Word Count: 5,698

COLORADO COURT OF APPEALS 101 W. Colfax, Suite 800, Denver, CO 80203 Appeal from District Court, Denver County, Colorado District Court Judge Michael A. Martinez Case No. 2011CV4424 *consolidated with* 2011CV4427	
Defendants-Appellants: DOUGLAS COUNTY SCHOOL DISTRICT and DOUGLAS COUNTY BOARD OF EDUCATION, COLORADO STATE BOARD OF EDUCATION AND COLORADO DEPARTMENT OF EDUCATION, **and** **Intervenors-Appellants:** 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, **v.** **Plaintiffs-Appellees:** JAMES LARUE; SUZANNE T. LARUE; INTERFAITH ALLIANCE OF COLORADO; RABBI JOEL R. SCHWARTZMAN; REV. MALCOLM HIMSCHOOT; KEVIN LEUNG; CHRISTIAN MOREAU; MARITZA CARRERA; SUSAN MCMAHON; TAXPAYERS FOR PUBLIC EDUCATION, a Colorado non-profit corporation; CINDRA S. BARNARD, an individual; and MASON S. BARNARD, a minor child.	▲ COURT USE ONLY ▲ Case Number: 2011CA1856 2011CA1857
Attorneys for Defendants-Appellants: James M. Lyons, #882 Eric V. Hall, #32028 Rothgerber Johnson & Lyons LLP One Tabor Center, Suite 3000 1200 Seventeenth Street Denver, CO 80202 Telephone: 303.623.9000; Fax: 303-623-9222 Email: lyons@rothgerber.com; ehall@rothgerber.com	

REPLY BRIEF OF DOUGLAS COUNTY SCHOOL DISTRICT AND BOARD OF EDUCATION

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 5,698 words.

☐ It does not exceed 30 pages.

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

☐ For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority, and (2) a citation to the precise location in the record (R __, p __), not to an entire document, where the issues was raised and ruled on.

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It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

☑ 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/ *Eric V. Hall*
Eric V. Hall

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I. Plaintiffs Misunderstand the Constitutional Significance of Parental Choice.

Plaintiffs-Appellees ("Plaintiffs") begin their Answer Brief regarding Colorado's Religion Clauses[1] (the LaRue Brief) stating: "The Colorado Constitution…forbid[s] the use of public taxpayer money to fund [parental] choices…of private and religious schools," such as Douglas County's Choice Scholarship Program ("CSP"). LaRue Br. at 4. Throughout their Brief, Plaintiffs misunderstand the constitutional significance of parental choice. *Id.* at 6, 15, 26-27, 41-42. Under both the Colorado and federal Constitutions, private choice breaks any connection between government and religion, thereby simultaneously eliminating government preference for religion while protecting parental rights and free religious exercise.

The Colorado Supreme Court recognized the critical role of private choice in *Americans United for Separation of Church and State v. Colorado*, 648 P.2d 1072 (Colo. 1982), when it held that public funds could be directed to religious schools through the independent choices of students. Because the "statutory program is designed for the benefit of the student, not the educational institution," the Court held it "does not amount to a form of compulsory support for sectarian institutions or a preferential grant to religious denominations," thereby rejecting challenges

[1] This Reply Brief addresses Colorado's Religion Clauses, *i.e.*, Articles II §4; IX §7; IX §8 and V §34. The State Defendants address the non-religious claims. The District Defendants hereby incorporate by reference the Reply Briefs of both the State and Intervenors.

under the "compelled support" and "preference" clauses of Article II §4. *Id.* at 1082. For the same reason, the Court held "[a]ny benefit to the [religious] institution" was a mere "by-product" and "[s]uch a remote and incidental benefit [that it] does not constitute …aid to the institution itself within the meaning of Article IX §7," *id.* at 1083-84, or, for the same reason, Article V §34, *id.* at 1085.

Likewise, the United States Supreme Court in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), recognized the critical importance of government neutrality and parental choice, upholding a similar scholarship program because the "government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice." *Id.* at 652.

Ignoring this key principle, both Plaintiffs and the trial court purport to measure the pervasiveness of religion in the partner schools. LaRue Br. at 7-10; Order at 9-12.[2] This is irrelevant. Courts must distinguish between *government* conduct, which may not favor or disfavor religion, *Americans United*, 648 P.2d at 1082, and conduct by *private* citizens, who have a constitutional right to the free exercise of religion, Colo. Const. Art. II §4; U.S. Const. amend I. As *Zelman* explained, when religious schools are indirectly aided as a result of private choice

[2] The trial court's Order is attached to the District Opening Brief as Addendum 1, and the CSP Policy is attached as Addendum 2.

"[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, *not to the government*, whose role ends with the disbursement of benefits." *Zelman*, 536 U.S. at 652 (emphasis added).[3] Plaintiffs and the trial court raise concerns about "religious indoctrination," but fail to ask whether any indoctrination is attributable to government.

Under each program – the CSP, the *Americans United* grant program, and the *Zelman* scholarships – the payment mechanism is functionally identical: the government sets aside public funds to be used solely for educational purposes, and parents or students direct those funds to the school of their choice. *See* Policy ¶¶ B.4, C.4 (parents direct scholarship check); *Americans United*, 648 P.2d at 1075 (describing grant mechanisms); *Zelman*, 536 U.S. at 646 ("checks are made payable to the parents who then endorse the checks over to the chosen school," and citing Ohio Rev. Code Ann. §3313.979).[4]

In short, parental choice within a neutral government program alleviates the constitutional concerns that *government* is trying to "aid" or "support" religion. As *Americans United* stated, "Being essentially neutral in character, [the grant

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[3] Numerous cases apply this indirect aid principle. *See Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Dep't of Servs. for Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

[4] Colorado's Attorney General relied on this same reasoning and law to conclude the College Opportunity Fund constitutes indirect aid. Op. Colo. Att'y Gen. No. 05-03 at 5.

program] advances no religious cause and exacts no form of support for religious institutions. Nor does it bestow preferential treatment to religion in general or to any denomination in particular." 682 P.2d at 1082. So too here.

II. Plaintiffs' Radical Interpretation Must Again Be Rejected.

Plaintiffs' persistent refusal to acknowledge the role of private choice is not merely an oversight; it is a by-product of a radical view of Colorado's Religion Clauses that simply cannot be squared with their text or Colorado precedent. Towards the end of their Brief, Plaintiffs boldly assert that Colorado's founders "decid[ed] to keep *all* religion separate from publicly-funded schooling." LaRue Br. at 55 (emphasis in original). Accordingly, they conclude that the Religion Clauses require "devoting public funding exclusively to secular education." *Id.* at 67. This extreme position is flatly at odds with *Americans United*, which held that public funds could be provided to students who could choose to spend them at a qualifying school of their choice, religious or non-religious. 648 P.2d at 1081-86. It also calls into question over a dozen, currently-functioning programs throughout Colorado's education system, from the College Opportunity Fund to the Denver Preschool Program, which permits students to spend public funds at qualifying schools, including religious ones. *See* State's Opening Br. at 5-13 (discussing 22 public-private partnerships).[5]

[5] The two amici who address existing public-private partnerships focus exclusively on the *statutory* provenance of the programs, not their *constitutional* significance.

Plaintiffs' extreme position is further revealed in footnote 6 of their brief. After acknowledging that the Tenth Circuit in *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008)("*CCU*"), struck down the pervasively sectarian exclusion at issue in the *Americans United* statutory grant program, Plaintiffs continue: "No Colorado court has evaluated whether the grant program, without the statutory exclusion, complies with Article IX, Section 7…." LaRue Br. at 24 n.6.[6] Plaintiffs' suggestion is that without the pervasively sectarian exclusion which *CCU* struck down, Colorado's college grant program now violates Colorado's Religion Clauses. In other words, as long as the grant program discriminated against pervasively religious schools, it was constitutional, but now that it no longer discriminates based on religion, it violates Article IX §7. This illustrates how profoundly mistaken Plaintiffs are.

Extending Plaintiffs' logic would mean the Ten Commandments monument must be removed from Lincoln Park, contrary to *Colorado v. Freedom from Religion Found.*, 898 P.2d 103 (Colo. 1995); neither a crèche nor any other religious symbol could be included in a holiday display at a government building, contrary to *Conrad v. City and County of Denver*, 724 P.2d 1309 (Colo.

See Amicus Br. of Vision Home & Community Inc, at 4-5; Amicus Br. of American Ass'n of School Administrators, at 30-35. If Plaintiffs are correct, then these public-private partnerships are constitutionally threatened regardless of statutory structure.

[6] Footnote 6 is the only place where Plaintiffs cite *CCU*, which is telling given that it and *Americans United* are the two most directly-relevant cases as issue. Rather than address it on the merits, they simply ignore it.

1986)("*Conrad II*"); and no religious leader could hold events at public parks or lead parades through public streets, contrary to *Freedom from Religion Found. v. Romer*, 921 P.2d 84 (Colo.App. 1996).

Contrary to Plaintiffs' revolutionary vision to eradicate religion from public life, Colorado courts have instructed that the Religion Clauses require affirmatively accommodating religion, *Colorado v. FFRF*, 898 P.2d at 1020, and demonstrating a benevolent government neutrality towards religion, *Young Life v. Div. of Employment and Training*, 650 P.2d 515, 520 (Colo. 1982). Plaintiffs' position is diametrically opposed to Colorado law and amounts to disfavoring religion and all religious believers, which is forbidden. *Colorado v. FFRF*, 898 P.2d at 1026 (refusing to "require government to prefer non-believers over believers").

Not surprisingly, Plaintiffs fail to cite a single Colorado case interpreting the Religion Clauses that supports their position. Whereas Defendants cited every major Colorado Religion Clause case and demonstrated how it supported upholding the CSP, District Opening Br. at 12-23, the best Plaintiffs could muster was an unsuccessful attempt to distinguish all these cases in two footnotes. LaRue Br. at 35 n.9, 36 n.10.

Colorado courts previously rejected Plaintiffs' radical views. In 1981, Americans United for the Separation of Church and State – one of the same groups backing Plaintiffs today – wrote briefs advocating for the same extremist interpretation of the Religion Clauses. *See* Addendums A and B (attached to this

brief). Those arguments are just as wrong today as they were 30 years ago when they were first rejected in *Americans United*. They must be rejected again today.

III. Response to Plaintiffs' Statement About Standard of Review and Preservation of Issues.

Because the CSP has never been implemented, Plaintiffs' constitutional claims are facial. For a facial challenge of unconstitutionality, this Court must determine "there exists *no set of circumstances* in which the statute [*i.e.*, the CSP] can be constitutionally applied." *Sanger v. Dennis*, 148 P.3d 404, 410-11 (Colo.App. 2006) (emphasis in original). The claims must fail unless the asserted invalidity is established "beyond a reasonable doubt." *Evans v. Romer*, 854 P.2d 1270, 1274 (Colo. 1993).

The only issue Plaintiffs contend was not preserved is that the Order violates the federal Constitution. LaRue Br. at 56. Plaintiffs are mistaken. Defendants argued at length that the trial court risked violating the First Amendment if it strayed from Colorado precedent, as Plaintiffs requested. R.1616; R.1622; R.2186-87; Vol.1 44:9-13, 47:8-16; Vol.3 849:15-850:9. Moreover, no one, including Defendants, knew how the trial court was going to rule until it issued its Order. Only after reading the Order were Defendants able to argue – in their opening appellate briefs – that it violated the federal Constitution.

IV. Plaintiffs Offer No Authority to Uphold the Trial Court's Order.

A. The Trial Court Engaged In The Unconstitutional Exercise of Trying to Determine Whether Schools Indoctrinate.

The overriding theme in the trial court's Order is that the CSP violates the Religion Clauses because it allows public funds to, in the court's view, subsidize religion indoctrination. Order at 38, 40, 42-43, 45, 51. However, this inquiry violates the First Amendment, as explained in Douglas County's Opening Brief (at 23-27). As the Tenth Circuit explained, "It is well established…that courts should refrain from trolling through a person's or institution's religious beliefs." *CCU*, 534 F.3d at 1261.

1. Plaintiffs Cannot Defend the Trial Court's Indoctrination-Evaluation Factually or Legally.

Factually, Plaintiffs argue there is not "a single instance where the District Court considered *how* sectarian a particular institution was." LaRue Br. at 62 (emphasis in original). Not so. On page after page of the Order, the court describes in painstaking detail how sectarian the partner schools are. Order at 12 ("The curricula…is thoroughly infused with religion and religious doctrine, and includes required courses in religion or theology that tend to indoctrinate and proselytize."); *id*. at 42 ("religious instruction is the foundation of [the schools'] core educational curriculum"). *See generally id.* at 9-12, 40-43, 45. Even worse, the trial court made specific findings using the pervasively sectarian factors that *CCU* held unconstitutional. *Compare* Order at 9-12, ¶¶38-45 *with Americans United*, 648

P.2d at 1072 (listing factors), *id.* at 1083 (acknowledging them as "relevant to [the Court's] analysis"), and *CCU*, 534 F.3d at 1261-66 (explaining why using these factors is unconstitutional).

Plaintiffs also try to defend the Order with two legal arguments. First, they state, "The District Court merely applied the criteria set forth in *Americans United*…." LaRue Br. at 62-63. In fact, the trial court misconstrued *Americans United* because it wholly failed to consider *CCU* and other Colorado precedent. In *Americans United*, the Court upheld the student grant program, in part, because it relied on the pervasively sectarian factors – good law in 1982 – to conclude that Regis College was not pervasively sectarian and so there was little risk, for example, that the "religious mission predominates over its secular educational role," 648 P.2d at 1082, or that aid "may seep over into the non-secular functions" of the school, *id.* at 1083. Likewise, Plaintiffs employ the pervasively sectarian factors, urging this Court to evaluate whether a school has a "strong commitment to academic freedom," whether the "governing board [has a] sectarian bent," and whether "the curriculum tend[s] to indoctrinate or proselytize." LaRue Br. at 23. However, *CCU* held squarely that using Colorado's pervasively sectarian factors was an unconstitutional religious inquiry. 534 F.3d at 1261-66.

Second, Plaintiffs argue that "courts [may] evaluate the religious nature of particular organizations and activities." LaRue Br. at 63 (citing cases). Plaintiffs are wrong for two reasons. First, in none of the case cited by Plaintiffs do courts

"evaluate the religious nature" of an organization. Rather, in all the cases courts apply Establishment Clause jurisprudence, usually *Lemon v. Kurtzman*, to determine whether government action has the "effect of advancing religion." Second, when they are engaged in this inquiry, they are focused on *government* (not private) action and they expressly rely on the twin principles of government neutrality and private choice. For instance, on page 809 of *Mitchell v. Helms*, the page cited by Plaintiffs, the Court writes:

> In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.

530 U.S. 793, 809 (2000) (plurality).

Plaintiffs also cite Justice O'Connor's concurrence, but she makes the same point: "[W]hen government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, 'no reasonable observer is likely to draw from the facts…an inference that the State itself is endorsing a religious practice or belief.'" *Id.* at 842 (O'Connor, J., concurring). Thus, Plaintiffs' cases actually support Defendants'

position that the religious (or non-religious) nature of the schools participating in the CSP is irrelevant given the private choice inherent in the program.[7]

2. It Is Appropriate To Look To Federal Precedent.

Plaintiffs repeatedly dismiss federal precedent as "irrelevant." LaRue Br. at 42, 57-59. However, Plaintiffs never challenge the fact that Colorado courts have consistently considered and followed analogous federal precedent when interpreting Colorado's Religion Clauses. *See* District Opening Br. at 18-20 (citing cases). Just months ago this Court again followed this unbroken jurisprudential principle in *Freedom from Religion Foundation v. Hickenlooper*, 2012 COA 81 (striking down six Colorado Day of Prayer proclamations).

Moreover, Plaintiffs incorrectly assert that reading Colorado's Religion Clauses similarly to analogous federal clauses would "render certain provisions of the Colorado Constitution meaningless." LaRue Br. at 58. Colorado's Religion Clauses were enacted in 1876, long before the First Amendment was made applicable to the States. *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (incorporating Free Exercise Clause); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947)

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[7] Plaintiffs even try to revive the pervasively sectarian exclusion. LaRue Br. at 65 n.15 (citing cases). This is flatly at odds with *CCU*, which held unambiguously it is "now-discarded doctrine." 534 F.3d at 1258. Moreover, Plaintiffs cite only two indirect aid cases, both concluding that the pervasively sectarian analysis is irrelevant. *Steele v. Indus. Dev. Bd.*, 301 F.3d 401, 416 (6th Cir. 2002); *Virginia College Bldg. Auth. v. Lynn*, 538 S.E.2d 682, 698 (Va. 2000). The other cases involve direct funding or do not involve funding at all. No indirect aid cases apply the pervasively sectarian test after *Mitchell*.

(incorporating Establishment Clause). Thus, it would not have been "meaningless" for Colorado to enact constitutional guarantees consistent with the federal Constitution. Further, the Colorado Supreme Court has explained on many occasions its policy reasons for interpreting Colorado's Religion Clauses "to embody the same values of free exercise and governmental non-involvement secured by the religious clauses of the First Amendment." *Americans United*, 648 P.2d at 1081-82. *See* District Opening Br. at 19 & n.4 (citing cases).

B. The Trial Court and Plaintiffs Are Mistaken on Each of the Specific Religion Clauses.

1. The CSP Does Not Violate Article II §4

Plaintiffs argue the CSP violates the "compelled support" and "compelled attendance" clauses of Article II §4. LaRue Br. at 29-36. The trial court concluded only "compelled support" was violated. Order at 43-45.

a. Compelled Support

The threshold error of both Plaintiffs and the trial court is to ignore the other four clauses of Article II §4 and Colorado precedent. *See* District Opening Br. at 12-17. Plaintiffs, however, go further than this; they assert that "the purpose[s] of other clauses…are irrelevant" to a proper understanding of the compelled support clause and any attempt to try to harmonize the provisions would be to "render the other clauses…redundant." LaRue Br. at 35. This approach to constitutional

interpretation is simply wrong. *See Bruce v. City of Colorado Springs*, 129 P.3d 988, 992 (Colo. 2006) (courts must harmonize all constitutional provisions).

Second, in two footnotes Plaintiffs attempt to brush aside six Colorado cases cited by Defendants interpreting Article II §4 (not including *Americans United*). LaRue Br. at 35 n.9, 36 n.10. They boldly claim that no Colorado case, including *Americans United*, has interpreted or articulated the aims of the support clause; rather the cases "all concern" the preference clause. *Id.* at 34-35. Not so. In *Americans United*, the Court definitively interpreted both the compelled support and preference clauses, stating they embody the "same values" as the First Amendment. 648 P.2d at 1081-82. Erasing any doubt, *Americans United* separately quoted *Vollmar v. Stanley,* 255 P. 610 (Colo. 1927) and *its* interpretation of both clauses. *Id*. at 1082. Subsequent cases have followed *Americans United*. *See Young Life*, 650 P.2d at 525-26 (quoting *Americans United*'s interpretation of both clauses); *Conrad v. City and County of Denver*, 656 P.2d 662, 670 (Colo. 1982) (while noting plaintiffs emphasized the preference clause, the Court italicized both clauses as being at issue).

Plaintiffs then offer trivial factual distinctions in an attempt to distinguish Colorado cases rejecting "compelled support" challenges when government was *directly* supporting religion. LaRue Br. at 36 & n.10. No cases support Plaintiffs' claim (at 36) that "incidental uses of government personnel or resources" should be treated differently than the CSP. For instance, *Conrad II* involved a challenge a

display's "funding through tax revenue." 724 P.2d at 1310. The Court in *Colorado v. FFRF* specifically noted the public maintenance costs for the Ten Commandments monument. 898 P.2d at 1017. This Court in *FFRF v. Romer* noted the challenge to "the use of state funds to facilitate" the Pope's visit. 921 P.2d at 87. Nowhere in these cases is there any support for Plaintiffs' distinction between "incidental" and "non-incidental" expenditures. Rather, these cases all focus on government neutrality and avoiding a state-established church. *Americans United* itself held, "Being essentially neutral in character, [the grant program] …exacts no form of support for religious institutions." 648 P.2d at 1082.

The CSP does not violate the compelled support clause.

b. Compelled Attendance

Plaintiffs' "compelled attendance" argument wholly misses the mark. LaRue Br. at 31-32. Here, again, Plaintiffs simply ignore the fact that the CSP is a choice, and that even those students who elect it have a further choice about whether to enroll in a religious or non-religious school. Plaintiffs try to downplay private choice by emphasizing that currently most of the partner schools are religious. *See* LaRue Br. at 6-8, 15, 28 n.8, 41. This ignores the real choice provided by Douglas County to its students and parents, who, as explained in the Opening Brief (at 4-7), have numerous educational options from which to choose (*e.g.*, traditional public schools, charter schools, online education, home schooling, *etc.*). Plaintiffs even try to distinguish *Zelman* by stating that it had "a wider range of non-religious

options," LaRue Br. at 28 n.8, but never explain how *Zelman* is any different than Douglas County, which currently offers a variety of excellent educational options to its parents and students.

There is no violation of Article II §4.

2. The CSP Does Not Violate Article IX §7

As to Article IX §7, Plaintiffs err when they claim "the grant program upheld in *Americans United* was wholly different" from the CSP. LaRue Br. at 22. In fact, the CSP cannot be held to be "in aid of" religion any more than the grant program is "in aid of" Regis College or Colorado Christian University under proper readings of *Americans United* and *CCU*.

a. The CSP is not 'in aid of" churches under *Americans United*

First, Plaintiffs mistakenly assert, "The [CSP] payments . . . are 'in aid' of churches, sectarian societies, and sectarian purposes." LaRue Br. at 20. This is directly contrary to the Order, which found, "[T]he purpose of the program is to aid students and parents, not sectarian institutions. The Court agrees with Defendants on this point." Order at 39. *See also id.* at 3 ¶8, 44. Accordingly, *Americans United* dictates that "[a]ny benefit to the [religious] institution" must be seen as a mere "by-product" and "remote and incidental benefit" that does not violate Article IX §7. 648 P2d at 1083-84.

Second, while the trial court wrongly criticized the CSP for having "no meaningful limitations on the use of taxpayer funds," Order at 12, neither did the

grant program in *Americans United*, 648 P.2d at 1084 ("the statute does not expressly limit the purpose for which the institutions may spend the funds"). For that matter, neither does the COF, which allows resident students to direct funds to participating higher education institutions of their choice, religious or non-religious, which can spend the funds as they see fit. C.R.S. §23-18-202(5)(a)(I).

Third, the trial court again mistakenly faulted Douglas County for the alleged actions of one of its partner schools in reducing its aid award in the amount of the scholarship. Order at 41. *See* LaRue Br. at 20-23. As even Plaintiffs note, *id.* at 20 n.2, Assistant Superintendent Christian Cutter testified that such action by a partner school "would go against the intended contract" with Douglas County. Vol.1 295:20-21. Douglas County reasonably expected all partner schools to comply with its contracts, and schools that did not would have them terminated. *See* Vol.2 512:7-14.

Fourth, like the trial court, Plaintiffs are wrong to try to evaluate the indoctrination quotient of the K-12 partner schools. LaRue Br. at 25 ("[I]ndoctrination is a primary purpose of nearly all of the approved religious Private School Partners."). They compound this error when they then try to distinguish between how much "indoctrination" goes on at, for example, Regis High School (a CSP partner school) versus Regis University (an approved higher education partner under *Americans United* and the COF). The trial court and Plaintiffs err by ignoring *CCU*, which teaches, "The First Amendment does not

permit government officials to sit as judges of the 'indoctrination' quotient of theology classes." 543 F.3d at 1263. *CCU* holds that government should not be in the indoctrination-evaluation business at all.

In any event, because neutrality and private choice are designed into the CSP, any "indoctrination" simply cannot be considered *governmental* indoctrination. *See Mitchell*, 530 U.S. at 811 (plurality)("neutrality and private choices together eliminated any possible attribution to the government"); *id*. at 842 (O'Connor, J., concurring)(same).

b. *Americans United* interpreted Colorado's general "no aid" clause to permit indirect aid to religious schools.

Article IX §7 is a so-called "general no-aid" provision, as opposed to other state constitutions that specifically forbid indirect aid. *Cf.* Fla. Const. art. I §3 ("No revenue of the state…shall ever be taken from the public treasury directly or *indirectly* in aid of any church….") (emphasis added); Mont. Const. art. X §6(1) ("The legislature…shall not make any direct or *indirect* appropriation…for any sectarian purpose or to aid any church….") (emphasis added). Like other states that have more general provisions, *Americans United* interpreted Colorado's "no aid" clause to permit indirect aid due to private choice. *See Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998); *Meredith v. Daniels*, No. 49D07-1107-PL-025402 (Marion Cnty. Super Ct. Jan. 13, 2012); *Simmons–Harris v. Goff*, 711 N.E.2d 203

(Ohio 1999). Accordingly, Plaintiffs' citation to Florida cases are inapposite given the difference in constitutional language. LaRue Br. at 27 (citing *Bush v. Holmes*).

The two other out-of-state cases Plaintiffs cite, *id.* at 26-27, cannot be squared with *Americans United*. Indeed, the Nebraska case, *Rogers v. Swanson*, was cited and specifically rejected in *Americans United*, 648 P.2d at 1085 n.8. Instead, *Americans United* cited a different Nebraska case, *Lenstrom v. Thone*, as support for its conclusion that indirect aid is so "remote and incidental" that it cannot constitute "aid to the institution itself" under Article IX §7. *Id.* at 1083-84. Likewise, the Arizona case of *Cain v. Horne* is flatly inconsistent with *Americans United* and relies on precedent that it rejected. 648 P.2d at 1085 n.8 (rejecting *Hartness v. Patterson*, which *Cain* adopts, 202 P.3d 1178, 1184 (Ariz. 2009)).

In summary, the CSP should be upheld under Article IX §7.

3. The CSP Does Not Violate Article IX §8.

a. The first sentence of Article IX §8 does not apply.

The first sentence of Article IX §8 applies to "public educational institutions of the state." Plaintiffs concede (at 45) that *Vollmar* expressly distinguishes between "state educational institutions" and "public schools," by which the Court means state colleges and universities, on one hand, and K-12 public schools, on the other. 255 P. at 615. Plaintiffs wrongly suggest, however, that the law has changed since *Vollmar*, relying principally on *Wilmore v. Annear*, 65 P.2d 1433 (Colo. 1937). LaRue Br. at 45. But *Wilmore* clearly states: "the term 'educational

institutions' [refers] to schools *other than* the constitutionally required public schools." 65 P.2d at 1434 (emphasis added, ellipsis omitted). It further contrasts these "state educational institutions" with the "public schools" by defining the latter to mean "schools that serve only those between the ages of 6 and 21…." *Id.* at 1435. The first sentence of Article IX §8 simply does not apply here.

b. The CSP does not require a religious test for admission.

Even if the first sentence applies, the CSP does not violate it. The only basis for concluding the CSP imposes a religious test for admission is one mistaken draft document which the Superintendent, upon direct questioning by the trial court, expressly corrected. *See* District Opening Br. at 35-37 (citing Vol.2 571:13-15). Plaintiffs offer nothing to support the trial court's erroneous finding except their assertion that the mistaken paper was "an actual Program document [used in] actual Program operations." LaRue Br. at 40. In fact, the Superintendent and her staff are the ones who "actually operate" the CSP, and she testified that enrollment in the CSP and in any partner school are independent. Vol.2 571:18-572:13.

c. The CSP does not require attendance at religious services or the teaching of sectarian doctrines.

As to the other portions of Article IX §8, the CSP neither requires attendance at religious services or the teaching of "sectarian doctrines."[8] The CSP

[8] Plaintiffs are simply wrong when they allege, "Colorado has not specifically addressed the meaning of the term 'sectarian'…." LaRue Br. at 17 n.1. In fact, the Colorado Supreme Court first defined the term in *Vollmar*, 255 P. at 615, and then

is a choice. Douglas County does not require either teachers or students to select a religious school in which to work or study. Neither does Douglas County require anyone – either one of its own schools or one of the partner schools – to teach any sectarian doctrines. Douglas County has left religion alone, neither favoring nor disfavoring it. *See* Policy ¶A.9, ¶E.2.c; Vol.2 361:7, 598:10-20. This should end the inquiry. *See* District Opening Br. at 37-40.

The choice Douglas County offers is not "illusory," as Plaintiffs claim. LaRue Br. at 41. As discussed herein, Douglas County families have a multitude of outstanding educational options, including the CSP. Moreover, Plaintiffs miss the mark with their observation that "[t]he Constitution applies to all public school students, even those who attend optional institutions." LaRue Br. at 42. Of course it does. But the relevant inquiry is whether *the government* is requiring attendance at religious services or the teaching of sectarian doctrines. The answer is plainly no. Just like public school students may choose religious release time programs or religious lunch or after-school programs and not run afoul of Article IX §8, so might they choose a religious school in the CSP. *See* District Opening Br. at 38 (citing *Lanner v. Wimmer*, 662 F.2d 1349 (10th Cir. 1981) (upholding release time); *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001) (public schools must grant equal use to religious groups)). Moreover, Plaintiffs' extreme

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quoted that definition in *Americans United*, 648 P.2d at 1083. Further, *CCU*, recognized that "the term 'sectarian' imparts a negative connotation…meaning 'pertaining to a sect; bigoted.'" 534 F.3d at 1258 n.5.

interpretation that Colorado's Religion Clauses forbid such voluntary activity cannot be correct because it would violate affirmative rights to the free exercise of religion. Colo. Const. art. II §4; U.S. Const. amend. I.

In summary, the CSP does not violate any portion of Article IX §8.[9]

4. The CSP Does Not Violate Article V §34.

a. Article V §34 does not apply to the CSP.

As with the first sentence of Article IX §8, Article V §34 does not apply to the CSP. *See* State Opening Br. at 38-40. Plaintiffs incorrectly suggest that Defendants' reading "ignores the plain text of the Colorado Constitution." LaRue Br. at 47. To the contrary, the Constitution is structured with Article IV governing the Executive Department, Article V the Legislative, and Article VI the Judicial. Consequently, Article V begins, "The legislative power of the state shall be vested in the general assembly…." Colo. Const. art. V §1(1). Section 34 of Article V, like the sections around it, deal with legislative appropriations. As a result, Colorado courts have limited application of Article V §34 to "disbursement of state funds only, and their disposition by the state in its corporate capacity." *Williamson v. Bd. of Comm'rs of Arapahoe Cnty*, 46 P. 117, 118 (Colo. 1896). *See also Lyman v.*

[9] In this section of their brief (at 37), as in a few other places (at 3, 6), Plaintiffs invoke the "sham charter school." This is a red herring. Plaintiffs brought no claims under the Charter Schools Act. Nothing about any of their claims turns on the charter school. The CSP Policy says nothing about it, and it is not necessary for implementation of the Program. The District employed it purely as a matter of administrative convenience. Vol.2 519:18-520:12.

Town of Bowmar, 533 P.2d 1129, 1136 (Colo. 1975) (citing *Williamson* and holding Section 34 "does not extend to municipalities").

Plaintiffs incorrectly counter that because part of the District's funding consists of "state appropriations," therefore Article V §34 must apply. LaRue Br. at 47. However, such a reading misconstrues *Williamson* which focused on what *entity* was responsible for spending the funds – state or local – rather than their *origin*. 46 P. at 118. If the mere origin of the funds made a political subdivision subject to Article V, that would eradicate the distinction between state and local, and it would make every local government body subject to all of Article V. Rather, the purpose of the limitations throughout Article V, including Section 34, is to restrain state legislative power, given its vastly superior power to tax and spend throughout the entire State.

b. The Public Purpose Exception Applies to the CSP.

Even if Article V §34 applies, the CSP has public purposes just as "discrete and particularized" as others upheld by similar Colorado cases. The trial court found that the CSP's purposes are to "provide greater educational choice for students and parents to meet individualized student needs, improve educational performance through competition, and obtain a high return on investment of educational spending." Order at 3 ¶8 (bracketed words omitted) (citing Policy ¶A.3). The CSP's purposes are functionally identical to the ones upheld in *Americans United*, 648 P.2d at 1085-86 – essentially, improving education.

Plaintiffs try to distinguish *Americans United* by alleging the CSP "engages in full-fledged sponsorship of religious education." LaRue Br. at 48 (citing a New Hampshire case). Again, however, Plaintiffs' position is flatly contradicted by both the Order, finding the CSP is "for the benefit of students, not the benefit of the private religious schools," Order at 44, and *Americans United*, which explained, "we are not dealing with direct aid to private schools, but rather with financial assistance to individual students." 648 P.2d at 1085. Plaintiffs' refusal to acknowledge the importance of private choice blinds them to legitimate constitutional distinctions.

Furthermore, if a taxpayer subsidy of $115 million to United Airlines for economic development satisfies the public purpose exception of Article V §34, then enacting the CSP for educational improvement certainly does. *See In re Interrogatory Propounded by Governor Roy Romer*, 814 P.2d 875, 884 (Colo. 1991).[10]

This Court should also reject Plaintiffs' bogus claim that "the Program permits…discrimination." LaRue Br. at 49. *See also id.* at 10-12. This is entirely irrelevant to a claim under Article V §34. Furthermore, it is factually incorrect because the Policy expressly prohibits discrimination "on any basis protected under applicable federal or state law." Policy ¶E.3.f. Plaintiffs speculate that Douglas County did not actually intend to enforce this provision because it

[10] As with *CCU*, Plaintiffs ignore this case, failing to cite it at all.

accepted certain private schools into the Program. LaRue Br. at 38 n.11. This is specious. Douglas County admitted these schools into the CSP on the condition that they would follow the CSP contract and Policy. The Superintendent testified that if a partner school were to discriminate against a protected class, the District would terminate its contract. Vol.2 512:7-14.[11]

The CSP does not violate Article V §34.

V. The Trial Court Erred by Disregarding the Discriminatory Legislative History of the Blaine Provisions.

Plaintiffs' response to the discriminatory legislative history of the Colorado Blaine provisions[12] misconstrues the legal issue and attempts to distract this Court from the overwhelming record below of the discriminatory history surrounding the enactment and purpose of these provisions. The legislative history of Colorado's Constitution is certainly relevant.

Plaintiffs admit that the testimony of Defendants' expert, Professor Glenn, dealt with the "framers and ratifiers" of the Colorado Constitution, but made no effort to challenge his status as an expert or his testimony at trial. LaRue Br. at 50-52. Indeed, the history of discrimination against religion to which Professor Glenn testified is supported by published articles from *Plaintiffs'* own designated expert,

[11] The amicus brief of The Legal Center tries to use this erroneous finding to speculate about possible violations of the ADA or Section 504. However, the record in this case is wholly insufficient to support any of its allegations.
[12] Article IX §7 and the second sentence of Article IX §8 are classic Blaine provisions. Articles V §34 and IX §3 could be misconstrued as having Blaine-like effect. *See* District Opening Br. at 41 n.8.

Professor Steven Green, whom the Plaintiffs declined to call to the stand. *See* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AMER. J. OF LEG. HIST. 39 (1992). *See also* Intervenors Reply Brief (discussing more fully the Blaine evidence in the record).

On the legal issues, Plaintiffs are wrong to suggest the Colorado Blaine provisions were not "motivated by bias" and have not "been applied in a discriminatory manner." LaRue Br. at 68 n.16. In fact, Defendants presented uncontroverted evidence of the bias motivating Colorado's Blaine provisions, and the discriminatory application of the Blaine provisions is amply evidenced by *Vollmar*. 255 P. at 618 (upholding reading of King James Bible in public schools). Accordingly, heightened scrutiny under *Hunter v. Underwood*, 471 U.S. 222, 233 (1985), must be applied.

Plaintiffs are equally mistaken when they claim the Supreme Court's *Locke v. Davey* decision has settled the issue. LaRue Br. at 59, 66. The Supreme Court explained, "the Blaine Amendment's history is simply not before us," and "the provision in question is not a Blaine Amendment." 540 U.S. 712, 723 (2004). The result in *Locke* has nothing to do with the history of Colorado's Blaine provisions.[13]

[13] Plaintiffs also discuss *Locke* when addressing a straw man argument that the Free Exercise Clause requires government to fund private and religious schools. LaRue Br. 59-61. Defendants make no such claim. The federal constitution, however, does prohibit discrimination against religion and between religions. *See* District

If this Court were to follow the interpretation of Colorado's Blaine provisions advanced by the trial court and Plaintiffs, the history of discriminatory intent behind these provisions must be confronted. Alternatively, this Court could avoid the constitutional conflict by interpreting Colorado's Religion Clauses to be consistent with federal precedent, as has always been done in Colorado. *See above.* As the U.S. Supreme Court recently reiterated, "[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality" and the "question is not whether that is the most natural interpretation of [the law], but only whether it is a fairly possible one." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S.___, No. 11-393, slip at 32 (June 28, 2012) (citations and quotations omitted).

VI. Conclusion

For the reasons discussed in the Opening and Reply Briefs of Defendants and Intervenors as well as the supporting *amici* briefs, the trial court's Order must be reversed and the permanent injunction vacated.

Opening Br. at 23-27. In this case Plaintiffs and the trial court try to distinguish *Americans United* by arguing the partner schools are too pervasively religious or too "indoctrinating" to receive public funds. This is a misreading of *Americans United* and a violation of the First Amendment. *See Larson v. Valente*, 456 U.S. 228, 246 (1982) (discrimination between religious groups is unconstitutional).

Dated: August 3, 2012

Respectfully submitted,

ROTHGERBER JOHNSON & LYONS LLP

s/ James M. Lyons
James M. Lyons

s/ Eric V. Hall
Eric V. Hall

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

James C. Ho (of counsel)*
Lawrence C. VanDyke (of counsel)*
Gibson, Dunn & Crutcher LLP
1801 California Street, Suite 4200
Denver, CO 80202-2642
Telephone: 303.298.5700
Facsimile: 303.298.5907
jho@gibsondunn.com
lvandyke@gibsondunn.com
*Not admitted in Colorado

CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2012, I electronically filed the foregoing with the Clerk of Court using Lexis/Nexis File and Serve and caused an electronic copy of the foregoing to be served upon the following:

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

Mark Silverstein, Esq.
msilver2@att.net
Rebecca T. Wallace, Esq.
rtwallace@aclu-co.org
American Civil Liberties Union
Foundation of Colorado
400 Corona Street
Denver, CO 80218

Michael S. McCarthy, Esq.
mmccarthy@faegre.com
Colin C. Deihl, Esq.
cdeihl@faegre.com
Madia G. Malik, Esq.
nmalik@faegre.com
Sarah A. Kellner, Esq.
skellner@faegre.com
FAEGRE & BENSON, LLP
3200 Wells Fargo Center
1700 Lincoln
Denver, CO 80203-4532

Antony B. Dyl, Esq.
tony.dyl@state.co.us
Nicholas G. Stancil, Esq.
nick.stancil@state.co.us
Office of the Attorney General
1525 Sherman Street, 7th Floor
Denver, CO 80203

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

Alexander Halpern, Esq.
ahalpern@halpernllc.com
Alexander Halpern LLC
1426 Pearl Street, #420
Boulder, CO 80302

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

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

s/ Karen S. Lutterschmidt
Karen S. Lutterschmidt

IN THE SUPREME COURT

OF THE STATE OF COLORADO

No. 81 SA 126

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE FUND, INC.; DENVER CHAPTER OF AMERICANS UNITED AND IRENE H. WILSON, Plaintiffs-Appellants, v. STATE OF COLORADO, COLORADO COMMISSION ON HIGHER EDUCATION, REGIS EDUCATIONAL CORPORATION, AND ANY AND ALL PERSONS WHO ARE NOW NOMINATED OR WHOM MAY BE ELIGIBLE TO RECEIVE FUNDS UNDER THE COLORADO STUDENT INCENTIVE GRANT PROGRAM, Defendants-Appellees	)	APPEAL FROM THE DISTRICT COURT FOR THE CITY AND COUNTY OF DENVER, STATE OF COLORADO HONORABLE GILBERT A. ALEXANDER, DISTRICT JUDGE

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

Fuller and Evans
Dwight A. Hamilton
Larry G. Johnson
900 Equitable Building
730 17th Street
Denver, Colorado 80202
(303) 629-1761
Attorneys for Plaintiffs-Appellants

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Petitioners-Appellants submit the following as their Statement of Issues presented for review:

1. Is the Colorado Student Incentive Grant Program unconstitutional under Article II, Section 4 of the Bill of Rights to the Colorado Constitution in that it compels taxpayers to support sectarian institutions and gives preference to certain denominations and modes of worship?

2. Is the Colorado Student Incentive Grant Program unconstitutional under Article IX, Section 7 of the Colorado Constitution in that it appropriates state money to private schools and to schools controlled by churches and sectarian denominations?

3. Is the Colorado Student Incentive Grant Program unconstitutional under Article V, Section 34 of the Colorado Constitution in that it appropriates state money for educational purposes to corporations and communities which are denominational and sectarian in nature and which are not under the absolute control of the state?

4. Is the Colorado Student Incentive Grant Program unconstitutional for vagueness and due to its delegation of authority to the Colorado Commission on Higher Education to determine which institutions are entitled to receive appropriations under the grant program?

5. Is the Colorado Student Incentive Grant Program unconstitutional under the Establishment Clause of the First Amendment to the United States Constitution?

6. Was the trial court in error in entering summary judgment against the Plaintiffs-Appellants?

STATEMENT OF THE CASE

In 1977, the Colorado Legislature gave final approval to Senate Bill 398, which amended Title 23 of the Colorado Revised Statutes to add Article 3.5, establishing the Colorado Student Incentive Grant Program. That act is now codified at Colo. Rev. Stat. §23-3.5-101 through 106 (1980 Cum. Supp.). The legislation provides for an appropriation of state funds for tuition grants for in-state students having a financial need. Eligible institutions include accredited private or public four-year and two-year colleges, and certain private vocational schools. The act provides that eligible "institutions of higher education" shall not include any "pervasively sectarian" or "theological" institution. Colo. Rev. Stat. §23-3.5-105 (1980 Cum. Supp.) provides that an institution of higher education shall be deemed not to be "pervasively sectarian" if it meets the following criteria:

a. The faculty and students are not exclusively of one religious persuasion;

b. There is no required attendance at religious convocations or services;

c. There is a strong commitment to principles of academic freedom;

d. There are no required courses in religion or theology that tend to indoctrinate or proselytize;

e. The governing board does not reflect nor is the membership limited to persons of any particular religion;

f. Funds do not come primarily or predominantly from sources advocating a particular religion.

The Act provides that the grant program is to be administered by the Colorado Commission on Higher Education, which has the authority to determine which institutions of higher education are eligible for participation. It prohibits participating institutions from decreasing their own financial aid to students upon becoming eligible to participate in the grant program. The statute also provides for a biannual audit of the participating institutions by the State Auditor. The bill became effective on July 1, 1977. A full text of this Act is contained in the appendix.

The primary intent of Senate Bill 398, as revealed in the Senate Education Committee hearings, was to aid private schools. Particular mention was made of the desperate financial plight of Colorado Women's College. The sponsors felt that by aiding private schools, specialized educational programs at those schools could be preserved so that such programs need not be duplicated at state public colleges.

The sponsors conceded that direct aid to sectarian institutions would be unconsitutional, but felt that the indirect aid provided by the tuition grants was permissible. The sponsor, Senator Hugh Fowler, stated that the prohibition of aid to institutions which are "pervasively sectarian" was based upon recent United States Supreme Court cases. There was no attempt to reconcile Senate Bill 398 with the relevant provisions of the Colorado Constitution. (Senate Education Committee hearing on Senate Bill 398, March 23, 1977.)

In 1978, this action was undertaken by Plaintiffs, including taxpayers of the State of Colorado, to have the Colorado Student Incentive Grant Program declared to be unconstitutional

on the basis that the statute provides for the appropriation of state funds to private and sectarian colleges in violation of Article II, Section 4; Article V, Section 34; and Article IX, Section 7 of the Colorado Constitution. The Plaintiffs also asserted that the legislation was unconstitutional for vagueness of the definitions of the terms "pervasively sectarian" and "theological" and that the statute was unconstitutional because it delegated to the Colorado Commission on Higher Education the authority to define whether an institution is "pervasively sectarian" or "theological" and therefore ineligible to participate in the grant program. Plaintiffs further alleged that the statute was unconstituional as applied to Defendant Regis Educational Corporation ("Regis").

The Plaintiffs filed a motion for summary judgment and the Defendants replied with their own cross-motion for summary judgment. At a hearing held on January 12 and 13, 1981, the District Court, the Honorable Gilbert A. Alexander presiding, found that the Plaintiffs had standing to maintain the action. The Court held that the statute was presumed to be constitutional and that the Plaintiffs had the burden to prove its invalidity beyond a reasonable doubt. The Court further held that criteria for determining the eligibility of institutions of higher education for the grant program and the terms "pervasively sectarian" and "theological" were not unconstitutionally vague. The decision also held that the statute contained adequate standards for determining which institutions were eligible and did not contain an unconstitutional delegation of legislative power.

The Court held that the purpose of Article II, Section 4 was to prevent a church being established by the state, and that

the grant program did not constitute a preference to any religious denomination or mode of worship and that it did not constitute support for a religious sect or denomination which would violate Article II, Section 4. The Court held the statute to be constitutional under Article V, Section 34, on the basis that the Article allowed grants to private institutions for educational purposes, as long as the grants were for a public purpose. The Court further held that the grant program was constitutional under Article IX Section 7, preventing grants to private and sectarian institutions, because it prohibited the grant of funds to students attending "pervasively sectarian" or "theological" institutions.

Finally, without taking of evidence as to the character of Regis, the Court held that the act was constitutional as applied to Regis in that Regis was not "pervasively sectarian", and was an eligible "institution of higher education" as defined in the statute. The Court entered summary judgment in favor of the Defendants and against the Plaintiffs and entered a declaratory judgment that the Colorado Student Incentive Grant Program was constitutional. A copy of the Ruling of the Court and the Order summarizing the Ruling is contained in the Appendix.

A Notice of Appeal by Plaintiffs-Appellants was filed on March 13, 1981, pursuant to an extention of time granted by the District Court. The appeal, concerning the constitutionality of a Colorado statute under the Colorado Constitution, is a matter over which the Colorado Supreme Court has original jurisdiction pursuant to Colo. Rev. Stat. §13-9-102 (1973). The appeal was docketed with the Supreme Court and a Designation of Parties filed on March 23, 1981. The record has been certified to the Supreme Court by the Clerk of the Denver District Court.

SUMMARY OF ARGUMENT

I. The Colorado Constitution absolutely prohibits appropriations of state funds to private schools and to sectarian schools.

II. The Colorado Student Incentive Grant Program constitutes an appropriation of state funds to private schools and to sectarian schools and is therefore unconstitutional.

III. Since the Colorado Student Incentive Grant Program impinges on a fundamental right, there is no presumption of its constitutionality.

IV. The Colorado Student Incentive Grant Program is unconstitutional under Article II, Section 4 of the Bill of Rights to the Colorado Constitution in that it compels taxpayers to support sectarian institutions and gives preference to certain denominations and modes of worship.

V. The Colorado Student Incentive Grant Program is unconstitutional under Article IX, Section 7 of the Colorado Constitution in that it appropriates money to private schools and to schools controlled by churches and sectarian denominations.

VI. The Colorado Student Incentive Grant Program is unconstitutional under Article V, Section 34 of the Colorado Constitution in that is provides appropriations for educational purposes to private schools and to schools which are denominational and sectarian.

VII. The Colorado Student Incentive Grant Program is unconstitutional for vagueness and due to its delegation of legislative authority to the Colorado Commission on Higher Education to determine which institutions are eligible to participate in the program.

VIII. The Student Incentive Grant Program is unconstitutional as applied to Regis College, a sectarian and denominational institution.

IX. The District Court was in error in entering summary judgment against the Plaintiffs while many issues of material fact concerning the sectarian character of Regis College remained to be resolved.

X. The Colorado Student Incentive Grant Program is unconstitutional under the Establishment Clause of the First Amendment of the United States Constitution in that it has a primary effect that advances religion and requires an excessive entanglement between state government and religion.

ARGUMENT

I. THE COLORADO CONSTITUTION ABSOLUTELY PROHIBITS APPROPRIATIONS OF STATE FUNDS TO PRIVATE SCHOOLS AND TO SECTARIAN SCHOOLS.

The United States Constitution and the constitutions of most states prevent federal and state governments from establishing or financially supporting churches or sectarian schools. Until quite recently, neither the Federal Government nor any state made significant efforts to appropriate public funds to private colleges. In the 1960's and 1970's, many private colleges faced a fiscal crisis. Private institutions recognized that without government subsidies many of them would be forced to close their doors. Intense lobbying efforts began for public support of private colleges. Since the 1960's the federal government and

many states have devised a variety of programs whereby public funds are used to subsidize and support private colleges, the majority of which are sectarian. These include the providing of text books and instructional materials, bus transportation, construction grants and tuition grants to private school students.

One of the central concerns of the framers of the United States Constitution in enacting the Bill of Rights was to guarantee that citizens of the United States could freely practice their religion and that they would not be compelled to adhere to or to financially support any other religious denomination against their will. This determination is reflected in the First Amendment to the United States Constitution, which provides in part: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof". This "Establishment Clause" was intended to eliminate two perceived evils, the establishment of a state church to be supported by taxpayers and religious persecution or discrimination by the state. The Establishment Clause has been applied to the states by the Fourteenth Amendment. Murdock v. Pennsylvania, 319 U.S. 105, 63 S. Ct. 870 (1943). A concise history of the Establishment Clause is contained in Everson v. Board of Education, 330 U.S. 1, 67 S. Ct. 504 (1946).

The Establishment Clause of the Federal Constitution sets forth two fundamental axioms, freedom of religion and freedom from religion. It has consistently been held under the First Amendment that neither the United States nor any state can pass laws restricting freedom of religion. Government can only interfere with religious practices where those practices are criminal in nature or where the state has a compelling interest which

justifies its interference with religious beliefs. See Johnson v. Motor Vehicle Division, 197 Colo. 455, 593 P.2d 1363 (1979).

The corollary principle of the Establishment Clause is freedom from religion. The federal government and the states are prevented from establishing a state church or making appropriations which favor any religion or all religions. Everson v. Board of Education, 330 U.S. 1, 67 S. Ct. 504 (1946). Accordingly, legislative schemes for appropriations to sectarian schools have been subject to consitutional attack in a flurry of Supreme Court cases.

The concerns of the Establishment Clause are reflected in the constitutions of most states. A primary concern of the Colorado Constitutional Convention was the insertion of a provision which would guarantee religious freedom and prohibit any public appropriation of any kind to any private or sectarian school. On Wednesday, January 5, 1876, the following resolution was referred to the Convention's Committee on Education. It was part of the first constitutional resolution presented to the Convention:

> "Resolved, That the State of Colorado shall never pass any law respecting an establishment of religion or prohibiting the exercise thereof; but Church and State shall forever be separate and distinct, and each be free within its proper sphere.
>
> Neither the Legislature, nor any county, city, town, township, school district or other municipal or public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or literary or scientific institution controlled by any church or sectarian denomination whatever, nor shall any grant or donation of land, money or other personal property ever be made by the State or by any county, city, town, township, school district or other municipal or public corporation, to any church or for any sectarian purpose.

> The Legislature shall provide for the establishment and maintenance of a thorough and efficient system of free schools, whereby all children of the State between the ages of six and twenty-one years, irrespective of color, birthplace or religion shall be afforded a good common school education.
>
> No theological, religious or sectarian tenets or instructions shall ever be imparted; nor shall any theological or religious book or any version of the Bible be introduced as a text book, or read as a school exercise; nor shall any religious services or worship be permitted in any school, college, academy, seminary or university supported in whole or in part by taxation or by money or property derived from public sources."
>
> Proceedings of the Colorado Constitutional Convention held in Denver, December 20, 1875, P. 43 (1907).

The Committee on Education received several petitions concerning the resolution, which expressed particular concern that there be no appropriation of state money to private and sectarian schools.

> "To the Honorable Constitutional Convention of Colorado:
>
> The undersigned respectfully represent to your honorable body that they are citizens of Colorado, and are not members of the Protestant Church; that they sincerely desire the speedy admission of this Territory into the Union, and fear such admission will be endangered or delayed to the great prejudice of common interests should the Constitution not contain a provision sacredly and forever guarding the common school fund from appropriation to any sect or sects of religious denominations; they believe that sections 7 and 8, as reported by the Committee on Education, contain all that justice and honor dictate, and that wrong will be done to no one and equal rights secured to all by the adoption of those sections.
>
> (Signed) P. Gottesleben,
> and one hundred others
>
> Proceedings of the Constitutional Convention held in Denver, December 20, 1875, p. 278 (1907).
>
> To the assembled delegates to the Constitutional Convention of Colorado:

We, the undersigned citizens of the Territory would most respectfully ask your careful consideration of the following demands of liberalism:

First - That churches and other ecclesiastical property shall no longer be exempt from just taxation.

Second - That the employment of chaplains in the State Legislatures, prisons, asylums, and all other institutions supported by public money, shall be discontinued.

Third - That all public appropriations for educational and charitable institutions of a sectarian character shall cease.

Fourth - That all religious services sustained by public money shall be abolished and especially that the use of the Bible in the public schools, whether ostensibly as a text book or avowedly as a book of religious worship, shall be prohibited.

Fifth - That the appointment by the Governor of all religious festivals and feasts shall wholly cease.

Sixth - That all laws directly or indirectly enforcing the observance of Sunday as the Sabbath shall be prohibited.

Seventh - That all laws looking to the enforcement of Christian morality shall be abrogated and that all laws shall be conformed to the requirements of natural morality, equal rights and impartial liberty.

Eighth - That no privilege or advantage shall be conceded to Christianity or any other special religion; that our entire political system shall be founded and administered on a purely secular basis, and that whatever changes shall prove necessary to this end shall consistently, unflinchingly and promptly made.

(Signed by 45 Citizens of the Territory)

Proceedings of the Constitutional Convention held in Denver, December 20, 1875, P. 83 (1907).

"To the Honorable Constitutional Convention of Colorado:

We, the undersigned citizens of the United States and residents of Colorado, firm in the belief that free, non-sectarian common schools are essential to the life and perpetuity of our form

> of government, and constitute the only security for a free, untrammeled ballot; and believing it better that such questions be settled at once and permanently, so that designing and corrupt politicians may not continually distract the attention and impose upon the minds of our people, do hereby most earnestly and respectfully petition your honorable body: First, to make ample provision for the support of free common schools. Second: To compel parents or guardians to educate their children. Third: To guard well the public school land, guarding against hasty sales that greater results may be obtained for the school fund; and Fourth: To now and forever settle the question of a non-sectarian character and non-division of the sacred school fund, thus taking the question out of our politics entirely. This we will ever pray.
>
> Boulder, Colorado, February 7, 1876.
>
> (Signed) O. F. A. Greene,
> And one hundred and thirty-five others
>
> We, the undersigned, fully endorse the foregoing petition, with the understanding that non-sectarian implies the exclusion of the reading of any Bible and all religious training and exercises from the public schools.
>
> (Signed) J. H. Decker,
> And forty others.
>
> Proceedings of the Constitutional Convention held in Denver, December 20, 1875, P 277 (1907).

The Committee on Education of the Constitutional Convention recognized that the original resolution had three separate and distinct components:

1. The resolution evidenced a strong commitment to religious freedom and non-discrimination and a desire to prevent the state from establishing or supporting any sectarian institution. This was recognized as a fundamental right of the citizens of Colorado. It was referred out of the Education Committee and became a part of the Colorado Bill of Rights, Article II, Section 4:

> "Religious Freedom. The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness or justify practices inconsistent with the good order, peace or safety of the state. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent. Nor shall any preference be given by law to any religious denomination or mode of worship."

2. The resolution demanded that the state institute a comprehensive system of free public education and provided that no sectarian doctrines be taught in the public schools. It also required a total prohibition of appropriations to private and sectarian schools. This portion of the bill was retained by the Committee on Education and became a part of the article on Education, Article IX, Section 7, which remains faithful to the text of the original resolution of 1876:

> "Aid to private schools, churches, sectarian purpose, forbidden. 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 be made by the State, or any such public corporation to any church, or for any sectarian purpose.

3. The resolution contemplated that the legislature would forever be prohibited from making any appropriation to a private or sectarian school. This was recognized as a limitation on legislative power and was referred to the committee which was framing Article V on legislative powers and limitations. It became Article V, Section 34:

> "Appropriations to private institutions forbidden. No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association."

Only three "church and state" issues of substance arose at the Constitutional Convention. The first concerned whether a Supreme Being would be recognized in the Preamble. This controversy was resolved by amendment of the Preamble to its present form, recognizing "The Supreme Ruler of the Universe". The second issue was whether reading of the Bible would be prohibited in public schools. That prohibition in the original resolution was stricken. The most significant controversy was whether church property would be exempt from property taxes. That exemption was allowed.

Significantly, there was never any suggestion that there be appropriations of state funds to private and sectarian schools. The Denver church groups seeking the exemption of church properties from taxes expressly requested that no public moneys should ever be appropriated to support the church or sectarian schools. Proceedings of the Constitutional Convention Held in Denver, December 20, 1875, p. 111-114 (1907).

It is obvious that the framers of the Colorado Constitution intended that there was to be no grant or appropriation of any state money to any private institution or to any institution controlled by a religious sect or denomination for any purpose. The absolute prohibition of appropriations to private and sectarian colleges contained in the Colorado Constitution and in the constitutions of several other states arose not from opposition to religion, but from a desire on the part of the framers that

private and sectarian institutions be completely and forever independent of state appropriations and control. The proposer of Article VIII, Section 11 of the Nebraska Constitution, (the full text of which appears on page 29 of this brief) a provision very similar to Article V, Section 34 of the Colorado Constitution, expressed the purpose of that clause as follows:

> "As far as I am personally concerned, I desire to have the Constitution prohibit any state aid under any guise to any educational institution other than the public school. It is not a difficult matter, if the legislature sees fit to find an excuse in the interests of the general welfare, to make donations under the guise of military training or normal training or what not, to a private institution. I have absolutely no hostility to those institutions, but it will invariably bring on the kind of warfare that this state should stay clear from, if you mingle the state and church even to that extent." See State ex. rel. Rogers v. Swanson, 192 Nebr. 125, 219 N.W. 2d 726, 729 (1974).

There is no question that the intent of these provisions was to absolutely and forever prevent the legislature, under any guise, from in any manner appropriating money to private or sectarian schools, regardless of purpose. The people of Colorado placed far more severe restrictions on the grant of state moneys to non-public schools that those in the United States Constitution. The Colorado Constitution expressly prevents appropriations to all private schools, even those which have no connection with any church.

The grant program at issue is more than a self-interest scheme on the part of private colleges and vocational schools. One of the consequences of the plan is to encourage and promote vocational and college education, which is a proper and even laudable public purpose. Certainly private institutions of higher

education make a significant contribution to the economy and well-being of the State of Colorado. However, the Colorado Constitution has not been altered, amended or interpreted to allow for a program like the Colorado Student Incentive Grant Program. The constitutional language used is plain, and its intent to prohibit any appropriation to any non-public schools clear. The Constitution must be declared and enforced as written. Jones v. Board of Adjustment, 119 Colo. 420, 204 P. 2d 560 (1949). "A written constitution is not only the direct and basic expression of the sovreign will, but is the absolute rule of action and decision for all departments and offices of government in respect to all matters covered by it, and must control as it is written until it is changed by the authority that established it. When that sovreign will has been clearly expressed, it is the duty of the courts rigidly to enforce it. It is not the province of the courts to circumvent it because of private notions of justice of because of personal inclinations." Judd v. Board of Education, 278 N.Y. 200, 15 N.E. 2d. 576 (1938). In order to reaffirm the ruling of the trial court, this Court must interpret the applicable constitutional provisions not to mean what they clearly say, or interpret them in a manner precisely contrary to their express language.

The issue in this case is not whether the legislature passed the Student Incentive Grant Program with good motives. Neither is the question whether promotion of education is a proper state purpose. Since the statute impinges on an absolute constitutional right, the motives or purposes of the legislation are irrelevant in determining whether the statute is constitutional. The question in this case is whether the Colorado Student

Incentive Grant Program is valid in view of the prohibitions in the Colorado Constitution against the appropriation of state funds to non-public educational institutions. Given the absolute and unqualified nature of those constitutional prohibitions, there can be no conclusion except that the statute is unconstitutional.

II. THE COLORADO STUDENT INCENTIVE GRANT PROGRAM CONSTITUTES AN APPROPRIATION OF STATE FUNDS TO PRIVATE SCHOOLS AND TO SECTARIAN SCHOOLS AND IS THEREFORE UNCONSTITUTIONAL.

The Colorado Student Incentive Grant Program is a program by which tuition grants are given to in-state students having a financial need. The funds are handled by the institution, which recommends students for the grant program and upon approval, gives the student credit against tuition. The statute specifically provides that private institutions are eligible for grants, rendering the statute unconstitutional on its face under Article IX, Section 7 and Article V, Section 34 of the Colorado Constitution.

The Constitutional provisions at issue cannot be circumvented by the argument that the grants do not constitute aid to the institution. This position is contrary to the statements of the bill's sponsors and contrary to the express language of the statute. The argument that tuition grants do not constitute an appropriation to the institution attended by eligible students was adequately disposed of in Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 93 S. Ct. 2955 (1973). That case concerned a New York program whereby parents were reimbursed for a portion of their children's private school tuition. The state claimed that since the money was paid to the parents

and not directly to the institution, it could not be in violation of the Establishment Clause. The grants were made after private school tuition was paid, in the form of a reimbursement or tax credit to parents, without restriction on how the parents could spend the funds. The Court rejected the State's argument with the following statement: "If the Grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions. Whether the grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same." 413 U.S. at 786, 93 S. Ct. at 2972. The Court went on to find the New York Tuition Grant Program to be unconstitutional under the First Amendment since there was no restriction in the statute that would prevent tuition fees from being used for sectarian purposes.

State courts have also rejected the fiction that tuition grants do not constitute aid to the school. In Hartness v. Patterson 179 S. E. 2d 907 (S. Carolina 1971) the Court stated as follows:

> "We reject the argument that the tuition grants. . . do not constitute aid to the participating schools. Students must pay tuition fees to attend institutions of higher learning and the institutions depend upon the payment of such fees to aid in financing their operations." 179 S.E. 2d at 909.

A state cannot indirectly make an appropriation which it could not make directly. The fact that tuition grants constitute aid to the eligible schools was also upheld in Almond v. Day, 89 S.E. 2d 851 (Va. 1955), State ex. rel. Rogers v. Swanson, 192 Nebr. 125, 219 N.W. 2d 726 (1974) Minnesota Civil Liberties Union

v. Roemer, 452 F. Supp. 1316 (D. Minn. 1978) and Public Funds for Public Schools of New Jersey v. Byrne, 444 F. Supp., 1228 (D.N.J. 1978).

Obviously, the bills' sponsors did not believe that the tuition grants constitute aid to students and not to the institution. If the grants did not constitute aid to the eligible institution, then grants could be given to students at a seminary without any fear of impermissibly aiding religion. In the statute, it is the "theological" or "pervasively sectarian" character of the institution, not the student which renders a particular institution ineligible. The statute clearly recognizes that a tuition grant to a student attending an institution that only awarded the degree of Doctor of Divinity would constitute an impermissible aid to religion. Therefore, the Court must hold that tuition grants constitute an appropriation of state funds to the eligible institution.

Since the statute expressly provides for grants to students of non-public colleges and private vocational schools it is unconstitutional on its face. The statute is also unconstitutional because it allows appropriations to sectarian institutions. One of the keys to this case is the fact that the Colorado constitution prohibits support to any "religious sect or denomination", "sectarian society", "sectarian denomination" and "sectarian institution or association". The Colorado Constitution never refers to a "pervasively sectarian" institution. There is no case law whatsoever in Colorado interpreting the constitutional terms "sect" or "sectarian" to mean "pervasively sectarian". There is no Colorado case law supporting the guidelines in the statute to be

used in determining whether an institution is "pervasively sectarian". There has been no attempt to conform the statute to the applicable clauses in the Colorado Constitution.

The term "pervasively sectarian" is derived from a First Amendment U.S. Supreme Court case, Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 96 S. Ct. 2337 (1976). The guidelines to determine whether an institution is "pervasively sectarian" is derived from a First Amendment case decided by the Federal District Court in Kansas, Americans United for Separation of Church and State v. Bubb, 379 F. Supp. 872 (D. Kans. 1974). Neither case concerned a state constitutional provision similar to the clauses of the Colorado Constitution at issue.

"Pervasively sectarian" as defined in the statute is more restrictive than "sectarian" as used in the Colorado constitution, which is defined as "pertaining to one of the religious sects." See Vollmar v. Stanley, 81 Colo. 276, 255 P. 610 (1927). There are institutions which are "sectarian" as defined in the Colorado Constitution which are eligible for the grants because they are not, under the guidelines, "pervasively sectarian". Obviously the statute authorizes aid to flow to institutions which are "sectarian" under Colorado law and on that ground is unconstitutional on its face. For purposes of the Colorado Constitution, the guidelines defining which institutions are "pervasively sectarian" are irrelevant. If an institution is "sectarian" within the definition of the Constitution, it does not matter that it may admit persons of all faiths, tolerate other religious practices or have an administration that does not "reflect" the denomination. Likewise, the useful public purpose served by the institution is irrelevant. See Constitutional Defense League v. Waters, 308 Pa. 150, 162 Atl. 216 (1932).

Regis College has been determined to be eligible, although it is a private institution which identifies itself and is universally identified by the public with the Catholic religion. There is no doubt that Regis is "sectarian" within the meaning of the Colorado Constitution. The presumption is that words used in a constitution are to be given the natural and popular meaning in which they are usually understood by the people who adopted them. Prior v. Noland, 68 Colo. 263, 188 P.729 (1920). A court must presume that words were used in their ordinary meaning and that the people intended what they said. Colorado State Civil Service Employees' Association v. Love, 167 Colo. 436, 448 P.2d 624 (1968). Therefore, if a college is clearly identified in the public mind as pertaining to or being associated with a religious sect, it is "sectarian" within the meaning of the Constitution. The allowance of grants to sectarian institutions which are not "pervasively sectarian" is a fatal flaw in the statute. This flaw cannot be corrected by interpretation or severance, and renders the entire statute unconstitutional.

III. SINCE THE COLORADO STUDENT INCENTIVE GRANT PROGRAM IMPINGES UPON A FUNDAMENTAL RIGHT, THERE IS NO PRESUMPTION OF ITS CONSTITUTIONALITY.

In constitutional cases involving economic legislation or police power regulations challenged on due process grounds, the statute is presumed constitutional and the burden is upon the person challenging the legislation to prove its unconstitutionality beyond a reasonable doubt. Mosko v. Dunbar, 135 Colo. 172, 309 P.2d 581 (1957). This is not such a case. This case involves

a statute which impinges on a fundamental right of the Plaintiffs, expressed in Article II, Section 4 of the Bill of Rights to the Colorado Constitution, which states in part: "No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent." The analogous provision in the United States Constitution is in the First Amendment.

In cases involving alleged infringements on First Amendment rights, there is no presumption of constitutionality. See Citizens for a Better Environment v. City of Schaumberg, 590 F.2d 220 (7th Cir. 1978). The right to freedom from state support or establishment of religion is a fundamental right equal in dignity to freedom of speech, freedom of religion and freedom to peaceably assemble. In fact, freedom from religion is given greater regard in the case law. Freedom of religion may be infringed upon if a compelling state interest so requires. Freedom of speech may be reasonably restricted as to time, place and method. By contrast, freedom from religion is absolute. The state's interest in promoting the legislation is irrelevant in determining whether the legislation is constitutional. The right is not subject to any restriction or regulation by the state.

Generally, when a statute impinges on a guaranteed constitutional right, the burden of proof is not upon the person asserting its unconstitutionality, but upon the State. The State carries a heavy burden to establish its constitutionality. See Harding v. Industrial Commission, 183 Colo. 52, 515 P.2d 95 (1973) and Gates Rubber Company v. South Suburban Metropolitan Recreation and Park District, 183 Colo. 222, 516 P.2d 436 (1973). When the subject is legislation which requires a person to do something

which is in violation of his religious beliefs, the state must also show a compelling state interest which cannot be achieved by less restrictive means to justify that legislation. Poe v. Gerstein, 517 F. 2d 787, Affd. 428 U.S. 901, 96 S. Ct. 3202 (1976).

In cases concerning an alleged violation of the Establishment Clause, there is no presumption of constitutionality, and unconstitutionality need not be proven beyond a reasonable doubt. If the legislation is in violation of the Establishment Clause, it is absolutely void. Atlantic Department Store, Inc. v. State's Attorney for Prince George's County, 323 A.2d 617 (Md. App., 1974). Since the guarantees embodied in the Establishment Clause in the First Amendment to the United States Constitution are absolute within their scope, sovereign actions which fall within the scope of that guarantee, although they otherwise would be permissible exercises of the state's public welfare powers, are absolutely prohibited. Abington School District v. Schempp, 374 U.S. 203, 83 S. Ct. 1560 (1963). The existence of a compelling state interest will not justify the legislation. Bonjour v. Bonjour, 592 P.2d 1233 (Alaska, 1979). The trial court erroneously held in this case that there was a presumption of constitutionality as to the statute at issue and that its unconstitutionality must be proven beyond a reasonable doubt. The holding as to burden of proof alone constitutes grounds for reversal.

A state may not restrict exercise of freedom of religion to a greater extent than allowed under the First Amendment. Zavilla v. Masse, 112 Colo. 183, 147 P.2d 823 (1944). However, a state may impose greater restrictions on the use of public funds to support private institutions, churches and sectarian societies than is implied in the First Amendment's restriction on Congress

making a law as to the establishment of religion. See Board of County Commissioners v. Idaho Health Facilities Authority, 96 Idaho 98, 531 P.2d 588 (1929). Colorado has posed an absolute prohibition on appropriations to all non-public educational institutions, which is certainly more restrictive than the First Amendment Establishment Clause.

Plaintiffs would submit that Article II, Section 4 of the Colorado constitution, like the Establishment Clause, constitutes an absolute right. If the present legislation impinges upon that fundamental right it is unquestionably void. The significance of the Colorado establishment clause is amplified by the related absolute prohibitions on appropriations to private and sectarian schools contained in Article IX, Section 7 and Article V, Section 34. Therefore, if the statute at issue impinges to any degree on these constitutional provisions, or any of them, it must be held absolutely void.

IV. THE COLORADO STUDENT INCENTIVE GRANT PROGRAM IS UNCONSTITUTIONAL UNDER ARTICLE II SECTION 4 OF THE BILL OF RIGHTS OF THE COLORADO CONSTITUTION IN THAT IT COMPELS TAXPAYERS TO SUPPORT SECTARIAN INSTITUTIONS AND GIVES PREFERENCE TO CERTAIN DENOMINATIONS AND MODES OF WORSHIP.

Article II Section 4 of the Colorado Constitution states as follows:

> "Religious Freedom. The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion; but the liberty of conscience hereby secured shall not be

> construed to dispense with oaths or affirmations, excuse acts of licentiousness or justify practices inconsistent with the good order, peace or safety of the state. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent. Nor shall any preference be given by law to any religious denomination or mode of worship."

The fundamental right at issue is the right of the Plaintiffs as taxpayers not to be required to support any religious sect or denomination against their consent. It is obvious that under the statute, a college founded, supported, administered by and identified with a religious group may be granted state funds. Taxpayers are required by the statute to support the religious sect or denomination with which such a sectarian college is affiliated against their consent.

The Colorado Student Incentive Grant Program also has other pernicious effects proscribed by Article II, Section 4. Its effect is to give preference to certain religious denominations or modes of worship, to discriminate between religious denominations and to inhibit the free exercise and enjoyment of religious profession and worship. Sectarian institutions are allowed to participate in the grant program, but not "pervasively sectarian" institutions. An institution which would otherwise qualify under the guidelines might be disqualified by enacting a policy requiring attendance at any religious service or by accepting a substantial donation from a sectarian source.

The statute encourages the secularization of colleges and discriminates against the more conservative or fundamental religious institutions, which might require attendance at religious services, in favor of the more "liberal" denominations which

would not impose such a requirement. It has a "chilling effect" on religious expression at sectarian colleges.

In short, the statute opens up the Pandora's Box of state government entanglement with religion that the framers of the Colorado and United States Constitutions so earnestly sought to avoid. Since the statute requires taxpayers to support sectarian institutions and also gives preference to certain religious denominations and modes of worship, it is unconstitutional on its face under Article II, Section 4 of the Colorado Constitution.

V. THE COLORADO STUDENT INCENTIVE GRANT STATUTE IS UNCONSTITUTIONAL UNDER ARTICLE IX, SECTION 7 OF THE COLORADO CONSTITUTION IN THAT IT APPROPRIATES MONEY TO PRIVATE SCHOOLS AND TO SCHOOLS CONTROLLED BY CHURCHES AND SECTARIAN DENOMINATIONS.

Article IX Section 7 of the Colorado Constitution provides as follows:

> "Aid to private schools, churches, sectarian purpose forbidden. 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 literary or scientific institution, controlled by any church or sectarian denomination; 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."

The Constitutional provision cited above amounts to an absolute prohibition of any appropriation by the state or any other public body in Colorado to any non-public school. Furthermore, it expressly provides that appropriations may not be made

for any sectarian purpose or to help support or sustain any school controlled by a church or sectarian denomination. The Student Incentive Grant Program is unconstitutional under Article IX, Section 7 on two separate grounds. First, it is in violation of the blanket prohibition of appropriations to non-public schools. Secondly, its allowance of grants to sectarian institutions which are not "pervasively sectarian" would allow the grant of funds to institutions controlled by sectarian denominations in violation of the absolute prohibition. The statute does not even purport to prevent aid to institutions controlled by a religious sect.

In addition, the statute at issue is invalid under Article IX, Section 7 because that section prohibits appropriations for any sectarian purpose. In the statute at issue, there is no restriction whatsoever on the use of the grant funds by the institution. There is no assurance that the funds will not be used for a sectarian purpose, and the substantial risk that state funds will be used for religious purposes renders the program unconstitutional.

The statute expressly allows grants to non-public institutions, allows grants to institutions controlled by religious denominations and allows the funds to be used for sectarian purposes. Therefore, there are three distinct bases upon which the statute is unconstitutional under Article IX, Section 7 of the Colorado Constitution.

VI. THE COLORADO STUDENT INCENTIVE GRANT STATUTE IS UNCONSTITUTIONAL UNDER ARTICLE V, SECTION 34 OF THE COLORADO CONSTITUTION IN THAT IT PROVIDES APPROPRIATIONS FOR EDUCATIONAL PURPOSES TO PRIVATE SCHOOLS AND SCHOOLS WHICH ARE DENOMINATIONAL AND SECTARIAN.

Article V Section 34 of the Colorado Constitution provides as follows:

> "Appropriations to Private Institutions Forbidden. No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association."

This section reiterates the absolute prohibition on appropriations to non-public educational institutions by prohibiting grants to any institution not under the absolute control of the state, whether sectarian or not. Like Article IX Section 7, it also specifically prohibits appropriations to any denominational or sectarian institution or association. It emphasizes that this restriction is absolute, even if the appropriation clearly serves an educational purpose, which would otherwise be a proper public expenditure.

The Colorado Student Incentive Grant Program is unconstitutional on its face under Article V Section 34 on two separate grounds. First, it authorizes appropriations to private institutions which are not under the absolute control of the State. Secondly, it authorizes appropriations to denominational or sectarian institutions or associations as long as they are not "pervasively sectarian" as defined in the statute. It is clear that this section was intended to prevent any appropriation of moneys

for charitable, educational or benevolent purposes to any private person or organization. In Re Relief Bills, 21 Colo 62, 39 P. 1089 (1895) explains Article V, Section 34 as follows:

> "The words "not under the absolute control of the state," were inserted as an amendment to the provision as originally drafted. This amendment was essential in order that the state might support the educational and other institutions established and fostered by the territorial government. There being no disposition to withhold state aid from these institutions, the amendment became necessary in order that such aid might be extended in the future.
>
> It is clear that the section as originally prepared absolutely prohibited the state from extending aid for charitable, education or benevolent purposes, and it seems equally clear that the amendment was not for the purpose of changing the original intent of the section, except in so far as the same became necessary to authorize the support of those persons, corporations, etc., which were then or might in the future be brought under the control of the state." 21 Colo. at 68 39 P. at 1091.

Similar provisions in the Nebraska and Virginia Constitutions were found to render private college tuition grant programs unconstitutional in State ex. rel Rogers v. Swanson, 219 N.W. 2d 726 (Nebr. 1974) and in Almond v. Day 89 S.E. 2d 851 (Virginia, 1955).

Article VII, Section 11 of the Nebraska Constitution is similar to the constitutional provision at issue:

> "Neither the state legislature nor any county, city or other public corporation shall ever make any appropriation from any public fund or grant any public land in aid of any sectarian school or college, or any educational institution which is not exclusively owned and controlled by the state or a governmental subdivision thereof."

The Supreme Court of Nebraska stuck down a textbook loan program based on this section in Gaffney v. State Department of Education, 192 Nebr. 358, 220 N.W. 2d. 550 (1974). The Court stated that the inquiry under that section was whether public

funds were appropriated under the statute to any private school (one not "owned and exclusively controlled by the state"). The Court held that since such an appropriation was contemplated by the statute, it was unconstitutional under that section. It further held that a finding as to the sectarian or non-sectarian nature of eligible institutions was unnecessary, since it was conceded that the statute contemplated aid to private institutions. The court stated "There is no ambiguity in our constitutional provision. The impact of the language and its purpose can be understood by any literate person." The Court declined to construe the statute to mean the opposite of what it clearly said. Likewise, in the present case, the constitutional provision should be applied as written to prevent appropriations to any private college.

The trial court interpreted Article V, Section 34 to allow any appropriation to a private institution as long as the appropriation had a public purpose, based on Bedford v. White, 106 Colo 439, 106 P.2d 469 (1940). That case involved the validity of an appropriation for pensions to former justices of the Colorado Supreme Court. Some of the justices were eligible for a pension under a prior statute, but others were not, leading to the assertion that the appropriation as to the ineligible justices was "a grant to private persons for a charitable purpose". The appropriation was upheld under Article V Section 34. The Court held that the appropriation could be made, since the payment was for a public purpose, to reward state employees for their service to the state and to encourage qualified persons to serve on the bench.

Article V, Section 34 by its own terms does not apply to the expenses of state government. It is obvious that all state

appropriations, whether for the purchase of land, office supplies, or for employees' salaries, benefit recipient private persons or entities to some degree. It seems highly unlikely that Article V, Section 34 would have been enacted to prevent the legislature from appropriating money for the expenses of state government, including salary, fringe benefits or pensions for public employees. There can be little doubt that the providing of salary and benefits for state employees is a proper state purpose and that it is neither a charitable nor a benevolent purpose.

The Supreme Court in Bedford v. White stated that payments to private persons are not violative of the section if the payments are for a public purpose. Taken at face value, that statement would nullify Article V, Section 34. It would mean, contrary to the express language, that the state could appropriate money to any private person or entity as long as there was arguably some public purpose to be served by the grant. Obviously this was not the intent of Section 34, since it specifies that grants cannot be made to private persons or institutions for an educational purpose, which would otherwise generally be regarded as a proper public purpose.

A constitutional provision should not be interpreted in a manner which would render it absurd. See Mahood v. City and County of Denver, 118 Colo. 338, 195 P. 2d 379 (1948). A more reasonable interpretation of Bedford v. White is that valid state expenditures for salaries and employee benefits are not rendered invalid by Article V, Section 34 because the recipients are private persons. The phrase "not under the absolute control of the State" was inserted to make it clear that that clause was not intended to apply to valid governmental expenditures by the State

of Colorado or its political subdivisions. See In Re Interrogatories on House Bill No. 1247, 193 Colo. 298, 566 P.2d 350 (1977). Therefore, the section could not reasonably be applied to an appropriation for pensions to state employees.

Furthermore, the recipients in Bedford v. White were private individuals and not denominational or sectarian institutions. That case did not contain any Establishment Clause implications. By contrast, the statute at issue contemplates aid to institutions which are "sectarian" within the Colorado constitution definition as long as they are not "pervasively sectarian". The statute at issue is clearly in violation of Article V, Section 34 in that it contemplates an appropriation of state funds to private colleges and vocational schools. State aid to any private school, whether sectarian or non-sectarian, is forbidden under that Section. The statute is also unconstitutional under Article V, Section 34 in that it contemplates the appropriation of state funds to sectarian colleges.

VII. THE COLORADO STUDENT INCENTIVE GRANT PROGRAM IS UNCONSTITUTIONAL FOR VAGUENESS AND DUE TO ITS DELEGATION OF LEGISLATIVE AUTHORITY TO THE COLORADO COMMISSION ON HIGHER EDUCATION TO DETERMINE WHICH INSTITUTIONS ARE ELIGIBLE TO PARTICIPATE IN THE GRANT PROGRAM.

The Plaintiffs assert the right not to have their money as taxpayers appropriated for the use of private, denominational and sectarian institutions. Since a fundamental right is involved, any statute which impinges on that right is absolutely void. Any statute which delegates the authority to define which sectarian

institutions are eligible for participation is void for vagueness and for an unlawful delegation of legislative authority.

A statute which is so vague that men of common intelligence must guess at its meaning and may differ as to its application is unconstitutional as a deprivation of due process, a right guaranteed by the 14th Amendment to the United States Constitution and Article II, Section 25 of the Colorado Constitution. See Hosack v. Smiley 276 F. Supp. 876 (D. Colo. 1967) Affd. 390 U.S. 744, (1968). The terms "theological" and "pervasively sectarian", and the guidelines to determine if the institution is pervasively sectarian are such that different persons may differ as to their application.

In a case where there is no claimed infringement on a fundamental right, a slight amount of vagueness in the language of the statute may be tolerable. In addition, although the legislature may not delegate the power to make or to define a law, it may delegate the power to determine the applicable facts and situations to which the law applies. See People v. Willson, 187 Colo. 141, 528 P.2d 1315 (1974). In the case of police power regulations, the delegation may be tolerable though quite broad in nature, such as a general delegation of power to the Department of Health to formulate and enforce health regulations. See People v. Giordano, 173 Colo 567, 481 P.2d 415 (1971).

Where the challenged statute is alleged to impinge on a fundamental constitutional right, far greater specificity is required of the guidelines by which the act is to be administered. The standard must be narrow, objective and definitive, so that nothing is left to the unbridled discretion of the government authorities. See People v. Hayden, 190 Colo. 457, 548 P. 2d 1278 (1976). Keyishian v. Board of Regents, 385 U.S. 589, 87 S. Ct.

675 (1967). See also Swearson v. Meyers 455 F. Supp. 88 (D. Kans. 1978) and Hall v. McNamara 456 F. Supp. 245 (N. D. Cal. 1978).

The guidelines in the statute at issue are facially unconstitutional in expressly allowing aid to sectarian institutions. Furthermore the guidelines are broad, subjective and vague, allowing funds to be appropriated in an unconstitutional manner. The statute at issue provides that an eligible "institution of higher education" does not include a "theological institution". Nowhere in the statute is "theological institution" defined. The common definition of theological is "pertaining to the study of religion". See Websters Unabridged Dictionary, Second Edition. Nearly all colleges, public and private, have some portion of their curriculum devoted to the study of religion. A state university offering five courses in religious studies out of two thousand possible course offerings is probably not a theological institution. By the same token, an institution offering only Doctor of Divinity degrees probably is a theological institution. The problem arises when there is a private sectarian college requiring a substantial number of hours in religious studies or an institution in which 20 percent of the students receive a degree in religious studies or a Doctor of Divinity degree. Are these institutions "theological institutions"? Neither the statute nor a reference to the common definition of the term "theological" answers that question. Nevertheless, the Colorado Commission on Higher Education is required to make a finding on that point as to each institution claiming eligibility. In view of the fundamental right involved and the absolute constitutional prohibition against grants of money to theological institutions, the term "theological institutions" is unconstitutionally vague.

By the same token, to allow the definition and application of the term "theological" to be delegated to the Colorado Commission on Higher Education is to delegate to that Commission the substantive power to make a law or define a law, which is a power which cannot be delegated. See People v. Giordano, supra., and Bettcher v. State, 140 Colo. 428, 344 P.2d 969. (1959).

Delegation of the power to make the determination that an institution is "pervasively sectarian" is an unconstitutional delegation of legislative power to the Colorado Commission on Higher Education. The criteria for determining if an institution is pervasively sectarian are subject to varying interpretations. Many sectarian institutions do not have a written policy of required attendance at religious services but nonetheless there may be pressure from peers and faculty which is equally effective. Does such an institution require attendance at religious services? The statute does not answer that question. The Colorado Commission on Higher Education is also asked to determine whether there are "required courses in religion or theology that tend to indoctrinate or proselytize." It is difficult to imagine how such a determination could be made, since any text or lecture suggesting that one religion has greater validity than another might be interpreted as an effort to indoctrinate or proselytize. As a practical matter, the maintenance of this standard would require continual monitoring of lectures to make sure there are no expressions of opinion which would indicate a value judgment in favor of one religion or another. According to Webster's Unabridged Dictionary, Second Edition, "Indoctrinate" is defined as "to instruct in theories, beliefs or principles." By such definition, any college course, whether in religion or in physics might be described as tending to "indoctrinate".

The Colorado Commission on Higher Education also has to make a determination whether the governing board "reflects" any particular religion. This term is not defined, and it is not clear whether this means that all members of the board must be members of certain religion, a simple majority, a two-thirds majority or a significant minority. In the case of Regis College, the fact that a majority of the board members were Catholics and Jesuits, and that the by-laws required the board to be so constituted, was held by the Commission not to "reflect any particular religion"!

Finally, the Commission is called on to determine whether the funds of the institution come "primarily or predominantly from sources advocating a particular religion." To properly accomplish that job, the Commission would have to examine all sources of funding and then make inquiry into the religious beliefs of all persons paying tuition or making contributions in money or in kind to the organization. If the primary source of funds to a private institution is tuition and if 80% of the students of that institution identify themselves as Catholic, do the funds come primarily or predominantly from sources advocating a particular religion? In the case of Regis College the Commission found that they did not.

The standards for determination of whether an institution is "theological" or "pervasively sectarian" are not adequately defined in the statute. The guidelines are capable of varying interpretations. The Colorado Commission on Higher Education was given leave under the statute to <u>make</u> and to <u>define</u> the law as to which institutions are theological and pervasively sectarian. Therefore, the statute is void for vagueness and due to an unconstitutional delegation of legislative powers to the Colorado Commission on Higher Education.

VIII. THE COLORADO STUDENT INCENTIVE GRANT PROGRAM IS UNCONSTITUTIONAL AS APPLIED TO REGIS COLLEGE, A SECTARIAN AND DENOMINATIONAL INSTITUTION.

The fundamental assertion of the Plaintiffs-Appellant is that the Colorado Student Incentive Grant Program is unconstitutional on its face. They also assert that it is unconstitutional as applied to Defendant Regis Educational Corporation. It is conceded that Regis is not a public college. Therefore any appropriation made to it violates Article V, Section 34 and Article IX, Section 7 of the Colorado Constitution.

The eligibility of Regis also illustrates the mischievous effect of the statute in providing aid to a sectarian institution, which the people of Colorado sought to avoid in their Constitution. Regis College is an institution identified with and controlled by the Catholic Church and specifically by the Jesuits. Its faculty handbook and its catalog indicates its identification with the Jesuits and its religious mission. There is no doubt that the general public universally identifies it with the Catholic Church. 80% of the student body identifies itself as Catholic and Jesuits constitute a majority on the governing board.

There is no doubt that Regis College is a sectarian institution within the meaning of the Colorado constitution. Nonetheless, to the consternation of the sponsors of the Colorado Student Incentive Grant Program, Regis College was approved as a recipient of grant moneys. It is obvious that Regis is not only sectarian, but is "pervasively sectarian". Its governing board definitely reflects a particular religion. Its funds are claimed

to be primarily from tuition, and therefore come primarily or predominantly from sources advocating a particular religion, since 80% of the students profess to be Catholic. In spite of this overwhelming evidence, the Colorado Commission on Higher Education found that Regis qualified. The eligibility of Regis illustrates the unconstitutional vagueness in the statute and the delegation of legislative power to the Commission. The Plaintiffs were deprived by the trial court of the opportunity to present facts which would show Regis to be sectarian by entry of Summary Judgment without any resolution of disputed facts concerning Regis.

The eligibility of Regis College for grant funds illustrates that this statute may be interpreted in such a way as to clearly violate the Colorado constitutional provisions against aid to private and sectarian schools. Therefore the statute must be found unconstitutional as applied to Regis under Article II, Section 4; Article V, Section 34; and Article IX, Section 7 of the Colorado Constitution.

IX. THE DISTRICT COURT WAS IN ERROR IN ENTERING SUMMARY JUDGMENT AGAINST THE PLAINTIFFS WHILE MANY ISSUES OF MATERIAL FACT CONCERNING THE SECTARIAN CHARACTER OF REGIS REMAINED TO BE RESOLVED.

The complaint of the Plaintiffs alleges that the statute is unconstitutional on its face and is unconstitutional as applied to Defendant Regis Education Corporation. In order to establish that the statute was constitutional as applied to Regis, the court would have to find that Regis was not "a private school," not "sectarian," not "controlled by a religious sect or denomination"

and was "under the absolute control of the state" under the applicable constitutional provisions. The Court made no such findings, but only found that Regis arguably met the guidelines in the statute and was not "pervasively sectarian". Multiple disputes as to facts concerning the character of Regis were apparently simply resolved against the Plaintiffs without the taking of testimony and without affidavits. The Request for Admissions upon which Defendants relied to establish that there were no material issues of fact were not deemed admitted.

The issue of the facial constitutionality of the statute could be resolved as a matter of law. Clearly its constitutionality as applied to Regis could not. There are many facts as to the sectarian character of Regis which were hotly contested. By entry of Summary Judgment, Plaintiffs were precluded from establishing the sectarian character of Regis.

Rule 56(c) of the Colorado Rules of Civil Procedure provides in part as follows: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law". The requirements of Rule 56 were not met by the trial court. Summary judgment is a drastic remedy and is never warranted except upon a clear showing that there is no genuine issue of a material fact. Hatfield v. Barnes, 115 Colo. 30, 168 P.2d 552 (1946). All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Ginter v. Palmer and Co., 196 Colo. 203, 585 P.2d 583 (1978). A litigant is entitled to have disputed facts determined by trial. Moses v. Moses, 180 Colo 397, 505 P.2d 1302 (1973). Plaintiffs in this case were unjustly denied the

opportunity to present their case as to the unconstitutionality of the statute as applied to Regis. The entry of Summary Judgment was not proper and the judgment of the District Court must be reversed.

X. THE COLORADO STUDENT INCENTIVE GRANT STATUTE IS UNCONSTITUTIONAL UNDER THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION IN THAT IT HAS A PRIMARY EFFECT THAT ADVANCES RELIGION AND REQUIRES AN EXCESSIVE ENTANGLEMENT BETWEEN STATE GOVERNMENT AND RELIGION.

Objections to the constitutionality of the Colorado Student Incentive Grant Program on the basis of the First Amendment to the United States Constitution were neither raised nor preserved for appeal in this case. The absolute prohibition on appropriation of funds to non-public institutions in the Colorado Constitution is far more restrictive than any interpretation of the Establishment Clause of the First Amendment. Therefore, all the statutes under which state grants to private and sectarian institutions were upheld by the U.S. Supreme Court under the Establishment Clause would be invalid under the Colorado Constitution. However, since the statute was apparently drafted in an effort to comply with some portions of the case law under the First Amendment, Plaintiffs-Appellants submit that it may be helpful for this Court to examine briefly the case law that has arisen under Establishment Clause of the First Amendment to determine whether the statute would be held constitutional.

Though the First Amendment does not expressly prohibit appropriation of funds to churches and sectarian institutions, it has consistently been interpreted to prevent any government

financial support to religious institutions. The three perceived evils against which the Establishment Clause was to protect are financial support, sponsorship and active involvement of the sovreign in religious activity. Lemon v. Kurtzman, 403 U.S. 602, 612 91 S. Ct. 2105, (1971). Any aid program which is such that there is a substantial risk of promoting the religious factor of the institution is unconstitutional under the Establishment Clause. See Levitt v.Committee for Public Education and Religious Liberty, 413 U.S. 472, 93 S. Ct. 2814 (1973).

The Supreme Court of the United States rendered an opinion on a tuition grant program in Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 93 S. Ct. 2955 (1973). The New York State program at issue in that case provided for reimbursement to parents of a certain amount of private school tuition and a tax deduction for private school tuition moneys expended. That program was examined under the tripartite test of Federal constitutionality established in Lemon v. Kurtzman 403 U.S. 602, 91 S. Ct. 2105 (1971), which held that the law in question will be upheld against an establishment clause challenge if it: (1) reflects a clearly secular legislative purpose; (2) has a primary effect that neither advances nor inhibits religion; and (3) avoids excessive government entanglement with religion.

The Court stated that the legislation in Nyquist had a valid secular public purpose, being that of educating children. However, the Court found that since the funds reimbursed by the tuition subsidies were not restricted in use, there was no assurance that the moneys reimbursed by the tuition subsidies would not be put to a religious use. Since the funds could have the effect of advancing religion, the statute was held unconstitutional. A similar tuition grant program enacted in Pennsylvania

after the decision in Lemon v. Kurtzman, supra, was also struck down by the Supreme Court in accordance with the Nyquist case. Sloan v. Lemon, 413 U.S. 825, 93 S. Ct. 2982 (1973).

It is certain that in order for an appropriation to be held constitutional there must be an absolute prohibition against funds being used for religious purposes. In Tilton v. Richardson, 403 U.S. 672, 91 S. Ct. 2091 (1971), the subject was a federal act providing grants to private colleges for the erection of buildings. The grant required that the buildings be used solely for secular purposes for the first 20 years of their useful life, implying that they might then be converted to religious facilities. The grant program was upheld, with the exception of the 20 year provision, which was severed out. The Court held that the grant program, with its absolute prohibition on the use of funds for buildings to be used in religious activities would be constitutional but for that the possibility of reversion to religious use after twenty (20) years that potential conversion would render the grant program invalid as an aid to religion.

In the statute at issue, there is absolutely no restriction on the use of the funds. Funds received by Regis from the State of Colorado could be deposited into a special fund for building a chapel. Such an action on the part of Regis would not disqualify it for the grant program. The lack of restriction on funds granted is a fatal defect in the statute. Therefore the tuition grant program at issue would be held unconstitutional under the Establishment Clause of the First Amendment as was the tuition reimbursement program in the Nyquist case, supra.

It is doubtful whether any tuition grant program to sectarian institutions can ever be upheld under the First Amendment, since tuition grants become the general funds of the institution, and it is nearly impossible to restrict the use of general

funds to secular purposes. Any attempt to restrict the use of general funds to secular uses would likely violate the "entanglement test", more fully set forth below.

The legislation at issue fails the tripartite test under the Establishment Clause as set forth in Lemon v. Kurtzman. First, the legislation must reflect a clearly secular purpose. The advancement of education in general is a secular purpose. However, it is clear that the sponsors primarily intended the grants to help solve the fiscal problems of private institutions. (Hearings of the Senate Education Committee March 23, 1977). Since some of the private institutions aided are sectarian, the intent of the legislation is not "clearly secular".

The second part of the test is that the legislation must have a primary effect that neither advances nor inhibits religion. Private institutions historically have not been granted state funds in Colorado. Therefore the statute, though neutral on its face as between public and private institutions, in fact exemplifies an intent to aid private institutions, some of which are sectarian. A secular purpose and facial neutrality are not sufficient where a statute has the impermissible effect of aiding a sectarian institution. Roemer v. Board of Public Works, 426 U.S. 736, 96 S. Ct. 2337 (1976). Furthermore, the lack of restriction on the funds granted means that they may be used for religious purposes. The trial court appeared to take the position that appropriations advance religion only when the recipient institution is "pervasively sectarian", that is where a college is such that the religious functions cannot be separated from the secular functions. This is the result of a fundamental misunderstanding of Roemer, supra, and Hunt v. McNair 413 U.S. 734, 935 S. Ct. 2868 (1973). These cases concerned direct grants for specific secular

uses (Roemer) and the issuance of revenue bonds for specific secular facilities (Hunt). In each case, the regulations required that the money granted and the facilities to be built would not be put to any religious use. The rule in these cases is that if the statute expressly and effectively limits the appropriation to secular use, it may be valid if the entanglement tests are met. In other words, the fact that the providing of secular facilities by the state allows a sectarian institution to devote its own resources to its religious activities in and of itself does not constitute an impermissible aid to religion. The exception to that rule is where an institution is so pervasively sectarian that its religious and sectarian missions cannot be separated. Where the character of the institution is such that no part of its campus, even a gymnasium, could be described as purely secular, no aid of any kind may be granted. Since the law at issue does not make any attempt to restrict the use of funds, it does not satisfy the general rule in Roemer and Hunt, therefore, the question of whether an institution would be disqualified from the program under the "pervasively sectarian" exception is not reached.

This misunderstanding of the relevant Supreme Court cases caused the erroneous result in Americans United for Separation of Church and State v. Bubb, 379 F. Supp. 872 (D. Kansas, 1974), which was the apparent basis for the drafting of the statute at issue. The same misapprehension is apparent in Alabama Education Association v. James, 373 So. 2d 1076 (Ala. 1979) and Americans United for Separation of Church and State v. Rogers 538 S.W. 2d 711. (Mo., 1976).

The primary effect of the present legislation is to encourage attendance at private schools, some of which are sectarian. The funds granted may be freely used for religious purposes.

Therefore, a primary effect of the statute is to advance the religions which operate sectarian colleges in Colorado. The statute fails under the second test.

The third test is whether the statute leads to excessive state entanglement with religion. The primary case on this subject is Lemon v. Kurtzman, supra., the case in which the tripartite test was established. That case concerned a Rhode Island statute providing for a salary subsidy to teachers in private schools and a Pennsylvania statute providing a reimbursement to private schools for the cost of teaching secular subjects. Both statutes were struck down as leading to an impermissible degree of government entanglement with religion. This impermissible entanglement arose from the constitutional requirement that the subjects taught by the teachers whose salaries were subsidized be purely secular in nature. The program required continuing state surveillance as to the subject matter taught, and an examination of records to determine how the funds granted were actually spent.

In Tilton v. Richardson, supra., the one-time construction grant program passed the entanglement test in that money would be granted for a specific project and there need be little continuing administration of the program. In Roemer v. Board of Public Works of Maryland, supra., the Supreme Court very reluctantly approved an annual direct grant program to private colleges. Each grant was based on an application from the college which set forth a specific use to be made of the funds. The proposed use and the amount to be devoted to it were subject to approval by a state agency. Although there could be an audit to determine that the funds were actually spent in accordance with the application, the Court found that there was no excessive entanglement, since the audit would be no more burdensome than the inspections and

audits incidental to accreditation by the state. The Court in Roemer also relied on the fact that there was no need to intrude into the classroom to determine what subjects were being taught and whether there was any attempt at religious indoctrination.

It is clear that the statute at issue would fail the "entanglement" test. The statute provides for a mandatory biannual audit of the program by the State Auditor. It requires that the participating institution not decrease its own financial aid programs for students, which would also require an audit of the institution's own students and program. The requirement that there be a continuing oversight of eligibility of the institutions requires the Colorado Commission on Higher Education to:

1. Monitor the policies of the institution, express and implied, with regard to attendance at religious convocations or services.

2. Sit in on classes to be sure that there is a strong commitment to principles of academic freedom.

3. Sit in on classes to determine that there are no required courses in religion that tend to indoctrinate or proselytize.

4. Inquire into the religious beliefs of the administration to make sure that the governing board does not reflect a particular religion.

5. Audit the funds and revenues of the institution and examine the identity and religious beliefs of its students and donors to determine whether those funds come primarily or predominantly from sources advocating a particular religion.

The Colorado Student Incentive Grant Program involves an impermissible degree of entanglement between the state and sectarian institutions. The statute not only encourages the Colorado

Commission on Higher Education to force the institutions to make policy, personnel and academic changes to suit its guidelines, but mandates the continued supervision of all financial affairs of the institution, of academic policy, of curriculum and of the conduct of classes. Intrusion of the state government into the classroom was the intolerable "entanglement" in Lemon v. Kurtzman, supra.

The degree of entanglement required by the statute is exemplified by the fact that the Colorado Commission on Higher Education required answers to a 30 page questionnaire by Regis to determine its continuing eligibility for the program after it had received initial approval for participation. (Deposition of Dr. Thomas Emmet of Regis, p. 9). This continuing relationship is precisely the type of entanglement between church and state that the First Amendment and Article II Section 4 of the Colorado Constitution were intended to prevent.

Contrary to the apparent holding of the trial court, the U.S. Supreme Court has not given blanket approval of aid of all kinds to any private or sectarian school which is not "pervasively sectarian". The rule in Roemer, put as simply as possible, is that a state may appropriate money to a sectarian institution for specific secular purposes where there is an absolute condition of the grant that none of the funds ever be used for religious purposes, where as a practical matter is extremely unlikely that the specific purpose of the grant could serve a religious use, and where the specific program does not require a continuing relationship of audit and control by the state, (an "excessive entanglement"). If an institution is "pervasively sectarian," it effectively has no secular purpose. Any grant to such a college would serve a religious purpose and could not be effectively restricted. No aid can constitutionally be granted to such an institution.

The statute at issue fails all three conditions of the rule in Roemer. Use of tuition fees is unrestricted, and grant funds may be freely applied to religious purposes by the institution. Continuing audits and monitoring of classes by the state is not only likely but is mandatory.

The Supreme Court continues to apply the rule in Roemer consistently. Assuming there is no excessive entanglement, grants will be allowed for specific secular purposes where there is no reasonable risk that religion will intrude, such as the administration of hearing tests or Scholastic Aptitude Tests. Where there is any reasonable chance that religion might intrude, such as in vocational and personal counseling or field trips, where the institution has some discretion in the destination and purpose, such aid is unconstitutional. Wolman v. Walter 433 U.S. 229, 97 S. Ct. 2593 (1977) is instructive in this regard.

The statute at issue provides for an unrestricted grant to sectarian colleges. The funds granted may freely be applied to religious purposes. An excessive entanglement between state government is required by the statute. Because of these characteristics, there is no doubt that the U.S. Supreme Court would hold the Colorado Student Incentive Grant Program unconstitutional under the First Amendment.

XI. CONCLUSION.

Plaintiffs-Appellants submit that there is no reasonable basis upon which the Colorado Supreme Court can uphold the Colorado Student Incentive Grant Program. The People of the State of Colorado, in enacting the Constitution in 1876, determined that there was to be an absolute prohibition of the appropriation of

state funds to non-public schools. There is also an absolute prohibition against the use of state funds for sectarian schools and against any appropriation which might be used for religious purposes. Where the meaning of constitutional provisions enacted by the people is clear, the constitution must be enforced as written. The statute at issue can only be upheld by disregarding the relevant constitutional provisions or interpreting them contrary to their plain and unambiguous meaning.

The Defendants-Appellees argue that the absolute prohibition in the Colorado Constitution of appropriation of funds to private and sectarian schools is out of fashion and politically unpopular. Even if this were true, the answer is to amend or repeal the relevant articles in the manner provided in the Constitution, not to attempt to circumvent them by statute. None of the relevant provisions of the Colorado Constitution have ever been interpreted in a manner consistent with the Colorado Student Incentive Grant Program. The public purpose and state interest served by the legislation is irrelevant to its constitutionality under the Colorado Constitution. Therefore, this honorable Court must reverse the judgment of the Trial Court and declare the statute at issue to be unconstitutional on its face and as applied to Regis College.

Dated this 28th day of May, 1981.

FULLER AND EVANS
Dwight A. Hamilton
Larry G. Johnson

By _____
Larry G. Johnson, No. 8728
Attorneys for Plaintiffs-Appellants
730 17th Street
900 Equitable Building
Denver, Colorado 80202
(303) 629-1761

IN THE SUPREME COURT

OF THE STATE OF COLORADO

No. 81 SA 126

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE FUND, INC.; DENVER CHAPTER OF AMERICANS UNITED AND IRENE H. WILSON, Plaintiffs-Appellants, v. STATE OF COLORADO, COLORADO COMMISSION ON HIGHER EDUCATION, REGIS EDUCATIONAL CORPORATION, AND ANY AND ALL PERSONS WHO ARE NOW NOMINATED OR WHOM MAY BE ELIGIBLE TO RECEIVE FUNDS UNDER THE COLORADO STUDENT INCENTIVE GRANT PROGRAM, Defendants-Appellees	APPEAL FROM THE DISTRICT COURT FOR THE CITY AND COUNTY OF DENVER, STATE OF COLORADO HONORABLE GILBERT A. ALEXANDER, DISTRICT JUDGE

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Fuller and Evans
Dwight A. Hamilton
Larry G. Johnson
900 Equitable Building
730 17th Street
Denver, Colorado 80202
(303) 629-1761
Attorneys for Plaintiffs-Appellants

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IV. Article V, Section 34 of the Colorado constitution prohibits the appropriation of funds to private and sectarian colleges for educational purposes.

V. Since the Colorado Student Incentive Grant Program impinges on the fundamental right of freedom from religion, the statute enjoys no presumption of constitutionality and is absolutely void.

VI. The Colorado Student Incentive Grant Program is unconstitutional for vagueness and due to an unlawful delegation of legislative authority because a fundamental constitutional right is involved.

VII. The trial court was in error in entering summary judgment against Americans United with regard to the unconstitutionality of the statute as applied to Defendant Regis.

VIII. The Colorado Student Incentive Grant Program cannot be rendered constitutional by construction or severance.

IX. Conclusion.

ARGUMENT

I. THE COLORADO STUDENT INCENTIVE GRANT PROGRAM CONSTITUTES AN APPROPRIATION OF STATE FUNDS TO PRIVATE SCHOOLS AND TO SECTARIAN SCHOOLS AND IS THEREFORE UNCONSTITUTIONAL.

In their Opening Brief, the Plaintiffs-Appellants (hereinafter collectively referred to as "Americans United") set forth the history of the constitutional provisions at issue and argued that the clear intent of those provisions was to forever prevent the Colorado legislature from appropriating any state funds to or for the benefit of any private or sectarian school. Based upon that interpretation, Americans United has asserted that the Colorado Student Incentive Grant Program (hereinafter "CSIG") is unconstitutional as applied to any private institution of higher education and that it is certain that a private sectarian college such as Regis is absolutely prohibited from receiving the benefits of CSIG.

The Appellees apparently do not challenge the assertion that the constitution intended an absolute prohibition against appropriations to private and sectarian educational institutions (p. 11 brief of Regis). However, Appellees argue that the CSIG does not constitute an appropriation, aid or support to eligible private institutions. That argument has been made in many tuition grant cases and has been consistently rejected by the U.S. Supreme Court, the lower federal courts and the state courts. See Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 93 S. Ct. 2955 (1973). (See also the cases cited in Section II of the Opening Brief of Americans United.)

The Appellee's contention that tuition grants do not constitute aid or support to the institution is inconsistent with the arguments of the Appellees and with the statute itself. The Appellees agree that an institution whose sole purpose is to train persons for a religious profession cannot be a recipient of CSIG funds. The statute determines whether a student at a particular institution is eligible based not in any way on the religious beliefs of the student but solely and exclusively on the religious nature of the institution. If the legislature and the Appellees believed that the program constituted aid to students and not to the institution, there would be no reason to deny eligibility to "pervasively sectarian" institutions. Under the circumstances, the Appellees cannot argue in good faith that the CSIG does not constitute aid to the eligible institutions.

II. THE COLORADO STUDENT INCENTIVE GRANT PROGRAM PROVIDES FOR SUPPORT TO SECTARIAN SCHOOLS AND IS THEREFORE UNCONSTITUTIONAL UNDER ARTICLE II, SECTION 4 OF THE COLORADO CONSTITUTION.

Americans United has asserted that the CSIG is void under Article II, Section 4 of the Bill of the Rights to the Colorado Constitution in that the taxpayers are required to support the religious sect or denomination with which eligible sectarian colleges are associated. The Appellees' response is that the prohibition of aid to "pervasively sectarian" institutions, as defined in the statute, prevents aid to a "religious sect or denomination" in violation of Article II, Section 4.

The Colorado Constitution is far more restrictive than the First Amendment, in that it expressly prohibits any appropriation to a sectarian institution. "Sectarian", is defined as "pertaining to one of the religious sects". Vollmar v. Stanley, 81 Colo. 276, 255 P.610 (1927). There is no authority for the Appellee's proposition that "pervasively sectarian" as defined in the statute is the same as "sect", "denomination" and "sectarian" in the Colorado Constitution. The U.S. Supreme Court cases make clear that "pervasively sectarian" institutions are a sub-class within the class of "sectarian" institutions. Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 96 S. Ct. 2337 (1976) and Hunt v. McNair, 413 U.S. 734, 93 S. Ct. 2868 (1973) hold that there is a fundamental and constitutionally significant distinction between "sectarian" and "pervasively sectarian" institutions. Sectarian institutions may receive appropriations which are effectively limited to secular purposes and which do not involve an "excessive entanglement" between church and state. By contrast, pervasively sectarian institutions are those in which secular and religious functions are not distinguishable, so that any appropriation would aid religion. No appropriations of any kind can be received by a pervasively sectarian institution. In every Establishment Clause case involving aid to private schools the court must make a finding as to whether the recipient institutions are sectarian or pervasively sectarian in order to determine if an appropriation is constitutional. The Appellees cannot argue in good faith that "sectarian" means the same as "pervasively sectarian", since Roemer and Hunt held precisely to the contrary.

III. THE COLORADO STUDENT INCENTIVE GRANT PROGRAM IS UNCONSTITUTIONAL UNDER ARTICLE IX, SECTION 7 OF THE COLORADO CONSTITUTION IN THAT IT APPROPRIATES STATE FUNDS TO PRIVATE SCHOOLS AND TO SCHOOLS CONTROLLED BY CHURCHES AND SECTARIAN DENOMINATIONS.

Americans United has set forth that the CSIG is unconstitutional under Article IX, Section 7 on four separate grounds. First, the statute expressly states "aid to private schools. . . forbidden." The Appellees have not challenged the broad assertion that the Colorado Constitution prohibits appropriations to any and all private schools, including private vocational schools.

Secondly, Americans United contends that CSIG is unconstitutional in that in constitutes an appropriation "in aid of a church or sectarian society". The Appellee's response is that CSIG does not constitute an appropriation to the eligible institution and that "sectarian" has the same meaning as "pervasively sectarian", both of which contentions have been previously discussed.

Americans United also contends that the CSIG is unconstitutional in that the funds received by the institution are unrestricted and may be freely applied to "any sectarian purpose". The Appellees' response is that since "pervasively sectarian" is the same as "sectarian", the prohibition of aid to pervasively sectarian institutions would prevent the funds being used for any sectarian purpose. Apparently the Appellee's position is that no college other than a pervasively sectarian college can have or promote a "sectarian purpose", and that Regis is purely secular.

Finally, Americans United asserts that the CSIG is designed to "help support or sustain any. . .college. . .controlled by any church or sectarian denomination." The Appellee's apparent response to this argument is that the statute's prohibition of aid to any institution whose governing board "reflects" a particular religion would prevent aid to an institution "controlled by any church or sectarian denomination." Since the CSIG was not drafted to comply with Article IX, Section 7, the question of whether "reflects" is the same as "controlled" offers little more than a subject for argument. In corporation law, "control" generally does not require exclusive control of the board of directors, only a simple majority or whatever majority is required by the state corporation law or the by-laws. Regis, which requires a majority of Jesuits on the board, was held not to "reflect any particular religion". The Colorado Commission on Higher Education and the Appellees take the position that unless the board is exclusively of one particular religion, it does not "reflect" that religion. Therefore, under the Appellee's interpretation, the statute allows aid to institutions controlled, in the usual sense of the word, by a particular denomination, as long as the board is not exclusively of one denomination. Therefore, the statute is in violation of Article IX, Section 7 by the Appellee's own interpretation.

IV. ARTICLE V, SECTION 34 OF THE COLORADO CONSTITUTION PROHIBITS THE APPROPRIATION OF FUNDS TO PRIVATE AND SECTARIAN COLLEGES FOR EDUCATIONAL PURPOSES.

Americans United has taken the position that CSIG is unconstitutional as an appropriation of funds for educational

purposes to private and sectarian institutions not under the absolute control of the state in violation of Article V, Section 34 of the Colorado Constitution. That section states as follows:

> "Appropriations to private institutions forbidden. No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association."

In spite of the language clearly preventing appropriations to private corporations for educational purposes, the Appellees rely on dicta in Bedford v. White, 106 Colo. 439, 106 P.2d 469 (1940) for the position that any appropriation may be made to private corporations as long as it is for a "public purpose". Since education is a "public purpose", they argue, any appropriation to a private or sectarian school to further education is permissible. Their interpretation is precisely contrary to the express language of the statute.

Bedford v. White did not concern an appropriation for educational purposes to a private college. It concerned payment of pensions by the State of Colorado to state employees. Article V, Section 34 could not apply to those pensions, since it does not apply to the expenses of state government, including the salaries or benefits of state employees nor to appropriations to any political subdivision of the State of Colorado. See In Re Interrogatories on House Bill No. 1247, 193 Colo. 298, 566 P.2d 350 (1977). In the only Colorado case in which there was proposed an appropriation to private persons for charitable purposes, that appropriation was held unconstitutional. In Re Relief Bills, 21 Colo. 62, 30 P.1089 (1895). Bedford v. White was correctly decided on its facts, but should not be extended to nullify Article V, Section 34, as the Appellees urge.

The section means precisely what it says. It prevents the appropriation of state funds to private schools, charities or institutions. This prohibition specifically applies to appropriations for educational purposes. The proper interpretation of Article V, Section 34 is obvious. The legislature may appropriate funds to the University of Colorado, a state university. This does not violate Article V Section 34, in that the appropriation is for educational purposes to a political subdivision under the absolute control of the State. By contrast, the legislature cannot appropriate funds to a private or sectarian college because such an institution is not a political subdivision of the state and is not under the control of the state.

V. SINCE THE COLORADO STUDENT INCENTIVE GRANT PROGRAM IMPINGES ON THE FUNDAMENTAL RIGHT OF FREEDOM FROM RELIGION, THE STATUTE ENJOYS NO PRESUMPTION OF CONSTITUTIONALITY AND IS ABSOLUTELY VOID.

Where there is no fundamental right at issue such as First Amendment Rights or the right to vote, a statute is presumed to be constitutional and the burden is upon the person challenging that statute to prove its unconstitutionality beyond a reasonable doubt. It is equally clear that where a fundamental right is at issue, there is no presumption of constitutionality. In fact, in a freedom of speech case, a statute alleged to constitute a prior restraint on freedom of speech is presumed to be unconstitutional. See People ex rel. McKevitt v. Harvey, 176 Colo. 447, 491 P.2d 563 (1971).

The Appellees state that a presumption of constitutionality must apply in this case. This position is taken because the Appellees do not recognize the right to freedom from religion to be fundamental. They assert, without authority, that freedom from religion is somehow inferior to other First Amendment freedoms.

The position of Americans United is that the right to freedom from religion, guaranteed by the First Amendment to the United States Constitution and Article II, Section 4 of the Bill of Rights to the Colorado Constitution, is a fundamental right and is entitled to the same protection as other First Amendment rights. No Supreme Court case has ever held that a statute challenged on the basis of the Establishment Clause is entitled to a presumption of constitutionality. Neither has any Supreme Court case stated that unconstitutionality under the Establishment Clause must be shown beyond a reasonable doubt. The Supreme Court has recognized the right of freedom from religion to be fundamental. "There is no doubt that the right to freedom from religion is equal in dignity to the right of freedom of religion. Both of these aspects of the Establishment Clause are absolute." See School District of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203, 83 S. Ct. 1560 (1963).

Regis argues that the question of the presumption of constitutionality is not a proper issue on appeal. It is obvious that a party asserting the unconstitutionality of a statute necessarily puts at issue whether that statute is presumed to be constitutional, as well as all other applicable rules of construction and interpretation. The issue was ruled upon by the trial court and that finding was specifically set forth as an assignment of

error by Americans United at its first opportunity to specify the grounds of appeal. The issue has been preserved and is clearly before this Court.

The Appellees' concern as to the party having the burden of proof is easily answered. Americans United has the burden of showing that the statute provides for appropriations of state funds to private and sectarian institutions. If the Plaintiff meets this burden of proof, then the legislation is void since the prohibitions in the Colorado Constitution are absolute.

The exercise of freedom of speech or freedom of religion may be curtailed by the State where the State has a compelling interest which cannot be served by less restrictive means. Therefore, it is proper in such cases that once the plaintiff has alleged an infringement of a fundamental right, the State be called upon to prove that it has a compelling state interest which might justify the legislation. This shifting of the burden of proof is not proper in a freedom from religion case, because the right to freedom from supporting a religious sect is absolute. The interests of the state, no matter how compelling, are entitled to no weight. Since the state cannot justify any infringement on this freedom, there is no reason to shift the burden of proof to the state.

VI. THE COLORADO STUDENT INCENTIVE GRANT PROGRAM IS UNCONSTITUTIONAL FOR VAGUENESS AND DUE TO AN UNLAWFUL DELEGATION OF LEGISLATIVE AUTHORITY BECAUSE A FUNDAMENTAL CONSTITUTIONAL RIGHT IS INVOLVED.

In their answer briefs, the Appellees have cited multiple cases concerning police power regulations, and not involving

any assertion of a violation of fundamental First Amendment rights for the proposition that the statute is not unconstitutionally vague and is not an unconstitutional delegation of legislative power. Americans United has clearly conceded in its Opening Brief that in such cases, a statute may be constitutional even though its language is somewhat vague and even though it authorizes administrative agencies to make findings of fact.

However, where a fundamental constitutional right is involved, the legislation must be very carefully drafted, with narrow, subjective and definitive standards, so that nothing is left to the discretion of the authorities administering the program. Keyishian v. Board of Regents, 385 U.S. 589, 87 S. Ct. 675, (1967). The statute at issue obviously fails to reach that standard and is unconstitutional.

The fundamental problem with the statute at issue is that the statute clearly contemplates and requires that state funds be appropriated to private colleges and to sectarian colleges in violation of the constitutional prohibitions. Given the fundamental unconstitutionality of the statute, the issues of vagueness and delegation of legislative authority are secondary. However, it is obvious that the vagueness of the statute and the delegation of the authority to determine eligibility requires and allows the Colorado Commission on Higher Education to approve an unconstitutional appropriation of funds to private and sectarian colleges.

VII. THE TRIAL COURT WAS IN ERROR IN ENTERING SUMMARY JUDGMENT AGAINST AMERICANS UNITED WITH REGARD TO THE UNCONSTITUTIONALITY OF THE STATUTE AS APPLIED TO DEFENDANT REGIS.

The Appellees suggest in their briefs that by moving for summary judgment as to the unconstitutionality of the statute, Americans United is precluded from complaining that it was not allowed to present evidence at trial as to the sectarian character of Regis College. The motion of American United alleged the unconstitutionality of CSIG on multiple grounds. A finding of facial unconstitutionality would have rendered CSIG's unconstitutionality as applied to Regis a moot issue. Therefore Americans United's motion for summary judgment is not inconsistent with its position on appeal.

Regis takes the position that if a party moves for summary judgment, and if that motion is denied, the moving party has impliedly waived the opportunity to present evidence at trial. Regis argues that by moving for summary judgment, the party has impliedly asserted that there is no material issue of fact and has thereby accepted the self-serving statements of the other party as being established facts. Such is obviously not the intent of Rule 56, and the moving party is bound only by facts actually admitted or stipulated to. The argument of Regis was considered and rejected by this court in Morlan v. Durland Co., 127 Colo. 5, 252 P.2d 98 (1952).

The denials given by Americans United in response to the requests for admissions amply illustrate multiple remaining issues of fact. The appellees Regis and the State of Colorado

spend several pages in their briefs arguing the facts, which also illustrates the issues remaining to be resolved. The trial court itself expressed doubt as to whether summary judgment should be granted while facts remained to be resolved. Even where it is doubtful whether a genuine issue of material fact exists, summary judgment is not appropriate. Abrahamsen v. Mountain States Telephone & Telegraph Co., 177 Colo. 422, 494 P.2d 1287 (1972).

Had the Plaintiffs been allowed a trial on the unconstitutionality of the statute as applied to Regis, the evidence at trial would have shown that Regis College identifies itself and is universally identified by the public with the Catholic church and that it is controlled by the Jesuits. The evidence would show that the revenue of the institution is to a great extent derived from advocates of the Catholic religion. The evidence would further show that the sponsors of the bill were incredulous when they discovered that Regis was found to be eligible for participation in the program and that sectarian institutions such as Regis were not intended to be eligible. Reference to facts "not in the record" is appropriate where Americans United complains that it was deprived of a trial and an opportunity to make a record. The contention by Appellees that Americans United must carry out a "trial by affidavit" at the risk of having all factual issues resolved in favor of the opposing party is equally without merit. See Hatfield v. Barnes, 115 Colo. 30, 168 P.2d 552 (1946).

VIII. THE COLORADO STUDENT INCENTIVE GRANT PROGRAM CANNOT BE RENDERED CONSTITUTIONAL BY CONSTRUCTION OR SEVERANCE.

In their briefs, the Appellees suggest that the court be guided by the principles of construction and severance in

addressing the statute. Specifically, they suggested that if the statute may be construed to be valid or to be invalid the court should construe it such that it would be upheld. Americans United maintains that this approach may be proper with regard to cases not involving a fundamental right, but where a fundamental right is involved and where the obvious meaning of a statute would render it unconstitutional, that principle does not apply.

The Appellees do not elaborate on how the statute can be construed but obviously "pervasively sectarian" as defined in the statute must be construed to include the terms "sect", "sectarian", "church" and "denomination". An institution must be either pervasively sectarian or purely secular, for Appellees position allows no middle ground. "Aid to private schools. . .forbidden" in Article IX, Section 7 must be construed to say "aid to private schools. . .allowed". "Appropriations to private institutions forbidden" in Article V, Section 34 must be construed to mean "Appropriations to private institutions allowed." In order to find the CSIG constitutional, the Court must construe the Colorado Constitution to mean precisely the opposite of what it says.

The Appellees also suggest that some part of the statute be severed in order to render it constitutional, but do not suggest the portion to be severed. The principle of severance applies where there is a statute having one independent portion which is unconstitutional, and a remainder which would be constitutional standing alone. The statute at issue cannot be saved through severance, since there is no portion which can be excised to render the balance constitutional. The only constitutional application of the statute can be one where the only eligible

institutions are state institutions. Since this was the law prior to the enactment of the CSIG, the statute becomes meaningless when revised to constitutional form.

IX. CONCLUSION

The Colorado Student Incentive Grant Program is fundamentally unconstitutional in providing for appropriations of public funds to private and sectarian colleges in violation of a very clear and absolute prohibition against such appropriations in the Colorado Constitution. Since the statute's only effect is to provide for the appropriation of public funds to private and sectarian colleges, its basic unconstitutionality cannot be changed through construction or severance. This Court cannot reasonably interpret the CSIG to conform to the constitutional provisions at issue. It must either strike the statute down or interpret the Colorado Constitution contrary to its plain meaning and contrary to the clearly expressed intent of the People of Colorado.

Respectfully submitted,

FULLER AND EVANS

By _____

Dwight A. Hamilton, No. 1871
Larry G. Johnson, No. 8728
Fuller and Evans
Attorneys for the Plaintiffs-Appellants
900 Equitable Building
Denver, Colorado 80202
(303) 629-1761

CERTIFICATE OF MAILING

I hereby certify that on July 31, 1981, a true and accurate copy of the foregoing Reply Brief of Plaintiffs-

Appellants was placed in the United States Mail, with adequate postage prepaid, addressed as follows:

A. Thomas Elliott, Jr., Esq
Attorney for Regis Educational
Corporation
3539 West 50th Avenue Parkway
Denver, Colorado 80221

Nancy Connick, Esq.
Assistant Attorney General
State of Colorado
Human Resources Section
1525 Sherman Street
Third Floor
Denver, Colorado 80203

Carter Foulds
Student Counsel
Student Law Office
University of Denver
College of Law
250 West 14th Avenue
Denver, Colorado 80204

Robert B. Yegge, Esq.
Nelson and Harding
2600 Energy Center
717 Seventeenth Street
Denver, Colorado 80202