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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 MORE; 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.

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PETITIONERS' REPLY TO INTERVENOR-RESPONDENTS' BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that subject to the 5,700 word limit set in the Court's April 9, 2014 Order, this Reply 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 Reply Brief contains 5,602 words. I acknowledge that this Reply 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

By seeking to brand the Colorado Constitution's no-aid provisions as "Blaine Amendments," Intervenors hope that this Court will take the drastic step of voiding constitutional language that has stood in Colorado for almost 140 years. But the claim that these constitutional protections were intended to, and continue to, discriminate against Catholics is simply unsupported. The evidence shows that the framers of these provisions were primarily concerned with safeguarding the separation of church and state, promoting religious freedom and tolerance, and securing the stability of the burgeoning and vulnerable public-school system. To that end, these provisions have been applied to prohibit aid to faiths and denominations across the board and have not been used as tools of discrimination against Catholics.

Intervenors also argue that application of Colorado's prohibition on public funding of religious schools would violate the U.S. Constitution. Such arguments, however, have been squarely rejected by the U.S. Supreme Court and other federal

and state courts, and do not provide any basis to avoid the application of the Colorado Constitution as written.[1]

ARGUMENT

I. The "Blaine Argument" Is Baseless, and This Court Should Join the Many Other Courts That Have Rejected It.

Intervenors claim that Sections 7 and 8 of Article IX of the Colorado Constitution were motivated by anti-Catholic animus. The historical record, however, refutes this argument. The records of Colorado's Constitutional Convention contain no evidence of such animus on the part of the delegates to the Convention. To the contrary, they reflect that a variety of objectives animated the adoption of Sections 7 and 8, including preserving the separation of church and state, protecting religious freedom and tolerance, avoiding religious conflicts, and ensuring the survival and stability of a nascent public-school system. Intervenors' contentions to the contrary depend on second-hand comments by some observers of the Convention and a guilt-by-association argument that any anti-Catholic

[1] This reply brief responds to the principal arguments raised by Intervenors concerning federal constitutional issues. Plaintiffs respond to Defendants' principal arguments in Petitioners' Reply to Defendants' Brief. Each reply brief incorporates the other, as Defendants and Intervenors raise overlapping arguments.

sentiment in the U.S. during the same era should be imputed to Colorado's framers.

Intervenors' "Blaine" argument should be soundly rejected on its unsupported factual premise alone. It also fails legally, however, because Colorado's Religion Clauses treat all religions equally.

A. The Evidence Indicates That the Framers' Motives In Enacting Sections 7 and 8 Were Multifaceted and Not Anti-Catholic.

Convention and other contemporaneous records show that Sections 7 and 8 were grounded in the following principles:

1. The Framers Were Concerned With Protecting the Separation of Church and State.

Prominent among the framers' objectives was ensuring the separation of church and state. Delegate W.E. Beck, for example, offered a resolution that included the language of Sections 7 and 8 and stated, "Church and State shall forever be separate and distinct." *Proceedings of the Constitutional Convention* ("*Proceedings*") (1907) at 43. Delegate Carr also promoted a "well-defined" separation of church and state. *The Framers of the Constitutional Convention,* Boulder Cnty. News, Mar. 3, 1876, at 2. Professor Hensel, a constitutional scholar relied upon heavily by Defendants' expert, concluded that the delegates passed

Section 7 "[t]o strengthen the separation of church and state." Donald Hensel, *Religion and the Writing of the Colorado Constitution*, 30 Church History 349, 356 (1961). As another scholar put it, the framers of the Colorado Constitution "almost all seemed to be in agreement" that a "rigid separation of church and state" should exist. 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). This objective was also reflected in popular sentiment. *See, e.g.*, Editorial, *Schools and the Church*, Denver Daily Times, Jan. 25, 1876, at 2 (observing that "the people of Colorado seem to be very positive against all interference by churches, of whatever name, creed or denomination, in State affairs."); *Proceedings* at 83 (citizen petition to the Convention urging the foundation and administration of "our entire political system . . . on a purely secular basis"); *see also Taxpayers for Public Educ. v. Douglas Cnty. Sch. Dist.*, Nos. 11CA1856 & 11CA1857, 2013 WL 791140, at *35 (Colo. App. Feb. 28, 2013) (hereinafter, "*Taxpayers*") (dissent).

Contrary to Intervenors' argument that Sections 7 and 8 were intended to ensure Protestant supremacy by prohibiting funding of Catholic schools while allowing public schools to be Protestant, many Convention delegates and

petitioners were expressly opposed to allowing use of the Bible in public schools. *Proceedings* at 43, 83, 277, 360. One petition specified that "non-sectarian" meant "the exclusion of the reading of any Bible and all religious training and exercises from the public schools." *Id.* at 277.[2] Other delegates were content to allow the Constitution to be silent on the matter, but opposed requiring use of the Bible; this compromise position was the one the Convention ultimately adopted. *Id.* at 113, 360; *see also* Hensel at 356; Dale A. Oesterle & Richard B. Collins, *The Colorado State Constitution: A Reference Guide* 223-24 (2011) (hereinafter "Oesterle & Collins").

2. The Framers Wanted To Promote Religious Freedom and Tolerance.

The Convention delegates also sought to promote religious freedom and tolerance. The 1875 Enabling Act authorizing Colorado to pursue statehood

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[2] Intervenors argue that "sectarian" meant "Catholic" to Colorado's framers. *See* Intervenors' Br. at 21, 22, 34. They point to no Colorado-specific evidence in support. Moreover, they ignore this Court's explanation that "[s]ectarian meant, to the members of the convention and to the electors who voted for and against the Constitution, 'pertaining to some one of the *various* religious sects,' and the purpose of said section 7 was to forestall public support of institutions controlled by such sects." *Americans United for Separation of Church & State Fund v. State*, 648 P.2d 1072, 1083 (Colo. 1982) (quoting *People ex rel. Vollmar v. Stanley*, 255 P. 610, 615 (Colo. 1927)) (emphasis added).

mandated that the drafters "provide an ordinance . . . [t]hat perfect toleration of religious sentiment shall be secured, and no inhabitant of [the state of Colorado] shall ever be molested in person or property, on account of his or her mode of religious worship." *Proceedings* at 10. Governor Gilpin likewise encouraged the delegates to "maintain the enjoyment of civil and religious liberty." *House Journal of the Legislative Assembly of the Territory of Colorado* 11 (1861).

Accordingly, on the first day of the Convention, the delegates passed an ordinance on religious tolerance. *Proceedings* at 712. The Convention also enacted Article II, Section 4, which provides broad protection for religious exercise and equality. Section 8 reflected these values by ensuring that "[n]o religious test or qualification" could be required for public-school admission, and that no student would be "required to attend or participate in any religious service whatsoever." As petitioners to the Convention pointed out, "wrong w[ould] be done to no one and equal rights secured to all by the adoption of [Sections 7 and 8]." *Id*. at 278.

Thus, far from discriminating against Catholics, the Convention passed measures that *protected* the rights of Catholics. The delegates to the Convention also rejected a proposal to tax church property, which would have substantially harmed the Catholic Church in Colorado. Hensel at 352; *cf.* Colo. Const. Art. X, §

5. It is therefore not surprising that, even though there were approximately eight Catholic delegates at the Convention (*see* Oesterle & Collins at 11, 222 n. 985), Section 7 was approved with just three delegates opposed (*see id.*; *Proceedings* at 357-58). Indeed, a petition to the Convention representing 101 non-Protestant Colorado citizens supported Sections 7 and 8. *Proceedings* at 278.

Convention delegates also supported Sections 7 and 8 to prevent religious conflict. *See* Hensel at 352 (one delegate argued that the constitution should settle church-state issues to "avoid the spectacle of a lobby of religionists gathering about each legislature."); *Proceedings* at 277 (a petition to the Convention advocated for free, non-sectarian common schools as a means of "forever settl[ing] the question of a non-sectarian character . . . [and] thus taking the question out of our politics entirely").

3. The Framers Aimed To Secure the Stability of the Public Schools.

State no-aid clauses also sought "to secure the financial stability of the nascent common schools." Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 B.Y.U. L. Rev. 295, 310 (2008); *see also Taxpayers* at *31. This was one of the principal motives for Colorado's Section 7. For example, Delegate Bromwell asserted that the no-funding provision "was basic to

maintaining a system of popular education." Hensel at 355. Similarly, in an address to the Colorado Teachers' Association, Judge James Belford noted that "three sects" (contrary to Intervenors' argument that "sectarian schools" referred only to Catholic ones) had already received funding from the state, and wondered "[w]hat will become of [public schools] when they all sit down at the public table?" Hon. James B. Belford, "Address Before the Colorado Teachers' Association," *The Writings and Speeches of Hon. James B. Belford* 232 (William B. McClelland, ed., 1897).

Many Convention petitions expressed similar sentiments. One petition stated, "[w]e believe that . . . funds raised for [the support of public schools] should not be diverted to other uses." *Proceedings* at 113. Other petitions stressed the importance of "mak[ing] ample provision for the support of free common schools . . . [and] guard[ing] well the public school land . . . against hasty sales [so] that greater results may be obtained for the school fund." *Id.* at 277. At least three separate petitions supported a provision that would "forever prevent . . . the use of any portion [of the public school fund] for the support of sectarian schools." *Id.* at 296, 309, 313.

B. Intervenors Fail To Establish That General Anti-Catholic Sentiment of the Time Should Be Imputed to Sections 7 and 8.

Intervenors and their amici place a great deal of emphasis on history that is not specific to Colorado. *See* Intervenors' Br. at 23; Becket Fund Br. at 4. They quote the plurality opinion in *Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000), describing so-called "Blaine amendments" as rooted in "bigotry" and "pervasive hostility to the Catholic Church and to Catholics in general." That opinion, however, was not adopted by a majority of the Supreme Court, and it did not strike down any state constitutional clause. *See id.* at 836-44 (O'Connor, J., concurring), 869 (Souter, J., dissenting).

The fact that some anti-Catholic sentiment was present in America during this period is not in dispute. But Intervenors and their amici fail to link general evidence of such sentiment to the specific motives of Colorado's framers in enacting Sections 7 and 8. Instead, they merely suppose that because anti-Catholic bias existed at the time of the Convention, Sections 7 and 8 must be products of it. But this is simply an assumption of guilt by the loosest of associations, which ignores the actual motives of the Convention delegates (discussed above). In any event, there is considerable historical evidence that so-called Blaine Amendments in other states were generally motivated by legitimate reasons similar to those of

Colorado's delegates. *See Lemon v. Kurtzman,* 403 U.S. 602, 646-47 (1971) (Brennan, J., concurring) (the "widespread demands throughout the States for secular public education" were a product of powerful social forces that included "[t]he Nation's rapidly developing religious heterogeneity, the tide of Jacksonian democracy, and growing urbanization") (citations and footnote omitted); Green, 2008 B.Y.U. L. Rev. at 310 (noting that "educational leaders and public officials increasingly came to identify the no-funding principle with principles of religious non-establishment").

Moreover, many of the amendments Intervenors characterize as "Blaine Amendments" in fact *preceded* Senator Blaine's proposal and the attendant controversy. *See id.* at 327-28. These include the no-aid provision of the Illinois Constitution, on which Colorado's Section 7 was modeled. *See, e.g.*, Oesterle & Collins at 222 n.987; *compare* Ill. Const. of 1870 art. VIII § 3 *with* Colo. Const. art. IX § 7. Although Intervenors argue that the Illinois clause was tainted by anti-Catholic animus, this claim is based on a single statement by one delegate. *See* Intervenors' Br. at 29-30. In fact, records of the debate at the Illinois Convention show that the delegates were motivated not by anti-Catholicism, but by goals that included ensuring that taxpayers would not be forced to fund religious beliefs to

which they did not subscribe and preventing governmental entanglement with religion. *See Debates of the Constitutional Convention of the State of Illinois* at 618-26 (1870). The delegates noted that they wanted to prevent public funding of the schools of any religion, specifically mentioning Presbyterians, Methodists, Baptists, and Congregationalists. *See id.*

C. The Trial Record Does Not Support Defendants' Claim of Anti-Catholic Sentiment.

The trial court correctly found that Defendants and Intervenors provided insufficient evidence to support their Blaine argument. Record 2514 (Order 35). This factual finding is due deference on appeal.

At trial, Defendants' allegations of anti-Catholicism were largely based on testimony of their expert, Charles Glenn. The district court was right to disregard Glenn's testimony. Glenn is not a historian; he holds no academic degrees in history; and his publications are not peer-reviewed. Tr. 694:11-12, 715:4-13. He is also an ardent supporter of school vouchers. Tr. 713:10-25, 714:18-715:3.

Moreover, his testimony was based on little relevant evidence. As Glenn admitted at trial, his conclusions about the motivations behind Sections 7 and 8 were largely based upon national history. Tr. 736:4-16. To the extent that Glenn did discuss Colorado, he relied "heavily" on materials quoted by secondary

sources, along with a small selection of newspaper articles provided to him by Defendants' lawyer. Tr. 702:1-704:8; *see also* Tr. 678:2-5; 695:8-12. Glenn made no efforts to find and review primary documents himself. Tr. 703:22-704:8.

D. There Is No Legal Basis for Defendants' "Blaine" Argument.

State and federal courts around the country have rejected arguments like those made by Intervenors in other cases involving so-called "Blaine amendments." In *Bush v. Holmes*, the Florida Supreme Court held that while there was "no evidence of religious bigotry relating to Florida's no-aid provision . . . [e]ven if the no-aid provisions were 'born of bigotry' . . . such a history" would not nullify them. 886 So. 2d 340, 351 n.9 (Fla. Dist. Ct. App. 2004), *aff'd on other grounds,* 919 So. 2d 392 (Fla. 2006). Similarly, in *Cain v. Horne*, an Arizona appellate court rejected arguments that Arizona's no-aid clause was motivated by anti-Catholic animus, but noted that even if that were so, "none of the parties has produced any authority suggesting we may disregard constitutional provisions merely because we suspect they may have been tainted by questionable motives." 183 P.3d 1269, 1273 (Ariz. Ct. App. 2008), *judgment aff'd but opinion vac'd*, 202 P.3d 1178, 1185 (Ariz. 2009); *see also Wirzburger v. Galvin*, 412 F.3d 271, 282 (1st Cir. 2005) (concluding that evidence that Massachusetts no-aid clause was

influenced by anti-Catholic animus was irrelevant, and noting that it was not aware of any case "in which evidence of animus toward religion was itself sufficient to invalidate a government action, without the animus being tied to some resulting infringement on freedom of belief or on religious status, acts or conduct"); *Univ. of Cumberlands v. Pennybacker*, 308 S.W.3d 668, 682 (Ky. 2010).

Intervenors' reliance on *Hunter v. Underwood*, 471 U.S. 222 (1985), which overturned discriminatory Jim Crow laws, is misplaced. Not only were such laws indisputably passed to discriminate against African-Americans, but they also had such an effect throughout their history and during the time when the case was decided. *See id.* at 229, 233. Two other cases cited by Intervenors, *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534-36 (1993), and *Romer v. Evans*, 517 U.S. 620, 627-30, 634 (1996), are even less apposite, as those cases concerned challenges to laws passed to discriminate against a particular minority that were brought shortly after the laws were enacted. By contrast, in a group of cases upholding Sunday closing laws, the Supreme Court held that even though those laws originally had an improper purpose of advancing Christianity, they now have the legitimate effect of providing a uniform day of rest, and so do not violate

the U.S. Constitution. *See, e.g.*, *McGowan v. Maryland*, 366 U.S. 420, 428-29, 442, 449, 453 (1961); *Braunfeld v. Brown*, 366 U.S. 599, 602, 605 (1961).

Here, Intervenors have not only failed to demonstrate discriminatory intent, they have also failed to show that Colorado's no-aid provisions have ever been used to discriminate against Catholics or any other particular faith. The provisions apply equally to all religions. And, as the district court found, while sixteen of the twenty-three private schools approved to participate in the Program are religious, only three of them are Catholic. Record 2387-89 (Order ¶¶ 32, 35, 38, 40). A ruling striking down the Program therefore would not disproportionately impact Catholics or their schools. (The Court need not reach these issues at all, however, if it strikes down the Program under Article II, Section 4, as Defendants do not claim that this clause arose out of anti-Catholic animus.)

II. The Colorado Constitution's Prohibitions Against Public Funding of Religious Schools Do Not "Discriminate Against Religion" in Violation of the U.S. Constitution.

A. *Locke v. Davey* Forecloses This Argument.

In *Locke v. Davey*, 540 U.S. 712 (2004), the Supreme Court held that a state law barring university students from using state scholarship funds to pursue a degree in theology did not violate the U.S. Constitution, even though allowing such

use of scholarship funds would be permitted under the Establishment Clause. *Id.* at 715, 719, 720 n.3, 725 n.10.

Addressing an argument that the law violated the Free Exercise Clause, the Court first noted that "'there is room for play in the joints'" between that Clause and the Establishment Clause—"[i]n other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.* at 718-19. The Court then explained that the law did not significantly burden students' religious-exercise rights. The law did not impose "criminal [or] civil sanctions on any type of religious service or rite," "deny to ministers the right to participate in the political affairs of the community," or "require students to choose between their religious beliefs and receiving a government benefit." *Id.* at 720-21. "The State ha[d] merely chosen not to fund a distinct category of instruction," and the students were not prohibited from undertaking theological study. *Id.* at 721.

The Court then found that the law was motivated by a "historic and substantial state interest" in ensuring that religious education is supported by private money instead of tax dollars. *Id.* at 721-23, 725. The Court held that

because any burden on religion was "minor," while the state interest was "substantial," the law did not violate the Free Exercise Clause. *Id.* at 725.

The Court also rejected in a footnote the argument that the law violated the Equal Protection Clause, explaining that because the program did not violate the Free Exercise Clause, it was subject only to rational basis scrutiny under the Equal Protection Clause. *Id.* at 721 n.3; *accord Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (holding that religion-related Equal Protection claim merited only rational-basis scrutiny because Free Exercise claim failed). The Court similarly rejected in a footnote the plaintiff's Establishment Clause claim, explaining that the state's decision not to subsidize religious instruction did not reflect "animus toward religion." 540 U.S. at 725 & n.10.

Here, likewise, the framers of the Colorado Constitution merely chose "not to fund a distinct category of instruction," while leaving private citizens free to receive such instruction without state assistance. *See id.* at 721. Colorado's constitutional provisions are supported by substantial state interests in preserving the separation of church and state, protecting the public schools and their financial health, and preventing religious divisiveness. *See supra* at 3-8. Intervenors' Free Exercise Clause argument therefore fails. *See Locke*, 540 U.S. at 725.

Accordingly, only rational-basis scrutiny applies under the Equal Protection Clause, and the interests supporting Colorado's constitutional clauses are more than sufficient to satisfy such scrutiny. *See id.* at 721 n.3. Likewise, Intervenors' Establishment Clause claim fails because Colorado's constitutional clauses were motivated by those interests, not "animus toward religion." *See id.* at 725 & n.10.

Intervenors attempt to distinguish *Locke* on two grounds, both of which are baseless. First, they argue that the state interest involved in *Locke* was the interest in not funding the training of clergy, and that this interest is somehow different than the state's interest in not funding religious instruction in general. Intervenors' Br. at 40. To the contrary, *Locke* recognized that states have broad, traditional interests in not supporting religious ministries in any way, including in not funding religious instruction. *Locke* described the traditional state interests as "antiestablishment interests" and as "prohibit[ing] . . . using tax funds to support the ministry." *Id.* at 722-23. The Court explained that the "most famous example" of legislation that led to restrictions on state funding of religion in founding-era Constitutions was a Virginia bill that sought to assess a tax for "Christian teachers." *Id.* at 723 n.6. As the Court noted, in response to this bill, Thomas Jefferson and James Madison wrote legislation and a pamphlet that opposed *any*

form of tax support of religion. *See id.* at 722-23 & n.6; *see also Flast v. Cohen*, 392 U.S. 83, 103-04 (1968).

Many founding-era state constitutions thus contained broad prohibitions against tax-funded support of religious ministries. *See Locke*, 540 U.S. at 723. Of course, religious education of children is part of what religious ministries do to maintain themselves. The Court thus concluded in *Locke* that use of public funds for "religious *instruction* is of a different ilk" than other uses of public funds. *Id.* at 723 (emphasis added); *see also People ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 215 (1948) (Frankfurter, J., concurring) ("long before the Fourteenth Amendment subjected the States to new limitations, the prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people").

Second, Intervenors argue that the scholarship program in *Locke* went "'a long way toward including religion in its benefits'" (Intervenors' Br. at 40 (quoting *Locke*, 540 U.S. at 724)), while the Colorado constitutional provisions at issue do not allow any public funding of religious instruction. In *Locke*, however, the Court examined the entirety of the Washington Constitution, not just its restrictions on funding of religion, to determine that the state's "constitution [was] not hostile

toward religion." *Id.* at 724 n.8. Colorado, even more so than Washington, has included a variety of benefits and protections for religious persons and practices in its Constitution. *See* Art. II, Sec. 4 (guaranteeing the free exercise of religion and prohibiting religious discrimination); Art. IX, Sec. 8 (prohibiting religious discrimination in admissions or employment by public educational institutions); Art. X, Sec. 5 (exempting property used for religious worship from taxation). As was the case in *Locke*, the motivation for the Colorado constitutional clauses was not hostility toward religion—as discussed *supra* at 3-8, the framers wanted to protect the separation of church and state and the public schools, and to prevent religious divisiveness, by, among other things, not funding religious schools.

B. Numerous Other Cases Reject Intervenors' Argument.

Intervenors' argument is further foreclosed by a series of pre-*Locke* Supreme Court cases establishing that states have the right to deny public funding to religious schools, even when they offer comparable funding to secular private schools. In *Brusca v. State Board of Education*, 405 U.S. 1050 (1972), *aff'g mem.*, 332 F. Supp. 275 (E.D. Mo. 1971) (three-judge court), for example, the Court summarily rejected a free-exercise and equal-protection challenge to Article IX, Section 8 of the Missouri state constitution, a clause which is virtually identical to

Article IX, Section 7 of the Colorado Constitution and prohibits the state from aiding religious but not secular private schools. *See also Sloan v. Lemon*, 413 U.S. 825, 834-35 (1973) (rejecting an argument that the Equal Protection Clause would bar a voucher-like "tuition reimbursement" program from funding secular private schools but not religious private schools; explaining, "valid aid to nonpublic, nonsectarian schools [provides] no lever for aid to their sectarian counterparts"); *accord Norwood v. Harrison*, 413 U.S. 455, 462, 469 (1973).

Intervenors' arguments are also contrary to a broader line of Supreme Court cases that have recognized "in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Regan v. Taxation With Representation*, 461 U.S. 540, 549 (1983); *accord Rust v. Sullivan*, 500 U.S. 173, 201 (1991); *Harris v. McRae*, 448 U.S. 297, 321-22 (1980); *Maher v. Roe*, 432 U.S. 464, 478-79 (1977). Applying this principle to the Free Exercise Clause, the Supreme Court has said that the clause "'is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'" *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)).

Numerous federal and state appellate courts have rejected arguments similar to those made by Intervenors. For example, in *Eulitt ex rel. Eulitt v. Maine Department of Education*, 386 F.3d 344, 354 (1st Cir. 2004), the court held that a state did not violate the Free Exercise, Equal Protection, and Free Speech Clauses by paying tuition for students in secular but not religious private schools, noting, "[*Locke*] confirms that the Free Exercise Clause's protection of religious beliefs and practices from direct government encroachment does not translate into an affirmative requirement that public entities fund religious activity simply because they choose to fund the secular equivalents of such activity." *See also Gary S. v. Manchester School District*, 374 F.3d 15, 21 (1st Cir. 2004) ("the mere non-funding of private secular and religious school programs does not 'burden' a person's religion or the free exercise thereof"); *Anderson v. Town of Durham*, 895 A.2d 944, 959 (Me. 2006) ("[t]he statute merely prohibits the State from funding [religious parents'] school choice, and as such, it does not burden or inhibit religion in a constitutionally significant manner"); *accord, e.g.*, *Bowman v. United States*, 564 F.3d 765, 775 (6th Cir. 2008); *Bush*, 886 So. 2d at 362-66; *Cumberlands*, 308 S.W.3d at 680.

Intervenors cite several cases that they claim found a Free Exercise or Equal Protection violation in connection with a denial of state funding of religious education. Intervenors' Br. at 38. But of these, only *Colorado Christian University v. Weaver ("CCU")*, 534 F.3d 1245 (10th Cir. 2008), was decided after *Locke*.[3] As noted *infra* at 23-24 and in Plaintiffs' Opening Brief (at 62-63), *CCU* is easily distinguishable because the program there discriminated among different kinds of religious institutions and required an overly intrusive inquiry into religion. Intervenors rely on some language in *CCU* that goes beyond those facts (*see* Intervenors' Br. at 38 (quoting 534 F.3d at 1255)), but that language is equivocal dicta, and interpreting *CCU* as standing for the proposition that a state cannot deny

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[3] Intervenors' pre-*Locke* cases are not good law to the extent they can be interpreted to support Intervenors' position. They are also distinguishable. *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998), concerned the provision of state services to disabled students, not public funds that went into the coffers of religious schools, and did not involve any state constitutional interest. In *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995), where the court struck down under the Free Exercise Clause an Army regulation prohibiting inclusion of religious practices in day-care provided on army bases, the day-care providers were paid with private funds instead of tax funds, and no state constitutional interest was at stake. And *Locke* plainly abrogated the ruling in *Columbia Union College v. Oliver,* 254 F.3d 496, 500 (4th Cir. 2001), that a religiously-affiliated college was entitled to participate in a state grant program under the Free Speech Clause, for *Locke* held that the Free Speech Clause cannot create a right to scholarships for religious education because a scholarship program "is not a forum for speech" (540 U.S. at 720 n.3); in any event, Defendants make no Free Speech Clause claim here.

public funding to religious schools would render it contrary to Supreme Court precedent and the weight of federal and state appellate authority.

III. This Court Can Enforce Colorado's Religion Clauses Without Engaging In Any Constitutionally Prohibited Inquiry.

Intervenors and Defendants contend that the Colorado Constitution cannot be enforced as written because doing so would result in an improper religious inquiry. *See, e.g.*, Defendants' Br. at 45-48, 56; Intervenors' Br. at 34-35, 44-47. This argument, however, is not supported by the case law. If accepted, it would invalidate other constitutional provisions, and numerous statutes, including ones that exempt religious organizations from various requirements.

A. *CCU* Does Not Prohibit Application of Colorado's Religion Clauses as Written.

Defendants argue that enforcing the Colorado Constitution would trigger an improper inquiry into religious matters because, they say, *CCU* held that such an inquiry was conducted under the college-scholarship program this Court upheld in *Americans United*, 648 P.2d 1072. The college-scholarship program, however, was construed by *CCU* as requiring a much more intrusive inquiry into religious questions than Colorado's Religion Clauses actually mandate. *See CCU*, 534 F.3d at 1261-66. For example, instead of simply requiring participating institutions not

to discriminate based on religion in admissions or employment, the college-scholarship program called for an inquiry into the religious beliefs of faculty and students. *Id.* at 1264. According to *CCU*, this and other aspects of the college-scholarship program resulted in state officials making "contentious religious judgments" and "evaluat[ing] . . . contested religious questions." *Id.* at 1266.

Applying the clear prohibitions of the Colorado Constitution itself, however, does not require any such inquiry. To apply Article IX, Section 7, the Court need only ask whether public funds are aiding or supporting a school controlled by a church or sectarian denomination. Similarly, to apply Article IX, Section 8, the Court must only ask whether public school students or teachers are being subjected to a religious test for admission or employment, mandatory religious services, or religious instruction. Article II, Section 4 calls for similarly straightforward inquiries. The same is true with respect to the grounds upon which Plaintiffs distinguish *Americans United* from this case. *See* Plaintiffs' Reply to Defendants' Brief at 30-33.

B. Courts Routinely Inquire About Whether Institutions Are Religious or Not.

To the extent that Defendants and their amici argue that courts are prohibited from asking such simple questions—or from otherwise distinguishing religious

institutions from non-religious ones—their arguments are contrary to the case law. Federal cases make clear that the U.S. Constitution does not prohibit courts from inquiring about *whether* something *is* religious. Courts must only avoid analyzing whether religious beliefs are valid, or dissecting their content in a manner that impermissibly entangles the courts in theological questions. *See, e.g.*, *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709-10 (1976); *United States v. Seeger,* 380 U.S. 163, 184-85 (1965); *see also Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005).

Indeed, federal courts routinely examine whether institutions are religious to determine whether they qualify for exemptions for religious organizations from various statutes, such as employment laws. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 699 (2012); *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226-31 (3d Cir. 2007); *White v. Denver Seminary*, 157 F. Supp. 2d 1171, 1174 (D. Colo. 2001). Similarly, this Court has held that the U.S. Constitution permits courts and state administrative bodies to determine whether an entity qualifies as a "church" for purposes of an exemption for churches from state unemployment taxes. *Young Life v. Div. of Employment & Training*, 650 P.2d 515, 522-24 (Colo. 1982). This Court has also

upheld an inquiry into whether an entity's "properties were primarily used for religious worship and reflection." *Maurer v. Young Life*, 779 P.2d 1317, 1331-33 & n.21 (Colo. 1989).

The inquiry that Colorado courts need to conduct to apply the plain text of Colorado's Religion Clauses is simpler and less intrusive than the inquiries this Court upheld in the two *Young Life* cases. In fact, here, the participating religious schools themselves made their religious nature clear in documents provided to the School District, many of which they also make available to the public. *See* Record 2489-92 (Order ¶¶ 38-45 and documents cited therein).

Defendants' argument that courts cannot distinguish schools controlled by religious organizations from ones that are not, or ask the other simple questions relevant to Colorado's Religion Clauses, would—if adopted—invalidate a host of exemptions for religious institutions from employment, labor, tax, and other laws. For example, many federal anti-discrimination statutes grant religious organizations exemptions—many of which, like Colorado's No-Aid Clause, focus on whether an institution is controlled by a religious organization. *See, e.g.*, 42 U.S.C. § 2000e-2(e)(2) (exempting from Title VII "a school, college, university, or other educational institution or institution of learning … [if it] is, in whole or in

substantial part, owned, supported, controlled, or managed by a particular religion"); *see also* 42 U.S.C. § 1681(a)(3) (Title IX); 42 U.S.C. § 3607(a) (Fair Housing Act); 42 U.S.C. §§ 12113(d), 12187 (ADA).

CONCLUSION

For the foregoing reasons, the Court should reinstate the district court's order enjoining the Voucher Program.

Dated this 15th day of September, 2014

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