No. _____

In The
Supreme Court of the United States

FLORENCE AND DERRICK DOYLE, ET AL.,

Petitioners,

v.

TAXPAYERS FOR PUBLIC EDUCATION, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Colorado

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING

The Petitioners in this Court are Florence and Derrick Doyle, on their own behalf and as next friends of their children, A.D. and D.D.; Diana and Mark Oakley, on their own behalf and as next friends of their child, N.O.; and Jeanette Strohm-Anderson and Mark Anderson, on their own behalf and as next friends of their child, M.A. They were the intervenors-respondents in the Colorado Supreme Court.

The Respondents in this Court are Taxpayers for Public Education, Cindra S. Barnard, Mason S. Barnard, James LaRue, Suzanne T. LaRue, Interfaith Alliance of Colorado, Rabbi Joel R. Schwartzman, Reverend Malcolm Himschoot, Kevin Leung, Christian Moreau, Maritza Carrera, and Susan McMahon. They were the petitioners in the Colorado Supreme Court.

Other parties in the Colorado Supreme Court were the Douglas County School District, Douglas County Board of Education, Colorado State Board of Education, and Colorado Department of Education. They were the respondents in the Colorado Supreme Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Florence and Derrick Doyle, on their own behalf and as next friends of their children, A.D. and D.D.; Diana and Mark Oakley, on their own behalf and as next friends of their child, N.O.; and Jeanette Strohm-Anderson and Mark Anderson, on their own behalf and as next friends of their child, M.A., respectfully petition for a writ of certiorari to review the judgment of the Colorado Supreme Court in this case.

OPINIONS BELOW

The opinion of the Colorado Supreme Court (App. 1-68) is reported at 351 P.3d 461. The opinion of the Colorado Court of Appeals (App. 69-171) is unreported but is available at 2013 WL 791140. The order and opinion of the City and County of Denver District Court (App. 172-270) is also unreported.

JURISDICTION

The Colorado Supreme Court entered its judgment on June 29, 2015. Petitioners timely applied for an extension of time to file their petition for certiorari. On September 15, 2015, Justice Sotomayor granted

the application, extending the time to file until October 28, 2015. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND POLICY INVOLVED

The Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Policy JCB of the Douglas County School District, which governs the Choice Scholarship Program, is reproduced in the Appendix. App. 271-293. Article IX, section 7 of the Colorado Constitution, pursuant to which the Choice Scholarship Program was enjoined, provides:

> 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; nor shall any grant or donation of land, money or other personal property, ever be made by the state, or any such public corporation to any church, or for any sectarian purpose.

STATEMENT

In a string of cases culminating in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), this Court held that government may allow religious and non-religious schools alike to participate in publicly-funded student aid programs, so long as the programs are neutral toward religion and allow students or parents, rather than government, to decide what school a student will attend.

These cases, however, did not resolve a separate, but related, question: May government *bar* religious schools from such programs? This Court's jurisprudence suggests that it may not. In *Everson v. Board of Education*, 330 U.S. 1 (1947), after all, the Court explained that to "exclude . . . members of any . . . faith, because of their faith, . . . from receiving the benefits of public welfare legislation" would violate the Free Exercise Clause. *Id.* at 16. And on numerous occasions since *Everson*, it has "prohibited governments from discriminating in the distribution of public benefits based upon religious status." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) (collecting cases).

Nevertheless, in the late 1990s, a split among the federal circuits and state courts of last resort began to develop on this question. Justice Thomas acknowledged this split in 1999, identifying the courts on either side of it and urging this Court to "provide the lower courts . . . with much needed guidance." *Columbia Union Coll. v. Clarke*, 527 U.S. 1013, 1013 (1999) (Thomas, J., dissenting from denial of certiorari).

It appeared this Court might provide that guidance in *Locke v. Davey*, 540 U.S. 712 (2004), which concerned the State of Washington's exclusion of "vocational religious instruction" – that is, "the religious training of clergy" – from a state scholarship program. *Id.* at 722 n.5, 725. Although the particular exclusion was narrow, this Court recognized the potential implications of its decision for broader religious exclusions, including, specifically, the exclusion of "religious schools" from the type of "school voucher program . . . upheld in the Zelman case." Transcript of Oral Argument at 31, *Locke*, 540 U.S. 712 (No. 02-1315) (statement of O'Connor, J.). But not wanting to "foreclose [itself] on the voucher issue," *id.* at 36 (Kennedy, J.), the Court ultimately resolved *Locke* narrowly, declining to "venture further into this difficult area." *Locke*, 540 U.S. at 725.

The Court's avoidance of a broader pronouncement in *Locke* was jurisprudentially wise, but the conflict that had begun to develop before the decision only deepened in its wake. The First Circuit, for example, finds "no authority" for the proposition that

Locke is "applicable to certain education funding decisions but not others," and it therefore construes the opinion as authorizing the complete prohibition of religious schools in publicly-funded student aid programs. *Eulitt ex rel. Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344, 355 (1st Cir. 2004). The Tenth Circuit, on the other hand, has expressly rejected the First Circuit's interpretation and maintains that *Locke* "does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1255, 1256 n.4 (10th Cir. 2008).

In short, we are no closer today than we were before *Locke* to resolving whether government may, consistent with the federal Constitution, bar religious options in student aid programs. The Sixth, Seventh, Eighth, and Tenth Circuits maintain that it may not, but the First and Ninth Circuits, as well as the Maine and Vermont Supreme Courts, insist that it may.

With this case, the Colorado Supreme Court joined the latter camp. In an outcome-determinative decision, a three-justice plurality of the seven-justice court rejected the narrow reading of *Locke* adopted by the Tenth Circuit, within which Colorado lies, and instead read *Locke* as authorizing "state constitutions [to] draw a tighter net around the conferral of such aid" – a net "far more restrictive than the Establishment Clause." App. 34, 35. In that light, the plurality determined that it could apply a provision of the Colorado Constitution that prohibits public funding of

schools "controlled by any church or sectarian denomination," Colo. Const. art. IX, § 7, to invalidate a publicly-funded scholarship program, simply because the program afforded students the *option* of attending religious schools. It concluded, moreover, that its "decision that the [scholarship program] violates" this state constitutional provision "does not encroach upon the First Amendment." App. 38.

Whether the United States Constitution tolerates barring the choice of religious schools in student aid programs is a question that this Court should resolve, and it should use this case to resolve it. First, the case involves a deep, well-acknowledged split: the question presented has divided lower courts for nearly two decades, both before and after *Locke*, and the Colorado Supreme Court has taken a position opposite that of the federal circuit covering Colorado. Second, the question is recurring and important: students and their parents are seeing their Free Exercise, Establishment, and Equal Protection Clause rights meet wildly different fates based solely on the state or federal circuit within which they happen to reside. Third, this case is a clean vehicle for resolving the question: the evidence is not in dispute, and the plurality's resolution of the question was outcome-determinative. Accordingly, this Court should grant certiorari.

I. The Choice Scholarship Program

The Douglas County Board of Education (hereinafter "the Board") created the Choice Scholarship Program in March 2011 to "provide greater educational choice for students and parents to meet individualized student needs." App. 271. Under the program, the Douglas County School District (hereinafter "the District") provides tuition scholarships for up to 500 eligible students. App. 292. To be eligible, a student must reside in the District and have attended a public school in the District the prior year. App. 279.

Parents may use a scholarship to send their child to any private school, religious or non-religious, that participates in the program and that has accepted the child. App. 272-73, 275, 278.[1] Private schools inside and outside the District's boundaries may participate, provided they meet conditions set forth in the policy governing the program. App. 273, 283. They need not change their admissions criteria, but religious schools must afford scholarship students the option of not participating in religious services. App. 287, 288.

Scholarships are capped at the lesser of: (a) the private school's tuition; or (b) 75 percent of per-pupil revenue under state law. App. 276. (At the time the

[1] For administrative purposes, students are also enrolled in the Choice Scholarship School, a District charter school. All instruction, however, occurs at the private school selected by the child's parents. App. 10.

program was adopted, the upper limit was $4,575.) The District distributes these funds in a series of four checks made out to parents and sent to the private school they have chosen for their child. Parents must restrictively endorse the checks to the school for the purpose of paying tuition. App. 275.

II. The Petitioner Families

The Petitioners are three families – the Oakleys, Andersons, and Doyles – with one or more children who received a Choice Scholarship. Each family chose a different participating school under the program.

The Oakleys' son, N.O., has special needs and was not succeeding in his public school. He had to repeat fifth grade and, the following year, was assaulted by another student. The Oakleys therefore chose to use their scholarship at Humanex Academy, a school for children with special needs. *See* Intervenors' Combined Resp. Br. Opposing Pls.' Mots. Prelim. Inj. Ex. A (D. Oakley Aff.).

The Andersons were very involved at the public school their son, M.A., attended; Jeanette Anderson was even president of its Parent Teacher Organization. But they became increasingly unhappy with aspects of its curriculum, particularly its "reform" math approach, and so chose to use their scholarship at Woodlands Academy, which has a particularly strong math curriculum. *See id.* Ex. C (J. Strohm-Anderson Aff.).

The Doyles' twins, A.D. and D.D., attended public elementary and middle schools, but the Doyles wanted to provide their children a stronger spiritual foundation before college. Accordingly, they chose to use their scholarships at Regis Jesuit, a Catholic high school. *See id.* Ex. D (F. Doyle Aff.).[2]

III. Proceedings In The Trial Court

On June 21, 2011, two groups of plaintiffs filed later-consolidated lawsuits, in the City and County of Denver District Court, challenging the Choice Scholarship Program. Naming the Board, District, Colorado Department of Education, and Colorado State Board of Education as defendants, they alleged that, by allowing religious schools to participate, the program violates Article IX, section 7 of the Colorado Constitution, which prohibits the payment of public funds "in aid of any church or sectarian society . . . or to help support or sustain any school . . . controlled by

[2] In the last few months, there have been some shifts in the Families' circumstances: the Doyles' twins graduated high school, while the Andersons moved to another Colorado school district. Moreover, the Oakleys moved out of Colorado during the court of appeals proceedings. These changes present no obstacle to this petition because the Colorado Supreme Court's decision will bar *every* school district in Colorado, *including the Andersons' new school district*, from adopting voucher programs that include religious schools. In any event, the State and County defendants, who are also petitioning for certiorari, have standing and the Court therefore "need not address the standing of the intervenor-defendants." *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 233 (2003).

any church or sectarian denomination." The plaintiffs also alleged that the program violates Colorado's Public School Finance Act of 1994, Colo. Rev. Stat. §§ 22-54-101 to -135 (2014).[3]

The Oakley, Doyle, and Anderson families (hereinafter "the Families") intervened as defendants. They asserted, as an affirmative defense, that the Choice Scholarship Program is a "religiously neutral school choice program that enables parents to independently select the school that is best for their child, whether religious or secular," and that to prohibit religious options in such a program "would violate the Free Exercise, Establishment, . . . and Equal Protection Clauses of the United States Constitution." App. 296.

The plaintiffs moved for a preliminary injunction. App. 172. In their brief in opposition to the motion, the Families argued that the program does not violate the plain terms of Article IX, section 7 because it aids students, not schools. *See* Intervenors' Combined Resp. Br. Opposing Pls.' Mots. Prelim. Inj. 18-21. They further argued that "the interpretation [of Article IX, section 7] urged by Plaintiffs, if implemented, would actually violate the federal constitutional

[3] The plaintiffs alleged that the program violates several other state constitutional provisions, but those provisions did not factor into the judgment of the Colorado Supreme Court, which this Court is asked to review. *See* App. 9 n.2; App. 51 (Márquez, J., concurring in the judgment); App. 52 & n.1 (Eid, J., concurring in part and dissenting in part).

rights of Douglas County families." *Id.* at 13; *see also id.* at 26. Moreover, they asserted that Article IX, section 7 is "a 'Blaine Amendment' rooted in anti-religious bigotry" and that "[t]o extend its reach" to programs that fund students, rather than "sectarian" schools, "would be to extend the discriminatory animus attending its enactment." *Id.* at 18, 24.

The trial court conducted a hearing on the preliminary injunction motion. App. 173. The Families reasserted their arguments at the hearing, maintaining that the plaintiffs' interpretation of Article IX, section 7 was "at loggerheads with . . . the First Amendment" and that applying the provision as the plaintiffs requested "would cause significant federal constitutional problems" and "require th[e] court to . . . wade into the Blaine thicket." App. 299, 300. At the hearing, moreover, Dr. Charles Glenn provided unrebutted expert testimony concerning the discriminatory object of Article IX, section 7, including its roots in the Blaine movement. App. 312. The court certified Professor Glenn "as an expert on the history of education in the United States," "the social, religious, and political history of the Blaine movement in Colorado and nationally," and "the broader movement to bar public funds flowing to so-called sectarian schools." Reporter's Tr. 645-46.

Nevertheless, on August 12, 2011, the trial court issued an injunction, which it *sua sponte* made permanent. It concluded that the Choice Scholarship Program violates Article IX, section 7 because any scholarships used at religious schools, "even for the

sole purpose of providing education, would further the sectarian purpose of religious indoctrination within the schools['] educational teachings and not the secular educational needs of the students." App. 234. The court rejected the Families' argument that applying Article IX, section 7 in this manner would violate the federal Constitution, concluding that there is "no legal authority supporting a limitation on the scope of the religious provisions of the Colorado Constitution." App. 225; *see also* App. 226. It also rejected as "unpersuasive" the Families' arguments concerning "the historical nature of the Blaine Amendments," despite the unrebutted testimony of Professor Glenn. App. 226, 227. Finally, the court held that the program also violates the Public School Finance Act. App. 255.

IV. The Colorado Court Of Appeals' Decision Upholding The Program

The Families (as well as the County and State defendants) appealed the decision. The Families' notice of appeal asked the Colorado Court of Appeals to resolve, among other issues, whether the trial court's application of Article IX, section 7 was "permissible under the Free Exercise, Establishment, and . . . Equal Protection . . . Clauses of the . . . United States Constitution," and whether the trial court "erred in refusing to consider the anti-religious bigotry behind Article IX, section[ ] 7." App. 302, 303. The

Families argued, and the plaintiffs responded to, these points in the subsequent appellate briefing.[4]

On February 28, 2013, the court of appeals, in a 2-1 decision, reversed the trial court's judgment. It held that the Choice Scholarship Program does not violate Article IX, section 7 because it is "neutral toward religion, and funds make their way to private schools with religious affiliation by means of personal choices of students' parents." App. 114. The court, moreover, noted the federal constitutional problems with the trial court's contrary conclusion. Article IX, section 7, it stressed, "must be applied in a way that does not violate the Religion Clauses" of the United States Constitution, and "Supreme Court jurisprudence . . . holds that inquiry into the pervasiveness of an institution's religious beliefs . . . violates the constitutional requirement of neutrality toward religion embodied in the Establishment and Free Exercise Clauses." App. 109 n.17, 107.

The court also rejected the plaintiffs' argument that this Court's opinion in *Locke v. Davey*, 540 U.S. 712 (2004), authorizes a state constitution to prohibit religious schools' participation in student aid programs. Quoting the Tenth Circuit's reading of *Locke* in *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008), the court concluded that

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[4] *See* Opening Br. Intervenor-Appellant Families 26-45; Answer Br. LaRue Appellees 50-69; Am. Reply Br. Intervenor-Appellant Families 6-22.

"the State's latitude to discriminate against religion . . . does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." App. 109 (omission in original). And because it concluded that the program does not violate Article IX, section 7, the court found it unnecessary to consider whether that provision is a "Blaine provision[ ]" and a product of "anti-Catholic bigotry." App. 102. Finally, the court held that the plaintiffs lacked standing to bring their Public School Finance Act claim. App. 86.

Judge Bernard dissented solely from the court's resolution of the Article IX, section 7 claim. He would have relied on that provision to invalidate the program, App. 124, and he maintained that his interpretation of the provision was authorized by *Locke*. App. 134-35. Although Judge Bernard reviewed the evidence linking Article IX, section 7 with the Blaine movement, he concluded that the provision was not the "sole product of anti-Catholic animosity." App. 163. He concluded, therefore, that "applying section 7" to invalidate the Choice Scholarship Program would "not violate the Free Exercise, Establishment, or Equal Protection Clauses." App. 130; *see also* App. 169.

V. The Colorado Supreme Court's Decision Invalidating The Program

The plaintiffs petitioned the Colorado Supreme Court to review the judgment of the court of appeals, arguing that the court of appeals had wrongly "held that the U.S. Constitution prohibits the church-state provisions of the Colorado Constitution from imposing greater restrictions on public funding of religious schools than does the federal Establishment Clause." App. 307. They further asserted that the court of appeals' decision "conflicts with the United States Supreme Court's decision in *Locke v. Davey*," which, according to the plaintiffs, permits government to "deny[ ] . . . religious institutions public funding that is offered to secular institutions." App. 307-08.

The Families opposed the petition, again asserting that the interpretation of Article IX, section 7 advanced by the plaintiffs would violate the Free Exercise, Establishment, and Equal Protection Clauses, App. 313, and would "deny[ ] families an otherwise neutral and generally available educational benefit solely because of their private and independent choice of a religious school." App. 312. The Colorado Supreme Court granted review.

After briefing and an oral argument in which these issues were extensively treated,[5] the Colorado

[5] *See* Opening Br. 62-65; Answer Br. Intervenor-Respondent Families 21-47; Pet'rs' Reply to Intervenor-Respondents' Br. 2-27.

Supreme Court reversed the judgment of the court of appeals and invalidated the Choice Scholarship Program. A three-justice plurality of the seven-justice court concluded that the program violates Article IX, section 7, and it "reject[ed] [the Families'] argument that striking down the [program] under the Colorado Constitution in fact violates the First Amendment to the United States Constitution." App. 23. The plurality opinion, authored by Chief Justice Rice, noted that "section 7 is *far more restrictive* than the Establishment Clause regarding governmental aid to religion," and, citing *Locke*, asserted that "state constitutions may draw a tighter net around the conferral of such aid." App. 34, 35 (emphasis added). The plurality, moreover, expressly refused "to wade into the history of section 7's adoption" to determine whether it is "a so-called 'Blaine Amendment' " and a product of "anti-Catholic animus." App. 27. It thus concluded that its "decision that the [program] violates section 7 does not encroach upon the First Amendment." App. 38.[6]

Justice Márquez provided the fourth vote to invalidate the program. But she would have invalidated it under the Public School Finance Act and therefore did not reach the Article IX, section 7 claim. App. 39-40, 51. No other justice joined her opinion;

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[6] The plurality decision did not separately address the Equal Protection Clause. *Cf. Locke*, 540 U.S. at 720 n.3 (holding that because the scholarship program comported with the Free Exercise Clause, mere rational basis review applied to any equal protection inquiry and was necessarily satisfied).

rather, all six of the other justices concluded that the Plaintiffs lacked standing to bring the statutory claim. App. 23, 52 n.1 (Eid, J., dissenting).[7]

Three justices, in an opinion by Justice Eid, dissented from the plurality's conclusions regarding Article IX, section 7 and the federal Constitution. First, the dissent disagreed with the plurality's determination that the Choice Scholarship Program violates Article IX, section 7; according to the dissent, that provision "prohibit[s] expenditures made to assist institutions" and "not . . . expenditures made to support students." App. 60. But the "more fundamental problem with the plurality's opinion," according to the dissent, was its conclusion that "it need not consider whether the provision is in fact enforceable due to possible anti-Catholic animus." App. 63. "The U.S. Supreme Court has made it clear that allegations of such animus must be considered," the dissent stressed. App. 53 (citing *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)). In taking a "head-in-the-sand approach," according to the dissent, the plurality had thus "failed to perform its duty to consider whether section 7 is enforceable

[7] Accordingly, the plurality's conclusion that it could, consistent with the federal Constitution, invalidate the program under Article IX, section 7, was outcome-determinative. If this Court were to disagree with the plurality's conclusion on that point, reversal of the Colorado Supreme Court's judgment and remand to that court would be required, as there is no independent and adequate state ground upon which that court's judgment could rest.

under the U.S. Constitution before enforcing it against" the Choice Scholarship Program. App. 53-54, 68.

REASONS FOR GRANTING THE PETITION

I. There Is A Deep Split Among The Lower Courts On Whether Government May Bar Religious Choices From Otherwise Neutral And Generally-Available Student Aid Programs: The Sixth, Seventh, Eighth, And Tenth Circuits Hold That It May Not, While The First And Ninth Circuits, As Well As The Colorado, Maine, And Vermont Supreme Courts, Hold That It May.

There is a deep and well-acknowledged split among the federal and state courts on the question of whether government may bar religious options from otherwise neutral and generally-available student aid programs. This split, which began to develop in the 1990s, deepened after this Court declined to resolve the question in *Locke v. Davey*, 540 U.S. 712 (2004). Today, the Sixth, Seventh, Eighth, and Tenth Circuits maintain that government may not, consistent with the federal Constitution, prohibit religious options in such programs. The First and Ninth Circuits, as well as the Maine and Vermont Supreme Courts, maintain

that it may.[8] With the decision below, the Colorado Supreme Court joined the latter camp, creating an even more problematic split with the Tenth Circuit, the federal circuit within which Colorado lies.

A. The Split Began To Develop In The Decade Before *Locke v. Davey* Was Decided.

By the mid-1990s, it had become clear in this Court's jurisprudence that government can include religious schools alongside non-religious schools in student aid programs, so long as the programs operate on the private choice of students. *See, e.g.*, *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S.

[8] There is a separate, but related, split over the constitutionality of barring religious schools from participation in programs that provide aid directly to schools themselves. *Compare Columbia Union Coll. v. Oliver*, 254 F.3d 496, 510 (4th Cir. 2001) (holding it unconstitutional to exclude "pervasively sectarian" schools from state grant program for higher educational institutions), *with Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 783-85 (8th Cir. 2015) (upholding exclusion of church preschool from state grant program for playground resurfacing), *reh'g en banc denied*. Because this Court "ha[s] drawn a consistent distinction between government programs that provide aid directly to religious schools" and student aid programs "of true private choice," *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) (citations omitted), this petition focuses only on the split regarding the latter. *Cf. Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 409-10, 412 (6th Cir. 2007) (upholding moratorium on state funding of religious residential placement service provider because statute governing funding did not afford "true private choice").

481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983). The Court, however, had not resolved the separate, but related, question of whether government may *exclude* religious schools from such programs. While the Court's jurisprudence seemed to suggest that government may not do so,[9] a split developed on this question among the federal circuits and state courts of last resort.

1. On one side of that split were the Sixth and Eighth Circuits. According to these courts, prohibiting religious options in otherwise neutral and generally-available student aid programs violates the Free Exercise, Establishment, and/or Equal Protection Clause.

The Eighth Circuit, for example, held that a Minnesota regulation prohibiting school districts from providing special education benefits to students at religious schools violated the Free Exercise and Equal Protection Clauses. *Peter v. Wedl*, 155 F.3d 992, 997 (8th Cir. 1998). According to the court, the regulation drew an "unconstitutional distinction between private religious schools and private nonreligious

[9] *See, e.g.*, *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) (collecting cases in which the Court had "prohibited governments from discriminating in the distribution of public benefits based upon religious status").

schools" and imposed a disability on students "because of the religious nature" of the schools their parents had chosen for them. *Id.*[10]

Similarly, the Sixth Circuit held that a regulation barring providers that "teach or promote religious doctrine" from a federal child-care program violated the Free Exercise Clause. *Hartmann v. Stone*, 68 F.3d 973, 977, 986 (6th Cir. 1995) (quoting Army Reg. 608-10, § 1-8i). In its view, "the Supreme Court ha[d] made it clear" that the First Amendment's Religion Clauses demand "neutrality between religion and non-religion." *Id.* at 978 (emphasis omitted); *see also id.* at 985-86.

2. On the other side of this split were the First and Ninth Circuits, as well as the Supreme Courts of Maine and Vermont. According to these courts, there is no federal constitutional impediment to barring religious schools from otherwise neutral and generally-available student aid programs.

The Ninth Circuit, for example, upheld an Oregon regulation that, like the one the Eighth Circuit had invalidated, prohibited school districts from providing special education benefits to students at religious schools. *KDM ex rel. WJM v. Reedsport Sch. Dist.*, 196 F.3d 1046, 1050-52 (9th Cir. 1999). The

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[10] Of course, a public/private, as opposed to religious/non-religious, distinction would be constitutional. *See Luetkemeyer v. Kaufmann*, 419 U.S. 888 (1974) (mem.), *aff'g* 364 F. Supp. 376 (W.D. Mo. 1973); *see also id.* at 889-90 (White, J., dissenting).

Ninth Circuit recognized that the "regulation [wa]s not 'neutral'" toward religion. *Id.* at 1050. But unlike the Eighth Circuit, it concluded the regulation was permissible under the Free Exercise, Establishment, and Equal Protection Clauses because "it d[id] not have 'the object or purpose . . . [of] suppression of religion or religious conduct.'" *Id.* (omission and second alteration in original) (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993)).

The First Circuit similarly upheld – against a Free Exercise, Establishment, and Equal Protection Clause challenge – the exclusion of "sectarian" schools from a Maine voucher program for students in towns without public schools. *Strout v. Albanese*, 178 F.3d 57, 60-65 (1st Cir. 1999). The Maine Supreme Court separately upheld the exclusion the same year. *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 147 (Me. 1999).

Finally, the Vermont Supreme Court, relying on the First Circuit and Maine Supreme Court decisions, upheld the exclusion of "sectarian" schools from a similar voucher program. *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 169 Vt. 310, 344-45, 738 A.2d 539, 563-64 (1999). It concluded that the exclusion was mandated by the Vermont Constitution and that "[t]his application of state constitutional law does not implicate the Free Exercise Clause of the First Amendment." *Id.*

3. Around the time these cases were decided, Justice Thomas, citing many of them, discussed the split that had developed on the question of whether government may constitutionally bar religious schools from participating in student aid and other educational programs. He emphasized "the growing confusion among the lower courts" on the question, stressed that "we cannot long avoid addressing the important issues that it presents," and urged the Court to "reaffirm that the Constitution requires, at a minimum, *neutrality* not *hostility* toward religion." *Columbia Union Coll. v. Clarke*, 527 U.S. 1013, 1013 (1999) (Thomas, J., dissenting from denial of certiorari). This Court, however, decided to let the split mature, denying certiorari in several of these cases. *See KDM*, 531 U.S. 1010 (2000); *Andrews v. Vt. Dep't of Educ.*, 528 U.S. 1066 (1999); *Bagley*, 528 U.S. 947 (1999); *Strout*, 528 U.S. 931 (1999).

B. *Locke* Declined To Resolve The Split.

It appeared the Court might finally resolve the confusion among the lower courts when it agreed to hear *Locke v. Davey*. *Locke* concerned a Washington merit- and need-based scholarship program for college students. *Locke*, 540 U.S. at 715-16. The program allowed students to attend religious colleges, but it excluded students who were majoring in "devotional theology" – that is, "religious instruction that will prepare students for the ministry." *Id.* at 715, 719. Joshua Davey received a scholarship under the program, only to lose it when he chose to major in

devotional theology. *Id.* at 717. He then challenged the exclusion, arguing that it violated his rights under the Free Exercise Clause, as well as the Establishment and Equal Protection Clauses. *Id.* at 718.

Although the particular exclusion at issue in the case was narrow, this Court was aware of, and sensitive to, the potentially far-reaching impact of any decision it might render. During oral argument, for example, Justices repeatedly questioned counsel regarding the implications of their arguments for the power of states to broadly bar religious options in publicly-funded voucher, or scholarship, programs like the one in *Zelman v. Simmons-Harris*:

> Suppose a state has a school voucher program such as the Court indicated could be upheld in the Zelman case. Now, if the state decides not to give school vouchers for use in religious or parochial schools, do you take the position it must, that it has to do one or the other? It can have a voucher program, but if it does, it has to fund all private and religious schools with a voucher program?

Transcript of Oral Argument at 31, *Locke*, 540 U.S. 712 (No. 02-1315) (O'Connor, J.); *see also id.* at 32 (O'Connor, J.), 34 (Ginsburg, J.), 35-36 (Kennedy, J.), 37-38 (Souter, J.), 52-53 (Kennedy, J.). Rather than grapple with such issues, members of the Court looked for a way to decide the case in a "narrow[ ]" way that would not, in Justice Kennedy's words, "foreclose this Court on the voucher issue." *Id.* at 36.

And the Court did, in fact, resolve the case narrowly. It began its analysis by noting that there is some "play in the joints" between the Free Exercise and Establishment Clauses. *Locke*, 540 U.S. at 718. "In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.* at 718-19. Davey's case, the Court noted, involved that "play." *Id.* at 719. While "there [wa]s no doubt that the State could, consistent with" the Establishment Clause, permit scholarship recipients to pursue a degree in devotional theology, "[t]he question before" the Court was "whether Washington, pursuant to its own constitution, . . . can *deny* them such funding without violating the Free Exercise Clause." *Id.* (emphasis added) (citations and footnote omitted).

The Court proceeded to uphold the devotional theology exclusion despite earlier decisions that had "prohibit[ed] governments from discriminating in the distribution of public benefits based upon religious status." *Mitchell*, 530 U.S. at 828 (plurality) (collecting cases); *see also id.* at 835 n.19. In so doing, however, the Court identified several critical factors that limited the reach of its opinion.

First, the Court emphasized that the "only" governmental interest implicated by the "devotional theology" exclusion was the "State's interest in not funding the religious training of clergy." *Locke*, 540 U.S. at 722 n.5. Second, it stressed the fact that, "[f]ar from evincing . . . hostility toward religion," the

scholarship program went "a long way toward including religion in its benefits" by, among other things, "permit[ting] students to attend pervasively religious schools." *Id.* at 724. And third, the Court noted that state constitutional "Blaine Amendment[s]," which have been "linked with anti-Catholicism," were not at issue in the case. *Id.* at 723 n.7.

In discussing these limiting factors, however, this Court did not explain which, if any, was controlling in the case. Nor did it discuss the relative import of the factors for guiding future Religion Clause analysis. Instead, the Court stated that it would "not venture further into this difficult area." *Id.* at 725.

Because this Court avoided a more definitive pronouncement, "[t]he precise bounds of" its decision were "far from clear." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1254 (10th Cir. 2008). While the opinion made clear that there is a "'joint' between the Establishment Clause and the Free Exercise Clause," it shed little light on "[h]ow big that joint is." *Ruiz-Diaz v. United States*, No. C07-1881RSL, 2008 WL 4962685, at *6 (W.D. Wash. Nov. 18, 2008) (unreported).

C. The Split Deepened In *Locke*'s Wake.

Consequently, an "active academic and judicial debate about the breadth of the decision" developed, *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 785 (8th Cir. 2015), and the lower courts have come to diametrically opposed conclusions

as to whether the decision in *Locke* authorizes the wholesale exclusion of religious options from otherwise neutral and generally-available student aid programs. In other words, the split that existed before *Locke* has only deepened.

1. Some courts – namely, the First Circuit and Maine Supreme Court – have read *Locke* broadly, as authorizing a wholesale prohibition on the choice of religious schools. After *Locke* was decided, these courts revisited their earlier opinions upholding the exclusion of "sectarian" schools from the Maine voucher program. In *Eulitt ex rel. Eulitt v. Maine Department of Education*, 386 F.3d 344 (1st Cir. 2004), the First Circuit reaffirmed its earlier conclusion in *Strout* that the exclusion was constitutional, reading *Locke* "broadly" and rejecting the argument that "the 'room for play in the joints' identified by [*Locke*] is applicable to certain education funding decisions but not others." *Id.* at 355.

Relying on *Locke*, as well as *Eulitt*'s reading of it, the Maine Supreme Court also reiterated its conclusion in *Bagley* that the "sectarian" exclusion was constitutional. *Anderson v. Town of Durham*, 895 A.2d 944, 961 (Me. 2006). "*Locke* and *Eulitt*," it claimed, "clarified that a statute does not lose its neutrality and become subject to strict scrutiny simply because it precludes state funding of a religious educational choice." *Id.* at 959. Accordingly, the court concluded, states have "leeway to choose not to

fund" student tuition at religious schools even though they fund it at non-religious private schools. *Id.*[11]

2. The Seventh and Tenth Circuits, on the other hand, have read *Locke* far more narrowly. In fact, in *Colorado Christian University v. Weaver*, a case concerning Colorado's exclusion of "pervasively sectarian" schools from state scholarship programs, the Tenth Circuit expressly rejected the First Circuit's broad interpretation of *Locke*. *Colorado Christian Univ.*, 534 F.3d at 1256 n.4. In defending the exclusion, the state maintained that it was mandated by Article IX, section 7 of the Colorado Constitution (the same provision on which the plaintiffs in this case challenge the Choice Scholarship Program), *id.* at 1253, 1267-68, and argued that the federal constitutionality of enforcing such a provision "was definitively

[11] The Florida Court of Appeal adopted a similar reading of *Locke* in *Bush v. Holmes*, 886 So. 2d 340 (Fla. Dist. Ct. App. 2004) (en banc), *aff'd on other grounds*, 919 So. 2d 392 (2006). There, a group of plaintiffs challenged a voucher program that *allowed* religious schools to participate, claiming the program violated a provision of the Florida Constitution barring aid to "sectarian institution[s]." *Id.* at 343 (quoting Fla. Const. art. I, § 3). Voucher recipients intervened and argued that to apply the state constitutional provision to invalidate the program would violate the federal Free Exercise Clause. *Id.* at 344. The Florida Court of Appeal rejected their argument, reading *Locke* as broadly holding that "a state constitutional provision . . . can preclude state financial aid to religious institutions without violating either the Establishment Clause or Free Exercise Clause." *Id.* at 360. The Florida Supreme Court affirmed the decision on other grounds but declined to disapprove its interpretation of *Locke*. *See Bush*, 919 So. 2d at 413.

resolved in [its] favor by the Supreme Court in *Locke v. Davey*." *Id.* at 1254. In an opinion authored by then-Judge Michael McConnell, the Tenth Circuit disagreed and invalidated the exclusion under the Free Exercise, Establishment, and Equal Protection Clauses. *Id.* at 1258, 1266, 1269. According to the Tenth Circuit, *Locke* "suggests, even if it does not hold, that the State's latitude to discriminate against religion . . . does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Id.* at 1255. Thus, the First Circuit's decision in "*Eulitt* went well beyond" *Locke*, which did not empower states to "declin[e] funding the entire program of education at . . . disfavored schools, based on their religious affiliation." *Id.* at 1256 n.4.

The Seventh Circuit adopted a similarly narrow reading of *Locke* in resolving a federal constitutional challenge to a state university's ban on the use of extracurricular student funds for "worship, proselytizing, or religious instruction." *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 777 (7th Cir. 2010).[12] In defending the ban, the university argued that it had simply "made the sort of choice that *Locke* approved."

[12] Although the program in *Badger Catholic* was not a student aid program in the sense of providing benefits to individual students, it did, as the Seventh Circuit explained, provide funds to student organizations that, in turn, exercised "private choice" in using them. *Badger Catholic*, 620 F.3d at 778, 780.

Id. at 780. In a two-to-one decision authored by Judge Easterbrook, the Seventh Circuit rejected that argument. "[I]n *Locke*," the majority explained, "the Court stressed . . . that the state's program did not evince hostility to religion," as "[t]he scholarships could be used at pervasively sectarian colleges, where prayer and devotion were part of the instructional program; only training to become a minister was off limits." *Id.* The university's exclusion, on the other hand, *did* evince hostility toward religion, as it completely *barred* support for "programs that include prayer or religious instruction." *Id.* In dissent, Judge Williams disagreed with the majority's interpretation of *Locke* and with what he viewed as its implication: "that a school district which . . . provide[s] vouchers must allow vouchers to be used at religious schools." *Id.* at 789 (Williams, J., dissenting).

3. In short, *Locke* did not put the pre-existing split to rest. Rather, lower courts are reading the opinion for two diametrically opposite propositions: that government may, or may not, mandate the exclusion of religious choices from otherwise neutral and generally-available student aid programs. The split, consequently, has only deepened. The Seventh and Tenth Circuits have now joined the Sixth and Eighth in concluding that the federal Constitution will not tolerate the wholesale exclusion of religious options. And, having reiterated their earlier positions, the First Circuit and Maine Supreme Court have joined the Ninth Circuit and Vermont Supreme Court in concluding that such an exclusion is perfectly

permissible. The Colorado Supreme Court is the latest to take this side of the issue.

D. In Rejecting The Interpretation Of *Locke* Adopted By The Federal Circuit Within Which Colorado Lies, The Colorado Supreme Court's Plurality Decision Further Compounds The Split And Ignores The Limiting Factors In *Locke* Itself.

The Colorado Supreme Court's plurality decision further compounds this split, concluding that a state constitutional ban on the inclusion of religious options in student aid programs "does not encroach upon the First Amendment." App. 38. In so concluding, it rejects the narrow interpretation of *Locke* adopted by the Tenth Circuit, within which Colorado lies, *see* App. 33-34, 36, 38,[13] and instead reads *Locke*

[13] The plurality decision claims the Tenth Circuit's opinion in *Colorado Christian* is "inconsequential to the legality of the" Choice Scholarship Program because the exclusion at issue in that case applied only to "pervasively" sectarian schools and therefore "distinguish[ed] among religious schools." App. 36. The Tenth Circuit, however, has made clear that *Colorado Christian* prohibits *all* distinctions based on "religiosity," including, specifically, preferences for "non-sectarian" schools over sectarian ones. *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1201 (10th Cir. 2015); *see also Lukumi*, 508 U.S. at 532 (noting First Amendment prohibits discrimination against "a particular religion *or . . . religion in general*" (emphasis added)). Moreover, district courts within the Tenth Circuit recognize that *Colorado Christian* prohibits laws that "discriminate[ ] among religions *or discriminate[ ] between religion and*

(Continued on following page)

as authorizing states to draw a "far more restrictive . . . net around the conferral of such aid." App. 34-35. This rejection of the Tenth Circuit's reading of *Locke* is itself grounds for certiorari. *See Johnson v. California*, 545 U.S. 162, 164 (2005) (granting certiorari where "[t]he Supreme Court of California and the United States Court of Appeals for the Ninth Circuit ha[d] provided conflicting answers" to a federal question). So, too, is the plurality's complete disregard for the various limiting factors in the *Locke* opinion itself.

1. Unlike *Locke*, This Case Does Not Involve A "State's Interest In Not Funding The Religious Training Of Clergy."

First, the plurality decision ignores the fact that "the only interest at issue" in *Locke* was "the State's interest in not funding the religious training of clergy." *Locke*, 540 U.S. at 722 n.5. That interest is simply not at issue in this case.

The very reason this Court stressed that this was the "only" interest at issue in *Locke* was to assuage Justice Scalia's concern that the Court's opinion might be viewed as "ha[ving] no logical limit" and as "justify[ing] the singling out of religion for exclusion

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non-religion." *Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs of Boulder Cnty.*, 612 F. Supp. 2d 1163, 1185 (D. Colo. 2009) (emphasis added), *aff'd*, 613 F.3d 1229 (10th Cir. 2010).

from public programs in virtually any context." *Id.* at 730 (Scalia, J., dissenting). "Nothing in our opinion suggests" such a reading, the Court stressed. *Id.* at 722 n.5. Yet that is precisely the reading that the plurality in this case adopts.

2. Unlike Washington's Position In *Locke*, The Plurality's Position In This Case Does Not Go "A Long Way Toward Including Religion" In Educational Benefits.

The plurality decision also ignores the fact that *Locke* upheld the Washington scholarship program because it went "a long way toward including religion in its benefits" – specifically, by "permit[ting] students to attend pervasively religious schools" and take religion courses – and therefore did not "evince[e] . . . hostility toward religion." *Id.* at 724, 725; *see also* App. 65 (Eid, J., dissenting). While the Choice Scholarship Program also goes a long way toward including religion in its benefits, the plurality *invalidates* it for that very reason.

Thus, there is "hostility toward religion" in this case: it is in the plurality's application of Article IX, section 7. Far from "including religion" in educational benefits, the plurality's decision *banishes* religion. And that is problematic not only under *Locke* and this Court's Religion Clause jurisprudence, but also under *Romer v. Evans*, 517 U.S. 620 (1996), in which this Court invalidated, under the Equal Protection Clause,

a provision of the Colorado Constitution because the provision made it "more difficult for one group of citizens than for all others to seek aid from the government." *Id*. at 633. That is precisely the effect of the plurality's application of Article IX, section 7.

3. Unlike *Locke*, This Case Involves A "'Blaine Amendment,' Which Has Been Linked With Anti-Catholicism."

Finally, the plurality decision also ignores the fact that *Locke* did not involve state constitutional "'Blaine Amendment[s],'" which "hav[e] been linked with anti-Catholicism." *Locke*, 540 U.S. at 723 n.7. These state constitutional provisions are named after Representative James G. Blaine, who, in 1875, introduced a federal constitutional amendment designed to (1) preserve the overtly religious, non-denominationally Protestant nature of the era's public schools, while (2) prohibiting direct public funding of so-called "sectarian," or Catholic, schools. *See Zelman*, 536 U.S. at 721 (Breyer, J., dissenting). Although the federal amendment failed, many states included such provisions in their own constitutions. *Id.* They are widely regarded, including by many members of this Court, as having been "born of bigotry" – a product of "pervasive hostility to the Catholic Church." *Mitchell*, 530 U.S. at 828, 829 (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.); *see also Zelman*, 536 U.S. at 721 (Breyer, J., dissenting, joined by Stevens and

Souter, JJ.) (noting anti-Catholicism "played a significant role" in the Blaine movement).

While "the Blaine . . . history" was "not before" this Court in *Locke*, 540 U.S. at 723 n.7, it was front-and-center in this case. Professor Glenn's unrebutted expert testimony concerning Article IX, section 7 of the Colorado Constitution – including evidence of its text, operation, and history – tied the provision directly to the Blaine movement and its anti-Catholic objectives.[14] As Justice Eid's dissent notes, App. 53, this Court's decision in *Lukumi requires* a court to consider such evidence of animosity in determining whether a law is neutral for purposes of the First Amendment's Religion Clauses. *See Lukumi*, 508 U.S. at 532-40. *Romer* likewise requires its consideration in determining whether a law has the neutrality demanded by the Equal Protection Clause. *Romer*, 517 U.S. at 623, 631-34. Nevertheless, and despite the call in *Mitchell v. Helms* for Blaine's legacy to be "buried now," 530 U.S. at 829 (plurality opinion), the plurality decision expressly *refuses* to consider any evidence of animosity. App. 27-28 & n.17. Instead, "the plurality simply sticks its head in the sand" and

[14] In fact, the Colorado constitutional convention commenced just six days after Blaine introduced his federal constitutional amendment in Congress. *See* Philip Hamburger, *Separation of Church and State* 297-98 & n.28 (2002); *Proceedings of the Constitutional Convention Held in Denver, December 20, 1875 to Frame a Constitution for the State of Colorado* 15 (1907).

"allows allegations of anti-Catholic animus to linger unaddressed." App. 63, 68 (Eid, J., dissenting).

In short, the plurality decision ignores every factor that this Court stressed in *Locke* to cabin the potential reach of its opinion. In so doing, the plurality takes *Locke* for precisely what this Court said it was not: "without limit." *Id.* 540 U.S. at 722 n.5.

II. The Question Presented Is A Recurring One Of Great Constitutional Importance For Parents And Their Children.

The question presented by this case is a frequently recurring one that directly bears on the Free Exercise, Establishment, and Equal Protection rights of families throughout the country. As noted above, there were six decisions from federal circuits or state courts of last resort confronting the question before *Locke* was decided. Including this case, there have been five more since. Yet we are no closer to resolution on the question of whether government may prohibit religious options in student aid programs.

Some courts, moreover, are relying on state Blaine Amendments to invalidate student aid programs without even acknowledging – much less addressing – the potential federal constitutional problems of doing so. *E.g.*, *Elbe v. Yankton Indep. Sch. Dist. No. 63-3*, 640 F. Supp. 1234 (D.S.D 1986) (invalidating state textbook lending program for students in private schools because it included religious schools); *Cal. Teachers Ass'n v. Riles*, 29 Cal. 3d 794,

632 P.2d 953 (1981) (same). Other courts, in the meantime, are avoiding the thorny federal constitutional issues by applying Blaine Amendments in a way that, like this Court's Establishment Clause jurisprudence, distinguishes programs that aid students from programs that directly aid religious institutions. *E.g.*, *Meredith v. Pence*, 984 N.E.2d 1213, 1228 (Ind. 2013) (holding voucher program did not violate Indiana Blaine Amendment because "the principal actors and direct beneficiaries" were "Indiana families"); *Jackson v. Benson*, 218 Wis. 2d 835, 878, 578 N.W.2d 602, 621 (1998) (holding voucher program did not violate Wisconsin Blaine Amendment because any benefit to religious schools was "incidental" to parental choice (quoting *State ex rel. Warren v. Nusbaum*, 55 Wis. 2d 316, 333, 198 N.W.2d 650, 659 (1972))).

The consequence is a perverse state of affairs in which:

- a disabled child in Minnesota may access federally-funded special education services at her religious school,[15] but a disabled child in Oregon may not;[16]
- a child in Indiana, Wisconsin, or Ohio may use her state-funded voucher to attend a

[15] *Peter*, 155 F.3d at 996-97.

[16] *KDM*, 196 F.3d at 1050-52.

religious school,[17] but a child in Maine or Vermont may not;[18]

- a child in Connecticut may receive publicly-funded transportation to her religious school,[19] but a child in Washington may not;[20] and
- a child in New York or Rhode Island may receive a public loan of textbooks at her religious school,[21] but a child in California or Kentucky may not.[22]

In short, the freedom to participate in such student aid programs – and, thus, the Free Exercise, Establishment, and Equal Protection Clause rights of students themselves – are meeting wildly different fates based solely on the state or federal circuit within which students happen to reside. This Court should not allow the status of these fundamental

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[17] *Meredith*, 984 N.E.2d at 1230-31; *Jackson*, 218 Wis. 2d at 876-84, 578 N.W.2d at 620-23; *Simmons-Harris v. Goff*, 86 Ohio. St. 3d 1, 10-11, 711 N.E.2d 203, 211-12 (1999).

[18] *Eulitt*, 386 F.3d at 353-56; *Chittenden Town Sch. Dist.*, 169 Vt. at 344-45, 738 A.2d at 563-64.

[19] *Bd. of Educ. of Stafford v. State Bd. of Educ.*, 243 Conn. 772, 785-86, 709 A.2d 510, 517 (1998).

[20] *Mitchell v. Consol. Sch. Dist. No. 201*, 17 Wash. 2d 61, 66-68, 135 P.2d 79, 81-82 (1943).

[21] *Bd. of Educ. v. Allen*, 20 N.Y.2d 109, 116, 228 N.E.2d 791, 794 (1967), *aff'd*, 392 U.S. 236 (1968); *Bowerman v. O'Connor*, 104 R.I. 519, 521, 247 A.2d 82, 83 (1968) (per curiam).

[22] *Cal. Teachers Ass'n*, 29 Cal. 3d at 813, 632 P.2d at 964; *Fannin v. Williams*, 655 S.W.2d 480, 481-84 (Ky. 1983).

rights to remain in flux. Rather, it should grant certiorari to bring clarity to this area once and for all.

III. This Case Is A Clean Vehicle For Deciding The Question Presented.

Finally, this case is a clean vehicle for deciding the question presented. First, the plurality's conclusion that invalidating the Choice Scholarship Program under Article IX, section 7 is permissible under the federal Constitution was outcome-determinative. Although the fourth justice comprising the majority would have invalidated the program on statutory grounds, all six of the other justices rejected her position. Accordingly, if the plurality's conclusion on the federal constitutional question is incorrect, reversal of the court's judgment would be required. *See supra* p. 16-17 and note 7.

Second, this case concerns the federal constitutionality of barring religious choices from *student* aid programs: that is, "programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Zelman*, 536 U.S. at 649. It does not present the distinct – and thornier – question of whether religious schools may be excluded from "government programs that provide aid directly to . . . schools" themselves. *Id.* This Court's decisions "have drawn a consistent distinction between" the two types of programs. *Id.* In taking this case, the Court would only have to address the former; it could leave for

another day the more difficult matter of direct, institutional aid programs.

Third, unlike the few cases concerning *Locke*'s reach that this Court has been asked to review,[23] this case presents a troubling split of authority between a state court of last resort and the federal circuit within which it sits.

Finally, the facts in this case are not in dispute. Even the expert testimony concerning the history and object of Article IX, section 7 went unrebutted. The Colorado Supreme Court, moreover, did not take issue with that evidence; it simply refused to consider it. App. 27-28 & n.17. Thus, there is a clean record on which to decide whether Blaine's legacy, "born of bigotry, should be buried now." *Mitchell*, 530 U.S. at 829 (plurality opinion).

[23] *See Walsh v. Badger Catholic, Inc.*, 562 U.S. 1280 (2011) (denying certiorari); *Anderson v. Town of Durham*, 549 U.S. 1051 (2006) (same).

CONCLUSION

The petition for a writ of certiorari should be granted.

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