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

IN THE

Supreme Court of the United States

FLORENCE DOYLE, et al.,
Petitioners,

v.

TAXPAYERS FOR PUBLIC EDUCATION, et al.,
Respondents.

DOUGLAS COUNTY SCHOOL DISTRICT, et al.,
Petitioners,

v.

TAXPAYERS FOR PUBLIC EDUCATION, et al.,
Respondents.

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

v.

TAXPAYERS FOR PUBLIC EDUCATION, et al.,
Respondents.

On Petitions for a Writ of Certiorari to the Supreme Court of Colorado

SUPPLEMENTAL BRIEF OF RESPONDENTS

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SUPPLEMENTAL BRIEF

The Court's decision to grant certiorari in *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, No. 15-577, should not affect the Court's disposition of the petitions for certiorari in this case.

Petitioners' request that their case be heard "in tandem" with *Trinity Lutheran*, County Supp. at 1, should be rejected for all the reasons set forth in the brief in opposition. The grant of certiorari in *Trinity Lutheran* does not sweep away the numerous and insurmountable vehicle problems in this case. Critically, the decision below simply does not present the question whether a state may "discriminate" against religious schools by excluding them from a "generally available" government benefit. County Pet. i; State Pet. i; Doyle Pet. i. The decision below enjoined the voucher program for religious and non-religious schools alike and thereby treated secular and religious private schools equally.

Moreover, *Trinity Lutheran* does not involve state funding used for religious instruction, which was the subject of *Locke v. Davey*, 540 U.S. 712 (2004). There, the Court held that the Free Exercise Clause does not compel states to subsidize religious instruction, and the Colorado Supreme Court faithfully applied that precedent below. In *Locke*, the Court doubted that declining to fund religious studies could even "be called" "disfavor of religion" because failure to fund religious education "does not require students to choose between their religious beliefs and receiving a government benefit"—in this case, a free public education. 540 U.S. at 720–21.

Nor should the Court hold the petitions pending resolution of *Trinity Lutheran*. A hold is warranted

only if disposition of a "pending case raising identical or similar issues" would "aid or control the determination of the matter." S. Shapiro et al., Supreme Court Practice 340 (10th ed. 2013). The question presented in *Trinity Lutheran* is "[w]hether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern." *Trinity Lutheran* Pet. i. That question is inapplicable for three reasons.

First, no church is "excluded" from the school voucher program in Colorado; the entire program is enjoined, with respect to religious and non-religious schools alike. Br. in Opp. 26–27. Unlike in Missouri, *no* participant is receiving the disputed state aid in Colorado. Second, the Colorado program involved state funding specifically for religious instruction, while the *Trinity Lutheran* program involved state funding of a scrap tire program to resurface playgrounds. Most of the participating schools in Colorado had curricula thoroughly infused with religion and religious doctrine, *id.* at 7, and this Court held in *Locke* that the Constitution permits states to exclude religious instruction from otherwise secular educational aid programs.* Indeed, the *Trinity Lutheran* petitioners argued that playground resurfacing is distinct from religious instruction and that playground resurfacing is not an "essentially religious endeavor." *Trinity Lutheran* Pet. 23. Third, the school voucher program in Colorado runs

* Article IX, Section 7 of the Colorado Constitution specifically "forbid[s] the State from using public money to fund *religious schools*." State Pet. App. 24 (plurality op.) (emphasis added).

headlong into the Establishment Clause because high-school students without special needs have no non-religious school options under the program. Br. in Opp. 29. The voucher program thus denied "genuine opportunities . . . to select secular educational options" for all students. *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002). As a result, even if petitioners were to prevail on the question presented in *Trinity Lutheran*, that disposition would have no bearing on this case.

Petitioners acknowledge the "critical difference between the cases." Doyle Supp. at 1; *see also* State Supp. at 2 (describing the "distinct" and "potentially dispositive" differences). One set of petitioners candidly admits that this case turns on a "distinct constitutional test" not implicated in *Trinity Lutheran*, and that "[r]esolution of *Trinity Lutheran* and the present case will therefore likely involve consideration of different lines of cases, different legal tests, and different governmental interests." Doyle Supp. at 2. These salient differences weigh decisively against holding the petitions pending disposition of another case that will not aid petitioners' cause in any event.

The petitions should be denied.

Respectfully submitted,

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