COURT OF APPEALS, STATE OF COLORADO 101 W. Colfax Ave., Room 800, Denver, CO 80203 _____ Appeal from District Court, Denver County Colorado The Honorable Michael A. Martinez Case No. 2011CV4424 *consolidated with* 2011CV4427 _____ **Defendants-Appellants:** DOUGLAS COUNTY SCHOOL DISTRICT and DOUGLAS COUNTY BOARD OF EDUCATION, and **Defendants-Appellants**: COLORADO STATE BOARD OF EDUCATION; AND COLORADO DEPARTMENT OF EDUCATION, and **Intervenors-Appellants:** FLORENCE and DERRICK DOYLE, on their own behalf and as next friends of their children, ALEXANDRA and DONOVAN; DIANA AND MARK OAKLEY, on their own behalf and as next friends of their child, NATHANIEL; and JEANETTE STROHM-ANDERSON AND MARK ANDERSON, on their own behalf and as next friends of their child, MAX, **vs.** **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 and **Plaintiffs-Appellees:** TAXPAYERS FOR PUBLIC EDUCATION, a Colorado non-profit corporation; CINDRA S. BARNARD, an individual; and MASON S. BARNARD, a minor child.	**^COURT USE ONLY^** Case Nos.: 11CA1856 11CA1857

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ANSWER BRIEF OF LARUE APPELLEES

CERTIFICATE OF COMPLIANCE

I hereby certify that, subject to the statement below regarding Plaintiffs' pending motion to exceed the word limit imposed by C.A.R. 28, 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 contains 15,050 words. Plaintiffs have filed an Amended and Renewed Joint Motion for Expansion of Word Limit along with this Answer Brief.

The Brief complies with C.A.R. 28(k) because it contains, under a separate heading, a statement of whether such party agrees with the opponents' statements concerning the standard of review and preservation for appeal, and if not, why not.

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/ Matthew J. Douglas

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STATEMENT OF ISSUES

Given the number and complexity of issues raised by Appellants in this case, the Plaintiffs-Appellees have divided the issues between their two briefs. In this brief, James LaRue et al. ("LaRue Plaintiffs") address the Douglas County School District ("DCSD") and State Defendants-Appellants' issues III, VI, and VII; Intervenors' issues I-III; and the issues raised by amicus curiae the Association of Christian Schools International et al. and the Beckett Fund for Religious Liberty. The Taxpayers for Public Education ("TPE Plaintiffs") address issues I, II, IV, and V as identified in the DCSD and State briefs. The LaRue Plaintiffs adopt by reference the TPE Plaintiffs' brief.

The LaRue Plaintiffs disagree with the Statement of Issues as formulated by Appellants and amici curiae. The issues addressed by the LaRue Plaintiffs are:

1. Did the District Court correctly conclude that the Voucher Program violates the following provisions of the Colorado Constitution:

    a. Article IX, Section 7 by using public funds to aid religious organizations and schools controlled by such organizations?

    b. Article II, Section 4 by compelling support and attendance at religious services?

    c. Article IX, Section 8 by requiring public school students to take religious oaths as conditions of admission, discriminating among

students on the basis of religious beliefs, and teaching religious tenets?

d. Article V, Section 34 by appropriating public funds to institutions not under the absolute control of the state?

2. Did the District Court properly reject the argument that Article IX, Sections 7 and 8, and Article II, Section 4, should be invalidated based on unsupported speculation—which the District Court found not to be credible—regarding supposed improper motives for enacting those provisions 135 years ago?

3. Did the District Court correctly reject the argument that the federal Constitution mandates upholding the Voucher Program when the specific provisions of the Colorado Constitution prohibit it?

STATEMENT OF THE CASE

The Douglas County "Choice Scholarship Program" ("Voucher Program" or "Program") seeks to use millions of dollars of public taxpayer money designated for public education in Colorado to fund private, primarily religious schools, with self-described missions that include mandatory religious education and inculcation, and admissions and hiring policies that engage in religious and other discrimination. The students participating in the Program must seek and be granted admission to, and attend private schools, even though the Program purports to operate through a public charter school, the "Choice Scholarship Charter School" ("Charter School"). The Douglas County Defendants ("DCSD" or

"School Board") created this sham Charter School in an attempt to continue to "count" the Program students for the purpose of obtaining state taxpayer funding intended for public school students. There are no limits on how the receiving schools may use the public funds.

In July 2011, the LaRue and TPE Plaintiffs (collectively, "Plaintiffs" or "Appellees") sought an injunction to stop the Program because it violated the Colorado Constitution and other state laws by, among other things, using taxpayer money to aid churches and schools controlled by churches or religious organizations; requiring student attendance at religious services and teachings; imposing religious tests as conditions of admission and hiring; and accepting as "partners" schools that discriminate on various bases, including religious belief, sexual orientation, and disability.

After extensive briefing and a three-day evidentiary hearing, the District Court issued a 68-page Order holding that the Program violates the Colorado Constitution and statutes, including the specific prohibition against providing public funds to religious schools, which has been the law of the State for over 135 years. The District Court made extensive factual findings and concluded that Plaintiffs demonstrated a "clear and certain right to mandatory or permanent

injunctive relief" with respect to their claims under several provisions of the Colorado Constitution (Article IX, Sections 3, 7 and 8; Article II, Section 4; and Article V, Section 34); the Public School Finance Act, C.R.S. § 22-54-101 *et seq.*; and the Contract Statute, C.R.S. § 22-32-122.

The Appellants attempt to present this case as being about "choice" and claim that the District Court's ruling that the Voucher Program violates the Colorado Constitution is, in itself, discriminatory. That could not be further from the truth or the facts. The District Court applied the plain language of the Colorado Constitution in a neutral fashion that does not discriminate or distinguish between any particular religion or religious group. The Colorado Constitution does not prevent parents from choosing private and religious schools, but it does forbid the use of public taxpayer money to fund such choices, which is exactly what the Voucher Program attempts to do.

The founders of Colorado carefully crafted a number of constitutional provisions that, in their view, would best serve civil society and public education in Colorado. The fact that DCSD and amici do not like these provisions and would prefer to undo or re-write them is irrelevant. There is a procedure to amend the Constitution, and Appellants have not followed it. The District Court's ruling,

which faithfully followed and applied the language of the Colorado Constitution to enjoin the Douglas County Voucher Program, should be upheld.

STATEMENT OF FACTS

The District Court carefully considered the witness testimony and documentary evidence presented by both sides at a three-day trial. The District Court made findings of fact that are binding on appeal unless "clearly erroneous." C.R.C.P. 52. The LaRue Plaintiffs incorporate by reference the TPE Plaintiffs' Statement of Facts, which addresses in greater detail public education funding in Colorado, funding of the Voucher Program, and the Contract Statute.

The Program

The Voucher Program would divert millions of dollars in public funds intended to support public education to send up to 500 students enrolled in Douglas County public schools to participating private schools. *See* District Court's Aug. 12, 2011 Order ("Order"), Record at 2482-84 (¶¶4, 10, 12). If successful, DCSD likely will expand the Program. *Id.* at 2496 (¶64); Tr. 608:11-24 (Carson). The Voucher Program is not designed to assist low-income students, and there are no income requirements to participate. *Id.* at 2482 (¶16); Tr. 285:4-7 (Cutter). The Program purports to offer students greater "choice" in selecting a primary or

secondary school. In reality, for most students who wish to participate in the Program, virtually their only choice is to attend a religious school with religious teachings integrated throughout the educational curriculum and required attendance at religious services.

To participate in the Program, a student must apply for and be granted admission to an approved private school. Record at 2485 (¶18). If a student is accepted at a participating private school and admitted to the Program, the School District sends the private school a check for 75% of the "Per Pupil Revenue" that it receives from the State of Colorado ($4,575 for 2011-12) for that student, or the private school's actual tuition, whichever is less. *Id.* at 2483 (¶9). Although the checks are made out to the parents of the participating students, they are mailed directly to the private schools, and parents must restrictively endorse the voucher checks for the sole use of the private school. *Id.* (¶10). DCSD decided to make the checks out to the parents precisely to try to make the Program constitutional. Tr. 290:1-3 (Cutter).

In order to "count" the participating students for purposes of receiving State funding for those students, and to "administer" the Program, the Douglas County Board established a sham charter school, the Choice Scholarship School ("Charter

School"). Record at 2485-86 (¶¶23, 26, 27); Pls.' Ex. 69 at 2 (DCSD and State representatives discussing new charter school in context of "[t]hings you can do to be able to count students"). Students participating in the Program technically would be enrolled in the Charter School. Record at 2485 (¶19). The Charter School, however, exists only on paper. *Id.* at 2486 (¶25). It has no buildings or classrooms, employs no teachers, requires no supplies or books, and has no curriculum. *Id.*

The Participating Schools

Douglas County entered into contracts with 23 private schools to participate in the Program. *Id.* at 2486-88 (¶31-32). Of these schools, all but five are sectarian or religious schools that teach religious tenets or doctrines. *See id*. at 2489 (¶36). Of the five participating non-religious schools, one (Aspen Academy) only accepts gifted students through eighth grade, and one (Humanex) only accepts a particular type of special needs student. *Id.*; Tr. 276:13-21 (Cutter); Pls.' Ex. 124 at 124.001, 124.009. The remaining three (Woodlands, Mackintosh, and Beacon), run through eighth grade only. Record at 2489 (¶36). As a result, at the elementary and middle school levels, only three participating schools offer a non-religious education for non special needs or gifted students. *Id.* (¶36); *see* Tr.

274:24-277:20 (Cutter). And unless they qualify for admission to Humanex, high school students who wish to participate in the Program *must* attend a religious school: The Program does not offer a single non-religious option for high school students who do not have special needs. Record at 2189 (¶36); Tr. 270:1-9.

The religious schools generally are owned and controlled by private religious institutions, Record at 2489 (¶38), have governing entities that are often limited to adherents of each school's particular faith, *id.* (¶39), and are funded by sources that promote or are affiliated with a particular religion, *id.* at 2490 (¶40). Some participating schools are organizationally part of, or "physically attached to," a church. Tr. 315:11-19 (Cutter); *see also* Tr. 395:17-396:8 (Bignell) (school is located in a "multi-use" facility also used for church purposes, and is a "ministry of the church").

The absence of non-religious school options for students participating in the Program is reflected in the lack of student enrollment in non-religious schools. At the time of the hearing, approximately 93% of students participating in the Program were enrolled in religious schools. Record at 2489 (¶37). All but one of the 120 high school students participating in the Program were enrolled in religious

schools, with the one being a special needs student enrolled in Humanex Academy. *Id.* (¶37); Tr. 282:19-25 (Cutter).

The self-described mission of the participating religious schools is to provide a religious upbringing that inculcates in students the particular religious beliefs and values of the school or sponsoring religious organization. *Id*. at 2491 (¶44); *see generally* Pls.' Exs. 18-63 (participating religious schools' applications and web pages). Students at many of these private religious schools, including voucher recipients, must submit to religious teaching and indoctrination in and out of the classroom. Record at 2492-94 (¶¶45, 52).

"The curricula at most participating schools is thoroughly infused with religion and religious doctrine," including required courses in theology that openly seek to indoctrinate and proselytize. *Id.* at 2492 (¶45); Pls.' Ex. 99 (Mar. 7, 2011 email from Valor Christian principal to Cutter) ("Our aim is to infuse faith in all we do--it is who we are as a school."). DCSD does not require participating religious schools to make any alterations to religious curricular requirements. Record at 2492 (¶46); Tr. 238:11-17 (Cutter).

Almost all of the participating private religious schools require students to attend worship services. Tr. 316:5-17 (Cutter); Record at 2490 (¶41). The

Program purports to afford participating students the right to "receive a waiver from any required religious services at the Private School Partner" but does not in fact do so. *Id.* at 2493 (¶51). Under the so-called "waiver," the students would be allowed to sit silently during the religious service if they do not draw attention to their non-participation, but they can nevertheless be compelled to attend the service. *Id.* Students have no right to opt out from full *participation* in religious instruction or other religious exercises that schools mandate throughout the day. *Id.* (¶52); Pls.' Ex. 002 (DCSD FAQ Sheet); Tr. 390:22-391:12 (Bignell) (no opt out from daily Bible classes and weekly chapel services); Tr. 448:4-10 (Gehrke) (no opt out of theology classes). Each religious school, not DCSD, determines the content of its own waiver. Tr. 356:22-357:12; Pls.' Ex. 101 (Apr. 15, 2011 letter from Bignell to Cutter) ("My summary of our two hour interview is that the district wants no control over Cherry Hills Christian or any other partner school."). Even counsel for DCSD acknowledged that this is "[n]ot much of an opt out." Record at 2530; Pls.' Ex. 97 (Mar. 28, 2011 email).

Religious and Other Discrimination

The Program does not require private schools to make any modifications to their admissions or hiring criteria in order to gain approval as a partner school,

even if the criteria involve religious or other discrimination. Record at 2486-93 (¶¶30, 46, 49, 50). On the contrary, the Program specifically authorizes participating private schools to "make enrollment decisions based upon religious beliefs." *Id.* at 2486 (¶30); Pls.' Ex. 1 at 001.009 (Voucher Program Executive Summary). Most of the participating schools do just that. *See* Record at 2490 (¶42); *see, e.g.*, Tr. 320:4-9 (Cutter); 399:1-7 (Bignell) (Cherry Hills Christian reserves the right to prioritize placement of students in grades 1-8 based on current parental membership in full-time ministry at Cherry Hills Community Church). Most of the schools also subject student and faculty applicants to religious tests and qualifications. For example, a number of participating schools require applicants to sign a doctrinal statement that the applicants commit to pray for faculty and administration, attest to a belief in Jesus Christ, or profess a personal relationship with God. Record at 2491 (¶43); Pls.' Exs. 26 at 026.005 (Evangelical Christian Academy Doctrinal Statement states that the school "shall admit only students of parents who . . . affirm this doctrinal statement, and who manifest the desire to be educated both morally and intellectually in the light of the Bible with Jesus Christ as the center of all truth"); 25 at 025.101, 105 (similar doctrinal statements must be signed by parents and teachers).

Many of the religious schools also discriminate against students and staff on the basis of disability and other grounds. Record at 2493 (¶¶49-50); Tr. 408:12-409:5 (Bignell) (enrollment of special needs students at Cherry Hills Christian is considered on an individual basis, and admitted special needs students are assessed additional tuition); *id.* at 448:11-19 (Gehrke) (stating his understanding that the Program imposes no obligation on Lutheran High School to take special needs students); Pls.' Exs. 23 at 023.028 (Denver Christian's "AIDS policy" permits an appointed team to deny admission to or withdraw HIV-positive students); 25 at 025.110 (Evangelical Christian Academy forbids teachers from "homosexual behavior"); 29 at 029.072 (Front Range Christian considers homosexuality a "cause for termination"); 37 at 037.053 (Lutheran High School may expel students who get married as well as pregnant students). The Program allows these discriminatory practices to continue using taxpayer funds. Record at 2492-93 (¶46).

Lack of Restrictions On Use Of Taxpayer Money

There are no restrictions on how participating schools may spend the public funds awarded as part of the Program. Schools are free to use the funds for religious instruction, worship services, clergy salaries, purchasing religious

literature, and construction of facilities used for worship and prayer. *See, e.g.*, Record at 2493 (¶47). Evidence at trial showed that for at least one school, tuition is the school's largest source of revenue. Tr. 432:13-15 (Gehrke). Tuition payments support the operation of the school, including chapel facilities and carrying out of the school's mission to "nurtur[e] academic excellence and encourag[e] growth in Christ," which Mr. Gehrke, the head of this school, explained is accomplished in part by converting students to the Lutheran religion. See Tr. 428:21-24, 432:13-433:1; 433:22-435:4. Revenue obtained from the voucher checks also helped this school address its debt problems. Tr. 439:7-11 (Gehrke); *see also* Tr. 389:23-390:3, 403:18-404:14 (Bignell) (agreeing that public funds flowing to Cherry Hills Christian through the Program would "benefit" the school and "aid[] the school in its mission"). The evidence also showed that at least one school, Valor Christian, reduced its financial aid to a program student by precisely the amount of the voucher check. Record at 2484 (¶13); Tr. 297:19-298:6 (Cutter).

SUMMARY OF THE ARGUMENT

Appellants' effort to divert taxpayer funds to private, religious schools was a deliberate effort to overturn 135 years of law and practice in Colorado. The

Voucher Program violates the strong and explicit protections for religious liberty and public education—two bedrock principles of the Colorado Constitution. The arguments of DCSD, Intervenors, and amici boil down to the assertion that the language of the Colorado Constitution does not mean what it says. The District Court, however, properly rejected this argument and construed the Colorado Constitution in accordance with its plain text and governing case law.

A violation of any one constitutional provision or law would be sufficient to enjoin the Program, but the District Court found that the Program violated Colorado's Constitution and State statutes in numerous ways. The Voucher Program violates the "no aid" clause of Article IX, Section 7 and the "no compelled support" clause of Article II, Section 4 by sending public funds to schools controlled by churches or religious organizations. In the first year alone, the Voucher Program would have sent over $2 million dollars to "aid" private, primarily religious schools. There are no restrictions on how the receiving institutions may use these public taxpayer funds, and thus the money can finance fundamentally religious purposes such as constructing chapels or paying clergy salaries. The Program allows for mandatory attendance at religious services and therefore violates the prohibition in Article II, Section 4 on "compelled

attendance" at such services. The Program is unconstitutional under Article IX, Section 8 because it subjects students enrolled in the Charter School, a public school, to religious tests and services and to the teaching of sectarian tenets. Finally, by directing public moneys to private, religious institutions without a discrete legislative "public purpose," the Voucher Program is unconstitutional under Article V, Section 34.

Appellants' position that the Voucher Program exists to promote school "choice" does not exempt the program from the requirements of the Colorado Constitution. Even setting aside the fact that the Voucher Program provides very little actual "choice" to students who wish to attend a non-religious school, the Colorado Constitution's education and religion clauses clearly prohibit the state from funding private, religious education in this manner. Moreover, this Court cannot and should not accept Appellants' invitation to effectively invalidate the education and religion clauses of the Colorado Constitution. Finally, nothing in the federal Constitution *requires* Colorado to fund religious education and indoctrination or *requires* this Court to uphold the Program.

For these reasons, and the reasons set forth in the TPE Plaintiffs' brief, this Court should affirm the District Court's Order enjoining the Voucher Program.

ARGUMENT

I. The District Court Correctly Held That The Voucher Program Violates Article IX, Section 7; Article II, Section 4; Article IX, Section 8; And Article V, Section 34 Of The Colorado Constitution.

The District Court correctly ruled that the Voucher Program violates Article IX, Section 7; Article II, Section 4; Article IX, Section 8; and Article V, Section 34 of the Colorado Constitution. Record at 2523, 2525, 2531, 2540. As discussed below, the law and facts overwhelmingly support the District Court's rulings on these provisions, and this Court should affirm its judgment.

A. Standard Of Review.

The LaRue Plaintiffs agree that the District Court's interpretation of these provisions of the Colorado Constitution is reviewed *de novo*. *See Rocky Mountain Animal Def. v. Colorado Div. of Wildlife*, 100 P.3d 508, 513 (Colo. App. 2004). Factual findings are reviewed for clear error and may not be set aside unless they are "so clearly erroneous as to find no support in the record." *People ex rel. AJL*, 243 P.3d 244, 250 (Colo. 2010) (reversing appellate judgment for failing to properly apply clearly erroneous standard of review) (quotation omitted); *see also* Colo. R. Civ. P. 52. An appellate court cannot "substitute itself as a finder of fact." *AJL*, 243 P.3d at 250 (quotation omitted). These issues were preserved for appeal.

B. The Program Violates Article IX, Section 7 By Using Public Funds To Support Schools Controlled By Churches Or Religious Denominations, And In Aid Of Religious Organizations.

The District Court held that the Plaintiffs "demonstrated a clear and certain right to mandatory or permanent injunctive relief" because the Voucher Program violated Article IX, Section 7. *See* Record at 2525. The plain language of Article IX, Section 7, prohibits the government, including school districts, from making any payment in aid of schools controlled by churches or religious denominations:

> 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* …."[1]

Colo. Const. art. IX, § 7 (emphasis added). The facts, which are largely undisputed, demonstrate that by taking public funds intended for public education and sending them to religious schools, many of which are controlled by or

[1] While Colorado has not specifically addressed the meaning of the term "sectarian" or its inverse term, "non-sectarian," 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." *See* Proceedings of the Constitutional Convention: Colorado 1875-1876, 277 (emphasis added). Accordingly, Plaintiffs use the term "sectarian" synonymously with the term "religious."

indivisible from churches or religious denominations, the Program does precisely what Article IX, Section 7 prohibits. *See* Record at 2522-23 (finding the Program "will result in impermissible aid to Private School Partners to further their missions of religious indoctrination").

It is undisputed that through the Program, DCSD receives from the State 100% of the "per pupil funding" amount for each student participating in the Voucher Program. *Id*. at 2483 (¶¶9-10). It is also undisputed that DCSD funds the Program by sending 75% of the per-pupil funding it receives for each participating student to the participating private schools in which the student enrolls. *Id*. (¶9). This is the "sole source of funding" for the Program. *Id*. at 2486 (¶27). DCSD sends the money directly to the schools in the form of checks made out to the parents of the participating student. *Id*. at 2483 (¶9). The student's parent or guardian "is required to endorse the check for the sole use of paying tuition at the Private School." *Id*. (¶10).

It is also undisputed that most of the participating private schools are controlled by churches or other private religious organizations, including, for example, the Diocese of Colorado Springs, Cherry Hills Community Church,

Village Seven Presbyterian Church, and the Lutheran Church-Missouri Synod. *Id.* at 2489 (¶38).

These payments to the participating religious schools violate Article IX, Section 7 by helping "support or sustain" schools controlled by churches or religious organizations. *See* Tr. 428:21-24, 432:13-433:1 (Gehrke) (voucher checks support the operation of Lutheran High School, including chapel facilities and carrying out of the school's mission to "nurtur[e] academic excellence and encourag[e] growth in Christ"); Tr. 390:1-3, 403:18-404:14 (Bignell) (agreeing that public funds flowing to Cherry Hills Christian through the Program "benefit" and "aid[]" the school in carrying out its mission); Record at 2493 (¶47); *see supra* at 8, 12-13. Moreover, as the District Court found, the Program provides "no meaningful limitations on the use of taxpayer funds to support or promote religion" and "[t]here are no restrictions on how participating private school partners may spend the taxpayer funds that they receive under the Scholarship Program." Record at 2492-93 (¶¶46-47). By making taxpayer funds available for purposes such as religious instruction, worship services, clergy salaries, the purchase of Bibles and other religious literature, and construction of chapels, the Program violates Article IX, Section 7.

The voucher payments also are "in aid" of churches, sectarian societies, and sectarian purposes. Most of the Program schools teach and inculcate religion in students, and the voucher payments support those activities. *See* Record at 2493 (¶46). At the hearing, for example, Mr. Gehrke, the head of Lutheran High School, testified that tuition is the largest revenue source for the school and that revenue from tuition would be used for chapel facilities and to aid in carrying out Lutheran High's mission, which includes attempting to convert students to the Lutheran religion. *See id*. at 2520-21; Tr. at 433:24-435:4.

The Program also "does not prohibit participating private schools from raising tuition . . . or from reducing financial aid." Record at 2484 (¶13). Indeed, at least one school, Valor Christian (which had enrolled over 60 program students), reduced its financial aid to one program student by precisely the amount of the voucher check. *Id.*; Tr. 295:25-298 (Cutter).[2] The voucher payments to Valor

[2] DCSD argues that this Court should disregard this finding because Dr. Cutter allegedly testified that DCSD "prohibited this." *See* DCSD Br. 30. DCSD does not cite Dr. Cutter's actual testimony or any documents to support this contention. None of the planning documents created by DCSD, including the school application, include such a prohibition. Moreover, Dr. Cutter initially testified that he *did not know* the answer to this question and *did not think* anything in the program or contract would prevent this situation, but he then hedged that he "thought" the contract "would cover it" and that this would go against the "intended contract." Tr. 294:19-295:21. This shifting, unsubstantiated testimony does not show that the District Court's factual finding was clearly erroneous.

Christian, then, saved the school thousands of dollars that it otherwise would have spent on financial aid, but instead redirected toward furthering its self-proclaimed vision to "prepare tomorrow's leaders to transform the world for Christ"— a fundamentally religious purpose. *See* Pls.' Ex. 49 at 049.18 (Valor Christian Participation Agreement).

1. The Program Is Completely Different From The One Upheld By The Colorado Supreme Court In *Americans United*.

Unable to dispute these facts and the plain language of Article IX, Section 7, Appellants seek refuge in the Colorado Supreme Court's decision in *Americans United for Separation of Church & State v. Colorado*, 648 P.2d 1072 (Colo. 1982). Appellants argue that, under *Americans United*, the aid to religious schools and entities is "too remote and incidental" to violate Article IX, Section 7, *see* DCSD Br. 29,[3] and that the aid "funds students," not the private religious schools. *See*

[3] DCSD's assertion "the trial court acknowledged that, as in *Americans United*, the indirect nature of the aid makes it to 'remote and incidental' to violate Article IX § 7," DCSD Br. 29, grossly misstates the District Court's opinion. The District Court found that the "purpose" of the Voucher Program was to aid students, Record at 2519, but it said nothing about the nature of the aid being remote or incidental and, contrary to DCSD's claim, found that the evidence presented at trial showed that "any funds provided to the schools, even if strictly limited to the cost of education, will result in *impermissible aid* to [the schools] . . . ." *See* Record at 2522-23 (emphasis added).

Intervenors Br. 18-19.[4] In fact, the grant program upheld in *Americans United* was wholly different from the Voucher Program challenged here, and *Americans United* supports the District Court's holdings.

As an initial matter, Intervenors mistake the Colorado Supreme Court's conclusion that "the aid [at issue there was] designed to assist the student, not the institution," *Americans United,* 648 P.2d at 1083, as a sign that the government need only make a bald assertion of such a purpose to ward off constitutional scrutiny. Such a broad reading would largely eviscerate the "no-aid" provision. Rather, the Court made clear that the government's claim must be borne out by the actual terms of the Program. *See id.* at 1084 (recognizing that the analysis "turn[ed] to a great extent on the particulars of the [program] measured against the applicable constitutional provision"). In *Americans United*, the Court examined the college grant program and concluded, based on its terms, provisions and restrictions, that it was unlikely the approved aid would "seep over into the nonsecular functions of an institution." *Id.* at 1083. Among other features of that program, it explicitly prohibited a participating college from "decreas[ing] the

[4] Intervenors' wrongly support this claim with two quotations from *Americans United* that are strung together and taken out of context. *See* Intervenors Br. 18.

amount of its own funds spent for student aid below the amount spent prior to participation in the program." *Id.* at 1084. The Court found that "[t]his prohibition creates a disincentive for an institution to use grant funds other than for the purpose intended—the secular educational needs of the student." *Id*. The statutory criteria that applied to participating colleges—which required, among other things, "a strong commitment to academic freedom by an essentially independent governing board with no sectarian bent in the curriculum tending to indoctrinate or proselytize,"— "militate[d] against the type of ideological control over the secular educational function which Article IX, Section 7, at least in part, addresses." *Id.*[5]

Here, as explained above, the Program design (*i.e.*, its terms, provisions, and lack of restrictions) virtually ensures that the aid will seep over into the nonsecular functions of participating elementary and secondary religious schools in myriad ways. *See supra* at 18-21; *see* Record at 2525 ("[A]s the [Program] is presently constituted, Private School Partners are allowed to, and, as the evidence reflects, undoubtedly will use public funds to further their respective religious missions.").

[5] DCSD's argument that Colorado courts must apply the Colorado religion clauses to mean exactly the same thing as, and no more than, the federal First Amendment, *see* District Br. 20-23, is not supported by *Americans United* or federal case law. *See infra* at Section III.A.

Moreover, the specific restrictions on how the money could be spent for the college tuition assistance program "significantly reduce[d] any risk of fallout assistance to the participating institution." *Id*. at 1082. The program's statutory criteria completely "eliminated" the risk of "even incidental or remote institutional support" for institutions whose "religious mission predominates over [their] secular educational role." *Id*.[6]

In *Americans United*, the Court also found critical the fact that "financial assistance [was] available only to students attending institutions of higher education." 648 P.2d at 1084. The Court explained that "[b]ecause as a general rule religious indoctrination is not a substantial purpose of sectarian colleges and universities, *there [was] less risk of religion intruding into the secular educational function of the institution than there is at the level of parochial elementary and secondary education*." *Id.* (emphasis added).

[6] In *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1268 (10th Cir. 2008), the Tenth Circuit held that the *Americans United* statutory grant program's inquiry into whether individual schools were "pervasively sectarian" resulted in excessive entanglement with religion in violation of the Establishment Clause. No Colorado court has evaluated whether the grant program, without that statutory exclusion, complies with Article IX, Section 7 of the Colorado Constitution, a question on which the Tenth Circuit did not rule.

The Court's reasoning in *Americans United*, then, fully supports the District Court's finding that the Voucher Program unconstitutionally "aids" religious schools in violation of Article IX, Section 7. Unlike in *Americans United*, it is undisputed that the Voucher Program includes elementary and secondary schools that will use government funds to teach religion, indoctrinate students, and hold religious services. Indeed, indoctrination is a primary purpose of nearly all of the approved religious Private School Partners. Religious teachings are a central part of their curricula, and "nearly all" of the participating private schools compel attendance at religious services, including worship services and prayer in classrooms. *See* Tr. 316:5-17. Moreover, the "opt-out" provision for worship services is at best "illusory," as the District Court found, *see* Record at 2493 (¶51), and it does not extend to a wide range of other religious activities and exercise, such as morning prayers and scriptural readings. *Id.* at 2493-94 (¶52); *see supra* at 9-10. In short, the Program here will directly fund the nonsecular functions of the participating religious institutions. *See Americans United*, 648 P.2d at 1082. In fact, for many of the participating religious schools, there are no purely "secular" functions, given the predominant position of religious tenets in the school curricula and required worship services. Unlike the program challenged in *Americans*

United, the Voucher Program does not just aid students; it will directly aid religious schools and organizations by providing them with money to indoctrinate elementary and secondary students in particular religious beliefs.

2. The Decisions Of Other State Courts Considering "No Aid" Challenges To Voucher Programs Support The District Court's Opinion.

Intervenors cite two decisions from other state courts in an attempt to bolster their argument that if the aid is "designed to assist the student"—presumably by making the voucher checks out to the parents—that somehow cures the constitutional defects of the Voucher Program, even though the checks are sent directly to schools and *must* be restrictively endorsed to those schools. Intervenors Br. 18-19. Several other state courts have rejected similar arguments.

For example, in *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009), the Arizona Supreme Court held that a school voucher program could not circumvent Arizona's "aid clause" by making out the checks to parents.[7] As the court explained, "[t]hat the checks or warrants first pass through the hands of parents is immaterial; once a pupil has been accepted into a qualified school under [the program], the parents or

[7] The Arizona "aid clause" provides that "[n]o tax shall be laid or appropriation of public money made in aid of any church, *or private or sectarian school . . . .*" Ariz. Const. art. 9, § 10.

guardians have no choice; they must endorse the check or warrant to the qualified school." *Id*. at 1184; *see also Bush v. Holmes*, 886 So.2d 340, 352 (Fla. App. 2004) ("*Bush I*"), *aff'd on other grounds*, 919 So.2d 392 (Fla. 2006) ("*Bush II*") (finding that the state aid was to the schools even though the voucher program "gives parents and guardians a choice as to which school to apply a tuition voucher," given that the parents must "restrictively endorse the voucher to the school"); *State ex. rel. Rogers v. Swanson*, 219 N.W.2d 726, 730 (Neb. 1974) ("[T]he Legislature cannot circumvent an express provision of the Constitution by doing indirectly what it may not do directly. Here the grant is not directly to a private school but rather to a student, but it must be used for tuition at a private school."); Letter from Mark J. Bennett, Record at 816 (Hawaii Attorney General advising Rep. Blake K. Oshiro that a school voucher program would violate that state's no-aid provision).

The Wisconsin Supreme Court's decision in *Jackson v. Benson*, 578 N.W. 2d 602 (Wis.1998), and the recent trial court decision in *Meredith v. Daniels*, No. 49D07-1107-PL-025402 (Marion Cnty. Super. Ct. Jan. 13. 2012), *appeal pending*, Ind. Supreme Ct. No. 49-S-00-1203-PL-00172, which upheld voucher programs under those states' no-aid provisions, are simply inapposite here. Both "no-aid"

provisions are substantially narrower than Art. IX, Section 7 of the Colorado Constitution and do not prohibit appropriations to any school controlled by a church or religious organization. *See* Wis. Const. art. 1, § 18 (stating in relevant part, "nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries"); Ind. Const. art. I, § 6 ("No money shall be drawn from the treasury, for the benefit of any religious or theological institution.").

Moreover, while Appellants point to the U.S. Supreme Court decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) as evidence that writing the checks to the parents *does* cure these problems, DCSD Br. 32, this argument is completely misguided because *Zelman* only addressed whether the voucher program in that case was *permitted by* the U.S. Constitution, as discussed *infra* in Section III.A.2, not whether the federal Constitution *required* it.[8] Appellants' arguments that various provisions of the federal Constitution required the District

[8] The program at issue in *Zelman* was also different from the Voucher Program in several ways. Schools participating in that program were not allowed to discriminate in enrollment on the basis of religion, race, or ethnic background, or to "teach hatred of any person or group" on these bases. 536 U.S. at 645. There were also a wider range of non-religious options, including other public schools, thus providing a more genuine "choice." *See id.* at 662-63.

Court to uphold the Program are similarly wrong, as explained *infra* in Section III.B.

In conclusion, the District Court correctly held that the Program violates Article IX, Section 7.

C. The Voucher Program Compels Support And Attendance Of Religious Ministries And Worship, In Violation Of Article II, Section 4.

The "compelled support" clause of Article II, Section 4 states that "[n]o person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent." The District Court correctly found that the Plaintiffs "demonstrated a clear and certain right to mandatory or permanent injunctive relief" because the Voucher Program violated this provision. Record at 2525.

1. The Voucher Program Compels "Support" of Religious Ministries.

The District Court correctly found that "any 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." *Id.* The plain language of the "compelled support" clause supports the District Court's conclusion.

The use of taxpayer dollars to fund the Program compels financial support of churches and religious organizations in violation of Article II, Section 4 by sending taxpayer funds in the form of checks directly to the private religious schools that teach religious tenets. As of the date of trial, over $200,000 had been distributed to private schools through the Voucher Program. *See id.* at 2495 (¶59).

As it did with respect to Article IX, Section 7, the District Court properly rejected Appellants' argument that because the checks are made out to the parents, the voucher payments do not "support" ministries or religious groups. *See id.* at 2523-25; *supra* Section I.B.2. Rather than adopting such a constrained reading, which would effectively eviscerate the clear prohibition on "support" evident in Article II, Section 4 (if this were so, the state could end run this provision simply by making out a check to a private individual under any circumstances it wished and then having it restrictively endorsed to a religious organization), the District Court appropriately considered whether the Program would have the effect of "supporting" such institutions, and it correctly concluded that the Program would have that effect, in violation of Article II, Section 4. *See id.* at 2523-25.

2. The Program Also Compels "Attendance" At Places Of Worship.

The Program also violates Article II, Section 4 by compelling attendance at ministries and places of worship. As discussed above, most of the participating private schools require students, including voucher recipients, to attend religious services that are held in churches, chapels, and other places of worship, and there is no opt-out from attendance at such services. Record at 2490 (¶41); Tr. 255:24-256:11 (Cutter); Tr. 390:21-392:15 (Bignell); Pls.' Ex. 96 (Email of April 7, 2011); *see supra* at 9-10, 25-26. In many cases, the schools and churches are one and the same, and may even be situated within the same facilities. *See, e.g.*, Tr. 429:5-7 (Gehrke) (stating that Lutheran High School is part of the Lutheran Missouri Synod Church); Tr. 396:3-5 (Bignell) (explaining that Cherry Hills Christian School is a "ministry" of and "share[s] space" with Cherry Hills Community Church). While the lack of any opt-out from *attendance* at religious services is itself a violation of Article II, Section 4, the violation is even more egregious because the School Board agreed to allow the private schools to further limit the opt-out by insisting that students can only opt out of participation so long as they do not "call attention to the fact" that they are not participating in the religious ceremony. Pls.' Ex. 96 (Email of April 7, 2011).

Moreover, elementary and middle school students who want to participate in the Program have only a few non-religious school options and non special needs high school students have none. Record at 2489 (¶36). *Id.* Because attendance at religious services is obligatory at nearly all of the participating religious schools, *see id.* at 2490 (¶41), attendance of worship services is, effectively, a mandatory condition of participation in the Program. A non-special needs high school student who was unwilling to attend religious services would have no participating schools to even apply to, and would therefore not be eligible for the government benefit in the form of a school voucher. Or, if such a student entered the Program and subsequently became unwilling to attend such services, the student's only option would be to drop out of the Program.

3. *Americans United* Supports The Conclusion That The Program Violates Article II, Section 4.

Unable to reconcile these facts with the plain language of Article II, Section 4, Appellants again seek safe harbor in *Americans United*. *See supra* Section I.B.1. The District Court appropriately distinguished *Americans United*'s analysis of Article II, Section 4, however, based on (1) the Program's failure to limit or condition the use of state funds received by the private school partners, (2) the additional risk that religion would intrude upon education at the primary and

secondary education levels, and (3) the inseparability of religious indoctrination from classroom teaching at many of the participating schools. Record at 2524-25.

The Voucher Program is substantially different from the program challenged in *Americans United* with respect to each of these factors. While the program in *Americans United* contained safeguards to avoid aiding any religious functions of the schools, as discussed above, the Voucher Program lacks any such restrictions, and the evidence shows that the voucher money in fact aided religious functions of some participating schools. Critically, unlike in *Americans United*, the Voucher Program involves elementary and secondary schools, many of which have no separation between the "secular" and "religious" components of the education provided. Finally, the aid from the Program at issue in *Americans United* could be used at a wide range of colleges, both private and public, and both sectarian and nonsectarian, further minimizing any risk that students wishing to participate in the grant program would be coerced into attending a religiously affiliated university. *See Americans United,* 648 P. 2d at 1082 (noting that grant program was "nonrestrictive in the sense that it is available to students at both public and private institutions of higher learning"). By contrast, as noted above, the Voucher

Program offers few non-religious options to elementary and middle school students and none for high school students.

4. The Purpose Of The Compelled Support Clause Bolsters The Conclusion That The Program Violates Article II, Section 4.

Contrary to DCSD's argument, the purpose of the "compelled support" clause of Article II, Section 4 supports the District Court's conclusion that the Program violates this provision. As with any inquiry into the meaning of a statute or constitutional provision, a court must begin by looking at the plain language. *In re Submission of Interrogatories on House Bill 99-1325*, 979 P.2d 549, 554 (Colo. 1999) (recognizing the "general rule of constitutional construction that the language of our constitution, so far as possible, must be given its ordinary meaning, and the words thereof their common interpretation"). The purpose of the compelled support clause is clear from its text: to protect anyone from unwillingly attending or supporting any place of worship. *See Americans United*, 648 P.2d at 1082. As explained above, the voucher Program does just what this clause prohibits.

None of the cases DCSD relies on, *see* DCSD Br. 13-14, or the language it points to from *Americans United*, interpret or articulate the aims of the compelled

support clause; they all concern the "preference clause."[9] Appellants' reliance solely on cases interpreting the preference clause of Article II, Section 4 is misplaced. Whatever the purpose of other clauses of Article II, Section 4 may be, they are irrelevant to an examination of the purpose behind the compelled support language. To hold otherwise would render the other clauses in Article II, Section 4 redundant and disregard basic rules of construction, which dictate that each provision be understood to have a specific meaning and purpose. *See Kelo v. New London*, 545 U.S. 469, 496 (2005) ("When interpreting the Constitution, we begin with the unremarkable presumption that every word in the document has independent meaning, that no word was unnecessarily used, or needlessly added.") (internal quotation and citation omitted).

[9] *See, e.g., Young Life v. Div. of Employment & Training*, 650 P.2d 515 (Colo. 1982); *Conrad v. City & County of Denver*, 656 P.2d 662 (Colo. 1982); Conrad v. City & *County of Denver*, 724 P.2d 1309 (Colo. 1986); *Colo. v. Freedom from Religion Found*., 898 P.2d 1013 (Colo. 1995). The relevant language from *Americans United* cited by Appellants also refers directly to the preference clause, quoting *People ex rel. Vollmar v. Stanley*, 255 P. 610, on that very point. *See Americans United*, 648 P.2d at 1082 ("*Vollmar* also considered the proscription against religious preferences and stated that this clause 'is aimed to prevent an established church.'"); *Vollmar*, 81 Colo. at 255 (similarly explaining in a discussion specifically concerning the preference clause that "this clause refers only to legislation for the benefit of a denomination or mode of worship and is aimed to prevent an established church").

5. The Appellants' "Aid To The Student" Argument With Respect To The "Compelled Support" Clause Is Wrong.

DCSD's argument that the compelled support clause is not violated because the Program only aids the student, DCSD Br. 16, fails for the same reasons discussed *supra* at I.B.1-2. Moreover, the cases cited by DCSD for the proposition that the Voucher Program cannot violate the compelled support clause when Colorado courts have upheld what they call "direct" aid all concern incidental uses of government personnel or resources to support displays or events that were erected or held in public places, as opposed to direct conveyance of public funds to religious institutions. *See* DCSD Br. 16-17.[10] Appellants' arguments that the federal Constitution requires upholding the Program despite this clear violation of Article II, Section 4 fail for the reasons discussed below. *See infra* at III.

[10] *See Freedom From Religion Found. v. Romer*, 921 P.2d 84,90-91 (Colo. App. 1996) (holding only that public employees carrying out ordinary police, sanitation, and related services during Pope's visit were protected by qualified immunity because these actions were not "so clearly unconstitutional that any reasonable person would have known that his or her actions violated plaintiffs' constitutional rights"); *State v. Freedom From Religion Found.*, 898 P.2d 1013, 1016-27 (Colo. 1995) (evaluating whether Ten Commandments monuments *donated by* a private party and displayed on state property violated the preference clause and federal Establishment Clause); *Conrad*, 724 P.2d at 1309 (evaluating whether nativity scene displayed on state property violated Colorado's preference clause).

D. The Program Violates Article IX, Section 8 Of The Colorado Constitution By Subjecting Public School Students To Religious Tests and Services, And By Teaching Sectarian Tenets In Public School.

In setting up a sham charter school to receive and divert state funds to private religious schools, DCSD only multiplied and compounded the Voucher Program's constitutional infirmities. Under the Voucher Program, public school students must enroll in a public charter school, but as a prerequisite for enrollment in that public school, they must agree to be subjected to religious tests and services and to be taught religious beliefs and doctrine on a daily basis. The Voucher Program therefore violates three parts of Article IX, Section 8:

> [1] No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as a teacher or student; [2] no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatsoever. [3] No sectarian tenets or doctrines shall ever be taught in the public school….

Colo. Const. art. IX, § 8. The specific findings of fact by the District Court, which are supported by extensive testimonial and documentary evidence in the record and are largely undisputed by Appellants, demonstrate clear violations of all three of these constitutional prohibitions.

Under the Program, "[m]ost participating Private School Partners discriminate in enrollment or admissions on the basis of the religious beliefs or practices of students and their parents…." Record at 2490 (¶42). In fact, many of the schools require participating students to swear a religious oath or similar profession of faith. *Id*.[11] Most of the partner schools also require students to attend religious services. *Id*. (¶41). While the Program allows public school students to "opt-out" of "participating" in these services, the Program nonetheless requires public school students to "attend" religious services silently. *Id*. at 2493-94 (¶¶51-54). The teaching of sectarian tenants is also a core mission of most of the partner schools and "[t]he curricula at most participating schools is thoroughly infused with religion and religious doctrine…." *Id*. at 2492 (¶45). The District Court thus correctly found that the Program violates all three provisions by

[11] DCSD gives no basis for its argument that it was "clear error" for the court to "ascribe" this discrimination to DCSD. *See* DCSD Br. 30 n.5. While DCSD points to the program policy in its defense, it fails to address why, if DCSD intended to enforce its supposed non-discrimination policy, it failed to address discrimination by the private schools before accepting them as partners, particularly given that the applications *submitted to DCSD* by the schools describe the schools' discriminatory practices. *See, e.g.*, Pls.' Ex. 23 at 023.028. Moreover, DCSD does not dispute that the Program explicitly permits discrimination in admissions and hiring based on religious beliefs.

"allowing for faith based admission standards, compelled attendance at religious services, and teaching of religious tenets…." *Id*. at 2531.

1. The Trial Court Correctly Determined That The Program Violates Article IX, Section 8 By Subjecting Public School Students to Religious Tests, Services, And Teachings.

(a) The Program Subjects Public School Students To Religious Tests.

The first provision of Article IX, Section 8 guarantees that "any person of any religion or no religion may become a student of a public institution." *Id*. at 2526. Most schools participating in the Program discriminate in enrollment based on religion and "subject students, parents, and faculty to religious tests and qualifications." *Id*. at 2491 (¶43). Religious tests imposed by some of the private schools include required attestations to faith in Jesus Christ, required signing of "doctrinal statements," or required professions of a "personal relationship with God." *Id*. Many also discriminate against teachers in their hiring practices. Moreover, the Program does not require private schools to change their admission criteria. Record at 2528. Based on these facts, the District Court was correct in concluding that these "admission qualifications violate Article IX, Section 8 of the Colorado Constitution." *Id*. at 2529.

Appellants admit that many of the private schools subject students to religious tests. *See, e.g.*, Intervenors Br. 24. They only dispute the District Court's finding that the Charter School's enrollment policy requires students to be admitted into one of the private schools. *See* DCSD Br. 35; Intervenors Br. 24. The only factual basis for this argument is testimony by DCSD Superintendent Dr. Fagen that admission to a private school is not a prerequisite for Charter School students to receive a scholarship through the Program. This testimony explicitly contradicts DCSD's intentionally-crafted Choice Scholarship School Application, which states that "[t]o be *eligible for enrollment in* [the Charter School], a student *must* qualify and receive a DCSD [voucher], *be accepted and attend*" a participating private school. *See* Charter School Application, Record at 1770 (emphasis added). Regardless of whether Dr. Fagen testified that she would have changed the application, under actual Program documents and actual Program operations, it is undisputed that students have to gain admission to and attend an approved private school in order to actually take part in the Program. If they do not, students attending the Charter School would not be going to school at all.

(b) The Program Requires Attendance At Religious Services.

The District Court also correctly found that the Program separately violates the second provision of Article IX Section 8 because it subjects public school students to mandatory attendance at religious services. Record at 2530. Although the Program supposedly provides an "opt-out" clause, as discussed above, there is no opt-out from attendance at religious services, and in some cases where non-participation might be deemed disruptive, even participation may be compelled. *See supra* at 9-10; *see also* Pls.' Ex. 97 (Email of March 28, 2011) (DCSD Attorney Robert Ross characterizing the provision as "[n]ot much of an opt-out"). Because the "opt-out" clause requires public school students to "attend" religious services, it does not cure the violation of Article IX, Section 8.

Appellants argue that the Colorado Constitution should have no force because parents have a "choice" about whether to send their children to the Charter School or the partner schools. *See* DCSD Br. 37; Intervenors Br. 25. First, the alleged "choice" touted by Appellants is illusory because the vast majority of the partner schools are religious. Indeed, for virtually all high school students, the *only* options are religious schools. Record at 2489 (¶36). Second, even if the Program did afford a meaningful choice, the mere fact that parents are not required

to have their children participate in the Program does not shield it from constitutional scrutiny. The Constitution applies to all public school students, even those who attend optional institutions. For example, traditional charter schools are likewise optional, but are nonetheless subject to constitutional requirements applicable to public schools. *See* Colo. Rev. Stat. Ann. § 22-30.5-104 (charter schools are public schools). Appellants attempt to support their novel argument by citing to a number of cases which address the scope of the federal Establishment Clause or viewpoint discrimination under the Free Speech Clause. *See* DCSD Br. 38; Intervenors Br. 25. Those cases do not address the prohibitions of Article IX Section 8 or any similar provision and are irrelevant. *See infra* Section III.

(c) Students Participating In The Program Are Taught Religious Tenets And Doctrines.

The vast majority of the public school students enrolled at the Charter School would be taught religious doctrines at school as part of their everyday curriculum. Record at 2492 (¶45). Appellants do not dispute this fact. The District Court thus correctly found that the Program's "teaching of religious tenets to students enrolled in a public charter school" violates Article IX, Section 8. *Id*. at 2531.

2. The Program Operates As A Public School And Enrolls Public School Students; Therefore, It Must Comply With Constitutional Provisions Applicable To Public Schools.

Appellants argue that the charter school itself is "neutral towards religion" and that any teaching of religious tenets or doctrines is outsourced to the private schools. *See* DCSD Br. 39-40; Intervenors Br. 25. The District Court correctly rejected this argument. Record at 2530. Appellants cannot have it both ways by claiming that students are enrolled in the public Charter School for purposes of obtaining public funding but enrolled in private schools to avoid the consequences of the Colorado Constitution. Private schools may of course teach religious tenets to private school students, but all participating Program students are public school students who are enrolled in the public Charter School. Under these circumstances, the teaching of sectarian tenets violates Article IX, Section 8.

As discussed in greater detail in the TPE Plaintiffs' brief at 32-36, Appellants cannot avoid Colorado law by soliciting or retaining third parties to engage in otherwise impermissible conduct. A school district can obtain state funding to contract for services only if those services "meet the same requirements and standards as would be necessary if performed by the school district." C.R.S. § 22-32-122. The private schools must thus meet the same legal requirements that

govern the public school district, including compliance with Article IX, Section 8. DCSD apparently also understood this fact, as it stated in its contract with the Charter School that "[t]he educational Programs conducted by the School are considered to be operated by the School as part of the District. As such, *the School is subject to Colorado laws and District policies that apply to all public schools . . .*" Choice Scholarship School Agreement, Record at 835 (emphasis added). If Appellants wish to enroll Program participants in a public charter school and receive funding on that basis, then they must also comply with applicable Colorado law.

3. The Charter School is a "Public Educational Institution of the State"

DCSD next seeks to avoid the first two provisions of Article IX Section 8 by arguing that the District Court was wrong to treat the charter school as a "public educational institution of the state," claiming that public elementary and secondary schools do not belong in this category. *See* DCSD Br. 33-34. This assertion is wrong. Moreover, even DCSD admits that the charter school is bound by the third prong of Article IX, Section 8. *See id*. Therefore, even if Appellants were correct about Article IX, Section 8's scope, (and it is not), the Program would still be unconstitutional under the section's third prong.

DCSD primarily relies on *People ex rel. Vollmar*, 255 P. 610. It fails to note that since *Vollmar*, Colorado courts have made clear that public schools are indeed "of the state." In fact, this is the express holding of *Wilmore v. Annear*, 100 Colo. 106 (1937), the other case upon which DCSD principally relies. Appellants cite to dicta from *Wilmore* implying that "educational institutions" is a term that refers to a set of institutions broader than just the public schools. This hardly means, however, that "public schools" are not also "educational institutions of the state." It means only that the latter term encompasses more than just the former. The actual holding of *Wilmore* is that "the establishment and financial maintenance of the *public schools of the state* is the carrying out of a state and not a local or municipal purpose." *Id*. at 115 (emphasis added).

Additionally, Appellants' assertion that the term "educational institutions" excludes public schools is contradicted by multiple court decisions in other contexts. *See, e.g., Indus. Comm'n v. Bd. of County Com'rs*, 690 P.2d 839, 842 (Colo. 1984) (term "educational institution" as used in a statute interpreted as applying to elementary and secondary schools); *People ex rel. J.P.L.*, 214 P.3d 1072, 1074 (Colo. App. 2009) (same). To construe the first two parts of Section 8 so narrowly that they apply only to higher education would provide greater

constitutional protections against compelled religious tests, attendance, and teaching in post-secondary education than in primary and secondary education. Such a perverse effect would be contrary to the Colorado Supreme Court's observation in *Americans United* that protecting against religious indoctrination is more critical at the elementary and secondary school levels. *See Americans United*, 648 P.2d at 1079. Thus, the better interpretation, which is confirmed by *Wilmore*, is that the Charter School is an "educational institution of the state" that must comply with *all three* provisions of Article IX, Section 8.

E. The Voucher Program Violates Article V, Section 34 By Directing State Funds For Educational Purposes To Non-State Denominational Or Sectarian Institutions Without A Discrete And Particularized Legislative Purpose.

Article V, Section 34 of the Colorado Constitution prohibits the payment of state funds for educational purposes to any person, corporation, or community "not under the absolute control of the state, [or] to any denominational or sectarian institution or association." On appeal, the State Defendants and Intervenors concede, as they must, that the schools that would receive state funds under the Voucher Program are "denominational or sectarian institutions" that are not "under the absolute control of the state." Instead, they raise a series of arguments that are unsupported by the text of the Colorado Constitution and case law.

First, the State Defendants and Intervenors argue that Article V, Section 34 "'refers only to state funds,' not local expenditures," and that it does not apply to counties' expenditures of state funds. *See* State Br. 39 (quoting *Lyman v. Town of Bowmar*, 533 P.2d 1129, 1136 (Colo. 1975)); Intervenors Br. 22. This argument ignores the plain text of the Colorado Constitution, which applies to all appropriations and does not exempt payments that are made through local governments. The cases cited by Defendants deal with expenditures of *local government funds*, not state funds, and are therefore inapposite. *See Williamson v. Bd. of Comm'rs of Arapahoe Cnty.*, 46 P. 117, 117 (Colo. 1896) (statute requiring counties to provide treatment to alcoholics and drug addicts "at the expense of the county," with no appropriation of state funds); *Lyman*, 533 P.2d at 220 (municipal ordinance involving local funds, not from the state). As the District Court found, the "undisputed evidence and testimony" demonstrates that the Voucher Program is funded by state appropriations, with state funds being paid to participating schools. *See* Record at 2537-38.

Second, the State and Intervenors argue that the Voucher Program falls within the "public purpose" exception set forth in case law interpreting Article V, Section 34. *See* State Br. 40; Intervenors Br. 22. The public purpose exception is

not an across-the-board exemption for expenditures that somehow relate to any conceivable public purpose, however. It only applies to legislation that "evince[s] a discrete and particularized public purpose." *Americans United*, 648 P.2d at 1086. This discrete and particularized purpose must outweigh "any individual interests incidentally served by the statutory program." *Id*.

The public purpose exception does not apply to the Voucher Program because the Program engages in full-fledged sponsorship of religious education, a fundamentally private purpose. *See Opinion of the Justices*, 258 A.2d 343, 347 (N.H. 1969) ("support of parochial schools . . . is not a public purpose"); Record at 2491-92 (¶44) (finding that many of the participating schools are funded primarily or predominantly by organizations that advocate a particular religion and have a mission to "provide students with a religious upbringing and to inculcate in them the particular religious beliefs and values of the school or sponsoring religious organization"). Although the Court in *Americans United* found that the public purpose exception applied to the program at issue there, that program had several features, missing from the Voucher Program, that limited its religious nature and thereby amplified its public purpose. *See supra* at 21-26. Moreover, many of the religious schools discriminate on the basis of religious beliefs and other criteria,

including sexual orientation, marital status, and positive HIV tests. *See supra* at 10-12. That the Program permits such discrimination belies Appellants' claim of a public purpose.

These private, religious purposes predominate in every aspect of the Program. The District Court correctly found that these "core principles" were "fundamentally at odds with the college tuition-assistance program and the Colorado Supreme Court's holding in *Americans United.*" *Id*. at 2539.[12] When measured against the proscription of Article V, Section 34, there are no discrete and particularized public legislative purposes that preponderate over the private, religious interests of the Program. And for the same reasons set forth in Section I.B.1-2, the State Defendants' argument that Article V, Section 34's blanket

[12] Intervenors overreach by arguing that the U.S. Supreme Court rejected the proposition that aid to parochial school students does not serve a secular, public purpose in *Everson v. Bd. of Education*, 330 U.S. 1 (1947). Intervenors' Br. 22-23. *Everson* analyzed whether the First Amendment prohibited reimbursing bus fares to children who attended private schools. The Court did not address whether such funds provide a public purpose under Article V, Section 34 of the Colorado Constitution. Indeed, the Court distinguished the bus fares from the kind of funding at issue here, specifying that the program passed constitutional muster because "[t]he State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." *Id.* at 18.

prohibition of funding to *any* "denominational or sectarian" institution, regardless of control, does not apply to the Voucher Program's funding of religious schools because the aid goes to the individuals, is unavailing. *See* State Br. 42; Intervenors Br. 22.[13]

The District Court was correct in holding that Article V, Section 34 prohibits the Voucher Program's payment of state funds to religious schools. The payments are for private educational purposes, the schools are denominational or sectarian and not under the state's control, and there is no discrete and particularized public purpose that outweighs the private interests arising from the program. The Voucher Program can be enjoined on this basis alone.

II. Appellants' "Blaine" Argument Is Irrelevant And Inaccurate, And Was Properly Rejected By The District Court.

LaRue Plaintiffs agree in part with Intervenors' statement of the standard of review for this issue. *See* Intervenors' Br. 26. The District Court's conclusion that Defendants and Intervenors failed to provide any legal authority indicating that the

[13] State Defendants' reliance on *In re Substitute for Senate Bill No. 83*, 39 P. 1088 (Colo. 1985), *overruled on other grounds by Bertrand v. Bd. of Cnty. Comm'rs*, 872 P.2d 223 (Colo. 1994), is misplaced. The payment to the Benedictine Sisters of Colorado was to compensate the sisters for the taking of their property during the construction of a canal. *Id*. The payment was not for charitable, industrial, educational or benevolent purposes, and therefore Article V, Section 34 did not apply. *Id.* at 1089.

court should ignore the language of the Colorado Constitution is reviewed *de novo*. *See Rocky Mountain Animal Def. v. Colo. Div. of Wildlife,* 100 P.3d 508, 513 (Colo. App. 2004). The District Court's factual findings regarding the historical evidence presented at trial relating to the enactment of the Colorado Constitution must be upheld unless clearly erroneous. *See supra* at 16. Evidence not introduced below is outside the scope of the record and may not be considered on appeal. *Genua v. Kilmer,* 546 P.2d 1279, 1281 (Colo. App. 1976) ("[S]tatements of purported facts made in the brief but not contained in the record are improper, cannot supply deficiencies in the record, and may not be considered.").

A. The "Blaine" Argument Is Irrelevant.

The District Court correctly concluded that it could not "disregard certain constitutional provisions" simply because the Defendants and Intervenors allege that the provisions were motivated in part by bias. Record at 2515. As the District Court noted, Appellants cite to no legal authority that has invalidated similar provisions on these grounds.[14] *Id*. Indeed, other courts have rejected similar

[14] Appellants cite only to language from a handful of federal Equal Protection Clause cases. *See* Intervenors Br. 37 (citing *Hunter v. Underwood*, 471 U.S. 222 (1985); *Romer v. Evans*, 517 U.S. 620 (1996)). That language is irrelevant here. Those cases invalidated laws that were clearly enacted for discriminatory purposes *and that were being used to impermissibly discriminate*. The Colorado

arguments. *See Univ. of the Cumberlands v. Pennybacker*, 308 S.W.3d 668, 679-80 (Ky. 2010); *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009); *Bush v. Holmes*, 886 So. 2d 340, 351 n. 9 (Fla. Dist. Ct. App. 2004), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006). This Court should likewise disregard what Appellants claim was the personal motivation of certain of the supporters of the Colorado constitutional provisions 135 years ago.

B. Even If Relevant, The History Of Those Provisions Do Not Support Appellants' Argument.

Even if the attempt to discern the thoughts and motivations of the framers and ratifiers of the Colorado Constitution 135 years ago were relevant, the District Court correctly found that Appellants provided insufficient evidence to support their version of history. Record at 2515. Appellants rely largely on the trial testimony of Charles Glenn. Glenn is not a historian, he holds no academic degrees in history, and his publications are not peer-reviewed. Tr. 715:4-13; 694:11-12. He is also an ardent supporter of school vouchers who believes "that school voucher opponents use scare tactics based on unfounded stereotypes about faith-based schooling . . . ." Tr. 713:10-25; 714:18-21. In short, Appellants

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Constitutional provisions are not being used to discriminate among religions. *See infra* Section III.B.

ground their case in the testimony of a single non-historian who is admittedly biased.

Glenn's testimony is also based on sparingly little evidence. As Glenn admitted at trial, there is no transcript of the Colorado convention debates, and very little historical work has addressed the specific provisions in question. Tr. 678:2-5; 695:8-12. Glenn's conclusions about the motivations behind these provisions were based largely upon irrelevant national history. To the extent that Glenn did discuss Colorado, he mostly relied on a small selection of letters and newspaper articles quoted by secondary sources. Glenn admitted that he made no efforts to find and review primary documents himself. Tr. 703:22-704:8.

On this record, the District Court was not persuaded by Glenn's testimony. It also rightly noted that other evidence cited by Glenn contradicted his conclusion, including the fact that Colorado's "no aid" provision was modeled on an Illinois provision, which was enacted years before Blaine's proposed amendment, and the fact that Catholics conducted a pro-Constitution rally in Denver just two days before the ratification election. Record at 2515; Tr. 741:8-17. Appellants simply shrug off this latter point, and they go outside the record in their attempt to attack the former.

Indeed, Appellants and their amici spend a great deal of energy on national history that is not in the record, not a proper subject of review, and not relevant to Colorado in any event. Moreover, a fair reading of the very sources upon which Appellants and their amici rely does not support Appellants' version of Colorado history. One source cited by the Appellants suggests that a belief in the importance of separation of church and state, not bias, motivated many supporters of the provisions, noting the introduction early in the Colorado constitutional convention of "several resolutions calling for a rigid separation of church and state, including a ban on reading the Bible in school." Pls.' Ex. 149 (Donald Hensel, *A History of the Colorado Constitution in the Nineteenth Century* 193 (1957)); Tr. 722: 6-24.

Amicus Becket Fund's own sources describe a significant debate throughout the Colorado territory about the role that the Bible and religion *generally* should play in the public schools:

> [A] lively public debate ensued on whether the Bible should be read in Colorado public schools. Some argued that the Bible was necessary to a proper moral education, but the delegates took a stand against Bible reading in class, agreeing with a contemporary writer of letters to newspapers that "the Bible could take care of itself . . . and needed no legislation to bolster it up," and that "religion [should] be taught in the family circle, in the church, and in the Sunday school."

Dale A. Oesterle & Richard B. Collins, The Colorado State Constitution: A Reference Guide 212 (2002); *see also* Pls.' Ex. 149 at 196 (Hensel article) ("The delegates turned their backs on the churches and took a determined stand. They barred all 'sectarian tenets or doctrines' from the public schools. The convention rejected the assumption that Bible-reading was indispensable evidence that the schools were moral institutions."); Proceedings of the Constitutional Convention: Colorado 1875-1876, 277 ("We, the undersigned, fully endorse the foregoing petition, with the understanding that non-sectarian implies the exclusion of the reading of any Bible and all religious training and exercises from the public schools.").

In short, even the sources relied on by DCSD, Intervenors, and the Becket Fund paint a picture of a territory debating the role of religion in its public schools —and deciding to keep *all* religion separate from publicly-funded schooling—not one of an ill-motivated attempt to attack a single church. It may be true that some in the Catholic Church were vocal opponents of these provisions, but that does not affect their validity. To hold otherwise would be to open the door to judicial review of any legislation on the basis that once upon a time it was opposed by a

religious institution. The Court should not do so, especially upon the thin and contradictory evidence offered by Appellants here.

III. The District Court Correctly Rejected Appellants' Federal Arguments Raised Below, And Their New Federal Arguments Should Also Be Rejected.

LaRue Plaintiffs agree with DCSD's and Intervenors' statement of the standard of review to the extent that constitutional questions are reviewed *de novo*. LaRue Plaintiffs agree that DCSD and Intervenors preserved their arguments that the Program is permissible under the Establishment Clause and required by the Free Exercise Clause. Plaintiffs disagree that Appellants preserved their arguments that the District Court's interpretation of Colorado law violates the Establishment, Equal Protection, Free Speech, and Due Process Clauses. These issues were not briefed, argued, or ruled on below. They are now raised for the first time on appeal. Colorado courts may not "consider constitutional issues raised for the first time on appeal." *See Colgan v. Colo. Dep't of Revenue*, 623 P.2d 871, 874 (Colo. 1981).

A. The District Court Properly Rejected Appellants' Claims That The Establishment Clause *Permits* The Program And The Free Exercise Clause *Requires* It.

Defendants and Intervenors advanced two primary arguments below concerning the federal Constitution. First, they argued that Colorado's religion clauses mean the same thing as the religion clauses of the federal Constitution. Based on this reasoning, they cite cases construing the federal Constitution and argue that the Program would be constitutional under the First Amendment, and that therefore it should have been upheld. Second, they argued that the Free Exercise Clause required the District Court to uphold the Voucher Program. The District Court correctly rejected both arguments. *See* Record at 2513-15.

1. It Is Irrelevant Whether The Establishment Clause Permits The Program Because Colorado's Religion Clauses Are Not Synonymous With The First Amendment.

The Colorado Supreme Court in *Americans United* rejected the argument that Colorado's religion clauses mean no more than the federal religion clauses. *See Americans United*, 648 P.2d at 1081-82. There, the Court explained that although in some regards, Colorado's religion clauses "embody the same values of free-exercise and governmental non-involvement," Colorado's provisions are "considerably more specific" than the Establishment Clause and Free Exercise

Clause. *Id*. To interpret Colorado's more specific provisions to mean exactly the same thing as the federal constitutional provisions would render certain provisions of the Colorado Constitution meaningless. Notably, the Colorado Supreme Court in *Americans United* engaged in an analysis of several of the Colorado constitutional provisions that are also at issue here. If those provisions meant nothing more than the federal Constitution, the Court would have simply analyzed federal law, but it did not. *See, e.g.*, *id*. at 1082-83.

Appellants' argument also implies that there is an "analogous" federal precedent that addresses every state constitutional right to religious freedom and separation, including the rights protected by Article II, Section 4. Nothing in the federal constitution mirrors the language of either Article IX, Section 7 or Article II, Section 4, however. *Americans United* also did not "anticipate" the Supreme Court's holding in *Zelman* as Intervenors suggest. Intervenors Br. 13. *Zelman* concerned the limitations imposed by the Establishment Clause, which was not an issue before the Court in *Americans United* and is not an issue before this Court.

Because the Colorado constitutional provisions have a meaning independent of the federal constitutional provisions and mandate a stricter separation between

church and state than does the federal Constitution, it is irrelevant whether the Program is *permissible* under the federal Establishment Clause.

2. The Free Exercise Clause Does Not Require States To Fund Religious Schools.

The District Court also properly rejected Appellants' argument below that the Free Exercise Clause *requires* funding of religious schools. *See* Record at 2514-15. This argument is not substantiated by *Zelman*, which found only that the First Amendment *permits* the use of school vouchers at religious schools in certain circumstances. In *Locke v. Davey*, 540 U.S. 712, 725 (2004), the Supreme Court rejected the proposition advanced by Appellants here, that the Free Exercise Clause *requires* public funding of religious instruction. The Court held that a provision in a state college scholarship program barring funding of study toward a devotional theology degree at a private college did not violate the Free Exercise Clause. *See id.* In *Locke*, the Court explained that there is "play in the joints" between what is permitted by the Establishment Clause and what is required by the Free Exercise Clause. *Id.* at 719. In other words, there are some activities that are allowed by the Establishment Clause that are, nevertheless, not mandated by the Free Exercise Clause. *See id.* at 725.

Following *Locke*, the federal circuit courts have repeatedly rejected arguments similar to those advanced by Appellants here. For example, in *Eulitt ex rel. Eulitt v. Maine Dep't of Educ.*, 386 F.3d 344, 356 (1st Cir. 2004), the First Circuit rejected arguments that a state violated the Free Exercise Clause by establishing a program that provided for funding of secular but not religious private schools. Similarly, in *Bowman v. United States*, 564 F.3d 765, 774 (6th Cir. 2008), the Sixth Circuit rejected an argument that the Free Exercise Clause prohibits the U.S. government from excluding religious institutions from a program that provides increased or early retirement pay to former military service members for public-service work. *Accord Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 409-10 (6th Cir. 2007); *Wirzburger v. Galvin*, 412 F.3d 271, 280-82 (1st Cir. 2005); *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15, 21 (1st Cir. 2004); *Univ. of Cumberlands v. Pennybacker*, 308 S.W.3d 668, 679-80 (Ky. 2010); *Anderson v. Town of Durham*, 895 A.2d 944, 958-59 (Me. 2006); *Bush v. Holmes*, 886 So. 2d 340, 362-66 (Fla. Dist. Ct. App. 2004).

Moreover, Intervenors' citation to *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), is inapposite. Unlike the law struck down there, the District Court's decision does not prohibit or impose criminal or civil

sanctions on any religious activity. *See id*. at 528 (holding unconstitutional law that prohibited practitioners of the Santeria religion from carrying out their religious practice of engaging in animal sacrifice, and violations were punishable by fines and imprisonment). The freedom of individuals to believe in and practice their religion is in no way jeopardized by enjoining the Program. Parents and students may still believe and exercise their faith as they desire; and, as has always been the case, parents may still enroll their children in private religious schools.

B. Defendants' And Intervenors' New Federal Constitutional Arguments Also Should Be Rejected.

As explained above, because DCSD's and Intervenors' new federal arguments were not sufficiently preserved, the court should summarily deny these arguments. In any event, these new arguments are without merit.

1. The District Court's Opinion Does Not Offend The Establishment Clause.

DCSD argues on appeal that any inquiry into whether a private school indoctrinates students violates the Establishment Clause. *See* DCSD Br. 23-28. It claims that the analysis of "indoctrination" is "indistinguishable from past concerns about whether a religious institution is 'pervasively sectarian'" and argues that this inquiry is no longer valid. *Id.* at 24. Both assertions are incorrect.

This argument is largely based on language that appears nowhere in the District Court's opinion. DCSD asserts that the District Court distinguished between the schools at issue in *Americans United*, which were "merely sectarian" (DCSD even inserts quotes around this language to suggest the District Court said this, when in fact the District Court never made any such statement), and ones that are so religious or sectarian that they indoctrinate, such as those participating in the Voucher Program. *Id.* at 25. This assertion misrepresents the District Court's analysis and opinion. DCSD fails to point to a single instance where the District Court considered *how* sectarian a particular institution was, or suggested that a *less* sectarian institution would pass constitutional scrutiny but a more sectarian institution would not.

In fact, nowhere in the Order does the District Court draw lines between how religious the different schools are, nor does it ever use terms such as "merely sectarian" or "pervasively sectarian," except to state its belief that it would be improper for the Court to analyze whether any participating schools are "pervasively sectarian." Record at 2517, 2519, n.4. Nor does the District Court consider how religious the participating private schools are as compared to the schools at issue in *Americans United*. The District Court merely applied the

criteria set forth in *Americans United* and concluded that the Voucher Program raised constitutional concerns that were identified by the Court in *Americans United*, but not present there, such as the fact that the Program targets primary and secondary age students. In the end, the Court found that the inclusion of *all* the religious schools participating in the voucher program—whether "pervasively sectarian" or not, and whether Catholic, Jewish, Lutheran, or otherwise—violated the Colorado Constitution and other laws.

Moreover, the First Amendment clearly permits courts to evaluate the religious nature of particular organizations and activities, and courts routinely do so. *See Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (plurality opinion); *id.* at 840, 845 (O'Connor, J., concurring); *Agostini v. Felton*, 521 U.S. 203, 219 (1997); *accord Glassman v. Arlington Cnty.*, 628 F.3d 140, 148 (4th Cir. 2010); *Am. Atheists, Inc. v. Detroit Downtown Dev. Auth.*, 567 F.3d 278, 291 (6th Cir. 2009); *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 424-25 (8th Cir. 2007); *Cmty. House v. City of Boise*, 490 F.3d 1041, 1056-59 (9th Cir. 2006); *Freedom From Religion Found. v. Bugher*, 249 F.3d 606, 611 (7th Cir. 2001); *DeStefano v. Emergency Hous. Grp.*, 247 F.3d 397, 414-19 (2d Cir. 2001).

The Colorado Supreme Court has similarly recognized that courts must be able to evaluate whether challenged activity complies with Colorado's religion clauses. *See, e.g., Young Life v. Div. of Emp't & Training*, 650 P.2d 515, 522-24 (Colo. 1982) (en banc) (rejecting argument that determination of whether Young Life was a church under Colorado law—which necessitated evaluation of evidence concerning "Young Life's doctrinal creeds, religious beliefs and practices, time place and manner of worship services, . . . religious organizational affiliations, . . . and sources of financial support"—constituted impermissible entanglement under the Establishment Clause). Here, the District Court did precisely what it was required to do: evaluate whether the Program violated the religion clauses of the Colorado Constitution. This analysis necessarily required the District Court to consider whether, among other things, any public funds were used to aid any "sectarian society," or any school was "controlled by any church or sectarian denomination" (Colo. Const. art. IX, § 7); whether any person was required to attend or support "any religious sect or denomination" (*Id*., art. II, § 4); and whether any public school teachers or students were required to "attend or participate in any religious service whatsoever," or if "sectarian tenets or doctrines" were being taught in a public school (*Id*., art. IX, § 8). It was necessary

and proper for the Court to inquire whether the religious component of the curriculum and programs at the religious private schools complied with these provisions.[15]

The Appellants similarly suggest that the Court's analysis violates the Preference Clause of Article II, Section 4, by showing a preference to "less sectarian" religious institutions that do not purport to indoctrinate. DCSD Br. 28-29. DCSD cites no Colorado case law in support of this argument, however, which merely follows the same lines as Appellants' federal constitutional argument and, even if considered on the merits, should be rejected for the same reasons. Under

[15] Moreover, even though it was not used by the District Court in this case, the "pervasively sectarian" analysis, while questioned by the plurality in *Mitchell*, has not been overruled. Justice O'Connor's controlling opinion in *Mitchell* does not adopt the plurality's reasoning and instead suggests that the pervasively sectarian inquiry may be relevant to the analysis of whether funds are being used to further religion. *See Mitchell*, 530 U.S. at 841 (O'Connor, J., concurring); The federal circuit courts have agreed that it is Justice O'Connor's opinion, not the plurality, that represents the controlling opinion in *Mitchell*. *See, e.g.*, *Cmty. House*, 490 F.3d at 1057-59; *DeStefano*, 247 F.3d at 418; *Johnson v. Econ. Dev. Corp*., 241 F.3d 501, 510 n.2 (6th Cir. 2001). Many lower courts have thus continued to ask whether religious organizations or activities are "pervasively sectarian." See *Am. Atheists*, 567 F.3d at 295-96; *Kong v. Scully*, 341 F.3d 1132, 1140 (9th Cir. 2003); *Steele v. Indus. Dev. Bd.*, 301 F.3d 401, 407-09 (6th Cir. 2002); *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 469 (5th Cir. 2001); *State v. Yencer*, 718 S.E.2d 615, 618 (N.C. 2011); *Virginia Coll. Bldg. Auth. v. Lynn*, 538 S.E.2d 682, 694-98 (Va. 2000).

the District Court's Order, all religious denominations and modes of worship are treated the same.

2. The Equal Protection Clause Does Not Require The Provision Of Public Funds For Religious Activities.

The precise argument set forth by Intervenors, *see* Intervenors Br. 42-44, and amicus curiae The Becket Fund, *see* Becket Br. 17-27, under the Equal Protection Clause was considered and rejected by the U.S. Supreme Court in *Locke*. The Court held in *Locke* that if government action does not violate the Free Exercise Clause, then an equal protection claim based on alleged religious discrimination is subject to rational basis review. *See Locke*, 540 U.S. at 720, n.3; *see also McDaniel v. Paty*, 435 U.S. 618 (1978) (reviewing religious discrimination claim under the Free Exercise Clause). Earlier Supreme Court decisions, as well as many circuit court decisions, have also rejected arguments that the Equal Protection Clause requires the provision of public funds for religious institutions or activities. *See, e.g.*, *Sloan v. Lemon*, 413 U.S. 825, 834 (1973); *Norwood v. Harrison*, 413 U.S. 455, 462 (1973); *Bowman*, 564 F.3d at 772; *Wirzburger*, 412 F.3d at 282-85; *Eulitt*, 386 F.3d at 353-57; *Gary S.*, 374 F.3d at 22-23; *cf. Anderson*, 895 A.2d at 959-60.

The District Court's decision more than satisfies rational basis review. Colorado has legitimate state interests in enforcing its Constitution, avoiding excessive entanglement with religion, and devoting public funding exclusively to secular education, and stopping the Voucher Program is rationally related to these interests. *See Eulitt*, 386 F.3d at 356; *Wirtzburger*, 412 F.3d at 279; *Pennybacker*, 308 S.W.3d at 680; *Anderson*, 895 A.2d at 961; *Witters v. State Comm'n for the Blind*, 771 P.2d 1119, 1122-23 (Wash. 1989).

Moreover, the Court should not depart from rational basis review based on unsubstantiated allegations of discriminatory motives in enacting the Colorado religion clauses as discussed *supra* in Section III. Even assuming that there was any credence to Appellants' factual allegations about the alleged discriminatory history of these provisions, rational basis review would still apply because the District Court's Order does not discriminate against Catholicism (indeed, Appellants cite nothing in the record substantiating their allegation that the District Court's interpretation "perpetuates discrimination" against Catholicism). *See* Intervenors Br. 44. The District Court's Order applies in a neutral fashion to all religions, on an entirely non-discriminatory basis.

Even if heightened scrutiny did apply, however, the state has a compelling interest in giving meaning to its religion clauses. *See Witters*, 771 P.2d at 1123.[16]

3. The Free Speech Clause Does Not Require Funding Of Religious Education In Private Schools.

The argument by the Association of Christian Schools amici that the District Court's opinion violates the Free Speech Clause by discriminating against an "otherwise qualifying" private school solely on the basis of viewpoint was not raised by the parties and is meritless. The cases cited in support of this argument all concern viewpoint discrimination in public forums. The Voucher Program is not a public forum for speech. When the government provides funds to pay for services or items of value to the public, and not for the purpose of encouraging expression of private views, no public forum has been created, and the government can constitutionally deny funding to religious applicants. *See Locke*, 540 U.S. at

[16] *Hunter v. Underwood*, 471 U.S. 222, 233 (1985), is inapposite. In *Hunter*, it was undisputed that the provision at issue was motivated by a desire to discriminate based on race, and its present-day application continued to have that effect. *Romer v. Evans*, 517 U.S. 620 (1996), is also inapplicable, because it involved a law that was enacted shortly before it was challenged, precisely to discriminate against a particular class, and the law was used to that effect. In contrast, Colorado's religion clauses exist to protect religious liberty and public education in the State, and Appellants have failed to show that these Clauses were motivated by bias or have ever been applied in a discriminatory manner, much less in recent times.

720 n.3; *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 779-80 (7th Cir. 2010); *Eulitt*, 386 F.3d at 356; *Pennybacker*, 308 S.W.3d at 681.

4. There Is No Due Process Right To Public Funding Of Religious Education.

Intervenors' suggestion in a footnote that the Program also may violate the Due Process Clause is insufficient to raise the issue before this Court (and it was not raised below). Intervenors Br. 45 n.8. Appellants point to the right to direct a child's education as a legal basis for a due process claim. Directing one's children's education is distinct, however, from having a constitutional right to use public taxpayer funds to support that education. The courts have, accordingly, rejected arguments that there is a substantive due process right to public funding for religious education. *See Gary S.*, 374 F.3d at 23; *Strout v. Albanese*, 178 F.3d 57, 65-66 (1st Cir. 1999); *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376, 384-87 (W.D. Mo. 1973), *aff'd mem.*, 419 U.S. 888 (1974).

CONCLUSION

For the foregoing reasons, the LaRue Plaintiffs-Appellees respectfully ask that the Court (1) affirm the District Court's conclusions that the Voucher Program violates Article IX, Sections 3, 8, and 9; Article II, Section 4; the Public School Finance Act; and the Contract Statute; (2) reject Appellants' new arguments raised

for the first time on appeal; and (3) reject Appellants' arguments that the federal Constitution or undetermined legislative history warrant a different conclusion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this13th day of July, 2012, I electronically filed a true and correct copy of the foregoing **ANSWER BRIEF** with the Clerk of the Court of Appeals using Lexis/Nexis File and Serve; and served an electronic copy upon the following through Lexis/Nexis File and Serve:

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