COLORADO SUPREME COURT
Two East 14th Avenue
Denver, CO 80203

Court of Appeals, State of Colorado
Hon. Jerry N. Jones, Dennis Graham, and Steve Bernard
Case Nos. 11CA1856 and 11CA1857

District Court, City and County of Denver
Hon. Michael A. Martinez
Case Nos. 2011CV4424 and 2011CV4427

Petitioners: Taxpayers for Public Education; Cindra S. Barnard; Mason S. Barnard; James LaRue; Suzanne T. Larue; Interfaith Alliance of Colorado; Rabbi Joel R. Schwartzman; Reverend Malcolm Himschoot; Kevin Leung; Christian Moreau; Maritza Carrera; and Susan McMahon,

v.

Respondents: Douglas County School District; Douglas County Board of Education; Colorado State Board of Education; and Colorado Department of Education,

and

Intervenors-Respondents: Florence and Derrick Doyle, on their own behalf and as next friends of their children, A.D. and D.D.; Diana and Mark Oakley, on their own behalf and as next friends of their child, N.O.; Jeanette Strohm-Anderson and Mark Anderson, on their own behalf and as next friends of their child, M.A.

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ANSWER BRIEF OF INTERVENOR-RESPONDENT FAMILIES

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules, as amended by this Court's April 9, 2014 order. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g), as amended by this Court's April 9, 2014 order.

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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, as amended by this Court's April 9, 2014 order.

S/ Michael E. Bindas

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INTRODUCTION

The Choice Scholarship Program empowers parents to exercise their constitutional right "to direct the … education of [their] children." *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925). Upset that some parents choose religious schools for their children, Petitioners sued to deprive students of their scholarships and the educational opportunities they afford. They based their suit on interpretations of the Colorado Constitution's religion provisions that this Court rejected in *Americans United for Separation of Church and State Fund, Inc. v. State*, 648 P.2d 1072 (Colo. 1982).

The Court of Appeals straightforwardly applied *Americans United* to uphold the Program. Federal constitutional jurisprudence not only supports that decision—it *prohibits* a contrary one. This Court should accordingly affirm.

ISSUE PRESENTED

Is the Choice Scholarship Program permissible under Article II, section 4 and Article IX, sections 7 and 8 of the Colorado Constitution?[1]

[1] Intervenor-Respondents adopt Respondents' briefing on Article IX, section 3 and the Public School Finance Act.

COUNTERSTATEMENT OF THE CASE

The Douglas County Board of Education created the Choice Scholarship Program ("Program") to expand educational opportunities for students in the Douglas County School District. Ex. 1 (Tr. 13:20-25) ¶¶A.1-.3. On June 21, 2011, however, two groups of plaintiffs filed later-consolidated lawsuits challenging the Program. Naming the Board, District, and Colorado Department and Board of Education as defendants, they alleged the Program violates the Colorado Constitution's religion provisions (Article II, section 4 and Article IX, sections 7 and 8), as well as Article IX, section 3 and the Public School Finance Act ("Act"). ID#40243226, pp.1-22; ID#40255768, pp.65-84.

The Oakley, Doyle, and Anderson families (collectively, "Families"), who had children participating in the Program, intervened as defendants. They asserted an affirmative defense that "exclusion of religious schools from an otherwise neutral program would violate the Free Exercise, Establishment, Free Speech, and Equal Protection Clauses of the United States Constitution." ID#40492890, p.235.

The plaintiffs moved for a preliminary injunction. ID#40601133, pp.396-419; ID#40601853, pp.538-74. On August 12, 2011, the District Court issued an injunction and sua sponte made it permanent, holding the Program violates the

religion provisions, as well as Article IX, section 3 and the Act. ID#41656000, pp.2516-31, 2533-36, 2540-43.

The Families, alongside the County and State defendants, appealed, and on February 28, 2013, the Court of Appeals reversed. *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, Nos. 11CA1856 & 11CA1857, 2013 WL 791140 (Feb. 28, 2013) ("*Taxpayers*"). It held the "plaintiffs do not have standing to seek redress for a claimed violation of the Act, and that the [Program] does not violate any of the constitutional provisions on which plaintiffs rely." *Id.* at *1. Judge Bernard dissented solely on the Article IX, section 7 claim. *Id.* at *21.

The plaintiffs petitioned for certiorari, which this Court granted.

COUNTERSTATEMENT OF FACTS

I. The Choice Scholarship Program

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

Parents may use the scholarship to send their child to any private school participating in the Program that has accepted the student. *Id.* ¶D.2. (For

administrative purposes, students are also enrolled in the Choice Scholarship School, a District charter school. Tr., p.571:3-9.) Private schools inside and outside District boundaries may participate. Ex. 1, ¶E.1.

The Program is religion-neutral, allowing religious[2] and non-religious schools to participate and allowing parents to choose their child's school. It is only by the private, independent choice of parents that scholarship monies flow to any school.

Scholarships are capped at the lesser of the private school's tuition or 75 percent of per-pupil revenue under state law. *Id.* ¶C.6. The District distributes funds in a series of four checks made out to parents and sent to their chosen private school. Parents must restrictively endorse the checks to the school for the purpose of paying tuition. *Id.* ¶¶C.3-.4.

II. The Families

The Oakleys, Doyles, and Andersons each have at least one child who received a scholarship. Each chose a different participating school.

The Oakleys have a son, N.O., with special needs. Tr. 784:10-787:5. He was not succeeding in his District school and had to repeat fifth grade. Tr. 785:21-

[2] Religious schools must afford scholarship students the option of not participating in religious services. Ex. 1, ¶E.3.l.

786:8; ID #41153741, p.2070:¶8. The following year, he was assaulted by another student. Tr. 787:6-9. The Oakleys applied for and received a scholarship; they chose to send N.O. to Humanex Academy, a non-religious school for special-needs children. Tr. 789:22-790:22.

The Doyles have twins, A.D. and D.D., who attended District elementary and middle schools. For high school, however, the Doyles wanted them to attend Regis Jesuit, a Catholic school. ID#41154048, p.2080:¶¶2-3. They were attracted to Regis's challenging curriculum and wanted to provide their children a spiritual foundation before college. *Id.*, pp.2080-81:¶3. They chose to use their scholarships at Regis. *Id.*, p.2081:¶¶5-6.

The Andersons were very involved at the District school their son, M.A., attended; Jeanette Anderson was even president of its Parent Teacher Organization. ID#41153945, p.2077:¶¶2-3. However, they became increasingly unhappy with its curriculum, particularly its "reform" math approach. *Id.*, p.2077:¶4. Accordingly, they chose to use their scholarship at Woodlands Academy, a non-religious school with a strong math curriculum. *Id.*, p.2077:¶¶5-7.

Three families choosing three different schools for three different—but equally valid—reasons: that is precisely what the Choice Scholarship Program was designed to accommodate.

STANDARD OF REVIEW

The Families agree that constitutional issues are reviewed de novo and that the issues presented were preserved.

SUMMARY OF ARGUMENT

Proper application of the Colorado Constitution's religion provisions requires a correct understanding of the role parents play in the Choice Scholarship Program. Under the Program, parents—not government—choose the schools their children attend. The Program thus empowers parents to exercise their fundamental right "to have their children taught where, when, how, what, and by whom they may judge best," *Vollmar v. Stanley*, 255 P. 610, 613 (Colo. 1927), *overruled on other grounds by Conrad v. City and Cnty. of Denver*, 656 P.2d 662 (Colo. 1982), while ensuring that the separation of government and religion required by Colorado's religion provisions is maintained.

The Court of Appeals was correct in upholding the Program for three reasons. First, in *Americans United*, this Court upheld the constitutionality of student-aid programs with religious options, rejecting the very arguments Petitioners advance here. Other state supreme courts have rejected similar challenges to student-aid programs indistinguishable from Douglas County's.

Second, two of the three religion provisions at issue are "Blaine" provisions—products of anti-Catholic bigotry intended to preserve the Protestant nature of nineteenth-century public schools and prevent direct funding of Catholic schools. Extending their reach to exclude religious options from student-aid programs would extend the animus attending their enactment.

Finally, Petitioners' interpretation of Colorado's religion provisions violates the federal Free Exercise, Equal Protection, and Establishment Clauses. The Court of Appeals correctly construed the state provisions as consistent—not at loggerheads—with the U.S. Constitution.

ARGUMENT

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

This Court endeavors to construe Colorado's religion provisions consistent with those of the U.S. Constitution. It is significant, then, that in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), which Petitioners do not acknowledge, the U.S. Supreme Court rejected an Establishment Clause challenge to a scholarship program indistinguishable from Douglas County's. In *Zelman*, children in the Cleveland School District received scholarships they could use to attend private schools. *Id.* at 653. A large majority of participating schools were religious, and the overwhelming majority of students selected religious schools. *Id.* at 657-58.

The Court nevertheless upheld the program because it was: (1) "neutral with respect to religion, … permit[ting] the participation of all schools within the district, religious or nonreligious"; and (2) a program of "true private choice," providing a benefit "to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice." *Id.* at 652, 653. *Zelman* culminated a long line of cases upholding neutral student-aid programs that operate on private choice. *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983).

Thus, "[i]t is now settled that the Establishment Clause permits evenhanded funding of education—religious and secular—through student scholarships." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1253 (10th Cir. 2008). Petitioners' only hope, therefore, is to convince this Court to reinterpret the *state* religion provisions as far more restrictive. This Court should decline that invitation.

A. The Program Does Not Violate Article II, Section 4 or Article IX, Section 7

The Program does not violate Article II, section 4 or Article IX, section 7 of the Colorado Constitution. In fact, this Court upheld a similar student-aid program under those provisions in *Americans United*. Although Petitioners attempt to

distinguish that case, their attempts fail. Moreover, the highest courts of other states have upheld indistinguishable scholarship programs under analogous state constitutional provisions.

1. In *Americans United*, This Court Upheld A Similar Program Under Article II, Section 4 And Article IX, Section 7

In *Americans United*, plaintiffs brought an Article II, section 4 and Article IX, section 7 challenge to a postsecondary student-grant program that allowed religious schools to participate. They argued the program violated Article II, section 4 because it "compel[led] Colorado taxpayers to support sectarian institutions," and Article IX, section 7 because it constituted an "appropriation to help support or sustain schools controlled by churches or sectarian denominations." *Ams. United*, 648 P.2d at 1081, 1083. This Court rejected both contentions.

The Court began its disposition of the Article II, section 4 claim by stressing that that provision "embod[ies] the same values … secured by the [federal] religious clauses"—that is, that it "echoes the principle of constitutional neutrality underscoring the First Amendment." *Id.* at 1081-82. In an analysis prefiguring *Zelman*, it upheld the program because it was "essentially neutral in character" and "designed for the benefit of the student, not the educational institution." *Id.* at 1082.

The Court disposed of the Article IX, section 7 claim similarly, holding that because the program "[wa]s designed to assist the student," it did not constitute an "appropriation to help support or sustain schools controlled by churches or sectarian denominations." *Id.* at 1083. Any benefit flowing to a religious institution as a result of student choice, the Court explained, is "remote and incidental" and "does not constitute … aid to the institution itself." *Id.* at 1083-84.

The same is true here. Even the District Court recognized the Program is designed "for the benefit of the students, not the benefit of the private religious schools." ID#41656000, p.2524. And as the Court of Appeals held, it "is neutral toward religion." Funds "make their way to private schools with religious affiliation by means of personal choices of students' parents," and "any benefit to the participating schools" is merely "incidental." *Taxpayers*, at *17; *see also id.* at **13-14.[3] These characteristics render the Program constitutional under Article II, section 4 and Article IX, section 7.

[3] Although Petitioners suggest that making scholarship checks payable to parents, for endorsement to schools, is a ruse to "indirectly" aid religious schools, Opening Br. 46, it is a common method of disbursing scholarship funds. *E.g.*, *Zelman*, 536 U.S. at 646. The argument that it is "some type of 'sham' to funnel public funds to sectarian private schools" has been rejected. *Jackson v. Benson*, 578 N.W.2d 602, 618 (Wis. 1998). Moreover, the New York Court of Appeals rejected the similar argument that a textbook loan program for students was a "nefarious scheme" to fund religious schools. *Bd. of Educ. v. Allen*, 228 N.E.2d 791, 794 (N.Y. 1967), *aff'd*, 392 U.S. 236 (1968). New York's constitution, unlike Colorado's, expressly

2. Petitioners' Attempts to Distinguish *Americans United* Are Unavailing

Faced with *Americans United*, Petitioners attempt to distinguish the Program from the one in that case. Each attempted distinction is incorrect or immaterial.

a. The Elementary/Secondary Nature Of The Program Is Immaterial

Petitioners first attempt to distinguish *Americans United* by noting the program there was for postsecondary students, whereas here it is for students in elementary and secondary schools. Petitioners complain that the latter are more "religious" and "indoctrinat[ing]." Opening Br. 59-60 (internal quotation marks omitted).

The elementary/secondary versus postsecondary distinction is one without a difference. Although *Americans United* noted the postsecondary nature of the program there, it did so because "the Supreme Court ha[d] recognized significant differences between the religious aspects of church-affiliated institutions of higher education, on the one hand, and parochial elementary and secondary schools on the other." *Ams. United*, 648 P.2d at 1079. Since then, the Court has clarified that those differences have no bearing on programs designed to assist students, rather

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prohibits "indirect" aid to religious schools, yet the court found no violation, finding the program was "meant to bestow a public benefit upon … school children." *Id.*

than schools, and, in that light, has upheld elementary and secondary student-aid programs with religious options. *E.g.*, *Zelman*, 536 U.S. at 649; *Zobrest*, 509 U.S. 1; *Mueller*, 463 U.S. 388.

Moreover, Petitioners' argument—that religiously-affiliated elementary and secondary schools are *more* religious than religiously-affiliated postsecondary schools—is simply an invocation of the now-discarded "pervasively sectarian" doctrine. It is now settled that the religiosity of schools participating in student-aid programs is constitutionally irrelevant, *see Zelman*, 536 U.S. at 652-53, 658, and the federal Constitution *forbids* its consideration. *Colorado Christian Univ.*, 534 F.3d at 1261-69. Although federal jurisprudence once required exclusion of "pervasively sectarian" schools from *institutional*-aid programs, the Supreme Court abandoned even that requirement as inconsistent with its decisions "prohibit[ing] governments from discriminating in the distribution of public benefits based upon religious status." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality). Thus, in *Colorado Christian University v. Weaver*, the Tenth Circuit struck down, under the U.S. Constitution, a "pervasively sectarian" exclusion in Colorado's postsecondary scholarship programs. 534 F.3d at 1261-69. This Court should not countenance Petitioners' attempt to resurrect the "pervasively sectarian" doctrine here.

b. The Percentage of Religious Schools Participating Is Irrelevant

Petitioners next attempt to distinguish *Americans United* on the ground that, there, aid "could be used at both public and private institutions," whereas, here, it must be used at private schools, the "vast majority" of which are religious. Opening Br. 60. This, too, is a distinction without a difference.

First, the Program is one option among many. As in *Zelman*, it is "part of a broader undertaking … to enhance the educational options of … schoolchildren." *Zelman*, 536 U.S. at 647. In *Zelman*, that undertaking included community schools, magnet schools, and tutoring aid. *Id.* at 647. Here, it is far broader, "including open enrollment, option schools, magnet schools, charter schools, on-line programs, home-education programs and partnerships, and contract schools." Ex. 1, ¶A.2. This array provides "genuine opportunities for … parents to select secular educational options for their school-age children." *Zelman*, 536 U.S. at 655; *see also Jackson* 578 N.W.2d at 617-18.

Petitioners ignore these options, focusing myopically on the percentage of scholarship recipients who choose religious schools. Here, again, *Zelman* is instructive. Under the scholarship program there, 82 percent of participating schools were religious, and 96 percent of students selected religious schools. *Zelman*, 536 U.S. at 657-58. The Court held that those figures—which are *higher*

than in this case, *see* ID#41656000, p.2489 ¶¶35, 37—had no constitutional significance. The constitutionality of a student-aid program "simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school." *Zelman*, 536 U.S. at 658.

c. The Program Has Adequate Safeguards

Petitioners' next attempt to distinguish *Americans United*—their claim that the Program lacks safeguards to ensure funds are properly spent—fares no better. *See* Opening Br. 61. First, contrary to their assertion, the Program does *not* permit participating schools to reduce student aid; "the District's Assistant Superintendent testified that any school which would reduce its financial aid to a participating student … would be in violation of the [Program]." *Taxpayers*, at *14. Second, even the District Court recognized the Program has "a check and balance system whereby Douglas County retains a right to periodically review … financial records of the Private School Partners participating in the program." ID#41656000, p.2520. The Program, in short, has adequate safeguards.

d. Other Factors Considered In *Americans United* Are Now Constitutionally-Proscribed

Finally, Petitioners unsuccessfully attempt to distinguish *Americans United* on the ground that the program there had certain requirements for participating

schools that are absent here—specifically, that in that program, schools could not have governing boards from one religion, receive funds primarily from sources advocating one religion, limit enrollment to students of one religion, or require attendance at religious services. *See* Opening Br. 59, 61. As this Court explained, however, those requirements were established "to conform to First Amendment doctrine developed by the United States Supreme Court." *Ams. United*, 648 P.2d at 1075. First Amendment jurisprudence has now progressed and, today, exclusion of such institutions from student-aid programs not only is not required—it is *prohibited*. *Colo. Christian Univ.*, 534 F.3d at 1263-66. For that reason, those criteria have been *repealed* from the program in *Americans United*. They are an illegitimate basis on which to distinguish that case.

In short, Petitioners cannot distinguish *Americans United* in any constitutionally-meaningful way. That opinion dictates the Program's constitutionality.

3. Other State Supreme Courts Addressing Similar Constitutional Provisions Have Upheld Indistinguishable Programs

Finally, other state supreme courts have upheld indistinguishable scholarship programs under state constitutional analogues to Article II, section 4 and Article IX, section 7. Just as they ignore *Zelman*, Petitioners ignore these decisions.

For example, the Wisconsin Supreme Court upheld a scholarship program for Milwaukee students against claims akin to Petitioners'. It held the program did not violate Wisconsin's "compelled support" clause because "[a] qualifying student only attends a sectarian private school under the program if the student's parent so chooses." *Jackson*, 578 N.W.2d at 623. And it held the program did not violate a constitutional prohibition on appropriations "for the benefit" of religious schools because any benefit accruing to schools is "incidental" to parental choice—not the "principal or primary effect" of the program. *Id.* at 621 (internal quotation marks omitted).

The Ohio Supreme Court rejected a similar challenge to a scholarship program for Cleveland students. It saw no compelled-support problem because the program operates on private choice. *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211-12 (Ohio 1999). And the program did not violate a provision prohibiting "religious or other sect[s]" from having any "right to, or control of," any "school funds of this state" because "[s]ectarian schools receive money … only as the result of independent decisions of parents and students." *Id.* at 212.

Finally, the Indiana Supreme Court rejected a challenge to that state's Choice Scholarship Program. It explained that Indiana's compelled-support clause "is a restraint upon government compulsion of individuals to engage in religious

practices" and held there is no such compulsion under the program. *Meredith v. Pence*, 984 N.E.2d 1213, 1225-26 (Ind. 2013). The program likewise did not violate a constitutional bar on the use of public money "for the benefit of any religious or theological institution," because "the principal actors and direct beneficiaries under the voucher program are … Indiana families." *Id.* at 1227, 1228. "*[N]o* funds may be dispersed to *any* program-eligible school without the *private, independent selection by the parents of a program-eligible student.*" *Id.* at 1229.

Petitioners do not even acknowledge these cases.[4] All of them support *Americans United*'s conclusion that religion-neutral student-aid programs are perfectly consistent with Article II, section 4 and Article IX, section 7.

[4] Petitioners cite a handful of their own state cases; all are inapposite or unpersuasive. The first, *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009), involved a constitutional provision concerning *all* private schools—not just religiously-affiliated ones. *Id.* at 1184. The second, *Bush v. Holmes*, 886 So. 2d 340 (Fla. Ct. App. 2004), held a scholarship program unconstitutional under Florida's "no aid" provision, but the Florida Supreme Court *refused* to approve that holding. *See* 919 So. 2d 392, 413 (Fla. 2006). The next, *Opinion of the Justices*, 259 N.E.2d 564 (Mass. 1970), was a non-binding advisory opinion issued under a constitutional provision more like, if anything, Colorado's Article V, section 34, which petitioners do not raise. *Id.* at 566. So, too, was *Opinion of the Justices*, 616 A.2d 478 (N.H. 1992), a non-binding advisory opinion. The next, *Almond v. Day*, 89 S.E.2d 851 (Va. 1955), is a half-century old and relied largely on now-outdated Establishment Clause jurisprudence. And *Chittenden Town School District v. Department of Education*, 738 A.2d 539 (Vt. 1999), involved a "tuitioning"

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

Finally, the Program does not violate Article IX, section 8, which provides that: (1) "[n]o religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution"; (2) "no … student of any such institution shall ever be required to attend or participate in any religious service"; and (3) "[n]o sectarian tenets or doctrines shall ever be taught in the public school." The first two proscriptions do not apply to public elementary and secondary schools. *Vollmar*, 255 P. at 615-16. Yet even if all three did, the Program implicates none of the proscriptions, which restrain government action in "public educational institution[s]" and "public school[s]"—not the actions of private citizens and private schools.

Petitioners' contrary assertion rests on the fact that participating students are enrolled for administrative purposes in the Choice Scholarship School, a public charter school. That school, however, does none of the things proscribed by Article IX, section 8.

First, admission to the school is not conditioned on any "religious test or qualification." Although admission to some participating private schools may be,

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program for towns lacking a public school—not a scholarship program providing additional options.

Article IX, section 8 does not restrain private schools. And although, *after* being admitted and enrolled in the Choice Scholarship School, a student must apply to a private school, her parents choose that school freely and independently. If any religious test or qualification is applied to any student, it is because of parental choice—not because the District required it "as a condition of admission into any public educational institution." Colo. Const. art. IX, § 8.

Nor does the Program require any student "to attend or participate in any religious service," or cause "sectarian tenets or doctrines" to "be taught in [a] public school." *Id.* Petitioners argue that students may be required to attend religious services or receive religious instruction in their private schools, *see* Opening Br. 55-58, but, again, private schools are not subject to Article IX, section 8. Moreover, no family is required to choose a religious school, much less participate in the Program. *See Meredith*, 984 N.E.2d at 1229. Any participation in religious activities or instruction is the result of parental choice, not governmental compulsion. *See Corp. of Presiding Bishop of Ch. of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 337 (1987) (holding that before Establishment Clause violation can occur, "it must be fair to say that the *government itself* has advanced religion").

Finally, the Program affords families a layer of protection beyond anything constitutionally-required, providing parents "the option of having their child receive a waiver from any required religious services at the Private School." Ex. 1, ¶E.3.l. Petitioners argue the waiver does not go far enough, Opening Br. 55-56, but private schools, chosen freely by parents, need not provide a waiver at all. *See Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (holding parents' right to direct children's education includes "inculcation of … religious beliefs"). By requiring the offer of a waiver, Douglas County *further* accommodates parental choice.

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

C. Colorado's Framers Did Not Intend To Prohibit Student-Aid Programs

In a last-ditch argument, Petitioners baldly assert that "[i]t is difficult to imagine what other words the framers of the Colorado Constitution could have chosen to more clearly communicate their intent to prohibit" a program like Douglas County's. Opening Br. 45. It is not difficult at all. The Michigan Constitution states clearly that "[n]o … tuition voucher … shall be provided … to support the attendance of any student … at any … nonpublic school." Mich.

Const. art. VIII, § 2. This language was added after the Michigan Supreme Court concluded that an earlier provision—which, like Article IX, section 7, provided that "[n]o money shall be appropriated or drawn from the treasury for the benefit of any religious sect … or religious seminary," Mich. Const. art. I, § 4—*allowed* a program for the purchase of education services from religious schools. *See Advisory Opinion re Constitutionality of P.A. 1970*, 180 N.W.2d 265 (Mich. 1970).

Had Colorado's framers intended to prohibit student-aid programs, they would have said so. As discussed below, however, student-aid programs were not on their mind. Preserving the Protestant nature of public schools—and denying direct aid to so-called "sectarian," or Catholic, schools—was.

II. Petitioners' Interpretation Of Colorado's Religion Provisions Would Extend The Anti-Catholic Animus Attending Their Enactment

Interpreting the Colorado Constitution as the Court of Appeals did was not only correct given *Americans United*, but also *necessary* to avoid effectuating and extending the anti-Catholic animus underlying two of the three religion provisions at issue: Article IX, sections 7 and 8. As educational historian Dr. Charles Glenn testified, these sections include "Blaine" provisions, adopted as state analogues to the unsuccessful federal "Blaine Amendment." Tr. 704:18-706:2. Like the Blaine Amendment, they had the discriminatory purpose of preserving the non-denominational Protestant nature of public schools and preventing direct public

funding of Catholic ("sectarian") schools. Interpreting them to require the exclusion of religious options from programs that fund *students* would not only effectuate, but *extend*, the provisions' reach and, thus, the animus attending their enactment.

The U.S. Supreme Court has recognized the Blaine movement was "born of bigotry" and called for its legacy to be "buried now." *Mitchell*, 530 U.S. at 829 (plurality); *see also Zelman*, 536 U.S. at 721 (Breyer, J., dissenting) (recognizing anti-Catholicism "played a significant role" in state Blaine provisions and that references to "'sectarian' schools … in practical terms meant Catholic"). This Court should reject any interpretation of Colorado's Blaine provisions that would resurrect that animus.

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

During the early nineteenth century, advocates for the establishment of public schools sought to ensure they would be "non-sectarian." Although, today, "non-sectarian" is understood as "non-religious," the term meant something much different then.

Public school advocates believed moral education was an integral part of schooling and "should be based upon the common elements of Christianity." R. Freeman Butts, *The American Tradition in Religion and Education* 117 (1950).

The typical public school incorporated prayer and the Bible, "both for instruction and devotionally," and "practiced a generic Protestantism." Tr. 647:13-17. Invariably, it was the King James, or Protestant, version of the Bible that was read. *E.g.*, *Vollmar*, 255 P. at 613 (upholding reading of King James Version in Weld County schools).

Creation of early public schools coincided with increased Catholic immigration. Unsurprisingly, Catholics objected to compulsory education in Protestant public schools. When efforts to obtain better treatment failed, they opposed tax levies to support the schools and, later, organized their own schools and sought equal funding. Tr. 654:8-13, 666:19-667:5. This angered Protestants, and a nativist anti-Catholicism erupted. *E.g.*, Tr. 649:16-650:6, 652:23-655:1.

This bigotry metastasized after the Civil War. In the mid-1870s, Republicans—facing the growing unpopularity of their signature issue, Reconstruction—were "looking for a new issue" to campaign on. They chose "the Catholic threat to the common public school." Tr. 658:1-13.

In September 1875, President Grant delivered a widely-publicized speech raising the specter of a "new Civil War, not over race but … over religion." Tr. 658:21-25. He urged the nation to "resist" the threat of "sectarian schooling" and

that December, days before Colorado's convention, pressed Congress to adopt a constitutional amendment to do so. Tr. 658:25-659:3, 670:23-671:5.

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

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

Congressional debate over the amendment confirmed these motives. *See* Tr. 667:6-668:19; Ex. KK (Tr. 662:22-23, 663:21-22), pp.6, 8-9. As one senator observed, with Reconstruction having run its course, Republicans sought to bring forth "another animal … to engage the attention of the people," and "the old Pope of Rome … is to be the great bull that we are all to attack." Ex. KK, p.10; *see also* Tr. 669:5-14.

Mitchell v. Helms summarized this sordid history:

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

530 U.S. at 828 (plurality).

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

Colorado was not immune from this anti-Catholicism. *See* Tr. 676:1-6, 736:11-20. The state's convention, dominated by Republicans, opened six days after Blaine proposed his amendment. It "'exemplified on a smaller scale the religious, social, and political currents of the United States as a whole.'" Ex. NN (Tr. 673:1, 697:10-11), p.13.

Whether to include Blaine language in the constitution was one of the convention's most controversial issues. Tr. 672:10-14. Numerous proposals were made to prohibit public funding of "sectarian" schools. Tr. 678:5-680:25; Ex. PP (Tr. 677:9-12, 677:13-18), pp.5-6, 8-9. For example, former territorial governor John Evans petitioned on behalf of eleven Protestant churches for provisions to keep public schools "free from sectarian" influence, prohibit diversion of funds to

Catholic schools, and allow Bible reading in public schools. Ex. PP, pp.5-6; Tr. 679:5-680:25.

Father Joseph Machebeuf, apostolic vicar and future Catholic bishop of Denver, urged the delegates not to adopt such provisions. *See* Tr. 671:17-672:8, 681:5-683:23; Ex. NN, p.14; Ex. PP, pp.13, 19-22. He stressed Catholics' loyalty to Colorado, "clearly concerned to answer the charge that Catholics were disloyal citizens" who "did not want their children … to become real Americans." Tr. 681:15-682:4; *see also* Ex. PP, pp.19-22. He noted the school-funding issue had never been reasonably discussed and implored the delegates to refrain from including Blaine language so that the "question of separate schools and denominational education" could be resolved "when the passions of this hour … have subsided." Ex. PP, pp.20-21; *see also* Tr. 682:5-683:23; Ex. NN, p.14.

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

Vigorous public discussion ensued. A *Rocky Mountain News* article warned that the "'antagonism of a certain church towards our American public school

system'" threatened to "'lay our vigorous young republic … bound with the iron fetters of superstition at the feet of a foreign despot.'" Ex. NN, p.13 (quoting *Rocky Mountain News*, Jan. 11, 1876). A *Boulder County News* editorial asked, "'[I]s it not enough that Rome dominates in Mexico and all of South America?'" Ex. NN, p.14 (quoting *Boulder County News*, Jan. 21, 1876). And a *Denver Daily Times* piece suggested the convention's debate over taxation of church property—another issue with a "perceptible undercurrent of anti-Catholic hostility," Hensel, *supra*, at 352—was retaliation for the Catholic position on schools. Ex. NN, p.12.

Unsurprisingly, the public-school establishment strongly supported inclusion of Blaine language. The Colorado Teachers' Association expressed "deep concerns about the character of the education Mexican … children were receiving" in southern Colorado, believing "an education provided by Catholic teaching orders … would not fit them to be real participants in American life." Tr. 676:12-16, 676:22-677:2; *see also* Ex. NN, p.13.

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

In the end, the delegates included Blaine language. The *Rocky Mountain News* celebrated, explaining that "'far more protestants can be got to vote for the constitution on account of this very clause than catholics for the same reason to vote against it.'" Ex. NN, p.14 (quoting *Rocky Mountain News*, Mar. 17, 1876). It was right: the people ratified the constitution overwhelmingly, "'voting up,'" as a *Boulder County News* piece said, what "'the Pope of Rome … [had] ordered voted down.'" Hensel, *supra*, at 356 (alteration and omission in original; quoting *Boulder County News*, May 12, 1876).

C. The Blaine History Is Unambiguous And Germane To This Court's Analysis

The animus underlying Colorado's Blaine provisions is clear. They were designed to preserve the Protestant nature of publicly-funded schools and prevent Catholics from obtaining funding for their own schools. Petitioners' interpretation would *extend* that animus in two ways: it would broaden the provisions' reach to encompass programs that fund *students*, rather than schools; and it would exclude *all* religious, not just Catholic, options from such programs.

Petitioners and Amicus Anti-Defamation League ("ADL") attempt to downplay the provisions' sordid history and its significance. None of the bases on which they do so is legitimate.

1. Existence Of "Proto-Blaine" Provisions Confirms The Animus Underlying Colorado's Provisions

ADL makes much of the fact that some state constitutions barred funding of "sectarian" schools before Blaine's proposal. *See* Br. ADL 23. Specifically, it notes Article IX, section 7's similarity to a provision of the Illinois Constitution enacted five years earlier. *Id.* 26. Blaine himself, however, drew from such "proto-Blaine" provisions. *See* U.S. Comm'n on Civil Rights, *School Choice: The Blaine Amendments and Anti-Catholicism* 33, 35, 43 (June 1, 2007) (testimony of Richard Komer).

Moreover, the Illinois provision's history is dripping with anti-Catholicism. The virulently anti-Catholic Know-Nothings gained substantial influence in Illinois and, in 1855, secured a law prohibiting aid to "sectarian" institutions. *See* Lloyd Jorgenson, *The State and the Non-Public School: 1825-1925* 100 (1987). The law was constitutionalized in 1870, *see* Ill. Const. of 1870 art. VIII, § 3, in a convention that, contrary to ADL's claim, was rife with anti-Catholicism. As one delegate complained, "aspersions upon … the catholic church" were common, with Catholics "misrepresented and slandered on this floor, charged with the design to overthrow the free institutions of this country." II *Debates and Proceedings of the*

Constitutional Convention of the State of Illinois 1760 (1870). That Colorado's framers may have looked to Illinois only confirms anti-Catholicism's influence.[5]

2. Supposed Evidence Of A Pro-Constitution Rally With Catholics Is Meaningless

In another effort to sow confusion, ADL notes that some Catholics "rallied in Denver in support of ratification of the state Constitution." Br. ADL 25. That does not mean they supported its Blaine provisions. Even the most ardent abolitionists among the federal Framers supported the U.S. Constitution notwithstanding its Three-Fifths, Importation, and Fugitive Slave Clauses.

Moreover, in discussing this supposed rally, which is reported in an unpublished thesis, *see* Ex. 149 (Tr. 728:1, 729:14), p.21, ADL omits the broader context. The thesis explains that the delegates expected "most hostility" to ratification would come from "southern Colorado," where "Spanish-speaking," "predominately Catholic" citizens were concentrated. Ex. 149, p.19. This "served as a Protestant call to arms," prompting a Denver newspaper to "implore[] the Colorado citizens" to "'put their seal of condemnation upon any attempt by any religious society to break down the … school system.'" Ex. 149, p.21 (quoting

[5] ADL's invocation of Illinois is also ironic, as today "[t]he restrictions of the Illinois Constitution concerning the establishment of religion" are interpreted as "identical to those imposed by the first amendment." *People v. Falbe*, 727 N.E.2d 200, 207 (Ill. 2000).

Denver Weekly Times, June 28, 1876). Governor Evans "confirmed this reaction": "'The Catholics are going to oppose [the constitution] because it prohibits a division of the School fund. If they come out on that issue it will rally all Protestants for it and carry it.'" Ex. 149, pp. 21-22 (quoting letter to Margaret Evans (Mar. 13, 1876)).

3. The Text Of Colorado's Blaine Provisions Reveals Anti-Catholic Animus

Again trying to downplay anti-Catholicism, Petitioners claim Colorado's framers intended "to prevent any use of public funding to support religious schools and to prohibit any religious instruction in schools aided by the State." Opening Br. 48. That is not what the Colorado Constitution *provides*, however, and it is not what its framers intended.

First, with Article IX, section 7, the framers prohibited public funding of schools "controlled by any church or sectarian denomination"—not "religious schools," as Petitioners and ADL incorrectly paraphrase. *Id.*; Br. ADL 20. Colorado's public schools were overtly religious, yet not controlled by any church or sectarian denomination. The framers sought to preserve that religious character while prohibiting funding of schools that *were* controlled by churches or sectarian denominations—which, as Dr. Glenn testified, were almost exclusively Catholic. Tr. 710:7-8.

And with Article IX, section 8, the framers prohibited "sectarian tenets or doctrines" in public schools—not "religious instruction," as Petitioners and ADL again paraphrase. Opening Br. 48; Br. ADL 6. Although the delegates used "religious" as a modifier for other purposes in that section (to prohibit "religious" tests, qualifications, and services in higher educational institutions), when it came to public schools, they abandoned the term "religious" and prohibited only "*sectarian* tenets or doctrines."

Why were they so deliberate in their wording? They feared that prohibiting "religious"—as opposed to "sectarian"—instruction would preclude Bible reading, which they did not want to do. After all, at the time of the convention, courts allowed reading of the King James Version in public schools precisely because, while religious, it was not "sectarian." *E.g.*, *Commonwealth v. Cooke*, 7 Am. L. Reg. 417, 423 (Police Ct. Boston 1859) ("The Bible has long been in our common schools … not for the purpose of teaching sectarian religion, but a knowledge of God and of his will, whose practice is religion."); *Donahoe v. Richards*, 38 Me. 379, 407 (Me. 1854) (upholding expulsion of Catholic student for refusing to read King James Version and blaming the *student* for attempting to exert "sectarian interference in the selection of books").

4. The Legislative History Confirms Anti-Catholic Animus

Nor for that matter, does the legislative history of Colorado's Blaine provisions demonstrate that the delegates sought to prohibit *all* religious instruction in public schools and *all* public funding of religious schools, as Petitioners and ADL claim. It is certainly true that, "[e]arly in the Convention, delegates submitted a resolution to the Convention's education committee urging" that "the Constitution should bar teaching of any '*theological, religious or sectarian* tenets or instruction[] … in any school … supported in whole or in part by taxation or by money or property derived from public sources.'" Opening Br. 48-49 (emphasis added; omissions in original); *see also* Br. ADL 18-19. However, contrary to ADL's assertion, that language is not "virtually identical" to what was adopted. Br. ADL 19. In the final product, the delegates jettisoned "theological" and "religious," prohibiting only: (1) the teaching of "sectarian tenets or doctrines" in public schools, Colo. Const. art. IX, § 8; and (2) the public funding of schools "controlled by any church or sectarian denomination," Colo. Const. art. IX, § 7. This change confirms the delegates' twin desire to preserve the Protestant religious nature of public schools and prevent public funding of Catholic schools.

5. That The Convention Did Not Expressly Address Bible Reading Is Further Evidence Of Anti-Catholicism

Finally, the fact that the delegates "did not insert language in the constitution that directly addressed the reading of the Bible in public schools," *Taxpayers*, at *35 (Bernard, J., dissenting), also confirms anti-Catholicism's influence. The delegates, after all, rejected a proposal that would have *prohibited* use of the Bible "in any public school in this State for the purpose of religious instruction." Tr. 738:9-739:23. The effect of this rejection was to allow Bible reading to continue, as this Court explained in *Vollmar*: "If the … constitutional convention had intended that the Bible should be proscribed, they would simply have said so…. [But] here there was an express refusal to mention it. We conclude that the reading of the Bible without comment is not sectarian." *Vollmar*, 255 P. at 617 (internal quotation marks omitted).

In short, the anti-Catholic animus underlying Colorado's Blaine provisions is clear. Interpreting them as Petitioners urge would resurrect and extend it. This Court should reject that interpretation.

III. Petitioners' Interpretation Of The State Provisions Violates The Federal Constitution

Petitioners attempt to downplay them, but the *federal* constitutional problems created by their interpretation of Colorado's religion provisions are

substantial. "Government neutrality toward religion," after all, "is the hallmark" of the federal Constitution, *Nichol v. ARIN Intermediate Unit 28*, 268 F. Supp. 2d 536 (W.D. Pa. 2003), yet Petitioners would have this Court interpret the state provisions to *bar* religious options from student-aid programs.

As this Court has held, "a state constitution *cannot* … permit a greater restriction of the exercise and enjoyment of religious profession and worship than is permissible under the federal Constitution." *Zavilla v. Masse*, 147 P.2d 823, 824-25 (Colo. 1944) (emphasis added). Petitioners' interpretation would create an unnecessary conflict between Colorado's religion provisions and the Free Exercise, Equal Protection, and Establishment Clauses. The Court of Appeals recognized this danger and avoided it. *See Taxpayers*, at *15 n.17. So, too, should this Court.

A. Petitioners' Interpretation Violates The Free Exercise Clause

The Court of Appeals correctly concluded that Petitioners' interpretation of Colorado's religion provisions violates the Free Exercise Clause. *See Taxpayers*, at **14-15. Although Petitioners insist the state provisions demand stricter separation than the Establishment Clause, a state's interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause … is limited by the Free Exercise Clause." *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). Thus, "even though the [Colorado] Constitution's provision[s]

prohibiting governmental establishment or preference of religion may be broader than the United States Constitution," they cannot justify discrimination based upon religious status. *Kreisner v. City of San Diego*, 1 F.3d 775, 779 n.2 (9th Cir. 1993).

In fact, the U.S. Supreme Court has repeatedly stressed that excluding religious options from student-aid programs violates the Free Exercise Clause. For example, in upholding government's reimbursement of busing costs for private school children, it held that to "exclude … members of any … faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation" would violate the clause. *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947). And in upholding a student-assistance program that provided educational materials to private schools, a four-justice plurality explained that the Court's jurisprudence "prohibit[s] governments from discriminating in the distribution of public benefits based upon religious status." *Mitchell*, 530 U.S. at 828 (plurality); *see also id.* at 835 n.19.[6]

Lower federal courts have likewise held that excluding religious options violates the Free Exercise Clause. In *Colorado Christian*, for example, the Tenth

[6] Similarly, in holding a regulation prohibiting use of student-assistance funds for religious activities unconstitutional under the Free Speech Clause, the Court held that when government "subsidize[s] the exercise of fundamental rights," it must adhere to "viewpoint neutrality in the … provision of financial benefits." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995).

Circuit held Colorado's exclusion of "pervasively sectarian" schools from postsecondary student-aid programs unconstitutional under the clause. *Colo. Christian Univ.*, 534 F.3d at 1257-58.

Petitioners try to distinguish *Colorado Christian*, arguing that the "pervasively sectarian" exclusion there "discriminated *among* different kinds of religious institutions." Opening Br. 62. They insist that their interpretation of Colorado's religion provisions bars *all* religious options from student-aid programs and, thus "works no discrimination among different kinds of religious institutions." *Id.* 63.

Petitioners' argument falls flat: a religious/non-religious distinction is just as constitutionally offensive as a religious/pervasively-religious distinction. The U.S. Constitution, after all, demands neutrality toward religion, and while the Constitution certainly prohibits "distinguish[ing] *among* religions …, the Supreme Court has made it clear that 'neutral' also means that there must be neutrality *between* religion and non-religion." *Hartmann v. Stone*, 68 F.3d 973, 977 (6th Cir. 1995). The Free Exercise Clause, in short, forbids discrimination against "a particular religion *or … religion in general.*" *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 532 (1993) (emphasis added).

In fact, the Tenth Circuit made this very point in *Colorado Christian*, explaining that the Free Exercise Clause does not permit "the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Colorado Christian Univ.*, 534 F.3d at 1255. Other federal courts of appeal agree. For example, the Eighth Circuit held that denying special-education benefits to students at religious schools violated the Free Exercise Cause, as it imposed a disability on students "because of the religious nature" of the schools their parents chose for them. *Peter v. Wedl*, 155 F.3d 992, 997 (8th Cir. 1998). The Sixth Circuit similarly held that excluding religious day-care providers from a federal child-care program violated the clause because it amounted to a "direct and unequivocal regulation, and even prohibition, of private acts of religious conscience." *Hartmann*, 68 F.3d at 985-86. And although the Fourth Circuit's opinion in *Columbia Union College v. Oliver*, 254 F.3d 496 (4th Cir. 2001), concerned a pervasively-sectarian exclusion in an institutional, as opposed to student, aid program, the court addressed the perniciousness of religious exclusions more generally: "[B]y refusing to fund a religious institution solely because of religion, the government risks discriminating against a class of citizens solely because of faith. The First Amendment requires government neutrality, not hostility, to religious belief." *Id.* at 510.

These cases make clear that excluding *all* religious options from student-aid programs is just as violative of the Free Exercise Clause as excluding "pervasively" religious options alone. Petitioners' argument to the contrary is perverse; more discrimination does not mean more constitutional.

Finally, interpreting Colorado's Blaine provisions as Petitioners propose would extend the anti-Catholic animus underlying them. Such animus itself can engender a free-exercise violation. *See Lukumi*, 508 U.S. at 547 (holding government "may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion"). And even if, today, discrimination against Catholics *specifically* would not be the effect of the provisions as interpreted by Petitioners, discrimination against *religion* would be. That an enactment born of anti-Catholic animus takes on broader discriminatory effect over time only compounds the free-exercise problem. *Nichol*, 268 F. Supp. 2d at 552.

1. Supreme Court Opinions Petitioners Invoke Do Not Support Their Position

Undeterred, Petitioners cite a handful of Supreme Court decisions they claim authorize wholesale exclusion of religious options from student-aid programs. *See* Opening Br. 64. None does.

The first, *Locke v. Davey*, 540 U.S. 712 (2004), concerned a scholarship program that excluded *only* theology majors studying for careers in ministry. The

Court upheld the exclusion but went to extraordinary lengths to limit its holding, emphasizing repeatedly that "[t]he only interest at issue" was "the State's interest in not funding the religious training of clergy." *Id.* at 722 n.5; *see also id.* at 719, 721, 725 (describing governmental interest as the non-funding of: "religious instruction that will prepare students for the ministry," "vocational religious instruction," and "religious education for the ministry").

Moreover, *Locke* relied heavily on the unique, Framing-era tradition against public funding of clergy. As the Court explained, "early state constitutions … exclude[ed] *only* the ministry from receiving state dollars." *Id.* at 723.

Finally, *Locke* emphasized the many ways in which the scholarship program there *included* religious options. "The program permit[ted] students to attend pervasively religious schools," and students could "take devotional theology courses." *Id.* at 724, 725. Thus, "[f]ar from evincing … hostility toward religion," the program went "a long way toward including religion in its benefits." *Id.* at 724.

Locke has no application here. First, the "[s]tate's interest in not funding the religious training of clergy" is not involved. *Id.* at 722 n.5. Second, unlike the tradition in Framing-era constitutions of "excluding *only* the ministry from receiving state dollars," *id.* at 723, state Blaine provisions—which *Locke* explained

were *not* at issue in that case, *id.* at 723 n.7—were a post-Framing-era development, "born of bigotry," that broadly targeted Catholic education. *Mitchell*, 530 U.S. at 829 (plurality). Finally, Petitioners' interpretation of Colorado's religion provisions would *not* "go[] a long way toward including religion." *Id.* at 724. It would mandate its total exclusion.

The other Supreme Court decisions Petitioners invoke fare no better. One, *Luetkemeyer v. Kaufmann*, 419 U.S. 888, 888 (1974) (mem.), *aff'g* 364 F. Supp. 376 (W.D. Mo. 1973), concerned a government-drawn distinction between public and private—not religious and non-religious—institutions. *Id.* at 888 (White, J., dissenting). Another, *Norwood v. Harrison*, 413 U.S. 455 (1973), concerned racial discrimination in private schools, *id.* at 456, which, of course, the Choice Scholarship Program prohibits. Ex. 1, ¶E.3.f. The next, *Sloan v. Lemon*, 413 U.S. 825 (1973), holds only that the Equal Protection Clause does not require government to provide to religious schools aid that it provides to non-religious schools if doing so would violate the Establishment Clause, *id.* at 834; here, Petitioners have never contended that the Program violates the Establishment Clause, nor could they. *See Zelman*, 536 U.S. 639. Finally, *Brusca v. State Board of Education*, 405 U.S. 1050 (1972) (mem.), *aff'g* 332 F. Supp. 275 (E.D. Mo. 1971), concerned whether government "is compelled to finance [a] child's non-

public school education"—not whether government *may* do so, as Douglas County has chosen to do. *Brusca*, 332 F. Supp. at 277.

In short, none of the Supreme Court cases Petitioners invoke supports their position.

2. Lower Court Opinions Petitioners Invoke Do Not Support Their Position

Nor, for that matter, do the lower court opinions Petitioners cite. Each is distinguishable:

- Two concerned direct aid to religious institutions—not aid to students. *See Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 408-09 (6th Cir. 2007); *Univ. of Cumberlands v. Pennybacker*, 308 S.W.3d 668, 682-83 (Ky. 2010).
- The regulations in two others did not even classify based on religious status. *See Wirzburger v. Galvin*, 412 F.3d 271, 281 (1st Cir. 2005); *Bowman v. United States*, 564 F.3d 765, 774 (6th Cir. 2008).
- Another, *Eulitt v. Maine Department of Education*, 386 F.3d 344 (1st Cir. 2004), was *rejected* in *Colorado Christian*, which Petitioners neglect to mention. *See* 534 F.3d at 1256 n.4.

Moreover, *Anderson v. Town of Durham*, 895 A.2d 944 (Me. 2006), involved the same regulation as *Eulitt* and simply adopted the same misguided reasoning. *Id.* at 961.

- The next, *Bush v. Holmes*, proposed a radical interpretation of *Locke* that the Florida Supreme Court *declined* to approve on review. 919 So. 2d at 413.
- Another, *Chittenden Town School District*, concerned a "tuitioning" system for towns that *lack* public schools. 738 A.2d at 542. Moreover, it was rejected in *Meredith*. *See* 984 N.E.2d at 1226 n.20.
- Yet another, *Bronx Household of Faith v. Bd. of Educ.*, 750 F.3d 184 (2d Cir. 2014), was decided over a vigorous dissent, and its mandate has been stayed pending a petition for certiorari. *Bronx Household of Faith*, No. 12-2730 (2d Cir. July 10, 2014) (order staying issuance of mandate).
- Finally, *Witters v. State Commission for the Blind*, 771 P.2d 1119 (Wash. 1989), concerned a program that, like *Locke*, excluded *only* "religious instruction of aspirants to the clergy." *Id.* at 1120.

None of these cases warrants construing Colorado's religion provisions as Petitioners urge, and none alleviates the free-exercise problem of that interpretation.

B. Petitioners' Interpretation Violates The Equal Protection Clause

Petitioners' interpretation of Colorado's provisions also violates the Equal Protection Clause, which prohibits religious classifications. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). In fact, the educational-aid exclusions in *Colorado Christian*, *Wedl*, and *Columbia Union* were held unconstitutional not only on free-exercise, but also equal-protection, grounds. *Colo. Christian Univ.*, 534 F.3d at 1258, 1269; *Wedl*, 155 F.3d at 997; *Columbia Union College v. Clarke*, 159 F.3d 151, 155 n.1 (4th Cir. 1998).

Here, the equal-protection problem is compounded by the original purpose of Colorado's Blaine provisions: targeting Catholics for disfavored treatment. In *Romer v. Evans*, 517 U.S. 620 (1996), the Supreme Court struck down another Colorado constitutional provision that targeted gays and lesbians. There were two problems with the provision. First, it made it "more difficult for one group of citizens than for all others to seek aid from the government"; "[c]entral … to the … Constitution's guarantee of equal protection," the Court explained, "is the principle that government and each of its parts remain open on impartial terms to all who

seek its assistance." *Id.* at 633. Second, "the disadvantage imposed [wa]s born of animosity toward the class of persons affected." *Id.* at 634.

For the same reasons, in *Hunter v. Underwood*, 471 U.S. 222 (1985), the Court struck down an Alabama constitutional provision that disenfranchised persons convicted of crimes of moral turpitude. As in *Romer*, (1) the provision negatively impacted one group, African-Americans, far more than others, *id.* at 227, and (2) historical evidence demonstrated the provision was adopted for that reason—*i.e.*, it was born of "discriminatory motivation." *Id.* at 231.

Colorado's religion provisions, as interpreted by Petitioners, present the same problems. They treat families who choose religious schools differently than those who choose non-religious schools, making it "more difficult for [the former] group of citizens than for all others to seek aid from the government." *Romer*, 517 U.S. at 633. That disadvantage, in turn, was "born of animosity" toward Catholics—and, by Petitioners' interpretation, extended to religion in general. *Id.* at 634.[7]

Faced with this, Petitioners will likely note, as they did below, that *Locke* rejected an equal-protection argument concerning the state constitutional provision

[7] Discriminatory purpose need only have been a "motivating," not the sole, factor to trigger equal-protection problems. *Hunter*, 471 U.S. at 228.

relied on there to exclude aspirants to the clergy. As *Locke* explained, however, "the provision in question [wa]s not a Blaine Amendment," and there was nothing in its "history or text … that suggest[ed] animus toward religion." *Locke*, 540 U.S. at 723 n.7, 725. "[T]he Blaine Amendment's history," the Court concluded, is "simply not before us." *Id.* at 723 n.7.

Here, that history is front-and-center. Should this Court entertain the interpretation Petitioners proffer, it will have to confront that history and its implications for the federal constitutionality of state Blaine provisions—an issue *Locke* left open. This Court should instead take the jurisprudentially-prudent course of the Court of Appeals, which avoided equal-protection problems by construing the state provisions to allow religious options.

C. Petitioners' Interpretation Violates The Establishment Clause

Finally, Petitioners' interpretation of the state religion provisions violates the Establishment Clause. Just as that clause prohibits government from "favoring religion," so too it prohibits government from "discriminating *against* religion." *Bd. of Educ. v. Grumet*, 512 U.S. 687, 717 (1994) (O'Connor, J., concurring); *see also Everson*, 330 U.S. at 18 ("[T]he First Amendment … requires the state to be neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary."). If either "the purpose [or] the primary

effect of [an] enactment … is … inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by" the clause. *Sch. Dist. v. Schempp*, 374 U.S. 203, 222 (1963). This is true whether the inhibition is of "a particular religion or … religion in general." *Lukumi*, 508 U.S. at 532. Petitioners' interpretation of Colorado's religion provisions creates such an inhibition, and this Court should reject it.

CONCLUSION

This Court should affirm the Court of Appeals' decision.

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