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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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William H. Mellor
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Phone: (703) 682-9320
Atty. Reg. # 8402

Michael E. Bindas
INSTITUTE FOR JUSTICE
101 Yesler Way, Suite 603
Seattle, WA 98104
Phone: (206) 341-9300
Pro Hac Vice

Case Number:
11CA1856
11CA1857

OPENING 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).

Choose one:

☑ It contains 9,440 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 issue was raised and ruled on.

For the party responding to the issue:

☐ It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal and, if not, why not.

S/ William H. Mellor
William H. Mellor

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

Other Authorities

ISSUES PRESENTED

1. Whether the trial court erred in holding that the Choice Scholarship Program violates the Colorado Constitution's religion provisions—specifically, Article II, section 4; Article IX, sections 7 and 8; and Article V, section 34.
2. Whether the trial court erred in refusing to consider the anti-Catholic history of Article V, section 34, and Article IX, sections 7 and 8, in resolving Appellees' claims under those provisions.
3. Whether the trial court's interpretation of the Colorado Constitution's religion provisions violates the First and Fourteenth Amendments to the U.S. Constitution.

STATEMENT OF THE CASE

The Douglas County Board of Education ("Board") created the Choice Scholarship Program ("Program") to provide greater educational opportunities to families. Under the Program, the Douglas County School District ("District") provides tuition scholarships for up to 500 District students. Policy ¶F.1.[1] Parents may use the scholarship to send their child to any private school, religious or non-

[1] The policy governing the Program, including its two-page executive summary, was admitted by stipulation as Exhibit 1. Tr., p.13:20-25. For convenience, it is attached as Addendum 1 and referred to herein as "Policy." The trial court's order is attached as Addendum 2 and referred to herein as "Order."

religious, that participates in the Program and has accepted the child. Policy ¶D.2. In other words, the Program is religion-neutral and operates on private choice.

On June 21, 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, among other things, that the Program violates the Colorado Constitution's religion provisions—specifically, Article II, section 4; Article IX, sections 7 and 8; and Article V, section 34.[2] ID #40243226; ID #40255768.

On June 29, the Oakley, Doyle, and Anderson families ("Families"), each of which has at least one child participating in the Program, moved to intervene as defendants. They asserted, as an affirmative defense, that "exclusion of religious schools from an otherwise neutral program would violate the Free Exercise, Establishment, Free Speech, and Equal Protection Clauses of the United States Constitution, as well as the Due Process Clause of the Fourteenth Amendment." ID #40492890, p.235.

The plaintiffs moved for a preliminary injunction on July 5, and a three-day hearing was held in early August. ID #40601133; ID #40601853. Among those

[2] The County Appellants refer to Article II, section 4, and Article IX, sections 7 and 8, as "religion clauses" and to Article V, section 34, as the "Anti-Appropriations Clause." For convenience, the Families refer to the four provisions collectively as "religion provisions."

testifying were Diana Oakley, mother of a scholarship recipient with special needs, Tr., pp.781:7-799:19; and Dr. Charles Glenn, an educational history expert who testified regarding the anti-Catholic origins of three of the four Colorado religion provisions at issue, Tr., pp.641:22-741:23.

On August 12, the trial court issued a preliminary injunction, which it *sua sponte* made permanent. It held the Program violates the four state religion provisions. Order 36-51, 56-60.[3]

STATEMENT OF FACTS

I. The Choice Scholarship Program

The Board adopted the Program in March 2011 to "provide greater educational choice for students and parents to meet individualized student needs." Policy ¶A.3. The Program provides tuition scholarships for up to 500 eligible students. Policy ¶F.1. To be eligible, a student must reside in the District and have attended a District public school the prior year. Policy ¶D.5.

Parents may use the scholarship to send their child to any private school that participates in the Program and has accepted the student. Policy ¶D.2. (For administrative purposes only, students are also enrolled in the Choice Scholarship

[3] The court also held the Program violates Article IX, section 3 and the Public School Finance Act. The Families adopt by reference the County and State Appellants' arguments regarding these claims and the denial of the Joint Motion to Dismiss.

School, a District charter school. Tr., p.571:3-9.) Private schools inside and outside District boundaries may participate, provided they meet conditions set forth in the policy governing the Program. Policy ¶¶E.1, .3. They need not change their admissions criteria, but religious schools must afford scholarship students the option of not participating in religious services. Policy ¶E.3.l; Ex. F, ¶D.10.[4]

Scholarships are capped at the lesser of: (a) the cost of tuition at the private school; or (b) 75 percent of per pupil revenue allocated under state law. Policy ¶C.6. Currently, the upper limit is $4,575. Policy, p.2. The District distributes these 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 then restrictively endorse the checks to the school. Policy ¶¶C.3-.4. The Program thus empowers parents to exercise their pre-existing constitutional right to choose the school that is best for their child.

II. The Families

The Families are three of the nearly 500 Choice Scholarship families. Their children were already enrolled—in some cases, already taking classes—at their chosen private schools when the Program was enjoined.

[4] Exhibit F was admitted by stipulation. *See* Tr., p.13:20-25.

The Oakleys. Diana and Mark Oakley have three children: N.O., a seventh-grader; A.O., a fifth-grader; and J.O., a second-grader. The family resides in Highlands Ranch, but Mark works in South Carolina; he was unemployed for two years and unable to find work in Colorado. Tr., pp.781:21-784:5.

A.O. and J.O. attend Eagle Ridge Elementary, a District school. Diana and Mark are very happy with their progress there. Tr., pp.782:23-783:23.

Before this year, N.O. also attended Eagle Ridge. Unlike his siblings, however, he was not doing well. N.O. has Asperger's Syndrome. Because of it, he is prone to meltdowns, can be disruptive in conventional classroom settings, and has difficulty processing and interpreting his interactions with others. Tr., pp.784:10-787:5; ID #41153741, p.2069:¶¶3-4. He was not proficient on standardized tests at Eagle Ridge and had to repeat fifth grade. Tr., pp.784:16-18, 785:21-786:8; ID #41153741, p.2070:¶8. He was also subjected to relentless bullying and, toward the end of sixth grade, was assaulted by another student. Tr., p.787:6-9; ID #41153741, p.2070:¶10.

Consumed with worry over N.O.'s safety and academic progress, Diana and Mark were overjoyed when the Board adopted the Program. Seeing it as an opportunity to get N.O. out of an environment where he had not thrived and into

one where he would, they applied for and received a Choice Scholarship. ID #41153741, p.2070:¶¶12-13.

Diana and Mark chose to use the scholarship to send N.O. to Humanex Academy, a small, non-religious private school that focuses on children with special needs. N.O. had "shadowed" students at Humanex twice during the 2010-2011 school year and, as Diana testified, was very excited to be there:

> He's actually excited about school. When he was there, and I watched him in a classroom, he—I could tell that he was comfortable. The other kids didn't treat him like he was a freak.…

Tr., pp.789:22-790:22.

Diana and Mark were impressed with everything from Humanex's small size to its individualized curriculum; from its use of natural lighting (artificial lighting is problematic for Asperger's patients) to its quiet environment (hypersensitivity to noise is another symptom). ID #41153741, p.2070:¶15; Tr., pp.790:23-792:17.

Diana and Mark enrolled N.O. at Humanex on July 14, 2011. Tuition was $17,900, and they had to take a line of credit on their home to cover the $11,325 not covered by the $4,575 Choice Scholarship and $2,000 in assistance they received from Humanex. ID #41153741, pp.2070:¶16-2071:¶17; Tr., pp.793:12-794:11.

At the August preliminary injunction hearing, Diana testified that if the Program were enjoined, she and Mark would not be able to keep N.O. at Humanex, as they cannot afford the $4,575 in scholarship funds they would lose. Tr., p.794:18-24; ID #41153741, p.2071:¶19. At the same time, they would not put N.O. back in public school, where he had been neither safe nor proficient. Rather, they would home-school him, which would entail considerable hardship, as Mark works in South Carolina and Diana is a full-time nurse. Tr., pp.794:24-797:1; ID #41153741, p.2071:¶¶20-22.

Diana and Mark's hopes of keeping N.O. at Humanex were dashed when the trial court enjoined the Program three days before N.O's first day of school. It is only because Humanex has refrained from charging them the $4,575 scholarship amount that they have been able to keep him there this year. *See* Nancy Mitchell, *Voucher pilot in legal limbo*, EdNewsColorado.org (Nov. 15, 2011), *available at* http://www.ednewscolorado.org/2011/11/15/28596-voucher-pilot-in-legal-limbo.

The Doyles. Florence and Derrick Doyle have twins, D.D. and A.D., who are high school freshmen. D.D. and A.D. attended District elementary and middle schools, but for high school, Florence and Derrick wanted them to attend Regis Jesuit, a Catholic school. ID #41154048, p.2080:¶¶1-3. The Doyles were attracted to Regis's small classes, challenging college-prep curriculum, strict discipline, and

Jesuit approach to education. Most importantly, they wanted their children to receive a spiritual foundation before college. ID #41154048, pp.2080:¶3-2081:¶3.

Regis's $11,225-per-student tuition, however, was going to be a substantial burden for the Doyles. Accordingly, Derrick and Florence applied for and received Choice Scholarships for D.D. and A.D. ID #41154048, p.2081:¶¶4, 9.

The children enrolled in Regis for the 2011-12 school year. ID #41154048, p.2081:¶5. Both took classes during the summer of 2011: D.D., an honors geometry class; A.D., a strength and conditioning class. The classes ran from early June through mid-July. D.D. also joined Regis's football team and began practices and strength training in early June. ID #41154048, p.2081:¶7.

On August 12—on the cusp of the academic year and two months after D.D. and A.D. had begun taking classes at Regis—the trial court enjoined the Program. Although the Doyles have been able to keep D.D. and A.D. at the school, it has been a considerable hardship for the family, requiring use of savings or credit to cover the $9,150 that they would have received from their Choice Scholarships. ID #41154048, p.2081:¶9.

The Andersons. Jeanette and Mark Anderson have two children: M.A., who completed second grade at Larkspur Elementary, a District school, in June

2011; and A.A., a Douglas County High School junior who also attended Larkspur. ID #41153945, p.2077:¶2.

Jeanette and Mark were very involved at Larkspur; Jeanette even served as president of its PTO. Nevertheless, she and Mark became unhappy with aspects of its curriculum, particularly Everyday Mathematics, a controversial "reform" math approach. Accordingly, they applied for and received a Choice Scholarship for M.A. ID #41153945, p.2077:¶¶3-5.

They chose to use the scholarship at Woodlands Academy, a small, non-religious private school. They were impressed with its strong science and math curriculum, small classes, and passionate teachers. M.A. spent time "shadowing" at Woodlands in April 2011. When Jeanette picked him up, he described it as "the best seven hours of my life." ID #41153945, pp.2077:¶6-2078:¶8.

Jeanette and Mark enrolled M.A. at Woodlands in early summer 2011. On August 12—ten days before his first day of class—the trial court enjoined the Program. They have been able to keep him at the school, but tuition is $7,000, and covering the $4,575 in lost scholarship funds has burdened the family. ID #41153945, p.2078:¶¶9-10, 12-13.

SUMMARY OF ARGUMENT

A proper application of the Colorado Constitution's religion provisions requires a correct understanding of the role that parents play in the Program. Under the Program, it is parents—not the government—who choose the schools their children will attend. By providing this private choice, the Program not only empowers parents to exercise their fundamental right to "direct the … education of [their] children," *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925)—that is, "to have their children taught where, when, how, what, and by whom they may judge best," *Vollmar v. Stanley*, 255 P. 610, 613 (Colo. 1927), *overruled on other grounds by Conrad v. City and Cnty. of Denver*, 656 P.2d 662 (Colo. 1982)—but also ensures that the separation of government and religion required by Colorado's religion provisions is maintained.

In concluding the Program violates the religion provisions of the Colorado Constitution, the trial court erred in three ways. First, its interpretation of the provisions—as requiring the exclusion of religious options from student aid programs—was rejected in *Americans United for Separation of Church and State Fund, Inc. v. State*, 648 P.2d 1072 (Colo. 1982), which upheld a state grant program that included religious schools and operated on private choice. The trial court's interpretation is also inconsistent with decisions of the U.S. Supreme Court

and numerous state courts upholding school choice programs indistinguishable from Douglas County's.

Second, three of the four religion provisions in question contain "Blaine" provisions—products of anti-Catholic bigotry intended to preserve the Protestant nature of 19th-century public schools and prevent direct funding of Catholic schools. Although the Blaine provisions do not address programs that aid students, rather than schools, the trial court extended their reach to restrict such programs, thereby extending the anti-Catholic animus attending their enactment.

Third, as interpreted and applied by the trial court, Colorado's religion provisions are inconsistent with the First and Fourteenth Amendments to the U.S. Constitution.

ARGUMENT

I. The Program Does Not Violate The Colorado Constitution's Religion Provisions

A. Standard Of Review

The constitutionality of school district policies is reviewed *de novo*. *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1103 (Colo. 1998).

B. Discussion

The Colorado Constitution's religion provisions are consistent, not at loggerheads, with the right of parents to choose the schools that are best for their children and the discretion of government to aid parents' exercise of that right.

1. The Program Does Not Violate Article II, Section 4

The Program does not violate the "compelled support" clause of Article II, section 4, which provides: "No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent." Article II, section 4 "embodies the same principles as those enunciated in United States Supreme Court cases interpreting the [First Amendment]," *Young Life v. Div. of Emp't and Training*, 650 P.2d 515, 526 (Colo. 1982), and "[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).[5]

In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)—a case the trial court did not even acknowledge—the U.S. Supreme Court rejected an Establishment

[5] Interpreting Colorado's religion provisions to embody the same principles as the First Amendment does not, as the trial court claimed, imply "the framers of the Colorado Constitution … debated, drafted, and ratified these provisions without purpose." Order 33. The federal religion clauses did not even apply to the states when the Colorado Constitution was adopted. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3034 n.12 (2010).

Clause challenge to a school choice program legally indistinguishable from Douglas County's. Under the program, children in the Cleveland School District received scholarships that they could use to attend private, including religious, schools. *Id.* at 653. A large majority of participating schools were religious, and the overwhelming majority of students selected religious schools. *Id.* at 657-58. The Court nevertheless upheld the program because it was: (1) "neutral with respect to religion, … permit[ting] the participation of all schools within the district, religious or nonreligious"; and (2) 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). *Zelman* culminated a line of cases upholding religion-neutral student aid programs that operate on private choice. *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983).

The Colorado Supreme Court anticipated these rulings as early as 1982, when, in *Americans United*, it rejected an Article II, section 4 (as well as Article IX, section 7 and Article V, section 34) challenge to a postsecondary grant program. The plaintiffs argued that because students could choose religious

schools, the program "compel[led] Colorado taxpayers to support sectarian institutions." 648 P.2d at 1081. After emphasizing that Article II, Section 4 "echoes the principle of constitutional neutrality underscoring the First Amendment," the court upheld the program as "essentially neutral in character" and "designed for the benefit of the student, not the educational institution." *Id.* at 1082.

The same is true here. The Program is "neutral in character," allowing religious and non-religious schools alike to participate; and, as even the trial court recognized, it was designed "for the benefit of the students, not the benefit of private religious schools." Order 44. These characteristics should have spelled its constitutionality.

Instead, the trial court held the Program violates Article II, section 4, reasoning that some participating schools "infuse religious teachings into the curriculum" and, therefore, "any public taxpayer funding provided to the partner schools, even for the sole purpose of education, would inherently result in compulsory financial support to a sectarian institution to further its goals of indoctrination and religious education." Order 45. The court found it particularly problematic that, unlike the postsecondary program in *Americans United*, the Program allows students to choose religious elementary and secondary schools,

which, the trial court suggested, are incapable of serving a "secular educational function." Order 45 (internal quotation marks and citation omitted).

The trial court's analysis is fatally flawed. First, it ignores the constitutionally dispositive fact that the Program operates on private choice. When a scholarship program "permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients," the "circuit between government and religion [i]s broken," and any "incidental advancement of a religious mission … is reasonably attributable to the individual recipient, not to the government." *Zelman*, 536 U.S. at 652. For this reason, numerous state courts have upheld school choice programs under the "compelled support" clauses of their own constitutions. For example, the Wisconsin Supreme Court held the Milwaukee Parental Choice Program did not violate Wisconsin's compelled support clause because "[a] qualifying student only attends a sectarian private school under the program if the student's parent so chooses." *Jackson v. Benson*, 578 N.W.2d 602, 623 (Wis. 1998). The Ohio Supreme Court rejected a compelled support challenge to the Cleveland Pilot Project Scholarship Program because it operates on private choice. *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211-12 (Ohio 1999). And in January 2012, a compelled support challenge to Indiana's Choice Scholarship Program was rejected because scholarships "are given to a

private citizen who may then choose to use those funds to pay tuition at religious schools." *Meredith v. Daniels*, No. 49D07-1107-PL-025402, at 5 (Marion Super. Ct. Jan. 13, 2012).[6]

Second, the distinction the trial court drew between postsecondary and elementary/secondary schools is one with no significance. Although *Americans United* noted the postsecondary nature of the program there, it did so only because, at the time, "the 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." *Ams. United*, 648 P.2d at 1079. Since then, the Court has clarified that those differences have no bearing on programs designed to assist students, rather than schools, *see Zelman*, 536 U.S. at 649, and, in that light, has upheld elementary and secondary student aid programs that include religious options. *E.g.*, *id.*; *Zobrest*, 509 U.S. 1; *Mueller*, 463 U.S. 388.

Finally, the trial court's suggestion that religious elementary and secondary schools cannot perform a secular educational function is baseless. "Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans" and "often afford wholesome

[6] A copy of the *Meredith* opinion is attached as Addendum 3.

competition with our public schools." *Mueller*, 463 U.S. at 395 (internal quotation marks and citation omitted). Thus, "[a] state's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable." *Id.* Were parochial schools *not* capable of performing a secular educational function, Colorado would not allow them to satisfy its compulsory education laws. Of course, it does, C.R.S. § 22-433-104(2)(b), and empowering parents to choose such schools is permissible under Article II, section 4.

2. The Program Does Not Violate Article IX, Section 7

The Program is likewise permissible under Article IX, section 7, which states:

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

(Emphasis added.) Two things are evident from the highlighted language: (1) this provision is concerned with governmental actors; and (2) it prohibits such actors from directly funding religious institutions.

The Program implicates neither concern. First, scholarship funds are directed to schools by the free, independent choices of parents—not by governmental actors. Second, the Program does not fund religious institutions; it funds students. An aid program that permits private individuals to independently select from among a wide array of service providers, religious and non-religious, is not a program passed "in aid of," "for", or "to help support or sustain" religious institutions.

The trial court nevertheless held the Program violates this provision, reasoning that scholarship funds "would further the sectarian purpose of religious indoctrination within the schools[']educational teachings and not the secular educational needs of the students." Order 40. Although it claimed to not consider the "religiousness" of participating schools in reaching this conclusion, it focused expressly on the "interplay between the participating Private School Partners' curriculum and religious teachings." Order 40.

The trial court's analysis is incorrect. First, as *Americans United* explained in rejecting the Article IX, section 7 claim in that case, when "aid is designed to assist the student, not the institution," any benefit flowing to the institution is "remote and incidental" and "does not constitute … aid to the institution itself within the meaning of Article IX, section 7." 648 P.2d at 1083-84. Other states'

courts have reached similar conclusions in upholding school choice programs under the Article IX, section 7 analogues of their constitutions. For example, the Wisconsin Supreme Court held the Milwaukee program did not violate a state constitutional prohibition on appropriations "for the benefit" of religious schools because any benefit accruing to such schools was "incidental" to parental choice—not the "principal or primary effect" of the program. *Jackson*, 578 N.W.2d at 621 (internal quotation marks and citation omitted). The recent decision upholding Indiana's program similarly concluded the program was not enacted "for the benefit of" religious schools because "only eligible students have a guaranteed benefit that their parents can, by exercising individual choice …, use to pay for them to attend any participating school." *Meredith*, No. 49D07-1107-PL-025402, at 8. Any "cost-savings and curriculum expansion benefits to religious schools," the court held, "are incidental to parents choosing to provide their children with religious education." *Id.*

Second, although the trial court claimed it would "not analyze the religiousness" of participating schools or assess how "pervasively sectarian" they are, Order 37, it did exactly that. For example, it inspected Lutheran High School's "materials and applications" and determined the "curriculum is premised on the basis of religious education and teaching in the classroom." Order 11-12,

42. It scrutinized Lutheran's mission statement, reasoning that "tuition from students participating in the Scholarship Program" would "aid[] in carrying out the mission of the school, which is to 'nurture academic excellence and encourage growth in Christ.'" Order 41. The trial court even inquired into Lutheran's bank, claiming "an increase in enrollment would result in more tuition to aid in payment of Lutheran High School's financial debt and mortgage payments," which are made to the "Lutheran Church Extension Fund, a bank that is a 'dual ministry in partnership' with the Lutheran Church." Order 41.

The religiosity of schools participating in a neutral student aid program is constitutionally irrelevant, *see Zelman*, 536 U.S. at 652-53, 658, and the federal Constitution forbids its consideration. *Colo. Christian Univ.*, 534 F.3d at 1261-69. Although federal jurisprudence once required the exclusion of "pervasively sectarian" schools from *institutional* aid programs, the Supreme Court abandoned even that requirement as inconsistent with its decisions "prohibit[ing] governments from discriminating in the distribution of public benefits based upon religious status or sincerity." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality). Moreover, in 2008, the Tenth Circuit struck down a "pervasively sectarian" exclusion in Colorado's scholarship programs. *Colo. Christian Univ.*, 534 F.3d at 1261-69. In short, "[i]f a parent wishes to send her child to a 'pervasively

sectarian' institution, that is her choice. The precise degree of religiosity of schools participating … has no bearing on the program's constitutionality." *Meredith*, No. 49D07-1107-PL-025402, at 3.

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

The Program is also permissible under Article V, section 34, which provides:

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

Once again, *Americans United* is dispositive. There, plaintiffs argued the grant program violated this provision because it authorized appropriations to "institutions … not under the absolute control of the state" (specifically, "denominational or sectarian institution[s]"); or, alternatively, constituted "aid for educational purposes to persons not under the absolute control of the state." *Ams. United*, 648 P.2d at 1076, 1085. The Colorado Supreme Court rejected both contentions. Regarding the former, it reiterated that the program was not "a form of governmental aid to institutions," but rather individuals. *Id.* at 1085. Regarding the latter, it concluded that the program fell within the "public purpose" exception to Article V, section 34, which permits appropriations "serv[ing] a public purpose, even though the recipient may be a private citizen who is incidentally benefitted by

the payment." *Id.* at 1085. Because there is an "overriding public purpose served by higher education," the court held, the "[p]rogram does not violate Article V, Section 34." *Id.* at 1086.

The same is true here. Choice Scholarships are a form of aid to individuals, not institutions, and there is an equal, if not greater, public purpose served by elementary and secondary education.

In nevertheless concluding the Program violates Article V, section 34, the trial court erred in two respects. First, it held the Program "appropriates taxpayer funds for private schools that are not under state control." Order 58. That contradicts not just *Americans United*, but the trial court's own, earlier conclusion that "the purpose of the [P]rogram is to aid students and parents, not sectarian institutions." Order 39.

Second, the court refused to apply the public purpose exception, reasoning that unlike "the college tuition assistance program … found to satisfy the public purpose exception in *Americans United*, the Scholarship Program here applies directly to elementary and secondary education and thus the risk of religion intruding into the secular educational function is significantly higher." Order 58-59 (internal quotation marks and citations omitted). The proposition that aid to parochial school students does not serve a secular, public purpose was squarely

rejected in *Everson v. Board of Education*, 330 U.S. 1 (1947), involving a school district's reimbursement of parents for the cost of busing their children to private schools. In *Everson*, as here, some schools "g[a]ve their students, in addition to secular education, regular religious instruction conforming to the religious tenets and modes of worship of the[ir] … Faith." *Id.* at 3. The plaintiff argued that children attended such schools "to satisfy the personal desires of their parents, rather than the public's interest in the general education of all children." *Id.* at 6. The Court disagreed, upholding the reimbursements and, specifically, the determination that "a public purpose will be served by using tax-raised funds to pay the bus fares of all school children, including those who attend parochial schools." *Id.* Here, too, a public purpose is served by the Program, and it is therefore permissible under Article V, section 34.

4. The Program Does Not Violate Article IX, Section 8

Finally, the Program does not violate Article IX, section 8, which provides that: (1) "[n]o religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state"; (2) "no … student of any such institution shall ever be required to attend or participate in any religious service whatsoever"; and (3) "[n]o sectarian tenets or doctrines shall ever be taught in the public school." The Program implicates none of these

provisions, which restrain government action in public schools—not the actions of private citizens or private schools.

The trial court's contrary conclusion rested on the fact that participating students are enrolled for administrative purposes in the Choice Scholarship School, a public charter school. That school, however, does none of the things proscribed by Article IX, section 8.

First, admission into the Choice Scholarship School is not conditioned on any "religious test or qualification." Although admission to some of the participating private schools may be, Article IX, section 8 does not restrain private schools. The trial court nevertheless found an Article IX, section 8 violation, claiming that "enrollment in the Choice Scholarship School is predicated on a student's admittance into one of the Private School Partners." Order 47-48 (emphasis omitted). But enrollment in the Choice Scholarship School is *not* predicated on admission to a private school, as the District's Superintendent testified. Tr., p.571:10-15. *After* enrolling, a student must apply to a private school, but her parents will choose that school, freely and independently, from among religious and non-religious options. Thus, if any religious test or qualification is applied to any student, it is only because the student's parents choose a private school that applies such a test or qualification—not because the

district required it "as a condition of admission into any public educational institution." Colo. Const. art. 9, § 8.

Nor does the Program require any student "to attend or participate in any religious service," or cause "sectarian tenets or doctrines" to "be taught in [a] public school." *Id.* The trial court rested its contrary conclusion on the possibility that "once the students begin attending classes" at their private schools, "they may be subject to mandatory attendance at religious services and religious teachings and indoctrination." Order 50-51. Private schools, however, are not "public school[s]" subject to the strictures of Article IX, section 8. Moreover, no family is required to choose a religious private school (or participate in the Program, for that matter). Any parents unwilling to have their child attend a private school out of fear she may be subjected to religious services or "religious teachings and indoctrination" remain free to select a different school or decline to participate in the Program. Any participation in religious activities or instruction is the result of parental choice, not governmental compulsion. *See Corp. of Presiding Bishop of Ch. of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 337 (1987) (holding that before Establishment Clause violation can occur, "it must be fair to say that the *government itself* has advanced religion through its own activities and influence").

Finally, the Program actually affords families a layer of protection beyond anything constitutionally required: It provides parents "the option of having their child receive a waiver from any required religious services at the Private School Partner." Policy ¶E.3.l. The trial court held the waiver does not go far enough, as it covers only participation at religious services and not attendance. Order 49-50. But private schools, chosen freely and independently by parents, need not provide a waiver at all. *See Wisconsin v. Yoder*, 406 U.S. 205, 213, 233 (1972) (holding parents' right to direct children's education includes "inculcation of … religious beliefs").

In short, the Program respects the constitutional right of parents to direct their children's studies by permitting—not requiring—them to select private schools that make enrollment, worship, and curriculum decisions based on shared religious values.

II. The Trial Court Ignored The Anti-Catholic Origins Of Colorado's Religion Provisions And Extended The Animus Attending Their Enactment

A. Standard Of Review

Whether a court "failed to consider or accord proper … significance to relevant evidence" is reviewed *de novo*. *Harvey v. United Transp. Union*, 878 F.2d 1235, 1244 (10th Cir. 1989).

B. Discussion

In striking down the Program, the trial court did not merely eschew controlling precedent and persuasive case law. It also ignored the anti-Catholic origins of three of the four state religion provisions at issue: Article IX, sections 7 and 8, and Article V, section 34. As Appellants' expert, educational historian Dr. Charles Glenn, testified, these sections contain "Blaine" provisions, adopted as state analogues to the unsuccessful federal "Blaine Amendment." Tr., pp.704:18-705:7, 706:3-12. Like the Blaine Amendment, they had the discriminatory purpose of preserving the non-denominational Protestant nature of public schools and preventing direct public funding of Catholic ("sectarian") schools.

The U.S. Supreme Court has recognized that the Blaine movement was "born of bigotry" and has called for its legacy to be "buried now." *Mitchell*, 530 U.S. at 829 (plurality). The trial court therefore had an obligation "to learn what history has to show" regarding Colorado's Blaine provisions, *McCreary Cnty. v. ACLU*, 545 U.S. 844, 866 (2005), so that it could avoid any interpretation that would resurrect the historical animus that engendered them. *See In re Keller*, 357 S.W.3d 413, 421 (Tex. Spec. Ct. Rev. 2010) ("[C]onstitutional provisions . . . will not be construed so as to lead to . . . unjust discrimination if any other interpretation can be reasonably indulged."). Instead, the trial court turned a blind

eye to history, *extending* the reach of the provisions and, thus, the animus attending their enactment.

1. The Blaine Movement Was A Manifestation Of Anti-Catholic Bigotry

During the early 19th century, educators advocating for the establishment of public schools sought to ensure they would be "non-sectarian." Although, today, "non-sectarian" is understood as "non-religious," the term had a much different meaning then. Public school advocates believed moral education was an integral part of the schooling necessary to produce virtuous citizens and "should be based upon the common elements of Christianity to which all Christian sects would agree." R. Freeman Butts, *The American Tradition in Religion and Education* 117 (1950). This included "reading of the Bible as containing the common elements of Christian morals but reading it with no comment in order not to introduce sectarian biases." *Id.* Invariably, it was the King James, or Protestant, version of the Bible that was read. *E.g.*, *Vollmar*, 255 P. at 613 (upholding King James Bible reading in Weld County schools); *Donohoe v. Richards*, 38 Me. 379 (Me. 1854) (upholding expulsion of Catholic student for not reading King James Bible). As Dr. Glenn testified, the typical public school incorporated prayer and the Bible, "both for instruction and devotionally," and "practiced a generic Protestantism." Tr., p.647:13-17; *see also* Tr., p.697:21-25.

Creation of the early public schools coincided with increased immigration of non-Protestants, particularly Catholics. Not surprisingly, Catholics objected to compulsory education of their children in Protestant public schools. When efforts to obtain better treatment within public schools failed, they began opposing tax levies to support the schools and, later, organizing their own schools and seeking equal funding. Tr., pp.654:8-13, 666:5-667:5; *see also* Lloyd Jorgenson, *The State and the Non-Public School: 1825-1925* 72-110 (1987). This angered the Protestant majority, and a nativist, anti-Catholic sentiment erupted. Tr., pp.649:16-650:6, 652:23-655:1.

This bigotry metastasized after the Civil War. By the mid-1870s, Republicans—having lost control of the House in 1874; facing the growing unpopularity of their signature issue, Reconstruction; and plagued by Grant administration scandals—were "looking for a new issue" to campaign on. That issue was "the Catholic threat to the common public school." Tr., p.658:1-13.

The Republicans' anti-Catholic opportunism reached new levels in September 1875, when President Grant delivered a widely-publicized Des Moines speech that raised the specter of a "new Civil War, not over race but … over religion." Tr., p.658:21-25. Grant urged the nation to "resist" the threat of "sectarian schooling" and, that December, just days before Colorado's

constitutional convention, pressed Congress to adopt a constitutional amendment to do so. Tr., pp.658:25-659:3, 670:23-671:5.

Representative James Blaine, planning an 1876 run to succeed Grant, took up the president's charge. Within days, he introduced an amendment to prohibit public funding of "sectarian" schools. Tr., pp.661:8-663:12.

Blaine's proposed amendment was a "transparent political gesture against the Catholic Church." Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 671 (1998). The term "sectarian" was widely understood as "Catholic" and "used by the public to refer obliquely to Catholic schools." Tr., p.664:22-23. Even Blaine sympathizers acknowledged the amendment was "directed against the Catholics" and that he planned "to use it in the campaign to catch anti-Catholic votes." *The Nation*, Mar. 16, 1876, at 173.

Congressional debate over the Blaine Amendment confirmed these motives. The supposed "danger" posed by the Catholic Church and its schools was discussed at length, and papal documents were even introduced as evidence of the threat. *See* Tr., pp.667:6-668:19; Ex. KK (Tr., pp.662:22-23, 663:21-22), pp.6, 8-9. One senator observed that with the Reconstruction issue having run its course, Republicans sought to bring forth "another animal … to engage the attention of the

people in this great arena in which we are soon all to be combatants," and "[t]he Pope, the old Pope of Rome, is to be the great bull that we are all to attack." Ex. KK, p.10; *see also* Tr., p.669:5-14.

This sordid history was summarized in *Mitchell v. Helms*:

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

Mitchell, 530 U.S. at 828 (plurality).

2. Colorado's Religion Provisions Are Products Of The Blaine Movement

Colorado was not immune from this anti-Catholicism. *See* Tr., pp.676:1-18, 736:11-20. The state's convention, dominated by Republicans, opened six days after Blaine submitted his amendment to Congress. It "'exemplified on a smaller scale the religious, social, and political currents of the United States as a whole.'" Ex. NN (Tr., pp.673:1, 697:10-11), p.13.

Whether to include Blaine language in the new constitution was one of the convention's most controversial issues. Tr., p.672:10-14. Numerous requests and proposals were made to prohibit public funding of "sectarian" schools. Tr.,

pp.678:5-680:25; Ex. PP (Tr., pp.677:9-12, 677:13-18), pp.5-6, 8-9. For example, former territorial governor John Evans submitted a petition on behalf of eleven Protestant churches calling for provisions to keep public schools "free from sectarian" influence, prohibit diversion of funds to Catholic schools, and allow Bible reading in public schools. Ex. PP, pp.5-6; Tr., pp.679:5-680:25.

Father Joseph Machebeuf, apostolic vicar of Colorado and, later, first Catholic bishop of Denver, urged the delegates not to adopt such provisions. *See* Tr., pp.671:17-672:8, 681:5-683:23; Ex. NN, p.14; Ex. PP, pp.13, 19-22. He began by speaking of Catholics' loyalty to Colorado, "clearly concerned to answer the charge that Catholics were disloyal citizens" who "did not want their children … to become real Americans." Tr., pp.681:15-682:4; *see also* Ex. PP, pp.20-22. He noted the school funding issue had never been fully and dispassionately discussed in America, much less Colorado, and asked the convention to refrain from adopting any Blaine-like language so that "future legislative bodies of the state" could resolve the "question of separate schools and denominational education." Ex. PP, p.20; *see also* Tr., pp.682:5-683:23; Ex. NN, p.14. He "look[ed] forward" to a day "when the passions of this hour will have subsided; when the exigencies of partisan politics will no longer stand in the way of right and

justice, and political and religious equality shall again seem the heritage of the American citizen." Ex. PP, p.21; *see also* Ex. NN, p.14.

Father Machebeuf's plea only galvanized Protestant determination to include Blaine provisions in the constitution. As Governor Evans observed, Machebeuf had "'put the Protestants on their ear'"; they would "'put in and make a fight.'" Donald W. Hensel, *Religion and the Writing of the Colorado Constitution*, 30 Church History 349, 354 (1961) (quoting Letter from John Evans to Margaret Evans (Feb. 8, 1876)).

Vigorous public discussion ensued. A *Rocky Mountain News* article warned that the "'antagonism of a certain church towards our American public school system,'" if left unchecked, would "'lay our vigorous young republic … bound with the iron fetters of superstition at the feet of a foreign despot, the declared foe of intellectual liberty.'" Ex. NN, p.13 (quoting *Rocky Mountain News*, Jan. 11, 1876). A *Boulder County News* editorial asked, "'[I]s it not enough that Rome dominates in Mexico and all of South America?'" Ex. NN, p.14 (quoting *Boulder County News*, Jan. 21, 1876). And a *Denver Daily Times* piece suggested the debate over whether to tax church property—another issue with a "perceptible undercurrent of anti-Catholic hostility," Hensel, *supra*, at 352—was retaliation for the Catholic position on schools. Ex. NN, p.12; Tr., pp.660:10-661:5.

Not surprisingly, the public school establishment strongly supported Blaine language. "The newly-formed Colorado Teachers' Association, meeting in December 1875, urged that the new constitution exclude 'sectarianism' and prohibit the diversion of public funds for education to non-public schools." Ex. NN, p.13. The Association expressed "deep concerns about the character of the education Mexican … children were receiving" in southern Colorado, believing "an education provided by Catholic teaching orders … would not fit them to be real participants in American life." Tr., pp.676:12-16, 676:22-677:2.

Governor Evans summarized the convention's atmosphere as "'seem[ing] much like the Know Nothing movement,'" with "'the Republicans … going into secret societies against the Catholics.'" Like Blaine, he was happy to exploit the situation, adding, "'I keep my hand covered while I stir them up.'" Ex. NN, p.12 (quoting Letter from John Evans to Margaret Evans (Jan. 9, 1876)).

Even some opposed to including Blaine language nevertheless supported its intent; they opposed its inclusion only to avoid stoking Catholic opposition that might jeopardize ratification. *See* Tr., pp.686:8-687:12, 739:25-740:16; Ex. NN, pp.13-14. The *Rocky Mountain News*, for example, explained that "'[w]ere the passage of the constitution a foregone conclusion, … this paper would hardly propose to … gainsay the Blaine amendment to the federal constitution, or to even

in appearance controvert the doctrines enumerated in the Des Moines speech of the president.'" But "'[u]nder the circumstances,'" the paper "'regard[ed] it clearly the better part of wisdom for the constitutional convention to insert no clause in the constitution calculated to excite the opposition of any class in the community.'" Ex. NN, p.13 (quoting *Rocky Mountain News*, Feb. 2, 1876).

The delegates nevertheless included Blaine provisions in the constitution they sent the voters. Suspecting its earlier ratification concern had been unfounded, the *Rocky Mountain News* now celebrated: "'[I]n taking the bull by the horns and grappling with the school fund question as it did, the convention showed the wisdom of the serpent …, for far more protestants can be got to vote for the constitution on account of this very clause than catholics for the same reason to vote against it.'" Ex. NN, p.14 (quoting *Rocky Mountain News*, Mar. 17, 1876); *see also* Tr., pp.687:24-690:8, 735:1-10, 740:17-741:1. According to the paper, "'the president's Des Moines speech and Mr. Blaine's amendment to the national constitution struck a chord in the average American breast that has not yet ceased vibrating.'" Ex. NN, p.14 (quoting *Rocky Mountain News*, Mar. 17, 1876).

The paper was right: The people ratified the constitution overwhelmingly, "'voting up,'" as a *Boulder County News* piece put it, what "'the Pope of Rome … [had] ordered voted down.'" Hensel, *supra*, at 356 (alteration in original; quoting

Boulder County News, May 12, 1876). In so doing, they preserved the Protestant character of Colorado's public schools well into the 20th century. *E.g.*, *Vollmar*, 255 P. 610.

3. The Trial Court Extended The Reach Of Colorado's Blaine Provisions And, Thus, Their Attendant Bigotry

Only one conclusion can be drawn from this history: Religious animus motivated the adoption of Colorado's Blaine provisions. They were designed to preserve the Protestant nature of publicly-funded schools and prevent Catholics from obtaining direct public funding for their own schools. The trial court's interpretation of the provisions extends that animus in two ways: It broadens their reach to encompass programs that fund students, rather than schools; and it excludes all religious options, not just Catholic ones, from such programs.

The trial court downplayed the provisions' sordid history by suggesting that "no legal authority" allows it to consider "the historical nature of the Blaine Amendments" or that they "may have been tainted by questionable motives." Order 35.[7] The U.S. Supreme Court, however, has held that because "governmental purpose is a key element of a good deal of constitutional doctrine,"

[7] The court cited two cases for this assertion. One, *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009), says nothing on the matter. The other, *Bush v. Holmes*, 886 So.2d 340 (Fla. Ct. App. 2004), declined to consider the issue of anti-Catholicism because "there [wa]s no evidence of religious bigotry relating to Florida's no-aid provision." *Id.* at 351 n.9. In Colorado, there is abundant evidence.

courts must "be familiar with the history of the government's actions" and not "turn a blind eye to the context in which" they arose. *McCreary Cnty.*, 545 U.S. at 861, 866 (internal quotation marks and citation omitted). Such historical inquiry is particularly appropriate when it is a state constitutional provision that is the product of questionable motives. *See Romer v. Evans*, 517 U.S. 620, 634 (1996) (striking down Colorado constitutional provision because it was "born of animosity toward" gays and lesbians); *Hunter v. Underwood*, 471 U.S. 222, 231 (1985) (striking down Alabama constitutional provision because of its "racially discriminatory motivation").

The trial court erred again in claiming that even if consideration of historical motive is appropriate, "there is a genuine dispute as to the historical relevance of the 'Blaine amendments' in the context of the Colorado Constitution." Order 35. The court offered two illustrations of this supposed "dispute," neither convincing.

First, the court noted that some Catholics "conducted a 'pro-constitution' rally in Denver just days before ratification, signifying at least some Catholic support of the provisions of the Colorado Constitution." Order 35. That "at least some" Catholics supported the Constitution does not mean they supported its Blaine provisions. Even the most ardent abolitionists among the federal Framers

supported the U.S. Constitution notwithstanding its Three-Fifths, Importation, and Fugitive Slave Clauses.

Second, the court made much of Article IX, section 7's similarity to a provision of the Illinois Constitution that "was enacted prior to the proposal of the Blaine amendments." Order 35. Blaine himself, however, drew from such "proto-Blaine" provisions found in several state constitutions. *See* U.S. Comm'n on Civil Rights, *School Choice: The Blaine Amendments and Anti-Catholicism* 33, 35, 43 (June 1, 2007) (testimony of Richard D. Komer). Moreover, the history of the Illinois provision is itself dripping with anti-Catholic bigotry. The Know-Nothings gained substantial influence in Illinois in the 1850s and, in 1855, secured a law prohibiting public aid to "sectarian" institutions. *See* Jorgenson, *supra*, at 100. In his 1857-1858 biennial report, the state's Superintendent celebrated the blow this law dealt to private schools, which he deemed a relic of the "old feudal and anti-American system." *Id.* at 100-01. The law was constitutionalized in 1870, *see* Ill. Const. art. X, § 3, and helped preserve the Protestant character of Illinois' public schools. *E.g.*, *McCormick v. Burt*, 95 Ill. 263 (1880) (affirming judgment against Catholic student suspended for dispute over King James Bible reading). That Colorado's framers may have looked to Illinois is thus confirmation of—not evidence of a dispute over—anti-Catholicism's influence.

Finally, the trial court's invocation of Illinois is ironic given that the restrictions imposed by the Illinois provision, presumably to avoid effectuating its discriminatory history, "have been held to be identical to those imposed by the first amendment to the Constitution of the United States." *People v. Falbe*, 727 N.E.2d 200, 207 (Ill. 2000); *see also Toney v. Bower*, 744 N.E.2d 351 (Ill. App. 2001) (upholding school choice program against proto-Blaine challenge). Even Appellees recognize the Program is valid under the First Amendment.

III. The Trial Court's Interpretation Of Colorado's Religion Provisions Creates An Unnecessary Conflict With The Federal Constitution

A. Standard Of Review

Resolution of an affirmative defense that turns on a constitutional question is reviewed *de novo*. *Lockyer v. Sun Pac. Farming Co.*, 77 Cal. App. 4th 619, 632 (Cal. Ct. App. 2000).

B. Discussion

The U.S. Constitution's "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 839 (1995). By interpreting Colorado's religion provisions to *forbid* religious options in student aid programs, the trial court created an unnecessary conflict between those

provisions and the U.S. Constitution—specifically, the Free Exercise, Equal Protection, Establishment, and Due Process Clauses.

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

The trial court's interpretation of Colorado's religion provisions violates the Free Exercise Clause. That clause forbids "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. It was in this light that the Tenth Circuit held Colorado's exclusion of "pervasively sectarian" schools from postsecondary aid programs unconstitutional under the Free Exercise Clause. *Colo. Christian Univ.*, 534 F.3d at 1257-58. The Eighth Circuit similarly held that denying special education benefits to students at religious elementary and high schools violated the clause, as it imposed a disability on students "because of the religious nature" of the schools their parents had chosen for them. *Peter v. Wedl*, 155 F.3d 992, 997 (8th Cir. 1998).

The trial court's interpretation of Colorado's religion provisions suffers the same infirmity: It imposes a disability on children whose parents desire a religious school. That problem is exacerbated by the anti-Catholic animus underlying the provisions. *See Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 540

(1993) (plurality) (holding ordinance violated Free Exercise Clause because of its "discriminatory object").

The trial court offered two unconvincing defenses of its interpretation. First, it claimed there is "no … limitation on the scope of the religious provisions of the Colorado Constitution." Order 33. That is wrong. A state's interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause … is limited by the Free Exercise Clause," *Widmar v. Vincent*, 454 U.S. 263, 276 (1981), and "a state constitution [therefore] 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 Kreisner v. City of San Diego*, 1 F.3d 775, 779 n.2 (9th Cir. 1993). In enforcing separation provisions like Colorado's Blaine and compelled support provisions, therefore, 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.

Second, the trial court incorrectly interpreted *Locke v. Davey*, 540 U.S. 712 (2004), as authorizing the wholesale exclusion of religious options from student aid programs. Order 34-35. *Locke* concerned a state scholarship program that

excluded theology majors studying for careers in the ministry. The Court upheld the exclusion but emphasized that "[t]he only interest at issue" was "the State's interest in not funding the religious training of clergy." *Id.* at 722 n.5; *see also id.* at 719, 725 (describing the governmental interest as non-funding of "vocational religious instruction" or "religious instruction that will prepare students for the ministry"). In fact, the Court emphasized that the Program went "a long way toward including religion in its benefits"—for example, by "permit[ting] students to attend pervasively religious schools." *Id.* at 724. Thus, when the Tenth Circuit struck down Colorado's pervasively sectarian exclusion, it cited *Locke* for the proposition 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." *Colo. Christian Univ.*, 534 F.3d at 1255.

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

The trial court's interpretation also violates the Equal Protection Clause. That clause prohibits classifications drawn upon "inherently suspect" distinctions, including religion. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Thus, the benefit exclusions in *Colorado Christian* and *Wedl* were struck down

under the Equal Protection Clause, as well. *Colo. Christian Univ.*, 534 F.3d at 1258, 1269; *Wedl*, 155 F.3d at 997.

Here, the equal protection problem is compounded by the original purpose of Colorado's religion provisions: targeting Catholics for disfavored treatment. In *Romer v. Evans*, the Supreme Court struck down a Colorado constitutional provision that targeted gay and lesbian citizens. The Court noted two problems with the provision. First, it made it "more difficult for one group of citizens than for all others to seek aid from the government"; "[c]entral … to the … Constitution's guarantee of equal protection," the Court explained, "is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." 517 U.S. at 633 (citations omitted). Second, "the disadvantage imposed [wa]s born of animosity toward the class of persons affected." *Id.* at 634; *see also Hunter*, 471 U.S. at 231; *Lukumi*, 508 U.S. at 540, 547.

As interpreted by the trial court, Colorado's religion provisions present the same problems. They treat families who choose religious schools differently than those who choose non-religious schools, making it "more difficult for [the former] group of citizens than for all others to seek aid from the government." *Romer*, 517 U.S. at 633. That disadvantage, in turn, was "born of animosity" toward

Catholics—and, by the trial court's interpretation, extended to religion in general, "compound[ing] the constitutional difficulties the [provisions] create[]." *Id.* at 630, 634.

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

The trial court's interpretation also violates the Establishment Clause. Just as that clause "prohibit[s] the government from favoring religion," so it prohibits government from "discriminating *against* religion." *Bd. of Educ. v. Grumet*, 512 U.S. 687, 717 (1994) (O'Connor, J., concurring). If either "the purpose [or] the primary effect of the enactment … is … inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by" the clause. *Sch. Dist. v. Schempp*, 374 U.S. 203, 222 (1963). This is true whether the inhibition is of "a particular religion or … religion in general," *Lukumi*, 508 U.S. at 532, because "government may not favor one religion over another, or religion over irreligion." *McCreary Cnty.*, 545 U.S. at 875; *see also Schempp*, 374 U.S. at 225 ("[T]he State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion.").

The trial court's interpretation of Colorado's religion provisions violates these tenets in two ways. First, it perpetuates the discrimination against a particular religion—Catholicism—that underlies the provisions. Second, by

extending the provisions to prevent families from freely and independently choosing *any* religious schools, it transmutes an engine of discrimination against Catholics into an engine of discrimination against religion in general.[8]

CONCLUSION

The constitutional conflicts discussed above are easily avoided by interpreting Colorado's religion provisions as the Colorado Supreme Court did in *Americans United* and as courts in other states have done in upholding school choice programs under their own Blaine and "compelled support" provisions. This Court should follow that approach, reverse the trial court's decision, vacate the injunction, and enter judgment upholding the Program.

INSTITUTE FOR JUSTICE

S/ William H. Mellor

William H. Mellor, #8402
Richard D. Komer, *Pro Hac Vice*
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Fax: (703) 682-9321

[8] The trial court's interpretation also raises due process concerns. By barring aid programs that allow parents to choose religious schools, it conditions receipt of education benefits on parents' surrender of their right to direct their children's education. "This is a classic 'unconstitutional condition,'" in which "receipt of a benefit or privilege" is conditioned on "relinquishment of a constitutional right." *Bourgeois v. Peters*, 387 F.3d 1303, 1324 (11th Cir. 2004).

Email: wmellor@ij.org
rkomer@ij.org

Michael E. Bindas, *Pro Hac Vice*
INSTITUTE FOR JUSTICE
101 Yesler Way, Suite 603
Seattle, WA 98104
Tel: (206) 341-9300
Fax: (206) 341-9311
Email: mbindas@ij.org

Timothy D. Keller, *Pro Hac Vice*
INSTITUTE FOR JUSTICE
398 S Mill Avenue Ste 301
Tempe, AZ 85281-2840
Tel: (480) 557-8300
Fax: (480) 557-8305
Email: tkeller@ij.org

Raymond L. Gifford, #21853
WILKINSON BARKER KNAUER, LLP
1430 Wynkoop Street, Suite 201
Denver, CO 80202
Tel: (303) 626-2350
Fax: (303) 626-2351
Email: rgifford@wbklaw.com

Attorneys for Intervenors-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2012, I filed the foregoing OPENING 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:

Attorneys for Defendants Douglas County School District and Douglas County Board of Education:

James M. Lyons, #882
L. Martin Nussbaum, #15370
Eric V. Hall, #32028
David M. Hyams, #42648
Michael Francisco, #39111
Reneé A. Carmody, #40202
ROTHGERBER JOHNSON & LYONS LLP
One Tabor Center, Suite 3000
1200 Seventeenth Street
Denver, Colorado 80202
Telephone: (303) 623-9000

Attorneys for Defendants Colorado Department of Education and Colorado Board of Education:

Geoffrey N. Blue, #32684
Antony B. Dyl, #15968
Nicholas G. Stancil, #35955
OFFICE OF THE ATTORNEY GENERAL
1525 Sherman Street, 7th Floor
Denver, CO 80203
Telephone: (303) 866-5380

Attorneys for Plaintiffs James LaRue, Suzanne T. Larue, Interfaith Alliance of Colorado, Rabbi Joel R. Schwartzman, Rev. Malcolm Himschoot, Kevin Leung, Christian Moreau, Maritza Carrera, and Susan McMahon:

Matthew J. Douglas, #26017
Timothy R. Macdonald, #29180
Michelle K. Albert, #40665
ARNOLD & PORTER LLP
370 17th Street, Suite 4500
Denver, CO 80202
Telephone: (303) 863-1000

George Langendorf, *Pro Hac Vice*
ARNOLD & PORTER LLP
22nd Floor, One Embarcadero Center
San Francisco, CA 94111-3711
Telephone: (415) 356-3000

Mark Silverstein, #26979
Rebecca T. Wallace, #39606
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO
400 Corona Street
Denver, CO 80218
Telephone: (303) 777-5482

Daniel Mach, *Pro Hac Vice*
Heather L. Weaver, *Pro Hac Vice*
ACLU FOUNDATION PROGRAM ON FREEDOM OF RELIGION AND BELIEF
915 15th Street, NW, Suite 600
Washington, D.C. 20005
Telephone: (202) 675-2330

Ayesha N. Khan, *Pro Hac Vice*
Gregory M. Lipper, *Pro Hac Vice*
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1301 K Street, NW
Suite 850, East Tower
Washington, D.C. 20005

Telephone: (202) 466-3234

Attorneys for Plaintiffs Taxpayers for Public Education, Cindra S. Barnard, and M.B.:

Michael S. McCarthy, #6688
Colin C. Deihl, # 19737
Nadia G. Malik, #35761
Sarah A. Kellner, #38111
Gordon M. Hadfield, #42759
Caroline G. Lee, #42907
FAEGRE BAKER DANIELS LLP
3200 Wells Fargo Center
1700 Lincoln
Denver, CO 80203-4532
Telephone: (303) 607-3500

Alexander Halpern, #7704
ALEXANDER HALPERN LLC
1426 Pearl Street, #420
Boulder, CO 80302
Telephone: (303) 449-6178

S/ Madeline Roche
Madeline Roche