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COURT OF APPEALS, STATE OF COLORADO
101 W. Colfax Avenue, Suite 800, Denver, CO 80202

Appeal from the District Court, City and County of Denver
Case No. 2011CV4424 (consolidated with 2011CV4427)
Hon. Michael A. Martinez

Defendants-Appellants:
COLORADO BOARD OF EDUCATION; COLORADO DEPARTMENT OF EDUCATION,

Defendants-Appellants:
DOUGLAS COUNTY BOARD OF EDUCATION; DOUGLAS COUNTY SCHOOL DISTRICT,

Intervenors-Appellants:
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.,

v.

Plaintiffs-Appellees:
JAMES LARUE; SUZANNE T. LARUE; INTERFAITH ALLIANCE OF COLORADO; RABBI JOEL R. SCHWARTZMAN; REV. MALCOLM HIMSCHOOT; KEVIN LEUNG; CHRISTIAN MOREAU; MARITZA CARRERA; SUSAN MCMAHON,

Plaintiffs-Appellees:
TAXPAYERS FOR PUBLIC EDUCATION, a Colorado non-profit corporation; CINDRA S. BARNARD, an individual; and M.B., a minor child.

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Case Number:
11CA1856
11CA1857

AMENDED REPLY BRIEF OF INTERVENOR-APPELLANT FAMILIES

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

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☑ It contains 5579 words.

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For the party raising the issue:

☐ It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R __, p __), not to an entire document, where the issues was raised and ruled on.

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☑ I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

S/ William H. Mellor
William H. Mellor

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I. INTRODUCTION

Appellees and their supporting amici's arguments do nothing to undermine the constitutionality of the Choice Scholarship Program ("Scholarship Program").

- Despite their suggestion that the Scholarship Program is a "sham" that provides only "illusory" choice to parents, it is a program of genuine private choice that empowers parents to choose the schools that are best for their children.
- Despite their assertion that the history of Colorado's Blaine provisions is unclear and irrelevant, that history is steeped in anti-Catholic bigotry and germane to the constitutional analysis.
- Despite their efforts to downplay them, the Free Exercise, Equal Protection, Establishment, and Due Process problems created by the trial court's interpretation of Colorado's religion provisions are real.
- Despite their portrayal of the Scholarship Program as harmful to students with disabilities, the program offers those students new options to meet their unique educational needs while preserving all existing options.
- Despite their attempt to muddy the constitutional issues with irrelevant policy arguments, the empirical research supports school choice programs like Douglas County's.

For these reasons, and those discussed in the State and County Appellants' briefs, which Intervenor-Appellant Families ("Families")[1] incorporate by reference, this Court should uphold the Scholarship Program.

II. ARGUMENT

A. The Scholarship Program Offers Parents A Genuine Choice

This Court should reject attempts by Appellees and their amici to disparage the role parental choice plays under the Scholarship Program. Appellees' primary contention—that "the alleged 'choice'… is illusory because the vast majority of the partner schools are religious," Larue Br. 41—is baseless.

First, Appellees' argument ignores the fact that participation in the Scholarship Program is one option among many. As in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the Scholarship Program is "part of a broader undertaking … to enhance the educational options of … schoolchildren." *Id.* 647. In *Zelman*, that undertaking included community schools, magnet schools, and tutoring aid. *Id.* at 646-47. Here, it is far broader:

> DCSD provides school choice to students and parents through numerous programs, including open enrollment, option schools, magnet schools, charter schools, on-line programs, home-education

[1] Subsequent to the Families' filing their opening brief, the Oakley family moved to South Carolina, where Mark Oakley has been working because of his inability to find employment in Colorado. *See* Tr. 782.

> programs and partnerships, and contract schools. The Choice Scholarship Program is another way in which DCSD seeks to maximize school choice for students and parents to meet the individualized needs of each student.

Ex. 1, p.3 ¶A.2. This wide array of offerings provides "genuine opportunities for … parents to select secular educational options for their school-age children." *Zelman*, 536 U.S. at 655; *see also Jackson v. Benson*, 578 N.W.2d 602, 617-18 (1998) ("The amended MPCP, in conjunction with existing state educational programs, gives participating parents the choice to send their children to a neighborhood public school, a different public school within the district, a specialized public school, a private nonsectarian school, or a private sectarian school. As a result, the amended program is in no way skewed towards religion.")

Appellees and their amici "discount[] entirely" these other options and focus myopically on the percentage of Choice Scholarship recipients who choose religious schools. *Zelman*, 536 U.S. at 659. Here, again, *Zelman* is instructive. Under the scholarship program there, 82 percent of participating schools were religious, and 96 percent of students selected religious schools. *Id.* at 657-58. The Court held that those figures—which are *higher* than the respective percentages in

this case[2]—had no constitutional significance and were not evidence that the choices offered by the program were illusory.

Regarding the high percentage of religious schools, the Court explained that "Cleveland's preponderance of religiously affiliated private schools … did not arise as a result of the program; it is a phenomenon common to many American cities." *Id.* at 656-57. Regarding the high percentage of students choosing religious schools, the Court "flatly rejected" the argument that this demonstrated the program lacked true choice:

> Respondents … claim that … we should attach constitutional significance to the fact that 96% of scholarship recipients have enrolled in religious schools. They claim that this alone proves parents lack genuine choice, even if no parent has ever said so. We need not consider this argument in detail, since it was flatly rejected in *Mueller [v. Allen]*, where we found it irrelevant that 96% of parents taking deductions for tuition expenses paid tuition at religious schools.

Id. at 658 (citing *Mueller v. Allen*, 463 U.S. 388 (1983)). The Court accordingly upheld the program, explaining that its constitutionality "simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school." *Id.*

[2] Here, the figures were 69.6 and 93 percent, respectively, at the time of the preliminary injunction hearing. Order 9, ¶¶35, 37.

The same is true here. The percentage of Choice Scholarship students enrolled in religious schools is the "result of numerous, private choices of individual parents," *id.* at 650 (internal quotation marks and citation omitted)—not, as Appellees suggest, evidence that parents *lack* a choice, or that their choice is "illusory."

Appellees next contend that making scholarship checks payable to parents, for restrictive endorsement to the school they choose, is some sort of ruse to "end run" the Constitution. Larue Br. 30. To the contrary, it is the usual method of disbursing scholarship funds in school choice programs. *E.g.*, *Zelman*, 536 U.S. at 646; *Jackson*, 578 N.W.2d at 872. In fact, the Wisconsin Supreme Court specifically rejected the argument that this method was "some type of 'sham' to funnel public funds to sectarian private schools." *Id.*[3]

Ultimately, however, the specific mechanics of scholarship disbursement are irrelevant. What matters is *who* chooses where those funds will be used. *Id.* ("[T]he importance of our inquiry here is not to ascertain the path upon which public funds travel under the amended program, but rather to determine who

[3] Appellees cite *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009), to suggest there really is no choice, as checks "*must* be restrictively endorsed to th[e] schools." Larue Br. 26. Such a narrow focus on the mechanics of scholarship disbursement ignores the choice parents have among schools and, more fundamentally, the choice they have to participate in the program in the first place.

ultimately chooses that path."). Under the Scholarship Program, "[w]here tuition aid is spent depends solely upon where parents who receive tuition aid choose to enroll their child." *Zelman*, 536 U.S. at 646. "[N]ot one cent flows from the State to a sectarian private school … except as a result of the necessary and intervening choices of individual parents." *Jackson*, 578 N.W.2d at 872.

The final tack Appellees and their amici take in disparaging the parental role is to suggest there simply is no need for parental choice, because the District's public schools have higher average test scores and graduation rates relative to other Colorado school districts. *See* Amici American Association of School Administrators ("AASA") and American Federation of Teachers ("AFT") Br. 5. In adopting the Scholarship Program, however, the Board was not concerned with averages. It was concerned with the "individualized needs of each student." Policy ¶A.2. Children are not averages, and even the above-average Douglas County public schools are not the right fit for every Douglas County child.

B. The Blaine History Is Unambiguous And Germane To This Court's Analysis

Appellees and their amici do little to rebut arguments regarding the sordid history of Colorado's Blaine provisions. They acknowledge that *Romer v. Evans*, 517 U.S. 620 (1996), and *Hunter v. Underwood*, 471 U.S. 222 (1985), require consideration of the history and motivations behind discriminatory state

constitutional provisions, *see* Larue Br. 51 n.14, 68 n.16, but insist such analysis is "irrelevant" to the Blaine provisions because "no legal authority … has invalidated similar provisions on these grounds." Larue Br. 51. That is beside the point; the Families do not seek to "invalidate" Colorado's Blaine provisions, but rather to have this Court interpret them in a manner that avoids giving effect to the bigotry that motivated them. Numerous courts, in school choice and other educational aid cases, have interpreted such provisions consistent with the federal religion clauses. *E.g.*, *Jackson*, 578 N.W.2d at 620 ("[W]e interpret and apply the benefits clause … in light of the United States Supreme Court cases interpreting the Establishment Clause of the First Amendment."); *Springfield Sch. Dist. v. Dep't of Educ.*, 397 A.2d 1154, 1170 (Pa. 1979) ("[W]e believe that the limitations contained in our constitution do not extend beyond those announced by the United States Supreme Court in interpreting the first amendment to the federal constitution."); *Toney v. Bower*, 744 N.E.2d 351, 358 (Ill. App. 2001) ("[T]he restrictions in our constitution concerning the establishment of religion are identical to those contained in the federal establishment clause."); *see also Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 (Ohio 1999) ("We reiterate the reasoning discussed during our analysis of the federal constitutional standard, and although we now analyze

pursuant to the Ohio Constitution, we not surprisingly reach the same conclusion.").[4]

Moreover, although the Supreme Court has not yet had occasion to resolve the federal constitutionality of state Blaine provisions, it has recognized the anti-religious bigotry that engendered them. *Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000) (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").

Finally, none of the cases Appellees cite for the supposed irrelevance of the Blaine issue is of any moment. *Cain v. Horne* says nothing regarding the Blaine issue, and *University of Cumberlands v. Pennybacker* and *Bush v. Holmes* found no historical evidence linking the state provisions in those cases to anti-

[4] The doctrine of constitutional avoidance requires an interpretation consistent with the U.S. Constitution if possible. *NFIB v. Sebelius*, __ U.S. __, 132 S. Ct. 2566, 2593 (2012). If such an interpretation were not possible, invalidation, as occurred in *Romer* and *Hunter*, would be necessary.

Catholicism. *Univ. of Cumberlands v. Pennybacker*, 308 S.W.3d 668, 681-82 (Ky. 2010); *Bush v. Holmes,* 886 So.2d 340, 351 n.9 (Fla. Ct. App. 2004).[5]

Here, on the other hand, the evidence is abundant, notwithstanding Appellees' insistence that it is "insufficient." Larue Br. 52. That evidence includes three hours of unrebutted testimony from Dr. Charles Glenn, whom the District Court certified as an expert "on the history of education in the United States, and more particularly on the social, religious, and political history of the Blaine movement in Colorado and nationally." Tr. 645:23-646:3, 22-23. Appellees declined to challenge Professor Glenn's qualifications on *voir dire* and did not object to his expert certification, Tr. 646:9-11, 20-22, yet they now claim his testimony is not competent, primarily because his doctoral degrees are in educational policy and administration, as well as religion and modern culture, rather than history. Larue Br. 52; Tr. 643:20-24. It is too late for such an objection, which, in any event, ignores that Professor Glenn has taught the history of education in the Department of History at Boston University for more than a dozen years and that his career has focused on "the role of the state in relation to schools" and "the education of immigrants and members of minority groups." *See*

[5] Moreover, in reviewing *Holmes*, the Florida Supreme Court declined to approve its treatment of the Blaine issue. *See Bush v. Holmes*, 919 So.2d 392, 413 (Fla. 2006).

Tr. 643:25-644:18. Appellees also contend Dr. Glenn's testimony was "based on sparingly little evidence," Larue Br. 53—a contention belied by even a casual examination of the exhibits introduced during his testimony and the 16-page bibliography to his learned treatise on the national and Colorado Blaine movements. *See* Ex. OO.[6]

Unable to make an issue of Dr. Glenn, Appellees attempt to manufacture a dispute regarding the evidence, focusing, like the District Court, on a "pro-Constitution rally" attended by some Catholics before ratification and the fact that one of Colorado's Blaine provisions was modeled on an Illinois provision that preceded the federal Blaine Amendment. Larue Br. 53. In discussing the rally, which is reported in one sentence of a dissertation, Ex. 149, p.21, Appellees omit the broader context, which is provided in the paragraphs preceding and following the cherry-picked sentence. They explain that "the delegates generally agreed … that the most hostility would come … from … southern Colorado," where "Spanish-speaking," "predominately Catholic" citizens, many of whom "oppose[d]

[6] Appellees note that Exhibit NN, a chapter from a forthcoming book by Dr. Glenn, was not peer reviewed. Larue Br. 52. Although the exhibit was not peer-reviewed, the outline and introduction that gave rise to it were reviewed and accepted by the editorial board of his publisher. Tr. 693:9-18. The exhibit was not subject to further review precisely because Dr. Glenn is "an established scholar." Tr. 694:10-11.

the constitutional ban on dispersing state funds among parochial schools," were concentrated. Ex. 149, pp.19. This "served as a Protestant call to arms," prompting a Denver newspaper to "implore[] the Colorado citizens" to:

> put their seal of condemnation upon any attempt by any religious society to break down the best school system the sun ever shone upon, and which is the safeguard for the perpetuation of our liberties and republican form of government.

Ex. 149, p.21 (footnote omitted). Former territorial governor John Evans "confirmed this reaction":

> Only one thing may save [the constitution]. The Catholics are going to oppose it because it prohibits a division of the School fund. If they come out on that issue it will rally all Protestants for it and carry it.

Ex. 149, pp. 21-22 (footnote omitted).

As for the Illinois provision that served as a model for one of Colorado's Blaine provisions, the Families demonstrated that "Blaine himself … drew from such 'proto-Blaine' provisions"; that "the history of the Illinois provision is … dripping with anti-Catholic bigotry"; and that it "helped preserve the Protestant character of Illinois' public schools." Families' Br. 38. Rather than refute these points, Appellees invite the Court to ignore them, arguing that the Families relied on authorities "outside the record" in making them. Larue Br. 53. The authorities are an Illinois Supreme Court opinion, a report of the U.S. Commission on Civil

Rights, and an influential academic work on the history of education—all of which this Court may take notice. *United States v. Eagleboy*, 200 F.3d 1137, 1140 (8th Cir. 1999).

Finally, Appellees make a last-ditch attempt to portray Colorado's Blaine provisions as having been adopted out of a benign "belief in the importance of separation of church and state, not bias." Larue Br. 54. They claim the delegates "decid[ed] to keep *all* religion separate from publicly-funded schooling," and that "since the time of the Constitutional Convention it has been understood that non-sectarian implies the exclusion of the reading of *any* Bible and *all* religious training and exercises from the public schools." Larue Br. 17 n.1, 55; *see also* Alliance Defense Fund ("ADF") Br. 16. Were it only true. The Colorado Supreme Court's decision in *Vollmar v. Stanley*, upholding reading of the King James Version of the Bible in public schools, makes clear it is not:

> It is said that King James' Bible is proscribed by Roman Catholic authority; but proscription cannot make that sectarian which is not actually so….
>
> …If the legislature or the constitutional convention had intended that the Bible should be proscribed, they would simply have said so….
>
> ….
>
> We conclude that the reading of the Bible without comment is not sectarian.

255 P. 610, 617 (Colo. 1927), *overruled on other grounds by Conrad v. City and Cnty. of Denver*, 656 P.2d 662 (Colo. 1982).

C. The Federal Constitutional Problems Created By The District Court's Interpretation Are Real And Substantial

Notwithstanding Appellees' attempts to downplay them, the federal constitutional problems created by the District Court's decision are real. Tellingly, Appellees' first approach is to fundamentally mischaracterize the Families' arguments on this point as an assertion that "the federal Constitution *requires* Colorado to fund religious education." Larue Br. 15. The Families argue no such thing. They argue what the federal Constitution *prohibits*: the wholesale exclusion of religious options from an otherwise neutral and generally available educational aid program.[7]

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[7] Appellees are also wrong in claiming the Families' Equal Protection, Establishment, and Due Process Clause arguments are "raised for the first time on appeal." Larue Br. 56. They were raised in the District Court, *e.g.*, ID #40492890, p.235, despite the fact that the Families were not obligated to raise them, as the unconstitutionality arose from the District Court's *decision*. *See Holmes*, 886 So.2d at 391 n.40 (Polston, J., dissenting). Moreover, although the District Court *sua sponte* issued a permanent injunction, this case was briefed in the context of Appellees' motion for a *preliminary* injunction, and Appellees maintained throughout that they sought preliminary relief only. It is disingenuous to now suggest Appellants failed to adequately develop issues they would have had the opportunity to more fully develop had there been proceedings on a permanent injunction. *See Governor's Ranch Prof'l Center, Ltd. v. Mercy of Colo, Inc.*, 793 P.2d 648, 651 (Colo. App. 1990).

Although Appellees maintain that such an exclusion is permissible because "the Colorado constitutional provisions … mandate a stricter separation between church and state than does the federal Constitution," Larue Br. 58-59, it is well established that "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." *Zavilla v. Masse*, 147 P.2d 823, 824-25 (Colo. 1944); *see also Widmar v. Vincent*, 454 U.S. 263, 276 (1981); *Kreisner v. City of San Diego*, 1 F.3d 775, 779 n.2 (9th Cir. 1993). Thus, "even though the [Colorado] Constitution's provision[s] prohibiting governmental establishment or preference of religion may be broader than the United States Constitution," *id.*, they cannot justify discrimination based upon religious status. *Widmar*, 454 U.S. at 276; *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 172-73 (3rd Cir. 2002); *Bronx Household of Faith v. Bd. of Educ. of City of New York*, __F. Supp. 2d ___, 2012 WL 2509918, *10 n.13 (S.D.N.Y. June 29, 2012).[8]

[8] Although there may be some limited "play in the joints" between the Free Exercise and Establishment Clauses, any such "play" must be "productive of a benevolent neutrality." *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970). The wholesale exclusion of religious options is not "benevolent neutrality." *See Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008).

1. The District Court's Interpretation Violates The Free Exercise Clause

Appellees' argument that there is no Free Exercise problem hinges largely on *Locke v. Davey*, 540 U.S. 712 (2004), which has no application here. "[E]ven the *Locke* Court itself intimated that" its opinion "is *sui generis*," and it "did not seem concerned with establishing much precedential value." *Bronx Household of Faith*, __F. Supp. 2d ___, 2012 WL 2509918, *9. Although its precise holding has been subject to debate, what *Locke* does *not* do is clear: "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.

Locke concerned a state scholarship program that "permit[ted] students to attend pervasively religious schools" but excluded devotional theology majors training to become ministers. *Locke*, 540 U.S. at 724. The Court upheld the exclusion but went to extraordinary lengths to limit its holding. First, it emphasized that the "only interest at issue" in the case was the "State's interest in not funding the religious training of clergy." *Id.* at 722 n.5. To that end, the opinion is replete with language limiting its reach to the ministerial training exclusion. *E.g., id.* at 719, 721 (describing the state's interest as not funding

"religious instruction that will prepare students for the ministry," "vocational religious instruction," and "religious education for the ministry").

Second, *Locke* relied heavily on the unique, Framing-era tradition against public funding of clergy. It noted that "[m]ost States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry." *Id.* at 723. It emphasized that these "early state constitutions … exclude[ed] *only* the ministry from receiving state dollars." *Id.*

Third, *Locke* emphasized the many ways in which the scholarship program *included* religious options. For example, "[t]he program permit[ted] students to attend pervasively religious schools," and "students [we]re still eligible to take devotional theology courses." *Id.* at 724, 725. "Far from evincing … hostility toward religion," the Court concluded, "the entirety of the Promise Scholarship Program goes a long way toward including religion in its benefits." *Id.* at 724.

Locke has no application here. First, the "[s]tate's interest in not funding the religious training of clergy" is not at issue. *Id.* at 722 n.5. Second, unlike the tradition in Framing-era constitutions of "explicitly excluding *only* the ministry from receiving state dollars," *id.* at 723, state Blaine Amendments—which *Locke* determined were not at issue in that case, *id.* at 723 n.7—were a post-Framing-era

development, "born of bigotry," that broadly targeted Catholic education. *Mitchell*, 530 U.S. at 829 (plurality); *see also Zelman*, 536 U.S. at 721 (Breyer, J., dissenting). Finally, unlike the scholarship program in *Locke*, the District Court's decision does not "go[] a long way toward including religion in [educational] benefits." *Id.* at 724. It is a wholesale exclusion.

In urging a more expansive reading of *Locke*, Appellees rely largely on *Eulitt v. Maine Department of Education*, 386 F.3d 344 (1st Cir. 2004), which the Tenth Circuit expressly rejected in *Colorado Christian University*—a point Appellees neglect to mention. Despite *Locke*'s holding that "the only interest at issue" in the case was "the State's interest in not funding the religious training of clergy," 540 U.S. at 722 n.5, *Eulitt* radically extended the opinion to encompass all "education funding decisions." *Eulitt*, 386 F.3d at 355. The Tenth Circuit rejected that interpretation for going "well beyond the holding in *Locke*" and for authorizing the exclusion of "disfavored schools, based on their religious affiliation." *Colo. Christian Univ.*, 534 F.3d at 1256 n.4.[9]

[9] Appellees' other cited cases have equally little application. Two concern *direct* aid to religious institutions. *Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 408-09 (6th Cir. 2007); *Pennybacker*, 308 S.W.3d at 682-83. Three concern regulations that did not classify based on religious status. *See Wirzburger v. Gavin*, 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). *Anderson v. Town of Durham* involved the same regulation at issue in *Eulitt*, and the Maine

The only other argument Appellees make in attempting to moderate the Free Exercise problems with the District Court's decision is to claim that *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), on which the Families rely, is "inapposite" because the "law struck down there … prohibit[ed] or impose[d] criminal or civil sanctions on … religious activity." Larue Br. 60-61. To the extent appellees mean to suggest a Free Exercise violation may only occur when civil or criminal fines are levied, they are mistaken. *See Colo. Christian Univ.*, 534 F.3d at 1257-58; *Peter v. Wedl*, 155 F.3d 992, 997 (8th Cir. 1998). Moreover, Appellees ignore *Lukumi*'s lesson that anti-religious animus like that behind Colorado's Blaine provisions can itself engender a Free Exercise Clause violation. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 540-41 (plurality). Even the cases on which Appellees rely recognize as much. *E.g.*, *Wirzburger*, 412 F.3d at 281.

2. The District Court's Interpretation Violates The Equal Protection Clause

Colorado's religion provisions, as interpreted and applied by the District Court, also suffer the same equal protection infirmities as the Colorado

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court reflexively adopted the misguided reasoning of that opinion. 895 A.2d 944, 961 (Me. 2006). Finally, although *Bush v. Holmes* proposed a radical interpretation of *Locke* like *Eulitt*'s, *see* 886 So.2d at 364, the Florida Supreme Court declined to approve that interpretation on review. 919 So.2d at 413.

constitutional provision that targeted gay and lesbian citizens in *Romer v. Evans*. They make it "more difficult for one group of citizens than for all others to seek aid from the government," and "the disadvantage imposed [wa]s born of animosity toward the class of persons affected." *Romer*, 517 U.S. at 633-34. Appellees' only attempt to distinguish *Romer* is to argue that "Appellants have failed to show" the Blaine provisions "were motivated by bias or have ever been applied in a discriminatory manner." Larue Br. 68 n.16. It strains credulity to suggest they were not motivated by bias, and there is no question they discriminate, *particularly* as interpreted and applied by the District Court.

Appellees insist, however, that even if the Blaine provisions are rooted in anti-Catholic bigotry, that history is irrelevant, because "the District Court's Order does not discriminate against Catholicism," but rather "applies … to all religions." Larue Br. 67; *see also* ADF Br. 11, 17-18. That is a distinction without a difference, as religion itself is an "inherently suspect distinction[]" under the Equal Protection Clause. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). The District Court's application of Colorado's religion provisions cannot escape meaningful scrutiny simply because its effect is *more* discriminatory than the provisions were originally intended to be. A wholesale exclusion of religious options from otherwise neutral and generally available educational aid programs is

most certainly an equal protection violation. The Eighth Circuit held as much in *Wedl*, 155 F.3d at 996-97, which Appellees do not acknowledge, much less attempt to distinguish.

Appellees are again off the mark when they claim "[t]he precise argument set forth by Intervenors and … Becket Fund under the Equal Protection Clause was considered and rejected by the U.S. Supreme Court in *Locke*." Larue Br. 66 (citations omitted). In *Locke*, the Court did not regard the state constitutional provision in question as a Blaine provision, and it found nothing "in the history or text" of the provision "that suggest[ed] animus toward religion." *Locke*, 540 U.S. at 725. "[T]he Blaine Amendment's history," the Court therefore concluded, is "simply not before us." *Id.* at 723 n.7. Here, it is front and center.[10]

Finally, Appellees' suggestion that "the state has a compelling interest in giving meaning to its religion clauses" is both disingenuous and incorrect. Larue Br. 68. It is disingenuous because the State is a party to this case and *rejects* appellees' interpretation of Colorado's religion provisions. It is incorrect because

[10] The other cases Appellees cite on this point are equally irrelevant. *Sloan v. Lemon* stands for the proposition that a state may not be compelled to do, under the Equal Protection Clause, that which the Establishment Clause prohibits. 413 U.S. 825, 834 (1973). Here, appellees acknowledge that the Establishment Clause *permits* the Scholarship Program. *Norwood v. Harrison* is similarly unavailing; it concerns governmental aid to racially segregated schools. 413 U.S. 455 (1973). The remaining cases are distinguished in note 9, above.

a state's desire to achieve greater separation than is achieved by the Establishment Clause is *not* a compelling interest. *Widmar*, 454 U.S. at 276; *Tenafly Eruv Ass'n*, 309 F.3d at 172-73; *Bronx Household of Faith*, __F. Supp. 2d at ___, 2012 WL 2509918, *10 n.13.

3. The District Court's Interpretation Violates The Establishment Clause

The District Court's interpretation also violates the Establishment Clause, which, in addition to "prohibit[ing] the government from favoring religion," prohibits government from "discriminating *against* religion," *Bd. of Educ. v. Grumet*, 512 U.S. 687, 717 (1994) (O'Connor, J., concurring)—whether "a particular religion or … religion in general." *Church of Lukumi Babalu Aye*, 508 U.S. at 532. Appellees' only attempt to rebut this point is an argument even the District Court rejected: "the First Amendment," they claim, "permits courts to evaluate the religious nature of particular organizations" and to exclude "pervasively sectarian" options from public benefit programs. Larue Br. 63, 65. As the District Court correctly held (if not heeded), "the U.S. Supreme Court has reversed course with respect to the analysis of 'pervasively sectarian' institutions" and "determined that any inquiry into the religiousness of a particular institution, including religious schools, is improper." Order 37; *see also Mitchell*, 530 U.S. at 828-29 (plurality); *Colo. Christian Univ.*, 534 F.3d at 1258, 1263.

4. The District Court's Interpretation Violates The Due Process Clause

In regard to the Due Process Clause, Appellees argue only that that there is no "substantive due process right to public funding for religious education." Larue Br. 69. The Families, however, never argued there was. Rather, they argue that it is unconstitutional to condition "receipt of a benefit or privilege," including a scholarship, on "relinquishment of a constitutional right," including the due process right to choose a religious school for one's child. *Bourgeois v. Peters*, 387 F.3d 1303, 1324 (11th Cir. 2004). The District Court's interpretation of Colorado's religion provisions does exactly that, allowing benefits for children whose parents choose non-religious, but not religious, private schools.

D. The Scholarship Programs Helps, Not Hurts, Children With Special Needs

Appellees and their amici are wrong again in claiming the Scholarship Program harms children with disabilities. Douglas County continues to provide special education services pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, including provision of a "free and appropriate public education" to children with special needs. It also recognizes, however, that a public school education is not right for every such child. It

therefore provides parents the *option* of using a Choice Scholarship to attend a school that, in the parents' opinion, will better meet their child's unique educational requirements.

One such child is Intervenor-Appellant N.O. Despite receiving services under the IDEA in a Douglas County public school, he was not proficient on standardized tests, had to repeat fifth grade, was subjected to relentless bullying, and, toward the end of sixth grade, was assaulted by another student. Tr., pp.784:16-18, 785:21-786:8; 787:6-9; ID #41153741, p.2070:¶¶8, 10. N.O.'s parents, Diana and Mark Oakley, attempted to secure alternative services for him but were thwarted by the expensive, time-consuming, and bureaucratic quagmire that is the IDEA. Tr., pp.797:2-798:8.[11] They eventually concluded that N.O. "doesn't fit inside of a public school box. He … just doesn't learn that way." Tr., pp.787:3-5.

Consumed with worry over N.O.'s safety and academic progress, Diana and Mark were overjoyed when the Board adopted the Scholarship Program, as it was "an opportunity to remove [him] from an environment in which he was not thriving and to place him into an environment in which he would thrive." ID #41153741,

[11] *See also* Natalie Pyong Kocher, *Lost in Forest Grove: Interpreting IDEA's Inherent Paradox*, 21 Hastings Women's L.J. 333, 350-52 (2010).

p.2070:¶12. *But for the Scholarship Program*, N.O. would not have had that opportunity. Tr., pp.794:18-24; ID #41153741, p.2071:¶19. It is therefore nonsense to suggest the program harms students with special needs.

Nor is there any merit to the claim of amicus Legal Center for People with Disabilities that the Scholarship Program violates the Americans with Disabilities Act or Section 504 of the Rehabilitation Act. Tellingly, Appellees did not even challenge the Scholarship Program under these provisions, and they are not properly before this Court.

E. Policy Considerations Are Not Relevant But, If Considered, Support the Scholarship Program

Finally, amici AASA and AFT advance various policy arguments against the Scholarship Program—claiming, for example, that choice does not yield positive academic outcomes—but such arguments are not germane to the constitutional questions before this Court. Questions of the "wisdom, justice, policy, or expediency of a statute are for the legislature alone," *Denver Milk Producers v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers' Union*, 183 P.2d 529, 541 (Colo. 1947), and the propriety of school choice as a policy matter has no bearing on its constitutionality. *Meredith v. Daniels*, No.

49D07-1107-PL-025402, at 1-2 (Marion Super. Ct. Aug. 15, 2011) (denying preliminary injunction).[12]

Even if policy considerations were relevant, however, empirical research overwhelmingly supports the Scholarship Program. Ten random-assignment studies have been undertaken to assess how publicly- and privately-funded voucher programs impact participating students. Nine found such programs improve student outcomes; only one found no visible impact, positive or negative. Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Vouchers* 1, 8 (Found. for Educ. Choice 2nd ed. Mar. 2011). Studies show that school choice programs also boost high school graduation rates. Patrick Wolf et al., *Evaluation of the DC Opportunity Scholarship Program* xx, 41 (U.S. Dep't Educ. June 2010); Joshua M. Cowen *et al.*, *Student Attainment and the Milwaukee Parental Choice Program* 21 (Univ. of Ark. Mar. 2011). And research confirms that school choice improves the academic achievement of students who remain in the public school system. Forster, *supra,* at 15-23; Martin R. West & Paul E. Peterson, *The Efficacy of Choice Threats Within School Accountability Systems: Results from Legislatively Induced Experiments*, 116 Econ. J. C46, C54 (Mar. 2006); Marcus A.

[12] A copy of the *Meredith* opinion is attached as Addendum 1.

Winters & Jay P. Greene, *Competition Passes the Test*, Education Next 66, 68-71 (Summer 2004).

III. CONCLUSION

This Court should accordingly reverse the District Court's decision, vacate the injunction, and enter judgment upholding the Scholarship Program.

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I hereby certify that on August 7, 2012, I filed the foregoing AMENDED REPLY BRIEF OF INTERVENOR-APPELLANT FAMILIES, with attachments, with the Clerk of the Court of Appeals through Lexis/Nexis File and Serve and served an electronic copy upon the following through Lexis/Nexis File and Serve:

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