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| COLORADO SUPREME COURT<br>Colorado State Judicial Building<br>Two East 14th Avenue<br>Denver, CO 80203<br><br>COURT OF APPEALS, STATE OF COLORADO<br>Judges Jones, Graham, and Bernard<br>Appeals Court Case Nos. 11CA1856 and 11CA1857<br><br>Appeal from District Court, Denver County, Colorado<br>The Honorable Michael A. Martinez<br>Case No. 2011CV4424 *consolidated with* 2011CV4427<br><br>**Petitioners:**<br>JAMES LARUE; SUZANNE T. LARUE; INTERFAITH ALLIANCE OF COLORADO; RABBI JOEL R. SCHWARTZMAN; REV. MALCOLM HIMSCHOOT; KEVIN LEUNG; CHRISTIAN MOREAU; MARITZA CARRERA; SUSAN MCMAHON<br><br>and<br><br>**Petitioners:**<br>TAXPAYERS FOR PUBLIC EDUCATION, a Colorado non-profit corporation; CINDRA S. BARNARD, an individual; and MARSON S. BARNARD, a minor child.<br><br>vs.<br><br>**Respondents:**<br>DOUGLAS COUNTY SCHOOL DISTRICT and DOUGLAS COUNTY BOARD OF EDUCATION,<br><br>and<br><br>**Respondents:**<br>COLORADO STATE BOARD OF EDUCATION and COLORADO DEPARTMENT OF EDUCATION,<br><br>and<br><br>**Respondents:**<br>FLORENCE and DERRICK DOYLE, on their own behalf and as next friends of their children, ALEXANDRA and DONOVAN; DIANE and MARK OAKLEY, on their own behalf and as next friends of their child, NATHANIEL; and JEANETTE STROHM-ANDERSON and MARK | ▲ COURT USE ONLY ▲<br><br>Case Number: 13SC233 |

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| ANDERSON, on their own behalf and as next friends of their child, MAX.<br><br>_____<br><br>**Attorneys for Respondents Douglas County School District and Douglas County Board of Education:**<br>LEWIS ROCA ROTHGERBER LLP<br>James M. Lyons, #882<br>Eric V. Hall, #32028<br>One Tabor Center, 1200 17th Street, Suite 3000<br>Denver, Colorado 80202-5855<br>Telephone: (303) 623-9000<br>Facsimile: (303) 623-9222<br>E-mail: jlyons@LRRLaw.com<br>ehall@LRRLaw.com<br><br>**Attorneys for Respondents Colorado State Board of Education and Colorado Department of Education**<br>JOHN W. SUTHERS, Attorney General<br>Michael Francisco, #39111<br>Antony B. Dyl, #15968<br>Ralph L. Carr Colorado Judicial Center<br>1300 Broadway, 6th Floor<br>Denver, CO 80203<br>Telephone: (720-508-6000)<br>Facsimile: (720-508-6030)<br>E-Mail: michael.francisco@state.co.us<br>tony.dyl@state.co.us | |
| **ANSWER BRIEF** | |

## CERTIFICATE OF COMPLIANCE

I hereby certify that subject to the 14,000 word limit set in the Court's April 9, 2014 Order, this Answer Brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in those rules. The Answer Brief contains 13,812 words. I acknowledge that this Answer Brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

*s/ Eric V. Hall*
Eric V. Hall

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## INTRODUCTION

Plaintiffs challenge the decision of the Court of Appeals upholding the Choice Scholarship Program ("CSP" or "Program") of the Douglas County School District and its Board. Plaintiffs lack standing for their statutory claim under the School Finance Act, which provides no private right of action, express or implied.

Plaintiffs also claim the CSP violates provisions of the Colorado Constitution regarding neutral student aid programs. But there are several fatal flaws to Plaintiffs' arguments. First, Plaintiffs ignore the voluntary nature of the Program and its essential ingredient: parental choice. Second, Plaintiffs' position requires this Court to violate the U.S. Constitution by engaging in a constitutionally impermissible judicial inquiry into the religious nature of private schools. Finally, Plaintiffs ignore that precedents from this Court, the U.S. Supreme Court, and the U.S. Court of Appeals for the Tenth Circuit all support the CSP. By contrast, no precedent supports Plaintiffs' claims.

The judgment of the Colorado Court of Appeals should be affirmed and the Program upheld as lawful.

## STATEMENT OF ISSUES

This Court granted certiorari on six issues. The first two ask whether Plaintiffs have standing to assert a violation of the Public School Finance Act and, if so, whether the Program violates the Act. The third issue asks whether the Program violates Article IX §3, regarding the Public School Trust Fund. The last

three issues ask whether the Program violates Colorado's Religion Clauses, Article II §4 and Article IX §§7 and 8.

## STATEMENT OF THE CASE

The Douglas County Board of Education unanimously approved the Choice Scholarship Program on March 15, 2011. This came after months of robust public debate about the Program at public meetings as well as in newspapers, on television, and through social media.

On June 21, 2011, plaintiffs – made up of taxpayers, parents, and one student (now graduated) – filed two lawsuits, which were consolidated, against the Douglas County Board of Education and Douglas County School District ("Douglas County" or "District") as well as the Colorado State Board of Education and Colorado Department of Education ("State") (collectively, "Defendants"). Plaintiffs asked the Denver District Court to enjoin the Program on the ground that it violated various provisions of the Colorado Constitution as well as the Public School Finance Act. Three families intervened as defendants in support of the Program. A three-day preliminary injunction hearing was held August 2-4, 2011. On August 12, 2011, the trial court issued its Order permanently enjoining the Program, finding violations of Articles II §4, V §34, IX §§3, 7 and 8 and the School Finance Act. The trial court agreed with Defendants that the Program did not violate Article IX §§2 or 15.

Defendants appealed and on February 28, 2013 the Court of Appeals reversed the trial court, directing judgment to be entered for Defendants on all issues. *Taxpayers for Pub. Educ. v. Douglas County Sch. Dist.*, 2013 COA 20.[1] It was a 2-1 decision, with the dissent arguing solely that the Program violated Article IX §7.

## STATEMENT OF FACTS

### A. Origin and Development of the Program

Beginning in June 2010, Douglas County convened a series of regular and public meetings by its School Choice Task Force to develop a host of school choice initiatives. *Taxpayers*, ¶6; Tr.592:8-17.[2] The Task Force divided into subcommittees to discuss seven discrete areas of school choice: charter schools, contract schools, home education, neighborhood schools, online education, open enrollment, and the Choice Scholarship Program. Tr.592:23-593:6. This effort aligned with the District's overarching policy of "universal choice," creating "multiple pathways for educational success" and assisting families to select the best educational program for their child. Tr.491:17-493:15; 591:25-592:4.

During the winter months of 2010-11, the CSP was widely publicized, and both opponents and proponents voiced their opinions at public meetings, in the media, through email, and in formal letters. Tr.595:10-596:5. For instance, Plaintiff

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1 The opinion by the Court of Appeals is attached as Addendum 1.

2 The record on appeal contains the transcript of the three-day hearing. It is cited as "Tr. page #:line #."

Cindra Barnard made several formal presentations in opposition to the Program. Tr.79:19. The Board held several public meetings and work sessions to discuss and craft the Policy, and it heard extensive comments from the public about it. Tr.594:4-596:21.

On March 15, 2011, the Board formally adopted the Program and directed Superintendent Elizabeth Celania-Fagen to implement it so that it would be operational for the 2011-12 school year. Policy ¶C.2;[3] Tr.597:3; 599:20-22. As a pilot program, the Board, the Superintendent, and her administration recognized that modifications would have to be made along the way. Tr.240:1-2; 365:16-18; 512:18-21; 516:8-10. Accordingly, the Board expressly delegated to the Superintendent and her administration the authority to make the necessary changes so that the Program could be implemented successfully. Tr.516:20-22; 624:12-22.

**B. The Choice Scholarship Program**

The Choice Scholarship Program adds another educational option for Douglas County families. Policy ¶A.2. A family may continue to attend their neighborhood school, or they may choose a charter school, home education, online education, open enrollment, a magnet school, or the CSP. The CSP is but one of about 30 strategies for improving educational choice in the District. *Taxpayers*, ¶6; Tr.494:22-495:1. If a family receives a scholarship, then the parents have a further choice as to the partner school in which to enroll their child. *Taxpayers*, ¶6 (bullets

[3] The Policy is attached as Addendum 2.

9-11); Policy ¶D.1-2. Scholarships are worth the lesser of either the private school's actual tuition or 75% of the per pupil revenue ("PPR") received by the District for each student (estimated at $6,100 for 2011-12); thus, by the latter calculation scholarships were worth $4,575 for 2011-12. *Taxpayers*, ¶6 (bullet 14); Policy ¶C.6. The District retains the remaining 25%. *Id.*

Private schools also have a choice as to whether to apply for the Program. If they apply, they must meet twelve conditions of eligibility. *Taxpayers* ¶6 (bullets 2-3); Policy ¶E.3. These are safeguards to ensure private schools deliver "student achievement and growth results…at least as strong as what District neighborhood and charter schools produce." Policy ¶E.3.a. *See also Taxpayers* ¶86 (same). These safeguards address every aspect of school performance, such as the educational program, financial stability, safety, student discipline, assessments (*i.e.*, state-mandated examinations), and non-discrimination. Policy ¶E.3. "Participating private schools are prohibited from discriminating 'on any basis protected under applicable federal or state law.'" *Taxpayers*, ¶6 (bullet 4) (quoting Policy ¶E.3.f). The Superintendent testified that if a partner school were to discriminate against a legally protected class, the District would terminate that school's contract. Tr.512:7-14. The Policy provides for ongoing District oversight, and the District has a host of measures with which to ensure performance, including the power to terminate the contract of any non-performing school. Policy ¶¶C.5, E.3, E.9; Tr.567:3-12; *Taxpayers*, ¶6 (bullet 5).

The purposes of the CSP are "to provide greater educational choice for students and parents to meet individualized student needs, improve educational performance through competition, and obtain a high return on investment of DCSD educational spending." *Taxpayers*, ¶6 (bullet 1), ¶100; Policy ¶A.3.

The Program is neutral toward religion. "The District in no way promotes one Private School Partner over another, religious or nonreligious." Policy ¶A.9. *Accord Taxpayers*, ¶¶67, 74, 81; Tr.361:7; 598:10-20. "Nonpublic schools shall be eligible without regard to religion. The focus of the Choice Scholarship is not on the character of the Private School Partner but on whether that school can meet its responsibilities under this Policy and its Contract with the District." Policy ¶E.2.c. Both lower courts agreed that "the purpose of the [CSP] is to aid students and parents, not sectarian institutions." *Taxpayers*, ¶67, 81, 99; Order at 39, 44.[4]

### C. The CSP Fits Within the Larger Context of School Choice in Colorado

The CSP is similar to numerous public-private partnerships throughout Colorado's education system, from pre-Kindergarten through higher education. Like the CSP, these programs use public funds – including, for some programs, School Finance Act funds – to enable Colorado students to attend a broad variety of qualified private schools, both religious and non-religious. Tr.458:9-462:10; 471:16-472:10.

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[4] The trial court's Order dated August 12, 2011 is attached as Addendum 3. It is also contained in the appellate record at pages 2481-2548.

### 1. Preschool

***State Level***. The Colorado Preschool Program uses public funds to provide free preschool to eligible children at risk of academic failure. C.R.S. §22-28-101 to -114. Through this program, participating school districts may contract with facilities associated with private and parochial schools. C.R.S. §§22-28-103(2), 26-6-102(1.5). *See also* ROA 1830-88, 1855 (Colorado Preschool Program: 2010-11 Handbook, at 24).[5]

***Local Level***. The Denver Preschool Program allows residents to apply tax-derived funds toward tuition at any qualified preschool. Denver Mun. Code, ch.11, art. III, §11-20 to -22. All licensed preschools – for-profit, non-profit, public, private, home-based, religious, and regardless of location (inside or outside Denver) – are eligible to participate. *Id.* §11-22(5)(i); *see also* C.R.S. §26-6-102(1.5); ROA 1472-74 (DPP provider list with religious preschools highlighted).

### 2. Primary and Secondary

***Special Education***. Under the Exceptional Children's Educational Act, school districts may place special education students in private "facility" schools, secular and religious, to provide them with a "Free and Appropriate Public Education" under the Individuals with Disabilities Education Act. *See* C.R.S. §22-20-109; ROA 1476-79. State per pupil revenues are sent directly to the approved

[5] The record on appeal includes a PDF containing 2,833 pages; it is cited as "ROA page#".

school by the Colorado Department of Education, and the school can then bill the child's school district for any remaining amounts owed. *See* 1 CCR 301-8, 2220-R-9.03(2)(a)(ii)(B); *see also* 2220-R-8.03; C.R.S. §22-54-103(10)(b)(II).

***College in High School Programs***. The Concurrent Enrollment Programs Act allows high school students to use public funds to pay for approved courses at eligible colleges and universities, public and private. C.R.S. §22-35-105. These public funds flow through the School Finance Act, but participating institutions of higher education need not modify their curriculums in any respect. *Id.* -105(2); *see also* C.R.S. §22-54-103(7).

The Early College Program similarly partners charter high schools with institutions of higher education. A substantial part of the students' coursework is through the college or university, which may be private or public. C.R.S. §22-35-103(10). For example, Colorado Springs Early Colleges ("CSEC") is a charter school associated with Colorado Technical University ("CTU"), a private university. CSEC students are dual-enrolled in the charter school and CTU, and CSEC uses PPR to pay CTU for the courses it provides. Tr.747:3-750:15; ROA 1590-91.

***Charter Schools Operated by Education Management Providers.*** Charter schools are permitted to use School Finance Act funds to purchase services from private entities, called education management providers ("EMPs"). Tr.753:21; *see* C.R.S. §22-30.5-112. EMPs typically provide a complete educational and

operational package – curriculum, supplies, building, employees, accounting, everything (except the governing board). C.R.S. §22-30.5-103(3.5) & -104(4)(b). EMPs include Edison Learning, Imagine Schools, K-12 Inc., and Mosaica Education. Tr.750:1-753:21. Students have dual enrollment in EMP charter schools; they enroll in the school for funding purposes, but they attend the educational program provided by the EMP. *Id.*

***Contract Schools.*** Colorado permits school districts to purchase educational services from private schools, including operating an entire school. C.R.S. §22-32-122(1); Tr.757:14-759:5. These are commonly called "contract schools," and, like the CSP, early colleges, and EMP charter schools, contract school students can be seen as having dual enrollment – enrolled in the district for funding purposes but also enrolled in the contract school itself, where they receive day-to-day instruction. Tr.459:5-10. Denver Public Schools, for instance, has operated two to three contract schools over the years, such as Escuela Tlatelolco and Rocky Mountain School of Expeditionary Learning. Tr.758:16.

***Education Accountability and Turnaround Strategies***. Under Colorado's Education Accountability Act of 2009, a low-performing public school may be placed on a "turnaround plan" to try to improve performance. C.R.S. §22-11-406. One of the strategies identified to salvage a failing school is to hire "a public or *private* entity…to manage the public school pursuant to a contract with the local school board …." *Id.* -406(3)(d)(IV) (emphasis added).

***Other Programs***. Other elementary and secondary programs permit public funds to be spent at private schools, including those that are religiously-affiliated, such as:

- Childcare Assistance Program, C.R.S. §§26-2-805(3)(a); 22-28-103(2); 26-6-102 (1.5);
- English Language Proficiency Act, C.R.S. §22-24-103(2.5); 22-2-402(1); 26-6-102 (1.5) & -104; 1 CCR 304-1;
- Career and Technical Education Programs, C.R.S. §23-8-101.5(5), -102, & -103(2)(d);
- Expelled and At-Risk Student Services Grant Program, C.R.S. §22-33-203(2)(c)(I) & -205(1)(b); and
- Tony Grampsas Youth Services Program, C.R.S. §25-20.5-201(1)(a) & -201(4).

### 3. Higher Education

***College Opportunity Fund***. Colorado's College Opportunity Fund provides stipends for Colorado undergraduate students to attend any Colorado institution of higher education, including religious ones like Colorado Christian University or Regis University. C.R.S. §23-18-102 & -201; Tr.753:22-755:23. Students pursuing a professional degree in theology are not eligible to receive the stipend, C.R.S. §23-18-102(5)(a)(II)(C.5), but students can spend these public funds at any Colorado college or university, whether public or private, including religiously-affiliated.

***Other Programs***. Many other programs apply state-funded financial aid to tuition at Colorado's colleges and universities. These programs include:

- Colorado Student Grant Program,
- Colorado Graduate Grant Program,
- Colorado Leveraging Educational Assistance Partnership Program,
- Supplemental Leveraging Educational Assistance Partnership Program,
- Centennial Scholars Program,
- Colorado Graduate Scholars Program,
- Dependents Tuition Assistance Program, and
- Work-Study Program.

Standards for student eligibility vary for each program, but they all allow public funds to be spent at private institutions, both religious and non-religious. *See* C.R.S. §23-3.3-101 to -901.

Colorado legislative bodies, at both local and state levels, have relied on decades of stable constitutional law to create these neutral government programs. Plaintiffs' novel interpretations of the School Finance Act and the Colorado Constitution would effectively overturn most, if not all, of them.

## SUMMARY OF THE ARGUMENT

There is no violation of the Public School Finance Act. As a threshold matter, Plaintiffs lack standing under the Act. Indeed, their request is unprecedented; no private party has ever asserted a private right of action under the

Act, given that the Legislature created an explicit administrative system for resolving funding disputes. Were it otherwise, small groups of disgruntled parents, like Plaintiffs, would essentially transform Colorado's courts into perpetual overseers of every spending decision made by local school districts.

Even if Plaintiffs had standing, there would be no violation because Finance Act funds are constitutionally and statutorily committed to the spending discretion of local school districts. This Court's decision in *Owens v. Congress of Parents, Teachers*, 92 P.3d 933 (Colo. 2004), underscored the deep constitutional roots of local control in our public education system. The Finance Act itself specifies that "the amounts and purposes for which [Act] moneys are budgeted and expended shall be *in the discretion of the district*." C.R.S. §22-54-104(1)(a) (emphasis added).

Plaintiffs are also mistaken about Article IX §3, which is designed to protect the public school fund from being tapped by the General Assembly, or other governmental bodies, to pay for highways, prisons, irrigation, or other non-education matters. These provisions do not, however, limit the discretion of local school districts regarding how they choose to educate students. Moreover, school fund income is less than two percent of the District's overall budget. Given the presumption of constitutionality owed to the CSP, it cannot be maintained that this tiny fraction of the District's budget would prohibit creation of the CSP. Indeed,

Plaintiffs' erroneous interpretation would render unconstitutional all district expenditures on private entities, including private schools.

The CSP also conforms to this Court's long-established understandings about the proper relationship of church and state under Colorado's three religion clauses: Article II §4 and Article IX §§7 and 8. This case is no different than *Americans United for Separation of Church & State Fund v. Colorado*, 648 P.2d 1072 (Colo. 1982), where this Court upheld an indistinguishable state grant program that provided public funds to Colorado students, who could then spend those funds at qualified colleges and universities, including religious ones. Nor is it any different from the U.S. Supreme Court's decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), in which that Court upheld a similar scholarship program for elementary and secondary students by applying the same rationale this Court used in *Americans United*. Plaintiffs, however, ignore all of this Court's jurisprudence in this area. Indeed, Plaintiffs fail to cite *Zelman* or any significant Colorado cases in support of their arguments. Worse, Plaintiffs urge an interpretation of *Americans United* that actually violates the First Amendment.

Plaintiffs' analysis of Article IX §8 also wholly ignores long-standing Colorado law that holds that the first sentence of IX §8 applies only to state higher educational institutions, not Douglas County and the CSP. Moreover, they overlook the controlling evidence about enrollment in the CSP being available to all students, instead focusing on one mistaken statement in an application. Most

fundamentally, Plaintiffs ignore that the CSP is a voluntary program based on parental choice. By definition, there cannot be any compelled attendance at religious services or compelled religious instruction when parents have made this choice. Without compulsion, there can be no violation of Article IX §8.

In sum, the decision by the Court of Appeals should be affirmed.

## STANDARD OF REVIEW

Defendants generally agree with Plaintiffs' statement of the standard of review. Opening Brief at 19-20. However, Plaintiffs omit that they seek a declaration that the CSP is facially unconstitutional, *i.e.*, that it should be declared "utterly inoperative" in all circumstances. ROA 21, 83. For a facial challenge of unconstitutionality, this Court must determine "there exists *no set of circumstances* in which the [CSP] can be constitutionally applied." *Sanger v. Dennis*, 148 P.3d 404, 410-11 (Colo.App. 2006) (emphasis in original). *Accord Dallman v. Ritter*, 225 P.3d 610, 625 (Colo. 2010). Accordingly, Plaintiffs' constitutional challenges must fail unless the asserted invalidity is established "beyond a reasonable doubt." *Hinojos-Mendoza v. People*, 169 P.3d 662, 668 (Colo. 2007).

Finally, Defendants agree that the issues upon which this Court granted certiorari review were properly preserved below. As noted *infra*, Plaintiffs' extended argument about whether there has been a violation of the Charter Schools Act was not considered by the lower courts and cannot be raised to this Court in

the first instance. *See Melat, Pressman & Higbie v. Hannon Law Firm*, 2012 CO 61, ¶18.

## ARGUMENT

### I. PLAINTIFFS LACK STANDING TO ASSERT A VIOLATION OF THE PUBLIC SCHOOL FINANCE ACT

#### A. The Standing Inquiry Is Different for Statutory and Constitutional Claims

Plaintiffs contend they have standing to assert a violation of the School Finance Act. Opening Brief at 20-30; *see also* Order at 19-22. The Court of Appeals properly concluded they do not. *Taxpayers*, ¶¶12-27.

Standing is a threshold issue that asks whether particular plaintiffs may invoke the jurisdiction of the court to hear a particular claim. *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977). To establish standing, plaintiffs must demonstrate (1) injury-in-fact (2) to a legally protected interest. *Id*.

As in the Court of Appeals, Defendants do not contest that Plaintiffs have standing to bring their *constitutional* claims. *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004) ("case law provides [for] broad taxpayer standing" for alleged violations of the state constitution). However, the standing inquiry for statutory claims is different from – and more demanding than – the inquiry for constitutional claims, as the Court of Appeals noted. *Taxpayers*, ¶26. *Accord Olson v. City of Golden*, 53 P.3d 747, 750-53 (Colo. App. 2002) (distinguishing *Dodge v. Dep't of Soc. Serv.*, 600 P.2d 70 (Colo. 1979)).

The Court of Appeals "focus[ed] on the second [*Wimberly*] requirement" because "plaintiffs' failure to satisfy that prong is most clear." *Taxpayers*, ¶14 & n.6. Accordingly, the latter requirement is taken first.

### B. Plaintiffs Do Not Have a Legally Protected Interest Under the Act

The "question of standing to bring a statutory claim is essentially an inquiry into whether the subject statute can properly be understood as granting a right to judicial relief to persons in the plaintiff's position." *Anson v. Trujillo*, 56 P.3d 114, 117 (Colo. App. 2002). Plaintiffs concede that "[t]he Act does not expressly permit enforcement by students and parents." Opening Brief at 22; *accord id.* at 15-16. The Court of Appeals recognized this as well: "The Act does not expressly authorize a private cause of action to enforce its provisions." *Taxpayers*, ¶15. Accordingly, Plaintiffs are compelled to argue for an implied right of action as their sole basis for statutory standing. Opening Brief at 22.

The Court of Appeals properly considered and rejected Plaintiffs' argument. *Taxpayers*, ¶¶15-22. The court recited the three relevant factors: "(1) whether the plaintiffs are within the class of persons intended to be benefitted by the Act…; (2) whether the General Assembly intended to create, albeit implicitly, a private right of action; and (3) whether an implied private right of action would be consistent with the purposes of the Act." *Id.* at ¶15 (citations omitted). Even assuming Plaintiffs meet the first requirement, as the court did, *id.* at ¶17, the second and third factors do not support finding an implied private right of action.

There is no evidence the General Assembly intended to create a private right of action. To the contrary, the Act commits to the State Board of Education the "administration and enforcement" of the Act, C.R.S. §22-54-120(1), and directs the State Board to create "reasonable rules and regulations" to that end. *Id*. These regulations, 1 CCR 301-39, establish "procedures for administration of the Public School Finance Act of 1994, including the procedures for revocation or withholding of school district accreditation for Act violations." *Id*. 2254-R-1.00.

One of these regulations, Rule 2.00, describes the procedures for violations, including written notice to the district, an opportunity for the district to respond, a hearing process in front of the State Board, and penalties. Nowhere in these regulations is there a provision permitting parents, students, or taxpayers to bring claims – before the State Board or in court – for alleged violations of the Act.

This statutory and regulatory structure dispels any "indication of legislative intent to create" an individual enforcement right. *Olson*, 53 P.3d 752. Indeed, any such right would be "[in]consistent with the statutory scheme." *Id*. By investing the State Board with power to enforce the Act, the General Assembly indicated that parents, students, and taxpayers could not sue in court for an alleged violation of the Act.

**1. Plaintiffs' Arguments Are Meritless**

Plaintiffs argue that the Act's detailed regulatory scheme "is entirely consistent with a private equitable remedy." Opening Brief at 24. This is not

Colorado law. As the Court of Appeals noted, "[w]here, as here, a statute provides a means of enforcement, the designated remedy ordinarily excludes all others." *Taxpayers*, ¶19 (citing *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 924-25 (Colo. 1997)). The appellate court went on to cite six cases in which Colorado courts found the existence of a specific enforcement scheme demonstrated that the Legislature did not intend to create a private right of action. *Id.* (citing cases). Similar cases could be added to that list. *See Wimberly*, 570 P.2d at 539; *Olson*, 53 P.3d at 752-53; *Pomerantz v. Microsoft Corp.*, 50 P.3d 929, 934-35 (Colo. App. 2002); *Cloverleaf Kennel Club, Inc. v. Colo. Racing Comm'n*, 620 P.2d 1051, 1059 (Colo. 1980).

In response, Plaintiffs point to the implied right of action found in *Allstate Ins. Co. v. Parfrey*, 830 P.2d 905 (Colo. 1992). Opening Brief at 24. However, *Parfrey* is equally unavailing. In that case this Court explained that "the legislative decision to enact a particular administrative remedy…is consistent with a legislative intent to *preclude* a private civil remedy." 830 P.2d at 910 (emphasis added). Further, this Court noted that the specific provision at issue in *Parfrey* was "totally silent on the matter of remedy, and no other statutory provision expressly address[ed] that question." *Id.* This is in stark contrast to the Act's extensive remedial system described in this brief and by the Court of Appeals. *See Taxpayers*, ¶18. *Cf. Capital Sec. of Am. v. Griffin*, 2012 CO 39, ¶23 (refusing to find a specific remedy because of "extensive and detailed remedial scheme").

Plaintiffs try to distinguish *Gerrity Oil* and *Bd. of Cnty. Comm'rs v. Moreland*, 764 P.2d 812 (Colo. 1988), on the ground that they "involved actions by private parties for *civil damages*," while Plaintiffs "seek an injunction." Opening Brief at 26 (emphasis in original). This misses the point of those cases in this context. "[T]he critical question is whether the legislature intended…[to] implicitly create[] a private right of action." *Gerrity Oil*, 946 P.2d at 923. *Accord Moreland*, 764 P.2d at 820 ("the ultimate issue is one of legislative intent"). Courts consistently find that the Legislature's enactment of a detailed remedial scheme – as here – is strong evidence that it did not intend to create a private right of action. *Gerrity Oil*, 946 P.2d at 924-25; *Moreland*, 764 P.2d at 817-21. *Accord Taxpayers*, ¶19.

Plaintiffs are also incorrect when they cite three cases for the proposition that "private parties…are entitled to sue school districts for unlawful financial decisions." Opening Brief at 21 (citing cases). As the Court of Appeals properly noted, these cases involve constitutional, not statutory, claims. *Taxpayers*, ¶26.

Finally, Plaintiffs accuse the District and the State of "questionable collaboration" and "working in concert" to "circumvent[]" the Act. Opening Brief at 23, 25, 26. *See also id.* at 8-9, 16. The Court of Appeals was right to describe these as "*ad hominem* assertion[s]" that are "unsupported by the record." *Taxpayers*, ¶24. In truth, the trial court found that the State had not determined whether or not it would fund the CSP, but that if it later determined funding was

improper it could recover the money. Order at 15 (¶¶60-61); Tr.130:13-25, 209:13-213:12. Further, in its dealings with the District about the CSP, the Department of Education treated the District just like it would have treated any other district. Tr.146:11-12, 182:4-11, 196:6, 219:24-221:1. Not even the trial court accepted Plaintiffs' "conspiracy" arguments, Order at 21-22, and the Court of Appeals had every reason to reject them. *Taxpayers*, ¶24. Finally, Plaintiffs offer no legal authority for their novel "conspiracy exception" to prevailing standing law. Opening Brief at 23-26. This fact was not lost on the Court of Appeals. *Taxpayers*, ¶24.

### 2. Public Policy Supports Lack of Standing

Public policy also supports the conclusion that Plaintiffs lack standing. Plaintiffs' position would allow any group of parents, students, or taxpayers to sue a school district to overturn any funding decision. This unprecedented interpretation of the Finance Act would create a flood of lawsuits and transform the courts into the budgetary supervisors of the State's school districts. In the contentious arena of public school finance, boards of education often decide to spend money in ways some families dislike, *e.g.*, constructing or closing schools, hiring or firing administrators and teachers, negotiating with unions, or buying textbooks. To permit disgruntled parents to take these claims to court would violate

separation of powers principles and waste judicial and educational resources.[6] *Accord Taxpayers*, ¶21.

Plaintiffs contend these problems would not arise because "Plaintiffs' claims address [spending] public school funds [at] *private* schools, not how funds can be expended on *public* education." Opening Brief at 29 (emphases in original). There is no such distinction. When a school district spends public funds to send a severely disabled student to a specialized private school, it is providing "public education." Likewise, when a district pays tuition for a high performing student to concurrently enroll in a private college or when an early college charter school pays its private university partner, these are instances of providing "public education." These and dozens of other examples of public-private partnerships, described *supra* at 10-15, are all part of the public education system in Colorado. Public schools are not an end in themselves but the means by which local school districts achieve the end of educating children, in conjunction with numerous, currently-functioning public-private partnerships, like the CSP.

### C. Plaintiffs Have Not Shown Injury-in-Fact

Plaintiffs have also not shown injury-in-fact.[7] To the contrary, the undisputed evidence in the record shows that the CSP – because it allows the District to reduce expenses and retain 25% of state funds for CSP students –

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[6] The Colorado Association of School Boards expands upon this issue in its amicus brief at pages 5-14.

[7] The Court of Appeals did not reach this issue. *Taxpayers*, ¶14 n.6.

would financially *benefit* the District in the amount of $350,000. Tr.374:2-375:20. The Assistant Superintendent testified that, after accounting for the administrative costs of overseeing the Program, the "break even" point was 200 students. Order at 16 (¶65); Tr.363:10-23. Because 500 students signed up for the Program for the 2011-12 school year, Douglas County would have received a net financial benefit. *See* Tr.377:12-379:20. This money would directly benefit, not harm, Plaintiffs who remain in traditional District schools.

Relying most heavily on *Dodge*, Plaintiffs argue they "have shown injury in fact as Colorado taxpayers." Opening Brief at 29. As mentioned at the outset, however, taxpayer standing is a discrete subtype of Colorado standing law. *See Olson*, 53 P.3d at 750-53. Nothing in *Dodge*'s majority or concurring opinions can properly be read as supporting Plaintiffs' expansive theory that citizen-taxpayers may sue to enjoin allegedly improper public expenditures under each and every spending statute on the books. Especially given that in *Dodge*, unlike here, there was no statute at issue; indeed, that was the plaintiffs' point – they argued that the State was acting *ultra vires* because the Legislature had not passed an act that authorized such spending, as required by Article V §33. 600 P.2d at 70-71. As noted in *Dodge*'s concurrence, their allegation that no authorizing act existed was a "corollary" of their constitutional claim. *Id.* at 72 (Dubofsky, J., concurring).

In sum, the Court of Appeals was correct to reject Plaintiffs' claim of taxpayer standing, writing that Plaintiffs' limitless approach "would in most, if not

all cases render unnecessary the standing analysis the supreme court has applied in this context for decades." *Taxpayers*, ¶25.

## II. EVEN IF PLAINTIFFS HAD STANDING, THERE IS NO VIOLATION OF THE SCHOOL FINANCE ACT

### A. Preservation of Issue

The parties briefed and the trial court ruled on only whether there was a violation of the School Finance Act. *See* Order at 53-56. The Court of Appeals did not reach this issue because it held Plaintiffs lacked standing. *Taxpayers*, ¶27.

To this Court, however, Plaintiffs advance a different issue, *i.e.*, whether there was a violation of the Charter Schools Act, C.R.S. §22-30.5-101 to -704. *See e.g.*, Opening Brief at 30 (claiming the charter school was "statutorily non-compliant"). Neither lower court considered this issue, which presents for the first time complex standing and merits questions. Plaintiffs cannot now ask this Court to consider them in the first instance. *See Melat, Pressman & Higbie*, ¶18 ("It is axiomatic that issues not raised in or decided by a lower court will not be addressed for the first time on appeal.").

### B. There Is No Violation of the School Finance Act

The Program does not violate the School Finance Act. The trial court, however, found the CSP upsets the Act's "funding balance," resulting in an "increased share of public funds" to Douglas County. Order at 56.[8]

[8] As noted, the Court of Appeals did not address this issue. *Taxpayers*, ¶27.

The trial court was mistaken for at least three reasons. First, the court's decision was premature. The State Board of Education has not yet decided whether it will fund the Program – something the Act expressly commits to its authority. Second, the trial court invaded the regulatory authority of the State Board in concluding the Program violates the Act. Third, the record demonstrates that the CSP would not and could not result in an "increased share" of funds to Douglas County.

The trial court's premature decision was demonstrated through the testimony of the Commissioner of Education, who noted "that the state has not determined whether or not it will fund the Scholarship Program." Order at 15, ¶60. Whether Douglas County "intended" to receive funding – which is all the trial court found – is irrelevant to whether the Act was actually violated, *i.e.*, whether Douglas County in fact received funds it should not have. Moreover, the State has mechanisms to recover funds improperly paid to school districts, as the trial court recognized. *Id.* ¶61. Plaintiffs acknowledge the same: "The Act…obligates the [State] Board to 'avoid overpayments of state moneys' and to recover amounts it has overpaid." Opening Brief at 35 n.3 (quoting C.R.S. §22-54-115(4)). Likewise, the Court of Appeals explained that "the Act provides a number of mechanisms for ensuring compliance with its funding scheme." *Taxpayers*, ¶18 (citing specific sections of Act). In other words, the School Finance Act system is working: the State Board

will, after careful deliberation, determine whether state funds may be spent on the CSP.

By attempting to shortcut the State Board's consideration of the matter, the trial court's decision improperly invaded the province of a coordinate branch of government. *See Wimberly*, 570 P.2d at 538 (warning courts against "invad[ing] the fields of policy preserved to…the realm of administrative discretion lodged in the executive branch"). Whether any particular set of students is properly "counted" for purposes of the Finance Act is committed to the Department of Education – not the judiciary. *See* C.R.S. §22-54-120(1); 1 CCR 301-39. Nothing in the Act or the regulations indicates that courts should decide whether a district is receiving an "appropriate share" of Finance Act funding. That is why no case law discusses the "appropriate funding balance" under the Act; the question is not committed to the judicial branch at all.

The Court of Appeals properly concluded that the CSP would not result in an increased share of Finance Act funds to the District. *Taxpayers*, ¶¶11 n.5, 46 & n.9. "This is because the record evidence indicates that [CSP] students would otherwise be enrolled in District public schools." *Id.* at ¶11 n.5. The Policy requires this: "[T]o be eligible to participate in the CSP, students must be current District residents, must have been District residents for at least one year, and must have been enrolled in District public schools during the 2010–2011 school year (the school year immediately prior to the school year during which the CSP was to

operate)." *Id.* at ¶46. *See* Policy ¶¶A.8, D.5. The testimony of the State's Assistant Commissioner for Public School Finance and the District's Superintendent confirmed this as well. Tr.465:20-466:11; 507:11-18.

### C. School Districts Have Statutory and Constitutional Authority to Decide How to Educate Their Students

More fundamentally, however, Plaintiffs overlook that school districts have express statutory and constitutional authority to decide how to spend money to educate their students, including using public funds to pay private schools. The Act specifies that "the amounts and purposes for which [Act] moneys are budgeted and expended shall be *in the discretion of the district*." C.R.S. §22-54-104(1)(a) (emphasis added). *Accord* Tr.475:7-12. This explicit statutory discretion grows out of the "deep roots" of local control of public education found in the Colorado Constitution. *Owens*, 92 P.3d at 938. Indeed, in the one case Plaintiffs cite in this section of their brief, *Lobato v. State*, this Court wrote: "'[T]he historical development of public education in Colorado has been centered on the philosophy of local control' due to the freedom and flexibility local control provides." 2013 CO 30, ¶38 (citing cases). Local school districts may build upon the constitutional floor to provide *additional* educational options to their students. *See id.* at ¶19 (districts may provide more than three months of school); *In re Kindergarten Schools*, 32 P. 422 (1893) (districts may provide Kindergarten to children under six years of age). *Accord Taxpayers*, ¶¶41, 43, 47. Under this express statutory and

constitutional authority, Douglas County has the discretion and right to create the CSP as one of its school choice options for families.

Further, school districts also have express authority to contract directly with private schools for educational services. C.R.S. §22-32-122(1).[9] Likewise, charter schools may contract with private corporations to provide a complete package of educational services. C.R.S. §22-30.5-104(4)(b). Undisputed testimony confirmed actual examples of such spending at contract and charter schools. *See* Tr.225:11-228:12; 750:1-759:5.

Far from upsetting the trial court's vague invention of the Act's "funding balance," Order at 56, these and dozens of other programs are precisely within the contemplation of Colorado law, and occur throughout Colorado's public education system. *See, e.g.*, 1 CCR 301-39, Rule 2254-R-5.02 (providing that "[a] pupil shall be 'enrolled' if such pupil attends school…in a district…which purchases comparable instructional services for such pupil"); *id.* -5.15(1) (allowing districts to count "[a] pupil receiving education services from another entity through a

[9] Plaintiffs object that this statute requires educational services "meet the same requirements and standards" as those provided by a district. Opening Brief at 36-37. The CSP does exactly this. Each participating school "shall demonstrate that its educational program produces student achievement and growth results for [CSP] students at least as strong as what District…schools produce." Policy ¶3(a). Further, the Policy requires private schools "deliver[] quality educational instruction to [CSP] students." *Id.* ¶3. "The CSP provides for District oversight of private schools' compliance with program requirements." *Taxpayers*, ¶6 (bullet 5). Moreover, the contracting statute itself grants discretion to districts to decide what sort of services to purchase and on what terms. *See* C.R.S. §22-32-122.

purchase agreement"); *id.* -5.15(3) (allowing districts to count "[a] pupil for whom a district either pays or receives any amount of tuition").

All of these programs are just as much part of the public education system as traditional neighborhood schools. There is no violation of the School Finance Act.

## III. THE CSP DOES NOT VIOLATE ARTICLE IX §3 – THE PUBLIC SCHOOL FUND

Plaintiffs argue the CSP violates Article IX §3. Opening Brief at 37-43. *See also* Order at 60-63. The Court of Appeals found it does not. *Taxpayers*, ¶¶49-55.

Plaintiffs are mistaken for two reasons. First, Article IX §3 and the other provisions that make up the public school fund prevent income from the fund from being spent on purposes other than education. These provisions do not, however, limit the discretion of local school districts on how they choose to spend this money to educate students. Second, the school fund income is less than two percent of the District's overall budget. Given the presumption of constitutionality due to the CSP, it cannot be maintained that this tiny fraction of the District's budget would bar creating the Program. Indeed, such an erroneous interpretation would render unconstitutional all district expenditures on private entities, including private schools, because they received even one dollar from the public school fund.

### A. The Public School Fund Does Not Limit How Local Districts Spend Money to Educate Students

Article IX §3, along with Article IX §§5, 9 & 10 and the Colorado Enabling Act passed by Congress in 1875, ch. 139, 18 Stat. 474, creates a school land trust

similar to those in other states. *See generally Branson Sch. Dist. v. Romer*, 161 F.3d 619 (10th Cir. 1998); *Brotman v. East Lake Creek Ranch*, 31 P.3d 886 (Colo. 2001). The State of Colorado is "the trustee for the school land trust," *Branson Sch. Dist.*, 161 F.3d at 643, and Colorado's school districts are the trust beneficiaries, *id.* at 629. The State of Colorado has a fiduciary responsibility to manage in perpetuity the school lands for the benefit of local school districts. *Id.* at 634, 637. *See also Brotman*, 31 P.3d at 887. Article IX §3 states that the fund income "shall be distributed amongst the several counties and school districts of the state, in such manner as may be prescribed by law." *See Taxpayers*, ¶52.

The General Assembly enacted article 41 of title 22 as the statutory system to govern the public school fund. Consistent with Colorado's constitutional principle of local control and the text of Article IX §3, the relevant statute provides that "interest and income" from the fund "shall be expended in the maintenance of the schools of the state and shall be distributed to the several school districts of the state…." C.R.S. §22-41-102(1). As noted above, this is consistent with similar School Finance Act language giving spending discretion to local districts. *See* C.R.S. §22-54-104(1)(a). These statutory provisions are in accord with long-standing Colorado law that provides that once funds are distributed to local districts, they have the legal authority and discretion to spend them to educate students. *Craig v. People ex rel. Hazzard*, 299 P. 1064, 1066 (Colo. 1931) ("Upon the distribution [of funds], title thereto vests in the distributees [the local

districts]."); *Owens*, 92 P.3d at 941 (local control of funds means that each district "determine[s] its own education policy, free from restrictions imposed by the state or any other entity").

The trust imposed on the public school funds prevents those monies from being spent by the General Assembly or any other governmental body on things other than education. *See* Article IX §5 (the public school fund consists of proceeds given "for educational purposes"); Article IX §3 ("No part of this fund… shall ever be transferred to any other fund…."); C.R.S. §22-41-102(1) (same). *Accord People ex rel. Dunbar v. City of Littleton*, 515 P.2d 1121, 1121 (Colo. 1973) (neither a city, a county, nor the state can invade the public school fund to spend the proceeds on matters other than "for educational purposes").

Rather than recognizing that the public school fund protects monies for the benefit of local school districts, Plaintiffs assert that Article IX §3 restricts districts' discretion to spending the funds "only in *public* schools." Opening Brief at 42 (emphasis in original). Plaintiffs' view is mistaken because "public schools" are not an end in themselves but one of many means by which school districts educate students. When providing "public education," local districts spend money in the private sector in countless ways, including contracting with private schools.

The Court of Appeals correctly found that "[u]pon distribution by the state to the counties and school districts, the money from the [public school] fund belongs to the counties and school districts." *Taxpayers*, ¶52. Local districts may

then use the money to pursue their "own education policy," *Owens*, 92 P.3d at 941, including by creating the CSP as Douglas County has done.

### B. The Scholarship Program Does Not Use Public School Fund Income and Therefore Does Not Violate Article IX §3

Even if one takes a more restrictive view of the public school fund, there is no violation. In Colorado, a tiny fraction of public school funding – less than two percent[10] – comes from the public school trust fund. Plaintiffs argue the CSP violates Article IX §3 because trust income "will ultimately end up being disbursed to non-public schools." Order at 63. *Accord* Opening Brief at 39-40. In other words, they contend that income from the public school land trust infects the 98% of state-level public school funding that does *not* come from the trust, requiring the entire pool of money be spent "only in public schools." *Id.* at 42 (emphasis omitted). This novel theory is mistaken on the basis of both (1) basic trust law and (2) the presumption of constitutionality owed to the CSP.

#### 1. Under Basic Trust Law, Restrictions on Trust Income Do Not "Infect" Other Income

The terms of a trust may restrict the ways in which trust income is spent. RESTATEMENT (THIRD) OF TRUSTS §49[11]; C.R.S. §15-1-403(1)(a). But beneficiaries

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[10] *See Taxpayers*, ¶54; Tr.473:1-10 (funding from the trust amounts to $101 million out of a total budget of more than $5.2 billion); *see also Brotman*, 31 P.3d at 888 (for fiscal year 1999-2000, income from the fund was $42 million out of a total budget of over $5 billion).

[11] Colorado has adopted the RESTATEMENT (THIRD) OF TRUSTS. *Van Gundy v. Van Gundy*, 2012 COA 194, ¶¶14-21.

may spend non-trust income without regard to the terms of the trust; trust income does not "infect" all other income sources such that, by virtue of receiving restricted trust income, all other income sources are now similarly restricted. *Cf. Guidry v. Sheet Metal Workers Int'l Ass'n*, 10 F.3d 700, 707 (10th Cir. 1993).

The trial court overlooked this basic proposition of trust law when it assumed that school land income, "which flows into total public school funding, will ultimately end up being disbursed to non-public schools." Order at 63. In view of the number of statutes the General Assembly has passed over the decades, each of which would allegedly violate this provision, this reading of the Colorado Constitution cannot be correct. The Court of Appeals properly rejected this. *Taxpayers*, ¶¶51-52.

#### 2. Given the Presumption of Constitutionality Owed to the CSP, No Trust Funds Are Spent in Violation of Article IX §3

Under Colorado law, there is a "presumption that governmental bodies adopt legislation intending compliance with constitutional requirements." *Denver Pub. Co. v. City of Aurora*, 896 P.2d 306, 318 (Colo. 1995). The presumption means that "the party attacking [the enactment] must establish its unconstitutionality beyond a reasonable doubt." *Trinen v. City & Cnty. of Denver*, 53 P.3d 754, 757 (Colo. App. 2002). Interpretations that "harmonize it with the constitution…should be preferred." *Id.*

Plaintiffs acknowledge Colorado law supporting the presumption, listing cases in which Colorado appellate courts have applied it, including (i) statutes passed by the Colorado Legislature, (ii) a House rule enacted by the General Assembly, (iii) a resolution adopted by a board of county commissioners, and (iv) rules adopted by the Colorado Civil Rights Commission. Opening Brief at 41 (citing cases). To this list can be added regulatory bodies, *Orsinger Outdoor Adver., Inc. v. Dep't of Highways*, 752 P.2d 55, 61 (Colo. 1988) (applying presumption to regulations of billboards), citizen ballot initiatives, *Branson Sch. Dist.*, 161 F.3d at 636 (applying presumption in case involving Article IX §3), and municipal ordinances, *Landmark Land Co. v. City & Cnty. of Denver*, 728 P.2d 1281, 1283-85 (Colo. 1986) (applying presumption to Denver's mountain view ordinance).

The Scholarship Program is entitled to a presumption of constitutionality. After months of open, public hearings, it was passed unanimously by Douglas County, a Colorado school district with constitutional authority to educate children in its jurisdiction. *See* Colo. Const. Art. IX §15; *Lobato*, ¶38 (discussing the "freedom and flexibility" Colorado's Constitution grants to local school districts). *See also* Tr.592:8-597:8 (testimony about the public process to enact the CSP).

Plaintiffs argue the CSP "is not a legislative enactment" entitled to the presumption. Opening Brief at 40. However, this Court explained that an enactment is considered "legislative action," and hence qualified for the

presumption, if it "is prospective in nature, of general application, and requires the balancing of questions of judgment and discretion." *Landmark Land Co.*, 728 P.2d at 1284 (citing cases). Like the mountain view ordinance at issue in that case, so also the CSP "fits squarely into [this] description of legislative action." *Id.* Accordingly, the Court of Appeals was correct to apply the presumption to the CSP. *Taxpayers*, ¶54.

By so doing, the lower court held that "we must construe the CSP as funded out of the ninety-eight percent of total per pupil revenue that does not come from the public school fund." *Id.* In the alternative, it also held that "[e]ven were we to regard a small (less than two percent) percentage of funding for the CSP as coming from the public school fund, we would regard that money as within the twenty-five percent of per pupil revenue retained by the District to administer the program." *Id.* at ¶54 n.11. Either alternative properly applies the presumption in this case.

Plaintiffs object that the CSP "was, at best, an informal agreement between the staff of the Colorado Department of Education and the District, reflecting decisions made in non-public meetings…." Opening Brief at 41-42. This can only be characterized as another "*ad hominem*" attack that bears no relation to the record. *See Taxpayers*, ¶24 (rejecting "collusion" argument in these terms). The record establishes that the CSP was the subject of months of public hearings and debate, generating statewide and even national publicity. *Id.* at ¶6; Order ¶¶1-4;

Tr.592:8-597:8. The CSP shares the hallmarks of legislative action just as much or more so than the numerous other enactments also presumed constitutional.

Plaintiffs also assert that the interpretation of the Court of Appeals would "eviscerate Article IX §3." Opening Brief at 42. Not so. As discussed, the purpose of the public school trust fund is to prevent other governmental bodies – especially the General Assembly – from invading the trust's principal and interest to spend on purposes other than education. *See People ex rel. Dunbar*, 515 P.2d at 1121; Article IX §5; C.R.S. §22-41-102(1). Plaintiffs' suggestion that not only the 2% of the trust funds but also the remaining 98% of non-trust monies cannot flow, directly or indirectly, to any private entity, including private schools, effectively prevents school districts from buying any goods or services in the private sector. Plaintiffs' position is unsupported by any authority and must be rejected. There is no violation of Article IX §3.

## IV. THE CSP DOES NOT VIOLATE COLORADO'S RELIGION CLAUSES

Plaintiffs also contend the CSP violates Colorado's three religion clauses: Article II §4 and Article IX §§7 and 8. It does not. The CSP is a neutral student aid program of genuine private choice. Families participate in it only by choice, and the type of private school they choose is also entirely up to them. Douglas County does not compel *anyone* to do *anything*. This parental choice eliminates any

constitutional concerns, just like the programs upheld by this Court in *Americans United* and the U.S. Supreme Court in *Zelman*.

Notably, Plaintiffs ignore *Zelman*, which they do not cite even once, and avoid every case by this Court interpreting Colorado's Religion Clauses. The one exception is *Americans United*, but Plaintiffs' interpretation of that case is flatly at odds with the First Amendment, as made clear by the Tenth Circuit in *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), and the U.S. Supreme Court in numerous decisions. The Court of Appeals properly rejected Plaintiffs' radical position and this Court should as well.

### A. Colorado's Religion Clauses Express Benevolent Neutrality Toward Religion

For over a century, this Court has consistently interpreted Colorado's Religion Clauses in a series of cases spanning a wide variety of ways in which government and religion intersect.

Two principal themes emerge from this Court's cases. First, Colorado's Religion Clauses require that government affirmatively accommodate religious exercise and adopt an attitude of benevolent neutrality toward religion. "The Constitution does not require complete separation of church and state: It affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Colorado v. Freedom from Religion Found.*, 898 P.2d 1013, 1020 (Colo. 1995) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984)). "[T]he proper attitude of government toward religion [is] one of

'benevolent neutrality.'" *Young Life v. Div. of Emp't & Training*, 650 P.2d 515, 520 (Colo. 1982). *Accord Americans United*, 648 P.2d at 1081-82; *Conrad v. City & Cnty. of Denver*, 656 P.2d 662, 670-71 (Colo. 1982) ("*Conrad I*").

Resting on these bedrock constitutional principles, this Court has upheld taxpayer funds flowing indirectly to Regis College, a private Jesuit institution, in *Americans United*, 648 P.2d at 1082; approved the placement of a monument of the Ten Commandments in Lincoln Park, *Freedom from Religion Found.*, 898 P.2d at 1025-26; and allowed Denver's purchase and display of a nativity scene on the steps of the Denver City and County Building, *Conrad v. City & Cnty. of Denver*, 724 P.2d 1309, 1317 (Colo. 1986) ("*Conrad II*"). The CSP falls squarely in this tradition: it permits families to select a religious school *if they choose*, and it permits private schools to participate in the CSP *if* they can satisfy the twelve neutral eligibility criteria. *See* Policy ¶E.2.c & ¶E.3; *Taxpayers*, ¶6 (bullet 3).

The second overarching theme of this Court's Religion Clause cases is that, noting the similarities between Colorado's Religion Clauses and those of the First Amendment, this Court has drawn consistently on analogous federal precedent.[12] This is especially true, as here, when "striking similarities" exist between the facts

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[12] *See Zavilla v. Masse*, 147 P.2d 823, 825 (Colo. 1944) (following *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)); *Conrad I*, 656 P.2d at 672-76 (following *Lemon v. Kurtzman*, 403 U.S. 602 (1971)); *Conrad II*, 724 P.2d at 1314 (following *Lynch v. Donnelly*, 465 U.S. 668 (1984)); *Young Life*, 650 P.2d at 519-20, 526 (following *Larson v. Valente*, 456 U.S. 228 (1982) and *Walz v. Tax Comm'n*, 397 U.S. 664 (1970)); *Freedom From Religion Found.*, 898 P.2d at 1019-27 (following *Allegheny County v. ACLU*, 492 U.S. 573 (1989)).

of the case at hand and federal precedent. *Freedom From Religion Found*., 898 P.2d at 1019. Indeed, this Court has warned that deviating from analogous federal precedent "should not be undertaken lightly." *Conrad II*, 724 P.2d at 1316. Even when explicitly asked to do so by the parties, the Court has consistently declined. *Id*.; *Young Life*, 650 P.2d at 526.

The federal case with "striking similarities" to this one is *Zelman*, in which the U.S. Supreme Court upheld an Ohio scholarship program for elementary and secondary schools in Cleveland. In *Zelman*, 96% of participating students enrolled in religious schools, and 82% of the participating schools were religious. *Id*. at 647. The U.S. Supreme Court held the program was constitutional – despite the fact that public money flowed indirectly to religious schools – because the program was "neutral with respect to religion, and provide[d] assistance directly to a broad class of citizens who, in turn, direct[ed] government aid to religious schools wholly as a result of their own genuine and independent private choice." *Id*. at 652. The U.S. Supreme Court thus endorsed the central principle of this case: parental choice. The Court rejected the argument that public money was impermissibly being used to aid religion, explaining that any "incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to

the *individual recipient, not to the government*, whose role ends with the disbursement of benefits." *Id*. (emphasis added).[13]

Of course, two decades earlier, this Court had already applied precisely the same rationale in upholding the scholarship program in *Americans United*. This Court made clear that when a neutral government program distributes benefits evenhandedly to families, who then make an independent choice to direct those funds to private schools the advancement of any school's religious mission is too "remote and incidental" to offend Colorado's Religion Clauses. *See Americans United*, 648 P.2d at 1082, 1083-84.

### B. The CSP Does Not Violate Article II §4

As relevant here, Article II §4 provides: "No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent." The trial court found the CSP violated this provision because taxpayers were being compelled to support religious schools. Order at 45. Plaintiffs argue the CSP violates both the "no compelled support" and "no compelled attendance" clauses. Opening Brief at 51-53. The Court of Appeals correctly concluded there is no violation. *Taxpayers*, ¶¶63-77.

The lower court simply followed this Court's decision in *Americans United*, which had already rejected similar arguments to an analogous state grant program.

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[13] The Court of Appeals found it unnecessary to draw on federal precedent because it concluded that Colorado's "existing jurisprudence" was sufficient to "resolve the merits of plaintiffs' claims." *Taxpayers*, ¶61.

*Taxpayers*, ¶64. This Court recognized that Article II §4 "embod[ies] the same values of free exercise and governmental non-involvement secured by the religious clauses of the First Amendment," and it "echoes the principle of constitutional neutrality underscoring the First Amendment." *Americans United*, 648 P.2d at 1081-82.

Applying these constitutional principles, the CSP does not violate any part of Article II §4. "[T]he CSP is neutral toward religion generally and toward religion-affiliated schools specifically." *Taxpayers*, ¶74. *Accord* Policy ¶¶A.9, E.2.c. It is also neutral in that "it is available to all District students and to any private school which meets the neutral eligibility criteria." *Taxpayers*, ¶67. Identical to the funding mechanism in *Americans United* and *Zelman*, the CSP was "designed for the benefit of the student, not the educational institution." 648 P.2d at 1082. Both lower courts recognized this, explaining that "the purpose of the Scholarship Program was for the benefit of the students, not the benefit of the private religious schools." Order at 44; *Taxpayers*, ¶67. *See also Taxpayers*, ¶6 (bullet 1), ¶100; Policy ¶A.3 (stating secular purposes of the CSP).

Plaintiffs also argue the CSP violates the "no compelled support" clause by "diverting taxpayer dollars" to religious schools. Opening Brief at 51. However, this argument is also foreclosed by *Americans United*. There, like here, the government created a neutral grant program that provided students a genuine choice about where to spend their grant funds. In both programs it is the

"individual recipient, not the government" that directs the funds, so "[a]ny benefit to the institution" is a mere "byproduct" and so "remote and incidental" that it does not constitute "aid to the institution" within the meaning of the Colorado Constitution. *Americans United*, 648 P.2d at 1083-84 (explaining this rationale when discussing Article IX §7); *see also id*. at 1082 (finding the grant program "exacts no form of support for religious institutions" within the meaning of Article II §4). *Accord Zelman*, 536 U.S. at 652.

Moreover, such "remote and incidental" indirect aid cannot constitute a violation of the "no compelled support" clause when Colorado appellate courts have rejected such challenges when government support has been direct. For instance, this Court rejected a "no compelled support" challenge even though Denver used taxpayer funds to buy and display a full-size nativity scene on the steps of the City and County Building. *Conrad II*, 724 P.2d at 1312, 1317. Likewise, this Court in *Freedom from Religion Found.* held there was no violation when State employees had for decades cleaned and maintained the Ten Commandments monument in Lincoln Park. 898 P.2d at 1017. In addition, the Court of Appeals previously rejected a challenge when public funds were spent on police, sanitation, and other public services during the Pope's 1993 visit to Denver. *Freedom from Religion Found. v. Romer*, 921 P.2d 84, 91 (Colo.App. 1996). If Plaintiffs are right here, then all of these cases are wrong.

Finally, there is no merit to Plaintiffs' arguments about "compelled attendance" because the CSP is completely voluntary. Parents have the choice about whether they want to enroll their child in the CSP in the first place. If they choose to do so, they then have the further choice among the various qualifying private schools. *See Taxpayers*, ¶77 ("the CSP does not compel anyone to do anything, much less attend religious services").[14]

In sum, a proper evaluation of the text, purposes, and case law regarding Article II §4 demonstrates that the CSP does not violate any part of it.

### C. The CSP Does Not Violate Article IX §7

Plaintiffs claim the CSP violates Article IX §7 for the same reason they believe it violates the "no compelled support" clause of Article II §4; namely, because it "channel[s] public money to private religious schools." Opening Brief at 44. *Cf. Taxpayers*, ¶110 (dissent). Like elsewhere in their brief, Plaintiffs ignore the relevant Colorado law on point, relying solely on the bare text, out-of-state cases, and one biased commentator's interpretation of the historical record. Opening Brief at 44-50. Plaintiffs are mistaken; the CSP does not violate Article IX §7.

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[14] Plaintiffs' citation to *University of Colorado v. Derdeyn*, 863 P.2d 929, 947 (Colo. 1993), is misplaced. Opening Brief at 53. *Derdeyn* is a Fourth Amendment case about random drug testing of intercollegiate student athletes. *Id.* at 930. Further, unlike the extensive record in *Derdeyn* about whether the students' choices were voluntary, there is nothing in this record or the CSP to suggest that parents who choose to enroll their children in the CSP are not making a fully voluntary choice.

### 1. The CSP Comports with This Court's Interpretation of Article IX §7 in *Americans United*

Both lower courts agreed that the CSP satisfies the textual core of Article IX §7, because CSP funds are not "in aid of" any church or sectarian purpose. *See* Order at 39 ("the purpose of the program is to aid students and parents, not sectarian institutions"); *id.* at 44 (same); *Taxpayers*, ¶¶67, 81, 99 (same). Since parents are the ones directing the scholarships to religious schools, not the government, the indirect funding is too "remote and incidental" to constitute "aid to the institution itself within the meaning of Article IX §7." *Americans United*, 648 P.2d at 1083-84.

Other similarities between the CSP and the grant program upheld in *Americans United* provide further support for the CSP's constitutionality. First, as both lower courts found, the CSP has a "'check and balance system' which allows for periodic District review of participating private schools' records to assure that the schools are complying with the educational and other requirements to which they agreed." *Taxpayers*, ¶70. *Accord* Order at 40, 44. *Cf. Americans United*, 648 P.2d at 1082, 1084. Second, the CSP is "non-restrictive in the sense that it is available to [all Douglas County] students," *Taxpayers*, ¶66, just like the grant program, 648 P.2d at 1082, 1084. And finally, the CSP does not permit

participating schools to decrease its own aid to students in proportion to the amount of the scholarship. *Taxpayers*, ¶70; *Americans United*, 648 P.2d at 1084.[15]

### 2. Plaintiffs' Out-of-State Cases Are Unavailing

Because Colorado case law is solidly against them, Plaintiffs cite to a number of out-of-state cases for support.[16] Opening Brief at 47-48. The dissent does the same. *Taxpayers*, ¶¶128-131, 138. However, in all of these cases the out-of-state courts disregard the indirect nature of the aid. Such an approach, as the Court of Appeals explained, "is flatly at odds with [this Court's] reasoning in *Americans United*." *Id.* at ¶88. "The purpose of the aid and the identity of the person or entity choosing the school make all the difference in determining whether money is 'in aid of' [religious schools]" for purposes of Article IX §7. *Id.* at ¶88 n.25.[17]

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[15] Plaintiffs claim the contrary, citing the Order ¶13 and testimony at Tr.295:25-298:15. Opening Brief at 46. Plaintiffs are incorrect and their citations are misleading. In the very next paragraph of the trial court's Order (¶14) and in the immediately preceding lines of the Assistant Superintendent's testimony (Tr.295:7), it states clearly that any CSP school that tried to reduce its aid would violate the Program. As a result, its contract would be terminated. Tr.512:7-14. The Court of Appeals properly recognized this, noting that neither the trial court nor Plaintiffs cited any "evidence supporting a conclusion that such reduction was permissible under the CSP." *Taxpayers*, ¶70.

[16] More broadly, fully half of the cases Plaintiffs cite *on all issues* – not just related to the Religion Clauses – are not from Colorado. *See* Opening Brief at v-ix (Table of Authorities) (28 out of 57 cases are not from Colorado).

[17] The dissent interprets Article IX §7 to "den[y] funding to *all* private religious schools." *Taxpayers*, ¶158 (emphasis in original). However, this position is not only flatly at odds with *Americans United*, it also runs counter to all of this Court's decisions requiring religious accommodation and benevolent neutrality towards religion. *See e.g.*, *Freedom from Religion Found.*, 898 P.2d at 1020. Such a view would also overturn dozens of educational programs operating for decades.

One of the most important reasons for this is because Article IX §7 is a so-called "general no-aid" provision, as opposed to other state constitutions that specifically forbid indirect aid. *Cf.* Fla. Const. art. I §3 ("No revenue of the state…shall ever be taken from the public treasury directly or *indirectly* in aid of any church….") (emphasis added); Mont. Const. art. X §6(1) ("The legislature …shall not make any direct or *indirect* appropriation…for any sectarian purpose or to aid any church….") (emphasis added). Like other states that have more general provisions, *Americans United* interpreted Colorado's "no aid" clause to permit indirect aid due to private choice. *See Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998); *Simmons–Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999).

### D. Plaintiffs' Interpretation of *Americans United* Violates the First Amendment

Plaintiffs propose an interpretation of *Americans United* that is not only incorrect – it also violates the First Amendment. Opening Brief at 58-61. Plaintiffs ignore the fact that "[i]n the thirty years since *Americans United* was decided, the United States Supreme Court has made clear that, in assessing facially neutral student aid laws, a court may not inquire into the extent to which religious teaching pervades a particular institution's curriculum. Doing so violates the First Amendment." *Taxpayers*, ¶71 (citing cases). Rather than acknowledge this fact, Plaintiffs propose that this Court use the exact same criteria used to distinguish

between "sectarian" and "pervasively sectarian" schools that the Tenth Circuit held unconstitutional in *Colorado Christian University*. Specifically, Plaintiffs seek to distinguish the grant program on the basis that those funds could be used only at schools where:

- "The governing board does not reflect nor is the membership limited to persons of any particular religion;"
- "Funds do not come primarily or predominantly from sources advocating a particular religion;"
- "[P]articipating institutions [do not] limit admission to students of one religion;" and
- "[S]tudents [are not required] to attend religious services."

Opening Brief at 59, 61 (citing four of the six "pervasively sectarian" factors in *Americans United*, 648 P.2d at 1075). However, the Tenth Circuit specifically and exhaustively discussed how "inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established…that courts should refrain from trolling through a person's or institution's religious beliefs." *Colo. Christian Univ.*, 534 F.3d at 1261 (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000)).

Indeed, just like the trial court's unconstitutional evaluations of the religious schools, Plaintiffs urge courts to evaluate whether "religious indoctrination is…a substantial purpose" at participating private schools and how much "risk" there is "of religion intruding into the secular educational function" of such schools.

Opening Brief at 59-60. However, as the Court of Appeals correctly pointed out, "the inquiry in which the district court engaged – into the degree to which religious tenets and beliefs are included in participating private schools' educational programs – is no longer constitutionally permissible." *Taxpayers*, ¶71.

Additionally, Plaintiffs try to justify an "indoctrination evaluation" based upon whether the schools are elementary, secondary, or collegiate. Opening Brief at 60. *Cf. Taxpayers*, ¶¶145-46 (dissent). However, the Court of Appeals properly rejected this as well: "The inappropriateness of the inquiry into the extent to which a school teaches religious doctrine is based on the First Amendment's requirement of neutrality. That principle does not evaporate because the school in question is an elementary or secondary school. Indeed, the schools at issue in *Mitchell* were elementary and secondary schools." *Taxpayers*, ¶75. *See also id.* at ¶84 (noting that "nothing in the text of article IX, section 7 even remotely hints at the distinction" between K-12 and higher education).

This makes sense: A student should not be barred from attending Regis High School (a CSP partner school) because a judge has deemed it "too religious," only to graduate and attend Regis University using state grant funds approved by this Court in *Americans United*. *Zelman* further confirms these conclusions. In that case, involving K-12 schools, the U.S. Supreme Court spent not a word trying to divine "how religious" the schools were or how many public dollars would be spent on "indoctrination" versus "education." 536 U.S. at 643-63.

The Tenth Circuit identified Plaintiffs' proposed "indoctrination analysis" as the "potentially most intrusive element" of the "pervasively sectarian" inquiry, which has "long been condemned by the Supreme Court." *Colo. Christian Univ.*, 543 F.3d at 1261-62 (citing cases). As the Tenth Circuit explained at some length, "The First Amendment does not permit government officials to sit as judges of the 'indoctrination' quotient of theology classes." *Id.* at 1263. The trial court engaged in this type of unconstitutional inquiry, and Plaintiffs and the dissent urge it as well. The Court of Appeals rightfully rejected it. *Taxpayers*, ¶68-75. This Court should reject it as well. [18]

### E. The CSP Does Not Violate Article IX §8

#### 1. The First Sentence Applies Only to State Institutions of Higher Education, Not Douglas County and the CSP.

Plaintiffs argue the CSP violates three parts of Article IX §8, two from the first sentence and one from the second. Opening Brief at 53-58. However, the first sentence does not apply to Douglas County at all. It applies only to "public educational institutions *of the state*," *i.e.*, "state institutions, *e.g.*, University of Colorado, School of Mines, or State Teachers' College," while "the last sentence

[18] Plaintiffs and the dissent also cite to the U.S. Supreme Court case of *Locke v. Davey*, 540 U.S. 712 (2004). Opening Brief at 64; *Taxpayers*, ¶¶134-136. However, *Locke* supports upholding the CSP. Citing *Zelman*, the Supreme Court in *Locke* reiterated that there is no constitutional impediment to public funds flowing indirectly to religious schools because funds are directed by "the independent and private choice of recipients," not the government. 540 U.S. 712, 719 (2004) (citing cases). Indeed, *Locke* specifically noted that scholarships could be spent at "pervasively sectarian religious schools." *Id.* at 724.

of [IX §8] refers to *public schools*." *People ex rel. Vollmar v. Stanley*, 255 P. 610, 615 (Colo. 1927) (emphasis added), *overruled in part by Conrad I*, 656 P.2d at 670 n.6.

This distinction between the first and second sentences of IX §8 has been drawn by Colorado courts for decades, based on its plain language and the principle that "a word repeatedly used in a constitution will generally be given the same meaning throughout the instrument." *Wilmore v. Annear*, 65 P.2d 1433, 1435 (Colo. 1937). In *Wilmore*, for instance, the court drew this distinction based upon the fact that Article VIII §1 "of the Constitution uses the term 'educational…institutions' in referring to schools other than the constitutionally required public schools…. [Whereas] 'Public Schools' is the term used in sections 2 and 15 of article 9 and as so used…clearly applies there to schools that serve only those between the ages of 6 and 21 residing in the district." *Id*. at 1434-35. *Cf. Jones v. Newlon*, 253 P. 386 (Colo. 1927); *Bd. of Educ. v. Spurlin*, 349 P.2d 357, 365 (Colo. 1960) (Frantz, J., dissenting); *People ex rel. Walker v. Higgins*, 184 P. 365, 365 (Colo. 1919).

Thus, the first sentence of Article IX §8 is simply irrelevant to this case.[19]

[19] The Court of Appeals did not reach this issue. *Taxpayers*, ¶93 n.26.

### 2. The CSP Does Not Violate Any Part of Article IX §8

Plaintiffs wrongly maintain that the CSP compels a religious test for admission, attendance at religious services, and teaching sectarian doctrines. Opening Brief at 54-58. None of this is correct.

#### a. The CSP Does Not Require a Religious Test for Admission

Relying on a single, incorrect statement in an application form, Plaintiffs allege that the CSP requires a religious test for admission. Opening Brief at 54. [20] This is incorrect and directly contrary to the record.

The trial court, *sua sponte*, asked the Superintendent this question directly at the close of her testimony. Tr.571:11-572:2. She answered it clearly and unequivocally:

> THE COURT: "[I]s [enrollment in the CSP] predicated on gaining admission into one of the private partner schools…?"
>
> THEWITNESS: "No."

Tr.571:13-15. She explained that just because a student might enroll in the CSP and receive a scholarship does not mean the student will decide to enroll in or be accepted by a partner school; enrollment in the CSP and enrollment in a partner school are independent. Tr.571:18-572:13. Even the dissent recognized this,

[20] Plaintiffs also cite to the trial court's Order (at ¶18), but this is redundant because the court relied on the same mistaken document.

writing that "[CSP] students…must be accepted by *two* schools, the private school and the Choice Scholarship School." Taxpayers, ¶155 (emphasis in original).

While the trial court expressly noted Dr. Fagen's testimony, it improperly disregarded it. Order at 48; *see also id.* at 5 ¶20. However, the testimony was undisputed that the Superintendent had express authority to make changes to the Program to ensure it was implemented properly. Tr.512:21; 516:20-22; 624:12-13, 22. Further, the evidence was uncontested that the Board could, if necessary, change anything about the Policy to ensure it was successful and legally compliant. Tr.569:23; *see also* Policy ¶H (severability clause). The Court of Appeals properly rejected the trial court's and Plaintiffs' unsupportable allegation, concluding that enrollment in the CSP for administrative purposes does not justify conflating the CSP and the private schools. *Taxpayers*, ¶93.[21]

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[21] Plaintiffs also wrongly assert that the CSP permits discrimination on the basis of "disability, sexual orientation, marital status, and HIV status." Opening Brief at 55 n.4. In fact, the CSP specifically prohibits discrimination "on any basis protected under applicable federal or state law." Policy ¶E.3.f. The evidence was undisputed that the District would terminate a school's contract if it were to discriminate against a protected class. Tr.512:7-13. The Policy's sole exception permits religious schools to make decisions based upon religious beliefs, accommodating religion in accord with constitutional principles of religious liberty. *See Hosanna-Tabor v. EEOC*, 132 S. Ct. 694 (2012) (constitutional right of religious schools to select teachers); 42 U.S.C. §2000e-1(a), §2000e-2(e)(2) (Title VII exception for religious schools); C.R.S. §24-34-402(6) (same under Colorado Anti-Discrimination Act). To support their meritless accusation of discrimination, Plaintiffs cite to materials from two private schools, Opening Brief at 55 n.4, *not* anything from the District. Like the lower court, this Court must reject Plaintiffs' attempt to ascribe illegal discrimination to the District when the CSP expressly forbids it. *See also Taxpayers*, ¶77 n.21 (rejecting discrimination argument).

### b. The CSP Does Not Compel Attendance at Religious Services or Teaching Sectarian Doctrines

Plaintiffs claim the CSP compels attendance at religious services and the teaching of sectarian doctrines. Opening Brief at 55-58. Plaintiffs are incorrect because they (1) ignore the fact that the CSP is entirely voluntary, and (2) conflate the CSP and private schools.

As noted above, the CSP contains two levels of choice. Parents, first, must affirmatively choose to participate in the CSP, and then, if their child receives a scholarship, parents independently choose where to enroll their child. If a CSP family elects a religious partner school, it is because they *want* their child educated there, not because Douglas County or the CSP requires it. As in *Americans United* and *Zelman*, the CSP is absolutely neutral with regard to religion.

The absurdity of any conclusion to the contrary is illustrated by considering public schools themselves. When public schools offer religious options, they are not compelling religious choices. For instance, public schools are permitted to offer release time programs, in which they release students during the school day to receive religious instruction or participate in worship services. *Zorach v. Clauson*, 343 U.S. 306 (1952); *Lanner v. Wimmer*, 662 F.2d 1349 (10th Cir. 1981). Public schools may also open their buildings during lunch or after school to religious groups, who may use the space for religious teaching or worship. *Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990) (upholding Equal Access

Act, 20 U.S.C. §4071 *et seq.*); *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001) (Free Speech Clause requires equal use by religious groups). In both circumstances, it is the parents who choose whether they want their children to participate in any religious activity – just like the CSP.

Like the trial court, Order at 49-50, Plaintiffs focus their arguments almost exclusively on the religious opt out. Opening Brief at 55-56. This misses the point entirely. The opt out is an *additional* protection, which attempts to strike a balance between a student's liberty of conscience and a school's rights of association and religious exercise. As the Court of Appeals observed, even if one were to disregard the opt out, "the fact remains that the CSP does not compel anyone to do anything, much less attend religious services. No student is compelled to participate in the CSP or, having been accepted to participate, to attend any particular participating private school. To the extent students would attend religious services, they would do so as a result of parents' voluntary choices." *Taxpayers*, ¶77.

Further, nothing about the CSP compels anyone to teach sectarian doctrine. It does not mandate sectarian lessons in the District's public schools; not even Plaintiffs claim that. Private schools are left to themselves to determine which religious tenets they teach, as is required under our constitutional system. *See Freedom from Religion Found. v. Cherry Creek Sch. Dist.*, 2008 WL 4197618 *5 n.6 (D. Colo.) (holding a program does not violate the "no sectarian doctrines" clause because it was "entirely neutral as to what type of religious instruction

children should receive"). The CSP is entirely neutral toward religion. *Taxpayers*, ¶¶67, 74, 81; Policy ¶A.9.

Plaintiffs are concerned that "public school students" are receiving religious instruction. Opening Brief at 57. But, as discussed, parents may choose to have their children (public school students) receive religious instruction in release time or after school programs. Just because students are "counted" for funding purposes does not mean they are prohibited from receiving religious instruction *voluntarily*.

Finally, Plaintiffs accuse the District of trying to "have it both ways" by counting students as enrolled in the CSP for financial purposes but permitting students to attend CSP participating schools. *Id.* However, such relationships are inherent in any public-private partnership, whether one of the dozens described in this brief for K-12 and higher education, or those outside the education context. The critical constitutional question is not whether "public students" are using "public funds" to attend "private schools" – religious or non-religious. This Court's decision in *Americans United* clearly permits that. The question is whether the government is neutral towards religion, *Zelman*, 536 U.S. at 652, which the CSP indisputably is, *Taxpayers*, ¶81 ("The CSP is neutral toward religion, and funds make their way to private schools with religious affiliation by means of personal choices of students' parents.").

Accordingly, there is no violation of any part of Article IX §8.

### F. The History of Article IX §§7 and 8 Reveal Them to Be Blaine Amendments

In their discussion of Article IX §7, Plaintiffs spend three pages recounting the historical viewpoints of a single commentator, Tom I. Romero, II.[22] Opening Brief at 48-50. However, there are two critical problems with Professor Romero's conclusions. First, they are contrary to settled Colorado law. Second, they ignore the evidence in the record about the bigoted history of Article IX §§7 and 8, Colorado's Blaine amendments. [23]

Plaintiffs begin by asserting that the history shows that "the Constitution's framers intended to prevent any use of public funding to support religious schools." Opening Brief at 48. However, this is directly contrary to this Court's holding in *Americans United*. It is also contrary to the dozens of Colorado education programs already in place, described above. Plaintiffs also quote Professor Romero's conclusion that Colorado history suggests a "rigid separation"

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[22] Plaintiffs' attempt to insert Professor Romero as an expert witness for the first time at the appellate level should be rejected. First, the record reflects that both sides endorsed experts at the trial court. Defendants called Charles Glenn, while Plaintiffs did not call their expert. Thus, Dr. Glenn's testimony stands unrebutted in the record. Second, Professor Romero admits that he was a retained expert for plaintiffs in *Lobato* and that "much of the research" for this article arose from that engagement. Romero, *Of Greater Value*…, 83 Univ. Colo. L. Rev. 781, 788 n.25 (2012). Third, while at first blush it appears Plaintiffs draw on his 2012 article *in addition to* the 1907 *Proceedings* and a 1940 article by Colin Goodykoontz, in fact virtually all their conclusions and citations are drawn from Professor Romero's article. Accordingly, these untested opinions of questionable provenance should be disregarded.

[23] The Court of Appeals avoided the Blaine issues in upholding the CSP. *Taxpayers*, ¶62.

between church and state. *Id.* Again, this is not Colorado law: "The Constitution does not require complete separation of church and state: It affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Freedom from Religion Found.*, 898 P.2d at 1020.

Further, the unchallenged evidence from the hearing is that Article IX §§7 and 8 are so-called "Blaine provisions," laws that were born of religious bigotry in general and anti-Catholic nativism in particular. Tr.697:15-698:17. At trial, Defendants' expert witness, Professor Charles Glenn, testified about the discriminatory anti-Catholic motivation behind the Colorado Blaine provisions. Tr.686:8-687:11. He recounted how Colorado's Blaine provisions were enacted to "knowingly discriminat[e] against Roman Catholics" and to discriminate among different religious groups. Tr.698:12-15. These Blaine provisions were unconstitutionally "born of animosity toward the class of persons affected" – in this context, Catholics. *See Romer v. Evans*, 517 U.S. 620, 634 (1996). The U.S. Supreme Court has described similar Blaine provisions from other state constitutions as having "a shameful pedigree" that "should be buried now." *Mitchell v. Helms*, 530 U.S. 739, 828-29 (2000) (plurality opinion).[24] Plaintiffs' proposed interpretation of these provisions would create a conflict with the federal Constitution.

[24] The amicus brief by the Becket Fund relates this disgraceful history in more detail.

Fortunately, Colorado courts have never given life to this discriminatory history and bigoted interpretation. This Court should avoid the constitutional conflict urged by Plaintiffs by doing what it has always done – following *Americans United* and *Zelman*. Doing so would offer the dual benefit of conforming to the unbroken precedent of Colorado courts and avoiding the deeply-rooted constitutional problem posed by giving life to Colorado's Blaine amendments. *See also Independence Inst. v. Coffman*, 209 P.3d 1130, 1136 (Colo.App. 2008) (courts should avoid interpretations that create conflict with the federal Constitution).

## CONCLUSION

Over 30 years ago, this Court in *Americans United* approved a program of public aid to Colorado students that enabled them to spend that aid at any qualified school of their choice, including private, religious institutions. That decision was located squarely within this Court's jurisprudence holding that government must affirmatively accommodate religion and show a benevolent neutrality toward religious believers. In reliance on this unwavering precedent, the Legislature, Department of Education, and other Colorado school districts have approved and utilized scores of current programs spending public funds at private schools, including those that are religiously-affiliated, at all levels of education throughout Colorado.

Furthermore, the U.S. Supreme Court in *Zelman* held constitutional the use of public money through parental choice for a program substantially similar to the CSP. Voluntary parental choice – the heart of this Program – also makes impossible any compelled attendance or forced religious teaching arguments. Nor may courts constitutionally scrutinize how much indoctrination is occurring in religious schools, as *Colo. Christian Univ.* makes clear.

The combined principles of these cases call for the affirmance of the Colorado Court of Appeals and the declaration by this Court of the lawfulness of the Choice Scholarship Program.

## STATEMENT REGARDING ATTORNEY FEES

Neither Plaintiffs nor Defendants make any claim regarding attorney fees arising out of this appeal.

Dated: August 4, 2014.

*s/ James M. Lyons*
James M. Lyons

*s/ Eric V. Hall*
Eric V. Hall

Lewis Roca Rothgerber LLP
One Tabor Center, Suite 3000
1200 17th Street
Denver, CO 80202-5855
Telephone: (303) 623-9000
Facsimile: (303) 623-9222

**Attorneys for Respondents Douglas County School District and Douglas County Board of Education**

JOHN W. SUTHERS
Attorney General

*s/ Michael Francisco*
Michael Francisco, No. 39111
Assistant Solicitor General
Antony B. Dyl, No. 15968
Senior Assistant Attorney General

**Attorneys for Respondents Colorado Department of Education and Colorado State Board of Education**

James C. Ho (of counsel)*
Prerak Shah (of counsel)*
Gibson, Dunn & Crutcher LLP
1801 California Street, Suite 4200
Denver, CO 80202-2642
Tel: 303.298.5700
Fax: 303.298.5907
jho@gibsondunn.com
pshah@gibsondunn.com
*Not admitted in Colorado

## CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of August, 2014, a true and correct copy of the foregoing **ANSWER BRIEF** was filed via ICCES, and electronically served on the following:

Matthew J. Douglas, Esq.
Timothy R. Macdonald, Esq.
Michelle K. Albert, Esq.
Arnold & Porter LLP
370 17th Street, Suite 4400
Denver, CO 80202

Mark Silverstein, Esq.
Sara Neel Rich, Esq.
American Civil Liberties Union
Foundation of Colorado
400 Corona Street
Denver, CO 80218

Michael S. McCarthy, Esq.
Colin C. Deihl, Esq.
Caroline Lee, Esq.
Faegre Baker Daniels, LLP
1700 Lincoln Street, Suite 3200
Denver, CO 80203

and served via e-mail on the following:

Raymond L. Gifford, Esq.
rgifford@wkblaw.com
Wilkinson Barker Knauer, LLP
1430 Wynkoop Street, Suite 201
Denver, CO 80202

Michael Bindas
mbindas@ij.org
Institute for Justice
101 Yesler Way, Suite 603
Seattle, WA 98104

William H. Mellor, Esq.
wmellor@ij.org
Richard D. Komer, Esq.
dkomer@ij.org
Timothy D. Keller, Esq.
tkeller@ij.org
Institute for Justice
901 N. Glebe Road, Suite 900
Arlington, VA 22203

and served via U.S. mail on the following:

Alexander Halpern
Alexander Halpern, LLC
1426 Pearl Street, #420
Boulder, CO 80302

Paul Alexander
Arnold & Porter LLP
1801 Page Mill Road, Suite 110
Pala Alto, CA 94304-1216

Daniel Mach
Heather L. Weaver
ACLU Foundation Program on Freedom of Religion and Belief
915 15th Street, NW, Suite 600
Washington, DC 20005

Ayesha N. Khan, Esq.
Alex J. Luchenitser
Americans United for Separation of Church and State
1301 K Street, NW
Suite 850, East Tower
Washington, DC 20005

*s/ Jonelle S. Martinez*
of Lewis Roca Rothgerber LLP