| 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 No. 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:** 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:** 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:** DOUGLAS COUNTY SCHOOL DISTRICT and DOUGLAS COUNTY BOARD OF EDUCATION,<br><br>and<br><br>**Respondents**: COLORADO STATE BOARD OF EDUCATION; AND COLORADO DEPARTMENT OF EDUCATION,<br>and | ^COURT USE ONLY^<br><br>Case No: 13SC233 |
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| **Respondents:** FLORENCE and DERRICK DOYLE, on their own behalf and as next friends of their children, ALEXANDRA and DONOVAN; DIANA AND MARK OAKLEY, on their own behalf and as next friends of their child, NATHANIEL; and JEANETTE STROHM-ANDERSON AND MARK ANDERSON, on their own behalf and as next friends of their child, MAX,<br><br>Attorneys for Petitioners James LaRue, Suzanne T. LaRue, Interfaith Alliance of Colorado, Rabbi Joel R. Schwartzman, Rev. Malcolm Himschoot, Kevin Leung, Christian Moreau, Maritza Carrera and Susan McMahon:<br><br>Matthew J. Douglas, #26017<br>Timothy R. Macdonald, #29180<br>Michelle K. Albert, #40665<br>ARNOLD & PORTER LLP<br>370 17th Street, Suite 4400<br>Denver, CO 80202<br>Telephone: 303.863.1000<br>Fax: 303.832.0428<br>Matthew.Douglas@aporter.com<br>Timothy.Macdonald@aporter.com<br>Michelle.Albert@aporter.com<br><br>Mark Silverstein, #26979<br>Sara Rich, #36904<br>AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO<br>400 Corona Street<br>Denver, CO 82018<br>Msilver2@att.net<br>Srich@aclu-co.org<br><br>Daniel Mach, DC Bar #461652<br>Heather L. Weaver, DC Bar #495582<br>ACLU FOUNDATION PROGRAM ON FREEDOM OF RELIGION AND BELIEF<br>915 15th Street, NW, Suite 600<br>Washington, DC 20005<br>Telephone: 202.675.2330<br>Fax: 202.546.0738<br>dmach@aclu.org<br>hweaver@aclu.org | |

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**REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BY LARUE PETITIONERS**

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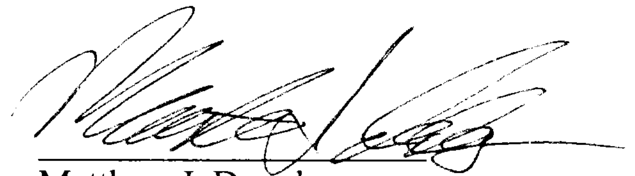
## CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply complies with all requirements of C.A.R. 32 and C.A.R. 53, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The Reply complies with C.A.R. 53(d) as it contains 2240 words.

I acknowledge that my Reply may be stricken if it fails to comply with any of the requirements of C.A.R. 32 and C.A.R. 53.



Matthew J. Douglas

## INTRODUCTION

This reply principally responds to the briefs filed by the Douglas County School District and Douglas County Board of Education (collectively, "DCSD"), and by the Intervenor-Respondents ("Intervenors"). Those briefs, which present flawed substantive arguments about the constitutional merits of the challenged Voucher Program, only serve to confirm that this case raises important constitutional questions that warrant this Court's review.

For example, Respondents acknowledge that the decision below substantially altered this Court's analysis in *Americans United for Separation of Church and State Fund, Inc. v. State*, 648 P.2d 1072 (Colo. 1982). In particular, Respondents admit that the court of appeals selectively applied certain criteria from *Americans United* and disregarded others, and they attempt to defend the court of appeals' decision to do so. Whether the *Americans United* analysis should be abandoned, however, is precisely the kind of question that should be decided by this Court.

Respondents also attempt to downplay the significance of this case by stating that the Douglas County program is only a "pilot" program. If the opinion below is allowed to stand, however, its reasoning would be equally applicable to broader school voucher programs. Every school district within Colorado would be

free to develop similar programs—of unlimited size—that would channel public funds to religious schools and activities, without having to satisfy the criteria established by this Court in *Americans United.*

For the reasons set forth in this Reply and in the LaRue Petition ("Petition"), LaRue Petitioners respectfully urge this Court to grant certiorari.[1]

**ARGUMENT**

Respondents' arguments only confirm that this case meets the standards for certiorari review established by Appellate Rule 49 and this Court's jurisprudence. Under Appellate Rule 49(a), factors supporting review include whether a lower court has decided "a question of substance not yet decided by this Court" or issued a ruling that is "probably not in accord" with this Court's precedent. Further, this Court has stated that in deciding whether to grant certiorari, it focuses on whether the subject matter "has significant public interest, whether the cause involves legal principles of major significance to the jurisprudence of the State, or whether the decision below is in probable conflict with a decision of the Supreme Court." *Bovard v. People*, 99 P.3d 585, 592 (Colo. 2004) (discussing *Ross v. Moffitt*, 417

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[1] LaRue Petitioners previously adopted by reference the Petition for Writ of Certiorari by the Taxpayers for Public Education ("Taxpayers"), and they now adopt the Taxpayers' Reply, which addresses the State Respondents' brief and Respondents' arguments regarding the presumption of constitutionality that the majority below extended to all acts of school districts.

U.S. 600, 615 (1974), and explaining that Colorado's certiorari requirements are analogous to those evaluated in *Ross*). When these considerations are applied to the Voucher Program, they overwhelmingly weigh in favor of granting review.

**I. This case presents issues of significant public interest.**

As explained in the Petition, this case involves legal questions of major significance to Colorado: How should the specific provisions of Colorado Constitution's religion clauses that are at issue here be interpreted in the context of a program such as the Voucher Program? To what extent, if any, can public funds be channeled to religious schools under these circumstances? Are school voucher programs similar to Douglas County's permissible in this state? These questions are inherently important to the citizenry of this State, and clearly justify certiorari.

Respondents retort by attempting to downplay the importance of this case, pointing out that the Voucher Program is only a "pilot program" with some 500 participants in its first year. *See, e.g.*, DCSD Br. at 17. This argument is disingenuous, as DCSD maintains that it intends to expand the Voucher Program if the Program is upheld. *See* District Court's Order (hereinafter, "Order") (R. ID #39266572) at 16 (¶64). There appears to be no basis for restricting such expansion if the decision below stands.

What is more, if the court of appeals' decision were left undisturbed, it would give school districts around Colorado carte blanche to enact similar programs. While other districts have not yet followed suit, this is not surprising, for the Voucher Program has been enjoined since shortly after its passage. This potential wider impact on Colorado's public educational system is precisely the type of issue of "significant public interest" that supports certiorari.[2]

Respondents also argue against certiorari on the ground that reversing the decision below could have wide-reaching effects on a host of other programs that are not at issue in this case. *See* DCSD Br. at 2-3; State Br. at 16. The district court correctly rejected similar arguments (*see* Order at 67), and the court of appeals did not address them. But if indeed there are other programs whose constitutionality may be questionable under the church-state clauses of Colorado's Constitution that are at issue here, that would only highlight the need for this Court to clarify the meaning of those clauses.

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[2] DCSD attempts to further downplay the importance of this case by arguing (incorrectly) that the Program would be "revenue-neutral" (DCSD Br. at 17-18), but this too is irrelevant and does not lessen the significance of the constitutional violations sanctioned by the majority opinion.

## II. Respondents admit that the majority decision below is not in accord with this Court's jurisprudence.

DCSD and Intervenors oppose certiorari on the basis that the majority below "simply followed" *Americans United* with a "straightforward application" of that decision. *See* DCSD Br. at 4-5; Intervenors Br. at 7. Respondents' rhetoric is contradicted by their own arguments, which acknowledge that the court below did *not* actually use the same analysis that this Court applied in *Americans United.* Rather, as Respondents admit, the court of appeals applied certain criteria from *Americans United* and disregarded others.

For instance, in *Americans United*, this Court relied in part on the distinction between K-12 schools and higher education, but the majority below refused to consider that factor here. DCSD and Intervenors attempt to explain the majority's deviation by arguing that this Court's previous reliance on U.S. Supreme Court cases such as *Tilton v. Richardson*, 403 U.S. 672 (1971), is "no longer current" (DCSD Br. at 11), and that under current federal law, the distinction has "no bearing on the constitutionality of student aid programs under the Establishment Clause" (Intervenors Br. at 9). Not only are these arguments wrong on the merits (*see* Petition at 9-11, 13, 15-17), they also contradict Respondents' assertion that the majority below engaged in a straightforward application of *Americans United.*

This Court further considered in *Americans United* whether the participating educational institutions were religious in nature—an inquiry driven by the very language of Article IX, section 7. *See* 648 P.2d at 1083-85. Intervenors argue (wrongly, *see* Petition at 16-17) that any inquiry into "the religiosity of schools participating in student aid programs" is now "constitutionally forbidden" by federal case law, and that therefore "the Court of Appeals simply *could not* have interpreted Colorado's provisions to require the exclusion of religious elementary and secondary schools." Intervenors Br. at 10-11. Once more, this contention belies Intervenors' claim that certiorari is unnecessary because the court engaged in a straightforward application of *Americans United.*

DCSD and Intervenors do not even agree among themselves as to what the law is: Intervenors adopt by reference certain of the other Respondents' arguments, but notably do not adopt DCSD's arguments regarding the religion clauses. *See* Intervenors Br. at 6 n.2. If the law were indeed as settled and straightforward as Respondents claim, there would be no basis for such disagreement.

DCSD also relies on the statement by the majority below that "even if we assume that consideration of all the facts discussed in *Americans United* remains constitutionally permissible, we conclude that our holding is consistent with

*Americans United*." *See* DCSD Br. at 11-12 (quoting the court of appeals' opinion (hereinafter, "App.") at 51). But the majority did not actually conduct any such analysis. It did not consider, for example, the distinction between K-12 and post-secondary education, whether state aid was likely to "seep over into the non-secular functions" of the receiving institutions, whether the Program was structured to prevent participating institutions from using grant funds for any purpose other than "the secular educational needs of the student," or the extent of "ideological control over the secular educational function," all of which were discussed by this Court in *Americans United*, 648 P.2d at 1083-84.

In sum, Respondents' arguments confirm that the court of appeals did not apply the analysis used by this Court in *Americans United.* Respondents may believe that the majority's analysis was correct, but that is irrelevant to whether this Court should grant certiorari. The relevant questions for Petitioners' Article IX, section 7 and Article II, section 4 claims are whether the majority opinion applied *Americans United* in a way that probably conflicts with this Court's precedent, or addressed novel and important questions not yet resolved by this Court. The answer to these questions is "yes." The resolution of these important issues should come from this Court, not a split decision of the court of appeals.

## III. Respondents' arguments serve to highlight that this case raises important legal questions that have not been decided by this Court.

*Americans United* addressed the constitutionality of a statutory, post-secondary program known as the "Colorado Student Incentive Grant Program." *See* 648 P.2d at 1074. The program provided grants to college students to assist in pursuing a secular education. *See id.* at 1082-84. This Court held that the program at issue there did not violate Article IX, section 7 or the compelled support clause of Article II, section 4. In doing so, the Court recognized that the analysis "turn[ed] to a great extent on the particulars of the [program] measured against the applicable constitutional provision." *See id.* at 1084.

The Voucher Program differs from the *Americans United* program in several critical ways, including that the Voucher Program is a K-12 program, lacks any features that may prevent state funds from being used for religious instruction, and operates through a public charter school in which all participants must enroll. Respondents go to great lengths to explain away these distinctions—but if *Americans United* "dictates" the result reached by the majority of the court of appeals (Intervenors Br. at 6), a lengthy analysis should be unnecessary. Extensive analysis is necessary only because, as the dissent and the district court correctly recognized, *Americans United* did *not* predetermine a validation of the Program here. To the contrary, the reasoning of *Americans United* supports the conclusion

that the Voucher Program is unconstitutional. App. at 78-82 (dissent); Order at 36-45. While *Americans United* set forth an analytical framework, application of that framework to the Voucher Program raises novel legal questions that are important both to Douglas County and to Colorado as a whole.[3]

What is more, Petitioners' arguments under the compelled attendance clause of section 4 of Article II, as well as their arguments under section 8 of Article IX, raise questions of substance not previously decided by this Court. Respondents cannot and do not dispute this.

Intervenors also make a variety of arguments concerning the federal Constitution which, although substantively without merit, provide further support for this Court's review. Intervenors assert that the U.S. Constitution prohibits courts from considering whether schools are religious and prohibits states from denying public funding to schools on the ground that they are religious. *See* Intervenors Br. at 10-11, 17-18. Similar arguments have been rejected by the U.S. Supreme Court and numerous other courts. *See* Petition at 15-17. Yet the majority

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[3] DCSD also suggests (for the first time in this case) that the Voucher Program is constitutional under this Court's decision in *Owens v. Colo. Congress of Parents, Teachers & Students*, 92 P.3d 933 (Colo. 2004). *See* DCSD Br. at 16-17. *Owens* held that a statewide school voucher program was *unconstitutional*, and said nothing about whether a program such as the Voucher Program here would be any different. DCSD's argument regarding *Owens*, if anything, supports granting certiorari, for it raises more questions than it answers.

below adopted these arguments, at least to some extent. *See* App. at 41-46, 50. As the majority's view conflicts with the rulings of other courts, and as this Court has not had an opportunity to consider this matter, these federal arguments weigh in favor of granting the Petition.

## IV. Decisions from other states support granting certiorari.

It is true, as Intervenors note, that some state courts have found certain voucher programs to be permissible under the particular language of their state constitutions. *See, e.g.*, App. at 73 (dissent) (explaining that Wisconsin and Ohio cases upholding voucher programs "are distinguishable because the constitutional language that they interpret is substantially different from [Article IX] section 7"). But many other state courts—including ones with constitutional provisions similar to Colorado's—have struck down voucher programs or other aid to religious schools under their state constitutions. *See id.* at 71-73 (dissent) (discussing decisions by Washington, Florida, Arizona, and Kentucky courts).

The divergence between the decision below and the rulings of other state courts that have considered similar constitutional provisions lends further support to this Court's review. Furthermore, regardless of how they came out, all of the decisions referenced above were rendered by the states' highest courts, which reflects those courts' appreciation of the importance of similar legal questions.

## CONCLUSION

For the foregoing reasons, and those set forth in their Petition, the LaRue Petitioners respectfully request that this Court grant certiorari.

Respectfully submitted this 15th day of May, 2013.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 15th day of May, 2013, a true and correct copy of the foregoing **REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BY LARUE PETITIONERS** was served by U.S. Mail, postage prepaid, to the following:

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