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COLORADO COURT OF APPEALS 101 W. Colfax, Suite 800, Denver, CO 80203 Appeal from District Court, Denver County, Colorado District Court Judge Michael A. Martinez Case No. 2011CV4424 *consolidated with* 2011CV4427	
Defendants-Appellants: DOUGLAS COUNTY SCHOOL DISTRICT and DOUGLAS COUNTY BOARD OF EDUCATION, 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, **v.** **Plaintiffs-Appellees:** JAMES LARUE; SUZANNE T. LARUE; INTERFAITH ALLIANCE OF COLORADO; RABBI JOEL R. SCHWARTZMAN; REV. MALCOLM HIMSCHOOT; KEVIN LEUNG; CHRISTIAN MOREAU; MARITZA CARRERA; SUSAN MCMAHON; 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 Number: 2011CA1856 2011CA1857
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REPLY BRIEF OF DOUGLAS COUNTY SCHOOL DISTRICT AND BOARD OF EDUCATION

CERTIFICATE OF COMPLIANCE

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

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

Choose one:

☑ It contains 5,698 words.

☐ It does not exceed 30 pages.

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

☐ For the party raising the issue:

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

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

☑ 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/ *Eric V. Hall*
Eric V. Hall

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I. Plaintiffs Misunderstand the Constitutional Significance of Parental Choice.

Plaintiffs-Appellees ("Plaintiffs") begin their Answer Brief regarding Colorado's Religion Clauses[1] (the LaRue Brief) stating: "The Colorado Constitution…forbid[s] the use of public taxpayer money to fund [parental] choices…of private and religious schools," such as Douglas County's Choice Scholarship Program ("CSP"). LaRue Br. at 4. Throughout their Brief, Plaintiffs misunderstand the constitutional significance of parental choice. *Id.* at 6, 15, 26-27, 41-42. Under both the Colorado and federal Constitutions, private choice breaks any connection between government and religion, thereby simultaneously eliminating government preference for religion while protecting parental rights and free religious exercise.

The Colorado Supreme Court recognized the critical role of private choice in *Americans United for Separation of Church and State v. Colorado*, 648 P.2d 1072 (Colo. 1982), when it held that public funds could be directed to religious schools through the independent choices of students. Because the "statutory program is designed for the benefit of the student, not the educational institution," the Court held it "does not amount to a form of compulsory support for sectarian institutions or a preferential grant to religious denominations," thereby rejecting challenges

[1] This Reply Brief addresses Colorado's Religion Clauses, *i.e.*, Articles II §4; IX §7; IX §8 and V §34. The State Defendants address the non-religious claims. The District Defendants hereby incorporate by reference the Reply Briefs of both the State and Intervenors.

under the "compelled support" and "preference" clauses of Article II §4. *Id.* at 1082. For the same reason, the Court held "[a]ny benefit to the [religious] institution" was a mere "by-product" and "[s]uch a remote and incidental benefit [that it] does not constitute …aid to the institution itself within the meaning of Article IX §7," *id.* at 1083-84, or, for the same reason, Article V §34, *id.* at 1085.

Likewise, the United States Supreme Court in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), recognized the critical importance of government neutrality and parental choice, upholding a similar scholarship program because the "government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice." *Id.* at 652.

Ignoring this key principle, both Plaintiffs and the trial court purport to measure the pervasiveness of religion in the partner schools. LaRue Br. at 7-10; Order at 9-12.[2] This is irrelevant. Courts must distinguish between *government* conduct, which may not favor or disfavor religion, *Americans United*, 648 P.2d at 1082, and conduct by *private* citizens, who have a constitutional right to the free exercise of religion, Colo. Const. Art. II §4; U.S. Const. amend I. As *Zelman* explained, when religious schools are indirectly aided as a result of private choice

[2] The trial court's Order is attached to the District Opening Brief as Addendum 1, and the CSP Policy is attached as Addendum 2.

"[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, *not to the government*, whose role ends with the disbursement of benefits." *Zelman*, 536 U.S. at 652 (emphasis added).[3] Plaintiffs and the trial court raise concerns about "religious indoctrination," but fail to ask whether any indoctrination is attributable to government.

Under each program – the CSP, the *Americans United* grant program, and the *Zelman* scholarships – the payment mechanism is functionally identical: the government sets aside public funds to be used solely for educational purposes, and parents or students direct those funds to the school of their choice. *See* Policy ¶¶ B.4, C.4 (parents direct scholarship check); *Americans United*, 648 P.2d at 1075 (describing grant mechanisms); *Zelman*, 536 U.S. at 646 ("checks are made payable to the parents who then endorse the checks over to the chosen school," and citing Ohio Rev. Code Ann. §3313.979).[4]

In short, parental choice within a neutral government program alleviates the constitutional concerns that *government* is trying to "aid" or "support" religion. As *Americans United* stated, "Being essentially neutral in character, [the grant

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[3] Numerous cases apply this indirect aid principle. *See Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Dep't of Servs. for Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

[4] Colorado's Attorney General relied on this same reasoning and law to conclude the College Opportunity Fund constitutes indirect aid. Op. Colo. Att'y Gen. No. 05-03 at 5.

program] advances no religious cause and exacts no form of support for religious institutions. Nor does it bestow preferential treatment to religion in general or to any denomination in particular." 682 P.2d at 1082. So too here.

II. Plaintiffs' Radical Interpretation Must Again Be Rejected.

Plaintiffs' persistent refusal to acknowledge the role of private choice is not merely an oversight; it is a by-product of a radical view of Colorado's Religion Clauses that simply cannot be squared with their text or Colorado precedent. Towards the end of their Brief, Plaintiffs boldly assert that Colorado's founders "decid[ed] to keep *all* religion separate from publicly-funded schooling." LaRue Br. at 55 (emphasis in original). Accordingly, they conclude that the Religion Clauses require "devoting public funding exclusively to secular education." *Id.* at 67. This extreme position is flatly at odds with *Americans United*, which held that public funds could be provided to students who could choose to spend them at a qualifying school of their choice, religious or non-religious. 648 P.2d at 1081-86. It also calls into question over a dozen, currently-functioning programs throughout Colorado's education system, from the College Opportunity Fund to the Denver Preschool Program, which permits students to spend public funds at qualifying schools, including religious ones. *See* State's Opening Br. at 5-13 (discussing 22 public-private partnerships).[5]

[5] The two amici who address existing public-private partnerships focus exclusively on the *statutory* provenance of the programs, not their *constitutional* significance.

Plaintiffs' extreme position is further revealed in footnote 6 of their brief. After acknowledging that the Tenth Circuit in *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008)("*CCU*"), struck down the pervasively sectarian exclusion at issue in the *Americans United* statutory grant program, Plaintiffs continue: "No Colorado court has evaluated whether the grant program, without the statutory exclusion, complies with Article IX, Section 7…." LaRue Br. at 24 n.6.[6] Plaintiffs' suggestion is that without the pervasively sectarian exclusion which *CCU* struck down, Colorado's college grant program now violates Colorado's Religion Clauses. In other words, as long as the grant program discriminated against pervasively religious schools, it was constitutional, but now that it no longer discriminates based on religion, it violates Article IX §7. This illustrates how profoundly mistaken Plaintiffs are.

Extending Plaintiffs' logic would mean the Ten Commandments monument must be removed from Lincoln Park, contrary to *Colorado v. Freedom from Religion Found*., 898 P.2d 103 (Colo. 1995); neither a crèche nor any other religious symbol could be included in a holiday display at a government building, contrary to *Conrad v. City and County of Denver*, 724 P.2d 1309 (Colo.

See Amicus Br. of Vision Home & Community Inc, at 4-5; Amicus Br. of American Ass'n of School Administrators, at 30-35. If Plaintiffs are correct, then these public-private partnerships are constitutionally threatened regardless of statutory structure.

[6] Footnote 6 is the only place where Plaintiffs cite *CCU*, which is telling given that it and *Americans United* are the two most directly-relevant cases as issue. Rather than address it on the merits, they simply ignore it.

1986)("*Conrad II*"); and no religious leader could hold events at public parks or lead parades through public streets, contrary to *Freedom from Religion Found. v. Romer*, 921 P.2d 84 (Colo.App. 1996).

Contrary to Plaintiffs' revolutionary vision to eradicate religion from public life, Colorado courts have instructed that the Religion Clauses require affirmatively accommodating religion, *Colorado v. FFRF*, 898 P.2d at 1020, and demonstrating a benevolent government neutrality towards religion, *Young Life v. Div. of Employment and Training*, 650 P.2d 515, 520 (Colo. 1982). Plaintiffs' position is diametrically opposed to Colorado law and amounts to disfavoring religion and all religious believers, which is forbidden. *Colorado v. FFRF*, 898 P.2d at 1026 (refusing to "require government to prefer non-believers over believers").

Not surprisingly, Plaintiffs fail to cite a single Colorado case interpreting the Religion Clauses that supports their position. Whereas Defendants cited every major Colorado Religion Clause case and demonstrated how it supported upholding the CSP, District Opening Br. at 12-23, the best Plaintiffs could muster was an unsuccessful attempt to distinguish all these cases in two footnotes. LaRue Br. at 35 n.9, 36 n.10.

Colorado courts previously rejected Plaintiffs' radical views. In 1981, Americans United for the Separation of Church and State – one of the same groups backing Plaintiffs today – wrote briefs advocating for the same extremist interpretation of the Religion Clauses. *See* Addendums A and B (attached to this

brief). Those arguments are just as wrong today as they were 30 years ago when they were first rejected in *Americans United*. They must be rejected again today.

III. Response to Plaintiffs' Statement About Standard of Review and Preservation of Issues.

Because the CSP has never been implemented, Plaintiffs' constitutional claims are facial. For a facial challenge of unconstitutionality, this Court must determine "there exists *no set of circumstances* in which the statute [*i.e.*, the CSP] can be constitutionally applied." *Sanger v. Dennis*, 148 P.3d 404, 410-11 (Colo.App. 2006) (emphasis in original). The claims must fail unless the asserted invalidity is established "beyond a reasonable doubt." *Evans v. Romer*, 854 P.2d 1270, 1274 (Colo. 1993).

The only issue Plaintiffs contend was not preserved is that the Order violates the federal Constitution. LaRue Br. at 56. Plaintiffs are mistaken. Defendants argued at length that the trial court risked violating the First Amendment if it strayed from Colorado precedent, as Plaintiffs requested. R.1616; R.1622; R.2186-87; Vol.1 44:9-13, 47:8-16; Vol.3 849:15-850:9. Moreover, no one, including Defendants, knew how the trial court was going to rule until it issued its Order. Only after reading the Order were Defendants able to argue – in their opening appellate briefs – that it violated the federal Constitution.

IV. Plaintiffs Offer No Authority to Uphold the Trial Court's Order.

A. The Trial Court Engaged In The Unconstitutional Exercise of Trying to Determine Whether Schools Indoctrinate.

The overriding theme in the trial court's Order is that the CSP violates the Religion Clauses because it allows public funds to, in the court's view, subsidize religion indoctrination. Order at 38, 40, 42-43, 45, 51. However, this inquiry violates the First Amendment, as explained in Douglas County's Opening Brief (at 23-27). As the Tenth Circuit explained, "It is well established…that courts should refrain from trolling through a person's or institution's religious beliefs." *CCU*, 534 F.3d at 1261.

1. Plaintiffs Cannot Defend the Trial Court's Indoctrination-Evaluation Factually or Legally.

Factually, Plaintiffs argue there is not "a single instance where the District Court considered *how* sectarian a particular institution was." LaRue Br. at 62 (emphasis in original). Not so. On page after page of the Order, the court describes in painstaking detail how sectarian the partner schools are. Order at 12 ("The curricula…is thoroughly infused with religion and religious doctrine, and includes required courses in religion or theology that tend to indoctrinate and proselytize."); *id*. at 42 ("religious instruction is the foundation of [the schools'] core educational curriculum"). *See generally id.* at 9-12, 40-43, 45. Even worse, the trial court made specific findings using the pervasively sectarian factors that *CCU* held unconstitutional. *Compare* Order at 9-12, ¶¶38-45 *with Americans United*, 648

P.2d at 1072 (listing factors), *id.* at 1083 (acknowledging them as "relevant to [the Court's] analysis"), and *CCU*, 534 F.3d at 1261-66 (explaining why using these factors is unconstitutional).

Plaintiffs also try to defend the Order with two legal arguments. First, they state, "The District Court merely applied the criteria set forth in *Americans United*…." LaRue Br. at 62-63. In fact, the trial court misconstrued *Americans United* because it wholly failed to consider *CCU* and other Colorado precedent. In *Americans United*, the Court upheld the student grant program, in part, because it relied on the pervasively sectarian factors – good law in 1982 – to conclude that Regis College was not pervasively sectarian and so there was little risk, for example, that the "religious mission predominates over its secular educational role," 648 P.2d at 1082, or that aid "may seep over into the non-secular functions" of the school, *id.* at 1083. Likewise, Plaintiffs employ the pervasively sectarian factors, urging this Court to evaluate whether a school has a "strong commitment to academic freedom," whether the "governing board [has a] sectarian bent," and whether "the curriculum tend[s] to indoctrinate or proselytize." LaRue Br. at 23. However, *CCU* held squarely that using Colorado's pervasively sectarian factors was an unconstitutional religious inquiry. 534 F.3d at 1261-66.

Second, Plaintiffs argue that "courts [may] evaluate the religious nature of particular organizations and activities." LaRue Br. at 63 (citing cases). Plaintiffs are wrong for two reasons. First, in none of the case cited by Plaintiffs do courts

"evaluate the religious nature" of an organization. Rather, in all the cases courts apply Establishment Clause jurisprudence, usually *Lemon v. Kurtzman*, to determine whether government action has the "effect of advancing religion." Second, when they are engaged in this inquiry, they are focused on *government* (not private) action and they expressly rely on the twin principles of government neutrality and private choice. For instance, on page 809 of *Mitchell v. Helms*, the page cited by Plaintiffs, the Court writes:

> In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.

530 U.S. 793, 809 (2000) (plurality).

Plaintiffs also cite Justice O'Connor's concurrence, but she makes the same point: "[W]hen government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, 'no reasonable observer is likely to draw from the facts…an inference that the State itself is endorsing a religious practice or belief.'" *Id.* at 842 (O'Connor, J., concurring). Thus, Plaintiffs' cases actually support Defendants'

position that the religious (or non-religious) nature of the schools participating in the CSP is irrelevant given the private choice inherent in the program.[7]

2. It Is Appropriate To Look To Federal Precedent.

Plaintiffs repeatedly dismiss federal precedent as "irrelevant." LaRue Br. at 42, 57-59. However, Plaintiffs never challenge the fact that Colorado courts have consistently considered and followed analogous federal precedent when interpreting Colorado's Religion Clauses. *See* District Opening Br. at 18-20 (citing cases). Just months ago this Court again followed this unbroken jurisprudential principle in *Freedom from Religion Foundation v. Hickenlooper*, 2012 COA 81 (striking down six Colorado Day of Prayer proclamations).

Moreover, Plaintiffs incorrectly assert that reading Colorado's Religion Clauses similarly to analogous federal clauses would "render certain provisions of the Colorado Constitution meaningless." LaRue Br. at 58. Colorado's Religion Clauses were enacted in 1876, long before the First Amendment was made applicable to the States. *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (incorporating Free Exercise Clause); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947)

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[7] Plaintiffs even try to revive the pervasively sectarian exclusion. LaRue Br. at 65 n.15 (citing cases). This is flatly at odds with *CCU*, which held unambiguously it is "now-discarded doctrine." 534 F.3d at 1258. Moreover, Plaintiffs cite only two indirect aid cases, both concluding that the pervasively sectarian analysis is irrelevant. *Steele v. Indus. Dev. Bd.*, 301 F.3d 401, 416 (6th Cir. 2002); *Virginia College Bldg. Auth. v. Lynn*, 538 S.E.2d 682, 698 (Va. 2000). The other cases involve direct funding or do not involve funding at all. No indirect aid cases apply the pervasively sectarian test after *Mitchell*.

(incorporating Establishment Clause). Thus, it would not have been "meaningless" for Colorado to enact constitutional guarantees consistent with the federal Constitution. Further, the Colorado Supreme Court has explained on many occasions its policy reasons for interpreting Colorado's Religion Clauses "to embody the same values of free exercise and governmental non-involvement secured by the religious clauses of the First Amendment." *Americans United*, 648 P.2d at 1081-82. *See* District Opening Br. at 19 & n.4 (citing cases).

B. The Trial Court and Plaintiffs Are Mistaken on Each of the Specific Religion Clauses.

1. The CSP Does Not Violate Article II §4

Plaintiffs argue the CSP violates the "compelled support" and "compelled attendance" clauses of Article II §4. LaRue Br. at 29-36. The trial court concluded only "compelled support" was violated. Order at 43-45.

a. Compelled Support

The threshold error of both Plaintiffs and the trial court is to ignore the other four clauses of Article II §4 and Colorado precedent. *See* District Opening Br. at 12-17. Plaintiffs, however, go further than this; they assert that "the purpose[s] of other clauses…are irrelevant" to a proper understanding of the compelled support clause and any attempt to try to harmonize the provisions would be to "render the other clauses…redundant." LaRue Br. at 35. This approach to constitutional

interpretation is simply wrong. *See Bruce v. City of Colorado Springs*, 129 P.3d 988, 992 (Colo. 2006) (courts must harmonize all constitutional provisions).

Second, in two footnotes Plaintiffs attempt to brush aside six Colorado cases cited by Defendants interpreting Article II §4 (not including *Americans United*). LaRue Br. at 35 n.9, 36 n.10. They boldly claim that no Colorado case, including *Americans United*, has interpreted or articulated the aims of the support clause; rather the cases "all concern" the preference clause. *Id.* at 34-35. Not so. In *Americans United*, the Court definitively interpreted both the compelled support and preference clauses, stating they embody the "same values" as the First Amendment. 648 P.2d at 1081-82. Erasing any doubt, *Americans United* separately quoted *Vollmar v. Stanley,* 255 P. 610 (Colo. 1927) and *its* interpretation of both clauses. *Id*. at 1082. Subsequent cases have followed *Americans United*. *See Young Life*, 650 P.2d at 525-26 (quoting *Americans United*'s interpretation of both clauses); *Conrad v. City and County of Denver*, 656 P.2d 662, 670 (Colo. 1982) (while noting plaintiffs emphasized the preference clause, the Court italicized both clauses as being at issue).

Plaintiffs then offer trivial factual distinctions in an attempt to distinguish Colorado cases rejecting "compelled support" challenges when government was *directly* supporting religion. LaRue Br. at 36 & n.10. No cases support Plaintiffs' claim (at 36) that "incidental uses of government personnel or resources" should be treated differently than the CSP. For instance, *Conrad II* involved a challenge a

display's "funding through tax revenue." 724 P.2d at 1310. The Court in *Colorado v. FFRF* specifically noted the public maintenance costs for the Ten Commandments monument. 898 P.2d at 1017. This Court in *FFRF v. Romer* noted the challenge to "the use of state funds to facilitate" the Pope's visit. 921 P.2d at 87. Nowhere in these cases is there any support for Plaintiffs' distinction between "incidental" and "non-incidental" expenditures. Rather, these cases all focus on government neutrality and avoiding a state-established church. *Americans United* itself held, "Being essentially neutral in character, [the grant program] …exacts no form of support for religious institutions." 648 P.2d at 1082.

The CSP does not violate the compelled support clause.

b. Compelled Attendance

Plaintiffs' "compelled attendance" argument wholly misses the mark. LaRue Br. at 31-32. Here, again, Plaintiffs simply ignore the fact that the CSP is a choice, and that even those students who elect it have a further choice about whether to enroll in a religious or non-religious school. Plaintiffs try to downplay private choice by emphasizing that currently most of the partner schools are religious. *See* LaRue Br. at 6-8, 15, 28 n.8, 41. This ignores the real choice provided by Douglas County to its students and parents, who, as explained in the Opening Brief (at 4-7), have numerous educational options from which to choose (*e.g.*, traditional public schools, charter schools, online education, home schooling, *etc.*). Plaintiffs even try to distinguish *Zelman* by stating that it had "a wider range of non-religious

options," LaRue Br. at 28 n.8, but never explain how *Zelman* is any different than Douglas County, which currently offers a variety of excellent educational options to its parents and students.

There is no violation of Article II §4.

2. The CSP Does Not Violate Article IX §7

As to Article IX §7, Plaintiffs err when they claim "the grant program upheld in *Americans United* was wholly different" from the CSP. LaRue Br. at 22. In fact, the CSP cannot be held to be "in aid of" religion any more than the grant program is "in aid of" Regis College or Colorado Christian University under proper readings of *Americans United* and *CCU*.

a. The CSP is not 'in aid of" churches under *Americans United*

First, Plaintiffs mistakenly assert, "The [CSP] payments . . . are 'in aid' of churches, sectarian societies, and sectarian purposes." LaRue Br. at 20. This is directly contrary to the Order, which found, "[T]he purpose of the program is to aid students and parents, not sectarian institutions. The Court agrees with Defendants on this point." Order at 39. *See also id.* at 3 ¶8, 44. Accordingly, *Americans United* dictates that "[a]ny benefit to the [religious] institution" must be seen as a mere "by-product" and "remote and incidental benefit" that does not violate Article IX §7. 648 P2d at 1083-84.

Second, while the trial court wrongly criticized the CSP for having "no meaningful limitations on the use of taxpayer funds," Order at 12, neither did the

grant program in *Americans United*, 648 P.2d at 1084 ("the statute does not expressly limit the purpose for which the institutions may spend the funds"). For that matter, neither does the COF, which allows resident students to direct funds to participating higher education institutions of their choice, religious or non-religious, which can spend the funds as they see fit. C.R.S. §23-18-202(5)(a)(I).

Third, the trial court again mistakenly faulted Douglas County for the alleged actions of one of its partner schools in reducing its aid award in the amount of the scholarship. Order at 41. *See* LaRue Br. at 20-23. As even Plaintiffs note, *id.* at 20 n.2, Assistant Superintendent Christian Cutter testified that such action by a partner school "would go against the intended contract" with Douglas County. Vol.1 295:20-21. Douglas County reasonably expected all partner schools to comply with its contracts, and schools that did not would have them terminated. *See* Vol.2 512:7-14.

Fourth, like the trial court, Plaintiffs are wrong to try to evaluate the indoctrination quotient of the K-12 partner schools. LaRue Br. at 25 ("[I]ndoctrination is a primary purpose of nearly all of the approved religious Private School Partners."). They compound this error when they then try to distinguish between how much "indoctrination" goes on at, for example, Regis High School (a CSP partner school) versus Regis University (an approved higher education partner under *Americans United* and the COF). The trial court and Plaintiffs err by ignoring *CCU*, which teaches, "The First Amendment does not

permit government officials to sit as judges of the 'indoctrination' quotient of theology classes." 543 F.3d at 1263. *CCU* holds that government should not be in the indoctrination-evaluation business at all.

In any event, because neutrality and private choice are designed into the CSP, any "indoctrination" simply cannot be considered *governmental* indoctrination. *See Mitchell*, 530 U.S. at 811 (plurality)("neutrality and private choices together eliminated any possible attribution to the government"); *id*. at 842 (O'Connor, J., concurring)(same).

b. *Americans United* interpreted Colorado's general "no aid" clause to permit indirect aid to religious schools.

Article IX §7 is a so-called "general no-aid" provision, as opposed to other state constitutions that specifically forbid indirect aid. *Cf.* Fla. Const. art. I §3 ("No revenue of the state…shall ever be taken from the public treasury directly or *indirectly* in aid of any church….") (emphasis added); Mont. Const. art. X §6(1) ("The legislature…shall not make any direct or *indirect* appropriation…for any sectarian purpose or to aid any church….") (emphasis added). Like other states that have more general provisions, *Americans United* interpreted Colorado's "no aid" clause to permit indirect aid due to private choice. *See Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998); *Meredith v. Daniels*, No. 49D07-1107-PL-025402 (Marion Cnty. Super Ct. Jan. 13, 2012); *Simmons–Harris v. Goff*, 711 N.E.2d 203

(Ohio 1999). Accordingly, Plaintiffs' citation to Florida cases are inapposite given the difference in constitutional language. LaRue Br. at 27 (citing *Bush v. Holmes*).

The two other out-of-state cases Plaintiffs cite, *id.* at 26-27, cannot be squared with *Americans United*. Indeed, the Nebraska case, *Rogers v. Swanson*, was cited and specifically rejected in *Americans United*, 648 P.2d at 1085 n.8. Instead, *Americans United* cited a different Nebraska case, *Lenstrom v. Thone*, as support for its conclusion that indirect aid is so "remote and incidental" that it cannot constitute "aid to the institution itself" under Article IX §7. *Id.* at 1083-84. Likewise, the Arizona case of *Cain v. Horne* is flatly inconsistent with *Americans United* and relies on precedent that it rejected. 648 P.2d at 1085 n.8 (rejecting *Hartness v. Patterson*, which *Cain* adopts, 202 P.3d 1178, 1184 (Ariz. 2009)).

In summary, the CSP should be upheld under Article IX §7.

3. The CSP Does Not Violate Article IX §8.

a. The first sentence of Article IX §8 does not apply.

The first sentence of Article IX §8 applies to "public educational institutions of the state." Plaintiffs concede (at 45) that *Vollmar* expressly distinguishes between "state educational institutions" and "public schools," by which the Court means state colleges and universities, on one hand, and K-12 public schools, on the other. 255 P. at 615. Plaintiffs wrongly suggest, however, that the law has changed since *Vollmar*, relying principally on *Wilmore v. Annear*, 65 P.2d 1433 (Colo. 1937). LaRue Br. at 45. But *Wilmore* clearly states: "the term 'educational

institutions' [refers] to schools *other than* the constitutionally required public schools." 65 P.2d at 1434 (emphasis added, ellipsis omitted). It further contrasts these "state educational institutions" with the "public schools" by defining the latter to mean "schools that serve only those between the ages of 6 and 21…." *Id.* at 1435. The first sentence of Article IX §8 simply does not apply here.

b. The CSP does not require a religious test for admission.

Even if the first sentence applies, the CSP does not violate it. The only basis for concluding the CSP imposes a religious test for admission is one mistaken draft document which the Superintendent, upon direct questioning by the trial court, expressly corrected. *See* District Opening Br. at 35-37 (citing Vol.2 571:13-15). Plaintiffs offer nothing to support the trial court's erroneous finding except their assertion that the mistaken paper was "an actual Program document [used in] actual Program operations." LaRue Br. at 40. In fact, the Superintendent and her staff are the ones who "actually operate" the CSP, and she testified that enrollment in the CSP and in any partner school are independent. Vol.2 571:18-572:13.

c. The CSP does not require attendance at religious services or the teaching of sectarian doctrines.

As to the other portions of Article IX §8, the CSP neither requires attendance at religious services or the teaching of "sectarian doctrines."[8] The CSP

[8] Plaintiffs are simply wrong when they allege, "Colorado has not specifically addressed the meaning of the term 'sectarian'…." LaRue Br. at 17 n.1. In fact, the Colorado Supreme Court first defined the term in *Vollmar*, 255 P. at 615, and then

is a choice. Douglas County does not require either teachers or students to select a religious school in which to work or study. Neither does Douglas County require anyone – either one of its own schools or one of the partner schools – to teach any sectarian doctrines. Douglas County has left religion alone, neither favoring nor disfavoring it. *See* Policy ¶A.9, ¶E.2.c; Vol.2 361:7, 598:10-20. This should end the inquiry. *See* District Opening Br. at 37-40.

The choice Douglas County offers is not "illusory," as Plaintiffs claim. LaRue Br. at 41. As discussed herein, Douglas County families have a multitude of outstanding educational options, including the CSP. Moreover, Plaintiffs miss the mark with their observation that "[t]he Constitution applies to all public school students, even those who attend optional institutions." LaRue Br. at 42. Of course it does. But the relevant inquiry is whether *the government* is requiring attendance at religious services or the teaching of sectarian doctrines. The answer is plainly no. Just like public school students may choose religious release time programs or religious lunch or after-school programs and not run afoul of Article IX §8, so might they choose a religious school in the CSP. *See* District Opening Br. at 38 (citing *Lanner v. Wimmer*, 662 F.2d 1349 (10th Cir. 1981) (upholding release time); *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001) (public schools must grant equal use to religious groups)). Moreover, Plaintiffs' extreme

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quoted that definition in *Americans United*, 648 P.2d at 1083. Further, *CCU*, recognized that "the term 'sectarian' imparts a negative connotation…meaning 'pertaining to a sect; bigoted.'" 534 F.3d at 1258 n.5.

interpretation that Colorado's Religion Clauses forbid such voluntary activity cannot be correct because it would violate affirmative rights to the free exercise of religion. Colo. Const. art. II §4; U.S. Const. amend. I.

In summary, the CSP does not violate any portion of Article IX §8.[9]

4. The CSP Does Not Violate Article V §34.

a. Article V §34 does not apply to the CSP.

As with the first sentence of Article IX §8, Article V §34 does not apply to the CSP. *See* State Opening Br. at 38-40. Plaintiffs incorrectly suggest that Defendants' reading "ignores the plain text of the Colorado Constitution." LaRue Br. at 47. To the contrary, the Constitution is structured with Article IV governing the Executive Department, Article V the Legislative, and Article VI the Judicial. Consequently, Article V begins, "The legislative power of the state shall be vested in the general assembly…." Colo. Const. art. V §1(1). Section 34 of Article V, like the sections around it, deal with legislative appropriations. As a result, Colorado courts have limited application of Article V §34 to "disbursement of state funds only, and their disposition by the state in its corporate capacity." *Williamson v. Bd. of Comm'rs of Arapahoe Cnty*, 46 P. 117, 118 (Colo. 1896). *See also Lyman v.*

[9] In this section of their brief (at 37), as in a few other places (at 3, 6), Plaintiffs invoke the "sham charter school." This is a red herring. Plaintiffs brought no claims under the Charter Schools Act. Nothing about any of their claims turns on the charter school. The CSP Policy says nothing about it, and it is not necessary for implementation of the Program. The District employed it purely as a matter of administrative convenience. Vol.2 519:18-520:12.

Town of Bowmar, 533 P.2d 1129, 1136 (Colo. 1975) (citing *Williamson* and holding Section 34 "does not extend to municipalities").

Plaintiffs incorrectly counter that because part of the District's funding consists of "state appropriations," therefore Article V §34 must apply. LaRue Br. at 47. However, such a reading misconstrues *Williamson* which focused on what *entity* was responsible for spending the funds – state or local – rather than their *origin*. 46 P. at 118. If the mere origin of the funds made a political subdivision subject to Article V, that would eradicate the distinction between state and local, and it would make every local government body subject to all of Article V. Rather, the purpose of the limitations throughout Article V, including Section 34, is to restrain state legislative power, given its vastly superior power to tax and spend throughout the entire State.

b. The Public Purpose Exception Applies to the CSP.

Even if Article V §34 applies, the CSP has public purposes just as "discrete and particularized" as others upheld by similar Colorado cases. The trial court found that the CSP's purposes are to "provide greater educational choice for students and parents to meet individualized student needs, improve educational performance through competition, and obtain a high return on investment of educational spending." Order at 3 ¶8 (bracketed words omitted) (citing Policy ¶A.3). The CSP's purposes are functionally identical to the ones upheld in *Americans United*, 648 P.2d at 1085-86 – essentially, improving education.

Plaintiffs try to distinguish *Americans United* by alleging the CSP "engages in full-fledged sponsorship of religious education." LaRue Br. at 48 (citing a New Hampshire case). Again, however, Plaintiffs' position is flatly contradicted by both the Order, finding the CSP is "for the benefit of students, not the benefit of the private religious schools," Order at 44, and *Americans United*, which explained, "we are not dealing with direct aid to private schools, but rather with financial assistance to individual students." 648 P.2d at 1085. Plaintiffs' refusal to acknowledge the importance of private choice blinds them to legitimate constitutional distinctions.

Furthermore, if a taxpayer subsidy of $115 million to United Airlines for economic development satisfies the public purpose exception of Article V §34, then enacting the CSP for educational improvement certainly does. *See In re Interrogatory Propounded by Governor Roy Romer*, 814 P.2d 875, 884 (Colo. 1991).[10]

This Court should also reject Plaintiffs' bogus claim that "the Program permits…discrimination." LaRue Br. at 49. *See also id.* at 10-12. This is entirely irrelevant to a claim under Article V §34. Furthermore, it is factually incorrect because the Policy expressly prohibits discrimination "on any basis protected under applicable federal or state law." Policy ¶E.3.f. Plaintiffs speculate that Douglas County did not actually intend to enforce this provision because it

[10] As with *CCU*, Plaintiffs ignore this case, failing to cite it at all.

accepted certain private schools into the Program. LaRue Br. at 38 n.11. This is specious. Douglas County admitted these schools into the CSP on the condition that they would follow the CSP contract and Policy. The Superintendent testified that if a partner school were to discriminate against a protected class, the District would terminate its contract. Vol.2 512:7-14.[11]

The CSP does not violate Article V §34.

V. The Trial Court Erred by Disregarding the Discriminatory Legislative History of the Blaine Provisions.

Plaintiffs' response to the discriminatory legislative history of the Colorado Blaine provisions[12] misconstrues the legal issue and attempts to distract this Court from the overwhelming record below of the discriminatory history surrounding the enactment and purpose of these provisions. The legislative history of Colorado's Constitution is certainly relevant.

Plaintiffs admit that the testimony of Defendants' expert, Professor Glenn, dealt with the "framers and ratifiers" of the Colorado Constitution, but made no effort to challenge his status as an expert or his testimony at trial. LaRue Br. at 50-52. Indeed, the history of discrimination against religion to which Professor Glenn testified is supported by published articles from *Plaintiffs'* own designated expert,

[11] The amicus brief of The Legal Center tries to use this erroneous finding to speculate about possible violations of the ADA or Section 504. However, the record in this case is wholly insufficient to support any of its allegations.

[12] Article IX §7 and the second sentence of Article IX §8 are classic Blaine provisions. Articles V §34 and IX §3 could be misconstrued as having Blaine-like effect. *See* District Opening Br. at 41 n.8.

Professor Steven Green, whom the Plaintiffs declined to call to the stand. *See* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AMER. J. OF LEG. HIST. 39 (1992). *See also* Intervenors Reply Brief (discussing more fully the Blaine evidence in the record).

On the legal issues, Plaintiffs are wrong to suggest the Colorado Blaine provisions were not "motivated by bias" and have not "been applied in a discriminatory manner." LaRue Br. at 68 n.16. In fact, Defendants presented uncontroverted evidence of the bias motivating Colorado's Blaine provisions, and the discriminatory application of the Blaine provisions is amply evidenced by *Vollmar*. 255 P. at 618 (upholding reading of King James Bible in public schools). Accordingly, heightened scrutiny under *Hunter v. Underwood*, 471 U.S. 222, 233 (1985), must be applied.

Plaintiffs are equally mistaken when they claim the Supreme Court's *Locke v. Davey* decision has settled the issue. LaRue Br. at 59, 66. The Supreme Court explained, "the Blaine Amendment's history is simply not before us," and "the provision in question is not a Blaine Amendment." 540 U.S. 712, 723 (2004). The result in *Locke* has nothing to do with the history of Colorado's Blaine provisions.[13]

[13] Plaintiffs also discuss *Locke* when addressing a straw man argument that the Free Exercise Clause requires government to fund private and religious schools. LaRue Br. 59-61. Defendants make no such claim. The federal constitution, however, does prohibit discrimination against religion and between religions. *See* District

If this Court were to follow the interpretation of Colorado's Blaine provisions advanced by the trial court and Plaintiffs, the history of discriminatory intent behind these provisions must be confronted. Alternatively, this Court could avoid the constitutional conflict by interpreting Colorado's Religion Clauses to be consistent with federal precedent, as has always been done in Colorado. *See above.* As the U.S. Supreme Court recently reiterated, "[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality" and the "question is not whether that is the most natural interpretation of [the law], but only whether it is a fairly possible one." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S.___, No. 11-393, slip at 32 (June 28, 2012) (citations and quotations omitted).

VI. Conclusion

For the reasons discussed in the Opening and Reply Briefs of Defendants and Intervenors as well as the supporting *amici* briefs, the trial court's Order must be reversed and the permanent injunction vacated.

Opening Br. at 23-27. In this case Plaintiffs and the trial court try to distinguish *Americans United* by arguing the partner schools are too pervasively religious or too "indoctrinating" to receive public funds. This is a misreading of *Americans United* and a violation of the First Amendment. *See Larson v. Valente*, 456 U.S. 228, 246 (1982) (discrimination between religious groups is unconstitutional).

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Respectfully submitted,

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I hereby certify that on August 3, 2012, I electronically filed the foregoing with the Clerk of Court using Lexis/Nexis File and Serve and caused an electronic copy of the foregoing to be served upon the following:

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