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

IN THE
Supreme Court of the United States

FLORENCE AND DERRICK DOYLE, *et al.*,
Petitioners,
DOUGLAS COUNTY SCHOOL DISTRICT, *et al.*,
Petitioners,
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 *AMICUS CURIAE* UNITED STATES SENATOR CORY GARDNER IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Curiae Cory Gardner is a United States Senator from Colorado. A fifth-generation Coloradan, Senator Gardner previously represented Colorado's 4th Congressional District in the United States House of Representatives, and before that he served in the Colorado House of Representatives.

Senator Gardner submits this *amicus curiae* brief because he is concerned that Article IX, § 7 of the Colorado Constitution—his state's so-called "Blaine Amendment"—infringes the rights of Coloradans to the free exercise of their religious faith in choosing, through the Douglas County School District's religiously neutral Choice Scholarship Program, to send their children to religiously affiliated schools rather than non-religious private schools.

More broadly, in his service in the United States Congress and Colorado legislature, Senator Gardner has staunchly advocated school-choice reforms at the federal and state level. For example, in the Senate, he voted to allow states, under the Elementary and Secondary Education Act of 1965 (ESEA), to let federal funds for the education of disadvantaged children follow them to the accredited or otherwise

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[1] No counsel for a 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* or his counsel made a monetary contribution to its preparation or submission. Letters from the parties consenting to the filing of this brief are on file with the clerk.

state-approved public school, private school, or supplemental educational services program their parents selected for them.

As well, in the U.S. House of Representatives, then-Representative Gardner voted for the Scholarships for Opportunity and Results (SOAR) Act, which authorized the Secretary of Education to award five-year grants to nonprofit organizations to carry out programs providing expanded school-choice opportunities to students from low-income families in the District of Columbia. He also co-sponsored the Children's Hope Act of 2013, which would have allowed a tax credit for charitable contributions to an education investment organization that provided grants to students for expenses of elementary and secondary education at the public or private school chosen by their parents. Senator Gardner is concerned that state laws restricting parents from choosing religiously affiliated schools will result in unequal and unjust implementation of federal programs, and make Congress complicit in discrimination against religious faiths and institutions.

SUMMARY OF ARGUMENT

This Court should grant certiorari to decide the pressing question, raised nationally, whether the First Amendment and the Equal Protection Clause of the United States Constitution protect the right of parents to choose religious schools for their children as a part of generally available and religiously neutral student-aid programs. When the government decides to achieve its objectives through, or otherwise permits, a chorus of private voices, it is

contrary to fundamental American principles to exclude otherwise harmonious voices solely because they have a religious intonation.

The exclusion of *all* religious faiths, like the singling out of a particular faith, is at best irrational, and at worst reflects an animus to religion that infringes upon the right to free exercise. In Colorado, private schools are as diverse as the state's people. Religiously affiliated and non-religious schools are roughly equal in number, and each category itself reflects a wide variety of philosophical or pedagogical orientations from which parents may choose. Colorado offers religious schools affiliated with numerous Catholic, Protestant, and other Christian denominations, as well as the Buddhist, Jewish, Islamic, and other faiths. No one could reasonably view the state's financial support for a parent's selection of any particular religious school, from among competing religious and non-religious options, as an "establishment" of any religion or even all religions.

Congress's experience with educational reform and funding has been to support attendance at all otherwise-eligible private schools equally, without regard to whether they are religiously affiliated or non-religious. The most obvious parallel to Douglas County's program is the D.C. Opportunity Scholarship Program, which provides scholarships to students in low-income families in Washington, D.C., to attend a participating private school chosen by their parents. Religious and non-religious schools participate in this program on equal footing. Beyond such voucher programs, Congress has through numerous statutes provided direct and indirect

support to education of students in private schools, without regard to whether the schools are religiously affiliated.

Particularly where Congress funds such programs through block grants to state or local government agencies, allowing states to exclude otherwise-eligible religious schools for the very reason of their religious affiliation would threaten the unequal administration of such programs from state to state. It would also raise the specter of Congress's complicity in discrimination against religion. This Court should grant certiorari to resolve these issues and prevent such an unwarranted imposition on the rights of parents to do what is best for their children.

ARGUMENT

Petitioners have addressed in their respective petitions the history and constitutional infirmity of Colorado's "Blaine Amendment," as well as the errors in the Colorado Supreme Court's controlling plurality opinion. Instead of repeating that analysis, Senator Gardner puts the issue in the context of not only the options Colorado families have and should be able to choose from in educating their children, but also Congress's own religiously neutral approach to voucher and other programs that support parental school choice.

I. GOVERNMENT SUPPORT FOR PRIVATE CHOICE SHOULD BE NEUTRAL AS TO CHOICES BETWEEN VARIED RELIGIOUS AND NON-RELIGIOUS OPTIONS.

This Court should grant certiorari to address the constitutionality of state laws that prevent parents from choosing otherwise-eligible options for the education of their children simply because those options have a religious affiliation or content. This Court has long recognized American families' constitutional rights to educate their children in the manner they see fit, including the due-process rights to choose a private school (including a private *religious* school), *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925), and to have children "acquire useful knowledge" in particular subjects, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). "*Pierce* and *Meyer*, had they been decided in recent times, may well have been grounded upon First Amendment principles protecting freedom of speech, belief, and religion." *Troxel v. Granville*, 530 U.S. 57, 95 (2000) (Kennedy, J., dissenting).

The government, in pursuing secular objectives, may choose to operate exclusively through its own agencies and instrumentalities, and accordingly may decide to deny funding to all private institutions that compete with the government programs. Federal, state, and local governments are not required by the United States Constitution to fund *any* private schools. But where the government opts to achieve its ends through mechanisms of *private choice* or *private intermediaries*, it should not be permitted to

exclude religious voices merely on the ground that they are religious. The public square in the United States is civil, but that square should be open on equal terms to religious and non-religious participants.

In this case, there can be no cavil that the Colorado Constitution singles out religiously affiliated institutions: Regardless of the government objective, it bars, among other things, any government funding "to help support or sustain any school … controlled by any church or sectarian denomination whatsoever." Colo. Const. art IX, § 7. It is troubling to think that a state law—particularly a provision of a state constitution—may reflect a historical animus to a particular religious faith, here Roman Catholicism. *See, e.g.*, Douglas County School District Pet., No. 15-557, at 5-11. But equally as troubling should be state laws that reflect an animus toward *all* religious faiths collectively. Even if one were to reinterpret "sectarian" in § 7 to mean "religious" rather than "Roman Catholic," this would not solve the problem created by the exclusion of schools with religious affiliations of any kind from participation in programs that, like Douglas County's, are open to non-religious private schools and are powered by parents' decisions about what best serves their children. Indeed, in *Rosenberger v. Rector and Visitors of the University of Virginia*, this Court rejected the argument that the university's exclusion of funding was defensible because it applied to student organizations engaged in *any* "religious activity"—"an entire class of views"—because "exclusion of several views … is just as

offensive to the First Amendment as the exclusion of only one." 515 U.S. 819, 831 (1995).

This is particularly true in the area of primary and secondary education. The United States has long had a tradition of private schools, and religiously affiliated private schools, that antedates public school systems. The choice of a private school over a government school is constitutionally protected. *E.g.*, *Pierce*, 268 U.S. at 535. At first, many or even most private schools in a particular area may have been "parochial" in that they were affiliated with the Roman Catholic Church. But now private schools across the country are both religious and non-religious, and both categories are themselves internally diverse. Moreover, the students they serve are diverse, and even a religious school may serve students of different faiths or no faith.

Colorado is illustrative. According to *Private School Review*, there are 547 private schools in Colorado; those schools serve 72,435 students, 26% of whom are minorities.[2] Fifty percent of the schools are religiously affiliated in some way.[3]

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[2] Private School Review, *Colorado Private Schools*, http://www.privateschoolreview.com/colorado. The Colorado Department of Education's website refers users to *Private School Review*'s "detailed information." Colorado Department of Education, *Colorado Non-Public Schools*, https://www.cde.state.co.us/choice/nonpublic_index.

[3] Private School Review, *Colorado Private Schools*, http://www.privateschoolreview.com/colorado.

Private-school options in Colorado are diverse along several axes, not just religious and non-religious. Private schools—like many public district and particularly charter schools—may focus on regular education, special education, vocational education, or alternative education. For example, alternative schools provide a nontraditional curriculum, and there are eighteen alternative private schools in Colorado serving 1,210 students, including preschools, elementary schools, and high schools.[4] In addition, some schools are all-girl or all-boy. Some offer specific pedagogical methods, such as classical or "Great Books" curricula; others are Montessori schools or Waldorf schools. Other institutions may offer magnet programs that have a specific focus on themes like Science, Technology, Engineering & Math (STEM), Fine & Performing Arts, or International Baccalaureate (IB).

In particular, religious schools are every bit as diverse as Americans, with respect not only to the religious faith but also to the intensity of the religious component of the education. Some private schools may be "religious" primarily in the sense that they are sponsored by or affiliated with a house of worship or other religious institution; others may offer a significant religious curriculum alongside state-required instruction in science, mathematics, English, social studies, and other secular subjects. Government should not, and as a practical matter

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[4] Private School Review, *Colorado Alternative Private Schools*, http://www.privateschoolreview.com/colorado/alternative-private-schools.

likely could not, attempt to grade the religiosity of a particular school—or a particular grade within a school—in order to separate the nominally religious from the substantively religious.

Colorado has 274 religiously affiliated private schools, serving 46,353 students.[5] Even if one uses affiliation as a surrogate for content, there can be no cognizable imprimatur of government on religion in the face of their diversity.

Colorado Private Schools by Religious Affiliation (number of schools)[6]

Assembly of God (4)
Baptist (26)
Buddhist (1)
Christian (76)
Church of Christ (3)
Episcopal (3)
Evangelical Lutheran Church in America (5)
Friends (1)
Islamic (1)
Jewish (12)

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[5] Private School Review, *Colorado Religiously Affiliated Schools*, http://www.privateschoolreview.com/colorado/religiously-affiliated-schools.

[6] *Id.*; *see also* Snow Lion School, http://www.snowlionschool.com ("Buddhist inspired contemplative school" in Boulder, Colorado).

Lutheran Church—Missouri Synod (34)
Mennonite (2)
Methodist (4)
Other Lutheran (2)
Pentecostal (3)
Presbyterian (6)
Roman Catholic (62)
Seventh-Day Adventist (22)
Wisconsin Evangelical Lutheran Synod (8)

Particularly when such a diversity of religious options is viewed together with the diverse non-religious options, there can be no rational concern that providing scholarships to *students* for use in attending the school chosen by their parents would work an "establishment of religion." In *Zelman v. Simmons-Harris,* 536 U.S. 639, 655-56 (2002), this Court held that the "constitutional fact" that triggers an Establishment Clause violation in a school-choice case "is whether [a State] is coercing parents into sending their children to religious schools." The inquiry in *Zelman* began "by evaluating *all* options Ohio provides Cleveland schoolchildren." *Id.*

Moreover, in *Rosenberger*, this Court rejected the argument that exclusion of otherwise-eligible religious perspectives was justified by a fear of violating the Establishment Clause: "More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." 515 U.S. at 839 (collecting citations).

Voucher programs like that adopted by the Douglas County School District are about parental choice, not coercion, and they are "neutral in design." No one is compelled to send their children to a private school, much less one that is religiously affiliated. Such programs seek to advance the secular goal of improving the quality of education by expanding educational options of *all* kinds and promoting competition among public schools, among private schools, and between public and private schools.

Indeed, the support for attendance at private schools of all kinds pales next to direct public funding of public schools, including the many charter schools that compete directly with private schools in offering innovative or specialized educational settings. For this reason, religious private schools have been known to re-establish themselves as non-religious charter schools in order to be publicly funded and tuition-free, and therefore more attractive to parents. For example, in Washington, D.C., over a two-year period from 2007 to 2009, nine Catholic schools that had participated in the D.C. Opportunity Scholarship Program converted to public charter schools, even though students would no longer be able to use program vouchers at those schools.[7]

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[7] U.S. Department of Education, *Evaluation of the DC Opportunity Scholarship Program: An Early Look at Applicants and Participating Schools Under the SOAR Act* 6 (Oct. 2014) [hereinafter *Evaluation of the DC OSP*]; *see also* Erica Schacter Schwartz, *Why Pay for Religious Schools When Charters Are*

(Continued …)

Petitioners have and will continue to address the historical context and purpose of Article IX, § 7 of the Colorado Constitution. Even if one sanitizes such "Blaine Amendments" to rid them of any odor of anti-Catholic bigotry, *see* Douglas County School District Pet., No. 15-557, at 5-11, one is left to wonder what could possibly justify excluding varied religious educational options from an already extensive menu of other private-school opportunities, if not an arbitrary and ultimately baseless concern about establishing religion. It appears that the basis for Colorado's constitutional provision is either invidious or irrational. In either case, it should not be allowed to limit parental choices as part of a generally available, religiously neutral program.

II. ANY EXCLUSION OF RELIGIOUSLY AFFILIATED SCHOOLS FROM A NEUTRAL SCHOOL-CHOICE PROGRAM WOULD CONFLICT WITH FEDERAL EXPERIENCE AND POLICY.

The exclusion of religiously affiliated schools as such from participation in publicly supported school-choice programs is not only offensive to American principles, but also inconsistent with Congress's own practice in supporting education in private-school settings without regard to whether the private schools are religious or non-religious. This is particularly the case where, like the Douglas County

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Free?, Wall St. J., June 12, 2009, at W13 ("This mix of charter and after-school tutorial is the model that presents a real challenge to private, religiously focused day schools.").

School District, Congress is endeavoring to empower *parents* by enhancing their ability to choose the school that they believe best suits their child and will result in the best possible educational outcome. The experience of the federal government has been to allow religious and non-religious private schools to compete fairly for students and the government support they bring with them, not to exclude religious schools categorically. If Congress can treat religious and non-religious private schools equally, there is no reason why states should be allowed to discriminate on the basis of religion.

A. The D.C. Opportunity Scholarship Program

Congress has treated religious and non-religious private schools equally—and inclusively—in establishing a federally funded school voucher program for the District of Columbia. The DC School Choice Incentive Act of 2003,[8] signed into law in 2004, created the D.C. Opportunity Scholarship Program ("OSP"), which has provided scholarships for children from low-income families in Washington, D.C., to help bear the cost of tuition and other fees for attending participating private schools of the family's choice.[9] The OSP was allowed to expire in 2009, but it was reauthorized for five years in 2011

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[8] Pub. L. No. 108-199, §§ 301-313, 118 Stat. 3 (2004).

[9] *See generally* U.S. Department of Education, *District of Columbia Opportunity Scholarship Program*, http://www.ed.gov/programs/dcchoice/index.html; *D.C. Opportunity Scholarship Program … Your Gateway to Their Future*, http://www.dcscholarships.org.

under the Scholarships for Opportunity and Results (SOAR) Act.[10] From 2004 to 2010, the OSP was administered by a nonprofit group, the Washington Scholarship Fund, and funded at $14 million per year; as reauthorized, the program was administered by the D.C. Children and Youth Investment Trust Corporation and funded at $20 million per year. In 2015, the Department of Education named Serving our Children as the new administrator of the program.[11]

The program at its inception permitted students to receive scholarships of up to $7,500 per year. As reauthorized in 2011, students could receive scholarships of up to $8,000 for kindergarten through eighth grade and $12,000 for grades nine through twelve.[12] Scholarship amounts for the 2015-2016 school year are up to $8,381 for kindergarten through eighth grade, and up to $12,572 for grades nine through twelve.[13]

The critical aspect of the OSP for present purposes is its religious neutrality. Just over half of all D.C. private schools participate in the OSP.[14] As the Department of Education has noted, "[t]he D.C.

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[10] Pub. L. No. 112-10, § 3001, 125 Stat. 199 (2011).

[11] *D.C. Opportunity Scholarship Program ... Your Gateway to Their Future,* http://www.dcscholarships.org/about/our_story.asp.

[12] *Evaluation of the DC OSP*, *supra*, at 2.

[13] *D.C. Opportunity Scholarship Program … Your Gateway to Their Future*, http://www.dcscholarships.org.

[14] *Evaluation of the DC OSP*, *supra*, at vi.

private school sector is diverse, with schools that vary in their selectivity, target populations, affiliation, and other characteristics."[15] While the balance of religious and non-religious participating schools has varied over time, around 64% of participating schools now are religiously affiliated.[16] Under the OSP, as under the Douglas County program, the parents drive the use of religiously affiliated schools, and the government remains entirely neutral.

B. Other Federally Funded Educational Programs

The D.C. school-voucher program, although directly analogous to the Douglas County program, is far from the only demonstration of Congress's religiously neutral approach to education funding. Congress has similarly provided other support for education in private religious schools on an equal footing with private non-religious schools. A couple of examples illustrate Congress's broader approach of neutrality.

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[15] *Evaluation of the DC OSP*, *supra*, at viii.

[16] *Evaluation of the DC OSP*, *supra*, at viii, 10. This number has no legal significance. *See, e.g.*, *Zelman*, 536 U.S. at 657 ("attribut[ing] constitutional significance" to a high percentage of participating religious schools "would lead to the absurd result that a neutral school-choice program might be permissible" in some areas or states but not others).

The No Child Left Behind Act. The Elementary and Secondary Education Act (ESEA), originally passed in 1965, as amended and reauthorized by the No Child Left Behind Act of 2001 (NCLB),[17] provides benefits and services to students, teachers, and other education personnel in both religiously affiliated and non-religious private schools. Private schools themselves—religious or non-religious—receive no direct aid from these programs; like the OSP, the benefits are "considered assistance to students and teachers rather than private schools themselves."[18]

Under the Uniform Provisions for Participation by Private School Children and Teachers,[19] local education agencies or other entities that receive federal financial assistance must provide services to eligible private-school students and teachers comparable to the services and other benefits provided to participating public-school students and teachers.[20] Programs in the NCLB requiring such

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[17] Pub. L. No. 107-110, 115 Stat. 145 (2002).

[18] U.S. Department of Education, Office of Innovation and Improvement, Office of Non-Public Education, *The No Child Left Behind Act of 2001: Benefits to Private School Students and Teachers* 1 (rev. July 2007) [hereinafter *Benefits to Private School Students*].

[19] *See* 20 U.S.C. § 7881 (2002); U.S. Department of Education, *Uniform Provisions*, http://www2.ed.gov/policy/elsec/leg/esea02/pg111.html.

[20] *Benefits to Private School Students*, *supra*, at 1. Certain programs contain their own, somewhat-differing provisions requiring the equitable participation of private-school students and teachers. *Id.*

"equitable participation" by private schools include Improving Basic Programs Operated by LEAs; Reading First; Even Start Family Literacy; Migrant Education; Teacher and Principal Training and Recruiting Fund; Mathematics and Science Partnerships; Enhancing Education Through Technology; English Language Acquisition, Language Enhancement & Academic Achievement; Safe and Drug-Free Schools and Communities; 21st Century Community Learning Centers; Innovative Programs; Gifted and Talented Students; and Flexibility and Accountabilities.[21]

In addition to these programs subject to the ESEA's equitable-participation requirements, other Department of Education programs allow private schools and other institutions, religiously affiliated and non-religious, to receive funds for providing certain services. For example, "Title I allows community and other public and private institutions, including faith-based organizations and private schools, to be providers of supplemental educational services (such as after-school tutoring or academic summer camps) for eligible students attending public schools that are in need of improvement …."[22] Under

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[21] *Benefits to Private School Students*, *supra*, at 3-8; *see also* U.S. Department of Education Office of Non-Public Education, *ONPE General Issues Frequently Asked Questions Related to Nonpublic Schools*, No. 4 [hereinafter *ONPE General Issues*], http://www2.ed.gov/about/offices/list/oii/nonpublic/faqgeneral.html?src=preview.

[22] *Benefits to Private School Students*, *supra*, at 9; *see* U.S. Department of Education, *Become a Supplemental Educational*

(Continued …)

the NCLB, "[m]any types of organizations are eligible to be supplemental service providers, including faith-based organizations, for-profit companies, school districts, private schools, charter schools, and other community groups."[23]

Similarly, "private schools, including religious ones," are eligible to apply alongside other "[f]aith-based and community organizations" for some grants under certain programs, funded by the Department of Education, that "have a specific focus and address specific needs and concerns."[24] Examples of such programs include the Carol M. White Physical Education Program,[25] Parental Information and Resource Centers,[26] and the Upward Bound Program.[27] Program funds are granted to state or local public authorities—usually a local education agency or public school district, which are in turn responsible for serving eligible students, teachers, and other education personnel within their

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Services (SES) Provider, http://www.ed.gov/nclb/choice/help/ses/privschools.html.

[23] U.S. Department of Education, *Helping Families by Supporting and Expanding School Choice: The No Child Left Behind Act Increases Parents' Choices*, http://www2.ed.gov/nclb/choice/schools/choicefacts.html; *see also ONPE General Issues*, *supra*, No. 8.

[24] *Benefits to Private School Students*, *supra*, at 9-10 (listing programs).

[25] *See* http://www.ed.gov/programs/whitephysed/index.html.

[26] *See* http://www.ed.gov/programs/pirc/index.html.

[27] *See* http:/www.ed.gov/programs/trioupbound/index.html.

boundaries, whether they attend public or private school. The specifics vary by program—including the grant formula, requirements, and procedures—but the public authority's duty to serve all eligible students and teachers within its jurisdiction—in religious and non-religious private schools alike—does not change.

The Individuals with Disabilities Act (IDEA). Congress also has provided for aid to students in private religious and non-religious schools under the Individuals with Disabilities Education Act (IDEA).[28] Under the IDEA, a local education agency is responsible for locating, identifying and evaluating all children with disabilities who are enrolled by their parents in private elementary and secondary schools, including religious schools, located within the agency's jurisdiction.[29]

A local education agency may use federal funds to make public-school personnel available in non-public facilities to provide equitable services for private-school children with disabilities if necessary and the private school does not normally provide those services. The agency may also use those funds to pay for a private-school employee to provide those

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[28] U.S. Department of Education Office of Special Education and Rehabilitative Services, *Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools* (rev. Apr. 2011) [hereinafter *Questions and Answers*]. *See generally* 34 C.F.R. §§ 300.130 to -144.

[29] 34 C.F.R. § 300.131; *see* 34 C.F.R. §§ 300.13 (defining "elementary school"), 300.36 (defining "secondary school"); *Questions and Answers*, *supra*, at 12, Question B-2.

services if the employee does so outside of the employee's regular hours of duty and under public supervision and control.[30] Indeed, the agency may use federal funds to provide not only direct services to the eligible children, but also *indirect services*, including "training for private school teachers and other private school personnel," so long as the special education and related services themselves are "secular, neutral, and nonideological."[31] The key aspect of all of these programs is that non-religious and religious private schools participate equally; no school is excluded simply because it is religiously affiliated.

Allowing states to arbitrarily exclude religious schools from participation in neutral programs would be contrary to what Congress has been doing for years. In particular, Congress funds many programs through block grants, "a form of grant-in-aid that the federal government uses to provide state and local governments a specified amount of funding to assist them in addressing broad purposes …. Although legislation generally details the program's parameters, state and local governments are typically provided greater flexibility in the use of the funds …."[32] If certain states are allowed to exclude

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[30] *Questions and Answers*, *supra*, at 18-19, Question C-2; *see* 34 C.F.R. § 300.142(b).

[31] *Questions and Answers*, *supra*, at 21, Question D-4; *see* 34 C.F.R. § 300.138(c)(2).

[32] Robert J. Dilger & Eugene Boyd, *Block Grants: Perspectives and Controversies* 1 (Congressional Research Service July 15, 2014).

religious schools from parental options under Blaine Amendments or similar provisions of state law, Senators and Representatives will have no way to ensure that federal programs will be administered equally and fairly in the states they represent. Congress would have to make such grants with the knowledge that, at least in Colorado and similarly situated states, parents would be denied the ability to use federally funded support in a sizeable portion (or even most) of the private schools in their area, simply because the schools have religious affiliations. Yet congressional efforts to address that problem at the federal level may defeat the federalism-related advantages of block-grant programs.

This problem is not limited to schools. Congress may seek to further its objectives by funding state and local governments' contracts with a wide variety of private-sector entities, be they social-service organizations or otherwise. Colorado's constitutional provision applies to more than "church" or "sectarian" schools, and also bars any government payment "in aid of any church or sectarian society," or to "help support or sustain any … other literary or scientific institution, controlled by any church or sectarian denomination whatsoever," or "for any sectarian purpose." Colo. Const. art. IX, § 7. Choices would not be made on the basis of which providers are the most efficient or most effective, but instead this provision would categorically exclude religiously affiliated entities solely because of their faith. Congress could not proceed with block funding without seeming to make itself complicit in state-sponsored religious discrimination.

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In Justice Brennan's words, "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Parents do not need or want the state's encouragement to choose a religious option. Nor are they the passive victims of others' choices—much less the choices of any state actors—but rather they are the engine of choice by the students from among a wealth of religious and non-religious public and private options.

Colorado's constitution does not preclude aid to parents to enable their children to attend private schools generally, or to attend private schools that foster any theory of ultimate meaning—as long as that ultimate meaning is not "sectarian" or, as the Colorado Supreme Court's plurality redefined that term, "religious." Decreeing that the *only* private schools that parents cannot send their children to using the government voucher are religiously affiliated schools conveys a direct message that religious associations are disfavored in the public square. As this Court observed in *Citizens United v. Federal Election Commission*, "Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers." 558 U.S. 310, 340 (2010). The Court noted, "The First Amendment protects speech and speaker, and the ideas that flow from each." *Id.* at 341. Singling out religiously affiliated schools for exclusion from government programs, as the Colorado Supreme Court's decision requires, "create[s] an inevitable,

pervasive, and serious risk of chilling protected speech" and expressive association. *Id.* at 327. First Amendment standards, however, "must give the benefit of any doubt to protecting rather than stifling speech." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (opinion of Roberts, C.J.) (citing *New York Times Co. v. Sullivan,* 376 U.S. 254, 269-70 (1964)).

The very genius of school-choice programs is that the government plays no role in regulating the viewpoints of the schools; the parents make the choice based on what they perceive to be in the best interests of their children. The ever-increasing variety of private schools in Colorado and elsewhere reflects what Tocqueville described as the American people's "infinite art" in "the science of association," which allows citizens, by combining together, to achieve common objectives beyond the reach of individuals without resort to the "political power" of government.[33] "[I]f it is a question of bringing to light a truth or developing a sentiment with the support of a great example, they associate."[34] As Tocqueville observed, Americans have "associations" of "a thousand … kinds: religious, grave, futile, very general and very particular, immense and very small," and, among other things, "in this manner they create … schools."[35]

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[33] Alexis de Tocqueville, *Democracy in America*, 2d bk., ch. 5, at 489, 491-92 (Harvey C. Mansfield & Delba Winthrop eds. 2000).

[34] *Id.* at 489.

[35] *Id.*

Both Congress and the Douglas County School District have respected these First Amendment principles and other foundational characteristics of the American people in fashioning school-choice programs that protect such associational freedom—particularly in the intellectual, expressive realm of education. They have allowed parents to choose from among religious and non-religious private schools, in addition to public schools. This Court should not allow these programs and principles to be distorted and undermined by the Colorado Supreme Court's application of a state constitutional provision the history of which is checkered, and the consequence of which is invidious or entirely irrational.

CONCLUSION

The petitions for certiorari should be granted.

Respectfully submitted,

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