COLORADO SUPREME COURT Colorado State Judicial Building Two East 14th Avenue Denver, CO 80203 COURT OF APPEALS, STATE OF COLORADO Judges Jones, Graham, and Bernard Appeals Court Case No. 11CA1856 and 11CA1857 Appeal from District Court, Denver County Colorado The Honorable Michael A. Martinez Case No. 2011CV4424 *consolidated with* 2011CV4427	^COURT USE ONLY^ Case No: 13SC233
Petitioners: JAMES LARUE; SUZANNE T. LARUE; INTERFAITH ALLIANCE OF COLORADO; RABBI JOEL R. SCHWARTZMAN; REV. MALCOLM HIMSCHOOT; KEVIN LEUNG; CHRISTIAN MOREAU; MARITZA CARRERA; SUSAN MCMAHON and **Petitioners:** TAXPAYERS FOR PUBLIC EDUCATION, a Colorado non-profit corporation; CINDRA S. BARNARD, an individual; and MASON S. BARNARD, a minor child. vs. **Respondents:** DOUGLAS COUNTY SCHOOL DISTRICT and DOUGLAS COUNTY BOARD OF EDUCATION, and **Respondents**: COLORADO STATE BOARD OF EDUCATION and COLORADO DEPARTMENT OF EDUCATION, and	

Intervenors - 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. *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:* Matthew J. Douglas, #26017 Timothy R. Macdonald, #29180 Michelle K. Albert, #40665 ARNOLD & PORTER LLP 370 17th Street, Suite 4400 Denver, CO 80202 Telephone: 303.863.1000 Fax: 303.832.0428 Matthew.Douglas@aporter.com Timothy.Macdonald@aporter.com Michelle.Albert@aporter.com Mark Silverstein, #26979 Sara Rich, #36904 AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO 400 Corona Street Denver, CO 82018 Msilver2@att.net Srich@aclu-co.org Daniel Mach, DC Bar #461652 Heather L. Weaver, DC Bar #495582 ACLU FOUNDATION PROGRAM ON FREEDOM OF RELIGION AND BELIEF 915 15th Street, NW, Suite 600 Washington, DC 20005 Telephone: 202.675.2330 Fax: 202.546.0738 dmach@aclu.org hweaver@aclu.org	

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OPENING 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 Opening 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 Opening Brief contains 13,723 words. I acknowledge that this Opening 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/ Matthew J. Douglas

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INTRODUCTION

The Douglas County School District seeks to divert millions of state taxpayer dollars—which are designated for public elementary and high-school education—to private schools that are owned and operated by churches and other religious organizations. Most of these schools embed religious instruction in all areas of their curricula. Most of them discriminate based on religion and require attendance at religious services.

The Choice Scholarship Program ("the Voucher Program" or "the Program") operates through a public charter school, the "Choice Scholarship Charter School" ("the Charter School"). This school, however, does not have classrooms, teachers, or curricular materials, but instead sends students to private "partner" schools for the provision of educational services. To enroll in the charter school, students must be admitted to and attend one of the private partner schools, and must therefore meet the religious requirements for admission that most of those schools maintain. There is no non-religious high-school option, except for special-needs students. The voucher checks are sent by the School District directly to the private schools; parents then endorse the checks to the schools for the purpose of paying

tuition. The private schools may use the tax funds for any purpose, including religious instruction, services, and facilities, as well as clergy salaries.

The Voucher Program violates the plain language of the Colorado Constitution and the Public School Finance Act. The district court and the dissenting opinion of the court of appeals correctly concluded that the Program should be permanently enjoined. The majority court of appeals opinion that upheld the Program, if allowed to stand, would eviscerate core provisions of the religion and education clauses of the Colorado Constitution, restrict citizens' ability to enforce the Public School Finance Act, and give school districts around the state carte blanche to implement similar programs, with potentially devastating consequences for the State's constitutionally mandated public-school system.

Plaintiffs respectfully ask this Court to reverse the court of appeals and to reinstate the permanent injunction imposed by the district court.

STATEMENT OF ISSUES

1. Whether the court of appeals erred by restricting Colorado's standing doctrine when it held that the Public School Finance Act of 1994's ("the Act") mere grant of authority to the State Board of Education to issue rules and regulations necessarily deprives the Plaintiffs of standing and precludes any private action to enjoin the Defendants from violating the Act.
2. Whether the Voucher Program violates the Act by including 500 Program students "enrolled" in an illusory Charter School who actually attend private

schools in the School District and elsewhere in the District's student count for funding.

3. Whether the court of appeals erred in ruling that the Voucher Program is entitled to a presumption of constitutionality under Article IX, Section 3, that can only be rebutted by proof of unconstitutionality "beyond a reasonable doubt," and therefore in concluding that fund monies were not spent on the Voucher Program, notwithstanding the trial court's factual finding to the contrary.

4. Whether the Voucher Program violates Article IX, Section 7, of the Colorado Constitution by diverting state educational funds intended for Douglas County public school students to private elementary and secondary schools controlled by churches and religious organizations.

5. Whether the Voucher Program violates the compelled-support and compelled-attendance clauses of Article II, Section 4, of the Colorado Constitution by directing taxpayer funds to churches and religious organizations, and by compelling students enrolled in a public charter school to attend religious services.

6. Whether the Voucher Program violates Article IX, Section 8, of the Colorado Constitution by requiring students who are enrolled in a public charter school, and counted by Douglas County as public school students, to be taught religious tenets, submit to religious admission tests, and attend religious services.

STATEMENT OF THE CASE

In 2011, two plaintiff groups comprising Douglas County students and parents, taxpayers, and non-profit organizations (separately, "the LaRue Plaintiffs" and "the Taxpayer Plaintiffs"; collectively, "Plaintiffs"), filed suit to enjoin the Voucher Program. After a three-day evidentiary hearing, and based upon extensive factual findings, the district court issued an order ("Order") finding that

Plaintiffs demonstrated a "clear and certain right" to injunctive relief with respect to their claims under Sections 3, 7 and 8 of Article IX and Section 4 of Article II of the Colorado Constitution, and under the Public School Finance Act, C.R.S. § 22-54-101 *et seq.* Record 2482-96, 2523, 2525, 2531, 2536, 2543, 2548. The Douglas County School District and Board of Education (together, "the District"), the State Board of Education and Department of Education (together, "the State Entities," and collectively with the District, "Defendants"), and intervening private citizens appealed.

The court of appeals reversed in a 2-1 decision. *See Taxpayers for Public Educ. v. Douglas Cnty. Sch. Dist.*, Nos. 11CA1856 & 11CA1857, 2013 WL 791140 (Colo. App. Feb. 28, 2013) (hereinafter, "*Taxpayers*"). The majority opinion, authored by Judge Jones, found that the Taxpayer Plaintiffs lacked standing under the Public School Finance Act and concluded that the Program did not violate the religion or education clauses of the Colorado Constitution. The majority's analysis of the constitutional claims disregarded the plain language of the Colorado Constitution. Indeed, the majority interpreted the religion clauses in a manner indistinguishable from the test used to adjudicate claims under the substantively different wording of the federal First Amendment. *Taxpayers* at *13-

19. Judge Bernard's 55-page dissent found that the Program violates Article IX, Section 7 of the Colorado Constitution.

FACTS

The Voucher Program would annually divert millions of dollars designated for public education in Colorado to send students to participating private schools, most of which are controlled by churches or other religious organizations. *See* Record 2482-84 (Order ¶¶4, 10, 12). If successful, the District intends to expand this "pilot" program, *id.* at 2496 (¶64), and other school districts around the state would be free to follow suit.

The Plaintiffs

The Taxpayer Plaintiffs are Douglas County taxpayers, students, and parents, as well as two nonprofit organizations whose members include parents of Douglas County students. Plaintiff Cindy Barnard lives in Douglas County and pays taxes on property she owns there, which in part fund Douglas County Public Schools. Tr. Vol. I, 70:3-16. Her son, Plaintiff Mason Barnard, was in 2011 a senior at a District school, Highlands Ranch High School in Douglas County. *Id.* at 69:21-25, 70:24-71:10. Plaintiff Taxpayers for Public Education is an organization that counts as members Douglas County taxpayers and parents of

Douglas County students, including Cindy Barnard. Record 2501-03 (Order 21-23).

The LaRue Plaintiffs include James and Suzanne LaRue, Kevin Leung, Christian Moreau, Maritza Carrera, and Susan McMahon, all of whom own property in and pay taxes to Douglas County. Record 4-5 (LaRue Compl. ¶¶7-8, 12-15). They also have children in the Douglas County Public Schools. *Id.* Rabbi Joel Schwartzman and Reverend Malcolm Himschoot are Douglas County homeowners and taxpayers. *Id.* at 4 (¶¶10-11). Interfaith Alliance is a nonprofit corporation comprising 850 clergy and lay members from different faith traditions (including many Douglas County residents and taxpayers) that is "dedicated to promoting the positive role of faith in civic life, challenging intolerance and extremism, safeguarding religious liberty, and strengthening public education." *Id.* at 4 (¶9).

The Public School Finance Act

The Public School Finance Act was enacted to meet the mandate in Article IX, Section 2 of the Colorado Constitution, which requires a "thorough and uniform system of public schools throughout the state." C.R.S. § 22-54-102(1). Under the Act, Colorado's public schools are funded through a combination of

local and State revenues. The local share comes from local property taxes and specific ownership taxes, while the State's share is funded through personal income, corporate, sales, and use taxes, and the Public School Fund established by Article IX, Sections 3 and 5 of the Colorado Constitution. *Id.* §§ 22-54-106, 22-54-114(1); Record 2541-43 (Order 61-63); *see also* C.R.S. § 22-41-101(2) (providing that the Public School Fund, among other things, consists of public school lands proceeds). The Act specifically includes monies from the restricted Public School Fund to further ensure that no public education monies earmarked under the Act will be diverted to private schools. *See, e.g., id.* § 22-41-101(2). Income from the Public School Fund accounts for more than $100 million in school funding each year. Tr. Vol. II, 472:21-25, 473:1-2. This Public School Fund money is commingled with the other sources of school funding provided under the Act, and is then redistributed to all of the school districts in Colorado, including Douglas County pursuant to the terms of the Act. Tr. Vol. II, 474:13-17; *see also* Tr. Vol. I, 207:13-17; Record 1328 (State Defs.' Resp. to Mot. for Prelim. Injunc. 20).

The money each school district receives from the State is determined by multiplying that district's per-pupil funding amount by the number of students

enrolled in public schools in the district, and then adjusting the result by specific statutory factors. C.R.S. § 22-54-104. The District estimated that it would receive $6,100 in per-pupil revenue from the State for the 2011-2012 school year, which would amount to over $3 million in State funding for the voucher students for that school year. Record 2535 (Order 55); Tr. Vol I, 208:17-21.

Collaboration Between Douglas County and the State to Develop the Voucher Program

The District started the Choice Scholarship Program in 2011. In late 2010, the District presented its plans for the Voucher Program to the Colorado State Board of Education ("the State Board"). *See* Pls.' Ex. 76; Record 2482 (Order ¶3). The State Board took an active role in crafting the Voucher Program; its Chairman, Bob Schaffer, stated that he wanted to "pave the way" for the Voucher Program "right away within CDE [the Colorado Department of Education]" and instructed his staff to "identify any barriers at CDE regarding funding or anything else." Pls.' Ex. 65; Tr. Vol. I, 136:16-137:16.

In early 2011, CDE and District staff met on multiple occasions to structure the Voucher Program. *See* Pls.' Exs. 69, 76, 90; Record 2482 (Order ¶¶5-6). CDE staff advised District officials on various legal issues, including how to design the Program in a manner that would entitle the District to receive per-pupil funding

from the State for participating students even though they would be attending private schools. *See, e.g.*, Record 2482 (Order ¶6); Pls.' Exs. 69, 90; Tr. Vol. I, 210:2-7. Robert Hammond, the Commissioner of Education for the State, confirmed in testimony that the State and the District worked together to ensure that the District would be able to count students attending private schools as public school students in order to receive funding from the State. Tr. Vol. I, 156:19-25, 157:1-5. Mr. Hammond also confirmed that the State did not intend to block the Voucher Program, *id.* at 177:16-24, despite State officials' "concerns [regarding] tak[ing] money from other districts." *Id.* at 179:9-25; 180:1-3.

The Douglas County School Board approved the Voucher Program as a "pilot program" for the 2011-2012 school year on March 15, 2011. Record 2482 (Order ¶4); Pls.' Ex. 1 at 1. The District began taking steps to implement the Program the following day. Record 2483 (Order ¶7).

Program Structure

Through the Voucher Program, the District offered up to 500 "scholarships" in 2011-2012 to District students for tuition at designated private schools. Pls.' Ex. 1; Record 2484 (Order ¶12). The District counted "scholarship students" attending these private schools as enrolled in its public schools, so that it could receive State

per-pupil funding. *Id.* at 2486 (¶26); Tr. Vol. I, 240:14-21. The District created the Charter School so that "scholarship students" would be treated by the State as public-school students. *See* Pls.' Ex. 6 at 10, § 8.1.A, B; Record 2485-86 (Order ¶¶23, 26, 27); Pls.' Ex. 69 at 2.

All students participating in the Program are required to enroll in the Charter School. Record 2485 (Order ¶19). The Charter School, however, has no buildings, classrooms, teachers, books, or curricular materials. *Id.* at 2486 (¶25). Instead, it administers the Voucher Program and contracts with private partner schools for the provision of educational services. *Id.* at 2485 (¶23). Commissioner Hammond confirmed that the Charter School was "simply a mechanism to count... private school students as public school students for purposes of state funding." Tr. Vol. I, 217:19-24. The District planned to transfer to the Charter School all of the State per-pupil funding it received for each student participating in the Program in 2011-2012. *See* Pls.' Ex. 6 at 11, § 8.2; Tr. Vol. II, 499:9-11.

The Voucher Program has no income requirements for participation. Record 2484 (Order ¶16); Tr. Vol. I, 285:4-7. Students who wish to participate must first be admitted to an approved private school. Record 2485 (Order ¶18). The District then sends the private school a check for 75% of the state per-pupil funding

($4,575 for 2011-12) or the private school's actual tuition fee, whichever is less, and retains the remaining 25% to cover "administrative costs." *Id.* at 2483 (¶9); Tr. Vol. I, 155:3-12. The checks are made out to students' parents but are mailed directly to the private schools, and the parents must restrictively endorse the checks for the sole use of the private schools. *Id.* (¶10).

The District has suffered millions of dollars in budget reductions in recent years (*id.* at 2496 (¶65); Tr. Vol. I, 82:14-16), and the Voucher Program would have diverted to private schools another three million public-education dollars in its first year, *see* Tr. Vol. I, 82:19-22, 83:5-8; Pls.' Ex. 15. The District plans to expand the Voucher Program to more students, which would divert even more State funds from public schools to private schools. Record 2496 (Order ¶64) (citing Ex. 126); Tr. Vol. II, 615:6-11.

The Participating Schools

For most students in the Program, and for all high-school students without special needs, the only option to participate in the Program is to attend a religious school. Of the 23 private schools participating in the Program in 2011-2012, *see* Record 2486-88 (Order ¶¶31-32), all but five are operated by churches or religious organizations. *See id*. at 2489 (¶36). Of the five non-religious schools, four run

only through eighth grade (one of these, Aspen Academy, accepts only gifted students), and the fifth—Humanex Academy—accepts only certain special-needs students. *Id.* Thus, unless they qualify to attend Humanex, high-school students in the Program *must* attend a religious school. *Id.* At the time of the injunction hearing, all but one of the 120 high-school students participating in the Program were enrolled in religious schools, and 93% of all Program participants had signed up for such schools. *Id.* (¶37); Tr. Vol. I, 282:19-25.

The district court examined record evidence that included the participating schools' websites and materials the schools voluntarily submitted to the District, as well as some in-court testimony from the hearing, to ascertain whether the schools were controlled by churches or other religious organizations. *See* Record 2489 (Order ¶38). It found that most of the schools were owned or controlled by private religious institutions, and that many of them had governing entities that are limited to adherents of a particular faith or are funded by sources that promote or are affiliated with a particular religion. *Id.* at 2489-90 (¶¶38-40). Some of the participating schools are organizationally part of or physically attached to a church. Tr. Vol. II, 315:11-19, 395:17-396:8. Most of the participating schools have a mission of inculcating their students with their particular religious doctrines and

thoroughly infuse their curricula with religious teachings. Record 2491-92 (Order ¶¶44-45).

Religious Admission Requirements, Compelled Attendance at Religious Services, and Mandatory Religious Teachings

By design, the District does not require private schools to modify their admissions or hiring criteria to participate in the Voucher Program, even if the criteria discriminate based on religion or other grounds. Record 2486-93 (Order ¶¶30, 46, 49, 50). On the contrary, the District specifically authorizes participating private schools to "make enrollment decisions based upon religious beliefs." *Id.* at 2486 (¶30); Pls.' Ex. 1 at 9. The district court found that students at most of the participating schools had to meet religious admission tests; faculty also had to satisfy religious employment requirements. *See* Record 2492 (Order ¶¶41-43, 45); Tr. Vol. II, 320:4-9, 399:1-7. A number of the participating schools required students, parents, or faculty to sign doctrinal statements. Record 2491 (Order ¶43). The Program permits participating schools to discriminate against students with disabilities, and some of the participating schools also discriminate on other grounds, including sexual orientation and HIV-positive status. *Id.* at 2493 (¶¶49-50).

Almost all of the participating religious schools require students to attend worship services. *Id.* at 2490 (¶41). The Program purports to afford students the right to "receive a waiver from any required religious services at the Private School Partner," *id.* at 2493 (¶51), but the waiver only applies to saying prayers aloud; students can still be compelled to *attend* religious services. *Id.* Nor may students opt out of full participation in other religious exercises—such as prayer recitations and scriptural readings—that many of the schools mandate throughout the day. *Id.* at 2492 (¶45). Moreover, most of the schools require students to receive instruction in religious doctrine. *Id.* at 2492-94 (¶¶45, 52); Pls.' Ex. 2. Even the District acknowledged that this was "[n]ot much of an opt out." Record 2530 (Order 50); Pls.' Ex. 97.

How Schools Use The Vouchers

There are no restrictions on how participating schools may spend the public funds they receive through the Program. Schools are free to use the funds for religious instruction, worship services, religious literature, clergy salaries, and construction or maintenance of facilities used for worship and prayer. *See* Record 2493 (Order ¶47).

Testimony at trial concerning one participating school confirmed that tuition is the school's largest source of revenue and is used to support the school's operations, religious mission, and chapel facilities. *See* Tr. Vol. II, 428:21-24, 432:13-433:1, 433:22-435:4. One reason this school chose to take part in the Voucher Program was to obtain more revenue to address a debt crisis that was threatening its "vision" of "making disciples of high school students in the Denver metro area." Pls.' Ex. 36; Tr. Vol. II, 437:20-438:13, 439:7-11; *see also id.* at 389:23-390:3, 403:18-404:14. Another school reduced its previously awarded financial aid to a Program student by the amount of the student's voucher check. Record 2484 (Order ¶13).

ARGUMENT SUMMARY

The Voucher Program violates the plain language and core purposes of the Colorado Constitution and the Public School Finance Act.

Plaintiffs—who include Douglas County taxpayers, students, and parents—have standing to assert claims under the Public School Finance Act because the District is spending their tax dollars in violation of Colorado law and in a manner that undermines the public education of the student Plaintiffs. Though not express, the right of students and parents to enforce the Act is implied because: (1) students

and parents are the intended beneficiaries of the Act; and (2) their right to enjoin violations is critical to the Act's goals.

Without a private right of action, there would simply be no mechanism to prevent a school district from collaborating with the Colorado Department of Education to divert millions of dollars in public funds to non-public schools. Indeed, this unlawful expenditure of public funds can also be challenged by Plaintiffs as taxpayers: Colorado law recognizes broad taxpayer standing and abundant evidence of economic and non-economic harm satisfies the required injury-in-fact.

Overwhelming evidence also supports the statutory violation found by the trial court: the Voucher Program violates the Act by using public money to pay tuition for 500 students enrolled in a nominal charter school—students who actually attend sectarian and other private schools both inside the District and out. The Act funds *public* education: it makes each district's share of state funds proportional to pupil enrollment in public schools operated by the district or as "qualified charter schools." The District's Choice Scholarship School, however, is neither. Its "educational services" are not public, not non-sectarian or non-religious, and not confined to the district—contrary to express statutory

requirements. Indeed, the Charter School entitles the District to no state funding whatsoever.

Clear evidence also supports the trial court's conclusion that the Voucher Program transferred money from the Public School Fund to private schools in violation of Article IX, Section 3 of the Colorado Constitution. The court of appeals applied a presumption of constitutionality to the Defendants' use of the funds, relying exclusively on cases that applied the presumption to *legislative* enactments. But this was unfounded: no Colorado case has applied the presumption to either a school district decision or an internal funding decision of the Colorado Department of Education, and the Court should not have extended the presumption to decisions that lack the checks and balances of the legislative process.

The Program also contravenes the plain language and purposes of Sections 7 and 8 of Article IX and Section 4 of Article II of the Colorado Constitution. These provisions prohibit exactly what the Voucher Program attempts to do.

Specifically, Article IX, Section 7, prohibits payment of public funds "in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school . . . controlled by any church or sectarian denomination."

Despite this unequivocal prohibition, the Program seeks to deliver millions of state dollars to schools operated by churches and other religious entities. Article II, Section 4 provides that "[n]o person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent." The Program, however, requires taxpayers to support ministries that operate religious schools and requires participating students to attend chapel services. Article IX, Section 8 prohibits religious tests from being used for admission into public educational institutions, bars forcing students of such institutions to attend religious services, and bans "sectarian tenets or doctrines" from being taught in public schools. Yet Program students are subjected to all three of these forms of religious discrimination, coercion, and proselytization.

This Court has explained that the State Constitution "derives its force . . . from the people who ratified it, and their understanding of it must control. This is to be arrived at by construing the language[] used in the instrument according to the sense most obvious to the common understanding." *People v. Rodriguez*, 112 P.3d 693, 696 (Colo. 2005) (quotations and citation omitted). When the language "is plain, its meaning clear, and no absurdity involved, constitutional provisions must be declared and enforced as written." *Id.* (citation omitted). This Court does

not need to determine whether a voucher program of this type is good or bad public policy in Colorado. Instead, the Court should apply the plain language of the Constitution and the clear intent of Colorado's founders, who sought to prohibit public funds from being used to support private schools controlled by churches or other religious organizations. The Court should reinstate the permanent injunction.

STANDARD OF REVIEW

This Court generally reviews "the grant or denial of injunctive relief for an abuse of discretion, deferring to the factual judgment of the trial court." *Dallman v. Ritter*, 225 P.3d 610, 620-21 (Colo. 2010). The trial court's factual findings are reviewed for clear error and may not be set aside unless they are "so clearly erroneous as to find no support in the record." *People ex rel. AJL*, 243 P.3d 244, 250 (Colo. 2010); Colo. R. Civ. P. 52.

This Court reviews a decision that a party lacks standing *de novo*. *See Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004). The proper interpretation of the Public School Finance Act presents a question of law that this Court reviews *de novo*. *See Sperry v. Field*, 205 P.3d 365, 367 (Colo. 2009). This Court reviews the court of appeals' application of the presumption of constitutionality *de novo*. *See Landmark Land Co. v. City & Cnty. of Denver*, 728 P.2d 1281, 1284 (Colo. 1986).

The interpretation of a constitutional provision is a question of law that this Court reviews *de novo*. *Bruce v. City of Colo. Springs*, 129 P.3d 988, 992 (Colo. 2006). The Plaintiffs preserved for appellate review each issue on which the Court granted certiorari review. Citations to the location where each issue was raised and ruled on below are provided in the corresponding sections of Plaintiffs' Argument.

ARGUMENT

I. Plaintiffs Have Standing to Challenge the District's Violation of the Act.

Plaintiffs have standing to assert their statutory claims under the Act.[1] Standing requires that a plaintiff assert an "injury in fact" to a "legally protected interest." *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977).

A. Plaintiffs Have Standing as Students and Parents.

Plaintiffs have standing to assert their statutory claims because the District is spending Plaintiffs' tax dollars in violation of Colorado law and in a manner that directly undermines the public education received by several Plaintiffs and their children. As the trial court stated:

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[1] The court of appeals sustained Plaintiffs' standing to raise the constitutional arguments. *See Taxpayers* at *6 ("Taxpayer standing is recognized in the context of alleged constitutional violations."). Defendants have not sought this Court's review of that ruling.

> The prospect of having millions of dollars of public school funding diverted to private schools, many of which are religious and lie outside of the Douglas County School District, creates a sufficient basis to establish standing for taxpayers seeking to ensure lawful spending of these funds, in accordance with the Public School Finance Act. Similarly, these circumstances are sufficient to establish standing for students, and the parents of students, seeking to protect public school education.

Record 2501 (Order 21).

Plaintiffs have standing as students and parents to ensure that Defendants do not unlawfully divert funds from public education. It is well-established that private parties, including parents, are entitled to sue school districts for unlawful financial decisions. *See Bd. of Cnty. Comm'rs v. Bainbridge, Inc.*, 929 P.2d 691, 708-13 (Colo. 1996) (allowing private party claims against Douglas County School District based on district's actions beyond statutory limits); *Lobato v. State*, 216 P.3d 29, 35 (Colo. App. 2008), *rev'd on other grounds*, 218 P.3d 358, 368 (Colo. 2009); *Boulder Valley Sch. Dist. RE-2 v. Colo. State Bd. of Educ.*, 217 P.3d 918, 924 (Colo. App. 2009).

1. Plaintiffs Have Legally Protected Interests as Students and Parents.

Plaintiffs have a legally protected interest under the Act—an interest that "emanates from a constitutional, statutory, or judicially created rule of law that

entitles the plaintiff to some form of judicial relief." *Bd. of Ctny. Comm'rs. v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045, 1053 (Colo. 1992) (internal citations omitted). The Act does not expressly permit enforcement by students and parents, but the right to such enforcement may be fairly and reasonably implied. When a statute does not expressly provide for a private civil remedy, a court must consider whether:

> (1) the plaintiff is within the class of persons intended to be benefitted by the legislative enactment;
>
> (2) the legislature intended to create, albeit implicitly, a private right of action; and
>
> (3) an implied civil remedy would be consistent with the purposes of the legislative scheme.

Allstate Ins. Co. v. Parfrey, 830 P.2d 905, 911 (Colo. 1992). Plaintiffs' challenge to Defendants' failure to comply with the Act's requirements meets all three of these criteria.

2. Plaintiffs Are Within the Class of Persons Intended to be Benefitted by the Act.

Students and their parents fit squarely within the "class of persons intended to be benefited" by the Act. The Act furthers Colorado's constitutional obligation "to provide for a thorough and uniform system of public schools throughout the

state," a standard that "requires that all school districts and institute charter schools operate under the same finance formula." C.R.S. § 22-54-102(1). As consumers of the public education provided under the Act, students and parents *are* the "class of persons intended to be benefited" by the Act. The court of appeals' decision did not disturb the trial court's finding that Plaintiffs are within the class of persons the legislature intended the Act to benefit. *See Taxpayers* at *5.

3. Plaintiffs' Right to Sue to Enforce the Act is Implicit in and Necessary to the Goals of the Act.

With respect to the second and third factors, the right of students and parents to enjoin Defendants from violating the Act's requirements at issue here is not only necessarily implicit in the Act, it is critical to the Act's goals. Absent a private injunctive remedy, the statute would lack any mechanism to prevent a school district that was, as here, working in concert with the Colorado Department of Education, from diverting millions of dollars in scarce public funds to non-public schools. Plaintiffs' rights under the Act to receive an equitably funded, quality, and public education would be substantially frustrated if they were without a civil remedy to enforce their rights under the statute. *Parfrey*, 830 P.2d at 911.

The court of appeals misreads the Act when concluding that it exclusively "commits enforcement of its provisions to the State Board." *Taxpayers* at *5 (citing

C.R.S. § 22-54-120(1)). Section 22-54-120(1) states: "The state board shall make reasonable rules and regulations necessary for the administration and enforcement of this article." This authority to make rules is entirely consistent with a private equitable remedy and does not (without more) preclude citizens from bringing claims to enforce a statute. For example, Colorado statutes charge the Division of Insurance "with the execution of the laws relating to insurance," C.R.S. § 10-1-103, and provide that the insurance commissioner "may establish . . . such reasonable rules as are necessary to enable the commissioner to carry out the commissioner's duties under the law," C.R.S. § 10-1-109(1). Despite this language, this Court has recognized private causes of action based on violation of the state's insurance statutes. *See Parfrey*, 830 P.2d at 910-11 (finding legislatively implied private right of action for breach of duty imposed by insurance statute); *see also Colo. Ins. Guar. Ass'n v. Menor*, 166 P.3d 205, 210-11 (Colo. App. 2007) (same). Indeed, in *Parfrey*, this Court rejected the precise argument that the court of appeals adopted here:

> Allstate argues that the legislative silence in [the act] on the matter of civil liability manifests a legislative intent to relegate the exclusive responsibility for redressing breaches of an insurer's statutory duty to the administrative process. We are unpersuaded by Allstate's argument.

830 P.2d at 910; *see also Bainbridge*, 929 P.2d at 708-13 (allowing private right of action to enforce statutory limits on school district's conduct).

The court of appeals' reliance on statutory enforcement provisions also fails to account for circumstances like those presented here, where the body charged by statute with enforcing the statute's requirements has abetted the District in circumventing those provisions. Here, the Colorado Department of Education—the supposed watchdog of school financing on whose diligence the court of appeals relies—actually assisted the District in assembling the nominal charter-school scheme that the trial court found to be in violation of the Act. Based on significant evidence in the record, the trial court held that CDE "met on multiple occasions with Douglas County School District staff regarding the structure of the Scholarship Program" and "advised the . . . District on the legality of the Scholarship Program and how to structure the Scholarship Program so as to receive 'per pupil' funding under the . . . Act." Record 2482 (Order ¶¶5-6). The trial court also found that Commissioner Hammond publicly announced that "the Colorado Department of Education did not intend to block the implementation of the Scholarship Program" despite the fact that, "at the time he made this statement, he had no documents outlining the Scholarship Program." *Id.* at 2483 (¶6); *see also*

id. at 1090-92 (Pls.' Resp. to Mot. to Change Venue 8-10), 1098-1112, 2842 (¶5) (citing Pls.' Exs. 69, 76, 90). Defendants did not challenge and the court of appeals did not disturb these findings. Given this evidentiary record, the court of appeals' denial of Plaintiffs' standing creates a dangerous precedent under which the Act's requirements can be circumvented or ignored through questionable collaboration between a school district and the Department.

The court of appeals' reliance on *Gerrity* and *Moreland* as support for its rejection of standing is also misplaced. Both of those cases involved actions by private parties for *civil damages* based on statutory violations. *See Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 919-20 (Colo. 1997); *Bd. of Cnty. Comm'rs v. Moreland*, 764 P.2d 812, 818 (Colo. 1988). Here, Plaintiffs do not seek damages; they seek an injunction prohibiting the District from violating the Act. It is one thing for a court to conclude that the legislature did not intend to grant a private party a right to recover damages against another private party or a government body based on a statutory violation, as in *Gerrity* and *Moreland*; it is quite another to assume that the legislature intended to deny statutory beneficiaries any remedy by which they can vindicate their statutory rights.

B. Plaintiffs Have Standing as Taxpayers.

The court of appeals also erred in concluding that Plaintiffs do not have taxpayer standing to prohibit the District from violating the Act. Colorado law provides for broad taxpayer standing, and the required injury-in-fact may be based either on economic or noneconomic injury. *See Ainscough*, 90 P.3d at 856 (taxpayers may sue to protect a "great public concern" regarding a law's constitutionality); *Colo. State Civil Serv. Emps. Ass'n v. Love*, 448 P.2d 624, 627 (Colo. 1968). This Court "has held on several occasions that a taxpayer has standing to seek to enjoin an unlawful expenditure of public funds" like that demonstrated here. *Dodge v. Dep't of Soc. Serv.*, 600 P.2d 70, 71 (Colo. 1979).

Plaintiffs have established taxpayer standing by demonstrating both economic and noneconomic injury in fact as taxpayers. *See Ainscough*, 90 P.3d at 855 ("The injury may be tangible, such as physical damage or economic harm; however, it may also be intangible, such as aesthetic issues or the deprivation of civil liberties."). Defendants are diverting tax proceeds obtained from Plaintiffs and others to private and religious schools in direct violation of the Act, and the Voucher Program thereby undermines the substantial public interest in public

education. Record 2495, 2500-02 (Order 15, 20-22). The court of appeals' decision does not disturb these findings.

Instead, the court of appeals denied Plaintiffs taxpayer standing based entirely on a mistaken impression that Plaintiffs had cited no authority supporting taxpayer status for the statutory claims. The court's entire discussion of taxpayer standing reads as follows:

> Plaintiffs cite no authority holding that taxpayer status is sufficient to confer standing to seek judicial enforcement of a statute. Recognizing such standing would in most, if not all cases render unnecessary the standing analysis the supreme court has applied in this context for decades.

Taxpayers at *6. In fact, Plaintiffs had cited to the *Dodge* case, in which this Court held that the plaintiffs had taxpayer standing based on alleged violations of *both* the state constitution *and* a state statute:

> We thus hold that the appellants have standing to litigate the issue of whether there has been a violation of Colo. Const. Art. V, Sec. 33 (1978 Supp.), and *whether the appellees have the statutory authority* to use public funds for nontherapeutic abortions.

Dodge, 600 P.2d at 72 (emphasis added); *see also Bainbridge*, 929 P.2d at 694-97 (implicitly but necessarily recognizing homebuilders' standing to challenge counties' authority by adjudicating their claims on the merits); *Johnson-Olmsted*

Realty Co. v. City & Cty. of Denver, 1 P.2d 928, 930 (Colo. 1931) (taxpayer had standing to challenge city's expenditure of money in violation of city charter). The court of appeals decision cites no authority altering or disputing the holding in *Dodge*, which controls here. Plaintiffs have shown injury in fact as Colorado taxpayers, and thus have standing to challenge the District's violation of the Act.

C. Recognizing Plaintiffs' Standing Will Not Substantially Interfere with the Operations of Local School Boards.

The record and the circumstances here offer no basis for the court of appeals' concern that "allowing private citizens to act as substitute boards of education by challenging districts' actions in court would interfere with the state agencies' efforts to meet their statutory obligations." *Taxpayers* at *6. This case neither involves nor implicates the multitude of daily spending decisions that districts make to further their constitutional and statutory missions. Indeed, Plaintiffs' claims address whether the Act allows Defendants to divert public school funds to *private* schools, not how funds can be expended on *public* education. Put another way, the court of appeals was concerned about possible disruption of actions that school districts undertake to provide students and parents with school services *consistent* with the mandate to afford quality public education. Here, Plaintiffs challenge actions *contrary* to that mandate: diverting public funds

toward private education. Enforcing compliance with the "public education" requirements of the Act does not threaten disruption or uncertainty in local school board operations, any more than did permitting a construction company to litigate the District's statutory compliance in *Bainbridge*. *See* 929 P.2d at 713.

II. The District's Use of Public Funds to Pay Private School Tuition Violates the Act.

The trial court found that by concocting an invalid charter school to divert public funds to private schools, the Voucher Program violates the Act. Record 2533-36 (Order 53-56). Because the court of appeals held that Plaintiffs lacked standing to assert this statutory claim, it did not address the trial court's decision. *Taxpayers* at *5.

A. The Voucher Program Violates the Act by Using Public Funds to Pay Private School Tuition for 500 Students Enrolled in an Invalid Charter School.

The Voucher Program violates the Public School Finance Act by using public money to pay tuition for 500 students enrolled in a statutorily non-compliant charter school—students who actually attend sectarian and other private schools both inside the District and out. The Public School Finance Act funds *public* education: it furthers Colorado's constitutional duty "to provide for a thorough

and uniform system of *public schools* throughout the state." C.R.S. § 22-54-102 (emphasis added). To that end, the Act:

- Establishes a uniform "finance formula" that determines total "*public* education" funding (*i.e.*, the sum of state and local funding) for each school district. C.R.S. § 22-54-102(1); § 22-54-104(1)(a); § 22-54-106 (emphasis added);
- Equalizes that funding across districts by making each district's share directly proportional to pupil enrollment in two kinds of *public* schools—*i.e.*, schools operated by the district and "qualified charter schools"—as well as specified statutory education programs, C.R.S. § 22-54-103; § 22-54-124 (b)-(c); § 22-30-102(6) (emphasis added); and
- Makes the funding "available to the district to fund the costs of providing *public* education…." C.R.S. § 22-54-104(1)(a) (emphasis added).

See generally Lobato v. State, 304 P.3d 1132, 1140 (Colo. 2013) ("[T]he PSFA applies uniformly to all of Colorado's school districts and serves as the cornerstone of a public school financing system that funds a *public* education system that is . . . consistent across the state.") (emphasis added); *see also* Record 2533-35 (Order 53-55). Here, the District seeks to receive and then divert millions of dollars in public education funds under the Act by enrolling 500 students in an illusory charter school. *Id.* at 2486, 2536 (Order 6, 56). But this "Choice Scholarship School" is merely a conduit for the unlawful transfer of public funds to private schools.

Indeed, the Charter School existed only on paper. Record 2486 (Order 6). The undisputed evidence at trial shows that the Charter School had no buildings, books, curriculum, or teachers. *Id.* The "school" consisted solely of personnel to administer the Voucher Program. *Id*. By enrolling 500 students in the Charter School, the District sought to: (1) claim 500 "charter school" students in 2011-2012 for purposes of obtaining state funding under the statutory formula, *id*. at 3 (¶¶9-10); Tr. Vol. I, 240:14-21; (2) divert this public money to the Voucher Program, *see* Pls.' Ex. 6 at 11; Tr. Vol. II, 499:9-11; and (3) distribute 75% of these public funds as tuition vouchers for the private schools actually attended by its Charter School enrollees, while pocketing the remaining 25%. Record 2483 (Order ¶9); *see* Pls.' Ex. 1 at 2; Tr. Vol. I, 155:3-12. As the trial court concluded, the Charter School is nothing more than an instrument by which the District would obtain and divert to private schools an unlawful share of public education funds under the Act. Record 2486 (Order ¶25). *See also* Record 2535 (Order 55); Tr. Vol. I, 217:19-24 (testimony by Commissioner of Education Robert Hammond agreeing that the Charter School "is simply a mechanism to [] count private school students as public school students for purposes of state funding").

Equally important, the Charter School is not a "qualified charter school" entitled to funding under the Act. *See generally* Record 2536 (Order 56) (finding the Voucher Program "effectively results in an increased share of public funds to the Douglas County School District").[2] The State Entities recognized that this was a problem; Commissioner Hammond testified that "how [to] spin it as a charter" was a "key issue" when the Charter School was being developed. Tr. Vol. II, 202:19-25, 203:1-2.

But no amount of spin can transform the Charter School into what it is not. By law, charter schools are "public, nonsectarian, nonreligious, non-home-based school[s] which operate[] within a public school district." C.R.S. § 22-30.5-104. The Charter School meets only one of these descriptors: it is "non-home-based." Other than that, however, the Charter School is:

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[2] Though it did not generally address the statutory question, the court of appeals did reject, in a footnote, the trial court's finding that the Voucher Program violates the Act by increasing the District's share of public education funds. *Taxpayers* at * 4, n.5. The court based its reasoning on the hypothetical case that "participating students would *otherwise* be enrolled in District schools." *Id.* (emphasis added). The problem, of course, is that the Voucher Program ensures they are *not* so enrolled. The record evidence did not support the court of appeals' finding; however, the record contained evidence supporting the opposite conclusion—many enrolled students were high school students who intended to enroll in private school regardless of the Voucher Program. Tr. Vol. II, 536:10-19, 549:18-25, 550:1-17, 550:18-25, 551:1-9.

- *not* public. The Voucher Program operates through "private partners" that admit district students selectively and based on religious orientation, and do not provide complete educational services for all enrollees, Record 2483, 2486 (Order ¶¶11, 30);

- *not* non-sectarian or non-religious. The Voucher Program enrolls 93% of its students in religious schools and contracts with private partners owned and controlled by religious institutions, *id.* at 2488-89 (¶¶33-38); and

- *not* confined to the District. More than half of the Charter School's "private school partners" operate outside the District. *Id.* at 2489 (¶33).

Lacking any specific authority for funding the Charter School, the State Entities argue that funding the Charter School is legal on the ground that the funds are "budgeted and expended . . . in the discretion of the district." St. Defs.' Pet. Opp. 6, n.2 (citing C.R.S. § 22-54-104(1)(a)). But the District has no "discretion" to spend state funds to which it has no lawful claim. A student's enrollment in a sham charter school does not entitle a school district to a statutory share of public education funds. And the State Entities offer no other basis for entitlement to state funds: Charter School enrollees do not attend any other kind of public school, and enrollees do not participate in any of the statutory education programs that lawfully increase a district's enrollment under the Act. *See* C.R.S. § 22-54-103 (specifying programs).

In addition, any discretion the District might arguably have in spending these state funds is limited by the Act, which makes this money "available to the district *to fund the costs of providing public education*. . . ." *Id.* Just as the Act does not authorize the District to spend public education funds to build roads or operate parks, it does not permit the District to divert those funds to private school tuition.[3] *See generally Lobato*, 304 P.3d at 1143 (noting that "a dual-funded public school financing system is constitutional so long as it allows the local districts to retain control over how they spend *locally-generated* tax revenue") (emphasis added). No reported Colorado case has allowed any such diversion.

In sum, the Voucher Program rests on the transparent fiction that the Charter School is a "qualified charter school" entitled to claim and spend public funds under the Act. The Court should not sanction such a fiction. As the trial court rightly held: "overwhelming evidence in the record [shows] that the Voucher Program fails to comport with the Public School Finance Act provisions which promote 'uniform' funding of education across the state." Record 2536 (Order

[3] The Act also obligates the Board to "avoid overpayment of state moneys" and to recover amounts it has overpaid. C.R.S. § 22-54-115(4).

56). *See also Lobato*, 304 P.3d at 1140 (describing the single statutory framework which applies uniformly to all school districts "as the cornerstone" of the public school financing system).

B. The Contracting Statute Does Not Authorize the Voucher Program.

In the court of appeals, the State Entities also tried to devise statutory support for the Voucher Program by invoking the Contracting Statute, which authorizes school districts to contract with private parties "for the performance *of a service, including an educational service,* an activity, or an undertaking *that a school may be authorized by law* to perform or undertake." C.R.S. § 22-32-122(1) (emphasis added). State Defs.' App. Opening Br. 29. According to the State Entities, enrolling students in a nominal charter school "is no different from a school district choosing to contract directly with a private school to provide a complete educational program" under the Contracting Statute. *Taxpayers* at 29.

Under the Contracting Statute, however, contracted-for services must "meet the same requirements and standards that would apply if performed by the school district" itself. C.R.S. § 22-32-122. In other words, a school district cannot do through "contracted services" what it cannot do through its own agents and employees. The State Entities do not and cannot claim that the District could

lawfully provide the out-of-district, religious, sectarian, tuition-based, and selectively-offered services that are received by Charter School enrollees. And where the District cannot perform these services itself, the Contracting Statute does not permit the District to hire someone else to perform them.

III. The Voucher Program Violates Article IX, Section 3 By Using the Public School Fund for Private School Tuition.

Based on extensive evidence, the trial court found that the Voucher Program used monies from the constitutionally inviolate Public School Fund to pay tuition for students attending private schools. Record 2543 (Order 63). Applying this well-supported factual finding, the trial court properly held that the Voucher Program violated Article IX, Section 3 of the Constitution. *Id.*

Both the State Enabling Act and the Colorado Constitution prohibit using any part of the Public School Fund for private schools. *See* Colorado Enabling Act, ch. 139, §§ 7, 14, 18 Stat. 474 (1875); Colo. Const. art. IX, § 3; Record 2541-42 (Order 61-62); *Taxpayers* at *11. Article IX, Section 3 of the Constitution provides that the Public School Fund "shall" "forever remain inviolate and intact and the interest and other income thereon, only, shall be expended in the maintenance of the schools of the state…." Section 3 further provides:

> distributions of interest and other income for the benefit of *public schools* provided for in this Article IX shall be in addition to and not a substitute for other moneys appropriated by the general assembly for such purposes.

(emphasis added).

Based on extensive evidence adduced at the three-day injunction hearing, the trial court concluded as a matter of fact that the Voucher Program was funded in part by monies from the Public School Fund and held such payments violated Article IX, Section 3 of the Colorado Constitution. Record 2540-43 (Order 60-63). The court of appeals did *not* find that the trial court's factual finding lacked support in the record. Instead, it held that the Defendants' decision to count students attending private schools under the Voucher Program as "public" school students was a legislative act entitled to a presumption of constitutionality. Based on that presumption, and notwithstanding the trial court's factual finding to the contrary, the court of appeals "construed" the Voucher Program as being funded by only per-pupil revenue that does not come from the Public School Fund. *Taxpayers* at *11. Because the court of appeals incorrectly applied a presumption of constitutionality, the trial court's factual findings that the Voucher Program violates Article IX, Section 3 must be affirmed.

A. The Trial Court's Factual Finding that Money from The Public School Fund Was Used for the Voucher Program Is Supported by Clear Evidence in the Record.

The record evidence fully supports the trial court's finding that "funds from the 'public school fund' will be used, in part, to pay tuition at private schools . . . ." Record 2543 (Order 63). This support includes evidence that:

- Commissioner Hammond testified that the Choice Scholarship School was "simply a mechanism to count private school students as public school students for purposes of state funding." Tr. Vol. I, 217:19-24.
- Commissioner Hammond testified that by counting Voucher Program students as public school students, Douglas County's share of state money would increase per-pupil funding for 500 students or approximately $3 million. *Id.* at 208:17-21.
- The State per-pupil funding for each of the 500 Voucher Program students was $6,100 per student. *Id.* at 241:15-22.
- Leann Emm, the State Assistant Commissioner of Public School Finance, testified that $101 million of Public School Fund money was distributed by the State to local school districts in fiscal year 11-12. *Id.* at 472:21-25; 473:1-2; and 473:13-17; *see also* H.B. 10-137.

Indeed, the State admitted in its submissions to the trial court that monies from the Public School Fund are distributed to Douglas County as a portion of the per-pupil funding Douglas County received for each of the 500 students enrolled in the Voucher Program. Record 1327-28 (State Defs.' Resp. to Mot. for Prelim. Injunc.). The record thus provides more than adequate support for the trial court's

finding that that money from the Public School Fund was being disbursed to private schools.

B. A Presumption of Constitutionality Does Not Apply to the District's Funding Decision.

The court of appeals did not address the adequacy of the evidence supporting the trial court's finding that Public School Fund money was being routed to private schools. Instead, recognizing that such a finding would demonstrate a constitutional violation, the court of appeals decided to "construe" the Voucher Program as being funded out of money that does not come from the Public School Fund. The court of appeals created this fiction by applying a presumption of constitutionality to Defendants' decision to count Voucher Program students as public school students for purposes of state funding.

No Colorado case has applied a presumption of constitutionality to either a school district decision or to an internal funding decision of the Colorado Department of Education. This absence of authority strongly suggests that such a decision to count voucher students as public school students for purposes of state per-pupil funding is not a legislative enactment entitled to a presumption of constitutionality under this Court's cases. *See Landmark Land Co.*, 728 P.2d at 1285.

The Court's presumption that statutes passed by the legislature are constitutional reflects judicial recognition of the checks and balances inherent in the legislative process, and all of the presumption cases the court of appeals relied on involved legislative enactments that were subject to that process. *See Owens v. Congress of Parents, Teachers & Students*, 92 P.3d 933, 942 (Colo. 2004) (statute passed by Colorado legislature); *City of Greenwood Vill. v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 440 (Colo. 2000) (statute passed by Colorado legislature); *Grossman v. Dean*, 80 P.3d 952, 964 (Colo. App. 2003) (House rule enacted by the general assembly); *Asphalt Paving Co. v. Bd. of Cnty. Comm'rs*, 425 P.2d 289, 295 (1967) (resolution adopted by Board of County Commissioners); *Colo. Civil Rights Comm'n v. Travelers Ins. Co.*, 759 P.2d 1358, 1366 (Colo. 1988) (rules adopted by the Colorado Civil Rights Commission). The application of the presumption of constitutionality in all of these cases involved deference by the judicial branch to a legislative body's proper enactment or adoption of a statute, rule, or regulation.

In contrast, the Defendants' decision to use per-pupil funding from the State to fund the Voucher Program 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 convened to "pave the way" for the Voucher Program. Pls.' Ex. 65; Tr. Vol. I, 136:25-137:16. This process involved none of the safeguards reflected in a legislative process, and is due none of the deference this Court has reserved for the products of that process. The court of appeals erred in applying a presumption of constitutionality to the Defendants' decision and using the presumption to ignore factual findings supported by the record.

C. The Court of Appeals' Application of the Presumption Eviscerates Article IX, Section 3 of the Colorado Constitution.

Despite the State's admission in the trial court and the testimony of the State Commissioner of Education and Assistant Commissioner of Public School Finance that the per-pupil funding included Public School Fund monies, the court of appeals "construed" the Voucher Program as being funded only out of per pupil revenue that was not provided from the Public School Fund. *Taxpayers* at *11. This construction is contrary to the evidence in the record, ignores the trial testimony, and if applied broadly, would eviscerate Article IX, Section 3.

It is undisputed that the state does not segregate Article IX, Section 3 Public School Fund monies from other public school monies provided under the Act because both sources of funding are restricted for use only in *public* schools. *See*

supra at 7. By holding that the Taxpayers did not have standing to enforce the Act, and then presuming that all monies used for the Voucher Program came only from other sources, the court of appeals allowed money that is restricted for use only in public schools to be spent on private schools. The court of appeals' decision in effect permits a district to spend the 98 percent of the money it receives from the State in per-pupil funding on non-public schools so long as two percent of its per-pupil funding (the amount the Court "construed" as coming from the Public School Fund) is presumed to be spent on public schools. This cannot have been the intention of the framers of Article IX, Section 3.

The court of appeals' decision also ignores the last sentence of Section 3, which provides that monies from the Public School Fund are in addition to, and not a substitute for, other monies provided by the General Assembly for public schools. Colo. Const. art. IX, § 3. If the only requirement is that money from the Public School Fund be used for public schools, and all other public school monies allocated by the legislature can be spent on private schools, then the Public School Fund is necessarily just such a prohibited "substitute for other moneys appropriated by the general assembly" for public schools.

IV. The Voucher Program Violates Article IX, Section 7 by Aiding Schools Controlled by Churches.

By channeling public money to private religious schools, the Voucher Program "violates th[e] direct and clear constitutional command" of Article IX, Section 7 ("the No-Aid Clause"). *Taxpayers* at *21 (dissent); Record 2548 (Order 68); *contra Taxpayers* at *17 (majority holding on Section 7). Section 7 states:

> Neither the general assembly, nor any county, … school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever . . . .

Colo. Const. art. IX, § 7. Moreover, the historical record shows that the drafters of the State Constitution's religion clauses intentionally and unequivocally sought to create strong protections against diversion of public educational funds to support church-run schools. Such diversion is exactly what the Voucher Program would accomplish.

A. The Program Conflicts with the "Direct and Clear Constitutional Command" of the No-Aid Provision.

The language of the No-Aid Clause is strong and clear, and on its face restricts school districts from "ever mak[ing] any appropriation, or pay[ing] from

any public fund or moneys whatever, anything . . . to help support or sustain any school . . . controlled by any church or sectarian denomination whatsoever." *Id.* (emphasis added); *Taxpayers* at *21 (dissent). It is difficult to imagine what other words the framers of the Colorado Constitution could have chosen to more clearly communicate their intent to prohibit any appropriation or payment of public funds to help support any school controlled by a church or religious denomination. *See Taxpayers* at *24 (dissent).

The trial court's factual findings, which are largely undisputed, demonstrate that the Program diverts State funds to the support of schools controlled by churches and other sectarian organizations. The trial court found the following: For each student participating in the Voucher Program, the District receives its full per-pupil funding amount from the State. Record 2483 (Order ¶¶9, 10). The District pays three quarters of that amount directly to the private school in which the student enrolls, through a check made out to the student's parents, *id.*(¶ 9), which the parents must "endorse . . . for the sole use of paying tuition at the Private School." *Id.* (¶10). Most of the participating private schools are controlled by churches or other religious organizations. *Id.* at 2489 (¶38).

That the checks the District sends to religious schools are first nominally made out to parents does not somehow prevent the checks from supporting or aiding these schools or the churches and religious organizations that control them. *See* Tr. Vol. 1, 289:17-290:3. The No-Aid Clause forbids "any" payment of public funds toward the support of schools controlled by churches or other religious organizations, whether directly or indirectly. *See In re Senate Bill No. 9*, 56 P. 173, 174 (Colo. 1899) (explaining, in context of legislative action regarding school districts, that what a governmental body "is prohibited [by the Colorado Constitution] from doing directly it cannot accomplish indirectly").

Moreover, as the district court found, there are "no restrictions on how participating Private School Partners may spend the taxpayer funds that they receive under the Scholarship Program. The participating private schools are free to use these funds for . . . religious instruction, worship services, clergy salaries, the purchase of Bibles and other religious literature, and construction of chapels and other facilities used for worship and prayer." Record 2493 (Order ¶47). The Program also permits participating schools to reduce financial aid or raise tuition by the amount of a voucher. *Id.* at 2484 (¶13); Tr. Vol. I, 295:25-298:15. And the evidence presented at trial confirmed that the voucher payments in fact supported

the religious activities and missions of schools controlled by churches and other religious organizations. *See* Tr.Vol II, 428:21-24, 432:13-433:1, 437:20-438:13, 439:7-11; *see supra* at 14-15.

Construing constitutional provisions similar to Colorado's, many other state courts have struck down school-voucher programs, often rejecting for similar reasons arguments that the programs aided parents or children instead of religious schools. *See Cain v. Horne*, 202 P.3d 1178, 1183-85 (Ariz. 2009); *Bush v. Holmes*, 886 So. 2d 340, 352-53 (Fla. Dist. Ct. App. 2004), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006); *Op. of the Justices*, 259 N.E.2d 564, 566 (Mass. 1970); *Op. of the Justices*, 616 A.2d 478, 480 (N.H. 1992); *Almond v. Day*, 89 S.E.2d 851, 856-57 (Va. 1955); *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539, 562-63 (Vt. 1999). Many state courts have also rejected such arguments in striking down, under their analogous state constitutional provisions, much narrower governmental programs, including programs that provided textbooks to private-school students (*see Cal. Teachers Ass'n v. Riles*, 632 P.2d 953, 960-64 (Cal. 1981); *Dickman v. Sch. Dist. No. 62C*, 366 P.2d 533, 539-42 (Or. 1961); *Fannin v. Williams*, 655 S.W.2d 480, 482-84 (Ky. 1983); *Gaffney v. State Dep't of Educ.*, 220 N.W.2d 550, 556-57 (Neb. 1974); *In re Certification of a Question of Law*,

372 N.W.2d 113, 117 (S.D. 1985)), as well as programs that provided bus transportation to private schools (*see Op. of the Justices*, 216 A.2d 668, 670-71 (Del. 1966); *Spears v. Honda*, 449 P.2d 130, 133-38 (Haw. 1968)); *Epeldi v. Engelking*, 488 P.2d 860, 865-66 (Idaho 1971); *Gurney v. Ferguson*, 122 P.2d 1002, 1003-04 (Okla. 1941)).

B. The Framers of the State Constitution Unequivocally Intended to Prevent Any Diversion of Public Funds Toward the Support of Religious Schools.

The history of the Colorado Constitutional Convention confirms that the Constitution's framers intended to prevent any use of public funding to support religious schools and to prohibit any religious instruction in schools aided by the State.

From the beginning of the Convention, the "delegates signaled their strong preference for a rigid separation of public as opposed to private, religious schools." Tom I. Romero, II, *"Of Greater Value Than the Gold of Our Mountains": The Right to Education in Colorado's Nineteenth Century Constitution*, 83 U. Colo. L. Rev. 781, 830 (2012). Indeed, public education was a focus of the Convention. *See id.* at 826; *Proceedings of the Constitutional Convention* (Smith-Brooks Press 1907) ("*Proceedings*"). Early in the Convention, delegates submitted a resolution

to the Convention's education committee urging that the Constitution should prohibit payment of any public funding "in aid of any church or sectarian purpose, or to help support or sustain any school . . . controlled by any church or sectarian denomination," and that the Constitution should bar teaching of any "theological, religious or sectarian tenets or instruction . . . in any school . . . supported in whole or in part by taxation or by money or property derived from public sources." *Proceedings* at 43.

These proposals received strong support throughout the Convention. Of 45 petitions presented to the Convention on the subject, "thirty-eight, with over 1,500 names attached, urged that the use of public money for sectarian education be forever prohibited." Colin B. Goodykoontz, *Some Controversial Questions Before the Colorado Constitutional Convention of 1876*, 17 Colo. Mag. 1, 10 (Jan. 1940). By a vote of 25 to 3, the Convention delegates adopted this principle and approved what is now the text of Article IX, Section 7. *Proceedings* at 357-58. More broadly, the framers drafted and adopted an entire article of the Colorado Constitution, Article IX, dedicated to public education.

An address to the people of Colorado after the end of the Convention, prepared by the Convention chair and nine other delegates, summarized the

relevant provisions: "It is declared that . . . neither the State, nor any county, city, town or school district shall ever make any appropriation, nor pay from any public fund any thing in aid of, or to help support, any school or institution of learning of any kind controlled by any church or sectarian denomination whatsoever" and "that no religious or sectarian dogmas shall ever be taught in any of the schools under the patronage of the State." *Proceedings* at 727. Indeed, the Defendants' own expert admitted that the intention of Colorado's no-aid provision, as well as the other constitutional provisions, was to prevent public funding from going to private schools, including religious schools. Tr. Vol. III, 704:18-711:24.

The Voucher Program does exactly what Article IX was intended to prevent. It pays "public fund[s]" toward "aid" and "support" of schools controlled by churches and other religious organizations. It provides "the patronage of the State" to schools that teach "religious or sectarian dogmas." If the citizens of Colorado want to rewrite the State Constitution to allow public funding of religious schools, they can try to do so at the ballot box. Until then, the language and intent of the Colorado Constitution's framers must be followed.

V. The Voucher Program Violates the Compelled-Support and Compelled-Attendance Prohibitions of Article II, Section 4.

Article II, Section 4 of the Colorado Constitution provides that "[n]o person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent." The Voucher Program violates both the ban on compelled support ("the Compelled Support Clause") and the bar against compelled attendance ("the Compelled Attendance Clause"). *Contra Taxpayers* at *16 (majority holding on Article II, Section 4).

A. The Program Violates the Compelled Support Clause by Diverting Taxpayer Dollars Toward the Support of Ministries and Places of Worship.

The mission statements of many participating private schools explain that the schools' goals include providing students with a religious upbringing. Record 2491 (Order ¶44). Indeed, some of the schools expressly refer to themselves as a "ministry of the church." *See* Tr. Vol. II, 396:6-8. Some of the participating schools are organizationally part of a church. *Id.* at 315:11-19; 395:17-396:8; 429:5-7. Some are even operated within church facilities. *Id.* at 315:11-14; 395:17-396:5.

The Program allows the participating schools to use public taxpayer funds to further their ministerial missions, as well as to maintain chapels and other facilities

used for religious worship. Record 2493 (Order ¶47). By delivering tax funds to support ministries and places of worship, the Voucher Program violates the Compelled Support Clause.

B. The Program Violates the Compelled Attendance Clause by Coercing Attendance at Places of Worship.

The Program violates the Compelled Attendance Clause by compelling many students who wish to receive the benefit of a school voucher to attend places of worship and religious services. The record below contains materials created by the participating private schools and provided to the District (along with materials publicly available on the schools' websites) that show most participating schools require students, including Voucher Program students, to attend religious services held at churches, chapels, and other places of worship. *See* Record 2490 (¶41); Tr. Vol. I, 255:24-256:11; Tr. Vol. II, 390:21-392:15.

Although the Voucher Program purports to offer a "waiver" from religious services, the waiver is "illusory" because students are still compelled to attend religious services. Record 2493 (Order ¶51). The Assistant Superintendent of Elementary Education for the District, who had authority over and was involved in the design of the Program, confirmed that scholarship students can be "required to

attend religious services." *Id.* The Compelled Attendance Clause, however, prohibits mandatory *attendance* at places of worship.

The majority opinion below, *Taxpayers* at *16, erred when it found the Compelled Attendance Clause inapplicable because students and parents voluntarily decide whether to participate in the Program and enroll in religious schools. Non-special-needs students had no non-religious options at the high-school level, and only limited options in lower grades. Record 2489-90 (Order ¶¶35-37, 41). Having to choose between mandatory attendance at religious services on the one hand, or forgoing the opportunity to obtain a voucher on the other, does not fix the Program's constitutional defects. *See Univ. of Colo. v. Derdeyn*, 863 P.2d 929, 947 (Colo. 1993) (government may not condition provision of a benefit on surrender of constitutionally protected rights).

VI. The Voucher Program Violates Article IX, Section 8 by Subjecting Charter School Students To Religious Admission Tests, Mandatory Attendance at Religious Services, and Teachings of Religious Tenets.

Article IX, Section 8 of the State Constitution has three relevant provisions:

> (1) "No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as a teacher or student" ("the Religious Discrimination Ban");

> (2) "[N]o teacher or student of any such institution shall ever be required to attend or participate in any religious service whatsoever" ("the Religious Coercion Ban"); and
>
> (3) "No sectarian tenets or doctrines shall ever be taught in the public school" ("the Religious Instruction Ban").

Program students are protected by all three prohibitions because they are enrolled in the Charter School that the District set up to obtain per-pupil funding from the State for each student. *See* Record 2482, 2485-86 (Order ¶¶6, 19, 26); *contra Taxpayers* at *19 (majority holding on Section 8). Under Colorado law, charter schools are public schools: "A charter school shall be a public, nonsectarian, nonreligious, non-home-based school which operates within a public school district." C.R.S. § 22-30.5-104. The Voucher Program violates all three of Section 8's prohibitions, by subjecting public-school students to religious admissions tests, mandatory religious services, and religious teachings.

Religious discrimination. To enroll in the Charter School, Program students must apply to, be admitted to, and attend one of the participating private schools. Record 2484 (Order ¶18); Pls.' Ex. 5 at 8, § L (Choice Scholarship School Application, Enrollment Policy). Most of those schools, however, "subject students, parents, and faculty to religious tests and qualifications," including required attestations to a particular religion, doctrinal statements, and statements of

faith. Record 2491 (Order ¶43). The schools thus "discriminate in enrollment or admissions on the basis of the religious beliefs or practices of students and their parents, and some even give preference to members of particular churches." *Id.* at 2490-91 (¶¶42-43). Furthermore, the Program expressly allows the schools to discriminate on religious grounds in enrollment, as well as in employment of teachers. *See id.* at 2492-93 (¶46).[4] By linking admission to a public charter school to religious tests and qualifications, the Program violates the Religious Discrimination Ban.

Religious coercion. The Program runs afoul of the Religious Coercion Ban because most of the participating private schools require the public-school students who take part in the Program to attend religious services. Record 2490 (Order ¶41). As noted earlier, it is no answer that the Program purports to offer students an "opt-out" from participation in religious services, because there is no opt-out from attendance. *See id.* at 2493-92 (¶¶51-53); Pls.' Ex. 2 ("FAQ"). The Religious Coercion Ban prohibits public-school students from being required "to

[4] The Program also allows participating schools to discriminate against students and teachers on other grounds, including disability, sexual orientation, marital status, and HIV status. *See* Record 2493 (Order ¶¶49-50); Pls.' Ex. 23 at 28; Pls.' Ex. 29 at 71.

attend or participate in any religious service whatsoever." Art. IX, § 8 (emphasis added). In any event, as the district court found, "[t]he limited opt-out right is subject to even further reduction—or outright elimination"—based upon the "unique specifics for each individual school." Record 2494 (Order ¶54); Pls.' Ex. 96.

Religious instruction. The Program violates the Religious Instruction Ban because the participating religious institutions infuse religious teachings into the education that they provide to students enrolled in a public charter school. As the district court found, "[t]he curricula at most participating schools is thoroughly infused with religion and religious doctrine." Record 2492 (Order ¶45). This is beyond dispute—a public "FAQ" document created by the District and made available to families interested in participating in the Program explicitly "recognize[s] that many [participating] schools embed religious studies in all areas of the curriculum." *See id.* at 2493 (¶47); Pls.' Ex. 2. Indeed, most of the participating schools require their students to take classes in religion and theology. Record 2494 (Order ¶45).

The majority below perfunctorily dismissed these violations of Section 8 of Article IX, without reliance on any legal authority, contending that "for

educational purposes, participating students would be enrolled in the participating private schools." *See Taxpayers* at *19. This tautology highlights one of the fundamental constitutional flaws of the Voucher Program. If, as the majority believed, these students are actually enrolled in private schools, then they are not public-school students at all, and while they may be educated in whatever way those private schools deem best, state per-pupil funds cannot be used to pay for that education. If, however, the Voucher Program provides the participating students with an education through a public "charter school," as the Program was intentionally designed to do by the District so that the Program could receive state funding, then the students are public-school students and the three constitutional restrictions of Section 8 apply. Pls.' Ex. 19 at 4, § F (Voucher Program Private School Participation Agreement) ("The Private School understands that Choice Scholarship students are public school students . . ."). Allowing the District to have it both ways—to treat Program students as public-school students for financial purposes but as religious-school students for educational purposes—would grossly undermine Article IX's requirements that religious schools may not be funded with public dollars and that public-school students may not be subjected to religious discrimination, coercion, or instruction.

The majority below also found that Section 8 of Article IX is inapplicable because students choose to take part in the Program and to do so at religious schools. *Taxpayers* at *19. Section 8, however, protects the rights of both public-school students and the taxpayers who fund public schools. Charter school students cannot "choose" to nullify the constitutional requirements applicable to charter schools. Colorado statutes make clear that charter schools are public schools (C.R.S. § 22-30.5-104) and specifically require charter schools to comply with Article IX (C.R.S. § 22-30.5-204(2)(a)). What is more, as noted earlier, the Program does not provide any non-religious choices to high-school students who lack special needs, and only limited non-religious options to younger students. *See* Record 2489 (Order ¶¶35-37).

VII. Enjoining the Program Is Consistent with this Court's Precedent and Federal Law.

A. The Case Upon Which the Court of Appeals Principally Relied Concerned a Program Far Different from the One at Issue Here.

The majority decision in the court of appeals purported to apply this Court's decision in *Americans United for Separation of Church and State Fund, Inc. v. State*, 648 P.2d 1072 (Colo. 1982) to uphold the Voucher Program. *Americans United* upheld the facial constitutionality of a program that provided grants to

Colorado college students to assist in pursuing a secular education. *See id.* at 1082-84. For a host of reasons, *Americans United* does not render the Voucher Program constitutional.

First, the *Americans United* program allowed scholarships to be used only at institutions where "[t]he governing board does not reflect nor is the membership limited to persons of any particular religion" and "[f]unds do not come primarily or predominantly from sources advocating a particular religion." *Id.* at 1075. Thus, the Program did not run afoul of the No-Aid Clause's prohibition on aid to institutions "controlled by churches or sectarian denominations." *See id.* at 1083-84. Indeed, because the evidence before it did not make clear whether one college at issue was so controlled, the Court remanded the case for further factual development on that question, reversing a summary-judgment ruling that would have allowed scholarships to be used at that college. *See id.* at 1088 & n.16. Here, there is no dispute that participating schools are controlled by churches or other religious institutions. Record 2489-90 (Order ¶¶38-40).

Second, the *Americans United* program subsidized higher education, while the Voucher Program aids elementary and secondary schools. This Court explained that "[b]ecause as a general rule religious indoctrination is not a

substantial purpose of sectarian colleges and universities, there is less risk of religion intruding into the secular educational function of the institution than there is at the level of parochial elementary and secondary education." *Americans United*, 648 P.2d at 1084. Indeed, institutions taking part in the *Americans United* program were barred from imposing mandatory religious instruction upon students. *Id.* at 1075. By contrast, as the Court in *Americans United* noted (*see id.* at 1079, 1084) and as the record here confirms, Record 2492 (Order ¶45), religious instruction thoroughly infuses—and is mandatory in—the curricula of religious elementary and high schools, including most of the schools participating in the Program.

Third, the *Americans United* scholarships could be used at both public and private institutions, "dispelling any notion that the aid is calculated to enhance the ideological ends of . . . sectarian institution[s]." 648 P.2d at 1072. Here, on the other hand, only private schools are allowed to take part; the vast majority of those schools are religious; 93 percent of participating students were enrolled in religious schools; high-school students have no non-religious options if they do not have special needs; and only one of 120 participating high-school students was enrolled in a non-religious school. Record 2489 (Order ¶¶35-37).

Fourth, the *Americans United* program had safeguards which further ensured that scholarship funds would only be used for "the secular educational needs of the student" and therefore that taxpayers would not be compelled to provide "even incidental or remote" support to religious ministries. 648 P.2d at 1082, 1084. Participating institutions were barred from decreasing student aid below what they had previously provided, and biannual audits were conducted to ensure that Program funds were being properly spent. *Id.* at 1075, 1084. The Voucher Program, on the other hand, has no such safeguards. Record 2484, 2492-93 (Order ¶¶13, 46-47).

Fifth, recipients of the *Americans United* program's scholarships were not students of a public charter school and so were not afforded the protections granted by Section 8 of Article IX against religious discrimination, coercion, and proselytization. In any event, the *Americans United* program did not permit participating institutions to limit admission to students of one religion or to require students to attend religious services. 648 P.2d at 1075. The opposite is true here. Record 2490-93 (Order ¶¶41-43, 46, 51).

In short, the Voucher Program is fundamentally different, in numerous constitutionally salient ways, from the program upheld in *Americans United*.

B. Enforcement of the Colorado Constitution Does Not Violate the Federal Constitution.

Relying principally on *Colo. Christian Univ. v. Weaver* ("*CCU*"), 534 F.3d 1245 (10th Cir. 2008), the majority below concluded that the U.S. Constitution precluded it from applying the Colorado Constitution to invalidate the Voucher Program. *See Taxpayers* at *14-15, 17. The principles of the *CCU* decision, however, do not prevent this Court from holding that the Voucher Program violates the Colorado Constitution. In *CCU*, the Tenth Circuit ruled that the college-scholarship program this Court had upheld in *Americans United* violated the U.S. Constitution for two reasons. First, the Tenth Circuit concluded that the scholarship program unconstitutionally discriminated among different kinds of religious institutions, by prohibiting scholarships from being used at "pervasively sectarian" institutions, while allowing scholarships to be used at institutions that were "sectarian" but not "pervasively" so. *See* 534 F.3d at 1257-60. Second, the Tenth Circuit concluded that, to enforce the distinction between "sectarian" and "pervasively sectarian" universities, state officials engaged in ongoing and extremely intrusive "contentious religious judgments" and inquiries "evaluati[ng] . . . contested religious questions," *id.* at 1266, including determining whether various sects should be classified as members of particular religions, whether

various university policies conformed to the tenets of particular religions, and whether specific curricular materials conveyed "religious faith" or "academic theological beliefs," *see id.* at 1261-66.

Neither concern bars application of the Colorado Constitution to strike down the Voucher Program. First, Plaintiffs sought—and the district court granted—relief enjoining the entire Program. Record 2505, 2548 (Order 25, 68). Unlike in *CCU*, the district court's ruling works no discrimination among different kinds of religious institutions.

Second, applying the Colorado Constitution to invalidate the Voucher Program does not require—and the district court did not engage in—any intrusive inquiry that involves "contentious religious judgments" about "contested religious questions and practices." *Cf. CCU*, 534 F.3d at 1266. The No-Aid and Compelled-Support Clauses ask simple questions: are taxpayer dollars aiding any school controlled by a church or other religious organization, or otherwise going toward the support of a church, ministry, place of worship, or other religious group? Likewise, no complex inquiry is needed to implement the Compelled-Attendance Clause or Section 8 of Article IX, which ask whether public-school

students are being subjected to mandatory religious services, to religious admissions tests, or to religious instruction.

The district court answered these questions by examining uncontested information contained in documents created by the participating schools themselves, many of which the schools made publicly available, as well as limited testimony of representatives of the participating religious schools. Record 2489-92 (Order ¶¶38-43, 45). The district court thus "avoided the intrusiveness problem" by "deferr[ing] to the self-evaluation of the affected institutions," a type of inquiry expressly approved in *CCU*. *See CCU*, 534 F.3d at 1266.

The majority below also was concerned that the federal First Amendment may somehow prohibit state programs that fund private schools from denying funding to private religious schools. *See Taxpayers* at *15. But the proposition that states must fund religious education if they fund public or secular private education has been repeatedly rejected by the U.S. Supreme Court. *See Locke v. Davey*, 540 U.S. 712, 715, 725 (2004); *Luetkemeyer v. Kaufmann*, 419 U.S. 888 (1974), *aff'g mem.*, 364 F. Supp. 376 (W.D. Mo. 1973); *Sloan v. Lemon*, 413 U.S. 825, 834 (1973); *Norwood v. Harrison*, 413 U.S. 455, 462, 469 (1973); *Brusca v. State Bd. of Educ.*, 405 U.S. 1050 (1972), *aff'g mem.*, 332 F. Supp. 275 (E.D. Mo.

1971). Federal appellate courts and state supreme courts likewise routinely reject such arguments. *See, e.g., Bronx Household of Faith v. Bd. of Educ.*, No. 12-2730-CV, 2014 WL 1316301, at *3 (2d Cir. Apr. 3, 2014); *Bowman v. United States*, 564 F.3d 765, 772, 774 (6th Cir. 2008); *Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 409-10 (6th Cir. 2007); *Wirzburger v. Galvin*, 412 F.3d 271, 280-85 (1st Cir. 2005); *Eulitt ex rel. Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344, 353-57 (1st Cir. 2004); *Bush*, 886 So. 2d at 343-44, 357-66; *Univ. of Cumberlands v. Pennybacker*, 308 S.W.3d 668, 673, 679-81 (Ky. 2010); *Anderson v. Town of Durham*, 895 A.2d 944, 958-61 (Me. 2006); *Chittenden Town Sch. Dist.*, 738 A.2d at 546-57, 563.

The federal Constitution thus does not prevent this Court from enforcing the Colorado Constitution as it was written and intended by its framers.

CONCLUSION

The Voucher Program violates the plain text and purpose of the Colorado Constitution and the Public School Finance Act. The Plaintiffs respectfully request that this Court reverse the court of appeals and remand with instructions to reinstate the district court's order permanently enjoining the Voucher Program.

Dated this 29th day of May, 2014

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