Certification of Word Count: 3,713

COLORADO SUPREME COURT Colorado State Judicial Building Two East 14th Avenue Denver, CO 80203 COURT OF APPEALS, STATE OF COLORADO Judges Jones, Graham, and Bernard Appeals Court Case Nos. 11CA1856 and 11CA1857 Appeal from District Court, Denver County, Colorado The Honorable Michael A. Martinez Case No. 2011CV4424 *consolidated with* 2011CV4427 **Petitioners:** 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 **Petitioners:** TAXPAYERS FOR PUBLIC EDUCATION, a Colorado non-profit corporation; CINDRA S. BARNARD, an individual; and MARSON S. BARNARD, a minor child. vs. **Respondents:** DOUGLAS COUNTY SCHOOL DISTRICT and DOUGLAS COUNTY BOARD OF EDUCATION, and **Respondents:** COLORADO STATE BOARD OF EDUCATION and COLORADO DEPARTMENT OF EDUCATION, and **Respondents:** FLORENCE and DERRICK DOYLE, on their own behalf	▲ COURT USE ONLY ▲ Case Number: 13SC233

and as next friends of their children, ALEXANDRA and DONOVAN; DIANE 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. _____ **Attorneys for Respondents Douglas County School District and Douglas County Board of Education:** ROTHGERBER, JOHNSON & LYONS LLP James M. Lyons, #882 Eric V. Hall, #32028 Michael Francisco, #39111 One Tabor Center, 1200 17th Street, Suite 3000 Denver, Colorado 80202-5855 Telephone: (303) 623-9000 Facsimile: (303) 623-9222 E-mail: jlyons@rothgerber.com ehall@rothgerber.com	

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY DOUGLAS COUNTY SCHOOL DISTRICT AND BOARD OF EDUCATION

CERTIFICATE OF COMPLIANCE

Pursuant to C.A.R. 32(a)(3) the undersigned counsel certifies that this opposition to petition for certiorari contains 3,713 words. The brief complies with the applicable word limit. C.A.R. 53(c). Counsel relied on Microsoft Word for this word count.

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Eric V. Hall

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ISSUE PRESENTED

I. May a local school district create a voluntary scholarship program that is neutral towards religion and aids students in attending a participating private school of their choice, religious or non-religious, without violating Article II, Section 4 or Article IX, Sections 7 or 8?

Respondents Douglas County School District and Douglas County Board of Education ("Douglas County") address the issues raised in the Petition for Writ of Certiorari by LaRue Petitioners. Douglas County joins the Oppositions to Certiorari filed by the remaining Respondents.

STATEMENT OF THE CASE

The Colorado Constitution permits neutral government programs of genuine private choice, like the Choice Scholarship Program ("CSP"), where funds may indirectly reach religious organizations. These funds are not considered to be "in aid of" religious organizations and they do not establish a state church. This was the core holding three decades ago in *Americans United for Separation of Church and State v. Colorado*, 648 P.2d 1072 (Colo. 1982) where a substantively identical student scholarship program was upheld. That holding is determinative here.

The Court of Appeals below carefully followed *Americans United* and concluded the CSP fully complies with Colorado's religion clauses. The Court of Appeals decided the CSP is constitutional because the scholarships were intended

to benefit students, who may freely choose to attend a participating school, be it secular or religious. To hold otherwise would have been directly contrary to *Americans United*. Ultimately, the CSP complies with all three religious provisions of the Colorado Constitution.

If, on the other hand, the Petitioners' view of the Colorado Constitution were correct, then government funds could never flow to religious institutions, no matter how indirectly. This would threaten many existing Colorado programs beyond the CSP. Fortunately, all such program rest on the solid ground of *Americans United* where this Court rejected the same radical interpretations of the religion provisions made by Petitioners. The writ of certiorari should be denied, allowing *Americans United* to stand.

FACTS

The Choice Scholarship Program was created in March 2011 as a pilot program to allow up to 500 students in the Douglas County public schools to have an additional educational option. Any Douglas County student may continue to attend a neighborhood school, a charter school, home education, online education, open enrollment, a magnet school, or the CSP.

Under the CSP, eligible students receive a scholarship worth the lesser of a participating private school's tuition or 75% of the per pupil revenue (approximately $4,575 per student); Douglas County retains the remaining 25%.

The CSP requires participating private schools to satisfy 12 conditions of eligibility. These safeguards ensure the private schools perform at least as well as other Douglas County schools. Opinion 3, 14. The CSP is neutral towards religion, treating all schools equally without regard to their religious beliefs, if any. The trial court found "the purpose of the program is to aid students and parents, not sectarian institutions." Order 39.

The CSP is comparable with numerous public-private partnerships throughout the Colorado education system, from pre-Kindergarten through higher education. There are dozens of such partnerships, including many that allow both secular and religious schools to be indirect recipients of government funds. Perhaps the most renowned is the College Opportunity Fund, C.R.S. § 23-18-101 *et seq*.

PROCEEDINGS

The LaRue Petitioners (hereafter "Petitioners") mischaracterize the substance of the Court of Appeals decision. In fact, the majority opinion found the

CSP complied with Article II § 4; Article V § 34, and Article IX §§ 7 and 8. Petitioners have not sought review of the Article V § 34 ruling.

The dissenting opinion addressed only Article IX § 7. Thus, there was no stated disagreement with the majority opinion regarding Article II § 4 or IX § 8.

THE WRIT SHOULD BE DENIED

The Court of Appeals carefully followed this Court's precedent interpreting the religion clauses of the Colorado Constitution. On-point precedent that has stood for decades—allowing government funds to flow equally to secular or religious institutions based upon the genuine private choices of individuals—need not be revisited. None of the four factors in Appellate Rule 49(a), or any other reason, commends review of this case.

I. The Opinion Below Was Not Novel.

For certiorari to be warranted Appellate Rule 49(a)(1) asks if the lower court decided a "question of substance" that has "not heretofore been determined by this court." This factor is not met and weighs against granting the writ.

The Court of Appeals simply followed this Court's *Americans United* decision and found a religiously-neutral scholarship program of free and voluntary choice to be constitutional. Neither the majority nor dissent in the Court of Appeals

viewed this case as novel as both recognized *Americans United* as controlling. *E.g.* Opinion 37.

While Petitioners offer a flawed interpretation of *Americans United*, the legal issues here are not novel. At its core *Americans United* held that scholarship money directed to religious institutions by the independent choice of individual students is not "constitutionally significant aid" or "support" of those institutions. 648 P.2d at 1081-85. Mere disagreement with settled law should not be confused with novelty.

Petitioners also claim the Court of Appeals "effectively" ruled that the federal Establishment Clause curtails the Colorado Constitution. Petition at 15. Not so. Thrice the Court of Appeals rejected this very suggestion. *See* Opinion 35 ("We will not consider that issue … because we need not do so to resolve the merits of plaintiffs' claims under existing jurisprudence."); Opinion 38 n.14 (Article II § 4 not equated with First Amendment); Opinion 48 n.22 ("[W]e do not hold that the limitations of article IX, section 7 are merely coextensive with those of the Religion Clauses of the First Amendment.").

The appellate court's decision rests firmly on the Colorado Constitution. Perhaps for this reason Petitioners qualify their claims by saying the court "effectively" followed federal case law, or engaged in analysis that was

"indistinguishable" from federal case law. Petition at 10, 11. While Douglas County contends there is ample support in Colorado law for following the most analogous federal precedent when interpreting Colorado's religion clauses,[1] the Court of Appeals itself did not reach this issue and instead rested its Opinion entirely on Colorado decisional law. Opinion 35-36.

It is Petitioners who advance legal arguments never before adopted in Colorado. Indeed, Petitioners cite no Colorado cases contrary to the Opinion, save for repeated attempts to distort *Americans United*. Private choice breaks any connection between government and religion, simultaneously eliminating government preference for religion while protecting parental rights and religious liberty. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002); *Americans United*, 648 P.2d at 1082.

[1] In *every case* interpreting Colorado's religion clauses, Colorado courts have looked to *and followed* prevailing federal precedent. *See Zavilla v. Masse*, 147 P.2d 823, 825 (Colo. 1944) (following *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Conrad v. City and County of Denver*, 656 P.2d 662, 672-76 (Colo. 1982) ("*Conrad I*") (following *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Conrad v. City and County of Denver*, 724 P.2d 1309, 1314 (Colo. 1986) ("*Conrad II*") (following *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Young Life*, 650 P.2d at 519-20, 526 (following *Larson v. Valente*, 456 U.S. 228 (1982) and *Walz v. Tax Comm'n*, 397 U.S. 664 (1970); *Freedom From Religion Found.*, 898 P.2d at 1019-27 (following *Allegheny County v. ACLU*, 492 U.S. 573 (1989)).

The appellate court's application of *Americans United* is consistent with every other Colorado case decided under the religion clauses, including *Freedom from Religion Foundation*, 898 P.2d at 103, where the Ten Commandments monument was allowed to remain in Lincoln Park in Denver; *Conrad II*, 724 P.2d at 1309, where a crèche was allowed to be displayed at a government building; and *Freedom from Religion Foundation v. Romer*, 921 P.2d 84 (Colo. App. 1996) where public parks were allowed to be used by a religious leader. Indeed, Colorado has a rich tradition of affirmatively accommodating religion. *See Colorado v. Freedom from Religion Foundation*, 898 P.2d 1013, 1020 (Colo. 1995); *Young Life v. Division of Employment and Training*, 650 P.2d 515, 520 (Colo. 1982).

It is the Petition, not the Court of Appeals, that would require new law to be made in Colorado.

II. The Opinion Below is Consistent with This Court's Precedent.

For certiorari to be warranted Appellate Rule 49(a)(2) asks if the lower court decided a "question of substance" that is "not in accord with applicable decisions of the Supreme Court." The decision below is fully in accord with this Court's decisions under Article II § 4 and IX §§ 7 and 8. This weighs against granting the writ.

A. The CSP Is Permissible Under Article II § 4.

Article II § 4 provides, as relevant here, 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 Court of Appeals correctly concluded the CSP complies with all aspects of Article II § 4.

There is no compulsion in the CSP for either support or attendance. Opinion 47. The CSP is entirely voluntary and "designed for the benefit of the student, not the educational institution," just like the student-aid program in *Americans United*, 648 P.2d at 1082. Accordingly, under *Americans United*, "[a]ny benefit to the institution" is a mere "by-product" and so "remote and incidental" that it does not constitute "aid to the institution" within the meaning of the Colorado Constitution. 648 P.2d at 1083-84 (explaining this rationale when discussing Article IX § 7); *see also id*. at 1082 (finding the grant program "exacts no form of support for religious institutions" within the meaning of Article II § 4); *see* Opinion 38-39 (describing the CSP as substantively identical to the system approved in *Americans United*).

This application of *Americans United* is consistent with other cases interpreting the compelled support provision of Article II § 4. *See Conrad II*, 724 P.2d at 1312, 1317 (rejecting compelled support challenge to use of taxpayer funds

to display nativity scene); *Freedom from Religion Found. v. Romer*, 921 P.2d at 91 (rejecting compelled support challenge to use of public funds for Papal visit).

In the face of this consistent Colorado precedent, Petitioners rest their case on a misreading of *Americans United* and completely fail to examine any other Article II § 4 cases. Petitioners also incorrectly claim the Court of Appeals "applied an analysis indistinguishable from federal Establishment Clause analysis." Petition at 12. In fact, the Court of Appeals repeatedly relied on *Americans United*. *See* Opinion 37-47. By way of contrast, the Court of Appeals only cited *Zelman* once and explained why it would not consider *Zelman* when deciding the case under Colorado law. Opinion 35.[2]

Petitioners also argue the Court of Appeals somehow nullified the language in the Colorado Constitution that is more specific than the language of the First Amendment. Petition at 10. However, the majority expressly declined to reach this issue, ruling merely that the CSP complied with the Colorado Constitution; it left open the issue of the role of First Amendment precedent when interpreting Colorado's religion clauses. Opinion 48 n.22.

[2] The Petitioners incorrectly claim the lower court cited *Zelman* "often." Petition at 10.

In sum, the Court of Appeals correctly applied *Americans United* to conclude the CSP complies with Article II § 4.

B. The CSP Complies with Article IX § 7.

Article IX § 7 of the Colorado Constitution restricts certain government appropriations in aid of religious institutions. This provision, too, was examined at-length by this Court in *Americans United.* 648 P.2d at 1083-85. The Court of Appeals followed that interpretation carefully, concluding that the CSP, like the student-grant program in *Americans United,* is not "in aid of" churches and thus does not violate Article IX § 7. Opinion 48-53.

Petitioners offer three arguments against the lower court's decision. First, they contend the CSP violates the "plain text" of the provision. Petition at 7-8. The dissent made the same argument. Opinion 70. However, this Court in *Americans United* carefully examined the "plain text" of Article IX § 7. 648 P.2d at 1083. It concluded that if "the aid is designed to assist the student, not the institution," then any indirect benefit to religious schools is so "remote and incidental" that it "does not constitute, in our view, aid to the institution itself within the meaning of Article IX § 7." *Id.* at 1083-84.[3] The Court of Appeals followed this binding law.

[3] This Court's interpretation of Colorado's general "no aid" provision is no different than other states with similar clauses, which permit indirect aid under

Petitioners' second argument undercuts their first. Whereas in their first argument they demand a plain reading of the "plain text," in their second they advocate for a distinction between K-12 schools and higher education. Petition at 9. Yet, as the majority noted, "nothing in the text of article IX, section 7 even remotely hints at [this] distinction." Opinion 50. Petitioners cite three of the same off-point federal cases cited by the dissent, Petition at 9, ignoring the squarely on-point federal precedent like *Zelman* and *Mitchell*. *See* Opinion 50 (majority noting that "the schools at issue in *Mitchell* [and *Zelman*] were elementary and secondary schools"). Petitioners (like the dissent) overlook that "the [U.S.] Supreme Court has substantially modified its interpretation of the Establishment Clause" since this Court decided *Americans United* in 1982. *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1251 (10th Cir. 2008). Accordingly, this Court's reliance on U.S. Supreme Court Establishment Clause cases from the 1970s, like *Tilton v. Richardson*, 403 U.S. 672 (1971), is no longer current. The dissent fails to recognize that. Opinion 80 (discussing *Tilton* and this outmoded distinction). Even were this not the case, however, the majority makes clear that "even if we assume

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religiously-neutral government programs that allow for genuine private choice. *Meredith v. Pence*, ___ N.E.2d ___, 2013 WL 1213385 (Ind. March 26, 2013); *Simmons–Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998).

that consideration of all the facts discussed in *Americans United* remains constitutionally permissible, we conclude that our holding is consistent with *Americans United*." Opinion 51.

Finally, Petitioners mischaracterize the Court of Appeals as having followed the federal *Zelman* decision to the detriment of *Americans United*, and thereby "effectively rendering Article IX, Section 7 meaningless." Petition at 10. This is simply incorrect. As with Article II § 4, the Court of Appeals carefully applied this Court's decision in *Americans United*, rarely citing *Zelman* – only twice, in fact. Opinion 35, 49. In contrast, the Court of Appeals continually cited *Americans United*. Ultimately, the majority carefully adhered to the core logic of *Americans United*, writing: "[I]n *Americans United* the court held that because the program was intended to benefit parents and their children, any indirect benefit to the schools was not 'in aid of' any religious organization. 648 P.2d at 1083-84. This principle holds true regardless of the nature of the school – in all events the aid is incidental and therefore not in violation of article IX § 7." Opinion 50.

In contrast, Petitioners urge a radical reading of Article IX § 7, whereby any government funds that flow indirectly to religious institutions, regardless of purpose, would be invalid. This is flatly at odds with *Americans United*. *See* Opinion 52 n.25 ("According to the dissent, the plain language of the provision

dictates that whenever state money makes its way to a private school affiliated with a religious institution, the provision is violated. *Americans United* unequivocally held to the contrary.") The CSP cannot be held to be "in aid of" religion any more than the grant program was "in aid of" Regis College under a proper reading of *Americans United*. As that program stood, so this program stands.

C. The CSP Complies with Article IX § 8.

Article IX § 8 prohibits religious tests for admission, required religious services, and teaching sectarian doctrine. The first half of this provision does not apply to the CSP. Regardless, the voluntary nature of the Program removes any concerns.

As Douglas County argued below, the first sentence of Article IX § 8 applies only to institutions of higher education, not K-12 schools. Colorado courts have drawn this distinction for decades based on the plain language of the provision. *Wilmore v. Annear*, 65 P.2d 1433, 1435 (Colo. 1937). Without reaching this argument, the Court of Appeals assumed all relevant provisions applied, because it ultimately found the CSP did not violate any part of it. Opinion 54 n.26.

The Court of Appeals is correct. Article IX § 8 prohibits mandating certain religious activities, but the CSP is completely voluntary. Parents must affirmatively choose to participate in the CSP, and then, if their child receives a

scholarship, parents independently choose where to enroll their child. The voluntary nature of the CSP alleviates any Article IX § 8 concerns. Opinion 54.

Just as Petitioners willfully ignore the importance of the voluntary choices of parents, so too do they ignore the private status of the partner schools. The CSP does not have a religious test for admission, require attendance at religious services, or mandate the teaching of sectarian doctrines. To the contrary, it leaves religion alone, neutrally treating all private schools the same whether religious or non-religious. Actions of private schools do not create a violation. Petitioners provide no legal basis for concluding otherwise. Nothing about the CSP violates any aspect of Article IX § 8.

D. The Court of Appeals Correctly Applied Federal Law.

While Petitioners were careful not to raise any claims under the U.S. Constitution, they now allege the lower court created a conflict between it and the Colorado Constitution. Petition at 15-17. This argument is wrong on the merits, misreads the Opinion, and, in any event, would not justify this Court's review.

Petitioners' entire constitutional conflict argument is based on the claim that the Court of Appeals "effectively held that the U.S. Constitution prohibits church-state provisions of the Colorado Constitution from imposing greater restrictions on public funding of religious schools than does the federal Establishment Clause."

Petition at 15. However, the Court of Appeals denied any such holding: "We do not hold, of course, that any of the provisions of the Colorado Constitution here at issue violate the Religion Clauses of the First Amendment." Opinion 44 n.17.

The error is in Petitioners' reading of federal case law – particularly *Locke v. Davey*, 540 U.S. 712 (2004) – regarding the ability of courts to measure the pervasiveness of religion. Petition at 15-17. The holding in *Locke* was only that the federal Establishment Clause did not prohibit the Washington State legislature from declining to fund the study of devotional theology in a program that otherwise permitted scholarships for students to attend schools of their choice, including religious schools. 540 U.S. at 724-25; *see also* Opinion 44 n.18. *Locke* is simply not relevant to deciding the CSP's propriety under Colorado's religion clauses. Far from grafting the U.S. Constitution onto the Colorado Constitution, the Court of Appeals noted there may well be instances where the Colorado Constitution restricts funding that would otherwise be permitted under the federal Constitution. Opinion 48 n.22. The Court of Appeals did not create any conflict with federal law.

III. There Is No Conflict in the Colorado Courts.

For certiorari to be warranted Colorado Appellate Rule 49(a)(3) asks if the lower court "has rendered a decision in conflict" with another intermediate

appellate decision. Petitioners have not identified any conflicts. There are none. This factor weighs against granting the writ.

IV. The Proceedings Below Were Regular.

For certiorari to be warranted Colorado Appellate Rule 49(a)(4) asks if the lower court "has so far departed from the accepted and usual course of judicial proceedings" as to "call for the exercise of the Supreme Court's power of supervision." Petitioners have not identified any procedural irregularities. This factor also weighs against granting the writ.

V. There Is No Detrimental Statewide Impact from the CSP.

This Court may consider special and important reasons when considering whether or not to grant a writ of certiorari. C.A.R. 49(a). There are at least two important reasons not to grant the writ.

First, Douglas County carefully designed the CSP to improve educational options for students, consistent with its responsibility under the "local control" provision of Article IX § 15. This is precisely the type of action contemplated by this Court in *Owens v. Colorado Congress of Parents, Teachers & Students*, 92 P.3d 933 (Colo. 2004) when it held that a statewide school choice program intruded on constitutionally mandated local control over education. The *Owens* Court held local school districts, such as Douglas County, must be able to

"determine which schools or which students are eligible to participate in [a school choice] program, the amount of district funds to be devoted to the program, or the character of instruction paid for by those funds." *Id.* at 942. Douglas County followed this express teaching of *Owens* when it designed the CSP.

Second, the CSP is a pilot program capped at 500 scholarships. Opinion 2. It could not possibly impose a "devastating economic hardship" on the entire statewide public school system, as Petitioners claim. Petition at 2. Petitioners speculate about possible future impact, but there is no actual evidence to support their speculation. Indeed the 500 scholarship students come from a pool of 64,657 students in the Douglas County system in 2012-2013, or less than 1% of its students. The 500 scholarship students are only 0.05% of the 863,561 students in the statewide system.[4]

Moreover, far from "diverting" money away from public schools, the Program would either be revenue-neutral or an actual net-savings for the District, given that it allows the District to reduce costs associated with scholarship students while retaining 25% of the revenue. Opinion 28. In fact, there was testimony that the CSP would result in a net-savings for Douglas County of about $350,00 per

[4] Student figures available from Colorado Department of Education at http://www.cde.state.co.us/communications/Releases/20130114pupilmembership.html

year. [Tr. 374:22.] Allowing the lower court's decision to stand would permit this valuable educational option to move forward in Douglas County, to the benefit of both the students who choose to apply for the scholarships and those who elect to remain in the District's numerous other programs.

CONCLUSION

For the forgoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted on the 25th day of April, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of April, 2013, a true and correct copy of the foregoing **OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY DOUGLAS COUNTY SCHOOL DISTRICT AND BOARD OF EDUCATION** was served by U.S. mail, first-class postage prepaid, addressed to the following:

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