

In the
Supreme Court of the United States

FLORENCE DOYLE, et al.
v. *Petitioners,*
TAXPAYERS FOR PUBLIC EDUCATION, et al.,
Respondents,

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

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

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

BRIEF AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION
IN SUPPORT OF PETITIONERS

MERIEM L. HUBBARD
Counsel of Record
JOSHUA P. THOMPSON
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: mlh@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTION PRESENTED

Does a generally-available and religiously neutral student aid program violate the Religion Clauses or Equal Protection Clause of the United States Constitution, simply because the program affords students the choice of attending religious schools?

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**IDENTITY AND
INTEREST OF AMICUS CURIAE**

Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioners Florence Doyle, et al., Douglas County School District, et al., and Colorado State Board of Education, et al.¹

PLF is the most experienced public interest law foundation of its kind. It was founded in 1973 to provide a voice in the courts for the thousands of individuals across the country who believe in limited government, private property rights, individual freedom, and free enterprise. PLF is headquartered in Sacramento, California, and has offices in Washington, Florida, Hawaii, and the District of Columbia.

In pursuit of its mission, PLF has participated as amicus curiae in many cases before this Court involving K-12 education reform, including *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011) (tuition tax credit); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Ohio voucher program); and *Mitchell v. Helms*, 530 U.S. 793 (2000) (state and federal school aid programs). Additionally, PLF has

¹ Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

filed amicus briefs in numerous state courts, including *Magee v. Boyd*, 175 So. 3d 79 (Ala. 2015) (scholarship program); *Duncan v. New Hampshire*, 102 A.3d 913 (N.H. 2014) (tax credit scholarship program); *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013) (school voucher program); *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009) (school voucher program); *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006) (opportunity scholarship program).

This case raises an important issue of constitutional law. Amicus considers this case to be of special significance because it concerns an important component of parental choice about educational opportunities for their children. PLF believes that its public policy perspective and litigation experience provide an additional viewpoint on the issues presented in this case, which will be of assistance to the Court in its deliberations.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the constitutionality of Article IX, section 7, of the Colorado Constitution. According to the Colorado Supreme Court, this provision prohibits a local school district from offering scholarships to help pay the tuition of eligible students at partnering private schools, some of which are religious. *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, 351 P.3d 461, 475 (Colo. 2015). This constitutional provision was modeled after the failed federal Blaine Amendment. Petitioners' Brief at 8-11 (Douglas County); *see also* Philip Hamburger, *Privileges or Immunities*, 105 Nw. L. Rev. 61, 141-42 (2011) (discussing how Congress required states to have a Blaine Amendment to be admitted into the Union in the 1870s). Senator James Blaine attempted

to amend the United States Constitution to prohibit states from spending any public money on religious institutions. *Id.* at 141. The Blaine Amendment, however, was specifically targeted to discriminate against Catholics; it was understood by its supporters that this provision would not affect public funding of Protestant activities. *See* 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, 569 (2003). Though the Federal Blaine Amendment was not ratified, a number of states picked up the torch of anti-Catholic animus, and incorporated similar provisions into their state constitutions. *Id.* at 573. Article IX, section 7, of the Colorado Constitution is one of these discriminatory Blaine Amendments. Petitioners' Brief at 8-11 (Douglas County).

This discriminatory action against Catholics has harmed students' educational opportunities. Since America's founding, philosophers and economists have argued that school choice programs are important to improve the educational outcome for students. *Infra* Section I. Great minds such as Adam Smith, Thomas Paine, John Stuart Mill, Milton Friedman, and Rose Friedman all demonstrated how school choice benefitted students and society. *Id.* Even though these thinkers had different political philosophies, they all emphasized that education is an important mean by which to improve society. *Id.*

Today, empirical studies demonstrate that school choice programs result in consistent educational improvement. Students enrolled in school choice programs are more likely to graduate from high school, and parents are more satisfied with their children's

education. *Infra* Section II. School choice programs also provide the catalyst for improved public school performance as they are forced to compete with private, charter, or voucher-subsidized schools. These programs also help racial integration because parents and students often focus on the specific curriculum a school offers, not its racial makeup. *Id.*

The anti-Catholic bigotry of 19th Century Americans, however, has come to haunt current parents and students. A number of states have (and continue to) defended their school choice programs against Blaine Amendment challenges. *See, e.g., Meredith*, 984 N.E.2d at 1227-30; *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998). A 2015 study of Douglas County parents concludes that religious preference was not a significant variable in the decision to apply for the scholarship program. *Infra* Section III. While states and parents defend and rely upon these school choice programs, families are left questioning whether they will continue to receive the specialized schooling they desire.

This Court should grant certiorari to decide whether the anti-Catholic bigotry of a prior generation can stand in the way of a quality education.

ARGUMENT

I

SINCE THE 18TH CENTURY, POLITICAL PHILOSOPHERS AND ECONOMISTS HAVE DEMONSTRATED SCHOOL CHOICE'S IMPORTANCE TO SOCIETY

School choice is not a novel concept. *In the Wealth of Nations*, English philosopher and economist Adam Smith explained why private education systems operate better than state-sponsored ones. Smith was concerned that public school teachers might not work as hard if they were all paid the same, regardless of their performance. Adam Smith, *The Wealth of Nations* 963-64 (Edwin Cannan ed., Bantam Dell 2003) (1776). Smith recognized that all people, regardless of their profession, would work with only as much diligence as is required. *Id.* at 965. According to Smith, market forces encourage schools to provide better educational services, because they are forced to compete with one another to attract students. Thus, schools would have an incentive to provide the best service possible. *Id.* at 963. Such competition ensures that students receive the best education, while allowing top teachers to shine. *Id.* at 967.

Moreover, to the extent that Smith considered public funding of education at all virtuous, the most effective expenditures are public funds provided directly to parents to spend educating their children as they see fit, so long as the recipient schools met minimum standards established by the state. *Id.* at 990-91. By requiring all private schools that indirectly receive public money to meet minimum standards, market forces will result in improved

schools, and students will receive a quality education. *See id.*

Indeed, Smith elaborated that school choice benefits students and society because an educated population acts more rationally and diligently as it is less likely to be persuaded by fear or high rhetoric. *Id.* at 994. Moreover, a better educated population is able to engage in civil discourse, understanding multiple perspectives. *Id.* Expanding school choice offers families that otherwise would be denied educational opportunities the necessary skills to become productive members of society. *See id.* at 964, 990.

Fifteen years after *The Wealth of Nations* was published, political philosopher Thomas Paine argued that school choice could lift the poor out of poverty. Thomas Paine, *Rights of Man* 170 (Paul Negri ed., Dover Publ'ns, Inc. 1999) (1791-92). In *Rights of Man*, which rebuked the conservative philosopher Edmund Burke's *Reflections on the Revolution in France*,² Paine laid out his vision to increase aid to the poor and the old. *See id.* at 5-6, 192 (preface). Paine's plan included a steeper progressive income tax, Miranda Perry Fleischer, *Charitable Contributions in an Ideal Estate Tax*, 60 Tax L. Rev. 263, 277 (2007), coupled with a mandate that all children in England be properly educated.

Paine argued that any tax surpluses should be given to low-income families for the purpose of sending

² Burke criticized radical change brought by abstract and optimistic ideals of the French Revolution. Kent Greenawalt, *Justice Harlan's Conservatism and Alternative Possibilities*, 36 N.Y.L. Sch. L. Rev. 53, 54 (1991). *Reflections on the Revolution in France* has been called one of "the most revered conservative text." *Id.*

their children to school. *Id.* at 170, 173. By providing money for school choice, "poverty of the parents will be relieved . . . [and] ignorance will be banished from the rising generation." *Id.* at 170. This would inevitably lead to fewer people, impoverished because the knowledge students attain will help them provide for themselves and their families in the future. *See id.* Indeed, Paine believed that children could exploit their natural abilities in school to enter lucrative careers rather than being destined to follow in the footsteps of their father. *See id.*

Paine specifically believed that families should receive aid to send children to private schools because "public schools do not answer the general purpose of the poor." *Id.* at 173 (footnote). Paine noted that public schools were too often located outside the limited area poor students could reach. *Id.* Believing that parents should choose how to educate their children, Paine suggested that parents pool the money they received from the government to create local community-schools. *Id.*

In the mid-1800s, John Stuart Mill, the great English philosopher, elaborated on society's duty to provide all children an education, and why school choice is the best means of accomplishing this. In *On Liberty*, he argued "that the State should require and compel the education, up to a certain standard, of [everyone] who [is a citizen]." John Stuart Mill, *On Liberty* 89 (Paul Negri ed., Dover Publ'ns, Inc. 2002) (1859). Yet, he also recognized that if the government was too entangled in education, the system would dissolve into bickering over teaching preferences rather than actually educating students. *Id.* Also, a

state-sponsored education would “[mold] people to be exactly like one another.” *Id.* at 89-90.

To avoid a static education system, Mill proposed that government only concern itself with ensuring that children are being educated, and leave parents with the choice of how to educate their children. *Id.* at 89. Specifically, Mill argued that the government could ensure that all its citizens can afford to go to private schools by helping poor families pay the cost of a private education. *Id.* Mill urged that the government mandate minimum testing to ensure students are being educated, and award speciality certificates to students who demonstrate a strong command of particular subjects. *Id.* at 90. By allowing parents to guide their children’s education, students will gain more diverse skill sets and be in a better position to succeed in society. *Id.* at 89-90.

Nobel Laureate and economist Milton Friedman and Rose Friedman continued the call for school choice into the 20th Century. The Friedmans built on Mill’s arguments, recognizing that parents know their children better than the government does. Milton Friedman & Rose Friedman, *Free to Choose: A Personal Statement* 160 (1979). Essentially, the Friedmans argued that parents are better able to guide their children’s education than the state. *Id.* Indeed, putting parents in control of their children’s education would be beneficial because they would guide the way the money is spent. *Id.* at 161. As a result, they could spend money to reward the best performing schools, public or private. *Id.* This healthy competition would force schools to be innovative and provide the best service, thus enhancing students’ educational opportunities. *Id.*

The Friedmans also addressed concerns that voucher programs would lead to more segregation. They explained that integration was most successful when it came from choice, not coercion. *Id.* at 165. In fact, nonpublic schools were often at the forefront in the move toward integration. *Id.* The Friedmans argued that private schools would be defined by their particular strengths, such as arts, science, or foreign language, and thus overcome any sort of racial or socioeconomic bias. *Id.* at 166-67.

Hillsdale College, a private school in Michigan, provides an example of private choice leading to integration. Founded in 1844, Hillsdale was the first college in America to prohibit discrimination on the basis of race, sex, or religion in its written charter. Nicole Hoplin & Ron Robinson, *Funding Fathers: Unsung Heroes of the Conservative Movement* 177 (2008). Not only did Hillsdale extend admission to African-Americans shortly after its 1844 founding, but the college suffered one of the highest casualty rates during the Civil War because so many of its alumni were compelled to fight for equality. *Id.* In fact, Hillsdale’s race-neutral policy was implicated in this Court’s decision in *Grove City College v. Bell*, 465 U.S. 555 (1984) (holding that Title IX applies to Hillsdale and Grove City College because its students receive federal scholarships).

The modern debate about school choice continues this centuries-old concern about how best to educate children, particularly those of low-income or otherwise underprivileged families. The longstanding argument in favor of school choice stands in stark contrast to the blinkered approach favored by Blaine Amendment backers, who would deny educational opportunity on

the basis of an anti-Catholic relic. The time has come for this Court to resolve this nationally important issue.

II

SCHOOL CHOICE IS AN IMPORTANT TOOL TO INCREASE THE QUALITY OF EDUCATION FOR ALL CHILDREN

Smith, Paine, Mill, and the Friedmans' arguments in favor of school choice have been validated in recent years. Experience and time have demonstrated that there is a growing education gap in America (Eduardo Porter, *Education Gap Between Rich and Poor is Growing Wider*, N.Y. TIMES, (Sept. 22, 2015)),³ and that school choice is a tool for states to address this gap. Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Choice*, The Friedman Foundation for Educational Choice (3d ed., Apr. 2013) at 6-9.⁴ Thus, this Court should address Article IX, section 7's, constitutionality in order to provide states and local communities guidance as to what tools are available to remedy education inequality.

As Smith predicted, the lack of competition in the educational marketplace has harmed the quality of education. See Terry M. Moe, *Beyond the Free Market: The Structure of School Choice*, 2008 B.Y.U. L. Rev. 557, 590. Indeed, it is notoriously difficult to remove ineffective teachers in the current educational setting. *Id.* at 583. Allowing underperforming teachers to

³ [Http://www.nytimes.com/2015/09/23/business/economy/education-gap-between-rich-and-poor-is-growing-wider.html?_r=0](http://www.nytimes.com/2015/09/23/business/economy/education-gap-between-rich-and-poor-is-growing-wider.html?_r=0).

⁴ [Http://www.edchoice.org/wp-content/uploads/2015/07/2013-4-A-Win-Win-Solution-WEB.pdf](http://www.edchoice.org/wp-content/uploads/2015/07/2013-4-A-Win-Win-Solution-WEB.pdf).

remain in the classroom is devastating for America's future. Rather than face market forces, which would force educators to improve their quality, the current system guarantees a noncompetitive and safe environment for teachers. *Id.*

The battle over education reform in Washington, D.C., demonstrates the power of market forces. In 2010, then-Chancellor Michelle Rhee⁵ fired 241 poor performing teachers and listed 741 teachers as minimally effective, providing them one year to improve their performance. Bill Turque, *Rhee Dismisses 241 D.C. Teachers; Unions Vow to Contest Firings*, WASH. POST (July 24, 2010).⁶ Instead of working with Chancellor Rhee to find a substantive solution to address ineffective teachers, the Washington Teacher's Union contested the firings. *Id.* It is plainly the union's responsibility to represent its members, but this priority often conflicts with students' interests by allowing poor teachers to remain in the classroom. Moe, *supra*, at 583.

Mill also presciently argued that government entanglement in education leads to bickering over educational policy preferences, rather than focus on whether students are learning. For well over 150 years, the government's involvement in public schools has created tension over what to teach students.

⁵ Chancellor Rhee is highlighted in the award-winning documentary WAITING FOR SUPERMAN (Paramount Vantage 2010) (demonstrating how the current public education system is failing students, and the innovative solutions some have implemented to improve educational outcomes).

⁶ [Http://www.washingtonpost.com/wp-dyn/content/article/2010/07/23/AR2010072303093.html](http://www.washingtonpost.com/wp-dyn/content/article/2010/07/23/AR2010072303093.html).

John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 293-327 (2001). As far back as the 1830s, America was a pluralistic religious society. *Id.* at 297-300. Thus, it was predictable that parents and policy makers would fight over what religious doctrine would be taught in school. *Id.* at 299. That debate continues today. But rather than focusing on what Christian denomination will prevail in the classroom, today's debates center on how much reference to or expression of religion can be tolerated in public schools. *Id.* at 312-27. As a result, opponents and defenders of school choice engage in endless litigation focusing on how states or schools may spend money. *See, e.g., Zelman*, 536 U.S. 639; *Agostini v. Felton*, 521 U.S. 203 (1997); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993). Money spent in litigation is money that is not spent educating students. *See Grutter v. Bollinger*, 539 U.S. 306, 348-49 (2003) (Scalia, J., concurring and dissenting in part) (discussing additional costs associated with litigating affirmative action cases).

Not only have recent studies substantiated the problems with government control of schooling, but an increasing body of literature shows that school choice programs benefit both students and schools. Both Smith and the Friedmans contend that school choice programs create competition between schools, thus forcing private and public schools to improve in order to attract the best students. Smith, *supra*, at 963. *See Friedman & Friedman, supra*, at 161. Empirical studies have shown that school choice programs benefit public schools, with 22 of the 23 studies on this issue showing a positive impact. Forster, *supra*, at 11.

For example, in Albany, New York, school officials instituted major reforms at a failing elementary school, including replacing incompetent administrators, after a private individual began providing scholarships to students. Brad P. Bender, Comment, "Allegiance to Our Children." *The School Choice Debate in the Commonwealth of Pennsylvania*, 104 Dick. L. Rev. 165, 192 (1999). The district's superintendent also interviewed the school's teachers, finding cause to fire twenty of them, and worked with outside groups to obtain a grant for reading. *Id.* In that case, Albany school officials received a wake-up-call and instituted major reforms when many students took advantage of a scholarship program to exit the failing school. *Id.* This story from Albany is supported by the studies showing that school choice programs benefit public schools. Forster, *supra*, at 13 (studies conducted in six locations by 13 authors over a 12-year span).

Additionally, of the 12 studies conducted using random-assignment to examine how school choice affects its participants, 11 have shown a net-positive effect. Forster, *supra*, at 7. For example, students in Washington, D.C., who utilized the Opportunity Scholarship Program (OSP) have had better educational outcomes than students who did not utilize the program. Patrick Wolf, et. al., *Evaluation of the DC Opportunity Scholarship Program*, U.S. Dep't of Educ., June 2010, at 51-52.⁷ Students that used the OSP graduated high school at a statistically higher rate, and their parents were more satisfied with their education and safety. *Id.* Recent research shows that "private schools provide students with an educational climate that encourages school completion either

⁷ <http://ies.ed.gov/ncee/pubs/20104018/pdf/20104018.pdf>.

through the faculty and school environment or by having similarly motivated and achieving peers.” *Id.*

As the Friedmans foresaw, school choice programs have also helped parents enroll their children in schools that are better able to foster the students’ individual needs. Many parents use school choice programs to send their children to schools that are better suited to their needs or that are better able to foster an accelerated learning program. Monique Langhorne, *The African American Community: Circumventing the Compulsory Education System*, 33 Beverly Hills B. Ass’n J. 12, 21 (2000) (explaining how some African-American leaders pushed for educational reform to ensure that the education system is responsive to Black children’s needs). Moreover, parents regularly use school choice programs to place their children in specialized vocational programs. Lia Epperson, *Bringing the Market to Students: School Choice and Vocational Education in the Twenty-First Century*, 87 Notre Dame L. Rev. 1861, 1885-86 (2012). For example, there has been an increase of vocational training in Chicago, exposing students to new careers and post-secondary education skills. *Id.* Allowing parents to choose how to educate their children results in a diversity of views, and avoids the one-size-fits-all dilemma in education described by Mill.

School choice has wider societal benefits. Recent studies show that school choice programs help integrate schools. Benjamin Scafidi, *The Integration Anomaly: Comparing the Effects of K-12 Education Delivery Models on Segregation in Schools*, Friedman

Foundation for Educational Choice, Oct. 2015 at 23.⁸ In Louisiana, for example, school voucher recipients had a positive impact on racial integration. Jason Bedrick, *Study Shows Louisiana’s Choice Program Improves Racial Integration*, CATO Institute, Oct. 23, 2013.⁹

In light of empirical evidence demonstrating the wide-ranging benefits of school choice, this case takes on increased importance worthy of this Court’s review.

III

DOUGLAS COUNTY PARENTS WHO APPLIED FOR SCHOLARSHIPS SOUGHT QUALITY EDUCATION, NOT RELIGIOUS TRAINING

Douglas County’s choice scholarship program is unlike other school scholarship programs: it is the only district-created scholarship for which any child in the district can apply, regardless of family income, disability status, or any other characteristic. Dick M. Carpenter II & Marcus A. Winter, *Who Chooses and Why in a Universal Choice Scholarship Program, Evidence from Douglas County, Colorado*, J. of Sch. Leadership, Vol. 25, p. 899, Sept. 2015, at 901-02. A new study, focusing on this program alone, sought to determine the characteristics that distinguished Douglas County parents who applied for a choice scholarship, and those parents who did not, and the reasons the parents cited for their respective decisions. *Id.* at 902.

⁸ [Http://www.edchoice.org/wp-content/uploads/2015/10/2015-10-The-Integration-Anomaly-WEB.pdf](http://www.edchoice.org/wp-content/uploads/2015/10/2015-10-The-Integration-Anomaly-WEB.pdf).

⁹ [Http://www.cato.org/publications/commentary/study-shows-louisianas-choice-program-improves-racial-integration](http://www.cato.org/publications/commentary/study-shows-louisianas-choice-program-improves-racial-integration).

The Choice Scholarship Program was adopted in 2011, and the subjects of the study were parents who, on behalf of their children, applied or choose not to apply for the 500 available scholarships offered and awarded before the program was enjoined. *Id.* at 910. The study revealed only small differences between the characteristics of those who applied and those who did not.

Those who apply and those who do not apply look very similar and hold comparable views about educational expectations for their children. . . . [P]arents who were more involved—particularly as measured by communication with or about the school (voice)—were also more likely to take advantage of choice opportunities (exit).

Id. at 920, 922.

The study found that most parents do not choose religious schools “primarily for their faith-based orientation but for reasons of educational quality or learning environment.” *Id.* at 930. Parents who did apply for the scholarship were asked to rank fourteen reasons that may have influenced their decisions as most important, very important, important, somewhat important, or not important. *Id.* at 913.

The most important reason that parents applied for the scholarship was “better educational quality.” Close to half of the respondents—43.90%—listed better educational quality as the “most important reason,” and 72.59% responded that was a “very important” reason. *Id.* at 925 (Table 8). The next “most important” reasons were “smaller class size” (14.63%); “higher quality teachers” (8.94%); and “better aligned with

educational beliefs” (7.32%). *Id.* “Attend a safer school” and “child needs special program” each received 5.69%. *Id.* Only 6.50% of respondents said that “attend school with religious instruction” was “most important.” Another 31.11% said it was very important, balanced by a nearly equal number—37.78%—that said religious instruction was “not important.” *Id.* The authors of the study concluded that “parents’ religious preference proved not to be a significant variable in whether someone applied for a scholarship.” *Id.* at 930.

Parents have many reasons to use choice scholarships to send their children to schools run by religious institutions. As a practical matter, most of the private schools approved for participation in the scholarship program are religious schools, as are most of all the private schools in Colorado. *Id.* And many parents, regardless of their religious affiliation (if any affiliation at all) prefer those schools for the exceptional educational quality and learning environment. *Id.*

CONCLUSION

Smith, Paine, Mill, and Friedmans’ arguments for school choice have proven accurate. There is strong evidence that school choice benefits students and parents. Many states and cities have attempted to provide parents and students with more choice to guide their education. Unfortunately, many of these parents cannot exercise their choice to send their children to a private school as long as “Blaine Amendments” are applied to neutral scholarship plans where parents

decide how and where their children will be educated.
The petitions for writ of certiorari should be granted.

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Respectfully submitted,

MERIEM L. HUBBARD

Counsel of Record

JOSHUA P. THOMPSON

Pacific Legal Foundation

930 G Street

Sacramento, California 95814

Telephone: (916) 419-7111

Facsimile: (916) 419-7747

E-mail: mlh@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation