becketfund.org/wp-content/uploads/2015/11/2014.08.28-Transcript-of-Trial-Court-Proceedings.pdf (describing Southern Methodist University as merely "religiously affiliated," but Notre Dame as "sectarian").

B. There Is Federal Responsibility for Blaine Amendments, Since Many Were Required as a Condition of States' Admission to the Union.

Blaine Amendments cannot be defended as legitimate exercises of state discretion to adopt policies concerning the relations of government and religion. For one thing, states have no discretion to violate basic constitutional rights such as nondiscrimination against religion. Moreover, many state Blaine Amendments were adopted under explicit directive or implicit pressure from the federal government. Congress made adoption of such provisions a condition of several states' admission to the Union. Given the federal government's responsibility for the enactment of several state Blaine Amendments, it is particularly appropriate for this Court to intervene to correct the discrimination imposed under these provisions.

For example, the 1906 Oklahoma Enabling Act, §8, 34 Stat. 267, 273, required inclusion of a Blaine Amendment in the new state constitution as a condition of admission. The Act proposed language prohibiting "proceeds arising from the sale or disposal of any lands * * * granted for educational purposes" from being "used for the support of any religious or sectarian school, college or university." *Id.* What emerged from the state constitutional convention was Oklahoma's article 2, §5. Other states required to adopt Blaine Amendments in their enabling acts include North Dakota, Montana, South Dakota, Washington, Arizona, New Mexico, and Idaho. See

Duncan, *supra*, 72 Fordham L. Rev. at 519 nn.115-116 (listing provisions).[3] Montana's article X, §6 (see *supra* p. 23) was therefore adopted under direct federal pressure. So was Washington's provision that all schools "supported wholly or in part by the public funds shall be forever free from sectarian control or influence." Wash. Const. art. IX, §4; see *Davey*, 540 U.S. at 723 n.7 (noting that the federal requirement "was included" in the Washington provision).[4]

When Colorado was admitted in 1876, explicit requirements in enabling acts had not yet appeared, but the state still perceived informal federal pressure. The record shows that some observers worried, during the constitutional convention, that Congress would not admit Colorado unless it adopted Blaine-style language in its constitution. Tr. 691:6-20. In short, in this case and others, the federal pressure to enact Blaine Amendments calls for a federal response – through this Court's review – to correct the discrimination the provisions have inflicted.

[3] See Act of Feb. 22, 1889, 25 Stat. 676, ch. 180 (1889) (enabling act for North Dakota, Montana, South Dakota, and Washington); Act of June 20, 1910, 36 Stat. 557, §26 (1910) (enabling act for Arizona and New Mexico); Act of July 3, 1890, 26 Stat. 215, §8, ch. 656 (1890) (enabling act for Idaho)

[4] Other Blaine Amendments stemming from these Enabling Acts include S.D. Const. art. VIII, §16; N.D. Const. art. 8, §5; Ariz. Const. art. IX, §10; Idaho Const. art. IX, §5.

CONCLUSION

The petitions for certiorari should be granted.

Respectfully submitted,

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APPENDIX

Detailed Statements of Interest of *Amici Curiae*

The **Christian Legal Society** (CLS) is an association of Christian attorneys, law students, and law professors, with student chapters at approximately 90 law schools. Since 1975, CLS's Center for Law and Religious Freedom has worked to protect religious liberty in the courts, legislatures, and the public square.

CLS believes that civic pluralism, which is essential to a free society, prospers only when the First Amendment rights of all Americans are protected. Ensuring that parents of all economic backgrounds have an opportunity to choose the educational provider they think best for their children contributes greatly to civic pluralism and our free society.

For that reason, CLS attorneys were lead counsel in a challenge to Colorado's discriminatory exclusion of students at "pervasively sectarian" colleges from a statewide scholarship program in *Colorado Christian College v. Weaver*, 534 F.3d 1245 (10th Cir. 2008). For over two decades, CLS has participated on briefs *amicus curiae* in support of state school-choice initiatives with respect to K-12 schools and institutions of higher education. *See, e.g.*, *Hart v. State*, 774 S.E.2d 281 (N.C. 2015) (*amici curiae* brief of Christian Legal Society, *et al.*, 2014 WL 7669358); *Duncan v. State*, 102 A.3d 913 (N.H. 2014) (*amici curiae* brief of Concord Christian Academy, *et al.*, 2013 WL 10939279); *Arizona Christian School Tuition Organization v.*

Winn, 563 U.S. 125 (2011) (*amici curiae* brief of U.S. Conference of Catholic Bishops, Union of Orthodox Jewish Congregations of America, Christian Legal Society, *et al*., 2010 WL 2525061); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998) (*amici curiae* brief of Christian Legal Society, *et al.*, 1997 WL 33624892).

The **Becket Fund for Religious Liberty** is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions and the equal participation of religious people in public life and benefits. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. The Becket Fund litigates in support of religious liberty in state and federal courts throughout the United States as both primary counsel and amicus curiae. The Becket Fund has recently obtained landmark religious accommodation victories in the U.S. Supreme Court in *Holt v. Hobbs*, 135 S. Ct. 853 (2015) (involving a Muslim prisoner seeking accommodation of a religiously-mandated beard), and *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (involving religious objections to the Department of Health & Human Services' contraception mandate).

The Becket Fund has been actively involved in litigation challenging the state constitutional amendments known as "Blaine Amendments." Constitutional provisions passed in dozens of states in the latter half of the 19th century, Blaine Amendments

were birthed out of a shameful period in our national history tarnished by anti-Catholic sentiment. They expressed and implemented that sentiment by excluding all government aid from so-called "sectarian" faiths (targeting Catholicism), while allowing those same funds to support a common "nonsectarian" faith, a faith that is fairly described as a lowest common denominator Protestantism. The Becket Fund resolutely opposes the application of these state constitutional provisions to citizens today.

To that end, the Becket Fund has filed *amicus* briefs in states across the country and in this Court to document in detail the history of these state constitutional provisions and to protect the rights of children and their parents to be free from religion-based exclusion from government educational benefits.

The American Association of Christian Schools (AACS) serves Christian schools and their students through a network of thirty-eight state affiliate organizations and two international organizations. The AACS represents students in eight schools in Colorado and more than eight hundred schools nationally. The AACS believes that parental freedom to choose where and how their children are educated is the most effective and equitable way to improve the quality of K-12 education. In establishing a student scholarship program, Douglas County has created an environment in which diversity, individual choice, and educational quality can flourish; however, the decision of the Colorado Supreme Court has the effect of discriminating against families who choose a

religiously informed education. The AACS fully supports programs based on the core values of diversity, individual choice, and religious liberty.

The Lutheran Church—Missouri Synod, a Missouri nonprofit corporation, has approximately 6,150 member congregations which, in turn, have approximately 2,200,000 baptized members. The member congregations of the Synod operate the largest Protestant parochial school system in America, so the Synod has a keen interest in the important issues in this case. Moreover, The Lutheran Church—Missouri Synod promotes and fully supports protecting religious freedom under the First and Fourteenth Amendments.