Nos. 15-556, -557, -558

In the Supreme Court of the United States

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

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

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

On Petitions for Writs of Certiorari to the Supreme Court of the State of Colorado

BRIEF OF *AMICI CURIAE* THE STATES OF ARIZONA, NEVADA, OHIO, UTAH & WISCONSIN

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The *amici* States take seriously their obligation to defend the rights of their citizens, chief among them the religious liberty enshrined in the Establishment, Free Exercise, Free Speech, and Equal Protection Clauses. Discharging that responsibility becomes complicated, however, when state constitutions can be read to forbid what the United States Constitution permits—specifically, aid to individuals who may, in turn, choose to obtain their benefits from religious institutions. Despite differences in their constitutional texts, the *amici* States share an interest in tracing the boundaries between permissible and impermissible discrimination based on religious affiliation. The *amici* States thus urge this Court to grant the instant petitions for writ of *certiorari*.

Additionally, many state constitutions, including those of *Amici* Arizona, Nevada, Utah, and Wisconsin, contain so-called Blaine Amendments. These amendments were the product of anti-Catholic bigotry and their inclusion in the constitutions of *Amici* Arizona and Utah was a precondition for admission to the Union. This Court should grant *certiorari* to confirm that the Blaine Amendments embody a hostility toward religion and thus face strict scrutiny to the extent they impose a burden on religious exercise beyond the boundaries of the Establishment Clause.

SUMMARY OF THE ARGUMENT

The Colorado Supreme Court has construed a provision of that State's constitution to impose a religion-based exclusion from government programs. That construction conflicts with both the Constitution of the United States and with precedent in numerous States, which have construed their own Blaine Amendments to avoid violations of the Free Exercise, Establishment, and Equal Protection Clauses. The resulting division among States is not the result of variations across constitutional texts as much as uncertainty over the reach of this Court's holdings regarding neutrality toward religion. The Court should therefore grant the current petitions for writ of *certiorari* to resolve the division in the lower courts, clarify the scope of its own precedents, and recognize the bigoted purposes for which the Blaine Amendments were enacted.

ARGUMENT

I. Confirming that a Categorical Exclusion Based on Religion Offends the Free Exercise and Equal Protection Clauses Is a Matter of National Significance That Has Divided Lower Courts.

No fewer than three provisions of the United States Constitution forbid the categorical exclusion of religion from generally-available programs. While States are free to provide greater protections for fundamental rights than those in the federal Constitution, the latter remain an inviolable minimum. If States interpret their constitutions to undercut the federal baseline, as the Colorado Supreme Court has done, they offend the

Free Exercise, Establishment, and Equal Protection Clauses.

1. The Free Exercise Clause prohibits the wholesale exclusion of religion that the Colorado Supreme Court has sanctioned.[1] "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs . . . ." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). While facial discrimination does not render a law "presumptively unconstitutional," *Locke v. Davey*, 540 U.S. 712, 720 (2004), it nevertheless triggers strict scrutiny, *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076 (9th Cir. 2015). *See generally infra* Part II.C (discussing *Locke*).

Here, the contested provision is facially discriminatory. Colorado's Blaine Amendment forbids the expenditure of public funds "to help support or sustain any school . . . controlled by any church or sectarian denomination . . . ." Colo. Const. art. IX, § 7.[2] By its terms, this provision is not a "neutral law of

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[1] As a technical matter, the Choice Scholarship Pilot Program (CSP) included schools that were both religious and non-religious, but the sole reason for striking down the program was its inclusion of religious schools. *See* Colo. App. 9 (discussing only religious schools in questions presented), *id.* at 23-27 (distinguishing *Americans United for Separation of Church & State Fund, Inc. v. Colorado*, 648 P.2d 1072 (Colo. 1982), because the voucher program upheld in that case ***excluded*** "pervasively religious" schools).

[2] Even if the text were facially neutral, the contested provision fails the second line of analysis from *Lukumi* because it was enacted for a discriminatory purpose. *See infra* Part III (discussing history and purposes of Blaine Amendments).

general applicability." *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990). It therefore must undergo strict scrutiny, *Stormans*, 794 F.3d at 1076 (citing *Lukumi*, 508 U.S. at 531-32), and the record reveals no compelling interest to justify the discrimination. In particular, the eligibility of non-religious private schools confirms that the Blaine Amendment does not serve a neutral interest like cost savings or curricular uniformity.

Faced with similar exclusions, this Court and others have concluded that banning religious persons and institutions from government benefits violates the First Amendment. In upholding a New Jersey program to subsidize transportation for students at all types of schools, the Court announced the general rule that a State "cannot exclude" individuals "because of their faith or lack of it, from receiving benefits of public welfare legislation." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 16 (1947). While *Everson* held open the possibility for a State to provide benefits "***only*** to children attending public schools," *id.* (emphasis added), the option to exclude vanishes once the State enters the sphere of "general government services" by virtue of the Free Exercise Clause, *id.* at 17. As *Everson* illustrates, a benefit becomes a "general program" when its availability expands beyond public schools to include students in parochial or "other" private schools. *Id.*

On facts even more similar to the present case, the Eighth Circuit held that excluding students at religious schools from a program to provide paraprofessionals to support their studies was a form of "[g]overnment discrimination based on religion" and therefore

"violate[d] the Free Exercise Clause of the First Amendment." *Peter v. Wedl*, 155 F.3d 992, 996 (8th Cir. 1998) (citing *Lukumi*); *see also Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995) (holding that an Army program excluding religious child care-providers violated Free Exercise Clause).

Like the transportation vouchers in *Everson* and the support staff in *Peter*, Colorado's CSP is a general program that benefits students in all types of private schools. But while the CSP creates a general benefit, the Colorado Supreme Court has interpreted Article IX, Section 7 of the state constitution to craft a special exclusion based on religion. Other courts, including this Court, have rejected such a scheme, which strikes at the heart of the Free Exercise Clause.

2. The First Amendment's prohibition against laws "respecting an establishment of religion" is not one-sided. U.S. Const. amend. I. It applies with equal force to laws establishing a particular religion as it does to statutes enshrining the absence of belief in God. *Lukumi*, 508 U.S. at 532 ("In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion ***or of religion in general***." (emphasis added)); *Everson*, 330 U.S. at 18 (explaining that the "[First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers"); *Hartman*, 68 F.3d at 978 ("[T]he Supreme Court has made it clear that 'neutral' also means that there must be neutrality *between* religion and non-religion." (citing *Lukumi*)).

The importance of neutrality is especially pronounced in the context of education. A program for providing educational equipment to schools of all types withstood constitutional scrutiny in *Mitchell v. Helms*, 530 U.S. 793, 809 (2000), precisely because "the religious, irreligious, and areligious [were] all alike eligible for governmental aid." *See also id.* at 810 (explaining that a State serves its secular purpose "if the government . . . offers aid on the same terms, without regard to religion, to all who adequately further that purpose.").[3] Even in reaching the opposite conclusion regarding the constitutionality of a moment of silence in public schools, the Court nevertheless confirmed that educational policies cannot distinguish between religion and non-religion. *Wallace v. Jaffree*, 472 U.S. 38, 54 (1985) ("[T]he political interest in forestalling intolerance extends beyond intolerance among Christian sects . . . to encompass intolerance of the disbeliever and the uncertain."). The *Wallace* moment of silence failed Establishment Clause scrutiny because it took sides between belief on the one hand and disbelief on the other.

Article IX, Section 7 of Colorado's Constitution which, following the decision below, categorically forbids CSP families from choosing religious schools violates the rule in *Wallace*. The only difference is that the Colorado Supreme Court has favored non-religion over religion. But it matters not which way a State

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[3] The Colorado Supreme Court refused to follow this holding "[b]ecause Mitchell was a plurality opinion." Colo. App. 32 n.20 (plurality opinion). It failed to recognize, however, that the same principles commanded a majority in *Agostini v. Felton*, 521 U.S. 203, 230-31 (1997).

violates neutrality or which message of endorsement it chooses to send; including non-religious private schools while excluding their religious counterparts is irreconcilable with the Establishment Clause.

This point becomes stark when considering the mirror-image law—*i.e.*, one conferring benefits for religious conviction while withholding the same benefits from irreligious persons. The Court confronted just such a law in *United States v. Seeger*, 380 U.S. 163 (1965). There, the Court rejected a law allowing conscientious objection based on religious belief—defined to "embrace all religions" while excluding other "political, sociological, or philosophical views"—as an establishment of religion. *Id.* at 165. Just as the statute in *Seeger* violated the Establishment Clause by favoring religious belief over non-belief, so must a Colorado law that excludes only religious schools carry a forbidden message of partiality and impose an unconstitutional burden on the choice of a religious private school.

It is no salve to the Establishment Clause violation that the Colorado Supreme Court would consider how "pervasively sectarian" each school is. Colo. App. 29 n.18. To the contrary, this entanglement with the particular practices of each religious sect only exacerbates the problem. Would a Catholic school festooned with iconography be excluded from the state program while a Quaker school with bare walls qualified? Plain though the answer should be, this issue has divided the lower courts. *Compare Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 853-56 (7th Cir. 2015) (en banc) (applying "pervasively religious" test over dissent by Judges Ripple, Easterbrook, and

Posner) *with Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1258-59 (10th Cir. 2008) (rejecting the test as "explicitly discriminat[ory]"). Sorting religions based on how "pervasively" they incorporate their faith is an unconstitutional entanglement with religion and another reason to grant the Petitions.

3. Finally, discrimination based on religion also offends the guarantee of the Equal Protection Clause. In *Peter*, the Eighth Circuit expressly invoked equal protection to strike down a school district's ban on supporting students with disabilities on the basis of their decision to attend religious schools. 155 F.3d at 996. As the *Peter* court explained, "[i]f [the school district] denied a paraprofessional . . . because of Minnesota Rule 3525.1150's unconstitutional distinction between private religious schools and private nonreligious schools, or otherwise because of the religious nature of Calvin Christian School, then [the district's] action is illegal and the plaintiffs are entitled to the relief that they seek." *Id.* at 997. In reaching its conclusion, the Eighth Circuit relied on this Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996). The rationales in *Romer* apply equally to religious exclusions as they do to distinctions based on sexual orientation. First, the Colorado law "declar[es] that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government," which is "a denial of equal protection of the laws in the most literal sense." *Romer*, 517 U.S. at 633. Additionally, the bigoted purpose and text of Colorado's provision, which the court below refused to consider, supports at least an "inference" that the provision was "born of animosity." *Id.* at 634; *see infra* Part III.

Exclusions based on religion alone deserve more than rational-basis review, but even under *Romer*'s scrutiny, denying the equal protection of the laws based on religion does not bear a rational relationship to a legitimate state interest. 517 U.S. at 631 (citing *Heller v. Doe*, 509 U.S. 312 (1993)). There is no argument that religious schools cannot deliver an adequate education in secular subjects. *See Everson*, 330 U.S. at 7. Indeed, Colorado law already rejects that possible governmental interest by accepting education in a religious school for purposes of the State's compulsory-education law. Colo. Rev. Stat. § 22-433-104(b)(2). Likewise, as other courts have acknowledged, Colorado can have no state interest in excluding religious schools in the name of budget constraints when the same CSP funds could go to a non-religious private school. *See, e.g., Peter*, 155 F.3d at 997 (describing the proffered justification of "contain[ing] costs" as "irrational" and a "pretext for religious discrimination" because non-religious private schools were eligible for the program).

Permeating the constitutional analysis in this case is the fact that CSP scholarships would remain available if they extended only to non-religious private schools. This Court should grant *certiorari* to settle what should be uncontroversial but has remained unclear: the exclusion of "religion in general," *Lukumi*, 508 U.S. at 532, from otherwise neutral programs violates the First and Fourteenth Amendments.

II. As Many States Have Recognized, This Court Has Already Provided the Framework for Rejecting Exclusions Based on Religion.

A. This Court's Precedents Distinguish Between True Government Subsidies and Privately-Directed Funds.

The States that have construed their no-aid clauses to avoid offending the federal Constitution have relied on two rules from this Court's Establishment Clause jurisprudence: (1) private choices sever the connection between government support and a religions institution, and (2) the beneficiaries of such aid are not the institutions that provide services but the individuals who receive them.

The first insight follows from the premise that "the means by which state assistance flows to private schools is of some importance." *Mueller v. Allen*, 463 U.S. 388, 399 (1983). Under a voucher system, "public funds become available only as a result of numerous, private choices of individual parents of school-age children," thus severing any seeming connection between the State and the religious school. *Id.* The Court has affirmed this holding at least three times. *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 9-10 (1993); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 488 (1986). The regularity with which this issue has surfaced underscores its importance in assessing neutrality in school-choice programs, and its relevance does not end at the boundary of the Establishment Clause. The role of private choice—and the exclusion of certain choices based on their religious

motivation—is also relevant to the Free Exercise and Equal Protection Clauses. The present case turns on these private choices and asks the Court to confirm that they are, indeed, constitutionally protected private acts.

Equally germane is the principle that States do not themselves confer benefits on religious service-providers by providing aid to individuals on the basis of neutral criteria. Thus the "primary beneficiaries" of *Zobrest*'s program for providing sign-language interpreters were "disabled children, not sectarian schools." 509 U.S. at 12 (quoted in *Zelman*, 536 U.S. at 651); *see also Witters*, 474 U.S. at 488 (defining the purpose of the program as "providing vocational assistance to the visually handicapped," even if the student's purpose was to become a minister). The underlying principle of how to define the beneficiaries of a government program is not confined to the specific context of these cases. As the Court noted, the issue in *Zobrest* was whether the program "distributes benefits neutrally to any child qualifying as 'disabled.'" 509 U.S. at 10. The principles of neutrality are not unique to the Establishment Clause. They also inform judgments under the Free Exercise and Equal Protection Clauses. The Court should grant *certiorari* to resolve whether a State may refuse to apply these principles in the name of complying with state law.

As numerous States have found, this Court's insights regarding school choice and the Establishment Clause can reconcile a state no-aid provision with the safeguards of the First and Fourteenth Amendments. Far from idiosyncratic questions of state law, however, the role of private choice and the treatment of aid

directed toward individuals implicate the common duty of courts in every State to uphold the U.S. Constitution. For that reason, the instant Petitions raise an issue of profound national importance.

B. States Can—And Many Do—Construe Their Constitutions to Avoid a Categorical Ban Based on Religion.

States are free to adopt constitutions with "stricter dictates" regarding establishment of religion than the First Amendment. *Witters*, 474 U.S. at 489 (quotation omitted). They are not, however, free to use this license to the detriment of their citizens' rights secured by other provisions of the U.S. Constitution. Many States have recognized this limitation and rejected a categorical exclusion of religious service-providers from participation in state programs.

Arizona's constitution is like Colorado's in that it contains several amendments forbidding any "public money" from being "applied to any religious . . . instruction," Ariz. Const. art. II, § 12, or "in aid of any church, or private or sectarian school," *id.* art. IX, § 9. Unlike Colorado, however, Arizona reads its constitution to avoid a categorical exclusion of religious schools or the requirement that government assess whether the schools' religiosity is too "pervasive." *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999); *cf. Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009) (rejecting voucher program for both religious and non-religious schools under general no-aid provision and therefore not reaching free exercise and equal protection issues).

The first path to upholding the tax-credit program in *Kotterman* was recognizing "that funds remain in

the taxpayer's ownership at least until final calculation" of the taxes owed. *Id.* at 618 (emphasis omitted). The decision to make a donation (and claim a tax credit) was therefore not an expenditure of public money. *Id.* at 620; *accord, e.*g., *Magee v. Boyd*, --- So.3d ----, 2015 WL 867926, at *43 (Ala. Mar. 2, 2015) (refundable tax credit). Other States have reached the same conclusion regarding voucher programs. *See, e.g., Meredith v. Pence*, 984 N.E.2d 1213, 1229 (Ind. 2013).

Similarly, many States have followed this Court's example in *Zobrest* and recognized, as the Indiana Supreme Court has done, that "[t]he direct beneficiaries under the voucher program are the families of eligible students and not the schools selected . . . ." *Meredith*, 984 N.E.2d at 1228-29; *see also Jackson v. Benson*, 578 N.W.2d 602, 620-21 (Wisc. 1998) (relying on this Court's precedent defining beneficiaries to interpret state Blaine Amendment and compelled-support clause); *Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 (Ohio 1999); *Ala. Educ. Assn. v. James*, 373 So.2d 1076, 1081 (Ala. 1979); *Bd. of Educ. v. Allen*, 228 N.E.2d 791, 794 (N.Y. 1967).

Yet, absent a definitive ruling in the context of a program that includes non-religious private organizations while excluding their religious counterparts, many States have sanctioned such exclusions. The California Supreme Court, for example, has derided "the 'child benefit' theory" as "prov[ing] too much." *Calif. Teachers Assn. v. Riles*, 632 P.2d 953, 960 (Cal. 1981) (citing *Gaffney v. Dep't of Educ.*, 220 N.W.2d 550, 556 (Neb. 1974)); *see also Moses v. Skandera*, --- P. 3d ---,2015 WL 7074809 (N.M. Nov. 12, 2015) (reversing court of appeals decision that

expressly rejected *California Teachers* based on subsequent decisions of this Court).

The main source of divergence among the States is not the particularities of their own constitutions, but a disagreement over the meaning of this Court's precedents. *See, e.g., Moses v. Skandera*, 346 P.3d 396, 406-07 (N.M. App. 2014). Resolving these disagreements requires this Court's definitive statement that the neutrality guarantees of the First and Fourteenth Amendments apply to school-choice programs and prohibit an exclusion drawn along religious lines. The principles for reaching this conclusion are already in place, but their application to state constitutional provisions lags stubbornly behind.

In some cases, state courts have even enforced their Blaine Amendments with conscious awareness of their impact on fundamental rights. The Idaho Supreme Court, for example, forbade the State from providing transportation for students in parochial schools, reasoning that the religious organizations—not the students or their families—were the program's primary beneficiaries. *Epeldi v. Engelking*, 488 P.2d 860, 867 (Idaho 1971). On its way to that conclusion, *Epeldi* expressly notes that by enforcing Idaho's Blaine Amendment, "free exercise of religion (attending parochial schools) becomes more expensive." *Id.* The Idaho court's decision, made with full cognizance of how that State's Blaine Amendment hamstrings a civil right, is irreconcilable with the other liberties at stake—free exercise, freedom from an establishment of religion, and equal protection.

Many States with no-aid provisions similar to Colorado's have interpreted their constitutions

consistent with First Amendment precedent to avoid an exclusion based on religion. Others, however, have persisted in tolerating a disconnect between this Court's church-and-state principles and their application to a state constitution. The Court should grant the Petitions to resolve this division.

C. The Court Has Twice Approached the Issue in This Case, Which Is Now Squarely Presented.

This Court has twice deferred the question of whether a State's religious exclusion runs afoul of the Free Exercise Clause. In *Witters*, after reversing the Washington Supreme Court on the Establishment Clause issue, the Court remanded for the state courts to consider Washington's Blaine Amendment in the first instance. 474 U.S. at 489. In so doing, it refused the petitioner's request to "leapfrog consideration of those [state constitutional] issues by holding that the Free Exercise Clause *requires*" that religious schools be included alongside other private institutions. *Id.*

Two decades later, in *Locke v. Davey*, 540 U.S. 712, 722 n.5 (2004), the Court faced the unique question of whether a state constitution could forbid "funding the religious training of clergy." In answering that question, the Court reserved the issue of education in secular fields, reasoning that training ministers "is of a different ilk" than other forms of education. *Id.* at 732. In its reasoning and by express language, *Locke* confines itself to the training of clergy. As explained in that decision, "the only interest at issue here is the State's interest in not funding the religious training of clergy." 540 U.S. at 722 n.5. Unlike secular studies that could occur at a religious school, the program at

issue was "a distinct category of instruction" with "no counterpart with respect to other callings or professions." 540 U.S. at 721. Moreover, the Court reached this conclusion from pre-Blaine-era state constitutions, which it noted "saw no problem in explicitly excluding *only* the ministry from receiving state dollars." *Id.* at 723. None of the founding-era provisions cited in *Locke*, however, included general religion-based exclusions like the interpretation at issue in the present case. Indeed, the scholarship program at issue in *Locke* ***permitted*** recipients to use their award at "religiously affiliated" schools. *Id.* at 716. Thus, far from supporting the Colorado Supreme Court's restricted version of the CSP, *Locke* condoned a program allowing funds to reach religious schools, with a *sui generis* exception for the training of clergy.

In a split that calls out for this Court's resolution, lower courts have divided on whether to honor *Locke*'s narrow scope. *Compare Eulitt v. Maine Dep't of Educ.*, 386 F.3d 344, 355 (1st Cir. 2004) (rejecting the argument that *Locke* "restrict[s] its teachings to the context of funding instruction for those training to enter religious ministries" and therefore upholding a program providing aid ***only*** to families with students in non-religious private schools) *with Colorado Christian*, 534 F.3d at 1254-55 (holding that *Locke* does not apply to study of secular subjects, even at "pervasively sectarian" institutions).

The present case picks up where *Witters* and *Locke* left off: a non-ministerial school-choice measure that is unquestionably permitted under the Establishment Clause has been stricken by a State supreme court.

There is now no risk of "leapfrogging" the State in order to reach a question of federal constitutionality.

For its part, the Colorado Supreme Court gleans an accurate but irrelevant lesson from *Locke*. The court below cites *Locke*'s axiom that "a State [c]ould deal differently with religious education for the ministry" than does the federal government without evincing "hostility toward religion." *Locke*, 540 U.S. at 721 (cited at Colo. App. 33). This citation captures an important relationship between the States and the federal government, but it is irrelevant to the current case. No one has alleged that Colorado's newly enshrined treatment of religion is wrongful because it differs from the policy of the federal government. Rather, it is wrongful because it violates the Free Exercise, Establishment and Equal Protection Clauses that bind ***both*** federal and state governments. Additionally, the evidence of hostility toward religion underlying Colorado's Blaine Amendment is free-standing and depends in no way on the differences between Colorado's policy and that of the United States. *See infra* Part III.

The Colorado Supreme Court is correct that States retain latitude to adopt more strict establishment clauses than the one contained in the First Amendment to the United States Constitution. This is settled law. *Witters*, 481 U.S. at 489. Even the States that have correctly interpreted their constitutions to comply with the First and Fourteenth Amendments observe that their "religious liberty protections . . . were not intended merely to mirror the federal First Amendment." *Meredith*, 984 N.W.2d at 1225 (quotation omitted). But this recognition does not

obviate the corollary principle that a statute permissible under state law cannot stand if it violates rights guaranteed by the federal Constitution. *Peter*, 155 F.3d at 997. The present case does not require the Court to trace the precise boundaries of what activity the Establishment Clause permits but States remain free to restrict. For present purposes, it is sufficient to note that States cannot prevent individuals from selecting some schools while steering them toward others that are identical in every respect except for their religious affiliation.

III. A Record of Bigotry in Text and Purpose, Combined with Involuntary Adoption, Confirms that State Blaine Amendments Do Not Deserve the Shield of Federalism.

Nineteenth-century America experienced a substantial influx of Catholic immigrants resulting in a rise of nativist and anti-Catholic sentiment. That sentiment produced a wave of state constitutional provisions precluding the expenditure of public monies for the perceived purpose of aiding sectarian institutions. The Court should grant the instant Petitions in order to face this unsettling history and address its persistent effects.

1. States' Blaine Amendments were "born of bigotry." *Mitchell v. Helms*, 530 U.S. 793, 829 (2000) (plurality). Petitioner Douglas County School District has summarized the events leading to Colorado's adoption of Article IX, Section 7. Douglas Cnty. Pet. at 5-11. As explained there, the period between 1830 and 1876, was marked by an ugly rise of nativism and profoundly anti-Catholic views among those Americans who believed the papacy represented the "Old World"

and a threat to the country's "New" system of individuality and democracy.

This period culminated in an attempt by some members of Congress to adopt the Blaine Amendment to the federal Constitution, which was intended to exclude Catholic schools and institutions from public funding sources. Although the federal effort ultimately failed, the campaign shifted to the States, a majority of which adopted provisions patterned on their failed federal parent.

Colorado joined the first wave of 14 States to adopt explicitly discriminatory constitutional language for the purpose of preserving a "nonsectarian" (*i.e.*, Protestant) public school system, and forbidding public funding for any "sectarian" (*i.e.*, Catholic) schools. *Id.* at 8-11. While many States rode the wave of anti-Catholic sentiment and adopted similar provisions, "[n]ot all states had a choice as to whether anti-Catholicism would become a permanent part of their constitutional fabric." Robert William Gall, *The Past Should Not Shackle the Present: The Revival of A Legacy of Religious Bigotry by Opponents of School Choice*, 59 N.Y.U. Ann. Surv. Am. L. 413, 423-24 (2003). In these cases, "Congress ***forced*** new states . . . to include versions of the Blaine Amendment in their constitutions in order to gain admission into the Union." *Id.* (emphasis added).[4]

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[4] As noted by Petitioner Douglas County, still more States feared that the federal government would not admit them without a Blaine Amendment, even if the requirement did not appear in their enabling acts. *See* Douglas Cnty. Sch. Dist. Pet. for Writ of *Certiorari* at 9 (discussing Colorado's constitutional convention).

New States forced to swallow Blaine-like provisions as a condition of statehood include Arizona, Idaho, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Washington, and Wyoming. Thus, the shield of federalism offers no defense for these provisions against the First and Fourteenth Amendments—or against this Court's scrutiny pursuant to the same. Mindful of this history, the Supreme Court of Arizona has defanged that State's Blaine Amendment in an exemplary consideration of the provision's historical context:

> The Blaine amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing "Catholic menace." . . . We would be hard pressed to divorce the amendment's language from the insidious discriminatory intent that prompted it.

Kotterman, 972 P.2d at 624 (1999) (internal quotation marks and citations omitted). Whether added voluntarily (as in Colorado) or under duress (as in the States listed above), the Blaine Amendments cannot shed their discriminatory purpose and masquerade as neutral provisions that emerged fully formed in the modern era. This Court should not indulge such a belittling myth.

2. Beyond the bigoted purpose and history underpinning Colorado's Article IX, Section 7 and similar provisions in other States, the language of these no-funding provisions is facially discriminatory.

The key feature of state Blaine Amendments was the word "sectarian"—key because of the widespread understanding that the term held a particular meaning that accomplished the provisions' underlying purpose. Specifically, "sectarian" was widely understood to be synonymous with "Catholic" at the time Representative Blaine drafted his amendment—the same period in which Colorado adopted Section 7. The interchangeability of "sectarian" and "Catholic" persisted through the period in which Congress mandated that all new States adopt similar provisions.

Members of this Court have already acknowledged what the Colorado Supreme Court ignored: "it was an open secret [in the 1870s] that 'sectarian' was code for 'Catholic.'" *Mitchell*, 530 U.S. at 828 (Thomas, J., plurality); *see also Zelman v. Simmons-Harris*, 536 U.S. 639, 721 (2002) (Breyer, J., dissenting) ("But the 'Protestant position' on this matter, scholars report, was that public schools must be 'nonsectarian' (which was usually understood to allow Bible reading and other Protestant observances) and public money must not support 'sectarian' schools (which in practical terms meant Catholic)") (internal quotation marks and citation omitted).

Scholars, indeed, have widely reported on the clarity of the text and its original meaning. *See, e.g.,* Gall, *supra*, 59 N.Y.U. Ann. Surv. Am. L. at 419 ("[Horace] Mann plainly ascribe[d] different meanings to the words "religious" and "sectarian," which are typically used interchangeably today. But when Mann and others in the common school movement called for the exclusion of sectarian instruction from public schools, they were actually referring to the exclusion of

all religions except mainstream Protestantism. By definition, mainstream Protestantism, the religion of the majority, was "non-sectarian."); Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493, 503-04 (2003) ("So entrenched was this vague Protestant ethos that educators like Mann could claim that the common schools' religious content was not "sectarian," insofar as the curriculum excluded doctrines "peculiar to specific denominations but not common to all." Only in this narrow liberal Protestant sense could American public schools in the mid-1800s be fairly characterized as "religious but nonsectarian.")

In construing Section 7, the court below bizarrely consulted only the most modern legal dictionary rather than appropriately attempting to discern the original meaning of the plain text. Colo. App. 24 (citing Black's Law Dictionary (10th ed. 2014) for the proposition that "sectarian" means generically "religious"); *see also id.* at 26 (rejecting, on the same contemporary authority, the historical fact that "'sectarian' is actually code for 'Catholic.'"). This ahistorical white-washing contravenes the precedents of this Court and the most basic canons of interpretation. *See, e.g., Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 465-66 (2001) (looking to various then-contemporary dictionaries to aid in interpreting statutory amendments enacted across several decades).

Ascertaining the plain meaning of the provision at issue by disregarding entirely its meaning at the time of adoption, and instead referencing a modern dictionary, is anachronistic and works a profound injustice. When interpreted according to the canons

this Court has endorsed, Section 7's language is plainly discriminatory. It is therefore anathema to basic First and Fourteenth Amendment principles and warrants the strictest scrutiny. *See infra* Part I.

3. As previously noted, ten States, including *Amici* Arizona and Utah, had no choice in whether to enshrine anti-Catholic, anti-minority animus in their constitutions. Rather, the federal government mandated inclusion of Blaine-like language via these States' enabling acts. *See, e.g.,* Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676 (1889) (enabling legislation for South Dakota, North Dakota, Montana and Washington); Act of July 3, 1890, ch. 656, § 8, 26 Stat. 215 (1890) (enabling legislation for Idaho); Act of June 16, 1906, ch. 3335, 34 Stat. 267, 270 (enabling act for Oklahoma); Act of June 20, 1910, ch. 310, § 26, 36 Stat. 557 (1910) (enabling act for New Mexico and Arizona).

In other words, the federal government coerced the newest members of the Union to adopt a constitutional mandate for discrimination. *See Locke*, 540 U.S. at 723 n.7 (noting Blaine Amendments were linked with anti-Catholicism and that Washington State's enabling act required adoption of that State's Blaine Amendment). These conditions placed on statehood cannot now be recharacterized as articulations of the States' interests.

Further, this history is precisely the opposite of the federalism principles that might otherwise counsel against this Court's involvement. Federal coercion of this sort is not consistent with the "laboratories of democracy," which this Court prefers to leave undisturbed. *See, e.g., Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652,

2673 (2015). To the contrary, States with Blaine Amendments are ***less*** capable of engaging in policy experimentation related to educational and social services. And the reason for their incapacity is a shackle imposed by the federal government as a condition of statehood. *See* Meir Katz, *The State of Blaine: A Closer Look at the Blaine Amendments and Their Modern Application*, 12 Engage: J. Federalist Soc'y Prac. Groups 111, 114 (2011) (discussing the problem of "shadow enforcement" whereby state and local legislative bodies decline to adopt new programs due to uncertainty regarding the reach of their State's Blaine Amendment).

Laboratories of democracy are a jewel of the American system when they allow States to experiment within the realm of constitutional protections. It is a perversion of this system to cite States' autonomy over their constitutions in order to justify curtailed experimentation in furtherance of discriminatory policies that forced their way into those constitutions not to protect religious liberty but on the hooves of hate and pointed at the goal of exclusion.

CONCLUSION

Amici request that this Court grant the Petitions for Writ of *Certiorari* in order to remove uncertainty, allow religious entities to provide services in the context of neutral public programs, and foster further experimentation in our state laboratories.

Respectfully submitted,

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