COLORADO SUPREME COURT

December 10, 2014, 1:30 p.m.

Taxpayers for Public Education, et al. v. Douglas County School District, et al.

JUDGE: Alright, thank you. Will you please have a seat. It looks like we have a fairly full quorum today, and as a result of that, I'm going to ask just a couple of things extra. First, it has come to our attention that if you use the wireless function on your mobile devices that that somehow interferes with our audio recording system. I guess we're kind of like an airplane. I'm not exactly sure why, but that happens. So if you could please not use your wireless function on whatever devices that you have, we would appreciate that. And specifically, that means don't email, don't blog, don't tweet. That kinds of things from the courtroom. Other than that, of course, you can use your electronic devices as you wish. The second thing is, we have an awful lot of people in the courtroom so if you could just respect our need to be able to hear what we are saying, we would appreciate that. So let's get started. This case is called *Taxpayers for Public Education v. Douglas County School District*. May I have the entry of appearances? Talking with you, sir.

McCARTHY: Good afternoon. Michael McCarthy and Colin Deihl with Faegre Baker Daniels appearing on behalf of the Taxpayers and the Barnards.

JUDGE: Alright.

DOUGLAS: Good afternoon, Your Honor. Matt Douglas and Timothy Macdonald with Arnold & Porter appearing on behalf of LaRue Petitioners.

JUDGE: I take it since you both stood up that you both want to talk a little during today's hearing or no?

MACDONALD: Thank you, Your Honor. We do. What we've agreed to is that we will provide 30 minutes with Mr. Douglas and I each taking 12 minutes and reserving 6 for rebuttal. As we did in the Court of Appeals, I will address the school finance issues. Mr. Douglas will address the religion issues.

JUDGE: You'll need to keep track of your own time, and that's reasonably easy to do so because the members count down. Let's turn to the other side of the room. Mr. Lyons.

LYONS: Good afternoon, Your Honor. James Lyons and Eric Hall from Lewis Roca Rothgerber on behalf of the Defendants.

JUDGE: Thank you.

BINDAS: Good afternoon, Your Honor. Michael Bindas and Tim Kelp for the Institute for Justice, and we represent the individual Respondent families.

JUDGE: Alright, Mr. Bindas, thank you. And will both of you be addressing the Court, Mr. Lyons?

1 LYONS: I'm going to take the bulk of the time but try and reserve about five minutes for
2 Mr. Bindas.

3 JUDGE: Well let me just reiterate, sir, that you need to keep track of your own time. So this is
4 a one hour case. That is to say, that each side has 30 minutes to decide how to use as
5 you wish. And with that, let's get started. Mr. McCarthy.

6 McCARTHY: May it please the Court. The Douglas County School Voucher Program violates the
7 Colorado Public School Finance Act because, as the trial court found, and as we have
8 presented to this Court, that program is dependent for its implementation on a charter
9 school called the Choice Charter School, and in the papers that come before this
10 Court, that is invalid under both the Charter School Act and the Public School
11 Finance Act. There has been no meaningful, substantive response to the invalidity
12 that we have identified in the charter school that is used by Douglas County to
13 implement their school voucher program. It is invalid because it violates three of the
14 four definitional requirements for a charter school, that being the charter school,
15 under the statute, needs to be public, which this program when looking at where these
16 children are actually educated, it is not. It must be nonsectarian, which it is not. It
17 must be nonreligious, which it is not; and it must home based. So only one out of
18 those four definitional requirements under the Public School Finance Act as it
19 incorporates that definition from the Charter School Act, only one is satisfied. Any
20 one of those failing satisfaction causes the charter school to be invalid, and the
21 program, therefore, fails. And I emphasize that it is important to look at the substance
22 of where the voucher recipients are actually educated as opposed to the charter school
23 because the charter school is a mirage. What the record shows without any dispute is
24 that this charter school has no classrooms; it has no principal; it has no textbook; it is
25 a mirage. It is little more than a false front from an old western movie. And what is
26 really happening here is that the voucher recipients are, in truth and fact, being
27 educated at the private partner schools. And the money that is coming from the
28 Douglas County School Board is going directly to those private partner schools. Now
29 what necessarily is presented by the papers the Court has seen is the allegation and
30 the finding by the Court of Appeals that in terms of that statutory claim that we make,
31 a violation of the Public School Finance Act, there is not standing on behalf of our
32 clients to assert that claim. So I turn now to address the statutory standing question
33 because constitutional claim standing has not been challenged. The statutory claim
34 here was found not to be one that could be asserted by the Plaintiffs because,
35 according to the Court of Appeals' Opinion, there was no legislative intent under this
36 Court's juris prudence to allow for a private claim, a claim for enforcement of the
37 Public School Finance Act. What the Court of Appeals relied upon almost
38 exclusively in concluding that there was no standing was the rules and regulations.
39 What this Court has seen from the briefing is that there is little more in the actual
40 School Finance Act other than a broad authorization for the Department of Education
41 to promulgate rules and regulations. Based merely on that authorization to
42 promulgate rules and regulations, what the Court of Appeals found was that there was
43 no legislative intent to allow for a private claim. What we submit to the Court is that
44 that silence, and it's silence really is what we would point to, the effect of silence to
45 foreclose a private cause of action is not adequate under this Court's juris prudence.
46 But more importantly, and something that I think wasn't adequately, was alluded to,

1 but not adequately developed under the brief, goes to the rules and regulations
2 themselves. Because they are critical in the Court of Appeals' conclusion that there
3 was not standing. And I implore the Court to actually look at the rules and
4 regulations that the Court of Appeals relied upon to foreclose standing here. And
5 those regulations can be found at 1 CCR 301-39, 2.01 and following. Those are
6 regulations of the State Board of Education. The majority in the Court of Appeals
7 said because of those rules and regulations, you have no private cause of action. I
8 believe that when the Court looks closely at those actual rules and regulations, what
9 you will see is there is nothing there that addresses the sort of situation that we were
10 confronted with when Douglas County adopted the Public School Voucher Program.
11 There is nothing in those rules and regulations that addresses what we have here,
12 which is, in truth and fact, the export of, in this case, $3 million that was headed out
13 of the Douglas School District and into the hands of private parties. In a way, the
14 program presses the limits of many of . . .

15 JUDGE: Let me ask you this though. There are plenty of state statues, and you're familiar
16 with the environmental area, natural resources, for example, where our state's statutes
17 don't have a private cause of action, but the federal statutes do. Now, I'm going to
18 ask you this. And you'd have to say there's not a private cause of action built into the
19 School Finance Act. There's no clear avenue to bring a citizen's suit, for example.

20 McCARTHY: That's correct, Your Honor.

21 JUDGE: So what's the difference between that and standing that you're asserting? What is the
22 interest; what is the injury that allows citizens to challenge the setting up of this
23 charter school and the financing through it?

24 McCARTHY: Your Honor, the injury here is the depletion of a limited fund of monies that come to
25 these schools from the state in order to fund public education. And it is the most
26 basic premise in both the constitutional provisions that you see in Article IX and the
27 Public School Finance Act, which is that public school funds are intended to pay for
28 public education. The analogy, and I know, Your Honor, there's deep experience in
29 the environmental and natural resources area. There's really nothing comparable, I
30 think once if you actually take a look at these regulations. 2.01, in particular, which
31 is the enforcement provision here, there's nothing comparable to what you see in a
32 federal structure or even in a state structure as far as creating some kind of an
33 adequate remedy to prevent the export of millions of dollars out of the Douglas
34 County school budget. In some ways, the program was . . .

35 JUDGE: Maybe does the State Board of Education have standing to do that?

36 McCARTHY: Well, essentially, Your Honor, that's what the majority of the Court of Appeals said,
37 was that not so much standing, but this falls within the exclusive province of the State
38 Board of Education. Two responses to that. First, if you look at 2.01, which is the
39 only enforcement mechanism that exists under the statutes, the only mechanism that
40 exists there is a mechanism that speaks to broad noncompliance with the School
41 Finance Act. Nothing more specific than that. And the remedy is in a sense almost
42 overkill because what the remedy is, is suspension of accreditation of the entire
43 school district if there is noncompliance with the statute. But it is a process that

1 unfolds, as you can see, over months before that determination is reached. And here
2 we had immediate outflow of funds, and here's the significant part of it in particular,
3 Your Honor, that I think – because this goes to both a rightness issue that was raised
4 in the case but also to standing. There's been some discussion here about what's
5 called a claw back provision, which is that, if this money was somehow wrongfully
6 paid to Douglas County because these, in fact, were private schools, these students, in
7 fact, went to private schools. You could claw the money back. There's nothing,
8 nothing in the statute that gives the Department of Education any jurisdiction over the
9 private partner schools into whose hands this money will flow. So the claw back
10 provision is designed to require Douglas County to give the monies back. This case
11 is different than anything contemplated by this regulations.

12 JUDGE: So does any citizen of the State of Colorado have standing, then, to bring this suit?

13 McCARTHY: I would say not, Your Honor.

14 JUDGE: Then who does?

15 McCARTHY: The students and parents in the Douglas County School District. Because it is they
16 who are going to be impacted by the depletion of the monies that they would
17 otherwise be entitled to but which under this program are being exported to private
18 schools with no obligation from those private schools to pay that money back. And
19 so those are the individuals that have standing. Your Honor, the other point that
20 we've raised, and there's some controversy about this in the briefs, is the fact that we
21 have what I think is fair to characterize under the record as the School Board enabling
22 Douglas County. The record made very clear that there was extensive cooperation
23 between Douglas County and the State Board, which was supposed to be the enforcer
24 here. And, in fact, representatives of the State Board, and they admitted this under
25 oath at the preliminary injunction hearing, expressed their belief that this was a valid
26 program and they were going to do everything within their power to make sure that
27 this program was approved. So if the basis for saying that there's no standing here is
28 because these regulations are an adequate remedy, but what, in fact, we get is a deaf
29 ear hearing. If what we get is the administrative agency who is supposed to stand at
30 arm's length and be the enforcer of the School Finance Act has already expressed
31 before they even saw the program an inclination to approve the program, the enforcer
32 in power means nothing, Your Honor, because we have a compromised enforcer here.
33 And, again, I urge the Court, if I was to point to anything in the record in particular to
34 use this oral argument to do this, I would implore the Court to look at Trial Exh. 65.
35 Trial Exh. 65 is a very short email that was sent by a person who was at that point in
36 time the Chairman of the State Board of Education, expressing that person's clear
37 belief that everything was to be done that was possible to accelerate the approval of
38 this program. And also Mr. Hammond's testimony in the trial transcript.

39 JUDGE: What is that, a sort of backup surrogate standing if those who are supposed to enforce
40 it don't? Then the parents get to do it or what?

41 McCARTHY: Your Honor, the short answer to that question I think is yes. I think if the grounds for
42 denying standing is that there's an adequate enforcement mechanism under the
43 statute, but under these circumstances, we have proved on the record that the enforcer

1 is compromised, then if you would go back to the case that we've emphasized so
2 much in our papers, which is *Allstate v. Parfrey*, and you look at this Court's opinion
3 in *Allstate v. Parfrey*, the touchstone for standing is substantial frustration – those
4 were the exact words that this Court used – substantial frustration of a central purpose
5 of the Act. If the enforcer is not going to enforce, if the Department of Education is
6 going to abdicate its responsibility to enforce these provisions, then those regulations
7 cannot be a basis on which to deny standing. I have two other . . . I'm sorry, Your
8 Honor.

9 JUDGE: I was just going to say, can you respond to the allegation that it's going to result in a
10 parade of horribles, that there will be countless lawsuits if we open the door to private
11 enforcement in the way that you're suggesting?

12 McCARTHY: Your Honor, the response to that argument is that, none of those programs, none of
13 the parade of horribles were the subject of this case. We are here, and this Court
14 functions as I have always understood it, on a case or controversy basis. You hit
15 them as they're pitched. And there is nothing in the record, nothing, that adequately
16 develops what the facts and circumstances are of those programs that would enable a
17 legitimate argument to be made that if you strike down this voucher program, it's
18 going to have a cascading effect. And so, Your Honor, in trial evidence, it might be
19 Rule 403, these are programs which were simply not developed on the record. And
20 you can't argue for an attack upon the trial court's rulings because it's going to have
21 these implications. The only testimony that spoke to these programs, Your Honor,
22 came from Senator King in the preliminary injunction hearing, and that was nothing
23 more than naming the programs and saying what they did. That doesn't even come
24 close to becoming a foundation upon which this Court could decide the case. To say
25 that because this voucher program isn't valid, it's going to ripple out through the state
26 and invalidate, this case, and I'm confident this Court will decide this case on these
27 facts. We have, Your Honor, we think compelling facts here. We have a situation
28 both in terms of the invalidity, I'm out of time actually, and in terms of the Article IX,
29 § 3, public lands trust. What we're asking the Court to do is to enforce the plain
30 meaning, the plain meaning.

31 JUDGE: Of what?

32 McCARTHY: The plain meaning of the Constitution, Article IX § 3, as this Court interpreted the
33 lands trust in the *Brotman* case, the plain meaning of the School Finance Act, not to
34 engage in the kind of de jure allocation of funds that you saw the Court of Appeals do
35 when we saw that opinion, we'll we're going to segregate those funds. This Court
36 said it in *Brotman* that the public lands trust has an absolute prohibition on having
37 those funds be used for anything other than public education. I fear I've risked
38 Mr. Douglas' ire at this point. I'm way over, Your Honor. Thank you.

39 JUDGE: Alright, thanks, Mr. McCarthy. Mr. Douglas.

40 DOUGLAS: May it please the Court. I need to speak quickly now in order to save 6 minutes for
41 rebuttal, which is our plan. Your Honor, following on what Mr. McCarthy just said,
42 it's a nice Segway, that under the religion clauses of the Colorado Constitution, the
43 primary issue is a plain language issue. Does the Colorado Constitution mean what it

1 says? There is a direct and clear constitutional command in the no aid clause that
2 says specifically that school districts cannot pay any money to any school controlled
3 by any church or sectarian denomination whatsoever. This Court has held that when
4 the language is plain, its meaning clear, and there's no absurdity involved,
5 constitutional provisions must be declared and enforced as written.

6 JUDGE: And so keeping in mind that plain language, how do you explain our ruling in
7 *Americans United*, which obviously didn't adhere to the plain text of that provision?

8 DOUGLAS: Your Honor, this Court's decision in *Americans United* did not reach the key
9 constitutional questions that are presented by the facts before the Court in this case.
10 Specifically, on Article IX § 7, the no aid clause, this Court deferred ruling on
11 whether, if facts demonstrated that money was actually going to schools that were, in
12 fact, controlled by churches and sectarian denominations, whether that would be a
13 violation of the no aid clause. The Court actually reversed a summary judgment
14 ruling in favor of Regis College on that issue because it found that it did not have the
15 facts before it in order to determine whether money was going to a school that was so
16 controlled. Here, we have overwhelming factual evidence, undisputed factual
17 evidence, that these schools are controlled by churches and sectarian denominations.
18 So on the key question, this Court did not reach that question in its decision in
19 *Americans United*. And that's the question here. So it is a question of first
20 impression for the Court and as applied challenge to 23 schools, the vast majority of
21 which the evidence showed were, in fact, controlled by churches and sectarian
22 denominations. The Defendants try to get around the plain language of the no aid
23 clause by saying, this is a program of mutual private choice. And that somehow
24 excuses the violation of the plain language. But in order to make that argument, they
25 rely on the federal establishment law, Establishment Clause cases. But this is not an
26 Establishment Clause case. And, in fact, the Establishment Clause does not have a
27 clear and direct command like the no aid clause. And when you look at the context of
28 the decisions by the U.S. Supreme Court in funding of religious schools, what they
29 found is that neutrality and private choice removed the government endorsement of
30 the funding of the religious programs at issue. But the no aid clause in Colorado is
31 not about government endorsement. It's about its specific prohibition on government
32 payment of funds to schools that are controlled. So whether something is permissible
33 under the Establishment Clause may be able to be established under current juris
34 prudence by a mutual program of genuine private choice. But there's no exception in
35 the no aid clause or aid to prohibited schools that's done in a mutual way involving
36 genuine private choice. Another issue that *Americans United* did not reach is the
37 issue of whether sectarian tenets can be taught to public school students in violation
38 of Article IX § 8, the prohibition against teaching sectarian tenets. And that's largely
39 because that college grant program did not use the vehicle of the charter school to
40 funnel public school funds to private schools. Furthermore, here, back to Article IX
41 § 7, we have specific evidence in this case that this money is, in fact, aiding and
42 supporting these schools. That's evidence that was not present in the *Americans
43 United* decision. Specifically, Mr. Gierke, head of one of the schools that was
44 undisputedly controlled by a church, testified that the reason his school participated in
45 the voucher program was to deal with a debt crisis that was threatening the viability
46 of the school. And, in fact, his school's enrollment increased 10% through the

1 program specifically. And this is a pilot program from Douglas County. So, here, we
2 have specific evidence that the money is aiding and supporting schools. That was not
3 present in the facial challenge that was decided in *Americans United*. It's also
4 important to note that there is no intrusive test needed to apply the plain language of
5 the Colorado Constitution as written and specifically the no aid clause. Those
6 determinations and evaluations of whether something is religious is constitutionally
7 permissible, and they are conducted in a wide variety of contexts including
8 application of religious tax exemptions, unemployment exemptions, and religious
9 discrimination exemptions. Those have been upheld repeatedly by both state and
10 federal courts. This Court upheld a detailed inquiry into whether property was being
11 used exclusively for religious worship and reflection.

12 JUDGE: Let me ask you under the plain language of that provision in the Constitution, could it
13 be possible to have a payment to schools that are private but not sectarian, no
14 religious agenda, no affiliation, just a hypothetical now? What does that language
15 actually say in the Constitution?

16 DOUGLAS: The no aid clause of Article XI § 7?

17 JUDGE: Right, the no aid clause.

18 DOUGLAS: Says any school controlled by any church or sectarian denomination whatsoever. So
19 if it is not controlled by a church or sectarian denomination but is nevertheless a
20 private school, that would not violate Article IX.

21 JUDGE: So it is possible to have a voucher program for independent, private, nonsectarian
22 schools under your reading?

23 DOUGLAS: Under Article IX § 7, the no aid clause, yes. There may be issues under the Public
24 School Finance Act that may not be cured by that. There is a program in Maine that
25 was upheld by the First Circuit in the *Eulitt* case, which is a funding of private
26 education but it excludes all sectarian schools. So that has been held to be
27 constitutional in Maine. Whether it would meet all the different constitutional
28 provisions here at issue or the Public School Finance Act given the charter school,
29 may be another question. But under Article IX § 7, yes, that would be permissible.
30 Another example of the application of an evaluation if something is religious is the
31 Third Circuit's decision in 2007 looking in detail of whether a Jewish community
32 center was a religious corporation, association or society, and in doing so, evaluating
33 whether Title VII's exemption for religious discrimination would apply to that Jewish
34 community center and upholding that. Defendants have also made much of the
35 voluntary nature of the program, curing some of the constitutional violations. But,
36 Your Honor, all charter schools are voluntary. And no charter school can provide
37 religious education. This is essentially a charter school that students enroll in, and
38 then they're presented with a menu of options and they choose one. Almost all of
39 them are religious options. The fact that the charter school is voluntary does not cure
40 the fact that charter schools have to be nonsectarian and have to comply with the
41 provisions of the Constitution prohibiting religious tests on admission, teaching of
42 religious tenets to public school students and mandatory attendance at religious
43 services. Your Honor, parents are free to choose religious education for their

1 children. But under the plain language of the Colorado Constitution, public taxpayer
2 money cannot fund that choice. Your Honor, we would like to reserve the rest of our
3 time for rebuttal.

4 JUDGE: Thank you. Mr. Lyons.

5 LYONS: Thank you, Your Honor. Madam Chief Justice, may it please the Court and counsel.
6 As I said, we're going to reserve 5 minutes for Mr. Bindas. Let me start with the
7 constitutional religious issues. There are two principles and two questions this Court
8 has to ask. First, is this program that gives aid designed to aid the student. That was
9 the central test of *Americans United*. That's how this Court interpreted the language
10 of Article IX § 7. There's no reason for this Court to deviate from that. However, the
11 second question that the Court needs to ask is, who decides where this state money
12 goes? Is the state making the decision in the form of the School Board or is it parents
13 who are making the choice? Because the federal juris prudence here is clear. If it's
14 parents making the choice, the link is "broken," and that the *Locke* case that we cited
15 in our papers. Plaintiffs have argued that the First Amendment juris prudence of the
16 federal courts, particularly the Supreme Court of the United States, are not
17 determinative here citing *Americans United*. But what they don't cite from
18 *Americans United* is the next phrase, not necessarily determinative but cannot be
19 totally divorced. And that's found in your Opinion at p. 1078. So in our mind, the
20 analytical framework for this starts with *Americans United* from 1982 and then looks
21 to the federal juris prudence in the school choice area, which has developed since
22 1982. There are three cases. We cited more, but there are three that are particularly
23 instructive here. They are *Mitchell*, they are *Zelman* and they are *Locke*. Coming
24 back just for a moment to the benefit question, Plaintiffs also point out in their papers
25 that is one of several factors that are looked at by this Court in deciding *Americans*
26 *United*. And that's true. There are other factors that are identified. But the central
27 question, is the aid designed to benefit the student, is the essence of your Opinion in
28 *Americans United*. You said it not once, at p. 1081, not twice, at p. 1082, but a third
29 time at p. 1083. Now, if you start with that, then you move to the second question.
30 Who makes the decision? And in this case, the parents make the decision. Let's start
31 with those three cases I mentioned. The *Mitchell* case from 2000. It's a plurality
32 opinion as you know. I will take the concurring opinion of Justice O'Connor where
33 it's citing *Witter* at 478 U.S. 488. She says: "The fact that aid goes to individuals
34 means the decision to support religious education is made by the individual, not the
35 state." Two years later in *Zelman*, which dealt with a tuition aid program in
36 Cleveland, the Supreme Court said: "This Court's juris prudence makes clear that a
37 government aid program is not readily subject to challenge under the Establishment
38 Clause if it is neutral with respect to religion and provides assistance directly to a
39 broad class of citizens who, in turn, direct government aid to religious schools wholly
40 as a result of their own independent private choice." Citing, by the way, *Mueller v.*
41 *Allen*, which is 463 U.S. 388. And last but not least, there's the *Locke v. Davey* case.
42 This was a case out in the State of Washington dealing with a program that allowed
43 public funds to be used except for theological programs. This is the case where the
44 Supreme Court talks about the play and the joints between the Establishment Clause
45 and the Free Exercise Clause. And that's the case where Chief Justice Rehnquist says
46 clearly: "The length between government funds and religious training is broken by

1 individual and private choice of recipients." That's exactly what we have here. So,
2 taking *Americans United* and your interpretation of what the innate clause means,
3 meaning is it designed, being a neutral program, to benefit the student. You then look
4 to the federal juris prudence to account for the significance, in our view the
5 determinative significance, of parental choice. This program, the Choice Scholarship
6 Program of Douglas County, was found by both the trial court at pp. 39 and 44 of its
7 Opinion and the Court of Appeals at pp. 38 and 49 of its Opinion to benefit the
8 student. That question as a finding of fact is closed. Parental choice, as I said, breaks
9 the link.

10 JUDGE: What do you do with the plain language of the Constitution which, going back to the
11 founding days and then for a century after that, had a clear demarcation between free
12 public education and the choice of parents to send their kids to religious schools?
13 And it was always understood for generations that if you wanted your kid to go to a
14 religious school, you pay your taxes to keep the public schools going, and then you
15 also then made the family choice, and individual choice, to provide that kind of
16 education. So how about the implications of what the founders really intended with
17 respect to the free, universal, public education and its ability to survive this avenue to
18 take funding that's necessary to fund classrooms and teachers and quality education
19 and curriculum and divert it away from public education?

20 LYONS: A couple of answers to that Justice Hobbs. First of all, federal juris prudence has
21 changed. Choice didn't exist 100 years ago or 150 years ago. I'm not going to get
22 into the blind nature of . . .

23 JUDGE: We're talking about our state Constitution here.

24 LYONS: Alright.

25 JUDGE: And the commitment of taxpayer dollars through that Constitution.

26 LYONS: There is not a nickel from this program that is being diverted from any other school
27 district as found by the Court of Appeals. This is money that parents choose to take
28 with them. If they choose not to take with them, they stay in the Douglas County
29 school system, which by all accounts in the record is a very fine and good school
30 system. They are simply being given the choice here to take public money that is
31 available to them and use it as they see fit. And as the Supreme Court says, that
32 breaks the link. Now, in terms of where these amendments come from as we briefed,
33 these are Blaine Amendments. These are plain and simple Blaine Amendments. And
34 Justice Thomas writing for the plurality in *Mitchell* describes them exactly what they
35 are. They were born of bigotry, and they deserve to be buried. So am I asking you to
36 overturn them, no. But I am asking you to take into account the origin and pedigree
37 of these amendments as a matter of legislative intent if you will.

38 JUDGE: What if the founders intended that, in fact, there would be viable schools in each of
39 these districts. And the only way to do that was to be sure that money stayed for that
40 purpose. I mean, don't you think that in addition to whatever side effects or
41 prejudices people had at that time, that in the written language, there is a good public
42 purpose there that, in fact, is going to be diminished if some parents or more parents

1 or a majority of parents split away from the Douglas County Public Schools to take
2 this money? What happens to our free public school system?

3 LYONS: But they're actually, Your Honor, taking less money with them than they would
4 otherwise be entitled to have if they stayed in the Douglas County school system.
5 Think about the arithmetic for a minute. If the per pupil revenue very year is
6 hypothetically $6,700 as it was I think at the time of our trial and 75% of that is
7 subject to the program, a pilot program by the way that was enjoined before it could
8 be implemented, if 75% of that money is then given to a parent in the program to
9 make the choice, there's 25% left behind for administrative costs. If there was no
10 program or if a parent elected not to participate in the program, they're not taking
11 money that isn't theirs anyway. There is no diminution of the resources for a free and
12 public education. None.

13 JUDGE: Mr. Lyons, may I ask you a question, thank you.

14 LYONS: Yes, ma'am.

15 JUDGE: If I'm understanding your argument, you're almost saying that there's just a paradigm
16 shift in how we look at education and particularly public education. And that public
17 education is no longer, like what Justice Hobbs was suggesting is, it's just the schools
18 that you can go to for free. Now what you're saying is, public education is almost a
19 funding mechanism. That we'll give you money, you the public, you parents of
20 students money; and then you can use that to choose how you want to use that money
21 to buy education. Is that a fair . . .

22 LYONS: Not exactly.

23 JUDGE: Alright. Help me with that. Because it seems you're suggesting almost this paradigm
24 shift of what public is. Help me with that, please.

25 LYONS: There's clearly been a shift in the juris prudence in the 30 years since this Court
26 decided *Americans United*. There's also been significant changes in education and
27 how it's delivered. Going back 150 years, it was all little red schoolhouses located
28 right down the street in the same township so they could be funded by property tax
29 and some helped on backfill from the state. That's gone. That's been gone for a long
30 time. The founders never could have considered things like, and didn't, charter
31 schools, which are perfectly legal and valid. How about online schooling? How
32 about home schooling? How about the whole digital revolution? All of that has
33 contributed, as the record reflects, to the decision of this Board in its discretion and
34 exercising its constitutional authority under local control to offer a pilot program . . .

35 JUDGE: Perhaps I can come with my questioning a little bit differently to save a little time. In
36 your mind, is public education now that entire panoply of choice any kind of
37 educational choices that now are public education?

38 LYONS: I don't think necessarily. I mean to Justice Hobb's point . . .

1 2	JUDGE:	So then what, it's not necessarily everything that's public. Under your theory, what no longer is a public education?
3 4 5	LYONS:	Well, it would be exactly as Justice Hobbs asked me. If I choose, as I did, to send my kids to private religious schools, I paid for that. I also paid my taxes for the local school district to support the public school system.
6 7	JUDGE:	Today, what is no longer public? If I'm given the money, and I want to send my daughter to a school, an Episcopalian school let's say, is that now a public school?
8	LYONS:	No.
9	JUDGE:	Why not?
10 11	LYONS:	Because your daughter in that circumstance is a public student electing to attend, at your election or hers, electing to attend a private school.
12 13 14 15	JUDGE:	Sure. Now if we lived in Douglas County and Douglas County gave me some money, and I decided to use that money to send my daughter to this same Episcopalian school, would that be a free public education? Would that be a public education?
16	LYONS:	In part, it would be.
17	JUDGE:	That would be a public education?
18 19	LYONS:	In part, it would be because I don't think your stipend is probably going to cover the total tuition costs. So you're going to have to come out of pocket.
20 21 22 23	JUDGE:	Sure, but that would be a public education. So what you're saying is, all education is now is public education as long as we give the parents the money, and they can exercise their choice as to how they want to buy or choose their education. Is that right?
24 25 26 27 28 29 30 31 32 33 34 35 36 37	LYONS:	Well, let me try it a little differently. I'll try to be responsive. The effort here is for Douglas County to continue to provide the high quality of education to those students in its public institutions who choose to use them. And I think the record's pretty clear, they do a good job. They have decided in their discretion, which they have under the School Finance Act and within the state constitutional provisions for local control, to offer a pilot program to see if the quality of the education they offer throughout the district can be improved by competition. That was the testimony of Mr. Carson, President of the School Board at the time. So what happens here is, your daughter, living in Douglas County, is a public school student. If she qualifies and participates in the Choice Scholarship Program, she gets a stipend, public money, which she can use privately. That's what's changed. But it hasn't affected the responsibility of the school district to provide a full and free, fair public education for those who choose not to be in the program. And it doesn't diminish by a nickel the school system's ability to do that.

1 JUDGE: Thank you.

2 LYONS: Let me just take a moment on a couple of other issues. Mr. McCarthy talked about
3 there being a violation of the Charter School Act here. I would suggest to you that's a
4 red herring. The trial testimony was, the charter school was formed here, mostly as
5 an administrative convenience so that the students who were part of this program
6 could be tracked by Douglas County in terms of their performance, their curriculum,
7 the requirement for state testing and the like. Are there are other ways to do it?
8 Probably. But that's the way that they chose, and that was their discretion and their
9 right. The charter school here is public because it deals with public students who are
10 making a private choice. It is clearly nonsectarian and nonreligious. This program is
11 entirely neutral when it comes to religion. That's undisputed.

12 JUDGE: I guess the question is, how is it even a school as opposed to just a transfer agent?

13 LYONS: Well, first of all, there's a broad definition of what is a school under the Charter
14 School Act. And it embraces, for example, the fact that Douglas County, as do some
15 other school district, has online programs that are administered by the school district
16 through a charter school mechanism. So it's an administrative convenience. Could it
17 be done another way with school coding or some other way of tracking these
18 students? Probably. But that's up to Douglas County to decide. Point one. Point
19 two. This whole attack on the charter schools was not made until this Court. It
20 wasn't developed at the trial court; it wasn't raised at the Court of Appeals; it's being
21 presented to you for the first time. There's no record for support of this, and your
22 juris prudence is pretty clear that you don't consider issues first raised on appeal in
23 this courtroom. With regard to standing, let's set aside for a moment the first prong
24 of *Wimberly* and just look at the second one, which is, that there's an implied right of
25 action. That's their only answer to your question, Justice Hobbs. There is no implied
26 right of action here. Take the *Parfrey* case. *Parfrey* implied a right of action for an
27 individual insured to sue an insurance company, not to sue the government. And to
28 make it even clearer, this Court said in *Parfrey* citing *Magness*: "There is no
29 legislative intent to imply a private request of action for administrative remedies.
30 Rules and regulations exist to enforce the Act." That's precisely the case here. There
31 are a number of opportunities for the Colorado Department of Education to enforce
32 this Act. But you have to keep in mind, they were enjoined, like we were, from going
33 forward with the program. So they've not had an opportunity to fund the program, to
34 consider whether they're going to fund the program; they've not had an opportunity
35 to audit the program, which they have the right to do; and they do have the right to
36 claw it back. What do they claw it back from?

37 JUDGE: Excuse me, if I might interrupt you, it seems to me though that the record reflects that
38 the Department was acting, at least in concert, with the district in order to set this
39 program up. So the extent Plaintiffs are saying, if that's the enforcing body and the
40 enforcing body is complicit in this program and yet there seems to be perhaps or at
41 least there's arguably a challenge to that, who else could possibly have ____________
42 except the students and parents of students who would be affected?

1 LYONS: Well, I think you can start with the proposition that there is not a private right of
2 action for every governmental action that's taken, express or implied. Let's at least
3 start with that. Secondly, the Department of Education had no opportunity yet to do
4 its job. Yes, they were consulted on several occasions as this program was being
5 developed. There's no question about that. But that doesn't make them complicit.
6 They're simply doing their job. With a school district that comes to them and says,
7 we'd like to do this. You're the Department of Education. You're our funding
8 mechanism.

9 JUDGE: But there's no indication.

10 LYONS: We want to make sure you're satisfied.

11 JUDGE: There's certainly no indication, correct me if I'm wrong. But there doesn't seem to
12 be any indication from the Department that they had any problems with the way this
13 was set up.

14 LYONS: No, but as I say, this program was enjoined in August. The headcount day for
15 schools is in October. The ability to audit it comes at the end of the headcount. And
16 after the audit, the ability to claw it back comes in the first part of the following year.
17 None of that was allowed to happen. So for the Plaintiffs to argue that the
18 enforcement mechanisms are not adequate strikes me as a little inconsistent with the
19 fact that they enjoined the Colorado Department of Education from even using them.
20 And that's the state of the record at the moment. With regard to an argument that's
21 been made about Article IX § 3, the School Trust, I think one way to look at that, it
22 may be a bad example, is sort of like social security. The school trust funds are in a
23 lockbox, and that's to keep them from use by the legislature or the executive branch
24 for any other purpose: transportation, prisons, whatever else the state needs to fund.
25 The beneficiary of the funds in that lockbox are the school districts. That's what
26 Article IX § 3 says. Once those funds come out, then the school district has
27 constitutional authority under local control, has statutory discretion under the School
28 Finance Act to use those funds. You can also make the argument, as we did in our
29 papers, that like any trust, when the money leaves the trust and goes to the
30 beneficiary, it's no longer burdened by the trust. But we're not resting on that
31 argument.

32 JUDGE: I thought the whole thing is seeding those two sections of every township or whatever
33 it is. Maybe it's vice-a-versa. You know. And the _________ lands was a
34 dedication by the federal government for the perpetual support of the public schools.
35 Isn't that what it says?

36 LYONS: And they are, and they are.

37 JUDGE: Well, that goes back to the Chief's question about whether we really have public
38 schools here.

39 LYONS: Again, Justice Hobbs, these are public school students who are being given a private
40 choice to use, frankly, less money than they otherwise would get the benefit of if they
41 stayed in the public school system and elect a private option with no adverse effect on

1 anyone anywhere else, either in Douglas County or any of the other 190 some odd
2 school districts around the country. So maybe one way to look at it is, it's back to the
3 central thrust of *Americans United*. Who benefits here? Who is this designed to
4 benefit? Well, in the case of Article IX § 3, it's the school districts that are designed
5 to be benefitted. And after that, our Constitution is pretty clear and our statutes are
6 pretty clear, it's up to the school district how to use those monies. As far as the 2%
7 that this really accounts for, the Court of Appeals made a couple of suggestions as to
8 how that could be dealt with. You can either include it in the 25% that's retained or
9 you can regard the 98% that is funded as not including the 2%. I think that misses the
10 point to some extent, although we were successful in the Court of Appeals so I'm
11 hesitant to be too critical. The fact of the matter is, I think the lockbox analysis of
12 this money and who is the beneficiary and how they're entitled to use it pretty much
13 settles the question. So let me say two things and then give the rest of my time to
14 Mr. Bindas. First of all, as I've said, this is a pilot program that was enjoined in
15 2001, literally on the eve of the school year. The program was interrupted. We were
16 in the process, as the record shows, of talking to any number of private schools,
17 religious and nonreligious, and we were enjoined from going forward, required to
18 give the money back as a matter fact and get the money back. The Choice
19 Scholarship Program in Douglas County, to your question, Justice Hood, does impact
20 dozens of other programs in this state. Thousands of other students who participate in
21 programs which have a very fundamental common ground; they all use public money
22 at private schools. And we've set them all out in our brief, pp. 6-10 of our Answer
23 Brief, and they range from preschool programs to K-12 programs. Denver, for
24 example, has contracted with as many as three private schools to provide and meet its
25 obligation for public education. And, of course, at the higher education level, we
26 have the Colorado Opportunity Fund, which gives a stipend to students to use
27 wherever they choose at whatever institution of higher education they choose. All of
28 those programs will be thrown into chaos and certainly at a minimum placed in
29 jeopardy if this Court decides to reinterpret *Americans United* and to ignore, as the
30 Plaintiffs would have you do, the federal juris prudence that's developed in the choice
31 area. And only look at three: *Mitchell*, *Zelman* and *Locke*. Unless there are any
32 further questions, I'd like to give the remainder of my time, 7 minutes, to Mr. Bindas.

33 JUDGE: You may do so, Mr. Lyons. Mr. Bindas, you have 7 minutes and 8 seconds.

34 BINDAS: I'll try to make the most of it, Your Honor. May it please the Court. This
35 misinterpretation of the state religion provisions would violate the federal
36 Constitution's command of neutrality toward religion. A long line of cases from
37 *Everson* to *Lukumi* to *Rosenberger* to *Mitchell* make clear that singling out religion
38 for unfavorable treatment including excluding religious options from student aid
39 programs is impermissible under the First Amendment. Fortunately, this Court can
40 avoid that federal constitutional problem very simply. By simply holding, as it
41 already did in *Americans United* that religious options alongside nonreligious options
42 are perfectly permissible in student aid programs.

43 JUDGE: And we have to do a certain amount of surgery on the Colorado Constitution to
44 accomplish what you're suggesting, however, don't we?

1 BINDAS: Not at all, Your Honor.

2 JUDGE: Why's that?

3 BINDAS: Your Honor, with respect to the no aid provision, the no aid provision speaks to
4 funding to aid religious institutions. As Mr. Lyons ably demonstrated, this program
5 aids students. To accept the Petitioners' argument would be akin to saying that
6 Medicaid is a program designed to aid doctors and hospitals. No, it's a program
7 designed to aid people with medical needs. The Douglas County Scholarship
8 Program is a program designed to help people with educational needs so it would
9 require no surgery to the state constitutional provisions, Your Honor. As this Court
10 recognized in *Americans United*, the hallmark of the federal Constitution is neutrality
11 toward religion. And for that reason, the Court has repeatedly made clear that
12 government cannot exclude religion from educational aid programs that are otherwise
13 neutral and generally available. For example, *Everson v. Board of Education*, the
14 court held that to exclude members of any faith because of their faith or lack of it
15 from receiving the benefits of public welfare legislation would violate the free
16 exercise clause. More recently, the four justice plurality that Mr. Lyons mentioned in
17 *Mitchell v. Helms*, the court explained that the court's juris prudence "prohibits
18 governments from discriminating in the distribution of public benefits based upon
19 religious status." Yet that is precisely what Colorado's religion provision would do if
20 interpreted as Petitioners suggest. Now, in addition to that free exercise problem,
21 there's another significant problem here, and that is the equal protection problem.
22 Because as the Supreme Court held in *Romer v. Evans* in striking down a Colorado
23 constitutional provision, the Equal Protection Clause prohibits government from
24 making it more difficult for one class of citizens than for all others to seek aid from
25 the government, especially, but not only, but especially when that disadvantage was
26 born of animosity. Again, if interpreted as Petitioners' suggest, Colorado's religion
27 provisions would do exactly that; they would make it more difficult, in fact
28 impossible, for parents who desire a religious education for their children to seek aid
29 from their government. And, moreover, that disadvantage will have been born of
30 animosity.

31 JUDGE: If you don't mind if I might interrupt you. I'm struggling a little bit with the angle in
32 which your argument is coming from because it seems to suggest almost that Douglas
33 is, in fact, affirmatively required to fund this type of program. Am I
34 misunderstanding your position?

35 BINDAS: With all due respect, yes, Your Honor. We're not all suggesting that government is
36 compelled to fund private options. Government absolutely may do so, but
37 government can permissibly draw distinctions between public and private. Yet
38 government may not draw distinctions between religious and nonreligious.

39 JUDGE: Right, but under that theory, the point would be, if Douglas were to implement a
40 voucher program and only apply it to nonsectarian schools, that could be a problem.
41 In other words, to exclude religious schools from the voucher program. But that's not
42 the situation here. The question would be, you're not suggesting that Douglas is
43 affirmatively required to enact or implement a voucher program, are you?

1 BINDAS: No, Your Honor.

2 JUDGE: So it could choose to do nothing, and that would be not a problem?

3 BINDAS: Correct, Your Honor. However, when government chooses, and there's no question
4 that under the federal Constitution, Douglas County is perfectly within its realm to
5 adopt this program. When government does choose to provide this type of public
6 benefit, it is clear from *Everson*, from *Lukumi*, from *Rosenberger*, from *Mitchell* that
7 it has to do so evenhandedly with respect to religion.

8 JUDGE: And in that sense, you're saying the Section VII provision cannot come into play to
9 draw distinctions between private and religious schools?

10 BINDAS: Well, Your Honor, Section VII, first of all, doesn't speak to programs that aid
11 students, which is what this program is. It was intended to, its purpose was and its
12 impact initially was, to preserve; and the Beckett Fund had mentioned in our briefs,
13 the generic religious nature of the public schools at the time, and prevent government
14 funding of catholic schools, institutional aid to catholic schools. That's what that
15 provision is meant by the framers to do. Now, putting aside whether that's
16 permissible or not, that's not what's going on here. This is a program designed to aid
17 students, to help Douglas County families achieve the best education for their
18 children. And Douglas County has seen fit to provide a broad array of options,
19 religious and nonreligious. They include some of the things that Mr. Lyons
20 mentioned: charter schools, contract schools, home educational opportunities, option
21 schools, open enrollment, magnet schools, and the Choice Scholarship Program. This
22 is one option among many that Douglas County provides to families so that they can
23 get the best education to meet the unique and individualized needs of their children.
24 It's hardly surprising given these federal constitutional problems that I've mentioned
25 that the Tenth Circuit as well as the Fourth, Sixth and Eighth have all held religious
26 exclusions from educational aid programs impermissible under either or both the Free
27 Exercise Clause and the Equal Protection Clause. Fortunately, as I mentioned at the
28 beginning, this Court can and should avoid these problems. It just has to simply take
29 the very prudent approach that the Court of Appeals took. To interpret the state
30 provisions is requiring the same neutrality as the federal provisions in allowing
31 religious options alongside nonreligious options in student aid programs. Thank you,
32 Your Honors.

33 JUDGE: Thank you very much, Mr. Bindas. Counsel?

34 McCARTHY: Thank you, Your Honor. We're going to try to do a quick change here. The
35 invalidity of the charter school under the statute is key here, and the factual
36 foundation in the record to establish the invalidity of the charter school, the fact that it
37 was sectarian, that it was religious, that it was private; that foundation is established,
38 this Court can confirm that factual foundation by looking at the testimony that you
39 will find in the record for Mr. Carson, who is the Chairman of the School Board,
40 Ms. Celania-Fagen, who was the Superintendent, Mr. Cutter. I implore this Court to
41 look, re-cross-examine those individuals at trial, and we established from them under
42 oath that this so-called charter school had no classrooms; it had no books; and, in fact,
43 it was exactly what Chief Justice Rice called it: it was no more than a transfer agent.

1 It was an artifice. And without that artifice, Douglas County can't claim this money.
2 And that's the key point here. The reason why they created this charter school, but
3 they created it just as a transfer agent, was so that they could say that these students
4 who were, in fact, pupils at Valor Christian or Regis or Mullen, some of the well-
5 known and respected private institutions in this community; but they were students un
6 those schools. They said, no, they really weren't. Turn a blind eye to this. What
7 they really were, were they were students of this charter school that had no
8 classrooms, that had no books, that had no principal; and that goes back to what the
9 central funding mechanism is, and it is pupil count. And unless they could claim
10 these students as part of the pupil count, they couldn't claim the money. And that's
11 the critical point here, Your Honor. And if the charter school is invalid because it is,
12 when you look at where these children are actually being educated, it's sectarian, it's
13 private, it's religious; because that's where they were, in fact, going to school. Then
14 the charter school collapses, and the whole program collapses.

15 JUDGE: We're over here.

16 McCARTHY: I'm sorry, Your Honor.

17 JUDGE: That's alright. But isn't that for the State Board of Education to make that
18 determination that it's a sham? Isn't that the whole point? No, you're just creating
19 this to get our money.

20 McCARTHY: Your Honor, this goes back to the point that I made in my earlier argument. I believe
21 Justice Marquez alluded to this. What we have established and a big part of what we
22 were showing in the trial court, Your Honor, was the fact that the Department of
23 Education had already pre-decided this. They had already concluded, not only that
24 this program was okay, but that they were going to do everything they possibly could
25 to make sure that it would be approved. And the one thing I will also add to that,
26 Your Honor, the procedural context. This money was already going out the door. At
27 the time we had our preliminary injunction hearing, $200,000 had already been paid
28 over to private schools. And so by the time the Department of Education, even if they
29 were going to wash away everything they, in fact, said on the record and start from
30 scratch; the money would already be in the hands of the private schools and it would
31 be beyond the claw back power of the Department of Education to get it back.

32 JUDGE: But it's their job to do that, yes or no? You just don't think they're going to do it.

33 McCARTHY: They said they weren't going to do it, Your Honor, with all due respect.

34 JUDGE: My question is, is that's their responsibility ultimately. You're just saying they're not
35 going to live up to that responsibility, correct?

36 McCARTHY: It's their responsibility if they had the tools to do it. And that's an important
37 qualification, Your Honor, because it goes back to the regulations. And the
38 regulations that the Court of Appeals relied upon just don't speak to this kind of a
39 situation because it's so audacious. It's like an ultra vires act. And it is really beyond
40 anything, if you look at those regs, it's beyond anything that those regs contemplate.
41 So in a sense, it's not something that the regs say that they have to do because it's not

1 addressed in the regulations. That's the best answer I think I can give you, Your
2 Honor.

3 JUDGE: Thank you.

4 McCARTHY: I'm almost out, but I'll turn it over to Mr. Douglas.

5 JUDGE: Mr. Douglas.

6 DOUGLAS: Thank you, Your Honor. We're getting low on time. First of all, the federal First
7 Amendment issues that were discussed by Mr. Bindas have been squarely rejected by
8 federal courts. The U.S. Supreme Court in *Locke* and the First Circuit in *Eulitt*
9 squarely rejected the precise argument that Mr. Bindas made under both the Free
10 Exercise and Equal Protection Clauses in the context of exclusion of religious
11 education from funding programs. It said that it may be permissible to fund those
12 under the First Amendment, but state constitutions can, in fact, exclude religion and
13 religious education; and that's exactly what we have here. So that falls then back to,
14 it's not really aid to the student. First of all, the facts before this Court show that's
15 not the case. The Arizona and Florida courts that struck down voucher programs
16 there, said it well in that it may be aid to the student; but it's also material aid to the
17 institution. That's what the facts show here. Mr. Lyons also said that was the central
18 thrust of the *Americans United* decision, was it was not aid to the student. If that
19 were the case, this Court would not have had to reserve the question of whether there
20 might be a violation of Section VII if Regis College is, in fact, controlled. Because if
21 it were enough to say, well this isn't aid to the institution, this Court could have
22 stopped there. But it didn't. It reserved that question because there could be a
23 violation even it was designed to go to the student. And the link that they say is
24 broken is, again, First Amendment juris prudence. It breaks the link of government
25 endorsement. It does not. Choice and neutrality do not break any links in Article IX
26 § 7. The First Amendment is 10 words long. I apologize. I'm out of time.

27 JUDGE: I'm sorry too. Thank you. I have to stop you. Alright. This case has been argued
28 very ably by all counsel, and we want to thank you. Mr. McCarthy, Mr. Douglas,
29 Mr. Lyons and Mr. Bindas. The case will be submitted, and we'll be in recess until
30 tomorrow morning at 9:00 a.m.