DISTRICT COURT,
CITY AND COUNTY OF DENVER, COLORADO
1437 Bannock Street, Room 256
Denver, CO 80202

Plaintiffs: JAMES LARUE, et al.,

v.

Defendants: COLORADO BOARD OF EDUCATION, et al.,

Intervenors: FLORENCE and DERRICK DOYLE, et al.

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Div.: 259

INTERVENORS' COMBINED RESPONSE BRIEF OPPOSING PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION

Intervenors Florence, Derrick, Alexandra, and Donovan Doyle; Diana, Mark, and Nathaniel Oakley; Jeanette Strohm-Anderson and Mark and Max Anderson; Timothy and Geraldine Lynott and Timothy Lynott Jr. (collectively, "Families"), through their attorneys, submit this Combined Response Brief Opposing Plaintiffs' Motions for Preliminary Injunction. They brief Plaintiffs' Article II, § 4, Article IX, § 7, and Article V, § 34, claims and incorporate herein by reference County and State Defendants' arguments regarding Plaintiffs' other claims.

I. INTRODUCTION

Nearly a century ago, the U.S. Supreme Court recognized the constitutional right of "parents and guardians to direct the . . . education of children under their control." *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925). Two years later, the Colorado Supreme Court also recognized the constitutional "right of parents to have their children taught where, when, how, what, and by whom they may judge best." *Vollmar v. Stanley*, 255 P. 610, 613 (Colo. 1927), *overruled on other grounds by Conrad v. City and Cnty. of Denver*, 656 P.2d 662 (Colo. 1982).

In adopting the Choice Scholarship Program, the Douglas County Board of Education sought to empower parents to exercise this pre-existing constitutional right to make the choices concerning their children's education. Upset that some parents have privately and independently chosen religious schools for their children, Plaintiffs now seek to deprive Douglas County families of their scholarships and of the educational opportunities the scholarships afford them.

Plaintiffs base their request primarily on interpretations of Article II, § 4, Article IX, § 7, and Article V, § 34, that the Colorado Supreme Court has flatly rejected. These provisions have been correctly interpreted by that Court as consistent with a parent's right to choose the school that is best for her child and with the government's discretion to empower parents to do so.

Plaintiffs' interpretation, on the other hand, is not only inconsistent with such parental rights and governmental discretion—it would violate religious protections in the U.S. Constitution.

This Court should accordingly deny the requested injunction, which, if issued, would have a devastating effect on the Families in this case and the nearly 500 other Douglas County families that have received scholarships under the Choice Scholarship Program. Many scholarship recipients, including several in the Families, have been enrolled, taking classes, and playing sports at their new schools for nearly *two months*. Moreover, the academic year begins for all of these children in a matter of weeks. Rather than seeking an injunction in March, when the Program was adopted, Plaintiffs slept on their rights for four months. Now, at the eleventh-hour, they want to upend the education of these children. This Court should not allow it.

II. STATEMENT OF FACTS

A. THE CHOICE SCHOLARSHIP PROGRAM

The Choice Scholarship Program (hereafter, "Program") is a local school choice program adopted by the Douglas County Board of Education ("Board") on March 15, 2011, to "provide greater educational choice for students and parents to meet individualized student needs." Policy JCB ¶ A.3. The Program operates in a straightforward manner. The Douglas County School District ("District") provides private school tuition scholarships for up to 500 eligible students. *Id.* ¶ F.1. To be eligible, a student must be a resident of the District and have attended a public school in the District for at least the prior year. *Id.* ¶ D.5. A student may use the scholarship to attend any private school that participates in the Program and has accepted the student. *Id.* ¶ D.2.

Private schools inside and outside the boundaries of the District may participate in the Program, provided they meet Conditions of Eligibility set forth in the policy governing the

Program. *Id.* ¶ E.1, .3. Critically, the Program is neutral with respect to religion, allowing secular and religious schools alike to participate, and allowing parents to freely choose the participating school to which they will send their child. It is only by the private, independent choice of parents that any scholarship money finds its way to any school, religious or secular.

Scholarships are capped at the lesser of: (a) the actual cost of tuition at the private school a family chooses; or (b) 75 percent of per pupil revenue allocated under state law. *Id.* ¶ C.6. For the 2011-12 school year, the upper limit is $4,575. Scholarship funds are distributed by the District in four checks over the course of the year. The checks are made out to the parents of the scholarship recipients and sent to the private schools they will attend. A parent must restrictively endorse the check to the school to pay for her child's tuition. *Id.* ¶ C.4.

B. THE FAMILIES

The Oakleys. Diana and Mark Oakley have three children: Nathaniel ("Nate"), who completed sixth grade at Eagle Ridge Elementary School ("Eagle Ridge"), a Douglas County public school, in June; Amber, who completed fourth grade at Eagle Ridge in June; and Joshua, who completed first grade at Eagle Ridge in June. Ex. A (Oakley Aff.) ¶ 2.

Amber and Joshua have done well at Eagle Ridge; Nate, who has Asperger's Syndrome, has not. Because of Asperger's, Nate is prone to melt downs, can be very disruptive in class, and has difficulty processing and interpreting his interactions with others. *Id.* ¶¶ 3-4.

Nate attended first through fourth grades at a public school in Oklahoma. Diana and Mark were very happy with the special education services and staff at the school, which included a paraprofessional in the classroom at all times. *Id.* ¶ 5.

In 2008, Diana and Mark moved their family back to Colorado and enrolled Nate at Eagle Ridge for fifth grade. They encountered problems immediately. The school's administration informed them that the school could not provide a paraprofessional for Nate, explaining variously that it could not afford one, that it was "not the way our district does it," and that giving Nate a paraprofessional "would make him dependent on someone else." Not surprisingly, Nate did not thrive during fifth grade, so Diana and Mark made the difficult decision to have him repeat the grade. Things did not improve for Nate the following year. *Id.* ¶¶ 6-8.

For sixth grade, Eagle Ridge provided a part-time paraprofessional to work with Nate. Toward the end of the year, Nate was assaulted on school grounds by a fellow student with a pair of nunchucks. This incident was the culmination of more than a year of ruthless bullying at Eagle Ridge. After the incident, the school's administration finally assigned Nate a dedicated paraprofessional for the last two months of the school year. If Nate were to remain in the public school system, however, he would attend Crest Hill Middle School ("Crest Hill") for seventh grade and would not have paraprofessional assistance. *Id.* ¶¶ 9-11.

Diana and Mark were consumed with worry about Nate's lack of progress, his mental wellbeing, and threats to his safety, so they were overjoyed when the Board adopted the Choice Scholarship Program in March 2011. They saw the Program as an opportunity to get Nate out of an environment in which he had not thrived and into one in which he would. They applied for a scholarship on May 2 and received one two-and-a-half weeks later. *Id.* ¶¶ 12-13.

Diana and Mark chose to use the scholarship to send Nate to Humanex Academy. Humanex is a small, non-religious private school in Englewood that focuses on children with special needs. Nate "shadowed" at Humanex for several days late in the 2010-2011 school year.

Diana and Mark were impressed with everything from the school's small size (approximately 50 students); to the fact that it only uses natural lighting (artificial lighting can cause problems for children with autistic spectrum disorders such as Asperger's); to its far quieter environment than Eagle Ridge and Crest Hill (persons with Asperger's can have extreme sensitivity to noise). Nate recently told Diana he is very excited to attend a "school that is quiet." *Id.* ¶¶ 14-15.

Diana and Mark enrolled Nate at Humanex on July 14 and were required to pay a non-refundable $750 admissions/testing fee at the time. Tuition at the school is $17,900, and Diana and Mark have had to take a line of credit to cover the $11,325 in tuition that is not covered by the $4,575 Choice scholarship that Nate received and the $2,000 in assistance that the family received from Humanex. Nate's first day of classes is August 15. If the Choice Scholarship Program is enjoined, however, Diana and Mark will not be able to send him to the school. They cannot afford the additional $4,575 to cover tuition that would otherwise be covered by Nate's scholarship. *Id.* ¶¶ 16-19.

Diana and Mark will not put Nate back into a public school setting, where he has suffered so consistently. Rather, they would be forced to home school Nate, which would entail substantial hardships for the family. Mark works in South Carolina and would be unavailable to assist in the schooling. Diana, who is a nurse, typically works Monday through Thursday, 7:00 a.m. to 6:00 p.m. Accordingly, she would have to teach Nate during the evenings and on weekends, detracting from time she ordinarily dedicates to all of her children: Amber, Joshua, and Nate. *Id.* ¶¶ 20-21.

While superior to the public school, homeschooling would be significantly disruptive to Nate. He wants to be in an appropriate classroom environment, and Diana and Mark are

confident that Humanex, which is uniquely equipped and staffed to work with children like Nate, is where he will thrive. The anxiety problems Nate already experiences will be severely aggravated if the Oakleys are forced to home school him instead. *Id.* ¶ 22.

The Lynotts. Timothy and Geraldine Lynott have three children: Timothy Jr., who completed eighth grade at Sagewood Middle School, a Douglas County public school, in May; Catherine, who completed fifth grade at Legacy Point Elementary, also a Douglas County public school, in May; and Chandler, a toddler. Ex. B (Lynott Aff.) ¶ 2.

Geraldine is a public school teacher. Nevertheless, she and Timothy would like Timothy Jr. to attend Regis Jesuit High School ("Regis"), a Catholic school in Aurora. They are attracted to the school's small class sizes and rigorous college-prep curriculum, which they believe is best suited for Timothy Jr. They are also drawn to Regis's religious character and would like the high school Timothy Jr. attends to embrace the values they embrace in their home. *Id.* ¶¶ 3-4.

Without financial assistance, however, Timothy and Geraldine were unable to afford tuition at Regis. Accordingly, on May 2, they applied for a scholarship through the Choice Scholarship Program. They received one two-and-a-half weeks later and enrolled Timothy Jr. at Regis at the end of May. *Id.* ¶¶ 5-7.

Timothy Jr. is already very integrated into Regis and its community. This summer, he took a daily, for-credit English course that ran from June 7 to July 15. He is also a member of Regis's freshman baseball and football teams. He began playing baseball for Regis in May, and he has been participating in summer camps and weight training with the football team since June 7. Timothy and Geraldine have paid fees for each of these activities, including $500 for baseball, $460 for football, and $240 for the summer class. *Id.* ¶ 9.

Tuition at Regis is $11,225. Timothy and Geraldine have been awarded $2,500 in financial assistance from the school, and Timothy Jr. is eligible for a $1,000 work study program. The family is responsible for the remaining $3,150 in tuition that is not covered by Timothy Jr.'s Choice scholarship and the financial and work study assistance the family will receive from Regis. *Id.* ¶ 11. Pursuant to the Choice Scholarship Program, the District sent a $1,143.75 check in the Lynotts' name to Regis on July 1 for the Lynotts' restrictive endorsement. The check represents the first of four quarterly scholarship payments for Timothy Jr. *Id.* ¶ 8.

The first day of school at Regis is August 9. However, Timothy and Geraldine do not know whether they will be able to keep Timothy Jr. at the school if the Program is enjoined. Even with the financial assistance they have received from Regis, affording the school's tuition will be extremely difficult or impossible without the Choice scholarship. They may therefore be forced to withdraw Timothy Jr. from Regis. *Id.* ¶¶ 10, 12.

Plaintiffs' requested injunction would harm the Lynotts on many levels. First, Timothy and Geraldine believe Regis is the best educational opportunity for Timothy Jr. and an injunction could take that opportunity away. Moreover, if Timothy Jr. were forced to transfer to another school, he could lose eligibility for part of the football and baseball seasons at his new school.[1] Finally, the Lynotts have already paid $1,200 to Regis. *Id.* ¶¶ 9, 13-14.

The Andersons. Jeanette and Mark Anderson have two children: Max, who completed second grade at Larkspur Elementary School ("Larkspur"), a Douglas County public school, in June; and Alex, who completed his sophomore year at Douglas County High School, also a public school, in June. Alex previously attended Larkspur. Ex. C (Anderson Aff.) ¶ 2.

[1] *See also* Constitution of the Colorado High School Activities Association § 1800.21, .22, *available at* http://www.chsaa.org/about/pdf/Handbook_2011.pdf (last visited July 22, 2011).

Mark and Jeanette have been very involved at Larkspur over the years. Jeanette has even served as president and vice president of the school's Parent Teacher Organization. Nevertheless, she and Mark are unhappy with aspects of Larkspur's curriculum, particularly "Everyday Mathematics," a controversial "reform" math approach. Accordingly, they applied for a Choice scholarship for Max on May 2 and, on May 18, learned he had received one. *Id.* ¶¶ 3-5.

Jeanette and Mark chose to use the scholarship to send Max to Woodlands Academy ("Woodlands"), a small, non-religious private school in Castle Rock. They are impressed with Woodlands' strong science and math curriculum, its small class size, and the passion of its teachers. Max spent time "shadowing" at Woodlands in April 2011. When Jeanette picked him up after the first day, he described his experience as "the best seven hours of my life" and the "best math class I ever had." Jeanette and Mark have already enrolled Max at Woodlands for the 2011-12 school year, and his first day of classes is August 22. Pursuant to the Choice Scholarship Program, the District sent a $1,143.75 check in their name to Woodlands on July 1 for their restrictive endorsement. The check represents the first of four quarterly scholarship payments for Max. *Id.* ¶¶ 6-11.

Tuition at Woodlands is a non-refundable $7,000, and the school also charges a non-refundable $1,500 supply fee. If the Program is enjoined, the Andersons will be substantially harmed. Paying $4,575 to cover tuition that would otherwise be covered by Max's scholarship will be a considerable burden for Jeanette and Mark and will require them to draw from savings, use credit, or forego putting money toward other financial obligations. *Id.* ¶¶ 12-13.

The Doyles. Florence and Derrick Doyle have three children: Dominick, who completed his sophomore year at Regis in June; and twins—Donovan and Alexandra—who

completed eighth grade at Sagewood Middle School, a Douglas County public school, in June. Ex. D (Doyle Aff.) ¶ 2.

Florence and Derrick are very happy with the education Dominick is receiving at Regis and wish to send Donovan and Alexandra there for high school. They are attracted to the school's small class sizes, challenging college-prep curriculum, strict discipline, and Jesuit approach to education. Most importantly, they would like their children, whom they have raised Catholic, to receive a spiritual foundation before going off to college. *Id.* ¶ 3.

Paying tuition for three children to attend Regis, however, would be a substantial burden for the Doyle family. Accordingly, Derrick and Florence applied for and received scholarships for Donovan and Alexandra through the Choice Scholarship Program. They have enrolled the children in Regis for the 2011-12 school year. *Id.* ¶¶ 4-5.

Donovan and Alexandra are already very integrated into Regis. Both took summer classes at the school this summer. Donovan took a daily, five-hour-long honors geometry class for credit; it ran from June 7 to July 15. Alexandra took a daily strength and conditioning class that ran from June 6 to July 15. Donovan is also a member of Regis's freshman football team. Since early June, he has participated in daily practice and strength training. *Id.* ¶ 7.

Pursuant to the Choice Scholarship Program, the District issued two checks in the Doyles' name, each in the amount of $1,143.75, and sent them to Regis on July 1 for their restrictive endorsement. These checks represent the first of four quarterly scholarship payments for Donovan and Alexandra. *Id.* ¶ 6.

If the Program is enjoined, the Doyles will be substantially harmed. Tuition at Regis is $11,225 per student, and they have three children attending the school. Florence and Derrick

would have to draw from family savings or use credit to cover the $9,150 that Donovan and Alexandra would otherwise receive from their scholarships. *Id.* ¶ 9.

III. ARGUMENT

Plaintiffs are not entitled to their requested eleventh-hour injunction, which, if issued, would substantially harm the Families and derail their educational plans for the upcoming school year. To secure an injunction, Plaintiffs would have to satisfy each of the following six criteria:

(1) a reasonable probability of success on the merits;
(2) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief;
(3) that there is no plain, speedy, and adequate remedy at law;
(4) that the granting of a preliminary injunction will not disserve the public interest;
(5) that the balance of equities favors the injunction; and
(6) the injunction will preserve the status quo pending a trial on the merits.

Rathke v. MacFarlane, 648 P.2d 648, 653-54 (Colo. 1982) (citations omitted). Moreover, because the requested injunction is mandatory in nature, in that it seeks to disrupt, rather than preserve, the status quo and would have the effect of granting all the relief they could obtain in a final hearing, Plaintiffs' burden is even higher: They must prove that their right to relief is "*clear and certain*." *Allen v. City and Cnty. of Denver*, 351 P.2d 390, 391 (Colo. 1960). They cannot meet this standard.

A. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS

The Colorado Supreme Court has long recognized the fundamental right of parents "to direct . . . [their] children's studies," *Zavilla v. Masse*, 147 P.2d 823, 825 (Colo. 1944) (internal quotation marks and citation omitted), including, specifically, "the right of parents to have their children taught where, when, how, what, and by whom they may judge best." *Vollmar,* 255 P. at

613. The U.S. Supreme Court also recognizes the right of parents to direct the education of their children, including the right to opt out of the public school system and pursue a private education. *Pierce*, 268 U.S. at 535. Not all parents, however, possess the financial means to pursue private alternatives to public schools.

By providing parents with financial assistance, the Choice Scholarship Program empowers them to exercise their pre-existing constitutional right to choose the schools they believe are best for their children. As the Board stated in the policy establishing the Program, the "Douglas County School District . . . recognizes that the interests of students and parents are paramount," and the Program aims "to provide greater educational choice for students and parents to meet individualized needs." Policy JCB ¶¶ A.1, .3. In that regard, the Program adds yet another alternative to the "numerous [existing] programs, including open enrollment, option schools, magnet schools, charter schools, on-line programs, home-education programs and partnerships, and contract schools," by which the District "maximize[s] school choice for students and parents to meet the individualized needs of each student." Policy JCB ¶ A.2.

Plaintiffs wish to deny Douglas County families this new educational alternative. In attempting to do so, they rely on fundamental misinterpretations of Article II, § 4, Article IX, § 7, and Article V, § 34 of the Colorado Constitution. Tellingly, they have brought no federal constitutional claims, and for good reason: In 2002, the U.S. Supreme Court rejected a federal constitutional challenge to an Ohio school choice program that is legally indistinguishable from Douglas County's. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). Plaintiffs' only hope of success, therefore, is to convince this Court to interpret the religion clauses in the Colorado Constitution far more restrictively than those in the federal Constitution.

This Court should decline Plaintiffs' invitation. First, the Colorado Supreme Court has already rejected Plaintiffs' interpretation of the relevant provisions, adopting instead an interpretation that respects the right of parents to make the decisions concerning their children's education. Second, the interpretation urged by Plaintiffs, if implemented, would actually violate the federal constitutional rights of Douglas County families.

1. The Choice Scholarship Program Does Not Violate Article II, § 4

The Choice Scholarship Program does not violate Article II, § 4, which provides, in relevant part, that "[n]o person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent." The language of this provision derives from similar state constitutional provisions, commonly referred to as "compelled support" clauses, which were aimed at preventing the establishment of an official state religion. Its origins trace to the 1776 constitution of Pennsylvania, the most religiously pluralistic of the original 13 colonies. *See* Richard D. Komer, *School Choice and State Constitutions' Religion Clauses*, 4 J. Sch. Choice 331 (2009). When, after the Revolution, states wished to disestablish, or prohibit the establishment of, state churches, they adopted provisions modeled on Pennsylvania's "compelled support" clause. *Id.* The Colorado Supreme Court recognized this history in 1927, explaining that Article II, § 4, "is aimed to prevent an established church." *Vollmar*, 255 P. at 615.

To that end, Article II, § 4, prohibits the common elements of an established religion, such as compelling someone to attend a church or worship service, or to financially support a church or ministry. *See* Philip Hamburger, *Separation of Church and State* 90 (2002). Such compelled forms of direct support for religion are a far cry from what is at issue here: a

religiously neutral scholarship program that provides education benefits to *families*, thereby enabling parents to freely and independently choose the schools—religious or secular—that are best for their children.

As noted above, in *Zelman v. Simmons-Harris*, the U.S. Supreme Court rejected a federal Establishment Clause challenge to an Ohio school choice program that is legally indistinguishable from the Choice Scholarship Program. Under the Ohio Pilot Scholarship Program, the state provided scholarships to low-income families with children in Cleveland public schools, and eligible families could use their scholarships to send their children to private, including religious, schools. *Zelman*, 536 U.S. at 653. A large majority of the private schools participating in the program were religious, and the overwhelming majority of scholarship students enrolled in these religious schools. *Id.* at 657-58. The choice opponents claimed the program therefore violated the Establishment Clause. The Court rejected the argument, emphasizing that the program: (1) was "neutral with respect to religion," providing assistance "directly to a broad class of individuals defined without reference to religion" and "permit[ting] the participation of *all* schools within the district, religious or nonreligious"; and (2) was a program of "true private choice," providing a benefit "to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice." *Id.* at 652, 653. A program that shares these features, the Court concluded, is perfectly permissible.

Interestingly—and dispositively, for this case—the Colorado Supreme Court had foreseen the *Zelman* analysis as early as 1982, when it upheld another financial aid program that empowered private choice in education. In *Americans United for Separation of Church and*

State Fund, Inc. v. State, 648 P.2d 1072 (1982), the Court considered an Article II, §4 (as well as Article IX, § 7, and Article V, § 34) challenge to the Colorado Student Incentive Grant Program, a financial assistance program for postsecondary students. The plaintiffs argued that, because students could use their grants to attend religious schools, the program "compel[led] Colorado taxpayers to support sectarian institutions" in violation of Article II, § 4. *Id.* at 1081. The Court rejected the claim.

Significantly, the Court began its analysis by emphasizing that Article II, § 4, "echoes the principle of constitutional *neutrality* underscoring the First Amendment." *Id.* at 1082 (emphasis added). The Court then discussed the nature of the grant program, viewing it "as a governmental attempt to alleviate some of the financial barriers confronting Colorado students in their quest for a higher educational experience." *Id.* at 1082. As such, the Court explained, the program was "designed for the benefit of the *student*, not the educational institution." *Id.* (emphasis added). Because of that fact, and because the program was "essentially neutral in character," the Court concluded that "it advances no religious cause and exacts no form of support for religious institutions." *Id.*

The same is true of the Choice Scholarship Program. It is "a governmental attempt to alleviate some of the financial barriers confronting [Douglas County] students in their quest for [an] . . . educational experience" that is best suited to their individual needs, and it was "designed for the benefit of the student, not the educational institution." *Id.* It is "neutral in character," allowing religious and secular schools alike to participate, and it "advances no religious cause and exacts no form of support for religious institutions." *Id. Americans United* controls, and the Program is perfectly permissible under Article II, § 4.

Plaintiffs try to distinguish *Americans United* on the basis that the grant program there prohibited students from choosing so-called "pervasively" sectarian schools, whereas the Choice Scholarship Program permits its beneficiaries to select schools that teach religious doctrines and even proselytize. *See* Larue Mot. Prelim. Inj. 17. That is a distinction without a difference. As *Americans United* itself explained, the legislature included the "pervasively sectarian" exclusion in the program "[i]n an attempt to conform to First Amendment doctrine developed by the United States Supreme Court" at the time. *Id.* at 1075. The U.S. Supreme Court has since abandoned the "pervasively sectarian" doctrine, not only clarifying that "pervasively sectarian" options may be included in an otherwise neutral student aid program, *see, e.g.*, *Locke v. Davey*, 540 U.S. 712, 724 (2004), but also strongly suggesting that *excluding* such options would itself be unconstitutional:

> [A] focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. . . . [T]he application of the 'pervasively sectarian' factor collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity.

Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality).[2] Moreover, in a case that Plaintiffs begrudgingly acknowledge only in a footnote, *see* Larue Mot. Prelim. Inj. 17 n.2, the Tenth Circuit recently held that Colorado's practice of excluding "pervasively sectarian" options from student aid programs did, in fact, violate the federal religion clauses. *Colorado Christian University*, 534 F.3d at 1269. Thus, Plaintiffs' attempt to distinguish *Americans United* is really an attempt to restore a discredited and rejected constitutional doctrine.

[2] Although the fifth vote, Justice O'Connor, "did not join the plurality opinion in *Mitchell*, her separate opinion also refused to employ the pervasively-sectarian distinction." *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1258 (10th Cir. 2008).

Presumably realizing that *Zelman*, *Americans United*, and *Colorado Christian University* foreclose their arguments, Plaintiffs invoke several inapposite cases from other states to support their misguided interpretation of Article II, § 4. They rely most prominently on *Chittenden Town School District v. Department of Education*, 738 A.2d 539 (Vt. 1999), a deeply flawed opinion concerning Vermont's "tuitioning" system for towns that lack a public school, but they fail to even acknowledge that the Wisconsin and Ohio Supreme Courts rejected "compelled support" challenges to the inclusion of religious schools in school choice programs virtually identical to Douglas County's. *See Simmons-Harris v. Goff*, 711 N.E.2d 203, 211-12 (Ohio 1999); *Jackson v. Benson*, 578 N.W.2d 602, 883 (Wis. 1998).

Taking a slightly different, but no more successful, tack, Plaintiffs argue that the Program violates Article II, § 4, for a separate reason: It will require students, they claim, to attend worship services against their will. This argument is a non-starter. No family is forced to participate in the Program, and any parent who is unwilling to have her child attend a participating school out of fear the child may be subjected to religious services or "indoctrination" remains free to select a different school or to decline to participate in the Program. Any participation in religious activities is the result of parental choice, not governmental compulsion. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 337 (1987) (holding that before a program will even be considered to have violated the Establishment Clause, it must be fair to say that "the *government itself* has advanced religion through its own activities and influence").

Moreover, the Choice Scholarship Program requires that participating religious schools "provide Choice Scholarship parents the option of having their child receive a waiver from any

required religious services at the Private School Partner." Policy JCB ¶ E.3.l. Plaintiffs complain that this requirement does not go far enough, but they do not cite a single case for the proposition that private schools, chosen freely and independently by parents, must provide such an opt-out at all. Presumably, that is because there are no such cases. To the extent Douglas County requires participating schools to provide an "opt-out," it is affording parents and children an array of choices above and beyond anything that is constitutionally required.

In short, the Choice Scholarship Program complies with Article II, § 4, which the Colorado Supreme Court has interpreted as consistent with the right of parents to select the schools, secular or religious, that are best for their children. Plaintiffs are therefore unlikely to prevail on their Article II, § 4, claim.

2. The Choice Scholarship Program Does Not Violate Article IX, § 7

Plaintiffs are equally unlikely to prevail on the merits of their Article IX, § 7, claim. As it did with Article II, § 4, *Americans United* interpreted this provision as consistent with the right of private choice in education. 648 P.2d at 1083-85. As discussed below, that decision controls this case. As also discussed below, it is critical to appreciate the history of Article IX, § 7, which, unlike Article II, § 4, was not a benign attempt to prevent state establishment of religion, but rather a "Blaine Amendment" rooted in anti-religious bigotry.

A proper interpretation of Article IX, section 7, should begin with its text:

> Neither the *general assembly*, nor any *county, city, town, township, school district or other public corporation*, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything *in aid of* any church or sectarian society, or *for* any sectarian purpose, or *to help support or sustain* any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever . . . .

(Emphasis added.)

Two things are evident from the italicized language. First, this provision is concerned with governmental actors. Second, it prohibits such actors from directly funding religious institutions. The Choice Scholarship Program implicates neither concern. Scholarship monies are directed to schools only by the free and independent choices of parents—not by governmental actors. And the Program makes no appropriation or payment "in aid of" any church or sectarian society, nor "to help support or sustain any school . . . controlled by any church or sectarian denomination." Rather, it aids and supports parents and children so that they can secure the best education for their individual needs. Under no common understanding of the provision's language can an educational aid program that permits private recipients to independently select from among a wide array of services providers, religious and secular, be construed as having been passed "in aid of," or "to help support or sustain," religious institutions.

The Colorado Supreme Court rejected Plaintiffs' strained reading of Article IX, § 7, in *Americans United*. The plaintiffs there claimed that the grant program at issue was "an appropriation to help support or sustain schools controlled by churches or sectarian denominations in violation of this constitutional provision." *Americans United*, 648 P.2d at 1083. In assessing that argument, the Court had to "determine whether the financial assistance provided under the statutory program amount[ed] to constitutionally significant aid to a sectarian educational institution." *Id.* The Court held that it did not, because the "aid [wa]s designed to assist the student, not the institution." *Id.* Any benefit that flowed to the institution, the Court explained, was "remote and incidental" and therefore "d[id] not constitute . . . aid to the

institution itself within the meaning of Article IX, section 7." *Id.* at 1083-84. The Court concluded its discussion of Article IX, § 7, with this significant observation:

> To withhold benefits from students otherwise satisfying the statutory criteria for eligibility would be tantamount to withholding a public benefit solely on the basis of an incidental religious affiliation which poses no threat whatever to the constitutionally mandated separation of church and state. This we decline to do.

Id. at 1085-86.

Under *Americans United*, the Choice Scholarship Program is perfectly permissible. As discussed above, the Program is designed to assist students and parents—not schools—to "meet the individualized needs of each student." Policy JCB ¶ A.2. Any benefit that may flow to a school is "remote and incidental"—a byproduct of the independent choice of parents—and therefore cannot be considered aid to the school itself. *Americans United*, 648 P.2d at 1083-84.

Plaintiffs nevertheless try to distinguish *Americans United* based on the Court's observation that, under the grant program, "financial assistance [wa]s available only to students attending institutions of higher education." *Id.* at 1084. This is a distinction without a difference. The case was decided at a time when the U.S. Supreme Court had not yet resolved whether a religiously neutral program of true private choice for elementary and secondary students would pass federal Establishment Clause muster. In a series of cases that began a year after *Americans United* and culminated in 2002 with *Zelman*, the Court answered that question with a resounding, "Yes!" *See Mueller v. Allen*, 463 U.S. 388 (1983) (upholding tax deductions for elementary and secondary education expenses, the vast majority of which were tuition payments to religious schools); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)

(upholding program providing interpreter services to student at a parochial high school); *Zelman*, 536 U.S. 639 (upholding Ohio Pilot Scholarship Program for elementary school students).

In fact, the Wisconsin Supreme Court relied on this line of cases in upholding the Milwaukee Parental Choice Program—a school choice scholarship program for elementary and secondary students in the Milwaukee public schools. In *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), choice opponents argued that the program violated Article I, § 18, of the Wisconsin Constitution, which prohibits "money . . . drawn from the treasury for the benefit of religious societies, or religious or theological seminaries." The Court appropriately "focus[ed] [its] inquiry on whether the aid provided by the . . . [program] is 'for the benefit of" such religious institutions." *Id.* at 621. According to the Court:

> [T]he language 'for the benefit of' in art. I, § 18 is not to be read as requiring that some shadow of incidental benefit to a church-related institution brings a state grant or contract to purchase within the prohibition of the section. . . . The crucial question, under art. I, § 18, as under the Establishment Clause, is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion.

Id. (internal quotation marks and citations omitted). In this light, the Court concluded that a "neutral educational assistance program[]" like Milwaukee's did not violate the state constitutional restriction on appropriations "for the benefit of" religious schools. *Id.*

Apart from its obvious consistency with the text of Article IX, § 7, there is another reason to follow the *Americans United* and *Jackson* approach: To do otherwise and construe the provision as urged by Plaintiffs would be to allow a vestige of anti-religious bigotry to deprive students of choice in education.

During the first half of the 19th century, when educators successfully advocated for the establishment of "common" or public schools open to all children of the community, they sought

to ensure that these schools would be "non-sectarian." Although, today, "non-sectarian" is understood as "non-religious," the term had a much different meaning in 19th century America. Public school advocates believed that moral education was an integral part of the schooling necessary to produce virtuous citizens and "that moral education should be based on the common elements of Christianity to which all Christian sects would agree or to which they would take no exception," including the "reading of the Bible as containing the common elements of Christian morals but reading it with no comment in order not to introduce sectarian biases." R. Freeman Butts, *The American Tradition in Religion and Education* 118 (1950). As a result, public schools were nondenominationally Protestant and therefore not regarded as "sectarian" because they avoided teaching doctrines unique to any particular sect of Protestants.

The creation of the early public school systems also coincided with increased immigration of non-Protestants into the United States, particularly large numbers of Catholics. Not surprisingly, Catholics objected to the compulsory education of their children in the Protestant public schools.[3] When their efforts to obtain better treatment within the schools failed, they organized their own schools and demanded equal funding for them. *See* Lloyd Jorgenson, *The State and the Non-Public School: 1825-1925*, at 72-110 (1987).

The matter came to a head in Colorado during the Constitutional Convention of 1876. Inclusion of Article IX, § 7, was among the most contentious issues of the Convention, and the debate reflected the contemporaneous effort by Congressman James G. Blaine of Maine to amend the federal constitution to include a provision similar to Article IX, § 7. *See* Joseph P.

[3] The Bible read in the public schools was invariably the Protestant King James Version rather than the Catholic Bible. *See, e.g., Vollmar*, 255 P. 610. Thus, cases involving objections to Bible reading at the time involved Catholic students, not atheists. *See, e.g., Donohoe v. Richards*, 38 Me. 379 (Me. 1854).

Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J. L. & Pub. Pol'y 657 (1998). At the same time that Congressman Blaine was responding to President Grant's call to protect the public schools from "sectarian" influences, Monsignor Joseph Machebeuf, the Catholic bishop of Denver, petitioned the delegates to incorporate a provision allowing the legislature to divide the school fund between public and private schools. *See* Dale Oesterle & Richard Collins, *The Colorado State Constitution: A Reference Guide* 211 (1988); Donald Wayne Hensel, *A History of the Colorado Constitution in the Nineteenth Century* 190-198 (1959) (doctoral thesis on file with Univ. of Colo.). Threats of Catholic opposition to ratification if his petition was not granted galvanized Protestant opposition to the petition, leading to dozens of counter-petitions, *see* Hensel, *supra*, at 193, and inclusion of Article IX, § 7.

The plurality opinion in *Mitchell v. Helms* summarized the history behind the "Blaine" movement as follows:

> Opposition to aid to "sectarian" schools acquired prominence in the 1870's with Congress's consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that "sectarian" was code for "Catholic." . . . . This doctrine, born of bigotry, should be buried now.

Mitchell, 530 U.S. at 828-29 (plurality). Other justices have also recognized the anti-Catholic nature of the movement. *See, e.g.*, *Zelman*, 536 U.S. at 719-21 (2003) (Breyer, J., dissenting).

Two conclusions can be drawn from this history. First, the language of Article IX, § 7, was adopted to prevent Catholics from obtaining direct funding for their parallel school system. In other words, the provision was intended to accomplish precisely what it says: to forbid treating Catholic ("sectarian") schools the same as public schools, which receive direct funding

from various public sources in Colorado. The provision says nothing about programs that fund students, rather than schools. Such programs were not at issue in 1876, and, accordingly, Article IX, § 7, simply does not address such programs.

Second, religious animosity played a significant role in the adoption of Article IX, § 7. To extend its reach to programs not contemplated during its enactment would be to extend the discriminatory animus attending its enactment to new areas, thereby perpetuating and expanding the anti-Catholic bias underlying it. Fortunately, *Americans United* interpreted Article IX, § 7, so as to avoid these dangers. This Court should follow that lead.

Plaintiffs are therefore unlikely to prevail on their Article IX, § 7, claim. Like the grant program upheld in *Americans United*, the Choice Scholarship Program provides no institutional assistance whatsoever. It simply pays educational costs for its student beneficiaries. No public authorities direct the payments to any religious school. The direction of the funds is the province of the students' parents, not the state or local authorities addressed in Article IX, § 7.

3. The Choice Scholarship Program Does Not Violate Article V, Section 34

Finally, Plaintiffs are unlikely to prevail on the merits of their claim under Article V, § 34, which provides:

> No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association.

As an initial matter, it is important to note that Article V, § 34, restricts the state legislature—not local school districts. "[A]rticle 5, in defining and limiting the powers of the legislature in the matter of appropriations, had in contemplation the disbursement of state funds only, and their disposition *by the state* in its corporate capacity . . . . [The article's provisions]

treat strictly of state matters, and the payment of money out of the state treasury." *In re House*, 46 P. 117, 118 (1896) (emphasis added). Thus, "even if this action by [Douglas County] could be considered an 'appropriation,' it was decided long ago that Article V, Section 34 . . . does not extend to municipalities." *Lyman v. Town of Bow Mar*, 533 P.2d 1129, 1136 (Colo. 1975).

But even if the Choice Scholarship Program did implicate Article V, § 34, the provision has long been interpreted as allowing appropriations to private institutions or individuals so long as they serve a "public purpose": "[I]f such payments are for a public purpose, the incidental fact that the recipients are private persons does not violate this constitutional provision." *Bedford v. White*, 106 P.2d 469, 476 (1940); *see also In re Interrogatory Propounded by Governor Roy Romer on House Bill 91S-1005*, 814 P.2d 875, 883-84 (Colo. 1991).

The Colorado Supreme Court relied on this precedent in rejecting the Article V, § 34, claim in *Americans United*. The plaintiffs had advanced two theories as to why the grant program there supposedly violated the provision: (1) "it authorize[d] appropriations to institutions which are not under the absolute control of the state"; and (2) "it constitute[d] aid for educational purposes to persons not under the absolute control of the state." *Americans United*, 648 P.2d at 1085. The Court rejected both contentions. Regarding the first, it reiterated what it had already held earlier in the opinion: The grant program was not "a form of governmental aid to institutions," but rather to individuals. *Id.* at 1085. Regarding the second, the Court invoked *Bedford's* "public purpose" exception and concluded that there is an "overriding public purpose served by higher education." *Id.* at 1086. It therefore rejected Plaintiffs' claim.

An "overriding public purpose" is equally, if not more, served by elementary and secondary education, the opportunities for which the Board sought to expand in adopting the

Choice Scholarship Program. *See* Policy JCB § A.1–.3. The Program is therefore consistent with Article V, § 34, and Plaintiffs are unlikely to prevail on the merits of this claim.

4. Adopting Contrary Interpretations Of The State Constitutional Provisions At Issue Would Thwart Parental Liberty In Education And Violate The Federal Constitutional Rights of Parents and Children

Adopting an interpretation of Article II, § 4, Article IX, § 7, and Article V, § 34, that is inconsistent with the interpretation given those provisions in *Americans United* would thwart "the right of parents to have their children taught where, when, how, what, and by whom they may judge best." *Vollmar*, 255 P. at 613. It would also thwart the discretion of government to aid parents in the exercise of that right.

Equally, if not more, problematically, it would violate the Free Exercise Clause of the United States Constitution. There is no question after *Zelman* that a religiously neutral educational aid program like Douglas County's is permissible under the Establishment Clause. And as both the United States and Colorado Supreme Courts have held, a "state's interest . . . in achieving greater separation of church and State than is already ensured under the Establishment Clause . . . is limited by the Free Exercise Clause." *Id.* at 276; *see also Zavilla*, 147 P.2d at 824-25 ("[A] state constitution cannot . . . permit a greater restriction of the exercise and enjoyment of religious profession and worship than is permissible under the federal Constitution."). Thus, interpreting the Colorado Constitution to require *denying* benefits under a neutral educational aid program simply because some parents choose religious schools would violate the Free Exercise rights of those parents and their children.

B. THE BALANCE OF EQUITIES REQUIRES DENYING, NOT GRANTING, AN INJUNCTION

The balance of equities tips heavily against an injunction. The harm that would befall the Families if the Choice Scholarship Program is enjoined is overwhelming and extends far beyond simply losing the scholarships they have received. Each of the Families has already enrolled their child (in the Doyles' case, children) in his or her new school in reliance on the scholarship they have received. Three of the children—Timothy Lynott, Donovan Doyle, and Alexandra Doyle—began taking classes at their school in early June, and Timothy and Donovan have also been playing on their school's athletic teams since that time. Ex. B ¶ 9; Ex. D ¶ 7.

Although some of the Families may be able to keep their child at their chosen private school if the Program is enjoined, at least one, and likely two, will not be able to do so. The Oakleys are one of those families. In Humanex, they have found the perfect school to address Nate's special needs. If the Program is enjoined, however, they will be forced to remove Nate from Humanex and—because of their dissatisfaction with the special education services he received, and the relentless bullying he endured, in public school—to home school him. Homeschooling will be a tremendous burden for the family and will terribly aggravate the anxiety problems Nate already suffers. Ex. A. ¶¶ 20-22.

The Lynotts face similar problems. They do not know whether they will be able to afford tuition at Regis if the Program is enjoined and may therefore be forced to remove Timothy Jr. from the school—even though he has been taking a class and playing baseball and football at the school since early June. Moreover, the Lynotts have already paid more than $1,000 in fees for the activities Timothy Jr. participated in this summer, and Timothy Jr. risks losing sports eligibility if he has to transfer to another school. Ex. B. ¶¶ 9, 12, 14.

Although the Doyles and Andersons may be able to keep their children at their respective schools, Regis and Woodlands, it will be a struggle. The Doyles, for example, will have three children attending Regis, and the school's tuition is $11,225 *per child.* If the Program is enjoined, they will have to draw from family savings or use credit to cover the combined $9,150 they would have received from Donovan and Alexandra's scholarships. Ex. D ¶ 9. The Andersons will likewise have to draw from family savings, use credit, or forego putting money toward other financial obligations if Max cannot use his scholarship at Woodlands. Ex. C. ¶ 13.

Finally, in weighing the equities, this Court must consider Plaintiffs' delay in bringing this action. *See Combined Commcn's Corp. v. Denver*, 186 Colo. 443, 446 (Colo. 1974) (holding that delay in filing weighed against movant when court weighed the equities). Plaintiffs admit this program was adopted on March 15 yet they delayed fling their lawsuit until June 21. They did not seek an injunction until July 5—that is, four months after the Choice Scholarship Program was adopted; two months after families applied for scholarships; a month-and-a-half after families received scholarships; a month-and-a-half after parents began enrolling their children in participating schools; and a month after students began taking summer classes and playing sports at their new schools.

While Plaintiffs fiddled, parents relied on the availability of the Program to make important decisions regarding their children's educational future. There is no equity in rewarding Plaintiffs' dilatory conduct and wreaking havoc on the education of those children.

C. AN INJUNCTION WILL DESTROY, NOT PRESERVE, THE STATUS QUO

The purpose of "a preliminary injunction is to maintain the status quo," *Combined Commcn's Corp.*, 528 P.2d at 251, but an injunction in this case would destroy it. Plaintiffs'

argument on this point rests on the fundamentally mistaken assertion that "students participating in the [Scholarship] Program have yet to attend classes in private schools." TPE Mot. Prelim. Inj. at 24. As noted above, three of the children in the Families began attending class (and playing sports) at their new schools in early *June*.

Families have relied on the program. They have applied for and received scholarships. Schools have applied and been accepted to participate in the Program. Parents have enrolled their children in their new schools. The District has sent scholarship checks to the schools in the parents' names. The academic year begins in two to three weeks. *This* is the status quo, and the injunction Plaintiffs seek would upend it.

D. THERE IS NO DANGER OF REAL, IMMEDIATE, AND IRREPARABLE INJURY THAT WOULD BE PREVENTED BY THE REQUESTED INJUNCTION

Plaintiffs have failed to demonstrate that they will be irreparably harmed without a preliminary injunction. Although they claim harm as taxpayers, "a taxpayer's general interest in not having public funds spent unlawfully (including not having such funds spent in alleged contravention of fundamental constitutional restrictions) . . . ordinarily does not in itself constitute the type of irreparable harm that warrants the granting of preliminary injunctive relief." *White v. Davis*, 68 P.3d 74, 93 (Cal. 2003). Although "there may be some circumstances in which granting a preliminary injunction might be warranted in a taxpayer action (for example, if the [a government official] continues to approve expenditures that have been held unlawful by a controlling judicial precedent)," *id.*, such circumstances simply are not present in this case, where all of the relevant case law *supports* the lawfulness of the Choice Scholarship Program.

Moreover, Plaintiffs' "delay in seeking preliminary relief cuts against finding irreparable injury." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1211 (10th Cir. 2009). "Preliminary

injunctions are generally granted under the theory that there is an urgent need for speedy action to protect the plaintiffs' rights. Delay in seeking enforcement of those rights, however, tends to indicate at least a reduced need for such drastic, speedy action." *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985). Such is the case here.

E. ANY LACK OF A SPEEDY, ADEQUATE REMEDY IS OF PLAINTIFFS' OWN MAKING

To the extent Plaintiffs lack a speedy and adequate remedy at law, it is because of their own undue delay in prosecuting their case. Had they prosecuted their case diligently, it is conceivable that this entire controversy would already be resolved on summary judgment.

F. GRANTING A PRELIMINARY INJUNCTION WILL DISSERVE THE PUBLIC INTEREST

Finally, enjoining the Program will undoubtedly disserve the public interest. The duly-elected members of the Board, after extensive public input and debate, determined that the Program would "provide greater educational choice for students and parents to meet individualized student needs, improve educational performance through competition, and obtain a high return on investment of DCSD educational spending." Policy JCB ¶ A.3. The Program may not comport with Plaintiffs' personal policy preferences, but enjoining it would disserve the public interest as assessed by the Board after months of deliberation and input from the public itself.

IV. CONCLUSION

For these reasons, this Court should deny Plaintiffs' motion for a preliminary injunction.

Respectfully submitted this 22nd day of July, 2011.

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I hereby certify that on July 22, 2011, I electronically filed the foregoing with the Clerk of Court using Lexis/Nexis File and Serve causing an electronic copy to be served upon the following:

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