COLORADO SUPREME COURT
Two East 14th Avenue
Denver, CO 80203

Court of Appeals, State of Colorado
Hon. Jerry N. Jones, Dennis Graham, and Steve Bernard
Case Nos. 11CA1856 and 11CA1857

District Court, City and County of Denver
Hon. Michael A. Martinez
Case Nos. 2011CV4424 and 2011CV4427

Petitioners: Taxpayers for Public Education; Cindra S. Barnard; Marson 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,

v.

Respondents: Douglas County School District; Douglas County Board of Education; Colorado State Board of Education; and Colorado Department of Education,

and

Intervenors-Respondents: 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.; Jeanette Strohm-Anderson and Mark Anderson, on their own behalf and as next friends of their child, M.A.

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Case Number:
13SC233

INTERVENOR-RESPONDENT FAMILIES' OPPOSITION BRIEF TO PETITIONS FOR WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

I hereby certify that this Opposition Brief complies with all requirements of C.A.R. 32 and C.A.R. 53, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The Opposition Brief complies with C.A.R. 53(c).

Choose one:

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☐ It does not exceed 12 pages.

☑ I acknowledge that my Opposition Brief may be stricken if it fails to comply with any of the requirements of C.A.R. 32 and C.A.R. 53.

William H. Mellor

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I. INTRODUCTION

In adopting the Choice Scholarship Program, the Douglas County Board of Education empowered parents to exercise their pre-existing constitutional right "to direct the … education of children under their control." *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925). Upset that some parents privately and independently chose religious schools for their children, Petitioners filed a lawsuit to deprive students of their scholarships and of the educational opportunities the scholarships afforded them. Petitioners based their challenge primarily on interpretations of the Colorado Constitution's religion provisions that this Court flatly rejected three decades ago in *Americans United for Separation of Church and State Fund, Inc. v. State*, 648 P.2d 1072 (Colo. 1982).

In disposing of Petitioners' legal challenge, the Court of Appeals straightforwardly applied *Americans United* and upheld the Choice Scholarship Program, just as this Court upheld the student aid program at issue in that case. In so doing, the Court of Appeals emphasized the substantial body of Establishment and Free Exercise Clause jurisprudence that has developed since *Americans United* and that has confirmed this Court's *Americans United* decision. Finally, the Court of Appeals noted the federal constitutional problems that would result from a contrary interpretation of Colorado's religion provisions.

The Court of Appeals was correct: *Americans United* required it to uphold the Choice Scholarship Program, and federal constitutional law not only supported that conclusion—it *prohibited* a contrary one. Accordingly, none of the C.A.R. 49(a) factors warrants a writ of certiorari and the petition should be denied.

II. COUNTERSTATEMENT OF THE CASE

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") to "provide greater educational choice for students and parents to meet individualized student needs." Opinion 3.[1] The Program operates in a straightforward manner. The Douglas County School District ("District") provides private school tuition scholarships for up to 500 eligible students. Opinion 2. To be eligible, a student must reside in the District and have attended a District public school the prior year. Opinion 5.

Parents may use the scholarship to send their child to any private school that participates in the Program and has accepted the student. Opinion 5. (For administrative purposes, students are also enrolled in the Choice Scholarship School, a District charter school. Opinion 5.) Private schools inside and outside

[1] The Court of Appeals' opinion is attached to the Petitions.

District boundaries may participate, provided they meet conditions set forth in the Program. Opinion 3.

Critically, the Program is neutral with respect to religion, allowing religious and non-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 non-religious.

Scholarships are capped at the lesser of: (a) the cost of tuition at the private school a family chooses; or (b) 75 percent of per pupil revenue allocated under state law. Opinion 6-7. The District distributes scholarship funds in a series of four checks made out to the child's parents and sent to the private school they have chosen. A parent must restrictively endorse the checks to the school for the purpose of paying the child's tuition. Opinion 7. The Program thus empowers parents to exercise their pre-existing constitutional right to choose the best school for their child.

B. The Families

The Oakleys, Doyles, and Andersons are three of the nearly 500 Choice Scholarship families. Each of the three families has at least one child who applied for and received a scholarship under the Program, and each family chose a

different participating private school. The Oakleys, who have a son with special needs, chose Humanex Academy, a small, non-religious private school that focuses on children with special needs. Tr., pp.784:10-20, 789:22-790:22. The Doyles wished to provide their twins a strong spiritual foundation before college and accordingly chose Regis Jesuit, a Catholic school. ID #49891168, pp.2080:¶2-2081:¶3. The Andersons were unhappy with aspects of the "reform" math curriculum at their son's public school and therefore chose Woodlands Academy, a small, non-religious private school with a strong science and math curriculum. ID #49891166, pp.2077:¶¶2-7.

Three families who chose three very different schools for three very different—but equally valid—reasons: that is precisely what the Choice Scholarship Program was designed to accomplish.

C. The Proceedings

In June 2011, two groups of plaintiffs filed later-consolidated lawsuits challenging the Program. Naming the Board, District, Colorado Department of Education, and Colorado Board of Education as defendants, they alleged that the Program violates the Colorado Constitution's religion provisions—Article II, section 4; Article IX, sections 7 and 8; and Article V, section 34—as well as the Public School Finance Act and Article IX, sections 2, 3, and 15. Opinion 7-8.

Shortly thereafter, the Oakleys, Doyles, and Andersons intervened to defend the program alongside the County and State defendants. Opinion 1 n.1.

The plaintiffs sought an injunction and, in August 2011—the cusp of the new school year—the District Court enjoined the Program. It held the Program violates the four religion provisions of the Colorado Constitution, as well as Article IX, section 3, and the Public School Finance Act. Opinion 8. The court rejected plaintiffs' claims under Article IX, sections 2 and 15.

In February 2013, the Court of Appeals reversed the District Court's judgment, holding that the "plaintiffs do not have standing to seek redress for a claimed violation of the [Public School Finance] Act, and that the [Choice Scholarship Program] does not violate any of the constitutional provisions on which plaintiffs rely." Opinion 2.

The plaintiffs now petition for a writ of certiorari. Abandoning their Article V, section 34, claim, they ask this Court to review the Court of Appeals' disposition of their other religion-related claims—those under Article II, section 4, and Article IX, sections 7 and 8—as well as their claims under the Public School

Finance Act and Article IX, section 3.[2] For the reasons below, this Court should deny the writ.

III. REASONS TO DENY THE WRIT

A. This Court's Decision In *Americans United* Required The Court Of Appeals To Uphold The Scholarship Program

In attempting to create an issue that would warrant this Court's review, Petitioners erroneously contend that the Court of Appeals' decision conflicts with this Court's decision in *Americans United for Separation of Church and State Fund, Inc. v. State*, 648 P.2d 1072 (Colo. 1982). *See* LaRue Pet. 7-12. *Americans United*, however, supports—indeed, dictates—the result the Court of Appeals reached.

In *Americans United*, this Court flatly rejected the argument that the Colorado Constitution requires the exclusion of religious options from student aid programs. The plaintiffs challenging the program at issue there—a postsecondary grant program that, like the Choice Scholarship Program, included religious schools and operated on private choice—argued that because students could choose religious schools, the program "compel[led] Colorado taxpayers to support

[2] The Intervenor-Respondent families adopt by reference the County and State Respondents' arguments concerning Petitioners' Public School Finance Act and Article IX, section 3, claims.

sectarian institutions" in violation of Article II, section 4, and constituted "an appropriation to help support or sustain schools controlled by churches or sectarian denominations" in violation of Article IX, section 7. *Ams. United*, 648 P.2d at 1081, 1083. This Court rejected those arguments and upheld the program because it was "essentially neutral in character" and "designed for the benefit of the student, not the educational institution." *Id.* at 1082. The program, this Court explained, was "a governmental attempt to alleviate some of the financial barriers confronting Colorado students," and "[a]ny benefit to the institution" was "remote and incidental" and did "not constitute ... aid to the institution itself." *Id.* at 1082, 1083-84.

In the present case, the Court of Appeals undertook a straightforward application of *Americans United* to the Choice Scholarship Program and correctly held it constitutional. As the Court of Appeals explained, the Program is "neutral toward religion," Opinion 45, 49—that is, religious and non-religious schools alike are free to participate—and was "intended to benefit students and their parents," not private schools. Opinion 49. As in *Americans United*, "any benefit to the participating schools is incidental" and "'does not constitute ... aid to the institution itself.'" Opinion 49 (quoting *Ams. United*, 648 P.2d at 1083-84). Finally, any funds that "make their way to private schools with religious

affiliation" do so only "by means of personal choices of students' parents." Opinion 50. In short, contrary to Petitioners' contention, *Americans United* makes clear the constitutionality of the Program.

B. First Amendment Jurisprudence Since *Americans United* Supports The Court Of Appeals' Decision And Prohibits A Contrary One

Again trying to create an issue warranting this Court's review, Petitioners insist *Americans United* would have come out differently had the grant program at issue there involved elementary and secondary, rather than postsecondary, schools. *See* LaRue Pet. 9-10. Although this Court noted the program at issue in *Americans United* was postsecondary in nature, it did so because: (1) in interpreting the state religion provisions, it was obliged to comply with the requirements of the First Amendment to the U.S. Constitution, *Ams. United*, 648 P.2d at 1078; and (2) at that time, "the [U.S.] Supreme Court ha[d] recognized significant differences between the religious aspects of church-affiliated institutions of higher education, on the one hand, and parochial elementary and secondary schools on the other." *Id.* at 1079. Specifically, federal jurisprudence was concerned that religious elementary and secondary schools were, in the parlance of the time, "pervasively sectarian" and "indoctrinating." *See Mitchell v. Helms*, 530 U.S. 793, 826 (2000) (plurality); *Tilton v. Richardson*, 403 U.S. 672, 685-86 (1971).

In the intervening three decades, however, federal jurisprudence has evolved significantly. The U.S. Supreme Court has now made clear that any supposed differences between religious elementary and secondary schools, on one hand, and postsecondary schools, on the other, have no bearing on the constitutionality of student aid programs under the Establishment Clause. In that light, the Court has upheld numerous elementary and secondary student aid programs that include both religious and non-religious options. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding publicly-funded scholarship program that included religious elementary and secondary schools); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (upholding publicly-funded special education services at religious high school); *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding tax deduction for education expenses at private, including religious, elementary and secondary schools).

Most recently, in *Zelman v. Simmons-Harris*, the U.S. Supreme Court rejected an Establishment Clause challenge to an elementary and secondary scholarship program legally indistinguishable from Douglas County's. In reasoning strikingly similar to that adopted by this Court two decades earlier in *Americans United*, the U.S. Supreme Court upheld the program because it was "neutral with respect to religion" and 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 (emphasis omitted). Any "incidental advancement of a religious mission," the Court concluded, "is reasonably attributable to the individual recipient, not to the government." *Id.* at 652. In light of *Zelman*, "[i]t is now settled that the Establishment Clause permits evenhanded funding of education—religious and secular—through student scholarships." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1253 (10th Cir. 2008).

Nevertheless—and despite this Court's admonition that "First Amendment jurisprudence cannot be totally divorced from the resolution of" state religion clause claims, *Ams. United*, 648 P.2d at 1078—Petitioners now invite this Court to take review for the very purpose of *ignoring Zelman* and the other federal post-*Americans United* cases that allow religious options at the elementary and secondary levels. As the Court of Appeals recognized, however, ignoring these federal developments was not an option: not only is the religiosity of schools participating in student aid programs constitutionally irrelevant, its consideration is constitutionally *forbidden*. *Colo. Christian Univ.*, 534 F.3d at 1261-69. Requiring the exclusion of so-called "pervasively sectarian" elementary and secondary schools from aid programs, the U.S. Supreme Court has now explained, is

inconsistent with its decisions "prohibit[ing] governments from discriminating in the distribution of public benefits based upon religious status or sincerity." *Mitchell*, 530 U.S. at 828 (2000) (plurality); *see also id.* at 837-67 (O'Connor, J., concurring) (declining to engage in pervasiveness inquiry); Opinion 42 ("Supreme Court jurisprudence now holds that inquiry into the pervasiveness of an institution's religious beliefs (including the likelihood of 'indoctrination') violates the constitutional requirement of neutrality toward religion embodied in the Establishment and Free Exercise Clauses."). Because, "[i]n interpreting the Colorado Constitution," a court "cannot erode or undermine any paramount right flowing from the First Amendment," *Ams. United*, 648 P.2d at 1078, the Court of Appeals simply *could not* have interpreted Colorado's provisions to require the exclusion of religious elementary and secondary schools.

C. The Court Of Appeals' Decision Does Not Render The Colorado Religion Provisions Meaningless

In yet another attempt to manufacture a reviewable issue, Petitioners claim the attention the Court of Appeals paid the U.S. Supreme Court's First Amendment jurisprudence "effectively rendered" Colorado's religion provisions "meaningless." LaRue Pet. 7. That is false.

Nothing the Court of Appeals did (or that this Court might do, for that matter) could render Colorado's religion provisions "meaningless." First of all, the

federal Establishment Clause was not incorporated against the states until 1947, *see Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), and for the first 71 years of statehood, therefore, Colorado's constitution provided its citizens their *only* protection against a state establishment of religion. That is hardly "meaningless."

Today, moreover, Colorado courts may continue to give independent meaning to the state constitution's religion provisions, as the Court of Appeals recognized. Opinion 48 n.22. The U.S. Supreme Court, after all, has held that there is some narrow "play in the joints" between the Establishment Clause and Free Exercise Clause and that a state may act within this "play" without violating the latter provision. *Locke v. Davey*, 540 U.S. 712, 718-19 (2004). The quintessential example is *Locke v. Davey*, in which the Supreme Court upheld a state scholarship program that allowed students to attend religious schools but that excluded theology majors studying for careers in the ministry. *Id.* at 724. Even though the Establishment Clause would have permitted inclusion of such students, *id.* at 719, the Court held that the Free Exercise Clause did not mandate their inclusion. *Id.* at 725.

Despite the fact that the scholarship program in *Locke* went "a long way toward *including* religion in its benefits" and that the "*only* interest at issue" in the case was the "State's interest in not funding the religious training *of clergy*," *id.* at

724, 722 n.5 (emphasis added), Petitioners suggest the case provides blanket authorization for states to discriminate against religious options in educational aid programs generally. LaRue Pet. 15. *Locke* does nothing of the sort. As the Tenth Circuit recently explained, the opinion "does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Colo. Christian Univ.*, 534 F.3d at 1255; *see also* Opinion 44 (same). In fact, the Supreme Court has admonished that in enforcing separation provisions like Colorado's religion clauses, courts "must … be sure that [they] do not inadvertently prohibit [government] from extending its general state law benefits to all its citizens without regard to their religious belief." *Everson*, 330 U.S. at 16.

Tellingly, Petitioners do not even apprise this Court of the numerous state court opinions—before and after *Locke*—that have upheld elementary and secondary school choice programs under state constitutional religion provisions similar to Colorado's. For example, only last month, the Indiana Supreme Court upheld that state's Choice Scholarship Program under state constitutional provisions that prohibit the compelled support or maintenance of "place[s] of worship" or "ministry," and that bar appropriations "for the benefit of any religious or theological institution." Ind. Const. art. I, §§ 4, 6. In reasoning akin to that of

Americans United and the Court of Appeals' opinion in this case, the court held that the school a child attends, whether "religious or non-religious, derives from the private, independent choice of the parents" and that "[a]ny benefit to program-eligible schools," therefore, is "ancillary and incidental to the benefit conferred on these families." *Meredith v. Pence*, __ NE.2d __, 2013 WL 1213385, at *9 (Ind. Mar. 26, 2013). The Ohio Supreme Court likewise upheld an elementary and secondary scholarship program under similar state constitutional provisions because the program "distribute[d] benefits neutrally" and "[s]ectarian schools receive[d] money ... only as the result of independent decisions of parents and students." *Simmons-Harris v. Goff*, 711 N.E.2d 203, 209, 212 (Ohio 1999) (internal quotation marks and citation omitted). And the Wisconsin Supreme Court upheld the Milwaukee Parental Choice Program for elementary and secondary students, explaining that "[a] qualifying student only attends a sectarian private school under the program if the student's parent so chooses," and that any benefit accruing to such schools is "incidental" to parental choice—not the "principal or primary effect" of the program. *Jackson v. Benson*, 578 N.W.2d 602, 621, 623 (Wis. 1998) (internal quotation marks and citation omitted). These opinions are consistent—not at loggerheads—with *Locke*'s recognition that "the

link between government funds and religious training is broken by the independent and private choice of recipients." *Locke*, 540 U.S. at 719.

In inviting this Court to accept review and adopt a radically more expansive reading of *Locke* and of the Colorado Constitution—one that would require the exclusion of religious options from student aid programs—Petitioners string-cite a number of inapposite cases with no analysis or even parentheticals to explain their supposed relevance. LaRue Pet. 16. That is not surprising, as they have none. Two of the cases concerned *direct* aid to religious *institutions*—not students. *Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 408-09 (6th Cir. 2007); *Univ. of Cumberlands v. Pennybacker*, 308 S.W.3d 668, 682-83 (Ky. 2010). Three involved exclusions that were *not* based on religious status. *Wirzburger v. Galvin*, 412 F.3d 271, 281 (1st Cir. 2005); *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15, 18 (1st Cir. 2004); *Bowman v. United States*, 564 F.3d 765, 774 (6th Cir. 2008). One, *Eulitt v. Maine Department of Education*, 386 F.3d 344 (1st Cir. 2004), was expressly rejected by the Tenth Circuit for going "well beyond the holding in *Locke*." *Colo. Christian Univ.*, 534 F.3d at 1256 n.4. Another, *Anderson v. Town of Durham,* 895 A.2d 944 (Me. 2006), involved the same regulation at issue in *Eulitt* and reflexively adopted the same misguided reasoning. *Id.* at 961. The next, *Bush v. Holmes*, 886 So.2d 340 (Fla. Dist. Ct. App. 2004), proposed a radical interpretation of *Locke* similar to

Eulitt's, which the Florida Supreme Court declined to approve on review. 919 So.2d 392, 413 (Fla. 2006). And the last, *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009), is "flatly at odds with ... [this] court's reasoning in *Americans United*," as the Court of Appeals in this case explained. Opinion 52.[3] In short, Petitioners' arguments for certiorari fall flat.

D. Interpreting Colorado's Religion Provisions As Petitioners Propose Would Violate The Federal Constitutional Rights Of Families

Finally, Petitioners' interpretation of Colorado's religion provisions would violate the federal constitutional rights of Douglas County families by extending the animus that motivated two of the provisions and denying families an otherwise neutral and generally available educational benefit solely because of their private and independent choice of a religious school.

Two of the three religion provisions on which Petitioners rely—Article IX, section 7 and 8—are "Blaine" provisions that were designed to preserve the non-denominational Protestant nature of nineteenth-century public schools and prevent direct public funding of Catholic schools. The discriminatory history of such

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[3] Petitioners also cite *Chittenden Town School District v. Department of Education*, 738 A.2d 539 (Vt. 1999), decided well before *Locke*. That case has been cited only two times outside Vermont: once, when the Indiana Supreme Court rejected it in *Meredith*, __ N.E.2d __, 2013 WL 1213385, at *7 n.20; and, again, in the portion of *Holmes* that the Florida Supreme Court declined to approve on review.

provisions has been documented not only by Dr. Charles Glenn in three hours of unrebutted testimony before the District Court, *see* Tr., pp.641:22-741:23, but also by numerous members of the U.S. Supreme Court. *Mitchell*, 530 U.S. at 828-29 (plurality) (noting the Blaine movement has a "shameful pedigree," "born of bigotry," that "should be buried now"); *Zelman*, 536 U.S. at 721 (Breyer, J., dissenting) (recognizing that anti-Catholic sentiment "played a significant role" in adoption of state Blaine provisions and that references to "'sectarian' schools … in practical terms meant Catholic"). The Court of Appeals avoided extending the reach of these provisions—and, thus, the animus attending their enactment—by properly interpreting them to *not* require the exclusion of religious options from student aid programs. *See* Opinion 36-37 & n.13. Petitioners, however, would have this Court use them to discriminate against such options. This Court should decline the invitation.

The Free Exercise Clause, after all, prohibits government from "exclud[ing] … members of any … faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." *Everson*, 330 U.S. at 16. And just as the Establishment Clause "prohibit[s] the government from favoring religion," so too it prohibits government from "discriminating *against* religion." *Bd. of Educ. v.*

Grumet, 512 U.S. 687, 717 (1994) (O'Connor, J., concurring). The interpretation of the Colorado provisions Petitioners urge would violate both proscriptions.

Petitioners' interpretation would also violate the Equal Protection Clause. As the U.S. Supreme Court explained in *Romer v. Evans*, 517 U.S. 620 (1996), "[c]entral ... to our ... Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Id.* at 633 (citations omitted). A state, therefore, cannot make it "more difficult for one group of citizens than for all others to seek aid from the government," *id.*, especially when "the disadvantage imposed is born of animosity," *id.* at 634—whether animosity toward gays and lesbians, as in *Romer*, or against Catholics (and extended to religion generally), as in this case.

IV. CONCLUSION

The Court of Appeals' decision is consistent with—indeed, dictated by—*Americans United*, and it does not, as Petitioners contend, render Colorado's religion provisions "meaningless." Nor does it conflict with First Amendment jurisprudence. To the contrary, it is *Petitioners'* interpretation of the state religion provisions that would conflict with the U.S. Constitution. The jurisprudentially sound course, therefore, is to deny the writ and allow the Court of Appeals' decision to stand.

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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2013, a true and correct copy of the foregoing INTERVENOR- RESPONDENT FAMILIES' OPPOSITION BRIEF TO PETITIONS FOR WRIT OF CERTIORARI was served via U.S. Mail, postage paid, on the following:

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