Court of Appeals, State of Colorado 101 W. Colfax Avenue, Ste.800 Denver, CO 80202	
Lower Court: District Court Denver County, Colorado Judge Michael A. Martinez	
Defendants-Appellants: COLORADO BOARD OF EDUCATION, DOUGLAS COUNTY SCHOOL DISTRICT RE-1, et al., and Intervenors-Appellants: FLORENCE AND DERRICK DOYLE, et al. v. Plaintiffs-Appellees: JAMES LARUE, TAXPAYERS FOR PUBLIC EDUCATION, et al.	▲ COURT USE ONLY ▲ CASE NO. 2011CA1856 2011CA1857
Attorneys for Amicus Curiae: Daniel McKenzie, Atty. Reg #: 39288 Stephen Burg, Atty. Reg #: 39789 BURG SIMPSON ELDREDGE HERSH & JARDINE, PC 40 Inverness Drive East Englewood, Colorado 80112 Phone: 303.792.5595 Email: dmckenzie@burgsimpson.com sburg@burgsimpson.com	

BRIEF OF *AMICUS CURIAE* ANTI-DEFAMATION LEAGUE IN SUPPORT OF APPELLEES

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

☐ It contains less than 9,500 words.

☑ It does not exceed 30 pages.

☑ I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/ Daniel E. McKenzie
Daniel E. McKenzie

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF THE AMICUS

The Anti-Defamation League ("ADL") was organized in 1913 to stop the defamation of the Jewish people and to secure justice and fair treatment to all. It seeks to advance goodwill and mutual understanding among Americans of all creeds and races; to combat racial, ethnic, and religious prejudice in the United States; and to prevent discrimination of all kinds. Today, ADL is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism.

Among ADL's core beliefs is strict adherence to the separation of church and state, a principle directly at issue in this litigation. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and belief in America and to the protection of minority religions and their adherents.

ADL has previously opposed school voucher programs, such as the program at issue here, on the grounds that directing government money to private religious institutions subverts the separation of church and state. Preventing government from funding schools and other institutions that discriminate on the basis of

protected characteristics, such as the schools participating in the program at issue here, is a core mission of ADL. ADL is a fervent advocate of the enforcement of anti-discrimination laws, and has filed *amicus* briefs in numerous cases, including many landmark Supreme Court cases, urging the unconstitutionality or illegality of discriminatory practices or laws.[1]

---

[1] For example, ADL has filed *amicus* briefs in *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995); *Miller v. Johnson*, 515 U.S. 900 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Corp. of Presiding Bishop of Church of Latter-day Saints v. Amos*, 483 U.S. 327 (1987); *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979); *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Runyon v. McCrary*, 427 U.S. 160 (1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Sweatt v. Painter*, 339 U.S. 629 (1950); and *Shelley v. Kraemer*, 334 U.S. 1 (1948).

SUMMARY OF ARGUMENT AND INTRODUCTION

Colorado's constitution clearly and unequivocally forbids state and local governments from using public money to support religious institutions and religious schools in particular. These constitutional provisions have been further supplemented with statutory laws that prohibit state-funded institutions from discriminating based on religion, sexual orientation, and disability, among other protected characteristics. Despite these prohibitions, the Douglas County School District ("Douglas County" or "District"), through its so-called School Choice Program ("Program"), would disburse funds received from the State of Colorado – given to it for the express purpose of providing a free public education to Douglas County's school-age residents – to private, religious institutions that expressly discriminate in admission based on religion and other protected characteristics.

Were Douglas County to pay the tuition for Douglas County students attending religious schools directly, there would be no question that it would be violating Colorado's constitutional prohibition against government funding for religious institutions, or that private schools by accepting government funds would have to agree to abide by the non-discrimination laws applicable to public institutions. Douglas County, however, has attempted to circumvent this outcome by devising the Choice Scholarship Charter School ("Charter School"), an employee-less,

building-less, curriculum-less school in which participating students must first enroll before they can attend a private school partner. Students will not attend any classes at the Charter School; rather, the Charter School is merely a shell entity created to enable Douglas County to continue receiving state funds for those students participating in the Program. Most, but not all, of those funds will then be turned over to the private schools, via checks sent directly to the schools that the parents are forced to endorse restrictively to the school.

It is simply unacceptable for Douglas County to flout well-established constitutional law and anti-discrimination provisions with such a charade. Colorado's public and charter schools are unquestionably forbidden from using public money to advance or support religion, or to support institutions that discriminate based on protected characteristics. Douglas County is seeking the benefits of state funding for its schools without having to abide by the obligations that accepting those funds entails. Specifically, Douglas County engages in the fiction that the students participating in the Program are attending a *public* school in order for the District to continue collecting state funds, but it concomitantly claims that the students are attending *private* schools for the purpose of avoiding the Colorado constitution and anti-discrimination laws. The District cannot have it both ways.

Douglas County further argues that even if its Program does violate Colorado's constitution, the provision prohibiting state aid to religious schools should be struck down because of its alleged origin rooted in anti-Catholic bigotry. The provision, however, is facially neutral – a fact which Appellants do not contest – and is being applied accordingly. Moreover, its history does not evidence an intent to discriminate against Catholics or any other religious group; instead, its history evidences an intent to protect the viability of Colorado's public schools and to promote the bedrock principles of our pluralistic democracy. Ignoring or striking down the facially neutral provision at issue – particularly when there is no evidence that the provision has been applied in any way other than neutrally – would create a nearly impossible precedent to apply prospectively. The District Court's order is a correct application of a valid law and should be upheld.

ARGUMENT

A. The Program Is Unlawful Because Publicly Supported Schools In Colorado Are Forbidden From Engaging In Discriminatory Admission Practices.

Appellants base much of their advocacy on the fact that participation in the Program is voluntary. Setting aside the fact that the people ultimately funding the Program (i.e., Douglas County taxpayers) are forced to do so through a compulsory process, Appellants ignore the part of this process that makes the Program so

problematic from the perspective of those who want to participate. Although no one would be forced to participate in the Program, those students who want to participate may be prevented from doing so by the discriminatory admissions practices employed by the participating private schools and expressly permitted by the District. And while selectivity alone is not necessarily illegal, it certainly is illegal for discrimination on the basis of religious belief, sexual orientation or disability to be the ground on which a student is prevented from participating.

As institutions open to the public, Colorado public schools are forbidden from denying entry or service to individuals based on certain protected categories, including, most notably for this case, religious belief. Furthermore, it is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation, including public schools. C.R.S. § 24-34-601. Indeed, public schools, in particular, are specifically singled out, both in Colorado's constitution and its statutory law, as forbidden from engaging in discrimination based on religious belief, sexual orientation, and disability. Colorado's constitution, for example, forbids "any preference [from

being] given by law to any religious denomination or mode of worship" (Colo. Const. art. II, § 4), and forbids "public educational institution[s] of the state" from conditioning student or teacher admission upon any "religious test or qualification" (Colo. Const. art. IX, § 8).

Furthermore, the State requires Colorado school districts to adopt written policies specifying that their schools are subject to all state and federal laws outlawing discrimination based on, among other characteristics, disability, creed, sexual orientation, religion, and need for special education services. C.R.S. § 22-32-109. They must also affirm that enrollment decisions will be made in a non-discriminatory manner. *Id.* Indeed, Douglas County itself has done so. According to its website:

> The District is committed to the policy that no otherwise qualified person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any District program or activity on the basis of ethnicity, race, color, religion, sex, marital status, national origin, ancestry, age, disability, or sexual orientation.

Douglas County School Board, *Douglas County Policy on Nondiscrimination/Equal Opportunity* <http://bit.ly/JUG6Ov> (last accessed June 28, 2012). As required by state statute, Douglas County also maintains a policy prohibiting discrimination in employment. Douglas County School Board, *Douglas County Policy on Nondiscrimination/Non-Harassment of Employees*

<http://bit.ly/MsNfcv> (last accessed June 28, 2012) ("[N]o otherwise qualified employee shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any District program or activity on the basis of race, color, religion, national origin, ancestry, marital status, sex, age, disability or sexual orientation.").

The Program directly violates the Colorado Constitution, Colorado law, and Douglas County's own required non-discrimination policy by including schools that explicitly discriminate in enrollment based on religious belief, and in some cases, church membership. As a preliminary matter, other than a program for gifted students and one for special needs students, the only choices available to high-school-aged students participating in the Program are religious schools. Order at 9, ¶ 36. Even among younger students, the vast majority of the participating private schools have a religious affiliation. *Id.*, ¶ 38. As found by the District Court, most of these schools limit student enrollment and membership in their governing bodies to those who subscribe to their religious beliefs, and subject their students and parents to religious tests and qualifications. *Id.* at 10-11, ¶¶ 42-43. They openly and purposefully discriminate based on other characteristics that public institutions are forbidden from discriminating based on as well, including disability and HIV status. *Id.* at 13, ¶¶ 49-50. At least one partner school, Front Range Christian

School, lists homosexuality as a cause for termination of its staff members. The District has not required any school to modify these policies in order to participate in its Choice Program. In fact, the District Court found the opposite: during the Choice Program's development, Douglas County officials specifically promised potential partner schools that, so long as they met certain academic standards, the District would not seek to exercise any control over any school's policies or operations. *Id.*, ¶ 48.

Appellants attempt to deal superficially with this substantial objection about the religious discrimination in the Program with a mere footnote, in which they assure the Court that discrimination "on any basis protected under applicable federal or state law" is prohibited and grounds for termination from the program, with the sole exception being permission to discriminate based on religious belief. Appellant Brief (Douglas County School District and Board of Education) at 30, n.5. Religious belief, however, is not a permissible ground for discrimination. Appellants' argument that such discrimination is necessary to protect religious freedom is misleading – as are Appellants' citations[2] – and misses the central issue

[2] For example, Appellants cite *Hosanna-Tabor v. EEOC*, 556 U.S. ___ (Jan. 11, 2012), which involved a *private* religious school, and did not involve the use of any government funds. That reason alone would make the case inapposite. Moreover, the case turned entirely on the applicability of the "ministerial exception," which applies only to employer-employee relationships (not student admissions decisions) in private religious institutions, and is, therefore, inapplicable here. *Id.* There is no exception to Colorado's prohibition against *state funding* of private religious schools or its prohibition against schools receiving public funds from discriminating in admission based on religion or any other protected characteristic.

of this litigation: the Program operates by using a *public* Charter School, and directs *public* dollars to the schools. Colorado law plainly bars the use of public dollars in a public charter school for religious discrimination in admissions decisions. Consequently, the Program is unconstitutional, and the injunction should be upheld.

B. Douglas County's Paper Charter School Does Not Exempt The Program From State Constitutional Requirements Or State Anti-Discrimination Laws.

Appellants claim that it would be "absurd" for anyone to conclude that the Program violates state law prohibiting support of religious institutions. If the legality of the Program is so obvious, however, why the need for a fictitious charter school to make it work? As found by the District Court:

> School officials testifying during the hearing conceded that the Choice Scholarship School exists only on paper. The same school officials concurred with the fact that the Choice Scholarship School has no buildings, employs no teachers, requires no supplies or books, and has no curriculum. The Choice Scholarship School is merely the name given to the person(s) within the Douglas County School District who will administer the Scholarship Program.

Order at 6, ¶ 25. The Charter School at the heart of the Program serves no function other than to give District officials a cover under which to continue receiving state funds for students being sent to religious institutions, which, at least in some cases,

purposefully and openly engage in discrimination based on protected categories, most notably religious belief.

The Program suffers from a fatal inherent contradiction. The participating private schools' exemption from having to abide by Colorado anti-discrimination laws is dependent entirely on their status as private institutions. But the students participating in the Program will continue to be counted, for funding purposes, as public school students through their enrollment in the Charter School. The problem for Douglas County is that charter schools are, like any public school, forbidden from supporting any religion. C.R.S. § 22-30.5-104. Nor can charter schools discriminate in their enrollment decisions based on characteristics protected under state law. *Id.* Thus, by creating the Charter School fiction to enable receipt of state funds, Douglas County has boxed itself in to following Colorado law with respect to all aspects of the Program, including ensuring that all schools are equally accessible to all of its students, regardless of their religious affiliation or sexual orientation.

Although any Douglas County student can technically seek to enroll in the Charter School (assuming that there is space available), the student also must be accepted by and enrolled into one of the private school partners. In other words, the private school partners ultimately set the enrollment criteria for the purported

public school at the heart of the Program. Establishing a non-existent charter school simply is not a legal basis that frees Douglas County to direct public money to institutions that discriminate against applicants on the basis of protected characteristics. Consequently, the Program violates Colorado's constitution and its statutory law, and the injunction against it should be upheld.

C. Colorado's Constitutional Prohibition Against Government Support Of Religious Institutions Should Be Upheld Because It Is Facially Neutral, Non-Discriminatory In Application, And Maintains The Necessary Separation Of Church And State That Protects Religious Freedom.

Unable to sufficiently counter the District Court's correct ruling that the Program violates Colorado's "no funding" constitutional provision (Colo. Const. art. IX, § 7), which prohibits public aid to religious institutions, Appellants resort to arguing that the Court should simply ignore that provision because of its allegedly anti-Catholic origin. The assertion that bigotry caused Colorado to adopt the constitutional provisions protecting public schools and preventing government aid to religious institutions is unsupported speculation that ignores the critical value that these provisions play in protecting religious freedom and public education in Colorado. Appellants seek to use alleged anti-Catholic bigotry as the Trojan Horse to unravel the fundamental protections enshrined in Colorado's constitution that merely codified what had become the *status quo* in many other states decades before. Moreover, the provision, like that same provision in many

other states' constitutions, in fact safeguards and maintains the separation of church and state embodied in the state constitution, which ultimately protects religious freedom for all.

Regardless, the provision is facially neutral and non-discriminatory, and is being applied accordingly. Appellants cannot and do not claim otherwise. Refusing to abide by this 135-year-old keystone provision of the Colorado Constitution merely because the Appellants' paid expert seeks to impugn the motives of some of its original supporters – and in the absence of any allegation of, much less factual support for, any discrimination on the statute's face or any discriminatory application – is contrary to U.S. Supreme Court precedent. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (U.S. 1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (citations omitted).

1. Colorado's "No Funding" Provision Merely Codified What Had Become The Status Quo Around The Country Decades Beforehand.

After considerable debate at Colorado's constitutional convention, the delegates enacted a provision that was consistent with a trend in favor of prohibiting the use of public funds for religious education that had become well established around the

nation. The language of Colorado's "no funding" provision mirrors nearly identical provisions that had been enacted in several other states long before the issue gained national attention or became a vehicle for those who may have harbored anti-Catholic animus. It also is consistent with a resolution that Colorado's public school teachers had passed shortly before the constitutional convention stating that the constitution should exclude sectarianism and prohibit any division of school funds. In other words, Colorado's constitutional convention was merely codifying what was already becoming, in Colorado and in many parts of the country, the *status quo*.[3] *See* Steven K. Green, *"Blaming Blaine": Understanding the Blaine Amendment and the "No-Funding" Principle*, 2 First Amend. L. Rev. 107, 124-28 (2004).

The history surrounding the "no funding" provisions demonstrates that the provisions were advanced as a way to reduce conflict, not discriminate against any particular religion. By the time Colorado was drafting and debating ratification of its state constitution in 1876, many states around the nation had already engaged in similar debates about state funding for public schools and whether religion should

[3] Currently, 39 states have "no funding" provisions in their constitutions similar to Colorado's. In addition to Colorado, they are: Alabama, Alaska, Arizona, California, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, South Carolina, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming. The District of Columbia's Code also contains a "no funding" provision.

have any place in public education. A large number had determined that it should not, and many of these decisions predated or clearly had no relation to any anti-Catholic bigotry. *Id.*

The relationship between government and religious institutions was, of course, a topic of frequent and passionate discussion among the nation's founders. That debate quickly moved to the state level as the states' founders began to draft and enact their own foundational documents. As it did, the debate became intertwined with the increasingly widespread movement to establish uniform public schools around the country. As early as 1779, Thomas Jefferson himself had drafted a plan for public schools in Virginia, which included a specific proposal to keep the bible out of the curriculum, and instead focus on "the most useful facts from Grecian, Roman, European, and American History." *Id.* at 117. By 1825, New York City had discontinued public funding of schools run by religious institutions. *Id.* at 121. New York's decision had no grounding in any anti-Catholic prejudice, as it predated the Catholic Church's decision to create its own parochial school system by eight years, and predated the first significant wave of Irish Catholic immigration by more than a decade. *Id.* at 122.

Similar "no funding" provisions were enacted in a number of states with no history of or experience with anti-Catholic animus. Michigan, for instance,

included a "no funding" provision in its constitution in 1835, which then served as the model for constitutions including the same provision in Wisconsin (1848), Indiana (1851), and Minnesota (1857), none of which had significant Catholic populations at the time or histories of widespread anti-Catholic sentiment. *Id.* at 127. Colorado's language was modeled on Illinois's constitution, which had been re-ratified five years earlier. Hearing Transcript, Vol. III, 722:25 to 723:9. In short, while it is impossible to know the motivations of all of the individuals who ratified these types of provisions in each state, there can be no legitimate question that the provisions were seen as a critical component for those seeking to create and preserve a uniform public school system capable of serving people of all religious backgrounds. The same is true today.[4]

In Colorado, there is little evidence that the "no funding" supporters were motivated by anti-Catholic bigotry. Donald W. Hensel, *Religion and the Writing of the Colorado Constitution*, *Church History*, Vol. 30, No. 3 (Sept. 1961), pp. 349-360. Appellants' own expert on this point has found that the religious controversies that arose around Colorado's Constitutional Convention concerning the religious issues were "small scale." Charles L. Glenn, *Contrasting Models of State and*

[4] Since the date when it was initially drafted and approved by voters in 1876, the Colorado Constitution has been amended at least 155 times. And yet neither the Legislature nor the people of Colorado have ever chosen to remove the 'no-funding' provision. Five Facts About Amending Colorado's Constitution <http://www.citizensinchargefoundation.org/files/Five%20Facts%20Full_0.pdf>, last accessed July 13, 2012.

School: A Comparative Historical Study of Parental Choice and State Control (Continuum, 2011) at 13. This is not surprising. Although Colorado had a fairly significant Catholic population, it did not have the same history of some other states did with significant, sometimes violent, tensions between Catholics and Protestants. *Id.* at 12.

Catholics in Colorado provided support for the "no funding" provision in 1876, demonstrating support for vibrant public schools and religious freedom for all. As the District Court noted, two days before the constitution's ratification, organized Catholic groups conducted a pro-constitution rally in Denver. The end result was as follows:

> Neither the general assembly, nor any county, city, town, township, 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; nor shall any grant or donation of land, money or other personal property, ever be made by the state, or any such public corporation to any church, or for any sectarian purpose. Colo. Const. art. IX, § 7.

Appellants have provided none of the above detail with regard to the legislative history of Colorado's "no funding" provision, but instead have attempted to lump it

in with a broad, unsupported assertion that the provision was part of a national anti-Catholic movement. As can be seen from this history, however, different states enacted similar provisions at different times for a variety of reasons, including for the protection of religious freedom and public education for all without religious discrimination.

Appellants further claim that use of the word "sectarian" in the provision at issue creates a facial distinction between different religions. The provision, however, does not limit aid to "sectarian societ[ies]" alone, but to "any church ... whatsoever." Moreover, the implication that the word "sectarian" was a code word for "Catholic" is historically suspect, at best (and entirely unsupported by any evidence in Appellants' brief).[5]

Perhaps most importantly, although Colorado's "no funding" provisions prevent the religious schools from receiving public funds, those provisions similarly protect those same institutions from interference by the state in many other scenarios. This arrangement has created an environment in which religion has

[5] A group of leading legal historians has compiled evidence demonstrating that the word "sectarian" was regularly used to refer to other mainstream religions as well. For instance, in the 1820s, the New York state legislature rejected public funding for a religious school operated by the Baptist Church, citing its "sectarian" character. Brief for Historians and Law Scholars as *Amici Curiae* Supporting Petitioners, *Locke v. Davey*, 540 U.S. 712 (2004), at 9. Similarly, in 1891, the newly formed University of Chicago was dubbed "sectarian" in connection with criticism of its alliance with the Baptist church. Julie A. Reuben, *The Making of the Modern University: Intellectual Transformation and the Marginalization of Morality*, 85 (1996). ("In 1891, when the Baptist Education Society led a fund-raising drive for the new University of Chicago, the *Educational Review* published an editorial blasting efforts to establish denominational schools: 'The wickedness of this movement for sectarian universities is only exceeded

flourished. As a matter of policy, the Court should be wary about accepting Appellants' invitation to fix something that is not broken. As a matter of constitutional doctrine, the Court should reject Appellants' invitation to re-write or ignore the bedrock principles of Colorado's constitution that have served our state so well.

2. There Is No Basis For Striking Colorado's "No Funding" Provision As It Facially Treats All Religions Equally And It Is Applied In A Non-Discriminatory Manner.

Even if there were evidence that some number of constitutional delegates voted in favor of Colorado's "no funding" provision because of hostility towards Catholics, that would not suffice to invalidate the provision today. There can be no doubt that the "no funding" provision is both facially neutral and neutral as applied. The provision expressly forbids aid to "***any*** church or sectarian society" (Colo. Const. art. IX, § 7; emphasis added). Significantly, Appellants do not even allege – because they cannot– that the provision is facially discriminatory. The law places all religious denominations on equal footing. Not surprisingly, the vast majority of schools participating in the Program are not Catholic, and yet still would be impacted by the Court's order just the same.

---

by its folly.'"). Around that same time, Columbia University advertised itself as free from "sectarian control" after cutting its ties to the Episcopalian church. *Id.* at 86.

Appellants' citation to *Hunter v. Underwood*, 471 U.S. 222, 233 (1985), for their deeply flawed claim that state constitutional provisions can be struck down based on bigoted origins alone, itself demonstrates exactly why that argument fails. Appellants' Brief (Douglas County School District and Board of Education) at 43. That case is inapposite here. Appellants' own quotation from *Hunter* shows not only that the provision at issue in that case had been designed "to discriminate against blacks on account of race," but also that it was "continu[ing] to this day to have that effect," reflecting a discriminatory effect and application. *Id.* Whatever the original intent of Colorado's decision to constitutionally prohibit state funding for private religious institutions, there is no allegation that the prohibition discriminates against Catholics or any other particular religion today, either intentionally or in outcome. Moreover, Appellants' sole attempt to suggest any *historical* discriminatory application – by merely stating that the King James Bible was read in Colorado public schools before the United States Supreme Court invalidated that practice – falls flat. Colorado's prohibition is both facially neutral and is being neutrally applied. There is no basis for striking it down now.

CONCLUSION

For the reasons stated above, the Court should uphold the injunction entered by the District Court and permanently prohibit Douglas County from implementing its Scholarship Pilot Program.

Respectfully submitted,

s/ Daniel E. McKenzie
Daniel E. McKenzie, Esq. #39288
Stephen J. Burg, Esq. #39789
(Counsel of Record)
BURG SIMPSON
ELDREDGE HERSH & JARDINE, P.C.
40 Inverness Drive East
Englewood, Colorado 80112
Tel: (303) 792-5595
Fax: (303) 708-0527
dmckenzie@burgsimpson.com
sburg@burgsimpson.com

Steven M. Freeman, Esq.
David L. Barkey, Esq.
Miriam L. Lieberman, Esq.
ANTI-DEFAMATION LEAGUE
605 Third Avenue
New York, New York 10158
Tel: (212) 885-7700

Counsel for *Amicus Curiae*
Anti-Defamation League

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2012, I electronically filed the foregoing with the Clerk of the Court using Lexis/Nexis File and Serve and placed a hard copy version in the US mail, postage paid, and addressed to the following:

Matthew J. Douglas, Esq.
Timothy R. Macdonald, Esq.
Michelle K. Albert, Esq.
ARNOLD & PORTER LLP
370 17th Street, Suite 4500
Denver, Colorado 80202

Mark Silverstein, Esq.
Rebecca T. Wallace, Esq.
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO
400 Corona Street
Denver, Colorado 80218

Michael S. McCarthy, Esq.
Colin C. Deihl, Esq.
Nadia G. Malik, Esq.
Sarah A. Kellner, Esq.
Caroline Lee, Esq.
FAEGRE BAKER DANIELS, LLP
3200 Wells Fargo Center
1700 Lincoln
Denver, Colorado 80203-4532

Anthony B. Dyl, Esq.
Nicholas G. Stancil, Esq.
OFFICE OF THE ATTORNEY GENERAL
1525 Sherman Street, 7th Floor
Denver, Colorado 80203

Alexander Halpern, Esq.
ALEXANDER HALPERN LLC
1426 Pearl Street, #420
Boulder, Colorado 80302

William H. Mellor, Esq.
Richard D. Komer, Esq.
Timothy D. Keller, Esq.
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, Virginia 22203

Raymond L. Gifford, Esq.
Phil Roselli, Esq.
WILKINSON BARKER KNAUER, LLP
1430 Wynkoop Street, Suite 201
Denver, Colorado 80202

Michael Bindas
INSTITUTE FOR JUSTICE
101 Yesler Way, Suite 603
Seattle, Washington 98104

Ayesha N. Khan, Esq.
Gregory M. Lipper, Esq.
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1301 K Street NW
Suite 850, East Tower
Washington, DC 20005

Daniel Mach, Esq.
Heather L. Weaver, Esq.
ACLU FOUNDATION PROGRAM ON FREEDOM OF RELIGION AND BELIEF
915 15th Street NW, Suite 600
Washington, DC 20005

George Langendorf, Esq.
ARNOLD & PORTER LLP
One Embarcadero Center
22nd Floor
San Francisco, CA 94111-3711

Paul Alexander, Esq.
ARNOLD & PORTER LLP
1801 Page Mill Road
Suite 110
Palo Alto, CA 94304-1216

James M. Lyons, Esq.
Eric V. Hall, Esq.
ROTHGERBER JOHNSON & LYONS LLP
1200 17th Street
One Tabor Center, Suite 3000
Denver, CO 80202

s/ Pamela Grove
Pamela Grove